**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2011-485-268**
**CIV-2011-485-269**
**[2015] NZHC 1042**

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| UNDER | Part 4 of 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 that Act |
| BETWEEN | THE MAJOR ELECTRICITY USERS' GROUP INC<br>Applicant |
| AND | THE COMMERCE COMMISSION, VECTOR LIMITED, POWERCO LIMITED AND TRANSPOWER NEW ZEALAND LIMITED<br>Respondents |

On the papers

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| Counsel: | N M Pender and S L Franks for Applicant<br>V E Casey for Commerce Commission<br>A S Butler and C M Marks for Vector<br>V L Heine and B A Davies for Powerco and Transpower |
| Judgment: | 18 May 2015 |

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**COSTS JUDGMENT OF CLIFFORD J**

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## Introduction

[1] On 28 July 2014 this Court[1] gave judgment[2] declining leave to The Major Users' Electricity Group Inc (MEUG) to appeal its judgment in *Wellington International Airport Limited v Commerce Commission* [2013] NZHC 3289.

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1 Comprising, pursuant to s 52ZA(3) of the Commerce Act 1986, Clifford J, Mr R Davy (lay member) and Mr R Shogren (lay member).

2 *The Major Electricity Users' Group Inc v Commerce Commission* [2014] NZHC 1765.

[2] The respondents, Vector, and Powerco and Transpower jointly, seek Schedule 3C costs against MEUG on the basis they opposed leave being granted to MEUG and had succeeded in that opposition. MEUG opposes those applications. The Commerce Commission abided the Court's leave decision, and does not seek costs.

[3] In a Minute of 23 September 2014 I deferred consideration of costs on MEUG's application for leave to appeal until I knew whether I would be dealing with costs applications arising out of the substantive proceedings. In a joint memorandum dated 9 February 2015 counsel for Vector, and Powerco and Transpower, advised me that issues of costs arising from the substantive appeal had been resolved,[3] that MEUG continued to oppose their clients' applications for costs on its unsuccessful leave to appeal application and that a timetable had been agreed for the exchange of written submissions. MEUG subsequently sought an oral hearing on the question, which I declined.[4]

[4] I am therefore considering these applications on the papers. I do so first in terms of the applications originally made by Vector, and Powerco and Transpower, in September 2014, then by reference to the submissions filed by MEUG in February this year opposing those applications and, finally, to the reply submissions filed subsequently.

**Submissions**

*The applications*

[5] Powerco and Transpower apply jointly for an order of costs of $19,110 calculated on a 3C basis. That joint application reflects the fact that, in responding to MEUG's application for leave, they were represented jointly by Chapman Tripp. Vector applies individually for costs in an identical amount.

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[3] In a memorandum of 26 February 2015 the Commission confirmed that it had reached a settlement with all appellant parties for payment of costs at approximately 70 per cent of the estimated scale costs on a 3C basis (with some areas of uplift). Scale costs and disbursements totalling $468,736 were paid to the Commission by the appellants on a "pragmatic basis to reflect the multiplicity of appeals while at the same recognising the areas of overlap in responding to the appeals".

[4] *The Major Electricity Users' Group Inc v Vector Ltd and ors*, CIV-2011-485-268, Minute (No.6) of Clifford J, 19 February 2015.

[6] Each of those applications is based on the simple proposition that, as they succeeded in their opposition to MEUG's application for leave, costs should follow the event in the normal manner. Category 3C is said to be the appropriate categorisation, given the complexity and novelty of the issues raised.

*MEUG's opposition*

[7] As summarised in its written submissions, MEUG's position is:

> (a) The usual "costs follow the event" principle that applies in inter-party disputes should not apply to proceedings arising from input methodology determinations (IM). IM appeals are legislative in nature. Legislative processes seek to maximise the availability of information that helps estimate the effects of proposed rules on future conduct. Competing perspectives are to be encouraged, not deterred. Costs as between interested parties in IM proceedings should lie where they fall.
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> (b) Requiring MEUG to pay costs to regulated suppliers will chill consumer participation in future proceedings. Even if the usual costs principles is not to be displaced, the Court should still decline to order costs against MEUG for its participation in IM-related proceedings.
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> (c) All three suppliers could have presented a joint defence. If costs are to be awarded, they should be limited to one set only.
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> (d) The quantum sought is excessive. The costs of this application ought to mirror the costs scale used by the Court of Appeal for its own leave applications. Alternatively, High Court band B should be used to allocate time for all steps.

*Reply submissions*

[8] Vector, Powerco and Transpower reject MEUG's submission that, as a consumer representative, it should not be required to pay costs. MEUG cannot, they say, properly be described as a "consumer body" acting in the public interest. MEUG is an industry association. Vector pointed to the following extract from MEUG's mission statement found on its website:

> To add value to MEUG members' management of electricity costs and risks through market intelligence, networking, facilitating solutions to improve competition, maintain reliability, promote efficient operations and regulate monopolies to achieve outcomes consistent with competitive markets for the long term benefit of electricity consumers.

[9] Moreover, the "public interest" issues MEUG had raised had been considered by the Court when it declined MEUG's leave application. Importantly, and as recognised when the Court did so, the Commission was already re-considering the Cost of Capital IM's selection of the 75th percentile for the determination of WACC, the issue MEUG wished to pursue in the Court of Appeal.

**Analysis**

[10] In the substantive appeals, Vector, Powerco and Transpower as suppliers of regulated services contested a range of decisions made by the Commerce Commission when determining IMs. MEUG, representing purchasers of electricity lines services from Transpower and electricity distribution businesses including Vector and Powerco, did likewise. Each contended that the positions they took were consistent with, and indeed required by, the regulatory framework under which the Commission had made its challenged decisions. In particular, those positions were ones which would, in a materially better way, "promote the long-term benefit of consumers by promoting outcomes that were consistent with those produced in competitive markets".[5]

[11] MEUG's particular concern was the Cost of Capital IM and, within that, the Commission's determination to use the 75th percentile of the WACC range for price – quality path regulation. MEUG argued that the 50th percentile should be used, or alternatively that the 75th percentile should be applied only to new investment. Vector and Powerco – as interested parties – supported the Commission's decision. Transpower initially argued for the adoption of the 90th percentile, but did not pursue that at the appeal hearing.

[12] They did so in the context of a regulatory process which I have previously described in the following terms:[6]

> [The] Commission's role under Part 4 is best categorised as that of making legislative rules, in effect regulations as Professor Burrowes says. The clear purpose of Part 4 is, through the determination of input methodologies, to set up rules as to how Part 4 regulation will apply so that, before the event, firms

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5 The Commerce Act 1986, s 52A(1).

6 *Wellington International Airport Ltd v Commerce Commission* HC Wellington CIV-2011-485-1031, 22 December 2011.

> operating in a regulated sector have a greater degree of certainty as to how the regulatory framework will apply to them.

[13] In that contest over regulatory rules, the suppliers and purchasers of regulated services do not bring each other to the table: rather they are there in response to decisions by the regulator. As unsuccessful appellants, they have paid costs to the regulator. As I understand it, no question of costs arose as between suppliers and purchasers in the substantive appeals. That is notwithstanding the fact that, in those substantive appeals Vector, Powerco and Transpower on the one hand, and MEUG on the other, directly challenged the "materially better" propositions they respectively advanced, and supported approaches taken by the Commission when they did so.

[14] In many ways, the question that these applications raise is whether I should take the same approach here (although that is not the explicit way MEUG framed its argument), or whether I should adopt the more traditional party and party approach suggested by Vector, Powerco and Transpower.

[15] I think that question is best answered by reference to the way in which these proceedings have been conducted, and matters resolved as to the capacity in which appellants participated in the separate appeals of their co-appellants when only the Commission had been named as the respondent to those appeals.

[16] In the judicial review applications brought in response to the Commerce Commission's IM determinations, and then throughout the hearing of the substantive appeals, the "rulemaking" character of these proceedings was reflected in the approach taken to standing and participation. As this Court said in declining MEUG's leave application, in response to propositions by MEUG as to whether or not the suppliers should be regarded as respondents to its leave application:

> [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.

[17] From the outset, therefore, the Court took the view that an inclusive approach to standing and participation was most consistent with the objective of achieving input methodologies that would promote the Part 4 purposes. In my view, and as between suppliers and purchasers of regulated services who were – as relevant on the 75th percentile issue – effectively cross-appellants, leaving costs to lie where they fall in the substantive appeals best achieves that result.

[18] I think the same approach is appropriate on this application for leave. I acknowledge it was MEUG alone who sought leave to appeal, and that it was unsuccessful. But I do not think that changes the essential character of the leave proceedings in this Court. Namely, they were a continuation of the, essentially regulatory, contest that challenges to input methodology determinations by the Commission comprise.

[19] I therefore agree with MEUG's submission that on its leave application as between it and the supplier respondents costs should lie where they fall.

[20] I do not, however, base that conclusion on the status of MEUG as in some way representing consumers more generally. That, I think, would be naïve. Rather, I base it on the proposition that suppliers and purchasers challenge input methodology determinations by the Commission quite properly because to do so is in their own interests, albeit that – as I have noted – they all argue that the outcome they advocate is most consonant with the long-term interests of consumers, which is the purpose of the regulatory regime.

**Result**

[21] I accordingly decline the applications for costs made by Vector, Powerco and Transpower jointly. Costs of the participants in these processes should, and will here, lie where they fall. If a "costs" discipline is appropriate for potential

participants in proceedings like these, that in my view is provided by the accepted basis upon which the Commerce Commission may be entitled to costs where a challenge to one of its decisions fails.

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**Clifford J**

Solicitors:
Franks & Ogilvie, Wellington for Applicant
Chapman Tripp, Wellington for Powerco Limited and Transpower New Zealand Limited
Russell McVeagh, Wellington for Vector Limited