IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2016-485-702
[2017] NZHC 1774

BETWEEN	VECTOR LIMITED First Plaintiff
AND	PAUL HUTCHISON, WILLIAM CAIRNS, JAMES CARMICHAEL, KAREN SHERRY AND MICHAEL BUCZKOSKI Second Plaintiffs
AND	THE ELECTRICITY AUTHORITY Defendant

Hearing:	23 - 24 May 2017
Counsel:	J A Farmer QC and S M Hunter for First Plaintiff D R Bigio QC for Second Plaintiff A R Galbraith QC and L O'Gorman for Defendant D Laurenson QC and J L W Wass for Commerce Commission
Judgment:	31 July 2017

JUDGMENT OF SIMON FRANCE J

Introduction

[1] The Electricity Authority (the Authority) is established by the Electricity Industry Act 2010 (the Act).[1] Its role is to make and administer the Electricity Industry Participation Code 2010 (the Code), to monitor compliance with that Code and to enforce it.

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1 Electricity Industry Act 2010, s 12.

[2] Recently the Authority has announced proposed changes to the Code that will impact upon the contracts that are entered into between distributors and retailers. In brief, distributors own the power lines. Retailers must enter into agreements with them to use the distributor's network in order to get the electricity to their customers. These agreements are known in the industry as Use-of-System Agreements (UoSAs).

[3] From the distributor's viewpoint, the Authority's proposals mean that the content of much of these agreements will be set and made mandatory by the Authority unless the retailer agrees to different provisions. The parties are at odds over the extent of this mandatory component (Vector says all of it is mandatory) but it is common ground that as a consequence of these new proposals, if implemented, significant portions of the contracts will be fixed. Indeed, that is the purpose of the exercise, as the Authority wants these agreements to be standardised.

[4] The process is at the proposal stage, albeit there has previously been considerable consultation, and the matter is well advanced. In these proceedings Vector seeks declarations aimed at stopping the current proposal before it gets any further. Vector has two primary propositions:

(a) the Authority has no power to interfere with freedom of contract in this way; or, alternatively

(b) if it does have some power to do that, the proposed content of these changes is outside the matters the Authority can prescribe. Rather, the subject matter falls within the exclusive domain of the Commerce Commission. (The Commission appears to say it disagrees with that.)

[5] Vector is supported in its argument by the trustees of Entrust. Entrust owns three quarters of Vector. It distributes its income to consumers, and is concerned the proposed changes will prevent it doing so (by limiting Vector's ability through the UoSA to obtain information for Entrust).

Further background

[6] There has for some time been a push for the UoSAs between distributors and retailers to be standardised. Regulators have sought to achieve it by promulgation of model agreements which it was hoped would lead to voluntary standardisation. In the Authority's view this has not happened and so it has moved to a more mandatory model. The following lengthy passage from a 2014 Authority Consultation Paper is enough to capture the history of the matter and to set out the motivations behind the proposed steps:[2]

> **Executive Summary**
>
> Use-of-system agreements (UoSAs) are used by distributors and retailers to formalise agreement of the terms under which each provides services to the other. The primary service covered in UoSAs is the distribution service that a distributor provides to a retailer so that the retailer may sell electricity to consumers on that distributor's network.
>
> Industry participants began developing voluntary standard or model use-of-system agreements (MUoSAs) at the end of the 1990s, following the separation of network and retail functions.
>
> The Authority investigated the merits of requiring distributors to use more standardised UoSAs in 2011 and 2012. The Authority published new MUoSAs in September 2012 and expected that distributors and retailers would voluntarily use the new MUoSAs to develop standardised UoSAs, to replace legacy UoSAs and form the basis of UoSAs with new entrant retailers.
>
> The Authority also committed to monitoring the uptake of the MUoSAs. The objectives of this initiative were to promote efficiency and competition for the long-term benefit of consumers.
>
> The Authority's monitoring of the uptake of the MUoSAs indicates the Authority's expectations for MUoSAs are not being met, meaning that the competition and efficiency objectives are not being achieved. Specifically, the Authority has found that:
>
> - distributors are not engaging with retailers to negotiate new UoSAs that reflect the MUoSA
> - retailers are not engaging with distributors who seek to negotiate new UoSAs that reflect the MUoSA
> - in one case, a distributor is offering retailers a UoSA that materially varies from the MUoSA.

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2 *More standardisation of use-of-system agreements* (Electricity Authority, Consultation Paper, 8 April 2014) at A.

> The Authority now considers that less voluntary measures are necessary to achieve the efficiency and competition objectives expected from introducing the MUoSAs.
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> The Authority's preliminary conclusion is that these objectives can be best achieved by amending the Electricity Industry Participation Code 2012 (Code) to establish the UoSA as a default set of terms that can be varied by mutual agreement between each distributor and retailers on that network.
>
> The Authority considers a default agreement would reduce transaction costs for retailers and distributors, and improve the conditions that would lead to enhanced retail competition across more network areas in New Zealand.

Overview of plaintiff's case

[7] As noted, Vector challenges the power of the Authority to standardise UoSAs. As a key starting point, Vector submits that there is an established principle that clear statutory words are needed before it will be held that a third party, such as the Electricity Authority, has been authorised to interfere with freedom of contract. Decisions of the House of Lords and the Court of Appeal for England and Wales are cited in support of the principle.[3] The principle is submitted to apply even in areas of significant regulation, presumably by limiting the encroachment to the least extent needed to give effect to the statutory purpose.

[8] Far from there being words authorising the Authority's proposals, Vector submits aspects of the statutory scheme point the other way:

(a) a power to impose standardisation was included in a transitional provision,[4] the effect of which is now spent;

(b) in relation to different contracts, the Authority is given an express power to do what it now purports to do in another area;[5] and

(c) the subject matter of the compulsory provisions falls within the exclusive purview of the Commerce Commission.[6]

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3 *Johnson v Moreton* [1980] AC 37 (HL); *Hills Electrical and Mechanical Plc v Dawn Construction Ltd* [2003] CSOH 64, [2004] SLT 975; *Mixnam's Properties Ltd v Chertsey Urban District Council* [1965] AC 735 (HL) at 763–64; *Stewart v Perth and Kinross Council* [2004] UKHL 16; and *Contour Homes Ltd v Rowen* [2007] EWCA Civ 842.

4 Electricity Industry Act 2010, s 42.

5 Section 44.

6 Section 32(2)(b); and Commerce Act 1986, Part 4.

[9] To expand on this latter point, the owners of the power lines are considered to have a natural monopoly. Various constraints come together to mean there cannot be competition to distribute power across different networks. In reality there can only be one set of power lines. Recognising this natural monopoly, the Commerce Act 1986 charges the Commerce Commission with the task of promoting outcomes that mirror what would happen in a competitive market. Vector submits promoting competition is what underlies the proposals being advocated by the Authority, but it is the Commission that is given exclusive jurisdiction in this area. For this separate reason the proposals are said to exceed the Authority's powers.

[10] Concerning the second plaintiffs, as part of its UoSAs, Vector requires retailers to collect information from its customers. This information enables Entrust to identify the recipients of its dividends. Entrust submits, and the Authority agrees, that the proposal in its current form would not allow this practice to continue. The Authority advises it considers there are competition concerns about Vector receiving the information, but also submits Entrust's concerns highlight a flaw in the proceeding, namely its premature nature. The proposal is still at the consultative stage.

[11] The second plaintiffs submit the Authority has no power to impose default provisions. As with Vector, emphasis is placed on the presumption in favour of freedom of contract, and the existence of an express power in a different area to impose contractual terms. The absence of any equivalent provision for distribution agreements is said to be decisive.

[12] It is convenient to analyse the matter through the two issues raised by the proposed declarations – the Authority's power to dictate contractual terms, and secondly, the alleged encroachment into the Commerce Commission's domain.

Issue one – can the Authority impose contractual terms?

The current proposal

[13] Although the exact structure of the Authority's proposal is not central to this proceeding, it aids understanding to have an overview of what is proposed.

[14] Under the Authority's proposal, a new Part 12A of the Code would require each distributor to have its own standard distribution agreement. The content of that agreement will be influenced (or dictated depending on one's view) by a Template Agreement promulgated by the Authority (the Draft Distributor Agreement Template).[7] The key provision in the Proposed Code amendment is cl 12A.4 which provides:[8]

> **12A.4 Default distributor agreements**
>
> (1) Each **distributor** must have a **default distributor agreement** that –
>
> (a) includes –
>
> (i) each **default core term** set out in the **default distributor agreement template**; and
>
> (ii) **operational terms** that meet each of the requirements set out in the **default distributor agreement template** for **operational terms** that are italicised and in text boxes in the **default distributor agreement template**; and
>
> (b) does not include any other terms.

[15] It can be seen that (a)(i) will require terms that mirror those in the template, (a)(ii) will be able to be drafted by the distributor but must be consistent with a set of rules, and (b) means these will be the only terms in the contract. It is this last provision that presently rules out the type of data collection obligation that Vector imposes on retailers on behalf of Entrust.

[16] In terms of compulsion, the proposal is that within set time frames the distributor will need to have finalised a compliant default agreement. That agreement will need to be offered to new clients, but also to existing retailer clients. If the retailer does not want the default agreement, the parties have two months to negotiate a compliant agreement of their own, or the default applies.

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7 This would be contained in a schedule to the new Part 12A. See *Default Agreement for Distribution Services* (Electricity Authority, Consultation Paper, 26 January 2016) at 71.

8 At 61.

[17] Whether the default agreement becomes the contract is therefore totally within the control of the retailer. The distributor must offer and the retailer can choose. However, the parties can negotiate if both want to. That negotiation will be controlled by the proposed cl 12A.10 which provides:[9]

> **12A.10 Alternative agreements**
>
> 1. A **distributor** and a **trader** may enter into a **distribution agreement** on terms that differ from the terms set out in the **distributor's default distributor agreement** (an "alternative agreement").
>
> 2. However, a **distributor** and a **trader** that enter into an alternative agreement must ensure that the terms of the alternative agreement –
>
> (a) address only the subject matter of the terms of the **default distributor agreement**; and
>
> (b) relate only to **distribution** services.

[18] Of this the Authority observes:[10]

> An alternative agreement could be either:
>
> (a) an agreement that is identical to the distributor's [default distributor agreement] except that the parties have agreed to amend a single term (retaining all other terms) or
>
> (b) at the other extreme, an agreement that has terms that are completely different to the terms in the distributor's [default distributor agreement].
>
> The key requirement for alternative agreements is that their terms must relate only to distribution services.

[19] It can be seen that the provision allowing alternative agreements limits the content of such alternative contracts to distribution services. That means that the type of information gathering provision on which Entrust currently relies will not be permitted in either the default agreement or the parties own agreement. The absolute position advanced by Entrust, namely that the Authority has no power at all to impose mandatory conditions, if correct, would provide an immediate solution to its problem.

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9 *Default Agreement*, above n 7, at 64.

10 At [3.5.18]–[3.5.19].

[20] For Vector, however, if one moves beyond Entrust's proposition that the Authority has no power to do any of this, the idea of making a declaration in relation to the extent of the current proposal becomes fraught. Once it is determined some interference with contractual freedom is permitted, the issue changes to whether the proposed degree of interference is permissible. Once that is the battlefield, it is not sensible to form views or make declarations until the finalised model is confirmed.

Overview of the Electricity Industry Act

[21] I begin with an overview of the Act. Two extracts from the Explanatory Note provide the context for the legislation:[11]

> The Bill disestablishes the Electricity Commission, which was set up in 2003 following the failure of industry self-governance, and sets up an Electricity Authority to govern the electricity industry.
>
> The objective of the change is to improve the timeliness and quality of rule-making relating to competition, efficiency, and security of supply. This is achieved by the changes set out below.
>
> Firstly, the objective of the Electricity Authority is much narrower than the Electricity Commission's. The proposed objective is "*to promote competition in, reliable supply by, and efficient operation of, the electricity industry for the long-term benefit of consumers*". In contrast, the Electricity Commission had multiple objectives, including fairness, environmental sustainability, promotion of energy efficiency, and 7 other more detailed outcomes. This complicated rule-making.
>
> ...
>
> The Bill provides for the Authority to make and administer an Industry Participation Code in order to achieve its objective and functions. The Code replaces the Electricity Governance Rules 2003 (EGRs), which is the rulebook for the industry.
>
> The key difference with the current arrangements is that the Code, unlike the EGRs, will not require the approval of the Minister before coming into force. This change is consistent with increasing the independence of the Authority.

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[11] Electricity Industry Bill 2009 (111-1) (explanatory note) at 2–3 and 6, emphasis added.

[22] Looking then at the statutory wording, the purpose of the Act is to provide a framework for the regulation of electricity industry.[12] In a part called "Electricity industry governance", the Act established the Electricity Industry Participation Code,[13] with which every industry participant must comply.[14] Failure to do so risks the enforcement measures set out in the Act which include pecuniary penalties (up to $10 million for a body corporate for each breaching act or omission), injunctions, damages and the ability of the High Court to reopen agreements.[15]

[23] Next, the Electricity Authority was established to make the Code and manage it. It is to administer the Code, monitor compliance, investigate possible non-compliance, and enforce it.[16] Further, it is tasked with undertaking market facilitation measures and monitoring their effectiveness, and undertaking industry and market monitoring. The Authority's enforcement function is complemented by a Rulings Panel which has power both to hear and determine complaints of a breach of the Code, and to review certain enforcement decisions of the Authority.[17]

[24] The initial content of the Code was established by incorporating existing regulations and documents.[18] Prior to that, however, the Act describes the contents of the Code more generally. Section 32 states that it may include any provisions that are consistent with the objective of the Authority, and are necessary or desirable to promote competition, or the efficient and reliable supply of electricity, or to allow the Authority to carry out its functions. The Code is not a static document. Provision is made for the Authority to amend it.[19] A process for amending is prescribed, but urgent amendments are also catered for.[20] An amendment may be done at any time and its effect can be to add, omit, substitute or completely replace.[21] It is obviously a broad power, reflecting the central role of the Authority as market regulator.

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12 Electricity Industry Act 2010, s 4.
13 See the definition of "Code" in s 5.
14 Section 9.
15 Sections 80 to 85.
16 Section 16.
17 Section 25.
18 Section 34.
19 Section 38.
20 Sections 39 and 40.
21 Section 38(2).

[25] The Act lists who qualifies as an industry participant.[22] It is a broad list covering generators, Transpower, distributors, retailers, consumers who take electricity directly from the grid, other persons who generate electricity that is fed into the grid, and industry service providers. This latter group includes traders, metering equipment owners and providers and other identified entities. All these persons and bodies must register as a participant, and they must all comply with the Code which obviously in turn will control what they can and cannot do.[23] It is a highly regulated area aimed at ensuring reliability and efficiency of supply and competition.

Statutory interpretation: can the Authority dictate contractual terms?

[26] Against that background I turn to the issue of whether the Authority can dictate the terms of contracts between distributors and suppliers. Two specific provisions of the Act are relied upon by the plaintiffs as supporting their argument that the Authority cannot impose terms. The first is s 42, a new matters provision which required the Authority to make specified additions to the Code. The explanation for the requirement, as provided by the Explanatory Note, states:[24]

> The Ministerial Review recommended a lengthy list of changes that need to be made to the electricity market to improve competition and security of supply. The list is included as part of the Government's announcements available on www.med.govt.nz/electricity-market-review. The Review noted that the Electricity Commission is in the process of consulting on and implementing most of these changes as part of its Market Development Programme.
>
> Accordingly, there is a high degree of confidence that many if not most of these improvements will be put in place over the next 12 months or so. These will make a material difference to competition, efficiency, and reliability of supply in the market.
>
> However, there are a number of recommended improvements where there is room for doubt that satisfactory improvements which meet the Government's objectives will be put in place by the Electricity Commission or, subsequently, the Electricity Authority. These doubts arise mainly because the issues are highly contentious, with strongly divergent views held by industry participants. Some of the improvements (such as providing for a liquid hedge market and transmission hedges) were identified as priorities in 2003/4 when the Electricity Commission was first set up, but are still outstanding. Accordingly, the Bill sets out a short list of matters that must be

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22 Section 7.
23 Section 9.
24 Electricity Industry Bill, above n 11, at 8.

addressed by the Authority, and provides powers for the Minister to amend the Code if it does not do so.

[27] Section 42 of the Act provides:[25]

> **42 Specific new matters to be in Code**
>
> (1) Before the date that is 1 year after this section comes into force, the Authority must either—
>
> (a) have amended the Code so that it includes all the matters described in subsection (2) (the **new matters**); or
>
> (b) to the extent that the Code does not include all the new matters, have delivered to the Minister a report described in subsection (3).
>
> (2) The new matters are as follows:
>
> (a) provision of compensation by retailers to consumers during public conservation campaigns:
>
> (b) imposing a floor or floors on spot prices for electricity in the wholesale market during supply emergencies (including public conservation campaigns):
>
> (c) mechanisms to help wholesale market participants manage price risks caused by constraints on the national grid:
>
> (d) mechanisms to allow participants who buy electricity on the wholesale market (commonly called the demand side) to benefit from demand reductions:
>
> (e) requirements for distributors that do not send accounts to consumers directly to use more standardised tariff structures:
>
> (f) *requirements for all distributors to use more standardised use-of-system agreements, and for those use-of-system agreements to include provisions indemnifying retailers in respect of liability under the Consumer Guarantees Act 1993 for breaches of acceptable quality of supply, where those breaches were caused by faults on a distributor's network*:
>
> (g) facilitating, or providing for, an active market for trading financial hedge contracts for electricity.

[28] The plaintiffs advance two arguments in relation to this. First, the transitional provision provides for the conduct of the type now proposed by the Authority. However, the transitional period has expired and with it, it is submitted, the Authority's power to do the tasks identified in s 42. Second, s 42(2)(f) refers to

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[25] Emphasis added.

standardised" agreements, and then identifies a specific clause to be included. The identification of a specific mandatory provision, and the reference to "more" must mean it is not permissible for the Authority to impose complete or "total" uniformity and remove the power of the parties to contract on their own terms.

[29] Neither proposition is convincing. It would be extraordinary to read the identification by the legislature of a list of matters that must be addressed in the first 12 months as removing the power of the Authority to ever address those matters again. Such a consequence would ignore the reality that the market is not static, and the Code must adapt. That must be why such broad powers to amend the Code are conferred. Such a consequence would also be contrary to the core purpose of the Act which is to establish an Authority to regulate the industry via the Code.[26] It would make little sense to then limit the Authority's ability to do so in this way.

[30] The requirement on the Authority in s 42(1)(a) to have amended the Code within 12 months to address these matters cannot sensibly be read as a restriction on further addressing the same matters at a later date. That would be to say to the Authority you must get it right first time because thereafter you are stuck with it. The present situation provides an illustration of the difficulties that would cause. The Authority considers its initial approach, which focused on providing model UoSAs and hoping for voluntary standardisation, has not achieved its aim. So a more stringent standardisation approach is proposed as being necessary to achieve the aims of the legislation. There is no policy argument that would support reading s 42 in the way proposed so as to prevent this type of reassessment of the on-going utility of Code provisions.

[31] The other aspect of the plaintiffs' argument is to focus on the term "more standardised" agreements and to submit it is to be read as a message there cannot be total standardisation, just "more" of it. In my view this is equally untenable. First, the present proposal cannot be seen as total standardisation. The parties can agree to negotiate different terms, and the default agreement leaves the operational terms for the parties to agree on. Second, and more fundamentally, "more" just means to a greater extent than presently. If one imagines a spectrum any increase will always be

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[26] Electricity Industry Act 2010, ss 4, 12, 15 and 16.

"more". If, as the plaintiffs contend, more is to be read as excluding "total", it could nevertheless allow increasing standardisation up to an "all-but" point. Anticipating in the abstract when that stage might be reached is pointless. Further, it is with respect difficult to accept the legislature contemplated authorising the Authority to impose some standardisation of these agreements but not total standardisation, thereby leaving "how much" (surely an unquantifiable standard) to be somehow determined in the future. The key issue must be whether compulsion is permitted or not, not the extent of it.

[32] It is important to return to the purpose of s 42 which is to impose a preliminary timetable on the Authority. This provision exists because of a perception of a general lack of progress towards meeting the government's goals. Section 42 identifies the matters the legislature wants the Authority to get on with immediately. The use of "more" is to be seen in that context as one of the things concerning which immediate progress is needed rather than as a provision that dictates the extent of standardisation in the future.

[33] Rather than s 42(2)(f) supporting the plaintiff's case, I consider it undermines it. The starting point must be s 32(1) which says that the Code can contain *any* provision that is consistent with the Authority's objectives and is necessary or desirable to promote competition, or reliable supply, or efficient operation of the industry. It confers a very broad power on the Authority to use the Code to carry out its objectives. Section 42(2)(f) then gives some definition to this in two ways – it requires the Authority to ensure UoSAs contain a specific term, and it informs the Authority that one of its immediate goals is standardisation.

[34] This is a clear legislative statement that freedom to contract is secondary to the Authority carrying out its functions, and to the industry being regulated in a way that promotes competition, achieves a reliable supply of electricity and promotes efficient operation of the industry. Controlling the contracts between distributors and retailers is expressly one aspect of that regulatory framework.

[35] The second provision relied upon by the plaintiffs is s 44 of the Act which provides:[27]

> **44 Transmission agreements**
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> (1) Without limiting section 32, the Code may require Transpower and 1 or more industry participants to enter into 1 or more agreements for connection to, use of, and (where relevant) investment in, the national grid (a **transmission agreement**).
>
> (2) *The Code may prescribe default terms and conditions that are deemed to be included in transmission agreements.*
>
> (3) The parties to a transmission agreement may, by mutual consent, agree to modify any default terms and conditions, but only if and to the extent that the Code permits those terms and conditions to be modified.
>
> (4) Every transmission agreement between Transpower and an industry participant is deemed to include a provision under which the industry participant agrees to pay Transpower any amounts that Transpower charges the industry participant in accordance with the transmission pricing methodology.
>
> (5) A transmission agreement is binding on both parties and enforceable as if it were a contract between the parties that had been freely and voluntarily entered into.
>
> (6) If the parties do not comply with a requirement in the Code to enter into 1 or more transmission agreements, the default terms and conditions in the Code, and the provision in subsection (4), are binding on both parties and enforceable as if they were set out in a transmission agreement.

[36] The plaintiffs' point here is clear enough, and obviously a legitimate one. Parliament has specifically authorised the Authority to do in relation to transmission contracts that which the Authority says it can do with distribution contracts. If this is a power it generally has, it would be unnecessary to make it express in s 44(2).

[37] I accept the existence of s 44(2) is a factor to be considered, but do not consider it is determinative. Although in slightly different words, it was a provision that was already part of the Electricity Act 1992.[28] Its continued presence does not therefore require the newer Code provisions to be read down from their otherwise clear meaning. It is relevant that to ascribe that effect to s 44(2) would so undermine

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27 Emphasis added.
28 Section 172KA(2).

the Authority's powers in relation to agreements other than transmission agreements that I consider it would produce an effect contrary to the purposes of the Act. I therefore confine the import of s 44(2) to transmission agreements.

[38] This analysis of the statutory provision has to date not referred to the key proposition underlying the plaintiffs' case, namely that there is a presumption of interpretation that clear wording is required before a statute will be read as limiting parties' right to freedom of contract. The preceding discussion indicates my view that it is clear from the scheme and text of the Act that this is the effect of the legislation. I reach that view without particular reliance on the history of regulation in this area. Mr Galbraith QC took me through that history, which does support the proposition the Authority is there to do a job, and that job includes whatever degree of compulsion is necessary to implement the statutory purposes.

[39] Addressing, however, the plaintiff's submission, on its face it could be thought to be a surprisingly broad proposition given we live in an era of numerous consumer protection statutes which all interfere with freedom of contract. One can also rightly be cautious in New Zealand when faced with the idea that a presumption dictates interpretation. That there exist strong statutory presumptions cannot be doubted, but largely they have been enshrined in statute, such as the presumption against retrospective effect of legislation. These presumptions are also very well known, and their existence does not need analysis.

[40] Primarily, however, the approach to statutory interpretation in New Zealand is driven by s 5 of the Interpretation Act 1999 which leads to an exercise that balances the many relevant factors. The correct approach is set out in this passage from *Commerce Commission v Fonterra Co-operative Group Ltd*:[29]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative

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[29] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, 2007 3 NZLR 767 at [22], footnotes omitted.

> context. Of relevance too may be the social, commercial or other objective of the enactment.

[41] The authorities the plaintiffs rely on indeed contain the statements the plaintiffs cite, but none are New Zealand cases and no New Zealand expositions of the principle were proffered when I asked. The presumption that clear wording is required to limit freedom of contract is not one recognised in Burrows and Carter,[30] nor is it included in the list of ten fundamental principles identified in the Legislation Design and Advisory Committee Guidelines.[31]

[42] For myself, I would be content to accept it is a relevant factor, when assessing the scope of the Authority's powers, to have regard to the fact that the Authority is purporting to dictate to a significant extent the terms of a contract between the parties, and that the common law placed considerable value on freedom of contract. That would be to treat the presumption as what Professor Evans calls a "presumption that inclines interpretation in a certain direction".[32] Amongst these softer presumptions, Evans identifies one described as a presumption against alteration of the common law. That presumption would seemingly embrace the plaintiffs' proposition, although Evans immediately notes it to be a somewhat odd presumption given that is what statues usually do. He concludes:[33]

> What this presumption seems to mean is that a value traditionally respected in the common law will not be held to be overridden unless the intention that it should be is clear. So stated, the presumption can be allowed some limited legitimate role.

Additional case law: freedom to contract

[43] I understand, however, that the plaintiffs are contending for a stronger rule so it is necessary to consider the cases relied on.

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30 Ross Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).

31 Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* (Legislation Advisory Committee, October 2014) at 12–16.

32 Jim Evans *Statutory Interpretation: Problems of Communication* (Oxford University Press, Oxford, 1988) at 299.

33 At 299.

[44] As acknowledged, the following cases indeed contain the propositions cited by the plaintiffs. The cases themselves, however, do not really turn on the presumption. Nor does the presumption find recognition in an English text such as *Bennion on Statutory Interpretation*.[33]

[45] The first authority is *Johnson v Moreton* where the plaintiffs note Lord Hailsham stated that:[34]

> it is the policy and presumption of English and other systems of law that there should be freedom of contract.

[46] *Johnson* concerned a provision in an occupation contract between a landlord and a tenant of an agricultural holding. Legislation provided that when a notice to quit was given to such a tenant, as it had been in that case, the tenant could file a counter notice which had the effect of transferring the matter to a Tribunal. The legislation was designed to protect tenants. However, the contract between this landlord and tenant had a provision which purported to exclude the operation of the statutory provision.

[47] A unanimous House of Lords rejected the enforceability of the clause, so freedom of contract actually lost out, and emphatically so. The approach taken by their Lordships to discerning the meaning of the statute, which on its face did not expressly prohibit such a provision, would look very familiar to New Zealand practitioners. Lord Hailsham in his reasons observed:[35]

> The second proposition is that it is the policy and presumption of English and other systems of law that there should be freedom of contract and that contracts freely entered into should be enforceable. The appellants found no difficulty in adducing authority for this proposition, embellished, and perhaps even reinforced, but hardly improved, by translating it into Latin and saying: "pacta sunt servanda." See for instance *Griffiths v. Earl of Dudley* (1882) 9 Q.B.D. 357; *Hunt v. Hunt* (1862) 4 De G.F. & J. 221; *Hyman v Hyman* [1929] A.C. 601 and *Kennedy v. Johnstone* 1956 S.C. 39, especially *per* Lord Sorn. I myself share the doubts of Lord Wright in *Admiralty Commissioners v. Valverda (Owners)* [1938] A.C. 173, 185 as to whether the first of these cases was correctly decided; the point is now academic and cannot be tested since the Employers Liability Act 1880 is now past history. But of the general principle there can hardly be controversy.

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33 Oliver Jones *Bennian on Statutory Interpretation* (6th ed, LexisNexis UK, London, 2013).
34 *Johnson v Moreton*, above n 3, at 57.
35 At 57–58.

[48] However, perhaps counter-balancing the last sentence in this passage are the observations of Lord Simon in the same case.[36] In a judgment worth reading if only for the quality of its prose, Lord Simon traces the transition of progressive societies from ones where legal relationships between persons arose from their membership of classes to which rights were ascribed, to ones where the relationships were governed by private agreements which the law would enforce. And so freedom and sanctity of contract became pre-eminent legal values.

[49] Lord Simon then notes that challenges to this ideology quickly emerged as the consequences of inequality of bargaining positions became clear. The law, in Lord Simon's words, "began to back-pedal".[37] Freedom and sanctity of contract were not seen as being conclusive of the public interest, and legislation redressing inequality appeared. And so, it may be observed, it continues to do so today.

[50] The purpose of this counter point is to highlight that while *Johnson v Moreton* contains a statement of the presumption on which the plaintiffs rely, it does not represent an example of the alleged presumption at work. All their Lordships considered the protective purpose of the legislation clearly overrode the legitimacy of any attempt to contract out. Lord Simon went further and recognised an inherent limit on the ability of parties to agree on their own terms, namely where the subject matter of alleged private waiver was in an area where the public had an interest.

[51] A second authority referred to by the plaintiffs is *Hills Electrical and Mechanical plc v Dawn Construction Ltd.*[38] It is a decision of Lord Clarke sitting in the first instance in the Outer House of the Courts of Scotland. The equivalent in New Zealand is this Court and I doubt, with respect, a fundamental presumption of our law is to be found within the case.[39] The brief judgment deals with a dispute about a construction contract. Lord Clarke began the substantive part of his decision with an observation on which the plaintiffs rely:

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36 Beginning at 62 of that judgment.
37 At 66.
38 *Hills Electrical*, above n 3.
39 To be fair, I am not expecting this judgment to feature prominently in the jurisprudence of the Outer House either.

> [18] I approach the question which was raised at the debate from the starting point that it is to be assumed, as a matter of statutory interpretation, that the legislature intended to innovate on parties' freedom of contract only to the extent that this was clearly provided for, either expressly or by clear implication by the terms of the legislation itself.

but the next sentence is also relevant:[40]

> It appears to me that that approach is expressly recognised in various parts of the legislation dealing with the payment provisions in construction contracts.

[52] Examples are then given of express provisions in the statute which emphasise the limited intrusion into the parties' freedom to contract intended by the legislature. It is not a context where further analysis will assist the present debate.

[53] The best of the authorities relied on by the appellants is *Stewart v Perth and Kinross Council*,[41] where the House of Lords picked up an earlier observation of Lord Upjohn in *Mixnam's Properties Ltd v Chertsey Urban District Council*.[42]

[54] The latter case concerned a local council's ability to control the terms of contract entered into between landlords and caravan owners. The Council licensed the caravan site. The granting of a licence was obligatory but came with a power to impose conditions. It was the validity of some of the conditions that was in issue.

[55] It seems that at the relevant time demand far outweighed supply, and the Council was concerned to prevent exploitation by landlords. Accordingly, included amongst the challenged conditions were provisions giving the Council power to approve rents, and to prevent landlords from dictating to caravan owners what brand of caravans they bought, or whether they formed a tenants' association. The House of Lords concluded that the Council's powers were limited to imposing conditions relevant to the use of the site it was licensing. The landlord could be told what facilities the site must provide, but there was no power to dictate other terms of the contract between landlord and caravan owner.

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40 At [18].
41 *Stewart*, above n 3.
42 *Mixnam's Properties*, above n 3.

[56] In the course of his reasons, in passages on which the plaintiffs rely, Lord Upjohn observed:[43]

> In my opinion, however, the powers of local authorities are subject to the limitation that Parliament never intended to empower them to lay down any conditions which entitle them to prescribe the actual terms and stipulations which must be included in or omitted from any contract between the occupier and a caravan owner. Of course, it cannot be disputed that the local authority can indirectly fetter the freedom of contract of the occupier, for example, by prohibiting caravans of a certain size on the site, but the scheme of the Act, in my opinion, falls far short of empowering them to dictate the terms of contracts.

And:[44]

> Secondly, freedom to contract between the subjects of this country is a fundamental right even today, and if Parliament intends to empower a third party to make conditions which regulate the terms of contracts to be made between others then even when there is an appeal to a court of law against such conditions, it must do so in quite clear terms.
>
> There are no such terms in section 5. Indeed, although the ejusdem generis rule has no application I should have thought that had Parliament intended to empower local authorities to exercise such a right it would have done so in a clear sub-paragraph. Nothing in my view could be more dangerous than to assume by inference that Parliament intended that a very large number of local authorities all over the country should be clothed with such arbitrary and all-embracing powers unless it has given them a clear mandate to do so. I find no such clear mandate in the Act.

[57] Similar sentiments were not expressed in the other judgments although a common interpretation of the legislation was reached. Lord Reid observed in a passage later cited in *Stewart*:[45]

> In the present case there appears to me to be a fundamental difference between prescribing what must or must not be done on a site and restricting the site owner's ordinary freedom to contract with his licensees on matters which do not relate to the manner of use of the site. Conditions can make the site owner responsible for the proper use of the site and it is then for him to make such contracts with his licensees as the general law permits. I can find nothing in the Act of 1960 suggesting any intention to authorise local authorities to go beyond laying down conditions relating to the use of sites, and in my opinion the general words in section 5 cannot be read as entitling them to do so. I would therefore dismiss this appeal.

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43 At 763.
44 At 764.
45 At 752, cited in *Stewart*, above n 3, at [26].

but other passages of Lord Reid will have a familiar ring:[46]

> In construing an Act of Parliament we are attempting to find from its words the intention of Parliament; and the question here is whether, by inserting in section 5 of the 1960 Act the general words with which I have been dealing, Parliament can be held to have provided for the introduction of a completely new and indeterminate type of security of tenure and rent control for caravan dwellers. I say "indeterminate" because, if the appellants are right, Parliament has left it to each local authority to build up its own system of control in its own way…

And:[47]

> Whether general words in an Act should be given a limited meaning is a question which frequently arises, but so much depends on the particular circumstances that general statements of the law in other cases can be no more than guides…

[58] In yet another of the judgments from *Mixnam's Properties*, Viscount Radcliffe was dismissive of the Court of Appeal's reliance on the principle that a fundamental alteration to the general law needed the clearest of words. His Lordship observed:[48]

> With great respect, I cannot see what useful conclusions can be reached by this line of approach. Of course, conditions which limit an occupier's use of land as a caravan site interfere with what otherwise would be his unlimited common law rights (subject to nuisance). But then that is exactly what they are meant to do. Caravan sites as such had been a subject of legislative control, interfering with some common law rights, since the Public Health Act, 1936. There were good reasons why they should be.
>
> …
>
> If, then, one is to discover limitations upon the condition-making power, they must be found in the words of the Act itself and by fair deduction from those words. One such limitation presents itself at once. Since the Act deals with the licensing of land for use as a caravan site, conditions cannot validly be attached to a licence for such use that have no relation to the site itself.

[59] This last passage emphasises that although some Judges in some decisions have identified the presumption, generally the cases have turned on orthodox interpretation approaches, of which for some Judges the presumption has formed part of the reasoning. I do not consider it can be put higher than that.

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46 At 750.
47 At 751.
48 At 754 –755.

[60] The final case to which reference is needed is *Stewart v Perth and Kinross Council*.[49] At issue there was the ability of the Council to prescribe conditions under which a licensed car dealer could contract with purchasers. The House of Lords held that the effect of the conditions attached to the license was to interfere with the contractual arrangement between dealer and customer, and was not authorised. A fair reading is that the broad statutory words were not clear enough to authorise the Council to regulate the contracts between dealer and customer.

[61] The statutory provision on its face did not obviously invite the type of condition the Council was purporting to impose. The parent provision concerned record keeping, yet the condition imposed under it by the Council addressed information that the dealer had to give the customer. The case does not merit deeper detailed analysis. I accept there are statements in it that identify the need for clear words before a third party such as the Council can dictate terms of a contract between the licensee and his or her customer. Equally, the case could be seen as a reasonably orthodox example of limiting a power conferred in broad terms to uses which are consistent with the purpose of the legislation.

[62] For the reasons given, however, I do not consider the plaintiffs have established there is in New Zealand a presumption of strength that clear words are needed before legislation is seen as conferring a power to interfere with freedom of contract. The fact that interference with the freedom of contract will be a consequence of a particular interpretation is a relevant factor, but in the normal way the meaning must be discerned from the text in light of its purpose, and from the context of the legislation as a whole.

The present case

[63] Returning then to the declaration sought by Vector, it is worded in these terms:

> A declaration that the Act does not permit the Authority to amend the Code so as to require distributors to offer a Default UoSA containing core terms prescribed by the Authority and operational terms consistent with principles and policies set by the Authority.

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[49] *Stewart*, above n 3.

[64] I decline the declaration. I consider the Act does allow the Authority to dictate the content of "core" terms in the agreement between distributors and retailers. I base this on the purpose of the legislation, the context that a distributor has a natural monopoly so restraints on its unequal bargaining power are to be expected, the role of the Authority, the scheme of the Act including the ability to amend at any time and in any way, and the import of s 42(2)(f) of the Electricity Industry Act.

[65] Whether standardisation is done by a default UoSA or otherwise is not material. The terms of the declaration do not require me to determine if the Authority can dictate all terms. However, for the reasons given, it seems to me difficult once some dictation by the Authority is allowed to sensibly draw a line as to how much. I do not accept that the use of the term "more standardisation" in s 42(2)(f) requires that exercise to be done, or prevents complete standardisation.

[66] In terms of the second plaintiffs' concerns, if it is permissible to dictate the content then logically it must be permissible to limit the content to distribution services.

Issue two – Commerce Commission or Electricity Authority?

Introduction

[67] Section 32 of the Act is the provision which sets out what content the Code may consist of. It also establishes what it may not do:[50]

> (2) The Code may not
>
> (a) impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant, or the Authority; or
>
> (b) *purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986* (other than to set quality standards for Transpower and set pricing methodologies (as defined in section 52C of that Act) for Transpower and distributors); or

[50] Emphasis added.

(c) purport to regulate any matter dealt with in or under the Electricity Act 1992.

[68] The plaintiffs submit that much of the content of the proposed default UoSA falls foul of the rule in s 32(2)(b).

[69] The relevant aspects of the Commerce Act 1986 begin with ss 52 and 52A which provide:

> **52 Overview of Part**
>
> This Part provides for the regulation of the price and quality of goods or services in markets where there is little or no competition and little or no likelihood of a substantial increase in competition.
>
> **52A Purpose of Part**
>
> (1) The purpose of this Part is to promote the long-term benefit of consumers in markets referred to in section 52 by promoting outcomes that are consistent with outcomes produced in competitive markets such that suppliers of regulated goods or services–
>
> (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
>
> (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands; and
>
> (c) share with consumers the benefits of efficiency gains in the supply of the regulated goods or services, including through lower prices; and
>
> (d) are limited in their ability to extract excessive profits.
>
> (2) In this Part, the purpose set out in subsection (1) applies in place of the purpose set out in section 1A.

[70] The Commerce Act then identifies the types of regulation that are possible, being information disclosure regulation, negotiate/arbitrate regulation and price/quality regulation. Of the latter form of regulation there are two types – default/customised price-quality regulation and individual price-quality regulation. Further, subparts are devoted to providing further detail about each of these methods of regulation. Of particular interest to the plaintiffs is subpart 6 which deals with default/customised price-quality regulation. Section 53K explains:

53K Purpose of default/customised price-quality regulation

> The purpose of default/customised price-quality regulation 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.

[71] Section 53M then states that every price-quality path must set either the maximum price that can be charged or the maximum revenue that can be recovered, the regulatory period and importantly the quality standards that must be met by the regulated supplier.

[72] The plaintiffs' core proposition is that the default terms in the Authority's UoSA are all quality standards that a distributor must meet, and as such fall within the domain of the Commerce Commission when it sets a price-quality path. This submission is said to be reinforced by s 53M(3) which provides:

> (3) Quality standards may be prescribed in any way the Commission considers appropriate (such as targets, bands, or formulae) and may include (without limitation)–
>
> (a) responsiveness to consumers; and
>
> (b) in relation to electricity lines services, reliability of supply, reduction in energy losses, and voltage stability or other technical requirements.

[73] Part 4, subpart 9 of the Commerce Act is specifically about "Electricity Line Services" and s 54 begins this by stating:

> **54 Overview of how subpart applies**
>
> (1) This subpart provides–
>
> (a) that all suppliers of electricity lines services are subject to information disclosure regulation; and
>
> (b) that suppliers of electricity lines services that are not consumer-owned are also subject to price-quality regulation; and
>
> (c) for the transition to the new regime provided for in this Part.
>
> (2) This section is only a guide.

[74] Of some significance to the present issue, there is a section of Subpart 9 concerned with the "Interface with Electricity Industry Act 2010".[51] This is a recognition that the respective functions of the Commerce Commission and the Electricity Authority will impact on each other, and primarily s 54V says each must think about the other and consult before regulating in a way that will impact on the other.

[75] Finally, by way of introduction, it assists comprehension to give a general overview of what the default UoSA covers. Part I sets out the obligations that each of the distributor and trader undertake. These include delivering electricity to specified service levels, rules about load control and load shedding as well as rules about providing information when service interruption occurs. Each of these obligations is then amplified by detailed schedules. Schedule 1, for example, contains detailed rules about how long a distributor has to restore electricity depending on the location of the interruption, and has rules about how many service interruptions, and "voltage sags" there can be on a per annum basis. In general terms it can be observed the Schedules are detailed documents which contain obligations and terms that on their face relate to the quality of the service the distributor provides to the retailer.

Plaintiffs' submissions

[76] As noted, the general proposition is that the default UoSA, as a whole,[52] breaches the prohibition in s 32(2)(b) of the Electricity Industry Act that the Authority must not regulate anything the Commerce Act authorises the Commission to regulate. It is emphasised it is not relevant whether the Commerce Commission has exercised its power. The statutory test is what it is authorised to do.

[77] The declaration sought by the plaintiffs is in these terms:

> A declaration that section 32(2) of the Act prohibits the Authority from specifying terms for the supply of electricity lines services including by requiring distributors to offer a Default UoSA containing core terms

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51 Commerce Act 1986, s 54V

52 This term is used because the plaintiffs do not identify any specific clauses they say encroach on the Commerce Commission's domain.

prescribed by the Authority and operational terms consistent with principles and policies set by the Authority.

[78] Mr Farmer QC stressed that while s 15 of the Act identified the Authority's purposes to be promoting competition and efficiency in the *industry*, the area carved off for the Commerce Commission was limited to a non-competitive *market*, namely electricity lines. The carving off on one specific area of the industry was compatible with the general functions of the Authority, and needed to be given effect to.

[79] The second general point is that price control necessarily involves the regulation of the quality of services.[53] It is ineffective to regulate prices if there are not safeguards protecting minimum levels of service. Otherwise price limits are circumvented by reduction in quality of service. The point for the present case is that having required the Commission to achieve outcomes that mirror a competitive market, one would expect the Commission to have the task of setting performance standards.

[80] That expectation is said to be met when the language of the Commerce Act is considered. Of the provisions previously set out, reference is made to s 52A(1)(b) and s 53M(3) both of which refer to quality standards as part of the Commission's task. Further, s 53M(3)(b) gives examples of quality standards as they relate to electricity line services, and includes issues such as reliability of supply and voltage stability (matters addressed in the default UoSA).

[81] Next, the plaintiffs refer to s 54V which is the provision that addresses the relationship between the Electricity Authority and the Commerce Commission. Subsection (4) provides:

> (4) The Commission must take into account, before exercising any of its powers or performing any of its functions under this Part, –
>
> (a) any provision of the Code, or decision made under it, that relates to or affects the pricing methodologies or performance requirements applicable to Transpower:

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[53] Citing *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 515. The plaintiffs comment that this case has been cited many times by the New Zealand authorities, including in *Red Bull New Zealand Ltd v Drink Red Ltd* [2016] NZCA 373 at [115].

(b) any provision of the Code, or decision made under it, that relates to or affects the pricing methodologies applicable to any other line owner:

(c) any guidelines of which it receives advice under subsection (2)(c) that are likely to be relevant to the exercise of the powers or performance of the duties or functions of the Commission under this Part:

(d) any directions of which it receives advice under subsection (2)(d):

(e) the levy payable by Transpower or any other line owner under section 128 of the Electricity Industry Act 2010:

(f) the continuance of supply obligations imposed by section 105 of the Electricity Industry Act 2010.

[82] Mr Farmer emphasises the contrast between (4)(a) and (4)(b). If one goes back to s 32(2) of the Electricity Industry Act, it is the Authority rather than the Commission that is given the task of setting quality standards for Transpower. This is reflected in s 54V(4)(a) and (b) where the Commission has to have regard to performance requirements set by the Authority in relation to Transpower,[54] but not otherwise.[55] It is accordingly submitted that both Acts confer on the Commission the task of regulating quality as regards line services, and the Authority cannot do it regardless of how convenient it may be for them to do so.

Decision

[83] The submissions of the Authority and the Commission are reflected in my reasoning and do not need separate articulation. I note at the outset that it is plainly relevant, but not determinative, that these two specialist expert bodies view the legislative arrangements the same way.

[84] It is common ground that the functions of the two bodies potentially overlap. The Authority has the task of promoting competition in the whole industry, which includes lines services.[56] It also has the task of promoting the reliable and efficient supply of electricity, and the regulating all the players in the industry.[57] As regards

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54 Commerce Act 1989, s 54V(4)(a).
55 Section 54V(4)(b).
56 Electricity Industry Act 2010, s 15.
57 Section 15.

one sector, the electricity lines, the Commerce Commission is also given a role, which is to control price so as to achieve outcomes that would occur if it were a competitive market. Controlling price inevitably involves also regulating performance standards and therefore there is a potential overlap in functions.

[85] The plaintiffs' case cedes the entire area to the Commission but I am satisfied that was not the legislative intent. It cannot be so when s 42(2)(f) of the Electricity Industry Act gives to the Authority the task of standardising distribution contracts, and ensuring specific content. Allocating this task to the Authority is to insert the Authority directly into the area which the plaintiff says has been completely taken away from it. In my view, s 42(2)(f) is enough in itself to say the plaintiffs' case is too broadly put.

[86] The fixing of pricing paths is a complex task which occurs at what can be termed a big picture level compared to the detailed regulation of services one finds in the Authority's draft default UoSA. Thus the quality standards identified by the Commerce Commission are expressed in terms of a System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI). These in turn involve the application of prescribed formulae. The Act itself anticipates this broad principle approach. In s 53M(3) of the Commerce Act it is provided that the Commission's quality standards may be prescribed in any way the Commission wants "such as targets, bands, or formulae".

[87] Like any statutory function, the exercise of the power is controlled by the purposes of the Act and is limited to those. Here, the quality standards the Commission can apply are only those which promote outcomes that:[58]

(a) incentivise line distributors to innovate and invest;

(b) incentivise line distributors to be efficient and provide services that reflect consumer demands;

(c) prevent excessive profits; and

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[58] Commerce Act 1986, s 52A.

(d) share the benefits of efficiency gains with consumers.

[88] This specific and limited function is emphasised by the Commission, which submits it does not have the role or power to regulate the market such as by requiring specific terms in a contract.

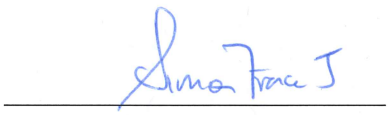
[89] In the end one must come back to the reality that both bodies have roles. The essential proposition underlying the plaintiffs' case cannot be right because s 42(2)(f) plainly says the Authority has a task in relation to distributor contracts, and that is to promote/ensure standardisation. That necessarily involves the type of activity involved in the Model UoSA and now the default UoSA. Further, as Mr Galbraith observed, if shut out of controlling service performance by the distributor, how is the Authority to regulate the other half of the contract, the retailer. Given the distribution contract dictates how the retailer can provide electricity to the consumer, it is very unlikely the legislature intended to so dramatically restrict the Authority's ability to intervene.

[90] Returning to the declaration sought, I do not consider that s 32(2), which recognises the Commission's exclusive role under the Commerce Act, has the effect of meaning the Authority cannot prescribe default terms that might fall within the label "performance services". Each entity has a complementary role in that regard. The Authority and the Commission both accept specific clauses required by the Authority may encroach on the Commission's function, and therefore be impermissible, but none have been identified by the plaintiff, so analysis is not needed.

Conclusion

[91] The application for the declarations is declined because I consider neither correctly interprets the relevant legislation. A key point of difference with the plaintiffs' case is the import of s 42(2)(f) of the Electricity Industry Act.

[92] Costs memoranda may be filed if necessary.



Simon France J