

## **REGULATORY ERROR: REVIEW AND APPEAL RIGHTS\***

### **Introduction**

No-one is infallible. This is just as true of regulatory bodies as it is of any other decision maker. The focus of this paper is on the different types of error that a regulator can make, and mechanisms for correcting such errors and providing guidance for the future.

I begin by outlining the functions served by review and appeal rights, the different ways in which things can go wrong in the regulatory process, and how different forms of review address these different types of error. I then survey existing review and appeal rights in respect of regulatory decisions in New Zealand. There does not appear to be any principled basis for the mix of rights currently available: the only pattern I can discern is a focus on what review is realistic before a High Court Judge sitting alone, without any consideration of the possibility of having some other review body.

In the light of this conclusion, I look at the case for and against merits review in the regulatory context, and explore some of the institutional concerns that appear to underpin the exclusion of merits review under many New Zealand regulatory regimes.

My basic thesis is that the importance and complexity of contemporary regulatory decision-making strengthens, rather than weakens, the case for merits review. Judicial review plays an important role in ensuring that regulators follow an appropriate process, and ask themselves the right question. But it is not a substitute for merits review – though in the absence of any provision for merits review, dissatisfied participants in regulatory processes will inevitably attempt to shoehorn complaints about the merits of decisions into a judicial review framework, with results that are usually unsatisfactory for the participants and for the courts. With a little creativity, it seems to me that even a relatively small jurisdiction such as New Zealand can provide an appropriate institutional framework for merits review of regulatory decisions, in a manner that improves the quality of regulatory decision-making and delivers significant public benefits over time.

The discussion of institutional arrangements for merits review also has implications for certain types of judicial review proceedings, in the regulatory arena. I discuss briefly how we might respond to the plaintive cries from Judges

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in recent judicial review cases that they are being asked to address questions outside their core competence, without the assistance of appropriate experts.

Finally, some of the difficulties that have been encountered in the judicial review context in New Zealand in recent years seem to me to stem as much from insufficient legislative guidance on the regulator's task as from problems with the regulatory process, or access to appropriate review rights. I conclude with some suggestions on regulatory design that might take some of the pressure off concerns about current institutional arrangements.

### **Why have review and appeal rights?**

Regulators make a wide range of decisions that affect the rights of participants in regulated markets, and the interests of the wider community. Their decisions can involve significant intrusions on property rights, with a major impact on the value of a business. Some regulatory decisions have broader welfare implications for the economy as a whole – for example, decisions on regulation of telecommunications services, or on the proposed Air NZ/Qantas merger. And the decision-making process is a complex and difficult one, requiring expertise in law, economics and the relevant industry setting.

Put simply, regulators are responsible for making difficult and important decisions that affect the rights and interests of many people. Those affected have a strong interest in ensuring that regulators exercise their powers properly and responsibly, and the entire community has a strong interest in ensuring that the quality of the decisions is as high as possible.

And (a related point) any person exercising significant powers should be effectively accountable for the manner in which those powers are exercised. Regulators cannot be dismissed for making bad decisions (their independence is protected under the Crown Entities Act 2004). Unlike Ministers and local authorities, they are not accountable politically. Accountability for the exercise of their powers comes through the public nature of their processes, the requirement for reasoned decisions, and – critically – review and appeal processes.<sup>1</sup>

In order to determine what forms of review or appeal right are appropriate in the regulatory context to ensure quality decision-making and accountability, it is

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<sup>1</sup> The importance of appeal and review as an accountability mechanism has been recognised by the Commission: see for example the recent speech by the Commission Chair, Paula Rebstock “The New Zealand Experience in Utility Regulation”, ACCC Regulatory Conference, 30 July 2004 at p15, available at <http://www.comcom.govt.nz//MediaCentre/Speeches/ContentFiles/Documents/ACCC%20Regulatory%20Conference%20%20July%202004%20Rebstock%20paper.doc> .

helpful to look at how things can go wrong, and the different types of error that can be addressed through different review and appeal mechanisms.

### **The ways in which things can go wrong**

The types of errors made by regulators can be broadly grouped as follows:

- process errors – the regulator has not followed the process prescribed by the legislation, or met the basic process requirements of the common law (in particular, natural justice);
- scope errors – the regulator has stepped outside its regulatory role, making decisions about matters it has not been given power to regulate, or making decisions that it has not been authorised to make;
- “asking the wrong question” – the regulator has misunderstood its task under the legislation, and has misdirected itself in law. This type of error can also be described as the exercise of a power for an improper or unauthorised purpose – ie for a purpose other than that for which it was conferred;
- failing to take relevant factors into account;
- taking into account irrelevant factors;
- getting the answer wrong (having asked the right question, taken into account everything that is relevant etc). In the regulatory context, it might be better to put this as failing to make the best available decision, on the merits.

### *Process defects*

Judicial review is well equipped to address the first of these types of error, and ensure that regulators follow a proper process, consistent with the statutory framework under which they operate and the requirements of natural justice. The issues raised by process complaints are very familiar to the courts, and are dealt with efficiently and effectively by the Judges.<sup>2</sup>

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<sup>2</sup> Recent examples of process challenges include the successful challenge in *Contact Energy Ltd v Electricity Commission* (unreported, High Court, Wellington, CIV-2005-485-624, 29 August 2005, MacKenzie J), and the unsuccessful challenge in *Electra Ltd v Commerce Commission* (unreported, High Court, Wellington, CIV-2004-485-389, 23 March 2005, Ellen France J).

### *Scope of statutory powers*

The Courts are also very familiar with challenges to the scope of statutory powers. Challenges of this kind raise, in essence, questions of statutory interpretation. Examples include Telecom's successful challenge to the Commerce Commission's proposed publication of a report on competition in the telecommunications industry,<sup>3</sup> and the recent proceedings in Australia raising the issue (among others) of whether the Visa and MasterCard credit card systems are "payment systems" that can be regulated by the Reserve Bank of Australia.<sup>4</sup> Other examples would include such questions as whether the Commerce Commission has power to serve a notice at an office in New Zealand requiring an overseas individual who sometimes works from that office to attend a s 98 interview,<sup>5</sup> and whether bodies such as the Commerce Commission and Securities Commission have the power to issue "formal warnings" to market participants, without taking any form of legal action against those persons.<sup>6</sup>

The issues raised in challenges of this kind are not usually unduly technical, and are well suited to determination by the courts in judicial review proceedings. Challenges of this kind have not thrown up any particular difficulties to date, so far as I am aware.

### *Illegality/unlawfulness challenges*

Judicial review applications based on "illegality", or "unlawfulness" as it is now often termed, are concerned to ensure that regulators have a proper understanding of their task – that is, to ensure that they direct themselves correctly on matters of law relevant to the decision they are making. If you ask yourself the wrong question, you are unlikely to arrive at the right answer. And if you ask the wrong question, you are no longer carrying out the task that the legislation conferred on you – you have set off on an unauthorised frolic of your own. So this type of error raises both quality issues, and legitimacy/accountability issues.

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<sup>3</sup> *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA).

<sup>4</sup> *Visa International Service Association v Reserve Bank of Australia* [2003] FCA 977 (19 September 2003)

<sup>5</sup> See *Koppers Arch Wood Protection (NZ) Ltd v Commerce Commission* (unreported, High Court, Auckland, CIV2004-4046653, 26 November 2004, Williams J), and the earlier decision of Justice Williams in the same proceedings dated 16 November 2004.

<sup>6</sup> Despite the absence of any express power to do so – compare Charities Act 2005 ss 54-55, Electricity Act 1992 s 172KE.

One aspect of this principle is that a statutory power can only be exercised for the purpose for which that power is conferred, under the relevant statutory scheme.<sup>7</sup>

The interpretation of legislation to ascertain the correct test to be applied in connection with the exercise of a power, and to ascertain the purpose for which the power has been conferred, is a core function of the courts which lies at the heart of many judicial review applications.

There is no question of deference on the part of the courts to any other decision-maker, so far as interpretation of legislation is concerned. The standard that the courts will apply in determining whether the regulator has correctly interpreted the law, asked itself the right question, and exercised its powers for the statutory purpose, is a “correctness” standard, not a reasonableness standard.<sup>8</sup>

This is an area where judicial review of regulatory decisions, before a High Court Judge, can become extremely problematic. Justice Wild has expressed concern about the capacity of the court to hear and determine review applications of this kind, at least without expert assistance in the form of a lay member,<sup>9</sup> and similar concerns about the complexity and breadth of such applications have been expressed in Australia.<sup>10</sup>

These concerns are in my view well founded. There are two main reasons for the difficulties that have been encountered with this type of judicial review application:

- defining the “right question” for the regulator to ask necessarily involves a careful analysis of the policy goals of the legislation, and the terms – often technical – in which the task of the regulator is defined. Judges are being asked to grapple with terminology and concepts that for many of them are unfamiliar and more than a little daunting (and some of those who are not daunted, should be). In my experience teaching competition and regulation

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<sup>7</sup> See Fordham *Judicial Review Handbook* (4 ed, 2004) paras 39.1; 53.1; *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997, 873G; *Darvell v Auckland Legal Services* [1993] 1 NZLR 111, 124; Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) pp789-793.

<sup>8</sup> Fordham para 16.4.1; *Padfield* at 1030; *Darvell* at 124; *New Zealand Society of Physiotherapists v ACC* [1988] 2 NZLR 641 (CA).

<sup>9</sup> *Powerco v Commerce Commission* (unreported, High Court, Wellington, CIV-2005-485-1066, 9 June 2006, Wild J), echoing concerns expressed by His Honour to counsel in *Unison Networks Ltd v Commerce Commission* (unreported, High Court, Wellington, CIV-2004-485-960, 28 November 2005, Wild J). The author appeared as counsel for Unison in those proceedings.

<sup>10</sup> Weinberg J in *Aus Retailers Assocn v Reserve Bank of Australia* [2005] FCA 1707 (28 November 2005) paras 624-637.

courses at Universities in Australia and New Zealand, it takes some time for anyone to become sufficiently familiar with these concepts, and the basic analytical tools used in economic regulation, to be able to use them confidently and effectively. It is not realistic to expect a Judge, however able, to get up to speed from scratch on such issues in the course of a trial;

- an argument that a regulator has asked itself the wrong question often starts with the regulator's decision, and reasons backwards from that decision to seek to show that if the right question had been asked, that answer could not have been arrived at. Thus, it is argued, the regulator must have asked itself the wrong question, even if this is not explicit in the reasons for its decision. This type of argument requires the Judge to understand the decision, the process of reasoning by which it was reached, and whether a reasonable regulator with the relevant expertise (economic, industry etc) could reach that decision if it asked itself the right question.

It is increasingly common for expert evidence to be filed on these issues by both plaintiff and regulator.<sup>11</sup> This can provide assistance to the Court – but it also makes further demands on the court's capacity to digest complex and unfamiliar material, and raises a host of practical issues about the extent of evidence that is appropriate in the judicial review context, and the desirability of cross-examination of experts.<sup>12</sup>

This is an area where unfamiliarity with the substance of the issues that are the subject of the regulator's decision, and with the language and concepts in which the statutory tests are framed, can lead, and often does lead, to a reluctance on the part of a Judge to intervene. It is not easy to point to hard evidence of this, but my strong sense based on appearing as counsel in a range of judicial review cases (and a review of other recent decisions) is that this is an area where Judges are less confident than usual in identifying the outer bounds of a statutory power and the purpose for which it was conferred, and as a result exercise less effective control over decisions by regulators than they do in respect of other statutory decision-makers operating in more familiar, or less technical, fields.

There is also an understandable tendency to be less willing to provide principled guidance for the future in an area where a Judge feels less confident: most Judges frankly acknowledge that the less familiar they are with a field of law, the more closely they tend to confine their decision to the particular facts and the narrowly

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<sup>11</sup> See eg *Unison v CC*, *Powerco v CC*, *Visa v RBA*, *Aus Retailers Assn v RBA*, *TXU Electricity Ltd v Office of Regulator-General* [2001] VSC 153 (17 May 2001).

<sup>12</sup> See eg *Powerco v Commerce Commission* (unreported, High Court, Wellington, CIV-2005-485-1066, 9 June 2006, Wild J).

specified issues raised by the case in hand. That tendency is very apparent in the regulatory field.

*Relevant/irrelevant factors*

Complaints that a regulator has failed to take into account relevant material, or has taken into account irrelevant material, are in practice closely related to complaints that the regulator has asked itself the wrong question, or misdirected itself on the law. They raise the same difficult issues identified above: in order to apply a relevance test, the Judge needs a good understanding of the nature and focus of the regulator's inquiry, and of the matters relevant to that inquiry.

*The answer is wrong – or could be improved on*

Finally, regulators sometimes just get it wrong. Within this category of errors lies the hotly contested boundary between judicial review and merits review.

If the regulator has made an error of law, then this can be corrected through an appeal on questions of law. It can also, in most cases, be addressed through judicial review – there is not much daylight, if any, between the types of error of law that can be raised on appeal, and in the context of judicial review proceedings. The New Zealand courts have rejected any distinction between jurisdictional and non-jurisdictional errors of law, and have held that statutory decision-makers are not (except perhaps in certain exceptional circumstances) intended to have the power to finally determine questions of law, with the court having no ability to intervene in cases of error of law.<sup>13</sup>

If the regulator gets things spectacularly wrong – makes a decision that is simply irrational – then judicial review may provide a remedy. Judicial review is available where a regulator makes a decision that is so unreasonable that no reasonable decision-maker, properly directing itself on the law, could have reached it (known as *Wednesbury* unreasonableness, after the English decision *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680). This is the ground of review that comes closest to review on the merits – and indeed, attacks on the correctness of regulatory decision-making are routinely dressed up as unreasonableness challenges. Review of regulatory decision-making on this ground almost invariably fails, unless the regulator has asked itself the wrong question – ie the real defect is an error of law on the part of the regulator.

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<sup>13</sup> See Joseph pp 815-816; *Peters v Davison* [1999] 2 NZLR 164 (CA); *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

Some challenges to regulatory decision-making have recently been mounted on “proportionality” grounds.<sup>14</sup> This ground of review seems likely to become important in the human rights sphere in coming years. It is more difficult to see what it adds to the established grounds of review in the regulatory context. The courts have not to date shown any willingness to go further into the merits of regulatory decisions in reliance on a “proportionality” test.

This, then, is the (orthodox) boundary of judicial review: the Court will not intervene by way of judicial review if a regulator has power to make the decision in question, has correctly directed itself on matters of law, has followed a proper process, and has not reached an unreasonable (in the *Wednesbury* sense) decision.

Judicial review cannot be used to correct simple errors in decision-making – it does not deal with the situation where the regulator asks itself the right question, but arrives at an answer that is wrong – or which is not the best answer, where there are multiple answers no one of which is “correct”. Errors of this kind can be challenged only through merits review – appeal rights going beyond error of law, and extending to the substance of the regulator’s reasoning and decision.

#### *Intensity of review*

Recent judicial review decisions have paid some attention to the question whether differing intensities of review are appropriate in different contexts.<sup>15</sup> The prevailing view appears to be that less deference will be paid to decision-makers – the intensity of review by the Court will be greater – in certain cases, for example where infringement of basic human rights is in issue. At the other end of the spectrum, more deference will be shown where a decision has a high policy content, and is made by a Minister or a democratically elected body such as a local authority.

This is a major topic in itself, which I cannot discuss here. But a few observations on intensity of review of regulatory decisions can be ventured:

- where the issue is one of unlawfulness, no question of the intensity of review should arise, since the test is one of correctness. But as noted above, lack of confidence in using and applying the economic concepts deployed in

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<sup>14</sup> See *Vector v CC* (unreported, High Court, Wellington, CIV-2005-485-1066, 9 June 2006, Wild J) paras 13-17.

<sup>15</sup> See *Vector v CC*, supra; Joseph pp 586-593; M Taggart, “Administrative Law” [2006] NZ Law Rev 83-85. See also Joseph p 838, suggesting that “bodies exercising purely regulatory functions may expect more intensive judicial scrutiny than, for example, Government Ministers, elected councils, commercial operations, or bodies entrusted to develop and apply policy.”

the legislation can lead to a more “hands off” approach than is in principle appropriate, or desirable, in the context of unlawfulness challenges;

- the primary justifications for a high level of deference to Ministers and elected bodies, on issues with a significant policy content, are the closely related points that those decision-makers have a popular mandate to make such decisions, and that they are accountable for those decisions politically (through the electoral process, and also in the case of Ministers to Parliament). There is no such accountability on the part of regulatory bodies, whose mandate derives solely from the legislation which confers their powers. So these factors do not justify a reduced intensity of review of regulatory decisions – quite the contrary;
- the industry and economic expertise of regulators, and the lack of corresponding expertise on the part of the Judges, is sometimes suggested as a reason for a lesser intensity of review in the regulatory context. Certainly the Court needs to recognise the scope for differing reasonable views on matters of economic and industry expertise, and should not substitute its views for those of the regulator, provided that those views have been reached following a proper process, after the regulator has asked itself the right question, and are views that a reasonable person with the relevant expertise could hold. But any suggestion that because it is a difficult area to understand, the Court should give up and assume the regulator’s views are reasonable and consistent with the statutory framework, should be firmly resisted as inconsistent with the basic principles of legitimacy and accountability on which judicial review rests.

### **Review and appeal rights in New Zealand: is there any pattern?**

The entire spectrum of review and appeal rights features in the New Zealand regulatory environment, as illustrated by the table below.

| <b>Review/appeal right</b> | <b>Decision</b>  |
|----------------------------|--|
| Judicial review only       | <p>Commerce Commission decisions to recommend price control - Commerce Act 1986, Part 4</p> <p>Ministerial decisions to impose price control – Commerce Act 1986, Part 4</p> <p>Commerce Commission decisions to set thresholds - Commerce Act 1986, Part 4A</p> <p>Commerce Commission decisions to</p> |

| <b>Review/appeal right</b>                                       | <b>Decision</b>   |
|--|---|
|  | <p>impose price control - Commerce Act 1986, Part 4A</p> <p>Securities Commission decisions under Corporations (Investigation and Management) Act 1989</p> <p>Takeovers Panel decisions on restraining orders – Takeovers Act 1993, s 32</p>  |
| Appeal on error of law   | <p>Commerce Commission decisions authorising prices under Part 5 of the Commerce Act 1986</p> <p>Commerce Commission decisions on TSO issues under Telecommunications Act 2001 Part 3</p> <p>Commerce Commission determinations relating to designated services and specified services under Telecommunications Act 2001 Part 2</p> <p>Electricity Commission decisions under electricity governance regulations and rules made under the Electricity Act 1992</p> <p>Securities Commission decisions under Securities Act 1978 and Securities Markets Act 1988 (other than on inspection of documents)</p> |
| Appeal by way of rehearing (based on materials before regulator) | <p>Commerce Commission decisions on authorisations and clearances in relation to trade practices issues (including mergers)</p> <p>Securities Commission decisions on inspection of documents</p>   |
| Appeal by way of de novo hearing                                 | Commissioner of Inland Revenue decisions on tax payable, tax avoidance etc  |

It seems clear that the nature of the review rights provided for does not depend on the importance of the issue to the affected persons, or to the wider community. Very significant decisions to subject a service provider to price control are not appealable at all, and decisions authorising prices are appealable only on questions of law, while merger authorisation decisions are subject to appeal by way of rehearing.

The complexity of a decision, and the extent to which the answer involves an exercise of judgment along a spectrum, seem to play some role. But these factors are not decisive: the Commerce Commission's merger authorisation decisions, which involve public detriment and public benefit issues, and extensive use of quantitative techniques, are as complex and wide-ranging as its decisions on whether or not to impose price control under Part 4A.

The most plausible explanation appears to be that the starting point has been to ask what extent of review can effectively be performed by the High Court, and to limit the available appeal or review rights to the scope of review that a Judge can reasonably be expected to perform. In other words, policy makers seem to have reasoned backwards from a particular review institution to the scope of review, rather than asking what scope of review is appropriate, then seeking to design an institutional framework to deliver the desired form of review. The following sections of this paper seek to redress this omission, asking when there is a case for merits review of regulatory decisions.

### **The case for merits review of regulatory decisions**

Why should Parliament go further than the common law safeguard of judicial review, and provide for merits review of regulatory decisions? The starting point, as noted above, must be that errors will occur in regulatory decision-making, and these will have significant adverse effects on individuals, firms and the economy as a whole. High quality decision-making (in particular cases, and in the long run) is important, as is effective accountability on the part of regulators.

The purpose of providing for merits review rights is to improve the quality of decision-making, and enhance accountability on the part of the regulator. Merits reviews achieve this in three ways:

- the potential for merits review strengthens incentives for the regulator to make high quality decisions, knowing that they may be subject to further scrutiny;
- the review body can correct errors in particular cases – the “error correction” function that is such an important feature of first appeals in the court system;

- the review body can provide guidance for the future, to the regulator and to those affected by the regulatory regime.

A recent conference paper by Professor David Round, a member of the Australian Competition Tribunal, argues strongly in favour of merits review on these grounds: “Few regulatory processes are costless or error free. It is in society’s interest to reduce the incidence of regulatory error. It is accepted internationally that regulators that possess large amounts of discretionary power should be held accountable for their decisions.”<sup>16</sup>

In the trade practices context, the statutory right of appeal from the Commerce Commission to the High Court sitting with a lay member has served all three of these functions, over the 20 years since the Commerce Act 1986 was enacted. The decision to provide for full appeal rights on the merits has paid handsome dividends in terms of the evolution of Commission’s decision-making, outcomes in particular cases, and the development of a body of principles and precedents that has been of great assistance to the Commission and advisers.

In the UK, the House of Lords Select Committee on the Constitution has also emphasised the constitutional importance of merits review rights. “Challenge constitutes the most powerful form of accountability”. The Committee recommended extending the existing range of appeal rights from regulatory bodies in the UK over time, to allow full merits review by all those subject to regulation, with fact track appeals where appropriate.<sup>17</sup>

Helpful guidance on the desirability of merits review is provided by the Legislation Advisory Committee Guidelines.<sup>18</sup> The guidelines say, at para 13.1.1:

“It is generally desirable for legislation to provide a right of appeal against the decisions of officials, tribunals and other bodies that affect important rights, interests, or legitimate expectations of citizens. The reasons for providing an appeal are to correct error and to supervise and improve decision-making. However, the value of having an appeal right must be balanced against the following factors:

- cost;
- delay;

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<sup>16</sup> D Round, “The merits of merits reviews”, [2006] NZLJ 237 at 240.

<sup>17</sup> UK House of Lords, Select Committee on the Constitution, Sixth Report 31 March 2004, chs 4, 11.

<sup>18</sup> 2001 edition, with 2003 supplement; available at <http://www.justice.govt.nz/lac/>.

- significance of the subject matter;
- the competence and expertise of the decision-maker at first instance;  
and
- the need for finality.

It will usually be appropriate to respond to concerns about cost and delay by limiting the scope of any right of appeal, rather than denying it altogether.”

The LAC recommends that in general, the most appropriate form of merits review is an appeal by way of rehearing (see Guidelines para 13.4.2) – this is discussed further below.

The same emphasis on the desirability of merits review is apparent in the guidance provided by the Australian Administrative Review Council on when statutory decisions should be subject to merits review. The ARC guidelines begin with the basic proposition that “As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding merits review of a decision that otherwise meets the Council’s test.”<sup>19</sup>

Because decision-making is a fallible process, and because merits review provides obvious benefits both in theory and in practice, it seems to me that the burden falls on those who oppose merits review in a particular context to justify that stance. This is consistent with the approach of the LAC (and, in Australia, the ARC). It is also consistent with the conclusion reached by Professor David Round in his recent paper, which argued for a general presumption in favour of merits review, “with the burden of proof against it requiring a convincing demonstration that its social costs in any given situation outweigh its undoubted social benefits.”

### **Why exclude merits review?**

So in what circumstances should merits review *not* be provided for, in the regulatory context?

The five factors identified by the LAC Guidelines as weighing against merits review of statutory decisions, as set out above, are:

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<sup>19</sup> Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, July 1999, para 2.1; available at [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review).

- cost;
- delay;
- significance of the subject matter (where the decision is relatively unimportant, the cost and delay of an appeal process may not be justified);
- the competence and expertise of the decision-maker at first instance (ie issues of institutional capacity – can an appeal body do the job better?);
- finality (an appeal right is not appropriate if there is “an overwhelming need for finality”).

### *Cost*

The cost argument is unpersuasive, in the regulatory context. The cost of appeals is small compared with the amounts that are routinely in issue: they would disappear as rounding errors in the quantitative analysis of major mergers, or the imposition of price control on a lines company, or the setting of prices for a designated telecommunications service. If full merits review is not prohibitively costly in the merger context, it could hardly be argued to be too costly in the price control or telecommunications sphere. The cost of making bad decisions – and of failing to provide guidance for the future – far outweighs the few millions involved in an appeal.

### *Delay, and tactical use of appeal rights*

The delay argument is also unconvincing, if analysed more than superficially. It cannot be good policy to prefer making wrong regulatory decisions swiftly to making better decisions over a slightly longer period. This argument also ignores the dynamic benefits of merits review in terms of enhancing the quality of initial regulatory decisions, and providing guidance for future decisions.

A related concern, tactical use of merits review by regulated firms to delay the application of decisions, can be addressed by providing that a merits review does not of itself prevent the regulator’s decision coming into effect, and excluding or limiting the grant of interim relief that would have the effect of delaying regulatory processes and outcomes. This concern is not, moreover, a function of providing for merits review– there is the same risk of delay from tactical judicial review applications. In the judicial review context the courts have been astute to prevent the use of interim relief applications to delay regulatory processes, and there is no reason to think that a different approach would be adopted in the merits review context.

The UK House of Lords Select Committee received evidence from the UK Competition Appeal Tribunal suggesting that tactical use of appeal rights was not a major concern, as appeals could be fast-tracked, and appeals without merit could be struck out summarily.

*(In)significance*

There may be some decisions made by regulators that are so unimportant that merits review is not justified. But with the exception of certain preliminary or process decisions (discussed further below), it is not easy to identify any decisions made by commercial regulators that fall into this category.

*Finality*

A small number of regulatory decisions meet the “overwhelming need for finality” test. One example that springs to mind is a decision by the Securities Commission to recommend statutory management, under the Corporations (Investigation and Management) Act 1989.<sup>20</sup> Because it is essential that the statutory manager be able to make very significant decisions very swiftly, and that third parties be able to deal with the statutory manager without any uncertainty as to his or her authority to commit the relevant company, there is a compelling case for finality. Other examples may include short-term powers to restrain action, such as the Takeover Panel’s powers under s 32 of the Takeovers Act 1993: there is little point in an appeal from a decision whose effect will be spent before any appeal could be finally determined.

But most regulatory decisions do not meet this test. It is more important that the decisions made be correct, than that the first decision made be final.

*Institutional capacity*

That leaves questions of institutional capacity. We cannot have merits review rights in the abstract – there must be some body to perform the review, and there must be good reason to expect that merits review by that body will improve the quality of decisions. In a small country like New Zealand, can we achieve this? If we have put together one expert body to make the primary decision, can we find people to serve on a second review body that will serve the three functions of merits review?

I think the answer to this question is almost certainly “yes”. There will be no one person who combines the level of legal, economic and industry expertise that we look for in a review body – but then we do not expect that of the regulator, either.

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<sup>20</sup> See *Hawkins v Minister of Justice* [1991] 2 NZLR 530; *Crawford v Securities Commission* (2003) 9 NZCLC 263,065 (O’Regan J).

We cannot justify a permanent specialist review body – but that is not what is required. We can in my view put together, on an ad hoc basis, a review body that would collectively bring to bear the relevant expertise, and would be well equipped to carry out merits reviews of decisions of the Commerce Commission, Electricity Commission, Securities Commission and possibly other bodies. The Commerce Act provides a model: a Judge, sitting with one or more lay members. The former New Zealand Electricity Market arrangements, with a very highly qualified Market Surveillance Committee, and provisions for appeals to an ad hoc Appeal Board, provide another precedent. I return to this topic below.

*ARC guidance on matters that should be excluded from merits review*

The ARC guidelines on merits review provide some helpful further guidance on particular categories of decision that should not be subject to merits review, or which may not be suitable for merits review.

The ARC identifies two types of decision that are, by their nature, unsuitable for merits review:

- “legislation-like decisions of broad application (which are subject to the accountability safeguards that apply to legislative decisions); and
- decisions that follow automatically from the happening of a set of circumstances (which leaves no room for merits review to operate).”

Most regulatory decisions fall into neither of these categories. One exception is the Commerce Commission’s threshold decisions under Part 4A of the Commerce Act, which are legislation-like and of broad application. I see real difficulty in applying merits review to these instruments. I note however that the threshold decisions are not subject to the accountability safeguards that normally apply to delegated legislative instruments, in particular disallowance. I return below to the question whether generally applicable decisions such as these, with a significant policy element, should be made by regulators.

The ARC also identifies a number of factors relating to decisions that may exclude merits review, which overlap to some extent with those identified by the LAC:<sup>21</sup>

- preliminary or procedural decisions;
- decisions to institute proceedings;

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<sup>21</sup> ARC, *supra*, section 4.2.

- decisions allocating a finite resource between competing applicants;
- decisions relating to access to parliamentary or judicial records;
- policy decisions of a high political content;
- decisions of a law enforcement nature; and
- financial decisions with a significant public interest element.

It seems appropriate to exclude merits review of decisions by regulators of a preliminary or procedural nature, and decisions to institute proceedings or which are otherwise of a law enforcement nature. None of the other factors seem especially relevant, in the regulatory context.<sup>22</sup>

### **Designing a merits review body**

Suppose we were setting out to put in place a merits review body that could deal with questions such as whether the Commission had correctly concluded that price control is necessary to achieve the goals of subpart 1 of Part 4A of the Commerce Act, as set out in s 57E. What sort of expertise would be required, and would provide good reason to expect that the review body would improve the quality of decision-making under Part 4A?

The success of the appeal regime for trade practices provides a useful starting point. A combination of expertise is needed: legal, economic, and also in some cases industry expertise (eg in electricity transmission, or telecommunications, or securities markets).

For the legal expertise, we can look to a Judge of the High Court. But we should be realistic about the specialised nature of this work, and allocate “horses for courses”. The prospect of achieving the goals of merits review will be much enhanced if the presiding Judge has a strong background in competition and regulatory matters. Without this, the risk of matters going awry – and making things worse in that case and in future cases – is very real. It is an illusion to think that every Judge can do this work well. A law firm that made this claim for all its partners would be laughed at – and would not get much work from clients, if they

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<sup>22</sup> Consistent with the ARC approach, the Australian Productivity Commission has on a number of occasions recommended introducing new merits review rights or extending merits review rights in regulatory schemes. Its recommendation to extend appeal rights in *Review of the National Access Regime* (28 September 2001) was accepted by the Australian Government. See also *Review of the Gas Access Regime* (11 June 2004) section 11.2, for a helpful discussion of the benefits of merits review in the regulatory context.

did not know which partner would end up doing their work. Those same law firm partners do not become omni-competent immediately upon taking the judicial oath, however convenient it would be if they did.

We should be less coy about expressly addressing, in the context of allocation of a trial Judge, the question of relevant expertise. The English courts do this quite openly, and so in my view should we.<sup>23</sup>

For the economic expertise, we need to look to first-rate people with good minds and a great deal of experience in competition and regulation. They should be at least the peers of those appointed to the Commission, and preferably they should be more experienced and knowledgeable (just as we expect appellate judges to be better qualified to hear the appeals than Judges at first instance). Such people are scarce in every country, and in a country as small as New Zealand, that scarcity will be exacerbated by the inevitable conflicts that affect any part-time tribunal members. But we can establish a pool of well qualified people, some from New Zealand, and some from abroad, on which to draw for particular cases. To get good people from overseas, we need to be willing to pay our experts at a realistic rate: we cannot expect public service to New Zealand from non-New Zealanders. This will be repaid many times over, as illustrated by the huge positive impact Professor Maureen Brunt has had on New Zealand competition law.

Our current pool of lay members contains some economists who meet this test. But a review of trade practices decisions over the last decade suggests that others do not. This may be because some very good academic economists are not experienced in the application of economic theory to real world competition and regulatory problems: an essential skill set for this work.

For industry expertise, we should adopt the same approach as with economists: a pool of highly skilled people from New Zealand and abroad, on which we can draw to establish an appropriate panel in particular cases.

We should not limit ourselves to one lay member in each case. Two economists, or an economist and an experienced industry expert, will often add real value. Part 5 of the Commerce Act provides for more than one lay member to sit on appeals, though this has not been done since the early years of the Act. In

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<sup>23</sup> See eg *London Borough of Islington v Camp* [1999] EWHC Admin 592 at para 174, a transcript of a leave hearing where the Divisional Court initiated an exchange with counsel on the appropriate Judge to be nominated to hear the case, suggesting it should be “a judge who is experienced both in public law and in employment law”, and going on to add: “There are one or two, but they may not be in London. It may be the case that there is at least one Chancery judge who may usefully be brought in.”

Australia the Competition Tribunal sits with a Judge and two lay members. Likewise the Competition Appeal Tribunal in the UK. By combining local and overseas lay members, we can also encourage cross-fertilisation of ideas and expertise.

There are still some things we cannot expect a body of this kind to undertake. For example, it cannot itself undertake sophisticated modelling exercises. But it can hear arguments about models put forward by parties, with expert witnesses providing relevant assistance. It should be able to ask parties to demonstrate how the models would be affected by certain specific changes contended for by one or other party. And it should have the power to appoint an independent expert to assist the Court on such matters, including running a model with parameters determined by the body, or modifying a model in a particular way.

It may be unrealistic to expect an appeal on the merits from a price authorisation decision to result in a different price being set by the review body – though if there is a specific error that is identified and corrected, this could be the result. In other cases, though, the review body would remit the matter to the Commission for reconsideration, drawing on the Commission’s greater resources, with guidance on specific matters. The fact that the Commission will be best placed to make certain decisions does not mean we should not have merits review, any more than the superior ability of a trial Judge to make credibility findings means we should not have appeals in criminal cases. It simply means that the merits review body will need to be discriminating about the sort of issues it tackles, and what it decides itself as opposed to remitting the issue to the Commission.

If we adopt this approach, it seems to me we could expect the review body to achieve the three goals of merits review, over time. It would have the necessary expertise, and the considerable advantage of taking a “second look” at the case with the facts largely settled, and the issues clearly identified and narrowed.

### **The form of merits review/appeal**

Another key design issue in any merits review is the nature of the review – should it be a de novo hearing, an appeal by way of rehearing, or an appeal on questions of law? This will depend on the nature of the decision to be reviewed, but the LAC guidelines suggest, sensibly in my view, that the default position should be that legislation provides for an appeal by way of rehearing. On such an appeal:<sup>24</sup>

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<sup>24</sup> See LAC Guidelines section 13.4.2; *Air New Zealand and Qantas v Commerce Commission (No 6)* (2004) 11 TCLR 347.

- the starting point is the material before the original decision-maker. But the appeal body has a discretion to rehear evidence or admit new evidence if there is a good reason to do so: for example, because the evidence was not available earlier, or because circumstances have changed;
- the appeal body forms its own view on the merits, and is not restricted by any findings which the original decision-maker made. But it is conscious of the advantages enjoyed by the original decision-maker in receiving the evidence/information direct, and will only reverse a factual finding or decision if satisfied that it was not open on the evidence, or was plainly wrong. And it starts from the presumption that the decision below was probably correct, and will reverse the decision only if satisfied that it was wrong. So for example if there were a number of equally reasonable conclusions that could have been reached, the appellate body will not disturb the original decision.

An appeal on questions of law is not in truth a merits review – in the regulatory context, it is a very narrowly confined right, and one which adds little if anything to judicial review. At the other end of the spectrum, it is hard to justify a *de novo* hearing where one decision-maker with substantial expertise has already marshalled the relevant information, and provided a reasoned decision. Providing for a *de novo* hearing can also lead to the first hearing being treated as a “dry run”, with the best evidence and expert assistance not being called at that stage.

It seems to me that there is strong case for adopting the same default position in the regulatory context, subject of course to modification in the context of particular types of decision, where there is good reason to adopt a different approach.<sup>25</sup>

### **Implications for judicial review proceedings**

Returning to the subject of judicial review proceedings, it seems to me that there is a compelling case for bringing the same level of expertise to bear in judicial review cases that raise substantive economic or technical issues – in particular, “right question” and “unreasonableness” cases.

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<sup>25</sup> Professor David Round, in the conference paper referred to above, argued in favour of review hearings *de novo*, rather than reviews “on the papers”. But the paper does not discuss the scope for rehearing evidence and calling new evidence – in particular, updating evidence – in the context of the rehearing procedure generally, or in the context of the example he gives of the *Air New Zealand & Qantas v Commerce Commission* appeal. In that appeal (where I appeared as counsel for the Commerce Commission) there was in fact extensive updating evidence, and even more extensive expert evidence on the implications of the updating evidence for the competition analysis of the proposal, and for the assessment of public benefits and detriments.

This was formerly possible, under the Judicature Act provisions establishing the Administrative Division of the High Court. Such a facility should be resurrected, with the allocated Judge having a discretionary power to direct that the Court sit with one or more lay members, with specified expertise. And with a genuine – and open – focus on allocating a Judge with relevant expertise.

One further advantage of providing for more extensive merits review of regulatory decisions should however be to take the pressure off the boundary of judicial review, and get away from the inevitable arguments in such cases about whether or not the Court should intervene by way of judicial review. There will be fewer judicial review cases, and the judicial review boundary will be of reduced practical importance, if merits review is available.

### **Regulatory design – some comments**

Finally, there are two aspects of the design of our current regulatory regimes which have in my view exacerbated the difficulties encountered by regulators, and by the Courts in the context of judicial review.

The first is apparent in the Part 4A thresholds regime: conferring on a regulatory body the responsibility for designing policy instruments of general application. It seems to me that this task is not well suited to a regulator whose primary responsibility is enforcement action and the making of fact-specific regulatory decisions, in particular cases. The Commission does not have a general policy-making role, and does not have the same degree of experience and expertise in this field that it brings to bear in its other activities. Its normal processes are not well suited to this task. And the sort of scrutiny that should apply to such instruments – review by the Regulations Review Committee, and potential disallowance – does not apply to Commission decisions.

The second is the lack of guidance provided by some regulatory statutes about the purpose of the powers conferred, and the factors that should be taken into account in making decisions. Part 5 of the Commerce Act is especially unsatisfactory, providing little guidance to the Commerce Commission or to a Court required to hear a judicial review proceeding (or merits review, if this is introduced). Part 4A provides more guidance at a very general level on the purpose of each subpart, but still gives remarkably little guidance on relevant factors to be considered or approaches to be adopted, when making decisions on control.

The quality of decision-making, and effective accountability, would be much improved if policy makers provided more explicit structure and guidance on how these powers are intended to be exercised, rather than leaving these matters implicit (creating a real risk that they may be misunderstood) or, less satisfactory still, unresolved.

Of course it is necessary to leave decision-makers with flexibility to craft solutions for particular circumstances. But I suspect we can go further in specifying key factors and “normal” approaches, with safety valves for unusual cases. This would reduce uncertainty for all concerned, and reduce cost and increase quality at all stages of the process: primary decision-making, judicial review and merits review.

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