

Hon Judith Collins KC

Attorney General
Minister of Defence
Minister for Digitising Government
Minister Responsible for the GCSB
Minister Responsible for the NZSIS
Minister of Science, Innovation and Technology
Minister for Space



Official Secretary
Office of the Governor-General
WELLINGTON

APPOINTMENT OF LAY MEMBERS OF THE HIGH COURT

I **attach** for reference to the Governor-General, papers relating to the appointment of:

- Dr Darryn Abraham
- Philip Barry
- Professor Hendrik Berkman
- Dr Richard Meade
- Professor Martin Richardson
- Edward Willett

as lay members of the High Court.

The appointments are made under section 77(1) of the Commerce Act 1986. The legislation requires the candidates to be qualified, in the Governor-General's opinion, for appointment by virtue of that person's knowledge or experience in industry, commerce, economics, law or accountancy. Biographical information is contained in the **enclosed** curricula vitae.

I **enclose** an advice sheet addressed to the Governor-General requesting that she make the appointments.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Judith Collins'.

Hon Judith Collins KC
Attorney-General

Encl Advice sheet

Curricula vitae for proposed appointment



Wellington, 19/11/2024

Her Excellency the Governor-General is respectfully advised to appoint,
pursuant to section 77 of the Commerce Act 1986

Professor Martin Richardson, Australian Capital Territory, Australia
Dr Darryn Abraham, Australian Capital Territory, Australia
Dr Richard Meade, Auckland, New Zealand
Philip Barry, Lower Hutt, New Zealand
Edward Willett, Sydney, Australia
Professor Hendrik Berkman, Auckland, New Zealand

as lay members of the High Court for a term of five years, to take effect on the date of appointment.

Hon Judith Collins KC
Attorney-General

Appointed

Governor-General

22/11/24



To:

Professor Martin Richardson

**Emeritus Professor, The Australian National
University, of Australian Capital Territory, Australia,
Greeting!**

I, the Governor-General of New Zealand, being of the opinion that you are qualified for appointment, in pursuance and exercise of the power and authority conferred by section 77 of the Commerce Act 1986 do hereby appoint you, the said

Professor Martin Richardson

a lay member of the High Court for a term of five years, to take effect on the date of this appointment.

Given under the hand of Our Trusty and Well-beloved The Right Honourable Dame Cindy Kiro, Chancellor and Principal Dame Grand Companion of Our New Zealand Order of Merit, Principal Companion of Our Service Order, Governor-General and Commander-in-Chief in and over Our Realm of New Zealand and issued under the Seal of New Zealand this 22 day of November two thousand and twenty-four.

A handwritten signature in blue ink, appearing to read 'Cindy Kiro'.

Governor-General

22 / 11 / 2024

Lay Member of the High Court under the Commerce Act 1986 Vacancies

The Ministry of Business, Innovation and Employment is seeking candidates who wish to be considered for appointment to the pool of lay members under the *Commerce Act 1986* for competition and regulatory cases. Multiple candidates may be appointed as a result of this search.

This is an 'as required' position. Once appointed to the pool, lay members may be considered for appointment to sit with a High Court judge to determine specified cases and appeals from Commerce Commission determinations. A lay member becomes a member of the Court for the purposes of the case. Lay members play a key role in ensuring that expert evidence on complex competition or regulation issues is properly understood, tested and assessed by the Court. A lay member must take an oath to faithfully and impartially perform the duties of their office.

At this time, the Ministry is looking for candidates who have expertise relevant to competition or regulatory cases or both. In particular, candidates with one of the following specialist skills and expertise are sought:

Competition cases

- expertise and experience in regulatory economic analysis and/or competition economic analysis, and an understanding of a range of methods, models and techniques engaged in economic analysis in competition and/or regulatory settings; and/or

Regulatory cases

- expertise and experience in the theory or practice of determining matters required to be covered by input methodologies under section 52T of the *Commerce Act 1986* and section 176 of the *Telecommunications Act 2001*. This includes the cost of capital, valuation of assets (including depreciation and treatment of revaluations), allocation of common costs (including between activities, businesses, consumer classes and geographic areas), treatment of taxation, pricing methodologies and regulatory processes and rules.

The following attributes are also relevant to this position:

- an understanding of the role of the Court, with experience in giving expert evidence before a court or tribunal being desirable; and

- similar attributes to those required for judicial appointments, relating to qualities of character, personal technical skills and an appreciation of diversity.

An absence of any conflicts of interest and some evidence of flexibility in scheduling to be available for court cases may also be taken into account.

Candidates must be willing to travel to participate in person for hearings at the relevant Court in New Zealand.

Lay members of the Court are appointed by the Governor-General on the recommendation of the Attorney-General after consultation with the Chief Justice and the Minister of Commerce and Consumer Affairs.

Please note that the Ministry nominates suitable candidates to the Crown Law Office, which assists the Attorney-General with the consultation and documentation required for the appointment process. The Ministry of Justice will also be engaged for the purposes of vetting candidates and checking for conflict of interest for appointments to specific cases.

Candidates wishing to apply for this position should enclose a copy of their CV and submit a cover letter outlining why they wish to be a lay member of the High Court under the *Commerce Act 1986*. Please refer to the attached position description for more details.

For enquiries about the position, please contact boardappointments@mbie.govt.nz.

Applications close at **8:00 am on Thursday 19 August 2021**.



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Lay Member of the High Court under the Commerce Act 1986

Position description

The pool of lay members for High Court cases

Section 77 of the *Commerce Act 1986* provides for the appointment of lay members of the High Court. Lay members may be called upon to sit with a Judge for certain competition and regulation law matters. There is no limit on the number of lay members that may be appointed.

There are two main classes of cases for which lay members may be appointed:

Competition cases

- civil enforcement proceedings related to Parts 2 (restrictive trade practices) and 3 (business acquisitions) of the *Commerce Act 1986*; and
- appeals from determinations of the Commerce Commission related to Part 5 (authorisations and clearances) of the *Commerce Act 1986*;

Regulatory cases

- appeals from input methodology¹ determinations of the Commerce Commission made under Part 4 (regulated goods or services) of the *Commerce Act 1986*;
- appeals from input methodology determinations of the Commerce Commission made under Part 6 (fibre fixed line access services) of the *Telecommunications Act 2001*;
- civil enforcement proceedings related to subpart 5 (regulation of dairy markets and obligations of new co-op) of Part 2 of the *Dairy Industry Restructuring Act 2001*; and
- civil enforcement proceedings related to Part 3 (separation of distribution from certain generation and retailing) of the *Electricity Industry Act 2010*.

Lay members in the pool must have expertise that is relevant to one or both of these classes of cases.

Before beginning the exercise of duties of their office, lay members are required to take an oath before a Judge of the Court that they will faithfully and impartially perform the duties of their office.

If a lay member is appointed to a case, the lay member becomes a member of the Court for the purposes of that case. A lay member must not sit on a case where he or she has a conflict of interest.

Roles and expectations of lay members

Lay members play a key role in ensuring that expert evidence on complex competition or regulation issues is properly understood, tested and assessed by the High Court.

¹ Input methodology as defined under section 52C of the Commerce Act is a description of any methodology, process, rule, or matter that includes any of the matters listed in section 52T and that is published by the Commission under section 52W; and in relation to particular goods or services, means any input methodology, or all input methodologies that relate to the supply, or to suppliers, of those goods and services.

Ideally, a lay member should work cooperatively with the Judge, advising within their area of expertise, towards a mutual determination on matters relating to that expertise.

In any case, the decision of the Court is a decision of the majority of the members sitting, but such majority must include the Judge (or where more than one Judge sits, the majority of Judges). If the members present are equally divided in opinion, the decision of the Judge (or of a majority of the Judges) is the decision of the Court. If neither of those situations applies, the question may be referred to the Court of Appeal for decision.

General skills, experience and attributes required

We consider the following expertise and attributes to be relevant to this position:

- Knowledge or experience in industry, commerce, economics, law or accountancy. In particular:
 - For competition cases*
 - recognised expertise in regulatory economic analysis and/or competition economic analysis, and an understanding of a range of methods, models and techniques engaged in economic analysis in competition and/or regulatory settings;
 - For regulatory cases*
 - knowledge and experience of the regulated industries; or
 - expertise and experience in the theory or practice of determining matters required to be covered by input methodologies under section 52T of the *Commerce Act 1986* and section 176 of the *Telecommunications Act 2001*. This includes the cost of capital, valuation of assets (including depreciation and treatment of revaluations), allocation of common costs (including between activities, businesses, consumer classes and geographic areas), treatment of taxation, pricing methodologies and regulatory processes and rules.
- an understanding of the role of the Court, with experience in giving expert evidence before a court or tribunal being desirable; and
- similar attributes to those required for judicial appointments², relating to qualities of character, personal technical skills and an appreciation of diversity.

Term of appointment and other matters

The term of appointment of lay members may not exceed five years. While there is provision for reappointment, there should be no expectation that a lay member will be offered a subsequent term on the expiry of term.

Any lay member may resign the office by notice in writing to the Minister of Commerce and Consumer Affairs.

The Governor-General may terminate the appointment of a lay member for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Governor-General.

² Crown Law, Judicial Protocol, as at April 2013 (updated April 2014), accessible at: <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf>

Remuneration

The fees for lay members are determined by the Cabinet Fees Framework. Fees are only payable on appointment to a High Court case.

Travelling allowances and expenses are paid in New Zealand dollars in accordance with the *Fees and Travelling Allowances Act 1951*.

The Ministry of Justice is responsible for the administration of payments to lay members.

Estimated time commitment and location of work

It is difficult to estimate the time commitment that the role entails as the position is on an 'as required' basis. For competition cases, ordinarily there can be one or two cases a year for which a lay member from the pool is appointed. Appeals from regulatory determinations by the Commerce Commission are less frequent.

There is normally an appeals conference that is held after appeals are filed at which time estimates will be given of how long hearings will take place and when they will be heard. It would be useful for candidates to be reasonably certain of their availability to participate in hearings, and having a flexible schedule would be helpful.

Lay members who are based overseas, or in another part of New Zealand to the relevant Court, will be required to travel to participate in person for the hearings.

Appointment process

Section 77(1A) of the *Commerce Act 1986* provides that lay members are appointed by the Governor-General. In 1994, Cabinet agreed that the Attorney-General would be responsible for recommending lay member appointments to the Governor-General in the same manner as judicial appointments. Before making a recommendation, the Attorney-General must consult the Minister of Commerce and the Chief Justice.

In practice:

- the Ministry of Business, Innovation and Employment (MBIE) identifies suitable candidates for appointment as lay members, reviews CVs and contacts referees, and forwards the list of suggested candidates to Crown Law and the Ministry of Justice;
- Crown Law assists the Attorney-General with the consultation and documentation required for the appointment process; and
- the Ministry of Justice provides administration, case management and support services to the High Court and undertakes conflict of interest checks prior to a lay member being assigned to a particular case.

Before a person is appointed as a lay member to the pool, they must certify that they are not disqualified from holding the position. Candidates are expected to complete a disclosure form and make a statutory declaration. Candidates must also consent to MBIE forwarding that information to Crown Law and the Ministry of Justice as part of appointment process.

Lay Member of the High Court under the Commerce Act 1986

Person specification

The Ministry of Business, Innovation and Employment is seeking candidates who wish to be considered for appointment to the pool of lay members under the *Commerce Act 1986* for competition and regulatory cases. Multiple candidates may be appointed as a result of this search.

At this time, the Ministry is looking for candidates who have expertise relevant to competition or regulatory cases or both. Due to COVID restrictions on travel, we are currently giving preference to candidates residing in New Zealand, but consideration will also be given to candidates residing in Australia who are willing to travel to New Zealand if required for cases.

In particular, candidates with one of the following specialist skills and expertise are sought:

Competition cases

- expertise and experience in regulatory economic analysis and/or competition economic analysis, and an understanding of a range of methods, models and techniques engaged in economic analysis in competition and/or regulatory settings; and/or

Regulatory cases

- expertise and experience in the theory or practice of determining matters required to be covered by input methodologies under section 52T of the *Commerce Act 1986* and section 176 of the *Telecommunications Act 2001*. This includes the cost of capital, valuation of assets (including depreciation and treatment of revaluations), allocation of common costs (including between activities, businesses, consumer classes and geographic areas), treatment of taxation, pricing methodologies and regulatory processes and rules.

The following attributes are also relevant to this position:

- an understanding of the role of the court, with experience in giving expert evidence before a court or tribunal being desirable; and
- similar attributes to those required for judicial appointments³, relating to qualities of character, personal technical skills and an appreciation of diversity.

An absence of clear conflicts of interest and some evidence of flexibility in scheduling to be available for court cases may also be taken into account.

³ Crown Law, Judicial Protocol, as at April 2013 (updated April 2014), accessible at: <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf>