

PAUL WICKS QC

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Dear Robert

**RE: OPINION ADVICE – VECTOR LIMITED
REQUEST TO RE-OPEN DEFAULT PRICE-QUALITY PATH**

1. I am asked to provide advice in respect of legal questions arising from Vector Limited (“**Vector**”) requesting the Commission re-open its electricity distribution services default price-quality path (“**DPP**”). I am advised Vector seeks re-consideration of the DPP on the basis of new health and safety policies. Vector considers this to have been necessitated by legislative change. The legislative change relied upon is the repeal of the Health and Safety in Employment Act 1992 and the commencement of the Health and Safety at Work Act 2015.
2. Vector seeks a reconsideration under the provisions of the electricity distribution services input methodologies, which allow for the price path to be re-opened for a “change event”, defined as:¹

Change event means –

- (a) change in a: or
- (b) a new,

legislative or regulatory requirement applying to an EDB subject to a DPP the effect of which –

- (c) must take place during the current regulatory period; is not explicitly or implicitly provided for in the DPP; and
- (d) will necessitate incursion of costs in response, which costs, over the disclosure years of the DPP remaining on and after the date at which they are reasonably incurred, have an impact on the price path by an amount at least equivalent to 1% of the aggregated allowable notional revenue for the disclosure years of the DPP in which the cost was or will be incurred.

¹ Electricity Distribution Services Input Methodologies Determination 2012, consolidated as of 3 April 2018 (as applicable to the current DPP in accordance with clause 1.1.1), Appendix 4 clause 4.5.2

3. There are two new health and safety policies introduced by Vector which I am referred to:
 - 3.1 The first is a new 'Live-Lines' works policy. That 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.
 - 3.2 The second change is the introduction of a new policy (which I refer to as the 'downed-lines' policy). This policy relates to remote de-energising of low or downed lines. The policy requires lines to be de-energised remotely upon receiving a reported low-lines before an onsite investigation is conducted.
4. I am asked to provide the Commission with advice as to the following legal questions:
 - 4.1. With respect to Vector's live-line policy:
 - 4.1.1 Are the practices described in Vector's live-lines policy practices that it is necessary for Vector to undertake, pursuant to health and safety law? If so, please explain how health and safety law necessitates these practices.
 - 4.1.2 Does any such requirement arise from a 'legislative or regulatory requirement' that is new or has changed?
 - 4.1.3 If there is a new or changed regulatory or legislative requirement, when did the change or introduction occur?
 - 4.1.4 If there is a new regulatory or legislative requirement, how does it differ from the prior requirement?
 - 4.2. With respect to Vector's downed-lines policy:
 - 4.2.1 Are the practices described in Vector's downed-line policy practices that it is necessary for Vector to undertake pursuant to health and safety law? If so, please explain how health and safety law necessitates these practices.
 - 4.2.2 Does any such requirement arise from a 'legislative or regulatory requirement' that is new or has changed?
 - 4.2.3 If there is a new or changed regulatory or legislative requirement, when did the change or introduction occur?
 - 4.2.4 If there is a new regulatory or legislative requirement, how does it differ from the prior requirement?

5. The Commission seeks, ideally, a degree of certainty as to whether Vector's practices are required by health and safety law, but it appreciates I may not be in a position to provide such certainty. I am therefore asked whether, in my view, the degree of certainty as to whether Vector's practices are required by health and safety law, could be framed as a question of law with respect to which the Commission could state a case for the opinion of the High Court under s 100A of the Commerce Act 1986.
6. I am further asked that if my conclusion is that either the live-lines policy or the down-lines policy is not required of Vector by law, to express my view from a legal perspective as to whether those policies are reasonable responses to health and safety law.
7. I have conferred with Victoria Casey QC in the preparation of this advice, and she generally agrees with my analysis and supports my conclusions.

The Health and Safety at Work Act 2015

8. The Health and Safety at Work Act 2015 ("**the HSW Act**") was enacted in September 2015 and came into force in April 2016, along with the regulations made under the HSW Act.
9. The coming into force of the HSW Act has been described as amounting to significant law reform in health and safety in this country. Regardless of statements as to the nature or degree of the legislative reform through the enactment of the HSW Act it is necessary in providing this advice to identify what new or changed health and safety practices have arisen following the coming into force of the HSW Act and the Regulations made under that Act compared to what was required under the Health and Safety in Employment Act 1992 ("**the HSE Act**") and Regulations made under the HSE Act.
10. It is then necessary in relation to any such changes, to consider how they differ from previous requirements.

Comparative analysis of the Health and Safety in Employment Act 1992 and the Health and Safety at Work Act

The Health and Safety in Employment Act 1992

11. The general duty on employers in the HSE Act was to take "all practicable steps" to ensure the safety of employees while at work.²
12. "All practicable steps" required all steps to achieve the result that was "reasonably practicable to take in the circumstances" having regard to, among other things, the nature and severity of the harm that may be suffered if the result was not achieved, the current state of knowledge about the likelihood of that harm and the means available to achieve the result (and the cost of those means). All practicable steps required only those steps in respect of circumstances that a person "knew or ought reasonably to know about".³

² Section 6 of the HSE Act

³ Section 2A of the HSE Act

13. The HSE Act required an employer to systematically identify hazards in the workplace.⁴ A “hazard” was defined as something that was “an actual or potential cause or source of harm” and included a person’s behaviour. “Harm” was separately defined to mean “illness, injury or both and includes physical or mental harm caused by work-related stress”. A “significant hazard” was defined as an “actual or potential cause or source of serious harm”.⁵
14. Where there was a “significant hazard”, the employer was then required to take all practicable steps to eliminate it,⁶ where elimination was impracticable, to isolate the hazard⁷ and if neither elimination nor isolation was possible, to take all practicable steps to minimise the likelihood that the hazard would be a cause or source of harm to employees.⁸ That included a requirement to make available suitable protective equipment and to monitor exposure to the hazard.

The Health and Safety at Work Act 2015

15. The primary duty of care on a person conducting a business or undertaking (“PCBU”) is to “ensure, so far as is reasonably practicable, the health and safety of workers while at work and of other persons at the workplace”, the provision and maintenance of a work environment that is without risks to health and safety, and the provision and maintenance of safe structures.⁹
16. Equivalent duties are imposed on a PCBU that manages or controls a workplace,¹⁰ manages fixtures, fittings or plant at a workplace,¹¹ or who designs,¹² manufactures,¹³ imports,¹⁴ supplies¹⁵ or installs¹⁶ plant, substances or structures.
17. A duty imposed under the HSW Act requires the elimination of risks to health and safety “so far as is reasonably practicable”, and if it is not so reasonably practicable then to minimise those risks.¹⁷ “Reasonable practicability”, in relation to a duty, means “that which is, or was, at a particular time reasonably able to be done in relation to ensuring health and safety” taking into account and weighing up all relevant matters including the likelihood of the hazard or risk eventuating, the degree of harm that might result from the hazard or risk, the person's state of knowledge or what they reasonably ought to know as to the hazards and risks which exist, the availability and suitability of the ways to eliminate or minimise the risk and the cost to do so.¹⁸

⁴ Section 7 of the HSE Act

⁵ Section 2 of the HSE Act

⁶ Section 8 of the HSE Act

⁷ Section 9 of the HSE Act

⁸ Section 10 of the HSE Act

⁹ Section 36 of the HSW Act

¹⁰ Section 37 of the HSW Act

¹¹ Section 38 of the HSW Act

¹² Section 39 of the HSW Act

¹³ Section 40 of the HSW Act

¹⁴ Section 41 of the HSW Act

¹⁵ Section 42 of the HSW Act

¹⁶ Section 43 of the HSW Act

¹⁷ Section 30 of the HSW Act

¹⁸ Section 22 of the HSW Act

18. The HSW Act then requires a PCBU to identify hazards that could give rise to reasonably foreseeable risks to health and safety.¹⁹ A “hazard” is defined to include a person’s behaviour where that behaviour “has the potential to cause death, injury or illness to a person”.²⁰ “Risk” is not defined, but logically must be the possibility of death, injury or illness to a person.
19. If it is not reasonably practicable for a PCBU to eliminate risks to health and safety, “control measures” must be implemented to “minimise” those risks.²¹ Those control measures are taking actions that are the most appropriate and effective taking into account the nature of the risk by substituting the hazard with something that gives rise to a lesser risk, isolating the hazard, implementing “engineering controls” (i.e. a mechanical device or process). If the risk remains, “administrative controls” must be implemented (i.e. a work process or procedure), and finally by ensuring the provision and use of personal protective equipment.
20. Additional “due diligence” obligations fall on “officers” of a PCBU. “Officers” of PCBUs are defined to include directors if the PCBU is a company, but also include any person occupying a position in the PCBU that enables that person to exercise significant influence over the management of the business of the PCBU (unless that person simply advises a director).²²
21. If the PCBU has a particular duty which arises under the Act, an officer of the PCBU is required to exercise “due diligence” to ensure that the PCBU complies with that duty. In discharging that duty, an officer must exercise the care, diligence, and skill that a reasonable officer would exercise in the circumstances.²³
22. “Due diligence” requires an officer of a PCBU to take reasonable steps to:²⁴
 - acquire and keep up to date knowledge of health and safety matters;
 - gain an understanding of the risks and hazards associated with the conduct of the business;
 - ensure and verify the PCBU has, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety;
 - ensure and verify the PCBU has appropriate resources and processes for responding to information regarding incidents, hazards and risks in a timely way; and
 - ensuring and verify the PCBU has, and implements, processes for complying with duties under the HSW Act.

¹⁹ Reg 5 of the HSW (General Risk and Workplace Management) Regulations 2016

²⁰ Section 16 of the HSW Act

²¹ Reg 6 of the HSW (General Risk and Workplace Management) Regulations 2016

²² Section 18 of the HSW Act

²³ Section 44 of the HSW Act

²⁴ Section 44(2) of the HSW Act

23. Officers therefore have a positive obligation under the HSW Act to be proactive when it comes to matters of health and safety; an obligation which they did not specifically have before under the HSE Act. Under the HSE Act, officers, directors and agents could be prosecuted where they directed, authorised, assented to, acquiesced or participated in a breach by a corporation of its obligations under the HSE Act.²⁵ However, such liability usually resulted from a failure by the employer (not the officer) to take all reasonably practicable steps under the HSE Act.

Regulations made under the Acts

24. Large parts of the 2016 Regulations have been lifted and transplanted from the Health and Safety in Employment Regulations 1995 (the "1995 Regulations"). Again, while there is some elaboration and technical changes in the 2016 Regulations, they are subtle changes and not in reality significantly different to the 1995 Regulations.

Electricity Industry Specific Health and Safety Changes

25. For completeness, I note that changes to the Electricity Act 1992 and to the Electricity (Safety) Regulations 2010 arising from the HSW Act were primarily to change the requirements to take "all practicable steps" to take "reasonably practicable" steps as now set out in the HSW Act, and to change necessary definitions arising out of the HSW Act.²⁶ In the same way, electricity generators and electricity distributors still are required to implement and maintain safety management systems to prevent the electricity supply system from presenting a significant risk of serious harm to a member of the public or significant property damage.²⁷

Summary of Essential Relevant Changes in Health and Safety Practice

26. The essential changes between the HSE Act and the HSW Act can be summarised as follows:
- 26.1 The overarching standard has changed from taking "all practicable steps to ensure the safety of workers" to taking "reasonably practicable steps to eliminate risks to health and safety".
 - 26.3 The actions arising from the duties have changed from the identification of "hazards" to the identification of "risks", which requires the identification of "hazards that could give rise to reasonably foreseeable risks to health and safety".
 - 26.3 The subsequent actions arising following the identification of "hazards" ("hierarchy of controls") have changed from the elimination, isolation or minimisation of hazards to, following the identification of "risks" requiring the substitution of a hazard with a lesser risk, isolation of the hazard, implementation of "engineering controls", implementation of "administrative controls", and the provision and use of personal protective equipment.

²⁵ Section 56 of the HSE Act

²⁶ Schedule 5 of the HSW Act

²⁷ Section 61A of the Electricity Act 1992

- 26.4 The most important additional requirement is a “due diligence” requirement for “officers”. If the PCBU has a particular duty which arises under the HSW Act, an officer of the PCBU is required to exercise “due diligence” to ensure that the PCBU complies with that duty. In discharging that duty, an officer must exercise the care, diligence, and skill that a reasonable officer would exercise in the circumstances.
27. In summary, therefore, while there have been definitional and technical changes in terms of duties and applicable standards, in reality, these are subtle. The overarching approach to health and safety is not really significantly different under the HSW Act to what it was under the HSE Act.
28. This would be particularly so for an employer or PCBU who already had comprehensive health and safety systems and processes etc under the HSE Act. Employers who were identifying hazards systematically would no doubt have had in mind the various risks that gave rise to those hazards. Employers who were eliminating, isolating and minimising hazards would no doubt have also been considering “engineering” and “administrative” controls, and likely implementing them when they could do practically do so.

Advice

Vector’s live-line policy

Are the practices described in Vector’s live-lines policy practices that it is necessary for Vector to undertake, pursuant to health and safety law? If so, how does health and safety law necessitate these practices.

29. Bearing in mind the duty imposed under the HSW Act to manage risks then the practices described in Vector’s live-lines policy, then practices to address these risks are required. The HSW Act does not specify what those practices must be, but if the practices in the policy are practices that eliminate or minimise the risk to health and safety, so far as is reasonably practicable, they will be within the scope of what the legislation requires.
30. Health and safety law, assuming the live-lines policy does in fact eliminate or minimise the risk to health and safety, necessitates the live-line policy practices (or other measures that similarly address these risks) through section 36 of the HSW Act.
31. Section 36 of the HSW Act sets out the primary duty of care on a PCBU to ensure to “ensure, so far as is reasonably practicable, the health and safety of workers while at work and of other persons at the workplace”, the provision and maintenance of a work environment that is without risks to health and safety, and the provision and maintenance of safe structures.
32. Section 22 of the HSW Act defines what is “reasonably practicable”, as that which is reasonably able to be done in relation to ensuring health and safety. To determine that which is reasonable able to be done requires a determination to be made by taking into account and weighing up “all relevant matters”. Section 22 sets out an inclusive list of “all relevant matters and provides:

22 Meaning of reasonably practicable

In this Act, unless the context otherwise requires, reasonably practicable, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including-

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might arise from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about-
 - (i) the hazard or risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

33. I am unable to conclude on the information I have received in preparing this advice whether the Vector live-lines policy is necessary under health and safety law. It is my view that, subject to a definitive position being able to be taken that the Vector live-lines policy is an available and suitable way to eliminate or minimise the risk to safety of working with live lines that is not at a cost grossly disproportionate to the risk, then the Vector live-lines policy (or other measures that similarly address these risks) will be necessary under health and safety law.
34. I am unable to address the live-lines policy in terms of section 22 as I have not been provided with either of the two Vector policies or any relevant risk matrix. Further, I do not have sufficient information relevant to the question of whether the cost of the live-lines policy is grossly disproportionate to the risk.

Does any such requirement arise from a "legislative or regulatory requirement" that is new or has changed?

35. There is no question that the change in legislation by the repeal of the HSE Act and commencement of the HSW Act was intended to have an improved effect on compliance with health and safety law. However, the duties under health and safety law haven't changed materially and as I have identified in my earlier analysis of the HSE and HSW Acts.
36. The Electricity Distribution Services Input Methodologies Determination 2012 defines a change event as being "change in a; or a new legislative or regulatory requirement". The phrase "legislative or regulatory requirement" refers to the requirements of legislation or regulations as to health and safety duties of the EDB. A change in the regulator, or a change in the regulators approach to health and safety obligations does not constitute a new or changed legislative or regulatory requirement.

37. Accordingly, in my view the requirement for the practices described in the Vector live-lines policy do not arise from a legislative or regulatory requirement that is new. Neither in my view does it arise from a changed legislative or regulatory requirement.

If there is a new or changed "legislative or regulatory requirement" when did the change or introduction occur?

38. For the reasons set out above there has not been any new or changed "legislative or regulatory requirement" to give rise to a change event as defined in the Electricity Distribution Services Input Methodologies Determination 2012.

Vector's Downed-Lines policy

Are the practices described in Vector's downed-lines policy practices that it is necessary for Vector to undertake, pursuant to health and safety law? If so, please explain how health and safety law necessitates these practices.

39. The same analysis as set out above at [29] – [34] applies to the downed-lines policy, which similarly under the HSW Act will be a required practice, if a definitive position is able to be taken that the Vector downed-lines policy is an available and suitable way to eliminate or minimise the risk to safety that is not at a cost grossly disproportionate to the risk.

Does any such requirement arise from a "legislative or regulatory requirement" that is new or has changed?

40. The same analysis as set out above applies to the downed-lines policy, which also in my view does not arise from a legislative requirement that is new, or from a changed legislative requirement.

If there is a new or changed "legislative or regulatory requirement" when did the change or introduction occur?

41. In my view there has not been any new or changed legislative or regulatory requirement.

The question of certainty of Vector's practices as a requirement of health and safety law.

42. I am not in a position to provide a sufficient degree of certainty as to whether Vector's particular practices are a requirement of health and safety law. I have not been provided with either of the two Vector policies or relevant risk matrix. Further, I do not have with sufficient information relevant to the question of whether the cost of the live-lines policy is grossly disproportionate to the risk.

43. In light of my concluded view the Vector practices do not arise from a new or changed legislative requirement the question of the certainty of Vector's practices as a requirement of health and safety law is academic in so far as the primary advice sought by the Commission is concerned.

44. In my view, it would in any event be difficult to frame the question of certainty of Vector's practices as a requirement of health and safety law as a question of law for the opinion of the High Court under s100A of the Commerce Act 1986. Whilst I have not received a copy of the Vector policies it would seem highly likely the Vector policies, even if by exception only, provide for variable approaches dependent on the particular risk matrix factors. The variations available on a case by case basis would preclude in my view the Court being able to answer a question of law as to the requirement for the practices under health and safety law.

Are the Live-Lines and Downed-Lines Policies reasonable responses to health and safety law?

45. I am asked that if either the Live-Lines Policy or the Downed-Lines policy is not required of Vector by law whether I have a view from a legal perspective as to whether those policies are reasonable responses to health and safety law.

46. I have been unable to conclude if either policy is required by law, however provided the policies are an available and suitable way to eliminate or minimise the risk to safety of working with live lines that is not at a cost grossly disproportionate to the risk, the policies will be within the scope of what is required by law.

Other Comments

47. While the HSW Act was clearly intended to improve compliance with health and safety requirements, the fundamental obligations on employers have not changed. Vector's policies, if appropriate to meet the requirements under the HSW Act, would also have been appropriate to meet the requirements under the former HSE Act. In other words, the change in legislation has not generated any substantive change in what an employer is required to do to address workplace hazards.

48. Placing this in the context of the re-opener provision in the input methodology set out above, the HSW Act did not "necessitate" Vector's new policies. Vector was under effectively the same obligations under the prior legislation: at most the new Act may have provided the practical incentive for Vector to review and improve its practices.

Yours faithfully



Paul Wicks QC