IN THE SUPREME COURT OF NEW ZEALAND

SC 46/2012
[2012] NZSC 99

BETWEEN	VECTOR LIMITED Appellant
AND	COMMERCE COMMISSION Respondent

Hearing: 9 and 10 October 2012

Court: McGrath, William Young, Glazebrook, Blanchard and Anderson JJ

Counsel: A R Galbraith QC, A S Butler, C M Marks and R H Versteeg for Appellant
B W F Brown QC, V E Casey and K C Millard for Respondent

Judgment: 15 November 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs of $40,000 together with disbursements to be fixed, if necessary, by the Registrar.

REASONS

(Given by William Young J)

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Introduction

[1] The Commerce Commission has price control functions under pt 4 of the Commerce Act 1986 (the Act) which came into effect on 14 October 2008[1] and replaced the previous pts 4, 4A and 5. Vector Ltd is subject to this Part in two capacities: under sub-pt 9 as an electricity distributor and under sub-pt 10 as a gas distributor. Sub-pt 9 – which is primarily important in this case – provides for price control through default and customised price-quality path regulation. An important component of price-quality path regulation is the setting and resetting of starting prices. Starting prices govern the prices which can be charged at the beginning of a regulatory period. The current starting prices under the default price-quality path for the five year regulatory period, which began on 1 April 2010, were set by the

[1] Except sub-pt 9 of Pt 4, which came into force on 1 April 2009, see Commerce Amendment Act 2008, s 2.

Commission on 30 November 2009. Under ss 54K(1) and 53P(3), it was open to the Commission to set those prices by reference either to its assessment of the current and projected profitability of each supplier or by rolling-over the prices which were applicable as at 31 March 2010. The Commission took the latter approach.

[2] An important feature of pt 4 of the Act is the requirement for the Commission to publish input methodologies. These constrain the Commission's evaluative functions, in particular as to the assessment of profitability. The Commission did not publish input methodologies until 22 December 2010. So, at the time the current starting prices were set on 30 November 2009, input methodologies relevant to profitability assessments were not in place. This was the primary reason why the Commission, at that time, opted to roll-over the prices applicable as at 31 March 2010 rather than engage in profitability assessments.

[3] The Commission's position is that under s 54K(3), and by reason of the publication of the input methodologies, it is now able to reset starting prices on the basis of profitability assessments. Vector disputes this and relies on two broad arguments: first, that the Commission was obliged to publish input methodologies which were specific to starting price resets and, because it has not done so, it may not resort to its s 54K(3) power to reset prices; and, secondly that, in any event, the publication of input methodologies does not entitle the Commission to resort to its s 54K(3) power to reset starting prices.[2]

[4] Vector was successful in the High Court before Clifford J[3] but the Commission appealed to the Court of Appeal,[4] which overturned the High Court judgment.[5] Vector now appeals to this Court.

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2 Vector has formulated this second argument in different ways. As we will later indicate, the various formulations seem to involve either (a) a reiteration of the first argument or (b) variations on the theme that a starting price set under s 54K(1) by reference to prices applicable at 31 March 2010 cannot later be reset by reference to profitability assessments.

3 *Vector Ltd v Commerce Commission* HC Wellington CIV-2011-485-536, 26 September 2011.

4 *Commerce Commission v Vector Ltd* [2012] NZCA 220, [2012] 2 NZLR 525.

5 One aspect of Clifford J's judgment which was adverse to the Commission was not challenged on appeal. This aspect of his judgment, however, is not material for present purposes.

Our approach – an overview

[5] The case arises out of the transition from the regimes provided under the former pts 4, 4A and 5 of the Act to the new regimes provided for under pt 4, and in particular, the transition from the former pt 4A to sub-pt 9 of the current pt 4. Vector's challenges to the course of action proposed by the Commission can only be understood and assessed against the background of a comprehensive understanding of the regime's intended operation, both as to how it will apply once mature and the way in which the transition to the mature scheme is to be effected.

[6] In the next part of this judgment, we will explain the legislative setting, focussing particularly on the intended operation of the sub-pt 9 regime once mature. We will then discuss the transition from pt 4A to sub-pt 9 and how this has been implemented to date. At that point we will identify the two legal issues raised by Vector and evaluate each of them.

The legislative setting

The former pt 4A and the criticisms it attracted

[7] The former pt 4A applied to electricity distributors such as Vector and provided for the setting of thresholds which, in some respects, were similar to the price-quality paths now provided for under pt 4 and sub-pt 9. One key difference, however, was that the thresholds set by the Commission did not directly constrain the prices which electricity distributors could charge. So the breaching of thresholds was not directly proscribed. Instead, the former pt 4A proceeded on the basis that a breach of the thresholds could be investigated by the Commission which was either to make a declaration of control in relation to the supplier or give reasons for not doing so. This regime was discussed by this Court in *Unison Networks Ltd v Commerce Commission*.[6]

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6 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

[8] For present purposes, what is primarily material about the pt 4A regime (and the regimes under the former pts 4 and 5) are the complaints they attracted from regulated suppliers as to the lack of certainty (particularly in the case of pt 4A because a supplier could not know in advance the consequences of breaching the thresholds), the scope they provided for evaluative assessments by the Commission (leading to regulatory instability), the absence of merits appeal rights and the lack of legislative requirements for regulation to incentivise investment. The current structure of pt 4 reflects legislative acceptance of the substance of these complaints.

Pt 4 – scope and purpose

[9] Pt 4 commences with s 52 which records:

> **52 Overview of Part**
>
> This Part provides for the regulation of the price and quality of goods or services in markets where there is little or no competition and little or no likelihood of a substantial increase in competition.

Section 52A is also of significance:

> **52A Purpose of Part**
>
> (1) The purpose of this Part is to promote the long-term benefit of consumers in markets referred to in section 52 by promoting outcomes that are consistent with outcomes produced in competitive markets such that suppliers of regulated goods or services—
>
> (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
>
> (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands; and
>
> (c) share with consumers the benefits of efficiency gains in the supply of the regulated goods or services, including through lower prices; and
>
> (d) are limited in their ability to extract excessive profits.
>
> ...

Types of regulation provided for

[10] Pt 4 provides for different forms of regulation including, relevantly, information disclosure and various types of price-quality regulation, of which two are relevant[7] for present purposes:[8] customised paths (under which customised price-quality paths are set for particular suppliers) and default paths (under which default price-quality paths are set for regulated suppliers).

[11] Sub-pt 9 sets the regulatory framework for electricity distributors (including Vector) by making them subject to information disclosure regulation (under s 54F) and, in the case of distributors such as Vector which are not consumer-owned,[9] default/customised price-quality regulation (under s 54G).

Price-quality path regulation

[12] Price-quality regulation is based around default or customised price-quality paths which set the maximum prices which suppliers can charge and the minimum quality standards that they must meet. The underlying purpose is to provide: [10]

(a) via default price-quality paths, for a relatively low-cost way of setting price-quality paths for suppliers of regulated goods and services; and

(b) via customised price-quality paths, for individual regulated suppliers to have alternative price-quality paths addressed to their particular circumstances.

[13] A price-quality path will provide for starting prices, rates of change and quality standards.[11]

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7 There is also individual price quality regulation under s 53ZC but this is not applicable to Vector.
8 Section 52B(2)(c)(i).
9 The expression "consumer-owned" is defined by s 54D and it is common ground that Vector is not "consumer-owned" for the purposes of this definition despite the Auckland Energy Consumer Trust having a 75.1 per cent interest in the company.
10 Section 53K.
11 Section 53O.

[14] The starting prices are the prices which can be charged at the beginning of the relevant regulatory period. Given the definition of "price" in s 52C (which encompasses revenues as well as prices) and the explicit terms of s 53M, starting prices can be specified by reference either to the prices charged or the revenues derived by a regulated supplier. Because it will be necessary to discuss the significance of this later, we note that s 53M(1)(a) provides:

> **53M Content and timing of price-quality paths**
>
> (1) Every price-quality path ... must specify,—
>
> (a) in relation to prices, either or both of the following with respect to a specified regulatory period:
>
> (i) the maximum price or prices that may be charged by a regulated supplier:
>
> (ii) the maximum revenues that may be recovered by a regulated supplier; ... .

[15] The rate of change defines the extent to which those prices may be adjusted within a regulatory period. This is most likely to be by reference to changes in the Consumer Price Index, using a formula, CPI – *x*, where *x* is stipulated by the Commission and reflects the Commission's assessment of long-run average productivity improvements.[12] There is, however, provision for the rate of change to be utilised to avoid price shocks or as an incentive to improve quality.[13]

[16] A price-quality path will also specify the quality standards which the supplier is required to meet (addressed for instance to reliability and responsiveness to complaints).[14]

Default price-quality paths

[17] The Commission is required to make a determination under s 52P specifying how information disclosure and price-quality regulation apply to electricity lines businesses.[15] A s 52P determination is of indefinite duration but may be amended

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12 See s 53P(5)–(7).
13 See s 53P(8).
14 See s 53M(3).
15 See s 52P(1) and (2)(b).

from time to time.[16] For present purposes, what is primarily important about a s 52P determination is that it sets out the details of the applicable default price-quality path[17] which is required to be specified for a regulatory period which must be either four or five years.[18] Before the end of each regulatory period, the Commission is required by s 53P to amend the s 52P determination by resetting the default price-quality path which is to apply for the next regulatory period.

[18] Under s 53P(3), the reset starting prices must be either:

> (a) the prices that applied at the end of the preceding regulatory period; or
>
> (b) prices, determined by the Commission, that are based on the current and projected profitability of each supplier.

[19] Determinations made under s 52P and resets under s 53P are appealable but only on points of law.[19]

Customised price-quality paths

[20] Sections 53Q–53ZA provide for suppliers, who are (or are likely to be) subject to a default price-quality path, to propose to the Commission that it adopt a customised price-quality path in respect of that supplier. Such a path will be closely tailored to the individual circumstances of the supplier. A full merits appeal is available under s 91(1) of the Act in relation to a customised price-quality path as determined by the Commission.

[21] From the point of view of a supplier, the right to propose a customised price-quality path is not a complete equivalent to a merits appeal in relation to a s 53P(3) determination (which, as noted, is subject only to an appeal on a point of law). For instance, a supplier may make only one proposal during a regulatory period,[20] is not entitled to withdraw a proposal once made[21] and will be bound by the customised

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16 Under s 52Q.
17 Section 53O.
18 Section 53M(4) and (5).
19 See s 91(1)(a) and (1B).
20 Section 53Q(3).
21 Section 53R(a).

price-quality path once determined.[22] Further, the customised price-quality path which is fixed may be less favourable to the supplier than the otherwise applicable default price-quality path.[23] That said, the right of a supplier to propose a customised price-quality path and the availability of a merits review are of some materiality, as we will later discuss.

Input methodologies

[22] Under s 52S(b)(ii), the Commission is required to apply "relevant" input methodologies when determining "the prices or quality standards applying to the goods or services". So the resetting of starting prices (and quality standards for that matter) must be made on the basis of the application of the relevant input methodologies.

[23] Section 52C defines "input methodology" as meaning:

> 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 or services

[24] Section 52R explains the purpose of input methodologies:

> The purpose of input methodologies is to promote certainty for suppliers and consumers in relation to the rules, requirements, and processes applying to the regulation, or proposed regulation, of goods or services under this Part.

[25] Section 52T is in these terms:

> **52T Matters covered by input methodologies**
>
> (1) The input methodologies relating to particular goods or services must include, to the extent applicable to the type of regulation under consideration,—
>
> (a) methodologies for evaluating or determining the following matters in respect of the supply of the goods or services:
>
> (i) cost of capital:

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22 Section 53R(b).
23 Section 53V(2).

(ii) valuation of assets, including depreciation, and treatment of revaluations:

(iii) allocation of common costs, including between activities, businesses, consumer classes, and geographic areas:

(iv) treatment of taxation; and

(b) pricing methodologies, except where another industry regulator (such as the Electricity Authority) has the power to set pricing methodologies in relation to particular goods or services; and

(c) regulatory processes and rules, such as—

(i) the specification and definition of prices, including identifying any costs that can be passed through to prices (which may not include the legal costs of any appeals against input methodology determinations under this Part or of any appeals under section 91 or section 97); and

(ii) identifying circumstances in which price-quality paths may be reconsidered within a regulatory period; and

(d) matters relating to proposals by a regulated supplier for a customised price-quality path, including—

(i) requirements that must be met by the regulated supplier, including the scope and specificity of information required, the extent of independent verification and audit, and the extent of consultation and agreement with consumers; and

(ii) the criteria that the Commission will use to evaluate any proposal.

(2) Every input methodology must, as far as is reasonably practicable,—

(a) set out the matters listed in subsection (1) in sufficient detail so that each affected supplier is reasonably able to estimate the material effects of the methodology on the supplier; and

(b) set out how the Commission intends to apply the input methodology to particular types of goods or services; and

(c) be consistent with the other input methodologies that relate to the same type of goods or services.

(3) Any methodologies referred to in subsection (1)(a)(iii) must not unduly deter investment by a supplier of regulated goods or services in the provision of other goods or services.

[26] The process and timing for determining and publishing input methodologies is set out in ss 52U–52W. The Commission may amend an existing input methodology under s 52X and is required under s 52Y to review input methodologies every seven years.

[27] There is a right of appeal on the merits to the High Court under ss 52Z–52ZA. If the Court allows an appeal, it may (a) amend the input methodology, (b) revoke it and substitute a new one or (c) refer the input methodology back to the Commission with directions as to the matters that require amendment.[24] These powers are exercisable if the Court is satisfied that the amended or substituted input methodology is, or will be:[25]

> ... materially better in meeting the purpose of this Part, the purpose in s 52R, or both.

The transition to the sub-pt 9 regime and how it has been implemented to date

Roll-over of existing thresholds – 1 April 2009

[28] Under s 54J, the thresholds established under the earlier regime were deemed to be s 52P determinations setting default price-quality paths with effect from 1 April 2009 (which is when the new pt 4 came into effect) for a regulatory regime which expired on 31 March 2010.

Reset of default price-quality path – 1 April 2010

[29] Section 54K(1) provides:

> Before 1 April 2010, the Commission must reset the default price-quality paths for each supplier that apply on and after that date, using the process set out in section 53P.

It will be recalled that under s 53P(3), the reset starting prices were required to be prices that either applied at the end of the preceding regulatory period (that is

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[24] Section 52Z(3)(b).
[25] Section 52Z(4).

31 March 2010) or were determined by the Commission and based on the current and projected profitability of each supplier.

[30] On 30 November 2009, the Commission amended the deemed default price-quality path by rolling over, from 1 April 2010 until 31 March 2015, the prices which were current as at 31 March 2010. It is clear from the discussion paper[26] which preceded this decision and the final decisions paper[27] that the Commission considered that it would be inappropriate to set starting prices based on profitability assessments ahead of the publication of input methodologies. This was because such assessments would probably have to be revisited after input methodologies were published. Instead, the Commission envisaged that starting prices would be reset based on profitability assessments once its input methodologies had been published, as it noted in the final decisions paper:[28]

> The Commission has confirmed that following the publication of input methodology determinations, it will undertake profitability assessments and implement related starting price adjustments.

[31] Anticipating a point we will discuss later, we note that Vector now argues that a reset as proposed by the Commission is not possible for reasons which include the contention that the s 54K(3) reset power is not available in relation to starting prices set under s 53P(3)(a). This is a change of position as Vector, in a submission to the Commission of 9 October 2009 in response to the Commission's proposals, which were later implemented, commented:[29]

> Vector welcomes the draft decision that starting prices on 1 April 2010 will be the prices which apply on 31 March 2010. ....
>
> Vector also supports the draft decision to make starting price adjustments after the input methodologies have been established. This will enhance the certainty and credibility of the new regulatory regime.

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[26] Commerce Commission *Reset of Default Price-Quality Path for Electricity Distribution Businesses* (Commerce Commission, Discussion Paper, June 2009).

[27] Commerce Commission *Initial Reset of the Default Price-Quality Path for Electricity Distribution Businesses* (Commerce Commission, Decisions Paper, November 2009).

[28] At [X14]. This was spelt out in more detail later in the decisions paper, see [4.51]–[4.54].

[29] Vector Ltd *Submission to Commerce Commission on Initial Reset of the Default Price-Quality Path for Electricity Distribution Businesses: Draft Decisions Paper* (Vector Ltd, Submission, October 2009) at [29]–[30].

Publication of input methodologies

[32] Under ss 52U and 52W, the Commission was required to determine input methodologies by 30 June 2010 and to publish them within 10 days of determination. However, under s 52U(2), the 30 June 2010 deadline was able to be extended by the Minister for six months and it duly was. This extended deadline was complied with by the Commission which published its input methodologies on 22 December 2010. These input methodologies did not address the resetting of starting prices.

Revision of default price-quality paths set under s 54K

[33] Section 54K(3) provides:

> If an input methodology is published after 1 April 2010 and if, had that methodology applied at the time the default price-quality paths were reset as required by subsection (1), it would have resulted in a materially different path being set, then the Commission may reset the default price-quality paths in accordance with section 53P ... .

[34] Following publication of its input methodologies, the Commission began work on the reset of starting prices foreshadowed in its November 2009 decisions paper. This involved developing and consulting on the way in which it should reset prices. The process got as far as a draft decisions paper of 19 July 2011 but, in the meantime, Vector had issued the judicial review proceedings which have given rise to the present appeal and have so far proved to be an impediment to a reset being finalised.

[35] One of the major differences between Vector and the Commission which emerged during the consultation process leading up to and including the draft decisions paper related to the ability of suppliers to propose a customised price-quality path. Some brief discussion of this may be helpful to set the scene for the later evaluation of the arguments.

[36] It is common ground that there is usually asymmetry in relation to the risk of regulatory error in that the adverse consequences of a regulated price being too low

(for instance in terms of impact on investment decisions made by a supplier) exceed the adverse consequences of setting the regulated price too high (in terms of excessive prices for consumers). So all other things being equal, a regulator fixing regulated prices might be expected to include, one way or another, an allowance in favour of the supplier to cover the risk of error. In the draft decisions paper, the Commission dealt with arguments from suppliers based on asymmetry of risk in this way :[30]

> In our view, it would not be appropriate to place significantly greater weight on the costs associated with setting the DPP too low relative to the costs associated with setting the DPP too high. This contrasts with some submissions, which have argued that the risks of regulatory error in relation to the DPP are asymmetric.
>
> These submitters have argued that EDBs' incentives to invest may be damaged if the DPP is set too low, and that this would have more severe consequences than if returns were set too high. We disagree with this view. While the risk of error is usually asymmetric in a regulatory context, default/customised price-quality regulation has unique features that mitigate this risk. In particular:
>
> - EDBs have the option of applying for an alternative price-quality path if the DPP is set too low
>
> - the IMs allow EDBs to pass on the costs involved with verification and audit of proposals ... so that the costs to an EDB of applying for a CPP are limited.
>
> We draw attention to the fact that, under default/customised price-quality regulation, consumers do not have the option of proposing an alternative price path to the Commission if the DPP is too generous to suppliers. So if we were to set the DPP too high, on average, then suppliers will not be limited in their ability to extract excessive profits. This would not be consistent with s 52A(1)(d).
>
> (footnotes omitted)

This reasoning is challenged by Vector. We will be reverting later to this dispute as it provides an illustration of what is in issue between Vector and Commission in terms of rights of review.

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[30] Commerce Commission *2010-2015 Default Price-Quality Path for Electricity Distribution* (Commerce Commission, Draft Decisions Paper, July 2011) at [2.36]–[2.38].

Vector's challenges

[37] Vector's challenge to the Commission's proposal to resort to s 54K(3) raises two broad questions:[31]

(a) Is the s 54K(3) power able to be exercised in the manner provided for in s 53P(3)(b) in the absence of a published input methodology (or methodologies) specific to starting price resets? And, if so:

(b) Whether s 54K(3) permits the Commission to reset the starting prices fixed for the regulatory period which commenced on 1 April 2010?

Is the s 54K(3) power able to be exercised in the manner provided for in s 53P(3)(b) in the absence of a published input methodology (or methodologies) specific to starting price resets?

An overview

[38] Vector's broad case on this aspect of the case is based on two propositions:

(a) the language and purpose of pt 4 are such that the input methodologies required to be published by the Commission must, one way or another,[32] address the resetting of starting prices; and

(b) a failure by the Commission to publish a required input methodology precludes its exercise of any regulatory power which addresses the subject matter of the required, but missing, input methodology.

It is open to question whether Vector's second proposition is necessarily right, particularly given the transitional nature of the s 54K(3) power. On the other hand, it is clear that the legislative purpose was that all required input methodologies would be determined at the latest by 31 December 2010 and that regulatory decisions made

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31 *Vector Ltd v Commerce Commission* [2012] NZSC 74.

32 On Vector's argument, this could be included in one of the s 52T(1)(a) methodologies or a regulatory processes and rules methodology under s 52T(1)(c). Alternatively there could be a standalone methodology.

after that date would be constrained by the published input methodologies. So we are prepared to assume, without concluding, that if Vector's first proposition is right, so too is the second.

The approaches of the High Court and Court of Appeal

[39] In the High Court, Clifford J was inclined to see the reference in s 52T(1)(c)(i) to "regulatory processes and rules, such as ... [t]he specification and definition of prices..." as requiring an input methodology addressed to the reset of starting prices. This was "the fairly obvious interpretation, in this context, of the combination of the definition of IM in s 52C and the provisions of s 52T(1)(c)(i)".[33] As well and "[t]o the extent that there [was] any ambiguity", he saw such ambiguity as "considerably resolved" by s 52T(2). Because the Commission intended to apply its published input methodologies to default price-quality regulation, it was required by s 52T(2) to spell out in a published input methodology how it intended to do so, including the resetting of starting prices.[34]

[40] In finding for Vector on this issue, Clifford J was influenced by some other considerations:

(a) The Commission had developed and consulted on a methodology for starting price resets which it could have published and he thought it consistent with the Act that it should do so.

(b) He did not see the option of seeking a customised price-quality path as providing an adequate answer to the certainty arguments advanced by Vector.

(c) He considered that his approach was consistent with the scheme of the Act as to appeals, and in particular, the availability of merits appeals in relation to input methodologies, but only on points of law in relation to s 52P determinations.

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[33] At [122].
[34] At [125].

[41] The Court of Appeal noted that certainty was an important aim of the 2008 amendments but saw certainty in relative terms.[35] The Court construed s 52T as not requiring the publication of a starting price reset methodology. In particular it disagreed with Clifford J's approach to the language of s 52T(1)(c)(i). In the Court's view, the expression "specification and definition of prices" was not "an obvious reference to a price reset input methodology" and if it was so construed, it would render s 52T(1)(b) redundant and require an impracticably large number of input methodologies.[36] The absence of a specific reference in s 52T(1) to starting price resets was striking.[37]

[42] The Court of Appeal then posed what it saw as the essential issue in relation to s 52T(2) in this way:[38]

> It is important to emphasise that s 52T(2) does not impose an obligation to publish an input methodology on any particular topic. It deals simply with what must be included in any input methodology required to be published under s 52T(1). The question is how far the detail required by s 52T(2) must go. Does it mean that input methodologies must be formulated so as to enable regulated firms to understand the application or impact of the methodology in all the contexts in which the Commission proposes to use it within a particular form of regulation (in this case in resetting prices in price-quality regulation)? Or does it mean simply that the Commission must give sufficient detail in the input methodology to enable a regulated firm to understand how it applies to its operations in respect of the matter with which it deals?

[43] It found that that the more limited interpretation was correct and summarised its conclusions in the following terms:[39]

> ... there is a continuum between complete certainty at one end and complete flexibility at the other. The question is where Parliament has drawn the line. Clearly Parliament did not accord the Commission absolute flexibility, nor did it require absolute certainty in the regulatory regime. The requirement for the publication of input methodologies was intended to promote certainty in relation to the matters dealt with in s 52T(1). Against that framework, however, the Commission still has to make regulatory decisions, including as to price resetting under s 53P(3)(b). Parliament must have considered that, as the Commission does so, further certainty will emerge. Moreover, the Commission's extensive consultation obligations under Part 4 are also likely to produce further certainty over time.

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35 See [34] of its judgment.
36 At [39]–[40].
37 At [42].
38 At [54].
39 At [60].

[44] Both Clifford J and the Court of Appeal placed much significance on the legislative history of pt 4. For reasons which we will come to later, we see the legislative history as somewhat less significant. We have, therefore, not dwelt on the way it was addressed in the courts below.

Vector's argument

[45] Counsel for Vector supported the approach taken by Clifford J and particularly his approach to s 52T(1)(c)(i) and the meaning of "specification and definition of prices". They contended that this covered an ''enumeration or statement" relating to price with the result that s 52T(1)(c)(i) must be taken to require publication of input methodologies in relation to any regulatory process or rule which provided for such enumeration.

[46] Vector's counsel also maintained that the effect of s 52T, when read as a whole, was that the input methodologies published by the Commission were required to address starting price resets. Vector also strongly contended that the absence of a published pricing reset input methodology was inconsistent with s 52T(2)(b) in that the published input methodologies did not set out "how" the Commission intended to apply them to its future regulatory decisions.

[47] The resetting of starting prices under s 53P(3)(b) involves a calculation of the profitability of each supplier, both current and projected, using published input methodologies. But this calculation is not enough, in itself, to determine starting prices. Other assessments are required, for instance, and by way of illustration only, as to what, if any, allowance should be made for the risk of regulatory error.[40] The way in which the Commission moves from profitability assessments to starting prices can be seen as amounting to a methodology. But, from a supplier's perspective, unless that methodology is published as an input methodology, it is not subject to merits review. As well, ahead of s 53P(3)(b) determinations being made, suppliers cannot be sure what methodology will be applied, with the result that the outcome of the process is "unknowable within any reasonable range". Vector maintains that it is critical that a starting price reset methodology should apply across

[40] See [36] above.

regulatory periods and this can only be assured if there is a published input methodology addressing starting price resets.

[48] The Commission's position is that starting price resets will be provided for as part of its ss 52P and 53P(3)(b) determinations and that there is no need for a separate input methodology. Starting price resets are not specifically provided for in s 52T(1). The reference in s 52T(1)(c)(i) to "specification and definition of prices" is a reference back to s 53M which requires price-quality paths to "specify" whether they are addressed to prices or revenues (or both). Consistently with this, the Commission has published a definition and specification of price input methodology which is addressed to this and the associated topic of pass-through costs. Given their importance in the regulatory scheme, starting price resets would have been listed as a discrete topic by the legislature if an associated input methodology was required.

An overview of s 52T(1) and (2)

[49] The methodologies required by s 52T(1)(a) have obvious relevance to the assessment of profitability of suppliers for the purposes of s 53P(3)(b).[41] On the other hand, the topics specified by s 52T(1)(a) do not cover the entire range of issues which the Commission is required to take into account when making a profitability assessment and when moving from that assessment to the fixing of a starting price. There is necessarily going to be scope for regulatory judgment by the Commission. So s 52T(1)(a), at least by itself, is not consistent with the view that the legislative purpose is that all critical areas of Commission decision-making must be governed by published input methodologies.

[50] "Pricing methodologies" is defined by s 52C as meaning:

> methodologies for setting the prices of individual goods or services, or classes of goods or services, and includes methodologies for setting different prices for different customer groups ... .

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[41] A s 52T(1)(a)(iii) input methodology may also be relevant to "pricing methodologies" whether stipulated by the Commission under s 52T(1)(b) or under some other statute (such as the Electricity Industry Act 2010), as explained in [50].

In this context, "prices" do not refer to the revenue which suppliers are entitled to derive. Rather, they are the prices which suppliers charge customers so as to recover that revenue. Section 52T(1)(b) provides that the Commission is not required to publish input methodologies where another regulator has the power to do so, as the Electricity Authority has in the case of electricity distributors, such as Vector. For both reasons, s 52T(1)(b) is irrelevant for the purposes of the present appeal and the parties have not suggested otherwise.

[51] Section 52T(1)(c)(i) refers to "the specification and definition of prices, including identifying any costs that can be passed through to prices". As a matter of ordinary English usage, Clifford J's interpretation (which Vector supported) is certainly available. On the other hand, it is also possible to construe the expression as a reference to the specification and definition of price contained in s 53M(1)(a) which sets out what a price-quality path must provide for. It will be recalled that "price" is defined in general terms in s 52C in respects which encompass not only prices but also revenues and, under s 53M, a price-quality path can be fixed by reference to either (or both) prices or revenues. The particular option adopted by the Commission in respect of suppliers such as Vector was to set price caps addressed not to individual prices but rather to overall allowable revenues, and this was provided for in the published input methodology addressed to the specification and definition of prices in relation to electricity distribution services.

[52] The interpretation of "specification and definition of prices" adopted by Clifford J and proposed by Vector is not unproblematic. It would render s 52T(1)(b) redundant.[42] It would, as well, impose an extremely onerous obligation on the Commission to provide input methodologies as to a wide range of the decisions it must make as to "price", which is, it will be remembered, very broadly defined.[43] Given the tightness of the statutory timetable, the imposition of such broad

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[42] Section 52T(1)(b) refers to methodologies for setting prices to be charged by suppliers. If "specification and definition of prices" has the meaning contended for by Vector, it would encompass not merely the revenues which can be derived but also the prices which could be charged, with the result that there would be no need for s 52T(1)(b) to separately provide for pricing methodologies.

[43] Counsel for the Commission noted that this would apply to the decision whether to roll-over starting prices under s 53P(3)(a) or reset them under s 53P(3)(b), along with decisions which may be made under s 53P(8), s 53V(1), s 53ZC(1), s 54K(3) and s 55F(4) (as to claw-back under s 52D) and s 53M(2) by way of reward or penalty in meeting quality standards.

obligations would have been challenging for the Commission. Indeed the obligations which this interpretation would entail go beyond what Vector itself has seen as necessary. For instance Vector has not suggested that there needs to be a methodology addressed to the decision required by s 53P(3) between a reset on the basis of current and projected profitability and the rolling over of existing prices. Nor has Vector suggested that an input methodology is required for fixing the rate of change. But on the interpretation adopted by Clifford J, both topics would have to be addressed.

[53] In the High Court, Vector did not place weight on the expression "specification and definition of prices". Instead, it relied on the more general phrase "regulatory processes and rules". This expression is potentially broad enough to capture mechanisms by which the Commission intends to (and does) reset starting prices. Here, however, and particularly if "specification and definition of prices" is construed as the Commission suggests, the particular context suggests a distinction between the "regulatory processes and rules", which set the scene for regulatory decision-making, on the one hand, and that decision-making on the other. The Commission is required to specify how price-control will be implemented (that is, whether it is by reference to prices or revenues or a combination of both) and when price-quality paths can be reconsidered within a regulatory period (s 52T(1)(c)(ii)). But the actual decisions to be made within that regulatory framework are left to the Commission under ss 52P and 53P.

Section 52T(2)

[54] It is common ground that s 52T(2) and particularly subclauses (a) and (b) (which were primarily relied on by Vector) do not impose an obligation as to the subject matter of the required methodologies which is distinct from those imposed by s 52T(1). Rather s 52T(2) addresses the content of such methodologies as are required under s 52T(1).

[55] Under s 52T(2)(a), the requirement is to provide sufficient detail for suppliers to reasonably estimate the impact of the methodology on them. Under s 52T(2)(b), the requirement is to set out how the Commission intends to apply the input

methodology to particular goods and services. Once again the general language of the section can be interpreted in the manner suggested by Vector, that is that the impact of the input methodology on a supplier and the goods and services which it supplies can only be fully understood if the input methodology sets out in detail the way it will be applied in the regulatory decisions (such as price resetting) which the Commission will be taking. That, however, involves taking a reasonably expansive approach to the language used, which can also be read as confined to requiring a level of detail sufficient for the supplier to work out how the particular methodology will operate in relation to its business (under s 52T(2)(a)) and the goods and services which it supplies (under s 52T(2)(b)).

Certainty and merits review

[56] There can be no doubt that the 2008 amendments were intended to address concerns as to regulatory uncertainty and associated concerns about the absence of a right of merits review of Commission decisions. Vector's argument was that the approach argued for by the Commission and adopted by the Court of Appeal leaves the current regime in an unacceptably uncertain state and suppliers with inadequate merits review rights. We think it worth addressing the extent to which this is so.

[57] On both arguments, a supplier can be reasonably confident that a default price-quality path, once set, will be in place for the regulatory period specified by the Commission, which so far has been five years and cannot be less than four years.[44] There are limited circumstances in which that path can be altered[45] but that will not be affected by the resolution of the current controversy.

[58] The starting price reset input methodology which would be necessary on Vector's argument would have to be reviewed not later than seven years after publication[46] and could be earlier amended under s 52X. Such a methodology would presumably operate to restrict the range within which starting prices might be reset (that is, during the period between publication of the input methodology and the

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44 Section 53M(4) and (5).
45 Under s 52P and the input methodology published under s 52T(1)(c)(ii).
46 Section 52Y.

s 53P(3)(b) determination). But allowing for the constraints on changing a default price-quality path (which apply equally on either interpretation) and the review obligations and amendment powers of the Commission in relation to input methodologies, the adoption of Vector's argument as opposed to the argument of the Commission would not necessarily result in a distinctly higher level of regulatory certainty. A possible exception to this arises in relation to the period preceding a price reset, during which time, on Vector's argument, the scope for regulatory judgment will be significantly constrained by the postulated starting price reset input methodology. The practical significance of this would depend on whether the Commission wished to change to methodology previously used. And, as explained, if a starting price reset input methodology is required, it would be open to the Commission to change it ahead of a starting price reset, albeit subject to process[47] and merits review constraints.

[59] On the other hand, the decision as to which argument is right has a material effect on the extent of the rights of merits review. Adopting Vector's interpretation would mean that more of the approach to be taken by the Commission in making a s 53P(3)(b) reset would be required to be covered by input methodologies than is so on the Commission's argument. This would necessarily increase the scope of merits review. In issue, however, is whether this increased scope is consistent with the overall legislative purpose.

[60] In this context, the entitlement of a supplier to propose a customised price-quality path and the availability of a full merits review in respect of the Commission's determination on such a path assume some relevance. It will be recalled that in its July 2011 draft decisions paper, the Commission indicated that in setting starting prices, it would not be making the sort of allowance for the risk of regulatory error which was contended for by suppliers. This was on the basis that the option of proposing a customised price-quality path limits the risk of suppliers being left with sub-optimal returns. This approach was premised on the conclusion that a supplier faced with a default price-quality path which provided for sub-optimal returns would, rather than put up with such returns, propose a customised price-

[47] The process for determining input methodologies provided for by s 52V is more exacting than the general consultation process required by s 53P(2) for starting price resets.

quality path. This conclusion involved a substantial rejection of the contention advanced by suppliers (and particularly Vector) that the risks and difficulties of proposing a customised price-quality path were such that suppliers might choose to put up with sub-optimal returns under the default price-quality path.

[61] The associated debate highlights the practical differences between the competing arguments in terms of merits review. If a starting price reset input methodology is not required, Vector will not be able to obtain a merits review of the Commission's approach to regulatory risk. And without wishing to express definitive conclusions, Vector will have, at best, limited ability to challenge the Commission's approach to regulatory risk on an appeal confined to points of law (which applies to ss 52P and 53P determinations on price-quality paths). On the other hand, if a starting price reset published input methodology is required, it would be open to Vector to challenge it on appeal on the basis that it would be "materially better" in terms of the statutory purposes, if it provided for the risk of regulatory error in the manner contended for.

Legislative history

[62] We were taken in considerable detail to the legislative history. We have reservations as to the relevance of much of the material we were shown to the meaning of the statutory text and propose to rely on only three aspects of the history.

[63] The first is that it is perfectly obvious that the mischief to which the 2008 amendments were addressed encompassed the lack of regulatory certainty under the old pt 4A regime and the absence of merits appeal rights in respect of Commission decisions.

[64] The second is the explanatory note to the Commerce Amendment Bill.[48] This recorded:

> The term input methodologies refers to the rules, processes, and requirements relating to regulation, such as how to calculate the cost of

[48] Commerce Amendment Bill 2008 (201–1) (explanatory note).

> capital, value assets, allocate common costs, comply with regulatory specifications and so forth.
>
> The Bill requires the Commission to set input methodologies by 30 June 2010. The purpose of setting input methodologies is to give greater certainty, transparency, and predictability to businesses (including businesses not subject to regulation) and their customers. This certainty is expected to help improve the climate for investment in infrastructure.[49]
>
> ...
>
> The advantages of this regime over the current Part 4A regime are that firms will have greater certainty as to their obligations (including the consequences of breaches) and that they have an up-front, time-bound opportunity to seek a customised path if the generic default path is unsuitable for them.[50] ...
>
> The proposal will provide an effective regime that *over time* provides more timeliness, certainty, and incentives for investment.[51]

[65] Thirdly, we note that cl 52S of the Bill (which was the precursor of s 52T) was the subject of submissions which sought to impose obligations on the Commission to publish input methodologies on a broader range of topics than were proposed. These submissions were rejected by the Commerce Committee which reported to the House of Representatives:[52]

> We did not agree with submitters who put forward a range of proposals for additional matters to be covered by input methodologies in new section 52S. Given that the Commission is already faced with a very large and demanding workload we consider that additional requirements would put pressure on the input-methodology process.

[66] For the sake of completeness, we should note the principal legislative history argument which we have not taken into account. When the 2008 Bill was before the Select Committee, Vector proposed an amendment to cl 52S (which became s 52T) which would have added starting price resets to the topics required to be addressed by input methodologies. This was one of the "proposals" alluded to by the Commerce Committee in the passage from its report which we have just cited.

[67] The Committee's rejection of an explicit requirement for a starting price reset input methodology might be thought to tell against Vector's construction of s 52T.

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49 At 5.
50 At 6.
51 At 24 (emphasis added).
52 Commerce Amendment Bill 2008 (201–2) (select committee report) at 4.

But counsel for Vector maintained that we should not rely on this consideration. This was because the reference in the report to Vector's proposal was in general terms and the House of Representatives as a whole was not made aware of the detail. Given the clear view we have formed – based on the statutory text and context – we see no need to resolve whether this aspect of the legislative history is properly able to be taken into account.

An overall assessment

[68] The drafting of s 52T requires the Commission to publish input methodologies which "must include" relevantly (a) methodologies for evaluating and determining cost of capital, valuation of assets, allocation of common costs and treatment of taxation, and (b) regulatory processes and rules. The input methodologies must, "as far as is reasonably practicable" be sufficiently detailed to meet the requirements of s 52T(2)(a) and (b). Input methodologies as determined by the Commission are subject to merits review in the High Court and will be changed if the High Court is persuaded that such change would be "materially better"[53] in terms of the relevant statutory purposes.

[69] There seem to us to be three possible approaches:

(a) The Commission was required to publish a starting price reset input methodology. This is Vector's argument.

(b) The published input methodologies could encompass starting price resets but whether they should is a matter for the Commission subject to the possibility of a right of appeal to the High Court.

(c) Input methodologies must not address starting price resets, in the sense that a published input methodology which did so would be ultra vires.

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[53] That is "materially better in meeting the purpose of this Part, the purpose in section 52R, or both", see s 52Z(4).

[70] The third approach is not very plausible, particularly in light of the non-exhaustive nature of the s 52T(1) obligation. In response to a direct inquiry from the bench, Mr Brown QC for the Commission accepted that it would have been open to the Commission to have published a starting price reset methodology if it chose to do so.

[71] With option (c) referred to in [69] out of the way, the choice for us comes down to one between (a) and (b). This choice must be made in a context in which the Commission has, ostensibly anyway, met its s 52T obligations by having published input methodologies addressed to each of the topics prescribed in s 52T(1).

[72] We consider that there are a number of factors intrinsic to s 52T which, in this particular context favour option (b):

(a) The non-exhaustive exposition of the topics required to be covered – a reference to the "must include" in s 52T(1).

(b) The slightly informal structure of s 52T(1)(c) – "regulatory processes and rules, such as ...". To be noted is the absence of a requirement for *all* "regulatory processes and rules" to be addressed.

(c) The "reasonably practicable" limitation in s 52T(2), with its implicit reference to the tight timetable imposed on the Commission in relation to the publication of input methodologies.

(d) Most significantly, the absence of a direct and explicit reference to starting price resets in s 52T.

All of these aspects of the statutory text tell against a construction of the section which requires the input methodologies to address the particular and very important, but not explicitly identified, topic of starting price resets.

[73] As is apparent,[54] we see the certainty arguments relied on by Vector as overstated. We do, however, accept that resolution of the issue whether a starting price reset methodology is required will have material effects on appeal rights. This is exemplified by the different ways in which the Commission's allowance (or non-allowance) for the risk of regulatory error might be reviewed, depending on whether or not a starting price reset methodology is required.[55] On the interpretation contended for by the Commission, there will be no merits appeal in relation to the approach it takes to regulatory risk. But, on the other hand, if the Commission sets a default price-quality path on a basis which does not leave a margin for suppliers to accommodate the risk of regulatory error, it will be open to suppliers to seek a customised price-quality path. As well, once the Commission had determined the customised price-quality path, it will then be open to suppliers to challenge that determination on the merits, and, thus, its approach to the risk of regulatory error. But on this basis, the Commission's approach to regulatory error in relation to the fixing of default price-quality paths will never be subject to merits review.[56]

[74] The availability of a full merits appeal on customised price-quality paths as compared to the appeal confined to points of law in relation to default price-quality paths implies a legislative recognition that the fixing of price-quality paths will involve regulatory judgments and not just the largely mechanical application of published methodologies. To put this another way, it is clear that the legislature did not require published input methodologies to cover all the issues which the Commission might have to address in reaching a regulatory decision.

[75] In deciding which issues must be addressed by input methodologies, the clearest guidance is provided by the language of s 52T(1). What is striking about the statutory text is the absence of any explicit reference to the actual decision-making exercises which have been entrusted to the Commission, particularly the setting of starting prices, rates of change and quality standards.[57] Instead the topics designated by the legislature (particularly in s 52T(1)(a) and (c)) have a scene-setting quality.

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54 See [56]–[58] above.
55 See [59]–[61] above.
56 This is on the basis that the risk of regulatory error will be distinctly less in the case of a customised price-quality path than in the case of a default price-quality path.
57 Section 53O.

[76] If the Commission wished to publish an input methodology, it was entitled to do so. We are, however, satisfied that s 52T did not impose on the Commission an absolute obligation to address starting price resets in the published methodologies.

[77] Vector's appeals against the published input methodologies include the contention that they should be amended to address starting price resets. Mr Brown was not disposed to accept that this contention could be resolved in favour of Vector on the appeals even if the High Court concludes that the input methodologies would be "materially better" if amended in the way proposed by Vector. This point was not pursued in any detail in argument and the underlying basis for Mr Brown's stance was not examined. Given the absence of detailed argument on the point, we are not in a position to resolve it one way or the other.

Whether s 54K(3) permits the Commission to reset the starting prices fixed for the regulatory period which commenced on 1 April 2010?

Preliminary comments

[78] The drafting of s 54K(3) postulates a counterfactual, that is what the starting price would have been if, when it was set, the input methodology in question had been published. If that starting price would have been materially different from what was actually set, s 54K(3) permits a reset. Viewed in this light, the question whether a reset is permitted in this case might be thought to turn on whether the starting price reset with effect from 1 April 2010 would have been materially different if the later published input methodologies had then been available.

[79] In the High Court, Vector argued that on the evidence which was adduced, the starting price set with effect from 1 April 2010 would not have been materially different if the input methodologies had been available. The Commission disagreed. In his judgment, Clifford J did not make a finding on this issue. This is what he said:[58]

> The evidence provided to me by each of Vector and the Commission as to whether or not in fact various IMs would have caused a material change to

[58] At [146].

> the s 54K(1) price paths determined in November 2009 if they had applied at the time was unclear. I have been unable myself to clarify it. Therefore, I do not intend to endeavour to reach a finding on that specific factual matter.

[80] The factual argument to which he referred seems to have come down to the contention that because the 1 April 2010 reset was made pursuant to s 53P(3)(a), it could not be said that there would have been a different outcome if the later published input methodologies were then in place. In a certain literal sense, that contention is undoubtedly correct because obviously the Commission's assessment of the "prices that applied at the end of the preceding period" (under s 53P(3)(a)) would not have been affected by input methodologies addressed to profitability assessments (a s 53P(3)(b) exercise). On the other hand, this contention did not really meet the Commission's case that if the input methodologies had been available in time for the 1 April 2010 exercise, it would have reset starting prices under s 53P(3)(b) and not s 53P(3)(a). Put in these terms, it is clear that the issue referred to by the Judge was legal, rather than factual, in nature and we will address it as such.

Section 53ZB

[81] The approach of Clifford J (to which we will refer shortly) and argument advanced by Vector on this aspect of the case relies in part on s 53ZB which we should, therefore, set out at this point:

> **53ZB What happens to price-quality paths if input methodologies change**
>
> (1) Default or customised price-quality paths may not be reopened within a regulatory period on the grounds of a change in an input methodology, except as provided in subsection (2).
>
> (2) Every default and customised price-quality path must be reset by the Commission in accordance with section 53P if—
>
> (a) an input methodology changes as a result of an appeal under section 52Z; and
>
> (b) had the changed methodology applied at the time the price-quality path was set, it would have resulted in a materially different path being set.
>
> (3) When resetting a default or customised price-quality path under subsection (2), the Commission must apply claw-back.

[82] The context primarily envisaged by s 53ZB is of a successful appeal by a supplier against an input methodology with the result that the price-quality path previously set by the Commission is materially unfavourable to the supplier. In these circumstances it is obviously right that there should be a reset (hence the word "must" in subsection (2)). In all likelihood, a reasonably mechanical and thus objective exercise should be practicable. This is because, on the assumptions just made, it will usually (and perhaps always) be possible to make an "apples and apples" comparison of the price-quality path as set using the input methodologies as they were at that time, and what it would have been if the changed methodology had then been in place.

The approach of Clifford J

[83] The approach of Clifford J was that intra-regulatory period starting price adjustments under ss 54K(3) and 53ZB(2) can be made only to the extent necessary to accommodate the new input methodology or the changes made to the earlier input methodology.

[84] As to the extent of the reset contemplated by s 53ZB, he observed:[59]

> In my view, the reset is to identify the materially different path that would have been set if "it", that is the changed IM, had originally applied. The section does not mandate reset on a broader basis. In my view, it would be inconsistent with the general statutory scheme if the words in s 53ZB(2) "in accordance with s 53P" were read as a signal that the resetting of a price path, following a successful IM appeal, could have such a broader basis.

And then, turning to s 54K(3):[60]

> I take the same approach with regard to the interpretation of s 54K(3). That a similar approach is required is, I think, confirmed by the cross-reference in that section to s 53ZB as otherwise preventing reset. Moreover, I think the words of s 54K(3) direct the focus of the reset being to the subsequently published IM, and the **effect** it would have had on the s 54K(1) price path, i.e. resulting in a materially different price path, if it had applied at the time that price path was set. In my view, if Parliament had intended that the Commission could, in effect, reset the price paths by reference to more general considerations, the legislation would have said that.

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59 At [149].

60 At [150]–[151] (bold emphasis in judgment).

> That conclusion supports the view I have reached of the requirement that the Commission promulgate a SPA IM. That is, as s 54K(3) only allows the s 54K(1) price path to be reopened by reference to subsequently published IMs, if the Commission did not promulgate a SPA IM, albeit reflecting its Electricity DPP Reset SPA methodology, it would not be entitled to reset in the manner anticipated by the Draft Electricity DPP Reset Paper.

The approach of the Court of Appeal

[85] Clifford J's approach seems to have been very much influenced by his view that a starting price input methodology was required. What is not so clear is whether he also considered, independently of that consideration, that a s 54K(3) reset under s 53P(3)(b), of a starting price set under s 53P(3)(a), was precluded as an "apples and apples" comparison could not be made. This, however, seems to be how his approach was construed by the Court of Appeal:[61]

> ... The Commission submitted that, on the view accepted by the Judge, the publication of input methodologies going to current and projected profitability would not materially affect the reset prices because those reset prices were not based on those concepts but were simply "roll-overs". The practical effect would be to prevent the resetting of prices until the beginning of the next regulatory period in 2015, which, the Commission said, was contrary to Parliament's intention.
>
> We accept the Commission's submissions on this point. Despite the use of the words "in accordance with section 53P" in both subsections, we consider that the scope of the Commission's power to reset under s 54K(3) is broader than its power to reset under s 53ZB(2). We consider that this follows from the different functions that each section performs in the statutory scheme. Parliament must have anticipated that the Commission might decide to roll over existing prices as from 1 April 2010. If Parliament had intended to limit the Commission's ability to reset prices under s 53P(3)(b) in that event, it would surely have made that clear in s 54K(3).

Vector's argument

[86] Vector supported the approach taken by Clifford J and as well the interpretation of his approach adopted by the Court of Appeal. It maintained that without a published starting price reset methodology, it could not be predicted that the newly published input methodologies would have produced a materially different outcome if in place when the starting price was reset. As well, without such an input methodology, it would not be possible to ensure that the reset price did not go

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61 At [71]–[72].

beyond what was necessitated by the new input methodologies. On Vector's argument, a strict objective (and perhaps mechanical) approach is required under s 53ZB and the same must be true of the similarly worded s 54K(3).

[87] Vector also picked up the argument addressed by the Court of Appeal and contended that a s 54K(3) reset under s 53P(3)(b) is not possible in respect of a starting price set under s 53P(3)(a), essentially because the necessary "apples and apples" comparison cannot be made. It will be noted that this second argument is reasonably similar (at least in outcome) to the factual argument that was addressed in the High Court which we have recorded at [79]–[80] above.

Our evaluation

[88] Since a starting price reset input methodology is not required to be published, it would be anomalous (and odd) to restrict s 54K(3) resets to circumstances where such a methodology had been published. Accordingly we reject the first of Vector's arguments.

[89] Vector's second argument puts a substantial gloss on the wording of s 54K(3). The test is whether the starting price as established on the first reset would have been materially different if the later published input methodology had then been in place. That question can be answered in the affirmative without the Commission (or court) necessarily being able to put a precise figure on the amount of the difference. That the corresponding exercise under s 53ZB probably will be able to be carried out in a largely mechanical way (given the context in which it will occur) does not preclude the similarly-worded s 54K(3) being applied in a way which is necessarily different given the very different – and in particular transitional – context in which applies. Accordingly, we see the gloss contended for by Vector as unnecessary and contrary to the overall legislative scheme and its underlying purpose. For the same reasons we regard the related factual argument which was advanced in the High Court as untenable.

[90] Despite the absence of published starting price reset input methodologies, we accept that it may have been possible for the Commission to have reset starting

prices for the regulatory period commencing on 1 April 2010 by reference to s 53P(3)(b). Indeed the possibility of doing so was addressed in the November 2009 decisions paper. That said, however, it was never particularly likely that it was going to do anything other than roll-over the existing prices under s 53P(3)(a). That such a roll-over was likely must have been apparent to the legislature. It would also have been apparent to the legislature that quite soon after 1 April 2010 and certainly by 31 December 2010, the Commission would be publishing a full suite of input methodologies. The regulatory period could not end before 31 March 2014 and most likely would not end before 31 March 2015. In this context, Vector's arguments attribute to the legislature the not very plausible purpose of deferring until at least 2014 (and probably 2015) assessments of supplier profitability and, in this way, defer very significantly the practical implementation of the sub-pt 9 regime as introduced in 2008.

Disposition

[91] For those reasons the appeal should be dismissed.

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