Review of funding for the regulation under the Telecommunications Act 2001

Feedback | Commerce Commission

12 February 2021

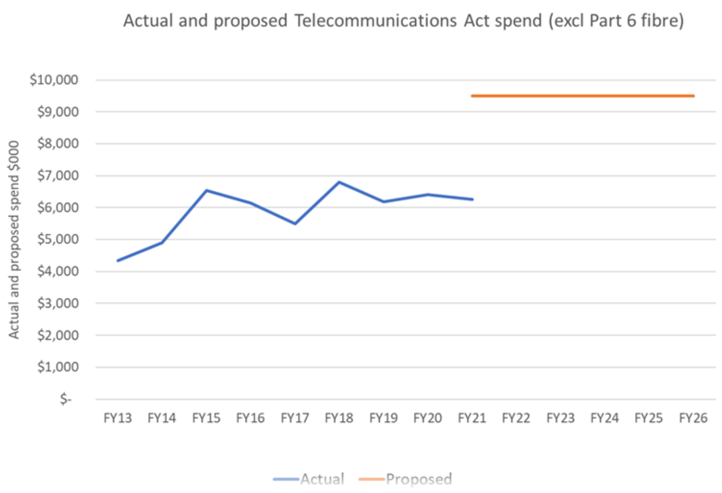
Contents

Executive summary

Thank you for the opportunity to comment on the Commission's funding of Telecommunications Act activities discussion paper (**the discussion paper**).

The discussion paper proposes a significant 50% plus increase in the cost of telecommunications related activities – and that these additional costs be funded through an industry levy.   We agree that the Commission's activities must be appropriately funded. However, this increase comes at a time when firms and our customers face significant economic pressure and key information that would enable the Commission to scope the medium-term resources needed is not available.

Figure 1: telecommunications actual and proposed spend (excluding Part 6)



Key dependencies have yet to be resolved

While we support the Commission considering its regulatory objectives and approach, in our view it is too early for the Commission to lock-in a significant increase in medium term resourcing and levy funding requirements of this nature. The Commission is in the process of establishing a new regulatory framework and a number of key issues that will determine ongoing resourcing remain uncertain, for example:

- The Commission involvement in developing retail service quality (**RSQ**) codes. The RSQ framework was designed as an industry led approach - reinforced by a creditable regulatory threat from the Commission[1]. Right now the Commission is only at the stage of seeking to understand consumer concerns, and has barely even begun working with the industry to develop codes let alone moved to a point where it can consider using its residual powers.

- The degree to which the resources previously used to administer regulated copper services are freed up for new Commission functions. The clear expectation through the legislative amendment process in 2017-18 was that, as the Commission is no longer required to actively regulate copper services, resources would be available for new fibre and retail regulation. For example, new monitoring obligations were expected to require an additional 1 – 2 full time Commission employees plus administrative costs, but these costs were expected to be met within existing resources[2].

Accordingly, current funding should remain for the immediate term until it is clear that there is a need for additional resources. The key RSQ and PQR resourcing dependencies are expected to be

[1] Para 84 of RIS
[2] Para 66 of RIS https://www.mbie.govt.nz/assets/512ad8c91a/telco-review-ris-consumer-matters.pdf

resolved over the coming year and this means the Commission should aim to finalise its ongoing funding needs for the June 2022 year rather than this year as proposed.

Deferring finalising funding will not delay Commission activity as Commission's actual funding will continue to be reviewed and set through the Government budget process[3] in any case (with the Government levying he industry), and in the past the Commission has routinely managed fluctuations in workload between areas and years within the existing funding.

The Commission and industry should engage further on programme funding

At this stage, it is further unclear whether the proposed programme should be fully funded through an industry levy or other sources. Aiming to finalise medium term resourcing by 2022 would enable parties to engage with officials on appropriate funding options consistent with the Act and Government guidelines.

The Commission is funded through a combination of direct Government funding, indirect Government funding through an industry levy and Commission fees. However, the Minister can only levy the industry for the Commission to perform its functions and duties, or exercise powers, under the Act. On the face of it,

- Some of the planned activities do not fit comfortability with an industry levy and, in principle, should be funded from other sources such as directly by Government. The discussion paper highlights, for example, that the Commission provides general regulatory and policy advice to the Government. Where this advice does not relate directly to the operational implications of proposals – this would be better funded directly by Government[4].

  Further, it's unclear whether the increased Commission costs due to new responsibilities in other sectors, or consumer initiatives additional to Part 7, can be funded through an industry levy.

- The proposals would commit the industry to over $40M of additional costs and, prior to doing that, we should resolve underlying concerns with the current levy approach. The telecommunications levy is not an efficient means of recovering regulatory costs - the current revenue-based approach is administratively expensive, does not apply to all providers and lacks transparency for consumers.

  We should ensure that any substantive new industry cost is implemented at the same time as a more efficient levy approach.

[3] See Vote Business, Science and Innovation
[4] Commission reports suggest that for the 5 years through to 2017 (when the Commission stopped reporting this breakdown), about 40% of Commission expenditure related to public reports and policy advice.

Introduction

1. Thank you for the opportunity to comment on the Commission's 10 December 2020 funding discussion paper (**the discussion paper**). The Commission is developing a funding proposal for regulatory activity that will, ultimately, be funded by consumers through higher prices for telecommunications services.

2. We support the objectives of the Act and the role of the Commission in facilitating the outcomes of competitive telecommunications market, where appropriate. The Commission should be properly funded in order to perform its responsibilities under the Act - including 9A market monitoring and studies, regulation of specified and declared services, oversight of retail service quality and applying the fibre regulatory framework – and provide advice or take on new roles as requested by Government.

3. However, in this submission we note that the discussion paper comes at a time when the industry and our customers face significant economic pressure and many of the key elements of the framework that would allow Commission to properly scope its medium-term resource requirements have yet to be resolved. Now is not the time to impose substantial increases in levies.

4. The Commission should aim to finalise its medium-term approach for the 2022 year when the uncertainties are expected to be resolved. The intervening period could be used to consider more fully the appropriate split between funding sources – whether funding for an activity is via direct Government funding, indirect Government funding through the industry levy or Commission fees – and for the industry to engage with officials to improve the levy itself. The levy is not an efficient means to fund the Commission activities and the medium-term obligations should not be locked in without considering underlying problems with the levy.

The paper anticipates a significant increase in spend

5. We agree that the Commission has specific roles under the Act that require funding.

6. But the discussion paper signals a significant increase in activity and spend – increasing Commerce Commission spend by over 250% from expected BAU activity – that was not expected at the time the regulatory framework was put in place and is not consistent with what we see in the market.

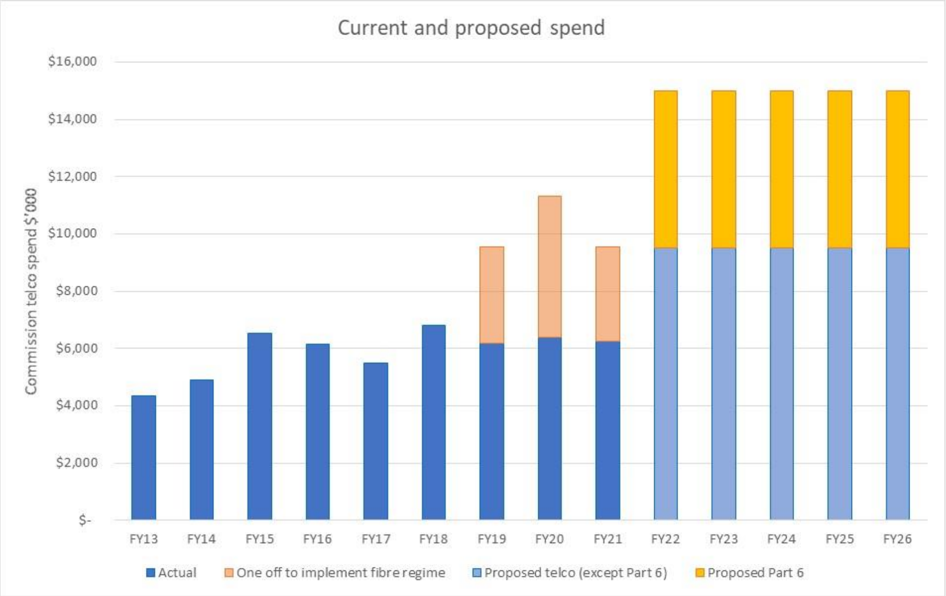
7. Figure 2 sets out the Commission's actual and proposed spend on Telecommunications Act responsibilities. The Commission typically spends around $6M per annum on this activity. The Government agreed in May 2019 to a temporary increase in Commission funding ($12.3M over four years) to implement the new regulatory framework. Following implementation of the new regime, it was made clear that Commission funding for telecommunications regulatory would revert to the original $6m level[5].

8. While the Commission should be funded appropriately to perform its obligation under the Act, the discussion paper anticipates a significant increase in telecommunications related spend.

[5] Para 27 https://www.mbie.govt.nz/dmsdocument/5728-changes-to-the-telecommunications-regulatory-levy-to-fund-new-commerce-commission-regulatory-work-proactiverelease-pdf

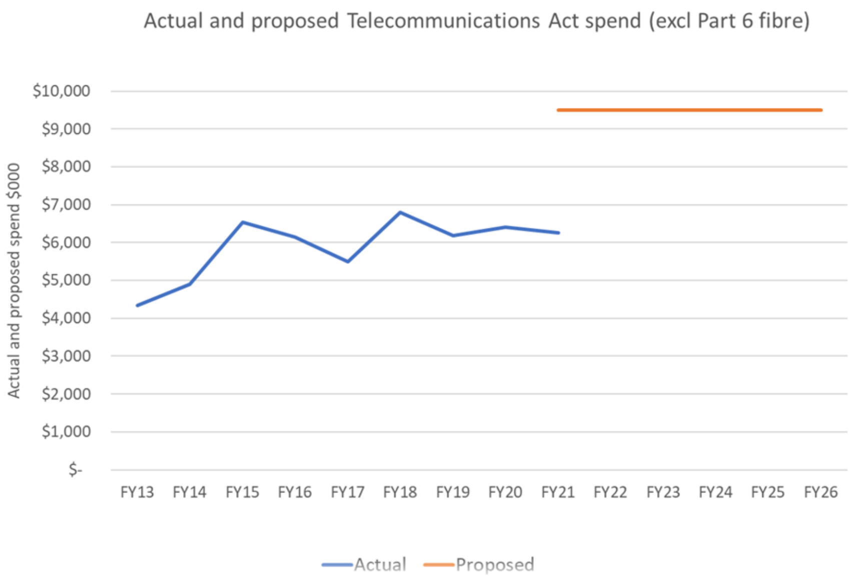
The discussion paper proposals would add $44M costs to the sector over 5 years over and above the $31M of existing funding[6].

Figure 2: telecommunications actual and proposed spend



9. Setting aside the costs to administer Part 6, the paper proposes that the industry levy increase from around $6M to $9.5M per annum. This is a significant increase in industry costs.

Figure 1: telecommunications actual and proposed spend (excluding Part 6)



10. We operate in an increasingly competitive market – with more service providers, more innovative services, and lower prices every year – and expect to see less rather than more regulatory oversight and cost. At the same time, we are at the initial phase on a new regulatory framework that we should be given time to see results - bottleneck fibre networks are regulated

[6] $6.25M 2021 budget funding over 5 years

under a new regime which was expected to stabilise regulation and reduce costs and we are only at the stage of starting to measure consumer outcomes and concerns.

Key dependencies have yet to be resolved

11. We support the Commission considering its regulatory objectives and approach – the Commission should have a long-term view on how it will approach its duties under the Act.

12. However, the Commission is in the process of implementing the new regulatory framework and key elements of that framework that determine the Commission's future resourcing requirements have yet to be solved.

13. We don't support the establishment of a funding envelope (for possible spend) with contingent industry liabilities. Liable parties need confidence in their levy liabilities over time so they can plan to reflect the implications in their businesses and in pricing to customers. Our ability to efficiently reflect levy costs to customers is already limited, let alone a retrospective levy that might fluctuate from year to year.

RSQ requirements are not yet clear

14. The discussion paper highlights that a substantive component of future requirements is for the retail service quality (**RSQ**) framework.

15. We agree that the Commission has an important role in the RSQ framework. But the RSQ framework was specifically designed to be an industry led approach - reinforced by a creditable regulatory threat from the Commission[7]. The Minister outlined a phased approach in her recommendation to Cabinet that the legislation would create powers to establish regulatory codes to improve retail service quality if industry self-regulation is shown to be inadequate[8].

16. Right now the Commission is only at the stage of seeking to understand consumer concerns[9], and has barely even begun working with the industry to develop codes let alone moved to a point where it can consider using its residual powers. Therefore, we cannot yet know what the medium-term requirements and required Commission resources are to administer the anticipated codes. It would be concerning if the Commission approach anticipates further Commission intervention when the process anticipated by the Act has yet to be completed. It risks undermining the TCF process.

17. The discussion paper further appears to anticipate a significant upgrade to coverage and network performance reporting, specific consumer assistance measures and increased pro-active compliance activity. However, as explained in the RIS, the Government considered at the time of the 2017-18 reforms that Commission retail service reporting, and the backstop ability to develop regulated codes, was a proportionate response to consumer concerns[10].

18. In the end, we simply don't have enough information to determine whether the proposed initiatives and costs are justified. We do not support creating a fund that the Commission can draw on the off chance that the resources and funding are necessary in the future.

19. Accordingly, the Commission should revisit its resource requirements for RSQ purposes at the time consultation and analysis of retail consumer quality concerns have been completed, and it

[7] Para 84 of RIS
[8] https://www.mbie.govt.nz/dmsdocument/1310-telco-review-cabinet-paper-may-2017-pdf
[9] The Commission is currently consulting on consumer pain points and holding consumer workshops
[10] Para 96 https://www.mbie.govt.nz/assets/512ad8c91a/telco-review-ris-consumer-matters.pdf

becomes clear that there are residual RSQ or general compliance concerns that require additional Commission effort to solve.

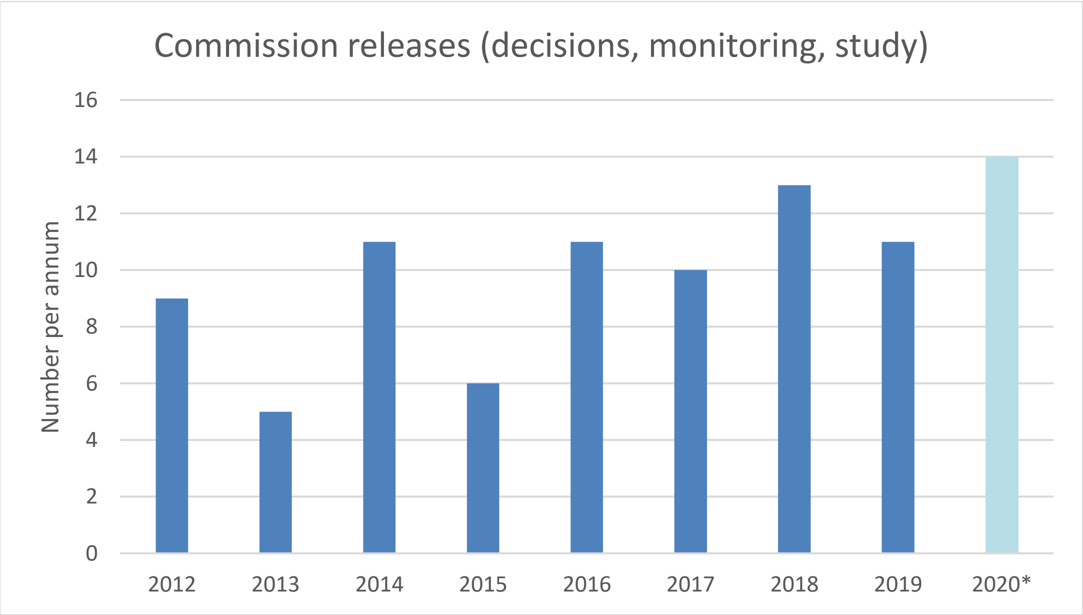
The discussion paper seems to assume that activity is not covered by current funding

20. Further, at this stage there is nothing to suggest that new Commission functions cannot be accommodated within the existing appropriation.

21. The Commission undertook a significant work programme prior to FY18 when the Act was amended, including determining a benchmark and TSLRIC copper prices, establishing broadband performance reporting, publishing consumer information, administering codes, competition and market reviews, and investigating significant competition matters such as Chorus' Boost broadband initiative.

22. Analysis of Commission releases through to 2020 highlights the significant number of key decisions, market monitoring reports and studies considered by the Commission within the existing funding framework, and Commission ability to manage workload within years (2013 and 2015 being the substantial IPP and FPP pricing decisions).

Figure 3: substantive Commission releases over time (exclude progress report or calls for submissions)[11]



23. The new framework requires the Commission to implement Part 6 fibre and Part 7 consumer regimes. Some functions remained unchanged, for example the Commission would continue to monitor the market, determine TDL levies, and review and amend industry codes. However, at the same as the Commission picked up new functions, regulated copper services were omitted from the Act or grandfathered, and the Commission would not be required to review terms and conditions or undertake Schedule 3 reviews for these services.

24. The expectation was that, as the Commission is no longer required to actively regulated copper services, resources would be available for new fibre regulation. For example, new monitoring

[11] *2020 includes fibre IMs

obligations were expected to require an additional 1 – 2 full time Commission employees plus administrative costs, but these costs were expected to be met within existing resources[12].

25. Attachment 1 highlights Commission functions and duties prior to the 2018 amendments, and how this have been displaced by the fibre-based framework. There is little to suggest that the Commission has expanded functions and role in the sector, rather than a refocus and transfer from copper to fibre regulated services. We believe that the Commission should first look to undertake its activities within existing funding before seeking additional funding from the industry.

The Commission should aim to identify medium term resource requirements for the 2022 year

26. Accordingly, it remains unclear what additional Commission resourcing and funding is required to administer the new telecommunications framework. A number of the uncertainties relating to the RSQ framework will be resolved - and resource implications of copper deregulation will become clearer - over the coming year.

27. Therefore, we recommend that the Commission aim to resolve its medium-term resourcing for June 2022 year rather than this year as proposed. A measured approach is unlikely to delay activity in any case as the Commission's funding requirements continue to be reviewed and set through the Government budget process[13], and the Commission further routinely manages fluctuations in workload between areas and years without significant increases in funding being required.

Further engaging on programme funding

28. Deferring medium term funding decisions until the 2022 year, would also allow the industry and Commission to engage officials on appropriate funding of the programme and underlying concerns with the current levy.

Programme funding

29. The discussion paper highlights that the Commission has specific functions under the Act, and also provides wider advice to Government and consumers.

30. The Commission is funded for these activities through a combination of direct Government funding, indirect Government funding through an industry levy and Commission fees. However, the Minister can only levy the industry for the Commission to perform its functions and duties, or exercise powers, under the Act.

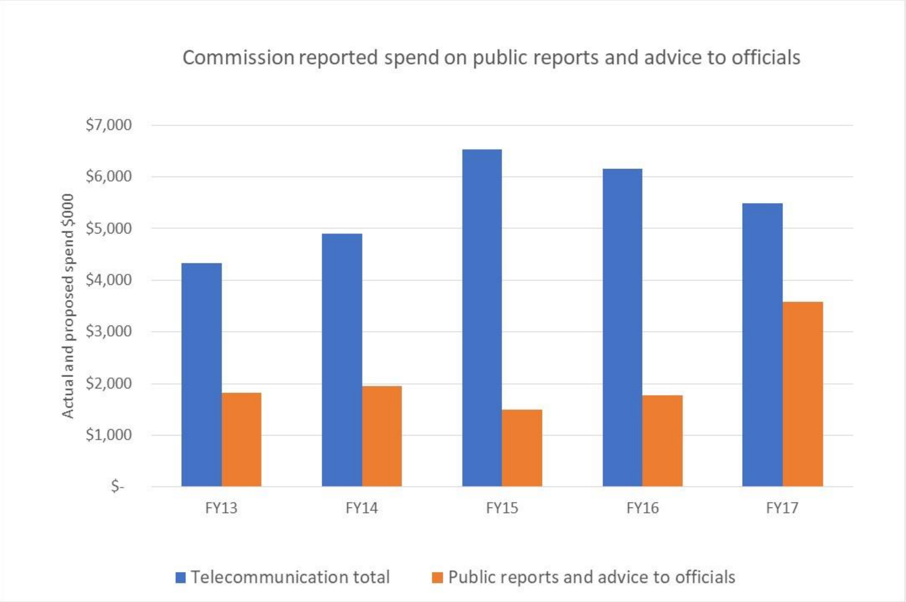
31. We believe the proposed programme should be funded, in part, through other sources rather than through the telecommunications industry levy, i.e. directly by Government (rather than indirectly via the levy) or by sectors that have driven additional Commission costs. The proposed regulatory programme likely includes initiatives that do not fit comfortably within the industry levy. For example, the discussion paper appears to:

    a. Anticipate the Commission continuing to provide general regulatory and policy advice to the Government, and this be funded through the industry levy. However, general competition and regulatory advice – except feedback on the specific operational implications of policy proposals - is likely appropriately funded directly by Government rather than through an industry levy.

[12] Para 66 of RIS https://www.mbie.govt.nz/assets/512ad8c91a/telco-review-ris-consumer-matters.pdf
[13] See Vote Business, Science and Innovation

The provision of policy advice can be material cost item. For example, as outlined in Figure 4, the Commission reported that around 40% of costs incurred through to 2017 were associated with the provision of public reports and advice to officials[14].

Figure 4: Reported spend on public reports and advice to officials[15]



b. Suggest a more pro-active engagement to influence consumer behaviour beyond publishing information and RSQ codes, to remove barriers to competition, to pursue a network coverage and resilience objective, and to engage in spectrum allocation policy. While these are important industry and consumer issues - and setting aside whether the Commission focus should remain on competition rather than specific market outcomes - the Government can only recover specific costs of interventions provided for in the Act through the industry levy.

The proposed programme appears to include initiatives beyond the specific activities set out in the Act and alternative funding may be necessary.

c. Suggest that the telecommunications industry levy should contribute to the costs of strengthening the impact of the Commission in markets and increasing Commission responsibilities as it grew from 180 to 250 staff[16]. The Government announced $41.8M of additional funding over four years for Strengthening the impact of the Commerce Commission[17], applied to Competition Studies, enforcement of Dairy, Fair Trading Act and CCA regulation, Liquid fuels monitoring and enforcement, and boosting Commission litigation funds[18].

[14] Commission reports suggest that for the 5 years through to 2017 (when the Commission stopped reporting this breakdown), about 40% of Commission expenditure related to public reports and policy advice.
[15] From Commission annual reports – the public reports and advice to officials break out was only provided through to 2017
[16] See para 138 and 139 of the paper
[17] See Budget page 27 and 56 http://spada.co.nz/assets/b20-wellbeing-budget.pdf
[18] See Cabinet minute at page 18 https://www.treasury.govt.nz/sites/default/files/2020-07/b20-cab-20-min-0155-05-4275938.pdf and detailed in Budget 2020 estimates under funded activities https://www.treasury.govt.nz/publications/estimates/vote-business-science-and-innovation-economic-development-and-infrastructure-sector-estimates-2020-21

The relationship between Commission functions under the Act, Strengthening of the Commission anticipated by budget (which relates to specific initiatives in other sectors), and any new initiative to strengthen the Commission impact in telecommunications markets is unclear. However, whatever the driver, only the costs associated with Commission functions and duties set out in the Act can be recovered through the industry levy.

32. Overall, the additional time could be used to consider the appropriate funding sources for new Commission initiatives, applying the requirements of the Act[19] and Treasury guidelines[20]. It is unclear to us that the telecommunications industry and consumers should fully bear the burden of the Commission workload.

An inefficient levy

33. Further, the industry should further engage with officials to amend the structure of the levy.

34. At the same time as the proposal committing the industry to an additional $40M cost over 5 years, there is increasing industry concerns with the underlying levy.

35. The telecommunications levy is inefficient means of recovering regulatory costs:

    a. The revenue-based approach is administratively expensive for the Commission an levy payers to apply;

    b. The levy liability is determined retrospective and only indirectly related to the services that retailers sell making it difficult to pass through to consumers;

    c. The levy only applies to some service providers, meaning that it is distortionary in the market; and

    d. Lacks transparency for consumers.

36. This means that more of the cost is trapped with operators, reducing industry returns and operators ability to fund innovation. While the levy is ultimately recovered from consumers, in this case that recovery is more likely to be through higher prices and reduced innovation and services than should be the case. The industry should engage with officials to identify a more efficient means of levying the industry.

37. A more efficient approach would likely reduce operator concerns with additional costs.

[End]

[19] The funding approach should be consistent with the Act and considerations of Legislation Design and Advisory Committee Guidelines chapter 14 and 17 http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/

20 For example, the Treasury Guidelines for Setting Charges in the Public Service at section 5.3 https://www.treasury.govt.nz/sites/default/files/2017-04/settingcharges-apr17.pdf

Attachment 1: proposed activities and activities funded under the original appropriation

The Commission had significant telecommunications responsibilities prior to the new framework. As part of those reforms and shift from regulating copper to fibre services, a number of responsibilities were omitted from the Act (in brackets).

Domain	FY13-FY21 $6M per annum	Planned activity FY22-26 $9.5M per annum
Setting and removing rules	• [5 yearly reviews of schedule 1 services] in part as many services removed] • Establish 111 and Copper withdrawal codes • Determine Specified fibre areas • Establish Fibre points of interconnection • [Reviewed and amended multiple copper determinations] • [Copper UCLL, UBA major pricing reviews[21]] • Review and amend regulated customer transfer codes • [Competition reviews: Resale services, PSTN, Backhaul and MTAS] • [Averaged [2] major reviews/determinations per annum] • Administer TDL	• 5 yearly reviews of schedule 1 services (incl. SMS) [97] • Administer 111 and Copper withdrawal codes [98] • Annual review of specified areas [99] • Reviews or amendments to residual determinations [100] • Working with industry to put in place codes that address the frictions that consumers have navigating product offerings [86]. • Where appropriate, put in place RSQ codes [101] • Copper review [102] • Administer TDL [103][22]
Analytics and insight	• Multiple studies and reviews to understand market, competition and consumer outcomes, i.e. backhaul, mobile, fibre and [xx] reviews. • Consumer research • Broadband performance reporting	• Coverage gaps and asset management practices [78.4] • Consumer information and behavioural work [104] • Consumer information requirements [84, 106] • Coverage and performance of networks reporting [87] • Mobile coverage and performance data [105] • Sub-national picture of state of infrastructure and competition [107]
Compliance and enforcement	• Monitoring of compliance with the Act, Codes and Deeds • Publication of guidelines and STD reviews • Engaged stakeholders on issues such as TDRS, broadband reporting	• Increased monitoring of compliance with the Act, Codes and Deeds [108] • Provide further guidance [109] • Review of disputes resolution scheme [110]

[21] The amended Act prohibits the Commission from reviewing or amending copper services
[22] Referenced broadcasting changes will have been implemented by the time of the planning period