VODAFONE NEW ZEALAND LIMITED
SUBMISSION TO THE NEW ZEALAND PRODUCTIVITY COMMISSION

PRODUCTIVITY COMMISSION
REGULATORY INSTITUTIONS AND PRACTICES ISSUES PAPER (AUGUST 2013)

PUBLIC VERSION

1 November 2013

Summary

1. Thank you for the opportunity to comment on the Commission's Regulatory Institutions and Practices Issues Paper published in August 2013 ('the Issues Paper').

2. The Government has asked the Commission to examine how the design and operation of regulatory regimes and their regulators can be improved – ultimately to improve regulatory outcomes. In this inquiry, the Commission is focusing on regulation that is implemented where the operation of markets fails to produce behaviour or outcomes that are aligned with the public interest.

3. We note that the inquiry is not a review of individual regulators, specific regulations or the objectives of regimes.

4. Our comments focus on the specific regulatory issues that we have most exposure to and interest in. Although made in this context, we hope that these comments nevertheless have some more general relevance to any regulation directed at addressing market failure.

5. These comments are provided in the form of answers to some, but not all, questions posed in the Issues Paper. Before addressing these questions, we provide some general comments on some of the key themes addressed in the Issues Paper.

General comments

6. Vodafone supports high quality regulatory frameworks, which are necessary to deliver consumer benefits, competition, certainty and incentives. In our sector, such a framework would include the following characteristics:

    a. a regulator which has clear functions and duties;

    b. a framework within which the regulator makes decisions that are predictable and transparent. This includes broad consistency between regulatory frameworks applied across network sectors, except where there are compelling public policy reasons for different treatment;

    c. regulatory 'solutions' are only proposed in response to a clearly defined problem that cannot be solved by any other means. In other words, intervention requires a significant and persisting market failure, that is likely to endure unless regulation is introduced;

    d. problems are well analysed and understood, and the regulator prefers the minimum intervention necessary to address the problem (i.e. intervention is proportionate). This includes an assessment of who is affected by a problem, the costs of action or inaction, and the costs of intervention vs. non-intervention;

    e. regulatory decisions are preceded by genuine discussion and consultation with stakeholders;

    f. decisions are based on broad and 'best quality' evidence, and competing evidence is carefully weighed and analysed;

    g. reasons for decisions are transparently explained;

    h. there is a process for review of decisions by an independent entity; and

    i. there is an express requirement for a regular stock-take of existing regulation, and provisions that ensure that regulation is retained only if the 'threshold conditions' that justified it being imposed originally remain in place.

7. Poor quality regulation, or an environment in which a framework is subject to regular and poorly planned changes, operates against such objectives.

8. It follows that we endorse Treasury's best practice principles for regulatory design and implementation.[1] That is, good quality regulation is regulation that is growth supporting, proportional, flexible, durable, certain and predictable, and transparent and accountable. In addition, regulators must be capable, equipped with the people and systems necessary to operate an efficient and effective regulatory regime.

9. Reflecting on these indicators of regulatory quality, as a company which operates in more than 26 countries around the world, we are puzzled as to why New Zealand has such a wide range of differing approaches to regulating very similar network problems. For example, the approach

[1] Treasury *The Best Practice Regulation Model: Principles and Assessments* (July 2012) at 9.

to regulating prices in the telecommunications sectors differs substantially from the approach to regulating prices in the electricity or airports sector, and again from that which applies to the dairy industry. In addition, there are a number of sectors which are currently unregulated which, were the underlying principles of the telecommunications regulation extended to those industries, *ex ante* regulation might be expected to be present.

10. In short, there does not appear to be a consistent underlying approach to whether, and if so how, regulation should be implemented in circumstances where markets do not produce outcomes that are aligned with public interest. There is general asymmetry of regulation in terms of both the sectors that a subject to regulation and regulatory methodology.

11. In general, we support alignment of regulation across network sectors. Regulation in these sectors (i.e. electricity transmission, telecommunications, gas transmission, or airports) has been applied to services to which access is considered essential in order to promote downstream competition (i.e. bottleneck services or essential facilities). In this sense, the objective of regulation is to mimic the conditions that would pertain in a hypothetical competitive market by, for example, requiring access prices to have a relationship with efficient cost or other outcomes expected in workably competitive markets.

12. In our view, it makes very little sense for products and services supplied in different sectors—but with a very similar underlying rationale for regulation—to be treated in to different ways. Using a different set of rules and approaches to regulate a specific sector only makes sense to us where products and services are clearly subject to a broader set of objectives (e.g. social goals).

Regulators and officials need to refocus on fundamental policy frameworks

13. In our view, a decision to regulate is often made too quickly and at a whim in response to short term and poorly defined problems.

14. Our industry has recently seen Government propose changes to the existing regulatory framework for telecommunications.[2] The review, which must be commenced prior to 30 September 2016, is to take into account the market structure, technology developments and competitive conditions in the telecommunications industry at the time of the review (including the impact of fibre, copper, wireless, and other telecommunications network investment).[3] We have significant concerns about the narrow scope of this review, the poor evidence base relied on to support initial thinking, and the process followed in reaching conclusions.

15. Despite the requirement for a wide ranging review of whether the framework remains fit for purpose given current industry structure and the rapid evolution of the markets, the Minister has adopted a "staged approach", bringing forward a single issue intervention that has the sole objective of reducing the relative difference between prices for different types of fixed access technology. The scope of the review is essentially limited to the impact of legacy copper investment (and its regulated price), and will be restricted in its ability to effectively take into

[2] MBIE Review of the Telecommunications Act 2001 – Discussion Document (7 August 2013)

[3] Telecommunications Act 2001, s 157AA. Section 157AA(2) also provides a number of considerations which the review must take into account.

account the significant ongoing investment in fibre and next-generation wireless access services which are in their very early stages in New Zealand.

16. In other words, a very significant and unsettling intervention is being justified on the basis of pursuit of an extremely narrow goal. In our view, there is no clear rationale for this intervention. We would support a review process that genuinely seeks to develop a framework providing certainly and stability over time, which acknowledges industry trends and makes provision for these. However, Government's current proposals lack any of this ambition.

Regulatory independence is vital for long term certainty

17. We believe that a well-informed independent regulator is almost always best able to make dispassionate, technical decisions on issues relating to the regulation of telecommunications markets.

18. Setting the functions and duties of a regulator, and the framework within which those duties are performed, is clearly a matter for politicians. However, having done so we do not believe it is appropriate for politicians to play a role in operational decisions (including intervention to alter or set aside operational decisions). Where this type of intervention is possible, it is likely to perpetuate a short term, expedient approach to market intervention that is not consistent with any principle of good regulatory practice.

Clarity of role, functions and duties

Question 6: Can you provide examples of regulatory regimes with particularly clear or (conversely) unclear objectives? What have been the consequences of unclear regulatory objectives?

19. As a communications company the regulatory regime that we have most exposure to is the Telecommunications Act 2001 (as amended) ('TA01') and related legislation.

20. The TA01 states that decisions made by the Commerce Commission in relation to designated and specified services (i.e. decisions to regulate terms of supply of certain services) have the primary purpose of promoting "*... competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers*."[4]

21. However, in making these same decisions the Commerce Commission must consider additional factors specified in sections 18(2) and 18(2)(A) TA01, which respectively concern efficiencies and the "*...incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services*".

22. In our view the hierarchy of objectives at play in relation to these decisions is clear:

    a. all aspects of the Commerce Commission's decision are subject to and must be consistent with its primary duty under section 18(1); and

    b. additional factors in section 18(2) and 18(2A) inform how the Commerce Commission exercises its primary duty in section 18(1) but cannot alter it.

23. It is apparent however that not all industry participants agree that the objectives of this legislation are clear. Government has also stated that "*implementation...has not delivered on the policy intent*"[5] of the TA01.

24. In our view, the dynamic at play here is not a lack of clarity in the objectives of legislation, but rather a situation in which legislation has not delivered the outcomes expected by certain market participants, and various policy ambitions are now asserted that are not adequately reflected in legislation.

25. The tension that has arisen in a regulatory context where the duties of the regulator are clear illustrates the potential consequences of unclear regulatory objectives. Where it is not possible to rank or prioritise some objectives ahead of others, a regulator must decide which competing objectives should be favoured. This compels the regulator to make value judgements (which are inherently political choices), favouring some outcomes over others with inevitable trade-offs, rather than undertaking technical, evidence based analysis within a clear framework.

[4] Section 18(1), TA01.

[5] MBIE Review of the Telecommunications Act 2001 – Discussion Document (7 August 2013), paragraph 169.

26. In this situation, a regulator may be exposed to significant criticism where it elects to favour one or more objectives over others, and may be incentivised to decide between objectives based on the identity of winners and losers in each instance, (i.e. by reducing exposure to political risk and criticism by favouring more 'popular' objectives).

Question 7: Where regulators are allocated multiple objectives, are there clear and transparent frameworks for managing trade-offs? What evidence is there that these frameworks are working well/poorly?

27. It is not the case that a regulator can never be charged with promoting multiple objectives. This can be done successfully, provided that there is a clear hierarchy of objectives and a primary objective should exist to provide a 'guiding principle' as to how the regulator should proceed where there is conflict between objectives. This model exists in the UK Communications Act 2003, which established the independent communications regulator Ofcom. The Communications Act assigns an extremely broad range of duties to the regulator. However, it makes clear that Ofcom has two principal duties in carrying out its functions, which all other objectives are subject to:

> *(a) to further the interests of citizens in relation to communications matters; and*
> *(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.*[6]

28. In general, this framework works well with little debate as to how Ofcom ranks and promotes different objectives.

Question 10: Are there examples of where regulators have clearly defined policy functions? Conversely, are there examples of where the policy functions of a regulator are not well defined? What have been the consequences?

29. We are not aware of good examples in the sectors that we operate in of regulators having clearly defined policy functions. However, we think there is some advantage to having a regulator closely involved in the development of policy settings that it will ultimately be required to implement or enforce.

30. In the telecommunications sector, the development of policy and legislation, as well as the provision of advice to Government, has been led by the Ministry of Business, Innovation and Employment ('MBIE') and its predecessors.

31. Given the highly technical, specialised nature of the Commerce Commission's enforcement and market regulation functions, it seems to us unfortunate that it is not encouraged to play a formalised and substantial role in developing legislation and policy that it is ultimately required to apply.

32. In the telecommunications sector, a disconnect between enforcement/regulation functions and underlying policy drivers is illustrated by the following example. The TA01 allows the Commerce Commission to regulate the terms for supply of certain designated or specified services. The rationale for it doing so it that these services would not otherwise be supplied on

[6] Section 3(1), Communications Act 2003 (http://www.legislation.gov.uk/ukpga/2003/21/pdfs/ukpga_20030021_en.pdf)

competitive terms. Regulation is therefore intended to provide a proxy for the terms on which these services would be supplied in a hypothetical competitive market. However, the Commerce Commission does not itself have the ability to determine which services should be subject to such regulation. This decision is reserved to the Minister of Communications and Information Technology. The Commerce Commission can recommend that a particular service should be regulated, but this recommendation may or may not be accepted.

33. Accordingly, there is every possibility of a situation in which the Commerce Commission, based on its specialist assessment of competition and well-functioning markets, thinks the terms on which a particular service is supplied is not in the long-term benefit of end-users of telecommunications services, and therefore considers it should be regulated as a designated or specified service but the Minister, based on a potentially much broader set of considerations, thinks otherwise.

34. In this situation, the Commerce Commission remains charged with promoting competitive markets, but lacks the necessary ability to effect policy changes that would enable it to do so.

35. Our preference would be for the Commerce Commission to operate within a clear framework, in which there are specific limits on type of decisions it can make, the matters it must consider when making those decisions, and the basis upon which any decision may be reviewed – but with sufficient flexibility to allow it to adjust its approach to account, for example, for market developments, new technology, unforeseen events and so on.

Regulatory independence and institutional form

Question 14: Are the dimensions of regulator independence discussed in Figure 4.2 helpful in thinking about New Zealand regulators?

36. The dimensions of regulator independence referred to in the Issues Paper provide a useful framework for considering the context in which New Zealand entities operate.

37. These dimensions are not expressed as operating in a hierarchy and this seems correct to us. 'Budgetary independence', 'institutional independence' and 'operational independence' all seem to us to be necessary conditions for any entity to claim that it exercises regulatory functions in a manner that is independent of Government and other stakeholders.

38. Beyond this, we consider that 'regulation independence' is a highly desirable characteristic of regulation in sectors where the regulator is making specialist judgements on the operation of markets, and related technical decisions. As we understand the concept of 'regulation independence', the functions and overarching framework within which a regulator operates would be set out in primary legislation, however the regulator would have the ability to initiate changes to secondary legislation based on its judgment on how to best perform its functions. This would involve an inevitable ceding of control from the Executive to a regulator. Whether this is appropriate will depend on the circumstances of each case.

Question 15: Which of these dimensions of independence is most important to ensure a regulator is seen to be independent?

39. As noted above, we think that 'budgetary independence', 'institutional independence' and 'operational independence' are all essential for an entity that wishes to operate as a credible, independent regulator. In our view, the only dimension of independence that can be applied flexibly is 'regulation independence'. The extent to which it is necessary or desirable for an entity to have discretion to set and adjust regulation/rules so as to achieve objectives is likely to be influenced by factors such as:

    a. the functions of the particular regulator and the nature of the decisions it is required to make;

    b. the complexity of decisions and the extent to which they are matters of purely technical judgement, rather than other matters of judgement;

    c. the range of considerations that should properly inform decisions; and

    d. whether it is desirable to remove decisions from political influence.

40. Where a regulator is charged with making specialist technical judgements, and where these decisions may be contentious, there is a strong case for insulating the regulator from political interference and any *ad hoc* measures motivated by a desire to alter particular decisions.

41. As a general principle, where primary legislation charges a regulator with making specialist technical judgements, the basis for challenge should exist only where the regulator has not acted in accordance with empowering legislation (for instance, its decision is unlawful), or

where legislation provides for specific grounds of challenge or review of the decision (such as a specific merits review procedure).

Question 17: What should be the limits of regulator independence? What sorts of regulatory decisions should be the preserve of Ministers rather than officials?

42. We accept that regulator independence must be subject to some limits. Indeed, it may not be appropriate in all cases. However, as noted above, we believe that an independent regulator is best able to make dispassionate, technical decisions on issues relating to the regulation of telecommunications markets.

43. Where Ministers and officials are involved in making this type of decision making, a broader set of factors is likely to be drawn into consideration. For example, narrow technical factors may be 'traded off' against broader social objectives. To the extent that trade-offs between different objectives need to be made, our strong preference is that there is provision for this in primary legislation. In other words, legislation clearly sets out the range of duties/objectives that a regulator must pursue in reaching any decision, and how these should be prioritised relative to each other. Provided that there is clarity as to how a regulator will proceed when faced with different objectives, then multiple goals need not undermine predictability and certainty.

44. What will undermine certainly is scope for intervention by the Executive at whim, in circumstances where such intervention is not anticipated or provided for within a regulatory scheme, and where intervention may pursue goals that are entirely at odds with the core purpose of regulation.

Question 18: Do you agree with the list of features in Figure 4.3 which indicate a need for more or less regulatory independence? What other criteria are missing?

45. We broadly agree with these features as appropriate indicators for whether more or less regulatory independence is appropriate.

46. However, we note that individual indicators may provide a conflicting indication as to the appropriate level of independence in different scenarios. For example, decisions involving significant fiscal or economic policy considerations, which might indicate that less independence is desirable, may also involve a substantial degree of technical expertise, complex analysis and expert judgement.

47. What we mean when referring to regulatory independence is that, having set the framework within which regulatory action may occur, Government does not intervene to change or influence specific decisions made by the regulator. We note that it will in every instance be open to the Executive to seek to alter the overarching framework within which regulation occurs via amendment to primary legislation. It would not be appropriate to make any recommendation that this ability should be fettered. Although we would not support legislation that has the purpose of changing specific regulatory decision, this involves a much broader set of issues than contemplated by the Issues Paper.

Question 19: Is regulatory capture more or less likely in a small country? Can you provide examples of capture in New Zealand?

48. In our experience, regulatory capture is no more likely in New Zealand than in other jurisdictions. However, we think that the decisions of independent regulators are relatively more susceptible to political interference. This is not a function of country size but should be attributed to other factors.

Decision review and appeal

Question 26: How effective and consistent are the review and appeals processes provided for in New Zealand regulatory regimes?

49. In our view, the effectiveness and consistency of these processes is questionable. The paucity of challenges to regulatory decisions can, we think, be explained in large part by doubts about the ability of provision for appeals to adequately address defects in decisions given that merits review is only available in a few sectors.

50. In general, decisions made by the Commerce Commission regarding a) generic competition law (i.e. the Commerce Act 1986 ('CA86')) and b) the TA01 are only subject to judicial review.[7] It is relatively difficult to challenge a regulator's decision on this basis. In judicial review proceedings, a court is essentially enquiring into whether a decision has been correctly made in terms of process, or whether it is a decision the regulator is entitled to make. The question being asked, in essence, is whether a decision is one that a reasonable regulator could have been made and whether it has been reached in the right way. It is not an enquiry into the underlying evidence, or whether another substantive decision should be preferred based on this evidence.

51. However, in some sectors the scope of review has expanded towards review of the substantive merits of regulatory decisions. For example, the regulatory control provisions in Part 4 of the CA86 provide for merits review of the Commerce Commission's input methodologies determinations (which provide the building blocks underpinning regulation under Part 4). The merits review process is by way of rehearing to the High Court (sitting with two lay member economists), and is solely on the basis of the evidence that was before the Commerce Commission in making its determination. The Court is tasked with determining whether a "materially better" alternative was available to the Commerce Commission.

52. It is not obvious to us why this form of merits review regime exists for some pricing decisions involving a regulated sector, while there is no equivalent regime is for other regulatory regimes where decision making involves issues which are not materially distinguishable (such as under the TA01).

Question 27: Can you provide examples where the review and appeals processes provided for are well-matched or poorly suited to the nature of the regulatory regimes?

53. At present, regulatory decisions that we are subject to can generally only be challenged via judicial review.

[7] Parties may seek a review of the initial pricing principle applied under Part 2 of the TA01, but the final pricing principle applied simply reflects a more comprehensive pricing methodology (as opposed to the benchmarking approach for the initial pricing principle) and there is no distinction between the decision maker for the initial and final pricing principle determinations. That is, while Part 2 of the TA01 includes a two-stage determination process, it cannot be described as an independent merits review process.

54. The threshold for bringing judicial review proceedings is, in general, quite high and judicial review does not provide an effective means for challenge of regulatory decisions.

55. In practice, the existing threshold means that review proceedings are most unlikely to be brought. In addition, even if brought these proceeding are unlikely to enquire into the substance of a specific decision, which in turn reduces incentives to appeal.

Question 28: What are the advantages and disadvantages of a general merits review body like the Australian Administrative Appeals Tribunal?

56. In our view, any decision by a regulator must be susceptible to review by an independent body in some form. The complexity of regulatory decisions increases possibility for error, and merits review is an effective tool for diminishing the likelihood of these errors (and their consequential social and private costs).[8] A means for correcting error is particularly important in small markets, where an incorrect decision may cause significant and enduring welfare loss (especially in the case of network industries). In addition, an effective review mechanism is likely to incentivise good regulatory decisions at the outset, supporting thorough consultation and other processes, and ultimately high quality analysis and decision making by the regulator. This includes encouraging a regulator to ensure that any decision is soundly based on evidence.

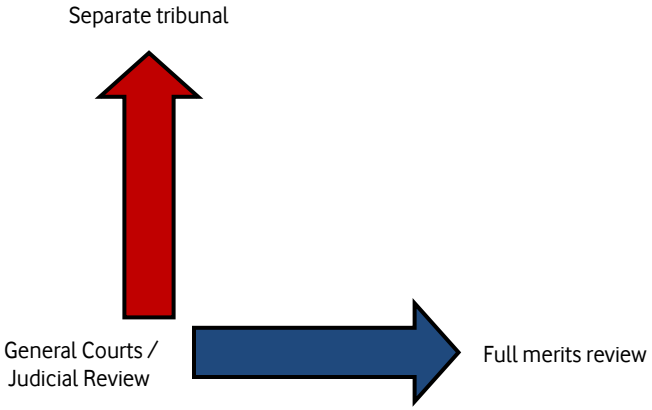
57. Inferior regulatory decisions generate uncertainty and force businesses to adopt expensive, second best 'work around' solutions to cope with the risk of uncertainty or arbitrary intervention. Although people may not be able to measure or even recognise the source of such costs, poor precedents in regulatory decision making threaten investment and economic growth. The difference between high quality predictable decisions and low quality *ad hoc* approaches can be enormous for a small economy like New Zealand.

58. When considering the regulation of telecommunications markets specifically, we observe that current practice is for MBIE to act as a 'final arbiter' of regulatory decisions. This process is often *ad hoc*, non-transparent and highly politicised. An independent, transparent appeals process would avoid these weaknesses.

Dimensions of review

59. Review of a regulator's decision can take a variety of forms ranging from (orthodox) judicial review through to full review of the underlying merits of a decision. The other dimension of review concerns institutional arrangements. Challenges to regulatory decision can be heard by general courts or, alternatively, by a separate tribunal. This range of different approaches is illustrated below.

[8] See discussion in Productivity Commission *Issues Paper* at p 29.



60. Under judicial review, appeals are limited to assessment of whether one or more grounds of challenge are made out (such as unlawfulness, unreasonableness, irrationality, breach of natural justice). If a challenge on this basis is successful, then remedies may include a declaration voiding the decision and directions to the regulator to reconsider its decision (taking into account, for example, other factors). However, these remedies do not require a different decision to be reached. They address a flaw in the decision process, not the substance of the decision. A decision maker may, following successful challenge, make exactly the same decision.

61. In contrast, merits review is generally understood to have a broader scope, exposing regulatory decision making to a greater intensity of review. Merits review can consider whether a decision is 'correct' in the sense of a decision being reached that is robust and soundly based on available evidence and free from error. Merits review (especially from a regulator's perspective), may be seen as a relatively more intrusive form of accountability, in the sense that the appeal body may conduct a more wide ranging enquiry into its decision making (particularly in comparison to the approach adopted in judicial review proceedings). From the perspective of parties affected by regulatory decisions (whether the regulated supplier or consumers of regulated services), merits review can be attractive in that it provides broader grounds of appeal against decision making. However, expanded appeal grounds can also lead to increased appeals (with their attendant cost), and relatively longer timeframes for finality in regulatory decision making (which can have negative consequences for both regulated suppliers and consumers).

62. In reality, the distinction between judicial review and full merits review may not be as clear-cut as this. Indeed, challenge based on judicial review could equally extend the timeframe for resolving a regulatory issue. Whatever the differences, and while one approach may provide a broader framework for appealing decision making, both approaches involve a transparent process and a context between objective evidence. This is significantly superior approach than a non-transparent 'special pleadings' process, whereby businesses make a direct request to Government for exemption or relief from regulation.

63. That aside, an assessment of whether general merits review confers an advantage over judicial review depends on the precise form of merits review applied, and the particular circumstances in which it utilised. On balance, we favour a system of merits review for three main reasons:

a. it provides a means for business to challenge regulatory decision making in a manner that acknowledges the complexity of these decisions, and which allows for proper engagement with the underlying evidence and analysis (something which judicial review proceedings appear less able to do).

b. it reduces the incentives for business to attempt to bypass the ordinary decision making process, for example by lobbying for exemption to the rules, or seeking to alter the rules after the fact. This "exception seeking" behaviour is not consistent with certainty and predictability in regulatory decision making, which we consider to be an essential indicator of regulatory quality.

c. it incentivises regulators to improve the quality of regulatory decision making, and encourages capacity building within regulators where necessary to achieve this.

64. In particular, we think there could be advantages in a merits review procedure where:

a. expertise and a single appeals process is applied across all sectors;

b. the relevant appeal body, however constituted, has sufficient expertise, resources and autonomy to ensure its proceedings are as efficient and cost effective as possible; and

c. incentives regarding appeals for both regulators and parties are properly balanced.

65. It is not clear to us that the merits review process that exists in relation to decisions under Part 4 of the Commerce Act achieves this. Similarly, we do not think that the Australian Administrative Appeals Tribunal model is one that should necessarily be replicated in New Zealand.

66. We would favour a more flexible system in which a tribunal, probably with a chairperson who is a current High Court judge either sitting alone or with lay members, could apply flexible rules of procedure and a relatively more 'inquisitorial' approach than is present in ordinary High Court proceedings. [9] This approach might allow, for example, the tribunal to engage directly with expert witnesses and invite experts to debate issues collectively. This process would need to be carefully managed, but may assist in the efficient conduct of proceedings and reduced costs.

67. We recognise that a permanent standing tribunal would involve significant costs and may only rarely have a full workload. For this reason, we think it makes sense for it to be constituted when required using, as far as possible, resources that are already available within the New Zealand courts system. A chairperson could be drawn from a specialist sub-set of judges from the High Court bench (i.e. a 'Competition' List). A broad panel of lay members whose expertise can be drawn on makes sense to us both in terms of ensuring that the tribunal has expert knowledge to deal with the issues before it, and to manage conflicts that will inevitably arise in a small country with a small market for this expertise. A panel already exists for proceedings under the CA86,[10] and it makes sense for the same panel to be drawn on in any proceedings

[9] We have in mind rules that are similar to the UK Competition Appeal Tribunal rules.

[10] See http://www.courtsofnz.govt.nz/about/high/cases-to-court/List-of-all-Lay-Members-in-the-High-Court.pdf.

involving merits review (potentially with different composition to reflect the sectors from which proceedings are drawn).

68. A merits review tribunal should operate within a clear framework, with clearly defined powers and processes. For example, the decisions that are susceptible to review, the basis and grounds of review (including the relevant standard of proof and evidence) and the powers of the tribunal if appeals are upheld should be set rigidly and expressly through legislation. In contrast, it would be appropriate and probably helpful for a tribunal to be able to adjust procedure within this framework on matters such as how evidence is heard, the form of directions, or costs awards. Providing broad discretion on such matters would in our view tend to reduce the potential for parties to debate ancillary issues that have no bearing on the substance of the case.

Expertise applied across all sectors

69. As noted above, we support a 'unified' approach to the regulation of network sectors as far as possible. It follows that we believe a merits review procedure should be available and apply equally to all network sectors. Hence we would support a merits review model in which a single appeal body and process considers decisions from across all sectors.

70. The framework and powers of a tribunal in conducting merits review of a decision in any sector should be the same. There is no case for divergent approaches to: a) the intensity of review; b) the procedure applied on review; and c) the powers of the tribunal in each case.

Appeal body form and autonomy

71. We think that allowing an appeal body significant autonomy over its rules of procedure, with a framework that clearly articulates its key functions and powers, has significant advantage. It would enable the tribunal to adjust its processes in light of experience. At the initial stages of a merits review regime there is likely to be an amount of 'learning by doing' on all sides. In the initial phase of developing a regime, it makes sense for rules to be adjusted where experience shows they are not working well.

72. In terms of remedies, where merits review finds that a regulator has made a material error we think the primary remedy should be for the tribunal to refer the matter back to the relevant regulator for further consideration, with directions as to the specific matters than should be addressed if appropriate (and, as suggested, broad discretion over the form of directions). However, in exceptional cases it may be appropriate for the tribunal to substitute its own decision for that of the regulator – particularly where reference back would be likely to result in substantial delay in settling an issue with ongoing regulatory uncertainly as a consequence.[11]

[11] We note that the merits review process in Part 4 of CA86 permits the Court to "uphold" the input methodology, or allow the appeal by amending, revoking and substituting, or referring the input methodology back to the Commerce Commission with directions as to the particular matters which require amendment.

Appeal incentives

73. Disadvantages are likely to accrue if a merits review system encourages parties either to make spurious appeals or to appeal decisions as a matter of course where appeal has been seen as costless. The first risk can be managed by enabling an appeal body to make robust decisions about an appeal's prospects of success, and to discourage unmeritorious claims (e.g. via broad discretion in relation to costs awards). The second risk may be more difficult to manage, particularly if a tribunal is seen as a *de facto* second regulator that appears overly willing to interfere with the findings of the regulator. In general, parties should have the opportunity to seek merits review where a regulator has made a material error.

74. We do not think it is appropriate for appeals to be heard in situations where an error is minor or trivial and cannot realistically affect the interests of any party. In other words, there needs to be a threshold for bringing merits review proceedings. It may also be helpful for primary legislation to clearly set out the categories of regulatory decision that can be examined under merits review (judicial review will be an adequate means of review for many decisions made by a regulator). In addition, rules of procedure need to clearly indicate that an appeal is not a 'one-way bet' in which a regulated entity will inevitably get a better answer from the tribunal than they did from the regulator.