IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-268
CIV-2011-485-269
[2014] NZHC 1765

UNDER	the Commerce Act 1986
IN THE MATTER	of an intended appeal to the Court of Appeal under s 52Z(6) and s 97(1) of the Act
BETWEEN	THE MAJOR ELECTRICITY USERS' GROUP INC Applicant
AND	COMMERCE COMMISSION, VECTOR LIMITED, POWERCO LIMITED, TRANSPOWER NEW ZEALAND LIMITED and WELLINGTON ELECTRICITY LINES LIMITED Respondents

Hearing:	6 June 2014
Court:	Clifford J, Mr R Davey (lay member) and Mr R Shogren (lay member)
Counsel:	N Pender and S Franks for The Major Electricity Users' Group Inc. V Casey and D Laurenson for the Commerce Commission A Butler, C Marks and N Lambie for Vector Limited V L Heine and B A Davies for Powerco Limited and Transpower New Zealand Limited No appearance for Wellington Electricity Lines Limited (appearance excused)
Judgment:	28 July 2014

JUDGMENT OF THE COURT

Introduction

[1] This is an application by the Major Electricity Users' Group Inc (MEUG) for leave to appeal against the decision of this Court in *Wellington International Airport Ltd v Commerce Commission* (*WIAL v Commerce Commission*).[1] This Court, amongst other things, dismissed MEUG's appeal pursuant to s 52Z of the Commerce Act 1986 against the decision of the Commerce Commission (the Commission) that the cost of capital input methodologies (IMs) for the electricity distribution businesses (EDBs)[2] and Transpower Limited (Transpower)[3] should be determined by reference to the Commission's 75th percentile estimate of the weighted average cost of capital (WACC) range. MEUG's argument that the 50th percentile estimate should be used, or alternatively that the 75th percentile should be applied only to new investment was not accepted.

[2] MEUG also asks this Court to make an order under s 97(3) of the Commerce Act that, if leave to appeal is granted and MEUG is unsuccessful, costs in the Court of Appeal should only be awarded against MEUG if it pursues its appeal unreasonably.

[3] The respondents, Vector Limited (Vector), Powerco Limited (Powerco) and Transpower oppose us granting MEUG leave to appeal. They also oppose the costs order MEUG seeks. Wellington Electricity Lines Limited (WELL) does not actively oppose MEUG's leave application but wishes to preserve its position as a respondent if MEUG's application is granted.

[4] Vector applied for leave to cross-appeal. In circumstances to which we refer later, Vector confirmed that it no longer pursued that application.

[5] A question of the formal status of Vector, Powerco, Transpower and WELL is raised. MEUG originally cited only the Commerce Commission as the respondent to its intended appeal. Vector, Powerco, Transpower and WELL subsequently applied

---

1 *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289.

2 *Commerce Act (Electricity Distribution Services Input Methodologies) Determination 2010 Decision 710*, 22 December 2010.

3 *Commerce Act (Transpower Input Methodologies) Determination 2010 Decision 713*, 22 December 2010.

to be joined as respondents, rather than as interested parties on which basis MEUG had acknowledged they were entitled to be heard on its appeal. MEUG no longer opposes the grant of respondent status to Vector, Powerco, Transpower and WELL, but proposes limitations on their participation. It proposes this issue should be left to the Court of Appeal. Vector, Powerco, Transpower and WELL oppose those limitations, and say that we should deal with this matter.

[6] The Commerce Commission takes a neutral position on all issues, and abides the outcome of our decision.

[7] The constitution of the High Court to hear this leave application is the same as for the hearing of the substantive s 52Z appeals. The background to that is set out in Clifford J's minute of 26 March 2014. As there recorded, Clifford J was of the preliminary view that the participation of lay members in the leave application would be appropriate. This was because the application raised the question of the proper characterisation of the Court's 75th percentile decision: was it a decision capable of being wrong in law or was it the decision of an expert tribunal in an area of its expertise? Justice Clifford invited any party who objected to that approach to file a memorandum. Silence would evidence concurrence. No memoranda were filed, and the leave application hearing proceeded accordingly.

Factual background

The cost of capital IMs

[8] IMs are the rules pursuant to which the Commission determines the parameters of two formulas (building block allowable revenue (BBAR) and return on investment (ROI)) that are central to price regulation under Part 4 of the Commerce Act.

[9] Cost of capital is, both directly and indirectly, a central element of both of those formulas. In broad terms, the cost of capital sets the allowed rate of return for Part 4 regulation. The cost of capital cannot be directly observed, but must be estimated. The process of estimation produces a range of outcomes. The

Commission determined that in calculating the cost of capital it would, in the case of Transpower and the EDBs, use the 75th percentile point of that range.

[10] In an affidavit of 13 February 2014, Mr Ralph Matthes – MEUG's executive director – deposed as to the financial significance between the Commission's 75th percentile approach and MEUG's 50th percentile approach. Mr Matthes' affidavit evidence was that for all customers of regulated electricity and gas line businesses the prospective difference in WACC over the five years between 2015-2020 was in the order of $770 million, and the retrospective difference over the five years between 2010-2015 was in the order of $500 million, a combined difference of in excess of $1 billion. For MEUG's members themselves, Mr Matthes estimated those amounts to be $25-$30 million, and $30-$40 million respectively, a combined difference of $55-$70 million.

[11] The Commission expressed no view on the accuracy of those figures, but the EDB respondents and Transpower did express some doubts. Be that as it may, the Commission's approach to WACC is of fundamental significance to Part 4 regulation and, however calculated, the numbers involved are very large.

The decision MEUG would appeal

[12] Central to MEUG's application for leave is its characterisation of the nature of the decision we reached regarding the Commission's choice of the 75th percentile in the cost of capital IMs for the EDBs and Transpower. We therefore consider it necessary to appropriately summarise our decision.[4] We now do so.

[13] We first assessed the Commission's reasons for its decision. We summarised those reasons as follows:[5]

> (a) The cost of capital cannot be directly observed, but must be estimated. Estimates are subject to error. The Commission needed to apply judgement to dealing with such error.
>
> (b) It cannot be known whether an estimate is in error or not but, using statistical methods, a confidence level can be assigned to how likely

---

4 *WIAL v Commerce Commission*, above n 1, at Pt 6.11 and at [1395]– [1397] and [1422]–[1487] in particular.

5 *WIAL v Commerce Commission*, above n 1, at [1395].

it is that the true value of the WACC is above or below a particular value. For example, if standard errors are correctly calculated, there is a three-in-four chance that the 75th percentile estimate exceeds the true value of the WACC, and a one-in-four chance that the 75th percentile estimate is below the true value of the WACC.

(c) The Commission considered that the social costs of underestimating the WACC outweigh the social costs of overestimating it.

[14] In terms of its estimate of the relevant social costs of under-estimating and over-estimating the WACC, the Commission acknowledged that where there was potentially a trade-off between dynamic efficiency (incentives to invest) and static allocative efficiency (higher short-term pricing), the Commission would always favour outcomes that promoted dynamic efficiency.[6] That was, in our view, an explicit exercise of judgement regarding the elements of the s 52A purpose set out in s 52A(1)(a) and (d). Incentives to invest and innovate were given greater weight than limiting suppliers' ability to extract excessive profits.

[15] We noted that we had not been persuaded that individual elements of the WACC calculation were inappropriate. The question on appeal therefore was whether, in terms of s 52Z(4), the approach advocated by MEUG of taking the 50th percentile estimate or the 75th percentile estimate for new investment only would be materially better in meeting the purpose of Part 4, the purpose in s 52R or both, compared to the Commission's 75th percentile approach. We reasoned:[7]

(a) The Commission's approach of using the 75th percentile involved the likelihood that suppliers would earn excess returns. If this feature of those IMs continued into future IMs, the likelihood of excess returns would be permanent.

(b) That would clearly be at odds with the s 52A(1)(d) purpose of limiting the ability of regulated suppliers to extract excessive profits. The Commission said as much in its reasons papers.

(c) The question was whether that result – a likelihood that suppliers would earn excess returns – was justified by fear of failure to achieve

6 At [1396].
7 At [1460]–[1467].

> the s 52A(1)(a) outcome of providing regulated suppliers with incentives to invest and innovate. We noted that no supporting analysis for that underlying proposition was provided by the Commission nor, to any material extent, by submitters during the Commission's extensive consultation process.

[16] We then observed:[8]

> In the light of the absence of supporting material for the 75th percentile approach – and more fundamentally, beliefs about the asymmetric social costs – the *Telstra* case cited by MEUG is of some interest. In that decision, the Australian Competition Tribunal refused an adjustment to recognise asymmetric error costs. The relevant passage is as follows:[9]
>
> > We accept that it is possible that there may be asymmetric consequences associated with setting a WACC too high or too low. However, it is not clear to us that the asymmetry would always imply that overestimation of the WACC led to a lesser social cost than underestimation of the WACC. The nature of the asymmetric consequences of incorrectly setting a WACC is likely to depend on the circumstances of a given matter that may be before the Tribunal. Telstra and Professor Bowman submitted that the long-term social costs of underestimating the WACC would be greater than the long-term social costs of overestimating it in this particular instance, largely because in circumstances where the WACC was set too low, there was a risk that this would lead to the cessation of services, or a failure to develop services at a socially desirable rate. In order to convince us of this submission, however, it was incumbent upon Telstra to provide evidence that these circumstances actually existed or would exist in relation to the ULLS. Professor Bowman assumed that they did, but he did not provide any evidence or support for the proposition that this was, or would be, the case.

[17] We went on to say:[10]

> In the light of the above discussion, we have some sympathy with MEUG's submission that the Commission's approach to the asymmetric costs of over and underestimating the WACC lacks a solid basis. Nevertheless, it must be said that there was strong support for it, including from the Commission's Experts.
>
> In the absence of empirical evidence before us, some tentative in-principle arguments counter to the Commission's reasoning may be ventured.

[18] It is those "tentative in-principle arguments" on which MEUG now relies to say we erred in law in not allowing its appeal. MEUG argues that, given that

---

8 *WIAL v Commerce Commission*, above n 1, at [1468].
9 *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [449].
10 *WIAL v Commerce Commission*, above n 1, at [1470] and [1471].

expression of views by us, we should, as a matter of law and logic, have allowed MEUG's appeal.

[19] Those "tentative in-principle arguments" can be summarised as follows:[11]

(a) First, the expectation of earning (only) a normal return on new investment ought to be an attractive proposition for a regulated supplier.

(b) Secondly, it is far from obvious that higher than normal expected returns would stimulate greater efficiency of any kind. If dynamic efficiencies were, as the Commission believed, most important, how were higher expected returns supposed to stimulate them?

(c) Thirdly, the outputs of regulated suppliers were inputs to numerous – probably all – other sectors of the economy, as well as being used by final consumers. If the prices paid by user industries were higher than the resource cost of producing the outputs (viz, electricity and gas transmission and distribution), then inefficiency would be promulgated throughout the economy.

(d) At the least, the inter-sectoral effects ought to be considered, and if possible estimated. This had not been done in the present regulatory processes.

(e) Nor was overseas practice suggestive that such an approach had found more than narrow favour, since the only examples from the numerous regulatory decisions made every year were two relating to United Kingdom airports.

(f) Applying the 75th percentile estimate to the initial regulatory asset base (RAB) was unlikely to be necessary to promote incentives to invest and innovate. The idea that greater revenues produced by

[11] At [1472]–[1480].

> higher allowed earning on past investments (ie on the initial RAB) provided the wherewithal for more future investment was contrary to rational investment choice.

[20] We then reflected on the in-principle objections we had just recorded. We observed that there was a lack of empirical support for those propositions, just as there was for the Commission's approach. We acknowledged the importance, in the regulatory history, of incentives to invest. We noted that the onus was on MEUG to persuade us that applying a mid-point WACC estimate would lead to a materially better IM.[12] But that proposition lacked positive evidential support. We therefore concluded that we were not satisfied that the IM amended as MEUG proposed would be materially better, in terms of s 52Z(4). We then observed:

> [1486] In reaching this decision not to amend the IM in respect of the use of the 75th percentile for DPP/CPP regulation, we are mindful that the IMs will be reviewed. At that time, we would expect that our scepticism about using a WACC substantially higher than the mid-point, as expressed above, will be considered by the Commission. We would expect that consideration to include analysis – if practicable – of the type proposed by MEUG. We would also expect the Commission to consider MEUG's two-tier proposal in light of our observations. We acknowledge that further analysis and experience may support the Commission's original position. But they may not. The following passage from the *Telstra* case is pertinent:[13]
>
> > … there exists as a matter of theory the potential for asymmetrical consequences should the WACC be set too low or too high. Which of these consequences will carry with it the greatest social damage is not a matter solely for theory, however, but for robust empirical examination, well-guided by theory, of the actual facts of any particular case.

Subsequent events

[21] The Commission is currently consulting, in a direct response to our judgment, on the cost of capital IMs. On 20 February 2014 the Commission published a consultation document entitled "Invitation to have your say on whether the Commerce Commission should review or amend the cost of capital input methodologies". Submissions in response to that document were due on 13 March 2014 and, as we understand matters, a decision is due shortly as to whether, and if so

---

12 At [1483].

13 *Telstra Corporation Ltd (No 3)*, above n 9, at [457].

to what extent, there should be amendments to the cost of capital IMs relating to the use or otherwise of the 75th percentile for the determination of cost of capital.

Leave to appeal – statutory provisions

[22] Section 91 of the Commerce Act provides generally for appeals to this Court against decisions (determinations) of the Commission. Such appeals are by way of rehearing. Section 91(1)(b) expressly excludes appeals against IM determinations from the s 91 right of appeal.

[23] Section 52Z of the Commerce Act provides for appeals against IM determinations by the Commission to a specially constituted High Court. Section 52Z appeals are also by way of rehearing, albeit explicitly on the basis of a closed record.[14] It was pursuant to that section that MEUG appealed the Commission's cost of capital IMs, and we determined its appeal. Subsections 52Z(3), (4) and (5) specify the options available to the High Court when determining such appeals, the threshold for appellate intervention, and provide for the Commission to seek clarification from the High Court:

> (3) In determining an appeal against an input methodology determination, the court may do any of the following:
>
> (a) decline the appeal and confirm the input methodology set out in the determination:
>
> (b) allow the appeal by—
>
> (i) amending the input methodology; or
>
> (ii) revoking the input methodology and substituting a new one; or
>
> (iii) referring the input methodology determination back to the Commission with directions as to the particular matters that require amendment.
>
> (4) The court may only exercise its powers under subsection (3)(b) if it is satisfied that the amended or substituted input methodology is (or will be, in the case of subsection (3)(b)(iii)) materially better in meeting the purpose of this Part, the purpose in section 52R, or both.

[14] Section 52ZA(2) reads "The appeal must be by way of rehearing and must be conducted solely on the basis of the documentary information and views that were before the Commission when it made its determination, and no party may introduce any new material during the appeal."

(5) If the court allows an appeal, the Commission may seek clarification from the court on any matter for the purpose of implementing the court's decision.

[24] Those provisions of s 52Z give the High Court, on appeals against IM determinations, a more limited role than it has under s 91. This can be seen by comparing those provisions with ss 93 and 94 of the Commerce Act, which provide as follows:

93 Determination of appeals

In determining an appeal under section 91(1), the court may do any of the following:

(a) confirm, modify, or reverse the determination or any part of it:

(b) exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the appeal relates.

94 Court may refer appeals back for reconsideration

(1) Notwithstanding anything in section 93, the court may, in any case, instead of determining any appeal under that section, direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(2) In giving any direction under this section, the court shall—

(a) advise the Commission of its reasons for doing so; and

(b) give to the Commission such directions as it thinks just concerning the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(3) In reconsidering the matter so referred back, the Commission shall have regard to the court's reasons for giving a direction under subsection (1), and the Court's directions under subsection (2).

[25] Section 52Z(6) itself provides for appeals to the Court of Appeal against decisions of this Court on s 52Z IM appeals:

(6) There is a right of appeal under section 97 to the Court of Appeal from any decision or order of the High Court under this section on a point of law only.

[26] Section 97 of the Commerce Act provides generally for appeals against decisions of this Court to the Court of Appeal. It reads:

Appeal to Court of Appeal in certain cases

(1) Notwithstanding anything in any enactment, any party to any appeal before the High Court against any determination of the Commission who is dissatisfied with any decision or order of the court may, with the leave of the court or of the Court of Appeal, appeal to the Court of Appeal; and section 66 of the Judicature Act 1908 shall apply to any such appeal.

(2) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made shall have regard to the following matters:

(a) whether any question of law or general principle is involved:

(b) the importance of the issues to the parties:

(c) the amount of money in issue:

(d) such other matters as in the particular circumstances the Court thinks fit.

(3) The court granting leave under this section may in its discretion impose such conditions as it thinks fit, whether as to costs or otherwise.

(4) *[Repealed]*

(5) An appeal to the Court of Appeal under this section may be made against either of the following only on a point of law:

(a) a decision or order of the High Court under section 52Z:

(b) a decision or order of the High Court on an appeal under section 91(1) or (1B) against a determination of the Commission made under section 52P.

Does MEUG need leave to appeal our decision?

[27] Notwithstanding that this is an application for leave to appeal, MEUG first argued that s 52Z(6) provided a right of appeal on a point of law. That is, leave was not required, as the phrase "there is a right of appeal" overrode or dispatched with the requirement in s 97(1) itself for leave to be obtained. We deal with that issue first, and then with what MEUG described as its "out of an abundance of caution" application for leave.

[28] We think this aspect of MEUG's argument can, with respect, be dealt with briefly.

[29] Section 97 of the Commerce Act does not limit appeals generally from the High Court to the Court of Appeal to questions of law. Rather, leave is required, and one of the relevant statutory considerations is whether any question of law or general principle is involved. But s 97(5) provides:

> **97 Appeal to Court of Appeal in certain cases**
>
> …
>
> (5) An appeal to the Court of Appeal under this section may be made against either of the following only on a point of law:
>
> (a) a decision or order of the High Court under section 52Z:
>
> (b) a decision or order of the High Court on an appeal under section 91(1) or (1B) against a determination of the Commission made under section 52P.

[30] Thus, in the case of appeals under s 52Z, in addition to leave being required under s 97(1), appeals are limited to those involving questions of law only.

[31] Justice Clifford in *Transpower Ltd v Commerce Commission* had occasion to review the structure of the rights of appeal provided by Part 4 as regards IM determinations.[15] Although complex, those statutory provisions indicate a clear legislative intention that, relative to general s 91 appeals, s 52Z appeals, although conducted on the merits, are more constrained. That consideration, together with the clear words of ss 52Z(6) and 97(1), answer MEUG's point.

[32] The right of appeal under s 97, referred to in s 52Z(6), is for an appeal with leave. We acknowledge there may be some duplication between ss 52Z(6) and 97(1) and (5). That is, on the basis that s 97(1) provides a right of appeal, with leave, to the Court of Appeal against any decision of the High Court considering an appeal against a determination of the Commission, it was not necessary for s 52Z(6) to also separately provide for that right of appeal. But we do not consider that duplication leads sensibly or as a matter of statutory interpretation to the conclusion that leave is not required under s 52Z(6). Rather, in our view that duplication, such as it is, reflects the complexity of the statutory provisions themselves in the legislative

---

[15] *Transpower Ltd v Commerce Commission* HC Wellington CIV-2011-485-1032, 4 November 2011.

scheme which gave rise to merits appeals against IM determinations. Section 52Z(6) does not create a separate, stand-alone right of appeal. Rather, it cross-references the s 97(1) right of appeal which requires leave. Section 97(5) limits that right of appeal to one involving a point of law only.

[33] In our view, the legislative scheme that leave is required is clear and we dismiss MEUG's argument to the contrary.

[34] We therefore now consider the basis upon which MEUG seeks leave.

MEUG's leave application

[35] As MEUG submitted, Cooke P noted in *Fisher & Paykel Ltd v Commerce Commission* that s 97(1) was "manifestly intended to confer on the Court a wide discretion in determining whether to grant leave to appeal".[16] As MEUG also noted, that liberal interpretation is qualified in this case by the requirement under ss 52Z(6) and 97(5) that appeals to the Court of Appeal against decisions under s 52Z be restricted to points of law only. Whether a point of law is involved in MEUG's proposed appeal is, therefore, the first question.

[36] With reference to the criteria found in s 97(2), if a point of law is involved the question then becomes whether leave should be granted. To that extent, those criteria, as relevant here, largely duplicate the criteria that have been enunciated in terms of the separate leave requirement found in s 67 of the Judicature Act 1908.

[37] Those principles were stated by the Court of Appeal (in relation to identical provisions in s 18A of the Land Valuation Proceedings Act 1948) in *Chief Executive of Land Information New Zealand v Luke*:[17]

> (a) The four criteria must be evaluated as a whole: "Not every question of law which is important to one of the parties and which involves a lot of money should be given leave:"[18]

---

16 *Fisher & Paykel Ltd v Commerce Commission* [1991] 1 NZLR 569 (CA) at 572.
17 *Chief Executive of Land Information New Zealand v Luke* [2008] NZCA 43.
18 At [17].

(b) Regard must be had to the Court of Appeal's function in relation to second appeals. The Court of Appeal adopted the test for second appeals from *Waller v Hider*:[19]

> The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal. …
>
> … The scarce time and resources of the High Court and of this Court are not to be wasted, nor additional expense for an unsuccessful client incurred without realistic hope of benefit.
>
> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

(c) The general principles from *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*,[20] "relating as they do to the fundamental role of this Court and the need for proportionality in civil litigation" must underlie any leave decision.[21]

[38] We therefore first assess whether MEUG's intended appeal is one that raises points of law only. We will then consider the more general criteria found in s 97(2).

MEUG's identified errors of law

[39] MEUG says that, given the views we expressed and which we characterised as "tentative in-principle arguments", we:

(a) failed to discharge our duty by deciding to defer action where proactivity was required to achieve the purpose of Part 4 and/or the purpose in s 52R of the Act; and

---

19 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413 (citing *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346-347).

20 *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591.

21 *Chief Executive of Land Information New Zealand v Luke*, above n 17, at [18].

(b) erred in applying the wrong legal test under s 52Z(4) of the Act and/or misconstruing the statutory phrase "materially better in meeting the purpose of this part, the purpose in s 52R or both".

[40] We failed and erred when we:

(a) decided not to amend the IMs by substituting the 50th percentile (mid-point) of the WACC range in place of the 75th percentile for price-quality regulation; and/or

(b) decided not to amend the IMs by applying the 75th percentile of the WACC only to new investment price-quality regulation; and/or

(c) decided not to refer the IMs back to the Commission with directions to substitute the 50th percentile (mid-point) of the WACC range in place of the 75th percentile for price-quality regulation; and/or

(d) decided not to refer the IMs back to the Commission with directions to apply the 75th percentile of the WACC range only to new investment for price-quality regulation; and/or

(e) decided not to refer the IMs back to the Commission for further consideration and substantive decision-making involving consultation with interested parties.

[41] In its notice of application for leave to appeal MEUG particularised those errors of law in the following ways.

Failure to discharge duty

The Court failed to discharge its duty by deferring action where proactivity was required to achieve the purpose of Part 4 and/or the purpose in s 52R of the Act.

Particulars

(i) The Court's role under s 52Z is as an expert delegated rule-maker in an iterative forward-looking legislative process where the long-term interests of consumers are paramount.

(ii) The Court's responsibility is to remedy an identified error or improve an IM if the change would be materially better at meeting the legislative purposes under Part 4 or in s 52R than the status quo.

(iii) The Court's function is triggered by an appeal brought under s 52Z of the Act, but is not an adjudication between parties with competing rights.

(iv) Due to the inter-relationship between IMs and the setting of price-quality paths under Part 4, it was foreseeable that consumers would be charged excessive prices for up to 10 years unless the Court exercised the powers under s 52Z(3)(b) of the Act.

(v) Instead of exercising its powers under s 52Z(3)(b), the Court expressed an expectation that its scepticism about using a WACC substantially higher than the midpoint would be considered by the Commission in a review of the IMs.

(vi) The Court erred in failing itself to remedy an identified error or improve the IM in a way which was materially better at meeting the legislative purposes under Part 4 or in s 52R than the status quo.

(vii) The Court erred in applying an onus or threshold test, as if the proceeding was an adjudication between parties with competing rights.

(viii) The Court erred in treating the parties' performance as determinative and failing to discharge the duty of a rulemaking body to seek the best rule it can, irrespective of deficiencies in the information available.

(ix) By criticising the Commission's selection of the 75th percentile without exercising its powers under s 52Z(3)(b) of the Act, the Court has, contrary to s 52R of the Act, created uncertainty in a significant aspect of the cost of capital IM.

Applied wrong legal test

The Court erred in applying the wrong legal test under s 52Z(4) of the Act and/or misconstruing the statutory phrase "*materially better in meeting the purpose of this Part, the purpose in section 52R, or both*" by:

(i) applying an onus or threshold test, as if the proceeding was an adjudication between parties with competing rights and/or requiring the appellant to meet too high a standard of proof;

(ii) having been satisfied that the Commission's departure from the midpoint WACC was supported neither by general economic principle nor by empirical evidence, declining to exercise its powers under s 52Z(3)(b) of the Act;

(iii) in the alternative to (ii), having been satisfied that applying the 75th percentile estimate to sunk assets was supported neither by general economic principle nor by empirical evidence, declining to exercise its powers under s 52Z(3)(b) of the Act.

> The Court erred in making the Findings but then declining to exercise its powers under s 52Z(3)(b) of the Act in order to limit the acknowledged ability of regulated suppliers to extract excessive returns.
>
> The Court erred by inferring or reinforcing a default bias in favour of suppliers that is inconsistent with the legislative intention.
>
> The Court erred in declining to exercise its power under s 52Z(b)(iii) of the Act to refer an IM determination back to the Commission with directions as to the particular matters that require amendment, by:
>
> (i) too narrowly construing a broad discretion; and/or
>
> (ii) fettering its powers contrary to the legislative intention.

[42] In argument before us, MEUG explained further that the relief it would seek on appeal would be an order requiring the Commission to carry out the exercise of reviewing the cost of capital IMs that the Commission currently has underway. The point here is that by so directing the Commission, the results of that review would be incorporated into, and require, the recalculation of the existing price paths that apply to Transpower and the EDBs. Under the Commission's current approach, even if it reaches the outcome MEUG argues for (calculation of WACC at the 50th percentile of the WACC range), no adjustment to current price paths will be required, and any adjustments will only take effect in the future.

[43] In making that argument, MEUG also advanced the proposition that it was not sufficient for us to have decided to dismiss MEUG's appeal: s 52Z(3)(a) also required us to confirm the Commission's cost of capital IMs. Again, given the "tentative in-principle arguments" that we had expressed, MEUG argued that we had not done that. Further, not having confirmed the cost of capital IMs, we were in effect required, given the Court's role under Part 4, to order the Commission to undertake a review of that aspect of those IMs.

[44] As can be seen, MEUG expressed the points of law it said were involved in its intended appeal in a somewhat discursive manner. We think, as we understand the argument, that those points of law can best be expressed as follows.

[45] In finding that MEUG had failed to discharge the onus upon it, we had misunderstood our role on appeal. Given the concerns we expressed with the use of the 75th percentile we were, in effect as a matter of law, required to be "proactive"

and go further ourselves to resolve the issue or to direct the Commission to engage in a process to consider those concerns. By failing to do so we erred in law. That error was reflected in the inappropriate reference to MEUG carrying an onus and in the view we took that the materially better standard, in these circumstances, precluded us from granting relief.

[46] Vector, and Powerco and Transpower jointly took similar positions in opposing MEUG's application. MEUG, they argued, had mischaracterised our cost of capital IM decision. Our assessment did not involve an error of law, nor did it wrongly – as a matter of law – place an onus on MEUG. Rather, as an expert tribunal, our overall evaluation was that whilst we recognised arguments both for and against the Commission's approach, at the end of the day we were not satisfied, on the record before us, that MEUG's approach would be materially better. That was essentially an evaluation of the evidence before us. Moreover, to suggest that we should have proactively sought to resolve the evidential uncertainty was not, as a matter of law, an arguable proposition. The closed record provisions of s 52ZA(2), and the specified ways of determining appeals found in s 52Z(3), established that proposition. Finally, and in any event, the Commission was itself undertaking a consultation exercise to address the uncertainties our decision had raised and, in doing so, was seeking to create an evidential record of the type we had found to be lacking before us. For all of those reasons, leave should be declined.

[47] In taking its neutral position, the Commission also queried whether any real question of law was raised, and pointed to the consultation exercise on the cost of capital IMs it had underway.

Analysis

[48] We have reached the conclusion that MEUG should not be granted leave to appeal. We have reached that conclusion for the following reasons:

(a) MEUG misconstrued the substance of our decision on its appeal against the EDBs' and Transpower's cost of capital IMs. In doing so, it seeks to create an error of law where, in our view, no point of law is involved.

(b) To the extent MEUG argued that, more generally, we had misunderstood the proper nature of our role under s 52Z appeals, in particular by failing to be proactive, we conclude that that point is not seriously arguable.

Our 75th percentile decision

[49] MEUG's core proposition was that, because of the conclusions we had reached which, MEUG argued, showed we agreed with its propositions on appeal, we erred when we did not allow that appeal. By our assessment, that core proposition misconstrues our decision.

[50] As set out above, our decision had, in effect, three parts:

(a) We first analysed what the Commission's 75th percentile decision meant.

(b) We then assessed what we carefully described as "tentative in-principle arguments" which ran counter to the Commission's reasoning.

(c) We then concluded that there was a lack of positive evidential support for MEUG's proposition. That meant we could not be satisfied, as required by s 52Z(4), on the materially better test. In reaching that conclusion, we noted the *Telstra* case cited by MEUG. There the Australian Competition Tribunal had also pointed to the need for robust empirical examination of the actual facts of any particular case when considering the theoretical potential for asymmetrical consequences should the WACC be set too high or too low.

[51] In other words, we did not reach a firm conclusion, as MEUG appeared to argue at times, in its favour. Rather, and very much as an expert tribunal on a matter of regulatory economics within its expertise, we made an evaluation based on the closed record that was available to us.

[52] In that context, when we referred to onus,[22] we were not referring to a legal, but an evidential onus. Put simply, MEUG was the appellant: by reference to the "documentary information and views that were before the Commission" it needed to point us to evidence from which we could conclude its alternative approach was materially better. Our decision, as a matter of evaluation, was that MEUG had failed to do that.

[53] By our assessment, that central challenge to our decision is not, therefore, one on a point of law. Rather, MEUG is in effect arguing that our evaluative assessment was wrong, and that we should have reached the view it promoted.

Failure to be proactive – a seriously arguable appeal point?

[54] More generally in this context, MEUG argued that given the views we had expressed, and accepting our characterisation of them as tentative and in-principle, we should have gone further and resolved the issue ourselves or directed the Commission to do so. It identified, by our assessment, two legal errors here. First, we had quite simply misunderstood our proper role under s 52Z appeals. This was its "proactivity" point. Secondly, because of those views we could not and had not confirmed the Commission's cost of capital IMs.

[55] By our assessment, and very much as the active respondents submitted, we do not think that those are arguable points of law.

[56] There are a number of reasons why that is so.

[57] First, there are the closed record provisions of s 52Z, which we have already referred to. We simply do not understand how we could "proactively" investigate the 50th or 75th percentile issue in the manner proposed by MEUG, given that, on appeal, we are confined to the record of information and views before the Commission.

[58] Secondly, we consider that the menu of determination options set out in s 52Z(3) also preclude the interpretation argued for by MEUG. We may:

---

[22] See [20].

(a) decline the appeal and confirm the IM in question; or

(b) allow the appeal by amending the IM, revoking it and substituting a new one; or

(c) refer the IM back to the Commission with directions as to the *particular matters* that require amendment.

[59] In our decision in *WIAL v Commerce Commission*, we set out at [181] to [191] a detailed analysis of permissible relief under s 52Z(3). We refer to, but do not repeat, that analysis. We note, however and in particular, the following comments.[23]

> We therefore consider that a reference back on particular matters requires the Court to provide the Commission with clear directions as to the substantive nature of the required amendments to particular aspects of an IM. Those amendments need to be specified in requisite detail to enable the Court to be satisfied – at the time of the reference back – that the outcome of the reference back will be a "materially better" IM.

[60] We think those comments are relevant here. In arguing for a more proactive approach, MEUG emphasised the particular and special nature of the High Court's role under s 52Z appeals. As is now clear, s 52Z appeals are merits appeals against decisions of the Commission making delegated legislation; that is, rules of economic regulation. That special aspect of these appeals is reflected in the constitution of the High Court. But recognising that character of these proceedings cannot, in our view, set aside the very clear framework the High Court is given within which to make its appellate decisions. That overall framework reflects the legislative history of these appeal provisions. Whilst Parliament decided to provide merits appeals against IM determinations, it was concerned – as reflected by the provisions in question – to effectively restrict the role of the High Court so as to avoid gaming behaviour by regulated entities, and to incentivise them to put before the Commission all relevant information. MEUG's "proactive" interpretation of our role under s 52Z, in our view, does not even arguably fit within that framework.

[61] Nor do we think, with respect, that MEUG can make much of the absence of formal "confirmatory" words in the case of this appeal. Throughout our decision, we

---

[23] *WIAL v Commerce Commission*, above n 1, at [191].

expressed our conclusions by reference to whether or not we were persuaded that the outcome sought by appellants was materially better than that found in the Commission's IMs. We did not, and do not, consider it necessary to add a formalistic reference, in that context, to confirm the IM in question. If a formalistic answer is required, however, we consider the statutory wording "decline the appeal and confirm the input methodology" is open to the obvious interpretation that, by declining the appeal, we thereby confirm.

[62] For those reasons, we therefore decline MEUG's application for leave to appeal.

[63] In these circumstances, it is not strictly necessary to decide the balance of the issues before us. MEUG may, however, seek special leave to appeal and, in those circumstances, our observations as the Court which has been conducting this lengthy and complex exercise, may be of some use. We therefore comment, albeit very briefly, on the balance of the issues raised.

Discretionary considerations

[64] Had we been persuaded that MEUG had an arguable (point of law) appeal, there would, nevertheless, have been a real question of whether leave should be granted in our discretion.

[65] The substantive points of concern to MEUG, the possible validity of which we did acknowledge, are the very points that are now being reviewed by the Commission in its consultation on the cost of capital IMs. We think that is an appropriate process. We note, again, the Supreme Court's observation that the increased certainty that Part 4 was designed to provide would increase over time.[24]

[66] We accept that the Commission's approach may mean that changes to the WACC will only be made in the future, albeit that the decision to make them may establish the validity of MEUG's concerns from the outset. We also recognise that the amounts of money involved are large. But the outcome of allowing the

---

[24] *Vector Ltd v Commerce Commission* [2012] NZSC 99, [2013] 2 NZLR 445 at [64].

Commission's approach to proceed, which MEUG does not favour, in many ways reflects MEUG's fundamental proposition as to the different nature of the public interest rule-making process provided by Part 4 compared with the normal process of litigating private rights and remedies and, in that context, the significance of granting appeals with retrospective effect as validation of private rights and remedies. That is, MEUG can be seen to be arguing for retrospective validation of a contended point of regulatory policy when, in the arena of public policy, adjustments are generally made on a forward looking basis, and are not designed to afford retrospective validation of positions taken. But, in these circumstances, we need say no more on that topic.

Status issues

[67] There is, in our view, no principled basis for seeking to draw any distinction between the position of the regulated respondents, Vector, Powerco, Transpower and WELL, on the basis of whether they are interested parties or respondents. The substantive appeals were conducted on the basis that there was no distinction between participation as a respondent or interested party, other than as regards the IM decisions in which persons participating in either of those capacities were interested. We have intituled this appeal accordingly.

[68] This is, of course, only an application for leave and, even if allowed, would not constitute the appeal itself before the Court of Appeal. It would be for the Court of Appeal to determine the basis upon which parties might participate before it. But, we trust, we have made our sense of matters clear.

Costs in the Court of Appeal

[69] Finally, in terms of MEUG's application under s 97(3) for us to set a costs condition, we consider that it would be inappropriate to make such an order if we had granted leave. In our view, there is no reason why costs before the Court of Appeal should be determined by us in this Court. If MEUG wishes to argue, on public interest grounds, that it should in some way be protected from an adverse costs award, then the Court of Appeal will, having heard any appeal for which it may grant special leave, be best placed to assess that matter. In that context, we consider

MEUG will be able to point to the terms of our substantive judgment, and the careful consideration given by us to the issues MEUG raised, to demonstrate to the Court of Appeal the role it has taken in these proceedings and the approach it has adopted.

Vector's application

[70] As we noted at the outset,[25] Vector originally applied for leave to cross-appeal. It did so on the basis that it wished to support our decision, albeit on the basis that we had, in interpreting and applying the s 52A(1) outcomes, misdirected ourselves as to the meaning of, and/or misapplied, the Part 4 purpose. During the course of hearing MEUG's leave application, Mr Butler for Vector explained that Vector wished to preserve its position, if MEUG was granted leave, to make that argument to the Court of Appeal and was concerned that it might face an argument that matters of concern to it had not formed part of our decision on MEUG's 75th percentile appeals. As we think is relatively clear from our decision in *WIAL v Commerce Commission*, our analysis of the implications of the Part 4 purpose, and in that context the provisions found in s 52A(1), were central to all the decisions we made on all of the appeals. When we confirmed that to Mr Butler, and also indicated that we would record our view in this judgment, Mr Butler then withdrew Vector's application for leave to cross-appeal.

Outcome

[71] We therefore decline MEUG's application for leave to appeal. All questions of costs relating to that application are reserved.

FOR THE COURT

"Clifford J"

---

[25] At [4].

Solicitors:
Franks & Ogilvie, Wellington for The Major Electricity Users' Group Inc
Crown Law Office, Wellington for the Commerce Commission
Russell McVeagh, Wellington for Vector Ltd
Chapman Tripp, Wellington for Powerco Ltd and Transpower New Zealand Ltd
Minter Ellison, Auckland for Wellington Electricity Lines Ltd