In the High Court of New Zealand
Wellington Registry

CIV 2011-485-268

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under:	the Commerce Act 1986 ("Act")
in the matter of:	an appeal to the Court of Appeal under section 97(1) of the Act
between:	**The Major Electricity Users' Group Inc** Appellant
and:	**Commerce Commission** Respondent

Application for Leave to Appeal to Court of Appeal

Date:	14 February 2014
Next Event Date:	
Judicial Officer:	Clifford J

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To: the Registrar of the High Court at Wellington

And to: the Commerce Commission

This document notifies you that —

1. The Major Electricity Users' Group Inc ("MEUG") applies for leave to appeal to the Court of Appeal against the decision of the Honourable Justice Clifford and lay members Messrs R Davey and R Shogren, given on 11 December 2013 in the High Court at Wellington ("decision") under s 52Z of the Commerce Act 1986 ("Act"). The decision declined MEUG's appeals against the cost of capital input methodologies for Electricity Distribution Services, found in [2012] NZCC 26, and Transpower, found in [2012] NZCC 17. MEUG's appeals also affected, by implication, the cost of capital input methodologies for Gas Pipeline Businesses, found in [2012] NZCC 27 and [2012] NZCC 28. All cost of capital input methodology determinations are referred to below as the IMs.

2. MEUG is seeking to appeal against the following parts of the decision:

   (a) The decision not to amend the IMs by substituting the 50th percentile (mid-point) of the weighted average cost of capital ("WACC") range in place of the 75th percentile for price-quality regulation.

   (b) Alternatively, the decision not to amend the IMs by applying the 75th percentile of the WACC range only to new investment for price-quality regulation.

   (c) Alternatively, the decision not to refer the IMs back to the Commerce Commission with directions to substitute the 50th percentile (mid-point) of the WACC range in place of the 75th percentile for price-quality regulation.

   (d) Alternatively, the decision not to refer the IMs back to the Commerce Commission with directions to apply the 75th percentile of the WACC range only to new investment for price-quality regulation.

3. The application for leave to appeal to the Court of Appeal is made under s 97(1) of the Act.

4. The specific grounds of the appeal would be:

Background

(a) The Court included two lay expert members who brought their own expertise to the Court.

(b) The Court found and/or expressed the following expert opinion ("Findings"):

(i) The midpoint of the WACC range was correctly estimated and free from bias.

(ii) The Commission's selection of the 75th percentile was explicitly chosen so as to likely be higher than the unobservable true WACC and to permit regulated suppliers to earn excess returns. This selection was clearly at odds with the s 52A(1)(d) purpose of limiting the ability of regulated suppliers to extract excessive returns.

(iii) The Commission's decision to choose a point higher than the mid-points was based on strongly expressed, but unsupported, views of the benefits of dynamic efficiencies deriving from investment, without apparent regard to the nature of the investment.

(iv) There was an absence of supporting material for the Commission's 75th percentile approach and beliefs about asymmetric social costs.

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

(vi) The expectation of earning above-normal returns on new investment could incentivise regulated suppliers to over-invest.

(vii) It was far from obvious that higher than normal expected returns would stimulate greater efficiency of any kind, contrary to the s 52A(1)(b) and (c) purposes.

(viii) In principle, higher than normal returns would be unlikely to stimulate dynamic efficiencies.

(ix) As the outputs of regulated suppliers were inputs to numerous – probably all – other sectors of the economy, higher than normal expected returns would likely promulgate inefficiency throughout the economy.

(x) Applying the 75th percentile estimate to the initial regulated asset base is unlikely to be necessary to promote incentives to invest and is contrary to rational investment choice.

(xi) Any concern about effects on investment by yet-to-be-regulated industries would seem to be misplaced.

(xii) The decision was contrary to Australian precedent.

(c) The midpoint WACC of 6.49% fell squarely within a range of estimates used as reasonability checks by the Commission and expressly adopted by the Court as its own yardstick.

(d) Despite the Findings, the Court declined MEUG's appeal on the basis that MEUG failed to present positive evidence that an amended or substituted IM would be materially better in meeting the purpose of Part 4 and/or the purpose of IMs in s. 52R, and the Court had found no such evidence in the record of Commission proceedings available to the Court.

Errors of Law

(e) 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 rule-making 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.

(f) 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.

(g) 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.

(h) The Court erred by inferring or reinforcing a default bias in favour of suppliers that is inconsistent with the legislative intention.

(i) 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.

5. This Court should grant leave to appeal because:

(a) The appeal raises questions of law and general principle;

(b) The issues raised are of significant public interest;

(c) The difference between the mid-point of the WACC range and the 75th percentile amounts, in monetary terms, is substantial; and

(d) This is the first time that rights of appeal against IM determinations have been determined. There is benefit in having the Court of Appeal consider the legal issues raised by this appeal, in particular the role of the High Court in considering appeals against IMs, to determine whether they have been properly interpreted and applied.

6. The judgment sought from the Court of Appeal, if leave is granted, is –

(a) The Court to amend the cost of capital IM determinations by substituting the 50th percentile (mid-point) of the WACC range in place of the 75th percentile for price-quality regulation.

(b) Alternatively, the Court to refer the cost of capital IM determinations back to the Commerce Commission with directions to amend the determination by substituting the 50th percentile (mid-point) of the WACC range in place of the 75th percentile for price-quality regulation.

(c) Alternatively, the Court to amend the cost of capital IM determinations by applying the 75th percentile of the WACC range only to new investment for price-quality regulation.

(d) Alternatively, the Court to refer the cost of capital IM determinations back to the Commerce Commission with directions to amend the determination by applying the 75th percentile of the WACC range only to new investment for price-quality regulation.

(e) Any other orders that maybe necessary to give effect to the preceding orders or to achieve the purposes of Part 4 and s 52R of the Act.

7. This application relies on the affidavit of Ralph Victor Matthes, sworn on 13 February 2014.

Date: 14 February 2014

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NM Pender/SL Franks
Counsel/solicitor for the appellant