



Supreme Court of New Zealand

15 November 2012

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

VECTOR LIMITED v COMMERCE COMMISSION (SC 46/2012) [2012] NZSC 99

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

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 and replaced the previous pts 4, 4A and 5. Vector Ltd is subject to pt 4 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 five year regulatory period began on 1 April 2010. The starting prices for this period were set by the 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.

An important feature of pt 4 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.

The Commission's position is that under s 54K(3), and by reason of the publication of 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 the starting prices initially fixed for the regulatory period which commenced on 1 April 2010

Vector was successful in the High Court before Clifford J but the Commission appealed to the Court of Appeal, which overturned the High Court judgment.

The Supreme Court has unanimously dismissed Vector's appeal against the Court of Appeal judgment.

The Court closely examined the statutory provisions of the Act to discern the intended operation of the price control regime once it is mature. It also looked at how the transition to the new regime is to be effected. In relation to Vector's first argument, the Court concluded that the Act did not require the Commission to publish an input methodology addressing the resetting of starting prices. The Court did not agree with Vector that the absence of such an input methodology left the new price control regime in an unacceptably uncertain state. And although the Court accepted that Vector would have had more extensive merits review rights if a starting price reset input methodology was published, it did not see this as a controlling consideration.

The Court also rejected Vector's second argument, holding that s 54K(3) permits the Commission to reset, by reference to profitability assessments based on the later published input methodologies, the starting prices which had been initially fixed for the current regulatory period by reference to prices applicable as at 31 March 2010. The contrary argument placed an unnecessary gloss on the statutory text and its acceptance would result in a substantial deferment of the practical implementation of the sub-pt 9 regime, which would not be consistent with the purpose of the statute.

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