IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-350
[2020] NZHC 3076

UNDER	the Electricity Industry Act 2010 and the Electricity Industry (Enforcement) Regulations 2010
BETWEEN	INTELLIHUB LIMITED Appellant
AND	GENESIS ENERGY LIMITED Respondent

Hearing:	12-13 October 2020
Counsel:	J D McBride and A W McDonald for Appellant S J P Ladd and B A Keown for Respondent R S May for Electricity Authority (Party directed to be served)
Judgment:	20 November 2020

JUDGMENT OF THOMAS J

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Introduction

[1] Intellihub Limited is an electricity metering services company. It appeals under s 64 of the Electricity Industry Act 2010 against a decision of the Electricity Authority to take no further action regarding what Intellihub alleged was a breach of the Electricity Industry Participation Code 2010 by Genesis Energy Limited. The breach was said to be that Genesis had failed to enter into arrangements with Intellihub in respect of Intellihub meters associated with Genesis customers.

Background and context

Intellihub's business

[2] Intellihub owns a nation-wide network of metering equipment known as the "Metrix Network." Intellihub contracted to acquire the Metrix business from Mercury NZ Limited (Mercury) in December 2018 with settlement taking place in March 2019. As a Metering Equipment Provider (MEP) as defined in the Electricity Industry Act 2010 (the Act), Intellihub uses its Metrix Network to provide services to industry participants – usually energy retailers like Genesis – such as metering data services and remote and field event services.

[3] The Metrix Network currently comprises around 460,000 metering installations. As at 15 January 2020, Genesis was the retailer for 45,467 individual connection points (ICPs) with Metrix metering installations.

[4] Until the late 2000s, electricity meters in New Zealand were typically "analogue" (also known as "legacy" metering). These required a person to visit the relevant address and manually read the consumption data displayed on the meter. In the last decade, legacy meters have largely been replaced by "smart" meters that can communicate data remotely. Smart meters are often referred to as "advanced metering infrastructure" or AMI meters.

[5] In New Zealand's retail electricity market:

(a) an end consumer contracts with an energy retailer for the supply of electricity to the consumer's home;

(b) in order for a retailer to know how much energy has been consumed, and how much to bill the consumer, a meter is installed at the consumer's property;

(c) an MEP installs the meter at the consumer's property and charges the retailer for provision of data and/or metering services;

(d) when the consumer switches to a new retailer, the new retailer is responsible for ensuring there is a meter;

(e) because of the frequency with which consumers change their retailers, MEPs and retailers tend to have ongoing "switching" arrangements that avoid the need to replace the meter each time a consumer switches retailers.

[6] In industry terms, Retailer A is said to be "trading on" an MEP's meter when Retailer A has the contract with the consumer and is receiving metering services from the MEP. When the consumer changes to Retailer B, the MEP's meter usually stays in place and provides metering services to Retailer B in respect of that consumer. At that point, Retailer B is trading on that meter. The arrangements between the MEP and the respective retailer govern the provision of the services.

Arrangement between Metrix (now Intellihub) and Genesis

[7] The Metrix Network has provided metering services to Genesis since 2000. The Electricity Industry Participation Code 2010 (the Code) was amended in 2013, requiring retailers such as Genesis to have an "arrangement" with MEPs. Although there was correspondence between Mercury, trading as Metrix, and Genesis from that time on, the parties did not conclude a formal written contract. However, Metrix continued to provide metering services to Genesis and Genesis continued to pay for those services. Metrix also wrote to Genesis each year following its annual pricing review providing a new pricing schedule for the next year.

The Request for Proposal (RFP) process

[8] In August 2018, Genesis began a commercial procurement process to select a preferred MEP for its entire gas and electricity business, including for the ICPs for which Metrix was the incumbent provider. Mercury and Intellihub's sister company, Intellihub New Zealand Limited participated in the RFP process but were ultimately unsuccessful.

[9] Genesis formally notified Intellihub of its intention to commence displacement of approximately 45,000 Metrix metering installations (the meters) on 22 November 2019 and met with Intellihub in December 2019 to explain how the displacement would occur over the next 12 months.

[10] Intellihub applied unsuccessfully to the High Court to restrain Genesis (and the successful bidder in the RFP process, Vector Limited) from commencing the displacement (the Injunction Application).[1] The Court of Appeal dismissed Intellihub's appeal.[2]

[11] On 30 March 2020, and prior to the High Court's decision on the Injunction Application (the Judgment), Intellihub filed a notice of breach (the Complaint) with the Electricity Authority (the Authority). The Authority issued its decision on 30 June 2020 (the Decision). It decided to take no further action on the Complaint because it considered it failed to establish a prima facie case for the alleged breach. Intellihub now appeals against the Decision on the basis the Authority erred in law.

The Complaint

[12] The documentation accompanying the Complaint was voluminous. I will address it in some detail as it was the information provided by Intellihub in the Complaint that essentially led the Authority to decide as it did.

[13] The Complaint alleged Genesis was in breach of cl 11.16(b) of the Code and the breach was an ongoing one. Clause 11.16 provides:

> **11.16 Trader to ensure arrangements for line function services and metering**
>
> Before providing the **registry manager** with information in accordance with clause 11.7(2) or clause 11.18(4), a **trader** must—
>
> (a) ensure that it, or its customer, has made any necessary arrangements for the provision of **line function services** in relation to the **ICP**; and

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1 *Intellihub Ltd v Genesis Energy Ltd* 2020] NZHC 807.
2 *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344.

(b) have entered into an arrangement with a **metering equipment provider** to be responsible for each **metering installation** for the **ICP**.

[14] The Complaint included a letter from Intellihub's lawyers (the Letter). The Letter discussed Genesis' proposed displacement of the meters, which it said would have a significant impact on Intellihub's revenue, and noted Genesis' intention to nominate Vector Limited (Vector) as the new metering equipment provider. It then said:

(a) in breach of the Code, Genesis has been trading on MTRX Metering Installations with no arrangement in place with Intellihub;

(b) in those circumstances, Genesis is not entitled to displace the MTRX Metering Installations;

(c) even if it were entitled to displace the MTRX Metering Installations, which Intellihub says it is not, Genesis must first give reasonable notice to Intellihub of its intention to do so; and

(d) in any event the Code does not permit Genesis to unilaterally displace functional AMI meters, such as the MTRX Metering Installations.

[15] The Letter provided an overview of the Complaint, saying that Intellihub was unable to locate any documentary evidence suggesting there had ever been an arrangement between it (or its predecessor, Metrix) and Genesis. It went on to say that Intellihub had repeatedly sought to reach an arrangement with Genesis by agreeing a "metering services agreement" (MSA) in respect of the meters and the parties were clearly aware of the need to document the terms of their arrangement in respect of them. It referred to correspondence between the parties which disclosed that negotiations were never concluded. The Letter then discussed the RFP process in which Genesis expressly described the meters as being "not covered by contract". It said the result of Intellihub's unsuccessful participation in the RFP meant that the approximately 45,000 meters would be displaced by Vector.

[16] The Letter concluded by requesting the Authority to appoint an investigator under reg 12 of the Electricity Industry (Enforcement) Regulations 2020 (the Regulations).

Attachments to the Complaint

[17] The Letter enclosed a copy of the Injunction Application, and supporting affidavits and submissions.

Injunction Application

[18] Intellihub had applied without notice (although serving the defendants on a Pickwick basis) for an injunction against Genesis and Vector preventing them from decommissioning or disconnecting the meters.[3] The grounds of the application included that there was a serious issue to be tried as to whether Genesis had been trading unlawfully on the meters. Intellihub claimed Genesis and Vector intended to cause loss to Intellihub by unlawfully displacing the meters and/or that Genesis had failed to give reasonable notice of its intention to decommission them.

Affidavits

[19] As well as affidavits from Intellihub discussing the RFP process and Intellihub's view of the detriment to its network if the meters were removed, Stacey Tibbetts, Intellihub's General Manager, Sales and Business Development, gave extensive evidence about what she viewed as the absence of any arrangement between Intellihub and Genesis. Ms Tibbetts said that written metering services agreements (MSAs) are typically long-term – between 10 and 15 years – and include notice periods, and break and displacement fees to help mitigate commercial risk and support cost recovery of meters if displaced.

[20] She described Intellihub's purchase of the Metrix business as involving:

(a) incorporation of Metrix Limited by Mercury NZ Limited on 13 December 2018, as the corporate vehicle to take ownership of the Metrix Network and all other assets of the Metrix business;

(b) the transfer of the Metrix Network and all other assets of the Metrix business to Metrix Limited, followed by the immediate purchase of the shares in Metrix Limited by Intellihub Australia Pty Limited, on 1 March 2019; and

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[3] The Meters were defined as all metering installations associated with installation control points for which the registered trader was Genesis and the metering installation has the equipment provider participant identifier MTRX.

(c) a change of name for Metrix Limited, to Intellihub Limited, on 7 August 2019.

[21] As a result, Intellihub became the metering equipment provider of approximately 412,000 AMIs installed in various locations in New Zealand. Ms Tibbetts said:

> 19. Since acquiring Metrix, Intellihub has continued to provide metering services to Genesis on an ad-hoc basis, which include broadly:
>
> (a) Daily register reads and half hourly interval data;
>
> (b) Remote disconnect/reconnect services; and
>
> (c) Event field services.
>
> 20. By way of example of some of the activities under categories (b) and (c) above, in the last 12 month period, Intellihub has carried out around 3,000 service request orders for Genesis. A service request involves such things as remote disconnect/reconnect actions, fault assessments, upgrading or downgrading a meter, moving or removing meter equipment, and so on.
>
> 21. Intellihub invoices Genesis on a monthly basis for its services, and Genesis pays for those services on invoice.

[22] Ms Tibbetts recorded her understanding that Metrix had sought to formalise its relationship with Genesis by way of a written MSA but that written terms were never finalised. She said that, since the acquisition, Intellihub had also sought to agree an MSA with Genesis.

[23] Ms Tibbets said Intellihub's records indicated no arrangement "was concluded" between Genesis and Intellihub in respect of the meters. She appended an MSA dated 14 February 2000 between Genesis and Mercury (then named Mighty River Power). She noted that, since 2013, there were negotiations which envisaged updating the 2000 agreement to include AMI metering services. She also appended various documents dated between 2013 and 2016, which I now briefly describe.

[24] A letter dated 29 August 2013 where Metrix wrote to Genesis, noting that:

> Metrix and Genesis already have arrangements in place for the provision of metering services from Metrix, and Metrix will provide MEP Services as required by the amended Code in accordance with these arrangements. **In our**

> **recent discussions Metrix and Genesis agreed to work together to update the current metering services arrangements to extend to AMI services**.
>
> Metrix is committed to its obligations as an MEP, and we look forward to working with you under the new regulatory framework. I will be contacting you in the coming weeks to discuss how we can best work together to finalise these arrangements including MEP service fees.
>
> (Emphasis added)

[25] A Metrix internal spreadsheet dated 13 September 2013 noted that legacy contracts were in place but that "smart agreements" were not.

[26] Metrix followed up by email on 11 November 2013, enclosing a draft variation agreement as a result of Code changes. This was followed by an email on 29 November 2013 from Metrix to Genesis, enclosing a letter outlining Metrix's MEP services fees effective 1 January 2014. It noted the need to continue discussions for a formal MSA.

[27] On 29 November 2013, Metrix wrote to Genesis (Energy Online Limited) saying:

> Metrix recently wrote a letter to you dated 29 August outlining our intent to provide MEP Services and maintain our Code obligations for Energy Online. Further to that letter we have now completed an internal review on the costs for providing MEP Services and enclose details of the MEP Services charges in the table below which is effective from 1 January 2014.
>
> …
>
> We are committed to working with you to continue to deliver a high quality and competitive service into the future and will be in contact with you in the coming weeks to continue discussions for a formal metering services agreement.

[28] Metrix internal emails included one dated 18 December 2015 noting that the draft "interim agreement been (sic) with Genesis since 23 Sept 15" and an internal spreadsheet dated March 2016 which recorded, regarding Genesis, "There may be a legacy agreement (circa 2000) but I cannot locate".

[29] Ms Tibbetts gave evidence of ongoing negotiations with Genesis, noting that, at the same time a draft MSA was being circulated, Genesis had also issued the RFP which referred to the meters as "not covered by a current metering contract". She said

that, following its unsuccessful participation in the RFP, Intellihub continued to try and reach agreement on MSA terms, including sending, in February 2020, an updated version of Intellihub's standard form MSA. An MSA was not concluded.

[30] Ms Tibbetts' affidavit included correspondence between the lawyers acting for Intellihub and Genesis, the first being Lee Salmon Long's letter to Genesis on 6 March 2020 saying:

> 16. As you are aware, it is a requirement of the Code that retailers enter into "arrangements" with MEPs, prior to accepting nomination as the Switch Retailer (clause 11.6).
>
> 17. An "arrangement" requires a consensus and agreement between the parties as to how they will conduct their future affairs, together with an expectation that the consensus will be implemented on its terms.
>
> 18. Intellihub (and its predecessor, Metrix) has consistently maintained that Genesis must enter into an MSA if it wishes to accept nomination as the Switch Retailer for ICPs with MTRX Metering Installations.
>
> 19. As noted above, Genesis has never entered into an MSA with Intellihub. Instead, Genesis has simply accepted nomination as the Switch Retailer from customers with MTRX Metering Installations, and commenced trading on that meter. Genesis has then requested metering services from Intellihub in respect of that MTRX Metering Installations, and paid Intellihub for those services.

[31] Lee Salmon Long noted this constituted a basis for a complaint to the Authority for continuing breaches of cl 11.16. Genesis responded by its then solicitors, Russell McVeagh, rejecting any allegation of breach of the Code or unlawful behaviour. It noted that Metrix (and later Intellihub) had been providing metering solutions for Genesis since around July 2005 and said there had clearly been an agreement (and at the very least an arrangement) in place, albeit unwritten, given that Metrix continued to provide services to Genesis and it received payment for such services.

[32] At this stage, Genesis relied on a letter dated 4 September 2013 from Metrix to Genesis which said:

> Metrix owns and manages metering assets and provides metering services to Genesis Power Limited (GENE) and Energy Online Limited (EOL). As of 29 August 2013, under the transition to the Electricity Industry Participation Code New Part 10: Metering (Code), Metrix will become the Metering Equipment Provider (MEP) for all ICPs where Metrix is the Metering Equipment Owner (MEO).

> This letter confirms Metrix, GENE and EOL agree that Metrix will provide MEP services to GENE and EOL as outlined above, beginning 29 August 2013 at the implementation of the new Code.
>
> Accordingly Metrix and GENE agree:
>
> 1. Metrix will perform all MEP functions for GENE and EOL ICPs where Metrix is the MEO immediately prior to 29 August 2013, and for new ICPs raised after 29 August 2013 where Metrix accepts a nomination as MEP.
>
> 2. The parties will comply with their respective obligations under the Code.
>
> 3. Prices and commercial arrangements will continue as presently exist.
>
> 4. This letter constitutes an arrangement under clause 10.36 of the Code.

[33] The letter was signed by Genesis but there is no evidence it was signed by Metrix. Russell McVeagh recorded Genesis' understanding that the parties had acted in accordance with the 2013 agreement since that time. It noted that any increases in price for the services provided by Metrix were recorded in writing as part of an annual review. It attached as an example Metrix's letter of 1 May 2018 to Genesis in respect of the annual pricing review which said:

> Metrix has now completed its annual pricing review based on our standard contracted terms reflecting changes in CPI over the past 12 months. This has resulted in an increase of 1.1 % to all Metrix metering pricing for Genesis Energy effective 1 July 2018. A full pricing schedule outlining the changes is attached in the annexe of this letter.
>
> Overall, this price change will mean an increase of approximately $2,900 per month based on your current metering equipment services with Metrix.
>
> Please note that Metrix is also providing you with data services from Counties Power owned AMI meters and we on charge the costs for their metering, load control and MEP Services on Counties Powers behalf. This price review also applies to the charges for Counties Power owned metering.
>
> We are committed to working with you to deliver a high quality and competitive service into the future.

[34] The appendix to the letter contained three pages setting out AMI metering equipment services pricing, MEP services pricing, legacy metering services pricing, "CT leasing" pricing and field services. Field services included costs of new connections, remote reconnection or disconnection of AMI meters, after hours remote reconnection of AMI meters and other matters.

[35] In respect of the breach of the Code, Russell McVeagh said:

> 37. Genesis' conduct in this case is entirely consistent with the objective of Part 10 of the Code to promote competition in the metering market. Part 10 of the Code is focussed on ensuring metering services are provided to a high technical standard. It deliberately leaves scope for retailers to make commercial arrangements for metering services as they see fit, which promotes competition.
>
> 38. Not surprisingly, the Electricity Authority has been aware of the arrangement for Vector to provide the advanced metering services to Genesis and its customers from 1 April 2020, and, as noted above, it has not raised any concerns.
>
> *Arrangement with Intellihub for the provision of metering services*
>
> 39. Intellihub alleges that Genesis failed to ensure it had an arrangement with Intellihub before accepting customers with MTRX Metering Installations, despite the clear evidence set out above that an agreement existed.
>
> 40. Notwithstanding this, the Code deliberately does not require a contract between the trader and MEP (the requirement for a "contract" was removed from an early draft of Part 10). The arrangement that Genesis has with Intellihub is entirely consistent with Part 10. That arrangement was that when Genesis acquired a customer, Intellihub, as the existing MEP, would continue to provide its metering services for the ICPs that it was recorded in the registry as being responsible for, and that Genesis would pay for those services.
>
> 41. The Code:
>
> (a) obliges Intellihub, as the existing MEP, to continue to comply with its obligations as MEP until a new MEP is appointed and recorded in the registry as assuming responsibility for the MEP; and
>
> (b) provides that the registry manager must notify an existing MEP once it receives information about a retailer switch completed in accordance with Part 11 (Schedule 11.3, clause 22(d) and Schedule 11.4, clause 5). Under clause 6 of Schedule 11 .4, a MEP must notify the registry manager if it believes it is incorrectly recorded in the registry as a MEP for an ICP.
>
> 42. Accordingly, not only was Intellihub provided with every opportunity to refute that it was validly retained as the MEP for ICPs at which Genesis was trading, it was under a positive obligation under the Code to do so if it believed it was not the MEP. It has not.
>
> 43. Intellihub has always been aware of and accepted that the arrangement with Genesis existed, evidenced by the fact that it has never sought to deny responsibility as MEP under the Code (in addition to increasing its prices annually and invoicing Genesis for its metering services). There is no basis to now assert that Genesis has breached its

> obligations under clause 11.16 of the Code by not having an arrangement with Intellihub. If Genesis has breached clause 11.16 (which it denies), then Intellihub has also failed to comply with its obligations under Schedule 11.4.

Statement of claim

[36] Intellihub's statement of claim filed as part of the Injunction Application pleaded as follows:

> 28. Between 2013 and 2020, Genesis (or its subsidiaries) accepted nomination as retailer in respect of some 43,327 ICPs with associated MTRX Metering Installations, relating to 45,467 meters.
>
> 29. Genesis has requested metering data services from, initially Metrix, and then, Intellihub, in respect of those MTRX Metering Installations.
>
> 30. As requested by Genesis, Metrix has:
>
> (a) delivered daily smart read services and associated field services to Genesis, in respect of the MTRX Metering Installations; and
>
> (b) invoiced Genesis for these services.
>
> 31. Genesis has consistently refused to enter into an MSA in respect of MTRX Metering Installations

[37] The pleading then set out the RFP process and Genesis' displacement decision. The first cause of action, intentionally causing loss by unlawful means, alleged that Genesis, by making the displacement decision and issuing the termination notice to Intellihub, intended to cause harm to Intellihub, its customers and consumers by unlawful means. The second cause of action, breach of contract, pleaded:

> 45. Following Genesis' registration as retailer for an ICP with a MTRX Metering Installation, Genesis has requested metering services from Intellihub in respect of that ICP, notwithstanding the absence of any pre-existing arrangement with Intellihub.
>
> 46. In response to Genesis' requests for metering services, Intellihub and Genesis have from time to time agreed that Intellihub will provide casual metering services to Genesis for specified ICPs (the Interim Service Agreements), notwithstanding Genesis' ongoing failure to agree any "arrangement" with Genesis as required by the Code.
>
> 47. The Interim Service Agreements are unwritten and are subject to the following implied terms:

(a) that Genesis will pay Intellihub a reasonable fee for metering services; and

(b) that Genesis will not displace the MTRX Metering Installation, absent either reasonable notice or compensation, in accordance with standard industry practice.

[38] Intellihub claimed that, in breach of the Interim Service Agreements, Genesis had given notice of its intention to displace the meters, without reasonable notice or compensation.

[39] Intellihub sought orders restraining Genesis and Vector from displacing the meters or damages in the alternative.

Genesis' response

[40] Intellihub had copied the Complaint to Genesis. On 15 April 2020, Mr Wakefield of the Authority wrote to Genesis notifying it of the Complaint, asking whether Genesis accepted or denied it and requesting information about the circumstances.

[41] Genesis responded by letter dated 29 April 2020 on a confidential basis, while noting it did not object to the information being provided to Intellihub and its lawyers.

[42] Genesis summarised its position by saying it had not breached the Code and had always had an arrangement in respect of the meters. It said:

4. Mercury (as the original provider) and then Intellihub (following its purchase of the Metrix business in March 2019) have provided Genesis with metering services for those installations, and Genesis has paid for those services, on a continuous basis since the relevant provisions of the Code came into force. After Intellihub purchased the Metrix business, it continued the same operational processes that Mercury had applied in respect of the MTRX metering installations.

5. At no stage, has Mercury or Intellihub suggested that Genesis was acting in breach of the Code prior to the recent dispute between Intellihub and Genesis and court proceedings issued by Intellihub.

6. Intellihub's complaint to the Authority was first made on 30 March 2020, more than one year after it acquired the MTRX metering installations and after both Mercury and Intellihub actively participated in a lengthy RFP process in which Genesis sought

> proposals for metering services (again without any suggestion that Genesis was in breach of the Code).

[43] Genesis expressed its view that the Complaint and Injunction Application were an attempt to reverse or disrupt the RFP process. It noted that Genesis and Vector had deferred the commencement of the displacement process from December 2019 to April 2020 at Intellihub's request. Genesis enclosed a copy of the Judgment declining the Injunction Application. It also enclosed the evidence and submissions filed by Genesis in the High Court. It then said:

> 14. Genesis respectfully suggests, based on the Court's judgment and the material provided to the Court, that the Authority can conclude that Genesis has not breached the Code and that further investigation of the Intellihub complaint is not necessary.

[44] Genesis referred to the evidence of Mr Hansen filed in the Injunction Application, who expressed the view that an arrangement may be an informal understanding in which the metering equipment provider continues to provide services to the retailer and the retailer continues to pay the metering equipment provider. Genesis referred to the following as demonstration of there being an arrangement with Mercury and then with Intellihub "as the successor to Mercury":

> (a) An agreement dated 14 February 2000 relating to the supply of metering services between Mercury and Genesis. That agreement has not been varied or terminated.
>
> (b) Mercury's written confirmation on 29 August 2013 that "Metrix and Genesis already have arrangements in place for the provision of metering services from Metrix, and Metrix will provide MEP Services as required by the amended Code in accordance with these arrangements". This confirmation was referenced at paragraph 13 of the Intellihub Complaint.
>
> (c) Intellihub has said in the High Court proceedings that "as requested by Genesis, Metrix has: (a) delivered daily smart read services and associated field services to Genesis, in respect of the MTRX Metering Installations; and (b) invoiced Genesis for these services."
>
> (d) Intellihub's evidence in the High Court proceedings also said that "Since acquiring Metrix, Intellihub has continued to provide metering services to Genesis on an ad hoc basis, which include broadly daily register reads and half hourly interval data … " and "Intellihub invoices Genesis on a monthly basis for its services, and Genesis pays for those services on invoice".

(e) In accordance with the contractual arrangements between the parties, Mercury continued to notify Genesis between February 2007 and May 2018 of price increases for providing advanced metering services for the MTRX metering installations.

[45] In support of its contention that the Complaint was a late attempt to disrupt the outcome of a normal commercial RFP process, Genesis pointed out that Intellihub did not file the Complaint until 30 March 2020, some nine months after it had been notified by Genesis that its tender was not accepted.

[46] Genesis provided the Authority with its affidavit evidence filed for the Injunction Application, including that discussed in the following paragraphs.

[47] Alicia Lane gave evidence about the RFP process. She included copies of correspondence starting towards the end of 2019 wherein Intellihub expressed its disappointment at the outcome of the RFP process and what it claimed was the "irreparable immediate and ongoing harm" to its business, and the ongoing exchanges between the parties, which included discussions on a switching agreement for new Intellihub meters, not part of the displacement programme.

[48] Carl Hansen is a consultant providing policy advice to public and private sector clients but had previously been the Chief Executive of the Authority. His role included overseeing the development of Part 10 of the Code relating to metering. His affidavit addressed the question of arrangements. Notably he said:

33. The Code permits retailers and MEPs to adopt whatever arrangements are appropriate for their particular circumstances, as this is most consistent with the Authority's CRE objective. As mentioned earlier, the Authority's focus for its metering rules is on facilitating the centralised functions carried out by market operation service providers and facilitating a competitive, reliable and efficient retail electricity market by removing inefficient entry barriers. Requiring retailers to have formal contracts with MEPs adds unnecessary entry barriers – both participants operate in open and competitive markets and can decide for themselves what form of arrangement best suits them.

34. The Code does not define 'arrangement'. In light of the CRE objective of the Code and that the Code contains over 75 pages of definitions (comprising clause 1.1), it is my opinion that the term 'arrangement' was deliberately not defined in order to facilitate the broadest interpretation possible within the confines of common law and any other laws affecting retailers and MEPs. This is consistent

with the Authority's interpretation of its CRE objective because a broad interpretation of 'arrangement' minimises entry barriers, and facilities competition and innovation.

35. It is noteworthy that prior to the amendments in August 2013, Part 10 of the Code referred not just to 'arrangements' but also to assignments, contracts and agency agreements. Also, there are several provisions in the current Part 10 requiring contracts between parties; for example, clause 10.25(2) requires distributors to contract with an MEP in cases where the distributor is proposing to create a certain type of network supply point (NSP) but is not intending to assume responsibility as an MEP for that NSP. Similar contracting requirements are specified in clause 10.26(7).

36. In my opinion as a regulatory economist with extensive experience with developing the Code, the Authority would have replaced 'arrangement' with 'contract' and/or 'formal agreement' if it had intended that formal agreements were required.

37. A literal reading of clause 10.36 is that retailers must have an arrangement with the MEP for a metering installation at an ICP before accepting responsibility for that ICP. But as mentioned above, the Code does not define 'arrangement' and this is very likely to be a deliberate omission by the Authority because of its CRE objective for the Code. In addition, the earlier analysis about the maturing of the metering market, in which vertical integration and long-term contracts may give way to informal arrangements, provides reason to think that an arrangement can simply be an informal understanding in which the MEP continues to provide services to the retailer and the retailer continues to pay the MEP.

38. Given all of these factors, it is my opinion that a history of a retailer and an MEP carrying on with an informal arrangement for provision of metering services for several years is sufficient to constitute an arrangement under the Code.

[49] Louise Griffen's affidavit addressed her dealings with Ron Beattie at the Authority in respect of Genesis' engagement of Vector and proposed displacement of the meters. She appended Genesis' letter to the Chief Executive of the Authority dated 18 March 2020 which referred to the ongoing dispute between Genesis and Intellihub and signalled its expectation that Intellihub might lodge a formal complaint with the Authority "in an attempt to inhibit the displacement of the Metrix smart meters owned by Intellihub". The letter addressed consumer benefits of the displacement programme and concluded by observing that in Genesis' view there was no legitimate basis for Intellihub to seek the Authority's intervention, regarding this as a dispute between sophisticated commercial entities.

[50] Simon Davies provided evidence of Genesis' relationship with Mercury, starting with the 2000 agreement. He said:

> 16. Since at least January 2000, Mercury supplied Genesis with Metering Equipment Services under the Metering Services Contract. These services were provided by Mercury's "Metrix" business division. They included the provision of analogue meters and, from approximately 2009, advanced meters. I refer to these meters in this affidavit as the "Metrix Meters". I refer to "Mercury" and "Metrix" interchangeably unless the context provides otherwise.
>
> 17. Metrix invoiced Genesis on a monthly basis for the charges associated with providing the Metrix Meters and associated services and Genesis paid these charges. Consistent with the terms of the Metering Services Contract, Metrix conducted annual price reviews and notified Genesis, in writing of any proposed increases. Examples of these notifications can be found at exhibit **SD-002**. I note that the line items of the pricing schedules attached to each notification reflect the line items in the equivalent pricing schedule of the Metering Services Contract.

[51] Mr Davies discussed the 2013 Code amendments and exhibited the letters dated 29 August 2013 and 4 September 2013, leading to his conclusion that Genesis had an arrangement with Metrix in compliance with cl 11.16 of the Code.

[52] Mr Davies then addressed events following the December 2018 agreement for Mercury's sale of the Metrix business to Intellihub. His understanding was that the sale resulted in Intellihub acquiring the assets and business of the Metrix business, including the meters and associated contracts. He said:

> 21. Commercially and operationally, we did not notice any real change as a result of the Metrix Sale. Intellihub stepped into Mercury's shoes and continued to provide Metrix Meters (and associated metering services) to Genesis. The Mercury personnel that we dealt with before the sale remained in place and we continued to work with them (albeit they were now representatives of Intellihub). Genesis continued to pay for the metering services it received.

[53] In Mr Davies' opinion, the 2000 contract has not been terminated or varied despite, for example, the letter from Metrix to Genesis in November 2013.

[54] Mr Davies exhibited evidence of the annual price reviews conducted by Metrix and notified to Genesis. This included the 1 May 2018 letter which was also attached to Ms Tibbetts' affidavit and is detailed at [33] above. The letter and appendix

replicated a letter dated 1 May 2017. Similar letters had been sent earlier, for example 2014 and 2013, although they did not refer to Metrix's "standard contracted terms".

[55] Finally, Genesis attached its notice of opposition to the Injunction Application.

Vector

[56] By letter dated 6 May 2020, Vector wrote to the Authority in respect of the Complaint, supporting Genesis' position that there was no breach of the Code and setting out the impact on Vector if the deployment project were to be deferred.

Intellihub's additional material

[57] By its solicitors, Intellihub wrote again to the Authority on 14 May 2020 in respect of the Complaint. They said that Genesis initially took the position that the parties had an arrangement in respect of the meters recorded in the letter from Genesis to Metrix dated 4 September 2013, a copy of which Intellihub had supplied with the Complaint. The solicitors noted that this position was at odds with Genesis' statements in 2018 and 2019 to the effect that the meters were "not covered by a current metering contract". They then noted that, prior to the hearing of the Injunction Application, Genesis abandoned its reliance on the 2013 "arrangement" and instead took the position that the relevant arrangement was in fact entered into by the 2000 agreement. The solicitors said that Genesis' position was plainly wrong. The 2000 agreement pre-dated both AMI meters and the Code. In their view, it had no application to the meters at issue, and for that reason has been treated by both the parties as obsolete since at least 2013.

[58] Intellihub maintained that the High Court, by the Judgment, had "little difficulty" rejecting Genesis' argument that the 2000 agreement could constitute an arrangement, noting that Intellihub was not a party to it and it did not extend to AMI services. It provided a copy of the Judgment.

[59] The letter then raised concerns about the propriety of communications between Genesis and the Authority as to Genesis' intention to displace the meters. It requested copies of all correspondence and file notes.

[60] The Authority treated the request as made under the Official Information Act 1982. It replied saying that it had "now concluded the Code breach process" and did provide some other correspondence, including Vector's letter to the Authority, Genesis' response to the Complaint, the Authority's legal advice and Compliance Committee minutes.

Memorandum on Complaint

[61] Mr Wakefield provided a memorandum on the Complaint to the Authority's Compliance Committee meeting on 3 June 2020 (the Memorandum). He recommended the Committee decline to take action under reg 11(1)(b) with the following rationale:

> 2. Genesis Energy Limited (Genesis) had an arrangement with Intellihub Limited (Intellihub) and therefore has not breached clause 11.16(b) as alleged by Intellihub. Genesis in denying the alleged breach has demonstrated the existence of an arrangement with Intellihub or its predecessors dating back to February 2000.
>
> 3. The Code does not define "arrangement" and this allows for flexibility ranging from informal arrangements to formal agreements between traders and MEP's.

[62] The Memorandum outlined the background, including the RFP process and the Injunction Application. It then said:

> 21. Genesis denies that it has breached clause 11.16(b), advising that at all relevant times it had an arrangement with Mercury as the MEP for MTRX metering installations, before Intellihub purchased Metrix Limited in March 2019, and then with Intellihub as the successor to Mercury.
>
> 22. Genesis demonstrated the existence of this arrangement by reference to:
>
> (a) An agreement between Mercury and Genesis dated 14 February 2000 relating to the supply of metering services by Mercury to Genesis. Genesis advises that this agreement has not been varied or terminated.
>
> (b) Mercury's written confirmation, on 29 August 2013, the date when clause 11.16(b) was first included in the Code, stated that "Metrix and Genesis already have arrangements in place for the provision of metering services from Metrix, and Metrix will provide MEP Services as required by the amended Code in accordance with these arrangements".

(c) Intellihub's statement in the High Court proceedings that "as requested by Genesis, Metrix has: (a) delivered daily smart read services and associated field services to Genesis, in respect of the MTRX Metering Installations; and (b) invoiced Genesis for these services."

(d) Intellihub's evidence in the High Court proceedings stating that "Since acquiring Metrix, Intellihub has continued to provide metering services to Genesis on an ad hoc basis, which include broadly daily register reads and half hourly interval data …" and "Intellihub invoices Genesis on a monthly basis for its services, and Genesis pays for those services on invoice".

(e) Mercury, continued to notify Genesis between February 2007 and May 2018 of price increases for providing advanced metering services for the MTRX metering installations, in accordance with the contractual arrangements between the parties.

23. Compliance also notes that Genesis' reconciliation participant audit reports have confirmed that Genesis was compliant with the requirement to have arrangements with MEPs. These audit reports date from when the requirement was introduced in the Code.

[63] It noted the three options the Committee could follow, being:

(a) decline to take any action on the breach under regulation 11 of the Regulations; or

(b) appoint an investigator to investigate the breach under regulation 12 of the Regulations; or

(c) require further information to be provided so that the Committee may make a more informed decision.

[64] The minutes of the Compliance Committee meeting on 3 June 2020 noted as follows:

10.1 The Committee received and discussed the paper.

10.2 Staff advised the Committee that separate from the Compliance paper the Authority had become aware of further legal proceedings underway to determine if there is a valid arrangement in place between parties.

10.3 As the Code does not define 'arrangement' allowing flexibility from informal to formal agreements between traders and MEPS, the Committee agreed to the recommendation and **declined** to take further action on the alleged breach under regulation 11 (1)(b) of the Regulations subject to the GM Legal, Ministerial and Compliance

receiving legal advice (internal and or external) confirming the interpretation of 'arrangement'.

[65] The matter was then referred to in-house legal counsel, who reported:

> I have considered whether it is reasonably open to the investigator in the 2003GENE2 case to take the view of that the agreement between Genesis and Mercury was an "arrangement" for the purposes of the Code
>
> My view is that it is open to the investigator to take the view of "arrangement" like he did.
>
> In answering the question I considered the investigator's report, Intellihub's statement of claim, and the High Court judgment dated 24 April 2020 dismissing Intellihub's application for an interim injunction.
>
> The requirement for a trader to have an arrangement with an MEP before submitting information to the registry manager (effectively trading) was introduced on 29 August 2013. It's drafting is based on the wording in clause 11.16(a) – where traders must make "any necessary arrangements for the provision of line function services" - which is carried over from the Electricity Governance Rules 2003.
>
> "Arrangement" is not defined in the Code. The Collins English Dictionary defines arrangement as "a plan for how something will happen" and "an agreement between two people or groups…".
>
> The original drafting of clause 11.16(b) contemplated traders "contract[ing] with a metering equipment provider", but the final drafting moved away from this approach, which suggests that an "arrangement" for the purposes of the Code may constitute an contract, but this is not mandatory. This approach in view my appears to capture a wide range of formal and informal situations, including written and unwritten.
>
> Having reviewed the agreement between Genesis and Mercury (Intellihub's predecessor), and the subsequent conduct set out in paragraph 22 of the investigator's report, I consider that together they constitute an "arrangement" for the purposes of the Code. It appears there is a mixture of written and unwritten agreements that have developed over a long time – and this approach fits with the intention of word "arrangement" in the Code.

The Decision

[66] The Authority issued the Decision on 30 June 2020. It decided to take no further action under reg 11(1)(b) on the basis the Authority considered the Complaint failed to establish a prima facie case for the alleged breach. The reasons for the Decision were stated as:

- Genesis in denying the alleged breach had demonstrated the existence of an arrangement with Intellihub or its predecessors dating back to February 2000.

- Genesis' reconciliation participant audit reports have confirmed that Genesis was compliant with the requirement to have arrangements with metering equipment providers. These audit reports date from when the requirement was introduced in the Code.

- The Code does not define "arrangement" and this allows for flexibility ranging from informal arrangements to formal agreements between traders and MEP's.

Grounds of appeal

[67] Intellihub appeals on the ground that, in deciding to take no further action on the Complaint, the Authority made the following errors of law:

The failure to understand and apply the "prima facie case" test

- The Authority's decision to carry out its own investigation into Intellihub's complaint and then decide not to commence an investigation under the Regulations, based on material that it refused to disclose to Intellihub and upon which Intellihub never had an opportunity to comment, was an error of law.

- The Authority's failure to conduct the investigation mandated by the Regulations deprived Intellihub of its entitlements and remedies under the Regulations, including its entitlement to take its complaint to the Rulings Panel if the Authority decided not to take matters further.

Failure to recognise that the Complaint established a prima facie case

- The Authority failed to recognise that the Complaint did, on its terms, amount to a prima facie case.

Failure to take relevant matters into account

- The Authority failed to take into account the comments of the High Court in the Judgment which were binding on the Authority and which were to the effect that it was seriously arguable that there was no arrangement between Intellihub and Genesis.

- The Authority failed to take into account – as Genesis did not supply it – the evidence set out in Intellihub's reply affidavits to the Injunction Application.

- The Authority failed to take into account – as Genesis did not supply them – Intellihub's objections to the admissibility of the evidence filed by Genesis in the Injunction Application.

Taking irrelevant matters into account

- Genesis' response to the Complaint was not relevant to the Authority's inquiry into whether the Complaint established a prima facie case.

Breach of the rules of natural justice

- The Authority breached the requirements of the rules of natural justice by conducting a fact-finding investigation that included private discussions with Genesis, in respect of which Intellihub was given no opportunity to comment.

Reasonable apprehension of bias

- At the time it received Intellihub's complaint, the Authority had already determined that there was no Code breach, based on representations made to it by Genesis.

[68] At the hearing, Intellihub abandoned its ground of appeal that the Authority failed to address Intellihub's complaint that cl 10.39(1)(c) of the Code had been breached.

[69] Before addressing the grounds of appeal, I turn to briefly describe the relevant legislation and the scope of the appeal in this case.

The legislative regime

[70] The Act, the Regulations and the Code govern the electricity industry in New Zealand.

The Electricity Industry Act

[71] The purpose of the Act is to provide a framework for the regulation of the electricity industry.[4] All "industry participants" are subject to the Act.[5] Intellihub and Genesis are industry participants, required to register under the Act and comply with the Code.[6]

[72] The Authority's statutory objective is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.[7] As well, the Authority has a wide range of statutory functions set out in s 16 of the Act, including making and administering the Code[8] and monitoring compliance with the Act, the Regulations and the Code. This includes the power to investigate and enforce compliance.[9]

The Code

[73] The Code binds all industry participants[10] and sets out the rights and obligations that apply to industry participants. Part 10 of the Code deals with metering. Part 11 of the Code deals with registry information management. It provides for the management of information held by the Registry (a national database containing information on every point of connection or installation control point), switching customers and embedded generators between retailers, and managing events of default by traders.

[74] The Authority and the Rulings Panel, an independent body established under the Act,[11] are responsible for enforcement of the Code. The process for dealing with breaches of the Code are set out in the Regulations.

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4 Electricity Industry Act 2010, s 4.
5 Defined in s 7.
6 Section 9.
7 Section 15.
8 Section 16(1)(b).
9 Section 16(1)(c)–(e). Powers include the ability to compel provision of information, require attendance at interviews and carry out searches under warrant – ss 45, 46 and 47.
10 Section 9.
11 Sections 23–26.

Electricity Industry (Enforcement) Regulations 2010

[75] Regulation 4 provides:

> (1) Reports of a breach of the Code may be received by the Authority as a result of mandatory reporting by an industry participant or as a result of voluntary reporting by any person.
>
> (2) If the Authority decides that a reported breach should be investigated, it appoints an investigator.
>
> (3) The investigator—
>
> (a) notifies the relevant parties and publicises the matter; and
>
> (b) attempts to reach a settlement.
>
> (4) If a settlement is reached, it is submitted to the Authority, which must either accept or reject it.
>
> (5) If a settlement is not reached, or if the Authority rejects a settlement, the Authority may lay a formal complaint with the Rulings Panel, in which case the investigator formulates the complaint and submits it to the Rulings Panel on the Authority's behalf.
>
> (6) If the Authority decides not to lay a formal complaint, an industry participant that was a party to the investigation and that has suffered loss as a result of it may independently lay a formal complaint with the Rulings Panel.
>
> (7) This regulation is by way of explanation only. If any other provision of the Act or these regulations conflicts with it, the other provision prevail.

[76] An industry participant who believes, on reasonable grounds, that another participant has breached the Code must report the breach or possible breach to the Authority as soon as possible.[12]

Application to facts

[77] The Authority decided under reg 11 to take no further action on the Complaint. Regulation 11 provides:

> **11 Authority may decline to act on reported breach**
>
> (1) The Authority may decline to take action on any report of an alleged breach if—

[12] The Regulations, reg 8.

(a) the report relates to a matter that has been, or that the Authority considers should more properly be, dealt with by any other person; or

(b) the Authority considers that the report fails to establish a prima facie case for the alleged breach; or

(c) the Authority decides that the alleged breach does not otherwise warrant further action being taken.

(2) If the Authority decides not to take further action, it must inform the industry participant or other person that reported the breach—

(a) that the Authority intends to do no more in relation to the matter; and

(b) of the reasons for that intention.

[78] Because of the Authority's decision, an investigator was not appointed under reg 12 and the more formal investigatory process was not carried out.

Appeals

[79] If the Authority decides to take no further action, there is a right of appeal to the High Court on a question of law only.[13]

[80] Decisions of the Rulings Panel may, however, be appealed under ss 63, 64 or 65 of the Act.[14] In determining an appeal under s 65, the Court may confirm, modify, or reverse the order, or any part of it, and exercise any of the powers that could have been exercised by the Rulings Panel in relation to the matter to which the appeal relates.[15] The Court may also direct the Rulings Panel to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.[16]

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13 The Act, s 64.

14 Section 63 permits an appeal against a decision of the Rulings Panel on the ground of lack of jurisdiction and section 65 provides for a general appeal against specified decisions of the Rulings Panel (including orders made in response to breaches of the Code).

15 The Act, s 67.

16 The Act, s 68.

Scope of appeal

[81] The principles relating to appeals on questions of law are summarised in *Countdown Properties (Northlands) Ltd v Dunedin City Council*,[17] where a full bench of the High Court held that this Court will interfere only if it considers the Tribunal (in that case the Planning Tribunal):[18]

> (a) Applied a wrong legal test; or
>
> (b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
>
> (c) Took into account matters which it should not have taken into account; or
>
> (d) Failed to take into account matters which it should have taken into account.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.
>
> Any error of law must materially affect the result of the Tribunals decision before this Court should grant relief.

[82] Cooke J followed that approach in his recent decision in *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd (City Financial)*,[19] a case that also dealt with the s 64 appeal provision. He then went on to say:[20]

> I accept that it would have been open for the Authority to conclude that there were difficult questions of interpretation that warranted a fuller investigation. But equally the Authority is entitled to conclude that based on the interpretation of the Code there is no prima facie breach involved. That is what the Authority concluded here. In the end, City Financial needs to establish that that conclusion was wrong in law. It does not establish that the Authority was wrong in law simply by demonstrating that an alternative interpretation was arguable when its complaint was made. The Authority must be able to decide not to continue investigations when it has reached the conclusion that no breach of the Code was involved. That is the very point of providing it with the power to do so.

[83] And:[21]

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17 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) followed in, for example, *Bay of Plenty Energy Ltd v Todd Energy Ltd* [2012] NZHC 238.

18 At 153 (citations omitted).

19 *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd* [2018] NZHC 1488 at [28].

20 At [31].

21 At [35].

> … Under the rule of law, the Court's proper function is to interpret the meaning of the law, but the rule of law also means that administrative bodies have the responsibility to undertake the functions Parliament has given them. In such a case, the Court will only interfere with the decision of a tribunal if it is irrational, and accordingly not lawful, which is what the Supreme Court concluded in *Vodafone*. (Citation omitted)

The alleged failure to understand and apply the prima facie case test

What constitutes a prima facie case?

[84] Intellihub says the Authority failed to understand and apply the "prima facie case" test, which is an appealable error of law.[22] A prima facie case is a "serious, as opposed to a speculative case"[23] and a litigating party is said to have a prima facie case when "the evidence in his or her favour is sufficiently strong for his or her opponent to be called on to answer it".[24]

[85] Intellihub's appeal under this ground involves a number of different allegations addressed below.

The Authority's decision to seek information from Genesis but not commence an investigation under the Regulations

[86] After receipt of the Complaint, the Authority wrote to Genesis seeking information on the following:

(a) whether Genesis accepted or denied the alleged breaches;

(b) the full circumstances surrounding them;

(c) Genesis' understanding of the extent of actual and potential market and operational impact and the rationale for this;

(d) any steps taken to resolve the breaches; and

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22 Citing *Commerce Commission v Harmoney Ltd* [2017] NZHC 1167, at [31] (the substantive decision was appealed only); See also *Milk New Zealand (Shanghai) Co Ltd v Miraka Limited* [2019] NZHC 2713, at [47].

23 *Re Collier* [2008] 2 NZLR 505 at [15].

24 *Re Collier* at [15].

(e) any steps taken to prevent them reoccurring in the future.

[87] The letter said the Authority was collating information to allow its Compliance Committee to decide whether the matter required a "formal investigation" to be undertaken. The letter concluded by saying that the information supplied to the Authority "will be used for investigative purposes only". Mr Wakefield signed the letter as "Senior Investigator".

[88] Intellihub says that the Authority's decision to "carry out its own investigation" but not an investigation under the Regulations was an error of law. It says a black letter reading of reg 11 would require the Authority to make its decision on the face of the Complaint. Mr McBride for Intellihub accepted that a "slight reading up" of the regulation could be seen to be acceptable as a matter of efficiency but submitted the Authority stepped well across the line of preliminary inquiries and undertook what was effectively a full investigation and merits assessment of the Complaint, and made factual findings. He described this as being done "to a degree that is indistinguishable from the formal investigation process contemplated by the Regulations".

[89] I am satisfied that the Authority is entitled to conduct preliminary inquiries before deciding whether to exercise its jurisdiction under reg 11. Doing so is not necessarily inconsistent with the prima facie case test. That is what Cooke J also concluded in *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd* where the Authority had received a complaint that Transpower had breached the Code.[25] The Authority conducted preliminary inquiries and gave Transpower the opportunity to respond. It had further interaction with Transpower, including by commenting on Transpower's proposed letter to City Financial about the alleged breaches. The Authority declined to take further action on the ground there was no prima facie case. As in the present case, that decision involved a consideration of factual issues by the Authority. The Authority in the present case, therefore, followed exactly the process approved by this Court in *City Financial*.

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[25] *City Financial Investment Co (New Zealand) Ltd v Transpower New Zealand Ltd* , above n 19, at [30]-[31].

[90] The Authority must reach its own decision as to whether a case has been established. To do that, inquiries are necessary. Parliament cannot have intended the Authority to take each complaint it receives at face value and launch a formal investigation without first determining whether the complaint is serious and not speculative.

[91] There are good policy reasons why the Authority must be empowered to conduct preliminary inquiries. It must ensure it has been presented with a complete picture rather than considering an alleged breach on the basis only of a complainant's self-serving report and a complaint may include incorrect or misleading information. As Mr May for the Authority pointed out, an investigation is a lengthy, resource-intensive and involved process – it cannot be sensibly contended that the Authority would embark on such a process without carrying out preliminary inquiries to determine whether or not such a process was warranted.

[92] The circumstances of this case amply demonstrate why this is so. Intellihub provided with its Complaint all of the documents it filed in the High Court in connection with its Injunction Application. It is inconceivable in those circumstances that the Authority would not ask Genesis for its response. Indeed, a failure to do so, followed by a decision to launch an investigation could arguably be considered an error of law in the context of the Authority's task under reg 11.

[93] Of equal force are the circumstances of the Complaint. The Regulations obliged Intellihub as an industry participant to report Code breaches as soon as possible.[26] Metrix had supplied metering services to Genesis for many years and it does not appear that, at any stage, alleged there was no arrangement. Intellihub acquired an interest in the business in December 2018 and settled its purchase in March 2019, continuing to supply metering services to Genesis for approximately a year without there being any evidence of a suggestion either to the Authority or to Genesis that there was no arrangement or that Genesis was in breach of the Code. In those circumstances, it is unremarkable that the Authority made some preliminary inquiries of Genesis.

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[26] The Regulations, reg 8.

[94] In addition, Intellihub's criticism of the response the Authority sought from Genesis overlooks the other limbs of reg 11. Not only does reg 11 allow the Authority to decline to take any action on an alleged breach if it considers the report fails to establish a prima facie case, but it can also decline to take such action if it considers another person ought to deal with the issue[27] or, if it decides that the alleged breach "does not otherwise warrant further action being taken".[28] I agree with Mr May's submission that the Authority cannot make those assessments without gathering further information. Whether or not an alleged breach warrants further action will clearly involve the Authority in considering a broad range of issues, some of which would have been captured by the inquiry the Authority made of Genesis. Having gathered that information, the Authority must be able to take it into account in deciding whether to take any further action.

[95] I also reject the contention that the Authority *in effect* embarked upon an investigation. Intellihub points to the fact Mr Wakefield gave Genesis 10 working days for its response, which is the same as the time period for a response when an investigation has been launched.[29]

[96] However, the Regulations provide for extensive powers of an investigator and mandatory steps in connection with any investigation, none of which were followed in the present case.

[97] Once appointed, the investigator has and may exercise the powers of the Authority which allow it to require an industry participant to:[30]

> (a) provide, within any reasonable time specified by the [investigator], any information, papers, recordings, and documents that are in the possession, or under the control, of the participant and that are requested for the purpose:
>
> (b) permit its officers or employees to be interviewed (which interview may be recorded) and ensure as far as possible that they are made available for interview and answer truthfully and fully any questions put to them:

---

27 Regulation 11(1)(a).
28 Regulation 11(1)(c).
29 Regulation 16(4).
30 Regulation 13(3)(a) and the Act, s 46(2).

(c) give all other assistance that may be reasonable and necessary to enable the Authority to carry out its functions and exercise its powers.

[98] The Regulations also impose several obligations on investigators. The investigator must publicise the information about the matter under investigation, including the content of the notice given under that regulation.[31] Any industry participant may be joined as a party to the investigation by providing the requisite notice.[32]

[99] The investigator must conduct an investigation of the facts surrounding the alleged breach.[33] The investigator must endeavour to effect an informal resolution (settlement) of every matter under investigation, by agreement between the parties to the investigation.[34] And if a settlement is not reached, the investigator must prepare a report that includes a recommendation on whether the Authority should discontinue the investigation or make a formal complaint to the Rulings Panel.[35]

[100] In the present case, the Authority simply asked Genesis for some information. The Authority did not commence an investigation – a far more formal process.

The failure to conduct an investigation deprived Intellihub of its entitlements and remedies under the Regulations

[101] Intellihub then contends that, by failing to conduct an investigation, Intellihub was deprived of its entitlements and remedies under the Regulations.

[102] Unless the Authority declines to take further action under reg 11 on a report of an alleged breach of the Code, it must appoint an investigator.[36] Then, if, following the process outlined above, the Authority decides to lay a formal complaint with the Rulings Panel, the investigator must send the complaint and the report to the Rulings Panel, as well as each party to the investigation.[37] If the Authority decides not to lay

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31 Regulation 17(1).
32 Regulation 17(2) and (3).
33 Regulation 20.
34 Regulation 22.
35 Regulation 23(1).
36 Regulation 12(a). Investigators must be suitably qualified and be free of conflicts of interest: Regulation 13(1) and (4).
37 Regulation 30.

a formal complaint, the industry participant who reported the breach (or was a party to the investigation), and has suffered loss as a result of the alleged breach, may lay a formal complaint with the Rulings Panel.[38]

[103] The Rulings Panel then considers the complaint in accordance with Part 2 of the Regulations. The Rulings Panel process is similar to a normal hearing.[39] If the Rulings Panel upholds a complaint, it can impose a range of remedial orders.[40]

[104] This aspect of Intellihub's appeal explains *why* it takes such exception to the Decision. Had there been an investigation, then even if the Authority did not refer the Complaint to the Rulings Panel, Intellihub itself could have done so. While this explains Intellihub's motivation, it does not reveal that the Authority made an error of law. That Intellihub could not pursue its Complaint further is the intended the result of the Regulations – when the Authority considers an alleged breach fails to establish a prima facie case, then that is the end of the matter.

[105] Mr McBride referred to *Auckland Commercial Solar Limited, Wellington Electricity Lines Limited and Powerco Ltd*. In that case a settlement agreement was entered into and approved by the Authority[41] in respect of a complaint by Wellington Electricity that Auckland Commercial Solar had breached cl 11.16(a) of the Code by not making arrangements for the provision of line function services in relation to installation control points (ICPs). The Authority appointed an investigator, Powerco was joined as an affected participant and the settlement was entered into. Pursuant to the settlement, Auckland Commercial Solar agreed inter alia:

> (a) the preferred form of arrangement for the purposes of clause 11.16 will be a fully executed [Agreement]
>
> (b) any arrangement other than a fully executed [Agreement]will only be an interim measure before a fully executed [Agreement] is in place
>
> …

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38 Regulation 31.
39 For example, it is public, there are written and oral submissions, the calling and cross-examination of witnesses, etc.
40 The Act, s 54.
41 Pursuant to reg 24(4).

(f) to move to arrange a fully executed [Agreement] for all networks where it currently has an arrangement other than a fully executed [Agreement]

[106] In Mr McBride's submission, that case was analogous to the present. He suggested it was inconsistent for the Authority not to follow the same approach and appoint an investigator in the present case. He also relied on the terms of the settlement that a "fully executed [Agreement]" was the preferred form of an arrangement.

[107] However, the case is readily distinguishable from the present case (and not only because it concerned cl 11.16(a) of the Code, not (b) as here). Without knowing the detail and circumstances, it is pure speculation to suggest the fact an investigation was ordered in that case means one should have been ordered here. More to the point, the settlement agreement records that Wellington Electricity had no commercial arrangement to enable it to recover its network costs for the relevant ICPs. As a result of the settlement, Auckland Commercial Solar provided the necessary information to enable Wellington Electricity to invoice those costs to Auckland Commercial Solar. In contrast, the evidence provided to the Authority by Intellihub confirmed that pricing for the meters was agreed on an annual basis and the invoices paid.

[108] Furthermore, I do not consider the Authority, by approving the terms of the settlement as between Auckland Commercial Solar and Wellington Electricity, consequently approved a wider, more general statement of law that an "arrangement" will only ever be an interim measure. Not only is the use of the word "arrangement" different in cl 11.16(a) as compared to (b) but also there is nothing in cl 11.16(b) which suggests that any arrangement may be an interim measure only.

[109] This brings me to the nub of Intellihub's appeal, which is its allegation that the Authority failed to recognise that the Complaint established a prima facie case.

Did the Authority fail to recognise the Complaint established a prima facie case?

[110] Intellihub contends that the Authority failed to recognise that the Complaint, on its face, amounted to a prima facie case. It says that the Authority failed to

appreciate that the fact it had appointed an investigator (although it had not), and sought a response from Genesis, was sufficient.

[111] I have discussed above in general terms what constitutes a prima facie case. In Mr McBride's submission, once the investigator "got into the back and forth", it demonstrated that the Complaint required a response and therefore there was a prima facie case.

[112] Mr McBride relied on *Furnell v Whangarei High Schools Board*,[42] where the Privy Council quoted with approval an observation of Lord Reid in *Wiseman v Borneman*:[43]

> Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him (ibid, 308, 277-278).

[113] That case concerned an appeal to the Privy Council in respect of disciplinary action against a teacher. The issue was natural justice and whether a sub-committee could suspend a teacher before he had been given the opportunity to comment on a complaint. Notably, the Privy Council emphasised that the context of the relevant legislation and subject matter dictated the process. In that case, there was a code governing the process to be followed.

[114] What constitutes a prima facie case must be considered in the context of the Regulations and their purpose.[44] As I have already observed, the Regulations do not envisage the Authority simply accepting a report of an alleged breach on its face. The Authority has the right to carry out some form of preliminary analysis, something Mr McBride acknowledged must be correct. The intent of reg 11 cannot be achieved without this preliminary analysis taking place. Were all cases which call for an answer in the context of the Regulations to be treated as if that meant a prima facie case existed, then there would be no point in the Authority's powers under reg 11.

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42 *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC).

43 *Wiseman v Borneman* [1971] AC 297; [1969] 3 All ER 275. Authorities V1 tab 12 at 719.

44 In the same way as the Court in *Re Collier* considered the purpose of s 88B(2) of the Judicature Act 1908 in considering an application for leave to appeal which was not to be granted under s 88B(2) unless the Court was satisfied the proceeding was not an abuse of the process of the Court and that there was prima facie ground for the proceeding.

[115] In *Re Collier*, Randerson J accepted that, while applications for leave to appeal under s 88B(2) of the Judicature Act 1908 should in general be dealt with on an ex parte basis, it may in cases be appropriate that proposed defendants be served with the application.[45] Randerson J considered this may be particularly applicable where there has been substantial prior litigation and evidence presented on issues relevant to the application. Those observations are applicable to the present case, particularly given the Complaint itself, by incorporating reference to the Injunction Application, brought squarely into play the past dealings and past (and current) litigation between the parties. Also, while *Re Collier* discusses what amounts to a prima facie case in a general sense, there is no suggestion that it is the behaviour of the decision-maker which is determinative of whether a prima facie case is made out or not.

[116] The Regulations required the Authority to consider whether the Complaint made out a prima facie case that there was no arrangement between Intellihub and Genesis.

What constitutes an Arrangement?

[117] The term "arrangement" is not defined in the Code.

[118] In *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board*, the Privy Council said in relation to s 27 of the Commerce Act 1986 and the meaning of "arrangements" substantially lessening competition:[46]

> "Arrangement" is a perfectly ordinary English word and in the context of s 27 involves no more than a meeting of minds between two or more persons not amounting to a formal contract, but leading to an agreed course of action.

[119] And in *Giltrap City Ltd v Commerce Commission*, the Court of Appeal said:[47]

> [17] Before there can be an arrangement under s 27 (or for that matter an understanding) there must be a consensus between those said to have entered into the arrangement. Their minds must have met – they must have agreed – on the subject-matter. The consensus must engender an expectation that at least one person will act or refrain from acting in the manner the consensus envisages. In other words, there must be an expectation that the consensus

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45 *Re Collier*, above n 23, at [27].

46 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC) at 261.

47 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608.

> will be implemented in accordance with its terms. If no specific action or inaction is envisaged on anyone's part, it would be difficult to find an arrangement under s 27, if only for want of the existence of the necessary purpose or effect of substantially lessening competition.
>
> [18] We therefore consider that the question whether a particular person entered into an arrangement or arrived at an understanding under s 27 should be answered by asking whether that person was part of a consensus giving rise to an expectation that some proscribed action or inaction take place. If they were, they will have entered into an arrangement.

[120] Recently, and again in relation to an arrangement under the Commerce Act, the Supreme Court in *Lodge Real Estate Ltd v Commerce Commission* said:[48]

> [58] We summarise the test in this way. If there is a consensus or meeting of minds among competitors involving a commitment from one or more of them to act (or refrain from acting) in a certain way, that will constitute an arrangement (or understanding). The commitment does not need to be legally binding but must be such that it gives rise to an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages.

[121] Notably, Intellihub does not challenge the Authority's conclusion that an arrangement is a flexible term that ranges from "informal arrangements to formal agreements between traders and MEPS". While before me Mr McBride accepted that reference to Commerce Act cases was appropriate,[49] he stressed that the primary requirement was agreement as to a course of action rather than what he submitted was the situation in the present case where the parties were "talking past" one another.

Evidence before the Authority

[122] The issue is whether it was open to the Authority to find there was no prima facie breach of the Code, that is, that Intellihub had not demonstrated to a prima facie standard that there was no arrangement between Intellihub and Genesis. In my assessment, it was.

[123] Intellihub relies upon the qualifications in the various communications between Metrix (and Intellihub) and Genesis beginning in 2013 to the effect that, while

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48 *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25.

49 One of the purposes of the Act is to promote competition. One of the purposes of pt 11 of the Code is to enable consumers to switch suppliers and retailers. Cases under the Commerce Act are therefore relevant to interpretation of the term "arrangement".

the parties might have agreed pricing, they still needed to work together to finalise a number of outstanding matters. In Mr McBride's submission, while the documentary record might have shown Intellihub or its predecessors invoiced Genesis monthly and Genesis paid those invoices, the Code requires an arrangement *in advance* rather than post facto. In his submission, any agreement on rates cannot on its own constitute an arrangement in circumstances where Intellihub or its predecessors continually stated that the parties needed to agree terms. If the basis on which Genesis was trading on the meters was not clear, then in his submission, there was no consensus between the parties.

[124] In the Memorandum, Mr Wakefield concluded that the fact of an arrangement was demonstrated by five matters. I repeat them:

> (a) An agreement between Mercury and Genesis dated 14 February 2000 relating to the supply of metering services by Mercury to Genesis. Genesis advises that this agreement has not been varied or terminated.
>
> (b) Mercury's written confirmation, on 29 August 2013, the date when clause 11.16(b) was first included in the Code, stated that "Metrix and Genesis already have arrangements in place for the provision of metering services from Metrix, and Metrix will provide MEP Services as required by the amended Code in accordance with these arrangements".
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> (c) Intellihub's statement in the High Court proceedings that "as requested by Genesis, Metrix has: (a) delivered daily smart read services and associated field services to Genesis, in respect of the MTRX Metering Installations; and (b) invoiced Genesis for these services."
>
> (d) Intellihub's evidence in the High Court proceedings stating that "Since acquiring Metrix, Intellihub has continued to provide metering services to Genesis on an ad hoc basis, which include broadly daily register reads and half hourly interval data … " and "Intellihub invoices Genesis on a monthly basis for its services, and Genesis pays for those services on invoice".
>
> (e) Mercury, continued to notify Genesis between February 2007 and May 2018 of price increases for providing advanced metering services for the MTRX metering installations, in accordance with the contractual arrangements between the parties.

[125] Rather than the Authority adopting Genesis' response as alleged by Intellihub, the Authority relied largely on Intellihub's own evidence, starting with that relating to

the situation between Metrix and Genesis, and then Intellihub's continuation of the same practices.

[126] The documentary record provided to the Authority revealed that pricing was agreed in advance. For example, in its letter of 1 May 2018, Metrix advised Genesis of the annual pricing review. Attached was a detailed list of AMI metering equipment services, legacy metering services and field services. This included the costs of new connections.

[127] It was open to the Authority to take the approach it did. The Authority concluded that, if matters were agreed between the parties to enable the supply of metering services to occur so that consumers could be supplied with electricity, then, even if they had not agreed on other terms, there was an arrangement for the purposes of the Code.

[128] Mr McBride focused on what he termed the "shifting sands" of Genesis' approach to the issue of an arrangement. This has apparently varied between relying on the 2000 Agreement, correspondence in 2013, an agreement by letter dated 4 September 2013 in respect of which the countersigned copy cannot be located, and Genesis' comments during the RFP process about the meters being "off contract". Two comments. First, while on its face the Complaint alleged a breach of the Code by reason of there being no arrangement between Genesis and Intellihub, the accompanying letter providing an overview of the Complaint referred in a number of places to the lack of an arrangement with Intellihub "or its predecessors". The most obvious point which bears repeating is that no predecessor complained of this, despite the obligation under the Code to do so, whilst continuing to supply advanced meeting services to Genesis for more than seven years.

[129] Secondly, if the Complaint is limited to the time during which Intellihub owned the meters, there was no report of an alleged breach until its unsuccessful participation in the RFP process. The allegation is also inconsistent with the way in which Intellihub put its position in the Injunction Application on which it relied in making the Complaint.

[130] And if the period relates only to Intellihub's ownership, then any so-called shifting sands in respect of Genesis' response is irrelevant.

[131] The most compelling point, however, is that it was open to the Authority to conclude *on the basis of the information in the Complaint* that Intellihub had not demonstrated the absence of an arrangement to a prima facie standard. I repeat Ms Tibbetts' affidavit evidence filed as part of the Complaint where she said:

> 19. Since acquiring Metrix, Intellihub has continued to provide metering services to Genesis on an ad-hoc basis, which include broadly:
>
> (a) Daily register reads and half hourly interval data;
>
> (b) Remote disconnect/reconnect services; and
>
> (c) Event field services.
>
> 20. By way of example of some of the activities under categories (b) and (c) above, in the last 12 month period, Intellihub has carried out around 3,000 service request orders for Genesis. A service request involves such things as remote disconnect/reconnect actions, fault assessments, upgrading or downgrading a meter, moving or removing meter equipment, and so on.
>
> 21. Intellihub invoices Genesis on a monthly basis for its services, and Genesis pays for those services on invoice.

[132] The last issue is Intellihub's claim that the Judgment provided the answer which was binding on the Authority as to whether the Complaint revealed a prima facie case.

What is the impact of the High Court's observations on the Injunction Application?

[133] Prior to the Decision, Intellihub provided a copy of the Judgment to the Authority. In Mr McBride's submission, the Authority failed to take into account the High Court's comments, which were binding on the Authority and "were to the effect that it was seriously arguable that there was no arrangement between Intellihub and Genesis".

[134] What Katz J in fact said was:[50]

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[50] *Intellihub Ltd v Genesis Energy* [2020] NZHC 807.

> [47] The issue of whether Genesis and Intellihub have entered into an arrangement in terms of the Code, allowing Genesis to trade on Intellihub's meters, was the subject of extensive argument at the hearing. This issue overlaps to a considerable extent with the arguments raised in relation to the contract cause of action, which I address below. Genesis' position, in essence, is that there is a contract between the parties which also constitutes an arrangement for the purposes of the Code. Intellihub's position is that there are a series of unwritten contracts, relating to individual meters, but these do not also constitute arrangements for the purposes of the Code. It is not my function at this interim stage to reach any concluded view on whether the parties have entered into an arrangement in terms of the Code, or not. I accept, however, that the issue is arguable, and proceed on that basis.

[135] And then:

> [51] … As for the allegation that Genesis is trading on Intellihub's meters in breach of the Code, the remedy for such a breach would appear to lie in the Electricity Act and the Code. (I note that Intellihub has already laid a complaint with the Electricity Authority in relation to this issue).

[136] These observations were made in the context of the first cause of action in the Statement of Claim. That is, that Genesis and Vector engaged in an unlawful and intentional interference with Intellihub's business. The Judge concluded that, "even taking Intellihub's case at its highest (and accepting that it is arguable that there is no arrangement in terms of the Code) the cause of action did not meet the essential elements of the unlawful means tort".[51] That conclusion was upheld by the Court of Appeal.[52]

[137] I therefore reject the contention that Katz J concluded it was seriously arguable that there was no arrangement between Intellihub and Genesis. She did not – and did not need to – express any views as to what constitutes an arrangement. Katz J explicitly declined to address whether there was an arrangement, finding only that it was "arguable" in the context of commenting on a cause of action which she concluded could not succeed.

[138] Indeed, the second cause of action in the Statement of Claim rather cuts across Intellihub's case of there being no arrangement between it and Genesis. The second cause of action alleged breach of contract. Intellihub claimed it had a series of interim service agreements with Genesis subject to implied terms that Genesis would pay a

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51 At [48].
52 *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344.

reasonable fee for metering services and would not displace the meters absent either reasonable notice or compensation. In respect of the second cause of action, Katz J said:

> [57] I am satisfied that there is a serious question to be tried in respect of this cause of action. The parties themselves appear to have been somewhat confused, over an extended period of time, as to what their contractual arrangements were. It is open to argument whether the 2000 Agreement (drafted many years prior to the introduction of smart meters) applies to such meters. Efforts by the parties in 2013, and subsequently, to update or vary their existing metering services arrangements, or agree new metering services arrangements (specifically covering the MTRX metering installations) appear to have been unsuccessful.
>
> …
>
> [59] Determining the precise nature of the contractual arrangements between Intellihub and Genesis is likely to be far from straightforward at trial. In the event that the 2000 Agreement does not apply, then neither of the implied terms contended for by Intellihub are particularly unusual or controversial, in the context of the commercial relationship between the parties. The more difficult issue is likely to be what constitutes reasonable notice in all the circumstances.

[139] The second cause of action was predicated on there being some form of contractual relationship between Genesis and Intellihub. As Mr Ladd put it for Genesis, there is a fundamental tension in Intellihub's position. It says it is the supplier of metering services to Genesis and that Genesis cannot move to a new supplier, but at the same time says that Intellihub and Genesis do not even have an arrangement for the supply of services. I agree with Mr Ladd that the real issue is that Intellihub does not accept that there can be an arrangement in the absence of a formal contract.

[140] In any event, the Memorandum noted that the High Court had dismissed the Injunction Application. The Authority's internal legal opinion said the Memorandum, Intellihub's statement of claim and the Judgment had all been considered.

[141] For these reasons, I reject the claim that the Authority's approach in applying the prima facie test amounted to an error of law.

Additional procedural complaints

[142] I now address the additional procedural deficiencies alleged by Intellihub to constitute errors of law.

Failure to take relevant matters into account

[143] Intellihub says the Authority failed to consider Intellihub's reply evidence filed in connection with the Injunction Application which it maintains answered Genesis' claim of there being an arrangement. Further, Genesis did not advise the Authority of Intellihub's objections to the evidence it filed in the High Court. Had Genesis provided the Authority with this material, Intellihub says a fairer and more balanced picture would have been presented to the Authority.[53]

[144] Genesis and the Authority say the reply evidence was not considered because it was not provided to the Authority. Intellihub did not provide it.

[145] Intellihub says it did not provide the evidence because it did not know an investigation was underway and therefore was unaware that Genesis had provided evidence to the Authority.

[146] Genesis was of course not obliged to ensure the Authority had all the information it needed to conduct its inquiries. It was not the decision-maker. Genesis' response to the Authority did not go beyond its evidence and submissions in the Injunction Application. Intellihub put further material before the Authority after the Judgment was issued. By this time it knew what Genesis' case was, given the extensive affidavit evidence Genesis filed in response to the Injunction Application and the two-day long High Court hearing.

[147] Natural justice aims to impose obligations on decision-makers, not necessarily affected parties. If this evidence was important to Intellihub's case, it should have provided it to the Authority. And it was Intellihub's evidence to provide. The Authority does not know what it does not know. In the circumstances – a preliminary

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[53] The reply affidavit of Stacey Tibbetts for example outlines why Intellihub did not consider that the 2000 metering agreement covered the AMI meters.

inquiry stage – it was reasonable for the Authority to proceed in the expectation that Intellihub had provided the Authority with a comprehensive overview of its position and supporting evidence.

[148] Also, it was not for Genesis to advise the Authority that Intellihub objected to some of Genesis' evidence in the High Court. As a respondent to a complaint made to the Authority, Genesis was not and should not be expected to act as an arbiter of admissibility. Equally, admissibility of evidence in Court proceedings is very different from matters that can be considered by the Authority.

[149] I do not accept that the Authority failed to take relevant matters into account.

Taking irrelevant matters into account

[150] Intellihub says the Authority considered irrelevant matters by seeking a broad-ranging explanation from Genesis. In Mr McBride's submission, if the Authority intended to accept that response, it was incumbent on it to ask Intellihub of its position in reply.

[151] However, as discussed above, the Authority is entitled to conduct preliminary inquiries under reg 11 for the purposes of determining whether the complaint should be dealt with by another body, whether there is a prima facie case, or whether the complaint warranted further action. Those considerations necessarily require the Authority to consider matters outside of the original report of an alleged breach. Of course, this does not mean the Authority could consider matters totally unconnected to reg 11. But nor should the Authority feel unable to enquire as to affected parties' positions before deciding on a course of action.

[152] The Authority accepts that there may be cases where natural justice requires it to disclose key points arising out of its fact-finding to a complainant prior to making a determination under reg 11, but says this cannot be a universal obligation to disclose all gathered information to a complainant. The Authority says commercially sensitive information is usually involved and that, where the complaint involves two industry participants, it can reasonably expect that each party knows the other's position. Inviting exchanges of rebuttal would delay matters. I do not necessarily accept that

the Authority can withhold information from parties to a complaint by relying on the parties knowing each other's position. But I do acknowledge that in the present case all the material had been filed in connection with the Injunction Application and that Intellihub knew Genesis' position.

[153] It is hardly surprising in those circumstances that the Authority did not feel the need to advise Intellihub of the detail of Genesis' response.

[154] I do not accept that the Authority took irrelevant matters into account.

Natural justice breaches

[155] Putting the same complaint under a different heading, Intellihub contends that the Authority failed to run a fair process. It says that all relevant information should have been disclosed to allow Intellihub an opportunity to controvert or correct material prejudicial to its case. Instead, Intellihub says, the Authority made its decision behind closed doors.

[156] Whether breaches of natural justice are properly examinable in an appeal on a question of law is uncertain. Much depends on whether there is in fact any difference between an appeal on a question of law and judicial review. The New Zealand courts have been inconsistent on this issue. For example, in *Chorus Ltd v Commerce Commission*, Kós J (as he then was) held that there is no material difference between appeals on questions of law and judicial review,[54] whereas in *Bay of Plenty Energy Ltd v The Electricity Authority* Ronald Young J held there was a difference between review and appeal.[55] Yet in *Gillies v Secretary of State for Work and Pensions* the House of Lords determined that a "breach of the principles of natural justice is essentially a question of law".[56] And in *E v Secretary of State for the Home Department,* Carnwath LJ held that there is no logical reason why the grounds of challenge should be wider in cases of judicial review than on appeal.[57]

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54 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [11].
55 *Bay of Plenty Energy Ltd v The Electricity Authority* [2012] NZHC 238 at [82].
56 *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 78 (HL) at [6].
57 *E v Secretary of State for the Home Department* [2004] QB 1044 (CA) at [40].

[157] I do not consider the distinction often drawn between appeals and review is overly helpful. While the source of the Court's power may differ, in substance the Court is tasked with supervising administrative decision-making, whichever the route of challenge.[58] It seems to me to be artificial to exclude from consideration breaches of natural justice in appeals on questions of law but include them in judicial review proceedings.

[158] The requirements of natural justice or procedural fairness vary depending on the statutory background and body in question.[59] In assessing the requirements of natural justice, the courts look at the rules that apply to the decision-maker, the interests at stake, the effects of an adverse finding on an individual, and the severity of the sanction the body is empowered to impose.[60] When a statutory body resembles or discharges functions similar to a court, the higher the expected standards of fairness will be.[61] The precise content of the rules of natural justice and standards of fairness must be tailored in a realistic way.[62]

[159] The Authority and its processes (especially at the preliminary inquiry stage) do not resemble a court. The Rulings Panel is more court-like. The Authority also holds an inquisitorial rather than an adjudicative role, where higher standards of natural justice are required. The fact the Authority does not decide on substantive rights – but decides whether a prima facie case is made out – is important. It flows from the Authority's role that fairness does not require it to provide interested parties with disclosure and/or an opportunity for comment when determining whether or not to take action in relation to a reported breach of the Code. This accords with the approach taken by Cooke J in *City Financial*.

[160] Further, Intellihub was the instigator of the Complaint. Intellihub knew Genesis' position and had adequate opportunity to make representations to the

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58 For a comprehensive discussion on the need to dispense with the distinction between appeals and judicial review, see Marcelo Rodriguez Ferrere "The Functional Convergence of Appeal and Judicial Review" [2016] NZ L Rev 157.

59 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355

60 *Peters v Collinge* [1993] 2 NZLR 554 at 567.

61 *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 226.

62 *Rabson v Transparency International (New Zealand) Inc* [2015] NZHC 334 at [23] citing *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 516 per Richardson J.

Authority. Intellihub should also have been aware of the likelihood the Authority would seek comment from Genesis. The Authority's website states:[63]

> Fact finding
>
> When an alleged breach report is received, we consider the information provided by the reporting party. If necessary, the reporting party, or other relevant parties, will be requested to provide further information.

[161] I consider the natural justice requirements were at the lower end of the scale. The Authority was not, by its own regulations or natural justice principles, required to disclose all the evidence it had received to both parties. Such a requirement would transform the function of the Authority into something resembling the Rulings Panel. The Authority's role is to determine whether complaints establish a prima facie case for an alleged breach. Exchanges of evidence and the opportunity to respond to prejudicial material is not required – nor would it be practical – at this stage.

[162] I do not accept the Authority failed to run a fair process.

Bias

[163] Intellihub alleges that the Decision is tainted by apparent bias. It says that, prior to receiving the Complaint, the Authority had already determined that there was no Code breach, based on representations made to it by Genesis, and had confirmed that position to Genesis. Intellihub's claim relies on communications that occurred between Mr Ron Beatty, Principal Adviser Market Services at the Authority, and Genesis before Intellihub complained to the Authority.

[164] The fact that Genesis had been in contact with the market services arm of the Authority in respect of the proposed change in metering equipment providers is hardly a surprise. Indeed, it would have been surprising had it not done so. There can be no complaint in this regard.

[165] There is no evidence that Mr Wakefield, the Compliance Committee, or any person involved in making the Decision took these communications into account.

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63 Electricity Authority "Code breach process" <https://www.ea.govt.nz/code-and-compliance/compliance/code-breach-process/>.

And, perhaps determinatively, there was no overlap between those considering the Complaint and those who communicated with Genesis prior to the Complaint.

[166] I am satisfied that a fair-minded lay observer would not reasonably apprehend that the Authority did not bring an impartial mind to the Complaint.[64]

Result

[167] The appeal is dismissed.

[168] Costs are reserved. If the parties cannot reach agreement, memoranda claiming costs are to be filed and served within 28 days of this decision, with any response 14 days thereafter. Memoranda are to be no more than five pages.

Thomas J

Solicitors:
Lee Salmon Long, Auckland for Appellant
Bell Gully, Auckland for Respondent
Luke Cunningham Clere, Wellington for Electricity Authority

[64] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].