

21 July 2017

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Matthew Lewer  
Manager – Price-Quality Regulation  
Commerce Commission  
44 The Terrace  
**Wellington 6011**

Dear Matthew

### **Request to reconsider the default price quality path**

Vector has recently introduced operational changes affecting the way it conducts works on its electricity lines and how it responds to outages or low lines. These changes have increased the costs to its regulated electricity business in ways that are out of step with the assumptions built into Vector's electricity price path under the current electricity default price-quality path (**DPP**) regulatory settings and have made compliance with quality standards in the DPP more challenging.

This letter is Vector's formal request that the Commission reconsider the DPP under the relevant provisions of the input methodologies in order to address these changes in costs and issues of quality compliance. It sets out the background to Vector's current circumstances, and invites the Commission to provide guidance on the information it now requires to respond to our request.

### **Changes to Vector's operational practice**

In the current regulatory period, Vector has been required to introduce two significant operational changes that directly affect its regulated electricity business.

The first change is that Vector has adopted a new "live-line" works policy. This policy requires lines to be de-energised before work on those lines is undertaken. While live-line work can still be undertaken by exception, this requires sufficient justification and the vast majority of work is now undertaken on de-energised lines. This is a change from the previous position, which allowed for live-line work to be conducted much more regularly. The change in policy was initiated as a result of the implementation of the requirements of the Health and Safety at Work Act 2015 (**HSW Act**), and we understand that our current policy is consistent with the emerging standard practice in the industry.

The second change is that Vector has adopted a new policy in respect of the remote de-energising of low or downed lines. This policy requires lines to be de-energised remotely upon receiving a report of low lines before an on-site investigation is conducted. This change is also consistent with the new HSW Act requirements, and follows the prosecution of a lines business in the United Kingdom following a death as the result of downed lines.

These operational changes have materially increased Vector's operating costs. De-energised work typically involves higher costs due to the increased manpower required to de-energise, conduct the work and then re-energise the lines. Live-line work is generally more efficient, involving less 'down time' for the network, and therefore results in less cost. The move towards more de-energised work has resulted in increased costs to Vector's regulated electricity business as against the cost and profitability assumptions in the DPP.

The operational changes have also significantly impacted on Vector's compliance with the DPP quality standards. As you will be aware:

- Vector breached the SAIDI performance cap in the 2015 and 2016 regulatory years; and
- Vector breached both the SAIDI and SAIFI performance caps in the 2017 regulatory year.

Vector's internal analysis indicates that the changes to Vector's health and safety practices precipitated by the HSW Act are a key cause of its difficulty complying with the SAIDI and SAIFI performance caps, although this analysis is ongoing.

Vector notes that its changes in operational practice are consistent with similar changes occurring in New Zealand and internationally. Vector has also engaged with Worksafe New Zealand in relation to these changes, who has indicated that it sees these changes as being consistent with the requirements of the HSW Act.

### **Change event**

The enactment of the HSW Act, and the consequent operational changes Vector has adopted, constitutes a "change event" for the purposes of clause 4.5.2 of the input methodology determination (**IM Determination**).

The HSW Act repealed and replaced the Health and Safety in Employment Act 1992 (**HSE Act**). In doing so, the HSW Act updated the New Zealand health and safety regime by moving it from a hazard-based regime to one focused on preventative and proactive risk management. This change was given effect through the establishment of a number of new or additional duties on those responsible for workplace health and safety. Those duties are material changes that mandate an improvement in health and safety standards from the previous workplace health and safety regime.

These new and changed legislative requirements occurred in the current regulatory period. The HSW Act was enacted in September 2015, and came into force in April 2016. Vector's new compliance obligations have been in force since before that time. The DPP does not expressly or impliedly provide for these changes to health and safety obligations, as the Commission itself has previously recognised.<sup>1</sup>

These new and changed legislative requirements have necessitated that Vector incur significant costs. These costs include:

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<sup>1</sup> Commerce Commission, Letter to Graeme Peters, Chief Executive, Electricity Networks Association (20 December 2016).

- The cost of performing de-energised lines work, over and above live-line work. These costs relate directly to Vector's changes in operational policy as it applies to maintaining the quality of Vector's regulated services.
- The cost of implementing changes to systems and processes as a result of the HSW Act. The new and changed legislative requirements have increased costs at the organisational level. Vector has not yet fully determined the extent to which these costs can be attributed to its regulated business, but initial indications are that these costs are significant.

The initial work we have undertaken to determine these costs suggests that they exceed the threshold of 1% of Vector's aggregate allowable notional revenue for the relevant disclosure years.

### **Grounds for reconsideration**

On this basis, Vector considers that the requirements of clause 4.5.2 have been satisfied. We also consider that there are a number of supporting grounds that suggest reopening the DPP is likely to be the appropriate course of action for the Commission to take. These grounds include:

- that the issue of operational changes in relation to live line work affects the entire sector, and not just Vector;
- that the Commission has previously recognised that operational changes in relation to live line work is a genuine issue for the calculation of regulated costs, and one that they are open to resolving with EDBs;<sup>2</sup>
- that the reopener provisions of the IM Determination are required to promote certainty for regulated businesses and their customers, and the Commission should therefore reconsider the DPP where the all relevant criteria have been satisfied;<sup>3</sup>
- that reconsideration is likely to be more appropriate than seeking a customised price-quality path as the industry is responding to an event not covered by the DPP, not asking the Commission recalibrate its approach to setting price-quality paths; and
- that falling to reconsider the DPP would risk a material impact on both regulated businesses' costs and consumer expectations of service quality.

### **Next steps**

Vector is still working to establish the cost impacts of the HSW Act changes. We are engaging with the Commission now to ensure that we can progress this work, and prepare and make available other information, in a way that is useful for the Commission's purposes.

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<sup>2</sup> Commerce Commission *Input Methodologies Review Decisions: Consolidated Reasons Paper* at [485].

<sup>3</sup> *Wellington International Airport Ltd v Commerce Commission* [2012] NZHC 3289 at [1907].

We anticipate that the Commission will have a number of specific questions and areas where it requires further information in response to our request. We welcome guidance from the Commission that enables us to understand the information that it now requires.

A useful next step would be for a meeting between the Commission and key Vector staff to address any initial questions the Commission may have and to progress our request. Would you please let us know when the Commission would next be available to attend such a meeting?

Yours sincerely

A handwritten signature in blue ink, appearing to read "Richard Sharp".

**Richard Sharp**  
Head of Regulatory and Pricing  
Vector Limited

17 November 2017

Mr Matthew Lewer  
Manager – Price-Quality Regulation  
Regulation Branch  
Commerce Commission  
44 The Terrace  
Wellington 6140

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Dear Matthew,

**Commerce Commission's questions arising from Vector's request to reconsider the default price quality path**

1. Vector has written to the Commerce Commission (Commission) formally seeking the Commission to reconsider the Electricity Distribution Services Default Price-Quality Path (DPP) on the grounds that there has been a change in the Input Methodologies.
2. The Commission has asked Vector to provide further information to assist it in assessing whether operational changes arising from recent changes in the health and safety regime have triggered a change event under clause 4.5.2 of the Electricity Distribution Services Input Methodologies Determination. Specifically, the Commission is seeking information:
  - a. explicitly setting out the chain of causation between the changes to the health and safety legislation (implemented via the Health and Safety at Work Act 2015) and the work practice changes that Vector has implemented; and
  - b. detailing the additional reasonable costs of meeting this legislative change, and therefore how these costs meet the 1% threshold requirement.

**Changes in regulator, legislation and regulatory approach**

3. In summary, Vector considers that changes in the health and safety legislation and the regulatory approach taken by Energy Safety represent a change in, or a new, legislative or regulatory requirement which requires the Commission to reopen the DPP.
4. There has been a series of changes in the regulatory approach to live work over recent years. The change in regulatory approach first started with the Department of Labour's attempt to prevent arc flashes, which raised concerns about live work and called into question whether the best solution was to carry out works in a de-energised state.
5. Subsequently, there have been a number of recent health and safety reforms. First, there has been a change in regulator. The Department of Labour was folded into MBIE, which in turn was superseded by WorkSafe New Zealand. Energy Safety (an operational unit of

WorkSafe) is now the relevant regulator, with responsibility for the administration and enforcement of the Electricity Act 1992 and regulations to support the safe supply and use of electricity.

6. Secondly, the Health and Safety in Employment Act 1992 was repealed, and replaced by the Health and Safety at Work Act 2015 (HSW Act). The new HSW Act caused the electricity supply industry to revisit risk management around live line work and other work more generally. Under the new HSW Act, businesses are required to eliminate risks to health and safety, so far as is reasonably practicable. If it is not reasonably practicable to eliminate risks to health and safety, a business must minimise those risks so far as is reasonably practicable. This risk management approach is also consistent with s169A(1)(b) of the Electricity Act and the Electricity (Safety) Regulations 2010.
7. Thirdly, there has been a change in regulatory approach. As a result of the legislative change, Energy Safety has adopted a policy of wanting to end live work. Energy Safety's principal technical advisor (Peter Morfee) has said that the overarching principle expressed by WorkSafe is that the presence of electrical energy at a level capable of causing injury "must be eliminated". Mr Morfee has said that supply quality measures are not an acceptable reason for doing live work.<sup>1</sup>
8. As a result, Energy Safety has been closely scrutinising live line work by utility companies and considering whether it is possible to "eliminate" risks to health and safety by disconnecting or isolating the supply of electricity so that there is no risk of exposure to live electricity. Energy Safety has increasingly focussed on the risks arising out of live line work and taken a strong position that work should be conducted in a de-energised state, wherever possible.
9. Energy Safety's position is that, in general, live line work or working adjacent to live components is intrinsically hazardous to the point that live line work should only be done, if at all, by exception. Energy Safety's position is that the efficiency of carrying out live work cannot override a business's health and safety obligations to eliminate risk by working in a de-energised state, even if the disruption in supply results in delays or inconvenience to customers. WorkSafe has taken this position in a number of investigations into workplace incidents and prosecutions.<sup>2</sup>

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<sup>1</sup> Neil Frank, "Crunch time coming for live HV work," *ElectroLink*, March-April 2017 at pp.12-15

<sup>2</sup> *WorkSafe NZ v Electrix Limited*, DC North Shore, CRI 2014-044-004650, 7 May 2015, at [5] per Judge Hinton; *WorkSafe NZ v Delta Utility Services Limited*, DC Queenstown, CRI 2015-059-377, 16 May 2016, at [21] per Judge Cook; *WorkSafe NZ v Northpower Limited and Wellington Electricity Lines Limited*, DC Wellington, CRI 2014-085-013982, at [9] and [10] per Chief Judge Jan-Marie Doogue.

### **Operational changes resulting from change in regulatory approach**

10. In response to this legislative change, and Energy Safety's change in regulatory approach, Vector has made a number of appropriate operational changes affecting the way Vector conducts works on its lines and how it responds to outages or downed lines.
11. While Vector does not accept that there should be a virtual ban on all live work, and considers that some work will still need to be done live, it now uses working de-energised as a starting point. Vector has developed a risk matrix and makes decisions on how to carry out work based on a thorough risk assessment and prioritisation process. This approach aligns with the risk management approach adopted by the new HSW Act and Electricity (Safety) Regulations 2010. Vector is happy to provide the Commission with further detail in relation to this risk matrix, should it so require.
12. Initially, Vector decided to stop live line work on its high voltage network for both planned and outage maintenance wherever possible, and to shut power off remotely when notified of low hanging or downed power lines, as a precaution until crews get to site to check for safety. Subsequently, Vector took the same approach with its low voltage network, so that most work is now carried out de-energised.
13. Vector has engaged Mr Tim Clarke, a Partner at Bell Gully, to assess Vector's new safety protocols and provide an opinion on whether Vector's new working practices were necessitated by the legislative change and if they accord with the response across the industry more broadly. Mr Clarke's letter (attached) finds that Vector's operational changes are consistent with other duty-holders efforts in taking significant steps to review and make changes in light of the new HSW Act.

### **Reasonable additional costs of meeting the legislative change**

14. Vector's new safety protocols have affected the duration and frequency of outages and Vector's ability to achieve its annual regulatory SAIDI and SAIFI targets. These changes have caused Vector to incur additional costs that will exceed 1% of the aggregated allowable notional revenue over the disclosure years of the current DPP.

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**In summary**

- 18. Vector considers that changes in the health and safety legislation and the regulatory approach taken by Energy Safety represents a change in, or a new, legislative or regulatory requirement which requires the Commission to reopen the DPP.
- 19. Our estimate indicates that this changed, or new, legislative or regulatory requirement has caused Vector to incur additional costs that over the disclosure years of the current DPP will exceed 1% of Vector's aggregated allowable notional revenue over the current DPP.



20. For these reasons, Vector considers that the change in regulatory requirement amounts to a change to the Input Methodologies, and that the Commission ought to exercise its discretion to reconsider the DPP in this case.

Yours sincerely

Vector Limited



**Richard Sharp**  
Head of Regulatory and Pricing

By email [REDACTED]

Vector Limited  
101 Carlton Gore Road  
Auckland

**Attention** Karl Vincent

FROM **Tim Clarke**

DATE 16 November 2017

Dear Karl

## **Amendments to the Default Price-Quality Path**

In support of Vector's request to the Commerce Commission to reopen the DPP, you have asked me to comment on Vector's operational changes which have been precipitated by the recent reform to the health and safety legislation. I set out below my comments, which are based on my experience in advising Vector and other companies on health and safety law, including the recent health and safety reform, as well as my understanding of overseas experience.

### **Operational changes**

I understand that Vector considers that recent health and safety reforms, including the change in the regulator from the Department of Labour to MBIE and then to WorkSafe, the repeal of the Health and Safety in Employment Act 1992 and enactment of the Health and Safety at Work Act 2015 (HSW Act), and the new approach taken by Energy Safety of wanting to end live work, when taken together represent a change in, or a new, legislative or regulatory requirement.

In response to this legislative change and Energy Safety's change in regulatory approach, Vector has made a number of operational changes affecting the way Vector conducts works on its lines and how it responds to outages or downed lines.

I understand that Vector does not accept that there should be a virtual ban on all live work, and that some work will still need to be done live, but it now uses working de-energised as a starting point. Vector has developed a risk matrix and makes decisions on how to carry out work based on a risk assessment and prioritisation.

Initially, Vector decided to stop live line work on its high voltage network for both planned and outage maintenance wherever possible, and to shut power off remotely when notified of low hanging or downed power lines, as a precaution until crews get to site to check for safety. Subsequently, Vector took the same approach with its low voltage network, so that most work is now carried out de-energised.

### **Vector has acted prudently and reasonably**

In my view, Vector has acted prudently and in a responsible manner in making significant operational changes to its business and adopting new safety protocols.

More fundamentally, Vector has sought to do "the right thing" to protect its workers from harm. Based on my experience of working with Vector since 2013, I believe that Vector had genuine concerns about the risks posed by carrying out live line work, and wished to consider whether the best solution was to carry out works in a de-energised state, wherever possible.

Based on my health and safety experience across different industries, Vector's operational changes are consistent with other duty-holders efforts in taking significant steps to review and make changes in light of the new HSW Act.

Please feel free to contact me should you wish to discuss.

Yours faithfully  
**Bell Gully**



**Tim Clarke**  
Partner

21 December 2017

Richard Sharp  
Regulatory Manager  
Vector

By email

**Re: Reply to Vector's request to reconsider the default price-quality path**

1. This letter is in response to your letter of 17 November 2017 that requested the Commission reconsider Vector's default price-quality path. We acknowledge the additional information you provided supporting the request.
2. We do not consider the provided information is sufficient to warrant further consideration of your request. This letter seeks to provide some guidance on the level of information required by the Commission to properly evaluate this reopener request.

**Framework we're operating within under the input methodologies**

3. There are six key considerations the Commission needs to satisfy itself with for the purposes of this request.
  - 3.1 Has there been a new or changed regulatory requirement?
  - 3.2 Was the regulatory or legislative requirement new or changed as of the current regulatory period?
  - 3.3 Was the impact on SAIDI and SAIFI and/or costs factored into the DPP?
  - 3.4 Was it necessary to incur additional costs as a result of the new or changed regulatory or legislative requirements?
  - 3.5 What were the incremental costs incurred as a result of the new or changed legislative or regulatory requirements and were these greater than 1% of the price path?
  - 3.6 Were all of the incremental costs incurred as a result of the new or changed regulatory or legislative requirements reasonable?

**What the Commission is looking for**

4. In order to properly assess this reopener the Commission would be looking for the following information:

- 4.1 Point to precisely what the changed or new regulatory or legislative requirement that Vector relies on is and where it is provided for (ie, any provisions in any legislation or codified regulation).
  - 4.1.1 For example, if it is the Health and Safety at Work Act 2015 on which you rely, please point to the particular provision you consider provides for changes to live line work requirement, and how this differs from the previous legislation. In addition, please specify what you consider the new requirement to be.
  - 4.1.2 Your letter refers to various matters under the heading “Changes in regulator, legislation and regulatory approach” and it is not entirely clear to us what it is you are relying on as being a new or changed regulatory or legislative requirement. For example, you refer to matters which are clearly not changed regulatory or legislative requirements (eg, the change of regulator, or statements by an Energy Safety employee) as well as matters that appear to have occurred in the previous regulatory period (eg, the Department of Labour’s attempts to prevent arc flashes).
- 4.2 Any information demonstrating the new or changed regulatory requirement you identify necessitates the additional costs.
- 4.3 More detailed breakdown of the incremental costings is required. Table 1 in your letter documenting [REDACTED] additional costs lacks sufficient detail and contains assumptions the Commission is uncomfortable with to make a proper assessment.
- 4.4 Internally produced information combining Vector’s two contractors would be more appropriate. This would remove the need for assumptions to build up the costs and enable the outputs to be director certified.
- 4.5 The spend categories used are appropriate and align with ID but descriptions as to what falls into each spend category is necessary.
- 4.6 Any information supporting the reasonableness of the amount of additional costs. For example, evidence of consideration of alternatives.
- 4.7 The information should support and make it clear as to what time period Vector believes they have been adversely affected by the new regulations.
- 4.8 Please also clarify the remedy Vector is seeking as well as what years any price path or quality standard modification would apply. The reopener cannot be retrospective.
- 4.9 Information about the SAIDI and SAIFI impact of the policy change.

**Explanation of process**

5. We are required to consult when reconsidering a price-quality path. We would therefore expect a minimum 12 week timeframe from receipt of appropriate information from Vector to reaching a final decision. This timeframe could extend longer, for example, if other businesses also want to apply.
6. Given these minimum timeframes and an assumption that any price changes would need to be notified to retailers by the end of February at the latest, we believe it is now too late for any price change in the 2018/2019 year.

Yours sincerely

Matthew Lewer

Manager, Price Quality Regulation  
Regulation Branch

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29 March 2018

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Dear Matthew

**Request to reconsider the default price quality path**

I am writing to follow up our meeting last Tuesday 20 March 2018 and your letter dated 21 December 2017 relating to Vector's request to reopen the Electricity Distribution Services Default Price-Quality Path (**DPP**).

In your letter, you identified additional information the Commission is looking for in order to further assess Vector's request to reopen the DPP on the grounds that there has been a change event. Further to your request we have sought advice from Bruce Stewart QC in relation to whether a change event has occurred as defined in the 2012 IM Determination and we enclose a copy for your consideration on a confidential basis.

We would welcome the opportunity to discuss our request to re-open the DPP further once you have had the opportunity to consider this.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Mark Toner".

**Mark Toner**  
General Manager – Public Policy and Regulatory Counsel

**Encl.**

Letter from R B Stewart QC – Default Price-Quality Path – Change Event

29 March 2018

Richard Sharp  
Head of Regulatory and Pricing  
Vector Limited  
Auckland

Email: [REDACTED]

Dear Richard

### **Default Price-Quality Path – Change Event**

1. You have asked whether the enactment of the Health and Safety at Work Act 2015 (**HSW Act**) is a “change event” as defined in the *Electricity Distribution Services Input Methodologies Determination 2012* (the **IM Determination**). The definition of change event includes a costs threshold, which Vector is continuing to analyse. For the reasons below, I consider that the other elements of the definition are clearly satisfied. The information Vector has already provided to the Commission suggests that the costs element will also be satisfied. I have prepared these reasons with Stephen Hunter of Shortland Chambers. This letter records our joint view.

### **The DPP Determination**

2. Vector’s electricity lines services are subject to default price-quality path (**DPP**) regulation under Part 4 of the Commerce Act 1986. The current DPP determination applies for the 2015 to 2020 regulatory period (the **DDP Determination**). The applicable input methodologies are those in the IM Determination.
3. The DPP Determination sets maximum allowable revenue for electricity distribution businesses (**EDBs**) and applies the following quality standards:
  - a. a maximum limit on the duration of outages experienced by consumers, determined by reference to the system average interruption duration index (**SAIDI**); and
  - b. a maximum limit on the frequency of outages experienced by consumers, determined by reference to the system average interruption frequency index (**SAIFI**).
4. Clause 4.5.4(1)(f) of the IM Determination provides that the Commission may reconsider a DPP Determination if a change event has occurred. A change event is defined in clause 4.5.2 as a changed or new “legislative or regulatory requirement” applying to the EDB which is subject to the DPP Determination. The effect of the requirement must take place during the current regulatory period; it must not explicitly or implicitly be provided for in the DPP Determination; and it must “necessitate incursion” of a specified level of additional cost.



## The HSW Act

5. The HSW Act was enacted in September 2015 and came into effect (for the most part) in April 2016. It arose from the recommendations of the Royal Commission on the Pike River Coal Mine Tragedy and the Independent Taskforce on Workplace Health and Safety. It is very clear from the historical and legislative background that the Act was intended to effect a profound change to New Zealand's workplace health and safety regulation.
6. There is extensive evidence in the legislative history and related official publications of the Act's intended significance. Some examples follow.
  - a. At its first reading in Parliament, the then Minister of Labour (Hon Simon Bridges) described the Act as "*the most significant law reform in this area for 20 years*". These comments were endorsed by the then shadow Minister, Darien Fenton. MP Mike Sabin described the Act as giving "*effect to an entirely different regulatory regime and approach*".<sup>1</sup>
  - b. At the second reading, the then Minister for Workplace Relations and Safety (Hon Michael Woodhouse) described the Act as "*the biggest reform in health and safety in more than 20 years*."<sup>2</sup>
  - c. MBIE's Regulatory Impact Statement (**RIS**) described the Act as "*step-change*". The RIS provides a frank assessment that the Act was intended to change workplace behaviour and would cause higher (but necessary) compliance costs for business.<sup>3</sup>
  - d. A relevant Cabinet paper describes the Act as "*a once in a lifetime opportunity to take an effective, systems-wide approach to workplace health and safety in New Zealand*."<sup>4</sup>
  - e. WorkSafe's guide to the Act states that "*New Zealand underwent its most significant workplace health and safety reforms in 20 years resulting in the Health and Safety at Work Act 2015 (HSWA) and the formation of WorkSafe New Zealand (WorkSafe)*."
7. Turning to the statute itself, the HSW Act:
  - a. introduces the concept of a person conducting a business or undertaking (**PCBU**) and imposes duties in respect of workplace health and safety on company directors (ss 17 and 18);
  - b. adopts a new risk management approach and requires persons who are subject to duties under the Act to "*to eliminate risks to health and safety, so far as is reasonably practicable*" (s 30);
  - c. requires what is "*reasonably practicable*" to be determined by reference to a range of factors, including "*the degree of harm that might result from the hazard or risk*" (s 22) – in other words, the greater the degree of potential harm, the greater the efforts that should be made to eliminate it;

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<sup>1</sup> Hansard: Volume 697; page 16705.

<sup>2</sup> Hansard: Volume 707; page 5520.

<sup>3</sup> Regulatory Impact Statement, Improving New Zealand's Workplace Health and Safety System.

<sup>4</sup> *Improving Health and Safety at Work: Overview*, Paper for the Cabinet Economic Growth and Infrastructure Committee, page 1.

- d. extends the traditional definition of “employee” to “worker”, which includes contractors and subcontractors (s 19); and
  - e. introduces a more stringent penalty regime (ss 47 to 49).
8. In summary, the HSW Act requires businesses to identify the risks that apply in their workplaces; to assess the likelihood of those risks materialising and the consequences if they do; and to take steps to eliminate the risks.
9. The HSW Act also created a new regulator – WorkSafe – to promote health and safety in the workplace and to enforce the new regime.

### Vector’s response

10. There is in my view no doubt that the HSW Act has put in place new legislative and regulatory requirements which apply to Vector. I understand that Vector introduced two significant operational changes in order to comply with those requirements.
- a. Vector has adopted a new “live-line” works policy. This requires lines to be de-energised in the vast majority of cases before work on the lines is undertaken.
  - b. Vector has adopted a new policy of remotely de-energising downed lines before an on-site investigation is conducted.
11. Vectors’ 2016 annual report specifically identified Vector’s cessation of live-line work as a response to the HSW Act.<sup>5</sup> In the language of the Act, Vector has decided to cease most live-line work because this is a “reasonably practicable” means of eliminating the risk caused by such work.
12. As noted above, what is reasonably practicable must be assessed by reference to, amongst other things, the degree of harm that might result from the hazard or risk. The business must also consider the “*the availability and suitability of ways to eliminate or minimise the risk*”. In the case of live-line work the degree of harm that might result is of the most serious kind, namely major injury or death. There is an available and suitable way to minimise the risk, by de-energising the line. In my view the approaches that Vector has taken – to cease most live-line work and de-energise downed lines pending on-site investigation – are ones that are required by the HSW Act.
13. Vector’s approach is consistent with the District Court’s recent decision in *Worksafe New Zealand v Dimac Contractors Limited* [2017] NZDC 26648. The Judge commented that the effect of the HSW Act was to require the contractor “*to give its workers, so far as reasonably practicable, the highest level of protection available from the risk of exposure to live electricity*”.<sup>6</sup> Furthermore, Worksafe, and its Energy Safety operation, have stated their opposition to live-line work.<sup>7</sup>
14. In respect of Vector’s decision to de-energise downed lines before an on-site investigation is conducted, I note that Vector also owes duties to the public to eliminate risks at its workplace. The definition of workplace in s 20 of the HSW Act is broad enough to cover Vector’s lines.

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<sup>5</sup> Vector 2016 Annual Report at page 6.

<sup>6</sup> At [28].

<sup>7</sup> Neil Frank, “Crunch time coming for live HV work”, *ElectroLink Magazine*, March-April 2017 at pages 12 to 15.

15. In the United Kingdom, the company that maintains the power distribution supplies to London, the South East and East of England (UK Power Networks (Operations) Ltd) was recently successfully prosecuted after it failed to de-energise a line immediately upon being notified that it was down. A jogger was electrocuted during the short delay before a technician arrived on site. The UK regulator commented that “*Distribution network operators have an absolute duty to ensure that they do everything reasonably practicable to ensure the health and safety of members of the public who may be put at risk by the operation of their undertakings.*”<sup>8</sup>
16. In summary, Vector itself, the Court and WorkSafe have all linked the need to cease live-line work to the enactment of the HSW Act.<sup>9</sup>

## Costs

17. Having regard to the above, and as noted earlier, my very clear view is that the HSW Act represents a new legislative and regulatory requirement applying to Vector. The effect of the requirement has taken and continues to take place during the current regulatory period. There is no suggestion that the HSW Act is explicitly or implicitly provided for in the DPP Determination.
18. The first three criteria for a change event are therefore satisfied. The remaining requirement is that the change “*will necessitate incursion*” of a defined level of costs.
19. Section 30 of the HSW Act provides that a business must eliminate risks to health and safety if it is reasonably practicable to do so. Where there is an extreme degree of harm associated with the risk and an available and suitable way of minimising it, the “reasonably practicable” test will almost certainly be satisfied.
20. Based on the materials I have read and the views of Vector (New Zealand’s largest lines company), the Court, and WorkSafe, I consider that Vector is required to minimise the risk to life associated with live-line work and that the cessation of most live-line work is an available and suitable way of doing this. In these circumstances, it is necessary for Vector to incur the costs of ceasing live-line work. This element of the test is satisfied.
21. Clause 4.5.2(e) of the IM Determination sets a costs threshold of one percent of revenue before the definition of change event is met. Vector’s assessment as set out in its letter to the Commission of 17 November 2017 is that its additional costs will exceed this threshold. As I understand it, Vector’s assessment is based solely on the direct costs associated with new safety procedures brought about by the HSW Act. There may be other costs at an organisational level which relate to the operation of the regulated business and which are therefore also relevant.
22. Vector’s assessment does not include what I understand to be the very substantial additional costs it would be required to incur to meet the current SAIDI and SAIFI standards. Clause 4.5.5 of the IM Determination allows the Commission to reconsider both the price path and quality standards. The most sensible way of addressing these potential costs is likely to be through a reset of the relevant quality standards in the DPP Determination.

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<sup>8</sup> See <https://www.shponline.co.uk/uk-power-networks-fined-1m-after-runner-electrocuted>

<sup>9</sup> See also the sentencing decision of *Worksafe New Zealand v Northpower Ltd* [2017] NZDC 17527 where the Court summarised at [18] the level of physical and emotional harm suffered by the victim who was seriously injured while performing work over live electricity terminals.

23. Vector is currently carrying out additional work to provide the Commission with greater detail around the costs it has incurred. As noted above, I have seen the information Vector has already provided to the Commission in its letter of 17 November 2017. The costs referred to in that letter appear reasonable and to pass the one percent threshold, meaning that the definition of change event in the IM Determination is fully satisfied.

### **Vector's remedies**

24. The IM Determination and the DPP Determination were made by the Commission pursuant to its powers under the Commerce Act. As noted above, clause 4.5.4 of the IM Determination reserves to the Commission the ability to reconsider the DPP Determination in specified circumstances. One of these circumstances is where the Commission considers or is satisfied by Vector, on application, that a change event has occurred.
25. In deciding whether to reconsider the DPP Determination, the Commission is exercising a statutory discretion. It must exercise the discretion according to law. If the Commission rejects Vector's application based on a wrong interpretation of the IM Determination, or because of some irrelevant consideration, or irrationally, then its decision will be amenable to judicial review.
26. In this regard, I do not consider that the availability of the customised price-quality path mechanism is a basis for the Commission to refuse to reconsider the DPP Determination. The Commission should make its decision on reopening the DPP Determination in accordance with the criteria it has established in the IM Determination.<sup>10</sup>
27. More broadly, I would expect the Commission to align itself with Parliament's clear intention to effect a major improvement in New Zealand's work place safety. The Commission is in a position to influence the behaviour of employers such as EDBs. It seems to me contrary to the purpose of the HSW Act to penalise Vector for taking proactive steps to reduce the risk of serious injury or death to its workers.
28. Please let me know if I can be of further assistance.

Yours faithfully



**R B Stewart QC**

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<sup>10</sup> See discussion in *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [1900] to [1908].