IN THE SUPREME COURT OF NEW ZEALAND SC 46/2012

[2012] NZSC Trans 15

BETWEEN **VECTOR LIMITED**

Appellant

AND **COMMERCE COMMISSION**

Respondent

Hearing: 9-10 October 2012

Court: McGrath J
William Young J
Glazebrook J
Blanchard J
Anderson J

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

CIVIL APPEAL

MR GALBRAITH QC:

Yes, if the Court pleases, I appear with Andrew Butler, Catherine Marks and Ricky Versteeg for Vector.

McGRATH J:

Mr Galbraith, Mr Butler, Ms Marks and Mr Versteeg.

MR BROWN QC:

May it please your Honours, I appear with Ms Casey and Ms Millard for the Commission.

McGRATH J:
Mr Brown, Ms Casey, Ms Millard.

MR GALBRAITH QC:
As the Court is aware, there are three questions for which leave has been granted. They're in vol 1 of the case, behind tab 2 and I intend to talk about issues A and B and Mr Butler will talk about issue C which is the s 54K(3) issue. Again, as the Court knows, the appeal is about one aspect of the scope of the new Pt 4 of the Commerce Act which was introduced in 2008 and again, as the Court knows, that part of the Act applies to businesses where competition is limited. Section 52 of the Act spells that out. Again, you'll find the Act or the relevant sections of the Act, in the appellant's bundle of authorities behind tab 1.

The reason for the new Pt 4 is set out in our submissions and in the extracts from both Hansard in the explanatory note and some extracts from the MED inquiry, but in broad terms it was because of general business dissatisfaction with the previous Pt 4 which itself had not been in place for that long and the way it was being applied by the Commerce Commission. In particular, there was a concern about the application of the then Pt 4 as a deterrent to investment and infrastructure.

As the Court will be well aware, this part of the Act applies generally to certain utilities. There have been incidents, if one likes to describe it as that, such as the lights going out in Auckland, which was reasonably significant, with Auckland becoming clearly a third world country for a period of time. There had been the confrontation between the Commerce Commission and Vector which had led to the Vector directors cancelling all capital investments, some 300 million I think it was and there had been a Government directive to the Commission in August 2006, which is referred to in our submissions, to take into account investment incentives. The concern of the Government was that there was perhaps too much focus on price issues and not enough focus on the broader impact of regulation.

You find an extract from that directive at [2.3] of our written submissions and if I could just take you to that briefly. You will see what's stated there is that, "The Government's economic policy objective is that regulated businesses have incentives

to invest in replacement, upgraded and new infrastructure and in related businesses for the long-term benefit of consumers. The Government considers this objective will be achieved by … regulatory stability, transparency and certainty giving businesses the confidence to make long-life investments." A couple of aspects to that … the regulatory stability means continuity. Long-life investments, these sort of utilities, the investments are 20, 30, 40-plus year investments, and so the Government recognised the need for continuity, stability, and certainty, and an inquiry was set up subsequent to that which led to the new 2008 amendments, but those objectives of regulatory stability, transparency and certainty come through all steps of the inquiry. They come through the explanatory note when Pt 4 was introduced, and the purpose of incentives to invest was recognised specifically in the new Pt 4 by the introduction into the purpose statement s 52A, which you'll find in the, as I say, behind tab 1 of our authorities.

Section 52A, especially s 52(1)(a) say, "The purpose of this Pt is to promote the long-term benefit of consumers in markets referred to in s 52" – and that's the markets where there's limited competition – "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." That was a new introduction into the Act. The Minister, in introducing, I think in the third reading of the Bill, emphasised that that was an important introduction and she welcomed the fact that it had been put as number one in the list of four objectives to promote as a purpose of the new Pt 4.

What Pt 4 provides, and I won't go into any great detail at the moment because I want to come back to it. But just in general terms, what Pt 4 provided was that it introduced a specific purpose statement, s 52A, because this was seen as more targeted than the general purpose of the Act. It included s 52A(1)(a) which I've just spoken about. It also introduced four possible types of regulation, and you'll see those described in s 52B(2). The first was information disclosure regulation. There already was regulation about information disclosure and various entities were subject to information disclosure. It introduced negotiated and arbitrated regulation, in other words, the possibility of imposing a regulation which required a supplier to first negotiate and then, if the negotiations were unsuccessful, then to arbitrate, then to introduce price-quality regulation, of which there were two types. The first was – and these are alternatives – default or customised price-quality regulation and the second was individual price-quality regulation. That applied particularly to Transpower, but

the price-quality regulation default customised is the regulation that we're concerned about in this particular hearing today.

It also introduced for the first time input methodologies as key determinants of these price paths, and you'll find – and again, I want to go into more detail later – but you'll find input methodologies identified at s 52B(1)(b) so this part provides for, it says, "(a) generic provisions for imposing 1 or more of 3 types of regulation," which we've just talked about, s 52B(1)(b), "for the Commission to determine input methodologies applying to the supply of goods or services regulated under this Pt, and input methodologies are defined in section 52C" – which is an interpretation section – "as being 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," and again, if one just looks at s 52R for a moment, you'll see that that defines 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 Pt."

The other novel introduction into this Pt was the review, the merits review, that was provided under s 52Z and this provided for merits review by way of an appeal against input methodology determinations and you'll see at s 52Z(1), "Any person who gave views on an input methodology determination … may appeal to the High Court" and then s 52Z(4), "The court may only exercise its powers … if it is satisfied that the amended or substitute input methodology is, or will be, materially better in meeting the purpose of this Pt, the purpose of section 52R or both."

At the moment, though not this week, merits reviews are being determined by Clifford J and two lay members in the High Court in Wellington, I think we're at day 25 at the moment and start again next Monday. Now, this appeal concerns, so far as Vector is concerned –

WILLIAM YOUNG J:
Can I ask a question? Is what's in issue here also subject to the merits review appeals?

MR GALBRAITH QC:

No, not in the merits review, Sir, but –

WILLIAM YOUNG J:

So there's no challenge to any of the input methodologies on the basis that it should have starting price reset or starting price adjustment provisions?

MR GALBRAITH QC:

Well there's a potential hearing in December where's there a legal – would say, a legal challenge to that but not a merits – it's not a merits review challenge, is it? It's a question of law challenge, Sir.

WILLIAM YOUNG J:

So there's no argument that the input methodologies would be better if they had a starting price reset component –

MR GALBRAITH QC:

Well the difficulty, Sir, is that so far as DPPs or the electricity lines companies and the gas companies are concerned, they haven't yet got to the stage where they have a price set under input methodologies. Nor have they got to the stage where there is a methodology which has been finalised in relation to how they're going to get from input methodologies to the other end of it. Yes, so that's been one of the thorny – well, I mean, the short answer is yes, it is an issue in the sense that, for example, the lay members keep saying well, how are we meant to figure out whether this is a good input methodology or a bad input methodology if we don't know what the outcome is going to be? That's certainly what – because both lay members are Australians and they're used to a quite different regime – they find it very difficult to – or sorry, they start off finding it very difficult to understand how they could assess the input methodologies before them as against an outcome they were certain of.

In relation to airports, it's a bit different, Sir, because what's happened with airports is that, with airports the Commission published both its input methodology where input methodologies that were applicable to airports and its determination of information disclosure requirements at the same time, at the end of December 2010 and what's played out before the Court, is that the Commission takes the position that the merits review can only consider what's in the input methodologies and can't take account of what's in the application of the input methodologies and the determination of what the

information disclosure has to be. So one gets this – well, that's the position the Commission takes and so that limits the scope, or the Commission wants it to limit the scope of the challenge that one can make to the content of the input methodologies. So that's a long answer, Sir.

Now what – but as you've quite rightly, is implicit in your question, or explicit in your question Sir, that this appeal is about what should have been either in the –

WILLIAM YOUNG J:
What had to be there, as opposed to what should be there?

MR GALBRAITH QC:
Yes, that's exactly what it's about and whether there should be a stand-alone, an individual –

WILLIAM YOUNG J:
Whether there has to be.

MR GALBRAITH QC:
Whether there – sorry, Sir?

WILLIAM YOUNG J:
Whether there has to be a stand-alone.

MR GALBRAITH QC:
Where there has to be, yes.

WILLIAM YOUNG J:
Whereas, perhaps I haven't really got my head around the review, the merits review appeal process, but the "should" question could perhaps be addressed in those proceedings.

MR GALBRAITH QC:
Yes. Yes, that's right. The merits review, to be fair about it at the moment, has been focused on really two input methodologies, and I stand to be corrected, I haven't been there the whole time, but the setting of WACC for both airports and for electricity and gas distribution companies and – so that's been a fairly technical

challenge and the valuation of assets input methodology which has been – which is coming up for electricity lines companies and gas distribution companies next week and also for airports. But, yes. So that's what's been going on down there for 25 days so far I think.

Now just briefly on how we've got to where we are today before this Court, perhaps if the Court wouldn't mind just looking for a moment at our written submissions: [4.2] just gives a little background. As the Court will be aware, this Act was passed in 2008. The Commission had started a consultation process in late 2008. The Act, as it was passed, required input methodologies to be determined by the end of June 2010 but provided for the possibility of a six month extension by Gazette notice that extension was given and the input methodology determinations came out in late December 2010. So far as default price path methodologies are concerned, Vector was concerned that the Commission hadn't determined input methodologies in relation to certain of the methodologies identified in s 52T(1) and was also concerned that there wasn't a methodology or a sufficient description so far as Vector was concerned to get them from the methodologies which had been determined to what the outcome might be for Vector. There had been consultation started in 2009 by the Commission on what Vector has described as a SPA methodology, which is a starting price adjustment methodology, but that –

WILLIAM YOUNG J:
Can I just ask, why do you call it starting price adjustment and Mr Brown calls it starting price reset?

MR GALBRAITH QC:
Well whichever –

WILLIAM YOUNG J:
It isn't necessarily an adjustment of what's there it can be a fresh start, I guess?

MR GALBRAITH QC:
It can only be a fresh start, Sir, by a reset or an adjustment because what they did, and it was the practical alternative, was that they rolled over what there was already so there already is a regime which is in place which is a roll forward from the prices which were previously, and the revenue caps which were – well, revenue thresholds that were previously there.

McGRATH J:

That was the initial determination?

MR GALBRAITH QC:

That's the initial determination, yes, Sir.

McGRATH J:

But from then on the Act really talks about a reset, doesn't it?

MR GALBRAITH QC:

Yes, yes.

McGRATH J:

It talks about setting prices but it's really a reset.

MR GALBRAITH QC:

Yes.

McGRATH J:

And so when you talk about an adjustment –

MR GALBRAITH QC:

It's a reset.

McGRATH J:

– that's the statutory concept you're talking about.

MR GALBRAITH QC:

Yes, yes, yes. It's how do you change from where you are to where you're going to.

WILLIAM YOUNG J:

But there's nothing in the –

MR GALBRAITH QC:

No there's nothing in the – and I see now that the Commission talks about a s 53P(3), I think they're talking about, or 52, 53, I get muddled. I think that's all strategic for the argument Sir, I'm not sure, but it's the same concept.

There's a number of consultation papers published in relation to the methodology and at the time of the High Court hearing there was a draft decision in July 2011 which is in the bundle. What the Commission was proposing in the context of this was having simply rolled forward effectively the revenue thresholds from the previous regime, it was planning to revisit that roll forward, once the input methodologies had been set and so as we say in [4.6], the current default price path, which was set on 30 November 2009, was to apply for that five year period, rolled over existing prices but the Commission believed it was able under s 54K(3), which my learned friend Mr Butler is going to talk about, to adjust those, that roll forward on the basis of the input methodologies that it had developed and published in December 2010 and/or the SPA methodology or the adjustment methodology which it was determining outside the input methodologies process.

And so Vector brought judicial review proceedings, the two heads, two principal heads being first, that the Commission hadn't identified input methodologies for asset valuation, cost allocation, and regulatory taxation; and secondly, that it hadn't – and we say should have – promoted a SPA methodology or an adjustment methodology as part of the input methodologies, and so the consequence of that was Vector's argument that they couldn't reset under s 54K(3).

Now, as you know, [4.9] sets out that the High Court said yes, the Commission had failed to identify those three methodologies for DPP and they had to be determined by 30 September 2012. The Commission didn't appeal against that direction, and I understand those methodologies emerged on 28 September, I think, or I think they're dated that date, just a couple of weeks ago.

The Commission appealed the finding that it should have determined a SPA methodology or an adjustment methodology. In the meantime, the Commission proceeded with developing an adjustment methodology that was due to be published on 7 June 2012, but the Court of Appeal came out with its judgment on 1 June 2012 so the Commission pulled the plug on publishing the adjustment methodology at that time. We're still awaiting a final adjustment methodology. There hasn't been one finally published by the Commission. It's proposed that –

McGRATH J:
Well, they're not going to publish it if the decision –

MR GALBRAITH QC:

No, they will. It's going to be in November, Sir, now, as I understand it, but it's not being published as an input methodology. It's just being published as a methodology.

McGRATH J:

Yes. They're going to tell you how they're intending to do it.

MR GALBRAITH QC:

Yes, how they're going to do it. That's right.

McGRATH J:

If they – they have to do some other things.

MR GALBRAITH QC:

That's right, and again, a difference of view between Clifford J and the Court of Appeal on the effect of s 54K(3) where Clifford J interpreted it consistently with Vector's submissions that it was relatively confined and certainly was confined only – the adjustment could only been made to the extent that there was a material difference that would have resulted from the input methodologies if they had been in place at the time the initial decision was made and the extent of the adjustment could only be to the extent that there would have been a difference, and the Court of Appeal took a rather more liberal view of the Commission's powers in respect of that.

ANDERSON J:

Mr Galbraith, this is an underlying concern of Vector that publishing a methodology other than an input methodology means you can't have a merits appeal.

MR GALBRAITH QC:

That's certainly one of the concerns, Sir. Just to speak to that for one moment, if you can't have a merits appeal you're stuck with on a DPP setting with an appeal on a question of law. And in fact, if one thinks of the way the Commission will reason between having an input methodology such as WACC or valuation of assets or whatever it is, and how it's then going to produce out of that a revenue threshold for an individual company, that's not a legal issue, that's the Commission sitting down and thinking, "What's the right answer and what are the inputs we should put into

that?" So the obvious submission from our point of view is that the merits review was seen as important to enable those sorts of issues to be challenged on a basis whereby they were challenged on the merits, not just on the law. It's very hard to challenge a determination such as that on a question of law because it's not a narrow issue of law, it's how do you best think that a revenue threshold should apply to Vector or Powerco or whoever else it might be.

ANDERSON J:
Perhaps you'd argue that it was irrational, wouldn't you?

MR GALBRAITH QC:
Yes, which – you're not going to get there. You hope you'd never get there, in any case.

ANDERSON J:
Well, what are the other concerns?

MR GALBRAITH QC:
The other concerns, Sir, are that on a reset if the Commission can change the methodology where you get from your input methodology to your revenue, if they can change the bit in between, which I want to take you to the evidence on this, then effectively they can get whatever answer they like. You can't predict where they're going to go. There's many a different way that you can get from A to C. You can go via B but you can also go via Z or X or Y, and so, on a reset, there's no certainty at all that you're going to get that regulatory stability or continuity that Parliament recognised and the Government recognised.

So that's a significant issue for investments to – sorry, for incentives to invest and it's really that whole issue of uncertainty which then arises. It also enables – input methodologies are subject to particular processes for changing them and there has to consultation, etcetera. The SPA methodology literally can be changed – I shouldn't say it, at the drop of the hat, but it's not subject to the same constraints so, in effect, the Commission can back-solve issues if its wants to. As I said, the challenge to it is effectively only a question of law so –

ANDERSON J:

So if this SPA methodology is published in say, November, you say it can be changed relatively easily after that?

MR GALBRAITH QC:

Yes and there's been already a number of different proposals by the Commission, alternative potential SPA methodologies. As I say, we haven't got a final one yet and each of those, as I'll take you to the evidence in a moment, each of those has a materially different outcome for individual suppliers. Not just Vector but other suppliers also and so it's been, one comes out and it looks fine, next one comes out and you're suddenly in negative territory to quite a substantial amount. Third one comes out and some people are back fine again and others have gone the other way and so that is a concern going forward, that without constraints on how the SPA methodology might be determined, as I say, going forward, that that regulatory roundabout can continue. That's the thrust of the concerns.

WILLIAM YOUNG J:

Where's the right of appeal in relation to a DPP determination, is that just a general right of appeal?

MR GALBRAITH QC:

There's – sorry, can I come back to that Sir because it's actually quite complicated?

WILLIAM YOUNG J:

Yes and one other thing that perhaps you could come back to later because I did understand it once but I now can't find it is –

MR GALBRAITH QC:

Well so did I once, Sir, but I have to –

WILLIAM YOUNG J:

Yes, how the regulatory period is set. I mean, it is either five or four years, as I understand it?

MR GALBRAITH QC:

Yes, that specific – I was looking at it this morning –

McGRATH J:

I'm quite happy Mr Galbraith, for you to come to these things in the order you're dealing with them. If you're taking us through the statute, that's going first, that's going to help us –

MR GALBRAITH QC:

Well I will come –

WILLIAM YOUNG J:

Well don't worry about it, it's just that they were two points I –

MR GALBRAITH QC:

Yes Sir, it is, it's five year regulatory period for DPP but they can shorten it to four years. Your Honour is quite correct, I'll take you to the section.

GLAZEBROOK J:

What do you say about s 52P, in respect of your submission that everything can be changed at the drop of the hat, how does that relate?

MR GALBRAITH QC:

Section 52P is just the – well, I shouldn't it's just – it's the section which provides for determinations and the Commission can revisit those determinations. They are –

GLAZEBROOK J:

I understand that there are not the same constraints as in relation to input methodologies but I was just really challenging your submission that things can be changed at the drop of a hat because there are obviously consultation requirements –

MR GALBRAITH QC:

Yes, there are –

GLAZEBROOK J:

– there are obviously requirements that you have to state in one of those determinations, how you're going to apply the input methodologies. So it's not that the Commission can just decide what it's going to do without telling people what it is

going to do and without consulting and without being under constrains. I suppose, the other point in s 52P is, if you are obliged to do that, that assumes there's going to be something that's not dealt with in input methodologies and so what is the something that's not dealt with but you're probably coming to that but it was just –

MR GALBRAITH QC:
Determination is a much –

GLAZEBROOK J:
– so I don't need to you answer that now.

MR GALBRAITH QC:
No, no but s 52Q(1), your Honour is quite correct, there has to be a consultation with determinations but there doesn't have to be an inquiry. With an input methodology they've got to actually hold an inquiry and they've got to have at least one, effectively "a hearing". With a determination they don't, there's just a consultation, they can determined. Determinations of course cover a very broad range of decisions by the Commission, not limited –

McGRATH J:
Section 52P determinations?

MR GALBRAITH QC:
Section 52P, yes, and s 52Q is the amendment of a s 52P determination.

Now, just as I flagged, before going into the detail of the – further detail of the statute, and we obviously have to do that, I just would like to take the Court to some of the expert and factual evidence which was before both the High Court and the Court of Appeal, though –

McGRATH J:
How long is this diversion, Mr Galbraith?

MR GALBRAITH QC:
A little while.

McGRATH J:

I'm very keen to get your perspective on the whole statute before we go too far into that.

MR GALBRAITH QC:

Yes, I think this will help, Sir. That's the reason I'm going to do it.

McGRATH J:

Thank you. I'm sure it will, yes.

MR GALBRAITH QC:

The first – in vol 2, you'll find under tab 17 an affidavit by a Lynne Taylor, who, as she says, she's been advising in this area in relation to utilities sector pricing since 1991, so she gives a perspective, and I think that's where it's useful, then, to come back to the statute, Sir.

McGRATH J:

Fine.

MR GALBRAITH QC:

So if we just go into – behind tab 17 and the page number is right at the bottom, right-hand side, 157, under the heading "DPP regulation" you'll see that she sets off saying that electricity distribution businesses and gas pipeline businesses are regulated under Pt 4. Perhaps just to note, these consumer-owned EDBs are subject to information disclosure only. Now, Vector's consumer-owned at 75 per cent, but to be exempt you've got to be 100 per cent so Vector doesn't fall outside that.

If you're not exempt, then you're subject to price control, and that's either the default or customised price paths regulation she's talking about in 2.1. As she says in 2.2, "At a high level, regulatory price paths operate by setting the allowable revenue that a regulated business can earn over a regulatory period, so non-exempt EDBs and GPBs are all subject to a DPP." As she says in (b), that's meant to be a relatively low cost form of price path regulation, and you'll see that from the name of the default price path regulation, the idea is that if you haven't got a customised CPP, then you fall into the default price path. It's hoped that a default price path will sweep up most of the businesses and therefore it's intended to be effectively, in a sense, a generic, generically-applied price path. It will be relatively low cost.

It can apply for a customised price path. All sorts of limitations on that I'll come to later but, among others, the Commission only has to determine four of those a year, so if everybody suddenly decides they didn't like the default price path, it would be the first four in the door, presumably, who would have a customised price path and the rest would just have to bear with it until the following year.

A point in (d), DPPs and CPPs are price-quality paths, so there are quality standards, as you would expect, also set. As she says in (e), the Commission is required to set in advance the methodologies and processes applicable which are the input methodologies, and of course the question here is, how extensive is that?

She notes in 2.3 that they've rolled forward the prices for the five years to 31 March 2015 by their determination in November 2009. That DPP has got to be reset before the commencement of the next regulatory period for the 2016, 2020 year, and as she notes in 2.4 that the Commission is intending to reset the 2011 to 2015 DPP, as I was telling the Court before.

Just across the page on 159, she talks about how allowable revenues determined under a DPP, and I won't go through the detail of that, but as you'll see in 2.11, she says DPP is not a form of price regulation in a strict sense, as there is no set limit on each individual price for the specified services of each EDB. It specifies the maximum revenue that may be earned by a regulated supplier for each year of the regulatory period. If the actual revenue exceeds allowable revenue, then the supplier will be deemed to have breached the DPP price path. And she then explains how the allowable revenue is calculated, and the important one is the first year allowable revenue, the starting revenue, because from that the revenue which is allowed for the rest of the five year period is adjusted based on the CPI or CPI minus X and on lagged quantity calculations. I say lagged quantities because forecasting is invariably difficult. They work off a lagged quantity at the end of the year when you can just look back and see what actually happened.

So she sets out in 2.14 the allowable notional revenue and just explains that it's calculated by multiplying the company's starting price or aggregate list prices by lag quantities. The starting revenue, that is starting prices times quantities, increases each year in accordance with a rate of change, CPI minus X, and with allowances made for changes in quantities. Starting revenue with annual adjustments for those

provides the allowable notional revenue for each year and the company has got to report its assessed notional revenue for each year and then that's compared with the allowable notional revenue and determination made whether there's been a breach of the price path or not.

Going across the page, 162, she sets out how the determination was made by the Commission in November 2009. That followed consultation. As I've already said it was a roll forward of – but you'll see in little "b" of 2.17, the starting price of those that applied at the end of the proceeding regulatory period and the starting quantities of those that applied over the 12 month period entered 31 March 2009 measure lag quantities. So you look back to see what the quantities were.

And then, just further down that page, adjustments when a DPP is reset. As you know it's got to be reset every five year period but there was going to be a reset proposed by the Commission and then across the next page 163. This is getting to the nub of what's before the Court: the relative importance of starting price adjustments because she's been talking about a reset whether it be of the initial period or the five year reset which is required. The point she's making here in 2.25 is the adjustment of the starting price will likely have a much greater impact on the EDBs business than adjustment to the other components, that's rates of change and quantities, and then explains why that is. Obviously because the rate of change is linked to CPI and linked to industry wide parameters, and the quantities are based on lag volumes but as she goes on to say in 2.26, "Changes to starting prices may significantly impact on the allowable notional revenue for each individual supplier at the beginning of a regulatory period. The extent of any change could vary significantly depending on the method applied by the Commission. Any change in starting revenue flows through to all subsequent years of the DPP as this new level of starting revenue is only able to be adjusted with reference to the annual CPI minus X adjustment and the annual quantity adjustment."

Then if one goes across the page to 164 she talks about the starting price adjustment methodology or the starting price reset methodology, whichever way you prefer it. In 3.1, she says, "Whatever method the Commission adopts for adjusting starting prices it is right to call it a method or a process. In my view the Commission cannot make an adjustment to a starting price without first determining a process to be applied. The requirements in section 53P of the Act set out some key parameters that apply to setting adjusted starting prices. Adjusted starting prices must be based on current

and future profitability and the Commission must not use comparative benchmarking or seek to recover excess profits from a previous regulatory period, but these requirements in themselves fall well short of the method that will ultimately need to be applied by the Commission."

And then she goes on to talk about the components of starting price adjustment methodology. "There are a wide range of feasible options for a starting price adjustment. Any method will set out how current and future profitability is to be determined under a less than four building blocks approach. Necessarily cover the following factors." She sets out how you assess current profitability and at this stage she refers to the final reasons paper and the way that the return on investment formula is likely to be derived. She then refers in little "b" to the data that will be specified in calculating the return on investment and there will be key input methodologies, common cost allocation, asset valuation, regulatory tax, which you'll see all are relevant to the formula she set out above. And then in little "c", that the cost of capital will be a benchmark against profits, will be determined as to whether they're too high or too low.

And then across the page she's talking about, "There's got to be a method for estimating the projected profitability for each supplier. There needs to be sources of data or estimates that will be used in estimating projected profitability including application of the input methodologies in the relevant time periods and there has to be a method for converting the current and projected profitability into adjustments to be made to the starting revenues of each of the companies.

Now, she then goes on to talk about two of the methodologies which the Commission –

McGRATH J:
Does this highlight, just looking at the two headings, projected profitability and current profitability, and under current profitability we have what you might call the sort of specific factual or historic matters which are listed in s 52T. Projected profitability – is the problem, really, a projected profitability problem that Vector has?

MR GALBRAITH QC:
It's what the Commission will allow. You'll see, perhaps if we look at the two methodologies that were suggested, Sir, you'll see how this applies, because that's

what she goes on to talk about. There was one in – what happened, and there's no criticism of this, the Commission put out a discussion paper, as she says, in August 2010 of one idea, let's just express it in that way, one possibility for consultation. As she says there in 4.1, the idea was that the supplier's returns would be calculated using a return on investment assessment based on historical data, normalised in relation to statistics and other information, and then the supplier's profitability was to be compared against returns, against an industry-wide return on investment bands centred around a weighted average cost of capital at the 75th percentile, but there was a band that was going to be assessed. If the supplier's returns were above or below that band, then the percentage difference was going to be calculated, and then the differential was going to be adjusted in the supplier's actual weighted average, prices, revenues for the specified year, so you're going to use a band approach, an industry-wide band approach, see how that – where the supplier's ROI fitted in there, and if there was a differential then they were going to adjust that for the period going forward. That was the first idea.

Then in April 2011, the Commission published a second proposal. What had happened then, by that time, was that the Commission decided the band idea wasn't a good idea or wasn't the idea it was then promoting, so under the revised method the Commission was going to calculate each supplier's return on investment in the year preceding the first year of the DPP regulatory period using supplier-specific information this time, and then a projection of revenue for each supplier for each year using industry-wide assumptions for annual real revenue growth and CPI applied to base year revenue. So they're going to look at the industry-wide assumptions and use that for the projections going forward, and then they were going to do a calculation, a calculated projection for each of the building block costs, the ones that go into that formula up above, OPEX depreciation etcetera, for each supplier by applying industry-wide forecasting assumptions for nominal growth and for those categories of inputs, and then calculate a positive or negative adjustment to the weighted average prices – or revenues, one should really read for that – so that the present value of the projected revenues is the same or would be the same as the present value of projected building block costs over the five year DPP. Then there might be a positive starting price adjustment where projected building block costs exceeded projected revenues or a negative starting price adjustment.

Now, she sets out in 4.3 the key differences in the two methods. In the first method, the current profitability is derived from historical return on investment data to be

normalised. Under the second method, from a single base year return on investment, being the year immediately preceding the DPP, and then certainly projecting profitability – sorry, projected profitability under the first method is by applying a return on investment band around the cost of capital benchmark to accommodate differences between current and projected profitability. Under the second method, profits for each supplier are projected using industry-wide assumptions. Now, she then says, well, the main impact on starting price adjustments under the first method is the band limits both your downwards and your upwards, whereas under the second method there's no buffer for forecasting uncertainty. The method now includes what's effectively explicit forecasts for each supplier, although they're based on common forecasting assumptions, so as she says in 4.6, applying whichever methodology you apply to each supplier ends up with a different answer. Then she goes on, under 4.7, to say that there's a number of other ways that you could identify or apply a methodology and so she sets across, in 4.8 and 4.9, various variants that could be adopted and in 4.9, that's because there's a range of possible outcomes which are significant because of the impact of those approaches on those various inputs.

So just to illustrate it, in 4.10, she says well, an illustration of the differences between the two methodologies which the Commission promoted in August 2010 and April 2011 for a couple of the companies, Network Tasman under the April 2011 method would have revenue adjustment of plus 49 per cent but would have nothing under the 2010 method and that's a huge variant. Aurora Energy under the April 2011 method would have a plus 5 per cent but have a minus 10 to 14 per cent under the August 2010 method. And so, as she says, "Those are indicative of the impact of the different methods on all EDBs. Of the 15 EDBs for which the Commission has presented results, five EDBs were assigned no SPA methodology. There was no adjustment under the August 2010 method. Two EDBs were assigned SPAs of more than 40 per cent under the April 2011, of those five, go up by more than 40 per cent under the April 2011 method and the other three are assigned positive SPAs within a range of 0 to 10 per cent. Of the other 10, two had positive SPAs under the August 2010, whereas six had positive SPAs under the new method and two EDBs which were assigned negative SPAs under the August 2010 method and get positive SPAs under the April 2011 method."

So there's wide variation on what the consequences may be depending on the methodology which goes back to his Honour Anderson J's point, that's nothing you

can – seems to be challenged on a question of law. It's a determination made by the Commission as to what's appropriate or inappropriate, which is a merits type issue and one can see how the merits cut different ways on the different tests.

So what she goes onto say across the page, in 170, is under the heading, "Inability to determine likely impact of input methodologies," is that the current input methodologies themselves don't allow you to narrow down the range of plausible outcomes. Now of course the Commission will come to a position but it's not being constrained in coming to a different position when it comes to a price reset in five years time. Then on the next page under, "The impact of uncertainty," makes the obvious point that if suppliers are unable to predict how the DPP will be reset, then they can't predict their future revenues and hence their cash flows.

Across the page, 172, under, "Achieving certainty," she says in 6.3, she sets out what – she says, "In order to achieve a reasonable degree of certainty the following aspects should be specified as an input methodology. The sources of data or estimates being used to identify each supplier's current profitability including time periods, the method that will be used to calculate current profitability using the data specified above including the application of the other input methodologies, the sources of data that will be used and the method for estimating projected profitability for each supplier using the data including how the other IMs will be applied." Then in little (e), "The method for deriving the starting price adjustments using those inputs."

So it's identifying the inputs that will be used in terms of data and estimates, etcetera and the method that will then be applied. She goes on to say that, so far as she's concerned, she believes the core aspects of that methodology could have been proposed and consulted on during the IM consultation process. She makes the point, in 6.5 little (b) that, "Any methodology determined should be able to be applied in principle across regulatory periods. Indeed, it is critical for certainty that it does."

She comments on, little (c), that the Commission, one of its justifications for not setting a methodology was that it needed to be iterative. She just makes the comment well, all the input methodologies are iterative, that's the process of putting forward a proposal for consultation as indeed the Commission did in relation to the SPA methodology but there's nothing different between that and the other methodologies in terms of their iterative nature.

I'll just take you quickly through the other affidavits and not in the same length –

GLAZEBROOK J:
Before you –

MR GALBRAITH QC:
Yes certainly.

GLAZEBROOK J:
– leave that can you just explain – perhaps in a bit more detail, why the current IMs don't, input methodology determinations, don't cover the field because, if you look at 4.9, a lot of those things are covered by input methodologies, and she says herself that they should do because at 5.5, if you're looking at asset valuation, cost allocation, tax and cost of capital should inform current profitability.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
So she does explain there but if you can just...

MR GALBRAITH QC:
Well perhaps the easiest way to show it, your Honours, if you go across to page 308, it's behind tab 24. On that, this is Ms Taylor's reply affidavit –

McGRATH J:
To Mr McLaren?

MR GALBRAITH QC:
Yes, it's a reply to Mr McLaren. What she's done there in that figure on page 308 is she's set out what you need to know to get to the answer at the bottom right, the DPP. Now at the time she did this, of course, this was before the Commission had accepted that it needed to provide an asset valuation, cost allocation, IM and a regulatory tax IM, so you'll see in that top left hand box on the left-hand side, she's got data for calculating current profitability including those things. Now, sure, there are now those three IMs but there still isn't the data for that. So you can see the blanks on the right-hand side and what she's saying in that affidavit is that without

those blanks being filled in, fine to know that the WACC is going to be 8.77 per cent but that's only what you're going to be, effectively, benchmarked against. That doesn't tell you how, what you're going to be allowed or how you're going to get there, and she says in 2.2 –

GLAZEBROOK J:
Sorry. So you say it's the data that's lacking, is that – or the method of finding the data or what exactly – in a nutshell really.

MR GALBRAITH QC:
Well it's data and, because if you take that, what I described before the – August 2010, for example, had a band so there was –

GLAZEBROOK J:
And I understand that bit of it.

MR GALBRAITH QC:
Right, okay.

GLAZEBROOK J:
It's really just the –

MR GALBRAITH QC:
But things like data, where the estimates are going to come from, what the industry wide assessment is going to be, what's the basis for that, are you going to use weekly, monthly, where are you going to get your sources from, and that can make a radical change. I mean the input methodologies hearing we're having at the moment, the difference between weekly and monthly data off Bloomberg makes a significant difference to some of the inputs to WACC. So there's significant – and she says, if I can just draw your attention on page 309 to [2.10], because as I say, this was done before we had the first round. She says, "Even if the Commission had specified asset valuation costs, application regulatory tax input methodologies relevant to DPP, the input methodologies by themselves do not constrain the Commission's discretion in relation to its determination of starting price adjustments, without suppliers knowing the other core components of the SPA methodology."

And then she goes on to say –

GLAZEBROOK J:

So in a nutshell what are those other core components? So I understand the banding or benchmarking or how you get end data, is there anything else?

MR GALBRAITH QC:

Well it's how you identify –

GLAZEBROOK J:

I mean how you put them all together –

MR GALBRAITH QC:

How you put them all together –

GLAZEBROOK J:

Although to me s 52P says, that a s 52P determination says how you put them all together, because it does say how they're going to apply those input methodologies, so one assumes that there's always going to be, because if you've got a whole pile of different input methodologies, logically you would have to have something that says how you put them together.

MR GALBRAITH QC:

You've got to, yes, otherwise you've got nothing.

GLAZEBROOK J:

Well, exactly, which is where I thought s 52P came in, to say you have a determination to say how you put them all together. Now I realise that –

MR GALBRAITH QC:

I understand totally what your Honour's … well I think I do, sorry, yes, at the end of the day, I mean you've got to put them all together because you've got to get an answer so they've got to be put together and there's got to be a s 52P determination because at the end of the day it's got to produce a DPP and the DPP has got to be whatever it is and the DPP will be specific to the individual companies so Aurora or Vector or whatever it might. So what we're arguing for doesn't obviate the need, at the end of the day, for the Commission to sit down and say, in relation to Vector, "Well, this is how this methodology is going to be applied to your particular

circumstances and we want to see this, this, this and this, and we'll input that, and there'll be an answer come out of that." It's the intermediate step of between having the input methodologies, which don't give you the answer unless they're put together in the way that your Honour was speaking of, but we need an intermediate step along the way so that we can – because, as we'll come to, s 52T(2), for example, we need to be able to reasonably estimate that, where we're going to end up. We won't get down to a dollar and cents position, but we need to know with a reasonable degree of certainty that if this is the approach the Commission is going to take, then we're going to be in a ballpark.

Now, how narrow the ballpark will be will depend when they actually come to use our particular information and apply industry-wide assessments etcetera to it, but we also need to know the methodology of getting from the, say, the input methodologies they've got floating around – I shouldn't say floating around – that they've got sitting there, to the answer at the other end isn't going to change every time they have a new bright idea. I don't mean that pejoratively, but some new idea crops up and so the getting from A to C no longer goes through what we thought was B but goes through E, so the answer at C is quite a different answer. No embarrassment in Vector saying Vector does want the Commission constrained. It wants the Commission to have to nail itself to an input methodology which gets it from the A to the B but not to the final answer, but something which Vector and the other suppliers can place some confidence in that it won't change other than through the input methodology regime and also, as his Honour Anderson J asked me, a methodology that can be challenged on its merits. That's what it wants.

McGRATH J:
Now, Ms Taylor's affidavit really, I think, spells out the theory of how regulation should work.

MR GALBRAITH QC:
Yes.

McGRATH J:
Does that enable us to get back to the statute, or those two affidavits?

MR GALBRAITH QC:

Almost, Sir. Can I just take you to a couple of others? Mr Mackenzie, who's the Chief Executive of Vector, has an affidavit under tab 18, and I won't dwell on it, but – I literally won't dwell on it, but what he's explaining is how important this is for infrastructure investment, for what Vector decides to do. If it doesn't have certainty, it doesn't know where it's going to, and it simply won't make the level of investment, and then he gives some examples. He also sets out, and it is quite interesting, that the difference between the market reaction to the August 2010 paper from the Commission and then the April 2011 paper from the Commission was – and it's set out in 4.20.1 on page 188 – that the change of thinking by the Commission was seen by market analysts as being regulatory uncertainty re-established, and that's the difficulty that one has. Unless you have got regulatory stability, then every time there's a change or another, a wind shift from the regulator, the market takes fright. So I won't dwell on that.

There was an affidavit from Mr Carvell for Vector which is behind tab 19. He also discusses the – starting at page 199 and following – he discusses the impact of starting price adjustments on Vector's business. He discusses those two different methodologies that were promoted by the Commission, and you'll see in paragraph 3.10 on page 200 that he makes the point that the difference between those two methodologies so far as Vector could calculate was the August 2010 methodology over five years would have affected it at minus 5.5 million. The April 2011 methodology over five years would affect it at minus 158 million. That's a huge variant if a company's deciding is it going to – well, what's it going to commit to in the future?

Mr McLaren under tab 20 filed an affidavit on behalf of the Commission. In effect, what Mr McLaren said at paragraph 19, on page 216, was that, "It would be wrong to draw any conclusions about the size of the starting price adjustments applied by the two approaches." He says they're simply hypothetical. Well, they were the two approaches that the Commission put out for discussion. They're hypothetical in the sense that the Commission didn't resolve to adopt those but they were what the parties were asked to consider and comment on.

I don't think you need, with great respect, to bother about Mr Houston's affidavit behind tab 21, or the affidavit behind tab 22, or Mr McLaren's reply affidavit behind tab 23. I've already taken you to Ms Taylor's reply affidavit behind tab 24. Mr

Carvell's affidavit behind tab 25, perhaps just note page 320, where he says that, "Despite what Mr McLaren says, the purpose of looking at those two different methodologies was because," as he says in 4.3, "they were clearly feasible methodologies promoted by the Commission and the inputs are constant," and so it's a fair measure of outcome to measure those differences which Vector predicted would apply to it.

There is, in my respectful submission, it is worth looking at the affidavit behind tab 27, the affidavit of Mr Goodeve. Mr Goodeve is the regulatory and business –

GLAZEBROOK J:
Well, just looking at 4.2 there, he says that wasn't, that was just modelling of the total outcomes, doesn't he?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
So he's not saying that that is actually the difference?

MR GALBRAITH QC:
No, no. He's saying that's the best estimate, given the information.

GLAZEBROOK J:
Well I don't really think he's saying that. He says that's the outer estimate that it could be, isn't it, on a modelling basis, to show that there could be differences rather than there would be. So he's not really that far away from what Mr McLaren says, is he?

MR GALBRAITH QC:
Well, I think he's a fair way away your Honour. I think he's saying – he says in 4.2, "While the model is intended to be illustrative only, no question of a range provided is in the vicinity of the range of outcomes associated with the Commission's choice of SPA methodology. That is, it clearly shows the difference of outcomes will vary."

Powerco, Mr Goodeve is the regulatory business manager of Powerco, his affidavit is behind tab 27. By the time he swore his affidavit the Commission came out with a third methodology and you'll see that in paragraph 8 of his affidavit. "At the date of

swearing my affidavit, the Commission has put forward three different SPA methodologies in less than a year of consultation on this issue. The first two proposed SPA methodologies were addressed in Vector's evidence and the third one is included in the Commission's draft decision in July 2011." Then in 10, again illustrative your Honour but –

GLAZEBROOK J:
Sorry, I think I've lost the – 10, is it, of which tab?

MR GALBRAITH QC:
Page 335, [10].

GLAZEBROOK J:
Thank you.

MR GALBRAITH QC:
He says, "The Commission's three methodologies indicated to Powerco is to face what the Commission has referred to as illustrative price premium reductions of August 2010, was going to be minus 13.5%," so 27.8 million for just one year, or for that particular year. "April 2011, the second methodology, only 0.3% over five years," so a reduction of 0.8 million for 2012/2013 and, "July, under the third proposed methodology, 9.2%, a revenue reduction of 20.7 million." So that's how the three methodologies were going to affect Powerco.

Now, what had been said by the Commission at some stage, was that, oh well, it can't be a problem because Powerco went off and raised money in the United States private placement market of $245 million in the course of all this. What Mr Goodeve goes onto say is, we raised that after the second methodology had been promoted and, as he says in [18], "In any case, regardless of the numbers involved, from Powerco's perspective the overall significance of the change in impact between the three methodologies is twofold. First, Powerco can't predict with any degree of certainty the real impact of DPP regulation on its business. The number of changes in methodologies to date suggests there was nothing to stop the Commission from releasing a different SPA methodology at every DPP reset. It makes long-term business planning and raising of capital, problematic. Exactly the type of uncertainty the new Pt 4 regulatory regime was designed to overcome. Second, the Commission's SPA methodology has become successfully more complex."

Then he refers to the private debt placement in 20 and says, in the second sentence, "It is significant, from Powerco's perspective, that the Commission's third reworking of its SPA methodology post dated Powerco's debt placement and that this further major change in approach was not anticipated, did not anticipate the Commission would shift between significantly SPA methodologies to the extent to the regulatory it has. The level of change sends a – and then he sets out in 21 a snarky letter from one of the debt providers saying, "You can tell the Commission that we're not impressed by the fluctuation in the Commission's position," and goes on to say, "We've invested in most of the Australian utilities. They're a much bigger size than the New Zealand ones, in part because of regulatory concerns," so this is a – this isn't theoretical, or as we've been discussing down before the Court, economists' thought exercises. This is, this has a – it's a crunch issue which part the new Pt 4 was meant to address.

So just, if you take up our written submissions again just briefly, I don't, because the Court will have read the background, the legislative history, but you'll see in 2.7 that at the time the –

BLANCHARD J:
I'm sorry, where are we going again?

MR GALBRAITH QC:
Back to our written submissions, Sir, page 4, [2.7]. At the time that the – there was an inquiry, as I say, as to what might be done to Pt 4, and of course all the suppliers made submissions and the Commission made submissions, and what the Commission argued was that the regime was working well and that, as we've set out in 2.7, it considered that the criticisms were overstated, that future thresholds could have an ex ante element, that administrative settlements were effective, and that as precedents are set firms would be provided with more certainty. The regime provides it, the Commission, with flexibility to address problems and issues which arise and that it is premature to replace it. Now, that wasn't accepted, as you'll see in 2.8, by either the Government or Parliament that enacted the new Pt 4, but there's more than an echo, with great respect, of the Commission's proposition that as precedents are set firms will be provided with more certainty in the reasoning of the Court of Appeal. It says effectively something almost – it's not word for word, but it's the same sentiment. That was a sentiment that was rejected, as I say, by Government

and by Parliament, in enacting Pt 4. It's not a question of over time certainty will develop, because over time what Parliament was concerned about was investment incentives then and now, not five years, 10 years, 15 years down the track, because that's what "over time" implies, because you get your resets every five years. So I'll come to what the Court of Appeal said, but it's a line of thought which is inconsistent with the purpose of s 52A(1)(a).

WILLIAM YOUNG J:
Just one point. If the reset methodology, if a reset methodology was published as an input methodology, it could be changed every seven years?

MR GALBRAITH QC:
Well, it could be changed earlier than that, Sir, if they went through the inquiry process, yes. It has to be changed every seven years, yes, Sir. It has to be reviewed, at least.

WILLIAM YOUNG J:
So where's the greater certainty? I appreciate there's greater challenge rights.

MR GALBRAITH QC:
Well, that was one of the ideas of the seven years for input methodologies, because you've got a regulatory period of five years and while it's correct that the Commission could change at any time if it goes through the process, the idea was that it had to review at least every seven years. Now, seven years, obviously, is longer is five years, so the idea was that the input methodologies would run through two periods, so you'd have your first five year period, a reset, your second five year period using the same input methodologies –

WILLIAM YOUNG J:
Well, they'd sometimes run through two and sometimes they'd change it.

MR GALBRAITH QC:
Yes. They could change it, I accept that, but you can see the thinking. That's why they have seven years. Otherwise you'd have it five years, but the idea was that you should set input methodologies which are robust, they're going to be subject to merits review, so they're going to have been tested in a merits review. They should be able to run more than six months, 12 months, two years.

WILLIAM YOUNG J:

The first IMs will only apply to the first full reset, won't they?

MR GALBRAITH QC:

Yes, they'll apply to the 2000 – I always get muddled, the 2016, whatever it is, reset, yes.

WILLIAM YOUNG J:

And then there'll be another set for the next reset in 2020?

MR GALBRAITH QC:

There may or may not be. They'll have to be reviewed in that time, yes, Sir. But they'll be reviewed subject to merits review and the argument will be, well why are you changing it, that's fine. But the SPA methodology isn't subject to merits review, it can be changed, as I – I mean her Honour is quite correct, I mean there's consultation required but there's no inquiry required. There's nothing which says it goes for seven years. There's no indication of statute that it's meant to traverse more than one regulatory period and, yes.

So – and just in 210, just again to note the explanatory note, it really confirms the point I was making before about how the objectives stayed the same.

Can I just briefly direct your attention to what we said in the written submissions about merits review, and I am coming back to the statutes, but we said in 216/217 that – perhaps this might help us on this – that in 217, there's no general merits appeal right in relation to final DPP decisions, and I knew it was a long way back in the statute –

WILLIAM YOUNG J:

It will just be a general appeal right, it's in the general appeals section.

MR GALBRAITH QC:

Yes.

WILLIAM YOUNG J:

From recollection that's what s A(1) is.

MR GALBRAITH QC:

I'll look it over at morning tea. There are some wrinkles in it, Sir. It's not entirely straightforward in my memory but my memory is not good enough to remember how not entirely straightforward it is.

WILLIAM YOUNG J:

Right.

MR GALBRAITH QC:

So going back to the statute, and the Court may find it useful, the little table we've got between pages 7 and 8 of our written submissions as a bit of a guideline to the statute. We don't need to look at all of it but you'll see that table between 7 and 8 I think it is. The purpose section, the top section, 52A, the Court's seen that. Transpower has got its – there are separate parts of Pt 4 which apply to each category of industry. So you'll see under regulated industries, Transpower's got subpt 9. Electricity distribution lines are under subpt 9. Gas pipelines service under subpt 10 and airport service under subpt 11 and then that points them down as to what's the particular regulation that applies to them.

You see under electricity distribution lines and gas pipeline services, they're both subject to information disclosure and to DPP and CPP regulations but I'm not sure when you need – or perhaps we should just look at the s 54 for a moment. Subpt 9 in the statute starts at s 54. It pulls in all suppliers of electricity lines services. The generic part of it is probably not particularly relevant. Section 54I requires the Commission to make s 52P determinations as to how the subpt will apply and s 54J requires default price path supplying from 1 April 2009 and we've explained that. The transition arrangement, I don't think we need bother about that.

McGRATH J:

You're not going to s 54K at the moment?

MR GALBRAITH QC:

Sorry, Sir, I was going to go to – that's the – that's for – the determination setting out the price path supply from 1 April 2010 and – no, that's what Mr Butler is going to talk about, s 54K(3), Sir. But I was going to talk about something else, I just can't find it. I'll come back to that.

McGRATH J:

It does provide for a transitional reset, doesn't it?

MR GALBRAITH QC:

Well that's the issue Sir, just what does it apply – provide for, and that was what I was talking about before when we were talking about the possibility that if the input methodologies, once they were identified, would have caused a different answer at the time that the initial revenue thresholds were set, then there is an ability to reset. The question is, what does that mean? As I say, Clifford J had a different view from the Court of Appeal and there may be even different view, when one looks at it closely, might apply.

Perhaps we should look at s 52P because these are determinations ultimately under – the DPPs and the determination under 52P –

GLAZEBROOK J:

When you did that, I presume you'll go on to look at s 53P but just in terms of changing these things as they go, what does s 53P seem to suggest, it might seem to suggest that you actually have a determination that applies for a regulatory period and then you have another one that applies for a subsequent regulatory period. So there might be a hint as to no drop of the hat, changing of determinations from what is said in s 53P?

MR GALBRAITH QC:

I think your Honour's quite correct in the sense that, I mean, there has to be a determination at each period where there's to be a reset –

GLAZEBROOK J:

I suppose I was just really saying, is it any different from an input methodology in terms of being able to change it, apart from it being consultation rather than enquiry and, apart from probably it being five years because it's regulatory periods rather than seven?

MR GALBRAITH QC:

Yes, so there's no limit on when they can change it under s 53Q, so they –

WILLIAM YOUNG J:
Section 52Q or –

GLAZEBROOK J:
Section 52Q, yes.

MR GALBRAITH QC:
Sorry, s 52Q, sorry.

GLAZEBROOK J:
I wish they – I wish these section numbers were easier, yes.

MR GALBRAITH QC:
I'm getting dyslectic in my old age I'm afraid but there is no limitation and there's none of that particular identification of seven years which there is in relation to input methodologies. Section 52P, as we say in that table, provides that the Commission has to make determinations, under s 52P(1), how the relevant forms of regulation apply to suppliers and they've got to specify also the input methodologies which apply to any such determination.

Then s 52Q, there's a general power to amend but a DPP or CPP determination can't be amended on the grounds simply of a change – well this is the argument, on the grounds of a change of an input methodology except where the input methodology is, as I said before, published after 1 April, or would have resolved in materially different price paths and that's the issue which Mr Butler is going to talk about.

The appeal, from a s 52P determination and we've got that in the little box on the right, so perhaps that does help, is questions of law under s 91(1)(b) or for CPPs and IPPs general appeal right under s 91(1). So from a DPP there isn't a general right of appeal. There is, as I said before, only an appeal on a question of law which is why we argue that there should be an input methodology for the methodology to get you from the other input methodologies to the s 52P answer and you can't appeal, by the way, against all or part of an input methodology, the process there is the merits review, though of course you can challenge on error of law.

Perhaps, looking under input methodologies, the right-hand side. I took you to s 52R before which is the purpose section and there's a whole section on input

methodologies, as you can see. Then s 52T is the crunch section, matters covered by input methodologies, "Input methodologies relating to particular goods must include to the extent applicable to the type of regulation under consideration. Methodologies for evaluating or determining the following matters, cost of capital, evaluation of assets, allocation of common costs, treatment of tax and pricing methodology except where another industry regulates, such as the Electricity Authority, has the power to set pricing methodologies."

Those are, my understanding of that, is that those are specific price fixing methodologies, so methodologies for fixing the price for particular consumers and that is now in fact done by the Electricity Authority in relation to electricity lines companies. In other words, it's not the linking methodologies between other input methodologies and the DPP answer.

Little (c), regulatory processes and rules such as the specification and definition of prices including identifying any costs that can be passed through to prices. Perhaps just – I didn't draw your attention but in Ms Taylor's affidavit she indicates that there are passed-through costs which the Commission identifies which don't come into the price path. They are simply costs which the suppliers are entitled to pass straight through to customers. I think Transpower's costs, for example, or charges, is one of those.

McGRATH J:
We're now into part of the statute which you say is pivotal, aren't we?

MR GALBRAITH QC:
Yes, and I've got to come back and –

McGRATH J:
A specification and definition of prices is all of your purpose argument you've been telling us about is directed to this and the next provision?

MR GALBRAITH QC:
Yes, and the next one, Sir. And so –

WILLIAM YOUNG J:
So pricing methodologies isn't relied on?

MR GALBRAITH QC:

No, no. When I first saw it there, Sir, I wanted to but I was told I couldn't.

And then s 52T(2), "Every input methodology must, as far as is reasonably practicable, set out the matters listed in subsection (1) in sufficient detail so that each affected supplier is reasonably able to estimate the material effects on the methodology on the supplier and set out how the Commission intends to apply the input methodology to particular types of goods or services." And so that's exactly what that evidence of Mr Carvell's was about, that the one SPA methodology, to the best of the – accepting it's illustrative – the best of his estimate had one effect on Vector and the next SPA methodology had a different effect, and that was a reasonable estimate of the material effects of the methodology, and you can see from the swing in the numbers it's certainly material.

Now, the Commission has to follow a process which is set out in – s 52U is just the one about the timing. Section 52V is the process for determining input methodologies. You've got to publish a notice of intention. It's got to give interested persons a reasonable opportunity to give views. It may hold one or more conferences, and has to consult. It has to publish under s 52W. Section 52X is how you amend an input methodology. If there's a material change, you've got to go back through the s 52V processes if it's a new methodology, and s 52Y(1) is that provision that his Honour Young J just asked me about, must review each input methodology no later than seven years after its date of publication and after that intervals of seven years.

Section 52S says everybody's got to apply input methodologies. There's an exemption for two of the input methodologies for airports under information disclosure, but that's not relevant here. And s 52Z I've already taken you to, which is the merits review, and as I said, you can still appeal on questions of law under s 91(1)(b) against input methodologies setting.

Now, we've also got a table at page 9 which sets out the differences between the previous regime and the present regime or the new regime in relation to the statutory provisions, and so firstly you've got s 52R, which has that promoting certainty et cetera, and which wasn't in the previous regime. You've got s 52A(1)(a), which I referred to before, which wasn't in the present regime, in the new regime. You've got

the requirement that relevant input methodologies must be applied by the Commission, so that's explicitly required as we refer to there in ss 52P(3)(c) and 52S referred to a moment ago. So the Commission can't change its approach in relation to the input methodologies as it goes. That wasn't in the previous regime.

There's the s 52T(2) requirement about having sufficient details so that suppliers can understand how it's going to affect their business. That wasn't in the previous regime. There's the merits review, wasn't in the previous regime. They've got to be reviewed every seven years. That wasn't in the previous regime, and that's the point that we make, that it – the indication is they apply across regulatory periods. There's the detailed s 52V consultation and that wasn't in the previous regime, and DPPs and CPPs can't be re-opened on the grounds of a change of input methodology except where that input methodology – and that's that the s 54K(3) issue, and that wasn't in the previous regime.

So what we say on page 10 is that DPP is the price path which crunches for lines companies and gas pipeline distribution companies, it's the methodology which is intended to be the – it's described as the default methodology but the low cost, across the board methodology. The High Court and Court of Appeal have accepted that the price reset mechanism is at the sharp end of DPP regulatory control. The CPP – and you'll see in the Commission's submissions, it says, oh, well, if there's a problem with DPP then the lines company can simply go off and get a CPP. The problem with CPP, apart from the fact, as I mentioned, that the Commission doesn't have to deal with more than four of them a year, is that once you set off down the CPP path you can't get out of that. You can't pull your application. It's a bit like appealing a criminal penalty. The Commission can, if I say do what it likes, it mightn't accept your CPP proposal and it might, in fact, reduce your revenue cap and you're stuck with that for whatever period the Commission decides it's going to apply, normally five years.

There are problems, also, in determining whether you're going to make a CPP application, because inevitably the CPP will be made, one would think, after one's seen what the DPP is going to do to you, because, you know, unless you have a warning of what's coming, then you're unlikely to set off down that path. So by the time you've got through a CPP process, though there are time limits and how the Commission is to deal with it, you're probably going to have your CPP path running

over the regulatory period, over when the DPP five years has expired, because you don't start until you know that.

One of your problems is if you don't know what the Commission is going to, or likely to do, on the reset or don't have some comfort that the Commission isn't going to come up with a radically different reset then that's one of the inputs into deciding whether or not to go for a CPP that you don't know, so again you want that comfort that there's going to be stability in relation to DPP and then you can determine more sensibly or on a better informed basis as to whether you're going to go for a CPP or not, and Mr Carvell talks about this in his affidavit.

So I think in our section 3 where we're talking about the relationship between DPPs and input methodologies, I've probably talked about this. But the point we make in 3.4 is, in my respectful submission, worth emphasising, that input methodologies only bite in terms of the DPP setting. I mean, they're completely irrelevant otherwise. Unless they're applied to determine your allowable revenue they've got no impact on a supplier. So it's the question of how they're going to bite, how you're going to get from the input methodologies to how they bite, which is the issue that suppliers are concerned to know so that they can reasonably estimate the impact on their business. So I think in 3.5 to 3.8 we're really just talking about in Ms Taylor's affidavit, probably through to 3.11. The point that we make, of course, is that despite the fact that we're saying that a methodology which connects the input methodologies to the DPP needs to be explained, that still leaves a quite separate determination to be made by the Commission in relation to each particular supplier as to how that methodology will then affect that particular supplier.

And so in 3.12 we, I guess, sum up those issues that if we don't have, if there isn't a starting price adjustment methodology or a starting price reset methodology then there isn't a sufficiently identified connection and so in our respectful submission the key rules that link the input methodologies won't have been determined by a significant degree of specificity which is required. The Commission can change its method of setting price at every reset with a large range of potential outcomes. A merits review won't be available, and the other problem is if there's a successful appeal against a DPP input methodology and the DPP is then changed, effectively the Commission can adjust the linking methodology, if I can use that term, or the application methodology to wipe out the win on the appeal because the starting price

adjustment methodology is subject only to s 52Q adjustment, so you can win on the input methodology and end up losing on the DPP outcome.

So as I say, there's no flinching in Vector's position from saying it is seeking to have the Commission constrained for the purpose of regulatory stability etcetera. One response from the Commission is, well, it's inappropriate that you're seeking restraint only in relation to input methodologies. There are two other factors, which are rates of change and quality standards. And the short response to that is it's the price fixing the input methodologies is the sharp end, where the bite comes. There isn't a – rates of change are really only a question of CPI minus X and whatever X might be and quality standards haven't produced the issues which are significant for investment incentives, whereas the sharp end, which is the pricing, is the issue which affects investment incentives.

Is that a suitable time?

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.47 AM

MR GALBRAITH QC:
If I can just clear up a couple of things from this morning. If I'd thought about it for two minutes, I would have realised that the December proceeding because it's in front of the same Court, is in fact a merits review which does include, on Vector's part, an argument about whether there should have been a methodology included in the input methodologies. I told the Court before that it was a question of law challenge but it's obviously not.

The second thing is just in relation to that question of Young J about pricing methodologies. They're defined in s 52C and they're individual prices effectively and the question about the five year period, that's s 53M. It's possibly just worth looking at s 53M for one moment because – the five year regulatory period is in s 53M(4) and subs (5) says that the Commission can set a shorter period but not less than four years. Section 53M(1), you'll see it applies to every price-quality path, whether default, customised or individual. It says that that must specify, in relation to prices, the maximum price a price may be charged by a regulated supplier and then the maximum, revenues may be recovered by a regulated supplier, the quality standards and the regulatory period and then, it may include incentives and –

WILLIAM YOUNG J:

So it is permissible to do a price control DPP but in fact, the intention is to do revenue based?

MR GALBRAITH QC:

Yes, well prices, as we'll see in a moment, is widely defined, Sir, in the Act.

WILLIAM YOUNG J:

And includes revenue?

MR GALBRAITH QC:

Includes revenue, yes, Sir.

WILLIAM YOUNG J:

But there's nothing – is there anything to stop the Commission coming up with a DPP determination that's based around prices rather than revenue?

MR GALBRAITH QC:

Well it's driven off prices, Sir, but the individual prices, as you see from that definition of pricing methodologies, are now determined by the Electricity Authority.

WILLIAM YOUNG J:

Yes, okay, I understand, thank you.

MR GALBRAITH QC:

Perhaps just to note also, in relation to input methodologies, that they were a new invention, if I can use that term and they were specifically identified as intended to reduce flexibility and you'll find one quote in relation to that in [2.13] of our written submissions. The input methodologies, just taking up a point I was making just before the Court rose, they don't of course include rates of change or quality and you see how the price-quality path is referred to in s 53M and rates of change are referred to somewhere else specifically. They're referred to in s 53O which provides that, "The section 52P determination must set out a default price-quality path that includes: (a) the starting prices during the first regulatory; (b) the rate or rates of change in prices, relative to the Consumer Price Index, allowed during the first regulatory period; (c) the quality standards that apply during the first regulatory

period," etcetera and then there's the resetting procedure under s 53P and you'll see under s 53P, just looking at s 53P, subss (5) and (6), that the Commission can set only one rate of change per type of regulated goods and there's an example given and subs (6), "The rate of change must be based on the long-run average productivity and improvement rate achieved by either or both of suppliers in New Zealand," etcetera, "using whatever measures of productivity."

So rates of changes are – they're in a category of their own. Quality control is in a category of its own and it's the price issue which is the one which, as both Courts have accepted, is the sharp end which bites in respect of DPP setting and bites of course in respect of incentives to invest, the s 52A(1)(a) objective. Just perhaps again, just to make clear what I was saying this morning, although input methodologies have been set and the SPA methodology can make a substantial difference to what the DPP is and that's the point of that evidence I took you through.

Now going to section 6 of our written submissions, where we turn in 6.4 to the interpretation of s 53T(1). It is Vector's submission that s 52T(1)(c)(i) encompasses in its natural meaning the methodology which Vector is contending for that would link the other input methodologies to the ultimate determination under s 53P of the actual DPP. The wording is, "Regulatory processes and rules," and you'll recall that the definition of input methodologies includes processes and rules and there's the such as, little Roman (i), "the specification and definition of prices," and prices defined back in s 52C, if one goes back to s 52C, as meaning, "any 1 or more individual prices, aggregate prices or revenues … [including] in the form of formulas by which specific numbers are derived … and includes a related term of payment."

So price is defined to include revenues, including formulas. There's no definition of specification in the Act and we've set out in our [6.6], we've said, from the *Shorter Oxford English Dictionary*, a definition of an explicit or detailed enumeration or statement, "When one looks at the definition of input methodology as being a methodology process, rule or matter then, in our respectful submission, that on its face one would think, includes a specification," and Clifford J, in the High Court, said what we've set out in 6.7, "It's difficult to see how section 52T(1)(c)(i) does not specifically require a SPA IM. A SPA IM is after all, by reference to 52C, a description of the method on due process, rule or matter, for a matter listed in section 52T applicable to DPP regulation and only the specification setting of starting prices for DPPs for electricity DPP regulation." By my assessment, that's a fairly obvious

interpretation. In this context, the combination of the definition of IM in s 52C and the provisions of s 52T(1)(c)(i) and so that was the reasoning – that was part of his reasoning, because he also found comfort in s 52T(2), but that was a central part of reasoning of coming to his conclusion that he came to.

Now, what the Court of Appeal said and we say in 6.9 was that the determination which the Commission made had a narrower focus and that's, of course, correct, it did, that if –

WILLIAM YOUNG J:
Where is that determination?

MR GALBRAITH QC:
If we look under – in vol 1, Sir, under tab 13, our paragraph – page 133 –

WILLIAM YOUNG J:
That's what the Court of Appeal said.

MR GALBRAITH QC:
That's what the Court of Appeal said. It starts [39]. You'll see in [39] what the Court said, the reference to what we're just talking about, "Specification is not, in our view, an obvious reference to a price reset input methodology. Input methodology which the Commission has published in relation to the definition of specification of price has a different focus than a price reset input methodology." Well, I mean, that's correct, but with great respect, it doesn't – that's not a question of interpretation, or that doesn't add to the interpretation.

And then in 40, "As the Commission submitted at 52T(1)(c)(i), to give it a broad meaning, it's difficult to understand the purpose of 52T(1)(b)."

WILLIAM YOUNG J:
Would we actually have their determination as to specification of price?

MR GALBRAITH QC:
Of – no, because –

WILLIAM YOUNG J:
The specification of different prices.

MR GALBRAITH QC:
Yes, well, we do. You'll find it in vol 7 page 1612, and you'll see it's headed subpt – it's headed, "Pt 3 input methodologies for both default and customised price-quality paths, subpt 1, specification of price."

WILLIAM YOUNG J:
This is – they've treated it as effectively an instruction by the legislature to come up with a generic determination as to how DPP regulation will apply in terms of prices or revenues?

MR GALBRAITH QC:
At a very generic level, yes, Sir. That's what the Court of Appeal – they don't quite say that, but that's what it comes down to, Sir.

WILLIAM YOUNG J:
Your clients have appealed against this, have they?

MR GALBRAITH QC:
I assume, so, yes. I'm sorry, I haven't been involved in the first part of the Vector – I was acting for Auckland Airport, so I'm a bit vague on that, but yes, I'm definitely getting the – and then in [40] you'll see in the Court of Appeal's judgment that they accept the Commission's submission that if s 52(1)(c)(i), as they say, were to be given a broad meaning as indicated by the Judge, and we say that's the natural meaning but it's difficult to understand the purpose of s 52T(1)(b) but s 52T(1)(b) has its specific – pricing authorities in s 52T(1)(b) are those which are specifically defined, as I say, in s 52C and which have been sent off, in the case of lines companies, to the Electricity –

WILLIAM YOUNG J:
But they won't have in relation to other utilities, I take it?

MR GALBRAITH QC:
No, they won't in relation to other utilities, Sir, but they're not at the revenue level, they're at the level of what price should apply to an individual customer. Then 41,

they suggest that s 52T(1)(c)(i) is oblique. In our submission, it's explicit. At [42], the Court of Appeal agreed that the decision to set a new price is the sharp end of default path regulations, so they agreed with Clifford J in respect of that and we, with respect, agree with that and it's central and they say, therefore one would have regarded it, or would have expected it to be specifically identified in s 52T(1)(c)(i). We say it is but that was the view that the Court took.

So in 6.10 of our written submissions, we obviously say in (a), that the fact that the Commission took a narrow view says nothing about the correct interpretation of the Act. As I've already told the Court, the Commission took the view that it didn't have to set IMs for three of the categories which are specified in s 52T(1) and it was wrong in that, so one can't put any weight on the view that the Commission took. We said in (b), "While parties have referred to starting price adjustments etcetera, there's nothing which requires this methodology to be described in any particular way and so we say, on the plain words, specification of price has been one that takes account of the fact that prices includes revenues, it includes formulas." In our respectful submission, that's certainly a description of a methodology which directly links the input methodologies, the other input methodologies, to the output which is going to be a DPP setting.

With respect to the suggestion, both in the Court of Appeal's judgment and in the submissions for the Commission, that that interpretation would capture aspects such as rate of change and quality standards. Our respectful submission is that it would not, those don't fall within the ordinary meaning of specification of prices and they're separately provided for in terms of the statutory provisions.

It's perhaps just noticeable that, as I said before, where's – sorry, I just want to give you another reference. It's a minor point but in vol 9 of the case on appeal, behind tab 68, at page 2216 and this was part of the Commission's July 2011 … you'll recall that they came up with another possible starting price model then. If one looks at page 2216, the Commission itself saw nothing inappropriate in defining the starting price model as being a specification for a starting price model. You'll see appendix B, "Specification for a starting price model," and go down to the next subheading, "High level specification". So the point we make is specification fairly captures, as the Commission obviously itself thought, a starting price model, a reset model, and so with respect to the Court of Appeal's approach of seeing great difficulties or seeing difficulties because of what it regards as an inapposite use of the term, in fact,

in our respectful submission, is apposite as is recognised, as I say, just by the Commission itself. So we say as a direct interpretative provision the starting price adjustment or the starting price reset methodology falls within a specification of price, and if there is any ambiguity about it then, of course, we obviously say that one takes into account the purpose of the new Pt 4 and the – what we would submit the clear evidence that the lack of such a methodology does not provide the ability of a supplier to reasonably estimate what the material effect will be of the input methodologies on that supplier and provides no step that incentivises investment because of a lack of certainty or specificity or stability or transparency in how you get from A to C.

In our submission, that submission is supported by s 52T(2), which is, I'll have to discuss in a moment, was introduced at the select committee stage and so s 52T(2), and we deal with this at paragraph 6.11 of our submissions, is in our submission equally explicit in requiring every input methodology as far as is reasonably practicable, to set out the matters in subs (1) in sufficient detail so that each affected supplier is reasonably able to estimate the material effects of the methodology on the supplier, so each affective supplier. It doesn't suggest something which is so generic that each individual supplier can't take that and apply that reasonably to determine what impact that's going to have on that supplier's business.

And then subcl (b) of subs (2) requires the input methodology to set out how the Commission intends to apply the input methodology to particular types of goods or services, and again, reference to particular types of goods or services. So as we say in 6.12, and as I said earlier, the only material effect that input methodologies have on suppliers is their effect on regulated prices. They have no other effect. If they just aren't applied, then they have no effect at all, and so to understand how they're going to affect you, you have to know how the A is going to get to the C, and so what the B is to get there. So the submission is that the words "intends to apply" in s 52T(2)(b) are important because that means that that's how the Commission is going to intend in the future to apply that input methodology to particular types. It's a forward-looking, future regulatory decision which is anticipated, and of course the whole regime is meant to be forward-looking. So it's not, in our submission, not simply the detail of what the Commission has already done. It's the detail of what the Commission is going to do with the input methodology and the only relevance of what it's going to do is in setting a DPP for the suppliers.

Now, the Court of Appeal, as we say in 6.15, favoured an interpretation of s 52T(2) under which the Commission was obliged to give sufficient detail to enable a regulated firm to understand how it applies in respect of the matter with which it deals. It's sort of a self-referencing type of interpretation. So that what the Court of Appeal was saying is that all that is necessary is for a regulated supplier to be able to work out how the cost of capital or to calculate the cost of capital that would apply to that particular regulated supplier, and you'll see that – the Court of Appeal discusses s 52T(2), from [51] on and they see it – but before that, it discusses a select committee issue about not including a specific SPA methodology in s 52T which I'll have to come back too but –

GLAZEBROOK J:

Can I just check, s 52T(2) says every input methodology must refer back to an input methodology that sets out under s 52T(1) which would favour the Court of Appeal's view in terms of just those input methodologies, just setting out how they're to apply. So you have to find – so where do you get – and I probably just missed this, so where do you get the requirement to set an input methodology for a starting price adjustment from, is it just from the specification, is that where it comes from in (c)?

MR GALBRAITH QC:

That's the specific reference, yes.

GLAZEBROOK J:

That's the specific … So instead of putting that in (1), where they set out input methodologies, they've put it (1)(a), they've put it in (c), is that –

MR GALBRAITH QC:

Well yes, well –

GLAZEBROOK J:

– because I think the argument has shifted a bit, as far as I can see. So just so I can just be absolutely clear what the argument is now –

MR GALBRAITH QC:

We were always –

GLAZEBROOK J:

– I mean, shifted but over the period, I don't mean –

MR GALBRAITH QC:

No, no, I understand what you're saying. We were always under s 52T(1)(c) but perhaps with more emphasis on the regulatory processes and rules. What the Court of Appeal said because we were saying well, regulatory processes and rules such as was – the next two are just examples and the Court of Appeal said no, it's a closed category which, with great respect, I find it a slightly odd interpretation of "such as" but that's what the Court of Appeal said. So our position is well, if it's a closed category, regulatory process and rules and there are only (i) and (ii), then specification and definition of prices certainly capture the methodology which is needed to link the, as I say, the A, the input methodologies, the other input methodologies, to the C, the DPP determination and so, your Honour is quite correct, I mean, there are specific methodologies which are set out under (a) but (b), (c) –

GLAZEBROOK J:

No, it's all right, I was just making sure that I understood.

MR GALBRAITH QC:

Yes, sure, no, that's all right but there are two ways it can be done. It can be done, we say firstly and Clifford J was quite right, that s 52T(1)(c)(i) specification is a stand-alone justification for an input methodology but effectively the same result could be achieved by the input methodologies otherwise identified as having the specificity of how they're going to be applied in them. Now what happened at the end of the day, before Clifford J and I think we've annexed it as annexure to our submissions, is that he was wanting to know what he should do if he came to the conclusion that Vector was correct, whether he should send the input methodologies there were back for the Commission to rewrite them to include the how, or the specificity. The Commission opted that it would prefer to have a stand-alone methodology produced because that saved them having the present ones taken back and set aside and rewritten.

So that was the direction which he gave and, as I think we've noted in here, we were within only a few days of getting that at the time we got the Court of Appeal judgment. So it can be done one of two ways is what I'm saying. The Commission seems to accept that you can either do it by rewriting the existing input methodologies or, we say, there should be a stand-alone one. But either way it can produce the same result.

GLAZEBROOK J:
Well your argument, under s 52T(2), could apply even if you didn't have to have a stand-alone one though, couldn't it?

MR GALBRAITH QC:
Yes, yes, it could.

GLAZEBROOK J:
So that when you go to have a merits appeal on the input methodologies the argument, as I understand, I think you said after the adjournment, would be that in fact those input methodologies as they are at the moment don't comply with s 52T(2)?

MR GALBRAITH QC:
Yes, certainly. That certainly can be argued. What I'm just a little bothered about is the fact that three of the input methodologies only came out on 28 September, so I'm not quite sure how far that's going to be practicable in terms of a December hearing in front of the – and, in fact, it's a point which the Commission makes in its submissions. This Court should not do anything about it because you don't know what's in the three input methodologies we've now published, but the one answer, at least, to that is that the Commission has made it very clear in its submissions that it doesn't believe it has to do the how and so I think this Court can safely proceed on the basis that, well, in my respectful submission, my learned friend may say something different, but it hasn't included effectively a SPA methodology in the new input methodologies which have been published, but that's a wrinkle, your Honour, which comes out of what's happened in the history of this.

But we do say that s 52T(2) is a very clear signal that (a) an affected supplier has got to be able to take what the input methodologies contain and reasonably translate that into, well, is that going to be the sort of parameters that Mr Carvell was talking about and Mr Goodeve on our business? Are we going to be minus 20 million a year or are we going to be plus or minus 0.8 million a year or what are we going to be. And unless we know that then we don't know what we're doing going forward and we can't make, the business can't make, informed decisions on it.

Now, the way the Court of Appeal treated s 52T(2), you'll see in the same paragraph, [51], it's quite interesting the way they start it off. "We do not see section 52T(2) as being inconsistent with our analysis," they say, so they then refer to Clifford J said, and what Clifford J said was if there's any ambiguity arising out of s 52(1)(c)(i) then he thought that the ambiguity was considerably resolved by s 52T(2) and in our respectful submission we see them as complementary also. They set out, then, in s 52 what paragraph s 52T(2) says. They refer to what Clifford J said in [53]. They say in [54], "It's important to emphasise that 52T(2) does not impose an obligation to publish an input methodology on any particular topic." We agree with that. "It deals simply with what must be included in any input methodology. The question is how far the detail required by 52T must go. It doesn't 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 proposed to use it within a particular form of regulation. Or does it mean simply the Commission must give sufficient detail to enable the regulated firm to understand how it applies to its operations in respect of the matter with which it deals?

So to take the cost of capital input methodology as an example, the input methodology must set out not simply how the Commission proposed to undertake the cost of capital calculation but also how the Commission proposed to use the cost of capital calculation in the various contexts. On the latter view, the input methodology must be sufficiently detailed to permit regulated firms to calculate the cost of capital consistent with the Commission's approach but a further explanation as to how the Commission proposed to use that calculation in various contexts within price-quality regulation is not required." So they're saying, well, all it has to be is so the firm can calculate its cost of capital, but you don't need to know how it's actually going to be applied. Well, that's, with great respect, not very helpful.

"In considering which is the correct meaning to begin with, 52T(1) sets out what input methodologies must include. It must be linked to particular types of regulation. If valuation of assets relevant to two or more there should be an input methodology for each. If the Commission proposed to approach …" etcetera. It questions how much further an input methodology must go. "Returning to 52T(2), we consider the more limited an interpretation could make the following points. First, if input methodologies had to set out not simply how the Commission proposed to calculate the cost of capital or approach asset valuation but also explained how the Commission proposed to use the cost of capital input methodologies in particular contexts, input

methodologies would inevitably have to be more detailed and therefore it would be more time-consuming to prepare." Well, with the greatest of respect, that's not a compelling argument. Of course they'd have to be more detailed. Then people would know or would have a reasonable chance of assessing what their impact would be, and of course going back to the merits review point, there would then be the ability to have the detailed review, and absent the detail, you haven't got a connection between the A and the C. "As the legislative history illustrates, Parliament attempted to balance the desire for greater certainty against the need to overburden the Commission unduly at the outset of the process, given the applicable timeframe." I've got to come back to that select committee matter in a moment.

"Second, requiring greater detail is the outset is likely to give rise to a greater risk of error." Now again, with the greatest respect, that's a rather extraordinary proposition. I mean, the Commission has got to get it right. If it doesn't get it right, then it should be able to be reviewed. It says, "Given that the Commission would have to provide a detailed description of how it intended to utilise cost of capital etcetera, once published, input methodologies cannot easily be amended." Well they can by the proper process and it said, "This supports the more limited interpretation." With great respect, it's absolutely consistent with the idea of regulatory stability, certainty and transparency.

"Third, it seems to us implausible that Parliament would have rejected enacting a requirement," this is the select committee issue, "would have rejected enacting a requirement that the Commission prepare a price reset methodology on the ground that it would entail too much work for the Commission but then enact s 52T(2), with the purpose of imposing essentially the same obligation on the Commission among other obligations. The legislative history to which we were referred indicated that industry submitters, including Vector, did not regard s 52T(2) as an alternative to the inclusion that it required a price reset input methodology, nor did the select committee." I'll have to come back to that.

"Finally, 52Z provides for appeals to input methodologies, 52Z(4) provides that a Court may only allow such an appeal on the basis that it would be materially better. We do not consider that the interpretation of 52T(2) that we favour, illegitimately undermines the right of appeal conferred by 52Z. Rather, we consider that input methodologies will contain sufficient detail to enable regulated firms to make informed decisions as to whether to appeal." But that's not what s 52T(2)(i) is about.

It's about whether they can make informed decisions as to what the effect is going to be on them and if you don't know how it is going to materially affect you then, sure you might appeal but it's not on the basis of – well, go back a step, s 52T(2) is not about what you need to know to appeal, it's about what you need to know to estimate the effect of the input methodology on your business, for the purpose of making investment decisions, etcetera .

So, they go on to say in [58], "The concern that led to the introduction of 52T(2) was that the Commission might develop high level methodologies that did not provide sufficient certainty, as we see it. There will be greater certainty than might otherwise have been the case, even on the more limited interpretation that we consider is correct." It's in fact in that [60] that you'll see in the second part, or right down the bottom, they talk about, in the second last sentence, "Parliament must have considered that as the Commission does so, further certainty will emerge," which as I say, the echo which I said before of what the Commission said in the enquiry, before Pt 4 ever came in and which was rejected by the Government. That it wasn't a question of certainty and merging over time, or whatever the Commission decided. And so the Court also said, "Moreover, the Commission's extensive consultation obligations are also likely to produce further certainty over time," but that wasn't the objective of s 52A(i)(a). The objective was to provide, by the new Pt 4, incentives to invest on the basis of having certainty and regulatory stability, etcetera.

So perhaps going back to what we say in our written submissions at 6.16, we submit that that interpretation is without, we would say, without intelligible application, it isn't supported by any evidence and that's why I took the Court to the evidence before because the evidence says you can't do that. You can't come to a meaningful, intelligible conclusion without knowing what the methodology is and once you know the methodology you can come to an illustrative conclusion and the different methodologies will produce different illustrative conclusions and so, that's what we say in (a), without the SPA methodology, the calculated number for cost of capital is just a number with no effect or identifiable impact on the supplier or its operations for DPP purposes. Unless it's applied and depending on how it's applied, it's of no effect at all. "Input methodologies contribute to the objectives of rt 4 by being applied to key regulatory decisions. The conclusion that input methodologies can contribute to certainty without having to have any connection to the key regulatory decisions is entirely inconsistent with the scheme of Pt 4." Effectively, the Court of Appeal's approach to s 52T(2) is to render it redundant. Even though the Court acknowledged

that a particular input methodology must be tailored to the form of regulation under s 52T(1), but s 52T(2) would add no further requirement of any substance or effect. I mean, the Court is just emphasising, there's no need to detail it more than sufficient to explain how you can calculate your cost of capital or the value of your assets or your common costs or whatever else.

Now, in our respectful submission, the reason that principally led the Court of Appeal to this position and the reason that was principally advanced by the Commission before both Courts was what happened before the select committee. There's a good description of it in Clifford J's judgment which is behind tab 6 in vol 1. There was no section – at the time that the Bill came before the select committee there was no s 52T(2). At [136] page 89 of the vol 1 of the case on appeal, his Honour turned to this issue. He had already concluded on a straight interpretation basis that a stand-alone input methodology was required and he had done that on the basis of s 52T(1)(c)(i) and also on the basis of s 52T(2) confirming that view. But he then says in [135] one important matter he hadn't yet considered, and in [136] he turns to that. He says, "During the select committee consideration of the Bill, a number of proposals were made for additional matters to be covered by IMs and what became 52T. One such additional matter was there'd be a specific reference to an IM to be used when setting and resetting DPPs. The proposal was made by Vector and also subject at one point of a recommendation by MED, which MED subsequently withdrew."

Now, it's worth looking at that. It's to be found in the respondent's bundle of authorities behind tab 2 and this is an officials' paper from the MED to the select committee. This is not all the paper that would have been surrounding this, but this is a summary paper which was provided by the officials to the select committee. Behind tab 2 there's numbering at the bottom. You'll see that there's a chart, which looks like this, where they go through and analyse the various submissions which were made, and it's on page 12 which on my copy is not well printed, but page 13 at the bottom right-hand side you'll find out where page 12 is.

At page 12, there's a heading, you'll see, "Input methodologies, IMS". Items 28 and 29 are the relevant items. You'll see under item 28 that, "The issue was more guidance on input methodologies is required as levels of certainty and prescription. The Bill gives the Commission too much discretion to develop only high level methodologies that would undermine any attempt to provide regulatory certainty. Submitters argue that the Commission should be required to set input methodologies

at a level of detail that would enable a business to reasonably estimate the impact on their business." You'll see the submitters, Wellington Airport, PwC, Christchurch Airport, Orion, and BARNZ. Departmental comment agreed that, "It's essential for input methodologies to be specified in sufficient detail to provide businesses with certainty and predictability as to their effect and application on all material matters," and then under 29, "Further matters should be included in the list of mandatory IMs. Submitters put forward a range of proposals for additional matters to be included in the list of IMs such as the methodologies for default paths, allocation of assets, treatment of costs and efficiency gains in the formulae for combining any input methodologies. PwC suggested that the definition of IM must be amended to include any decision on any matter which affects more than one regulated business in relation to particular goods or services. The submitters were … and you see the list of submitters there.

The departmental comment stated, "Agree in part. The following should be added to the list of IMs, how to compile financial statements, the methodologies for setting default price-quality paths including starting price, the rate or rates of change in price and quality standards. However, this should not be a requirement for setting the first default paths for ELBs and gas pipelines in light of timeframe issues." So that was the department's then recommendation. Undoubtedly, some lobbying went on, as I presume happens in these matters and then, behind tab 3, you find the department's further paper to the select committee. It says at the top, "Response to issues raised by the Commerce committee. This note responds to issues raised by the committee on 10 July. Issues uncovered," and then you'll see item 2 on the first page, "Additional input methodologies, 52S. The departmental report recommended two additional IMs and how to compile financial statements and methodologies for setting default price-quality paths. At the committee's last meeting, we advised that we wish to withdraw this recommendation, noting that the Commission had said that the addition of these further issues would overload the IM setting process. The committee asked for further advice. The Commission has advised that the problem with these additional methodologies is that … ." The first one is not of any importance.

Across the page, "Both proposed additional methodologies to the best developed an initiative process in which the methodologies are applied to the specific circumstances of individual firms and account is taking of feedback and comment from the firms." Well, you know that this methodology isn't – in any case, it's not

specific to individual firms. "The Commission is faced with a very large and demanding workload and in a short period of time the additional requirements have put the timetable in jeopardy. We think that there is substance to these concerns. Perhaps more importantly, we think that other proposed amendments in s 52S on IMs and on appeals, mean that these additional IMs are unnecessary." Now s 52S at that time, was what is now s 52T.

"Specifically, 52S(1), capital A, B and C, require the Commission to set out how it intends to apply the input methodologies, particularly to types of goods and services and for the IMs to be consistent with each other. This will require the Commission to specify how the IMs fit together to develop the set of accounts, etcetera –

GLAZEBROOK J:
What's that related to in s 52T, sorry?

MR GALBRAITH QC:
I'm just trying to find the drafting. I'll just have to find the draft your Honour and I just can't lay my hands on it immediately. It's at the end of the previous one, I'm sorry your Honour. Yes, you'll find it on page 69 of the previous one, on the previous tab and the proposed draft, at that stage, is s 52S(3). "Any methodologies under (1)(a), (b) or (c) must, as far as is reasonably practicable, include sufficient detail so that the supplier who is affected has a reasonable amount of estimate to predict its affect. (b), include the intended means of applying the input methodology predicted, particularly goods or services." Now, s 52T(2) goes somewhat beyond that but that's what I think that they were talking about.

So, what happened ultimately was, s 52T(2) came forward in the form which it's now been enacted and there wasn't a specific DPP SPA methodology incorporated in the rest of s 52T. Perhaps just worth noting that, you'll see from the first officials' paper I took you to, it wasn't just that methodology which the submitters were contending for, they were contending for a much wider range of amendments to be made but that was one of the two methodologies which the officials initially recommended and then change their recommendation because it seems principally, the Commission is saying it was going to have too much work to do.

So you'll see going back to Clifford J's judgment at [137], he – or perhaps going back to [136], he says, "The proposal was not accepted by the select committee. At the

same time, what became section 52T(2) was added in response to concerns that IMs might be set at too high a level of generality to serve their purpose." He then refers to the report back by the select committee to Parliament, which said, "We recommend the addition of a new section 52S(1)(iv)" – which became 52T(2) – "to ensure that input methodologies would be set out in sufficient detail to allow affected suppliers to reasonably estimate the impact on their business. We did not agree with the submitters who put forward a range of proposals for additional matters," so there was a whole range of proposals. "Given the Commission was faced with a large and demanding workload, we consider additional requirements will put pressure on the input methodology process." Then in [138], he refers to that note which I just took the Court to where MED commented on its previous recommendation, and that's what he's referring to in [138].

He says in [139], "It's clear therefore the select committee did consider an additional specific reference in 52T(1) and rejected that proposal, clearly a factor which counts against Vector's argument." [140], "Having said that, I am not persuaded that the very detailed material put before me when seen in the context of the interpretation that I think the legislation as passed calls for is, at the end of the day, conclusive on the point. First, there is at least a suggestion that the decision not to include a specific reference was made not because a SPA IM was considered unnecessary but because, in fact, the officials have said that it should be one, but in view of the officials at least, section 52T(2) in effect met that need." Then he refers to the Court of Appeal's decision in *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182, and says, "It can be difficult and even inappropriate to draw firm conclusions from expressions of opinions and legislative history as to what legislation, when enacted, may mean. Moreover, with contentious and very technical legislation such as the Commerce Act, what may or may not have been in the minds of the select committee or individual submitters is not necessarily, in my view, a particularly helpful source of guidance to interpreting the legislation when passed. Trying to balance those considerations, I have reflected at length on the significance of this matter and in terms of my overall assessment of the arguments made by Vector and the Commerce Commission this was, at the end of the day, the matter that I considered was capable of providing the strongest support for the Commission's position that a SPA IM is not required. On balance, when I take into account what I consider to be the strength of the interpretation of 52T(1) and (2) that I have arrived at, the factors I consider now is made very clear by the Commission's own material of the relevance and use by the Commission in its electricity DPP reset

SPA methodology of various IMs. The significance of that use, in fact, in terms of 52T(2), a matter which quite understandably might well not have been appreciated by the select committee at the time, and the significance in terms of the scheme of Pt 4 generally and in particular the importance of DPP set and resets for DPP regulation of the relevant methodologies processes and rules applied by the Commission when it undertakes those exercises being stipulated as an IM I have concluded, notwithstanding this element of the legislative history, that Pt 4 as properly construed does require an IM providing the key elements to the regulatory processes and rules for the specification of starting point prices and therefore revenues for DPP sets and resets. That is taken overall, and although I acknowledge the complexity of the Pt 4 regulatory scheme and the challenges it no doubt it has provided to the Commission, I conclude that the Commission is required to determine what was termed before and is referred to in this judgment as a SPA IM for electricity DPP regulation."

I've taken you to the Court of Appeal's views on that, and in my respectful submission, the reasoning of the Court of Appeal, despite the fact that the Court of Appeal puts forward some other reasons apart from the reliance on that select committee, what happened before the select committee, those other reasons, in my respectful submission, lack substance and indeed, at the end of the day, as Clifford J fairly recognised, that the strongest argument in favour of the Commission's position is that the select committee elected not to include a specifically identified IM for DPP methodology.

In my respectful submission, that has got to be – that is, I won't say only a straw in the wind, but it is far from decisive. The Court has to interpret the legislation as it was passed by Parliament in its terms and in the context of its purpose, and that's what, of course, a requires, text in the light of its purpose and on the actual wording, the terms of the legislation, given the purpose which is identified in s 52A(1)(a) of incentives to invest and the very clear statutory context requiring regulatory stability, certainty, transparency, in Vector's respectful submission, that outweighs the time or trouble consideration which the select committee took into account in not specifying a belt and braces approach of another identified particular IM and the fact that s 52T(2) was enacted, or was recommended by the committee and subsequently enacted, confirms that the need for individual suppliers to be able to understand and identify the material impact of IMs on their circumstances and how the Commission intended to get from A to C, confirms that either, under s 52T(2), it's a constituent requirement of the IMs which were identified which have been identified by the Commission, or

our first position is that the wording of s 52T(1)(c)(i), the specification of price, quite fairly, in the context of the purpose of Pt 4, encapsulates the need for a specific IM that gets you from A to B.

So the submission is obviously, that Clifford J was correct in the way that he approached it and, with respect, that the Court of Appeal's reasoning, other than its reliance on the select committee, isn't at all persuasive and so that really becomes the, I don't know if choice is the right word but that's the – those are the weighing factors, in my respectful submission, that this Court has to take into account in deciding what interpretation should be applied to the actual wording at s 52T, both (1) and (2) and that's why obviously, I wanted to take this Court to the evidence because you have the rather strange position that business agitated for a new Pt 4 so that it would have certainty going forward and it's quite clear, from that evidence, that business hasn't got the certainty and dispute the intention of Parliament and the Government to provide that through the new Pt 4 and the reason it hasn't got the certainty, accepting that certainty is on a continuum, as I accepted in the Court of Appeal, the reason that it hasn't got that sufficient certainty is it hasn't got that link between the IMs which have been identified and the DPP setting process. So it's impossible, simply by knowing what the cost of capital might be or the valuation asset, approach to asset valuation, it's impossible for an individual supplier to identify the impact on its business and that can be a complete swings and roundabouts situation as those three examples that Mr Carvell and Mr Goodeve speak about, of the Commission's proposals show, with Powerco minus 28, minus 0.8, minus 20, on an annual basis, those are huge swings and roundabouts and uncertainties for business.

Now I do want to just finish off, after my learned friend Mr Butler has discussed s 54K(3) with you, I promised him I would try and bat until lunchtime but I haven't managed that so –

McGRATH J:
Mr Galbraith, can I just go back. You're emphasising the text and the purpose and you put –

MR GALBRAITH QC:
Yes.

McGRATH J:

– you do accept however, that we can refer to what the select committee said?

MR GALBRAITH QC:

Yes, I accept that. It's – no, I obviously accept that.

McGRATH J:

And then you even accept some of the further material, although you discount that quite heavily. You talk about it being out of balance but –

MR GALBRAITH QC:

Yes, well if I can just divert from a moment –

McGRATH J:

I can't recall a case which we've been asked to consider so much background material to clarify the meaning of legislation and I'm a bit worried about how we approach it.

MR GALBRAITH QC:

Sir, I always seem to have failed with that. I think that because the select committee reports to Parliament then, I mean, it is appropriate for the Court to take into account the select committee report back to Parliament, I have no quarrel about that.

McGRATH J:

Well the parliamentarians are taken to understand what's said in that.

MR GALBRAITH QC:

Yes, yes, I have to accept that. How far beyond that this Court would think it appropriate to go is a different question, and as I say, I've tried – well, *Skycity Auckland Ltd v Gambling Commission* was a case where I tried. I seem to have failed most times I've tried, Sir, to go beyond the straight and true, but on the other hand this is a situation where there is no doubt about what the purpose, the fundamental purpose of the new Pt 4 was. It's spelled out in s 52A. Apart from the explanatory note, etcetera, it's absolutely spelled out. And so – and the explanatory notes are unambiguous also, so there's no ambiguity there at all, and often of course one finds, and one ends up arguing before Courts or submitting before Courts that

the purposes is something and the Courts may not accept that, but the purpose is quite explicit both in terms of s 52A –

McGRATH J:
That's the purpose of promoting outcomes?

MR GALBRAITH QC:
Yes, promoting those outcomes, Sir. And then if one looks at the purpose of input methodologies at s 52R, again, that purpose is very clear. And then if one looks at s 52T(2), again, that's not a purpose statement, but it's what it's meant to do. It's meant to tell you what's – so you can work it out and it's meant to tell you how it's going to be applied. So all of that, in our submission, is consistent with the whole theme.

McGRATH J:
I certainly understand what you're saying once you get back to the purpose principles.

MR GALBRAITH QC:
Yes, sure. And so the select committee being persuaded not to put a specific IM in there because it thought it might be too much work in my respectful submission doesn't weigh very heavily in that balance.

GLAZEBROOK J:
I just want to get back to s 52T, and I'll just try again with the point I was trying to understand before. It might be that you can help a bit more clearly on this. I understand s 52T(2), if you're right, and s 52T(1)(c) requires a specific starting price adjustment methodology, well, actually, I'm not entirely sure that s 52T(2) adds very much if that's the case, because all it would say is that that starting price methodology can't be at a high level of generality. It must be – so let's park that for the moment because, I mean, I must say that I do have some doubts as to whether regulatory processes or rules even such as and even the specification and detail of pricing actually does encompass a starting price adjustment methodology if we go – or a starting price reset methodology, but let's assume for the moment, then, that it doesn't, the other argument in terms of s 52T(2) is that if you're looking at the specific ones like cost of capital etcetera that they have to, in some way, indicate how they

relate together. So if you go back to the affidavit that we looked at from Ms Taylor, is it?

MR GALBRAITH QC:
Taylor, yes.

GLAZEBROOK J:
Taylor, to actually say how you get the data and how those fit together has to be related in those particular – now, one of the difficulties I have with that is that this seems to be the wrong format. I know I was responsible for *Zaoui* to say that you could actually look at methodologies before they were put into place so you didn't have to wait, which is what was relied on by Clifford J, but I find it somewhat difficult in an argument at this level of abstraction to say exactly what should be included in cost of capital etcetera without actually having a lot more information on it, without having those input methodologies and really what I'm saying is, I suppose, that the forum to look at that would be in relation to a merits appeal on input methodology if, in fact, that was the argument in respect of s 52T(2) – and I'd be somewhat uncomfortable because I do see them as different arguments, the one that says that the subs (1) ones must contain that and the argument that says you must have a stand-alone. I know the effect could well be the same, but I seem them as different arguments, and one that I would have thought we're looking at is whether there should be a separate, stand-alone starting price reset methodology because of the importance of starting price and relying on (c) rather than what should be included in the others because, to be honest, I wouldn't have a clue, without actually knowing what was in those input methodologies, exactly what should have been included and how you actually would – I can understand how you might put in the data, so Ms Taylor's point about data. I can understand how that goes into cost of capital etcetera. What I can't really understand is where you have four separate input methodologies, how you would actually put a starting price methodology in terms of how you put them all together in one, and I would see that as actually coming in the statutory scheme under the determination under s 52P, which I'm probably coming back to the same point I made at the beginning. But how they're put together seems to be a s 52P determination point with the type of restrictions on when you have to look at them and when you can change them in terms of consultation are admittedly different from these input methodologies and the input methodologies coming under the other side.

MR GALBRAITH QC:

Well, if we put aside – if we accept your premise at the moment, obviously it comes under s 52T(1)(c)(i), fine, that's not a problem.

GLAZEBROOK J:

I don't have a problem with that. As I say, I have some difficulty with that proposition, but ...

MR GALBRAITH QC:

Yes, but that proposition gains strength, also, with respect, your Honour, from s 52T(2), because that's the best way of getting the answer, you know, getting the right answer.

GLAZEBROOK J:

I do understand your argument, and I also understand in terms of using – so when you went back to what was said by the MED you're actually relying on the fact that they say that it wasn't necessary because of s 52T(2).

MR GALBRAITH QC:

That's right, so that supports that, but if you just take in a sense s 52T(2) as a stand-alone, which is really the proposition that you're putting to me. The first issue is, as I said before, I think, the Commission denies it, and the Court of Appeal found that all you need to do to satisfy s 52T(2) is provide sufficient information that the supplier can calculate its own cost of capital or its valuation, its asset valuation or whatever else it might be. That's what they decided.

GLAZEBROOK J:

Which you would accept would be an argument that you have to include the data there, because if you don't include the data Ms Taylor says you can't actually calculate your cost of capital. The only thing you can do is know that it's 8 per cent, but you don't know 8 per cent of what, the Court of Appeal doesn't exclude the fact that it has to include the data. That's why I asked you what needed to be included.

MR GALBRAITH QC:

It certainly didn't include that.

GLAZEBROOK J:

All I'm suggesting to you is that the Court of Appeal decision doesn't preclude the fact that section – or maybe you say it does.

MR GALBRAITH QC:

Well, certainly the way the Court of Appeal dealt with me the Court of Appeal did, because the proposition was if you know the cost of capital what else do you need to know? If you know the cost of capital, the Commission says, well, what else do you need to know? The short answer is, well, it doesn't tell you anything until you try to apply it to the DPP setting. Section 52T(2), in my respectful submission, requires a heck of a lot more than just knowing what the cost of capital is, because you've got to be able to reasonably estimate the material effects of the methodology on the supplier, and we're talking about the methodology here, not just – and I struggle, with great respect, myself with the idea that coming to a cost of capital number of 8.7 per cent, for example, is a methodology. It's not a methodology at all. It's just a result of some methodology which has been gone through, but it's not a methodology.

Then if you look at (b), how the Commission intends to apply the input methodology to particular types of goods or services, well, as I said before, how are you going to apply it? That's not just coming to the answer that you've got 8.7 per cent. It's quite specific – it's a must, as far as reasonably practicable, it's a must set out how it's going to apply it, so while I understand entirely what your Honour's saying, you haven't got before you the specific IMs to look through and see whether they've done it or not. I think you can safely say from the Commission's submissions that hasn't occurred in the IMs which have occurred to date, because the Commission takes a position that it doesn't have to do that, that all it has to do is have a self-referencing explanation so the cost of capital IM is internal to the cost of capital IM, the valuation of assets IM is internal to the valuation of assets IM, the common cost IM is internal to the common cost IM, they simply reference back on themselves. And that, as I was saying before, is meaningless as far as the supplier is concerned because the supplier's only interest in the IMs is how they affect DPP setting.

GLAZEBROOK J:

I suppose my problem is that I can understand that argument, what I don't know is in the context of – without actually having anything referenced to those particular IMs and without having more than a very general statement from Ms Taylor about what actually you would need in those IMs to comply with s 52T(2). If I were writing a judgment I wouldn't have a clue what to put either in terms of what extra might be

needed, and without actually being in the context of an appeal in respect of those IMs, which is why I'm suggesting this might be just the wrong forum if that is the argument rather than the stand-alone. The stand-alone I can perfectly understand, and that seems to me what we're looking at, but what I don't know is if – well, I just wouldn't know what extra goes in there.

MR GALBRAITH QC:
No, and we're not asking you to do that at all.

GLAZEBROOK J:
What else are we supposed to say then, I suppose is the issue.

MR GALBRAITH QC:
Well, what Vector is asking you to say is that the IMs, if it's going to be under s 52T(2), have to contain explanations of how so that s 52T(2)(a) is satisfied.

GLAZEBROOK J:
But how what, because that's not very helpful to the Commission to say they must ...

MR GALBRAITH QC:
Well, the Commission fully understands. The question is producing, as I said before. They'd got a SPA methodology within less than a week of being delivered.

GLAZEBROOK J:
Okay, so in relation to how, you just mean a general SPA methodology?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
And how each of those relate to each other?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:

So what you say is s 52T(2) requires within either a separate methodology or within those to have an explanation of how the cost of capital relates to the valuation of assets and relates to the allocation of common costs.

MR GALBRAITH QC:
In the context of how it's going to relate to the DPP setting.

GLAZEBROOK J:
How you would set it. All right.

MR GALBRAITH QC:
And as I say, the Commission has gone through and is still going through that process, so it identifies that. The Commission, having got to a SPA methodology, then has to do another exercise which we say is the determination exercise of actually determining how that methodology then applies to the particular Vector or Powerco or Aurora, whoever else it might be, and that's a completely different exercise. It's applying that methodology then to come to a number in relation to each of the suppliers.

GLAZEBROOK J:
So do you say – I haven't, actually, I must admit, read s 52P as being a determination of a particular number.

MR GALBRAITH QC:
Yes, it will be, ultimately.

GLAZEBROOK J:
That's probably because I haven't totally understood how that process works.

WILLIAM YOUNG J:
Does the draft one in July, does that actually illustrate how it might work?

GLAZEBROOK J:
Because I didn't think it was coming to a number.

MR GALBRAITH QC:
No, it isn't.

GLAZEBROOK J:

I thought it was more a methodology so the determination was seen as the methodology and presumably, ultimately it will come to a number in respect of individual suppliers, but I hadn't seen s 52P as being quite that explicit. That's why I say I might have misunderstood.

MR GALBRAITH QC:

Well, I believe s 52P will be the effective power to reach a determination in respect of each supplier.

GLAZEBROOK J:

I know it says that.

MR GALBRAITH QC:

Yes, it says that.

WILLIAM YOUNG J:

Is there a draft determination?

MR GALBRAITH QC:

There's the one that we looked at. The one at vol 5 at 48 is a November 2009 one, which was what I was talking about, so that's the roll forward, so that perhaps isn't the most useful one. The draft determination or a draft determination, I should say, is in vol 10 at tab 69. If the Court would kindly ask me to explain the formula in there, I'd be grateful. 2261, yes, there's starting prices for the various – or inputs, at least, for determining prices.

GLAZEBROOK J:

And those are the application of the formula to the particular – which I can understand in terms of that, but it's got more generic formula that apply to everybody and then you work out how those formula or formulae apply to the particular individual suppliers, which makes sense.

MR GALBRAITH QC:

Yes, that's my understanding.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.13 PM

MR GALBRAITH QC:
If I could just take another 10 minutes of the Court's time. Just towards – one small matter, then I just want to take up a couple of matters that were discussed before. Just towards the end of our written submissions, in section 7 at page 28, we have some submissions in relation to the issue of certainty and consistency of the Court of Appeal's decision with Pt 4 inconsistency. I won't go through the first part of that, I've said enough about that already but, it's just interesting to note, [7.5]. In the explanatory note, the Court of Appeal made something of the need for flexibility.

Now, as we note there, in the explanatory note in the regulatory impact statement in the Bill, certainties are referred to 33 times; uncertainty, that's being undesirable, 14 times; predictability, seven times; flexibility, only twice and that's in the context of reducing flexibility and the only other reference to flexibility is that the regime which has been set up going forward, is to be a modern, flexible and forward looking regulatory regime and that was, strangely enough, the extract which was picked up by the Court of Appeal in [33] of its judgment, so it's a pretty slim foundation for placing too much emphasis on the need for flexibility which of course again, was one of the things the Commission had said.

Can I just take you though to a couple of other matters? In vol 1, if the Court wouldn't mind looking behind tab 5. This was a hand up in the course of the High Court hearing. It wasn't referred to in the Court of Appeal. His Honour Clifford J, at [125] of his judgment which is behind tab 6, said of this document and the second part of that paragraph, "Another way of understanding the Commission's methodology that is reflected in the draft electricity DPP reset paper and that was helpfully summarised in the memorandum provided to the Court in response to my questions, is that the Commission has, through those materials, described "how" various other IMs are to be used for the purpose of the price reset. It has, in that way, in effect produced a SPA IM. Thus, in its written response to questions raised by the Court, the Commission explained that (a), if it obtained cost data which formed the basis of various projections by references to IM determinations that were being applied, (b)," at [3.1] of that note, "the WACC, weighted average cost of capital value, for the DPP regulatory period was found from the DPP WACC IM and that the regulatory investment value or the initial RAB values are also derived from

information obtained by references to the IMs." His Honour then goes on to refer to Mr McLaren's affidavit and comes to the unsurprising conclusion that the IMs were being used to determine the DPP and in fact, the Commission was quite capable of setting out how the methodology operated, or was to be applied, at a generic level of the transmission, as I say, from A through to C which is what this document is about.

Just while we're with this document, if you just note in [2] of the document, it refers to the July 2011 draft decisions paper which I think I referred the Court to before which is to be found in vol 9, behind tab 68 and then before lunch, the Court was referred to vol 10, tab 69 which is the DPP determination in 2010 which had those formulae and the table in it.

Now, that was a determination that the tab 29 – sorry, 69, is a determination. That draft decision paper isn't a determination but it contains the sort of information that you would expect to find in a SPA methodology. It's how you get from input methodologies to the answers in the determination itself but the determination is the application of the reasons which are – or the intermediary steps which are set out in the draft reasons paper. Now the draft reasons paper has no statutory foundation, it's not a determination and what Vector is saying, there should be an input methodology, we say, between the input methodologies and the final determination, so that the method of getting from A to C is explicit and so those considerations which section s 52T(2) direct attention to can be complied with.

Now, in that same context, if the Court wouldn't mind just looking in vol 1, at the relief which was sought –

GLAZEBROOK J:
Can I just check with you … What's in the draft decision paper was not in the determination, so that – because we haven't looked at those in detail so –

MR GALBRAITH QC:
No, sure. It's in the determination in the sense that it says how the determination is going to be arrived at. It comes out on the same day. So what you get is a draft decision paper and a determination and you're meant to read from – if you want to understand the determination, you're meant to go back to the draft decisions, that's how it works.

GLAZEBROOK J:
All right, thank you.

MR GALBRAITH QC:
Could I just go briefly to our pleading which I think is behind tab 3 and if you just go across to page 16 at the foot, in the right-hand corner which is the first cause of action and you'll see there that the pleading in [31] is a pleading specifically of s 52T(1)(c)(i) and of the regulatory process and rules such as the specification and definition of prices. There's then an alternative pleading under s 52T(1)(c) about the regulatory processes and rules. It goes on to say that there's a lack of certainty, etcetera. [32] is the pleading about the failure to set those particular IMs and the claim for relief which follows is, "A declaration that a SPA methodology should have been included in the input methodologies and/or an order setting aside the decision not to include those in the SPA methodologies, a declaration that the published methodologies shouldn't be given effect to unless there is a SPA methodology and a referral back of the published input methodologies to the Commission with the direction the Commission include a SPA methodology." Similarly in (e).

So that's consistent with the discussion I had with her Honour before and what we included in our submissions as appendix B, was that – because what happened was there was the hearing before Clifford J, he came to a preliminary view that Vector's challenge was justified. There was then to-ing and fro-ing about remedy and, as I said to the Court before and you'll find it before appendix B, or tab B to our submissions, the Commission made submissions regarding remedy and in a nutshell, if I can express that term, it preferred the remedy of a stand-alone IM and that was what was being pursued at the time that the Court of Appeal came out with its decision on appeal.

McGRATH J:
So where do we find that in appendix B?

MR GALBRAITH QC:
Sorry Sir, you'll see in 28.2 on page 9, "Rather than necessary and sufficient remedy is to require the Commission to determine a SPA IM as per Vector's paragraph 514," rather than go back and redo the existing IMs.

The position at present of course, in respect of what her Honour was asking me, is that we have the Court of Appeal judgment saying you don't have to do any of this, you don't have to set out the detail, you don't have to be specific. So while it's correct that we have a merits review still on foot to be heard in December, I mean, the Commission's short answer to that is going to be well, the Court of Appeal says you don't have to do that so end of story. And that is the position the Commission takes at the moment and one can understand that. So it's only if this Court were to confirm the view that Clifford J reached, in relation to this, that that may in fact make the – that may not render the merits review issue redundant because of the sort of issues that her Honour Glazebrook J raised, that it may still be necessary for that Tribunal to look at, or that Court to look at, what's actually in the IMs but at least it won't be foreclosed from doing that which it is at the moment, I think effectively is at the moment.

That was all I was proposing to say. Mr Butler is going to talk about s 54K(3). Thank you.

McGRATH J:
Thank you, Mr Galbraith.

MR BUTLER:
Your Honours, if I can just have a moment to get my papers organised and if I can just say, I'm not used to appearing with a microphone, all I can hear is my voice, so I'm not sure whether I'm speaking at the right level or not, so if I'm not, please – your Honour, I'm sure will indicate to me.

So your Honours, as my learned senior has indicated, I'm going to deal with that part of the appeal that touches on s 54K which, as your Honours are familiar with, is the part of the appeal that concerns the transitional, I think is the phrase that's been used but sometimes it's called the mid-period reset, in respect of the 2010/2015 DPP determination that's being set and I thought perhaps the most efficient way that we might be able to do that is perhaps just to locate, in the case on appeal, the relevant part of the Court of Appeal decision and then equally, the relevant part of the High Court decision because the provisions that we will be discussing are set out there. So that's in the case – the Court of Appeal dealt with it in the bundle at 141 which will be tab 13 our Honours and dealt with the issue from [61]–[73]. Your Honours will see

the relevant provisions around which this issue turns, in Vector's submission, being s 53ZB, reproduced at [63] of the Court of Appeal's judgment and then at [65], s 54K.

His Honour Clifford J dealt with the s 54K issue in the case at page 91, [140] and following, of his judgment. So that will be at tab 6 and, as I said, beginning at page 91 of the case. So from my perspective, I thought your Honours it's likely to be just, in terms of the relatively limited scope of provisions that we're looking at, I thought that it's probably going to be easier to manage if we just have those two tabs identified, rather than having to run off to the bundle of authorities and such like. So that was how I propose we might deal with the issue.

Now your Honours, if I might explain how it was this issue arose in the context of Vector's judicial review, I think that might be very helpful in terms of an element of scene setting. If I can deal with it in this particular way. From Vector's perspective, when it was launching this judicial review, you might describe the reference and the reliance on s 54K in this somewhat crude way, as an indication that the Commission couldn't have its cake and eat it. The point simply being, that if the Commission chose not to adopt a SPA methodology as an IM then it hadn't provided itself with a basis for revisiting, or opening, resetting, in the middle of the regulatory period, the DPP that had been set to apply as from 1 April 2010.

So that was the – and I'm describing it somewhat crudely but I think it's just useful to just set out in that way and I'm sure I can refine it a little bit more but in terms of the dynamic. Now one of the things that went with that your Honours, when Vector took the case before the High Court and then the Court of Appeal, was Vector accepted that if it was right and that a SPA methodology needed to be determined as an input methodology and be subject to the sorts constraints that your Honour Anderson J referred to early on and which my learned senior made reference to, that if a SPA IM was part of the IM package, so as to speak, then that would provide a basis for the Commission to be able to say, in terms of s 54K(3), that had the input methodologies been in place at 1 April 2010, then that would have resulted in a materially different path being set.

So that was the – and I'm just articulating for your Honours' benefit the thinking behind the case at that particular stage and I say that by way preface to an argument that I'm going to advance which is slightly shifting ground, to use a phrase your Honour used a little bit earlier with my learned friend. When your Honour used it, I

don't think it would be fair to say that the ground had shifted in relation, at least to that argument, as you'll have seen from the pleading but what I am going to advance is an argument of statutory interpretation is a different argument from that which was posited in the High Court and Court of Appeal and the genesis for that argument really comes from a consideration of this Court's leave judgment and then a consideration of my learned friend's submissions around the proper interpretation of s 54K seen together with s 53Z(b), so I want to be open and upfront about that.

If I can, having expressed it that way, it seems to –

McGRATH J:
So it's not the argument in your written submissions?

MR BUTLER:
It's not the argument in the written submissions, Sir. That's the point I'm rolling at, and I want to do it in a transparent, open way.

And in essence, it seems to me, having considered the leave judgment in my learned friend's submissions and then gone back and closely reviewed the statutory language it would appear that there are really two issues which arise in respect of the interpretation of s 64 – sorry, 54K(3), and the first of those issues, your Honours, is whether or not the Commission is precluded from undertaking a mid-period reset under s 54K(3) if it chose to rollover prices when it set the first DPP to apply as from 1 April 2010. So that's the first question which arises. It is precluded from resetting? I'll explain where that comes from shortly.

Secondly, if it is not precluded from doing so, if what the Commission proposes to do, as it has here, is to effectively replace a decision to rollover prices, so to replace rolled over prices with another set of prices determined under s 53P(3)(b), so in other words what is the extent of the reset that is available to it? Now, what we said in relation to those two issues, and again, I'm just trying to again say as to why this hasn't been covered in the Courts below, that first issue, that's not an issue that was addressed directly in the Courts below, but it seemed to me, when considering the materials in preparation that that might be an issue that's being raised for consideration here today in relation to that, and I will address that.

In relation to the second issue, the stance which Vector took, which I think becomes apparent from the materials your Honours will have read, is that the Commission was limited in the extent to which it could undertake a mid-period reset in that it was only permitted to undertake a reset to the extent necessitated by the adoption of the IMs. And we said, bearing in mind there is no SPA IM, and since a SPA methodology is critical for the reasons outlined by my learned senior to determining what a path will actually be, then you simply aren't in a position to satisfy the statutory threshold which is a conclusion that had the IMs been in place – I think the statutes are in the singular, but let's pluralise it – if the IMs had been in place, they would have resulted in a materially different path being set. So that's simply by way of scene setting.

So if I may –

GLAZEBROOK J:
Does that argument apply whether there is an obligation to have a starting price reset input methodology or whether there isn't an obligation?

MR BUTLER:
Yes, it does.

GLAZEBROOK J:
But this is a – so it applies in both cases?

MR BUTLER:
It does.

GLAZEBROOK J:
It's accepted that the Commission could, if it wanted to, have done that?

MR BUTLER:
Correct. I think we're all at the same page, subject to my learned friend saying different, but in the Court of Appeal, and I can find the relevant paragraph at the outset of the judgment, maybe it's helpful if I do that.

GLAZEBROOK J:
Yes, I understand that, although I'm not actually sure that was a concession well-made.

MR BUTLER:

Well, your Honour knows the concession I'm referring to, so it's the one recorded at [7C].

GLAZEBROOK J:

Yes, the concession that the Commission could, if it wanted to, have done an input methodology for a starting price adjustment.

MR BUTLER:

Correct.

GLAZEBROOK J:

Presumably under s 52T(1)(c).

MR BUTLER:

Yes.

GLAZEBROOK J:

Because that's the only section from under which it could have been done, isn't it?

MR BUTLER:

Not necessarily, because the opening language –

GLAZEBROOK J:

Even under 1A?

MR BUTLER:

Well, under the language of 1, if you look at the chapeau to 1, it says the input methodologies related to particular goods or services must include.

GLAZEBROOK J:

All right, so the argument is it could have.

MR BUTLER:

So there's compulsory ones, but of course there could have been others. That's where I'm coming at, your Honour.

WILLIAM YOUNG J:

Just so I can let you know an issue that is in my mind, s 52S, I think, requires published input methodologies to apply so that where is an input methodology it must be applied.

MR BUTLER:

Correct.

WILLIAM YOUNG J:

It doesn't say you can't make a decision if there isn't an input methodology. It's just that there's a set of timelines which, at least in relation to mature scheme, means that there will be input methodologies by the time the decisions ...

MR BUTLER:

That's fair. That's correct.

WILLIAM YOUNG J:

All right. But there's no requirement in relation to s 54K on those timelines that there would be input methodologies, a complete set of input methodologies in place.

MR BUTLER:

That's fair, Sir, and the premise of the provision, of course, is that if you look at subs (1), there must be a reset prior to 1 April 2010, subs (2) says you can make the reset even though all or any – I should remember the exact language, just let me have a quick look to make sure I properly repeat it – all or any, I think. It's written in the negative, if I remember rightly. All or any of the – even if all or any of the relevant IMs have not been determined, so again the premise is all of them may not be determined, or indeed none of them may be determined at that stage.

WILLIAM YOUNG J:

Does subs (2) look upwards or upwards and downwards? Does it apply to s 54K(1) and (3) or just s 54K(1)?

MR BUTLER:

How Vector has approached these particular provisions is you look at subs (1), so there's a requirement to reset. You look to s 53P to determine how the reset is to occur, and we know that there's two options under subs (3), so you've got the

rollover option which is (a), and then you have the more elongated process of trying to figure out what current and projected profitability might be under (b), and you are entitled to undertake that reset under subsection (1) is how Vector has approached it, even though none of the relevant input methodologies have been determined. Do bear in mind, your Honour, in that regard the original date set out in the statute when it was envisaged that IMs would have been in place was originally 30 June 2010, so that was the original target date, so there could well have been a number of input methodologies that would have been in place prior to 1 April 2010 that could have been drawn on for the purposes of undertaking a reset. Now, we know that in fact that wasn't the case.

WILLIAM YOUNG J:
Right, but what I suppose I'm postulating is that by – for the purposes of s 54K(3) some input methodologies have been published. But say you're right, or Mr Galbraith's right, and a reset methodology should also be published but they haven't got round to doing it.

MR BUTLER:
Yes.

WILLIAM YOUNG J:
Would it not be possible for the Commission to reset starting prices under subs (3) and to an argument that, "Ha ha, you haven't got a reset methodology respond, well, under s 52S we only have to apply one if there is one, and there isn't, so we'll just get on with the task at hand." That's a line of thought that emphasises the transitional nature or intermediate nature of the s 54K(3) part.

MR BUTLER:
The reason for my pause, Sir, is I'm just trying to – again, as you'll have picked up, the sequence in here is quite critical. I might pause on that just for a moment. So your Honour's argument is no requirement of any particular input methodology is in place, the only obligation to apply that which –

WILLIAM YOUNG J:
There's only an obligation to apply those input methodologies that are published at the time a particular issues falls for determination, that the timing that's provided for in the Act contemplates some input methodologies being published after 1 April

2010, but perhaps not a full suite, so even if a price reset methodology is required under s 52T, the fact that one hasn't been promulgated or published wouldn't preclude a s 54K(3) reset.

MR BUTLER:

So that falls back to our argument, Sir, which is the argument that we've advanced in the High Court and the Court of Appeal.

WILLIAM YOUNG J:

Which you say is that you can't be certain that there would be a different outcome unless there was a starting point?

MR BUTLER:

Exactly, so you would have had some inputs, so just embracing your Honour's argument, you would have had some inputs provided by the partially-completed suite of IMs, if we put it that way. Let's say there'd been a WACC that had been produced, so you'd have a WACC number that could have been in place at the relevant time. That's where we fall back to our argument of saying, well, a WACC number simply doesn't provide you with enough information to be able to make that threshold determination of whether it would have resulted in a materially different path being set.

WILLIAM YOUNG J:

Well, I suppose the Commission might say, "Well, that is a matter for us. Under section 54K and section 53P, we have to decide whether we've got enough information to make the decision."

MR BUTLER:

And so the issue there, then, I suppose, Sir, would come down to how one reads those words. It would have resulted in a materially different path being set which we submit is obviously an objective standard.

WILLIAM YOUNG J:

And it can only be – you can only be certain if there is a reset methodology that's been published.

MR BUTLER:

Correct, and part of this submission that was delivered by my learned senior was trying to make that particular point, warming your Honours up, in one sense, for this particular argument, because if you recall the evidence around the banding exercise, so yes, you could have had a change in some of the input numbers, so a change in the WACC, but that would not –

WILLIAM YOUNG J:

But couldn't the Commission say, "Well, we do have a" – which is what you say they have – "reset methodology, it's just one we don't have to publish, so applying our thought processes we can be certain."

MR BUTLER:

Which would assume a certain methodology, SPA methodology.

WILLIAM YOUNG J:

Yes, but we do have a methodology. I mean, they presumably have to have a methodology, but it's just one we don't have to publish as an IM.

MR BUTLER:

Yes, and so the issue there, Sir, coming down to the language of subs (3) is the key, the subject of it would have resulted, it being the input methodology would have resulted. So from our perspective, the trigger, the light switch, so to speak, to get subs (3) has to be found in the input methodology itself. It's the thing that would have resulted in a materially different path being set.

WILLIAM YOUNG J:

Well, I suppose what may provide you with some support is that perhaps the s 54K(3) presupposes the same methodology would have been in place at both times, that is, before 1 April 2010 and also at the second date.

MR BUTLER:

Correct. So I don't know whether that helps, your Honour.

WILLIAM YOUNG J:

Well, it helps to clarify my thinking.

MR BUTLER:
Okay, thank you, Sir.

So I think I'd outline the argument, the statutory arguments that Vector's going to raise on this before your Honours. I did want to emphasise this alternate argument about not being able to move from A to B, once you've chosen A to B. That was not an argument advanced below. I need to be clear about that. So the argument, quite simply, in relation to that draws in a sense both on the language of s 54K and also on the provisions in s 53Z(b). Now, we've not talked so far, your Honours, much about s 53Z(b). Is it worth just focusing on that for a moment, [63] of the Court of Appeal judgment.

What subs (1) of 53ZB emphasises is, in Vector's submission, for want of another word, the solidity of a DPP or indeed a CPP, so a default price-quality path may not be re-opened within a regulatory period on the grounds of a change in an input methodology except as provided in subs (2).

And then it provides in subs (2) that every DPP must be reset by the Commission in accordance with s 53P if an input methodology changes as a result of an appeal under s 52Z, and had that changed methodology applied at the time the price-quality path would set it in a materially different path being set, and then there's a requirement, as we see, to apply claw-back.

Your Honours will notice that the language of subs (2) of 53ZB is very similar to the language of subs (3) of 54K. The only thing is that the particular item noteworthy is that whereas subs (2) helpfully has some subparas which make it easier to follow, that's not present in subs (3) of 54K.

The context or the circumstance in which s 53ZB arises is, as noted in subs (2), an appeal, a success appeal by a party. That's an appeal under s 52Z. I'm not sure if we've looked at s 52Z, but that's the merits review appeals, so I'm looking here at page 79 of the statute book, Sir. So s 52Z is what provides for the appeals against input methodology determinations, so that's what everybody refers to as the merits appeals process.

And so the thrust of subs (2) of 52ZB as noted, indeed, by Clifford J and the Court of Appeal, and I think there's no quibble with my learned friends in relation to this

particular aspect of the interpretation exercise is that where a party does successfully appeal on the merits review it should, where relevant, be able to enjoy the fruits of the appeal, so you'll note there's no discretion in terms of what the Commission must do. It must reset. The test to be applied is, would the – had the change methodology applied at the time the price-quality paths were set, would it, i.e. the change methodology, would it have resulted in a materially different path being set?

Claw-back applies under subs (3) when resetting a DPP under subs (2), then the Commission must apply claw-back and that's again designed where if somebody's successfully appealed, and claw-back is both positive and negative, so most people think of claw-back so if you look at the definition of claw-back most people think of claw-back as being perhaps the Commission clawing back additional revenue from regulated suppliers but it actually works both ways. The definition of what a claw-back is in s 52D if your Honours wish to find that.

Again if you look at the language there the underlying assumption of s 52 – of 53ZB is one that would be informed, Vector submits, on an objective basis. You can't have a situation whereby the Commission determines whether or not it would or would not have resulted in a materially different path being set. So the test, in other words, is an objective test that would be applied. So even though the obligation is an obligation on the Commission to reset the DPP, as it must be, because it's the organisation that sets DPPs, so it wears the obligation. The test to be applied by the Commission is an objective one. It must be determined objectively whether the change methodology that it applied at the time of the original DPP being set would have resulted in a materially different path being set. The same language is used in s 54K and we say with the same purpose and effect, in other words that's an objective threshold and that is said in s 54K(3).

Now if one turns to s 54K, so I just wanted to draw that parallel between s 53ZB and s 54K because we haven't, your Honours hadn't been brought to s 53ZB just quite yet. I want now, if I can, having done that little bit of introduction of the provisions, just advance the argument, well raise the same issue and advance the argument in terms of whether or not it is possible for the Commission to switch between the (3)(a) rollover prices option and the (3)(b) current and future profitability approach. Now let's just re-orientate ourselves to s 53P if we may your Honours, just so we're all on the same page in terms of the reset. So I'm at page 91, Sir, of the statute. So s 53P(3), so the starting prices in here, the references to the starting prices that are

required to be reset before the end of the first and every subsequent regulatory period, that comes from subs (1) of 53P. The starting prices must be either the prices that applied at the end of the preceding regulatory period, so that's the rollover option, or prices determined by the Commission, that are based on the current and projected profitability of each supplier. That's what I'm referring to when I'm talking about the two options.

WILLIAM YOUNG J:

It's clear, I take it, that theoretically at least the Commission could have resorted to s 53P(3)(b) before 1 April 2010 even without any input methodologies being published.

MR BUTLER:

Correct, yes, could have done so. What it chose to do instead however your Honour was exercise the option A, the rollover option, and so the argument of the statutory interpretation argument, which we're advancing now here for the first time, is that where the option A is chosen then when one reverts to the terms of s 54K(3) there is no methodology to be applied because option A does not involve the application of any methodology. What it involves is simply rolling over the existing prices from the preceding regulatory period.

GLAZEBROOK J:

Where do you say they're "not allowed to change them" comes from?

MR BUTLER:

Not allowed to change them?

GLAZEBROOK J:

Well this implies that once you set anything you're not allowed to change it, so where does the "you're not allowed to change them" come from because you can change s 52P determinations after consultation?

MR BUTLER:

Yes.

GLAZEBROOK J:

And then presumably, if you can change a determination after consultation, just if you want to, where does it say you can't reset starting prices if you change that

determination? Now, ZB only says you can't change on the grounds of a change in an input methodology. Well, you're doing that, you're changing it on the grounds of a differing s 52P determination.

MR BUTLER:

And so if one looks, in relation to that issue, at s 52T(c)(ii), the idea they are Ma'am, is that there should be a regulatory process or rule which identifies these circumstances in which a price-quality path may be reconsidered within a regulatory period. In other words, your IM tells you the circumstances in which the price-quality path may be considered within the regulatory period.

WILLIAM YOUNG J:

What does the existing s 52P determination say about that?

MR BUTLER:

Exactly Sir, so we've got the – we're still in that period with the IMs.

WILLIAM YOUNG J:

But there is a s 52P determination that's extant.

MR BUTLER:

Sir, there is a s 52P determination which is the rollover.

WILLIAM YOUNG J:

Yes but there's more in it than just the rollover of prices.

MR BUTLER:

Insofar as prices is concerned the –

WILLIAM YOUNG J:

I thought there was anyway, I –

MR BUTLER:

Yes there is, no, no, you're right, there's reference to quality for example, how quality standards might be addressed.

GLAZEBROOK J:

Well, your answer to my question was that there should be an input methodology setting out when you can reconsider which implies that you should be able to reconsider in that period, as long as it's in accordance with an input methodology. The difficulty is, if there isn't an input methodology that says that at the moment and is there or isn't there?

MR BUTLER:

So there isn't a methodology that says that at the moment.

GLAZEBROOK J:

Well I'm not sure I take from that, a prohibition on changing. There's certainly a prohibition on changing as a result of a change in put methodology because that's in ZB.

MR BUTLER:

Correct.

GLAZEBROOK J:

But I don't have a prohibition at the moment, apart from a backdoor prohibition through not having an input methodology that identifies the circumstances but in fact, you can make determinations without having all of those input methodologies in place anyway.

MR BUTLER:

On the – in the transitional period, that's right, that's right. The expectation being that in terms of –

GLAZEBROOK J:

Well you'd say we take from that that you don't change it, well sort of, drop of a hat or whatever –

MR BUTLER:

Yes, that's right.

GLAZEBROOK J:

– your friend called it?

GLAZEBROOK J:
Correct, that's right Ma'am.

GLAZEBROOK J:
But there isn't anything, apart from that, that you can point to, to say you can't change them otherwise – which actually might be a point in favour of the interpretation that says that you have to have these things has input methodologies but I'm just –

MR BUTLER:
Exactly, that's right –

GLAZEBROOK J:
– I just want to know if there's anything else other than that?

MR BUTLER:
– that's correct. No there's isn't, no, no –

GLAZEBROOK J:
That's it, thank you.

MR BUTLER:
– and so where your Honour has taken it, that's exactly where it's at, so you've helped me to get that out more quickly than perhaps I was getting us there, that's correct Ma'am.

So the argument, just again to restate the argument is that, where option A rather than option B has been chosen in the transitional period, what the Commission has done is it has gone along a pathway and I say, use that reluctantly, maybe say an avenue, to use another word, an avenue which itself is not dependant on methodologies. So changing methodologies would not have resulted in a different path being set.

WILLIAM YOUNG J:
That does leave a bit of a hole in the regulatory system though, doesn't it because as the Court of Appeal I think pointed out, it was always quite likely that the – for the

period beginning 1 April 2010, the pre-existing prices would be rolled over and on your basis, once that happened, s 54K(3) became a dead letter?

MR BUTLER:
That's right. The point I would make and I acknowledge that, I acknowledge that's a consequence of the interpretation that's being advanced, the point I'd make in relation to that is while the Court of Appeal saw that as being something to be avoided and not accepted, there's a number of counter arguments, or countervailing matters that need to be taken into consideration to determine whether that in fact is a hole, to use your Honour's term.

The first point is of course, the period for which the hole would be in place is relatively short one. The Commission has indicated there is no intention to claw back for the first two years. Of the relevant DPPs, we're talking about a three year period maximum in which the hole would exist. Not only that but the prices that are being rolled over are prices that are taking themselves from the previous old regime, the thresholds regime which of course, had the level of discretion that was available to the Commission. So what I'm saying basically there, is that the rolled over prices are prices that were previously acceptable and accepted by the Commission and which have been through the Commission's filter. So one can understand why, from the perspective of leaving the Commission to sit with its choice that it makes, that's between rollover and option A – what I'm going to refer to as option A and option B because otherwise these long phrases – as between option A and option B, option A is not a bad – is not a hole as such but rather is an option.

There are good things that go with option A and there's some potential disadvantages that go with option A. That's a choice for the Commission to make and evaluate. It had the responsibility of doing that but, having gone one way, it sits with the consequences of that particular option. Again, when seen in context, that option, option A, is not a bad option. So yes, I accept the logic of what your Honour says but it's actually, when seen in context, it's not a bad option.

GLAZEBROOK J:
How do you get there on the wording again? Because you say there has to have been a pre-existing methodology in place but I don't quite understand why that should be the case. Because, if it's published over that and that methodology applied at the time, well don't you just say that if that input methodology had been there and

the methodology in that input had applied at the time, it would have been a materially different result and then you compare, for a materially different result, you compare it to what would have happened if you just have a rollover. Why do you say you have to have had a methodology in place and a change of methodology? I'm sorry, I might have missed a step in your argument on that.

MR BUTLER:

No, no, so the reason for – the premise –

GLAZEBROOK J:

Why do you have to have a pre-existing methodology is what – on the wording of s 52K(3)?

MR BUTLER:

Because in Vector's submission, the premise of subs (3) is that there is a methodology – sorry, there is an exercise which had been undertaken by the Commission which had the Commission, had the methodology available to it to be applied, would have resulted in the materially different path being set.

GLAZEBROOK J:

Well, why do you have to have a pre-existing methodology for that argument? Because all you have to have is a materially different path. So if you'd had that methodology available, don't you just have to have a materially different path being set? And if that methodology is materially different from what would happen under the rollover, then haven't you just satisfied s 54K(3) with a new methodology, even if you had no methodology in the first place?

MR BUTLER:

So that argument, I understand the argument, the proposition, rather, that Your Honour is putting to me, and the submission I'm making focuses on the, it would have resulted in a materially different path being set, so again, I come back to the –

GLAZEBROOK J:

Well, the path is just the DPP itself, isn't it, or is there some other meaning you're using?

MR BUTLER:

Yes, but this is where I come to the trigger. The trigger is the input methodology. It would have resulted in a materially different path being set, because if what was actually envisaged, because the premise, if I can put it back to your Honour in this –

McGRATH J:

It's the methodology, not the reset?

MR BUTLER:

It's the methodology, not the reset. If what had been intended by Parliament was the Commission ought to be able to have a true choice between option A and option B then that's what it would have set.

McGRATH J:

Well, is it the methodology or is it the application of a methodology, or the availability?

GLAZEBROOK J:

Yes, well, that's where I – the methodology applied, is it?

BLANCHARD J:

It's the methodology which was published after 1 April. So you only have to have one methodology. You don't have to have a previous one.

GLAZEBROOK J:

Because conceivably you could have no methodologies, one assumes.

BLANCHARD J:

Well, it may be that subs (3) doesn't operate unless an input methodology is published, but it's not presupposing that there was an existing methodology. The comparison is with a hypothetical.

WILLIAM YOUNG J:

Well, there is this counterfactual. What would have happened before 1 April if this particular group of input methodologies had been published. Now, it may be difficult to resolve that counterfactual because one doesn't necessarily know how the

Commission would have worked those methodologies to produce an outcome. That may be a factual issue.

MR BUTLER:

And Sir, the other issue to interpretation as such is the difference between it would have resulted and could have. So it would have, so the methodology would have resulted in a materially different path being set. Important choices there.

GLAZEBROOK J:

Because the Commission would have applied those methodologies and that would have been quite different from the price reset or the rollover.

WILLIAM YOUNG J:

How different was the July from the earlier one, from the default rollover one?

MR BUTLER:

Sir, the proposed draft July?

WILLIAM YOUNG J:

Yes.

MR BUTLER:

So the July one had the references to bands, the banding exercise.

WILLIAM YOUNG J:

The third iteration.

MR BUTLER:

Sorry, we were talking about the July 2011 one.

WILLIAM YOUNG J:

It may have come out after the affidavits.

MR BUTLER:

Yes, they had, so that's why I'm loathe to describe the detail of it, not being an economist. Getting there, through the merits review exercise. Maybe that's something I should just come back to.

WILLIAM YOUNG J:

I suppose you might say, well, look, if they'd applied the first proposed methodology there wouldn't have been any difference.

MR BUTLER:

That's right.

WILLIAM YOUNG J:

The one they proposed around April 2010.

MR BUTLER:

That's right. And so the point I was just trying to make when I drew your Honour back to the question of the timelines was to say that it certainly was feasible because the work was going on to have developed some sort of methodology, but Parliament gave it the option. You can either prioritise a methodology, prioritise that form of work to give you a basis upon which you can exercise option B at a later stage, under s 54K, or you might just want to take a, I don't know, a more pragmatic approach which simply rolls over for the next regulatory period the existing prices, your option.

GLAZEBROOK J:

What say they'd used option B just on the basis of one input methodology? Is that all right, under your argument, because they'd have had a methodology even if they didn't have all of them? Then you'd have an input methodology published on something that's totally different and nothing to do with the methodology that the Commission used, if that makes sense in the ...

MR BUTLER:

The only missing bit of information there, I think, your Honour, is when the methodology you're talking about would have been published. Are you saying a methodology that might have been published prior to 1 April 2010?

GLAZEBROOK J:

Right, I see.

MR BUTLER:

So to reiterate, and I don't want to spend a huge amount of time on it, I feel I need to advance the argument from the materials in the leave judgment and such like. And

I've flagged to your Honour it's not the way the case was run in the High Court or Court of Appeal, but with the benefit of the materials, it's an open interpretation, and so it is an interpretation that Vector is advancing here before your Honours. The key is that the "it" is the trigger. There's a threshold there for that reason to focus on "it", and as I said, option A and option B. There's good pragmatic reasons why Parliament would have left open option A and option B and led the Commission to choose one or the other, and sets itself along a particular path.

So turning then to the – effectively the second issue, which is if we do assume that notwithstanding the fact that the Commission choose option A but now wants to adopt, as it's flagged, option B, what is the extent to which it can use the fact that some or now, I suppose, DPP IMs have been determined, which of those permitted to re-open prices? This particular point that our argument has originally advanced in the High Court and Court of Appeal kicks in. Our submission was a straightforward one that we say that reflects the threshold in s 54K, which is that in the absence, and this is really – in a sense, I'm really coat tailing on the submissions that have been made by my learned senior previous who, I think, has demonstrated from Vector's perspective the importance of the SPA methodology in terms of knitting together the IMs in a way that makes sense and creates predictability around prices in revenue for regulated businesses in terms of s 52T(2), the material effects or the input methodologies upon them.

Our argument is a straightforward one, which is to say in the absence of a SPA methodology which is determined as an IM, all the IMs give you is numbers and those numbers can't, in and of themselves, tell you that a materially different path – sorry, would have resulted in a materially different path.

WILLIAM YOUNG J:
Isn't this the same argument as the first one with its fingers crossed? What you're essentially saying is that unless there's a starting price adjustment methodology one can't be certain that the counterfactual that has to be established has been established, and that it works whether you're looking at a starting price adjustment methodology available prior to 1 April 2010 or after. Without these methodologies, one can't be certain what the outcome would be.

MR BUTLER:

With respect, no, I don't think it's crossing fingers. There are actual two quite different scenarios. That's why I was at pains to emphasise that the first argument depends on a statutory interpretation argument of saying, having chosen option A, you stick with option A. So that's the interpretation. That's the first argument I raised in terms of issue 1. What this second issue raises is saying, all right, okay, even if one is able to switch between A and B the issue becomes, again, and I do make references where I think your Honour might think I'm just slightly repeating myself, and I am repeating myself to some degree, because we are relying on the concept of materially – would have resulted in a materially different path being set, we say even if in this transitional period you could switch between a and b, for the reasons identified by your Honour in the Court of Appeal i.e. there's a hole which Parliament must have contemplated and wish to avoid, so I lose on my argument under issue 1. My point is even if I'm wrong on issue 1, even under option 2, there is that threshold that must be met and the only way you can know, in Vector's submission, that indeed a materially different path would have been set by it, it would have resulted in, is if a SPA methodology, determined as an IM, tells you that. Because an initial RAB, an initial regulatory asset base doesn't tell you whether a materially different –

WILLIAM YOUNG J:

But aren't these – well I suppose the point I didn't put very well is really these are – the fundamental point you're making is that s 54K(3) only applies where the counterfactual is one that is established with confidence and you can't establish that with confidence in the present situation because A, they simply didn't go down that route for the first three –

MR BUTLER:

Correct.

WILLIAM YOUNG J:

– sections, and secondly, now there isn't an input methodology and we don't know, with precision how –

MR BUTLER:

Correct. And if they wish to avoid that consequence next time around, or even potentially within this period, then what needs to happen is in input method – the SPA methodology needs to be determined as an input methodology. Once that's occurred

then the fact that that SPA methodology has been determined, permits you to trigger the threshold in s 54K(3), because it's then you can say with confidence, yes, it will or will not result in a materially different path being set.

If one looks at it another way, on the Commission's approach, with great respect, and I'm sure my learned friend Mr Brown will argue otherwise and I'll be interested to hear him on it, effectively, on my learned friend's argument, the threshold test is rendered redundant, serves no useful purpose, doesn't act as a filter. Effectively if he's right, I mean the Court of Appeal's judgment makes it clear, that so long as an input methodology is published, and it could result in a different price path being set, then everything is open and up for grabs.

WILLIAM YOUNG J:
Do you say that the extent of the operation is confined to what, the extent of the material difference?

MR BUTLER:
Correct.

GLAZEBROOK J:
You go further than that, though, don't you, because don't you say even under this argument that you couldn't tell whether that threshold has been met because there couldn't be a material difference without a SPA methodology?

MR BUTLER:
Correct.

GLAZEBROOK J:
That's why I think Young J suggested it was the same argument in fancy dress or cross fingers or whatever it was. I've been told by my clerk I'm not allowed to say the same argument in a skirt but...

MR BUTLER:
Well with WOW on perhaps we might be able to make other more Wellington-centric references. It's not in fancy dress, it simply serves, in a sense, to illustrate the centrality of the SPA methodology as part of the overall methodology package. It's another way of thinking about it.

GLAZEBROOK J:

The lesser argument, of course, is the one that's just been put to you, that you can only do it to the extent that that particular –

MR BUTLER:

Correct.

GLAZEBROOK J:

– input methodology would have –

MR BUTLER:

Correct.

GLAZEBROOK J:

– changed it, which is a different –

MR BUTLER:

Sure.

GLAZEBROOK J:

That's a level down from your argument, isn't it?

MR BUTLER:

And if I could explain it this way. I can certainly envisage circumstances, your Honour, where that could occur. Let's say, for example, the sequencing had been SPA methodology is formed. It says take a WACC from a particular place, maybe under their threshold regime or some other sort of information disclosure exercise, and then what happens is you get a DPP WACC IM which plugs in a different number. So what you'd be saying in those circumstances, so long as the input methodology tells you how to treat the WACC, in terms of calculating your path, so your allowed prices and we've seen what a DPP determination looks like, so far as prices are concerned it's just a dollar sign. Well there you could see a change and what one would be arguing there and I think the Court would accept that particular proposition, is just because there's been a shift in the WACC, input from say 7.1 to 7.3, doesn't mean ah, since there's a change of 0.2 in the WACC, that means everything is up for grabs. Whereas on my learned friend's argument, that's exactly what they're saying and so it must be the case, your Honour with respect,

that the change in the input methodologies has to be limited to the extent to which the change is necessitated by the input methodology. Sorry, Sir.

WILLIAM YOUNG J:
Well the Court of Appeal did point out some differences between s 54K(3) and s 53ZB –

MR BUTLER:
They did.

WILLIAM YOUNG J:
– the different context, mature scheme for s 53ZB, the may and the must, the time lag, the discretion over claw back.

MR BUTLER:
Yes. So there are different circumstances that give rise, that's true but, even in terms of the period, I mean, the s ZB, 53ZB can apply to an appeal in the first regulatory period. So we're not necessarily talking about a mature period. So one can shift from option A to option B and prices have been reset in accordance with newly minted IMs and if an appeal is successfully taken against the relevant IMs then the appellant should have the benefit of those. So I know you'll hear my learned friend that the ZB is really quite different and he levers off quite a lot of that but actually when you, with respect to the Court of Appeal, when you look at it, it can operate very early on in the regulatory scheme and yes, it's true to say that there is a nine month period which applies in respect of s 54K at reset. That's true but that just reflects, in my submission, the different circumstances.

So there must be a period within which a decision must be made, bearing in mind it's a discretionary decision for the Commission to make. So it can't be a non time-bounded discretion that's available for it to effectively spin out for as long as possible. However, in the case of the s 53ZB scenario, what we're looking at there is there has been a decision of the Court, the appeal has been allowed, there's no need for a nine month period.

Now it's true that the Commission would have to reset the relevant determination and there's not a time, a period within which the reset expressly has to be done but I should have thought, that as matter of statutory interpretation, the reset would have

to take place immediately and of course, the claw back would mean that there would be no advantage, in those circumstances to the Commission, if we say it was an energy appellant that had successfully appealed and had some numbers changed, obviously to the extent that the Commission must apply claw back, that explains why you don't see a time band period that sits alongside s 53ZB, in my submission.

Now your Honours, I think I've had an opportunity to explore in some detail the submissions I'd wanted to make to you on s 54K. I think you have a reasonably good understanding of where it is that Vector is coming at it from. Can I just check with my learned senior? I'm keen to give my learned friend the opportunity to have his say but if I can just check and make sure there's nothing, no points that I've left out.

Just one point, I think your Honour had the point, if Parliament had said you could reset once the IMs were in place, then the materiality threshold wouldn't have been in place if it was envisaged just for this transitional period. That the fact of the determination of the IMs was sufficient to allow a reopener in a shift from A to B, then Parliament would have been expected to say that the materiality threshold is there. It's the same materiality threshold as you find in s 53ZB. It serves a similar purpose, in Vector's submission.

McGRATH J:
Thank you Mr Butler.

McGRATH J:
Thank you your Honours.

McGRATH J:
Mr Brown.

MR BROWN QC:
Thank you your Honours. It is my preference not to get distracted by the s 54K(3) issue this afternoon, logically that comes later in the argument, but I'm anxious that the Court doesn't think I would be acquiescing in the arguments you have heard as it were one stage before. I do have reservations about whether that argument is available to my learned friend, to Vector, for two reasons. First of all, if you go to our, this is not in any particular sequence, but if you go to our written submissions at page 29 at [128] and I draw your attention to the last sentence about the last sort of four

lines, that up until this time, up until the argument we've heard today, Vector and the other energy companies that are in its group, have advocated that the Commission should have rolled over the prices in 2009 and then engaged in a reset partway through. So the proposition that you, if you, in the reset or in the transitional phase, if you elect to go with A, then you foreclose B, is not something they advocated, in fact the opposite. But possibly more telling is the question of whether it's open on the pleadings. The pleadings –

GLAZEBROOK J:
Sorry, can I just check, sorry, I've got it now. I found the bit that you're referring to.

MR BROWN QC:
I am hoping I'm getting the point here, and it's a bit difficult when you don't, haven't seen it in print, and I'll check the transcript if it's available, but as I understand it it's a sort of an all or nothing choice and the pleadings don't bear that either. The pleadings, you'll find –

McGRATH J:
Is this the pleadings insofar as they're sort of pleading the case in law?

MR BROWN QC:
Yes, well the whole structure of the pleading, in the amended statement of claim under tab 3 of vol 1.

McGRATH J:
Yes I suppose, Mr Brown, I found that quite helpful to read that amended statement of claim as it proceeded but it's not strictly part of pleadings procedure, is it, to spell out the whole of your legal argument in that way.

MR BROWN QC:
No, no, your Honour.

McGRATH J:
So if you happen to want to depart from it later can you really say that it was a matter of procedure, you should be prohibited from doing so?

MR BROWN QC:

I suspect that this Court can do what it wishes to do.

McGRATH J:

Well I think what the Court would wish to do here is to come to the correct view of the law –

MR BROWN QC:

Oh yes.

McGRATH J:

– and pronounce it rather than to be held back by the way the law had been pleaded in the amended statement of claim.

MR BROWN QC:

Yes. Now I appreciate that and I'm not trying to run any technical argument here, although it's curious in the footnotes to Vector's submissions, that so often the Commission sort of seems to be painted as the other side of the chessboard, you know, that it must take the risk of a lower/higher price or this or that. The Commission is simply seeking to discharge its statutory obligations and indeed at this very time is consulting on the A and B selection, so it will be very interested in knowing what the Court thinks about these things, although you do rather expect to have the chance to be briefed on the point before you hear it in argument. But what I would say is this, that the cause of action that alleged, and this is under tab 3, the fifth cause of action did allege that a decision to adjust starting prices under s 54K(3) was ultra vires. This was the s 54K(3) argument, and you'll find it at page 20 of the case, and it was ultra vires because it didn't have a, what they call a SPA IM. No ultra vires because as they pleaded, as a matter of fact at paragraph 18, that the Commission has decided to reset under s 54K(3). Now fine, if you, I just was anxious to, that you be fully aware of the basis on which the case has been run to date.

WILLIAM YOUNG J:

Well there may be a factual issue that's buried in this as well as a legal issue. It may be that the argument simply is, or an aspect of the argument simply is that the counterfactual as a matter of fact can't be established. It can't be established that the current suite of input methodologies, if available before 1 April, would have

produced a materially different outcome. Now, that's a point to which you might wish to respond, because it includes the complaint there isn't an input methodology, but it may also engage, for instance, with the evolving nature of the Commission's own approach to resets, because if it had used its August 2010 reset methodology no doubt – perhaps overstated in the affidavit, then it wouldn't have produced a materially different outcome perhaps. I don't know.

MR BROWN QC:

Well, when I come tomorrow to the legislative history, I suspect it'll be my submission to you that it isn't a counterfactual in that sense at all. It's not assuming an earlier IM. If there had been an earlier IM on the same subject matter it couldn't just be changed in that way. It's there. What they're recognising is that they're proceeding from the old benchmarking system that prevailed under the *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 decision that this Court heard and delivered in 2007. The s 54I says, well, we're going to deem for you the first rollover. It's rolled over. Although curiously enough it's deemed to have been published in four months before, it's a curious provision. Then J they say, well, you've got the option. You can go, we say, for – you can just roll them over or, if you like, you could try for a s 53P(3)(b) and I don't know the answer to Young J's question about whether (2) looks both up and down. It's a curious subs, (2), because it's a may provision that follows a must. It's a very strange piece of work. But that, again, and why I will, in the legislative history, be taking you back to the select committee. Almost all of these important changes, materially better, claw-back, s 54K(3), s 55F(4), all came out of this select committee process right at the end. They just – they all arrive as a group, and one of those, of course, is the s 52T yes or no scenario, so it was envisaged, in my submission, that having the statute having rolled over the first one for a year under s 54I, that until the IMs were definitely known you had this option but if you did go for the rollover of the CPI minus X sort of prices and things that were set under the old system you did have the opportunity to reset mid-period under the transition of s 54K(3), but that would be when an IM, that is, an IM as defined under the Act, manifested itself. Before then, there is an absence of IMs.

WILLIAM YOUNG J:

Would it have been practical before the period beginning 1 April 2010 to have reset under s 53P(3)(b)?

MR BROWN QC:

I very much doubt it.

WILLIAM YOUNG J:

It's theoretically possible.

MR BROWN QC:

Theoretically possible.

WILLIAM YOUNG J:

But whether it is actually possible, maybe out of the question.

MR BROWN QC:

Possible, but the Commission was consulting in all these things. It was lobbied, we say in our submissions, quite hard to, you know, only do that P – what they call the adjustment, a word, as you know, I don't favour because it conveys an idea of moving from one to the other but they refer to it in all those submissions as P0, and Vector said, we don't want two of those, so rollover on 1 April and then we can have a P0 adjustment once some of those IMs have started to come through.

WILLIAM YOUNG J:

Well, a P3 – a s 53P(3)(b) adjustment would have been quite expensive for the Commission, and suppliers, I take it, in the absence of input methodologies.

MR BROWN QC:

On 1 April, yes, I think it would have been, and once claw-back was introduced as well then all these things could be revisited, you see. Claw-back didn't exist even in relation to s 53ZB, that appeal provision that my learned friend took you to, until you find it in the report back from the Commerce Committee to Parliament, and I don't need – I mean, I will come to that in good time. So I would thus like to reflect overnight on this argument and take instructions. I would never seek to seek to foreclose something that's properly before the Court, but it is important that you know that it is not just sort of creative but it is something of a turn in the road.

BLANCHARD J:

Now, Mr Brown, can I just ask – I'm sorry to display my ignorance here – in s 54J(2) it talks about the thresholds for large electricity lines businesses that expire on 31 March 2009. What are they?

MR BROWN QC:

That is the cessation of the thresholds regime that applied under the law, under the old Pt 4A that this Court considered in *Unison Networks Ltd v Commerce Commission*. That was being abolished. It was being replaced by a new process, but you see what s (2) does it before it gets to K, so I called it I, it's actually J. Before you get to K, they deal with that first period from 1 April 2009 to the –

BLANCHARD J:

Yes, and they deem thresholds to be default price-quality paths.

MR BROWN QC:

Indeed.

BLANCHARD J:

So therefore in s 54K(1) the phrase "default price-quality paths" would include those thresholds?

MR BROWN QC:

Well, it would be doing a reset of – yes, of the paths that were deemed to be those.

BLANCHARD J:

So there is presumably a path there to be recognised?

MR BROWN QC:

Yes, there were –

BLANCHARD J:

And s 54K(3) is about comparison of paths?

MR BROWN QC:

That's right. It is. I mean, the same basic process applied under the –

BLANCHARD J:

So on the rollover, s 54K appears to be assuming there will be an ability to make a comparison.

MR BROWN QC:

Yes, there is. It's a transition through from the equivalent pricing. When I say equivalent pricing regime, it didn't – I'm going to take you to the various aspects that were –

BLANCHARD J:

And that can be done despite s 53ZB?

MR BROWN QC:

Yes, absolutely. It's curious, this s 53ZB. It sits as the sort of closing – no, it's 53ZB(1). It sits as the closing phrase to s 54K(3) and also its brother or sister at s 55F(4), which is the equivalent gas provision. If you come over to 55F(4) you'll find – and this was also introduced at the same time by the committee, we have exactly the same structure, although curiously it doesn't use – it doesn't actually carry the words within it in accordance with s 53P, but that's probably just one of those drafting issues, so it does the same thing. It would have resulted in different path set, may reset, may apply claw-back. Of course, this is gas as opposed to what was happening in –

BLANCHARD J:

But the reference to s 53ZB(1) takes out the whole of 53ZB, doesn't it?

MR BROWN QC:

Yes, it does, it does, but s 53ZB(1) was the provision that says that you can't re-open. What follows is an exception, that's right.

WILLIAM YOUNG J:

Could the exception – sorry, s 53ZB(1) doesn't apply here because the issue is not the change but rather the introduction of input methodology where previously there wasn't one.

MR BROWN QC:

Indeed. I think I argued in the Court of Appeal it was an otiose, the last few words in each of those sections.

WILLIAM YOUNG J:
So leaving aside entirely s 54K, what's to stop the Commission resetting the price?

MR BROWN QC:
Transitionally?

WILLIAM YOUNG J:
Yes.

MR BROWN QC:
My argument is there isn't anything to stop them doing it. The question –

WILLIAM YOUNG J:
So just assume s 54K wasn't there, or 54K(3) wasn't there. Would you be able to reset the prices?

MR BROWN QC:
Oh, I see. The general structure is that you are not –

WILLIAM YOUNG J:
It can be addressed in input methodology, can provide for resetting of prices on grounds other than a change in input methodology.

MR BROWN QC:
There are limited circumstances in which these either default or customary price paths are to be re-opened. There are a number of them. One of them is the appeal. One of them is s 54K(3) and there are two others, one of which is, I think, a recommendation by the Electricity Commission in s 54V I think you'll find that. 54V.

GLAZEBROOK J:
54B or V sorry?

MR BROWN QC:

V for Victor. V for Vector. Yes, subsection (5). So they are scattered around but the idea was there are several important aspects of certainty in the legislation –

WILLIAM YOUNG J:
There's one you haven't mentioned. Section 52T(1)(c)(ii).

MR BROWN QC:
Yes, that's right, and that is regarded as, generally the circumstances have been identified as where there's been, erroneous material has been relied upon, a correcting type of situation. There is an IM that addresses precisely that. That was the fourth of the scenarios I was looking for.

WILLIAM YOUNG J:
So there is currently an IM that addresses this?

MR BROWN QC:
Yes there are IMs, there are IMs that address everything, that is, what you see in the print in s 52T and there are other IMs as well but of the various certainties. My learned friends, of course, their real concern is with input methodologies and particularly trying to derive a right of appeal in relation to the reset but the certainties take a number of forms and one of them is the certainty of a regulatory period. That you basically can't change things during those periods and these are the exceptions and that is why ss 54K(3) and 55F cross-refer back to the appeal rule, even though it was –

WILLIAM YOUNG J:
And you have to rely on s 54K(3). You're not suggesting that there's a general right –

MR BROWN QC:
No.

WILLIAM YOUNG J:
– or that there's anything in the input methodology under s 52T(1)(c)(ii) that helps?

MR BROWN QC:

That's right and that's why I wanted to make that point because my learned friend was asked by Glazebrook J about s 52P and the amendment feature in s 52Q but that amendment, the power to amend a s 52P determination does not confer a general right to amend a DPP or a CPP during the regulatory period to which it relates. That's – it's dangerous to read a provision like that, that provides for amendment, as conferring the power to just the very act of amending a determination, that you can then change the –

GLAZEBROOK J:

I understand that but there doesn't seem to be anything that says you can't amend the CPP or DPP but you say it's just implicit in the structure of the Act, which I think was your friend's argument as well.

MR BROWN QC:

Yes, it is very – the structure of the Act is – well perhaps, 'intricate', might be taking it a little high, but certainly when I get underway I need to revisit some of the parts that he took you too because there is quite a structure that is relevant to the issues you're being asked to determine here.

GLAZEBROOK J:

My question was really in response to the argument that I think was made by Mr Galbraith, which was basically that if it wasn't in an input methodology it could be changed at the drop of a hat and you say well it might be changed at the drop of a hat but it doesn't actually affect the particular regulatory period –

MR BROWN QC:

No, that's right.

GLAZEBROOK J:

– because you can't translate it through and, of course, that might be a wrong because you still have to consult in terms of doing that, but it can only apply to the following regulatory period. I think there's something in – something somewhere that actually says you've got to relook at those determinations at the beginning of each regulatory period, which again might be an indication that they are applying for a regulatory period in any event. I can't now remember where it is.

MR BROWN QC:

Yes. Well in that point of consultation, I think my learned friend, on the change of a drop hat point, was really suggesting that the IMs had a sort of much more extensive – well, consultation process than the 53P. That isn't, with respect, correct. If you look at 53P(2), the Commission must consult with interested parties on the 53P which is done by amending the previous section 52P determination, so you have to do that. Whereas, when you look at the IMs, I think at one stage he referred to a hearing or a determination, the process for IMs is in 52V.

WILLIAM YOUNG J:

It's a conference, isn't it?

MR BROWN QC:

It's a conference.

WILLIAM YOUNG J:

But that is a sort of a hearing, isn't it?

MR BROWN QC:

That's true but it 'may', it doesn't have to hold conferences, it may hold them, that's s 52V(2)(c). It 'must' under s 52V(2)(a), it must publish a draft, it must give a reasonable opportunity to give views (s 52V(2)(b)), must have regard to the views (s 52V(2)(d)) but it only 'may' hold conferences but I'm not just – and rebutting, as it were, the suggestion that it's, or the IMs have all this structure and yet 53P – the Commission takes the 53P, subsection (2) consultation obligation very seriously and that's what it was doing in those various periods.

My learned friend and you will find in their submissions, at the back of their submissions, they have another chart that he didn't – a chronology he didn't take you to. It's a little like the one that was annexed to our submissions opposing leave but conveniently, in the middle of this chart, Appendix A, sort of the middle row is all SPA methodology. We say well it's not SPA methodology, that was the 53P(2) consultation in relation to the resetting of prices. If you want to try and see it as consulting on what would be a SPA IM, that's very much in the eye of the beholder.

Can I just, while we're sort of clearing the air on some of those matters and before I take you to the road map that I would like to follow, could I also just address a couple

of issues that arose from questions and answers from my learned friend and answers in relation to your Honour Justice Glazebrook.

Your Honour asked my learned friend about the difficulties in dealing with the second question. I regard it, as before, four questions framed in the approved questions, the second one. I regard the first one as being: is a reset input methodology explicitly required, that is by 52T(1), and if not – because the word 'alternatively' is used in the approved questions – alternatively is it to be applied, read in, through s 52T(2) and the question that your Honour was asking or exploring with my learned friend was, how could the Court really do that in the absence of the IMs themselves because it looks like something in the nature of a qualitative exercise, particularly when you see the words "reasonably practicable" written into 52T(2).

Now, this is not sort of trying to be wise after the event but the Commission did oppose that question being framed in that way in the leave submissions and I would just remind you, if I may, of the reason why it objected to it being framed in that way. It was for that very purpose and, in the submissions on leave at paragraph 20, we said that, "The framing of a suitably relevant and confined approved question to accommodate issue 2 is not straightforward, particularly in isolation from the consideration of specifically identified IMs, input methodologies, the content of which is asserted to be deficient and given the reasonably practicable limitation of 52T(2)." So you really have to deal with this. You're being asked to deal with this, as it were in vitro, in the abstract and the only way you can really be expected to deal with it, is to say well, if I have decided, if the Court has decided that this reset input methodology is not mandated by 52T(1), then because it's abstract, does all that that involves – and I say that advisedly because I will give you some indication of how comprehensive it is in a moment – does all that that involve have to be written in to each of the relevant input methodologies that are required. Cost of capital, asset valuation, taxation, allocation of costs. Is it only a bit of it in some, and some in the others, they all link together? Or is it all to be stated in one ? Because that is, when it comes before the Court in that abstract way, that is the way it has to be assessed. And my learned friend – the significance of it, I think, can be captured in the diagrams we put before you. I mean I won't take you to the affidavits, I don't think at all, that my learned friend took you to, but the first one, the Taylor affidavit, or affirmation, is very useful and indicated all the aspects that the witness would like to see in moving, as they say, from A to C, but it's captured rather well in the diagrams that are next to our submissions.

Now the genesis of these diagrams is, as my learned friend Mr Galbraith said, the lay members in the High Court on the appeals were. Because they tend to deal with the sort of the retail end, they found it a rather strange environment to be in just deciding the input methodology so they kept asking questions and we finally – and it always seems to come to the Commission, would the Commission prepare – so the Commission was tasked with preparing a joint memorandum to try and indicate how everything fitted together. So the memorandum was filed with these – and this is designed to, not to bewilder at all, it was actually designed to help –

BLANCHARD J:
Purpose or effect.

MR BROWN QC:
Well as your Honour's written before, we construe purpose from effect in a different environment. But the yellow part on the left reflects the information that the Commission acquires from the information –

WILLIAM YOUNG J:
We're looking at appendix A I take it?

MR BROWN QC:
Yes your Honour. From the information disclosure regime – gets that information, and the red are the input methodologies and the green box is where, is what I will call the section 52P determination phase. It's interesting when you look at the various – and we'll look at it tomorrow – the decisions the Commission has to make. The 52P determination in relation to an individual price path, that's Transpower, is very broad. In relation to a CPP it's quite broad. Likewise it's a question of how broad it is but it's still a determination power: the Commission has to decide under s 52P in relation to what's in the blue – what's in the green. And why I take you to that is that Vector didn't agree with all aspects of the diagram and it put its own diagram up to the Court, and you'll find that under C.

McGRATH J:
Just before we go, this is 52P, so it's not a DPP, it's a 52P diagram?

MR BROWN QC:

Yes your Honour. The, it is – no it's a DPP. Tomorrow I'll explain to you how there are, in my submission, two distinct phases. There are the – there's the setting of the IMs in advance and then all the things, then, that happen. The regulatory decisions that are made by the Commission over time, in the various capacities, information disclosure, CPP, they're all made by a mechanism called the s 52P determination. It's defined– it's referred to in the appeal provision and in this instance this is the, the function that is happening here is a s 52P power but it's by the vehicle of a s 52P determination.

WILLIAM YOUNG J:

It means a s 52P determination, doesn't it?

MR BROWN QC:

Yes, that's right. That's the sort of the –

McGRATH J:

Thank you.

MR BROWN QC:

– that's the mechanism – like an original application, it's the mechanism. Now I just– if you just, before you leave this, if you focus on the green box and see everything that's in white –

WILLIAM YOUNG J:

Of C?

MR BROWN QC:

No, no, before you leave A, notice how everything is white, the white squares in the green box, and we're going to look at what, now, Vector says should be IMs in effect. If you come to C and you look at the equivalent green box all the items that are in that charming shade of mauve from the left-hand side of the box, that really amounts to the IM, what they call the SPA IM. All of those matters – cap ex, operating expenditure, forecasts, tax and, tax current and forecasts – all of those would be part of this methodology that say the Commission should have settled upon as an IM in that tight period of time that it had to deal with them but the few that aren't included include, if you look at the bottom line, the three whites ones there, you'll see the reset

column rate of change and then up to the right of that, the reset weighted average path and the possible alternative rates of change.

Those resets there, rate of change, they would – that's something that was sought to be an IM in the legislature endeavour but of course, was rebuffed as well, so they're not pressed for now but all this other balance is and that gives you some idea of how comprehensive, albeit in the abstract, my learned friend's client contend should be the input methodology that the Commission is mandated, either by 52T(1) or 52T(2) to make.

Now, even assuming that it was possible in that timeframe, it would have been a very significant task because it would involve a reset methodology for several industries, gas, electricity, transmission and also, it would involve a number of different instances of reset because you've already seen, there's the general reset before the beginning of a regulatory period and that will happen every five years. There is the –

WILLIAM YOUNG J:
Sorry, is every regulatory period – did they all have this rollover – they can't all have the rollover?

MR BROWN QC:
No, they don't. Well yes, you do. What you could do, if you – it's possible, if you – you don't just sort of start with A and think whether you adjust it but when you come to the regulatory period and four months in advance you have to do it, you consult and the like, you could go right through the process and say well, the figure I get is not materially different from the figure that it would be if I rolled over, you could rollover but I doubt very much that that would happen but there will be a reset before every five yearly period but there will also be another reset to consider and that is when someone has moved to a CPP, we'll see this tomorrow and comes off a CPP back into a DPP, there's a reset there as well.

So there's three different types of resets and there were potentially nine possibilities of IMs because there were three of those for the electricity distribution entities, three for the gas distribution and three for the gas transmission. So you're looking at all those possibilities, all that work. So when the select committee was considering workload and capacity and whether this could be done in the time, even extended by

the six months that the legislation provided for, it was hardly surprising that it backed off from that suggestion.

Could I close with that point because when my learned friend was asked about it and the drafting and I mentioned to him page 69, this is in our bundle of authorities, under tab 2. It's the Ministry's report that has all those rows and columns but if you come right through to the end, you find the draft, this is on page 69. You come right through to the end and you find the drafting suggestion that had arisen from these submissions by Vector and others. Now it was the others that had generated the –

GLAZEBROOK J:
Sorry, I think I've –

MR BROWN QC:
I'm in our bundle of authorities, the respondent's bundle, under tab 2 but it's about the last page in that, the second to last page, page 69 and we have, you see there a section called "Section 52S" which in due course, became 52T and my learned friend took you to subs (3) which was being added. This is the – what we now know as s 52T(2) and this was being sought by those who didn't want high level IMs, they wanted detail and this is what – what he didn't take you to, however, was the changes to the 52T(1) part and you'll see that the two changes that were being advocated and considered but then rejected, were first of all in 52, I'll call it T(1), they were adding as roman numeral seven, compiling financial statements including projected financial statements and then in B, it wasn't C yet because pricing methodologies hadn't been added as a discreet B at that point, adding in B saying, "Subject to 53P, the methodologies for setting default price-quality paths including starting prices, the rate or rates of change in prices and quality standards." So all three components in s 53P(3)(i) were proposed to be put in here and you will notice also that that was in addition to the already existing, the next provision, the specification and definition of prices. This was seen as something different from the specification of prices, whereas now of course, we have the argument oh well, that didn't make it but we're back into specification of prices which was Justice Clifford's idea.

That actually wasn't Vector's argument in the High Court. You'll find that he records they didn't argue for that, they argued for – I won't provoke them by saying they argued for vibe but they said, it's in s 52T(1)(c) somewhere, just not specification of

price and they still don't think it's specification of price because when they reproduced – if I can take you back finally, to our charts again and A, B, C, when they reproduced our chart and I take you to their appendix C, "The specification of price IM was in its fit and proper place." If you look at the bottom right-hand side, you will see sitting in glorious isolation at the bottom right, the specification and definition of price IM for DPPs and CPPs. That's about that process for whether you're going to have a cap or a price, it's at the end of the process, it's nothing to do with this bit in here and they don't – so that's inconsistent with the argument they're making that you actually can get all of this, their mauve boxes and in the green, captured in the red specification definition of price IM.

Now, I've jumped ahead rather much but I thought it might be helpful to know our position on some of these things.

McGRATH J:
We'll adjourn, thank you.

COURT ADJOURNS: 4.02 PM
COURT RESUMES ON WEDNESDAY 10 OCTOBER 2012 AT 9.59 AM

MR BROWN QC:
Good morning, your Honours. Yesterday I remarked that we construe the decision granting leave as really involving four questions and if you look at the contents page to our written submissions we number those questions 1A, 1B, 1C and 2. They are sufficiently involved that we have devoted most of our 30 pages to our argument on those four questions, and indeed in this case I'm pleased to say our argument is there. When I come to that part of it, I will actually be working through or speaking to those submissions. There are – I'm afraid I lacked the creativity of my learned friend. I have no surprise arguments to make.

But the trouble with that is that there's very little attention in our written submissions to the structure of the legislation, and the structure of the legislation is very important. It's – I wouldn't necessary call it subtle but the pervasive nature of the s 52 determination and the role that that has – the regulatory decision phase, the second phase after the setting of the input methodologies in advance – is very important, and my learned friend's argument, of course, focuses very much on the IMs and the input

methodologies and that's certainly that's sort of it, and it doesn't really get the right balance, in my submission.

So what I'm proposing to do this morning is I want to start by making a brief comment about the regime before the new Pt 4, and that will involve looking briefly at the *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 decision which three of your Honours sat on and then I want to revisit the structure of the legislation. My learned friend has been there and to significant parts, but I do want to go back and look at some of the other pieces, as well.

Then having done that, I want to touch reasonably briefly on aspects of the legislative history. You might say to me, well, why not look at the history first? This is a case where I do think that a good understanding of the actual structure makes the history more relevant, as it were. You can actually see the significance of items, especially the desirability for an ex ante approval. That is what K gave rise to, the customised price-quality path, because the DPP/CPP concept is really indigenous to New Zealand legislation and it's a vital part, and you can see when you look at the legislative history how that was driving the urgency to get the legislation in place, to get the DPP up and running so that CPP applications could be made. That was – we'll see that when we come to the tension there was between submitters and the select committee on the transitional provisions, which are messy, I have to say. They are – they're trying to meet different objectives, and you'll see the commentary in the MED paper that feeds into the select committee report where they say, well, no one's come up with a better alternative. This is the best transitional arrangement we can make, and that's the context in which you come to have to look at section 54K(3) and section 55F(4).

Then I will turn to our arguments and go through them hopefully reasonably rapidly because they are already set out and they have – we are now confined, we no longer have the pricing methodologies argument that was made before. We no longer have the proposition that what my learned friends calls a SPA IM is somewhere in section 52T(1)(c)(i) but rather it's the words specification of price, that's the argument.

So if I could start by just looking for a moment at *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 because it captures, I think, the old Pt 4. This is in the Commerce Commission's bundle of authorities and it is the penultimate tab, it's tab 4. It's material because it has this threshold regime that, as

Justice Blanchard very correctly pointed out yesterday evening, it was the thresholds which were, in effect, deemed to be a price-quality path under 54J for that first year.

So I'll just touch on certain paragraphs, appreciating that some members of the Court will be more familiar with this than others.

BLANCHARD J:
You probably shouldn't assume that in my case, having sat on this case, I remember it.

MR BROWN QC:
Well, perhaps it's one of those sorts of things, one of those areas that one puts to one side, but I'm sure it will be quickly refreshed. Paragraph 8, your Honour, is the discussion about Pt 4A, what it was designed to do, and paragraph 10 then introduces the thresholds. After consultation the Commission had to set thresholds for the declaration of control of lines businesses and then publish them. Then paragraph 11 you'll see the Commission had to assess all lines businesses against the thresholds in order to identify whether they were in breach. So this is one of the problems that was addressed in the legislation which was regarded as very untidy, having to do it this way, complicated, and one of the advantages of the new Act was the people who step outside their price-quality path, then they're liable for the penalty regime that exists in the Act that has always existed in the '86 Act, so it's a much cleaner technique.

Then, if I can take you across to paragraph 16, this was the initial threshold regime and the paragraph 16 talks about the initial discussion document of the Commission in March 2002, and the now-familiar CPI minus X form of regulation, which really, of course, transfers through into the present regime as well. Then paragraph 17 talks about the two most common methods of regulation overseas, the cost-based building blocks approach with allowance for weighted average cost of capital, and of course under this regime there was no IM for the weighted average cost of capital, the argument is as to what it comprised. And then the other approach noted about line 40 was the appropriate levels of prices and rates of change would be determined through techniques such as the total factor productivity and benchmarking. The first one tends to be given the acronym TFP.

Of course, these things, you'll see, were to be – certainly benchmarking was to be prohibited in the new Act. You'll find that, I think it's in s 53P(10), making it clear. 53P(10), "The Commission may not, for the purpose of this section, use comparative benchmarking on efficiency in order to set starting prices, rates of change, quality standards, or incentives to improve quality of supply," so you will see when you come to the – when we come to the discussion paper that quite a degree of the structure of the old Pt 4 regime was carried forward, but not the techniques that were used for assessing profitability and the like.

Then paragraph 24 over on page 53, there's a further discussion about benchmarking and then paragraph 26 reference to the threshold price path being set in terms of the formula CPI minus X, so in a sense there was nothing too radical about the 54G deeming these paths to be default price-quality paths, but it was the underpinning or the way in which those paths had been calculated was the problem, and that was – that problem would be perpetuated by a simple rollover of prices under 53P(3)(a).

WILLIAM YOUNG J:
Was there a quality component to this regime, or not?

MR BROWN QC:
Yes, there was.

WILLIAM YOUNG J:
So it was a price-quality path of a sort?

MR BROWN QC:
Of sorts, not – lacks the sort of precision and the focus of the present regime where those three components are identified in 53P(3) and we'll see again, because that's the reset but the actual price-quality path is defined in 53M – in, sorry, O. Sorry, a bit of both. 53O talks about the s 52P determination setting out a price-quality path that includes (a) to (f), but in s 53M you find the content and timing of price-quality paths which talk about the prices, the quality standards and the regulatory period. So it's yet another instance of a number of sections having to be read together and I'll come to these in looking at the structure.

Paragraph 30 was more discussion of benchmarking and then the – perhaps I can conclude this by looking at paragraphs 45 and 46, where the Court referred to the decision of the Court of Appeal, whose decision was upheld by this Court which talks about the threshold performing a screening or filtering function over time, capturing those who are potential candidates for control, whereas of course, we have a regime where all the relevant parties are controlled by a variety of means. A statute to require more than rough approximation, incentive effects of the threshold will be relevant and the Court of Appeal pointed out how businesses could avoid being subject to control, under the initial threshold which did not screen for various factors at all.

So the problems with it were being well and truly identified at that point and I'd like to go from there to the, first of all, to a pre-statutory document, although it is referred to in the explanatory note to the Bill, that is the 2007 discussion paper which is actually in the case on appeal at volume 3, tab 30. This was the Ministry of Economic Development discussion paper that was the precursor to the legislation. I hasten to add, I'm not putting emphasis on these documents in terms of the interpretation of the Act, I have a – in my submission, the approach that we are taking and that the Court of Appeal took, is at the conservative end of looking at legislative sources and really it starts with the explanatory note to the Bill and particularly that phase where the select committee reports back and, not that I suspect precedent is required but we would be looking at this Court's approach in, I think, *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 (CA) and the like, where that's fairly standard.

Anyway, in this document, if I could take you to, looking at the pages of the case itself, pages 373 to 377 is a discussion of the then present Pt 4 and then chapter 3, the potential issues with the current regime and what my focus would be on page 377, paragraph 49, where it says that, "The evolution of the threshold regime has highlighted several potential issues. First of all, uncertainty resulting from breaching a price or quality threshold may lead to enquiry into whether or not control should be imposed." So that was recognising the random nature of how you might or might not become subject to control.

Secondly and this is really important for the CPP, they said, "The inability for firms to seek ex ante approvals for major capital expenditure" saying "the methodology to set price and quality thresholds used by the Commission is based on sector averages

and has to date been largely backward looking," because the real problem for one of these types of – monopoly type organisations that are looking at a prospective future expenditure is the inability to be able to deal with that in advance and that's what the CPP was designed to do.

Thirdly, potentially wrong targeting. That's firms with a too easy threshold are able to price up to that level, while firms subject to a threshold that was too tough were most likely to breach, resulting in subsequent regulator focus, potentially being on the wrong firms. So that was saying well, let's get a better default path regime sorted out.

With that, I could then take you if I could, to the Commerce Amendment Bill explanatory note. That is under tab 3 of the appellant's bundle of authorities and there are a number of relevant passages here, not all of which I will take you to but perhaps I could start, on page 15. We only have here – the Bill isn't here, the Bill is in our bundle I think but this is just the explanatory note and page 15 has the regulatory impact statement and it starts off you'll see, by referring to the discussion document released in April 2007 which we've just been referring to.

Then, by a series of bullets under that, it talks about the problems that the following key amendments are proposed to address. That is, specifying a purpose statement, more conventional or qualitative test for when regulation may be imposed, broadening the range of forms of regulation. Fourthly, the requirement that IMs be set, providing predictability for business and then providing for merits review.

Then if I can take you over to pages 22 and 23. Here was the discussion about which way to go because there were two options. They say that – this is halfway down the page under the heading, "Default customised price-quality path regime" – a key feature of the new regime is the replacement of Pt 4 with the default customised price-quality path regime. Of course there are going to be other things, there's going to be the individual one as well, the Transpower – but this is the key one and there were two ways of doing it you'll see. First of all, you could retain the Pt 4A threshold regime with a few changes, such as requiring the Commission to set input methodologies in advance. Or the second one was to replace that threshold regime with a default customised price-quality path regime and this would provide for the Commission to set such paths for a sector and in addition, would provide this ex ante time-bound opportunity for an individual firm to seek a customised path and then

under this regime, any breach of a firm's customised price-quality path, or the DPP, would be subject to conventional penalties and remedies that are proportionate to the breach. This was the preferred option.

You can see that subparagraph (b) captures those three issues that were being identified in paragraph 49 of the 2007 discussion paper. Of course, they end up favouring that item (b). Just at the bottom of that page, they say there will be – they're talking about additional costs and they say in the last paragraph, "There will be little additional cost to those firms that decide to remain on the DPP. For customised proposals, the firm may choose whether or not to put forward a proposal and to minimise costs and potential for delay, the proposal will include strict timeframes, input methodologies set upfront, preset criteria for proposals and statutory timeframes," and indeed, you probably recall seeing in s 52T(1), it's (d)(i) that provides for the IMs for the customised price-quality paths, they've got their own section there.

Then coming over to page 24, at the bottom of that page, they identify the benefit of option B. "It builds on the strengths of the Pt 4 regime," so it doesn't abandon it, "setting sector wide price paths based on available information while addressing its main weaknesses." Then it says, "The proposal will provide an effective regime that over time," now "over time" is a feature of the concept here, my learned friend said yesterday well, this is not right, this was, you know, because all through the, I mean, all through the appeals the appellant's focus on (1)(a) in 52A of the Act, that is the incentives to investment but they're saying here over time will provide more timeliness, certainty, and incentives for investment. They're thought to be overweighing the incremental regulatory and business costs and short-term costs of uncertainty arising from changes to the status quo, and then at the top of page 25 the reference to the input methodology being set in a standalone process at the start of an inquiry and any reset of price-quality paths, the purpose to provide greater certainty, transparency, and predictability to business, and certainly certainty is an important feature of this. My learned friend listed in his submissions a number of times and referred to in the preparatory document certainty appears once, I think, in the Act, and that is in 52R, the purpose statement in relation to the input methodologies.

Before I leave this, could I just look at a couple of other pages that are relevant to the broader arguments we make. First of all, if I can take you back to page 5 of the

explanatory note, there's a heading there, "Input methodologies," and it says it refers to the rules, processes, and requirements relating to regulation such as – and I ask you to note what it says about them. It says things such as how to calculate the cost of capital; how to value assets; how to allocate common costs; how to comply with the regulatory specifications. Because you've heard a very big push in my learned friend's submissions about, well, it's fine getting the IMs. But we want to know how to get, as he says, from A to C. Whereas the IMs are about addressing these very critical issues about the debates about what the cost of capital is, how do you – what is the valuation of assets.

Perhaps I can illustrate that in two ways. One, if I take you – keep your finger in that page and take you across to the next tab, which was the Minister's address on the first reading, and this is the second page of that. It's at the top left-hand corner, page 15158. You'll see the second paragraph that says a major improvement to the current regime is the proposal where we require the Commission to develop, as a matter of priority, the rules, requirements and procedures collectively called input methodologies of regulation. Businesses have complained about a current lack of certainty and predictability in the rules on crucial matters like how to calculate the cost of capital, to value assets, to allocate common costs, and these were contentious issues. It's not surprising, perhaps, that we've – even with a degree of selectivity in the merits appeals – that we've already had 25 days arguing about these things in the High Court. What is the cost of capital, is the asset beta 0.61 or 0.79, is the leverage 44%, those sort of things. This was the certainty that the IMs were bringing, which is critical to the Court of Appeal's decision when it came to look at s 52T(2) and what these material benefits of the IMs were. That is, were they internalised or specific to themselves or, as my learned friends would say, you know, they don't help us at all. It's what happens hereafter that counts.

So if I can just bring you back, then, to the explanatory note under tab 3, the other few pages I draw your attention to, the bottom of page 6 are specifically referring to the – this is the penultimate paragraph identifying as among the advantages the certainty of obligations, including the consequences of breaches, and they have upfront time-bound opportunities to seek a customised path if the generic default path is unsuitable for them, and then page 19 really is the last one I would take you to.

On page 19, in the middle of the page, the item "preferred option", and I would focus on D, a requirement that any input methodology be set ahead of any major decision-making as a standalone process. This is a theme that I will be developing as I go through the structure of the Act. The IMs are set in advance. They're to be at the beginning and set there, and then thereafter there will be these decision-making exercises by the Commission in relation to all other IPPs, CPPs, DPPs.

McGRATH J:
Where's the passage at page 19 you've just identified?

MR BROWN QC:
It's under the heading, "Preferred option," and it's item (d).

McGRATH J:
So in terms of the Act, this is part of your thinking that the IM process is different to the DPP process and price-setting under it?

MR BROWN QC:
Absolutely, and we had in the Court of Appeal, we handed up in the Court of Appeal an A3 page that – in a compacted form was attached to our submissions opposing leave in this Court, which I think would be helpful if you were to have. There are two ways of accessing this. There is an abbreviated timeline that the select committee requested that is annexed to – if you take our bundle of authorities and go to item 3, this is something my learned friend referred to yesterday. Under paragraph 1, it is said, "The committee requested preparation of a timeline." At the end of that paragraph 1, before 2 it says, "A more detailed and indicative timeline is attached," and the last page to that was an indicative timeline, albeit it's rather, at that stage it's rather perfunctory. To assist the Court of Appeal, we prepared a more extensive timeline and I have A3 copies if it will be more easy to read. This is really the document that was attached to the submissions in opposition, and it highlights the two streams that are really happening at once. At the top, there's the input methodologies and on the bottom is the default price-quality paths, and they were – they appear together in this way because – perhaps, would it be acceptable to hand this up?

It's the transitional nature of the provisions that forces them to be dealt with at the same time. In an ideal world, you'd have the input methodologies. They would be

done and dusted. You'd get the appeals heard, and then you would turn your attention to the default price-quality paths, but that was not possible, and so when I come, in a moment, to deal with this rather troublesome transitional phase, you see, they're both things happening at once, but they are distinctly – they're really distinctly different streams, and as to that, it might be helpful if I say a word now about that rather troublesome transitional phase. This is touched upon in paragraph 1 of our written submissions where we say that the regime is complex, and particularly so in the initial implementation phase involving the determination of input methodologies and the application of the transitional provisions attempting to make trade-offs between getting the benefits of a new regime and allowing enough time to exit the existing regime. Now, that, "trade-offs" is not our word. It is the select committee word and if we go to Vector's bundle and to the commentary of the – this is under tab 5 of Vector's bundle – and the commentary of the committee reporting back, and if we could take you to page 9 first of all. I'll be back at this page at another time because if you look at the top half of page 9 you will see the concept of claw-back getting introduced for the first time, but I'm interested in the passage that follows under the heading, "Regulation of electricity lines businesses." And in the second paragraph there it says, "Some submitters were concerned with the transitional timetable when the Bill is introduced. Arguments about incentives to invest could be undermined. They were concerned about the retrospective nature of the penalties," and then in the last paragraph there, the select committee explains how they're proposing to deal with that so that they won't have the new remedies visited upon old breaches.

Then if you come over to page 10, "electricity lines businesses submitted a special regime should apply to them until they obtained customised price-quality paths." So they wanted to jump to the customised price-quality paths as quickly as possible and the committee thought that the amendments recommended would make this unnecessary because breaches of the thresholds would be considered under Pt 4A and then, "Submitters were also concerned about inconsistency between the date for setting default price-quality paths, the 1st of April 2010 and that on which input methodologies must apply, 30 June or 20 December 2010, depending upon whether it is agreed to an extension."

That's when they say, "We consider that while the transitional timetables are difficult because of the trade-offs between getting the benefits of a new regime and allowing enough time to exit the existing regime, we were not convinced there was a better

alternative. It is important that the new regime should come into effect as soon as possible so that suppliers could make customised proposals." The reason they say that is, is that the structure is that there has to be a DPP in place first before you can apply for your customised one. In fact, the DPP will specify the date by which you are allowed to apply.

So for that reason, the input methodologies and the beginning of the sort of the regime in application were bundled together and that's what we sought to convey in this chart which is really an extension of the chart the select committee sought. So everything above the dates, 2008, 2009, 2010 etc, contains steps that were being taken in the IMs process and everything below the line has the steps being taken in the DPP process. So for example, the very first box, below the dateline, is what Justice Blanchard was referring to as the 54J-deemed DPP coming in to expire one year later and then, by 30 November, because it has to be done four months in advance, the determination of the one that became the rollover under 54K(1).

Then along the bottom of that line, just immediately above the black box that has "Default price-quality paths," you'll see the nine month mid-period reset hash, or dotted line, indicating the timeframe that was intended to apply. That box from which the dotted line runs is the 20 January, the nine month period for exercising the reset which is our s 54K(3) and (4) issue that you are confronting and questions (1)(c) and arguably (2).

I must say, I'm a bit anxious about flooding you with diagrams because we've already done it with our diagrams annexed to the submissions but they are sought to be a shorthand of the way in which the process works.

McGRATH J:
This is a timeframe?

MR BROWN QC:
It is a timeframe, yes and of course, it will go on, it goes on and on but this was the really sort of – the hotspot, was the 2009/2010 period for the setting of the IMs and then the appeals and, basically after that, the IMs would cease to come into play, except there would be the seven year revisitation, or at least no less, no more than seven years for reconsidering an IM. So that would only happen occasionally,

whereas under the DPP you would have the CPP applications, you would have the five year regulatory periods and on it goes.

Not that I need to underscore the select committee's statement about the concern but that concern that express – or it records of the submitters and the mismatch is recorded in a relevant part of that MED rose document which is in the previous document before it. There's a section there where all the submitters set out their concerns and MED has its response and says well, this is not ideal, this is what we're going to do. It has an interesting comment that I'll refer to later where it says well, these – at that stage, that's when MED was actually supporting Vector's proposal, that there be an input methodology for starting price. They have the comment well, it won't apply for the first – it's not intended to apply for the first roll-over, the first 2010 to 2015 and I note later in the submissions, that's the only reference in the legislative history to that but it perhaps throws some light on how s 54K(3) came to be.

I'd like now to go, as briefly as I can, to the structure of the Act and the relevant parts of the Act you will find in the appellant's bundle of authorities under tab 1. Pt 4 is the second page there, it's page 61 and it isn't so apparent there but it's actually broken into 11 different subpts this Pt and the starting points. If I just draw your attention to 52A, purpose of the Pt; 52B, outline of the Pt; and 52 itself which is the overview of the Pt. So this legislation has – it has quite a bundle of paragraphs scattered throughout it that deal with overview and purpose and we have collected those, if you look at our submissions at paragraph 9. In our submissions, paragraphs 7 to 12 are the sort of brief as possible introduction to the overall structure of the Pt 4 regime. You'll see in paragraph 8, we refer to *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 and then in paragraph 9 we list some of these overview provisions and purpose provisions.

Then the numbering is a little bit curious, at least you wonder how it works. The 52 numbers are for the input methodologies and basically the s 52 DPP determinations, the s 52 ones. You break into s 53A at the beginning of the various disclosure regimes. So if you come to page 81, when they come to deal with information disclosure, they break into the numbers 53 and they track through 53 until they hit – that includes the various types of regulation and then 54 starts on page 103, with the electricity lines services and the discrete parts then for the service industries, electricity has 54, gas has 55 and airports have 56. That's if one is sort of trying to locate something in a hurry, it's a little idiosyncratic.

Just starting if I may with subpt (2) and the concept of a s 52P determination. This is a defined term. If we come to page 64 to the definition section of 52C, the last definition in that section is of a s 52P determination which is "a determination by the Commission under s 52P that sets out how each type of regulation that applies to a particular regulated goods or services applies to a supplier of those goods or services" and one of the features that I want to seek to demonstrate by going through this, is the ubiquitous nature of the s 52P determination which interestingly arrives then in the appeal provision.

Now, my learned friend referred to the – in response to Justice Anderson – to a question about the appeal provision and the appeal provisions now are, I have to say, a little confusing to those who – I sort of feel for the uninitiated coming to this because once upon a time everything was in s 91, which is on page 196, and it was a relatively straightforward provision. Section 91(1) was a general right of appeal, as were fact and law. One of the various changes that was made here was to create what is called a separate right of appeal for the input methodologies. So if you look at page 196 and page 197, I mean, this is not my argument, it's my learned friend's argument, but it's just important you be aware of section 91, 196 and 197, it now breaks – that the general right of appeal that was in 91(1) is broken into two. So 91(1) now looks like it's a general right of appeal, because the initial wording hasn't changed, but introduced further down you will find 91(1B), which says, "There is a right of appeal to the High Court on a question of law against any determination of the Commission under this Act (including a determination referred to in subsection (1))."

Now, this was the subject of heated contest before Justice Clifford in yet another hearing that gave rise to his decision of the 4th of November, an application that Transpower made. His Honour ruled that that one section, (1B), is a right of appeal on the question of law in relation to all aspects of the Act, including the separate right of appeal for input methodologies. Now, why I use the word "separate" – if you just look up the page to item 91(1)(b) at the top of that page you will see the exclusion of input methodologies. It says, "An input methodology determination (as defined in section 52Z and for which a separate appeal right is given under that section)," so what we do know is that appeal rights for input methodologies have this separate right of appeal in 52Z, albeit the effect of the finding is that there's also an appeal on the question of law sitting there under 91(1B). What it means, however, is that 91(1)

is now appeals on matters other than questions of law, and so you look at it and you see it refers to (a), 91(1)(a), appeal against the determination.

Here we find again the words "section 52P determination". That's why I've come to this section. Then it excludes certain things from this right of appeal, and there are three of them, and we find at the top of the next page, in addition to the input methodology ones, they exclude how information disclosure regulation or negotiate /arbitrate regulation applies, so that's one of the types, and secondly the default price-quality path that applies, so the legislature has said you are going to have – you can have your full rights of appeal on input methodologies. You can have full rights of appeal on individual price paths and customised price paths. But in relation to default price-quality paths and negotiate/arbitrate or information disclosure, you don't have this appeal on the facts. You have the 91(1B) appeal on the law. That is why my learned friend runs the argument that he does that this SPA IM, as he calls it, needs to be an input methodology because there isn't a right of, as it were, general appeal. It's confined to the law, and we say, well, the reason for that is that's what Parliament has said. You're not having the right of appeal on a DPP. It's bizarre to say, well, we'll get around that by taking one part of the DPP, that is, the price, not the quality standards, not the rate of change, treat that as an IM and that way get the general right of appeal that they want under 52Z. That's the game. I mean, I don't mean game pejoratively, but that's the form of the argument that he's making. I don't think he really got to 91 yesterday. You need to see 52Z sitting with the changes to 91 to appreciate that.

McGRATH J:

Can I just ask you – how does this compare with the old regime, prior, where there were much stricter provisions in respect of rights of appeal?

MR BROWN QC:

Yes, well, there were and there weren't. In relation to – there was no rights of appeal, general rights of appeal, for 4A. There was judicial review. So they said what we're introducing is –

McGRATH J:

So there are no general rights of appeal, but there weren't rights of appeal on questions of law, either, were there, which is why you had to come to judicial review?

MR BROWN QC:

Yes. The only rights of appeal – well, there was a general right of appeal in 91 for determinations, and that was generally construed. If you look at s 92, there was provision for persons entitled to appeal. So it made clear what sort of appeals were being countenanced, and in particular this really limited the scope, as it were, and indeed you'll note – while we're there you'll note perhaps 92(d) "in the case of an appeal against a determination under section 52P, any supplier or consumer of goods or services to which the determination relates," so if you've got a CPP you can have a supplier or consumer. One can well understand, in my submission, why Parliament wouldn't be too keen on having a full right of appeal on a DPP with all the people who it related to and all the potential consumers who could be affected, so there are policy reasons in all of this, and the theory is, and this is what we say, and it's debated at some length – it waxed and waned in the legislative history and I don't propose to take you there, it's just not vital to my argument but – they waxed and waned as to when the appeal should be; should there be one appeal when the decisions were made and not in the IMs; should there be appeals on the IMs and not on the decisions, and in the end it was, all right, merits appeal on the IMs, then we won't have full merits appeals at the DPP stage, although you will have your question of law appeal, but of course there will be a full right of appeal on your customised path, the one that applies to you if you apply for that, and that was the sort of well, I wouldn't call it the compromise, but there is an abundance of appeals. There just isn't one at the DPP stage and for the reason that it's regarded as a progressive process, and that's explained – it's set out in the MED parts, it's explained in the select committee papers, and I don't want to make more of an issue, but it's part of my learned friend's argument, it's a big part of Vector's argument, gosh, you know, in support of having one of these things as an input methodology then we get a right of appeal that we should have, and we say that it's the "we should have" that begs the question, because you've got to look at what rights of appeal Parliament intended and how they visited that on the Act with the now quite complicated s 91. I suspect not a lot of – not all practitioners realise that when they confront any appeal under the Commerce Act they need to be thinking both about a 91(1) appeal and a 91(1B) appeal. You need two horses.

GLAZEBROOK J:

Can I just check what you said, they regarded it as a progressive process. What did you mean by that? Sorry, what did they mean by that?

MR BROWN QC:
I meant by that, that the appeal – they saw the need or the –

GLAZEBROOK J:
Oh, so the appeals as a progressive process, not the s 52P determination as a progressive process?

MR BROWN QC:
No.

GLAZEBROOK J:
Okay. Well, I totally understand now, thank you.

MR BROWN QC:
That's a bit of a deviation to 91, but again, it shows the pervasive nature of the s 52P determination, how it sits there and that exclusion, or the extent of the exclusion, in 91(1).

Now, if I could then just look for a moment at the contents of a s 52P determination, that's in 52P(2), that's on page 72 and 73, and subsection (3), what they must set out for each type of regulation: the requirements that apply; timeframes; specify the input methodologies that apply; and be consistent with this Act. Now, this is the generic description of what they must contain. When we come to each of the specified regulated industries, there are specific requirements as to what they can contain, but they transfer across from this generic requirement here.

We noted yesterday, then, the capacity to amend them under s 52Q and indeed your Honour will – Justice Glazebrook may have observed that when you come to a customised price-quality path it's actually an amendment of the s 52P determination. It's not a fresh one. It reflects the continuum of the DPP giving rise to a CPP.

Now, moving from – I want to move from the generic to the specific, and I'll very briefly look at the forms of regulation. If we come to page 81, in subpt 4, we find information disclosure which relates to airports and to electricity and here, the only bits I would highlight are s 53C. Here it is giving the specifics of what the s 52 determination must provide in relation to information disclosure. Two things that I would note. Note that there are – if you look at (1)(g), it has the standard, "specify

the input methodologies that apply" but I draw your attention to (1)(h), "specify any other methodologies that are required." The Act not only envisages input methodologies – and that one feature of those is pricing methodologies but it accepts that there will in addition be other methodologies. So it's just a reality of life.

Then 53C(2)(c) reference to "prices, terms and conditions relating to prices, and pricing methodologies." So that's dealing with the actual prices of the suppliers themselves. So that helpfully deals with all three permutations of methodologies. You'll see methodologies referred to again in (j) of subs (2), "assumptions, policies and methodologies used or applied in these or other areas."

Then if I can take you to the negotiate/arbitrate form of regulation which doesn't apply to anybody at the moment. That's subpt 5 on page 85. Again, we see our purpose and overview ss in 53G and 53H and then 53I, we see what the s 52 determination is required to set out and timeframes, again (d), reference to the input methodologies that apply. So each one of these assumes that the input methodologies have been set and determined. The Act assumes that there is a sort of a nice sequence. It's the transition that has all these things happening all at once, topsy-turvy.

Then if I could take you to, far more relevantly to DPP, CPP, this is subpt 6 at the top of page 88. It actually breaks into two parts. Subpt 6 starts by referring to the collective, the default/customised and then at page 90, it breaks specifically into default with the italicised heading and then, over at page 93, it addresses the customised discretely as well but they are one form of regulation, hence the default/customised and you get that in 53K, where it says the purpose, "The purpose ... is to provide a relatively low cost way of setting price-quality paths for suppliers of regulated goods or services, while allowing the opportunity for individual regulated suppliers to have alternative price-quality paths that better meet their particular circumstances."

There has been a lot of rather poor humour about low cost in relation to the length of the appeals, the number of lawyers involved but you will notice, when we come to look at specification of price and pass-through costs, there is a specific exclusion for the legal costs relating to appeals.

Then 53 – just in sequence – not quite in sequence, 53O, as I've said to you before, is the s 52P determination setting out the requirements of the default price-quality

path. So you've got the starting prices; the rates of change; the quality standards; the date it takes effect and then; the annual date by which any proposal for a customised price-quality path must be received. So here's the linkage through saying, this is when you can apply and then the annual date by which compliance must be demonstrated because there's a monitoring process here as well.

Then, as to what that path is, we looked earlier at 53M –

WILLIAM YOUNG J:
Just dealing with this, 53O, the first regulatory period must mean presumably the period starting 1 April 2010?

MR BROWN QC:
Yes, it is and it's actually specified – yes, so if you come back to page 89, this is where, I think someone asked yesterday, where is the length? It's in subs (4) of 53M there on page 89, "must be five years but the Commission may set a shorter period than five years if it considers it would better meet the purposes," and the first year was – the first five year period was to run from the 1st of April 2010 which we see when we come to the individual industries in their parts, 54, 55, 56. The customised period is not necessarily the same. You will find that over on page 95, 53W, "Term of customised price-quality paths". It applies for five years but the Commission may set a shorter period if it considers this would better meet the purpose of this Pt but in any event, not less than three. So again, an attempt to achieve a degree of certainty and this is, we say, an important part of the certainty the suppliers get of the duration of the paths but at the end of any particular path, or as we say, when customise reverts back, collapses back into default price-quality path, then there is, there is uncertainty, there's resetting and my learned friend's clients simply can't get the certainty that they crave, wanting to be able to predict really, what figure will apply at a certain period of time because that's what the proposition really is here, in terms of arguing how one gets from A gets to C.

GLAZEBROOK J:
Sorry, I think I missed your reference to the DPP timeframes?

MR BROWN QC:
The DPP timeframes are on page 89, subs (4) of 53M. Is that what you're after?

GLAZEBROOK J:

Yes, I have – it's just for me to note. I have seen it of course at some other time but finding your way around...

MR BROWN QC:

Yes, it's not easy. Now, just note that 53M and this is an important provision for us because this is what we say relates to the specification of price IM. Note it doesn't just relate to default price-quality path, it relates to whether default price-quality path, or customised price-quality path, or individual price-quality path, must specify in relation to prices either of the following: a maximum price they may be charged, or maximum revenues that may be recovered and the quality standards and the regulatory period.

Then it probably – you don't need to dwell on this but it is part of the fabric of what is sought to be achieved here, in subs (2): "A price-quality path may include incentives for an individual to maintain or improve its quality of supply and those incentives may include (without limitation) any of the following: penalties by way of a reduction in the maximum prices or revenues; rewards by way of an increase in the supplier's maximum prices or revenue; consumer compensation schemes that set minimum standards of performance; and reporting requirements; and quality standards may be prescribed in any way the Commission considers appropriate, such as targets, bands or formulae and may include (without limitation): responsiveness to consumers; and in relation to electricity lines services, reliability of supply, reduction in energy losses and voltage stability or other technical requirements."

So this is the path, the "Q" in the default price-quality path which we tend to lose when we just use the acronym the DPP, is a vital part of the legislative aspiration. Now –

McGRATH J:

So you relate that to s 52T(1)(c)(i) do you, "specification and definition of prices"?

MR BROWN QC:

Yes, I do.

McGRATH J:

That's what it's directed at?

MR BROWN QC:

That's what we say it's directed at and when we come – I suspect we'll come to that input methodology which is in, I think, volume 5 and my learned friend took you there yesterday when he was looking at cost of capital, that specification of price IM, it says, "For the purposes of 53M." Now he says oh well, it can relate to other things as well and we say well no, that's what it's about and we draw attention, as I will in the argument, to the reference to pass-through costs.

McGRATH J:

You're coming back to it?

MR BROWN QC:

Yes, I'm coming back to that. Then we can go to s 53P, and this is a vital provision. It –

GLAZEBROOK J:

Before you do, can I just check, in terms of s 53O, that's in addition to what's in 52P? Because it doesn't – the reason I say that is some of the other ones say that you have to specify the input methodologies that apply, which is in the generic provision in 52P but it doesn't seem to be in 52O, but presumably because it's a generic provision under 52P you would have to specify those input methodologies that apply.

MR BROWN QC:

Yes. I'm just struggling to –

GLAZEBROOK J:

It might say somewhere else, it just seems a slightly odd exclusion given that, that is specifically related to some of the other provisions that we've looked at. I mean, it does say "include", so...

MR BROWN QC:

Yes. On the face of it, it might look a little odd, but we – our position is that it's a cumulative –

GLAZEBROOK J:

That's what I would have thought, but –

MR BROWN QC:

Coming through from the requirement in 52P(3)(c) that the input methodologies be stated to apply. These –

GLAZEBROOK J:
Just specific ones that you do in addition to whatever is required under the general, that's what I would have thought.

MR BROWN QC:
It's not a sort of exclusionary proposition, but the details of what the –

BLANCHARD J:
Well, it can't be, because of the opening of s 53M.

MR BROWN QC:
Yes. That's right.

BLANCHARD J:
You wouldn't have a reference to default price-quality path in 53M(1) if it were – if 52O were to be exclusive.

GLAZEBROOK J:
Yes.

MR BROWN QC:
I think the other sections are simply – like, for example, information disclosure, there's so much there they – because they're listing all these other things, they put it in as well. Now, 53P merits some time being spent looking at it. It has a number of aspects to it, so we have 53P(1) which is "before the end of the first, and then for every subsequent", so it's dealing with the – it's dealing with all ones in future. The resetting, "the Commission must amend the 52 determination", so here's another instance of that determination being amended by setting out the starting prices as referred to in 53O(a), the rates of change, 53O(b), and the quality standards, 53O(c), that apply for the following regulatory period. Then in relation to all of those it's got to consult with the interested parties. That's the process it was going through that my learned friends like to say, look, they were consulting about a SPA methodology. The Commission says no, no, we're consulting about this is the process we've got to follow for each period.

Then we've got the 53P3(a) and 53P3(b) situation, what the starting prices – they must be either that, that applied at the end of the preceding regulatory period or prices determined by the Commission based on the current and projected profitability of each supplier, and then the important feature that comes through from the submissions: starting prices set in accordance with 3(b) must not seek to recover any excessive profits made during any earlier period. So they're discrete periods. When we come to deal with my learned friend's argument yesterday about A and B being mutually exclusive and then losing claw-back and the like, claw-back is a feature that applies intra-period, not period to period. So you start afresh, you've got certainty for the period that applies.

Then there's the Commission setting the one rate of change, what the rate of change must be based on, and 53P(7) "must take into account the effects of inflation", and then a provision that is important for our argument, because this is especially important, we say, for question 2, that is, it isn't just price but alternative rates of change. "The Commission may set alternative rates of change for a supplier as an alternative, in whole or in part, to the starting prices set under subs 3(b) if, in the Commission's opinion, it is necessary or desirable to minimise any undue hardship to the supplier or to minimise price shock to consumers or, as an incentive," – and we saw those incentives, under section 53M(2) – "for the supplier to improve its quality of service". This is part of our argument that these three components in the reset interrelate. You can't regard them as discrete items and carve one off from the other.

WILLIAM YOUNG J:
A rate of change can't exceed the rate of inflation, can it, CPI?

MR BROWN QC:
No, it can't, because CPI minus X.

WILLIAM YOUNG J:
You can't have X as a negative figure?

MR BROWN QC:
I don't think so. Well, that's my position for the moment, but if I'm – there will be many who will tell me if I'm wrong.

Then 53P(10), this is the point I took you to yesterday. This was such an important difference from the old regime. "The Commission may not, for the purpose of this section, use comparative benchmarking on efficiency in order to set starting prices, rates of change, quality standards, or incentives to improve quality of supply". And of course this principle here is compromised by the rollover of a DPP or a deemed DPP from the previous period that is developed through 54J, so that's the dilemma the Commission has.

Then of course 53P(11), if things haven't been set by way of amendment to the relevant 52P determination by the end of the period, then the existing ones run on until those resets, starting prices, etc occur.

Could I just note that in relation to that 53P(3)(a) and (b), that alternative, Vector has never contended, this is for a SPA IM, that there would be an IM in relation to the decision to go for (a) or the choice between (a) and (b). If you go to their pleading at paragraph 19, I think it is, or paragraph 22, where they define the SPA methodology they say if you opt for (b), then – perhaps you should just be aware of that – their pleading is under tab 3 in the first volume of the case on appeal and it's the start of paragraph 22 on page 14. It says in 22A that this will require the Commission (a) to determine whether, under 53P(3) the starting price applicable should be the price at the end of the preceding period or whether it should be adjusted. If the latter develop and then apply rules and processes for determining how the starting price is applicable to the service that should be adjusted to the SPA methodology. There's no methodology contended for in relation to that decision between the two, which is a point that the Court of Appeal noted and, I think, put some weight on.

Now, if I can take you to the CPP, still in subpt 6, but it starts at page 93, and I'll be as brief as possible, if I can, 53Q provides for the supplier proposing it and basically this is captured in the second of the diagrams connected to our, attached to our submissions, you'll find this tracked through, but the supplier proposes a customised path. 53R, the effect, this is what my learned friend talked about, the chilling effect, that if you make it you can't withdraw it, and that's fair enough given that the – you've got a place in the queue and you are taking the Commission's time to consider it, and you're bound to the period for which it applies, whether that be five or down to three, by any path that the Commission sets for the supplier.

Then there's the preliminary assessment of the proposal in 53S, 40 working days, and then 53T, the process and timing for assessing the proposal, within 150 days. 53U, extension of timeframes, and then 53V, the determination setting the customised price-quality path, and note, and this highlights the decision-making power that the Commission has, which we say it has in relation to DPPs and CPPs and IPPs, the Commission may determine any customised price-quality path the Commission considers appropriate for a supplier that's made a proposal. For the avoidance of doubt, without limitation, determining that which complies with 53M, do the following, and then note the point I was making a moment ago to you, Justice Glazebrook, subs (3), the path is imposed by way of amendment to the 52P determination relating to default/customised quality path applying to the supplier.

We've got "term" in 53W, and then 53X we've got what happens when they end. When it ends, the supplier then is subject to default price-quality path that is generally applicable, and it follows then at subs (2) the starting prices that apply to the beginning of the path are those that apply at the end of the customised price-quality path unless four months before the end the Commission advises the supplier that different starting prices must apply. So there is our third type of reset that I was referring to yesterday.

BLANCHARD J:
Mr Brown, the claw-back that applies under 53V, does that go back to the beginning of the regulatory period for the DPP which is now being amended into a CPP?

MR BROWN QC:
No, that claw-back, I believe, would apply to the – oh, yes, it would. The object would be to put them in the position that they –

BLANCHARD J:
So they're no worse off?

MR BROWN QC:
No, that's right.

BLANCHARD J:
Or no better off?

MR BROWN QC:

That's right, and that's to incentivise. I think that reflects the fact that the committee recognises there can be only so many applications at a time. You remember I took you to the part that said they want to get up and running so they can get these applications in, but the Commission has still ongoing work in this process. It goes on and on, and so there is a limit, but that is the evening out benefit.

BLANCHARD J:

And presumably if they're in the queue and they're number five, so they get dealt with in the next year, in the end it all gets adjusted out by the claw-back. So they'd have some uncertainty about what they were going to get for a longer period than those higher up in the queue.

MR BROWN QC:

That's true.

BLANCHARD J:

But in the end it would be sorted out.

MR BROWN QC:

That's true, and they would be able to make their decisions about their ex ante investment decisions accordingly.

Now, I pass over 53ZB, which my learned friend spent some time on. That's the focus of the argument of the end of 54K(3). Just a brief word about the individual price-quality regulation. That's on page 98. Another dreadful number, 53ZC. This, in fact, only applies to Transpower currently. But notice the wording here: "if individual price-quality regulation applies to goods or services, the Commission may set the price-quality path for that supplier using any process, and in any way, it thinks fit, but must use the input methodologies that apply to the supply of those goods or services". So we have Transpower's appeals, dealing with the issues of asset beta and leverage and the like, all go to what the IM requires, and then after that's resolved you've got the decision about what the actual price-quality path will be.

Now, if I can jump over the miscellaneous one, there's a miscellaneous subpt 8 that runs from pages 99 through to 102, and then we have the specific parts for the various industries, subpt 9 on page 103, the electricity lines services. We've got 54F

and 54G. 54F states that all electricity lines services are subject to information disclosure, but only certain of them, says 54G, are subject to default customised price-quality regulation, and that depends on the – there are also the consumer-owned ones, which are exempt.

Then the determination, if we come across to 54I on page 112, the Commission must make section 52P determinations determining how the subpt applies. So it must specify how information disclosure applies to each supplier and it must specify how default customised price-quality regulation applies to each supplier for the various periods, and then 54J we get that provision that Justice Blanchard referred to, the one year period, the deeming, the sort of statutory roll-over using the thresholds that are deemed to be a determination. And then we get to 54K(3) or 54K that we'll look at later, and certain transitional arrangements.

54P has the proposals for customised price-quality paths specific to electricity.

WILLIAM YOUNG J:
Just pause there. There's more in the s 52P determination than is provided for by current s 52 determinations – than is provided for by section 54J. Is that right?

MR BROWN QC:
Yes.

WILLIAM YOUNG J:
So how did that – where did that come in?

MR BROWN QC:
Well, 54J is just a deemed determination.

WILLIAM YOUNG J:
Yes, but there is a full – there's something that looks like a full section 52P determination, isn't there, for electricity lines businesses?

MR BROWN QC:
Yes. It's the one that's provided for in 54K.

WILLIAM YOUNG J:

But isn't that – doesn't that just set out the price-quality path?

MR BROWN QC:

Well, it'll be a – that's what it will be, though, it'll be a section 52P determination providing the price-quality path which will be 53O and 53M.

WILLIAM YOUNG J:

Does it provide other stuff as well, though?

MR BROWN QC:

Well, what it's got to do is in relation –

WILLIAM YOUNG J:

Just go as far as it can with section 52P?

MR BROWN QC:

Well, there will be two different types. There will be – because to the extent – if you take an electricity lines business that is the subject of information disclosure, then the s 52P determination we saw for that will set out all those requirements. And then to the extent that you've got one that is the subject of default customised, it will set out the provisions we looked at in 53O and a date for making the application for a customised application. That will be the determination. That will be looking at our, at the chart in our appendix A, the result of the green one that comes out and says these are the requirements.

If you look for a moment with me at our appendix A, we say that – just looking at it, we say working from the left-hand side of the page, with the information that is disclosed by, in this case, an electricity or a gas producer, the yellow material, and applying the various red input methodologies, the Commission – first of all looking at the top of the page – determines the WACC, the relevant WACC determination. That feeds into the s 52P determination process in the green box and comes out on the right-hand side with the blue s 52P determination, which is s 53M setting out the content of the price-quality paths. They'll have the price path, quality standards, incentives if applicable, regulatory period, IMs that apply, dates for proposals, annual compliance statements. That's the exercise.

WILLIAM YOUNG J:

But there must be a s 52P determination that goes beyond the deemed determination.

MR BROWN QC:

Yes, that's the one that is made. That's s 53P(1), at the beginning – "before the first and every subsequent regulatory period". Do you see 53P(1)? You've got what the first one will provide in 53O and then 53P(1) says before the end of the first and every subsequent period must amend it by setting those things out.

WILLIAM YOUNG J:

The end of the first is 2015, is it?

MR BROWN QC:

No. The first is actually the one year one, and in November 2009 they had to do this for the period beginning – five years beginning 2010. It might be helpful to see that. That's in volume 5.

WILLIAM YOUNG J:

Reading through the statute, I had some difficulty with this first and second regulatory period because I thought sometimes it fitted more easily with the one year period and sometimes more easily with the first five year period.

MR BROWN QC:

There is confusing wording. You see, only the electricity one has this deemed one year, and that's – the Commission then calls it the initial one as opposed to the first one. The first full period is from 2010 to 2015, but I think it would be useful for you to look at the s 52P determination itself, which is in the case on appeal volume 5, which is the lemon-coloured one, under tab 48 at page 1200. Here I think it actually refers to the initial – there is one of these where they use careful language so as they're indicating the first, the one year one which, of course, is a statutory one. This is the first one the Commission makes, and you'll see on page 1201, 3.1, "This determination resets the default price-quality path provided for by section 54J(2) as required by section 54K(1)," so that doesn't read very well, but what this is saying is, as required by section 54K(1), this determination resets the default price-quality path that the statute deems effective for one year by section 54J(2).

WILLIAM YOUNG J:

But it goes beyond the deemed one year one, plus reset, because there's lots of other stuff in here, too.

MR BROWN QC:

Yes. Well, this is what you would expect, and the key things, though, are the paths. If you look at page 1204, you've got as paragraph 5 the default price-quality path specified in clause 8, standards is 9, 6, you've got applicable input methodologies. Of course, none have been made at that point. This has been done in November 2009, four months in advance of the applicable date, so no input methodologies have been applied and then the price path is over at page 1205, the starting prices that apply are set out in schedule 1, rate of change set out in schedule 2, quality standards –

GLAZEBROOK J:

Are they are the rolled-over starting prices are they, in this one?

MR BROWN QC:

They are. You'll find those at page 1212. It says starting prices, the starting prices that apply are the prices that applied as at 31 March, that is, even though this is made in November 2009, that's the last day of the relevant preceding regulatory period. Likewise, the rate of change on the next page is the annual rate of change, the X is 0%, so it's CPI minus 0%.

WILLIAM YOUNG J:

What about the quality standards? Where do they come from? They're paragraph 9 or clause 9.

MR BROWN QC:

Yes. Well, I think they had these reliabilities already –

WILLIAM YOUNG J:

At Pt 4A?

MR BROWN QC:

Yes, and you see 9.2 and again my learned friend, hoping desperately don't ask me to deal with the formulae, but this was a – this lacked the sort of incentives and the changes that were going to be reflected in 53M, once the full process was in place.

The discussion paper in relation to this might be of interest on that. It's the preceding document – sorry, the decisions paper, it's the preceding document which, if you go to page 1087, you'll see it calls itself the initial reset. That was the expression I was looking for. Just on terminology on that, you might like to look at page 1096 at paragraph 1.4. This is the paragraph that explains what's been happening under the various stages, so it helpfully brings together the 54J situation. You'll see it says for the period 1 April 2009 to 31 March 2010 the thresholds notice was deemed to be a s 52 determination that applied to EDBs as if it was an initial price-quality path, and they call that the initial DPP. That's their shorthand. Under 54K, we're required to reset the initial DPP before 1 April and so they call this the reset DPP. This determination is called the initial reset determination. It's sort of helpful and sort of not, but why I mention this was in response to your question, Justice Young, about quality standards. If you come over to page 1144, there is quite a discussion there about quality standards, the definition of quality, accounting for extreme events, so if you, in an idle moment, want to explore the quality standards, they're a helpful discussion there about what they entail, 1144 and following.

Just to try and close off before the break, if we look, then, at the remaining particular industries, gas subpt 10 at page 122, and so again we're on page 122 we've got the familiar overview and we've got the ss 55D, all gas pipelines are subject to price-quality regulation after 1 July 2010. We've got 55E, the Commission must make the s 52 determination specifying how it applies. And then s 55F setting out the first default price-quality paths, so 55F is the sister of 54K, but doesn't have that 54J deemed one year period. But this is the one that has 55F(4) which you'll see is the same – essentially the same paragraph, albeit without the cross-reference, strangely enough, to section 53P as you are asked to consider in 54K(3). Then lastly we then come across to airport services under subpt 11. You've got page 130, overview, and this is 56C, they're subject to information disclosure regulation and 56E, although it doesn't have the number in the – doesn't have the 52P reference in the heading, 56E is the Commission to make a s 52P determination specifying how this applies to airports from the 1st of July 2010, hence all those 2010 dates, the mismatch between the finalising or the determining of the IMs and the legislature's desire for the regime to be up and running and these things being determined four months in advance of those dates.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.47 AM

McGRATH J:
How are we going time wise Mr Brown?

MR BROWN QC:
Acceptable, we won't – I'm not expecting that we'll finish any earlier than the day but I asked my learned friend how much time he'd require for replies. I'm aiming to leave him about three-quarters of an hour for replying.

McGRATH J:
So you're expecting to go beyond lunchtime?

MR BROWN QC:
Yes, I am. As I say, in terms of my road map I want to, after this, briefly look at some of the legislative history and then straight to the four arguments in the written submissions and basically, I mean, there are some cases where you sort of depart or – our submissions are collected in those submissions and I'll be going through those, possibly even slightly pedestrian in a way because they're there, our argument is contained in the written submissions here.

Can I just start however, with (inaudible 11:48:14). There are two positions I want to withdraw from, from what I said earlier. First of all claw-back, I said it was intra-period. Claw-back can be intra-period, as opposed to the – it's one thing to have the requirement in 53P(4) that you can't reset the price for a period to recover excessive pricing, that's clear but claw-back itself, in order to be effective, may need to span periods and you see that from the definition of claw-back in 53 – has it's own definition in 52D.

It's the "requiring a supplier to lower its prices on a temporary basis," this is on page 65 of the statute, "to compensate consumers for some or all of any over-recovery", or to allow a supplier to recover some or all of any shortfall," and (3) has the injunction on the Commission that, "if the Commission allows the supplier to recover any shortfall, it must require that any recovery must be spread over time in order to minimise price shocks to consumers." So it would debilitate the effectiveness of claw-back if you had to limit it to a particular regulatory period.

WILLIAM YOUNG J:

Right but it can only be, as it were, captured in relation to an intra-adjustment, intra-period adjustment?

MR BROWN QC:

Yes, yes, that's right. Or the –

BLANCHARD J:

So the spreading can be over a longer period but what is being spread, the compensation either way, is for a period?

MR BROWN QC:

The correction, yes, that's right. Secondly, I said to you and you probably gauged an air of uncertainty in my voice, Justice Young asked me, "Can the CPI ever be negative?" Yes, it can, or effectively positive, you can have minus minus and that's illustrated – can I just take you to volume 9 of the case, it's the gold volume, tab 68. This was the draft decisions paper for the mid-period reset, it's a draft paper, it's dated July 2011. So this was the draft of the decision that was to be released in October, that is within the nine month period and the release of this decision of course, was stopped by Justice Clifford's judgment about 54K and the like.

In this document, if you come through to page 2181, there is a helpful graph that shows the indicative effects, indicating what was proposed to happen in the mid-period reset. So there would be those like Vector, looking at that chart on 1281. The ones below the line are the ones who would have been recovering more than they should, that's Vector, Horizon and Powerco. The ones above the line are those who would be expecting to get a recovery back and there are – each column two tells things. It tells the amount of the, as it were, the new starting price, that's the column itself but in brackets at the top, you'll see the rate of change, CPI for example, in relation to the second to last from the right, CPI plus 10, making 20%. So that's the angle. So if you were changing something you could – if you said we're going to give you the full amount to start with, big high column, with no adjustment over time, that would be one thing but here, they have a smaller column and then a tilted angle going up, that's the rate of change to recover – so that you can recover the normal profit that you should have obtained, can be recovered over time in a more smooth way, or not all high impact at the front. That is demonstrating why I was wrong to say that it could never be –

WILLIAM YOUNG J:

It could never be negative.

MR BROWN QC:

Yes, albeit this is unusual, it's this mid-period reset situation. A situation that was always anticipated because, moving from the old regime to the new regime, this was going to happen, indicative but likely up to a point.

WILLIAM YOUNG J:

What did all of the businesses who were above the line say about the –

MR BROWN QC:

About the submission yesterday?

WILLIAM YOUNG J:

No, about the interruption, the stopping of this decision being implemented?

MR BROWN QC:

Well they're not, you know, they're not before the Court. I wish they were, to hear the argument yesterday, that the decision to go for (a) or (b) meant this didn't happen because, if my learned friend's argument yesterday was right, that if you make the decision to roll-over that you're stuck for five years, that none of this will ever happen. I think there might be a bit of clamber but they're not here.

WILLIAM YOUNG J:

So they've had to take it on the chin?

MR BROWN QC:

Now, I was going to touch on input methodology but I don't think I need to, my learned friend focused on those and in particular, you know, the addition of pricing methodologies. I'd like to just, from that discussion of the statute, make three preliminary points. First of all, the nature of the task. My learned friend's submissions do tend to understate the significance of the statutory deadline and the volume of work that the Commission had in undertaking the input methodologies that were required. If there's any doubt about that, I would pray in aid the decision of Justice Clifford, in yet another review.

This is the decision under tab 5 of our bundle of authorities. This is what they call the process review because the – basically, the whole IMs process was the subject of a judicial review that was heard, if you look at tab 5, heard in October 2011, judgment in 2011, where pretty well all the challenges were rejected, save in relation to one matter in relation to Transpower. It was found that there hadn't been sufficient consultation with Transpower in relation to leverage but Justice Collins here – sorry, Justice Clifford here, I draw your attention to paragraphs 11, he said, "All this was new. Suffice at this point to note the Commission's task of determining the necessary input methodologies for airport, electricity, gas and Transpower together with the initiating work that would lead to the making of the s 52P determinations was one of considerable magnitude."

Then paragraph 53, he quotes a passage from Ms Murray, the project manager of the Commission, for what was involved in the IP project, and he says in line 4, that table which he produced is set out in appendix 1 to this judgment, as that table shows the Commission's process was a necessity, an extensive one, that produced over 800 separate substantive documents and the Judge then annexed in the last five pages of his judgment that document showing the extent of the work that the Commission was required to undertake, so to the extent that my learned friend rather sort of again said the comment by the select committee that when the Commission said it was just too much to add this further material to it and the select committee accepted that, this is the proper context in which to be aware of the volume of work that the Commission was required to undertake.

Of course, all that was without knowing of the extension of the six month period would be obtained, and it's in the light of that that I ask your Honours to think about what the witness Taylor said. She said, "I think the Commission could have done this if it had found the time," basically.

Secondly, the second point I want to make is the two stage process. This chart that I presented rather tends to obscure the fact that there is a two stage process, but the transitional phase meant that there was a large degree of overlap in terms of what was happening, and that is why we have the rather difficult transitional provisions that perhaps not surprisingly find their way to this Court for a decision.

I'm not going to take you through what transpired, but following those boxes along the bottom you can follow the various steps that happened in the default price-quality path route. I'll move directly, then, to an aspect of the legislative history, and I take

this from what Justice Clifford at first instance said. I don't need to take you to it, but his paragraph 53 said this, "The question becomes, therefore, whether the proper interpretation of the relevant specific provisions of Pt 4, given the clear legislative history, results in the interpretation argued by for Vector or that by the Commission being correct," and that's pretty right. His Honour felt that it supported Vector. The Court of Appeal felt it supported the Commission.

There are just a few aspects of the legislative history that I would like to bring to your attention before I move to the argument, and they are quite limited. I've mentioned *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42. I've mentioned the recognition of benchmarking. If I could take you to volume 3 of the case, the red volume, and go to tab 31, this is the review document – sorry, the Cabinet Economic Development Committee proposal for the review. The input methodologies referred to, or the thrust of it is at the top of page 2 or the top of page 448, the first few paragraphs, and the input methodologies themselves, what they were to contain is listed at page 474. At that point, it included preparation of regulatory accounts as E and there was also an appendix which started at page 27 and was called appendix B, the detailed specifications, and it also listed the input methodology content at E on page 474. This is just the growth of how they were recognised.

Then the –

WILLIAM YOUNG J:
What's pricing principles, page 29?

MR BROWN QC:
That's what became pricing methodologies. That was the prices that the suppliers would actually charge to their customers.

Then we have the – under tab 32, there was the review of the provisions, the regulatory impact statement. On page 484(2)(iv) are specified what the – again, describing the input methodologies. Notice the – how to determine cost of capital, how to value assets.

McGRATH J:
All of these are prior to the Bill, obviously?

MR BROWN QC:
Yes, they are.

Then we have the Bill, which I've already looked at, and I won't take you to again. One of the things that is helpful is – one part that I think you will find helpful is the form of the Bill as reported back, because it has all the changes and additions. So under tab 5 of the appellant's bundle of authorities, after the report of the committee, you will find all the changes that are made. Some are quite hard to follow. For example, if you look at page 59 or 58 and 59, you will find the nature of the changes that were made to what is now 54J and 54K, which in large part involved a re-writing of those transitional arrangements. Whereas in relation to, for example, 52T it was limited to the addition of the pricing methodologies. This is at page 22 and 23. The addition of the pricing methodologies in lieu of the pricing principles, albeit with their own subpara within what became 52T, and the addition of what became 52T(2).

The next thing I would like to draw your attention to is the first reading. I won't take you through it, but it is an important feature of the legislative history here, and I would perhaps do it by reference – perhaps the simplest way is by reference to the Court of Appeal's judgment on this point, which is in volume 1 under tab 13. This would save me taking you to these sections, but this was a part not mentioned by my learned friend yesterday in his submissions. It's page 136 of volume 1, and it's a reflection on the legislative history. It says at the top of page 136 paragraph 48, "We see the committee's decision not to include a specific reference in 52T(1) to a price reset input methodology as having greater significance in the interpretative exercise than the Judge gave it. This is especially so given that the debates in the House indicated that the Government and opposition members worked together on the Bill and there was bipartisan support for it in the form reported back." You'll note they footnote the first and second readings there.

Then they say, "This is not a situation such as existed in *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182. In that case, the Court was asked to consider not only Parliamentary materials but also Cabinet papers. While not ruling out reference to Cabinet papers, this Court doubted that such materials would ever be of much assistance in interpreting specific statutory provisions. The best they could do would be to provide some sense of the overall purpose of the legislation, although that should be apparent from the legislation itself. We see this as being well-removed from the present situation where a Select

Committee has reported unanimously on a Bill and its report has received general support in the House. In short, then, the Select Committee was asked to include a specific requirement that the Commission publish a price reset input methodology in what became 52T. The Committee rejected that submission. Parliament acted on the Committee's recommendation by enacting the provisions reported back. This history supports our interpretation of 52T(1)." So that will avoid my having to take you to the – but they're very clear because by this stage it was – you had Lianne Dalziel as the Minister of Commerce but Simon Power had been the previous Minister, I think, involved and he was speaking back to it – absolutely bipartisan on this legislation.

McGRATH J:

Did you say Mr Power was the – he was the opposition spokesman of the Committee, is that right?

MR BROWN QC:

He was, yes. I'll just check this reference.

McGRATH J:

It was 2008, wasn't it?

MR BROWN QC:

Yes.

BLANCHARD J:

He wasn't in the House long enough to have been a previous Minister.

MR BROWN QC:

No, he wasn't, but ...

BLANCHARD J:

He was on the Select Committee.

MR BROWN QC:

That's right, that's what he spoke as on the second reading, in that capacity.

And we've already seen, then, and I won't take you again to the MED report, the rows document, which has these various changes, but I would like to take you back

to the response to the Commerce Committee – that is in our bundle under tab 3 – because we didn't look at all of this yesterday. This is the document I mentioned earlier that has the timeline attached to it. So it's our bundle of authorities, tab 3, and my learned friend took you to the bottom of the first page about the arguments about overloading the IM setting process and the Commission had advised of the problem, and then he said the substance to these concerns, more importantly we think, the amendments, make these unnecessary, specifically. Then he dealt with the first one, which is how to compile financial statements, and then in questioning moved – the questioning moved away from it.

What I wanted to focus on was the second or third bullets, which are responding to the particular amendment that we're dealing with, so the comment was that the proposed 53P(7)(a) – which became, which is our 53P(10), which precludes the Commission from using comparative benchmarking on efficiency to set default paths – "the use of comparative benchmarking by the Commission to set thresholds under Pt 4A and the Commission's current exercise to reset the thresholds has caused great concern in the industry because the extensive use of the s 98 powers to require businesses to provide large volumes of information". The explicit provision precluding comparative benchmarking plus the other detailed provisions in s 53P greatly reduces the need to include default paths as a specific IM. So this is a paragraph specifically addressed to this proposed IM as opposed to the first paragraph that was dealing with the other proposed change, that is, the accounting standards one.

And then they went on to say, of course, businesses which don't like the default paths will have the option to put forward a customised proposal and have it considered within strict timeframes according to preset criteria. "Under the proposals in this paper, businesses will also have the right of appeal from the Commission's decisions on customised paths". That was the s 91(1) appeal. Accordingly, given the above safeguards, officials recommended against adding these further two IMs, and that was the recommendation that was accepted.

So that's really all the history I wanted to refer to. Now I'd like to move directly to our arguments, which are in our written submissions. I'll seek to avoid reading them. I'll speak to them, basically. The question 1A you'll find at page 3. The equivalent submissions in Vector's written submissions are at paragraphs 6.4 to 6.10. We first advance the proposition that the list of matters that are in 52T(1) are the legislative

view of the compromise between the certainty that can be obtained from the rules and processes in advance, with the flexibility necessary to allow for changing circumstances and the expert judgement that the Commission exercises at the reset period.

WILLIAM YOUNG J:
Sorry, I've misplaced where I was. The submissions of Vector, the corresponding submissions are where?

MR BROWN QC:
6.4 to 6.10, this is their submissions on 52T(1). I might add, ours are sort of – direct each one – it's not entirely clear to me, the Vector argument – start again. This is a statutory interpretation case and Vector seems to be saying well, the IMs come in, in all of 52T(1) and 52T(2) and (a) and (b). I know that your questions are framed in the alternative, well if you don't – if they're not under 52T(1), then are they under 52T(2) and that's the logical question but then they don't distinguish, even then, between (a) and (b), they say (a) and (b) and really, if you're looking at giving words proper meaning, it would be helpful for them to alight on one position and indeed, the Court of Appeal noted that Justice Clifford recorded that they didn't, sort of, opt for a particular provision and the Court of Appeal noted that even Justice Clifford seemed to say that it was both explicit and implicit and that Mr Galbraith took that position still before the Court of Appeal. So, as you listen to the arguments, you are in a case where a number of candidates have been put forward for the inclusion of the same item.

Anyway, for now, I just deal with them as discrete items. So the thrust of our argument in 13 is that this is what the legislature has ordained as the balance, is the balance and that it's not appropriate, we say in 14, for Vector to be, in effect, asking this Court to recalibrate that balance. We say in 15 that, they are neither explicitly, nor by implication, within 52T(1). Now Justice Clifford's judgment which is under tab 6 in the blue volume, I draw attention that he did seem to have it both ways, at paragraph 120.

Paragraph 120 said, he said, "I have to say, that it is far less clear to me that there is not – if not an express, then at least an implicit – reference to a SPA IM in s 52T." The Court –

McGRATH J:

And you say he's covering both subsections?

MR BROWN QC:

He did seem to and indeed, the interesting thing –

GLAZEBROOK J:

What paragraph was it, sorry?

MR BROWN QC:

That's paragraph 120 and I would make this point, no Court – my perception of reading the judgments – is that no Court has held that it's by s 52T(2) that this is an IM. You see, Justice Clifford's reasoning say it's in s 52T(1) and then if you look at paragraph 125, he said, "To the extent that there is any ambiguity in the requirement of 52T(1)(c)(i)," – because he was a "specification of price" man, he said that – "as in and of itself, requiring a SPA IM, I think that ambiguity is considerably resolved by the requirements of 52T(2)." So I've never read this judgment as saying well, if it's not under (1), it's under (2) but that the interpretation of (2) lends support for my conclusion it's (1) and that explains why the Court of Appeal phrased its paragraph the way it did at paragraph 51 on page 136.

They start off – it might be thought to be an odd way to start the discussion of 52T(2), page 136, paragraph 51, they say, "We do not see 52T(2) as being inconsistent with our analysis." So they are saying it's not under 52T(1) and we don't find 52T(2) inconsistent. It's this Court's second question that raises squarely whether the SPA, I mean, for which my learned friends contend, is under 52T(2). Now, I'm not making any criticism about that, I'm just saying that it hasn't come up to the Court in that way, it's come up in a 52T(1) construct with people looking at 52T(2) as an eye to interpretive support, whereas we have two discrete questions: Is it in 52T(1)? Alternatively, is it in 52T(2)? Hence, our submissions are structured in that way.

So paragraph 16, we say that, not only is it not explicitly referred to but it doesn't include reference to any of the terms that are used in the Act to describe the reset of starting prices. Or even to the more general terms used in Pt 4 to describe the reset of price-quality paths which incorporates the reset of starting prices. So there's not any, even other words, that you might say, I wonder if that's what they had in mind? On the other hand, we say, 52T(1) does refer to price-quality paths in other respects.

For example, if you look at – dealing with CPPs – you've got s 52T(1)(d) which is addressing the customised price paths and it says proposals for a customised price-quality path. So it is envisaging that there will be material there.

Also, you've got 52T(1)(c)(ii) which is "identifying circumstances" – this is the point that Justice Young raised with me yesterday, in terms of when you can revisit price-quality paths – "identifying circumstances in which price-quality paths may be reconsidered within a regulatory period". So the legislation has touched the issue but certainly not in the context of the reset.

Then – and I won't be revisiting this because you're familiar with this now but we have, at the top of page 5, paragraph 18, we've got the consideration by the Select Committee which reads over onto paragraph 26 and coming back then to paragraph 19. Paragraph 19 is the – we quote the passage from the – I took you before to the – the last document we visited was the Commission's report to the Select Committee. This then is a statement by the Select Committee in the report back saying, "We do not agree with submitters who put forward a range of proposals for additional matters for IMs. Given the Commission is already faced with a very large and demanding workload, we consider additional requirements would put pressure on the input methodologies processes."

So then we come directly to deal with my learned friend's –

McGRATH J:

But doesn't that really encompass all your argument on this point really, I mean, I just wonder how much further we have to go into it?

MR BROWN QC:

No, well it is, I mean, we say it's – my learned friends really have to depart from the history. Although they're bold in doing so because if you look at paragraph 1.6 of their submissions, they actually suggest in 1.6 that – sorry, 1.8 – they actually say that, "The Court of Appeal's decision judicially legislates the outcome sought by the Commission when it first opposed the introduction of Pt 4." We say the Court of Appeal's decision is simply following the statutory history and the proper interpretation –

BLANCHARD J:

Mr Brown, that's just exchanges of rhetoric.

MR BROWN QC:
Yes.

BLANCHARD J:
Surely we're better just to look at the key provisions so that you can persuade us, if you can, that input methodologies are not being legislated for –

MR BROWN QC:
Yes, well –

BLANCHARD J:
– in the one that we're talking about?

MR BROWN QC:
Yes. Well our argument your Honour is – in short terms and in direct response to Justice McGrath – is that in 52T(1) they're not there, you can't see them. The reason you can't see them, is that they were considered and they were rejected. The argument for 52T(2) is a little more complicated, I want to come to that but basically we're saying that –

McGRATH J:
Well that's a sufficiently detailed provision you say?

MR BROWN QC:
That's right.

McGRATH J:
I think we've got the thrust of your submissions on this fairly well aboard and what we've heard in the last day and half has helped us to understand the background. So I think that we can probably – we're pretty familiar with your two stage argument, the structure and the fact that although we've got this general term in (c)(i), you're saying that the structure doesn't suit reading it in a broad way.

MR BROWN QC:

Well probably that's the one remaining point that I should deal with in terms of 52T(1), that is that it comes within "specification and definition of price" which is the next part. You'll see paragraph 20 and 21 and –

McGRATH J:

And that gets you back to s 53M you say?

MR BROWN QC:

Yes, it does. We say that – we record Vector's argument – we submit in paragraph 21 that, "Specification and definition of prices, a particular role in the context of Pt 4". It refers to the specification and definition of prices in 53M(1)(a), that being the form of control imposed on suppliers under a DPP or CPP," and I think it would be helpful, just for a moment, to revisit that decision which is in volume 7, at page 1612, that is the input methodology, it's the orange volume. The relevant page is 1612 and it's subpt 1 of part 3, these are input methodologies for both default price-quality paths and customised price-quality paths at that point.

It starts off in 3.1.1 by saying, "For the purposes of s 53M(1)(a), the maximum price or prices that may be charged, or revenues that may be recovered by an EDB are," and they then proceed to address the relationship between allowable notional revenue and notional revenue and then significantly, they come along in (2), subs or paragraph (2), to talk about the 12 month period, the function of the relevant CPIs and then in (c), you'll see, "Prices in the preceding 12 month period, multiplied by quantities net of the sum of relevant pass-through costs," and then pass-through costs are dealt with progressively through there, including over the page at 3.1.2, pass-through costs and then recoverable costs.

This reflects – if we look at 52T(1)(c)(i) – the observation I made yesterday, this is on page 75 of the statute, under tab 1 of my learned friend's bundle. It refers to, "The specification and definition of prices, including identifying any costs that can be passed through to prices –

BLANCHARD J:

I'm sorry Mr Brown, I've got behind, where are we?

MR BROWN QC:

That's all right Sir. We're in my learned friend's bundle of authorities, volume 1, it's the statute, at page 75, the definition, or the s 52T and I'm saying that it is instructive on what "specification and definition of prices" means because it says in (c)(i), "The specification and definition of prices, including identifying any costs that can be passed-through to prices (which may not include the legal cost of any appeals against input methodology determinations under this Pt...)" which is the point I mentioned earlier and that is, what we say is what it comprises, and that is reflected in the input methodology which was made which is why Vector, in our submission, – perhaps forensically Justice Blanchard – didn't – weren't really relying on that, they were relying on more the breadth of 52T(1)(c) rather than those words. It was the Judge, at first instance, who really fastened his attention on those words and said, "They seem to me – " and interestingly, he used the expression, "specification/setting of prices". That was the word that my learned – the passage that my learned friend quoted from. That's not the wording of (c), its specification –

BLANCHARD J:

And you say he misconceived what this was really getting out?

MR BROWN QC:

Exactly, exactly and if it's – we certainly say that and then we say the implications of that because – and this is what the Court of Appeal accepted. That if you accept specification of prices as extending to the reset of prices, then it would render, we would say in our paragraph 23, would render 52T(1)(b) redundant because pricing methodologies would clearly fall within a phrase so broadly interpreted.

Then in paragraph 24, we go on to list all the other matters that would be subsumed in and would require IMs, if the expression "specification and identification of price" was given such an expansive meaning. All –

McGRATH J:

Do you accept that "prices" includes "revenues" in this context, by reference to the definition?

MR BROWN QC:

Yes, it does in terms of 53M because that's what it is identifying. It's prices or revenues, it's in the nature of the cap. That's why, in relation to our diagram that I

held up, diagram A to our submissions, where it sits – unlike the others that sit at the beginning, on the left-hand side of the process, that are fed into the 52P determination, it sits down at the bottom right, dealing with the product that comes out of it. So we say that – the implications are set out in paragraph 24 – and we say that, in the context of the mandatory obligation to do them in the tight timeframe, dealing with all of those, would be utterly impracticable and contrary to the scheme of the Act.

Then 26 and 27, you're familiar with, that's that history of that provision. Then we come on to deal with an argument that I think I probably don't need to address. We were sort of anticipating an argument that Vector says that it should be somehow implied into s 52T(1) but, as I hear the Vector argument, they really are tying themselves to the mast of "specification of price". I think my learned friend said that they do that because the Court of Appeal said that 52T(1)(c) was exclusive of the matters therein.

I don't think the Court of Appeal says that but nevertheless, I don't apprehend that Vector are making this secondary argument but if it were to be made, this is the argument that we would make. I won't read you through it but I draw attention to what we say in paragraphs 34 and 35, this is the s 52 determinations point that I've been developing and the discussion of the history this morning and that your Honour Justice McGrath just put to me and at paragraph 36, the resetting of starting prices is dealt with in subpt 6.

We then draw attention in paragraph 38, to the somewhat sort of bizarre consequence of Vector's argument whereby, if it were right, that you were to read this aspect, the resetting of the price aspect, as being the subject of an IM, then it would be odd that the other three, two of the three elements, the interactive elements, all three of which were proposed for the change to the legislation but only one of them would have an IM, with the appeal rights and the like and we say at paragraph 38, line 4, we say, "There's nothing in the section to suggest that one of the three is subject to entirely different regime which requires an IM to be formally determined in advance, and subject to a full merits appeal process including any amendment."

Further, we say that the reset is of the entire default price-quality path, not just, as it were, components in isolation, and that involves the close interplay between all the

relevant elements. It does not make sense to suggest that the legislative scheme requires one part of it, the reset of starting prices to be consulted on separately and locked down in advance by years of the other key elements of the path.

Vector makes an argument that the starting prices are of such significance that they should be treated differently and we say that is self-evidently incorrect, that the three matters all have a very significant impact as well as claw-back on the supplier's revenue during a regulatory period.

And in response to the emphasis they place on IMs and their significance, and we accept in paragraph 40 the desire for regulatory certainty. But we do say it was over time and we do say in 41 that it was the introduction of the option to apply for a CPP that was seen as key to providing greater certainty to suppliers and was regarded as one of the main weaknesses of the previous regime. And we set out then at paragraph 42 the Court of Appeal's paragraph in relation to the extent of certainty that Mr Galbraith was recorded as pressing for which, of course, in Vector's submissions they say is very much at the lower end. Their submissions at paragraph 1.9 claim they're not seeking perfect certainty. "Perfect certainty" is the expression that they use, but in my submission it's getting very close to that top end.

GLAZEBROOK J:
Mr Brown, if, in fact, the – as you say, the determinations can't be changed over the five year period except in the circumstances that they can be, isn't the argument about certainty slightly odd in any event?

MR BROWN QC:
Yes.

GLAZEBROOK J:
In that effectively they do have certainty for that five year period. It's not this seven year under the input methodologies, but it's effectively the same certainty that they have with the input methodologies. The only issue is the appeal right which, as you say, was specifically decided that they – there wasn't going to be a general appeal right there.

MR BROWN QC:
Yes, I agree with that.

WILLIAM YOUNG J:

Is there a reason why, in the fullness of time, there shouldn't be a reset input methodology, a price reset methodology?

MR BROWN QC:

Well, the legislation could so provide, but the thesis is that the input methodologies that they were requiring were to be done in advance, you see.

WILLIAM YOUNG J:

Yes, but 52(1) is – it does knock you to the ground, it says what *must* be provided. It doesn't say what *can* be provided.

MR BROWN QC:

Indeed, I agree it's the mandatory ones. Other things – sorry, I misconstrued your question. Is it possible voluntarily to do one at a later point in time? In theory it would be possible, but the arguments my learned friends make is that this is a mandatory one.

WILLIAM YOUNG J:

Yes, I know that. But say it's not mandatory but it's something which either the Commission might voluntarily do or the High Court might say should be done on a merits review of the methodologies as they stand.

MR BROWN QC:

My answer would be in the current legislation it's time-limited for making the – if you were to sort of volunteer to do one you would be inviting a voluntary right of appeal and the like. I think the Act contemplates that if there are going to be input methodologies they will be made within the time period that Parliament provided for. Those ones can be – they'll be reviewed in seven years, but if you haven't made –

WILLIAM YOUNG J:

They're also being reviewed in the appeal process?

MR BROWN QC:

No. They're the subject of a merits review on appeal, but I'm saying every seven years they have to be revisited.

WILLIAM YOUNG J:

Well, what would you say to an argument that say the methodologies should be varied on appeal to stipulate how they apply to price reset? Because that would be a better – which I think is the – or a materially better outcome, which I think is the appeal test, than the one that's been reached. Not one that's mandatory, but it's just a better way of dealing with things.

MR BROWN QC:

If, in relation – if an appeal succeeded on an input methodology by requiring it to be changed because it was regarded as materially better, then that would be required to be done.

WILLIAM YOUNG J:

And is that – that's relief that's sought in some of the appeals, I gather?

MR BROWN QC:

Yes, Vector does argue on the – they've been split into groups and the group of appeals for December are sort of a collection of the lesser ones, well, lesser quantitatively, at least, taxation, allocation of costs, and rules and processes, and there are appeals against the IMs for not specifying the three components, rates of change, resetting of prices and quality controls as an IM.

WILLIAM YOUNG J:

What the Commission's response to that? Is that it's not open to the High Court to bring in a starting price reset or other reset methodologies or simply that it wouldn't be a good idea to do that?

MR BROWN QC:

Our approach would be to argue that the statute makes it clear that we weren't required to set an IM for those matters, that that is going – we weren't required to set an IM for those matters, and therefore to try and require, let's say a whole bundle of other IMs that we were required to set, say the big four in 52T(1), which do relate to price set, cost of capital, asset valuation etc, for them to all set out that we could have known and worked out in that timeframe a process that we were bound to as to the numbers it would spit out at the end, we'd say that is not something the statute accepted. The argument that we're making here.

WILLIAM YOUNG J:

So you would say (a) that the appeal is simply – is effectively not competent because it's not within the power of the High Court to grant the release, and (b) in any event they shouldn't?

MR BROWN QC:

That's right. It wouldn't be materially better.

GLAZEBROOK J:

Well, your argument of the two-stage process would suggest that it wasn't open on appeal to do it, so is that the basis of the argument that first of all you set the input methodologies and then you set the default price-quality path, then you set the DPPs or the CPPs, but it's two different processes as envisaged by the statute?

MR BROWN QC:

That's right. My learned friends, when I took you to that, those few comments that I made yesterday afternoon at the time available to me, and I compared their chart with our chart, they're saying that all those mauve features in what we say is the DPP s 52 determination, they should all be IMs, they're not something that we get to decide, that's the point.

I was just scanning page 12 of our submissions. We do refer to the logical inconsistency in Vector's approach, making the point that we say, well, IMs would unduly constrain us in terms of, you know, in terms of the iterative approach, and it's interesting the Vector witness, Ms Taylor, comes back and says, "Oh, don't worry, you can amend them, you can amend IMs." It's just ironic. It seems to depart from the level of certainty that Vector claims is required.

We say they have this certainty. Paragraph 45 really makes the point that your Honour Justice Glazebrook put to me about the certainty and the regulatory period and the prospect of change at the end of that period is the type of uncertainty that is inevitable when the legislature intends there to be a resetting over various periods of time.

WILLIAM YOUNG J:

I've just got a vague recollection of the submissions on the leave application. Wasn't there a suggestion in your submissions that one of the reasons for identifying two

questions was because question 2 was potentially an appeal point? I may be wrong on that. Question 1(b), I should put it more accurately.

MR BROWN QC:

Our main – the thrust of our submission I think is to say, well, there are more questions in here than are framed, and the second question you shouldn't go to because it involves the qualitative analysis of looking at the IM, yes. But you shouldn't – there isn't the jurisdiction anyway. So there's two stages. If anyone could do it, it would have to be at a Court that had the IM before it. Not on question 1. Question 1 is a straight question. Is it in 52T(1) or not? But if you're actually going to ask the question which I say is being asked here for the first time, is it in 52T(2), then you're asking in relation to a bundle of set input methodologies: are they reasonably – the words escape me in 52 – reasonably practicable etc, and that is a qualitative exercise. It has to be done with the IMs in front of them, so we're at least saying that the Court of Appeal will have the IMs, whereas this Court doesn't. But it doesn't change our first position that this –

WILLIAM YOUNG J:

Well, I'm just looking at your – and I wasn't wrong, the restatement of question 1 as different questions was to pick up a suggestion made in your submissions, and then in paragraph 17 you said, "The point of significance for a consideration of the grant of leave on issue 2 is this, if Vector's complaint is that the various IMs are deficient as to content, then that is a matter able to be addressed on a s 52Z merits appeal."

MR BROWN QC:

Yes, if they are –

WILLIAM YOUNG J:

So your position now is that it can't?

MR BROWN QC:

Well, if – perhaps one shouldn't read too much into deficiencies in content. If there are deficiencies about the content of an IM, if there's something about the rules and processes IM, that is that. The Court on appeal has jurisdiction. But in relation to this particular point, no, it ought not to be read in. We would say to that Court, you ought not to be reading into an IM a requirement to have a SPA methodology if the Court has ruled that it's not in 52T(1). I mean, it really is 52T(1) it should stand or fall

on. If this Court says that it's there, then that's where it should be, but we were particularly, your Honour, in the urgency of the timeframe with what's going on. We said, well, if you're going to consider questions, and what we saw at urgency was it was in relation to 52T(1), because if you didn't accept our argument, if you did say that 52T(1) did mandate the Commission to set a starting price reset methodology then subject to the little step of how it's done, given that the statutory timeframe has expired, then it's better for the process that you get on and deal with it, which the Commission was doing. It did that, as my learned friend said, without prejudice to pursuing the appeal, because we – it wasn't a sort of lack in the conviction in the appeal but time is running. All these people are waiting to have their results, so the Commission actually ran two processes at the one time. It consulted on a SPA methodology, as my friend would say, and it pursued the appeal. And certainly when the appeal came out it stopped and got on with other things, like it needed to, the other IMs that Justice Clifford had directed had to be released by September 2012.

I think I've really dealt with 52T(1), but to the extent that I haven't, I'd just ask you to read our submissions. I won't come to the appeal regime at paragraphs 53 and following, because I think I've sufficiently dealt with that in the exchanges this morning. Likewise 57, the CPP and final comment that we've got there in 59 about the legislative history. So if I could then move directly to 52T(2), and this you will find at Vector's submissions at 6.11 to 6.19. The Court of Appeal's decision discusses the meaning of 52T(2), but as I indicated before, it discusses it in the context of saying it wasn't inconsistent with the view they'd reached about 52T(1), so I wouldn't say their decision is obiter on 52T(2), but they weren't, as it were, saying that they were directly called upon to address it, but we do endorse the analysis and conclusions of the Court of Appeal at paragraphs 52 to 58, and I would simply make the following points on this. We would first of all – at the top of page 17, we say that it is a matter of fact and degree involved in s 52. It says "as far as reasonably practicable", and there's reference also in this section to being "reasonably able to estimate". So the question of whether, in respect of an individual IM, the Commission has complied with 52T(2) is a question of fact and degree and can't properly be assessed in isolation from the context.

We make the point that I was making yesterday at 65 that the Court is asked to be – to consider a hypothetical and absolute proposition, that is, really it's this, that if my learned friend's argument cannot be –

WILLIAM YOUNG J:

Pause there. The input methodologies addressed by Justice Clifford have now been re-issued, haven't they?

MR BROWN QC:

Yes.

WILLIAM YOUNG J:

They were re-issued towards the end of September?

MR BROWN QC:

They were.

WILLIAM YOUNG J:

And so they deal with how those information methodologies apply to default paths quality regulation?

MR BROWN QC:

No, well, they are – what the Commission failed to do, the best way to look at it is, I think, in the determined decision 710 itself. If you come with me to the orange volume, which is volume 7 under tab 63, and you come to page 1562, just so you know what the Commission had done, what it – do you see in s 52T(1), it uses at the beginning the words, "The type of regulation." The opening says, "...to the extent applicable to the type of regulation under consideration..." and then if you look across at 52T(2), (b) says, "...how the Commission intends to apply the input methodology to particular types of goods or services..." so as a result of that, this is what the Commission does, it realises five different decisions across the different services, so airports, gas, energy, so that's addressing the different types of services. Then within the services, so this one, this is decision 710, which is confined to electricity distribution, within it, it deals with the various several types of regulation, so if you look at 1562, the index there, you've got the general provisions, so it's got input methodologies for information disclosure and it sets the other ones out: cost of allocation, asset valuation, treatment of taxation, cost of capital. If you come down to input methodologies that are customised, you've got cost of capital, treatment of taxation, this is about, you know, in Pt 5 there, but in DPP Pt 4 it released cost of capital and reconsideration of the price-quality path.

So although I wasn't counsel at the hearing in the High Court, it started off by Justice Clifford rightly saying, "Where are these input methodologies for asset valuation and for DPP?" Everyone looks around. So that's what he directed them to do, and that's what they've done, and they have released now – they've republished this with the input methodologies for Pt 4 that include asset valuation, treatment of taxation, cost allocation, they're the three, so that brings me back to your question, do you say – your question implies that they've addressed the "how". They deal with the "how", but the "how" is not the "how" that my learned friends want, that is, how they say the jigsaw fits together in s 52P but how the cost of capital, say, methodology applies. That is, if you look, if you stay with that decision and come with me, for example, to cost of capital in relation to – page 1605 – here is a cost of capital IM in the context of information disclosure, so if we look at 2.4.2, the fixed WACC parameters, leverage 44, item 5, equity beta 0.61, item 6, debt issuance costs, 0.35, 7, the tax-adjusted market risk premium, this is how – this is a determination of how it applies to the - these are the "hows" that are the subject of all the appeals at the moment: whether it should be 44, whether it should be 0.79 equity beta rather than 0.61 etc, and not the "how" that my learned friends want of how does this, this and this get together to give you the result at the s 52P?

WILLIAM YOUNG J:
But what's not in here that's in the new ones?

MR BROWN QC:
Well, basically if you look at the information disclosure ones of asset valuation, treatment of taxation, and cost allocation, they have been re-stated for default price-quality paths. So where you've got Pt 4 in this, one has cost of capital and reconsideration of the path alone, now you will have as well asset valuation, treatment of taxation, cost allocation. The Judge said you can't read across those from information disclosure into DPP. You need discrete DPP ones.

WILLIAM YOUNG J:
So is it in substance (a): has it been dealt with – I'm not being pejorative formalistically by simply –

MR BROWN QC:
Not formalistically. The process we engaged with has taken this time to do it. They haven't just said, "We're taking them." We've looked at them again, but what you will

find there is essentially similar content dealing with those matters, so before there wasn't asset valuation for the initial RAB. Take asset valuation as sitting there in information disclosure. That will cover airports. It will cover the information disclosure for electricity, but it won't cover default price-quality paths for electricity because there isn't one, but it will be essentially the same.

WILLIAM YOUNG J:
Okay.

MR BROWN QC:
At least, I shouldn't say essentially the same because I actually haven't read personally the final one. I'm not making a statement to that effect.

So question of fact and degree, we say in 66 that the Commission's primary position is it doesn't allow such an abstract approach. Then we say that the – I've made the point as specified for each type of regulation and the different services and if we then come to make the point at 68, the point can be demonstrated by considering that the cost of capital which has not been re-determined, they'd already specified the DPPs, that sets out the methodology for how the Commission will determine the supplier's WACC but it does not state how the Commission proposes to reset starting prices in the DPP for the cyclical resets at the end of each regulatory period or the post-CPP resets under 53X, or the 54K(3) mid-period reset. Indeed, no decision had been made on any of those issues as at the final date for the determination of the IMs. It brings us back to that point of what was, what was possible, what was – what could, in fact, be done in that timeframe.

I think 69 through to 71 really speak for themselves, and in relation to 72, Vector's criticism of the Court of Appeal, there is a very real and meaningful link between the IM and the subsequent regulatory control achieved by 52T(2). The supplier will be, for example, able to anticipate how its regulatory asset base and cost of capital will be assessed for the purposes of setting the DPP or the CPP or for assessing a reasonable return under information disclosure, and these are not insignificant areas of uncertainty or certainty. So, for example, in just the last week in airports, we've been looking at the asset valuation for airports – so the question in relation to just the land, not the specialised assets, you know, Wellington's hill, Auckland's northern runway, seabed reclamation, how they are to be treated – let alone cost of capital, which is an argument about what should be the equity beta, what should be the

leverage, what should be the costs of allowed for raising capital, all these are in contest, and the reason they're in contest over such an extensive period of time is that is the certainty that the suppliers can expect to get. That's what the merits review gives them, and once the Court has released its decision and made changes or not, materially better or not, then that's where it is. Certainty is secured. They have achieved all that. At the risk of being a little pejorative, they're here on the Oliver principle. They're asking for more. They say we should get the certainty that comes with the s 52P determination.

We say that in 73 the Commission's position as to its approach to the next level of decision-making, the reset of DPPs at the beginning of a new period and for the one off transitional period is a matter for separate consultation and determination under 53P where it is expressly included.

The last two points I would make in relation to 52T(2), actually, there's more than two, but perhaps the inconsistency point I would make. In an argument on plain meaning, as I said before, it cannot be in both 52T(2)(a) and (b), although that's what my learned friend's submissions say at paragraph 6.14, (a) and (b), unless of course the argument is that it isn't found in just (a) and (b) but you need to rely on both to get there. I don't think we've really heard that argument. And then "reasonably practicable", we place some emphasis on this, but I would draw your attention to the fact that my learned friends are now making quite a new argument about "reasonably practicable" that's never been made in the Courts below. They're saying that that is some sort of legislative compromise that means you should – that the words mean you should do as many IMs as is "reasonably practicable" in the time available. That's the argument. That's why we say in 76, Vector suggests there's an obligation on the Commission to specify a SPA methodology unless it didn't have time to do so. It would logically extend – the logical extension of that would be that, well, if we had sufficient time there would be others we should be doing as well. We say that "reasonably practicable" is a reflection on the quality of the information that you are requiring in relation to the acknowledged 52T(1) IMs, that you can only give that degree of material effect as is "reasonably practicable". It's not a reflection of what you could do in the time that was available to you, so it's a quite new proposition.

COURT ADJOURNS: 12.58 PM
COURT RESUMES: 2.16 PM

MR BROWN QC:

Just before I break back into the flow of s 52T(2), I realise I've neglected, at any time, to take you to our second diagram which is under tab B of our submissions. I think it's just useful, in light of my exploration with you this morning of the structure of the Act, to look at the diagram so far as it relates to CPPs, remembering this will be something that has been spawned, as it were, from a DPP. You'll see it's in some contrast to the DPP one because it has the big yellow chunk on the left-hand side and of course, that reflects all the work that the supplier will be attending to. The supplier will be attending to the tax information forecasts and the operating expenditure forecasts and the like, that on a DPP, the Commission is addressing in course of the s 52P determination.

So just looking through from the left, we have the cost of capital IM at the top. The Commission uses that to determine WACC and with the relevant WACC determination then, and assisted by the bottom red square, that is the CPP proposals IM which comes out of s 52T(1)(d). Then the supplier has the wherewithal to prepare the application which then proceeds to the Commission through the yellow arrow and you see all the – basically the red IM determinations that we saw in the case of DPPs applying. And second from the bottom of the central column, the red ones, I draw your attention to the specification and definition of price IM. We saw it in the context of DPP, we see it again in CPP as s 53M provides and you'll see the arrow it leads to. It leads to the box relating to the reset weighted average price path or revenue path because, as we say, that's where it bites.

Then the Commission determines the application and outcomes, on the right-hand side, an amended s 52P determination. So somewhat, essentially similar in structure, to that which was in a DPP and of course at the end, once the period of this finishes its five years, or four years, or three years, then it lapses back into the DPP scenario that we have in the previous diagram.

Now before lunch, I was dealing with 52T(2) and I had progressed as far as – I was almost at the end in fact, at page – we dealt with page 19, "reasonably practicable", Vector's proposition in 6.19, that it's somehow doable and the Commission has the burden of producing evidence to show it's not doable and then I'd looked at the workload issue. Then the last couple of points I'd like to make are at the bottom of page 20, paragraph 80, Vector suggests that subs (2) was included as an alternative. In fact, it goes so far as to say, in its submission at 6.2, that the inclusion of it was

significant and we take issue with that. We draw attention to the fact that both proposals, that is more detailed, as it were, not so high level input methodologies, that idea, plus Vector's pressing for certain specific IMs were raised concurrently, clearly different objectives and as we saw yesterday, they resulted in different outcomes and we note that at paragraphs 81 and 82 and we collected in paragraph 83, where we say that the two rows, in the row 28 and row 29 of the MED report which my learned friend took you to, we say in paragraph 83, they separately and contemporaneously propose a new IM for setting and that was quite distinct from the not wanting the IMs to be at too high level of detail.

For example, if an IM had just said you've got to do it by asset valuation replacement cost, you know, it didn't descend to whether it was OD – like, we were having the debate, ODRC, ODV, what variation on the theme and if it's ODRC, is a valuation of assets as they are new, or do you assume that a supplier is going to, as it were, buy the existing assets and be looking at the price of new assets at a distant point in time with a dated back net present value to the present time, that sort of thing. They wanted it to be focused.

I don't think I need to take you through 85, 86. That's a discussion of the Judge's comments and, perhaps, bring you through to 87 and 88. We've been to 87 already and we say that what the Court of Appeal said in paragraph 57, this is at paragraph 88 of the submissions, is right, "That it would be implausible that Parliament would reject enacting a requirement that the Commission prepare a price reset methodology on the ground it would entail too much work for the Commission but then enact 52T with that purpose of imposing essentially the same obligation," because the Judge postulated this, at paragraph 85, that it might have been sort of introduced for one purpose but relied on for another.

So that really is our argument on 52T(2) and, at that point, we reach the divide in the questions that the Court asks because, from that point on, you come to question (1)(c) and (d) if a yes has been returned to either (1)(a) or (b), if the Commission is in difficulty on one or other of those heads. As to that, this is in no way a criticism or complaint but I do notice – and we say this in paragraph 89, that the third question is framed using a particular phrase. It says, "...in the manner provided for in section 53P(3)(b)". Now I'm actually not sure where that phrase derives from. I do note that the –

WILLIAM YOUNG J:

It didn't come from the statute, I take it from that?

MR BROWN QC:

No, it didn't, no. The statute, you'll see, uses the phrase "in accordance with s 53P".

WILLIAM YOUNG J:

Well what's s 54K(1) say?

MR BROWN QC:

That's what it says, "in accordance with s 53P".

WILLIAM YOUNG J:

Aren't subss (1) and (3) slightly differently expressed?

MR BROWN QC:

Oh yes, they are, they are. Let's go to them. In fact, you'll find all four are differently expressed. In 55F, they're different again but if we stay with 54K, 54K(1) says – this is on page 113 of the statute and this of course is not the provision we're talking about but 54K(1) says "using the process set out in section 53P". Now that's echoed in 55F, except that it uses "processes" plural, so we won't sort of take much grizzle about that but – and then 54K(3) says, "in accordance with section 53P". It doesn't go to a specific subs and I've made the point before, that curiously that phrase is actually missing from 55F but the question that is framed by the Court is specific to "in the manner provided for in s 53P(3)(b)". Now I'm not making –

WILLIAM YOUNG J:

But that's because – isn't that because s 53P(3)(b) is the one you want to use?

MR BROWN QC:

Well yes but it may be that all the other parts of 53P are relevant as well, consultation–

WILLIAM YOUNG J:

I think, well probably from my outburst, you will conclude that it may have been my hand that faulted in the drafting of this but –

MR BROWN QC:

I draw no conclusions your Honour.

WILLIAM YOUNG J:

I think it's probably an intention to capture the issue whether you can move from a rollover DPP to a profitability one.

MR BROWN QC:

Quite. No, no, I make no, I'm not – there's no forensic point, however one does – it's just perhaps to demonstrate that one scrutinises the Supreme Court's approved questions with care. Whatever happens, it does involve – obviously, if one is going to exercise the 54K(3) power, it will be in relation to the prices. Although, when we come on to question 2, you see our qualification there, it's not prices removed from the rate of change either, so that's part of the problem we have in question 2 but this question is silent on the implications for 53P(3)(b) itself, that is, at any other reset and it may be – that's presumably as we say in paragraph 90 because the Court used that result as a given and I'm not suggesting that it should be to the contrary but the Commission's position, you'll appreciate, is of at least as great interest for s 53P(3) at large, as it is in a s 54K(3) context and of course, all the approved questions were framed in a s 54K(3) context.

The maximum downside of the inability to exercise it in its transitional provision is the windfall gain/windfall loss scenario that I displayed in that diagram I took you to this morning, showing the different bars of income and the different rates. Remember the three below the line, the four below the line and the group above it? That's the implications of not being able to do a mid-period reset but if there isn't – if you definitely do need a reset IM to exercise the ongoing regulatory period resets, then of course the Commission has a more significant long-term problem. That is not part of an approved question but nevertheless, we need to be entertaining or considering –

WILLIAM YOUNG J:

Sorry, is your concern that if, wrongly, an input methodology in relation to starting price adjustments was not promulgated by December 2010, you cannot for the next regulatory period starting in 2015, reset the price?

MR BROWN QC:

There will be that view, I mean, you can be sure if there are suppliers out there who want one to stay with the price that is already turned over, rolled over in (a), they would be more than happy to see that continue.

WILLIAM YOUNG J:

But is that the point you're making in para 90?

MR BROWN QC:

Yes, yes, as opposed to we – the parties jointly put to Justice Clifford a sort of judicial review s 4, subs (5), sort of remit it back type situation but one has to say that, at the same time, the statutory period has run and I don't anticipate what this Court's approach to that would be. So I'm just signalling that the question you've asked is in the transition –

WILLIAM YOUNG J:

The answer might be in allowing one of the appeals?

MR BROWN QC:

Yes. In this matter?

WILLIAM YOUNG J:

No, in the –

MR BROWN QC:

No.

WILLIAM YOUNG J:

– input methodology appeals.

MR BROWN QC:

Well yes, it's possible. Anyway, the choice of (a) and (b). Perhaps I should just mention it as well, the question – various matters affected that decision. Justice Blanchard, I think, put to me yesterday, the cost would be a factor. In my submission, I would confirm that that is the position indeed. Perhaps I could just draw attention to a couple of documents that go to the factors that were relating to a roll-over and one of them we have in volume 3 of the case, tab 35, this is a

submission made by the Electricity Networks Association in relation to how the Commission should proceed, and at paragraph 12 here we see the cost proposition being advanced. They were questioning whether the Commission has the resources to complete the first approach in time across all non-exempt EDBs as draft decisions are required by September 2009, and there was, however, a further point that was being raised, and this is in paragraph 13. It says the Association supports the use of the second approach, that is, it's clearly right that it's desirable in this transition period to avoid two adjustments, so what that point that was being made –

WILLIAM YOUNG J:
What's the P there?

MR BROWN QC:
The P0 is the expression used for the adjustment price, so they were saying if, instead of the rollover in (a), you did elect to do a (b) reset, you might be resetting again in the middle of the year once the IMs were in. So you could have three different prices as opposed to two: you'd have the roll-over price that you were replacing with a reset price, which reset would then be replaced mid-period once the IMs were in place. So the argument was, well, let's only have one reset rather than two.

WILLIAM YOUNG J:
But was it ever really thought likely that the Commission would set out to assess a profitability path before doing the input methodologies on weighted average cost of capital and so on, and regulatory asset base?

MR BROWN QC:
Yes, there was consultation on precisely that. Indeed, paragraph 10 of this submission – the Commission's suggestion that there are two possible approaches, and the Commission, of course, is indicating its preference for the second approach. Everything, you know, consultation rules in this environment you have to –

WILLIAM YOUNG J:
I accept the first one is a theoretical possibility.

MR BROWN QC:
Yes. Anyway, it's just that factors – the number of factors that bore on it.

So if I could then just look at the argument briefly on this exercise, we asked the question at the top of page 23 before paragraph 94, "Is the exercise of a transitional s 54K(3) power constrained?" Vector's written submissions are very sparse on this. In fact, we only have the proposition. I think, that you'll find it at their submissions at 6.21 to 6.23 where they make the submission that, well, if you can't – these are the words, "Unless the SPA methodology is determined as an input methodology then you can't do the reset." That's their argument. So we have presumed in 94 that the argument is a staged one that says you may reset in accordance with 53P: that a prerequisite, then, to doing so is a reset IM, and hence that 54K(3) power is incapable of exercise, as, presumably, is the s 53P(3) power.

The Commission submits that that assumed "enabled" – and I confess to that verb – not everyone's happy with that verb, but I'm trying to convey that it has an inability to apply because of the absence of a SPA IM. We say that does not –

BLANCHARD J:
It would be disabled, wouldn't it?

MR BROWN QC:
Well, it never was "enabled", you see, so I worked from an inability rather than – preferring not to have the word "impotent" there, I went for something that was unable from the beginning, as opposed to something that had something and lost the power.

So we say it does not proscribe the implementation of the reset provided for, and we base our argument on the wording of 54K(3) and on the legislative history and on the different objectives of the two provisions, that is, 54K(3) and 53P(3), so I'll be reasonably brief about this. I mean, we obviously would like to win on the point, although it would be somewhat of a Pyrrhic victory to be able to do this and to have lost on 1 and 2 and have the implications, then, for the general reset in 53P(3). So we say that the wording of the provision, both of them, that's 55F(4) are addressing the – what I'd call the post-date IM; an IM has been published subsequent to, in this instance here, the 1st of April 2010. And we say that while the singular includes the plural, there is no basis for construing the subs as not also contemplating a solitary IM. I mean, my learned friends will say well, it was only reasonable, only practical to do them all at once. Well, that may be, but that's not what the legislation allowed for,

and indeed the further subs, 54K(4) and 55F(5) talk about the ninth month window from the date of the input methodology, so it's entertaining a particular one.

The subs doesn't specify that such post-date IM must be a starting price one, so it could be just, say, cost of capital, and nor does it specify that the post-date IM, that is, some other one, that there is an additional prerequisite to also having the starting price IM at the same time. So that's one interpretation for which Vector must contend. Indeed, it's the underlying premise that we have the big four.

We say that in 100 that the post-date IM would itself contain specific provision, that's the theory, but there is no real advantage to that unless the others are also determined and applicable, and it brings back one – that brings me back to the proposition implicit in Vector's case, that this input methodology is a reference to a suite of input methodologies which contain specific provisions to how they apply collectively, that is, whether they have a standalone one or they do it themselves, and our submission is that that is a distortion of the plain wording of 54K(3) and 55F(4). But in view of the differences of views, it is instructive, we say, to look briefly at the legislative history, and it's important given that these subss were not in the original Bill, and I think probably the best way to work on this is to have the amended Bill before you, so that would be the document under tab 5 of my learned friend's bundle of authorities, and the – I draw your attention that we introduce this in paragraphs 103 to 105. There was the potential, we say in 106, for the first reset dates for at least some of the input methodologies not to have been determined. The mismatch was the subject of submission to the Commerce Committee, so on that could you take at the same time our bundle of authorities and go to those MED rows under tab 2. Now, up until now you've looked at the ones in page 12, that is, rows 28 and 29. I want to take you through to row 86, which you will find at page 36, 37. These were the arguments that were made. This is on page 36.

So we've got the argument for further consideration being given to the timetable for the initial paths and there are a variety of propositions advanced. Orion advocates that two steps for IMs, Vector wanted – well, there were a series of propositions: roll-over the 4A thresholds if the IMs are ready, or require the Commission to use IMs for the reset, but if they're not, have a short duration default path, or allow claw-back of over or under-recovery of revenue after the IMs are set, and MEUG had another position. So the Department agreed in part, so the first paragraph on the right-hand side as you'll see, the statement that is really echoed in their commentary to

Parliament on the report back about the tradeoffs, and then the second paragraph is provisionally made for claw-back, which is a new addition that they're introducing, and then they say, “use of the current reset for the first default path as proposed by MEUG would not be appropriate as there would be no IMs and it uses comparative benchmarking, which is problematic”.

Then if I could –

WILLIAM YOUNG J:
Sorry, that was intended to interrupt the process that was then underway with the Commission?

MR BROWN QC:
Yes. MEUG, of course, as it were, represents the consumer side, so in the appeals we’ve had MEUG as an appellant but also resisting the suppliers’ appeals in the energy area where Air New Zealand has served a similar function in the airports’ appeals.

Could I also, then, take you back, however, to row 29. This is where this interesting – this is on page 12, and this is what I refer to at paragraph 109 of our submissions, this is in the context of the “more guidance” argument in row 28 and the further matters as IMs in 29. I make the point that at this point in time of course the Department is actually supporting Vector’s proposal of more IMs, and it’s the sentence, the last sentence in the commentary to 29 that I’m focusing upon, so it says, the second bullet, “The methodologies for setting default price-quality paths include starting prices, rates of change, quality standards. However, this should not be a requirement for setting the first default paths for ELBs and gas pipelines in light of timeframe issues.” Now, I can’t take you further than the fact that it’s there, whether it’s referring, contemplating, only referring to that one year, deemed year or whether it’s referring to the first five years with the reset, but of course it became academic for the Department, because within a fortnight, of course, it had gone – it reversed its position and wasn’t advocating those IMs anyway. But to what extent it percolated through into the – to deal with the mismatch is a little bit, involves, I suspect, a degree of speculation, which is why we refer to this at paragraph 110 at the top of page 226, and we suggest that this is the genesis for the insertion of 54K(2) and 55F(3). They’re the provisions that even though the first provision says

you ”must” do it, the second one says you ”may” do it even though the IMs have not been determined.

Then 112, we say that if the reset power could be exercised – this is the 53P argument – if the 53P(3) power could be exercised, however unlikely, in the absence of determined IMs – that's the traditional reset – then it must follow that the same power could be exercised or re-exercised in a scenario where some but not all had been determined, that is, the very scenario which the plain reading of 54K(3) appears to envisage, and we say the legislative history throws some light on the development of 53P. You've got the original form when the Bill is introduced. You've got MED row 71, this is where – this is one we haven't looked at, this is on page 30 of the rows document under tab 2, and I draw attention to this because it was a proposition that was talking about the power to obtain information or use statutory powers to obtain information, and what the Department said was – and this is looking at (b) – that 53P(3)(b) should be clarified provided that it should be based on current or projected profitability and should exclude any recovery of excess profits, so this is where you see the constraints creeping in on the 53P(3) power. First of all we had the no benchmarking, that was in the original, and this is where this – what is subs (4) derives each of these steps growing in the Select Committee process and then lastly the Commerce Committee's recommendations at page 8, which I won't take you to but that is also part of the historical context.

So we say the reset for the starting price was to be forward-looking. There was to be no attempt to recover excess profits, but no concept of claw-back applied. But at the report at that stage, claw-back entered the picture, and if I could take you to the Select Committee report, this is the Select Committee report back covering the Bill under tab 5 of my learned friend's bundle. This is where you will see claw-back entering the picture. The top of page 9, it says in the second paragraph or the first full paragraph, it says, “As introduced, new section 53ZA” – now it became ZB – “requires the Commission to reconsider price-quality paths when the material change in the IMs occurs as a result of appeal. We recommend it be amended to require the Commission to reset paths and to apply claw-back of any over and under-recovery of revenue in any circumstances. The consequential definition of “claw-back” is provided for in new s 52CA” – that became 52D – “which specifies where the Commission requires a supplier” – etc etc – “and further consequential amendments are proposed in new s 53V.” So claw-back seemed to enter in relation to the provision dealing with appeals and IMs and then it carried on, and if you come then

under regulation of electric lines businesses, the first paragraph, “We recommend the addition of a new s 54J(a)” – this is, of course, 54K – “to allow the Commission to provide for a claw-back. If the application of an IM determined after 1 April would affect the price set in the default price-quality path.” So here we see the emergence of 54K(3), which wasn’t there before, and it’s crept in. When I say crept in, these concepts have come at the same time, claw-back, transition, and the rest of it you saw before in the discussion we had about the problems of the mismatch in the two times.

Curiously enough, over on page 12 the commentary in relation to the gas, which has at the bottom of page 12, the new s 55F. It contains no reference to the sister provision, that is to F(4) or the claw-back, but it was carried through into that.

So we pull this together at paragraph 116 and we saw, whereas the policy at the outset appears to have been very limited scope for re-opening a DPP, the introduction of the concept of claw-back was introduced to the post-date IM scenario and it appears that the introduction of that mid-period reset was an exception, together with the compensating process of claw-back, was the trade-off in favour of the early commencement of the new regime, and consequently we argue at 118 that it’s necessary for the – we recognise, as the statute does, it’s necessary for the new regime to take early effect in order for the CPPs to be there, hence the need for the transitional reset provision, and hence the Court, in construing the circumstances in which 54K(3) should be exercised, should not be regarding that power as being proscribed by whether an IM has been set for a 53P(3)(b) reset. Sorry to reel off all those letters, but that’s the reality of it.

Lastly on this, we refer to the different objectives, and the Court of Appeal noted this, the very different objectives of 53ZB in 54K, but we are also drawing attention to the different objectives of 53P and 54K. The latter is designed to revisit a previous roll-over of what will be the thresholds, what Justice Blanchard pointed out yesterday. They’re there by virtue, by dint of 54J and it’s desirable that they be – assuming that the (a) rather than the (b) route has been pursued – and this is designed to enable the Commission to revisit that rather than wait for the whole five year period to run and look at it in 2015. So our submission is captured in paragraph 120 and so we say the answer to issue 1C should be no.

Then I moved lastly to question 2. Question 2 is the second of the formal questions in your decision granting leave, and it's the focus on the wording somewhat equivalent to the sort of s 36 of the Commerce Act by reason only that, and it asks the question whether any transitional reset is, as it were, limited to change, only to the extent necessitated. Now, I never liked to be one to sort of argue on a technical or literal basis, so we were simply making the point here in 121 that it's certainly not the Commission's objective to achieve more than Parliament intended, but it's that particular wording "necessitated only to the extent" or "only to the extent necessitated" that's problematic because we contrast the appeal scenario where say an appeal – you've got an existing IM and an appeal is allowed and there's a change, so the review, the three member Court says no, the equity beta shouldn't have been 0.61, it should be 0.79.

Now, it's not difficult to take that orange segment out and plug in the new orange segment. That's specific. It's quite – it's a different kettle of fish, we say, when what you're moving from is a thresholds regime deemed DPP to one that has the first IM. You're not substituting something in an IM. You don't know what form it will be. The Commission has quite a degree of discretion about the form and content of an input methodology subject to such constraints, and the Judge in the first instance was very much focused on the specific effect. We say that in 124. His views on specific effect, indeed, the word "effect" is in bold in paragraph 150 of his judgment. I don't mean to be unduly critical, but the problem here in part arose from considering something completely in the abstract, and if I could take you to the High Court judgment, it's under tab 6 in volume 1 of the case, and this is paragraph 146.

The Judge starts the – at 91 you find the heading, "Reset under 54K," and discusses through to about 145, and then gets to 146. 145 has that last sentence with "specific effect": "There is the more general question of whether it is only by reference to the specific effect of one or more IMs that DPPs may be reset under 53ZB generally and 54K(3) in particular." So he seems to have regarded the section we're talking about as a more particular phenomenon of the 53ZB. Then in 146 he says, "The evidence produced to me by each of Vector and the Commission as to whether or not various IMs would have caused a material change" – which as your Honour Justice Young said involves a question of fact, if that applied – "was unclear. I have been unable myself to clarify it, therefore, I do not intend to endeavour to reach a finding on the specific factual matter. What I will do, however, is set out my views as to the extent of the reset allowed by s 54K(3)." And then the Judge proceeded to express some

views which we contended were obiter dicta in terms of what was going before the Court of Appeal, and the Court of Appeal, of course, expressed their own views on this as well. It does seem remarkable, however, that Vector's submissions at 6.24 appear to criticise the Court of Appeal for I think what they call is the same omission. It wasn't the job of the Court of Appeal to enter on a factual consideration of whether there was a material difference or not, but we capture the argument about the oranges and apples, if we can put it that way, in paragraph 126. We say that it is difficult simply to transpose the appeal scenario onto the transitional one, which is what we say, in 127, the High Court did. It identified 53ZB, said this is what that means, saw what it regarded as supposedly identical phraseology in 54K(3), although it isn't – in fact, it's a "may" rather than "must" – and then proceed to read the meaning of the one onto the other, an approach which Vector endorses in its submissions at 6.25A. But the identification of a specific effect in the transitional context from one regime to another is not so straightforward.

What we submit is that at the initial reset for EDBs, which was in 2009 – it had to be done four months ahead to take effect on 1 April 2010 – the Commission apprehended that 53P(1) and (3)(a) permitted a roll-over mode which could be revisited and replaced by a first, we say, reasoned reset once the IMs had been determined and published, that is, during the following nine months. That's, I think, how it's felt the nine month period arose. That happens to be from the period from the 1st of April, of course, to the end of the year.

It considered that that was the rationale for the introduction of 54K(3) and 55F(4), together with claw-back, rather than let the less desirable course of awaiting expiry of the five year regulatory period and it was supported in that view by lots of submitters, including Vector. We submit that Justice Clifford misunderstood the Commission's objective and Parliament's intention in the final sentence of his 150, because he said, well, it can't mean that, and his view was that supported by Vector – his view that my learned friends call a SPA methodology was required, and if you look at those paragraphs, they're very short paragraphs, the judgment, 93, 94, he says, well, he's identified 54 – 53ZB. He says in 150: "I take the same approach with 54K(3). That a similar approach was required is confirmed by the cross-reference in that section to s 53Z(b). Moreover, I think the words of 54K(3) direct the focus of a reset being to the subsequently published IM and the effect – that's in bold – it would have had on the 54K(1) price path" resulting in a materially different path etc.

In my view, if Parliament had intended that the Commission could, in effect, reset the price path by reference to more general considerations, the legislation would have said that. So that in 151: "That conclusion supports the view I've reached of the requirement that the Commission promulgate a SPA IM. That is, as 54K(3) only allows the 54K(1) price path to be re-opened by reference to subsequently published IMs, if the Commission didn't publish or didn't promulgate a SPA IM then it would not be entitled to reset in the manner anticipated by the Draft Electricity DPP Reset Paper". And hence Vector's argument in this Court that that is how it follows.

WILLIAM YOUNG J:
The Court of Appeal in allowing the appeal must have made a decision on this.

MR BROWN QC:
Yes, yes, they did. They –

WILLIAM YOUNG J:
It's not obiter any more.

MR BROWN QC:
No, no, I'm not saying that their view is obiter. I'm just saying that it all – the hare started running in that environment and we were the appellant in the Court of Appeal and we were a little uncertain as to whether we ought to be pursuing an appeal from an obiter matter, so the way I put it to the Court of Appeal was, well, we're here to deal with 52T(1) and incidentally, if I ever get to it, this view has been expressed about 54K(3) and I never really addressed that as a whole. I touched on it at various points in time, and when the decision came out, the Court of Appeal expressed some views on 54K(3) largely because the parties wanted it, and I think that's what the Court of Appeal say at 13. I think they say under tab 13, input methodology – certainly not criticising the Court of Appeal in that regard – they say, yes, 61: "As we've said, the Judge's observations about the operation of 54K(3) were obiter, however, both parties have invited us to express a view about the subsection's operation." Certainly the Commission did because it was left there having come to the High Court on review about 54K(3) and wondering which way it should jump now. So the Court of Appeal concluded that the Court's powers were – they said there wasn't a necessary tying of the hip between 53ZB and 54K, which of course was the thrust of the argument by Vector and is what the Judge has said, and –

WILLIAM YOUNG J:

Well, what Vector seems to say is, well, you have to have a very automatic process, so that one cannot reset under s 54K(3) unless objectively, and ignoring any subjective approach of the Commission, one can say that if these input methodologies had been available earlier they would have produced a particular result.

MR BROWN QC:

Well, we agree with that, we agree there's a trigger and that something has to follow. We're not saying that you wait for an IM and go, "ah, you know, we will, now we've got a cost of capital IM, we're going to revisit asset valuation." You have to envisage a situation where there might be a series of IMs, in my submission, being released over time, and Justice Arnold's decision postulated that the reason for the nine months might be for the Commission to wait for all of them and then do it all at once. So, we agree that if they came sequentially and the Commission decided to do a 54K(3) reset followed by another one followed by another one, you would think that the reset would be responsive to what the IM had done. It was simply the wording. We were simply saying this, that it isn't simply a matter of price. Referring to s 53P(8), I think it is, that says you can do alternative quality paths, we said, "we're not that constrained as price, we must be able to deal with in terms of rate of change as well", and, so that's why, when you look at our submissions, we actually say, and I'm sorry if it looks like we're playing with words, but we say in 132, "while it may be feasible to reset a price-quality path mid-period without adjusting quality standards, it's not feasible to do so without considering alternative rates of change," as you've seen by that chart I showed you about the unders and overs of the suppliers. But alternative rates of change are neither affected nor effected by any input methodology. It would be an odd result if on this, the very first post-IM reset, the Commission could not set alternative rates of change under 53P(8) as an alternative, in whole or in part, to reset starting prices. So we say that would flow in a downstream sense from the trigger but would not necessarily satisfy the only "to the extent necessitated" threshold.

So I'm sorry to be focusing on words, but we could have a, we could answer, as it were, "yes" to question 2, but it wouldn't be a proper answer. We say, "no", but if you'd framed it with, if the question had been framed with sufficient breadth to include the steps that might logically flow from the trigger, we'd agree, that's our point.

BLANCHARD J:

Well, bear in mind, Mr Brown, that those questions are not a case stated.

MR BROWN QC:

No, no. No, no.

BLANCHARD J:

They're merely to encourage counsel to argue a point.

MR BROWN QC:

Yes.

BLANCHARD J:

So we really don't need to get into the semantics of whether the answer is "yes" or "no", because the judgment, I would think, is highly unlikely to try and answer in that form.

MR BROWN QC:

No, we can only say though – but may I respectfully say those questions have been supremely helpful in generating that process of thinking, because the, certainly from our –

BLANCHARD J:

That'll be a comfort to Justice Young.

MR BROWN QC:

Yes, I'm very anxious that my – I suppose one would only say this, that one tries in submissions to be as responsive as possible to the issues that are raised and you necessarily zone in on the questions, but we agree that the questions serve a purpose, and that's why we said, we say "yes" to the spirit of the question, if that's not too – but we'd have to say "no" to the particular formulation. That –

WILLIAM YOUNG J:

I think the formulation may flow from para 66 of the Court of Appeal judgment.

MR BROWN QC:

Yes, it may, in fact. Anyway, that really captures the essence of what we have to say on those four matters. We capture it in, I think, in 134, we accept that a transitional mid-period reset is more limited than a five yearly reset because it's clearly linked to the new intervening IMs, but on the nature of the linkage, our submission is that the change that flows is not so constrained, as we think Vector might argue – I think they would say, you know, if they're talking about a SPA IM that's limited to price, that really highlights the point, their SPA IM is limited to price. The so-called "sharp end", removed from the other components. We say the reset is of the default price path. Three components, interactive, and when we look at the words in accordance with s 53P, which sit in s 54K(3), we say, that is the injunction that your – the injunction and also the prescription that is being required.

That really captures what we have to say, unless your Honours have any questions.

McGRATH J:

No. Thank you, Mr Brown.

MR BROWN QC:

Thank you, your Honour.

McGRATH J:

Mr Galbraith.

MR GALBRAITH QC:

I'd be grateful if the Court would permit us the indulgence of Mr Butler replying in 54K(3), which is a section I've managed to avoid so far, but we'll be brief on that.

Just as a preliminary point and I understand it's not controversial between us and the Commission. I'm not quite sure that the Court of Appeal saw it this way. Section 52T doesn't confine the range of input methodologies that could be set and the Commission has, in fact, set input methodologies that go beyond the particular ones identified in 52T, and that is important for a number of reasons.

Can I also make the other comment that really the Court hasn't been given any substantive reason why an input methodology setting out what we would term a "starting price adjustment methodology" hasn't been made by the Commission, other

than it was all too busy, that's really what it boils down to, and indeed that's all the Parliament was told. So despite my learned friend's reference to the officials' Committee Report or paper to the Select Committee, which suggested a couple of other reasons that might have made it less important to set up a default price path methodology, that wasn't what Parliament was told. And so, if we could just look for a moment at what Parliament was actually told, and that's in our bundle of authorities behind tab 5 in the report back from the Commerce Committee. On page 4, under the heading, "Input methodologies," the first thing that Parliament was told in the first paragraph was the, "we're going to introduce a new section, which becomes s 52T(2), so that input methodologies will be set out in sufficient detail to allow affected suppliers to reasonably estimate the impact on their businesses". So the first thing Parliament's told –

WILLIAM YOUNG J:
Sorry, I've actually got the wrong page here.

MR GALBRAITH QC:
It's tab 5, Sir, page 4, of our bundle of authorities.

WILLIAM YOUNG J:
Sorry, I actually had the respondent's ones.

MR GALBRAITH QC:
And under the heading, "Input methodology." So, the first thing Parliament's told, in a sense, "don't worry, we've introduced a new section which is going to make sure that our suppliers will know how they can reasonably estimate the impact on their business of these input methodologies." And the next paragraph is, "we did not agree with submitters who put forward a range of proposals for additional matters to be covered by input methodologies and use s 52S. Given that the Commission already faced a very large and demanding workload, we consider that additional requirements could put pressure on the input methodology process." So Parliament wasn't told that there was a proposal for a, what we now call a SPA default price path adjustment methodology, and that that had been first recommended by the officials and then, for whatever reason, not recommended. They were told there'd been a range of proposals because the Commission was going to be so jolly busy they hadn't proceeded to include this range of proposals in the Bill as it was reported

back. So Parliament never knew on what was reported back to it in the parliamentary material in what you've been taken to.

And then you'll see in the next paragraph the recommendation of changing the term "pricing principles" to "pricing methodologies" and adding a definition, and that's why it's not correct to submit, as was submitted, that "pricing principles", as it was in the Bill before, meant a – sorry, pricing principles, as it was in the Bill previously, were now confined by a definition that was being introduced to target it simply at prices being charged to affect the individual groups of consumers or whatever else. And so it's not subsumed within the "specification of price", it's been taken out and given a particular definition.

So, with respect, we do have a situation where, before this Court and before the other Courts, there's never been a reason put forward that Parliament was aware of, as to why there shouldn't be a SPA methodology, other than that the Commission says it would have been too busy. But Parliament, indeed, wasn't even told that about the SPA methodology, only about arranged proposals.

WILLIAM YOUNG J:
But how do know they weren't told about it?

MR GALBRAITH QC:
Well…

WILLIAM YOUNG J:
This is the report.

MR GALBRAITH QC:
This is the report.

WILLIAM YOUNG J:
I mean, presumably they had the submissions, the members of the –

MR GALBRAITH QC:
No, no.

WILLIAM YOUNG J:

Oh, yes, I see, the –

MR GALBRAITH QC:

No, no, no, Parliament, I'm talking about Parliament.

WILLIAM YOUNG J:

Sorry, right sorry.

MR GALBRAITH QC:

The Select Committee doesn't pass legislation –

McGRATH J:

Yes, yes.

WILLIAM YOUNG J:

No, okay, sorry, okay, I understand that, right

MR GALBRAITH QC:

– Parliament passes legislation, that's been my whole point.

McGRATH J:

Yes, no –

MR GALBRAITH QC:

It's the text and purpose –

McGRATH J:

– it goes back to the discussion we had yesterday.

MR GALBRAITH QC:

– of the Act. Yes.

WILLIAM YOUNG J:

Right, okay.

MR GALBRAITH QC:

Now the next thing I'd just like to take the Court to is, and my learned – sorry, in the Commission's submissions, their tab C, because that illustrates exactly what Vector is talking about, and I think that was confirmed in my friend's submissions. That if you take that tab C diagram and you put – going to back to what I said the other day about A, Bs and Cs you put – an A above the second column in from the left, which is the red boxes of the IMs, and you put a B above the columns with the mauve in and you put a C above the white columns, you've got exactly the point Vector is making, that you can't get from A to C without understanding B, it's just not possible. And behind the arrows in B – sorry, between A and B – there are a lot of methodologies. It's not a straight line that you come from the IM for asset valuation and you get to capital expenditure forecasts, there are steps along the way to get there. And unless you know what the steps along the way are to get there, you can't get there, and if you can't get to B you've got no chance at all of getting to C, it just won't happen, and I can illustrate it. These appendices or this appendix C and appendix A that the Commission put forward are derived from the June 2011 draft decisions paper which the Commission put out and which is reflected also, you might remember, in volume 1, tab 5 the hand-up to Justice Clifford in the High Court. And if you wouldn't mind just going to volume 1 for a moment, to tab 5, I can just give you a couple of illustrations. We'll need also volume 7.

So if you just go to tab 5 first of all, and I can just locate us. Tab 5 was the hand-up which the Commission, as it says on the first textual page of it, to identify or to answer his Honour's questions which are set out there. And you'll see on the page 35, paragraph 3.4, it says, "Key steps and assumptions. The current and projected profitability calculation involved the following key steps and assumptions," – you remember, that's what 53P requires, you've got to look at current and projected profitability. And then it sets out the various steps, which are effectively the mauve box steps. These are the mauve box steps in more detail, and you'll see, just looking at the very –

GLAZEBROOK J:

Is this 3.2.1 that you're referring to?

MR GALBRAITH QC:

3.4 and 3.5 now.

GLAZEBROOK J:

3.4 and 3.5, right.

MR GALBRAITH QC:

So if you look at 3.5 for example, from 3.4 on it's the whole series of steps, and these are effectively mauve box steps, and you'll see that they're referenced in italics. For example, in 3.5, the second line, the end of it, "July paper, footnote 43." Now the July paper is found in volume 7 behind tab 63. I'm only going to take you to just a couple of examples, but one can go through every one of these but – paragraph 3.11 talks about projected opex, data sources and approach, and it's a question her Honour Justice Glazebrook asked me the other day, and if we go across in tab 63 – I shouldn't have given you tab 63, I should have given you tab 68. Sorry, I've misled the Court, it's volume 9, not volume 7, and it's tab 68. I'm sorry about that. This is the July 2011 draft decisions paper. If we just take paragraph 3.11 of that hand-up, tab 5, for a moment, and go across to page 2232, you'll see here, "Opex input price growth," clause C46 and going on, and –

WILLIAM YOUNG J:

Sorry, I'm a page behind you. Which page?

MR GALBRAITH QC:

We're now, Sir, in tab 68 at page 2232.

WILLIAM YOUNG J:

22 – sorry?

MR GALBRAITH QC:

2232.

WILLIAM YOUNG J:

Thank you.

McGRATH J:

And you're back at paragraph 3.11 of the hand-up?

MR GALBRAITH QC:

3.11, just as an example. This is only an example, Sir, but looking at opex data. So what you see under this heading, "Opex input price growth," is an explanation of the data sources which the Commission are going to go to – well, which, yes, are going to go to and apply for estimating opex input price growth into one of the mauve boxes. So this is, in other words, this is a methodology which lies behind one of the arrows, that gets from the left-hand input methodology column into the right-hand or the middle box, mauve box. And you can flick through the pages and you'll see that every one of those arrows has got calculations like this through it. If you go across to 2237 you'll find, "Approach to project capex growth." And so, again, there's another methodology set out for how you get to that. Now, unless you know what's behind the arrows, as I said before, you can't get from A to B, and if you can't get from A to B then you can't get to C.

GLAZEBROOK J:

Can you explain why you don't know what's behind the arrows, when what will have occurred will – that this process will have occurred with consultation, there'll then be a 52P –

MR GALBRAITH QC:

Yes, there'll then be a determination, yes.

GLAZEBROOK J:

– determination, which presumably, even though I hadn't fully appreciated this, but it probably doesn't include the mauve matters –

MR GALBRAITH QC:

No.

GLAZEBROOK J:

– but it will refer back to the papers with the mauve matters in them, then once that's set, it's there for the five years and isn't that the certainty…

MR GALBRAITH QC:

Well –

GLAZEBROOK J:
So where's the uncertainty?

MR GALBRAITH QC:
Can I get to that?

GLAZEBROOK J:
Apart from the first period, I can understand.

MR GALBRAITH QC:
Can I get to that? Yes, your Honour's correct in the sense that the draft reasons or the reasons paper will come out with the determination. It mightn't be expressly cross-referenced, your Honour, but no quarrel. The reasons paper will come out with the determination. Can I come to the complication of that?

So what's the status of the reasons paper? I mean, is it – it's not an input methodology, it's not a determination. The determination is the white, the end result of the white.

GLAZEBROOK J:
Yes, but you can't change that determination, I think the Commission accepts that, except in accordance – except after that period, so it's set for that period. So you couldn't change any of those inputs in the mauve boxes without changing the determination. So even if it's not expressly referenced or even if it's not there, because the mauve boxes and the draft decision have given you whatever is in the determination, which can't be changed, then well, unless by some happy coincidence you could change current profitability, capital expenditure, asset valuation methodologies, and yet still get to the same numbers that are in the determination, which I would have thought was highly unlikely and, if you do, I wouldn't have thought that anyone would be particularly concerned about it.

MR GALBRAITH QC:
Well, there's a lot wrapped up in what your Honour's said.

GLAZEBROOK J:
I understand that.

MR GALBRAITH QC:

The first thing is the determination can be changed and they have been changed.

GLAZEBROOK J:

Well, yes, but only in accordance with exactly the same sort of – well, that seems to be the argument. Only in the later period, if an input methodology has been changed.

MR GALBRAITH QC:

No, that's not correct. The input methodology's – if your Honour would, if you go in volume 10 under tab 69…

GLAZEBROOK J:

Oh, well, or in accordance with the determination that sets out –

MR GALBRAITH QC:

Yes, sure, that's right –

GLAZEBROOK J:

– when you can –

MR GALBRAITH QC:

– yes.

GLAZEBROOK J:

– sorry.

MR GALBRAITH QC:

But you'll find that the determination here – behind tab 69, just the first page of it – shows you the amendments which have been made to it. So a determination can be amended and has been amended. Query whether you can amend the determination to amend the default price path, the actual numbers. That's a different issue.

GLAZEBROOK J:

So, and that was where it was coming to here?

MR GALBRAITH QC:

Yes, but the determination can be amended. But the status of the document has significant implications, of course, for your rights to appeal, because if it's an input methodology –

GLAZEBROOK J:

I absolutely accept that.

MR GALBRAITH QC:

Right, but I want to say something about it.

GLAZEBROOK J:

All right.

MR GALBRAITH QC:

Obviously, if it's simply, if it's not a determination itself, which it isn't, then you don't have a right to appeal the actual reasons paper. You can appeal the determination, and of course the determination will be supported by the reasons paper, so I can understand how you get to that, but you've only got an appeal on a matter of law. This reasons paper has nothing to do with matters of law, it's a reasons paper about why, on various merits – I've just taken you to a couple of the projected opex, projected capex – those aren't legal issues at all, and so you're precluded from the document, from appealing the substance of what determines the determination, by the fact that it's not included as an input methodology. You literally don't have an appeal that's worth a pie.

Now, if it was an input methodology, of course, then you've got a merits-based appeal. And it is about the merits, that's what it's about, and that's why I go back to – there's been no explanation from the Commission why these matters of substance that the mauve matters and what's behind the arrows shouldn't be tested and there shouldn't be an appeal as to whether there's a better, a materially better set of arrows or set of mauve boxes or whatever else there is that gets you from A to C. And it's interesting to look back, the Commission made much of the situation with customised price paths.

Now, if we just have a look at customised price paths in respect to what the Commission has done there, and we find that behind, I hope, tab 63, but I'm looking desperately for confirmation…

GLAZEBROOK J:

Tab 63 of the…

MR GALBRAITH QC:

Sorry, volume 7 –

GLAZEBROOK J:

Is that the orange one?

MR GALBRAITH QC:

The orange one, yes. And what we find with customised price paths, if we go across to page 1625, is there's an input methodology for customised price-quality paths. It sets out, first, the contents of a CPP application, and you'll remember in s 52T(1) something or other it actually says they have to do that as an input methodology. It also says that they, that the Commission should set an input methodology for the criteria to be applied. And if you go across to 1626, you'll see subpt 2, which is the Commission's assessment, the criteria, in 5.2.1. But it then goes on in subpt 3, starting at 1627, to set out what is in substance a SPA methodology. So it's been done for customised price paths, it wasn't required by the express wording of s 52T, which provided only for the, what had to be in an application and what the criteria had to be, but here's it's applied here. And that's why, when you go back to the Commission's appendix B, its chart appendix B, you find, as my learned friend took you to, you find in appendix B, as he rightly said, the yellow box, which is the mauve box in the DPP setting. It's the yellow box which the applicant for a customised price path has managed to fill in, because the applicant's been told, through the input methodology, what it's got to put into that, and that's how the Commission's going to determine it. So, it could be done for CPPs, but for the only reason that Parliament was told, and it wasn't told specifically, couldn't be done apparently for DPPs.

WILLIAM YOUNG J:

But –

MR GALBRAITH QC:

Yes, Sir.

WILLIAM YOUNG J:

– am I right in assuming that this is rather easy to describe, compared to describing the methodology for a DPP, because this is, as it were, the full –

MR GALBRAITH QC:

Building blocks.

WILLIAM YOUNG J:

– process, the full building blocks process? So that's simply a statement of, you know, a well understood methodology?

MR GALBRAITH QC:

Well, I'm probably not the person to give evidence about it, Sir, so that's why I'm hesitating. All I can say is that Ms Taylor, in her affidavit, deposed that she certainly believed that it was practicable for the Commission to have done it for DPP and on a principled basis that would have extended over a regulatory period. So I really have to be dependent on the evidence, Sir, than…

And it's going back to another point, a point that her Honour made to me. What the Commission also did, and quite properly, it set itself an input methodology for which it limited its ability to reopen a default price path, and you find that also in tab 63 on volume 7 at pages, I think it's 1623 and 1624, and so what you see there in 1623 is reconsideration of the default price-quality path – and my learned friend referred to this – where there's an error, incorrect data has been discovered, or if false or misleading information has been provided to it. And then across on page 1624, "When, after reconsidering a DPP, the Commission determines the DPP should be amended, the Commission may amend either or both the price path or the quality standards, subject to the rest of this clause. The Commission will not amend the price path more than is reasonably necessary to mitigate the effect of the error or the provision of false or misleading information on price or on quality." So the Commission certainly there saw that its powers to amend, or what was appropriate to amend, should only be what had been affected by the error or the false information that had been provided.

So, just going back –

GLAZEBROOK J:

Sorry, what was the point of that? Because the question I asked you was, why is there less certainty because it's not an IM? And here it would suggest there's not much less certainty, apart from the five year, seven year possibly, because in fact the only time you can reconsider a default price-quality path is, as has been determined under 52T(1)(c), (ii), I think it is, I think that's right, determination here, at page 1623.

MR GALBRAITH QC:

Yes, well, every step which makes it less of a constraint or lessens the continuity so they wreck your stability, or lessens the certainty or lessens the transparency, every – it may only be, each one might be, I won't say insignificant in themselves, but might if they were just stand-alone, not be so significant or contribute to the lack of confidence which the suppliers have when they come to determine whether they're going to make capital investments or not, which is the, was the principal introduction to the purpose statement, incentives to invest, and if one goes back through all the MED documentation, one sees that as the driving purpose. And it seems a little odd why the Commission wouldn't set the SPA methodology as an input methodology. I mean, there isn't any substantive reason other than, as I said before, that the Commission says, well, it was very busy at the time. But if it's not set the first time round, it's never set, so you never have an input methodology for your price adjustments on resets.

WILLIAM YOUNG J:

Can it not be set later? Can there not be –

MR GALBRAITH QC:

The Commission's view is that it can't, that's the Commission's view that they've expressed, and my learned friend expressed it to this Court also.

WILLIAM YOUNG J:

What, that all input methodologies had to be set by the 30th of December or not at all?

MR GALBRAITH QC:

Yes, that's the Commission's view on it, Sir. We may end up arguing something different, but that's certainly the Commission's position on it.

GLAZEBROOK J:

Well, I thought the Commission's position was specifically related to the starting price methodology, the determination or the input methodology determination that's being sought by Vector on the basis that it's not in accordance with the statutory scheme, in that the statutory scheme has the input methodologies and then how those input methodologies are put together. Is it the later determination process where you're setting the default price-quality path which can't be changed within the five year period except in respect of the very limited numbers here or in that first period or in respect of a successful appeal on input methodology under a ZB reconsideration?

MR GALBRAITH QC:

My understanding, and I've seen a letter from the Commission which certainly broadly says this is the Commission's position, is you can't now – they can't now create a new input methodology full stop, and that was the point my learned friend was making about, well, the justification that the Commission believed it had for commencing a SPA methodology which it almost got within a week of publishing was that his Honour Justice Clifford had sent the issue back to them to – for redress, and I think His honour Justice Young made the comment, well, perhaps the only way round that now is if one of the appeals to the High Court succeeds in relation to the input methodologies, but that certainly is my understanding of the Commission's position, that's the only route to get to a SPA methodology.

Now, I can just point out another issue with this idea that the SPA methodology is something which can be set in the context of a determination and a reasons paper? If one looks at 52P, which is the section which applies to determinations, you'll see – look at 52P(8), because 52P(8) provides what's the effect of a determination, and the effect of a determination is that each supplier to whom the determination relates must comply with the requirements imposed by the determination.

Now, if you wouldn't mind then looking at 52S, 52S says, "Every relevant input methodology relating to the supply of" – blah blah – "in all cases must be applied"– (b) – "in all cases, by every person entitled or required under this Act to recommend, decide, or determine whether or how the regulation should be applied to the goods or services or, the price or quality standards applying to the goods or services," in other words, 52S and input methodologies bind the Commission. That's what 52S is about. 52P determinations don't bind the Commission except to the extent that they are determinations by the Commission. Yet a SPA methodology, the mauve box, is

all about what the Commission does, not what the suppliers do. So it's inappropriate for a determination. It's only appropriate for a methodology because the Commission is meant to be bound by the input methodologies. The Commission should be bound by the arrows and the methodologies behind the arrows and the process which it's adopting to get from A to C but the supplier is not bound by that. A supplier doesn't, as my learned friend quite rightly said, in a default price path. It's not the supplier that that's directed to, that's directed to what the Commission does.

So it's –

GLAZEBROOK J:
Well, the Commission can't just go against its 52P determination.

MR GALBRAITH QC:
The Commission can –

GLAZEBROOK J:
The 52P determination is the determination that says what a DPP is, which is related to a particular supplier, and the particular supplier is entitled to rely on it.

MR GALBRAITH QC:
Yes, but the nature of the matters in the reasons paper and in the – behind the arrows, the methodology behind the arrows is not something which binds the supplier in any way. The supplier doesn't do those things. The Commission does those things. I think, with respect, a fair reading of 52S as against 52P(8) would suggest that methodologies which the Commission is going to adopt are methodologies that are – perhaps put it no more highly than this – most appropriately dealt with as input methodologies catered for under s 52S. They're not catered for under 52P, and there's no sign of that in 52P in my respectful submission.

There's also, and again your Honour Justice Glazebrook asked me about this, but we have input methodologies, as the Court knows, which are set for seven year periods. Of course they can be reviewed, but obviously the scheme of the Act is they're meant to go over from one regulatory period to another regulatory period, so that you do have some greater certainty coming forward that every five years you're not going to have a – the rules of the game change on you. That's the intent of the – or that's one of the intents of the new Pt 4. As soon as you remove the B part, the mauve box

part, and say that's something that the Commission can revisit every five years or four years, whenever it wants to, then the game is a new game, it's like saying they can change from bowling overarm to underarm because you can adjust the joining methodologies between the input methodologies and the determination, the price path that comes out the other end, in any number of ways, and I don't want to go through Ms Taylor's affidavit, but you know what she said about that. We already know that there have been three methodologies proposed by the Commission, all of which give different answers, and there's apparently a fourth one coming in November. So at least four different ways that the Commission itself believes that it's appropriate to get from A to C. Now, that's – if you have an input methodology then that's meant to be it for seven years subject to the limited rights of change which are contained in the Act.

If you go back to our table in our submissions between 7 and 8, you recall there we've set out in the right-hand column what's required in relation to input methodologies. It's a sophisticated set of statutory provisions to ensure that input methodologies aren't just – aren't readily changeable, have been derived in an appropriate way, and are limited in the ways that the Commission may adjust them. So you've got, as you know, 53ZB(1) if there's an appeal. You've got 54K(3) that my learned friend has been talking about. You've got the input methodology I took you to a moment ago about re-opening DPPs that the Commission has adopted in error or false information. Now, if one thinks about a SPA methodology or a methodology, the (b), the mauve box methodology, it fits comfortably into that pattern that if you had that as an input methodology then you would have a coherent basis going forward under which that methodology could only be changed if there was an appeal, we would say a merits-based appeal against it. If, in fact, there was a subsequent input methodology which was, had been adopted, and we're going back to the April 2010 date, of course, it would only apply to that situation. Then it could be amended under 54K(3) if there was an error or some false information came in, but the additional certainty that it would give to suppliers is very considerable, and that, with great respect, seems to be entirely appropriate and consistent with the purpose of Pt 4, both the purpose statement of 52A and with the purpose statement 52R for input methodologies, it's consistent. I mean, there's no discordant note at all, no dissonance at all in relation to that, which goes back to what I said before, that it's very difficult to see why the Commission has resisted so vigorously having an input methodology of this nature.

Just perhaps briefly on merits review, it is a little odd also that you recall – and I made the comment before – where the Court of Appeal said one reason for not having this as an input methodology is that they might make a mistake. Well, it seems extraordinary that one would prefer a process which can't be effectively appealed if there's a mistake as against a process where something can effectively be repealed – appealed, sorry – if there's a mistake. It's very difficult to see the logic of that approach.

When one goes back to – and I do just want to take you to the explanatory note briefly. If you go back to the explanatory note, a lot of weight was placed on this new merits appeal because it was new, didn't exist before and the explanatory note is to be found in how bundle of authorities, tab 3. I won't take you to every reference because it's getting late but just a couple. Behind our tab 3, pages 17 and 18, you'll see at the foot of page 17, under the heading, "Inadequate accountability arrangements. The Commission's regulatory decisions are subject to judicial review only. There is a general perception that the accountability regime for the Commission is weak. A judicial review applies to questions on law and process only and not the substance of a decision."

Now, on the Commission's argument, we're even worse off now in one sense, that you've only got an appeal on a matter of law, you haven't even – I mean, of course you can bring judicial review but this is even worse in a sense – but yes, I accept, I mean, you can still bring judicial review. So that was the reason for bringing in merits based reviews.

Page 7 of the explanatory note, you'll see there's a heading, "Merits review," and the explanation as to why and what. In the last paragraph under that heading, "The Government gave careful consideration to whether merits review should also be available on final decisions of the Commission applying to individual firms and decided to limit" – you'll see it – "appeals to points of law". So the white box, the C is, in my respectful submission, the final decisions which are made. B isn't the final decisions, B is how you're getting to the final decisions and that same theme, that merits review is meant to go everywhere but the final decisions, is consistent through the explanatory –

GLAZEBROOK J:
How could you appeal the final decisions if you couldn't appeal the earlier ones?

MR GALBRAITH QC:

Well you can under – but only in a matter of law your Honour, that's what's provided–

GLAZEBROOK J:

Well no, I understand that but why were you – if you weren't going to give an appeal – if you were going to give a general appeal right up to the last decision, why wouldn't you give a general appeal on the last decision because it's so dependent on the earlier decisions?

MR GALBRAITH QC:

The explanation given was that it might lead to gaining –

McGRATH J:

That's at page 7, isn't it?

MR GALBRAITH QC:

Yes, yes and you'll find also at page 29 there's a further discussion on the issue –

WILLIAM YOUNG J:

Sorry, what page?

MR GALBRAITH QC:

Page 29 your Honour.

McGRATH J:

Oh, that's the pros and cons.

MR GALBRAITH QC:

Yes and they say – and you can see the pros and cons there on page 28, 29 and then 29, about halfway down, there's a paragraph saying, "The case for having merits review of input methodologies before a decision on whether and how to regulate is made is stronger than for review at the end for decisions on the control terms." Now there they're talking about where you're considering whether you're going to regulate against a particular entity but they're saying, not on the control terms but along the way, yes. So the control terms are like the prices which ultimately get set and the Minister – and I won't take you to it but under – well, it's under tab 4 of our authorities at page 15158. Again, the Minister echoes the same

reasoning that the decision was made, not to extend the merits appeal to the final decisions but again, she used the term “final decisions”.

She refers to the serious risk of gaining and she says, “This is why we have provided for appeals on only points of law for final Commission decisions relating to specific firms.” That’s the ultimate determinations that she’s speaking of there –

McGRATH J:
It was certainly an advance on the previous position, wasn’t it?

MR GALBRAITH QC:
Oh yes, yes it was and this merits based appeal is – well, I think we’re all struggling with it a bit but it is certainly new and there’s no doubt about that and it ranges pretty widely.

In contrast, if one doesn’t have a SPA methodology as an IM, then those constraints which have been imposed on IMs don’t, of course, apply if it’s simply a reasons paper that’s reasons for a determination. I mean, why go to all that trouble to impose those constraints and then have an unconstrained, subject to 52Q, an unconstrained determination process with the limited rights for appeal that I’ve spoken of.

So you might have the world’s best IMs, cost of capital, fantastic IM and the world’s worst methodology for applying it and yet you can only challenge the methodology on an error of law. Again, with great respect, it doesn’t make a lot of sense and it certainly doesn’t advance the purpose of Pt 4, in our respectful submission.

Can I just ask the Court if – not now obviously – just to have a glance at the affidavits of Mr Mackenzie and Mr Carvell. It’s quite clear when one looks back at the August 2006 directive to the Commission that what the Government was concerned about and what, in our respectful submission, came through into Pt 4, was an attempt to have an effect in the real world. It was meant to have a real world effect that it was going to encourage these utilities to make actual investment decisions and Mr Mackenzie and Mr Carvell’s affidavits are, in my respectful submission, relevant to that.

There is an issue which his Honour Justice Young, in particular, has raised about how this appeal, that’s with the appeals which are before the High Court now in

relation to the input methodologies which have been promulgated. As you know, three more came out on the 28th of September. No doubt there will be appeals – well, I shouldn't say "no doubt", I haven't read them yet but there may well be appeals in relation to those also which the High Court will have to deal with. Certainly in respect of the existing ones and my learned friend indicated the nature of them, they're really not the – except for the WACC they're not the – core input methodologies which affect lines companies and gas companies that, at the moment, are before the High Court.

There is the argument in those that it would be materially better to have effectively a SPA methodology included in those methodologies so one could see how everything fitted together. Now I think my learned friend, very fairly on behalf of the Commission, indicated that the Commission's position will be that the High Court is precluded from considering that because of the decision of the Court of Appeal and if one looks for example, at paragraphs 54 and 55 of the Court of Appeal decision, they've said that s 52T(2) relates – that the "how" relates only to how you get to the WACC, or the cost of the asset valuation, or whatever it is that is specific to the actual IM which is being determined. In other words, it's a self-referencing "how".

If that remains after this appeal then we will argue against it of course but effectively, the ability of the High Court to decide that it would be materially better if the "how" actually explained "how" these interact between each other could well be cut off and so, at a minimum, the submission on behalf of Vector is that either this Court should determine that the "how" is, as we contend, it's a "how" sufficient to explain or to allow a supplier to understand what the effect of the IMs are going to be on their business and you've read – I've taken you to Ms Taylor's and Mr Carvell's and Mr Goodeve's affidavits which say that they can't on the basis that the – effectively the Court of Appeal have decided, they can't tell what the impact is going to be on their business without the "how" being an interacting "how".

So either Vector would ask that this Court say well, that the "how", to satisfy s 52T(2), the "how" has to go further than the Court of Appeal certainly have suggested or alternatively, of course, the alternative would be to say that this Court doesn't agree with the Court of Appeal determination, that matter should be left to the determination of the High Court on appeal in relation to the input methodologies which gets round the –

WILLIAM YOUNG J:

The Court of Appeal was only dealing with what must be in the input methodologies?

MR GALBRAITH QC:

Yes, yes but I suspect and – well I don't suspect, I mean, you've heard the Commission's submission –

WILLIAM YOUNG J:

Well we heard what Mr Brown said but the conclusion that this isn't required under s 52T(2) doesn't mean that it wouldn't be better if it were provided?

MR GALBRAITH QC:

I think the way the Court of Appeal has expressed it Sir, is more as an interpretation of what 52T –

WILLIAM YOUNG J:

What methodology is.

MR GALBRAITH QC:

Yes and so we would need – if it was going to remain clearly open before the High Court, we would need that to be clarified. Perhaps, just finally, to say that with all this effort which has gone into this issue and again, as I say, not clearly understanding what the Commission's position is in relation to this, other than the time constraint there was previously, Justice Clifford of course ordered that a SPA methodology be determined. As I've told you umpteen times, there was one ready to go less than a week before the Court of Appeal judgment came out.

That would have been, certainly on Vector's view, that would have been permitted by the terms of Pt 4. In other words, it wouldn't have been barred by the lapse of time and so were this Court to say that Justice Clifford, that was appropriate, then there is a SPA methodology which is due in November, which could become an IM and then that could be subject to merits review and, with great respect, it's very difficult to see what harm would be done and one can, with respect, also see that much good might come of it because one could then deal – the suppliers could deal with the substance of the methodology in a context which is appropriate for the purpose of Pt 4.

Now, my learned friend Mr Butler, may just have a couple of comments to make on 54K(3).

McGRATH J:
Thank you Mr Galbraith.

MR BUTLER:
Your Honours, I'll be very quick, it's been a long two days on a technical statute. My points will be direct ones to my learned friend but in terms of the s 54K issue. However, there's just one or two issues I do need to raise, just preliminary, that aren't – that perhaps might have been in my learned Mr Galbraith's part but I need to make them and it relates to issues having been raised for the first time in this Court. I think I was very clear and explicit yesterday that the issue, what I described as issue one, in terms of s 54K(3) and its proper interpretation –

McGRATH J:
I don't think you need reply on the timing matter. You heard what we said to Mr Brown.

MR BUTLER:
Indeed and so I just wanted to emphasise, I was very clear that that was being raised for the first time but there was an indication today from my learned friend that there were two further issues that were being raised in this Court for the first time and again, it's simply so that the Court doesn't get an impression that we're in the habit of raising multiple issues for the first time in this Court –

McGRATH J:
You're just confined to a reply on 54K. You don't need to get into wider matters.

MR BUTLER:
Thank you. So the issues that have been raised by my learned friend, the first one I want to deal with is his indication that we were dealing with different kettles of fish, as between s 54ZA – sorry, s 53ZA and s 54K. I know he took you, on many occasions, to the MED report. If your Honours did turn to that row 86, what you'll see is the characterisation of s 54K, was that they propose something that would be akin to the proposed revisions to s 53 – so what's now s 53ZB is akin to the proposed revisions

to s 53ZA. So for it is for that reason that I was drawing on and that we say, quite rightly his Honour drew upon, the language in s 53ZB and saw that as being perfectly translatable across, so as to speak, to the proper interpretation of s 54K because it's clear that if you look at the official support, the intention was to draw on the idea, the concepts in s 53 – what's now s 53ZB – and use those to inform the approach under s 54K. So they are not a different kettle of fish in my submission.

My learned friend made the point in his submissions to you, I think I recorded him accurately, in saying the identification of a specific effect at the transitional phase is not so easy as under an appeal and that was part of the point that I was trying to make when I was making my submission yesterday, that's exactly right. It is difficult to tell whether there would and it wouldn't be a materially different path that might be set. That's an input that you plug in at the stage when you decide whether you're doing option A or option B. There are advantages and disadvantages of either option but that's something which was known at the time to the Commission when it made a choice between option A and option B and precisely because the identification of the specific effects at the transitional phase is not so easy. That's what makes it difficult, in fact we say impossible, to determine whether there would or would not have been a materially different path set in the absence of a SPA methodology, that you can tell what the specific effects would be.

My learned friend indicated that he agreed that there is a trigger and so he went some part along the way in his submissions, in terms of saying well look, we're not trying to take more than what Parliament intended us to have, I think was the phrasing my learned friend used. There's an element of, if I might describe it in that way, of a bit of a shift in the Commission's position in that respect and, just for your Honours' benefit, the position as set out in the High Court where my learned friend didn't appear and in the Court of Appeal, are recorded in those judgments in the High Court at 142 and in the Court of Appeal at paragraph 62 and was recorded there that what the Commission's perspective was that, in effect, where the IMs had been set then a generic reset could be undertaken. In other words, it was open season in terms of resetting a DPP and those paragraphs, I think, will be helpful to you to indicate what the position was between the parties.

My learned friend also finally made reference to s 53P(8), as an indication, another reason why your Honours shouldn't be attracted to the interpretation of s 54K that's been advanced to you by Vector. With great respect, I don't see s 53P(8) helping

him at all, in fact quite the opposite. If you look at s 53P(8), key to being able to choose to go down an alternative rate of change for a particular supplier is that you consider it as necessary or desirable to minimise any undue financial hardship to the supplier. How can you know that without knowing what the specific effects are going to be? You can't and the whole point of the submissions that were made to you by my learned Mr Galbraith, not disagreed with at all by my learned friend Mr Brown, is that the current suite of IMs simply don't get you there.

So 53P(8) can only kick in, is my point, when you actually know what the specific effects are, you can only know what the specific effects are, you can only make a judgment about whether it is going to have an undue financial hardship if you can actually say with some degree of specificity what those financial consequences are. So in my submission, it helps at my case and certainly doesn't help his. Those are the points I have to make in reply.

McGRATH J:
Thank you Mr Butler.

MR BUTLER:
As your Honours please, thank you.

McGRATH J:
We'll reserve our decision. All counsel, including those who were preparing the written submissions have worked under some pressure in this case and we're very grateful indeed for the assistance we've had. The judgment is reserved.

COURT ADJOURNS: 3.58 PM