IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA481/2017
[2018] NZCA 543

BETWEEN	VECTOR LIMITED First Appellant	
	PAUL HUTCHISON, WILLIAM CAIRNS, JAMES CARMICHAEL, KAREN SHERRY AND MICHAEL BUCZKOWSKI Second Appellants	
AND	ELECTRICITY AUTHORITY Respondent	

Hearing:	9 May 2018 (further submissions received on 30 May 2018)
Court:	Kós P, Winkelmann and Asher JJ
Counsel:	J A Farmer QC and S M Hunter for First Appellant D R Bigio QC for Second Appellants A R Galbraith QC and L A O'Gorman for Respondent D A Laurenson QC and J L W Wass for Commerce Commission as interveners
Judgment:	30 November 2018 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B A declaration is made that proposed cls 12A.4(1)(b) and 12A.10(2) of the Electricity Industry Participation Code 2010 would be unlawful.

C Further directions are given at [59] of this judgment for the determination of Issue 2.

D Costs are reserved.

REASONS OF THE COURT

(Given by Kós P)

[1] May the Electricity Authority prescribe standard terms for contracts between distributors and retailers of electricity? In particular, may it prohibit individually-negotiated terms in distribution agreements? Simon France J held that the Authority could do both.[1] Vector Ltd, one such distributor of electricity, and its principal shareholders, the second appellants, now appeal.[2]

Background

[2] We may begin by largely adopting the Judge's summary of background facts.[3]

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

[4] The New Zealand electricity industry comprises four sectors: generation, transmission, distribution and retail. Generators and retailers are permitted to be vertically integrated, but the intermediate sectors must be distinct. Transmission is undertaken by the national grid operator, Transpower. Some large industrial consumers connect directly to the grid. But otherwise Transpower transmits electricity to distributors (that is, lines companies). Distributors convey the electricity to retailers. Retailers buy electricity from generators through a wholesale market and sell it on to consumers.

[5] Retailers must enter into agreements with distributors to use the distributor's network to get the electricity to their customers. These agreements are known in the industry as use-of-system agreements.[4] The Authority intends to make changes to the Code that will affect UoSAs.

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1 *Vector Ltd v Electricity Authority* [2017] NZHC 1774 [High Court judgment].

2 The second appellants are trustees of Entrust, an electricity consumer trust which hold three quarters of Vector's share capital.

3 High Court judgment, above n 1, at [1]–[6].

4 Referred to hereafter as "UoSAs".

[6] From the distributors' viewpoint, the Authority's proposals mean that much of the content of UoSAs will be set and made mandatory by the Authority unless the retailer agrees to different provisions. It is common ground that these new proposals, if implemented, will result in significant portions of the contracts being fixed. Indeed that is the Authority's objective. It wants these agreements standardised.

[7] The exercise remains at the proposal stage. Vector seeks declarations aimed at stopping the 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

(b) alternatively, if it does have some power to do so, 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.

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

[9] As the Judge went on to observe:

> [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:
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> > **Executive Summary**
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> > [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.
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> 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.
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> 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:
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> - 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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> 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 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.
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> 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.

(Footnote omitted.)

[10] Clause 12A.4 of the proposed amendment to the Code would provide:

> (1) Each **distributor** must have a **default distributor agreement** that—
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> (a) includes—
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> (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.

[11] UoSAs between Vector and its retailers currently require the latter to collect information from consumers. That information has been used by Entrust to identify the recipients of its dividends. The effect of cl 12A.4(1)(b) is that such a provision would no longer be permitted. Nor could that information be obtained under the limited exception to cl 12A.4(1)(b) found in cl 12A.10 (as proposed):

(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.

[12] Obtaining the information Entrust seeks would not be impossible. But it would depend on other collateral arrangements being entered into between Vector and retailers beyond the terms of the UoSAs.

Declarations sought and issues on appeal

[13] The declarations sought originally by the plaintiffs were these:

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.

…

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

[14] At the hearing of this appeal we indicated that these declarations were cast in far-too-sweeping terms. The Judge was right to refuse relief in those terms. As a result, the declarations sought were revised, and were that:

(a) the Act does not permit the Authority to amend the Code to require distributors to offer a default distributor agreement either: (i) on terms prescribed by the Authority; or, in the alternative, (ii) which prohibits the inclusion of terms whose purpose is to confer a benefit on persons or entities over whom the Authority has no jurisdiction;

(b) section 32(2) of the Act prohibits the Authority from amending the Code to prescribe quality standards for suppliers of electricity lines services that are subject to default/customised price-quality regulation under pt 4 of the Commerce Act 1986; and

(c) the Authority may not amend the Code to require those suppliers of electricity lines services to offer a default distributor agreement containing quality standards prescribed by the Authority or to be fixed by the Rulings Panel.

[15] The parties have submitted these agreed issues for this Court's consideration:

(a) Issue 1: does the Act permit the Authority to amend the Code to require electricity distributors to offer retailers a default UoSA on terms prescribed by the Authority? In particular:

(i) do ss 42 and 44 of the Act permit the Authority to impose a complete contractual framework on parties to electricity distribution agreements; and

(ii) does the Act permit the Authority to prohibit parties to electricity distribution agreements from including terms that confer benefits on third parties over whom the Authority has no jurisdiction?

(b) Issue 2: does s 32(2) of the Act prohibit the Authority from amending the Code to require distributors to offer a default UoSA (because such amendments prescribe quality standards for distributors, a matter reserved to the Commerce Commission)? In particular:

(i) is the Authority prohibited from prescribing quality standards for distributors, because that is a matter for the Commerce Commission; and

(ii) in setting a comprehensive set of standardised contractual terms for distributors, is the Authority prescribing quality standards?

Issue 1: does the Act permit the Authority to amend the Code to require electricity distributors to offer retailers a default UoSA on terms prescribed by the Authority?

[16] We will analyse this issue after setting out the relevant statutory history and framework, the judgment appealed and the submissions made before us.

Statutory history and framework

[17] The electricity industry has been the subject of almost unrelenting review and reform since the mid-1980s. In 1989 the Electricity Task Force recommended separation of the ownership of generation and transmission assets, corporatisation of electricity supply authorities and a light-handed regulatory regime.[5] That regime would draw on both the Commerce Act (to address anti-competitive conduct) and additional public information disclosure regulation. It would be underpinned by the prospect of more heavy-handed regulation, such as price control, if market dominance was misused. The result of this was the Electricity Act 1992.

[18] That new legislative scheme anticipated further review, and that occurred in 2000 with a Ministerial Inquiry chaired by the Hon David Caygill (the Caygill Inquiry). The Caygill Inquiry recommended a new governance structure

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5 The legislative and industry history is set out in Daniel Kalderimis "Pure Ideology: The 'Ownership Split' of Power Companies in the 1998 Electricity Reforms" (2000) 31 VUWLR 255.

(a compulsory single market governed by an elected board), an increased role for the Commerce Commission (setting information disclosure regulation and targeted price control for distributors) and the creation of an industry-led electricity-ombudsman scheme.[6]

[19] The Caygill Inquiry noted that UoSAs had "been criticised for being too complex, inconsistent and imposing conditions out of line with commercial norms",[7] and concluded:[8]

> The Electricity Networks Association (an association representing nearly all the network companies in New Zealand) is developing principles to cover the development of these agreements. We welcome this as an initiative that will lead to greater consistency, lower compliance costs and increased competition. It is important, however, that the principles are developed in such a way that they do not unduly reduce flexibility to negotiate tailor made agreements or other opportunities for innovation. To achieve this, the principles should be developed within the new market arrangements. This will also allow other interested parties to contribute to their development. In the light of these developments, we do not see the need for a compulsory standard [UoSA] at this stage.

[20] After the Caygill Inquiry, Parliament enacted legislation implementing the recommendations of the Inquiry. But those reforms made no provision for standardisation of distribution terms. Part 4A of the Commerce Act was added by the Commerce Amendment Act (No 2) 2001, creating a targeted price control regime in relation to distributors. An Electricity Governance Board was established by the Electricity (Commencement of Electricity Governance Board) Order 2003. But further reform soon followed and the Board was replaced by the Electricity Commission under pt 15 of the Electricity Act with effect from October 2004. The Electricity Commission's functions included to "formulate and make recommendations concerning electricity governance regulations and rules" to "establish, operate, and facilitate the operation of markets for industry participants or consumers, or both".[9] The Commission had responsibility for regulating the industry via the Electricity Governance Rules 2003, which imposed common quality

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6 David Caygill, Susan Wakefield and Stephen Kelly *Inquiry into the Electricity Industry* (Ministry of Economic Development of New Zealand, Wellington, June 2000).

7 At [224].

8 At [225].

9 Electricity Act 1992, s 172O(1)(a) and (c), added by the Electricity Amendment Act 2004, s 16.

obligations for load shedding and voltage ranges by distributors.[10] The Minister retained power to make regulations providing for pricing methodologies for recovery of revenue requirements of distributors.[11]

[21] The Electricity Commission developed model UoSAs in the mid-2000s. They were not however published until 2008. Concerns were expressed about their content and it appears little progress was made in their adoption. At this point, in 2009, yet another Ministerial Review was held, the report on which was produced by the Electricity Technical Advisory Group led by Dr Brent Layton (the Layton Report).[12] The Layton Report referred to more standardised line pricing and UoSA business rules to promote competition.[13] It recommended that legislative provision be made for the Minister to make rules if the Electricity Commission failed to make progress in these areas. It did not refer to standardisation of UoSAs more generally.

[22] The present Act, the Electricity Industry Act, is a product of the Layton Report. In revising industry governance arrangements it replaced the Electricity Commission with a new independent Crown entity, the Authority. The Act was intended to alter and improve governance arrangements in the electricity sector. As a Minister put it in the House:[14]

> Functions better undertaken elsewhere are transferred, such as the promotion of energy efficiency to the Energy Efficiency and Conservation Authority, the approval of grid upgrade proposals to the Commerce Commission, and the management of supply emergencies to Transpower. The new Authority will be required to focus on getting the rules right, with the objective of improving competition, reliability, and efficiency in the industry.

[23] Section 4 states that the Act's purpose is to "provide a framework for the regulation of the electricity industry". The Authority is established as a Crown entity by s 12. Section 15 states the objective of the Authority, which is:

> … to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.

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10 Section 172E, added by the Electricity Amendment Act 2004, s 16.
11 Section 172D(9).
12 Electricity Technical Advisory Group and the Ministry of Economic Development *Improving Electricity Market Performance: Volume one: Discussion paper* (August 2009).
13 At [154].
14 (23 September 2010) 667 NZPD 14292.

[24] Functions of the Authority are provided in s 16. The second stated function, in s 16(1)(b), is "to make and administer the Electricity Industry Participation Code in accordance with subpart 3". Upon the relevant part of the Act coming into force, the Act gave effect to a draft Code compiled from various sources,[15] including a consolidation of the former Electricity Governance Rules and parts of the Electricity Governance Regulations 2003.[16] The draft Code was required to be certified by the Minister under s 35(1). It was then deemed to have been made by the Authority.[17]

[25] Section 42 of the Act required the Authority, within one year of that provision coming into force, to amend the Code to include all the matters set out in s 42(2):[18]

> **42 Specific new matters to be in Code**
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> (1) Before the date that is 1 year after this Section comes into force, the Authority must either——
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> (a) have amended the Code so that it includes all the matters described in subsection (2) (the new matters); or
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> (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).
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> (2) The new matters are as follows:
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> (a) provision of compensation by retailers to consumers during public conservation campaigns:
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> (b) imposing a floor or floors on spot prices for electricity in the wholesale market during supply emergencies (including public conservation campaigns):
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> (c) mechanisms to help wholesale market participants manage price risks caused by constrains on the national grid:
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> (d) mechanisms to allow participants who buy electricity on the wholesale market (commonly called the demand side) to benefit from demand reductions:
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> (e) requirements for distributors that do not send accounts to consumers directly to use more standardised tariff structures:

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15 Electricity Industry Act 2010, s 36(1).
16 Section 34(1).
17 Section 36(2).
18 Or, to the extent it had not, to deliver a report to the Minister identifying why not: s 42(1)(b).

(f) requirements for all distributors to use more standardised [UoSAs], and for those [UoSAs] 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.

[26] The Act provides that the Authority may amend the Code at any time, subject to s 39 (and s 54V of the Commerce Act).[19] Before amendment, the Authority is required to publicise a draft of the amendment, and a regulatory statement, and consult on both.[20]

[27] We now turn to the core provision of the Act for present purposes, which specifies the content of the Code, and therefore constrains the power to amend under s 39. That is s 32:

32 Content of Code

(1) The Code may contain any provisions that are consistent with the objective of the Authority and are necessary or desirable to promote any or all of the following:

(a) competition in the electricity industry:

(b) the reliable supply of electricity to consumers:

(c) the efficient operation of the electricity industry:

(d) the performance by the Authority of its functions:

(e) any other matter specifically referred to in this Act as a matter for inclusion in the Code.

(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

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19 Section 38(1).

20 Section 39(1). Urgent amendments without full compliance with s 39 are permitted under s 40.

methodologies (as defined in section 52C of that Act) for Transpower and distributors); or

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

(3) The Code may incorporate by reference any of the following:

(a) New Zealand Standards, or standards, requirements, or recommended practices of any overseas or international body:

(b) codes of practice issued under Part 4 of the Electricity Act 1992:

(c) any other written material dealing with technical matters that, in the opinion of the Authority,—

(i) is too long to publish as part of the Code; or

(ii) it is impracticable to publish as part of the Code.

(4) Schedule 1 applies to any material incorporated by reference into the Code.

[28] Finally, for present purposes, we note that the Act provides that the Code may require Transpower and other industry participants to enter into transmission agreements involving connection and use of the national grid. That is provided for in s 44:

44 Transmission agreements

(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.

Judgment appealed

[29] The Judge concluded that the Act allowed the Authority to dictate the content of "core" terms in the agreement between distributors and retailers.[21] He based that conclusion 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 it at any time and in any way) and the import of s 42(2)(f) of the Act.[22] The Judge said he did not expressly determine if the Authority could dictate *all* terms. But he went on:[23]

> 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.

Earlier (and consistently) he had also said this:[24]

> [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.

[30] The Judge did not consider the power to amend in s 42 to be timebound, unable to be revisited after one year. He said:[25]

> 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

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21 High Court judgment, above n 1, at [64].
22 At [64].
23 At [65].
24 At [31].
25 At [30].

> 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.

There is now no challenge to that finding in this appeal.

[31] The Judge did not consider that s 44 had the effect of limiting the prescription of default terms to transmission agreements. He noted this was a legacy provision from the Electricity Act, and should not be used to read down the newer Code provisions to limit the scope of s 42(2)(f).[26]

[32] Finally, he concluded that the plaintiffs had not established that there was 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".[27] Rather, that is a relevant factor to construction, but meaning remained to be discerned from the text in light of purpose and the context of the legislation as a whole.

[33] It may be noted that no one in the High Court addressed s 17 of the New Zealand Bill of Rights Act 1990, concerning the protected right to freedom of association. And no one raised it in this Court either, until the Court raised it. We received written submissions on that subject from parties after the hearing.

Submissions

[34] Mr Bigio QC (who argued this part of the case for all the appellants) submitted that s 42(2)(f) did not authorise the Authority to require the use of fully standardised UoSAs by distributors and retailers. Section 42(2)(f), even if not spent, contemplated and permitted only a requirement for *more* standardisation. That is, a reduction in differences between distributor agreements. Only via s 44 is full standardisation perhaps mandated, and then only in the case of transmission agreements. The contrast in drafting is significant. Parliament could have imposed a similar power under s 42, but chose not to. Mr Bigio also drew attention to s 44(5), which he said indicated a predisposition in favour of freedom of contract and the need for that freedom to be

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[26] At [37].
[27] At [62].

expressly overridden by statute. He submitted the Judge was wrong to read down s 44 as a mere carry-over from the Electricity Act. Mr Bigio submitted that the implication of the Judge's conclusion was that Parliament intended s 32 to be interpreted without reference to s 44, a conclusion he submits was impermissible.

[35] Mr Bigio also submitted that there was a body of authority providing that freedom of contract should only be limited if the wording of the statute expressly provides, or clearly implies, that limitation. He prays in aid the judgment of Arden LJ in the England and Wales Court of Appeal in *Contour Homes Ltd v Rowen*, where her Ladyship said that in interpreting legislation clear wording was required for freedom of a contract to be limited even if there had been significant restriction to that freedom by regulation.[28]

[36] For the respondent Authority, Mr Galbraith QC submitted that the Judge was correct in his analysis of the Act and the scope of the Authority's power to amend the Code. The proposed provisions of the Code are consistent with s 32 of the Act: the default-agreement proposal furthered the statutory objective in s 15 by promoting competition in the retail electricity market and promoting efficient operation of the electricity industry. Default contract terms would lower retail market entry and expansion barriers and reduce both the cost of doing business and the potential for UoSAs to stifle competition and innovation at the retail and related markets. The Authority expected the present proposal to promote competition in the electricity industry (consistent with s 32(1)(a)) by promoting even-handed treatment of traders and equal access to distribution services, and by reducing transaction costs for traders entering local distribution networks. Further, it would promote the efficient operation of the electricity industry by reducing transaction costs for traders and distributors in developing, negotiating, agreeing and maintaining disparate distribution agreements.

Analysis

[37] The question in this appeal is not so much the capacity of the Authority to impose standard terms in distribution agreements via the Code. This it clearly can do, as we will explain. Rather, the present issue really concerns the power of the Authority

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[28] *Contour Homes Ltd v Rowen* [2007] EWCA Civ 842, [2007] 1 WLR 2982 at [19].

to *prevent* parties negotiating *other* terms. In particular, terms that confer benefits on third parties over whom the Authority has no jurisdiction. The core question here is the validity of proposed cl 12A.4(1)(b) which, quite baldly, purports to preclude the inclusion of any other terms in a distributor agreement.[29] We do not here overlook the exception provided in proposed cl 12A.10.[30] But it is apparent from its terms that it is an extremely limited exception, confining alternative agreements to the subject matter of the terms of the Authority's default distributor agreement and further limited to terms concerning "distribution services" only.

[38] It does not follow logically that a statutory power to amend the Code, which permits the mandating of certain standard terms in a distribution agreement, would extend so far as to entirely exclude any other terms outside those prescribed in the default distributor agreement (or otherwise relating to distribution services). The question we must determine is whether Parliament intended the statutory power it conferred on the Authority to extend so far.

[39] In answering that question we make eight points.

[40] First, these proceedings require this Court to consider what constraints exist on the exercise of a statutory power by the Authority. In doing so we must bear in mind the requirement of s 5(1) of the Interpretation Act 1999 that the meaning of an enactment "must be ascertained from its text and in the light of its purpose". As the Supreme Court observed in *Unison Networks Ltd v Commerce Commission*:[31]

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act.

It may be observed, however, that in this case the statutory power is by no means conferred in unqualified terms.

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29 See above at [10].
30 See above at [11].
31 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

[41] Secondly, it cannot be said that our examination of the legislative history prior to the Act indicates a legislative intent to facilitate total standardisation of UoSAs.[32] To the contrary, the Caygill Inquiry identified a concern with inefficiencies in individual bespoke agreements and was encouraging of greater levels of standardisation. But that is about all. Complete standardisation was neither foreshadowed nor discussed. And there is nothing in the parliamentary debates on that subject either.

[42] Thirdly, and addressing statutory purpose, Parliament has conferred statutory power on the Authority to amend the Code, provided it undertakes the consultative requirements in s 39. But the power to amend is not unlimited. Apart entirely from process considerations, the power is expressly constrained by s 32. The objects underlying both the work of the Authority and the content of the Code are readily inferred from ss 15 and 32(1). They overlap and concern the promotion of competition in, reliable supply by, and efficient operation, of the electricity industry for the long-term benefit of consumers. Under s 32(1)(a) the Authority may not promulgate amendments that are inconsistent with the s 15 objectives of the Authority. And it may not promulgate amendments that are not necessary or desirable to promote the objects of competition in the electricity industry, reliable supply of electricity to consumers, efficient operation of the electricity industry, or performance of the Authority's functions.

[43] The essential question arising is whether the Authority's claim to powers to both prescribe terms (in aid of greater standardisation) and proscribe other terms (in aid of full standardisation of UoSAs) conform to those objects and limits. As s 42(2)(f) suggests (and we will turn to that provision shortly) such objects prima facie would permit greater standardisation of UoSAs. We accept Mr Galbraith's submission that greater standardisation of UoSAs would lower retail market entry and expansion barriers, reduce the cost of doing business and reduce the potential for UoSAs to stifle competition and innovation at the retail and related markets. Indeed, little contrary argument was advanced. The more difficult question is whether

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[32] See above at [17]–[22].

they permit full standardisation (with individual negotiation confined to distribution services under proposed cl 12A.10).

[44] Fourthly, we turn to the specific statutory text. The three provisions most relevant are ss 32(1), 42(2)(f) and 44(2). The first contains a very generalised power to incorporate "any provisions" within the Code that are consistent with the object of the Authority *and* are necessary or desirable to promote any of the s 32(1) objects. Taken in conjunction with s 42(2), its terms would appear to permit both the prescription of certain terms, and the proscription of other terms either contrary to terms prescribed or to the objects stated in s 32(1).

[45] Section 42(2)(f) informs the power in s 32. It confirms that s 32(1) and (2) both anticipate and permit the prescription of terms via use of "more standardised [UoSAs]". The expression "more standardised" does not convey to us a proscription against collateral provisions beyond the scope of imposed standard terms. Its natural and ordinary meaning is to permit: (a) prescription of particular terms; and (b) proscription against inclusion of terms inconsistent with (as opposed to merely collateral to) those terms. That impression is reinforced by the drafting of s 44.

[46] Section 44(2) expressly empowers the Authority to promulgate a Code prescribing default terms and conditions for inclusion in transmission agreements. It may be noted that it does not compel that course. Nor does it state explicitly that the Code may mandate the *entirety* of a transmission agreement. We consider the omission of such an express power significant in construing s 32. It does at least follow that parties to a transmission agreement could not incorporate terms *inconsistent* with default terms prescribed by the Code (assuming the validity thereof).

[47] We do not accept the submission for the Authority that s 44 is to be given less evaluative weight because it reflects a carry-over from the Electricity Governance Rules 2003 (which provided for the former Electricity Commission to determine benchmark transmission agreements). The Code was a new industry instrument. Sections 42 and 44 both provide the Authority power to prescribe certain terms in industry agreements via Code provision. There is no indication in the Act that

the distinct drafting of s 44 should not inform in the usual way the meaning of its neighbour provision in s 42.

[48] Fifthly, we consider the statutory purpose and language permits the prescription of standard terms and conditions for UoSAs where necessary or desirable to achieve the s 15 objects. And, similarly, they would permit the proscription of provisions that are inconsistent with those objects or with provisions prescribed in accordance with the Code. Nor do we see difficulty with a provision requiring a particular contractual structure, and requiring specific terms to be located particularly within that structure. As noted above, we accept that greater standardisation of UoSAs is demonstrably desirable to promote both competition within, and efficient operation of, the electricity industry. We accept that more standardisation will reduce transaction costs for parties in delivering and negotiating UoSAs. It may be expected to lower barriers to competition in retail electricity markets. It will encourage entry into new (and potentially multiple) network arrangements.

[49] Furthermore, differential trading terms have the potential to deter or diminish competition in retail markets. Standardised terms will mean retailers (including new entrants) are treated even-handedly, which is consistent with the pro-competitive objectives provided in ss 15 and 32(1). There could be little argument that the Code may impose mandatory contractual terms in UoSAs concerning matters such as delivery service standards and service levels, service interruption arrangements, load shedding and control, transmission losses, price categories, payment terms and conditions, and connection arrangements of course. Their inclusion may readily be connected to both the statutory objective of the Authority and necessary to achieve one or more of the specific objects in s 32(1).

[50] Sixthly, as we have noted already, the real question here is not whether the Authority can justify making mandatory the core terms of the draft default UoSA. There is no real challenge here to proposed cl 12A.4(1)(a) which does precisely that. Per se it is lawful, though it is susceptible to a vires challenge on a case-by-case basis. That is true whenever delegated statutory powers are involved. Rather, the real

question is whether proposed cls 12A.4(1)(b) and 12A.10(2) are necessary or desirable to achieve one or more of the specific objects in s 32(1).

[51] Nothing placed before us in affidavit or documentary evidence demonstrated why the statutory objects in ss 15 and 32 compel the exclusion from the UoSA of any other contract terms apart from terms regulating distribution services. The argument made was that such additional terms may delay negotiation, and thereby add transaction costs. And that substantial distributors (such as Vector) will use their market power to impose collateral terms on retailers (in particular, new entrant retailers). However, if that is the real objection, it is difficult to understand the permission extended in proposed cl 12A.10 to negotiate bespoke terms concerning distribution services. At the end of the day there was no substantial evidence from the Authority evaluating these potential inefficiencies, which are speculative only at this juncture. Their likely competitive effects may only be guessed at, when there has been no experience yet of a regime of greater (but incomplete) standardisation.

[52] In other words, while the Authority made its case for greater standardisation of UoSAs, it did not do so for complete standardisation. In the context of a claim to power so extensive, we do not consider the words "or desirable" in s 32(1) set a lower standard than the word "necessary". The necessity for proposed clauses 12A.4(1)(b) and 12A.10(2) was never demonstrated to our satisfaction, and for all practical purposes that determines the present issue.

[53] Seventhly, any asserted constraint upon freedom of action or association, including the freedom to contract, must be justifiable by reference to a lawful power. Where the source of the power is said to lie in statute, the statute must authorise the constraining power, either expressly or by necessary implication. Plainly that principle applies where the right constrained is a fundamental one, such as the right of citizens to contract with one another.[33] Any participant in the electricity industry has the right to challenge the imposition of standard terms on the basis of illegality

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[33] See for example *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 (NSWCA) at 133 per Kirby P. As to statutory intrusion upon freedom of contract see Patrick Atiyah *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) ch 16; and Jack Beatson, Andrew Burrows and John Cartwright *Anson's Law of Contract* (30th ed, Oxford University Press, 2016) at 4.

(absence of power), irrationality or invalid process. Unpalatable as it might perhaps be to the Authority, its standard terms are always going to be susceptible to challenge in this way. Only contract terms set forth in a schedule to an Act of Parliament could be immune from judicial review of this kind. That is the constitutional settlement under which we — including the commercial sector — get by with one another. It is by the application of the principle of legality that we have reached already the conclusion that proposed cls 12A.4(1)(b) and 12A.10(2) lie beyond the Authority's powers to impose, because the statutory language simply does not reach as far as the Authority would have us go.

[54] Finally, in this appeal we sought further submissions on the question whether rights of freedom of expression or of association (under ss 14 and 17 of the New Zealand Bill of Rights Act respectively) were engaged. The point has really been considered only at High Court level previously, by White J in *Turners & Growers Ltd v Zespri Group Ltd (No 2)*.[34] There a challenge was made to regulations prohibiting export of kiwifruit other than via the single-desk respondent, Zespri. One of the grounds of challenge was that the relevant Act did not permit regulations infringing the applicant's s 17 rights of freedom of association (here to contract with other buyers). White J concluded that s 17 rights were not engaged by regulation inhibiting parties to a contract from making their own export arrangements.[35] Not every activity involving or carried on by more than one person would amount to "association" for the purposes of the New Zealand Bill of Rights Act.[36] Freedom of association and freedom of contract are distinct concepts, and the Judge was wary of constitutionalising ordinary contractual relationships.[37] We observe that the distinction drawn in this decision is not an easy one, and not necessarily an attractive one either, given the capacity of a court to find that a regulation limiting freedom of contract and association may nonetheless be justifiable in a particular

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34 *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC).
35 At [72]–[77].
36 At [72].
37 At [73].

case.[38] In the present appeal it is demonstrably unnecessary to reach a view on this aspect of the argument, and we prefer not to do so given the absence of oral argument on it.

Conclusion

[55] The first declaration sought by the appellants (set out above at [14(a)]) was that the Act does not permit the Authority to amend the Code to require distributors to offer a default distributor agreement either: (i) on terms prescribed by the Authority; or (in the alternative) (ii) which prohibits the inclusion of terms whose purpose is to confer a benefit on persons or entities over whom the Authority has no jurisdiction.

[56] Consistent with the reasoning above we decline to make the first part of that declaration. Nor are we convinced that the second aspect is appropriately cast, because we imagine there may be some such terms whose express prohibition may yet be lawful. That will depend on an analysis of legitimacy in the particular case and should not be resolved, in the abstract, now.

[57] However, for the reasons set out above at [37]–[53], we will make a declaration that proposed cls 12A.4(1)(b) and 12A.10(2) of the Code would be unlawful.

Issue 2: does s 32(2) of the Act prohibit the Authority from amending the Code to require distributors to offer a default UoSA (because such amendments prescribe quality standards for distributors, a matter reserved to the Commerce Commission)?

[58] The Court has been unable to reach agreement on this issue. In order to resolve Issue 2 it will require additional submissions and evidence from the parties on the regulatory and operational context applicable at the time the Electricity Industry Act was enacted (including the regulatory functioning of the Authority's statutory predecessor, the Electricity Commission, and in particular the extent to

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[38] New Zealand Bill of Rights Act 1990, s 5. In *Turners & Growers Ltd v Zespri Group Ltd (No 2)*, above n 34, White J concluded that if he was wrong about s 17 being engaged, single-desk export regulation was nonetheless justifiable under s 5: at [77]. The core conclusions in that case have been criticised as unduly narrowing of the scope of s 17: see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [15.7.3].

which it was responsible for the imposition of quality standards affecting distributors).[39]

[59] A telephone conference is to be convened at a time to suit the convenience of the Court and counsel in the week of 3 December 2018 to timetable the provision of further submissions and evidence on Issue 2.

Result

[60] The appeal is allowed in part.

[61] A declaration is made that that proposed cls 12A.4(1)(b) and 12A.10(2) of the Electricity Industry Participation Code 2010 would be unlawful.

[62] Further directions are given at [59] of this judgment for the determination of Issue 2.

[63] Costs are reserved.

Solicitors:
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Buddle Findlay, Auckland for Respondent

[39] Limited affidavit evidence (not addressing Issue 2) and a common bundle of some publicly available material was filed in the High Court. We have not found this adequate to resolve Issue 2.