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

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-Ā-TARA ROHE**

**CIV 2017-485-657**
**[2018] NZHC 1488**

| | |
|---|---|
| UNDER | the Judicial Review Procedure Act 2016 |
| IN THE MATTER OF | an application for review of a decision of the Electricity Authority under reg 11 of the Electricity Industry (Enforcement) Regulations 2010 |
| IN THE MATTER OF | an appeal under s 66 of the Electricity Industry Act 2010 |
| BETWEEN | CITY FINANCIAL INVESTMENT COMPANY (NEW ZEALAND) LIMITED<br>Applicant |
| AND | TRANSPOWER NEW ZEALAND LIMITED<br>First Respondent |
| | THE ELECTRICITY AUTHORITY<br>Second Respondent |

**CIV 2017-485-658**

| | |
|---|---|
| BETWEEN | CITY FINANCIAL INVESTMENT COMPANY (NEW ZEALAND) LIMITED<br>Appellant |
| AND | TRANSPOWER NEW ZEALAND LIMITED<br>First Respondent |
| | THE ELECTRICITY AUTHORITY<br>Second Respondent |

Hearing: 5-7 June 2018

Counsel: J V Ormsby, S S R Meares and J I Taylor for Applicant/Appellant
T D Smith and J Y T Moran for First Respondent
L A O'Gorman for Second Respondent

Judgment: 21 June 2018

**RESERVED JUDGMENT OF COOKE J**

## Contents


**Background and context** ..... **[2]**
*The system generally* ..... [3]
*Changes to HVDC link* ..... [11]
*The challenged decisions* ..... [23]
**Appeal on question of law** ..... **[27]**
*Unlawful process* ..... [29]
*Authority's jurisdiction to interpret the Code* ..... [32]
**First alleged error of law: clause 12.111(1)(a)** ..... **[37]**
*Minimum service levels required by definition* ..... [42]
*Minimum service levels required by administrative decision* ..... [47]
**Second alleged error of law: clause 12.118(2)** ..... **[57]**
**Third alleged error of law: clause 13.30** ..... **[65]**
**Fourth alleged error of law: clause 7.10** ..... **[74]**
**Judicial review claims** ..... **[81]**
**Result** ..... **[99]**
**Costs** ..... **[100]**


[1] City Financial Investment Company (New Zealand) Limited (City Financial) is a trader in electricity futures. It appeals against decisions of the Electricity Authority (the Authority) which effectively dismissed its complaints that Transpower New Zealand Limited (Transpower) had breached certain provisions of the Electricity Industry Participation Code 2010 (the Code). The breaches were alleged to arise in relation to Transpower's change to aspects of the High Voltage Direct Current link (the HVDC link), which is the electricity transmission link between the North and South Islands' electrical power systems. City Financial has a right to appeal the Authority's decision to this Court under s 64 of the Electricity Industry Act 2010 (the Act), which is the Act regulating the electricity industry. In addition, City Financial supplements its appeal with judicial review challenges relating to decisions made by the Authority and Transpower.

## Background and context

[2] City Financial's challenges ultimately focus on technical detail concerning the regime for electricity distribution in New Zealand. Some background and context is of assistance.

*The system generally*

[3] Broadly speaking, the system for electricity generation and distribution in New Zealand involves a series of entities who generate electricity by various means, a series of entities who distribute and sell electricity to consumers, and a transmission system that connects the two.

[4] The HVDC link is part of the transmission system. It is the transmission link between the North and South Islands. It is a collection of electricity lines, undersea cables and converter stations linking Benmore Dam in Canterbury and the Haywards substation in Lower Hutt. When established in 1965 the transmission of electricity was all northward, but in 1976 it was modified to allow transmission in both directions. The HVDC link is a very important piece of infrastructure for the transmission of electricity, but there are various other important electricity transmission assets within the system which comprises the National Grid. In the broader system Transpower is as owner of the National Grid, with the industry referring to Transpower in this capacity as the "Grid Owner".

[5] There is another important part of the overall system. The demand for electricity by end users, and the generation of electricity by the generators must be matched to ensure that supply meets demand, and to provide the means by which the price for that electricity is set. That system is called the Scheduling Pricing Dispatch (SPD). Transpower has a second key function, which is to manage this system, with the industry referring to Transpower in this capacity as the "System Operator".

[6] Under the SPD generators make offers to the System Operator to generate a certain amount of electricity at certain prices. Purchasers, who are mainly electricity retailers, bid to buy that electricity. The SPD then determines the cheapest way to allocate enough generation to provide the amount of electricity required by the market. Wholesale electricity is bought and sold through this process at spot prices, which are set at certain points across the transmission grid every half hour. The wholesale electricity price is calculated at approximately 250 different locations around the country. The SPD is a sophisticated software model that is designed to determine the

lowest cost of matching supply and demand. Instructions are given to generators on when and how much electricity to generate.

[7] An important part of this system is the ability to call on reserves. Given the potential for events such as the failure of equipment, the System Operator needs to ensure that there is spare generating capacity available at all times that can be called on within seconds, and is available for long enough to resolve the relevant supply problem. The technical term for this is Instantaneous Reserve. The particular type of electricity generation can affect when and how such reserves are provided. Some generators can supply such reserves very quickly, but only for a short period of time. Other generators' supply is less instantaneous but can be longer lasting. The provision of reserves is also priced into the SPD. Generators make offers of how much reserves they are willing to make available at certain prices. The System Operator purchases enough reserves to cover the most significant risk that can arise in any one time.

[8] There is general price volatility that arises within this system. That can occur on both the supply and demand sides, and for a series of reasons – for example, weather events, plant failure, and climatic conditions. That volatility has resulted in the establishment and operation of a market for the buying and selling of contracts based on the future price of electricity – that is, derivatives or futures. This allows the participants to hedge their risk based on the expectations of future electricity prices. Accordingly, parties such as City Financial play an important role. They are willing to take on the price risk. The existence of this service has the effect of smoothing prices for the participants. Such derivative contracts can be the result of direct agreements (referred to as "over the counter" derivatives) or traded through an exchange. The primary exchange is the Australian Stock Exchange. There is also a separate exchange for a particular type of derivative product called Financial Transmission Rights (FTR). FTRs have two features that are significant. First they relate to the risk that arises from price differences between the 250 locations referred to above. The second is that FTR contracts have no counterparty. Settlement of the transactions occurs with the manager of an FTR settlement fund. In a sense, the fund overall is the counterparty. Such derivatives trading is an important part of the market and involves Transpower operating in a third capacity as FTR manager.

[9] Unsurprisingly a complex system of this kind is subject to detailed legal rules. The overall regime is established under the Act, and involves regulations such as the Electricity Industry (Enforcement) Regulations 2010 (the Regulations) established under the Act, and the Code which is also established under Part 2, Subpart 3 of the Act. The Code is a long and complex document setting out requirements that regulate different parts of the overall system. This includes Part 7 setting out requirements in relation to Transpower's functions as System Operator, Part 12 concerning transmission and accordingly Transpower's role as Grid Owner, and Part 13 concerning trading including the derivatives trading referred to above and Transpower's role as FTR manager.

[10] One feature of the New Zealand electricity market is that Transpower operates as both Grid Owner and as System Operator. By international standards it is more common for the System Operator to be an independent entity. Managing the dual role that Transpower performs within New Zealand is recognised by provisions of the Code, and is an issue raised in the challenges. Transpower is a state-owned enterprise subject to particular requirements under the State-Owned Enterprises Act 1986. Transpower is also subject to a regulatory framework under both the Act and the Commerce Act 1986. Under Part 4 of the Commerce Act it is subject to price-quality regulation.

*Changes to HVDC link*

[11] Changes have been made to the HVDC link over the years. Until 2013 it involved two "Poles". A Pole is a set of power lines (including undersea cables) attached to converters that transmits electricity. Originally the system comprised Pole 1 and Pole 2, but around 2013 Pole 3 was added, and Pole 1 was subsequently decommissioned. The HVDC link currently operates with Pole 2 and Pole 3.

[12] The HVDC link can be operated in a number of ways which are referred to as configurations – they are principally Pole 2 only, Pole 3 only, and bipole mode. These configurations can be utilised for either northward or southward transmission. Managing the HVDC link in the most efficient way, particularly in relation to the risk of equipment failure, involves a degree of complexity. If only one Pole is running,

then the other Pole can quickly be turned on to cover a failure. So no reserves are required for the capacity that can be supplied by the other Pole. When the HVDC link is in bipole mode it has some ability to self-cover because the other Pole will be able to provide some additional capacity, but it is still likely that reserves will be needed to meet the demand.

[13] Each of the Poles has a maximum capacity it can operate at, above which it begins to overheat from resistance. A Pole can nevertheless be overloaded for a period without causing heat damage. That capacity is called overload capacity. Pole 3 has a higher maximum capacity than Pole 2 given it is a more modern piece of equipment. When the HVDC link is operating in bipole mode, the risk of Pole 3 failure is assessed by taking into account the overload capacity of Pole 2, and then the amount of reserves that are required. The ramifications of this process are too complex to model in the SPD. Instead the SPD uses an estimate called the HVDC Risk Subtractor.

[14] A further feature relevant to the operation of the HVDC link is referred to as "losses". Losses are the electricity that is lost from cables and other infrastructure as transmission occurs. The relationship between the amount of electricity that is transmitted and the losses that occur is not linear. As the rate of transmission is increased, the rate of losses also increases.

[15] In 2016, Transpower, as Grid Owner, made a change in the way the HVDC link was operated, which is challenged in these proceedings. This change can be described as a re-balancing of how much electricity each of the Poles was carrying while operating in bipole mode, which had the effect of reducing the need for reserves. Reducing the need for reserves reduced the costs that Transpower would incur in managing the transmission equipment. That was seen as beneficial, not only because it reduced transmission costs to the system overall, but also because it freed up generation capacity that no longer had to be dedicated to reserves.

[16] In effect, what the proposed change involved was reducing the standard transmission limit of Pole 2 from 500 MW to 420 MW, whilst increasing the standard transmission limit of Pole 3 from 700 MW to 780 MW. At the same time the overload capacity of Pole 2 would be increased, and its overload time would be reduced from

30 minutes to 15 minutes. As a result, when operating in bipole mode, the HVDC link would still transfer 1,200 MW, but its ability to manage a failure of Pole 3 was increased, as Pole 2 had more spare capacity. The consequence was that Transpower had less need to purchase reserves.

[17] The assessment that the change was beneficial had at least one complexity. The re-balancing would have the effect of an increase in losses given the non-linear relationship between the level of transmission and the rate of losses. But Transpower, as System Operator, perceived this to be more than offset by the advantages.

[18] There is little doubt that the change was effectively driven by Transpower as System Operator. It improved its key performance indicators by delivering benefits to the market. It was agreed to by Transpower as Grid Owner including because it was said to have some advantages to it in terms of the reduced wear and tear on the assets.

[19] It should be noted that the pricing implications of this change also had a degree of complexity because the change affected different participants in different ways. Given the increased ability to self-manage a Pole 3 failure, the need to rely on North Island generators for reserves was reduced. The effect on pricing at the 250 locations around New Zealand changed, but in different ways at different places. As will be explained further below, this change apparently had a detrimental impact on positions that City Financial had taken in the FTR market.

[20] Transpower's means of communicating with the market includes use of Customer Advice Notices. When Transpower proposed the change, there appeared to be little market interest. Only two parties made submissions on it. Meridian Energy Limited supported the proposed change, and City Financial opposed it. On 24 November 2016, Transpower advised in a Customer Advice Notice that the change would be implemented as at 10 am on 30 November 2016.

[21] On 12 December 2016, City Financial complained to the Authority that the change involved breaches by Transpower as both Grid Owner and System Operator.

[22] The Authority appointed an investigator to conduct an informal investigation, which was then considered by the relevant Committee of the Authority at its meeting on 23 February 2017. The Authority then concluded that, subject to one allegation, Transpower had not breached the Code, and that no further action would be taken in accordance with reg 11 of the Regulations, which 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 –
>
> (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.

*The challenged decisions*

[23] The Authority provided two separate decisions in the form of letters to City Financial, one in relation to Transpower's role as Grid Owner, and the other in relation to its role as System Operator.

[24] Three of the four alleged breaches focused on by City Financial in this appeal relate to the decision concerning Transpower as Grid Owner. That decision was set out by the Authority in its letter of 6 March 2017 in the following terms:

> **Alleged breaches of the Electricity Industry Participation Code 2010**
>
> **File reference: 1612GROW2**
>
> On 23 February 2017, the Authority's Compliance Committee considered the alleged breaches of clauses 12.111, 12.118 and 13.30 of the Code by Transpower New Zealand Limited as the grid owner.

City Financial Investment Company (New Zealand) Limited (City Financial) alleged that the breaches occurred in relation to changes to the grid owner's HVDC asset offer implemented at 10:00 on 30 November 2016.

The Committee considered the circumstances and the grid owner's responses to the alleged breaches as follows:

*Clause 12.111*

City Financial alleged that the grid owner had breached clause 12.111 by not making Pole 2 available for use by the system operator to convey electricity at least at the service levels specified in the grid information document published by the Authority and incorporated by reference into the Code (grid information).

The grid owner denied the alleged breach of clause 12.111, which the grid owner considered related to subclause (1)(a) of clause 12.111. The grid owner responded that it was not obliged to comply with clause 12.111(1)(a) if one of the exceptions under clause 12.112(1) applied. In this instance, the exception in clause 12.112(1)(c) applied: since the current grid information came into effect, the grid owner has modified the HVDC link as a result of an investment in the grid, specifically, the HVDC Grid Upgrade Investment. Consequently, the grid owner did not breach clause 12.111.

The grid owner also noted that the grid information still refers to Pole 1 and does not refer to Pole 3. The grid owner contended that if it was in breach of clause 12.111(1)(a) for not complying with the grid information in respect of Pole 2, then the grid owner would also have to recommission Pole 1 (now deconstructed) and decommission Pole 3. The grid owner contended that this is not a sensible interpretation of the Code.

The Committee noted that the grid owner's change to its offer for the HVDC link has maintained the energy capacity of the HVDC link and has increased the reserve capacity of the HVDC link. The grid owner has therefore not reduced the capacity of the HVDC link, which is a key underlying objective of clause 12.111.

*Clause 12.118*

The grid owner admitted that it inadvertently breached clause 12.118(1) by not publishing the annual report on interconnection asset capacity and grid configuration. The grid owner had previously published these reports on its website, but the reports dropped off the grid owner's website when it revamped the website in September 2016.

The grid owner noted that the Code's Information System Definition did not oblige the grid owner to publish these annual reports on its own website until 4 November 2014. Before that date, the Information System Definition required publication on the Authority's website. The grid owner has been unable to locate any of the reports that may be still published on the Authority's website.

The grid owner advised it will restore the grid information on its website now that it is aware of this.

*Clause 13.30*

City Financial alleged the grid owner breached clause 13.30 by not providing the system operator with accurate information on the capability of the HVDC link that was consistent with the configuration of the HVDC link incorporated by reference into the Code.

The grid owner denied the alleged breach of clause 13.30. The grid owner noted that "configuration" in clause 13.30 does not refer to the grid information. In clause 13.30, "configuration" has the meaning in Part 1 of the Code: one of the listed monopole or bipole configurations of the HVDC link. The grid owner's advised its revised HVDC link offer is consistent with those configurations, to the extent they still apply following the decommissioning of Pole 1.

The Committee therefore considered:

- the grid owner did not breach clause 12.111 of the Code concerning its change to its offer for the HVDC link. The change to the grid owner's offer increased the reserve capacity and maintained the energy capacity of the HVDC link
- the grid owner breached clause 12.118(1) of the Code when it did not publish on its website its interconnection asset capacity and grid configuration (grid information), and
- the grid owner did not breach clause 13.30 of the Code because its offer was consistent with the configuration of the HVDC link

The Committee decided to take no further action on the alleged breaches of clauses 12.111 and 13.30 under regulation 11(1)(b) and clause 12.118 under regulation 11(1)(c) of the Electricity Industry (Enforcement) Regulations 2010.

The Committee also requested that the Authority's Compliance team monitor the grid owner's compliance with clause 12.118(1).

If you have any questions relating to this case, please contact me …

[25] The fourth error focused on related to Transpower's role as System Operator. It was addressed by the Authority in a similar letter dated 2 March 2017. The decision materially stated:

*Clause 7.10*

City Financial alleged that the system operator had breached clause 7.10 by permitting the grid owner to determine the overload time period rather than determining that period itself.

The Committee agreed with the system operator that clause 7.10 was an interpretation clause that does not place any obligation on the system operator.

> The Committee noted that despite there being no obligation, the system operator's self-review for November 2016 reported that, "in performing its role as system operator Transpower has not been materially affected by any other role or capacity Transpower has under the Code or under any agreement." The system operator also denied that it has acted improperly in its dealings with the grid owner.

[26] By letter received on 14 March 2017, City Financial asked the Authority to reconsider its decisions. When responding to say it stood by its decisions, by letter dated 8 May 2017, the Chair of the Committee stated:

> *Incorrect interpretation of key clauses of the Code*
>
> The Committee has reviewed its interpretation of the relevant clauses of the Code. While the Committee would agree that some of the clauses are not without difficulty, the Committee remains of the view that its interpretation of the clauses is correct and, except for the admitted breach of clause 12.118 by the grid owner, none of the alleged breaches established a prima facie case.
>
> The reasons for the Committee's decisions are adequately explained in the Authority's letters dated 2 March 2017 and 6 March 2017.

**Appeal on question of law**

[27] There was initially confusion as to whether City Financial could take its case to the Rulings Panel given an uncertainty about the meaning of the Act's provisions. But the High Court resolved that issue in an unrelated proceeding, *Unison Networks Ltd v Solar City New Zealand Ltd*, by concluding that there was no right to do so, meaning that any challenge needed to be by way of appeal or judicial review.[1]

[28] Appeals to the High Court from decisions of the Authority under s 64 of the Act are confined to appeals on questions of law. There was no material dispute between the parties on the applicable principles which are summarised in a number of decisions, including the decision of a Full Court of High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.[2]

*Unlawful process*

[29] City Financial raised a preliminary issue concerning the approach of the Authority – that is, in determining whether there was a prima facie case the Authority

---

1 *Unison Networks Ltd v Solar City New Zealand Ltd* [2017] NZHC 1343.
2 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

should not have conducted inquiries through an investigator, particularly given the provisions in the Regulations that contemplate formal investigations by an investigator appointed under reg 12, which occurs when the Authority has decided it will take further action. City Financial also contended that it was inappropriate for the Authority to reach a definitive conclusion on the interpretation of the Code at this preliminary stage. It argued that those matters are more appropriately dealt with through the more complete investigations contemplated as a consequence of the appointment of an investigator under reg 12, including the potential of a hearing before the Rulings Panel under Part 2 of the Regulations.

[30] I do not accept that the Authority is prevented from conducting preliminary inquiries to decide whether to exercise its jurisdiction under reg 11. The Regulations may contemplate an investigator being appointed in a more formal role under reg 12, but that does not prohibit the Authority properly informing itself of matters for the purpose of exercising its jurisdiction under reg 11. I do not find the approaches under other statutory regimes, involving other subject-matter, of much assistance when addressing this question.[3] Rather, the question is addressed by considering the scheme and purpose of the Regulations with the overall objective of making the provisions work as must have been intended.[4]

[31] 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

---

3 The parties referred to *McLanahan v The New Zealand Registered Architects Board* [2016] NZHC 2276; *McLanahan v The New Zealand Registered Architects Board* [2017] NZCA 458 and *Meek v Health and Disability Commissioner* [2016] NZHC 1205. These cases arise in very different circumstances and in the context of different statutory regimes.

4 Adopting the language used by the Court of Appeal in *Northern Milk Ltd v Northland Milk Vendors Association Inc* [1988] 1 NZLR 537 (CA). See Hon Douglas White QC "A Personal Perspective on Legislation: *Northern Milk* Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699, which suggests that this formulation is the best articulation of the principal function of the Court when approaching its task of statutory interpretation.

the conclusion that no breach of the Code was involved. That is the very point of providing it with the power to do so.

*Authority's jurisdiction to interpret the Code*

[32] The parties directed submissions to the respective roles of the courts and expert tribunals such as the Authority in interpreting and applying technical instruments, particularly technical instruments established under delegated legislation. In particular, the question arose whether the Court should defer to the Authority on questions of the interpretation of the Code.

[33] The answer to that question arises from the respective functions of the courts and expert tribunals established under legislative mechanisms under New Zealand's constitutional arrangements. It is a function of the courts to conclusively determine the meaning of legislative instruments. It is a function of tribunals established under those instruments to apply them as Parliament intended. In New Zealand "… what the statute means is *always* a question of law for the courts. Unless that approach is adopted the rule of law itself is subverted".[5] The position is different in North America, where under the so-called *Chevron* doctrine expert tribunals have an interpretive jurisdiction.[6]

[34] This means that in New Zealand the courts have been required to conclusively determine the meaning of legislative provisions, even in very technical areas. That is demonstrated by leading decisions of the Supreme Court. In *Commerce Commission v Fonterra Co-operative Group Ltd*,[7] the Court determined the regulatory meaning of the phrase "cost of capital", in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*,[8] it determined the statutory meaning of "net cost", and in *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers*

---

5 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [116] per Hammond J.

6 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US 837 (1984). For a review of the position see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [22.5.2].

7 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

8 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

*Incorporated*,[9] it determined the meaning of the expression "if practicable" in certain provisions of the Civil Aviation Rules. Those three cases involved a statute, regulations, and rules. In each case the approach was the same.

[35] The courts will nevertheless be assisted by the interpretation adopted by such tribunals because of their expertise. Moreover, as Blanchard J emphasised in *Vodafone*, a particular provision may not have a prescriptive meaning, and may allow different approaches to the facts that are consistent with the identified meaning.[10] 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*.

[36] It is possible to read the Court of Appeal's decision in *Equus Trusts v Christchurch City Council* as suggesting expert tribunals have an interpretative jurisdiction.[11] But it is apparent that the Court of Appeal did not mean to depart from the well-established principles. Accordingly, I approach the case on the basis that it is the Court's function to conclusively determine the proper meaning of the Code, but the function of the Authority and of Transpower to implement it, including when it provides latitude on how particular concepts are to be applied. As will be explained below this distinction is important to the determination of the major issues in this appeal.

**First alleged error of law: clause 12.111(1)(a)**

[37] City Financial's first allegation is that Transpower breached the Code because the change altered the prescribed levels of service it was obliged to provide under the provisions of the Code. Those levels are set under Part 12.

---

9 *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc* [2017] NZSC 199.

10 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 8, at [54]–[56], citing *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL).

11 *Equus Trusts v Christchurch City Council* [2017] NZCA 200, particularly the observation at [7] that "it is not sufficient for an applicant simply to point to one interpretation being perhaps preferable to another" when declining to grant leave to appeal on a question of law.

[38] In particular, cl 12.111 provides:[12]

> **12.111 Transpower to make interconnection branches and other assets available and keep grid configuration**
>
> (1) **Transpower** must make each **interconnection circuit branch, interconnection transformer branch**, the **HVDC link**, and each **shunt asset** identified in the interconnection asset capacity and grid configuration available for use by the **system operator** for the conveyance of **electricity** –
>
> (a) at least at the service levels specified in the interconnection asset capacity and grid configuration in accordance with clause 12.107(4); and
>
> (b) in accordance with **good electricity industry practice** and relevant health and safety standards.
>
> (2) **Transpower** must keep the **grid** in the configuration set out in the interconnection asset capacity and grid configuration.
>
> (3) **Transpower** is not required to comply with subclauses (1)(a) or (2) if clause 12.112(1) applies.

[39] Clause 12.107 specified the information required, with the requirements for the HVDC link set out in subclause (4) in the following terms:

> 12.107 **Transpower to identify interconnection branches, and propose service measures and levels**
>
> (1) **Transpower** must provide the **Authority** with the information set out in subclause (4) and a diagram showing the configuration of the **grid**, other than **connection assets**.
>
> …
>
> (4) The information required under subclause (1) is –
>
> …
>
> (c) the **transfer** capacity in the North and South transfer for each **configuration** of the **HVDC link** expressed as follows:
>
> (i) DC sent in **MW**;
>
> (ii) AC received in **MW**; and
>
> …

[12] In all cases in this judgment the emphasis is in the Code, and identifies a defined term.

[40] The "configuration" is defined in the definition section – cl 1.1 of Part 1 of the Code – in the following way in relation to Poles 2 and 3:[13]

> **configuration**, in relation to the **HVDC link**, means the following modes of operation of the **HVDC link**:
>
> ...
>
> (b) Pole 2 only:
>
> (c) Pole 3 only:
>
> …
>
> (e) Pole 3 and Pole 2 bipole **round power**:
>
> (f) Pole 3 and Pole 2 bipole not **round power**

[41] There was some uncertainty as to the Authority's reasons for dismissing City Financial's complaint on this matter. Transpower's submissions to the Authority were recorded in the decision letter, and relied on the exceptions to cl 12.111 set out in cl 12.112. On appeal, City Financial challenged whether the exceptions applied. But I accept Mr Smith's submission that the Authority's key basis for determining that there was no prima facie breach was that cl 12.111 had not been contravened in the first place. That is reflected in the bullet pointed sentence in the Authority's letter, which stated "The change to the grid owner's offer increased the reserve capacity and maintained the energy capacity of the HVDC link". Unfortunately, neither the decision nor the investigator's report nor the minutes of the meeting of the Committee making the decision otherwise explain why the conclusion was reached that cl 12.111 had not been contravened. I doubt that the Authority met its obligation under reg 11(2)(b) , which requires it to provide reasons for the decision to take no further action. When there is a right of appeal to the High Court, the provision of reasons should allow the Court to understand the reasoning applied by the body to reach a particular conclusion. That could have been achieved with only a few more sentences here.

---

[13] I have omitted the modes referring to the redundant Pole 1.

*Minimum service levels required by definition*

[42] Mr Smith elaborated on the reasons why there was no breach in his submissions. He emphasised that cl 12.111 only established minimum service levels, and that when the Code identified the minimum service levels for the HVDC link in cl 12.107(4)(c) it only specified a requirement to provide the transfer capacity of the bipole configuration in megawatts for the link overall – that is, the aggregate transfer capacity whilst in bipole mode. It did not require specification of the capacity of each Pole whilst in that mode. He contrasted this with other service levels specified in cl 12.107, which did contemplate greater particularity. Here, he argued, there was no change to the aggregate transfer capacity of the HVDC link when operating in bipole mode, and accordingly there was no reduction in the service levels below the minimum required.

[43] I do not accept that cl 12.111 only contemplates aggregate capacity by definition. The minimum service levels required are those "specified … in accordance with clause 12.107(4)". It seems to me that the words "transfer capacity" in cl 12.107(4)(c) are capable of encompassing a series of capacities associated with the bipole mode configuration. For example, they are capable of encompassing not just the aggregate transfer capacity of Poles 2 and 3 in bipole mode, but also their overload capacity (expressed in minutes as well as megawatts). They are equally capable of encompassing a bipole capacity particularised by reference to how much each Pole carries. The singular includes the plural, and the extent of the particularisation required is not defined, and is not otherwise identified as a matter of interpretation.

[44] However, for similar reasons, I reject Mr Ormsby's alternative submission for City Financial. He argued that the carrying capacity of each Pole whilst in bipole mode was required because it was a necessary feature of the system overall. It was, he said, hard-wired into the provisions of the Code. It was reflected in the risk factor formula embedded in the system, and it was also part of the SPD dispatch.[14]

---

[14] Mr Smith accepted that the individual capacities were known to SPD, but said this existed for a different reason, namely for the calculation of losses, and not for dispatching the required service.

[45] The clauses that Mr Ormsby took me to did not seem to me to establish his point in a decisive or unqualified way. In any event, whether or not the individual capacities of each Pole in bipole mode are known to the Code more broadly is beside the point. The question is what cl 12.111 of the Code requires by way of the specified minimum service levels. I have concluded that the minimum service levels for the operation of the HVDC link in bipole mode are capable of being expressed in the aggregate.

[46] So, I reject the arguments advanced by Transpower and City Financial that their respective positions are correct by definition. The "transfer capacity" of the HVDC link in bipole mode could have been expressed either by reference to the particular capacities of each Pole in that mode, or the capacities of both Poles together. Neither approach is mandated by definition. This case is an illustration of the point made by Blanchard J in *Vodafone* – that legislative phrases can allow for different approaches, and that decision-makers are required to apply the phrase to the facts of a given case.[15]

*Minimum service levels required by administrative decision*

[47] What matters is how the minimum service levels were specified by Transpower, and accepted by the Authority. In that context, Mr Smith for Transpower took me to the available documents on how that had developed over the years.

[48] Prior to the adoption of the Code, the then Electricity Governance Rules 2003 required the specification of service levels in materially the same terms. Under those rules, an issue emerged as to how the minimum service levels should be specified for Poles 1 and 2 while Pole 1 was in the process of being withdrawn. In responding to Transpower's proposals, the Electricity Commission (predecessor to the Authority) suggested an alternative way forward, namely "that the capacity service measures schedule include the capacity and configuration information for the entire HVDC link, not just Pole 2".[16] Transpower's document describing the configuration and capacity of the HVDC link, effective from 30 June 2009, then described the capacities of Pole 2

---

15 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 8, at [54]–[56].

16 Proposed interconnection service measures: capacity measures (Electricity Commission, 26 October 2007) at [4.5.9].

in megawatts (for both continuous and overload capacity), and then included a description of the possible operation of Pole 1 in a descriptive sense (that is, not in megawatts), with a cross-reference to a website for its capability at any one time.

[49] The more critical step then occurred after the Code came into effect in 2010, and more particularly after Pole 1 was decommissioned and Pole 3 was added. It was common ground that the investment in Pole 3 meant that the exception to cl 12.111 in cl 12.112(1)(c) applied. In particular:

> **12.112 Exceptions to clause 12.111**
>
> (1) **Transpower** is not required to comply with clause 12.111(1)(a) or (2) if –
>
> …
>
> (c) a modification to an **interconnection branch**, the **HVDC link**, a **shunt asset** or to the configuration of the **grid**, has been made as a result of an investment in the **grid**; or
>
> …
>
> (2) If subclause (l)(c) to (e) apply, or the grid is reconfigured under subclause (l)(b)(i) or (ii), **Transpower** must –
>
> (a) make the **interconnection branch**, the **HVDC link** or the **shunt asset** available to the **system operator** at least at its modified capacity rating, and at its modified service levels; and
>
> (b) keep the **grid** in its modified configuration.

[50] Additional machinery is then provided in cl 12.118 in the following terms:

> **12.118 Transpower to provide and publish annual report on interconnection asset capacity and grid configuration**
>
> (1) **Transpower** must provide the **Authority** with and **publish** an annual report including:
>
> …
>
> (f) any modifications made to **interconnection circuit branches**, the **HVDC link**, and each **shunt asset** under clause 12.112(c) to (e) in the **preceding year** and the extent to which it has complied with clause 12.112(2) in respect of those modifications, including any specific instances in which **Transpower** has not complied; and

…

(i) an update of the interconnection asset capacity and grid configuration required under clause 12.107(1), as at the end of the **preceding year**.

(2) The report referred to in subclause (1) must be provided and published by **Transpower** by 30 November each year.

(3) The **Authority** may incorporate by reference in this Code the updated interconnection asset capacity and grid configuration referred to in subclause (1)(i) in accordance with clause 12.110. The **Authority** may consult with any person the **Authority** considers is likely to be materially affected by the proposed amendments to the interconnection asset capacity and grid configuration, as it sees fit. **Transpower** must comply with the interconnection asset capacity and grid configuration incorporated by reference in this Code in accordance with clause 12.110.

[51] Under this regime, following an upgrade Transpower identifies what the modified minimum service levels have become in the annual report provided to the Authority, and the Authority can decide whether it wants to formally adopt the new minimum service levels by following the process for doing so by Gazette Notice. Annual reports cover the period beginning 1 July of the previous year to 30 June of the year the report is provided.

[52] I asked Mr Smith to supply Transpower's annual report to the Authority following the Pole 3 upgrade to see how the minimum service was specified. He duly provided it. Transpower's report to the Authority for the year 1 July 2013 to 30 June 2014 provided the following specification of the minimum service:

> Transfer capacity in the North and South transfer for each configuration of the HVDC link:
>
> **Summary of continuous ratings for, Pole 2: 1 cable and Pole 3: 2 cables**

| | North flow | | South flow | |
|---|---|---|---|---|
| | **DC sent** | **AC received** | **DC sent** | **AC received** |
| Pole 2 only | 500 MW | 475 MW | 489 MW | 465 MW |
| Pole 3 only | 700 MW | 655 MW | 700 MW | 655 MW |
| Pole 2 + Pole 3 | 1000 MW | 954 MW | 750 MW | 724 MW |

**Summary of 30 minutes short time overload ratings for, Pole 2: 1 cable and Pole 3: 2 cables**

| | North flow | | South flow | |
|---|---|---|---|---|
| | **DC sent** | **AC received** | **DC sent** | **AC received** |
| Pole 2 | 700 MW for 3-30 mins | 651 MW | N/A | N/A |
| Pole 3 | 1000 MW for 30 mins | 908 MW | 700 MW | 655 MW |
| Pole 2 + Pole 3 | N/A | N/A | N/A | N/A |

[53] The critical point is that the minimum service levels for Poles 2 and 3 operating in bipole mode are specified in aggregate form. The overload capacity is then specified for each Pole.

[54] The same format was used to describe the service levels in the report for the year ended 30 June 2016, albeit with higher overall capacity stated for Pole 2 and Pole 3 operating in bipole mode. That capacity was 1200 MW for DC sent. The reasons for the change in the minimum service levels implemented between 2014 and 2016 were not apparent from the evidence. But the June 2016 report seems to me to describe the minimum service levels specified by Transpower in accordance with cls 12.112(2) and 12.118(1)(i) that were in force at the time when the change challenged by City Financial was made. It describes the bipole service in aggregate. I was also supplied with Transpower's annual report for the following year (to 30 June 2017) after the change was made. It specifies the same minimum service levels, except that the south bipole capacity is higher. Mr Ricky Smith, the HVDC and Power Electronics Manager of Transpower, outlined at [25] of his affidavit that the aggregate service levels had not been reduced below 1200 MW by the change in 2016. That was not disputed in City Financial's reply evidence, or otherwise.

[55] It follows that the allegation that there has been a breach of the minimum service levels duly specified under the Code, and required to be maintained under cl 12.111, is not established, and that the Authority was right to conclude that there was no prima facie breach of the Code.

[56] Given this conclusion I do not need to address whether the exceptions in cl 12.112 could have applied as Transpower contended before the Authority and this Court. It follows that the first ground of appeal fails.

**Second alleged error of law: clause 12.118(2)**

[57] The second alleged error of law arose out of the Authority's treatment of the alleged contravention of cl 12.118(2), which required Transpower to "provide" and "publish" a report by 30 November each year.[17]

[58] Again, it was common ground, as it was during the investigation by the Authority, that Transpower had omitted to publish the 2016 annual report.

[59] On this issue, the Authority accepted that there had been a breach of the Code, but decided to take no further action under reg 11(1)(c).[18] Unfortunately, the Authority's reasons for doing so are not recorded in its decision. Indeed, there were no reasons provided at all. But the investigator's report to the Committee described the failure to publish the report as "inadvertent" and its impact as "negligible". That is consistent with the Committee minutes. It can be inferred that this is the reason for the decision, although once again reg 11(2)(b) has not been complied with.

[60] It is difficult to see what impact could have resulted from the report not being published. It is an annual report for the year ended 30 June that must be published by 30 November. The 30 June 2016 report simply specified the capacity prior to the change. The change made by Transpower was identified to the market by other means, including the Customer Advice Notice. The 2016 report had been duly provided to the Authority, but was simply not published. When pressed, Mr Ormsby was not able to identify what implications the technical failure could have had for City Financial.

[61] There was a further peculiarity of City Financial's case more broadly associated with this point. Exactly how City Financial had suffered loss was not made clear. It has provided no details of the futures contracts it entered, at what prices, and over what settlement periods. Two loss assessments were annexed to the affidavit of

---

17 See [50] above.
18 See [24] above.

Mr Phillip Anderson, a director of City Financial, neither of which provided these details, but the second of which estimated the loss at $3,144,040. It was explained that the difficulty in assessing loss was the complexity of calculating the counter-factual – that is, exactly what the market prices in the locational market would have been if the change had not been made.

[62] Whilst particulars have not been provided, it is apparent that this alleged loss arose because of an issue of timing. Whatever contracts City Financial entered into were locked in at the time that Transpower made its change at the end of 2016, with the change affecting the locational prices in a way contrary to the expectations that City Financial had in its futures contracts. Had the proposed change moved at a slower pace, it is possible that the futures contracts would have settled before the change took effect so that no loss would have arisen. Mr Eric Rowell, Transpower's Energy Market Services Manager, gave evidence that 60 per cent of FTR futures contracts were typically for settlement periods of between one and two years. The reality is that City Financial is indifferent to the underlying merits of Transpower's change – it has apparently just been caught out by the fact that the change was implemented faster than the period of its contracts, such that the market price changed unexpectedly prior to settlement.

[63] A further ramification of the claimed loss emerged during the hearing. Mr Ormsby argued that if the appeal succeeded and the Court concluded that Transpower had departed from the minimum service levels prescribed by cl 12.111 of the Code, the Court should nevertheless make clear in the relief granted that it did not require the change to be reversed. He pointed out the relief powers of the Rulings Panel were flexible if a breach of the Code was established. I saw some difficulty with that submission as it would allow Transpower to provide service levels beneath those required by the Code. But it may be that this submission was advanced because of a concern that, had the Court effectively reversed the change, City Financial might have suffered some yet further loss as a consequence of current positions it has taken in the futures market.

[64] In any event, and notwithstanding that the Authority did not provide reasons, it is apparent that the failure to publish the annual report by November 2016 had no

material consequences. There was no suggestion that any reliance was placed on the act of publication of the report. For example, City Financial did not suggest that it had tried, and failed, to get hold of a copy of it, and that this had some impact on the transactions it had entered. The materials before the Authority correctly described this breach as having no material consequence. For that reason the Authority's decision is not wrong in law, and this ground of appeal fails.

**Third alleged error of law: clause 13.30**

[65] The third alleged error of law relates to Transpower's obligations as Grid Owner under cl 13.30. This clause provides:

> **13.30 Standing data on HVDC capability to be provided to system operator**
>
> (1) In addition to the **asset owner** obligations to provide information under clauses 2(5) and (6), and 3(1) of **Technical Code** A of Schedule 8.3, the **HVDC owner** must provide standing data on the capability of the **HVDC link** to the **system operator** consistent with the **configuration** of the **HVDC link**.
>
> (2) The data provided under subclause (1) must include–
>
> (a) the HVDC transmission **lines** and system capacity, including reserve capacity; and
>
> (b) **HVDC link** capacity, including limits of each HVDC transmission line of the HVDC transmission system; and
>
> (c) HVDC system loss characteristics including transmission loss functions for each transmission line of the HVDC transmission system; and
>
> (d) in relation to Pole 2, or Pole 3, or Pole 2 and Pole 3, of the **HVDC link**–
>
> (i) if the **HVDC owner** imposes a limit on transfer direction, the direction of that transfer limit (northward or southward); and
>
> (ii) if the **HVDC owner** imposes a minimum transfer limit, that minimum transfer limit (in **MW**); and .
>
> (iii) if the **HVDC owner** imposes a maximum transfer limit, that maximum transfer limit (in **MW**).
>
> (3) Subclause (2)(d) applies only if–

(a) the **HVDC owner** is operating the **HVDC link** in accordance with–

(i) a **commissioning** plan agreed with the **system operator** under clause 2(6) to (9) of **Technical Code** A of Schedule 8.3; or

(ii) a test plan provided to the **system operator** under clause 2(6) to (9) of **Technical Code** A of Schedule 8.3; and

(b) the **configuration** of the **HVDC link** is–

(i) Pole 3 and Pole 2 bipole **round power**; or

(ii) Pole 3 and Pole 2 bipole not **round power**.

[66] City Financial's argument here was that the expressions "capacity" and "capability" related to engineering capacity and capability. It argued that when those concepts were referred to throughout the Code it was referring to this engineering concept. What was not contemplated were reductions in the capacity or capability of assets for management reasons. It identified evidence associated with the development of Transpower's proposals for the change that recognised the reduced capacity of Pole 2 in bipole mode was not the result of engineering considerations. For example, one document sent from Transpower as Grid Owner to Transpower as System Operator described the proposed change in the following way:[19]

> **HVDC HMI and controls update for Pole 2 overload work**
>
> The purpose of this update is to enable unbalanced pole operation above 840 MW. Present cable overload design doesn't release the full overload capability if the pole with one cable is operated around or above 500 MW under steady state operation. However, if the pole is operated around 420 MW the full overload capability of 700 MW is available for 15 mins. **Therefore, a control systems update has been made to artificially apply a current limit to limit the pole power transfer level of the one cable pole to 420 MW (1200 A at 350 kV) under steady state bipole operation.** This releases full cable overload capability when required (i.e. when the other pole trips).

[67] Mr Ormsby emphasised that this described the change as artificially reducing the capacity of Pole 2. Additional contextual support could be found for Mr Ormsby's argument in other provisions of the Code. For example, the provisions that describe the role of the Authority in originally approving the interconnection asset capacity and

---

19 Emphasis added.

grid configuration speak of the Authority assessing whether the capacity information is "accurate" and "correct", which are consistent with this being a technical engineering question rather than a management decision.[20] Mr Ormsby took me through the clauses in the Code that could be read as involving capacity in an engineering sense.

[68] The Authority did not fully understand City Financial's complaint on this clause. It focused on the word "configuration", rather than City Financial's point concerning capacity. To some extent this arose because the point was not clearly expressed in City Financial's complaint to the Authority. It was more clearly outlined in submissions to this Court, albeit that the expression "engineering capacity" was not articulated by Mr Ormsby until reply.

[69] I do not accept that the words "capacity" and "capability" have a singular technical meaning associated with engineering capacity. To some extent I have indirectly addressed this issue when identifying the meaning of "transfer capacity" in cl 12.107(4).[21] These are not defined terms, and if they were to carry a specific technical meaning that is different from the ordinary usage of the words, one would expect that to be spelled out in a Code such as this. As ordinary terms, they can contemplate the capacity or capability of assets from an efficiency point of view, rather than solely as an abstracted engineering concept. The idea that there is only ever one true engineering capacity also seems unrealistic. The very fact that the clause appears to use the words capacity and capability in an apparently interchangeable way suggests that a highly prescriptive technical meaning is not contemplated.

[70] The text of an enactment must be interpreted in light of its purpose. The purposes of Part 13 of the Code, as outlined in cl 13.1, is to provide processes for the market operations of the electricity system, including the allocation of generation by the SPD, and dispatch of electricity across the HVDC link. In that context, accurate information for the purposes of cl 13.30 is information that enables Transpower as System Operator to allocate generation in accordance with the actual availability of

---

20 See cls 12.107(6) and 12.108(1) respectively.
21 See [43] above.

the HVDC link, regardless of whether that corresponds with its theoretical engineering capacity.

[71] The purposes of Part 12 of the Code, as specified in cl 12.105, broadly include transparency (12.105(b)) and efficiency (12.105(c)). In terms of these purposes, it would be somewhat surprising that a rebalancing or recalibration of the overall system that secured efficiency gains could not be implemented under Part 12 because of the technical terms of the Code. Whilst the details were disputed by City Financial, a 2012 report by SKM MMA identified market benefits of such a change, albeit of a relatively small level, and a peer-reviewed report by Transpower in June 2017 concluded there had been a $12 million benefit from the change based on data from the 2016 winter.

[72] Those changes duly meet the purposes of Part 12, which need to be accurately identified to meet the purposes of Part 13. Transpower as Grid Owner provided accurate information on the capacity/capability of the HVDC link under Part 13 after its control systems had been changed to give effect to the rebalancing of the capacities between the two Poles under Part 12. The text of cl 13.30 is satisfied, as are the purposes of the provisions in light of their places in the Code.

[73] For those reasons, I also dismiss this ground of appeal.

**Fourth alleged error of law: clause 7.10**

[74] City Financial's final ground of appeal related to the Authority's decision in respect of cl 7.10, which provides:

> **7.10 Separation of Transpower roles**
>
> (1) **Transpower's** role as **system operator** under this Code and the **Act** is distinct and separate from any other role or capacity that **Transpower** may have under this Code and the **Act**, including as a **grid owner** or transmission provider.
>
> (2) For this purpose, when assessing an aspect of the performance, or non-performance, of the **system operator**,–
>
> (a) the assessment must be made on the basis that the **system operator** had no other role or capacity; and

(b) the **system operator** must be treated as if it did not have any knowledge or information that may be received or held by **Transpower** unless **Transpower** receives or holds that information or knowledge in its capacity as **system operator**.

(3) Subclause (2) applies, with necessary modifications, to an assessment of an aspect of the performance, or non-performance, of **Transpower** in any other role or capacity under this Code or the **Act**.

(4) **Transpower** must report, in each self-review report provided under this Code, on the extent to which its role as **system operator** under this Code and the **Act** has, despite subclauses (1) to (3), been materially affected by–

(a) any other role or capacity that **Transpower** has under this Code or the **Act**; or

(b) an agreement.

[75] City Financial's complaint was directed at the performance of Transpower as System Operator. It was dealt with in the Authority's second letter dated 2 March 2017, with the conclusion being that cl 7.10 was an interpretation clause that did not place any obligation on Transpower as the System Operator. On appeal, City Financial argued that this was wrong, and that the clause placed very important overriding obligations on Transpower in relation to its role as System Operator (and, given 7.10(3), its role as Grid Owner).

[76] I can deal with this ground of appeal relatively briefly. I do not accept the criticism of the Authority's decision and, in any event, I do not think that the different ways of describing how cl 7.10 works are material. The primary significance of cl 7.10 is found in cl 7.10(2) – when an assessment is being made of the performance of Transpower, it is made on the basis that it had no other role. But when evaluating whether Transpower has so acted independently, some particular conduct needs to be in issue. It is only possible to evaluate whether there has been a contravention of the principle of independence in the context of the performance of some functions under the Code. It cannot be addressed in the abstract.

[77] There is a general set of standards for Transpower as System Operator set by the Code. Clause 7.1A was inserted in May 2016, shortly before the contested change was made. It provides:

**7.1A Reasonable and prudent system operator standard**

(1) The **system operator** must carry out its obligations under this Code with skill, diligence, prudence, foresight, good economic management, and in accordance with recognised international good practice, taking into account–

(a) the circumstances in New Zealand; and

(b) the fact that real-time co-ordination of the power system involves complex judgements and inter-related events.

(2) The **system operator** does not breach a **principal performance obligation** or clause 8.5 of this Code if the **system operator** complies with subclause (1).

[78] So, in deciding whether Transpower has acted with diligence, and in accordance with recognised international good practice, the assessment proceeds on the basis that Transpower must operate as a completely independent System Operator would do. When assessing Transpower's performance surrounding the change, both as System Operator and as Grid Owner, cl 7.10(2) applies. For example, it applies in assessing whether Transpower has provided the minimum service levels required by cl 12.111(1)(a), and when assessing whether Transpower has operated in accordance with good electricity industry practice under cl 12.111(1)(b). Mr Smith emphasised that cl 12.111(1)(b) is a significant control over Transpower's conduct, and I accept that this is a response to Mr Ormsby's argument that Transpower was seeking to make unilateral changes of significance to the market. Similarly, cl 7.10 applies when assessing Transpower's obligation as Grid Owner to supply information under cl 13.30(1).

[79] There is no utility in seeking to assess the independence requirement separately from conduct required to be considered under the provisions of the Code. There is no breach of cl 7.10 separately from conduct that is being assessed. One way of describing its application is that it is an interpretive clause. For this reason, I accept that the Authority's approach was not wrong in law, and this ground of appeal also fails.

[80] Finally on the appeals, I note that some of the grounds in the notice of appeal were not pursued in submissions, and I treat them as having been abandoned.

**Judicial review claims**

[81] In addition to advancing its appeal under s 64 of the Act, City Financial also brought judicial review proceedings against Transpower and the Authority. Whilst two separate claims were advanced, in my view I am can deal with the two claims together for the reasons outlined below.

[82] Evidence, including expert evidence, was filed in connection with the judicial review proceeding. Transpower objected to some of this evidence. In the end, given the lack of a fully reasoned decision of the Authority, I have found this evidence helpful, although I accept that some of it amounts to submission.

[83] A preliminary issue concerning the judicial review challenges was raised by Transpower. In particular, Mr Smith argued that the judicial review proceedings should be dismissed because they were inappropriate given the existence of City Financial's appeal, particularly because of the substantial overlap between the appeal and the judicial review challenges. Reliance was placed on the decision of the High Court in *Turners & Growers Ltd v Zespri Group Ltd (No 2)*, where White J held that the initial jurisdiction of the Court to provide declaratory relief was excluded by necessary implication from a statutory scheme involving rights of appeal.[22] Mr Smith also referred to s 55 of the Act, which is arguably an ouster clause. It provides:

> **55 Restrictions on remedies**
>
> (1) The remedies that the Rulings Panel may impose under section 54 are the only remedies in respect of a breach of the Code.
>
> (2) No one may bring an action for breach of statutory duty that arises out of, or relates to, a breach of the Code.
>
> …

[84] Section 55 seems to me to have limited operation, relating only to the remedies available for breach of the Code. It does not purport to prevent the Court assessing whether the Authority has lawfully addressed complaints made to it. Indeed, there is a right of appeal to the High Court for the Authority's decision in this respect, so it is obvious that s 55(1) is not purporting to exclude the Court's jurisdiction in that area.

---

[22] *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC).

[85] The appropriate approach of the Court when judicial review is sought while there is also a right of appeal is the subject of many decisions. The Judicial Review Procedure Act 2016, like its predecessor, expressly states that judicial review is available notwithstanding that there is a right of appeal.[23] But whether the Court will entertain or give relief in a judicial review proceeding in such circumstances is a matter for the Court's discretion.[24] The position was summarised by McGrath J in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* after addressing the line of authorities in the taxation area:[25]

> [15] This line of authority is consistent with the approach taken to challenges to administrative decisions in areas other than taxation. New Zealand courts are generally reluctant to entertain judicial review where there is a right of appeal against a statutory decision both on questions of law and where the remedy of appeal provides a more appropriate process. The court may, for instance, refuse to grant relief in the exercise of its discretion where the merits of a decision can be better recognised under a statutory appellate process, which adequately protects the appellant's interests. Much depends on the context and whether the statutory process provides the more convenient and effective method for seeking redress in the particular case.

[86] With respect, it is preferable to analyse the question as a matter going to the Court's discretion, rather than suggesting the Court's jurisdiction is excluded by Parliament as a matter of implication. The authorities, including *Tannadyce* itself, make it clear that the exclusion of the jurisdiction of the courts requires very clear statutory language given the constitutional implications. The Court nevertheless may decline to exercise its jurisdiction when exercising it does not seem appropriate in the circumstances of the particular case given the rights of appeal.

[87] Here, the judicial review claim is heard in parallel with the appeal. Transpower is regulated by very detailed rules set out in the Code, which is then overseen by the Authority, with prospective rights of appeal to the Rulings Panel, and to the High Court on questions of law. There is then artificiality in the judicial review challenges that effectively replicate the grounds of appeal. To the extent that they do so, they have already been addressed above in the findings on the appeal.

---

23 Section 16(3)(a).

24 See, for example, *Fraser v Robertson* [1991] 3 NZLR 257 (CA) at 260 per Cooke P.

25 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153, on behalf of Elias CJ and himself, dissenting but not on this principle (footnotes omitted).

[88] It is possible to imagine judicial review proceedings of utility, which could be brought notwithstanding this regime. For example, if a body such as the Authority was failing to exercise a function contemplated by the Code in a way that meant no right of appeal was triggered, a judicial review remedy might be granted. But this is not such a case.

[89] In addition, in some cases rights of appeal may not cure the implications of a breach of natural justice, as was the case in *Fraser v State Services Commission*.[26] City Financial's natural justice/procedural impropriety complaints here face a difficulty, however. Three central complaints were made:

(a) First, the complaint about the extent of the preliminary enquiries, which I have already addressed above;[27]

(b) second, that the Authority failed to give it an opportunity to reply to Transpower's response to its complaint, which was said to be a breach of natural justice; and

(c) third, that the degree of interaction between Transpower and the Authority, both before and after its complaint was addressed, was too close, which was said to involve procedural impropriety.

[90] Even assuming there was merit in these criticisms, nothing is achieved by challenging them by way of judicial review. City Financial's complaint has been dismissed because there is no prima facie breach of the Code.[28] Either the Authority was right in this conclusion, or it was not. If City Financial established there was a breach of natural justice, but the Court accepts that the Authority was nevertheless right that there was no breach of the Code, the breach of natural justice becomes redundant. Moreover, the breach of natural justice would have been cured by the appeal processes, in this Court.[29] The same is true of the procedural impropriety complaint. It does not really matter that the relationship between Transpower and the

---

26 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA).
27 See [29]–[31] above.
28 With the exception of the publication breach, which had no consequences – see [64] above.
29 See *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 436-437 per Tipping J.

Authority was too close in these processes if the Authority was right in concluding that there is no prima facie breach of the Code.

[91] Even if I am wrong on the above point, I would also have rejected the natural justice complaint. City Financial was not provided the opportunity to reply to Transpower's response to its complaint, but as Mr Smith pointed out, there had been correspondence exchanged between City Financial and Transpower prior to the complaint being lodged, and there is nothing about Transpower's response to the Authority that triggered a need for City Financial's reply by way of fairness. Moreover, City Financial asked the Authority to reconsider its complaint after the decision disclosing Transpower's responses had been provided, and the Authority duly did so.

[92] There is more substance to the complaint that City Financial makes about the interactions between Transpower and the Authority. There are two related dimensions to this complaint. The first is that during the process when Transpower was developing the proposed change there was interaction with the Authority, to the point that Transpower's documents refer to identifying a "champion" within the Authority who would deal with the proposed change at the Authority. I take that to be a reference to an officer at the Authority who would be the sponsor of the proposal for the change, meaning he or she would explain the merits of the proposed changes to the relevant decision-making bodies at the Authority.

[93] Then, after City Financial's complaint to Transpower that the proposed change breached the Code, there was further interaction between Transpower and the Authority. In particular, Transpower invited the Authority to comment on Transpower's proposed letter to City Financial explaining why the complaints were not justified. The Authority duly provided comments on the draft. Given that the Authority had the regulatory function of assessing the merits of any complaints City Financial then made to the Authority, it was unwise of the Authority to provide comments on a draft letter in which Transpower denied there were such breaches. That risked putting the Authority in the position of assessing the correctness of a stance that it had helped Transpower formulate.

[94] There are mitigating considerations. The Code suffers from not having conceptual clarity about the respective roles of Transpower and the Authority in this context. It contemplates the Authority approving the original service levels under cl 12.107, albeit here those standards were inherited from the former regime.[30] Clause 12.118(3) then contemplates the Authority reviewing what are referred to as "proposed amendments" to the minimum service levels as advised in Transpower's annual reports to the Authority. But that includes the situation where Transpower has already made changes under cl 12.112 that are already in effect. To that extent they are not "proposed changes". It would also appear that in some circumstances Transpower's changes would be effective even if the Authority had not sought to review them and then update the Gazette Notice under cl 12.118(3). Given that the Authority would only receive this report some time later, I accept Ms O'Gorman's submission that these provisions of the Code are very difficult to apply in practice.

[95] These provisions contemplate the Authority having a role to provide regulatory oversight of what Transpower is doing. Given that, it is not surprising that there is a degree of interaction between Transpower and the Authority in relation to possible changes. Transpower would want to know what the Authority's views of a proposed change would be before they were implemented. It would not want a situation where it implemented a change, only to find out some time later that it was not approved by the Authority. But the Authority also has a role to subsequently assess whether there are prima facie breaches of the Code, and to initiate steps before the Rulings Panel if an industry participant subsequently complains about a change that is alleged to be in breach. Thus the regime itself places the Authority in the awkward position of assessing possible breaches for matters it may have been involved in as part of its regulatory oversight.

[96] One of the difficulties with the idea that compliance with the Code is adequately dealt with by the subsequent complaints process is that changes would already have been made. It may make more sense for the Authority to approve changes to the Code in advance, with rights of appeal to the Rulings Panel. But there may be

---

30 See cl 12.106.

other ways of resolving this conceptual difficulty, and I was advised that amendments to change the Code are being proposed.

[97] But, as I have already held, any criticisms of the Authority are ultimately not relevant given that the Authority rightly dismissed the complaints on the basis there was no breach of the Code.

[98] For these reasons, I dismiss the judicial review claims. There is no proper reason for the Court to exercise its judicial review jurisdiction given that it is able to ensure that the law is properly interpreted and applied in exercising its appeal function.

**Result**

[99] For these reasons, City Financial's appeal and judicial review claims are dismissed.

**Costs**

[100] The respondents are entitled to costs. My preliminary views are that:

(a) this is a category 3 case;

(b) Transpower is entitled to an award of costs in relation to the appeal, together with any additional steps in the schedule for the judicial review that are not encompassed by the award for the appeal; and

(c) the Authority, who would not normally be involved in an appeal,[31] is entitled to costs for the judicial review claims brought against it.

[101] If costs cannot be agreed, I will receive memoranda. The parties have 14 days to seek agreement, following which I will receive memoranda from the respondents within 21 days of the release of this judgment (no more than six pages each), and from

---

[31] *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Co Ltd* (2009) 19 PRNZ 824 (HC); *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41, [2014] 1 NZLR 717.

the applicant within seven days of receipt of the respondents' memoranda (no more than 12 pages).

**Cooke J**

Solicitors:
Wynn Williams, Christchurch for applicant/appellant
Chapman Tripp, Wellington for first respondent
Buddle Findlay, Auckland for second respondent