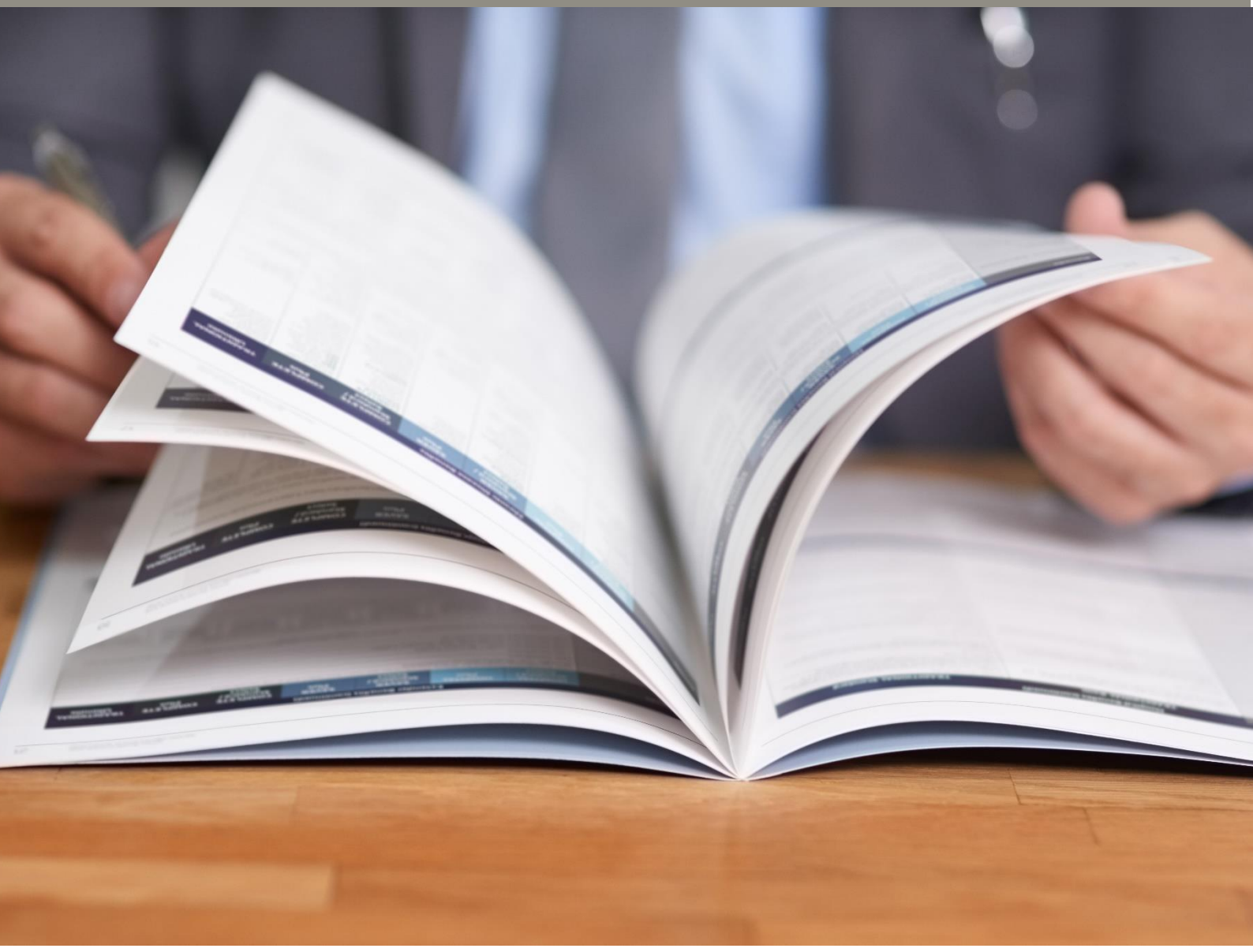


# Framework for reasonable grounds assessments

Under Schedule 3 and section 210 of the  
Telecommunications Act 2001

17 June 2025



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# Chapter 1 Introduction

## Purpose of this paper

- 1.1 This paper sets out the Commerce Commission (**Commission**)’s legal and economic framework for assessing whether there are reasonable grounds to commence an investigation into the regulation of designated or specified services, and regulated fibre fixed line access services under:
  - 1.1.1 Section 210 of the Telecommunications Act 2001 (the **Act**);
  - 1.1.2 Schedule 3, Part 1, clauses 1(1) and 1(3) of the Act.
- 1.2 The purpose of this framework is to promote consistency and transparency in the Commission’s reasonable grounds assessments under these provisions. The framework is consistent with that which has been applied in our most recent reasonable grounds assessments.<sup>1</sup>
- 1.3 We note that some differences exist between section 210 and the provisions of Schedule 3. However, in our view, a consistent approach is appropriate due to the similarities between the relevant sections and the requirement for both reviews to consider the forward-looking role of regulation in telecommunications markets.
- 1.4 This paper contains four chapters:
  - 1.4.1 Chapter 1 is this introduction.
  - 1.4.2 Chapter 2 provides the legal and economic framework.
  - 1.4.3 Chapter 3 describes the evidence the Commission will consider in applying the framework.

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<sup>1</sup> Commerce Commission, “[Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act Reasonable grounds assessment final decision](#)” (19 December 2024); Commerce Commission “[Review of Mobile Termination Access Service \(MTAS\) Final decision on whether to commence an investigation under clause 1\(3\) of Schedule 3 of the Telecommunications Act - Reasonable grounds assessment final decision](#)” (25 March 2025).

# Chapter 2 Reasonable grounds assessment framework

## Legal framework - background

2.1 Schedule 1 of the Act sets out designated services<sup>2</sup> (where the Commission regulates nonprice and price terms) and specified services (where the Commission regulates nonprice terms).<sup>3</sup>

2.2 Clause 1(1) of Schedule 3 of the Act sets out:

The Commission may, on its own initiative or if requested to do so in writing by the Minister, commence an investigation into whether or not [Schedule 1](#) should be altered in any of the ways set out in [section 66](#) or [67](#) (the **proposed alteration**) if the Commission is satisfied that there are reasonable grounds for an investigation into the matter.

2.3 In other words, under clause 1(1), the Commission has a power to initiate, at any time, an investigation into whether a new service should be added to Schedule 1, or whether an existing service should be amended or omitted, if we are satisfied that there are reasonable grounds for an investigation into the matter.

2.4 The Commission has a separate obligation under clause 1(3) of Schedule 3 to consider at intervals of not more than 5 years whether there are reasonable grounds for commencing an investigation into whether the regulated service should be omitted from Schedule 1. Clause 1(3) of Schedule 3 of the Act requires that:

Despite subclause (1), the Commission must consider, at intervals of not more than 5 years after the date on which a designated service or specified service came into force, whether there are reasonable grounds for commencing an investigation into whether the service should be omitted from Schedule 1 under section 66(1)(b).<sup>4</sup>

2.5 Since 1 January 2022, providers of regulated fibre fixed line access services (**FFLAS**)<sup>5</sup> have been subject to regulation under Part 6 of the Act. Section 210 provides for a review of this regulation at specified periods and on the Commission's own initiative. Section 210 states:

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<sup>2</sup> "Designated service" means "a designated access service or designated multinet network service". "Designated access service means a service described in [subpart 1](#) of [Part 2](#) of Schedule 1". "Designated multinet network service means a service described in [subpart 2](#) of [Part 2](#) of Schedule 1".

<sup>3</sup> "Specified service" means "a service described in [Part 3](#) of Schedule 1".

<sup>4</sup> Section 66(b) of the Act sets out that "(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, amend [Part 2](#), or [Part 3](#), of Schedule 1 by— (b) omitting a telecommunications service from the Part.

<sup>5</sup> "Fibre fixed line access services" means:

(1) The Commission may, at any time after the implementation date, review how 1 or more fibre fixed line access services are regulated under this Part if the Commission has reasonable grounds to consider that those services—

- (a) should no longer be regulated under this Part; or
- (b) should no longer be subject to price-quality regulation under this Part.

(3) The Commission must, before the start of each regulatory period (except the first regulatory period), consider whether there are reasonable grounds to start a review.

**2.6 In reaching our decisions under Schedule 3, section 19 of the Act requires us to make the decision that will give, or is likely to best give, effect to the purpose set out in section 18 of the Act. The section 18 purpose is:**

to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.

**2.7 Section 18(2) and (2A) identify particular matters that the Commission is required to consider when determining what promotes competition in telecommunications markets for the long-term benefit of end-users:**

(2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.

(2A) To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services.

**2.8 The High Court has observed that section 18(1) is the “dominant” provision in section 18, and subsections (2) and (2A) “are specified for the purpose of assisting analysis under section 18(1)”.<sup>6</sup> In this sense, subsections (2) and (2A) are not isolated considerations on their own. Rather, they form part of the consideration of whether competition is for the long-term benefit of end-users.**

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(a) means a telecommunications service that enables access to, and interconnection with, a regulated fibre service provider’s fibre network; but

(b) does not include the following:

(i) a telecommunications service provided by a regulated fibre service provider (F) if the ultimate recipient of the service is F or a related party of F (as if the test for related parties were the same as the test in section 69U, applied with any necessary modifications).

(ii) a telecommunications service provided, in any part other than a part located within an end-user’s premises or building, over a copper line.

<sup>6</sup> [\*Chorus Ltd v Commerce Commission\*](#) [2014] NZHC 690 at [34].

- 2.9 Similarly, in reaching a view on whether there are reasonable grounds for commencing a section 210 review, the Commission must make the decision that will give, or is likely to best give, effect to the purpose. For Part 6 this is contained in section 162 of the Act:

The purpose of this Part is to promote the long-term benefit of end-users in markets for fibre fixed line access services by promoting outcomes that are consistent with outcomes produced in workably competitive markets so that regulated fibre service providers—

- (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
- (b) have incentives to improve efficiency and supply fibre fixed line access services of a quality that reflects end-user demands; and
- (c) allow end-users to share the benefits of efficiency gains in the supply of fibre fixed line access services, including through lower prices; and
- (d) are limited in their ability to extract excessive profits.

- 2.10 Section 166 of the Act also requires that, in making a recommendation, determination or decision under Part 6, including in relation to reviews under s 210, we are required to consider the matters outlined in s 166. These matters are as follows:

- (a) to the purpose in section 162; and
- (b) to the extent that the Commission or Minister considers it relevant, to the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services.

- 2.11 Our assessment of whether there are reasonable grounds to start a section 210 review will also consider the factors listed in section 210(4) of the Act:

A review may consider the following:

- (a) whether competition to 1 or more fibre fixed line access services has increased or decreased in a relevant market;
- (b) the impact of any increase or decrease on the ability of regulated fibre service providers to exercise substantial market power;
- (c) whether the purpose of this Part would be better met if 1 or more fibre fixed line access services:
  - (i) were no longer regulated under this Part; or
  - (ii) were no longer subject to price-quality regulation under this Part.

## Legal framework

- 2.12 In carrying out a reasonable grounds assessment under the provisions identified above, the Commission will consider whether an investigation or review is warranted on an objective basis.
- 2.13 We will approach this in the round, considering whether, based on the evidence before us, there is at least a realistic possibility that following an investigation or review we would find that the service in question should be:
- (i) added to schedule 1 (in the context of clause 1(1) only);
  - (ii) subject to amended regulation (in the context of clause 1(1) only);
  - (ii) no longer regulated (in the context of clause 1(1), 1(3) and section 210); or
  - (iii) no longer subject to Price-quality (PQ) regulation (in the context of section 210 only), having regard to the purpose of the regulation.
- 2.14 Our assessment is forward-looking, taking account of present and expected market conditions with and without regulation.
- 2.15 Where we are considering amending or removing existing regulation, and where it will inform our assessment, we may compare these market conditions to those that prevailed when the relevant service became subject to regulation.
- 2.16 We may also take into consideration the costs and benefits of altering or removing regulation and of carrying out the investigation where this is a relevant factor.

## Economic framework

- 2.17 This section sets out the economic framework we will apply to our reasonable grounds assessments.
- 2.18 This is split into four key steps, which are informed by the approach taken by previous Schedule 3 reviews and the requirements under section 210(4) the Act regarding a FFLAS deregulation review, particularly section 210(4).
- 2.19 The four steps are as follows:
- 2.19.1 description of the service (step 1);
  - 2.19.2 the identification of alternatives (step 2);
  - 2.19.3 considering the effectiveness of competition in the relevant markets including the effect of competition on substantial market power (step 3); and

- 2.19.4 applying the legal framework, including testing alignment with the purpose of the regulation (step 4).
- 2.20 While these steps provide guidance on how we intend to carry out our reasonable grounds assessment, we note that:
  - 2.20.1 where it is impractical and/or unnecessary to undertake analysis at a step, we may make modifications to how we approach that step, or we may elect not to apply that step,<sup>7</sup> for example:
    - 2.20.1.1 where no alternatives exist we may not assess competition; or
    - 2.20.1.2 where a regulated service facilitates competition, for example by reducing barriers to switching (such as number portability which is a shared platform that enables consumers to take their telephone numbers with them when they switch providers), we may focus our assessment on the competition that the service facilitates.
  - 2.21 there might be other relevant considerations that should apply to each decision.

*Description of the service (step 1)*

- 2.22 Our first step is to describe the service and the purpose it serves. Doing this involves considering three key elements:
  - 2.22.1 First, the Commission starts with how the service is described, including any descriptions in the Act and any regulatory decisions (if applicable),<sup>8</sup> as this directs (and informs) the role it is intended to play in the market.
  - 2.22.2 Second, the Commission considers what the service is used for (the product dimension). There may be multiple uses at different levels of the value chain (i.e., wholesale and retail) that are influenced by the service (the functional dimension).
  - 2.22.3 Third, the Commission assesses any geographic constraints to providing the service (the geographic dimension), which, alongside step below, informs whether our competition analysis should be undertaken at a national level, or if a more granular approach is more appropriate.

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<sup>7</sup> This is subject to various considerations, including the nature and type of specific regulated service in question.

<sup>8</sup> When we are considering adding a service to schedule 1, there may not be any existing service descriptions in the Act or regulatory decisions. In such cases, we would describe the service intended to be added and views would be sought on the proposed description.



- 2.23 In certain instances, we may identify dependencies between services, such as where one is unlikely to be used without another, or where the regulation/deregulation of one service is impractical without the regulation/deregulation of others (due to actual or potential consumer harm). Such dependencies may guide how we undertake our analysis.

*Identification of alternative services (step 2)*

- 2.24 The Commission will consider any alternatives that could provide direct and indirect competitive constraints to the service, including in downstream retail markets.<sup>9</sup>
- 2.25 We view steps 1 and 2 as defining the relevant market(s) for the purposes of assessing reasonable grounds.<sup>10</sup>

*Effectiveness of competition (step 3)*

- 2.26 The Commission will consider how much competition the service faces and could be expected to face into the foreseeable future with and without regulation. This may include analysis of factors such as:
- 2.26.1 whether the alternatives identified in step 2 rely on the service;
  - 2.26.2 market structure and trends;
  - 2.26.3 the extent to which identified alternatives represent (sufficiently) close substitutes to the service including their availability and performance (the same applies for alternatives in downstream markets constraining services using the service being reviewed);
  - 2.26.4 actual demand and switching behaviour by access seekers (Retail Service Providers (RSPs) and end-users); and
  - 2.26.5 any other factors that may constrain the providers from raising prices.

*Application of the legal framework, including testing alignment with the purpose (step 4)*

- 2.27 We will consider whether, for the service described in step 1, there is at least a realistic possibility that following an investigation or review we would find that the service should either be (i) added to the Act, (ii) subject to amended regulation or (iii) no longer regulated or subject to PQ regulation, as applicable, to best promote the statutory purpose.

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<sup>9</sup> A downstream market is one further down the supply chain. In the case of telecommunications, the retail broadband market (where the end-user buys a broadband service) is downstream from the wholesale broadband market (where a wholesaler sells a broadband service to an RSP who then on sells it to the end-user).

<sup>10</sup> Defining markets is a distinct step in several review frameworks. However, we deem it most appropriate to combine this into steps 1 and 2 for ease of understanding. For further information on market definition, see Commerce Commission, "[Mergers and acquisitions Guidelines](#)" (May 2022), see Chapter 3.

- 2.28 This will include an assessment of whether or not the relevant purpose is best promoted by continuing to regulate the service, relative to a counterfactual where the service is not regulated (a with/without assessment).
- 2.29 We will consider this in the round, taking account of any alternatives identified in step 2 and the assessment of the effectiveness of competition faced by the service (step 3).

## **Chapter 3      Evidence for assessment**

- 3.1      The Commission will consider whether an investigation or review is warranted on an objective basis, based on the evidence before us. We will use available information in exercising our judgement, including drawing on our knowledge and experience in the services in question and in making reasonable grounds assessments, drawing on market insights gained through engagement with market participants and using information obtained as part of our market and consumer monitoring.
- 3.2      Where we consider it necessary for a particular assessment, we may seek additional information from relevant parties.