



**New Zealand Productivity Commission
Inquiry into Regulatory Institutions and Practices**

Initial Submission

25 October 2013

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INTRODUCTION

1. Vector Limited ("**Vector**") welcomes the Productivity Commission inquiry into Regulatory Institutions and Practices ("**inquiry**") and the opportunity to make a submission on issues relevant to the inquiry's terms of reference. Vector agrees that a good regulatory environment is an essential foundation for achieving step changes in New Zealand's productivity levels and enhancing the economic well-being of New Zealanders, particularly given our isolation and small size.
2. Vector hopes to assist the inquiry by drawing on its experience of economic regulatory arrangements in New Zealand. In particular, Vector discusses the range of best practice regulatory design features considered in the inquiry issues paper, and provides its perspective on how these design features "play out on the ground".
3. We provide with this submission a report from Liza Carver and Alice Muhlebach, partners at Ashurst Australia¹ ("**Carver and Muhlebach report**"), which sets out observations on the issues paper based on their experience in Australia as competition and regulatory legal advisors and, in the case of Liza Carver, as a Commissioner with the Australian Energy Market Commission and member of the NSW Independent Pricing and Regulatory Tribunal.
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SUMMARY

What sort of institutional arrangements and regulatory practice should the Commission review?

5. We consider that it is useful for the Commission to develop overarching common principles of design and operation that are relevant to all areas of regulation. However, such principles will inevitably be high level, and on their own may be unlikely to have a tangible impact on regulatory design and operation.
6. Accordingly, in order for the inquiry to be as effective as possible in improving regulatory outcomes, it makes sense to also consider principles and recommendations that are targeted at particular categories of regulation. On this basis, we propose four categories of regulation which have common features and suggest grouping regulators in accordance with those categories.

¹ Carver and Muhlebach, *Regulatory institutions and practice: Response to the New Zealand Productivity Commission's Issues Paper dated August 2013, 23 October 2013* ("**Carver and Muhlebach report**").

7. Of the four categories we outline, our focus in this submission is on economic regulation of markets, and economic regulation of infrastructure in particular. This focus reflects the nature of our business and our regulatory experience. More significantly:
 - (a) Economic regulation of markets has the most direct and significant impact on New Zealand's productivity and economic growth. Accordingly, this is an area where effective regulatory design arrangements can have a significant impact on New Zealand's long-term development, productive capacity and economic well-being.
 - (b) There are a number of characteristics and principles specific to economic regulation that can inform the development of meaningful guidelines and recommendations.

Case study

8. We provide as a case study an overview of the institutional design arrangements of the Commerce Commission and include specific examples of how these design features have impacted on the implementation of Part 4 of the Commerce Act 1986 ("**Commerce Act**").
9. In our view, this is an excellent case study where, among other things, the Commerce Commission's design has never been reviewed despite changing and increasing functions. There are also aspects of the design which are problematic with best practice principles and international approaches. In this context, the implementation of Part 4 of the Commerce Act provides an opportunity to consider how the institutional design features have impacted on the success or otherwise of a new regulatory regime aimed at achieving specific policy objectives.
10. In our view, the case study demonstrates that legislative reform has in itself been unable to deliver on its underlying policy objectives: it is also necessary to have in place an institutional structure and accountability framework that fits the functions delegated by the legislature. We consider the case study we present provides an opportunity to consider lessons that can be learnt, and to develop principles and recommendations that improve on the regulatory environment and are fit for purpose for New Zealand's circumstances.

The type of principles and recommendations that the inquiry could provide

11. We note there is unlikely to be an overseas regulatory model or set of overseas principles that can be simply uplifted and applied to New Zealand circumstances, whether to all regulatory regimes or to categories of regulatory regimes. However, aspects of overseas regimes and the principles that underpin those regimes can inform a design that is appropriate for New Zealand.

12. Drawing on overseas approaches and also on our case study, we consider the Productivity Commission could usefully consider the following types of recommendations and principles in order to improve on New Zealand's regulatory environment:

- (a) First, we consider it is critical to address the absence of effective arrangements for review of regimes and monitoring performance in New Zealand by way of:
 - (i) a dedicated unit or body to undertake independent periodic reviews and monitor performance;
 - (ii) principles for determining when an independent periodic review is required; and
 - (iii) improved processes and principles for regularly monitoring performance.

Review and accountability mechanisms are arguably important for any regulatory regime. However, as discussed in this submission, for economic regulation (where regulators tend to be independent) such mechanisms are crucial. These mechanisms also provide a framework for application of other principles and recommendations that may come out of the inquiry.

- (b) Second, in relation to economic regulation, to develop recommendations and principles in relation to structural design, legislative objectives, consistency of regulatory arrangements, and regulator capability, resourcing, and engagement. We outline in this submission some more specific suggestions in these areas.

OVERVIEW OF SUBMISSION

13. This submission is structured as follows:

- (a) Part A provides some background information about Vector.
- (b) Part B suggests a possible approach to categorising regulatory regimes for the purposes of this inquiry and outlines the characteristics of economic regulation of markets as a category and economic regulation of infrastructure as a sub-category.
- (c) Part C discusses characteristics of economic regulation of markets and the importance of quality regulatory design and implementation in this area.
- (d) Part D sets out a useful case study and includes:
 - (i) a brief background to the policy underlying the Part 4 reforms; and

(ii) in table form, how the Commerce Commission's current regulatory design and accountability framework appears to have had an impact in practice (considered against the regulatory design features set out in the issues paper).

(e) Part E makes suggestions about improving principles going forward in the context of economic regulation design, drawing on overseas arrangements and with reference to the challenges faced in New Zealand.

14. **Attached** to this submission are the following appendices:

(a) Appendix A: List of issues paper questions and location of responses in this submission;

(b) Appendix B: Evolution of the Commerce Commission (table);

(c) Appendix C: The legislative history to reform of Part 4 of the Commerce Act; and

(d) Appendix D: Comparison with overseas regulatory arrangements - energy regulators (table).

A: ABOUT VECTOR

15. Vector (along with other electricity, gas and telecommunications companies) is a provider of core infrastructure services that are vital to New Zealand's economic productivity. We have a portfolio of energy and fibre optic infrastructure networks in New Zealand, and are New Zealand's largest provider of electricity distribution, gas transmission, gas distribution and energy metering services.

16. Vector owns and operates the electricity distribution network in the greater Auckland region. Our electricity lines and cables deliver power to more than 460,000 homes and 65,000 businesses on behalf of electricity retailers.

17. Vector also owns and operates gas distribution networks (servicing approximately 150,000 domestic and business customers in 30 towns and cities across the North Island) and gas transmission networks (2,286 kilometres of high pressure transmission networks in the North Island).

18. Vector's metering businesses are responsible for the ownership and management of electricity and gas meters to more than 800,000 homes and businesses across New Zealand, as well as the provision of energy data management services to commercial and industrial electricity users.

19. In addition, through Vector Communications, Vector owns and operates a fibre-optic network that provides ultra high-speed connectivity in Auckland and Wellington, including carrier-grade access to the international Southern

Cross cable network, and telecommunications switching facilities in Tauranga, New Plymouth and Napier.

B: CLASSIFYING NEW ZEALAND'S REGULATORY REGIMES

20. Vector understands that the Productivity Commission's inquiry is wide-ranging and is not a review of individual regulators, specific regulations or the objectives of regimes. This presents both challenges and opportunities when the Productivity Commission is looking to present its recommendations to Government.
21. We consider it is useful for the Productivity Commission to develop overarching common principles of design and operation that are relevant to all areas of regulation. However, there is also a need for principles that are targeted towards particular regulatory categories. This is because there are, of course, substantial variations in the economic and institutional characteristics of different regulatory regimes. For this reason, the expected effects of regulation will likely be considerably different across industries and time.² Similarly, the optimal design and operational principles of regulators and regulations are likely to differ across different types of regulation.
22. In particular, developing principles that are targeted towards specific categories of regulation makes sense in the context of an inquiry that is ultimately focused on improving regulatory outcomes. This will best enable the inquiry to develop guidelines and recommendations that:
 - (a) are appropriately tailored to the New Zealand regulatory landscape;
 - (b) draw on international principles of good regulatory practice in the context of the relevant category (economic regulation, social regulation, etc) as relevant;
 - (c) add value to the growing body of research on principles of effective regulation; and
 - (d) represent meaningful and targeted principles, rather than being simply high-level principles that are unlikely to have a tangible impact on regulatory design or operation.
23. We suggest below four categories of regulation (which can include sub-categories), and then suggest grouping regulators in accordance with those categories. This grouping would then best enable three tiers of guidelines to be developed by the Productivity Commission, which recognise that there are:
 - (a) broad overarching principles of regulatory design and operation which apply to all types of regulation;

² P L Joskow and N L Rose (1989) "The Effects of Economic Regulation", *Handbook of Industrial Organisation*, Volume 11 at 1451.

- (b) sub-principles that apply to the main subject area classifications; and
- (c) more specific principles that apply to each sub-category of regulation.

Categorising regulatory regimes

24. Vector agrees with the Productivity Commission that it is sensible to think about regulatory regimes in a number of ways, including in terms of the organisational type of the regulator, and in terms of the subject matter or area of the regulation itself.

(a) Categorising by subject matter

25. Although the Productivity Commission's indicative grouping of New Zealand regulatory regimes is helpful, Vector recommends that further thought be given to the criteria that have been used to define each of the categories. It is also important to consider and develop categories that are workable and logical for the purposes of the Productivity Commission's inquiry, rather than to focus solely on strict theoretical definitions. In our view, there is merit in distinguishing between four main types of regulation:

(a) **Economic regulation of markets:** Economic regulation intervenes directly in market decisions such as pricing, competition, and market entry or exit³ for the benefit of consumers. The term typically refers to government-imposed restrictions on firm decisions over price, quantity, and entry and exit,⁴ but can also extend to other matters in addition to these elements (including aspects such as service quality and investment). Economic regulation incorporates the following key categories:

- (i) Regulation to promote competition: This type of regulation is designed to address anti-competitive practices, including misleading conduct in trade, and mergers, acquisitions and other financial transactions that restructure companies in a way that may fundamentally influence market behaviour.⁵ For example, New Zealand regimes in this category would include Electricity Authority rules for the operation of the electricity market, and Commerce Commission oversight of mergers, acquisitions and anti-competitive practices.
- (ii) Regulation of infrastructure: This type of regulation is designed to address circumstances where an infrastructure or essential service provider faces no or limited competition (that is, natural monopolies). It extends to regulation of the price and quality of services supplied by that provider and, in

³ OECD *Regulatory Reform: A synthesis* (Paris, 1997), page 11. See also P L Joskow and N L Rose (1989) "The Effects of Economic Regulation", *Handbook of Industrial Organisation*, Volume 11 at 1450.

⁴ W K Viscusi, J E Harrington Jr and J M Vernon *Economics of Regulation and Antitrust* (4th ed, The MIT Press, London, 2005) at 357.

⁵ W K Viscusi, J E Harrington Jr and J M Vernon *Economics of Regulation and Antitrust* (4th ed, The MIT Press, London, 2005) at 4.

New Zealand, covers regimes such as regulation under Part 4 of the Commerce Act (of electricity lines services, gas pipeline services, and specified airport services) and regulation of certain services under the Telecommunications Act 2001.

- (iii) Prudential market supervision: This category would include regulatory frameworks for market functioning and prudential oversight,⁶ with regulations designed to ensure the integrity of the financial and market systems involved. In New Zealand, this would include the regulatory regimes administered by the Reserve Bank and the Financial Markets Authority.

Regulatory reform and improvement in this area aims to increase economic efficiency by reducing barriers to competition and innovation, often through deregulation, efficiency-promoting regulation, and by improving regulatory frameworks for market functioning⁷ (including by promoting outcomes consistent with those seen in competitive markets, where natural monopolies exist).

- (b) **Social regulation:** Social regulation protects public interests such as health, safety and social cohesion.⁸ It drives to correct for the damaging effects of economic activity and to attain certain socially desirable outcomes.⁹ Although social regulation can have economic effects, these are often secondary concerns or even unexpected consequences (even though these effects may be substantial).¹⁰
- (c) **Environmental regulation:** A sub-set of social regulation, it is useful to consider this category separately given its specialised focus and importance in a New Zealand context. This is particularly the case given the increasing profile of, and focus on, environmental regulation globally (for example, climate change policy and the emergence of 'new' activities such as valuing natural resources). This category focuses on the use of the environment by present generations while maintaining its benefit for future generations.
- (d) **International trade and tariffs regulation:** This category focuses on New Zealand's international trade rights and obligations, including its free trade and tariffs policy. As a narrow and targeted area, it is logical to consider this regulation separately from both a practical and policy perspective.

⁶ See OECD *Regulatory Reform: A synthesis* (Paris, 1997), page 11.

⁷ OECD *Regulatory Reform: A synthesis* (Paris, 1997), page 11.

⁸ OECD *Regulatory Reform: A synthesis* (Paris, 1997), page 11.

⁹ E Windholz and G Hodge (2012) "Conceptualising social and economic regulation: Implications for modern regulators and regulatory activity" 38 Monash U L Rev 212 at 223-226.

¹⁰ OECD *Regulatory Reform: A synthesis* (Paris, 1997), page 11.

(b) Categorising by regulator

26. In our view, it makes sense to then identify the New Zealand regulators that fall within each of these categories (particularly given the Productivity Commission's focus in the inquiry is on regulator incentives and resources).
27. The regimes and legislation administered by each regulator then follow, providing a more useful and practical way of conceptualising New Zealand's regulatory map (rather than starting from legislative groupings or approaching regulators and the relevant legislation separately).
28. Approaching the categorisation task in this way also reflects that the overall design and objectives of the regulator is a critical starting point that then drives how the relevant legislation is implemented.
29. We provide examples of how these categories can be further subdivided in **Figures 1** and **2** below, and of the types of regulators and regulatory regimes that fall within each category.¹¹

¹¹ We note that these diagrams include a sample of New Zealand's regulators as presented in the Productivity Commission's issues paper. We also note that some regulators have more than one function and may sit across more than one regulatory area. However, for the purposes of these diagrams, regulators have been grouped according to their primary function(s).

Figure 1: Grouping of New Zealand regulators by subject area

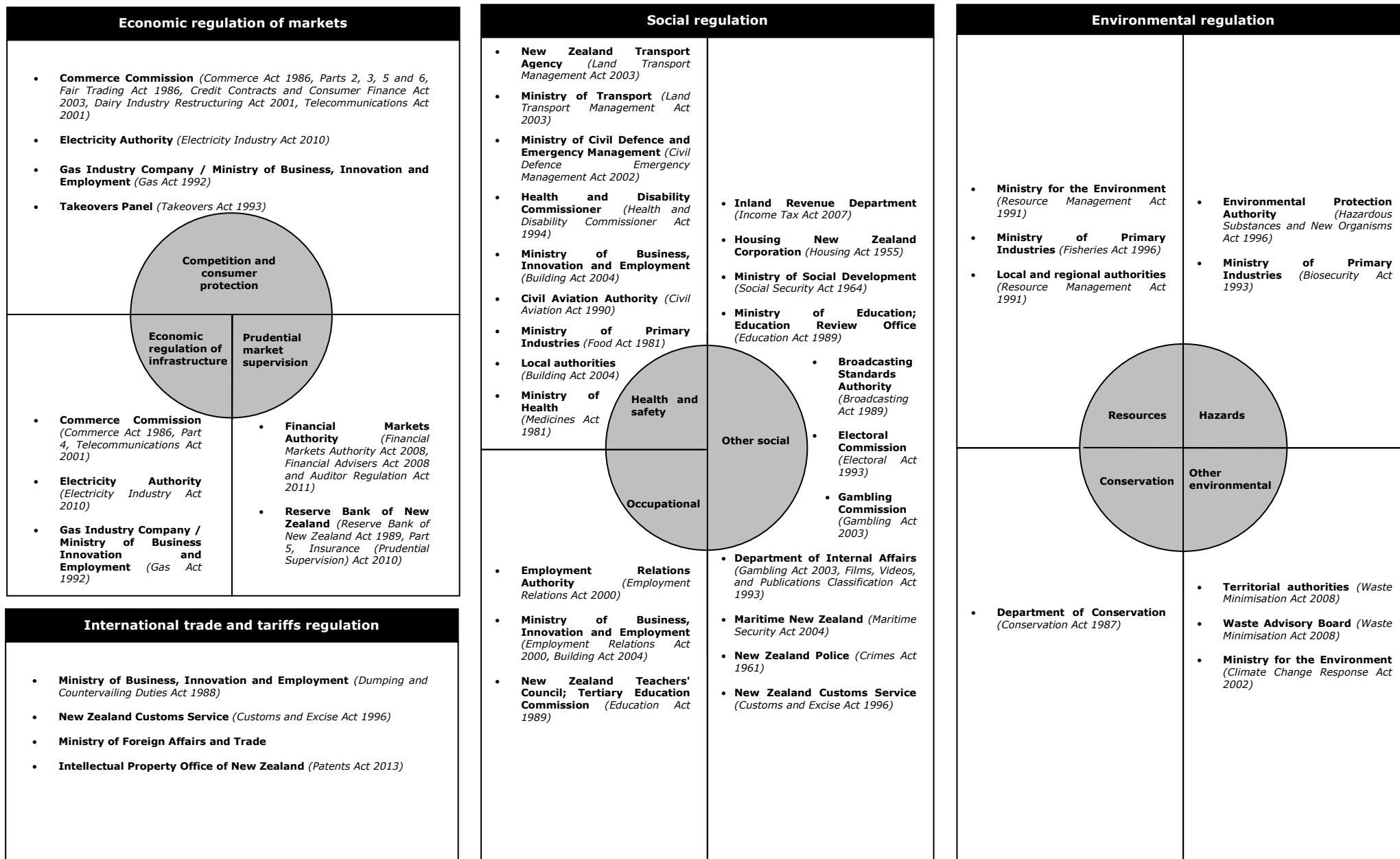
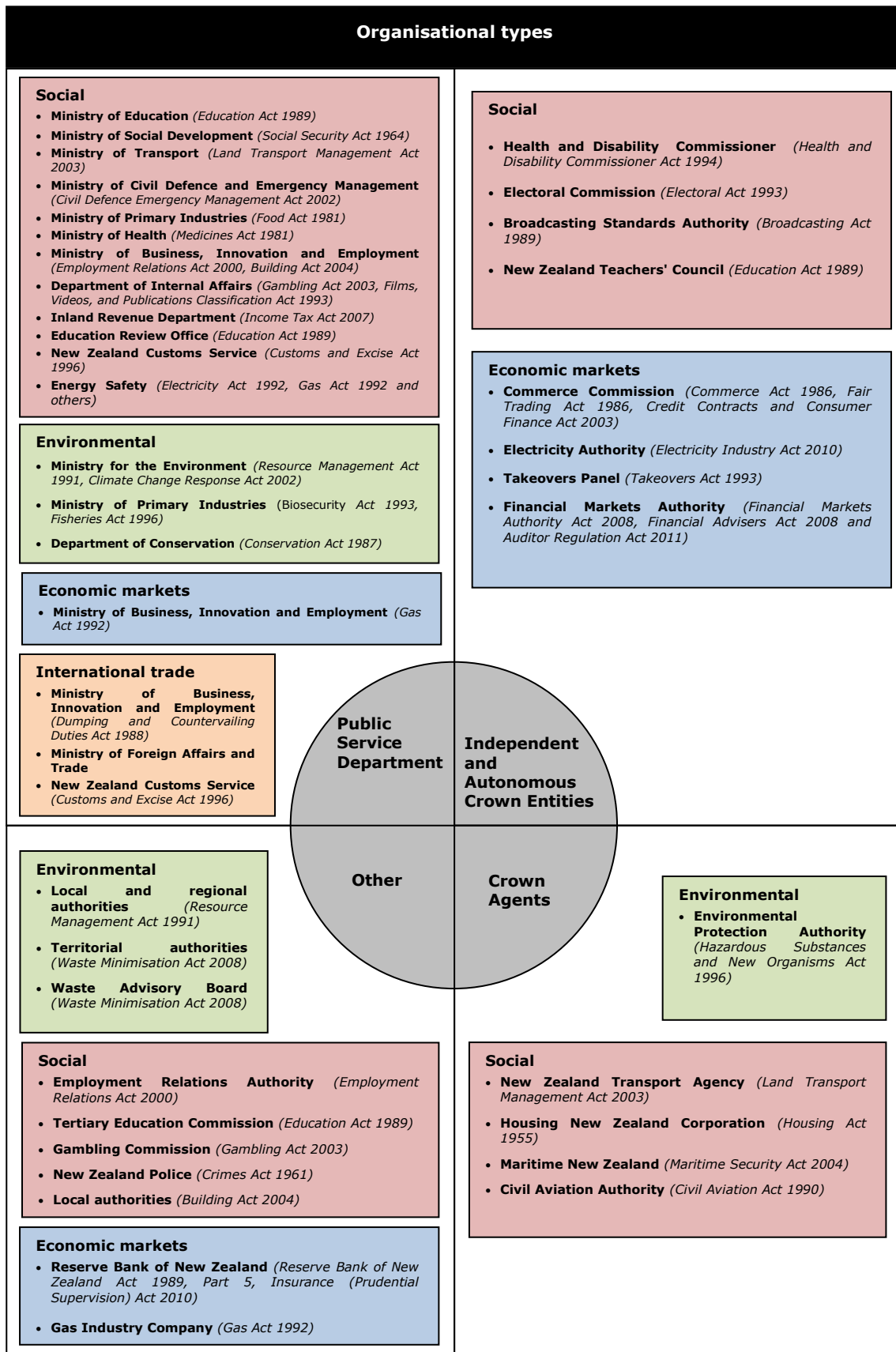


Figure 2: Grouping of New Zealand regulators into organisational types and subject areas



C: CHARACTERISTICS OF ECONOMIC REGULATION OF MARKETS AND THE IMPORTANCE OF QUALITY REGULATORY DESIGN AND IMPLEMENTATION

31. Vector is subject to a wide range of regulatory regimes that control or limit our business decisions to varying extents, including under the Commerce Act, the Electricity Act 1992 and Electricity Industry Act 2010, the Gas Act 1992, the Resource Management Act 1991 and the Climate Change Response Act 2002. In particular, a substantial proportion of our business is subject to economic regulation administered by the Commerce Commission. Given this, and for the reasons set out in this Part, the focus of our submission is on economic regulation of infrastructure.
32. We set out below the key features of the broader economic regulation of markets group and the economic regulation of infrastructure sub-group. We explain why these are areas where improved regulatory arrangements can have a direct and significant impact on the economic well-being of New Zealand and, accordingly, why they would be an appropriate focus for the inquiry.

Economic regulation of markets

33. Economic regulation of markets has the most direct and significant impact on New Zealand's productivity and economic growth. This type of regulation generally affects "upstream" markets where price, quality, stability, the range of networks and services, and access features have considerable implications for "downstream" or retail markets (and, therefore, for a wide range of businesses and consumers).
34. In New Zealand, the areas that would fall under the umbrella of economic regulation of markets include the following sub-groups: economic regulation of infrastructure, competition and consumer protection, and other market regulation. The regulators covered would include the Electricity Authority, Commerce Commission, Gas Industry Company ("**GIC**"),¹² and the Financial Markets Authority (and the regimes would cover the legislation these regulators are responsible for).
35. Economic regulation has a number of characteristics that will inform the development of best practice principles of regulatory design and operation. In particular, it will be useful to develop guidelines and recommendations that recognise that:
 - (a) The majority of New Zealand's economic regulators are independent Crown entities, as can be seen in **Figure 2** above. This means each

¹² The GIC operates under a co-regulatory model with the Ministry of Business, Innovation and Employment.

of these regulators have some common features that affect their design and operation, including common monitoring and accountability frameworks.

- (b) Internationally, there is often a connection between the regulators that are responsible for economic regulation of infrastructure, competition and consumer protection, and market regulation.¹³ Indeed, how these interrelationships are managed is often key to the overall regulatory design and operation. In a New Zealand context, we note that there are some significant overlaps between regulators (which create confusion and unnecessary compliance costs). For example, the Commerce Commission, Electricity Authority and GIC have some areas of common interest, regarding distribution pricing, information disclosure, network investment and the general promotion of competitive markets and efficiency. At the moment, these areas of common interest are addressed by way of Memorandums of Understanding between the Commerce Commission and Electricity Authority,¹⁴ and the Commerce Commission and the GIC.¹⁵
- (c) Economic regulation involves the explicit application of economic reasoning, with issues addressed through the application of economic tools to obtain a sensible market solution.¹⁶ Policy debate therefore turns on the merits of particular economic issues, and regulator incentives and resources are heavily influenced by economic theory and regulatory practice (previous regulatory determinations and judgments, both in New Zealand and overseas). As such, regulatory design and operation is driven heavily by economic and financial considerations.
- (d) Principles of appeal and decision-review mechanisms need to acknowledge the specialised nature of the decisions involved in economic regulation. Due to the often factual and merit-based elements of these decisions, judicial review can be an inadequate mechanism to ensure high quality regulatory decisions and successful regulatory outcomes.

¹³ For example, in Australia, there is a connection between the Australian Competition and Consumer Commission and the Australian Energy Regulator - they are separate but share resources.

¹⁴ Memorandum of Understanding between the Electricity Authority and the Commerce Commission, December 2010, retrieved from <http://www.ea.govt.nz/about-us/documents-publications/memorandum-of-understanding/> (8 October 2013).

¹⁵ Memorandum of Understanding between Gas Industry Company Limited and the Commerce Commission, 5 August 2011, retrieved from <http://gasindustry.co.nz/pages/about/memorandums-understanding> (8 October 2013).

¹⁶ W K Viscusi, J E Harrington Jr and J M Vernon *Economics of Regulation and Antitrust* (4th ed, The MIT Press, London, 2005) at 7.

- (e) Economists play a prominent role in the relevant economic regulatory agencies.¹⁷ This will be important when considering the ideal structural frameworks, governance models, appropriate appeal bodies, and resourcing and capability requirements for the regulatory entities.

Economic regulation of infrastructure as a sub-category

36. We consider the sub-category economic regulation of infrastructure has particular importance in terms of New Zealand's productivity and specific characteristics that may inform targeted guidelines for the ideal regulatory design and operational features for these types of regimes.
37. Improved productivity and economic growth relies on quality infrastructure.¹⁸ As noted in the recent National State of Infrastructure Report:¹⁹
- Infrastructure is an important part of the Government's strategy for achieving economic growth - it provides the supporting networks demanded by a growing economy and it catalyses growth by creating new economic opportunities.
38. Regulated infrastructure businesses are also well placed to utilise existing assets to reduce the cost of investing in new infrastructure and to take advantage of economies of scale and scope (which is critical in New Zealand given our size and isolation).²⁰
39. In relation to delivery of core infrastructure, decisions made now will impact on New Zealand's productivity and economic growth for many years to come. This is because infrastructure sectors involve sunk and long-life assets that require substantial investment and are used to deliver services for extended periods of time.
40. This is in circumstances where there is a strong link between decisions made by a regulator, decisions made by a regulated business, and outcomes for consumers. This is because regulatory decisions, rather than market circumstances, have the greatest influence on outcomes for the regulated

¹⁷ W K Viscusi, J E Harrington Jr and J M Vernon *Economics of Regulation and Antitrust* (4th ed, The MIT Press, London, 2005) at 7.

¹⁸ See for example National Infrastructure Unit "Infrastructure 2013: National State of Infrastructure Report", October 2013 at page 1, which notes that: "Infrastructure is fundamentally important to economic prosperity and improving living standards for all New Zealanders".

¹⁹ National Infrastructure Unit "Infrastructure 2013: National State of Infrastructure Report", October 2013 at page 6.

²⁰ The importance of infrastructure to productivity is reflected in the Minister of Commerce, *Statement to the Commerce Commission of Economic Policy of the Government: Incentives of regulated businesses to invest in infrastructure*, 7 August 2006, published on 10 August 2006, New Zealand Gazette No. 95/2006 at 2814. This policy underpinned the Part 4 of the Commerce Act 1986 (enacted in 2008) and was revoked on 4 November 2010 by the current Government because "the expectations in this statement are now included in Part 4 of the Commerce Act". See also National Infrastructure Unit "Infrastructure 2013: National State of Infrastructure Report", October 2013 at page 6, which notes that: "The private sector plays a critical role as investors in economic infrastructure and providing skills and expertise in planning and design, construction and asset management".

businesses and their customers (regulatory risk is, accordingly, the biggest risk faced by regulated businesses).

41. Regulatory design that allows or incentivises poor regulatory practice undermines confidence in the regime and distorts investment decisions. In Vector's experience, in relation to economic regulation of infrastructure in particular, confidence in the regulatory regime impacts on internal planning and investment practices within Vector and other regulated businesses. This ultimately impacts on New Zealand's long-term development, productive capacity and economic well being. Further, if the regime is not working now, the damage may not be realised until further down the line and at a point where the adverse consequences for economic productivity are difficult to mitigate.
42. In addition to its importance, there are unique features of economic regulation of infrastructure that make it suited to targeted recommendations and guidance from this inquiry. We note that (in addition to comments above in relation to economic regulation of markets):
 - (a) There are specific design features and incentives that are crucial to the efficient operation of economic regulation of infrastructure. For example:
 - (i) Independence from political interference is viewed as critical in the economic regulation of infrastructure in particular and Ministers should be limited in their ability to direct the regulator. The appropriate mechanism for policy direction by government is by way of legislation, and refining regulatory design arrangements.²¹
 - (ii) Effective accountability and monitoring mechanisms provide the necessary and critical counterbalance to this independence.²² This is where the role of the economic regulator is to operate within the powers delegated by the legislature (and its underlying policy) and it must be accountable in this respect.
 - (iii) As noted above, certainty and confidence in the regulator is also critical. As such, factors that incentivise (or

²¹ The Ministry of Business, Innovation and Employment's discussion document *Review of the Telecommunications Act 2001*, dated August 2013, included a proposal for the Government to overrule the Commerce Commission's copper access pricing decision. The Government's potential intervention in the decisions of the Commerce Commission in relation to the telecommunications sector (rather than adjusting the legislative direction to the Commission) appears to be contrary to accepted principles in relation to economic regulation. It also exemplifies the importance of political independence in the economic regulatory sphere.

²² OECD (2013) *Principles for the governance of regulators*. Public consultation draft, 21 June 2013, para 16, page 11.

disincentivise) the regulator to act in a way that promotes certainty, predictability and clarity take on additional importance when considering the ability of economic regulation to successfully meet its statutory objectives.

(iv) Given the technical nature of infrastructure regulation and the trade-offs often involved, it inevitably involves the exercise of some discretion by an expert regulator. For this reason, it is essential that the design features are right, so that this discretion is exercised in a way that furthers the legislation and policy factors underpinning the regulatory regime.

(v) As noted in the Carver & Muhlebach report, economic regulation of infrastructure typically involves a greater level of constructive engagement between the regulator and the regulated entities to achieve outcomes for the benefit of consumers. This can be compared with the different level of engagement required for a competition watchdog (which is focused on enforcement).

(b) It is useful for a common, broad framework to apply across all regulated infrastructure. Signals that are sent in one infrastructure regulatory regime have wider implications, and can create risk and uncertainty in other regimes. For example, the potential for government intervention to overrule the Commerce Commission's pricing determinations in relation to regulated telecommunications services creates risk and uncertainty across all infrastructure sectors, and risks creating a dangerous precedent, particularly given the same regulator is involved. For this reason, it is useful to consider principles governing the relationship between a regulator and central government at the regulatory sub-group level.

43. In the following sections, we set out a case study which provides useful insight into the way economic regulation of infrastructure currently operates. We use this case study to make recommendations and suggest principles of regulatory best practice, which are particularly important for economic regulation more generally and economic regulation of infrastructure as a specific sub-group.

D: A HELPFUL CASE STUDY

44. We believe the Commerce Commission and economic regulation under Part 4 of the Commerce Act is an excellent case study for this inquiry. In particular, this case study provides an opportunity to consider how design arrangements and regulator incentives might have impacted on the achievement of

legislative objectives in practice. It provides an illustration of a number of regulatory design topics in circumstances where:

- (a) The Commerce Commission is an existing regulator that was set up approximately 30 years ago, with its main focus to deal with competition matters (particularly restrictive trade practices). Since that time, the Commission's functions have expanded considerably, with no review of its institutional or structural arrangements.²³
- (b) The Commerce Commission's structure and design is now an outlier compared to overseas regulators, providing valuable opportunities to compare and contrast New Zealand's regulatory regime with international best practice principles. As discussed in further detail in **Table 1** below, the Commerce Commission's design raises questions regarding multiple functions, broad discretion to determine trade-offs between objectives, and weak accountability and monitoring mechanisms.
- (c) Parliament established a new regulatory regime for the economic regulation of infrastructure in 2008, namely Part 4 of the Commerce Act, which was intended to be a fundamental reform of the previous provisions (as discussed further below). This was in a context where the existing regulator had been established and designed to implement different objectives and functions.
- (d) Part 4 is focussed on promoting efficiency in core infrastructure sectors, and the effectiveness of the regulatory regime therefore has a significant impact on economic productivity for New Zealand.

45. We briefly summarise below the background to Part 4 then expand on the design arrangements and implementation issues that are of relevance to the Productivity Commission's inquiry.

Background to Part 4

46. The Part 4 reforms were prompted by concerns that the previous regime (Part 4A) was too uncertain and unpredictable, and was not promoting incentives to invest in infrastructure in accordance with the Government's objectives (i.e. the Commerce Commission's discretion was too broad for suppliers to be able to reasonably predict regulatory decisions).²⁴ A number of problems

²³ We set out in **Appendix B** a timeline of the evolution of the Commerce Commission.

²⁴ See, for example, the Regulatory Impact Statement, para 6, which notes that the "Part 4A model has not kept pace with changes in the regulatory environment and regulatory best practice. For instance, the Part 4A devolves a significant amount of discretion and flexibility to the regulator, but that has come at the cost of increased uncertainty for business". See also the 2008 Cabinet Paper, para 7, which notes that: "The amendments are expected to be generally welcomed by regulated businesses. They aim to improve certainty and apply more internationally conventional forward-looking approaches to regulation than the Act currently allows. The changes are expected to improve business confidence and, as a

were identified with the Part 4A regime through a review carried out by the Ministry of Economic Development in 2006 and 2007.

47. This review resulted in the 2008 amendments to the Commerce Act, which were primarily designed to reform the regulatory control provisions of the Act. These reforms were intended to:²⁵
- (a) provide an efficient and credible regime;
 - (b) provide specifically for incentives to invest in infrastructure and to innovate;
 - (c) improve regulatory clarity, certainty, timeliness, and predictability for businesses, recognising that certainty is a prerequisite for incentives to invest and innovate, particularly in long-life infrastructure assets with limited value in alternative uses (i.e. the investments are largely sunk once they are made); and
 - (d) tailor the regime to New Zealand's small size, with small firms and limited resources.
48. Key changes included:
- (a) A new purpose statement for Part 4, intended to give "clear guidance to the Courts and the regulator that the aim of regulation is to promote investment".²⁶ This purpose statement involved a balancing exercise between statutory objectives, including limiting excessive profits. However, more weight was to be placed on investment incentives than was the case for Part 4A.
 - (b) Reducing the Commerce Commission's discretion by requiring it to determine in advance key rules, processes and requirements relating to regulation (referred to as input methodologies ("**IMs**")). These IMs were intended to give businesses greater certainty, transparency and predictability, which in turn was expected to "help improve the climate for investment in infrastructure".²⁷
49. A more detailed summary of the legislative history to Part 4 is set out in **Appendix C**.
50. Vector participated in and fully supported the reform process, and continues to be a strong supporter of the objectives underlying Part 4. However, Vector considers that key aspects of the regime are now removed from what was

consequence, improve the climate for investment in infrastructure". See also paragraph 56 below for a discussion of investor views that the Part 4A regime was uncertain.

²⁵ 2008 Cabinet Paper, para 17.

²⁶ Commerce Amendment Bill, Second Reading (2008) 649 NZPD, 18313, pp 18320-18321.

²⁷ 2008 Cabinet Paper, para 7.

originally intended, such that the regime is not delivering on the reform objectives. In Vector's experience, these aims have not been achieved due to the design and institutional features that underpin the Commerce Commission.

Design features of the Commerce Commission

51. An assessment of the current regulatory design arrangements for the Commerce Commission, which we consider have impacted on the implementation of Part 4 regulation, are set out in the following table (considered against the relevant best practice design principles identified by the Productivity Commission in its issues paper).
52. Our experience is that the Commerce Commission's institutional design arrangements and regulatory practices are impacting on the ability of Part 4 to deliver on its statutory objectives. This is perhaps not surprising where the existing institutional design arrangements have built-in incentives for the Commerce Commission to focus on short-term outcomes rather than promoting longer-term investment, and to reserve for itself a high degree of discretion (where such incentives are at direct odds with the central intent of the reforms).
53. We emphasise that, in terms of identifying "problems" with current regulatory design and implementation, experience has built up cumulatively over a number of years. Subjective experience and perception is therefore also an important measure of performance. Indeed, it is recognised that much of the information about the performance of, and confidence in, a regulator is inevitably based on such perceptions.²⁸
54. Finally, we have no doubt that the Commerce Commission believes that it is properly applying the legislative framework and we acknowledge that it is a hard-working regulator. There are also aspects of the Commerce Commission's design arrangements that work well. For example, in terms of capability and resourcing, the Commerce Commission is staffed with individuals with considerable economic expertise. As a result, the decisions it produces are generally seen as more well-developed than those of other regulators we deal with regularly. The Commerce Commission is also generally viewed as an effective competition watchdog. In addition, as an independent crown entity, its design is appropriately independent from Government.

²⁸ Importantly, other regulators do use this type of stakeholder experience to monitor and measure performance, for example the AER in Australia. See also, for example, the discussion of stakeholder perceptions in the Australian Productivity Commission 2013, Electricity Network Regulatory Frameworks, Report No. 62, Canberra ("APC report"), chapter 21.

Table 1: Summary of Commerce Commission design features relevant to Part 4

Institutional arrangements	Commerce Commission design features relevant to Part 4
Clarity of role, functions and duties	<ul style="list-style-type: none"> • The Commerce Commission has a dual role as both a competition authority (consumer watchdog) and an economic regulator, where these roles require different skill sets, leadership culture and capabilities. In particular: <ul style="list-style-type: none"> ◦ Competition authority functions are focused on enforcing "protective" rules²⁹ and pursuing offenders. A limited understanding of the relevant market is sufficient, relationships between the regulator and regulated are less important; and consideration of long-term outcomes are not central to these processes. ◦ The economic regulator function, on the other hand, is concerned with "functional" rules³⁰ requires extensive stakeholder engagement, a focus on long-term consumer interests, and a deep understanding of the market being regulated. • As set out in the Carver and Muhlebach report,³¹ there are serious risks where multiple regulatory functions are conferred on a single regulator, particularly where adversarial and investigative functions are conferred on a regulator charged with responsibilities for economic regulation. • Within its role as an economic regulator, the Commerce Commission is a consumer advocate rather than an independent arbitrator balancing positions put forward by regulated suppliers and consumers. Although this is not uncommon overseas (where there is no established well-resourced consumer counterparty body), it carries a further risk of bias towards short-term rather than long-term consumer outcomes. In New Zealand this tendency is exacerbated by the combination of the other institutional design features of the Commerce Commission. • The mere perception that the Commerce Commission's economic regulator function is unduly influenced by its consumer watchdog function is problematic. However Vector's experience is that the Commerce Commission's culture, and its approach to Part 4, has in fact been influenced by its multiple roles.
	<ul style="list-style-type: none"> • Within its role as an economic regulator, the Commerce Commission determines, implements and enforces regulation. It is a fundamental principle of law and regulation that those who make the rules should not enforce them (and vice versa). A regulator that sets rules and then applies those rules faces a serious moral hazard. This is because it has incentives to make rules that are easy for it to enforce and/or that provide itself with a high degree of discretion and lessen the risk of successful appeals. There is also a lack of objectivity when subsequently interpreting the rules. This is of particular concern in the context of economic regulation, where regulatory rules should aim to provide clarity and predictability in advance to underpin the business confidence that is required for investment. Indeed, this was a key objective of the Part 4 reforms. • Incentives arising from being both the rule maker and the rule implementer have played out in the Commerce Commission's approach to setting and implementing the IMs. There are examples of the Commerce Commission maintaining broad discretion when determining rules or reinterpreting/adding to rules at a later date without going through a formal rule amendment process.
	<ul style="list-style-type: none"> • The legislative guidance or direction provided to the Commerce Commission lacks clarity, including in relation to competing objectives and trade-offs.³² • While Part 4 was intended to limit the Commerce Commission's discretion through better direction, the direction in the legislation does not clearly reflect the policy intent underlying the Part 4 regime. The purpose is broadly worded without providing further direction or guidance, including in relation to how competing objectives and trade-offs should be prioritised or assessed. • In our experience, this has enabled the Commerce Commission to exercise a high degree of discretion as to what the legislative direction requires (rather than the legislation directing the approaches the Commerce Commission adopts). This has contributed to extensive debate and

²⁹ See Carver and Muhleback report paras 1.2 and 3.2.

³⁰ Ibid.

³¹ Ibid at paras 1.2, 4.1 and 4.1.

³² As discussed further at 72(b), legislation should clearly state the objectives of the legislation and the power of the regulator. If objectives are broad or unclear and the regulator is given significant discretion, then the regime is more uncertain, the underlying legislative objectives are less likely to be met, and it is difficult to hold the regulator to account or measure its performance against those objectives.

Institutional arrangements	Commerce Commission design features relevant to Part 4
	<p>contention between the Commerce Commission and interested parties regarding appropriate methods to meet the legislative objectives. There is also a perception that the Commerce Commission is not committed to key objectives underlying Part 4, including the importance of certainty or the need to place more weight on incentives to invest than under the previous Part 4A.</p>
Regulatory independence and institutional form	<ul style="list-style-type: none"> • As an independent Crown Entity, the Commerce Commission is independent from Ministers and the Ministry. The Minister is unable to direct the Commerce Commission on matters of policy (the Commerce Commission is required only to have regard to Government Policy Statements). • The Commerce Commission is generally viewed as appropriately independent from Ministerial direction. This perception has been lessened following the approach to the Orion Customised Price-Quality Path ("CPP") where the Commerce Commission was under public pressure from the relevant Minister to minimise any price increase (and appeared to respond to this pressure with the release of an issues paper that has a clear weighting towards lower prices to the exclusion of network investment). • Government intervention in Commerce Commission pricing determinations in the telecommunications sector also raises concerns about the potential for similar intervention in other regulated sectors (notwithstanding the independence of the Commerce Commission).
Decision review and appeal	<ul style="list-style-type: none"> • Part 4 introduced merits review appeals of IMs and CPPs. Previously decisions were subject only to judicial review which was acknowledged to be a weak accountability mechanism for decisions of an expert regulator. • The introduction of merits review was intended to improve the quality of decisions through error correction and by acting as a discipline on the Commerce Commission. Vector agrees that the introduction of merits review is an important feature of the reforms. • The following observations can be made: <ul style="list-style-type: none"> ○ A number of key decisions remain outside the merits review appeal process, including Default Price-Quality Path ("DPP") and information disclosure determinations. In practice this has incentivised the Commerce Commission to develop methods and rules within the DPP and Information Disclosure ("ID") determinations rather than within the IMs in order to reduce the risk of appeal. ○ Merits review of IMs and not of DPPs is a consequence of the design choice not to have an independent rule maker. In retrospect, our experience suggests that this may not have been the most efficient or best economic decision for New Zealand. ○ While merits review is an important feature of the new regime it does not necessarily address performance and best practice behaviour, so accountability and monitoring mechanisms remain important (discussed below).
Accountability and transparency Performance assessment	<ul style="list-style-type: none"> • It is well accepted that a regulator should be independent of Ministerial control with direction provided through legislation. However, the flip side of independence in decision-making is effective monitoring of and accountability for performance. In the absence of institutional separation between its various roles, effective monitoring of the Commerce Commission's regulatory behaviour is even more critical. • A key issue with the current regime is the weak mechanism for monitoring of the Commerce Commission's performance by Government and/or external bodies. Under the current regulatory arrangements: <ul style="list-style-type: none"> ○ MBIE is primarily responsible for oversight of the Commerce Commission. The key mechanisms for monitoring performance are provided under the Crown Entity Act 2004. These mechanisms appear to be viewed as of limited effect and / or are underutilised. ○ In accordance with the Crown Entities Act 2004, the Commerce Commission determines its own performance criteria in Statements of Intent ("SOI") (including criteria to assess whether its regulatory decisions promote statutory objectives which tend to be high level) and self-assesses its performance against those criteria. There is no process for stakeholder surveys. ○ While the Minister can amend SOIs and may also request a review, these powers do not appear to have ever been used. Scrutiny provided by annual Select Committee financial reviews and monitoring by Treasury are also limited. ○ There is no formal process for external periodic review of the regulatory arrangements (the Commerce Commission's arrangements have not been reviewed in over 30 years). • There is no requirement for the Commerce Commission to undertake any cost benefit analysis when making determinations (the only explicit requirement of cost benefit analysis under Part 4 is when the Commission is making recommendations to Ministers on whether services

Institutional arrangements	Commerce Commission design features relevant to Part 4
	should be subject to regulation).
Regulator workforce capabilities Engagement	<ul style="list-style-type: none"> • In terms of capability, resourcing and engagement, the Commerce Commission is staffed with individuals with considerable expertise in the field of economic regulation. The decisions the Commerce Commission produces are generally seen as better developed than those of other regulators we deal with regularly. • However, the Commerce Commission, as with many regulators, has limited exposure/access to information that would inform its understanding of the commercial realities faced by regulated businesses, and does not tend to recruit staff with commercial expertise. • In addition, there is no requirement for the Commerce Commission to use industry advisory groups and it tends to instruct experts from academia. There are also limited processes for consumer engagement. • The Commerce Commission is required to consult with stakeholders on most decisions under Part 4.
Overlapping and Consistent regulatory regimes	<ul style="list-style-type: none"> • The New Zealand energy market includes regulation by the Commerce Commission, Electricity Authority, GIC, Energy Efficiency and Conservation Authority and the Energy Safety section of MBIE. There is some overlap between these bodies in particular areas. Additionally, regulated firms can find different regulators taking inconsistent or opposing positions on the same issues.
Compliance monitoring and enforcement	<ul style="list-style-type: none"> • As discussed above, the Commerce Commission has dual roles as competition watchdog and economic regulator. These roles require different approaches to the compliance and monitoring and enforcement functions.
Organisational culture	<ul style="list-style-type: none"> • In Vector's experience, the Commerce Commission's organisational culture is heavily influenced by its multiple functions and decision-making structure (see above comments).
Decision-making structure, processes and approaches	<ul style="list-style-type: none"> • From an internal governance perspective, there is a lack of transparency around whether the Commerce Commission's governance and management roles have been appropriately separated.
Funding and resourcing	<ul style="list-style-type: none"> • Most functions of the Commerce Commission under Part 4 are currently funded by industry levy, which can be passed through to consumers by regulated suppliers. If the Commerce Commission over or under-spends, the amount that varies from budget is passed back to suppliers to pass on to consumers. This means the Commerce Commission is not necessarily constrained by the budgets that are set for it. • Also, the Commerce Commission's litigation is funded by the Crown, while other Part 4-related costs are funded by levies. So if levy funding is limited, the Commerce Commission has an incentive to take court action (as it is funded from a different pool) rather than potentially more proportionate lower-level enforcement action.³³ • The separate litigation funding arrangements, while undesirable in theory, have not created significant problems to date. We are not aware of Commerce Commission funding incentives leading to an undue reliance on litigation as a means of enforcement.
Treasury Best Practice Regulation Model Principles	<ul style="list-style-type: none"> • In this model, Treasury considered that best practice regulatory principles would require regulation to be growth supporting, proportional, flexible and durable, certain and predictable, transparent, and administered by a capable regulator. • The Commerce Commission's design features have also impacted on the ability of the Commerce Act regulatory regime to meet the high level best practice principles developed by Treasury in its 2012 Best Practice Regulation Model, for the reasons outlined above.³⁴

³³ Ministry of Economic Development, *Revisiting Funding of the Regulation of Electricity, Gas and Airports under Part 4 of the Commerce Act 1986: Discussion Paper*, February 2011, page 23.

³⁴ New Zealand Treasury (July 2012) *Best Practice Regulation Model: Principles and Assessments* at page 12. We note that the review undertaken by Treasury in 2012 found that there were possible areas of material concern in relation to whether the Commerce Act regime was appropriately certain and predictable, and administered by a capable regulator. This review also considered that it was not known at the time whether the Commerce Act regime adequately supported growth. See New Zealand Treasury (July 2012) *Best Practice Regulation Model: Principles and Assessments* at page 13.

Perceptions of investors and rating agencies

55. As set out above, Vector's experience of Part 4 is that the Commerce Commission's design features are incentivising approaches that undermine the intent of the legislation. This is having an impact not only on investment decisions made by Vector and other regulated businesses, but also on the perceptions of rating agencies and investors about investing in businesses subject to Part 4 regulation.
56. By way of background, rating agencies and investors have previously raised concerns about uncertainty under the previous regulatory regime referring, for example, to "themes of uncertainty and subjectivity" as dominating the regulatory environment.³⁵ Following the introduction of the Part 4 regime, rating agencies and investors remained concerned that the regime, as implemented, was too uncertain. While this in part may have reflected the fact IMs and the first DPPs were yet to be determined, it was clear that there were also broad concerns about the way in which the regime was being implemented. For example, rating agencies and investors observed that "regulatory uncertainty and subjectivity remain endemic" and compared the regime unfavourably with Australia.³⁶
57. More recently, Standard & Poors has stated that "uncertainties surrounding the regulatory framework" are offsetting Vector's strengths, noting regulatory pricing as one factor most likely to impact on Vector's credit quality in the near-to-medium term.³⁷ This is notwithstanding that IMs have now been determined and the first DPPs set. That is, perceptions that the regime is uncertain remain five years after Part 4 was introduced (in the context of a regime that was intended to improve certainty and incentives to invest).

³⁵ For example, following the gas inquiry and authorisation process Goldman Sachs stated that: "The themes of significant uncertainty and [Commission] subjectivity that have dominated the regulatory environment for the past decade are strongly reflected in the gas inquiry. As such there is a broad range of potential outcomes to the decision. On a positive note, this is the last regulatory decision under the pre-Commerce Amendment Act regime." Matthew Henry, Goldman Sachs JB Were "Vector Limited. Commerce Commission Gas Decision Imminent", (23 October 2008), p.1.

³⁶ For example, in June 2009, Standard & Poor's stated (in relation to Vector's business risk profile) "compared with Australia, the regulatory framework governing New Zealand's energy networks is opaque, developing, and relatively unsupportive to regulated companies, including Vector." In the same publication, Standard & Poor's noted that "Vector's business profile, while strong, is weaker than most Australian peers, in our opinion. This is largely due to New Zealand's most uncertain and therefore, less-supportive regulatory environment – a divergence which should reduce over time as the Commerce Act amendments are phased in ...". Most recently in its publication of 6 August, 2010, Goldman Sachs observed that "regulatory uncertainty and subjectivity remain endemic". The Analyst, Matt Henry, continued, "... although our base view is that the Commerce Commission is likely seeking a relatively benign outcome, the chance of a highly punitive outcome cannot be completely dismissed. This uncertainty represents a major barrier to investing in Vector, which we expect to continue to weigh on the stock".

³⁷ Standard & Poors Rating Services, RatingsDirect Summary: Vector Limited, 20 February 2013 at page 2.

E: SUGGESTIONS GOING FORWARD

Challenges faced when developing regulatory design principles for New Zealand

58. The challenge for the Productivity Commission is to develop recommendations and guidelines for regulation generally, and economic regulation as a category, that address the core problem yet are workable in New Zealand.
59. This is where New Zealand faces unique challenges because of its small size and limited resources. Because of this, there has been a general reluctance on the part of officials and Ministers to establish multiple regulatory bodies across all of New Zealand's regulatory regimes and / or set up formal arrangements for oversight and review. Nevertheless, it is critical that our regulatory models are effective and deliver on the Government's objectives.
60. We note that there is unlikely to be an overseas regulatory model or set of overseas principles that can be simply uplifted and applied to New Zealand circumstances, whether to all regulatory regimes or to categories of regulatory regimes. However, aspects of overseas regimes and the principles that underpin those regimes can inform a design that is fit for purpose in New Zealand.
61. For example, we have reviewed economic regulatory arrangements in the United States, the United Kingdom, Australia, Canada and Ireland (with a focus on electricity and gas regimes).³⁸ In our view, useful observations that can be drawn from these arrangements include the following:
- (a) Overseas regimes tend to have a greater degree of role clarity, including separation between the competition authority and economic regulation functions in the energy sector and, for the most part, separation in relation to other regulated industries. For example, in Australia, the Australian Energy Regulator ("**AER**") is a separate legal entity from the Australian Competition and Consumer Commission ("**ACCC**") although it is co-located within the ACCC and shares staff and resources. Even this co-location has raised concerns in Australia about the impact on stakeholder confidence and there have been calls for more complete structural separation.³⁹
 - (b) In addition, Australia has formal separation between the rule makers and rule implementers in the energy sector.⁴⁰ Although these roles

³⁸ A comparison of overseas economic regulation regimes is set out in a table in **Appendix D**.

³⁹ APC report, chapter 21 page 775 - 756. Retrieved 3 September 2013 from http://www.pc.gov.au/_data/assets/pdf_file/0015/123027/24-electricity-chapter21.pdf . See also Carver and Muhlebach at para 4.2.

⁴⁰ For example, in Australia there are two electricity regulators: the AER which regulates the National Energy Market ("**NEM**") and is responsible for the regulation of gas pipelines and electricity and transmission networks; and the Australian Energy Market Commission ("**AEMC**") which has

are not formally separated in other jurisdictions, the potential negative impact of not separating the roles is mitigated in these countries by other design features that are absent in New Zealand (such as separation of competition and economic regulation roles, and separate industry regulators).⁴¹

- (c) In the United States, it is becoming more common for a well resourced consumer advocacy body (largely staffed by lawyers) to engage in the price-setting process for regulated entities. This results in a regulatory model where the suppliers and the consumer bodies make their respective cases and negotiate settlements, with the regulator's role to be the independent arbitrator. In other jurisdictions, regulators generally continue to have a consumer advocate role in electricity and gas distribution price setting decisions, but there has been a move in Australia and the UK towards more effective consumer engagement (which should therefore reduce the consumer advocate role of the regulatory body).⁴²
- (d) In terms of governance, the UK has implemented corporate regulatory models which distinguish between a regulator's governance and strategy role (which is controlled by a Board) and the management-level implementation of the regulatory regime.
- (e) All jurisdictions have appeal rights to different extents. For example, there are separate specialist appeal structures in Australia (through the Australian Competition Tribunal) and in the UK (through the Competition Appeals Tribunal). New Zealand appears to have adopted a design framework that incorporates less specialised appeal bodies (i.e. the High Court, albeit with lay experts sitting as part of the Court).
- (f) Most countries have better oversight and accountability mechanisms for assessing the regulator's performance that may provide useful insight for New Zealand. For example, in Australia, the Australian Productivity Commission ("**APC**") plays an important role in evaluating the effectiveness of the regulatory regime and considering the impact of regulation on wider sector outcomes.⁴³ Other

responsibility for rule-making and market development in relation to electricity and gas markets and networks.

⁴¹ See Appendix D.

⁴² Indeed, this was the topic for the 2013 ACCC conference and substantive new policies were announced by the Australian governments in late 2012 to increase consumer engagement in regulatory decision-making processes: Ibid, chapter 21 page 790.

⁴³ See, for example, the APC's role in performance monitoring and benchmarking. The APC undertakes national and international comparisons of the performance of key Australian infrastructure industries. These include the benchmarking of institutional arrangements. Linked to this, it is one of the APC's legislative 'instructions' to reduce unnecessary regulation. The Annual Report requirements on the APC include reporting on its activities, including industry and productivity performance generally, as well as the effects of industry assistance and regulation (section 10 Productivity Commission Act 1998).

jurisdictions also involve stakeholders and industry in the regulatory planning process.

62. Taking these observations into account will best ensure that:
- (a) Key principles applicable to economic regulation are drawn on where that is helpful. For example, while the Australian institutional structure for economic regulation might not be suitable for New Zealand, it may be useful to draw from best practice design and oversight principles applied in Australia.
 - (b) New Zealand can compare favourably with overseas jurisdictions from an investor perspective (who will have a preference for regimes that are perceived as less risky). This is critical in order to ensure that New Zealand firms can compete equally for the necessary capital to fund important investments in the country's essential infrastructure.
63. In relation to New Zealand's focus on developing low cost regimes to fit with our small size (and the associated reluctance to establish new regulatory entities) we note that:
- (a) A reluctance to consider proper separation of regulatory roles in order to manage costs, which has been a barrier to regulatory reform in New Zealand in the past, is arguably misplaced. As the Productivity Commission's issues paper sets out, New Zealand's size and isolation highlights the need for "an exceptionally good regulatory environment"⁴⁴ in order to mitigate the impact of economic geography on our economic performance.
 - (b) Regulatory improvements, including the establishment of separate regulatory bodies, can be undertaken in a way that is relatively low cost. For example:
 - (i) The establishment of a separate body can be relatively low cost where administrative costs, staffing and resources are shared.⁴⁵
 - (ii) A separate rule-making body can be called on as and when necessary, as once rules are sets its functions are limited to periodic review and amendment.⁴⁶

⁴⁴ Productivity Commission, *Regulatory institutions and practices Issues Paper* (August 2013), p 12, citing Conway (2011).

⁴⁵ For example, as noted above, in Australia the ACCC and AER are independent bodies that share staffing, resources and facilities.

⁴⁶ Refer, for example to the Australian context (ACCC and AER). According to the AER's 2012-2013 Annual Report, the model of two independent decision-makers, with shared resources, supports a common approach to regulation across regulated infrastructure sectors. And it allows the AER and ACCC to share expertise and overhead costs (see page 11).

- (iii) Reform measures could result in other cost savings. For example, a separate rule-making body could lessen the need for merits review of IMs given they are determined by an independent body or expert panel.⁴⁷ A separate economic regulatory body could also result in greater efficiencies across other entities such as the Electricity Authority, the GIC and Commerce Commission (for example, because current duplication of roles is addressed).

Developing general principles for economic regulation

- 64. In Vector's view, a number of lessons can be drawn from the Part 4 experience that are applicable to economic regulatory design and economic regulation of infrastructure more generally.
- 65. First and foremost, we consider that it is critical to address the absence of effective arrangements for review of regimes and performance. Review and accountability mechanisms are arguably important for any regulatory regime. However, as discussed above, for independent economic regulation (where regulators tend to be independent), such mechanisms are crucial.
- 66. Key mechanisms include (a) independent periodic review; and (b) regular annual performance monitoring processes (which in turn inform the less frequent periodic reviews). Such mechanisms ensure that a regime, as designed, is meeting its intended objectives, including by acting as a discipline on the regulator (which is central to the development of a high quality regulatory environment). They also provide a framework for application of other principles and recommendations that may come out of the inquiry.
- 67. On this basis, we consider below:
 - (a) principles and recommendations relevant to review and monitoring mechanisms; and
 - (b) other principles and recommendations relevant to economic regulation based on our experiences referred to above.

Review and monitoring mechanisms

- 68. In New Zealand, economic regulators tend to be independent Crown entities subject to the Crown Entities Act 2004. While this structure provides for independence from political intervention, there is an absence of corresponding effective review and monitoring mechanisms. Existing monitoring mechanisms under the Crown Entities Act are underutilised, possibly because they are viewed as weak accountability tools and / or

⁴⁷ See for example Commerce Amendment Bill (201-1) (explanatory note) p 26-27.

because there are limited consequences for poor performance. In addition there is no formal process for periodic review of regulatory regimes.

69. It is notable that Part 4 followed a Ministerial review conducted over a two year period with the assistance of expert and stakeholder input. In addition, many of the design features introduced were unprecedented (in New Zealand and overseas) and, accordingly, their ability to deliver a more efficient, certain and predictable regulatory regime was untested. However, there is no formal process for an *ex post* assessment of the effectiveness of the regime in meeting its intended objectives. This in itself is contrary to good regulatory practice. For example, a core OECD guiding principle is to "assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment".⁴⁸
70. In relation to this inquiry, drawing on our experience and overseas approaches, we consider the following features are required to address the current gap in monitoring and review arrangements in New Zealand:
- (a) a dedicated unit or body to undertake independent periodic reviews and monitor performance;
 - (b) principles for determining when an independent periodic review is required; and
 - (c) improved processes and principles for regularly monitoring performance.
71. We set out in the table below an overview of suggested principles relevant to the points above.

Table 2

Improved review and monitoring mechanisms	
Feature	Potential recommendations and principles
A dedicated unit or body to undertake periodic reviews and monitor performance	<p>Who should carry out this role:</p> <ul style="list-style-type: none"> • Currently MBIE has oversight of independent economic regulators utilising tools under the Crown Entities Act. The difficulty is that there is no dedicated unit and any review of a regime has to fit within other priorities. This means whether there is a review is often arbitrary. The question of review is also subject to political input and may conflict with the department's relationship with the regulator, which can be multi-faceted. • Arguably the Productivity Commission is better placed to carry out this role. Oversight of review and monitoring fits within its remit of improving productivity in New Zealand and focus on review and monitoring from a more arms length position. It would also fit

⁴⁸ See OECD, Guiding Principles for Regulatory Quality and Performance (OECD 2005), guiding principle 2.

Improved review and monitoring mechanisms	
Feature	Potential recommendations and principles
	<p>with its role in developing principles and recommendations in this inquiry.</p> <ul style="list-style-type: none"> • The APC's approach to a proposed periodic review of the AER design arrangements could usefully be applied by the Productivity Commission in New Zealand. The APC recommended an independent panel of people with appropriate expertise to review the AER. The APC then set out the terms of reference (focusing on capability and performance). This would be a cost effective method of managing comprehensive periodic reviews in New Zealand. • In terms of annual monitoring of performance, the Productivity Commission would have the appropriate in-house expertise for overseeing key Crown Entity performance reviews and an appropriate understanding of and commitment to the principles against which the entities are measured.
Principles for determining when a periodic review is required	<p>Principles could be developed for determining when regulatory arrangements or regimes should be reviewed.</p> <p>Principles could include for example:</p> <ul style="list-style-type: none"> • Institutional design arrangements should be reviewed at least every 10 years.⁴⁹ • In terms of existing regulatory regimes, priority should be given to review of design arrangements that have not be reviewed over the last 10 years, where there are existing issues with the regulatory design and / or where this is an area that has a significant impact on New Zealand's productivity. • Legislative regimes that have a potentially significant impact on New Zealand's productivity should be systematically reviewed after enactment in order to ensure that they meet their intended objectives efficiently and effectively (say after five years). <p>As noted above, the extent of review could be managed by the Productivity Commission determining terms of reference informed by its regulatory best practice principles, priority criteria and the outcome of annual monitoring reviews.</p>
Improved processes and principles for regularly monitoring performance	<p>The Productivity Commission could consider whether the existing monitoring/accountability framework for Crown entities could be enhanced by: (a) better utilising current mechanisms; and / or (b) recommending additions/changes to current monitoring mechanisms set out in legislation.</p> <p>In relation to performance criteria, while it is relatively easy to establish principles that a regulator should meet, it is harder to identify and quantify whether these principles are being met. However, there are proxy measures that could be used: performance can be linked back to measurable statutory objectives, and there are international examples to draw on. Further, stakeholder perceptions can be a valuable indicator of good regulatory performance, given confidence and trust in the regulator are key to the effective operation of a regime.</p> <p>Improvements could include:</p> <ul style="list-style-type: none"> • Establishing performance criteria that are tailored specifically for a

⁴⁹ See, for example: APC report chapter 21 at 759, where the APC recommended that the Australian Energy Market Commission, the Australian Energy Market Operator and the new proposed National Energy Consumer Advocacy Body should be independently reviewed by 2018, with all National Energy Market institutions reviewed every 10 years thereafter (Retrieved 3 September 2013 from http://www.pc.gov.au/__data/assets/pdf_file/0015/123027/24-electricity-chapter21.pdf).

Improved review and monitoring mechanisms	
Feature	Potential recommendations and principles
	<p>regulator's functions (these could possibly be included in a mandatory code of practice⁵⁰ and / or developed in consultation with industry).</p> <ul style="list-style-type: none"> • Ensuring performance is adequately externally assessed (for example by the Productivity Commission as suggested above) and monitored against those criteria, with the regulator held properly accountable for any failings. • A requirement for the regulator to consider alternatives and undertake cost-benefit analysis, which can then be externally monitored and assessed.⁵¹ Cost-benefit analysis by a regulator is important as it provides a form of protection for the regulated suppliers. In this way, it ensures regulation is cost-effective and does not impose excessive burdens, and is one means of preventing regulatory creep. For example, Ofcom and Ofgem are required to carry out impact assessments for all major regulatory decisions. • Other criteria or principles against which a regulator's performance is assessed could include, among other things, that it: applies rigour and sound evidence in making decisions and taking actions; has staff with commercial expertise (discussed further below); has the trust and confidence of its stakeholders (stakeholder surveys should be a standard feature of any performance review);⁵² and is consistent in its application of the relevant Act and its rules. • A regulator should also be required to publicly reveal its strategies for improving its performance, including how it intends to address concerns from stakeholders that become apparent from stakeholder surveys.

Other principles and recommendations relevant to economic regulation

72. Given the lessons learned under Part 4, general principles of regulatory good practice and overseas arrangements, we consider that the inquiry could usefully consider the benefits of principles or guidance that support the following elements of best practice regulation in relation to economic regulation of markets and economic regulation of infrastructure in particular. These principles could guide the establishment of regulators, inform periodic reviews and otherwise complement the enhanced review and monitoring mechanisms referred to above (for example, by way of measurable legislative objectives):

⁵⁰ See for example, United Kingdom, Regulators' Compliance Code (2007) made under the Legislative and Regulatory Reform Act 2006, s 23. Regulators subject to the code "must have regard" to it when performing certain regulatory functions (see s 22). The Code supports regulators' responsibilities to deliver desirable regulatory outcomes and stresses need for regulators to take a more positive and proactive approach towards ensuring compliance. We note that the Code does not apply in its current form to economic regulation (see s 24).

⁵¹ We note that the regulator's role is to work within its legislative framework and its cost benefit analysis would reflect this. This can be compared to regulatory impact statements undertaken by departments which are produced as part of a policy-making process.

⁵² Some of these criteria are taken from the APC principles of good governance, see APC report Chapter 21, Box 21.1 page 765.

- (a) **Structural design:** The Part 4 experience demonstrates that the following may be useful principles of wider application, and could be incorporated into system-wide recommendations:
- (i) Separation or clarification of roles where a regulator has multiple competing duties and roles. As set out in the Carver and Muhlebach report, separation of economic regulation functions and competition functions should be a key consideration given the serious risks that arise when these roles are undertaken by a single regulator. The desirability of separating these functions has been recognised in Australia and is reflected in the regulatory design arrangements in the United Kingdom.⁵³
 - (ii) Consideration of the establishment of a separate rule-making body or panel, rather than a regulator that is responsible for both rule-making and rule-implementation (unless there are other checks and balances in place to address the moral hazard issue).
 - (iii) Consideration of the establishment of a specialist appeal tribunal or body with expertise in economic regulation.⁵⁴
 - (iv) Reduction of duplication of roles and functions between regulators (discussed further below).
 - (v) Consideration of the establishment of a regulator as a neutral and independent arbitrator rather than a consumer advocate (this would require appropriate legislative direction and a well-resourced consumer advocacy body).
 - (vi) When considering the costs and benefits of establishing separate entities, those responsible for designing regulatory regimes should:
 - (aa) take account of the potential costs of a regime creating the wrong incentives and failing to best deliver on its legislative objectives; and
 - (bb) consider arrangements that would reduce costs such as sharing resources.

⁵³ See Carver and Mulhebach report at 4.2 and 5 where it explains why such a dual role creates serious risks and at 4.1 and 4.2 where it discusses overseas arrangements. See also para 61 above.

⁵⁴ The appeal body does not have to be a "court", for example the Competition Commission in the UK. We note that the majority of appeal bodies have legalistic characteristics, but that a specialist appeal body that is not a court may have a better balance and capability structure than a general purpose court.

(vii) Relevant to the above, there is value in considering the combination of optimal design features (including the balancing of roles and responsibilities spread across different regulatory bodies) that is most likely to mitigate against potential risks and issues. For example, separating the rule maker and rule implementer functions might lessen the need for a specialist appeal body. On the other hand, optimal regulatory arrangements could include both separation of rule-making and rule-implementing bodies and the combining of regulators (where there are significant overlaps in responsibilities and focus). It is also important to consider how to clearly define the roles and responsibilities of separate bodies so that the regulatory regime is cohesive and consistent (i.e. that different regulators are not dealing with the same issue in different ways).

(b) **Legislative objectives:** Clear objectives are critical to guide a regulator and are also needed so others can hold a regulator accountable for its performance. Where there are trade-offs to be addressed by a regulator (which is usual in the case of economic regulation), this should be in the context of considerations and priorities set out in legislation.⁵⁵ Again, clear legislative objectives are particularly important in the case of an independent regulator and economic regulation of infrastructure. If legislative objectives lack clarity, the regime is subject to uncertainty and lack of accountability, factors that negatively impact on investment decisions.

It should be possible to develop principles or objectives that guide the application of broader high level purpose statements without undermining the regulator's expert role. By way of example, the APC report set out key principles that it considered should be applied to all price setting determinations.⁵⁶ There seems to be no reason why such principles could not be included in legislation, for example as criteria a regulator must apply when determining specific matters.

(c) **Consistency of regulatory arrangements:** Where similar industries or sectors are regulated, it generally makes sense for them

⁵⁵ OECD (2013) *Principles for the governance of regulators*. Public consultation draft, 21 June 2013, paras 59 - 62, page 25.

⁵⁶ See APC report at page 223 which listed the following price setting principles that a regulator should ideally apply: (a) be aimed at effectively achieving the National Electricity Objective; (b) be based on an economic, rather than a legalistic, mindset; (c) take into account the incentives faced by the interested parties and the information asymmetries between them; (d) take account of all information that can cost-effectively be incorporated into the analysis, while recognising the relative strengths and weaknesses of such approaches; and (e) recognise that, over the longer term, under-compensation of network businesses resulting from regulatory errors is likely to have greater costs for customers and the wider community than 'symmetric' overcompensation.

to be subject to consistent regulatory arrangements. For example, electricity and gas network businesses are all regulated under Part 4 of the Commerce Act, while telecommunications networks are regulated under the Telecommunications Act. It is not clear that there is justification for different networks to be subject to different types of economic regulation and there may be benefits in promoting consistent regulatory regimes across network sectors.

- (d) **Capability, resourcing and engagement:** For example, it may be useful for the Productivity Commission to explore whether its guidelines and recommendations in relation to economic regulation, and economic regulation of infrastructure in particular, could include:
 - (i) Formal requirements to engage with a stakeholder advisory panel. For example, the 2013 OECD report recognises that advisory bodies can be a useful mechanism to provide for more effective engagement. We also note that the Electricity Authority and the GIC currently use advisory and working groups to develop and consult on regulatory approaches.⁵⁷
 - (ii) A move towards a greater focus on consumer engagement. For example, the focus could be on greater engagement with consumers by regulated companies in the first instance. As discussed above, Australia is about to set up a national advocacy body for energy regulation, but this framework is still untested and may not necessarily be the right solution for New Zealand.
 - (iii) Improving internal capability by requiring or expecting regulators (potentially by way of performance criteria) to employ some staff with commercial expertise and/or an industry background.
- (e) The requirements above could be linked to the regulator's performance criteria (discussed above).

⁵⁷ For example, the Electricity Authority is required to establish independent advisory groups under section 19 of the Electricity Industry Act 2010. It is also required develop and consult on a charter that sets out how it will establish and interact with advisory groups, when and how it will consult advisory groups, and how advisory groups will operate (section 19 of the Electricity Industry Act 2010).

APPENDIX A - LIST OF INQUIRY QUESTIONS

	Question	Paragraph reference in submission
Q1	What sort of institutional arrangements and regulatory practices should the Commission review?	Paragraphs 5 - 7, 35 and 42.
Q2	The Commission has been asked to produce guidelines to assist in the design of regulatory regimes. What type of guidelines would be helpful?	Paragraphs 11, 21-22, 35, 64 and 72.
Q3	Does New Zealand have (or need) a unique "regulatory style" as a result of our specific characteristics?	Paragraphs 59-63.
Q4	What influence has New Zealand's specific characteristics had on the way regulation is designed and operated in New Zealand?	Paragraphs 59-63.
Q5	What other ways of categorising New Zealand's regulatory regimes and regulators would be helpful in analysing their similarities and differences? How would these categorisations be helpful?	Paragraphs 21 - 42.
Q6	Can you provide examples of regulatory regimes with particularly clear or (conversely) unclear objectives? What have been the consequences of unclear regulatory objectives?	Table page 21-22, paragraphs 55-57. We discuss possible recommendations in this respect at paragraph 72(b).
Q7	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?	Table page 21-22.
Q8	Can you provide examples of where assigning a regulator multiple functions has improved or undermined the ability of the regulator to achieve the objectives of regulation?	Table page 21-22. We discuss possible recommendations in this respect at paragraph 72(a).
Q11	Can you provide examples where two or more regulators have been assigned conflicting or overlapping functions? How, and how well, is this managed?	Table page 21-22. We discuss possible recommendations in this respect at paragraph 72(c).
Q13	Can you provide examples of where two seemingly similar regulatory areas are regulated under different regulatory structures? What factors have contributed to differences in the regulatory structures?	Table page 23. We discuss possible recommendations in this respect at paragraph 72(c).
Q14	Are the dimensions of regulator independence discussed in Figure 4.2 helpful in thinking about New Zealand regulators?	Yes. For economic regulators all dimensions apply to varying degrees

	Question	Paragraph reference in submission
Q15	Which of these dimensions of independence is most important to ensure a regulator is seen to be independent?	Paragraph 42(a)(i).
Q16	Can you provide examples of where a lack of independence or too much independence according to one of these dimensions undermines the effectiveness of a regulatory regime?	Table page 22.
Q17	What should be the limits of regulator independence? What sorts of regulatory decisions should be the preserve of Ministers rather than officials?	Paragraph 42(a)(i).
Q18	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?	Yes
Q19	Is regulatory capture more or less likely in a small country? Can you provide examples of capture in New Zealand?	We are not aware of any examples of regulatory capture in New Zealand.
Q25	What type of governance and decision-making structures are appropriate for different types of regulatory regime?	Paragraph 61(d).
Q26	How effective and consistent are the review and appeals processes provided for in New Zealand regulatory regimes?	Table page 22.
Q27	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?	Table page 22, paragraph 61(e).
Q30	Can you provide examples of where the mix of funding sources contributes to the effectiveness or ineffectiveness of a regulatory regime?	Table page 23.
Q31	Is the mix of funding sources for individual regulators consistent with their stated funding principles?	Table page 23.
Q36	Where are there gaps in regulator workforce capability? Can you provide examples?	Table page 23. We discuss possible recommendations in this respect at paragraph 72(d).
Q37	What is the potential to improve capability through combining regulators with similar functions, compared with other alternative approaches?	Paragraph 72(c).

	Question	Paragraph reference in submission
Q38	When do changes to institutional arrangements work best to improve capability, and when are other solutions preferable?	Paragraphs 72(c), 72(d).
Q39	Can you provide examples of strengths and challenges in the way regulators monitor and enforce regulations? What are the consequences?	Table page 23.
Q42	Can you provide examples of where a regulator has too much or too little discretion in enforcing regulations? What are the consequences?	Table page 21-23.
Q45	Can you provide examples of where regulatory regimes require too much or too little consultation or engagement? What are the consequences?	Table page 23. We discuss possible recommendations in this respect at paragraph 72(d).
Q46	What are the characteristics that make some regulations more suited to prescriptive consultation requirements than others?	Table page 23. We discuss possible recommendations in this respect at paragraph 72(d).
Q47	What forms of engagement are appropriate for different types of regulatory regime? When do formal advisory boards work or not work well?	Table page 23. We discuss possible recommendations in this respect at paragraph 72(d).
Q48	What elements of a regulatory regime's design have the biggest influence on culture? Why?	Table page 21 and 23.
Q51	Can you provide examples where the culture or attitude of the regulator has contributed to good or poor regulatory outcomes? How?	Table page 21 and 23.
Q53	Can you provide examples where a regulator places too much value on managing risks to itself, relative to other priorities (such as the regulatory objective, or customer service)? What are the consequences?	Table page 21-22.
Q54	Can you provide examples of regulators whose approach to their business is largely shaped by their reliance on a particular profession? How might that approach be different if it drew on a wider range of professions?	Table page 23.
Q55	Can you provide examples of how accountability or transparency arrangements improve or undermine the effectiveness of a regulatory regime?	Table page 22-23.

	Question	Paragraph reference in submission
Q56	What types of accountability or transparency arrangements are appropriate for different types of regulatory regimes?	Table page 26, paragraphs 61(f), 65-66, 68-71, table page 37-38.
Q58	Can you provide examples of where performance assessment of regulatory regimes is working well, or needs improvement?	Table page 26, paragraphs 65-66, 68-71, table page 37-38.
Q59	When are feedback loops being used well to improve the performance of New Zealand regulatory regimes? When aren't they?	Table page 26, paragraphs 65-66, 68-71, table page 37-38.

APPENDIX B: EVOLUTION OF THE COMMERCE COMMISSION

Legislation	The early Commission (1975 - 1986)
Commerce Act 1975	<p>The 1975 Act consolidated the various acts covering restrictive trade practices, mergers, takeovers, monopolies and price control. The Department of Trade and Industry acted as the first instance regulator for competition, mergers and pricing matters, through its officers, the Examiner and the Secretary (Director). The Commerce Commission's role was limited to acting on the recommendation of the Examiner or, as an appellate body for the Secretary (on pricing matters).</p> <p>The Commerce Commission was mainly concerned with price control (many goods and services were subject to price control in an attempt to control the rate of inflation).</p>
Commerce Act 1986 Fair Trading Act 1986	<p>The Commerce Act reconstituted the Commerce Commission as a body corporate and abolished the Examiner. This institutional structure is substantially the same as the structure of the Commerce Commission today (but the functions have evolved significantly). The Commerce Commission's functions under the Act at the time included:</p> <ul style="list-style-type: none"> • to investigate and take enforcement proceedings in respect of restrictive trade practices, mergers or takeovers, and control of prices provisions; • to determine applications for authorisation of certain trade practices, which would otherwise be prohibited; • to report to the Minister of Trade and Industry on whether imposition of price control in respect of particular goods or services was necessary or desirable; and • to authorise prices or accept price undertakings for goods or services which had been made subject to price control. <p>The Fair Trading Act was introduced shortly after the 1986 Commerce Act and prohibits misleading or deceptive conduct in trade generally. The Commerce Commission enforces the Fair Trading Act by both civil and criminal proceedings.</p> <p>While the Commerce Commission had economic regulation and competition roles, it was initially preoccupied with competition matters (primarily authorisations for mergers, takeovers and restrictive practices). This was pre privatisation of public monopolies and economic regulation in New Zealand was in its infancy. Since then numerous and complex economic regulatory functions have been added across various sectors together with some additional competition functions - as set out below.</p>
	Functions added to the Commerce Commission from 1986
Electricity Industry Reform Act 1998 (EIR Act)	<p>The Commerce Commission has both an enforcement and adjudication role under the EIR Act. The EIR Act reformed the electricity industry to ensure that costs and prices in the electricity industry are subject to sustained downward pressure and the benefits of efficient electricity pricing flow through to all classes of consumers by:</p> <ul style="list-style-type: none"> • separating electricity distribution from generation and retail; and • promoting effective competition in electricity generation and retail.
Commerce Amendment Act (No 2) 2001 (since repealed)	<p>This Act introduced a new regulatory regime for electricity lines businesses under which the Commerce Commission was responsible for, amongst other things: setting price and quality thresholds; monitoring and investigating breaches; and issuing notices of intention to declare control.</p>

<p>Dairy Industry Restructuring Act 2001 (DIR Act)</p>	<p>In relation to the dairy industry, the Commerce Commission:</p> <ul style="list-style-type: none"> • provides determinations on disputes between Fonterra and other persons about the application of Subpart 5 of Part 2 or any regulations made under the DIR Act; • may apply to the High Court to have its determinations enforced; and • may seek pecuniary penalties, injunctions or damages in the High Court against any person for breaches of Subpart 5 of Part 2 or any regulations made under the DIRA Act. <p>The Commerce Commission does not have a general economic regulation function or an investigation function in regards to the DIR Act or the dairy industry.</p>
<p>Telecommunications Act 2001</p>	<p>The Telecommunications Act regulates the supply of certain telecommunications services in New Zealand. Telecommunications Commissioner role created. Significant amendments were introduced in 2006 which extended the Commerce Commission's powers in the telecommunications area further (see below). The Commerce Commission's functions under the Telecommunications Act include:</p> <ul style="list-style-type: none"> • determining terms and conditions for access to regulated telecommunications services under Part 2; • overseeing Telecommunications Service Obligations under Part 3; • making recommendations to the Minister of Communications as to the scope of regulation of telecommunications services; • considering telecommunications access codes which have been submitted to the Commerce Commission by the Telecommunications Carriers' Forum or developing telecommunications access codes itself; and • enforcing the provisions of the legislation.
<p>Credit Contracts and Consumer Finance Act 2003 (CCCF Act)</p>	<p>The Commerce Commission's functions under the CCCF Act are to monitor trade practices in finance markets, undertake prosecutions and civil proceedings and to make information available to parties involved in these transactions in order to promote compliance with the CCCF Act.</p> <p>In fulfilling its role under the CCCF Act, the Commerce Commission has numerous powers, including that of search and seizure, the power to take evidence and to require people to supply information or documents.</p>
<p>Commerce (Control of Natural Gas Services) Order 2005 (expired)</p>	<p>This Order made under Part 4 of the Commerce Act required the Commerce Commission to undertake a range of functions under Part 4 and 5 of the Commerce Act in relation to Vector and Powerco's controlled gas pipeline distributions businesses including determining a provisional and final authorisation.</p>
<p>Telecommunications Amendment Act (No 2) 2006</p>	<p>This Act made substantial amendments such that the functions now include:</p> <ul style="list-style-type: none"> • determining prescriptive terms and conditions for access to regulated telecommunications services such that commercial arrangements are not necessary; • prescribing the information that Telecom and access providers must disclose under Part 2B; • making recommendations to the Minister of Communications as to whether or not to accept undertakings lodged by access providers in lieu of regulation; • developing and administering accounting separation and information disclosure requirements; • conducting inquiries, reviews and studies: relating to the telecommunications industry, and publishing reports, summaries and information about

	<p>these activities; and</p> <ul style="list-style-type: none"> enforcing operational separation and ex ante regulation of Telecom New Zealand Ltd.
Commerce Amendment Act 2008	<p>This Act significantly amended the Commerce Commission's regulatory control roles under Parts 4 and 4A. Another sector, airports, was brought into the regulatory environment and regulation of gas pipelines extended beyond Powerco and Vector's Auckland gas pipeline network. A new range of regulatory instruments was introduced namely: information disclosure; default/customised price-quality price paths; negotiate/arbitrate regulation and individual price-quality paths. A separate purpose statement was introduced for Part 4. The Commerce Commission's functions under the Act include:</p> <ul style="list-style-type: none"> setting up upfront input methodologies that are relevant for applying the regulatory instruments and undertaking Part 4 inquiries (whether and how goods and services should be regulated); making determinations that specifying how the regulatory instruments apply; and deciding whether to enforce breaches of determinations.
Electricity Industry Act 2010 Ministerial review of electricity markets (underway)	<p>Following a 2009 Ministerial review of electricity markets in New Zealand, a number of changes were made to the electricity sector (including the formation of the Electricity Authority to replace the Electricity Commission). From 1 November 2010, the Commerce Commission assumed responsibility for requesting or approving electricity grid upgrade plan proposals by Transpower New Zealand Limited (previously part of the Electricity Commission's role). At the same time, responsibility for setting pricing methodologies for electricity lines businesses moved from the Commerce Commission to the Electricity Authority.</p>

APPENDIX C: LEGISLATIVE HISTORY TO THE REFORM OF PART 4 OF THE COMMERCE ACT

Review of regulatory control provisions

1. In May 2006, the Government announced a review of Parts 4 and 5 of the Act (with Part 4A being added to the review in September 2006). The Government explained that:
 - (a) experience with two price control inquiries and the application of Part 4A had highlighted a number of problems with the regulatory price control provisions of the Act;⁵⁸ and
 - (b) a key objective of the review was to ensure that regulatory control provisions "are consistent with the Government's objectives around infrastructure investment".⁵⁹
2. In August 2006 the Government issued the 2006 GPS, an economic policy statement under section 26 of the Act. The 2006 GPS stated that:⁶⁰
 - (3.) The provision of efficient infrastructure requires that businesses have the confidence and incentives to make investments in replacement, upgraded and new facilities and services.
 - (4.) Particular issues arise in the case of businesses which are or may be regulated under Parts 4, 4A or sections 70 to 74 of Part 5 of the Act. The way in which the prices, revenues and/or quality of goods and services produced by these businesses is regulated or controlled can affect their incentives to invest in new or upgraded infrastructure.
 - (7.) The Government's economic policy objective is that regulated businesses have improved incentives to invest in replacement, upgraded and new infrastructure, and in related businesses for the long-term benefit of consumers. The Government considers that this objective will be achieved by:
 - (a) regulatory stability, transparency and certainty giving businesses the confidence to make long-life investments;
 - (b) regulated rates of return being commercially realistic and taking full account of the long-term risks to consumers of underinvestment in basic infrastructure;
3. In April 2007, the Ministry of Economic Development ("**MED**") released a discussion document reviewing the regulatory control provisions under the Act. The executive summary stated:⁶¹

The primary objective of reviewing the regulatory control provisions of the Act is to ensure that economic regulation in New Zealand is consistent with providing for the long-term benefit of consumers within New Zealand... Consistent with the broad objective, the Review will consider whether any amendments to the Act are desirable to reinforce the Government's policy objectives on investment in infrastructure.

⁵⁸ Cabinet Economic Development Committee, *Review of Parts 4 and 5 of the Commerce Act 1986*, 13 September 2006 ("**2006 Cabinet Paper**"), para 17.

⁵⁹ 2006 Cabinet Paper, para 18(c).

⁶⁰ Minister of Commerce, "Statement to the Commerce Commission of Economic Policy of the Government: Incentives of regulated businesses to invest in infrastructure", 7 August 2006, published on 10 August 2006 in *New Zealand Gazette* No. 95/2006 at 2814. The policy statement was revoked on 4 November 2010 because "the expectations in this statement are now included in Part 4 of the Commerce Act".

⁶¹ Ministry of Economic Development, *Review of Regulatory Control Provisions under the Commerce Act 1986: Discussion Document*, April 2007 ("**MED Review**"), para 2.

4. The MED Discussion Paper proposed the following purpose statement:⁶²

The purpose of this Part is, in markets where there is little or no competition or prospect of competition, to provide for economic regulation for the long-term benefit of consumers in New Zealand. Any regulation under this Part should seek to ensure that suppliers:

- (a) are limited in their ability to earn excessive profits;
- (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands;
- (c) share the benefits of efficiency gains with consumers, including through lower prices; and
- (d) have incentives to innovate and to invest including in replacement, upgraded and new assets and in related businesses.

5. The express reference to incentives to innovate and invest was considered a significant addition to the existing Part 4A purpose statement.⁶³ Further, in relation to (a) above, MED noted that:⁶⁴

[T]here is a question of whether regulatory provisions should be designed to limit/minimise or eliminate/prohibit monopoly rents. However, because the costs of regulatory error tend to be asymmetric (i.e. the cost of errors leading to too-tough control terms and potential under-investment are likely to outweigh the costs of errors allowing higher than normal rates of return) the rest of this document focuses on the objective of limiting, rather than eliminating, monopoly rents.

6. Submitters on the review largely agreed that Part 4A was unsatisfactory, in terms of certainty for businesses and incentives to invest.⁶⁵ Key issues identified with the previous regime included that:⁶⁶

- (a) there was no requirement that the Commerce Commission specifically consider the impact of its decisions and approaches on incentives to invest and innovate or take a forward looking approach;
- (b) regulated businesses faced considerable uncertainty under Part 4A, particularly about the rules governing regulatory decisions; and
- (c) accountability of the Commerce Commission was limited to judicial review.⁶⁷

7. In relation to (c) above:⁶⁸

Most submitters were strongly of the view that the methodologies should be subject to some form of merits review given the importance of the issues, the need to correct any errors and to provide confidence to businesses about the integrity of the regulatory regime.

8. The Commerce Commission, however, argued that the regime worked well, and that:⁶⁹

⁶² MED Review, para 6.

⁶³ MED Review, para 87.

⁶⁴ MED Review, para 75.

⁶⁵ 2008 Cabinet Paper, para 17.

⁶⁶ 2008 Cabinet Paper, paras 4, 17; Regulatory Impact Statement, paras 6, 8, 15, 16; Explanatory Note, p 3.

⁶⁷ 2008 Cabinet Paper, para 17; Regulatory Impact Statement, para 13.

⁶⁸ 2008 Cabinet Paper, para 34.

⁶⁹ 2008 Cabinet Paper, para 53.

...criticisms are over-stated, that future thresholds could have an ex-ante element, that administrative settlements are effective, and that as precedents are set firms would be provided with more certainty...the regime provides it [the Commerce Commission] with flexibility to address problems and issues which arise and that it is premature to replace it.

9. In rejecting the Commerce Commission's views, the Government clearly decided reform was required.⁷⁰ While the Government noted that industry complaint was not in itself proof of a problem, it was satisfied that analysis of the current mechanisms indicated that:⁷¹

... the Part 4 and Part 4A model has not kept pace with changes in the regulatory environment and regulatory best practice. For instance, the Part 4A devolves a significant amount of discretion and flexibility of the regulator, but that has come at the cost of increased uncertainty for business.

Commerce Amendment Bill

10. In January 2008, Cabinet recommended major reform of the regulatory control provisions of the Act in the form of a Commerce Amendment Bill ("**Bill**"). Cabinet noted that:⁷²

The amendments are expected to be generally welcomed by regulated businesses. They aim to improve certainty and apply more internationally conventional forward-looking approaches to regulation than the Act currently allows. The changes are expected to improve business confidence and, as a consequence, improve the climate for investment in infrastructure.

11. The Bill was introduced in March 2008.⁷³ Objectives of the Bill were set out in the Explanatory Note. These included to "improve clarity, certainty, timeliness and predictability for businesses" and to "provide specifically for incentives to invest in infrastructure".⁷⁴ The Explanatory Note also stated that:⁷⁵

Because of the importance of input methodologies, the Bill makes provision for merits review of input methodology determinations by the Commission... **The appeal provides accountability for the Commission, helps ensure that input methodologies deliver on the purpose statement, and promotes business confidence.** [Emphasis added.]

12. The Bill contained a purpose statement similar to that proposed by MED at paragraph 4 above, except that the reference to incentives to innovate and invest had been shifted from fourth to first place in the list of desired "outcomes".⁷⁶

13. Upon introduction of the Bill, the Ministers of Commerce and Energy said:⁷⁷

The Bill introduces a purpose statement specifically for this section of the Act to give clearer guidance to the Courts and the regulator that the aim of regulation is to promote investment.

14. The Minister further explained this position during the First Reading of the Bill:⁷⁸

⁷⁰ 2008 Cabinet Paper, para 54.

⁷¹ Regulatory Impact Statement, para 6.

⁷² 2008 Cabinet Paper, para 7.

⁷³ Commerce Amendment Bill 2008 (201-2), introduced 13 March 2008.

⁷⁴ Explanatory Note, pp 3 - 4.

⁷⁵ Explanatory Note, p 7.

⁷⁶ Explanatory Note, p 4. Also see *Vector Limited v Commerce Commission* HC Wellington CIV-2011-485-536 26 September 2011 (Clifford J).

⁷⁷ Dalziel, L. and Parker, D., "Bill gives better incentives for infrastructure investment", 13 March 2008.

⁷⁸ Commerce Amendment Bill, First Reading (2008) 646 NZPD 15157 at 15157.

[T]he issue is...how do we balance the need to protect consumers from excessive prices while ensuring that suppliers have incentives to invest, to innovate, and to improve efficiency so we can be assured of reliable, efficient supply over the long-term? **I believe that the new bill gets the balance right, and that it makes significant improvements to the current legislation.** [Emphasis added.]

15. Accordingly, the Minister recognised that while the Commerce Commission must seek to achieve all four objectives in the Part 4 purpose statement, the right balance between incentives to invest and protection of consumers from excess profits was not being achieved under the existing regulatory framework.

16. The Bill was referred to the Commerce Select Committee. Some submitters to the Committee considered that investment should be the primary or only regulatory objective in the purpose statement (thereby avoiding multiple objectives with difficult trade-offs).⁷⁹ However, most submitters (including Vector and ENA) supported the purpose statement as drafted, subject to minor technical amendments.⁸⁰

17. The Committee reported back on the Bill in July 2007. The Committee stated that:⁸¹

Most submitters supported the purpose statement as drafted. Others argued that the primary objective in the purpose statement should be investment. Although we agree that incentives to invest are important, we consider they need to be balanced against the need to protect consumers from excessive prices.

18. The Committee's comment confirms the policy background referred to above. In particular, while Parliament intended a balancing exercise would occur under Part 4, it also intended that more weight be placed on incentives than previously (given the introduction of an express reference to incentives to invest and its deliberate placement at the top of the section 52A(1) list). For example, during the Committee of the Whole House the Minister of Commerce stated that:⁸²

I do not think we should ignore the fact that that [the objective of promoting incentives to innovate and to invest] **is No. 1 of a series of four tests against which those outcomes are being measured.**

Starting with the incentives to innovate and to invest is really sending a signal about how important it is not to forget that future needs are just as important when we are looking at a non-competitive market. ... **I think we have the order right, and that sends a very good signal.** [Emphasis added.]

19. In relation to merits appeals, the Minister of Commerce stated that:⁸³

I personally was **very passionate about having appeals at the input methodologies stage, because it is really important that when businesses are making investment decisions, they have certainty in respect of how the regulator will act. Businesses actually could not be**

⁷⁹ See, for example, MED, *Report on Commerce Amendment Bill*, 4 July 2008, at p 5 (row 7); which lists submissions by Infratil, Wellington International Airport, Christchurch International Airport and Orion as supporting this position.

⁸⁰ See Vector, *Submission to Commerce Select Committee on the Commerce Amendment Bill 2008*, 9 May 2008, para 30; Electricity Networks Association, *Submission on the Commerce Amendment Bill*, 9 May 2008, paras 50 - 51.

⁸¹ Commerce Committee, *Report on Commerce Amendment Bill (201-2)*, 28 July 2008, p 2.

⁸² Commerce Amendment Bill, Committee of the Whole House (2008) 649 NZPD 18539 at p 18541. Also see Dalziel, L. and Parker, D., "Greater Certainty for Businesses after Commerce Act Review", 23 November 2007 on the balance between incentives to invest and other objectives contained in the section 52A(1) purpose statement.

⁸³ Commerce Amendment Bill, Committee of the Whole House (2008) 649 NZPD 18539 at p 18541.

certain in this area of the input methodologies, which I have to say are pretty much the basis for all of the court cases that have been taken in respect of the Commerce Commission and Part 4 and Part 4A. [Emphasis added.]

20. The importance of improving incentives to invest was also expressed by a number of members of Parliament, for example:

I would go so far as to say that the absence of such a purpose statement has led to considerable uncertainty, which has affected the ability of infrastructure companies to make timely investment decisions.⁸⁴ [Hon Lianne Dalziel, the then Minister of Commerce]

We... saw the impact of intervention in the market, and how that can produce inappropriate impacts, in connection with events touching Vector that Members of the House may recall... It will be recalled that some analysts described the Commission's action as bizarre. Whether it was or was is not really an issue in debate here, but **it does point to the need for a better-developed regime** ... for the first time **there is a clear emphasis on the importance of incentives for regulated businesses to invest**.⁸⁵ [Hon Richard Worth]

[A] significant change with the introduction of a purpose statement specifically for the purpose of the Act, to give **clearer guidance to the courts and the regulator that the aim of regulation is to promote investment**. It is very easy to forget that. We are not seeking in this particular bill to stifle business activity. Rather, it is the opposite, and that is to promote investment.⁸⁶ [Hon Richard Worth]

This Bill gives better incentives for infrastructure investment... the purpose statement of the bill gives a clear guidance to the courts and the regulator, and the aim of this regulation is to promote investment.⁸⁷ [Hon Lindsay Tisch]

The third objective of the legislation is to provide for incentives for regulated firms to invest in infrastructure, and that is what we need to do. If we want a modern economy, and if we are serious about growing the wealth of this nation and about lifting wages, then there is no doubt that our basic infrastructure has to be world-leading. ... So providing those incentives is critical.⁸⁸ [Hon Chris Tremain]

[Emphasis added.]

21. In short, the Government recognised that a change in investment outcomes required a change in regulatory approach. On the passing of the new legislation in September 2008, the Minister of Commerce noted:⁸⁹

The passing of this Bill is excellent news for the growth and improvement of New Zealand infrastructure businesses that are natural monopolies. It will provide greater certainty for regulated businesses and incentives for investing in infrastructure while giving consumers protection from excessive prices and poor quality.

The Bill draws upon best practice overseas to achieve these objectives. In particular it seeks to ensure that regulation is not imposed unnecessarily, and that where it is required, it is applied in the most efficient way to promote the long-term interests of consumers.

This is another important step in the Government's ongoing efforts to foster investment in innovation and infrastructure that will help our business grow and improve productivity.

⁸⁴ Commerce Amendment Bill, Second Reading (2008) 649 NZPD 18313, p 18313.

⁸⁵ Commerce Amendment Bill, First Reading (2008) 646 NZPD 15157, p 15164.

⁸⁶ Commerce Amendment Bill, Committee of the Whole House (2008) 649 NZPD 18539, p 18545.

⁸⁷ Commerce Amendment Bill, Second Reading (2008) 649 NZPD 18313, pp 18320 - 18321.

⁸⁸ Commerce Amendment Bill, Second Reading (2008) 649 NZPD 18313 at 18325.

⁸⁹ Dalziel, L., "Infrastructure investment gets boost from law changes", 5 September 2008.

22. The final vote on the Bill exhibited a high degree of cross-party support.⁹⁰

⁹⁰ Commerce Amendment Bill, Third Reading (2008) 649 NZPD 18539, p 18548 (BOA 1:14).

APPENDIX D: COMPARISON WITH OVERSEAS REGULATORY ARRANGEMENTS - ECONOMIC MARKET REGULATORS

Principles of best practice	New Zealand	Australia	United Kingdom	Ireland	Canada
	<p>Commerce Commission New Zealand Productivity Commission ("NZPC") Electricity Authority ("EA") Gas Industry Company ("GIC")</p>	<p>Australian Competition and Consumer Commission ("ACCC") Australian Energy Regulator ("AER") Australian Energy Market Commission ("AEMC") Australian Productivity Commission ("APC") Australian Communications and Media Authority ("ACMA")</p>	<p>Competition Commission Office of Gas and Electricity Markets ("OFGEM") Office of Communications ("OFCOM") Civil Aviation Authority ("CAA") Office of Fair Trading ("OFT")</p>	<p>Irish Competition Authority Commission for Energy Regulation ("CER") Commission for Communications Regulation ("ComReg") Commission for Aviation ("CAR")</p>	<p>Competition Bureau National Energy Board ("NEB") Canadian Radio-television and Telecommunications Commission ("CRTC")</p>
<p>Separation of powers/roles</p>	<p>Commerce Commission: Commission has wide jurisdiction and wide variety of powers. Commission responsible for enforcement of competition and fair trading laws, plus other laws. It administers:</p> <ul style="list-style-type: none"> • Fair Trading Act 1986; • Credit Contracts and Consumer Finance Act 2003; • Dairy Industry Restructuring Act 2001; • Electricity Industry Reform Act 1998; • Telecommunications Act 2001; and • Commerce Act 1986. <p>Commission responsible for the regulation of telecommunications sector, electricity distribution and transmission businesses, airports and gas pipelines. Commission has enforcement,</p>	<p>Responsibilities largely split between competition enforcer and industry regulators. ACCC: Responsible for promoting/enforcing competition and fair trade law, plus has a role in the regulation of national infrastructure (including energy, communications and airports). AER: Part of ACCC but operates separately (staff, resources and facilities provided from ACCC) Regulates the wholesale electricity market, is responsible for the economic regulation of:</p> <p>(a) the electricity transmission and distribution networks in the national electricity market; and</p> <p>(b) gas transmission and distribution networks.</p> <p>Enforces the national gas law and national gas rules in all jurisdictions except Western Australia.</p>	<p>Responsibilities largely split between competition enforcer and industry regulators. Enterprise and Regulatory Reform Bill to create single Competition Markets Authority taking on certain functions of Competition Commission and OFT. Competition Commission: Responsible for enforcing competition law. OFT: Gathers intelligence about markets and recommends further action where it is needed. OFGEM: Regulates the gas and electricity markets. Governed by Gas and Electricity Markets Authority. OFCOM: Regulator and competition authority for communications industries.</p>	<p>Responsibilities largely split between competition enforcer and industry regulators. Irish Competition Authority: Responsible for the enforcement of competition law. Will be merged with National Consumer Agency in 2013, following announcements made in 2008. CER: Responsible for the regulation of the electricity market (including generation, transmission, distribution and retail), the gas network, and the supply/retail gas market. ComReg: Responsible for the regulation of communications. CAR: Responsible for aspects of aviation regulation including regulation of airports.</p>	<p>Responsibilities largely split between competition enforcer and industry regulators. Competition Bureau: Responsible for the promotion/enforcement of competition and fair trading laws. NEB: Regulator for international and interprovincial aspects of the oil, gas and electricity utility industries. CRTC: Responsible for the regulation of broadcasting and telecommunications. Airports: Self-regulated.</p>

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	<p>decision-making and inquiry roles.</p> <p>Commission is effectively the only regulatory body in relation to competition regulation.</p> <p>EA:</p> <p>The EA is the regulator of the New Zealand electricity industry established pursuant to the Electricity Industry Act 2010. The EA's objective is to promote competition, reliable supply and efficient operation of the electricity sector for the long-term benefit of consumers. Key functions include, among other things:</p> <ul style="list-style-type: none"> • developing and administering market rules and enforcing compliance with the rules; • undertaking sector reviews; and • facilitating market performance. • acting as Market. <p>GIC:</p> <p>The GIC is established under Part 4A of the Gas Act 1992 as the gas industry's approved co-regulatory body (together with MBIE). It is owned by industry shareholders and is funded by a participant levy.</p> <p>GIC performs the role of market administrator and also administers compliance processes, including through an independent Rulings Panel.</p>	<p>Responsible for regulating retail energy markets in the ACT, South Australia, Tasmania (electricity only) and NSW.</p> <p>AEMC:</p> <p>Responsible for rule-making, market development and policy advice concerning the National Electricity Market, access to natural gas pipelines services and elements of the broader natural gas markets. Provides strategic and operational advice to Australian Governments' Ministerial Council of Energy.</p> <p>ACMA:</p> <p>Regulates the communications industry. Regulator for broadcasting, the internet, radiocommunications and telecommunications.</p> <p>APC:</p> <p>Government's chief advisory body on all elements of microeconomic reform. Its research and advice covers all sectors of the economy.</p>	<p>CAA:</p> <p>Aviation regulator, including economic regulation.</p>		
Appeals	<p>Commerce Act:</p> <p>Certain determinations can be</p>	<p>ACCC:</p> <p>Some appeal rights to the</p>	<p>Competition Commission:</p> <p>Decisions can be appealed to</p>	<p>Irish Competition Authority:</p> <p>Enforces powers through the</p>	<p>Competition Bureau:</p> <p>Appeals of decisions made or</p>

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	<p>appealed to the High Court. All determinations can be appealed on point of law, but only some determinations can be appealed more generally (ie on merits) Provision for High Court to sit with experts.</p> <p>In relation to price control input methodologies subject to review appeal to the High Court (sitting with two experts). Full appeal rights for customised price-quality paths but not default price-quality paths or information disclosure determinations.</p> <p>Further Appeal to the Court of Appeal usually available on points of law.</p> <p>Decision subject to judicial review.</p>	<p>Australian Competition Tribunal. Some decisions judicially reviewable.</p> <p>AER: Decisions judicially reviewable to Federal Court of Australia.</p> <p>ACMA: Decisions reviewable, either by ACMA then Administrative Appeals Tribunal, or judicial review by Federal Court.</p> <p>There is a complaints process if complaining about ACMA, which is then referred to Ombudsman.</p>	<p>Competition Appeal Tribunal.</p> <p>OFGEM: Penalties imposed on licence holders can be appealed to High Court or Court of Session.</p> <p>Decisions of Ofgem can be appealed to Competition Commission, which has a range of powers to quash, direct modifications or remit decisions. Can then be appealed to Competition Appeal Tribunal.</p> <p>OFCOM: All decisions may be appealed against on their merits and Competition Act decisions to Competition Appeal Tribunal; appeal on point of law to Competition Appeal Tribunal or Court of Session.</p> <p>CAA: Appeals first to CAA, then judicial review to High Court.</p> <p>Appeals to Parliamentary Commissioner for Administration where maladministration is alleged.</p>	<p>Courts so decisions can be further appealed to higher courts.</p> <p>CER: Establishment of an Appeal Panel available where an application for a licence or authorisation is refused.</p> <p>CAR: Generally, decisions can only be questioned by way of judicial review to High Court.</p> <p>Certain persons aggrieved by the content of a determination can request the Minister for Transport to establish an Appeal Panel to consider their complaint.</p>	<p>refused, or orders made, as regards deceptive trade practices, may be brought to Federal Court of Appeal, Tribunal or provincial court of appeal.</p> <p>Can make complaints to the Bureau on service, fees, and resolutions made - examined by the Deputy Commissioner.</p> <p>NEB: Can appeal to Federal Court of Appeal on questions of law or jurisdiction. Otherwise, all decisions of Board are final.</p> <p>CRTC: Decisions can be appealed to the Federal Court of Appeal on questions of law.</p> <p>Airports: Airlines do not have the right to file complaints about prices.</p>
Accountability	<p>Commerce Commission: Crown Entities Act: Accountability regime the same for consumer watch-dog role and economic regulator role and does not report separately for these roles.</p> <p>Commission accountable to Minister of Commerce and Associate Minister of Commerce. Commission delivers its outputs under an Output Agreement with the Minister of Commerce and Minister of Communications</p>	<p>The APC also provides accountability and oversight of the key infrastructure industries, including electricity. This falls under the APC's broad power of inquiry on referral from the Minister. It also falls within a large workstream of performance monitoring of government services, government trading enterprises and other areas. This provides a form of external review of performance of regulatory agencies in Australia.</p>	<p>Competition Commission: General reporting and audit obligations including Annual Report and Accounts under Part 5 of the Enterprise Act 2002.</p> <p>Competition Commission's key corporate governance documents are Model Framework and Financial Memorandum. Framework document drawn up by Department for Business, Innovation and Skills ("BIS") in consultation with CC. Financial Memorandum details aspects of</p>	<p>Irish Competition Authority: General reporting obligations.</p> <p>CER: General reporting and audit obligations including publishing an Annual Report each year. Report describes work of CER over past year and sets work programme for coming year. Annual Report presented to Minister for Communications, Energy and Natural Resources. CER also publishes a five year</p>	<p>Competition Bureau: The Bureau is required to annually report to the Ministry of Industry on the operation of the Competition Act and other legislation.</p> <p>NEB: Accountable to Parliament through Minister of Natural Resources.</p> <p>Employees have a Code of Conduct.</p> <p>General reporting and financial obligations (Strategic Plan,</p>

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	<p>and Information Technology.</p> <p>The Commerce Commission is monitored by the Ministry of Business, Innovation and Employment.</p> <p>Required to produce annual reporting documents including annual report and statement of intent (SOI). Frequency of SOI preparation is being reduced to once every three-year period but will be an annual statement of performance (changes from July 2013). There is prescribed content required to be covered in SOIs, however Commerce Commission determines own performance criteria.</p> <p>The Minister has powers to participate in determining the content of SOI and review operations. These powers do not appear to be utilised to bolster the content of reports.</p> <p>EA:</p> <p>Crown Entities Act:</p> <p>The EA is subject to the same general reporting and audit requirements as the Commerce Commission. The responsible Minister is the Minister of Energy and Resources.</p> <p>GIC:</p> <p>The GIC is a company incorporated under the Companies Act 1993 and is governed by a board comprising industry-associated and independent directors. The relevant minister is the Minister for Energy and Resources.</p> <p>Under the Gas Act, the GIC is required to provide an annual</p>	<p>ACCC:</p> <p>General reporting and audit obligations including annual reporting and quarterly reports on the ACCC's activities and achievements. ACCC's Annual Report was previously produced with the AER but is now provided separately. Financial reporting under the Competition and Consumer Act 2010 and Financial Management and Accountability Act 1992 covers both the ACCC and AER. Treasury's portfolio budget statements contain indicators that are used in reporting documents.</p> <p>Ethical and procedural obligations, eg Service Charter - values and standards.</p> <p>AER:</p> <p>General reporting and audit obligations. The AER's Annual Report assesses conduct against deliverables and performance indicators including operations, staff and expenditure. It is now separate from the ACCC, following high level direction from the Council of Australian Governments and the Standing Council on Energy and Resources to strengthen accountability and reporting frameworks.</p> <p>The AER conducts stakeholder surveys (2008 and 2011) covering the areas of performance, consultation, reputation and communication. The survey will be conducted against in 2013-2014 and helps measure progress in improving</p>	<p>the financial framework for CC. Together, documents set the broad framework and parameters within which the CC operates.</p> <p>CC also prepares a Business Plan setting out objectives for the next year. Discussed with and approved by BIS.</p> <p>OFGEM:</p> <p>Answerable to the Public Accounts Committee of House of Commons; National Audit Office scrutinises spending.</p> <p>General reporting and audit obligations including Annual Reports that are audited by National Audit Office.</p> <p>Produce Forward Work Programme detailing main themes and priorities for coming year. Separate deliverables and performance indicators developed from Forward Work Programme. In addition, publish Simplification Plan listing main projects for coming year.</p> <p>Must publish impact assessments before carrying out certain functions.</p> <p>OFCOM:</p> <p>General reporting and audit obligations including Annual Report pursuant to Office of Communications Act 2002.</p> <p>Consults with stakeholders on proposed Annual Plan setting strategic purposes, proposed priorities and work programme for the coming year.</p> <p>Sponsored by two Government Departments: the Department for Business, Innovation and</p>	<p>strategic plan which contains mission, strategic goals and plans to achieve those goals over five year period. Strategic plan developed in consultation with industry partners.</p> <p>May be requested to account for the performance of its functions to a Joint Committee of the Oireachtas.</p> <p>ComReg:</p> <p>Required to publish a Code of Financial Management.</p> <p>Has adopted the "Code of Practice for the Governance of State Bodies".</p> <p>Has developed a written Code of Business Conduct for Directors and a written Code of Business Conduct for Employees.</p> <p>Decisions can be appealed to the High Court.</p> <p>CAR:</p> <p>General reporting and audit obligations. Required under Aviation Regulation Act 2001, s 26 to prepare and submit Annual Report.</p> <p>Must furnish information to Department of Transport when requested.</p> <p>Accountable to Joint Committee of the Oireachtas when requested.</p> <p>Code of Conduct for staff.</p> <p>Implements Department of Finance Guidelines for the Governance of State Bodies.</p> <p>Must comply with national procurement guidelines.</p>	<p>Service Standards Report). In addition to Annual Report, produces Departmental Performance Report ("DPR"), which accounts for results achieved against planned performance expectations as set out in the Reports on Plans and Priorities ("RPP"). RPP is individual expenditure plan for each department.</p> <p>CRTC:</p> <p>General reporting and audit obligations, similar to NEB. Produces three year plan, DRP and RPP.</p> <p>Airports:</p> <p>Public accountability principles and transparency requirements in lease agreements between CAAs/LAAs and Government.</p> <p>Community Consultative Committee, including airline representatives, must meet twice a year "to provide dialogue on matters related to the airport".</p> <p>General public meeting must be held annually.</p> <p>No external review of airports charges.</p>

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	<p>report to the Minister on its performance and operations for the year. The GIC is also required to prepare a strategic plan. According to the Gas Act, the GIC's constitution must also contain provisions for reporting to the Minister.</p>	<p>performance. AER prepares an annual Strategic Priorities and Work Programme. AER reporting twice a year to SCER on its work activities, key market outcomes and other matters. AEMC: Reports directly to Ministerial Council for Energy through Standing Council of Energy and Resources. General reporting and audit obligations. Must submit performance plan and budget to Minister. Minister sets form of plan and budget, including the matters addressed. Must also provide Annual Report under AEMC Establishment Act 2004. Ethical obligations - Code of Conduct - sets out its commitment to fairness, honesty, impartiality and integrity in its dealings with all stakeholders. Audit and risk management committee. Statutory regime for disclosure of interests. ACMA: General reporting and audit obligations including Annual Report that reports on ACMA's activities, contribution to market development, governance, and other matters and also includes financial statements. Ethical and procedural obligations - Client Service Charter and freedom of</p>	<p>Skills and the Department for Culture, Media and Sport, which are overseen by two House Select Committees. Subject to inspection by National Audit Office; accountable to Public Accounts Committee. CAA: General reporting obligations including Annual Reports and Accounts and Strategic and Safety Plans. Strategic Plan developed in consultation with stakeholders and Safety Plan developed in partnership with industry to drive improved performance across all sectors. Independent external audit arrangements (auditors appointed by the Department for Transport); costs scrutinised by aviation community (not National Audit Office). Council on Tribunals exercises a supervisory role over the workings of the CAA as a tribunal.</p>		

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		information procedures.			
Independence	<p>Commerce Commission: Independent Crown entity that is not subject to direction from Government. However must have regard to economic policies of the Government delivered under section 26 of the Act.</p> <p>EA: Independent Crown entity, like the Commerce Commission.</p> <p>GIC: Incorporated company with additional reporting requirements imposed by statute.</p>	<p>ACCC: Independent statutory authority; however Minister may direct (in writing) the ACCC to give special consideration to a specified matter or matters in exercising its powers or functions (some matters excluded), and the ACCC must comply with any such direction. Some actions of the ACCC require approval by the Minister.</p> <p>AER: Part of ACCC. Independent statutory authority with independent Board. Funded by the Commonwealth with its staff, resources and facilities provided from the ACCC.</p> <p>AEMC: Independent; not subject to direction by the Minister in the performance of its functions (unless specifically in National Energy Laws).</p> <p>APC: Independent; operates under the powers of its own legislation. Has its own budgetary allocation and operates at "arm's length" from other government agencies. Broad policy guidelines cover APC's work in legislation and must have regard to any other matters notified in writing by the Minister. Minister can make requirements as to how the APC undertakes its research into issues.</p>	<p>Competition Commission: An Executive Non Departmental Public Body ("NDPB") under the Department of Trade and Industry. NDPBs are bodies which have a role in the processes of national Government, but are not a Government Department or part of one, and which accordingly operate to a greater or lesser extent at arm's length from Ministers.</p> <p>OFT: A non-ministerial government department established by statute.</p> <p>OFGEM: Independent economic regulator; non-Ministerial Department, governed by a Board.</p> <p>OFCOM: Independent regulator and competition authority (television, radio, fixed-line telecoms, mobiles, postal services, airwaves).</p> <p>CAA: Independent regulator (airports). Secretary of state for Transport accountable to Parliament for the CAA's performance of its functions. A sponsorship statement sets out the relationship between the Secretary and the CAA and describes frameworks for policy, structure, planning and financial matters, external accountability</p>	<p>Irish Competition Authority: Independent statutory body; however the Authority is charged with advising the government and in turn the Minister for Enterprise, Trade and Employment may request studies and research be conducted.</p> <p>CER: Independent; however may be requested to account for the performance of its functions to a Joint Committee of the Oireachtas and must have regard to any recommendations. Minister retains some powers to give directions/set criteria in specific areas.</p> <p>ComReg: Independence in the exercise of its functions, subject to some limitations in its empowering Act.</p> <p>CAR: Independent public body.</p>	<p>Competition Bureau: Independent agency.</p> <p>NEB: Independent federal agency.</p> <p>CRTC: Independent federal agency; however Governor in Council may, by order, issue directions of general application to the CRTC on broad policy matters with respect to the Canadian telecommunications policy objectives; and Minister may make other orders as regards the CRTC such as ordering it to give effect to any technical standards established.</p> <p>Airports: No independent regulator; CAAs and LAAs responsible for airport charges etc.</p>

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		<p>ACMA: Statutory authority; Minister may give written directions to the ACMA in relation to the performance of its functions and the exercise of its powers. ACMA must perform its functions and exercise its powers in accordance with any directions given. Limited to general nature directions in relation to broadcasting.</p>	<p>and monitoring and review matters. Secretary sets the Government's priorities for the CAA over the following two years.</p>		