8 May 2014

Regulatory Institutions and Practices Inquiry
New Zealand Productivity Commission
WELLINGTON

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REVIEW OF REGULATORY INSTITUTIONS AND PRACTICES (DRAFT REPORT) - DECISION REVIEW

1 This submission is made to the Productivity Commission (*Commission*) on behalf of Chapman Tripp. Its focus is on Chapter 10 (Decision Review) of the draft report,[1] and more particularly, the distinction between judicial review and appeal.

2 The draft report expresses the view that the broad scope of judicial review means appeal rights do not provide significantly stronger incentives to make the correct decision than judicial review. We do not agree. In particular, given the fundamental distinction between judicial review and appeal, judicial review does not in our view have sufficiently broad scope to enable scrutiny of the merits of a decision.

3 We would be concerned if some of the reasoning and findings made in the draft report were formally adopted to support either the removal or limitation of appeal rights, particularly in the area of economic regulation. Appeal rights are a core part of the accountability mechanisms which constrain our regulators.

4 We develop these points more fully below.

Merits review is different to judicial review

5 The frequently cited reference to describe the function of judicial review is the statement of Lord Brightman in *Chief Constable of the North Wales Police v Evans*:[2]

> Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will...under the guise of preventing the abuse of power, be itself guilty of usurping power.[3]

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1 Productivity Commission "Regulatory Institutions and Practices – Draft Report" (March 2014) <www.productivity.govt.nz>

2 [1982] 1 WLR 1155 (HL) at 1173.

3 Notably cited by the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Limited* [1994] 2 NZLR 385 (PC) at 389 and more recently by the Court of Appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73 at [50] where the Court of Appeal cautioned that the proper realm of judicial review is procedural propriety and illegality, not the merits of the decision.

6 Accordingly, judicial review differs from an appeal. As Justice French stated in *Aorangi School Board of Trustees v Ministry of Education*:[4]

> [C]ontrary to popular belief, judicial review is not an appeal. It is not about the Court considering information afresh and coming to its own views. Judicial review is primarily limited to an examination of the process, and if successful usually results in the decision maker being required to start afresh, as opposed to quashing the decision for all time.

7 We note that the draft report refers to the High Court the decision in *Board of Trustees of Phillipstown School v Minister of Education*[5] to make the point that judicial review can be concerned with substantive aspects of a decision. We consider however, that this case can properly be viewed as an outlier. It was also a case in which the statute in question effectively required a merit assessment of the adequacy of the consultation. Justice Fogarty considered this required the Court to test the adequacy of the material provided by the Minister of Education to ascertain if the public could know and understand the reasoning process adopted in the decision to merge the Phillipstown school with Woolston primary school.

8 However, a court on an application for judicial review will not ordinarily be able to assess the adequacy of the explanation as to the decision maker's reasoning[6] and certainly cannot question the weight or balancing exercise conducted by a decision maker when many factors need to be taken into account.[7] Nor did the Court do either of these things in *Phillipstown*.

9 Courts often express considerable concern at entering into analysis of expert judgment in the context of judicial review applications. The recent and now common touchstone for this proposition is the statement of the Supreme Court in *Unison Networks Ltd v Commerce Commission*:[8]

> Often, as in this case, a public body, with expertise in the subject-matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

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4 [2010] NZAR 132 (HC) at [8].

5 *Board of Trustees of Phillipstown School v Minister of Education* [2013] NZHC 2641.

6 *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at [59].

7 See for example *North Taranaki Environment Protection Association Inc v Governor-General* [1982] 1 NZLR 312 (CA) at 317; *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1988] NZAR 58 (CA) at 70 and *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at 55. This is particularly so where a matter involves economic expertise - there is often room for more than one view: *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 210-211.

8 [2007] NZSC 74, [2008] 1 NZLR 42 at [55].

10 A significant degree of deference is universally shown to regulators entrusted with specialist knowledge or having to determine technical areas.[9]

11 Further, as the Court of Appeal noted in *Air New Zealand Ltd v Wellington International Airport Ltd,* care will be taken to ensure any assessment of rationality or *Wednesbury* unreasonableness does not morph into an assessment of the merits:[10]

> The High Court, as a non-specialist body, will take good care to avoid, in the guise of *Wednesbury* judicial review contention, being sucked into the kind of factual merits reappraisal for which the multi-disciplinary Commerce Commission with its resources is the convenient forum.

12 The 'standard' or 'intensity' of review which might be adopted in the context of an executive decision making exercise involving the application of statutory criteria, especially if it involves human rights considerations, cannot be compared to the balancing exercise a specialist regulator has to do to achieve particular (and sometimes competing) objectives.[11] As Justice Clifford has recently stated:[12]

> In judicial review the legal context is...of particular significance. No authority is needed for the proposition that context affects the substantive content of what the Courts will determine to be the obligations of those who exercise statutory powers, and the Court's willingness to intervene – or the intensity of review, as well as the availability of relief.

13 Given this, it is difficult to see how it can be stated in the draft report that:[13]

> There is no evidence to suggest judicial review is an ineffective method of challenging regulator's decisions, and ensuring they act in proper, lawful and *reasonable* ways (emphasis added).

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9 See for example *Auckland Bulk Gas Users Group v Commerce Commission* [1990] 1 NZLR 448 (HC); *Powerco v Commerce Commission* [2008] NZCA 289 at [48]; *New Era Energy Inc v Electricity Commission* [2010] NZRMA 63 (HC) at [68]; *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZRL 10 (CA) at 16; *Major Electricity Users Group v Electricity Commission* [2008] NZCA 536 at [56]; *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA) at 537 in relation to the Securities Commission and similarly *Crawford v Securities Commission* [2003] 3 NZLR 160 (HC) at [87]; *Marlborough Lines Ltd v The Takeovers Panel* HC Wellington CIV-2010-485-1150, 12 October 2010 at [88] and refer particularly to *Air New Zealand Ltd v Wellington International Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [170].

10 [2009] NZCA 259, [2009] 3 NZLR 713 at [182].

11 We note that the concept "Wednesbury deference" referred in the draft report at p 245 doesn't exist. We would also suggest that in the judicial review context as a large degree of deference will be shown to a specialist regulator, there will be an even more rigorous limitation on what is often referred to as the Wednesbury unreasonableness ground of judicial review to ensure it does not consider the substantive unfairness of the decision in question.

12 *Wellington International Airport Ltd v Commerce Commission* HC Wellington CIV-2011-485-1031, 21 December 2011 at [52].

13 [F10.9] at p 242 of the draft report.

Or that: [14]

> The broad scope of judicial review in New Zealand means that the availability of merits review would not provide significantly stronger incentives on regulators to make correct decisions than is provided by judicial review alone.

14 In the context of the example given by the Productivity Commission of the determination of input methodologies under Part 4 of the Commerce Act 1986, we suggest that it would take a brave court on an application for judicial review to find that the Commerce Commission had not got the balance between the competing objectives for that regime right when determining an input methodology.[15]

15 While the two forms of judicial intervention can be complementary, they are not the same as, and cannot be thought of as substitutes for, each other.

16 The more imperative question to ask is whether an appeal right is needed due to the subject matter or decision involved; not whether judicial review can provide a sufficient or proper substitute.

Because merits review is different to judicial review, it will provide a stronger check on getting a decision right in all respects

17 It is precisely because judicial review cannot appropriately accommodate the type of judgements being made in the area of economic regulation that a merits review was introduced into Part 4 of the Commerce Act:[16]

> The Commission's regulatory decisions are subject to judicial review only. There is a general perception that the accountability regime for the Commission is weak, as judicial review applies to questions of law and process only and not the substance of a decision. Thus the regime is less capable of correcting regulatory error or improving the regulator's decision making over time. This can impact on business/investor confidence in the regime.

And:[17]

> Parliament's clear intention in providing for merits appeals was to improve the accountability of the Commission and the outcomes intended for Part 4 regulation, and input methodologies in particular.

18 The strong degree of deference shown to expert decision makers in the judicial review context, and consequent narrow grounds on which review will occur,[18] necessarily means that merit appeal provides a greater check.

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[14] [F10.12] at p 245 of the draft report.

[15] In particular, we consider that a court would struggle to accommodate, unless there was a clear error, any arguments that could be seen to be arguing that the Commerce Commission had incorrectly or unreasonably reached a decision as to how to balance the objectives in s 52A.

[16] Regulatory Impact Statement on Commerce Amendment Bill at 18. See also Commerce Amendment Bill 2008 (201-2) (Explanatory Note) at 7.

[17] *Wellington International Airport Ltd v Commerce Commission* HC Wellington CIV-2011-485-1031, 21 December 2013 at [119].

19 While it is not possible to say what would have happened if merits appeal had not been provided for under Part 4, it is noticeable that the reasons papers issued (and the iterations of various decision making documents before the final papers were released) to support the input methodologies were substantial and comprehensive. Over 800 separate substantive documents were produced and approximately 1,200 pages of reasoning were given to support the input methodologies determinations.

20 No doubt much of the intensity of the process can be put down to the subject matters being dealt with, but the importance of having a fully explained decision that could be subject to merits review must, we suggest, have had some bearing on the decision makers as well.[19]

21 Moreover, having an independent appellate authority review the merits of a decision allows a further testing and consideration of a decision by a body with operational independence to the original decision maker and allows any necessary adjustments to meet the objective of the regime.[20] It also means that if the decision is upheld, there is likely to be greater confidence in the regulator's decisions.

22 Both the United Kingdom and Australian have reviewed their current appeal provisions applicable to economic regulation. In neither of those jurisdictions was it recommended to do away with an appeal right.[21] Rather, each review recommended improvements to the current regime to more clearly define the grounds and scope of appeal. Similarly any concerns about the practical application of the merits appeal in Part 4 should, we submit, be dealt with by a refinement of that appeal right rather than by removing it.

Finality should not come at any cost

23 If no provision is made for an appeal (whether it be a limited merits appeal or de novo hearing), it effectively means that there is no merits check on the specialist regulatory decision. In practice this means that whatever the specialist regulator determines would have to stand – whether it is right or wrong.[22]

24 The question must be for anyone setting up such a regime: can New Zealand bear, both in terms of cost and reputation, for that to be the result? Or, are the consequences (socially and economically) too great to risk that there could be an error?

25 In the area of economic regulation, common sense would seem to dictate that the answer to the last question, for most decisions, is 'yes'.

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[18] Refer to the quotation from the *Unison* decision at paragraph 9 above and to *Wellington Airport*, footnote 12 above.

[19] See also Prof David Round "The Merits of Merits Reviews" [2006] NZLJ 237.

[20] For present purposes we do not make any comments on the specific merits review versus appeal provided under any enactments and note that the Productivity Commission has not attempted to do this at this point in time either.

[21] Draft report at pp 230-232.

[22] In the context of the Commerce Commission, should appeal rights be removed from the economic regulation provided in Part 4 of the Commerce Act 1986 completely, it would mean that there would be significant difference depending on whether an entity or industry was subject to economic regulation under Part 4 or more general regulation under Part 2 where there has always been an appeal right.

26 We agree with the comments made by David Goddard QC in the paper cited by the Commission that a small number of regulatory decisions meet the test that there is an overwhelming need for finality; but most do not:[23]

> It is more important that the decisions made be correct, than the first decision made be final.

27 In the context of the example provided by the Commission, while input methodologies are intended to promote certainty, this does not mean finality.[24] And certainly not finality at any cost. Indeed, as stated above, judicial review is ill suited to considering how the determination of such inputs promotes the overall objectives for Part 4 regulation. It was precisely for this reason, and the importance of getting the input methodologies right, that merits appeal was explicitly provided for.[25]

28 It is also incorrect that no consideration was given to the importance of finality in this context (p 242 of draft report). It was specifically considered and rejected.[26]

29 The development of precedent in this area, combined with the fact that the re-determination of any input methodologies is unlikely (given the regime) to involve a completely new subject or approach to inputs, will also encourage a reduction in the scope and length of any future appeals. There has simply been insufficient time to draw the conclusion that there is no reason to believe that the incidence in such areas will decline over time.[27]

30 Finally, we also observe that the usual remedy in any judicial review proceeding is to have the matter referred back to the decision maker to consider its decision again. This can also result in a very lengthy process. Consequently, doing away with appeal rights will not necessarily result in brevity.

Lack of judicial specialisation is a reason to have appeal or merits review

31 Perceived lack of judicial specialisation does not mean that appeal rights should be removed. Appeal rights can (and do) allow for lay experts to sit on the appeal. This is simply not available for judicial review application given the source of the power is inherent to superior courts.[28]

32 Many of the difficulties identified by submitters to the Commission arose from the current limitation of the Part 4 merits appeal,[29] rather than being inherent to merit

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[23] David Goddard QC "Regulatory Error: Review and Appeal Rights" (paper presented to Legal Research Foundation Conference, Auckland, 18 September 2006) at 15.

[24] Section 52R of the Commerce Act 1986 states that the purpose of input methodologies is to "promote *certainty* for suppliers and consumers in relation to the rules, requirements ..." (emphasis added).

[25] See also Commerce Amendment Bill 2008 (201-2) (Explanatory Note) at 3.

[26] Refer for instance to the Report of the Ministry of Economic Development on the Commerce Amendment Bill, 4 July 2008 at p 20. See also, by way of example, comments of the Minister of Commerce on the introduction of the bill where she clearly indicates that careful consideration had been given to limiting appeals rights and the need to provide accountability – (20 March 2008) 646 NZPD 15157.

[27] Refer to draft report at [F10.15] at p 248.

[28] Even Associate Judges of the High Court are not permitted to determine judicial review applications.

[29] Draft report at p 247.

appeal itself. Provision can be made in appeals to hear from experts, including allowing courts to carry out what is known as "hot-tubbing" exercises to try to identify common areas of agreement. Mechanisms can be put in place to allow the judge(s) to ask questions of the experts to gain greater understanding of the issues.

33 We therefore support the Commission in its suggestion of exploring the use of opportunities to directly question experts in appeals of highly complex or technical regulation. This is not open to a court in a judicial review proceeding.

Imbalance between suppliers and consumers

34 The draft report states that it considers merit review will exacerbate the paradox that the imbalance between the resources of regulated firms and consumers/beneficiaries will mean that the objective of the regime may not be achieved due to appeals. We do not agree. Even in the absence of consumer representatives (such as the airlines), the presence of the regulator on appeal ensures that the full range of interests are put before the Court.

Summary

35 We therefore submit that care is needed when considering the scope of judicial review to correct what have the potential to be very costly errors.

36 Judicial review cannot be an appropriate substitute for an appeal right: the two applications involve correction of different types of errors. Given the inevitable level of deference which would be accorded a regulator in specialist areas, we submit judicial review cannot correctly provide an incentive to reach the correct decision in all respects, and nor should it be forced to do so.

Yours faithfully

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