

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

**CIV-2017-485-88
[2017] NZHC 1343**

IN THE MATTER of the Electricity Industry Act 2010;
Electricity Industry Participation Code
2010; and Electricity Industry
(Enforcement) Regulations 2010

IN THE MATTER of an appeal by Unison Networks Limited
of a decision by the Rulings Panel
pursuant to sections 63 and 64 of the
Electricity Industry Act 2010

BETWEEN UNISON NETWORKS LIMITED
Appellant

AND SOLAR CITY NEW ZEALAND
LIMITED
First Respondent

ELECTRICITY AUTHORITY
Second Respondent

Hearing: 12 May 2017

Counsel: A S Butler and C M Marks for Appellant
D M Salmon and D E J Currie for First Respondent
L A O’Gorman for Second Respondent
W L Aldred for Electricity Rulings Panel

Judgment: 19 June 2017

JUDGMENT OF THOMAS J

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Introduction

[1] The appellant, Unison Networks Limited (Unison), appeals against a decision of the Rulings Panel (the Panel), a body constituted under the Electricity Industry Act 2010 (the Act). The Panel’s decision dated 16 January 2017 (the Decision) involves the Panel’s jurisdiction to determine a dispute between the first respondent, Solar City New Zealand Limited (Solar City), and Unison (the Dispute). The key issue to resolve is whether the Panel was correct in finding it had jurisdiction under the Act to determine the Dispute.

Background

[2] The electricity industry in New Zealand is regulated by the Electricity Authority (the Authority). The industry is divided into the following functions: generation, transmission, distribution and retail. Electricity is generated at power stations which supply electricity to the national grid, which transmits the electricity to large industrial users who connect directly to the grid and to distribution networks to which smaller businesses and households connect. The transmission network is owned by Transpower and consists of high voltage pylons and lines. Distribution networks consist of lower voltage lines which distribute electricity to businesses and domestic consumers. Those generators who connect to a distribution network rather than the national transmission grid are “local generators” or “distributed generators” and carry out “distributed generation”.¹

¹ *Transpower Ltd v Electricity Authority* [2016] NZHC 2914, [2017] 2 NZLR 253 at [5]–[9].

[3] Unison is a lines company and “distributor”, supplying connectivity through the conveyance of electricity on lines not part of the national grid.² Solar City retains ownership of solar panels installed on private residences and is a “distributed generator”.

[4] The background to the Dispute is set out in the submissions on behalf of the Authority, which is agreed by all parties, as follows:³

- (a) On 1 April 2016, Unison introduced new delivery prices payable by retailers for delivering electricity to retailers’ customers with distributed generation.
- (b) On 8 May 2016, Solar City complained to the Authority that this constituted a breach of the pricing principles contained in pt 6 at sch 6.4 of the Electricity Industry Participation Code 2010 (the Code). Solar City’s broad allegation was that “Solar [City] users are being wrongfully disadvantaged”.⁴
- (c) On 7 July 2016, an internal memorandum from a senior investigator to the Compliance Committee of the Authority recommended that the Authority decline to take action under reg 11(1)(b) of the Electricity Industry (Enforcement) Regulations 2010 (the Regulations), as pt 6 of the Code applied to distributed generation and not retail consumer tariffs.
- (d) On 24 August 2016, the Compliance Committee advised Solar City it had decided to take no further action under reg 11(1)(b), noting that pt 6 of the Code applies to distributed generation and not retail consumer tariffs.

² Electricity Industry Act 2010, s 5: “distributor” means a business engaged in distribution and “distribution” means the conveyance of electricity on lines other than lines that are part of the national grid.

³ Electricity Authority’s submissions, 28 March 2017 at [2.1].

⁴ Solar City Complaint, 8 May 2016 at “Reasons”.

- (e) On 6 September 2016 Solar City laid a complaint with the Panel under reg 31, and sought a hearing under reg 34. Unison and the Authority opposed.
- (f) During October 2016, counsel for Unison and the Authority raised procedural points including an argument the Panel lacked jurisdiction to hear the Dispute.
- (g) On 16 January 2017, the Panel issued the Decision, determining (among other things):
 - (i) it did not have jurisdiction to consider the Dispute under reg 31 of the Regulations;⁵
 - (ii) it nevertheless had a broad residual discretion under s 50(4) of the Act and reg 76(1) to determine the Dispute.⁶

[5] There is no dispute between the parties as to the Panel's conclusion that it lacked jurisdiction under reg 31. Unison appeals the Panel's finding that it nonetheless had a broad residual jurisdiction under s 50(4) of the Act and reg 76(1) to determine the Dispute.

Scheme

[6] The Act was passed on 5 October 2010 and the Regulations were passed on 11 October 2010. The Act, the Regulations and the Code all came into force on 1 November 2010.

The Act

[7] The Authority was established on 1 November 2010, replacing the Electricity Commission as industry regulator.⁷ The Authority's prescribed functions include making and administering the Code and investigating and enforcing compliance with

⁵ Decision of the Electricity Rulings Panel, 16 January 2017 at [26].

⁶ At [28].

⁷ Electricity Industry Act 2010, ss 2, 12 and 133–140.

the Regulations and the Code.⁸ The Panel was continued as the same body established under the Electricity Governance Regulations 2003.⁹ The functions of the Panel include assisting in the enforcement of the Code by inter alia hearing and determining complaints about breaches or possible breaches of the Code and exercising any other functions conferred on it under the Act or Regulations.¹⁰

[8] The Code replaced the Electricity Governance Rules 2003, parts of the Electricity Governance Regulations 2003 and other relevant regulations.¹¹ The Code is dealt with in sub-pt 3 of pt 2 of the Act, which is entitled “Electricity industry governance”. There are detailed provisions as to the content of the initial Code,¹² which must be certified as complying with the required content by the Minister.¹³ Any amendments to the Code are subject to consultation.¹⁴ The content and status of the Code is also set out in the Act.¹⁵

[9] The Act sets out the Code enforcement provisions.¹⁶ Section 50 entitled “Complaints, appeals and disputes” is central to this case. Section 53, setting out the powers and procedures of the Panel is also relevant. I will return to these provisions in my analysis.

[10] The Act sets out appeal rights.¹⁷ There is a right of appeal to the High Court against any decision of the Authority or Panel on a question of law only.

The Regulations

[11] The ability to enact regulations relating to monitoring, investigating, and enforcing the Code is prescribed by s 112 of the Act. The Regulations provide for

⁸ Sections 16, 45 and 46.

⁹ Section 23.

¹⁰ Section 25.

¹¹ Section 34(1)(a)(i).

¹² Section 34.

¹³ Section 35.

¹⁴ Section 39 and 41. *Transpower*, above n 1.

¹⁵ Sections 32, 33 and 140.

¹⁶ Sections 50–62.

¹⁷ Sections 63, 64 and 65.

complaints about breaches of the Code and specify the process for making mandatory and voluntary reports of breaches of the Code.¹⁸

[12] The Authority may decline to take action on a reported breach if another forum is more appropriate, there is no prima facie case or the alleged breach does not warrant further action being taken.¹⁹ If the Authority decides to take no further action, it must inform the industry participant or other person who reported the breach that the Authority intends to do no more in relation to the matter and provide reasons.²⁰ In such a case the Authority cannot appoint an investigator in relation to the reported breaches.²¹ If an investigation is carried out and a settlement is not reached or approved, the Authority then decides whether or not to lay a formal complaint.²² The Regulations prescribe what happens if the Authority decides not to lay a formal complaint²³ and what happens if it does decide to lay a formal complaint with the Panel following an investigation.²⁴ Regulation 31 is particularly relevant to this case and prescribes the circumstances in which an industry participant may independently lay a formal complaint with the Panel.

[13] Disputes and appeals are dealt with in pt 3 of the Regulations. Regulation 76 relevantly provides:

- (1) Under the Act the Rulings Panel may resolve disputes, and determine appeals, of a kind identified in regulations made under the Act or in the Code.
- (2) Practices and procedures relating to any kind of identified dispute or appeal may be set out in the regulations or the Code.

[14] The Regulations identify two types of disputes the Panel may resolve,²⁵ being a dispute in relation to information provided for the purposes of reconciliation under pt 15 of the Code and a dispute which relates to a contract for the procurement of ancillary services.²⁶

¹⁸ Electricity Industry (Enforcement) Regulations 2010, regs 4, 7–9.

¹⁹ Regulation 11(1).

²⁰ Regulation 11(2).

²¹ Regulation 12.

²² Regulations 21, 23 and 27.

²³ Regulation 28.

²⁴ Regulation 30.

²⁵ Regulations 76(3) and 78.

²⁶ For the two types of disputes, regs 80–90 apply: reg 79.

The Code

[15] Part 6 of the Code concerns connection of distributed generation. It specifies a framework to enable the connection of distributed generation and includes the pricing principles to be applied for the purposes of pt 6.²⁷

[16] Schedule 6.4 contains the pricing principles to be applied for the purposes of pt 6 of the Code in accordance with cl 6.9.²⁸ Charges payable by the distributed generator or distributor must be determined in accordance with the pricing principles in sch 6.4.²⁹ The Authority and the Panel must apply the pricing principles set out in sch 6.4 to determine any connection charges payable.³⁰ Solar City's complaint to the Authority alleged Unison was in breach of cl 2 and 2(a) of sch 6.4.³¹

[17] The dispute resolution process in sch 6.3 applies to a dispute between a distributed generator and a distributor and to any allegation a party has breached a pt 6 provision, subject to exclusions.³² The Regulations apply to any complaint under sch 6.3, cl 2(3) except as specifically stated.³³ As reg 31 is not one of those exceptions, it applies to a complaint about an alleged breach of the pricing principles.

The Decision

Regulation 31

[18] Before embarking on an analysis of what general powers the Panel might have, it is worth first exploring in more detail why the Panel concluded, rightly, it did not have jurisdiction to consider the Dispute under reg 31.

²⁷ Electricity Industry Participation Code, cl 6.1.

²⁸ Schedule 6.4, cl 1.

²⁹ Clause 6.9, sch 6.2, cl 19.

³⁰ Clause 6.9, sch 6.3, cl 4.

³¹ Schedule 6.4, cl 2:

The pricing principles are as follows:

Charges to be based on recovery of reasonable costs incurred by distributor to connect the distributed generator and to comply with connection and operation standards within the distribution network, and must include consideration of any identifiable avoided or avoidable costs.

(a) subject to paragraph (i), **connection** charges in respect of **distributed generation** must not exceed the **incremental costs** of providing **connection** services to the **distributed generation...**

³² Clause 6.8.

³³ Schedule 6.3, cl 3(2)(b).

[19] Regulation 31 provides:

31 Industry participant independently laying formal complaint

- (1) An industry participant may lay a formal complaint with the Rulings Panel against another industry participant allegedly in breach if—
 - (a) the industry participant either notified the Authority of the alleged breach under regulation 7 or 8, or has been joined as a party under regulation 17; and
 - (b) the industry participant has suffered loss as a result of the alleged breach; and
 - (c) the Authority has informed the industry participant that it does not propose to lay a formal complaint.
- (2) The industry participant must lay the complaint in writing with the Rulings Panel—
 - (a) within 10 working days after receiving the notice from the Authority under regulation 28; and
 - (b) in accordance with regulation 30, as if the industry participant were the investigator.
- (3) The complaint may contain any additional evidence or material that the industry participant laying the complaint thinks fit.

[20] The Authority, having referred to Solar City's complaint, considered Solar City had failed to establish a prima facie case and decided to take no further action on the alleged breaches pursuant to reg 11(1)(b) of the Regulations. The Authority noted that pt 6 of the Code applies to distributed generation and not to retail consumer tariffs.³⁴ Having decided to take no further action under reg 11, there was no power to appoint an investigator.³⁵

[21] The approach taken by the Authority meant one of the pre-requisites to Solar City being able to lay a formal complaint with the Panel under reg 31 had not been met. The Authority had not informed Solar City that it did "not propose to lay a formal complaint".³⁶ Those words clearly refer to a decision required under regs 21(2), 23(3) or 27(3), all of which are premised on there having been an investigation. Under these provisions, if the Authority decides no complaint should

³⁴ Decision of the Authority 1605UNIS2, 24 August 2016.

³⁵ Electricity Industry (Enforcement) Regulations 2010, reg 12.

³⁶ Regulation 31(1)(c).

be laid and correspondingly that an investigation should be discontinued, then the Authority must notify “the parties to the investigation of that decision and the effect of regulation 31” and provide a copy of the investigator’s report.³⁷

[22] This notification requirement directly corresponds with the time limit for laying a complaint under reg 31(2) which provides that, if a participant wishes to lay a complaint, it must do so within 10 working days of “having received a notice from the Authority under regulation 28”. It is also consistent with the overview of pt 1 of the Regulations which provides that a formal complaint may be laid directly with the Panel by “an industry participant that was a party to the investigation...”.³⁸

[23] Because the Authority decided to take no further action under reg 11(1)(b), the only notification requirement was to inform Solar City it intended to do no more and of the reasons for that intention.³⁹ There was no need to notify Solar City about the effect of reg 31 because the rights in reg 31 were not engaged.

[24] The Panel was therefore correct in concluding:⁴⁰

[Regulation] 31 does not provide a mechanism for a notification of an alleged breach to the [Authority] that is not investigated to come before the Rulings Panel.

...

[T]he Rulings Panel has no jurisdiction to deal with the dispute as a continuation of this complaint brought under Schedule 6.3 ...

Broad residual jurisdiction

[25] The issues in this appeal arise from the Panel’s conclusion that it nonetheless has a general jurisdiction under s 50(4) and reg 76(1) to resolve the Dispute. The Panel concluded, in summary:⁴¹

... our view is that the Rulings Panel has jurisdiction to deal with both appeals from certain decisions of the [Authority] following notification of an

³⁷ Regulation 28.

³⁸ Regulation 4(6).

³⁹ Regulation 11(2).

⁴⁰ Panel’s decision, above n 5, at [26] and [36].

⁴¹ At [19] and [28]. See also [26], [30]–[36].

alleged breach **and** jurisdiction to resolve certain kinds of disputes between industry participants.

... the Rulings Panel finds that it has jurisdiction under s 50(4) and [reg] 76(1) to resolve this dispute.

[26] If the Panel is correct in this conclusion, its approach will impact on all matters under the Regulations and Code.

[27] The subsidiary findings of the Panel on the issue of jurisdiction are:

- (a) Disputes identified under cl 6.8 of the Code are disputes of a kind identified in the Code and Regulations for the purposes of s 50(4) notwithstanding that cl 6.8 does not in itself identify whether these disputes are referable to the Panel.⁴²
- (b) The Panel is not constrained by the sch 6.3 dispute procedures, including where these limit the Panel's jurisdiction to resolve pt 6 complaints because:
 - (i) the sch 6.3 dispute procedures are only "a subset" of available procedures for resolving pt 6 disputes;⁴³ and
 - (ii) the Code, specifically pt 6 and sch 6.3, is subordinate legislation and cannot be interpreted as limiting the Panel's jurisdiction under s 50(4) to resolve pt 6 disputes.⁴⁴
- (c) Because there is no jurisdiction for the Dispute under the sch 6.3 dispute procedures, there are no procedures prescribed for dealing with the Dispute and the Panel can develop its own procedures under s 53 of the Act.⁴⁵

⁴² At [28].

⁴³ At [34].

⁴⁴ At [32].

⁴⁵ At [36].

Appeal

[28] Unison has appealed the Decision saying the Panel was wrong in concluding that, notwithstanding the processes and procedures prescribed in the Code and Regulations for the Dispute, and that no procedures are set out for the Dispute, the Panel has broad jurisdiction to hear the Dispute under s 50(4) of the Act and reg 76(1) and can determine its own procedure.

[29] Unison challenges each of the findings the Panel made on the issue of jurisdiction outlined above at [27].

Parties' positions

[30] Unison's position is that part of the Decision is directly contrary to the plain wording in s 50(4) and (5) of the Act, which mandates the Panel only consider disputes of a kind identified as being referable to the Panel in the Regulations and the Code and apply the practices and procedures prescribed for a kind of dispute identified in the Code or Regulations, in this case the sch 6.3 dispute resolution procedures. Unison says the Panel has no jurisdiction to hear the Dispute.

[31] Mr Butler, who appeared for Unison, submitted the Panel's approach is inconsistent with the comprehensive processes contained in the Regulations and Code which relate to enforcement of the Code and, if accepted, would render nugatory a range of requirements and procedures under the Regulations and Code. There was no reason, in Mr Butler's submission, why subsidiary legislation cannot be used as an aid to interpret primary legislation.⁴⁶

[32] Ms O'Gorman appeared for the Authority. She supported the approach advocated on behalf of Unison. She referred to the large number of matters dealt with by the Authority where the Panel has no jurisdiction and where it is not intended the Panel would have jurisdiction. In her submission Solar City's complaint is about pt 6 pricing principles. There are specific provisions in the Regulations and Code to deal with complaints about pricing and, to the extent the Panel has jurisdiction, it is subject to those specific provisions.

⁴⁶ Referring to *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

[33] Mr Salmon, who appeared for Solar City, submitted the Panel correctly determined it had jurisdiction to hear the Dispute. He said the position taken by Unison and supported by the Authority would mean that the Panel's jurisdiction was conferred under the Regulations and the Code. He said, as a matter of policy, that was not a proper approach and stressed what, in his submission, was the role of the Act in providing for matters of competition in the electricity industry.

[34] Mr Salmon said the effect of the approach taken by Unison and the Authority would mean the Authority as regulator and author of the Code decides whether or not to bring an investigation and the party who has complained has no remedy if the Authority does not decide to take the initial step of ordering an investigation. It was insufficient, in his submission, to say parties could rely on appeal rights on a question of law, and judicial review was also of limited use when seeking to challenge a decision whether or not to prosecute.

Analysis

Principles of interpretation

[35] In undertaking my analysis, certain basic principles apply.

[36] As a statutory body, the Panel's jurisdiction is defined by statute. It has no inherent jurisdiction and cannot enlarge or limit its jurisdiction outside that provided for by statute.⁴⁷ The meaning of an enactment must be ascertained from its text and in light of its purpose.⁴⁸ In interpreting legislation, the primary focus is an examination of the legislation in question. Resort to legislative history, including

⁴⁷ *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 at [36]; *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50].

⁴⁸ Interpretation Act 1999, s 5(1). The effect of s 5(1) of the Interpretation Act 1999 has been discussed in numerous cases, including *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Astrazeneca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29]; *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [119] and [219] (leave to appeal to the Supreme Court was declined in [2011] NZSC 12); *Lean Meats Oamaru Limited v New Zealand Meat Workers and Related Trades Union Incorporated* [2016] NZCA 495, [2017] 2 NZLR 234 at [11] and [14].

Parliamentary debates, is appropriate only when, objectively, it may provide valuable contextual assistance.⁴⁹

Text

[37] The case centres on s 50 of the Act, which falls within sub-pt 4 of pt 2, “Monitoring and enforcement”. Section 50 appears under the general heading “Code enforcement” and provides as follows:

50 Complaints, appeals, and disputes

- (1) Complaints about breaches or possible breaches of the Code must be made to the Authority at first instance.
- (2) The Authority must deal with complaints in accordance with this Part and the regulations.
- (3) Complaints may subsequently be referred to the Rulings Panel, in accordance with this Part and the regulations, by either the Authority or an industry participant.
- (4) The Rulings Panel may determine appeals against decisions made under the Code, and resolve disputes between industry participants that relate to the Code, that are of a kind that are identified in the regulations or the Code.
- (5) If the regulations or the Code prescribe practices and procedures in relation to any kind of such appeal or dispute, the Rulings Panel must apply those practices and procedures when dealing with the appeal or dispute.

[38] The issue can be simply stated. Does the Act confer jurisdiction on the Panel which has been narrowed or watered down by the Regulations and the Code? The Panel’s approach is premised on the proposition that the Act gives a **right** of appeal to the Panel, which the Regulations and Code cannot restrict.

[39] My analysis of the scheme of the Act, Regulations and Code lead me to conclude the Panels’ interpretation is not tenable.

[40] The plain words of the Act make it clear Parliament intended the Panel to have a restricted role. The references to the role of the Panel in s 50(3), (4) and (5),

⁴⁹ *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [30] and [31]; *Vector Ltd v Commerce Commission* [2012] NZSC 99, [2013] 2 NZLR 445 at [62] to [67].

are all expressly made by reference to the Regulations and the Code. While s 50(3) provides for a referral to the Panel by an industry participant, this must be in accordance with that part of the Act and the Regulations. It is not in dispute that reg 31 and the corresponding provisions of the Code could not be applied in this case.

[41] The Panel relied on s 50(4) of the Act for its wider jurisdiction. The latter part of s 50(4) applies to both appeals and disputes, thereby restricting the Panel's jurisdiction to such matters which are "of a kind that are identified in the Regulations or the Code". Mr Salmon submitted the plain meaning of the qualification is that the Panel may resolve disputes between industry participants which relate to the Code that are of a kind (of dispute) identified in the Regulations or the Code. In Mr Salmon's submission, the Dispute is clearly identified in the Code and there is nothing in s 50(4) which requires the Dispute to be specifically identified as one referable to the Panel.

[42] I accept Mr Butler's submission that subsidiary legislation can, in limited circumstances, be used as an aid to interpret primary legislation. Regulations can be considered as an aid when they are contemporaneous with a statute and the statute is ambiguous.⁵⁰ In this case, reference to the subsidiary legislation is *specifically provided for* by the qualification in s 50(4), which expressly refers to the Regulations and the Code. The ability to refer to the Regulations and the Code in interpretation is therefore mandated by the Act's express reference to the operative nature of subsidiary legislation.

[43] The Code and Regulations expressly identify a number of disputes and appeals which *can* be referred to the Panel and are subject to the Panel's jurisdiction. These specific references clearly correspond with the qualification in s 50(4).

[44] At the hearing, Mr Butler provided an extensive table identifying a number of specific references in the Code and Regulations to referrals of appeals or disputes to

⁵⁰ *Quilter v Attorney-General*, above n 46, at 581. See *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) and *Hanlon v Law Society* [1981] AC 124 (HL).

the Panel.⁵¹ For example, disputes regarding Authority determinations under pt 8 of the Code such as determinations on the causer of under frequency events⁵² must be referred to the Panel within 10 working days, otherwise the Panel has no jurisdiction to consider the dispute.⁵³ It is evident the Code and Regulations include a detailed and comprehensive scheme for the way in which disputes and appeals are to be dealt with and the requirements for referral to the Panel.

[45] In relation to pt 6 disputes, there are specific requirements set out in the Code and Regulations for referral to the Panel which should not be ignored. Schedule 6.3 cl 3(2)(b) provides the Regulations apply to any complaint made under cl 2(3) except as specifically stated. Regulation 31 is not such an exception and therefore applies to a complaint about an alleged breach of pricing principles. As already discussed, a pt 6 dispute discontinued under reg 11(1) is not a dispute which gets through the expressly required gateway conferring jurisdiction on the Panel.

[46] In my view, the Panel has stepped outside of the scheme in concluding it has an alternative, broader gateway to jurisdiction despite the detailed provisions in the Regulations and Code, and the relevant qualification under s 50(4). “Of a kind that are identified” in s 50(4) is to be interpreted, in this case, as a reference to a dispute identified under the sch 6.3 dispute procedures as referable to the Panel.

[47] The Panel also relied on reg 76, which is simply an overview of pt 3 of the Regulations which deals with disputes and appeals. On its own it adds nothing to s 50 of the Act. It does however *correspond* with s 50 by setting out the qualification “of a kind identified” in the Regulations or the Code and that “practices and procedures” may be set out in the Regulations or the Code.

[48] The limitation on the Panel’s jurisdiction is taken from the plain meaning of the words in s 50(4). It is also supported by the limits placed on the Panel in other provisions in the Act, particularly ss 61, 112, 25 and 53.

⁵¹ The provisions of the Code referred to were cls 2.15, cls 8.36, 8.53, 6.8, schedule 6.3, cls 8.62, 8.63, 10.50, 12.10, 12.12, 12.13, 12.45–12.48, 12.A.3, 14.27, 14.A.23 and 15.29. The provisions of the Regulations referred to were regs 78 and 79–90.

⁵² Electricity Industry Participation Code, cl 8.61.

⁵³ Clause 8.62.

[49] Section 61 sets out the Panel’s **powers** in relation to appeals and disputes. It does not confer jurisdiction. It reinforces the language and meaning of s 50 in its reference to the Panel’s determination of an appeal or resolution of a dispute “of a kind identified in the Regulations or the Code”. The Panel’s powers are also “subject to” any general provisions of the Regulations relating to appeals and disputes or, if there are any specific provisions in the Regulations or the Code relating to that kind of appeal or dispute, those provisions.

[50] Section 112 in sub-pt 1 of pt 5, dealing with regulations, specifies that the Governor-General may, on the recommendation of the Minister responsible for pt 2, make regulations for:

- (f) identifying the kinds of appeals and disputes that may be determined by the Rulings Panel:
- (g) prescribing, both generally and in relation to specific kinds of appeal or dispute, practices and procedures of the Rulings Panel for dealing with appeals and disputes, whether those appeals and disputes are identified in the regulations or the Code:

[51] This confirms the role of the Regulations in *identifying* the kinds of appeals and disputes over which the Panel has jurisdiction.

[52] Provisions for the continuation, membership, function and funding of the Panel are set out in ss 23–26 of the Act. The function of the Panel is described in the following terms:

25 Function of Rulings Panel

The function of the Rulings Panel is—

- (a) to assist in the enforcement of the Code by—
 - (i) hearing and determining complaints about breaches or possible breaches of the Code; and
 - (ii) hearing and determining appeals from certain decisions made under the Code; and
 - (iii) considering and resolving certain disputes between industry participants relating to the Code; and
 - (iv) making appropriate remedial and other orders; and

- (b) to review any suspension of trading by the Authority under section 49; and
- (c) to exercise any other functions conferred on it under this Act or the regulations.

[53] While the wording of s 25(a)(i) is relatively wide, subss (ii) and (iii) refer to *certain* decisions under the Code and disputes relating to the Code. This language confirms that not every appeal or dispute is subject to the jurisdiction of the Panel. Rather, the Panel's powers are to assist in the enforcement of the Code.

[54] Section 53 deals with the powers and procedures of the Panel and provides:

53 Powers and procedures of the Rulings Panel

- (1) Every complaint, appeal, or dispute before the Rulings Panel must be dealt with by a panel of 3 members, one of whom must be the chairperson...
- (2) The Rulings Panel may determine its own procedures, subject to this Act and the regulations, the requirements of natural justice, and, in relation to particular kinds of appeals and disputes, the Code.
- (3) The Rulings Panel has all the powers necessary to perform its functions in accordance with this Act, the regulations, and the Code.

[55] Section 53 again limits the Panel's powers by reference to the Regulations and the Code. The ability to determine the Panel's procedures under s 53 necessarily requires jurisdiction to hear the dispute, which is not apparent in this case.

[56] All the language of the Act makes it clear that the Panel's jurisdiction was from the outset specifically limited by Parliament. The Act did not confer a general jurisdiction on the Panel. It conferred a jurisdiction specifically limited to the areas to be specified in the Regulations and Code.

[57] I accept the functions of the Authority⁵⁴ do not include a function of determining the matters which are subject to review by the Panel. That, in my assessment, would hardly be expected and in any event the Authority's functions include any specific functions imposed under the Act.⁵⁵

⁵⁴ Electricity Industry Act 2010, s 16.

⁵⁵ Section 61(j).

[58] The correct interpretation of 50(5) is also at issue in this appeal. Under s 50(5) the Panel is required to apply practices and procedures when dealing with an appeal or dispute if the Regulations or Code prescribe those practices and procedures.

[59] In Mr Salmon's submission, the language in s 50(5) is broad and recognises there may be disputes identified in the Code or Regulations which *do not* have prescribed procedures or practices. He submitted the prescribed practices and procedures are not exclusive and the Panel was entitled to determine its own procedures under s 53.

[60] It would be contrary to the scheme of the Act, Code and Regulations to read s 50(5) in the way suggested by Mr Salmon. Section 50(5) restricts the Panel by prescribing what practices and procedures it should apply as set out in the Regulations or the Code. In this case, s 50(5) required the Panel to apply the sch 6.3 dispute procedures for pt 6 disputes and under those procedures, it has no jurisdiction to hear disputes discontinued under reg 11(1).

[61] In contrast, Unison's interpretation of s 50 is consistent with the supplementary order paper (SOP) dated 7 September 2010 to the Electricity Industry Bill 2009. In that SOP it was noted that amendments relating to the Panel's jurisdiction to determine appeals or disputes were intended to clarify that:⁵⁶

... both the Code and the regulations can determine—

- the matters on which appeals against certain decisions made under the Code can be taken; and
- the kind of disputes between industry participants that the Rulings Panel can be asked to resolve; and
- the practices and procedures of the Rulings Panel in dealing with those appeals and disputes.

[62] The Panel erroneously concluded it was not bound by sch 6.3 dispute resolution procedures. Contrary to the Panel's position, the primary legislation, s 50(4), mandates the Code and Regulations determine when a dispute can be

⁵⁶ Supplementary Order Paper 2010 (154) Electricity Industry Bill 2009 (111-3) (explanatory note) at 9.

resolved by the Panel. Under s 50(5), the Panel must apply prescribed practices and procedures in the Code and Regulations which apply to disputes and appeals identified in the Code and Regulations. Under s 53 of the Act, the Panel's ability to determine its own procedures is subject to the Code and Regulations.⁵⁷ I therefore conclude on a textual reading of the scheme the Panel was wrong to consider it had a broad jurisdiction to determine the Dispute.

Policy issues

[63] The meaning of an enactment must be ascertained from its text but also “in the light of its purpose”.⁵⁸ Mr Salmon in his submissions raised a number of policy issues with Unison's interpretation and contended the Panel's interpretation was consistent with the purpose of the scheme and the primacy of the Act. I will address the policy arguments raised by Mr Salmon.

[64] Mr Salmon argued it would be contrary to natural justice for the Authority to both be the drafter and final enforcer of the Code without oversight of the Panel. In making his submission, Mr Salmon relied on s 27(1) of the New Zealand Bill of Rights Act 1990 (the NZBORA):

S 27 Right to justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

...

[65] To the extent Mr Salmon refers to natural justice principles to *establish* a right of appeal, that would be an improper interpretation of s 27 of the NZBORA. If a statute clearly limits jurisdiction, the concept of natural justice is not in itself a source of appellate jurisdiction.⁵⁹ That, however, does not completely answer Mr Salmon's contention. Mr Salmon submitted natural justice principles “strengthen Solar City's case”, whereby the source of jurisdiction is (on Solar City's view)

⁵⁷ Electricity Authority's submissions at [37].

⁵⁸ Interpretation Act 1999, s 5(1).

⁵⁹ *Erwood v Glasgow Harley* [2007] NZSC 4, at [5] and [6].

conferred under s 50(4) of the Act. The contention that Unison's approach may confer excess power on the Authority still requires exploration.

[66] Under the Act, there are numerous provisions which reduce the risk the Authority could amend the Code for an improper purpose.

[67] Section 32 prescribes the content of the Code and what it is to promote. Section 34 stipulates what the initial Code was to provide for and under s 34(1)(a) there is a list of what enactments the initial Code was required to consolidate. Section 42 outlines the specific new matters to be in the Code one year after the Code came into force and s 43 provides the Minister with powers to amend the Code.

[68] Although the Authority has the power to make amendments to the Code,⁶⁰ s 39 provides the Authority must publicise a draft of the proposed amendment, prepare and publicise a regulatory statement, and consult on the proposed amendment and the regulatory statement. Section 41 of the Act also requires the Authority to have a consultation charter which sets guidelines for amending the Code and consulting on proposed amendments. In *Trustpower Ltd v Electricity Authority*,⁶¹ the Authority's amendments of the Transmission Pricing Methodology (TPM) included the issuing of consultation papers, the establishment of an advisory group, forums and numerous publications. While the applicants were unsuccessful in judicially reviewing the length of the consultation process, the case demonstrates the degree of scrutiny industry participants have on Code amendments. The Authority does not have free-wheeling powers to make amendments to the Code.

[69] The Authority, in making its decision on Solar City's complaint, also acted in line with the relevant Regulations, written by the *Minister*, not the Authority.⁶² The Authority's responsibility for the Code is subject to provisions in the Regulations.

[70] Furthermore, it is highly relevant that, while the Panel's jurisdiction is restricted by the Regulations and the Code, the Panel still has an expansive

⁶⁰ Electricity Industry Act 2010, s 38.

⁶¹ *Trustpower Ltd v Electricity Authority*, above n 1..

⁶² Electricity Industry Act 2010, s 112.

jurisdiction over numerous appeals or disputes in order to place a check on the Authority's powers.

[71] In my assessment, there is sufficient oversight of the Authority's powers in the legislative constraints on those powers and the Panel's jurisdiction as prescribed by the Regulations and the Code. This interpretation would not be contrary to the principles of natural justice and does not raise any particular procedural concerns. A plain reading of s 50 prescribes limits on the Panel's jurisdiction which is detailed in the Act, the Regulations and the Code.

[72] Mr Salmon also raised the policy point that Solar City should be entitled to an effective right of appeal in the circumstances. In his submission, the construction of s 50(4) advanced by the Authority and Unison could not possibly give proper recognition to the rights of Solar City. He said the Panel is better placed than the High Court to consider a dispute where the Authority has declined to take action, such as in this case. This is because the Panel is not restricted to questions of law.

[73] In cases where the Authority considers a reported breach fails to establish a prima facie case under reg 11, there is still the ability to appeal on a question of law,⁶³ or to apply for judicial review. A specialist body, the Panel, has been set up to deal with matters which meet the requirements of a prima facie case and follow the appointment of an investigator. Where the requirements for an investigation have not been met, it is entirely logical for there to be no right of appeal to the Panel. If the Authority has acted unlawfully, there is the availability of an appeal to the High Court on a question of law or judicial review. This is not an unusual structure where statutory schemes are concerned.⁶⁴

[74] It is helpful to refer to analogous situations where there is no right of appeal from a decision that a complaint does not establish a prima facie case. For example, in a range of professional disciplinary legislative regimes, a decision not to take further action on a complaint does not give rise to a right of appeal and is restricted

⁶³ Section 64.

⁶⁴ Immigration Act 2009, s 245 prescribes an appeal from the Immigration and Protection Tribunal to the High Court on points of law by leave and Official Information Act 1982, s 32B provides a limited right of review to the High Court against an Order in Council following an Ombudsman's recommendation.

to judicial review.⁶⁵ It is, in my view, a principled approach to say that, should a complaint not pass the prima facie threshold, there should be no further avenue for challenge other than an appeal on a question of law or judicial review.

[75] Mr Salmon was not attracted by the floodgates argument. He suggested the Panel's ability to hear such disputes would "fill the gaps" where there are no relevant procedures governing the situation. I am not persuaded there are gaps which require filling. I am instead concerned the comprehensive and detailed procedures surrounding disputes and appeals as set out in the Code and Regulations would be undermined by the Panel obtaining a broad jurisdiction under s 50(4). There would be an inevitable and uncertain expansion of the Panel's decision-making powers.

[76] The floodgates argument cannot be avoided. For example, Mr Butler drew attention to the fact reg 31 requires an industry participant to have "suffered loss as a result of the alleged breach"⁶⁶ before laying a formal complaint to the Panel. Under the Panel's interpretation, an industry participant could simply make a fresh complaint to the Panel and the Panel could apply its own procedures. This is one of many examples of prescribed procedures under the Regulations and/or Code being undermined and/or rendered of no effect if the Panel's interpretation were to be upheld.

[77] Mr Salmon also submitted Solar City was entitled to a right of appeal in this instance because the Act removed or substantially reduced the electricity industry from the jurisdiction of the Commerce Act 1986. The Commerce Commission does, however, have jurisdiction over lines under pt 4 of the Commerce Act and in any event, the electricity industry was to be regulated in the way decided by Parliament through the Act, Regulations and Code.

[78] Mr Salmon emphasised the fact the Panel used to be a regulatory body and became a statutory one under the Act. That, in his submission, was a material departure. There is nothing in the explanatory note to the Electricity Industry Bill 2009 to suggest there was any conferral of a significantly increased jurisdiction on

⁶⁵ See for example Registered Architects Act 2005, ss 24(2) and 38 and *McLanahan v New Zealand Registered Architects Board* [2016] NZHC 2276.

⁶⁶ Electricity Industry (Enforcement) Regulations 2010, reg 31(1)(b).

the Panel or which would support the proposition Parliament intended to change or broaden the Panel's jurisdiction.⁶⁷

[79] Mr Salmon suggested Unison's approach would undermine the primacy of the Act. He submitted the jurisdiction of the Panel is found in the Act which establishes it. Subordinate legislation, in the Regulations and the Code, cannot restrict the jurisdiction of the Panel.

[80] My analysis does not depart from the principle the Act has superior status and the Regulations and the Code are subordinate.⁶⁸ The plain words of s 50 of the Act demonstrate Parliament's intention that the Regulations and the Code identify the kinds of disputes available to the Panel and may establish limits on the Panel's jurisdiction. That intention is clearly laid out in the *statute*. The Regulations and the Code do not unlawfully restrict the Panel's jurisdiction but have been promulgated to promote the policy and objects of the legislation.⁶⁹

[81] Moreover, the Act, Regulations and Code were enacted on the same date as part of a package and are comprehensive and deliberate. It is not, as Mr Salmon would have it, the tail wagging the dog but rather a package where the Act has set out qualifiers in the context of the statutory scheme found in the Regulations and the Code. On the Panel's approach, the relevance of the limitations, prescriptions and procedures as set out in the scheme and particularly the Regulations and Code would be undermined.

[82] On its own and in the context of the "package", s 50 of the Act clearly limits the Panel's jurisdiction to disputes which are of a kind identified *as referable to the Panel* in the Regulations and the Code.

⁶⁷ Electricity Industry Bill 2009 (111-3) (explanatory note).

⁶⁸ *Wielgus v Minister of Education* [1994] 1 NZLR 73 (HC) at 82 and R Carter, J McHerron, R Malone *Subordinate Legislation in New Zealand* (Lexis Nexis, Wellington, 2013) at 1.1.1.

⁶⁹ *Aviation Industry Association of New Zealand Inc v Civil Aviation Authority* HC Wellington CP289/00, 24 August 2001 at [18]; *Rowling v Takaro Properties Limited* [1975] 2 NZLR 62 (CA) at 67-88 and R Carter et al, above n 70, at 12.2.1.

Conclusion

[83] The Panel's powers to consider the Dispute were prescribed under s 50(4), pt 6 of the Code and the schedule 6.3 dispute resolution procedures, which properly interpreted, meant the Panel had no jurisdiction to hear the Dispute.

Result

[84] For the reasons given, the appeal is allowed. The Panel had no jurisdiction to consider the Dispute and the Decision is overturned.

[85] If the parties are unable to agree costs, any application is to be filed and served within 28 days of this decision, with any response 14 days thereafter.

A handwritten signature in blue ink, appearing to be 'Thomas J', written in a cursive style.

Thomas J

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