

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV 2022-404-001495  
[2023] NZHC 1075**

UNDER the Commerce Act 1986 Parts 4 and 6

BETWEEN COMMERCE COMMISSION  
Plaintiff

AND VECTOR LIMITED  
Defendant

Hearing: 19 April 2023

Appearances: E J Watt & Z G Mackay for the Plaintiff  
S M Hunter KC, S D J Peart & S J Thomson for the Defendant

Judgment: 5 May 2023

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**JUDGMENT OF TAHANA J**

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*This judgment was delivered by me on 5 May 2023 at 4.00pm  
Pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

Solicitors/Counsel:  
Crown Solicitors, Meredith Connell, Wellington  
Chapman Tripp, Auckland  
Stout Street Chambers, Wellington  
Shortland Chambers, Auckland

## Introduction

[1] The Commerce Commission (the Commission) claims that Vector Ltd (Vector) has contravened the quality standards prescribed under determinations made under s 52P of the Commerce Act 1985 (the Act) for the 2017 to 2020 (inclusive) assessment periods. Vector admits the contraventions. The parties have agreed a penalty of \$1,158,400.

[2] In *Commerce Commission v Aurora Energy Ltd (Aurora)* the Court noted that the established approach when a penalty is agreed is for the Court to impose the agreed penalty so long as it falls within an appropriate range that satisfies the objects of the Act and the circumstances of the case.<sup>1</sup> The Court noted that this is because of the interests of the parties and the public in promoting a resolution and thereby avoiding costly, time-consuming and uncertain litigation.<sup>2</sup>

[3] Vector has previously contravened quality standards for the 2015 and 2016 assessment periods. In 2020, Vector was ordered to pay an agreed pecuniary penalty of \$3,575,000 in relation to those contraventions.<sup>3</sup> This proceeding concerns subsequent contraventions in the 2017 to 2020 assessment periods. The parties agree that it is appropriate that the penalty for the contraventions during these subsequent assessment periods reflects the totality of Vector's contraventions in the assessment periods from 2015 to 2020. I therefore also need to consider totality and the relevance of the previous pecuniary penalty when determining whether the agreed penalty is within an appropriate range.

## Quality standards

[4] Vector is a distributor of electricity. The electricity lines services<sup>4</sup> provided by Vector are subject to price-quality regulation set out in Commission determinations

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<sup>1</sup> *Commerce Commission v Aurora Energy Ltd* [2020] NZHC 610 at [3].

<sup>2</sup> At [3] where the Court referred to for example: *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18]; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 96, 258 CLR 482 at [46]; and *Commerce Commission v First Gas Ltd* [2019] NZHC 231 at [3].

<sup>3</sup> *Commerce Commission v Vector Limited* [2019] NZHC 540 (*Vector*).

<sup>4</sup> "Electricity lines services" are defined in s 54C of the Commerce Act 1986 to include "the conveyance of electricity by line in New Zealand" (subject to certain exceptions). Distributors

under s 52P of the Act. The relevant determination in this case is the Electricity Distribution Services Default Price-Quality Path Determination 2015 dated 28 November 2014 (the DPP) which applied from 1 April 2015 to 31 March 2020.

[5] Distributors (including Vector) participate in setting determinations and the related input methodologies.<sup>5</sup> Methods for making determinations are subject to appeals on the merits,<sup>6</sup> appeals on points of law,<sup>7</sup> and regular challenge by judicial review. Further, a s 52P determination is subject to appeal on questions of law.<sup>8</sup> If a distributor considers a determination is not appropriate for its circumstances, it can apply for a customised price-quality path.<sup>9</sup>

[6] The DPP specifies quality standards. The relevant quality standards in this care are:

- (a) The system average interruption duration index (SAIDI). SAIDI represents the average period of outages experienced by each customer on the network during successive twelve-month periods ending 31 March (assessment periods). The SAIDI value is calculated by aggregating the duration of all service interruptions across all customers during the assessment period and then dividing by the number of customers.
- (b) The system average interruption frequency index (SAIFI) is calculated by aggregating the number of all service interruptions across all customers during the assessment period and dividing this by the number of customers.

[7] These standards are measures of the duration of outages and their frequency. The standards have tolerances before they are contravened. The measures recognise

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provide electricity lines services, and are also commonly known as “electricity distribution businesses” or “EDBs”.

<sup>5</sup> Commerce Act 1986, s 52V.

<sup>6</sup> Section 52Z.

<sup>7</sup> Section 91(1B).

<sup>8</sup> Section 91(1)(a)(ii) and (1B).

<sup>9</sup> Section 53Q.

that outages harm customers in a variety of ways depending on the type of customer. For example, wasted product for industrial consumers, loss of revenue for service-based consumers, and loss of heating and hot water for residential customers.

[8] Suppliers are expected to maintain their networks to comply with the SAIDI and SAIFI requirements. External factors that can affect service interruptions and a reasonable degree of variability in performance are accommodated in the way that the SAIDI and SAIFI measures operate. This includes the fact that a quality standard is not contravened unless a reliability assessment has been exceeded in the particular year and in either of the two preceding years.

### **Agreed conduct of Vector**

[9] Vector admits it contravened the quality standards from 2017 to 2020 (inclusive) by exceeding the SAIDI and SAIFI limits by:

- (a) In 2017, after the adjustments allowed for in the measures, Vector's approximately 551,728 customers:
  - (i) experienced service interruptions of 174 minutes per customer, which was 69 minutes per customer above the SAIDI limit (exceeding the limit by 67 per cent); and
  - (ii) experienced 1.850 interruptions per customer which exceeded the SAIFI limit by 0.455 interruptions per customer or 33 per cent.
  
- (b) In 2018, after the adjustments allowed for in the measures, Vector's approximately 557,490 customers:
  - (i) experienced service interruptions of 226 minutes per customer, which was 122 minutes per customer above the SAIDI limit (exceeding the limit by 117 per cent); and

- (ii) experienced 2.144 interruptions per customer which exceeded the SAIFI limit by 0.749 interruptions per customer or 54 per cent.
- (c) In 2019, after the adjustments allowed for in the measures, Vector's approximately 565,200 customers:
  - (i) experienced service interruptions of 198 minutes per customer, which was 94 minutes per customer above the SAIDI limit (exceeding the limit by 90 per cent); and
  - (ii) experienced 1.756 interruptions per customer which exceeded the SAIFI limit by 0.361 interruptions per customer or 26 per cent.
- (d) In 2020, after the adjustments allowed for in the measures, Vector's approximately 573,860 customers:
  - (i) experienced service interruptions of 167 minutes per customer, which was 63 minutes per customer above the SAIDI limit (exceeding the limit by 61 per cent); and
  - (ii) experienced 1.575 interruptions per customer which exceeded the SAIFI limit by 0.180 interruptions per customer or 13 per cent.

*Loss and damage*

[10] Vector accepts that the contraventions caused significant loss to consumers. The parties have not been able to agree the quantification of loss. However, the parties agree that the extent of loss caused by the contraventions is at least equivalent to the penalty they propose.

### *Circumstances of contraventions*

[11] Following the contraventions in the 2015 and 2016 assessment periods, Vector took steps as set out in the agreed facts, as follows:

- (a) **Governance of compliance with the quality standards:** Vector took steps to improve governance of its compliance with the quality standards. Those steps included restructuring the Networks business unit in 2019 to strengthen the focus of the management team to ensure single point accountability of quality standards, changing management of compliance risk and implementing a field services provider enablement strategy. The most significant actions were implemented in the 2019 and 2020 assessment periods. Those actions included increasing funding which had the most significant effect on improving reliability and returning the network to a compliant state.
- (b) **Asset lifecycle management practices:** While Vector took steps to address the deterioration of its assets, there was a noticeable worsening of some equipment failures between the 2017 and 2019 assessment periods. That worsening suggests the measures were put in place later than they should have been.
- (c) **Reliability management:** In the previous proceedings, Vector accepted that aspects of its approach to managing reliability did not meet good industry practice, including by failing to implement a strategic reliability management plan (SRMP). Vector has now implemented a SRMP, but only did so in 2020.
- (d) **Vegetation management:** Vector took steps to address vegetation management, but those steps were taken too late. Vector's vegetation management practices in the 2017 to 2020 assessment periods failed to meet good industry practice.
- (e) **Field service providers:** Vector established a fault response duration incentive scheme with its field service providers, but this was not

introduced until the 2020 assessment period. This is despite Vector being on notice that the average duration of outages was increasing throughout the DPP period. This scheme should have been negotiated sooner.

- (f) **Health and safety changes:** During the DPP period, Vector implemented changes to its health and safety practices that substantially increased the duration of outages. Vector has taken steps to mitigate the impact of health and safety practices on SAIDI, including conducting a review of live line work, which resulted in changes to its practices that seek to reduce planned SAIDI. However, this review was only conducted in 2019, while Vector's health and safety practices were introduced in 2016.

[12] Vector accepts that it could have acted sooner to implement steps to address the causes of the contraventions.

### **Relevant law**

[13] Vector is liable to pay pecuniary penalties under s 87(1)(a) of the Act. The maximum penalty is \$5,000,000 for each contravention.<sup>10</sup>

[14] In setting the penalty, the Court must take into account:<sup>11</sup>

- (a) the nature and extent of the contravention;
- (b) the nature and extent of any loss or damage suffered by any person as a result of the contravention;
- (c) the circumstances in which the contravention took place (including whether the contravention was intentional, inadvertent, or caused by negligence); and

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<sup>10</sup> Commerce Act 1986, s 87(3).

<sup>11</sup> Section 87(4).

- (d) whether or not the person has been found to have engaged in similar conduct by a court in proceedings under Part 6 of the Act.

[15] The accepted approach in setting a pecuniary penalty is to establish an appropriate starting point for the offending having regard to the maximum penalty, and then to adjust this starting point to take into account any aggravating and mitigating factors that are specific to the defendant.<sup>12</sup>

### **Analysis**

[16] The parties agree a pecuniary penalty of \$1,158,400 which includes a 36 per cent discount for mitigating factors. The pecuniary penalty is based on agreed starting points, as follows:

- (a) \$560,000 for the 2017 assessment period;
- (b) \$650,000 for the 2018 assessment period;
- (c) \$400,000 for the 2019 assessment period; and
- (d) \$200,000 for the 2020 assessment period.

[17] I consider whether the above starting points are within an appropriate range having regard to the relevant considerations in s 87(4) of the Act and the pecuniary penalties in the *Vector* and *Aurora* cases.

### *Nature and extent of the contravention*

[18] The nature and extent of the contraventions are set out at [9] above and are summarised in the table below:

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<sup>12</sup> *Commerce Commission v Vector Limited* [2019] NZHC 540 at [23] citing *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681, [2017] NZCCLR 14 at [4].



Assessment Period	SAIDI Limit (minutes)	Assessed SAIDI (minutes)	SAIDI Outcome	SAIFI Limit (interruptions)	Assessed SAIFI (interruptions)	SAIFI Outcome	Annual Reliability Assessment	Quality Standard
2017	104.2	174	Exceeded	1.395	1.85	Exceeded	Exceeded	Contravened
2018	104.2	226	Exceeded	1.395	2.14	Exceeded	Exceeded	Contravened
2019	104.2	198	Exceeded	1.395	1.76	Exceeded	Exceeded	Contravened
2020	104.2	167	Exceeded	1.395	1.58	Exceeded	Exceeded	Contravened

[19] The extent of the non-compliance peaked in the 2018 assessment period and this justifies that period having a higher starting point (\$650,000) than the starting points for the other assessment periods.

[20] A material proportion of Vector’s excess SAIDI and SAIFI is attributable to actions Vector took for health and safety reasons. This included limiting the circumstances where Vector and its field services providers undertook work on “live” lines.

[21] Vector accepts that it did not act in accordance with good industry practice by implementing changes later than it could have. The review of the health and safety practices did not happen until 2016 and the health and safety practices were introduced in 2016. That supports a penalty been imposed.

[22] This Court has previously held that acting to protect health and safety concerns reduces the severity of the contravention.<sup>13</sup> Vector has assessed the contribution of health and safety initiatives during the 2017 to 2019 assessment periods to the contraventions of SAIDI and SAIFI, and indicates that the contribution is reasonably significant. That is relevant to the severity of the contraventions and justifies lower starting points.

*Nature and extent of any loss or damage*

[23] The parties are unable to agree on a quantification of the loss caused by the contraventions. The parties agree that the loss caused by the contraventions is at least equivalent to the starting point penalty that the parties have jointly recommended to the Court, and that the extent of the loss is such that the proposed penalty is warranted.

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<sup>13</sup> *Commerce Commission v Vector Limited* [2019] NZHC 540 at [28].

*Circumstances in which contravention took place*

[24] Following the contraventions in the 2015 and 2016 assessment periods, Vector took steps to address its non-compliance with the quality standards.

[25] The agreed facts record the failures by Vector to meet good industry practice in relation to governance of compliance with the quality standards, asset lifecycle management practices, reliability management, vegetation management, arrangements with field service providers, and the mitigation of the effect on SAIDI of changed health and safety practices.

[26] The steps Vector took to address its reliability challenges occurred too late to prevent or mitigate the contraventions in the 2017 to 2020 assessment periods. Vector responsibly accepts that its failure to implement those steps earlier was not in accordance with good electricity industry practice and either caused the contraventions or caused the contraventions to be greater than they otherwise would have been.

*Engagement in similar conduct*

[27] Vector contravened the quality standards for the 2015 and 2016 assessment periods, resulting in a pecuniary penalty of \$3,575,000.<sup>14</sup>

[28] Counsel for Vector submitted that the contraventions in the 2017 to 2020 assessment periods represent a continuation of the reduced network reliability that resulted from Vector's failure to address, in a sufficiently timely way, the deficiencies identified in the earlier proceeding. Given the contraventions are contiguous and arose from a continuation of the same failures to observe good industry practice identified in the earlier proceeding, I accept the Court should have regard to the totality of the conduct, and the penalty imposed in the earlier proceeding, in assessing the appropriateness of the penalty recommended in this case.

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<sup>14</sup> *Commerce Commission v Vector Ltd* [2019] NZHC 540.

*Is the agreed penalty within range?*

[29] In *Vector* the Court adopted starting points of \$3 million and \$2.5 million for the contraventions in the 2015 and 2016 assessment periods respectively.<sup>15</sup> The circumstances that warranted those starting points are set out in the judgment.<sup>16</sup>

[30] In *Aurora* the Court imposed pecuniary penalties in respect of Aurora's contraventions in the 2016 to 2019 assessment periods, and adopted starting points as follows:<sup>17</sup>

- (a) \$4 million for the 2016 assessment period;
- (b) \$3 million for the 2017 assessment period;
- (c) \$560,000 for the 2018 assessment period; and
- (d) \$500,000 for the 2019 assessment period.

[31] Counsel for Vector submit that lower starting points are warranted in this case for the 2017 to 2020 assessment periods given Vector's remedial steps in the intervening period, the improvement in its network performance, and its ultimate return to compliance. This is consistent with the approach in *Aurora*.

[32] The total penalty Aurora was required to pay for the 2016 to 2019 assessment periods (four assessment periods) was \$4,997,200 which included a 38 per cent discount applied to all assessment periods. The proposed total penalty Vector will pay for contraventions in the 2015 to 2020 (six assessment periods) will be \$4,733,400 (\$3,575,000 in the previous proceeding for the 2015 and 2016 assessment periods and \$1,158,400 for the 2017 to 2020 assessment periods). This total is slightly less than Aurora (and includes a 35 per cent discount for the 2015 and 2016 assessment periods, and a 36 per cent discount for the 2017 to 2020 assessment periods) and relates to two additional years of contraventions.

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<sup>15</sup> *Commerce Commission v Vector Ltd* [2019] NZHC 540.

<sup>16</sup> At [19].

<sup>17</sup> *Commerce Commission v Aurora Energy Ltd* [2020] NZHC 610 at [25].

[33] I accept that setting Vector's starting points lower than Aurora is reasonable given Aurora's greater culpability. Aurora had been warned following an earlier contravention in 2012, had received a report identifying remedial steps it needed to take, and had failed to address those matters despite knowing it was risking further contraventions. Aurora's contraventions also involved sustained underinvestment in its network over a prolonged period.

[34] In contrast to the circumstances in *Aurora*, Vector had not received a warning or failed to address issues when raised. The issue with Vector's conduct is that it could have acted faster than it did in addressing the issues that gave rise to the contraventions. The other relevant issue is that Vector's actions in seeking to comply with the new Health and Safety at Work Act 2015 was a significant contributor to the contraventions. The motivations for the actions were valid and intended to ensure compliance with the new health and safety regime. Vector's contraventions do not therefore contain the same aggravating features as the contraventions of Aurora, thereby justifying a lower overall penalty.

[35] In this case, the starting points recommended by the parties are comparable to those adopted for *Aurora* in the years in which it was taking remedial steps (\$560,000 and \$500,000 in 2018 and 2019) and for the same reason. The downward trend in the recommended starting points recognises Vector's progressive response, improving reliability, and eventual return to compliance.

[36] The highest recommended starting point is \$650,000 in the 2018 assessment period. During that assessment period, Vector's excess SAIDI and SAIFI peaked. It is therefore appropriate that this starting point is higher than for the other assessment periods.

[37] The recommended starting points for the 2019 and 2020 assessment periods are lower. During those assessment periods:

- (a) Vector's excess SAIDI and SAIFI was declining as its remedial steps began to take effect; and

- (b) the majority of the remedial steps occurred in the 2019 and 2020 assessment periods.

[38] It is appropriate that lower starting points are adopted to recognise the remedial steps Vector took. I am therefore satisfied for the reasons set out above that the starting points are within the appropriate range.

*Mitigating factors*

[39] The agreed penalty has been arrived at by applying a discount to the agreed starting point of 36 per cent reflecting the following mitigating factors:

- (a) **Cooperation and admissions of liability:** Vector has fully cooperated with the Commission's investigation process and has admitted liability. Vector indicated its willingness to settle these proceedings at an early stage and has engaged constructively with the Commission to reach this settlement.
- (b) **Assistance with the investigation:** Vector proactively assisted the Commission in its investigation into the contraventions. This extended to voluntarily providing information and preparing a report for the Commission detailing the circumstances of the contraventions and remedial steps taken by Vector. This assisted the Commission's expert engineer.
- (c) **Service level payments:** Vector's use of system agreements with retailers include service levels related to unplanned interruptions that provide specified compensation payments to consumers on request. Vector had made service level payments to consumers amounting to \$563,156 over the course of the 2017 to 2020 assessment periods.
- (d) **Openness regarding future compliance:** Vector has continued to engage constructively with the Commission regarding its network performance and ongoing compliance.

[40] The recommended discount of 36 per cent is comparable to the discount adopted in *Vector* (35 per cent) and in *Aurora* (38 per cent). I therefore consider that it is within range having regard to the mitigating factors.

[41] In these circumstances, I am satisfied that the agreed penalty falls within the appropriate range and satisfies the objects of the Act and the circumstances of *Vector*'s contraventions.

## **Result**

[42] I make the following orders:

- (a) Vector is to pay a pecuniary penalty of \$1,158,400;
- (b) payment to be made within 20 working days from the date of this judgment; and
- (c) costs to lie where they fall.

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Tahana J