IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 16/3472 CoA/CIVA

BETWEEN: UNION ELECTRIQUE DU VANUATU LIMITED
Appellant

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: UTILITIES REGULATORY AUTHORITY
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabeck***
Hon. Justice John von Doussa
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield

Counsel: *Tim North QC, Henry Heuzenroeder and Mark Hurley for the Appellant*
Kent Tari (SLO) for the First Respondent
Garry Blake and Nigel Morrison for the Second Respondent

Date of Hearing: *Thursday November 10th 2016 at 9 am*
Date of Judgment: *Friday November 18th 2016 at 4 pm*

JUDGMENT

Introduction

1. This appeal is from a judgment of the Supreme Court in what is described as a *"decision on preliminary issue"* delivered on 22 September 2016. That decision addressed issues arising in each of 4 Judicial Review Cases, referred to below.

2. The parties to the appeal agreed about the nature of the issues addressed by the trial Judge in each of those Judicial Review Applications, and they accepted that the issues identified were important ones in each case. They also accepted that the issues as addressed by the trial Judge left some issues still to be determined. The trial Judge said as much: now that it has been decided that the second respondent could have done what it did, it is necessary to consider whether it did so properly.

3. On that basis, the Court of Appeal is prepared to accept that there has been a final answer given on each of the identified issues. Given the complexity of the issues, it also accepts that is appropriate to the extent necessary to give leave to appeal from those final decisions, even though they are not yet reflected in formal expressions of the determination made.

4. It was, however, not agreed that it was appropriate for the trial Judge to have addressed those issues each as preliminary issues, as there may have been further evidence which might have influenced the outcome of those decisions, so they should not have been the subject of the separate hearing and determination. Principally, it was said by the appellant Union Electrique Du Vanuatu Ltd trading as UNELCO Suez (UNELCO) that resolution of the issues as so identified required a careful consideration of the evidence, as well as the legislative and regulatory structure which existed, but (UNELCO said) the trial Judge proposed to, and did, address the issues only at such a high level of analysis that the answers to the issues addressed was unhelpful and left far too much unresolved.

5. The Court of Appeal has had the benefit of detailed argument, both on that question and on each of the issues which were in fact determined by the trial Judge. The Court of Appeal does not consider that it is necessary to further address the issue as to whether the preliminary issues should have been determined at all. That is because each of UNELCO and the second respondent Utilities Regulatory Authority (the Regulator), in their very helpful and focused submissions, addressed the issues in a way which enables the Court of Appeal to determine them as identified, and upon the basis of the detailed analysis of legislative, regulatory and evidentiary sources to which the Court of Appeal was referred.

6. There remain, nevertheless, certain issues which at present still require to be addressed, as discussed later in these reasons under heading *"Conclusion"*.

7. These reasons for judgment will separately address the background, the undisputed facts, the issues which arise in each of the 4 Judicial Review Applications, the decision of the trial judge, the consideration of those issues and conclusions on them, and finally the Orders to be made.

Background

8. UNELCO is, relevantly, the provider of the electricity and water supply to consumers in Port Vila some degree elsewhere within Vanuatu.

9. The Regulator is the regulatory authority established under the Utilities Regulatory Authority Act 2007 (URA Act) and the powers and functions in relation to the supply of regulated services (electricity and water) to consumers in Vanuatu under the URA Act.

10. As counsel for the Regulator put it, the issues in each of the 4 Judicial Review Applications are the extent to which the Regulator can regulate the activities of UNELCO as a monopoly provider of the electricity and water services to consumers in Port Vila. In many jurisdictions, that sort of issue does not arise, because the monopoly provider of such services is the Government itself. It has only been since the provision of such services in some jurisdictions has been privatized that the need for regulation of the delivery of those services has arisen. In such evolutionary changes, the regulatory structure has been put in place prior to or at the time of the privatization there is no dispute about the extent to which the privatized monopoly provider must comply with the proper decisions of the Regulatory Authority. It must do so.

11. In Vanuatu, again putting the position at a very general level, the problem arises because the provision of electricity services was first contracted to UNELCO, including the establishment of the infrastructure that provide those services. They were never *"run"* by the government. Under the agreements by which those facilities and services were to be constructed or established and the services provided, the sort of issues which the Regulator is now empowered to address were dealt with by the agreement itself.

12. It may be the case, and it is certainly the view of the Regulator, that the long term interest of consumers is no longer ideally served by the terms of the agreement or agreements to be referred to, at least not comprehensively. Consequently, the Regulator exercising its powers under the URA Act has issued certain instruments which, it says, will better regulate the provision of electricity and water services to consumers in Vanuatu for their benefit. UNELCO, for its part, says that the Regulator is not entitled to have done so, at least not as it has attempted to do so by the decisions of the Regulator under challenge. It says the URA Act precludes the Regulator from engaging or making such Decisions inconsistent with the agreement under which UNELCO came to construct and then provide the relevant services.

13. For the reasons which are set out below, the Court of Appeal does consider it appropriate to address each of the individual challenges to the Decisions of the Regulator, and to make rulings upon them. As noted, it has had the benefit of the extensive documentary material

and the very helpful and focused submissions of counsel for UNELCO and for the Regulator.

14. Obviously, it is necessary to refer in much more detail to the contractual and legislative structures and arrangements which exist, and which are relevant to each of the 4 Judicial Review Applications for their particular consideration.

15. The Republic of Vanuatu participated in the hearing before the Court of Appeal only to a limited degree, to provide information to the Court (as it did to the trial Judge). In the result, having regard to the submissions made by UNELCO and by the Regulator the Republic did not make any submissions beyond its brief written submission.

The Undisputed Facts

16. UNELCO is incorporated in Vanuatu. It is the subsidiary of a large international company. It has provided electricity to consumers in Vanuatu since about 1934.

17. On 15 August 1986 UNELCO and the Republic entered into a Concession Agreement for the exclusive supply of electricity entitled *"Convention relating to the Concession for the Generation and Public Supply of Electric Power in Port Vila"* (the Electricity Concession). That agreement has been amended from time to time, but it is not necessary for the Court of Appeal to note the nature of those amendments, save to record that one of them in 1997 extended the operation of the Electricity Concession to 31 January 2031.

18. Similarly, the URA Act has been amended on 2 occasions. Reference to the URA Act in these reasons for judgment is to the URA Act as it presently stands including those amendments. On one issue it will be necessary to refer to an earlier version of certain provisions of the URA Act.

19. The Electricity Concession entitled UNELCO to generate and supply electricity to the public within Port Vila for all purposes. That involved the entitlement, and the exclusive right, within Port Vila to construct and maintain the generating capacity for the public supply of electricity and the transmission and distribution facilities, to service, consumers and the, lines and cables and measuring devices to do so. That of course carried the obligation and entitlement to maintain and service those facilities. As noted, the Electricity Concession contained provisions relating to how that should be undertaken, and the obligations and entitlements of UNELCO in relation to consumers of electricity in Port Vila, including as to price structures and price adjustments.

20. The role of UNELCO in relation to the supply of water to consumers in Vanuatu is a little different.

21. It is necessary to start with the Water Supply Act 1955 (as amended from time to time). Again, it is convenient to refer to that Act in its present form, as the past amendments from time to time do not make any difference to the consideration of that aspect of the dispute, except where that is specifically noted. The Water Supply Act empowers the relevant Minister in certain circumstances to grant to a legal entity the sole concession for the provision, development, management and maintenance of water supply to the public within an area of Vanuatu, and it provided that the terms and conditions of any such agreement or contract made under section 22 (1) of that Act should be subject to the provisions of Part 3 of the Water Supply Act.

22. On 23 December 1993 the Republic through the responsible Minister and UNELCO entered into a concession agreement under section 22 (1) of the Water Supply Act for the exclusive supply of water in Port Vila by UNELCO entitled *"Contract for the Management and Operation of Water Supply Service in Port Vila"* (the Water Concession). UNELCO accepts that the terms and conditions of the Water Concession were subject to Part 3 of the Water Supply Act.

23. Under the Water Concession, UNELCO became entitled to exercise the powers functions and duties of the Public's Works Department or of the Director of Public Works in respect of the water supply within the area of the Water Concession.

24. UNELCO for its part was obliged to provide and develop, and then to manage and maintain, an efficient supply of water and to distribute water for public domestic or industrial purposes that included the entitlement to collect water revenues of consumers of water services. The tariffs for the supply of water are set out in the schedule of conditions to the Water Concession. They are adjustable every 5 years, so as to assure UNELCO of a specified rate of return on capital. Again it will be necessary to refer in more detail to the relevant documents when considering that particular issues.

The JR Applications and the URA Decisions

25. Judicial Review Application 25 of 2014 (JR 25/14) challenges the validity of 4 decisions by the Regulator.

26. On 24 July 2014 the Regulator issued a Final Decision and Order implementing feed-in and net-measuring tariffs for small-scale solar renewable energy for electricity consumers as customers of UNELCO (the Solar Decision).

27. In short, the Solar Decision enabled consumers of electricity to install solar panels on their premises to generate for the purposes of that consumer solar generated electricity. That is

not the subject of UNELCO's concern. Its concern is that the Solar Decision provided for excess power generated by a solar installation, which was not at that time used by the particular consumer, to be delivered to the electricity grid, and secondly that UNELCO was required to adopt a pricing formula in its dealing with those solar customers so that their electricity usage from the grid, provided through or by UNELCO, would be offset against the electricity which the solar panels of that consumer had generated back into the grid. There were complementary obligations to make that process work.

28. UNELCO says that the Electricity Concession has a formula for the determination of electricity pricing to be made by a panel of arbitrators, and that such a Final Decision had been made by a panel of arbitrators relevantly on 28 April 2011. It also says that the Solar Decision meant that, contrary to their exclusive entitlement to supply electricity to consumers in Port Vila, the feedback of electricity into the grid meant also that those consumers, by the pricing formula imposed under the Solar Decision, would also involve those consumers providing electricity back into the grid. It said that would be inconsistent with the Electricity Concession because it involves the sale of electricity to UNELCO or alternatively the supply of electricity through UNELCO for sale to other consumers.

29. Detailed consideration of that issue is addressed below under the heading of the Solar Decision.

30. JR 25/14 challenges the instrument entitled Utilities (Restriction on Provision of Financial Support Rules) 2014 (Financial Support Decision). In essence, it prohibited providers of electricity or water services, including UNELCO, from advancing loans or other financial assistance, or guaranteeing or pledging financial support to persons, except in special circumstances as approved by the Regulator.

31. UNELCO says that the Financial Support Decision as published was not authorized to be made by the Regulator, as it amounted to the making of Regulations under the URA Act and that the regulation making power in the URA Act rests with the relevant Minister. It also says that, in any event, the regulation making power could not be exercised to authorize the making of the Financial Support Decision because it is not relevantly limited in a proper way to a regulated service provider's corporate structure, accounts or finances. That issue was not addressed by the primary Judge, and it was not necessary to be addressed in the Court of Appeal.

32. In addition, UNELCO says that the Financial Support Decision is inconsistent with the Electricity Concession because it derogates unreasonably from its autonomy in conducting its business under the Electricity Concession. As a further alternative, UNELCO says that the dispute resolution procedure prescribed within the Financial Support Rules have the

effect of vesting in the Regulator the judicial power of the Republic and so it is not constitutional.

33. There were other supporting arguments in opposition to the Financial Support Decision.

34. The issue is addressed below under the heading Financial Support Decision.

35. Two further actions taken by the Regulator which were attacked by UNELCO in JR 25/14 were two Requests for Information, the first dated 23 May 2014 and the second dated 5 June 2014 made under section 13 (2) (a) of the URA Act (Information Request). It will be necessary to refer to the contents of those requests in due course.

36. UNELCO attacks those requests as being beyond power, as being inconsistent with the right to privacy implied in the Constitution, and as being inconsistent with its operational integrity.

37. There is, lurking within that application (and in respect of other issues) the suggestion of infringement of constitutional rights. That is put at 2 levels. Firstly it is said that there is an infringement of constitutional rights to the extent to which any of the relevant Decisions interfere with the proper operational activity and contractual rights of UNELCO under the Electricity Concession or under the Water Concession. If those Decisions are valid and if they entitled the Regulator to do what it has done, it is said that they are inconsistent with constitutional rights and so may entitle UNELCO to compensation for damages for the impairment of their constitutional rights. More accurately and relevantly, it is said that the relevant Decision must be construed consistently with its constitutional rights. That is a proposition which both the Republic and the Regulator accepted, so that to the extent to which those Decisions or steps taken under them might otherwise impair the constitutional rights of UNELCO, it is accepted that they would be invalid. As an aid to the proper construction of the legislative powers, and what they entitled the Regulator to do, having regard to section 3 of the URA Act (referred to below) and other legislative provisions, the secondary and latent argument was put that, although the Decisions themselves may be found to be valid, actions taken under the Decision may be invalid or may impair constitutional rights in particular circumstances so as to entitle UNELCO to compensation for having to comply with those Decisions. That is a somewhat theoretical argument at this point. The Court of Appeal will consider the extent to which it is necessary to address the particular Decisions of the URA, and the particular acts either under the URA Act or under the Decisions authorized by the URA Act as it presently stands. It is speculative, and inappropriate, for the Court to consider the legitimacy of future acts themselves.

38. By counterclaim, the URA has sought declaratory orders that each of its Decisions under challenge and the request for information are valid and that UNELCO should comply with them.

39. The second Judicial Review Case addressed was Judicial Review Claim 4 of 2015. It concerned only one Decision made by the Regulator.

40. On 5 December 2014 the Regulator issued a Final decision and Permission Order in the matter of Investigating and Implementing a Business Development Incentive Electricity Tariff for UNELCO in Efate. It was called the Business Development Incentive Tariff Decision (BDI Decision).

41. UNELCO says that the BDI Decision imposes a pricing structure or tariff which is not authorized, because it differs from the Final Award (Final Award) of the arbitrators of 28 April 2011 made under the Electricity Concession in relation to electricity pricing. In short, to a relatively limited degree, it imposes a pricing structure in certain circumstances which would be lower than the pricing structure resulting from or by the Final Award of the Panel of Arbitrators under the Electricity Concession.

42. The third of the 4 proceedings is Judicial Review Claim 30 of 2015 (JRC 30/15).

43. That application relates to Water Tariffs. It challenges the Final Decision and Commission Order made by the Regulator on 18 September 2015 (the Water Tariff Decision).

44. The UNELCO contentions are firstly that the Regulator has no power to make Orders of compulsion directed to the tariff to be applied in billings under the Water Concession or related matters, as well as challenging the reasonableness of the outcome in any event having regard to the Water Concession. It also says that the decision is inconsistent with the Water Concession because it prescribes certain items of charging, which are different from those determined properly in accordance with the Water Concession, and which are protected by section 3 of the URA Act.

45. In this matter, it is also alleged that the decision of the URA in issuing the Water Tariff Decision was subject to actual or apprehended bias on its part, or on the part of the Chief Executive Officer of the URA, who participated in the decision process. The Court will make some further observations about the allegation of bias when it addresses the Orders to be made in this appeal generally.

46. The final Judicial Review Application is Judicial Review Claim 745 of 2015 (JR 745/15). It concerns a Final Decision and Commission Order of the Regulator dated 25 May 2015 in

which the Regulator established *"Consumer Complaints and Dispute Resolution Rules and Procedures: URA Rules and Procedure for Assisting in the Resolution of Consumer Complaints"* (the Dispute Resolution Decision).

47. In that matter, by the Dispute Resolution Decision, UNELCO alleges that the imposition of that dispute resolution procedure is inconsistent with the Electricity Concession, (as well a Malekula Concession granted on 14 July 2000 and a Tanna Concession also granted on 14 July 2000, both relating UNELCO as the supplier of electricity on Malekula and on Tanna.) It also alleges that the imposition of the dispute resolution procedure is inconsistent with the terms of the Water Concession. It further alleges, in any event, that the dispute resolution procedure is beyond the power of the Regulator.

48. In this judgment, therefore, it is necessary separately to address:
    (1) Solar Decision;
    (2) Financial Support Decision;
    (3) Information Requests of May and June 2015;
    (4) BDI Decision;
    (5) Water Tariffs Decision; and
    (6) Dispute Resolution Decision.

49. An additional issue concerning Power Purchase Agreements for the generation and supply of electricity, which was also raised in JR 745/15, was not pursued as apparently the dispute between UNELCO and the Regulator in relation to that has been resolved.

The Decision of the Trial Judge

50. The trial Judge apparently raised with the parties a question whether the consideration of the extensive issues in the proceedings (consolidated) should be done in 2 stages. Appropriately, he was anxious to address the issues as expeditiously and as economically as possible.

51. Hence, although (as he said) the issue in the proceeding was whether the Regulator could do what it has done, the benefit of the detailed submissions on the appeal indicated that the question of whether the Regulator had the power or authority to do what it did could not be answered at the high level of analysis which the primary Judge adopted, and the *"next issue"* as to whether the Regulator did in fact do what it was entitled to do properly, was closely intertwined the broader question. The uncertainty generated by the high level analysis, and the detailed analysis of the nature and quality of the Decisions by reference to the Electricity Concession and the Water Concession is illustrated by the trial Judge looking

at the question of power without reference to the detailed context of the steps or acts taken by the Regulator.

52. It was not strictly speaking correct, as the trial judge did, to approach the matter simply as an exercise in statutory interpretation, because the URA Act itself in section 3 restricted the powers of the Regulator by reference to the content of the Electricity Concession and arguably by reference to the Water Concession.

53. It follows that, with one qualification in relation to the Water Concession, in our view the primary Judge focused too heavily on the powers of the Regulator under the URA Act without fully exploring the limits of those powers having regard to section 3 of that URA Act to the detail required.

54. Section 3 provides that:

> *"This Act applies to a regulated service to the extent that it is not inconsistent with a provision in any concession agreement under the Electricity Supply Act (Cap. 65) existing on or before the commencement of this Act or a provision of any other Act".*

55. The qualification is in relation to the water supply dispute. The trial Judge recognized that section 3 of the URA Act in its words does not expressly refer to the water concession. It expressly mentions concession agreements under the Electricity Supply Act only. There was a debate before the trial Judge as to whether the ending words of section 3, namely *"or a provision of any other Act"* enlivened section 3 in relation to the Water Concession. He found that it did not. That issue was debated on this appeal. If it does not, other issues would be enlivened as to the Constitutional implications for a broad reading of section 3, consistent with the statutory prescription in s 8 of the Interpretation Act and the common cannon of construction that an enactment should be construed consistent with its constitutional source, so that it does not extend beyond the constitutional power.

56. It is necessary to mention briefly, again, the issue of bias. That was expressly pleaded, by amendment, in JR 4/15 (the BDI Decision), in JR 25/14 (the Solar Decision), and in JR 30/15 (the Water Tariff's Decision). To the extent that the Court of Appeal does not resolve the main issues addressed by the trial judge in favour of UNELCO, those allegations of bias or apprehended bias will need to be addressed.

57. The Court of Appeal had before it extensive documentation, albeit obviously nowhere near as much as had been filed in each of the now 4 consolidated JR Claims. It appears from the material in the appeal books that the issues as now argued were in fact argued to the same general effect before the trial Judge. As we have noted, the trial Judge addressed the issues more by a focus on the terms of the URA Act than upon a comparative analysis of the

Electricity Concession and the Water Concession said to be given primacy by section 3 of the URA Act, and the other terms of the URA Act. The Court of Appeal also had the benefit of a document entitled *"Outline of inconsistencies between UNELCO's concessions and the URA's purported decisions."* The primary Judge did not have the benefit of that detailed outline. It makes it easier for the Court of Appeal to consider the contentions in detail, rather than simply to remit the matter for further consideration.

58. The Court will address the several Decisions of the Regulator in the sequence in which they were addressed in the course of the parties' submissions.

Water Tariffs Decision

59. As noted above, the Water Concession was granted on 23 December 1993.

60. At all material times, the Water Supply Act 1955 (Cap. 24) contained Part 2 – Regulation of the Supply of Water, and Part 3 dealing with any Agreement or Contract for the Provision, Development, Management and Maintenance of Water Supply within Port Vila. In short, Part 3 refers at length to the Water Concession granted to UNELCO.

61. Section 20 of Part 2 of the Water Supply Act empowered the Minister by Order to make regulations not in-consistent with the Act, including about charges payable by consumers for the supply of water.

62. Section 22 of the Water Supply Act, in Part 3, provided as follows:-

> *"(1) Notwithstanding anything to the contrary in Parts 1 and 2 of this Act or in any other Act, but subject to the provisions of this Part, it shall be lawful for the Minister with the approval of the Council of Ministers to enter into an agreement or contract with any legal entity granting that entity the sole concession for the provision, development, management and maintenance of water supply to the public within the area of concession.*
>
> *(2) The terms and conditions of any agreement or contract entered into under subsection (1) shall be subject to the provisions of this Part."*

Part 3 has a series of provisions dealing with the powers and duties of UNELCO as the holder of the Water Concession. It does not deal in detail with the basis of charging to consumers for the supply of water.

63. As earlier noted, the URA Act came into force in 2007.

64. On 20 October 2014 the Regulator wrote to UNELCO proposing a timetable for a tariff review in relation to the supply of water under the water concession. UNELCO responded, asserting that the proposed Tariff review had to be in accordance with the Water Concession, but that it would participate in good faith negotiations for the purpose of any such review.

65. The battle lines were drawn soon after that. On 3 November 2014 the Regulator wrote to UNELCO asserting that section 18 of the URA Act granted it the power to fix maximum prices and conditions, following the amendment to the URA Act which (it said) had removed the Water Concession from the protection of section 3. Consequently, the Regulator said it had power to initiate a tariff review, and proceeded to issue a Preliminary Decision in May 2015. UNELCO responded to that submission in some detail, but also reasserted that the proposed decision would be beyond the power of the Regulator.

66. Despite that, the Regulator duly issued the Water Tariff Decision as part of a Final Order in September 2015. It said it was acting on the basis of its powers in sections 13 and 18 of the URA Act. That decision was published in the Gazette on 3 November 2015.

67. That in turn led to JR 30/15 challenging the Water Tariff Decision.

68. The trial Judge in his reasons at [23] said that the Water Tariff Decision of the Regulator was within its powers under section 18 of the URA Act, determining the maximum price which may be charged to consumers in relation to any aspect of a regulated service. UNELCO's argument was to inconsistency, that is that a water tariff fixed in the detail of the Water Tariff Decision and in the manner adopted by the Regulator, would be inconsistent with the Water Concession and therefore invalid. The trial Judge referred to that argument only by implication, by saying that the Water Tariffs Decision is not inconsistent with any provision in any concession agreement under the Water Supply Act, or any other Act. Consequently, it was held that the Regulator had power to make the Water Tariffs Decision.

69. On this appeal, the Regulator supported the conclusion of the trial Judge.

70. But for the operation of section 3 of the URA Act, it may be that the approach of the Regulator is valid. Section 18 entitles the Regulator to determine the maximum price which may be charged to consumers in relation to any aspect of a regulated service in any place. Under section 18 (4) the maximum price so determined must take into account the *"leased cost generation for that Utility"*, but it does not provide that the price or prices so determined must allow for a recovery of such costs by the regulated service provider. It is difficult to understand how section 18 (4) would apply in the present circumstances. A

"regulated service" is defined in the URA Act to include the supply of electricity or water to a consumer. However, *"leased cost generation"* is defined in the URA Act specifically by reference to electricity generation as it is defined to mean *"the combination of electricity generation methods that provides the lowest overall cost for the consumers served by a particular Utility"*. Subsection (4), therefore, may not apply at all in relation to a regulated service provider supplying water to consumers, as UNELCO does under the Water Concession.

71. The background to the introduction of the URA Act in 2007, and its then terms, in particular the definition of *"regulated service"*, indicates that it was intended to apply to providers of both electricity and water. Hence, it is relevant to consider how it applies to UNELCO as a provider and supplier of water to consumers under the Water Concession.

72. When first enacted, section 3 read:

> *"This Act applies to a regulated service to the extent that it is not inconsistent with a provision in any applicable contract or other act"*.

73. The term *"applicable contract"* was and still is defined to mean any then existing contract relating to a utility made before, on or after the commencement of the URA Act and to which the Government is a party. That too appears to cover the Water Concession.

74. Hence, at that time, the URA Act applied to UNELCO in respect of the Water Concession, and s 3 applied the provisions of the URA Act to UNELCO to the extent that the URA Act is not inconsistent with any provision in the Water Concession itself.

75. By the Utilities Regulatory Authority (Amendment) Act No. 18 of 2010, section 3 was repealed and replaced. From that time, section 3 as then enacted reads:-

> *"This Act applies to a regulated service to the extent that it is not in-consistent with a provision in any concession agreement under the Electricity Supply Act [Cap. 65] existing on or before the commencement of this Act or a provision of any other Act."*

76. The principal issue debated by the parties in relation to the Water Tariffs Decision is whether, by reason of that amendment which specifically refers to a concession agreement under the Electricity Supply Act, UNELCO under the Water Concession is no longer entitled to the benefit of section 3. If it is not, UNELCO as the provider of the regulated service supplying water to consumers in Port Vila is now subject to the general terms of the URA Act, which include the Regulator using its powers under section 18 of the URA Act. That would be so, irrespective of whether the URA Act can operate in a way which is inconsistent with the Water Concession (subject to the *"constitutional argument"* which is referred to in the conclusions and orders section of this judgment).

77. Section 3 is curiously worded, simply because of its particular reference to the Electricity Supply Act and the fact that it does not refer to the Water Supply Act.

78. UNELCO contended that section 3, despite its substitution in the terms set out above in 2010, was nevertheless intended to continue apply to the Water Concession. UNELCO reads section 3 so that the URA Act applies to a regulated service supplying water to the extent that The URA Act *"is not in-consistent with a provision in any concession agreement under any other Act,"* that is under ...the Water Supply Act. The term *"concession agreement"*, is not itself defined in the URA Act.

79. The Explanatory Note to the Bill for the Utilities Regulatory Authority (Amendment) Act (which introduced section 3 in its present form when enacted) indicates that the focus at that time was entirely upon the supplier of electricity by a potential regulated entity. It records that the current contract for the supply of electricity to Luganville is to expire on 31 December 2010, and the amending Act is being introduced to ensure a competitive and fair tender process. The amendments are to increase the attractiveness of the Vanuatu electricity sector to private investors, both in general and specifically for the Luganville Concession. It is also, according to its terms, to enable and encourage private investment in renewable energy and in rural electrification by removing constraints in the current legislation. It also says that it:-

> *"...facilitates the regulation of electricity and water by the Regulator in line with international best practices and government policy."*

80. It could not be clearer that the legislative intention did not include any change to the holder of a concession agreement to supply water.

81. The amending Act dealt with 3 topics. First it added to the purposes of the URA Act the promotion of the long term interests of consumers. The Explanatory Note says that that does not reflect any change of policy or direction but is to give comfort to potential investors that the Regulator will look to the long term in fulfilling its functions. Secondly in relation to the proposed new section 3, it says simply that it is:-

> *".... to reflect the primary purpose of the legislation as a means of regulation in the future. Prior contracts take precedence over the Act but subsequent contracts will not."*

82. That also reaffirms the intention for section 3 to apply to both electricity and water concession agreement. Thirdly, it introduces or extends the information gathering powers of the Regulator by adding section 13 (2).

83. There is no focus at all upon the Water Concession. There is no express or implied intention to exclude a regulated service supplying water to consumers within Vanuatu under an existing Water Concession from the protection of section 3. It would be a very significant step to have taken. It is not a step which would be taken in an unconsidered way, because of the implications to those providing such services under a concession such as the Water Concession, where inconsistency would no longer be relevant when the Regulator came to consider appropriate pricing and other conditions for the delivery of water services to consumers.

84. The absence of any such material indicates, in our view, that there was no such intention by the amendment of section 3 by substituting it in its present terms. The focus upon the Electricity Supply Act by its specific mention is explained because of the desire of the Government at the time to procure a competitive bidding process for the grant of the Luganville Concession for electricity.

85. In those circumstances, it is the view of the Court that section 3 was not intended to remove from its scope the provider of the regulated service in the supply of water to consumers, and that it is capable in its terms of maintaining the operation which previously existed so as to shield the Water Concession from actions of the Regulator under the URA Act which the Regulator might otherwise take, and which actions are inconsistent with a provision in the Water Concession.

86. To adopt that construction of section 3, in our view, gives effect to the general principles of interpretation in section 8 of the Interpretation Act 1981 (Cap. 132) by having regard to the apparent intention of Parliament, and the context in which the relevant words appear in relation to the whole of the URA Act. Furthermore, in terms of section 8 (3) of the Interpretation Act, the Court considers that to decide otherwise would produce a result which cannot reasonably be expected to correspond with the intention of Parliament having regard to the legislative history of the URA Act, and the Explanatory Note.

87. To adopt the construction for which the Regulator contents would be to attribute to the Government an intention radically to alter the disposition of risks to those dealing with the Government with an increased perception of sovereign risk, where there is no apparent intention to take that quite significant step. It would require that step to have been intended by the Government, notwithstanding its ongoing awareness of the Water Supply Act, and in particular section 22 of Part 3 of that Act.

88. Once that step is taken, it is plain enough that the Water Tariffs Decision imposes a cost structure, and is reached by a process, which is not consistent with the Water Concession.

89. At a superficial level, that conclusion is not necessarily reached. Clause 7.3 of the Water Concession provides for UNELCO and the Government to a review water tariffs every 5 years, in such a way as to assure UNELCO of a return on capital investments of 12% taking into account previous losses. The Regulator says that that is what the Water Tariffs Decision is intended to do.

90. However, as the detailed analysis of the relevant terms in the Water Concession and of the terms in the Water Tariffs Decision indicate, the Water Concession as amended on 18 August 1998 provides for a base rate for the supply of water at a maximum and related subscription and proportional rates, and Article 3 following at addendum No. 3 for the Water Concession provides the means by which that process is to be undertaken. It is not the process which was undertaken by the Regulator. The process involves the determination of the issue by a commission of 3 members, one to be nominated by the Government (or the Regulator), the second by UNELCO, and the third by the 2 members then so appointed. That is not what happened.

91. As explained also in relation to the BDI determination later in these reasons, because of the terms of section 3, UNELCO is entitled to have that process adopted. To adopt a different process for the determination of Water Tariffs would be inconsistent with the Water Concession. (as the Regulator has done)

92. Further, a detailed comparison of the fixed maximum rate for water under Article 3 of the Addendum No. 3 to the Water Concession as made on 1 August 1998 also provides for a base rate and adjustments which are not consistent in their terms with that which is proposed in the Water Tariffs Decision.

93. For those reasons, in our view, the decision of the trial Judge was in error and on that aspect of the issues before the Court of Appeal, the appropriate determination is that the Water Tariffs Decision is inconsistent with the Water Concession and is therefore not valid.

94. The issue as to the appropriate orders is addressed later in these reasons.

BDI Decision

95. The trial judge concluded that the BDI Decision was not caught in the legacy protection for UNELCO provided by section 3 of the URA Act, and was not therefore beyond the powers of the Regulator.

96. At [27] of his reasons, he gave the following explanation for that conclusion, of course in the light of his analysis of the URA Act.

"BDI involves discounting business consumers, crudely put high voltage users can apply to UNELCO for discounts. UNELCO say these proposals must be a derogation of their rights under the concession agreements and therefore inconsistent with them. These decision are, say UNELCO, got by the proviso in section 3 of the Act and ultra vires the purposes and functions of the Authority. I find that not to be the case. Not every difference between what the Authority proposes and what is set out in the concession agreements renders a proposal beyond the powers of the Authority to make. Inconsistent means more than different to. To be in consistent, what is being proposed must be incompatible with what is set out in the concession agreements. The degree to which a proposal is different from what is in any concession agreement is relevant of course but essentially not every minor difference leads to inconsistency."

97. The final sentence exposes why we have come to a different view from that of the trial judge. Whilst it is quite appropriate to say that not every minor difference leads to inconsistency, there is no analysis in the reasons to determine what the differences are and whether they constitute inconsistency having regard to section 3 of the URA Act.

98. The process by which the BDI Decision was made can be referred to briefly. The Regulator, as is customary, had provided a Preliminary Decision to UNELCO on that topic for comment. UNELCO, in turn, responded on 21 July 2014 indicating its objection to the proposed BDI decision. The Regulator invited UNELCO to confer to address its concerns, and then sought certain information from UNELCO which, it said, was relevant to its further consideration of the proposed BDI decision. UNELCO responded that it would not confer to discuss the concerns and would not provide the data sought, because it considered that the proposed BDI Decision could not be made by the Regulator.

99. It is hardly surprising that the Regulator, in those circumstances, having regard to its view that it did have the power to make the BDI Decision, then made the BDI Decision. It sent a copy to UNELCO on 5 December 2014. The BDI decision was then gazetted on 17 December 2014.

100. The Electricity Concession contained a section headed *"Specifications"* which included Section 5 – Rates Calculation. That provided for a single base price, and then sequentially at least from 1st August 1998 the maximum price at which UNELCO could sell electricity into 6 supply categories (or tariff categories).

101. Section 5 of the Specifications provides for the single base price to apply to the Electricity Concession, and for a quarterly price adjustment formula operating in relation to the 6 tariff

categories, which may revised at the request of either UNELCO or of the Republic. For that purpose, the Electricity Concession provides for the resolution of such disputes by arbitration.

102. The Regulator apparently on behalf of the Republic, having reviewed the prices and terms of upon which UNELCO was operating and having recalculated figures which it considered appropriate, proposed prices in a Tariff Review Final Decision on 13 May 2010. UNELCO did not agree to that decision. The matter was referred to arbitration.

103. The depth and extent of the Arbitration Panel Final Decision is demonstrated by its separate detailed consideration of its role, consideration of the reasonable rate of return methodology issue, its separate consideration of certain other issues including the appropriate capital asset pricing model (CAPM), and then separately its conclusion on the CAPM Parameters and the final statement of its reasons. It is a very lengthy Arbitration Decision, and apparently a very carefully considered and thorough one.

104. Incidentally, it may be observed, that Arbitration Final Decision in the final section of its decision made separate allowances for the value of 4.1% as the equity country risk premium, and for the value of 2.7% as the debt country risk premium. That is noted because the submissions of UNELCO at several points on this appeal asserted that the Electricity Concession (and the Water Concession) had to be interpreted and applied in the context of UNELCO's exposure to what is sometimes called *"Sovereign risk"*.

105. That general tariff reviews by the Arbitration Final Decision was then given effect to.

106. The Regulator appears to have accepted that its Final Tariff Decision could not stand above, but was the vehicle for the Arbitration Panel and the Arbitration Final Decision.

107. The Regulator's next steps included the BDI Decision.

108. It established the BDI tariff (or sub tariff). It did so by making special provision for a new or increased customer usage of electricity in the setting of commercial customers or the setting of high voltage customers of UNELCO. New commercial or high voltage customers of UNELCO, or existing commercial or high voltage customers of UNELCO, who were prepared to significantly increase their use of electricity, were entitled to inform UNELCO of those plans, and UNELCO was then obliged to notify that customer or those customers of the BDI tariff program and the minimum subscription amount. Provided the minimum subscription amount was to be taken, and the criteria for eligibility met, UNELCO was to approve those customer's participation in the BDI Tariff program up to a total subscribed amount of 3,000 kW.

109. The BDI tariff, for those eligible to and entitled to receive electricity under its terms, involved a price for the supplier of that electricity, broadly speaking, for commercial customers about 36% lower than the price that UNELCO commercial customers were at the time receiving electricity under the Arbitration Decision and, but for the BDI Decision, would continue to receive electricity including any increase in its demand, and in the case of high voltage customers at about 24% lower than the price to that customer if that customer had sought supply directly from UNELCO even as a new or additional demand customer.

110. The process for making the BDI Decision is to be contrasted with the way in which the Electricity Concession provides for pricing of the supply of electricity, as illustrated by the Arbitration Decision.

111. It is not necessary to refer in great details to its provisions. There is no dispute about the relevant terms of the Electricity Concession, or their general effect.

112. Sections 17, 26 and 27 of the Electricity Concession provide the means by which the tariff or tariffs for the supply of electricity to consumers in Port Vila are to be fixed.

113. The process under section 17 is an arbitral one, in the event of dispute. An Arbitration Panel is to be established with that function and responsibility. UNELCO is entitled to appoint one member to that two member and panel the other is to be appointed by the Republic (or by the Regulator, provided the Minister has given its written approval to do so: see section 20 (2) of the URA Act). Section 5 of the Specifications includes rules 26 and 27 permitting revision of the base price and of the adjustment formula arbitration.

114. As noted, the Arbitration Final Decision was made following the dispute about the earlier general tariff review Final Decision of the Regulator made on 13 May 2010.

115. The Arbitration Final Decision of 28 April 2011, and in force at that time of the BDI Decision, became incorporated into the rates calculation section, (section 5), firstly by substituting the single base price as determined by the Arbitration Final Decision, and then by its operation through the formula prescribed to the 6 supply categories or tariff categories.

116. Having regard to the general considerations addressed above, the BDI Decision can therefore be seen, where it applies, as;

> *"(1) Obliging UNELCO to sell and supply up to 3,000 kW of electricity at significantly lower figures than that fixed by the Arbitration Final Decision, and*

(2) *Obliging UNELCO to establish two new categories, or sub categories of consumers beyond the 6 tariff categories contained in clause 17 of section 5 of the Specification."*

117. As accepted by both UNELCO and the Republic there has not, so far as the Court of Appeal was informed, been a separate dispute leading to arbitration on the BDI Decision topic. Unelco has simply said it was unlawful. For this purpose, the description of the new or increased usage customers, whether commercial or high voltage customers, as a new tariff class or classes or as a sub category class or classes, is not really significant.

118. The Court notes that the BDI Decision also established a pricing structure for those two categories of customers which has not been made by the arbitration process. It is, or may be, a matter which is capable of arbitration as a dispute between UNELCO and the Republic (or the Regulator, where the Republic's role has been or may be delegated to the Regulator). Instead, UNELCO appears to have, in relation to this and the other issues, drawn a line in the sand. Neither the Republic nor the Regulator have asserted that this Judicial Review proceeding (or any of the other JR claims) are premature and can only take place when and if there is an arbitral determination under the Electricity Concession. The Court of Appeal accepts, in the absence of any argument to the contrary, that UNELCO has the entitlement to bring each of the JR claims direct to the Supreme Court, and on appeal to the Court of Appeal in those circumstances.

117. To revert to the primary question, it is the view of the Court that the two differences referred to above lead to the conclusion that the main features of the BDI Decision are not consistent with the Electricity Concession as it presently stands. It is also the view of the Court that UNELCO cannot be bound by the BDI Decision as a free standing Decision made by the Regulator. It can only be a position adopted by the Regulator which may give rise to the arbitration. Under the Electricity Concession, UNELCO is entitled to have the Arbitral process followed.

118. The reasons are apparent from the analysis referred to.

119. That conclusion does not indicate that the Court has any view about the wisdom or otherwise of what is proposed in the BDI Decision, as a matter of economic analysis or as a matter of judgment about which of the alternatives is better in the long term interests of consumers or for the other purposes of the URA Act. The Regulator is no doubt motivated by real and practical considerations which it considers will fulfill the purposes of the URA Act as expressed in section 2. UNELCO, in its submissions, disputed that the BDI Decision would in fact serve to fulfill that all those purposes as (it says) that would create a cross subsidy between two categories of groups in the commercial and high voltage customers and it might

also lead to higher prices to the existing customers within those two tariff categories, depending upon the pricing effect of the discounted prices (if imposed) and possible (UNELCO also says) it may lead to those customers reducing their demand and in turn adversely affecting UNELCO's profitability.

120. The Court of Appeal has reached its conclusion without the need to address or determine whether or not either of those respective positions is correct or better in the long term interest of consumers.

Solar Decision

121. The feed-in tariff or Solar tariff dispute is one which is indicative of similar issues arising in other jurisdictions. It is a common government policy to encourage electricity users (commercial and domestic) to install solar panels on their property to take advantage of the available solar power. It is, in the spectrum of power generating sources, regarded as a clean source of power.

122. UNELCO accepts that solar power is available to be used by the consumers of electricity in Vanuatu for their usage, and for that purpose that consumers may install solar panels to generate their personal electricity usage.

123. The difficulty arises because solar power, so generated, is not routinely all used at the premises where it is generated. So the question is whether the electricity so generated but not used by that consumer should be allowed to be fed back into the electricity grid (part of UNELCO's infrastructure), and if so on what terms.

124. Such questions have been addressed in other jurisdictions by a range of responses, but focusing upon the extent to which (if at all) the "feed-in" electricity should be rewarded by a payment to encourage the greater installation of solar panels.

125. In Vanuatu, the Regulator on 8 April 2014 proposed a form of "feed-in" tariff structure by UNELCO by a Preliminary decision.

126. UNELCO made some technical response, and then on 4 July 2014 asserted that the proposed solar tariff decision was beyond the power of the Regulator, at least in so far as it purported to apply to UNELCO.

127. On 22 July 2014, the Regulator made the Solar Decision. It was sent to UNELCO the following day. It was gazetted on 6 August 2014.

128. From that time, the question whether the Regulator has power to impose the Solar Decision on UNELCO has been in the front of communications between UNELCO and the Regulator. At one point, it appeared that both UNELCO and the Regulator were taking steps to go down the arbitration path, as provided for by the Electricity Concession. Ultimately, however, the JR claim was made. The Regulator has not claimed that it is not a proper claim because an arbitration has not taken place.

129. The legislative context preserves the rights of UNELCO under the Electricity Concession where they are inconsistent with particular regulatory steps taken by the Regulator or in other circumstances. That also includes the issue of solar power fed into the grid: Section 3 of the URA Act.

130. The Electricity Supply Act, when first enacted, did not address specifically the issue of feed-in electricity or feed-in tariffs. By the Electricity Supply (Amendment) Act No. 21 of 2000, section IB was inserted. It provided that a person who is not the holder of an electricity concession agreement could manufacture and supply electricity outside a concession area and enabled such a person to sell the electricity to the holder of a concession.

131. That was further refined by the Electricity Supply (Amendment) Act No. 13 of 2010 Section IB was substituted to provide as follows:-

> *"(1) A person who is not a concessionaire may generate electricity;*
> *(2) A person who is not a concessionaire may supply electricity;*
> *(a) outside a concession area; or*
> *(b) to a concessionaire."*

132. The significant change is apparently designed to accommodate the generator of electricity from solar panels supplying excess electricity so generated to UNELCO, that is to feed-in that electricity to the grid.

133. The principal point on this application is whether the Solar Decision can stand, having regard to the rights of UNELCO under the Electricity Concession.

134. UNELCO says that it cannot because the Solar Decision, in so far as it imposes an obligation on UNELCO to receive surplus electricity as fee-in power to its grid from solar panel generated power, under section 1 B (2) (b) of the Electricity Supply Act, must be invalid because of section 2 (1)(a) and (2) of that Act and section 3 of the URA Act.

135. The Electricity Supply Act as amended in 2010 provides in Sections 2(1)(a) that the provisions of the Electricity Supply Act are subject to the terms of the Electricity Concession, and Sections 2(2) says that the Electricity Concession is subject to the terms of

the Electricity Supply Act, except to the extent of any conflict. Similarly, the powers of the Regulator under the URA Act are said to be limited by section 3 of the URA Act because it applies to a regulated service (which by definition includes the supply of electricity to Port Vila, that is the supply of electricity by UNELCO under the Electricity Concession) to the extent that it is not inconsistent with the Electricity Concession.

136. The Solar Decision is reflected in a substantial document of July 2014, with the title:-

"In the matter of investigating and implementing feed-in tariffs and net-metering program for renewable energy in Port Vila."

It addresses feed-in tariffs in relation to domestic customers, and commercial customers separately.

137. In the case of domestic customers, operating under the "low voltage" tariff, the metering method is "net metering" by which consumption drawn from the grid is reduced by the electricity sent to the grid. The standard supply charge and the fixed charge (the net work access charge) are unchanged, but the charge is imposed only for the net electricity provided from the grid after the off set. The amount of off set cannot exceed the net energy provided from the grid, so the situation cannot arise that UNELCO must pay a consumer once there is a neutral level of electricity coming from, and going into, the grid. An access fee is charged for the installed solar capacity.

138. In the case of commercial customers, the metering is done on a bi-directional basis, so that electricity drawn from the network is measured and the electricity sent to the network is separately measured. The standard or fixed charge (access to the network) is unchanged. The consumption charge for electricity provided from the network is also unchanged. A feed-in tariff, that is an amount to be paid by UNELCO for each kWh feed-in to the grid, is specified. There is no access fee, and there can no negative bills.

139. That also applies to high voltage customers.

140. There are installation limits.

141. The Solar Decision then provides a process and approval conditions for being eligible to feed into the grid or network, including application to UNELCO, its assessment, the installation being completed, and UNELCO being satisfied that it is compliant. There is a fixed application fee.

142. The balance of that document explains why the Solar Decision has been made, having regard to the renewal energy policy of the Republic, and has sections under customer empowerment, shared benefit from excess generation, and the Regulator's assessment of the

financial impact on UNELCO, and on other customers. Finally, there is a lengthy section asserting, and explaining, that the Regulator has power to implement the Solar Tariff decision notwithstanding the Electricity Concession.

143. UNELCO asserts that the creation of a right to feed-in electricity to the grid, presumably then to be part of the electricity supplied to consumers in addition to that generated by UNELCO, and secondly the obligation upon UNELCO to adjust its charging to give credit for feed-in electricity, are both clearly inconsistent with relevant provisions of the Electricity Concession.

144. Under the Electricity Concession, its purpose as set out in section 1, gives UNELCO the right to generate and supply electricity to the public for all purposes within Port Vila. Clause 2 of section 1 under the heading "Purpose and Term" of the Concession then obliges UNELCO to comply with the agreement arising from its exclusive right to generate electricity for all purposes for selling to consumers within Port Vila.

145. On 25 September 1997, the Electricity Concession was amended, as the recitals show, in response to the increased demand for electricity in the Port Vila area and the consequential need to develop and operate a new power station. One clause of that Variation agreement was to extend the Electricity Concession by 20 years, to terminate on 31 December 2031.

146. General Conditions, Clause 8.9 reads:

> *"The grantor and/or the Government shall not issue to any person other than the concessionaire any authority or permission to provide, at any time during the term of this concession, the right to manufacture and supply electric current for lighting and power within the supply areas of Port Vila and Luganville held by the concessionaire."*

As noted, UNELCO does not assert that that clause precludes the right of a consumer to generate electricity for that consumer's own usage.

147. Beyond that, in the view of the Court, the principal obligations of the Solar Decision which are referred to above are inconsistent with those clauses. That is because they do purport to create the right for a consumer to feed-in electricity to the grid or network of UNELCO when, it seems clear, clause 8.9 of the Electricity Concession as amended in 1997 precludes that very thing.

148. Strictly speaking, it is therefore not necessary to turn to the conditions upon which feed-in electricity is to take place. However, it appeared during the course of submissions that UNELCO had a further contention that imposing a feed-in pricing structure which involved, in effect, UNELCO paying for electricity which is fed into the grid. It may be that UNELCO, despite clause 8.9, would be prepared to accept feed-in electricity without the cost offsetting elements or revenue offsetting elements for which the solar tariff decision provides.

149. For much the same reasons as has been expressed in relation to the BDI Decision, it is the view of the Court that the imposition of the conditions upon which feed-in electricity must be accepted by UNELCO, is inconsistent with the Electricity Concession.

150. The Court therefore does not accept for those reasons the contentions on behalf of the Regulator that the exclusivity granted to UNELCO under the Electricity Concession is preserved notwithstanding the entitlement of Solar Panel users to feed-in the surplus electricity from the domestic or commercial solar panels in a manner for which UNELCO must give credit. The Court also does not consider that the language of clause 8.9 referred to above, which uses the expression *"manufacture and supply electricity"* is materially different from or produces a different conclusion because of any distinction between that expression and the expression *"manufacture or supply"* electricity.

151. It is, therefore, not significant the Regulator has presented in the Solar Decision careful analysis of the economic consequences of the Solar Decision to demonstrate that the structure and fees are intended to produce a net neutral cost to UNELCO. It is because UNELCO is entitled to the process prescribed by the Electricity Concession, as well as its primary structures as determined by the Arbitration Final Decision and adjusted from time to time.

152. Those reasons do not indicate that, absent the Electricity Concession, the Regulator could not make an order such as the Solar Decision. It is the view of the Court that, without the Electricity Concession, it would clearly be entitled to do so. The effect of section 3 of the URA Act, is to limit the powers which the Regulator might otherwise have under the URA Act, including section 13 (1), in circumstances where the rights of UNELCO have been impaired by the decision.

Information Requests

153. UNELCO has challenged information specified in the Notices the entitlement of the Regulator to seek financial information made by an officer of the Regulator on 23 May 2014 (alternately item 2 of the information requested) and on 5 June 2014 (alternatively item 3 of the information requested).

154. In the overall assessment of the issues on this appeal, the challenges of UNELCO to these two particular Requests for Information are relatively much less important. They are raised in JR 25/2014, together with the challenge to the Solar Decision and the challenge to the Financial Support Decision. The complaint regarding the 5 June 2014 request was added only by amendment.

155. The May request was made in the course of communications where the Regulator was seeking, and in part being provided with, certain financial and related information concerning UNELCO's business. It was a formal request in response to a letter from UNELCO of 20 May 2015 asserting that a particular request for financial information was outside the scope of what was authorized under the URA Act.

The 23 May 2014 Request expressly identifies section 13 (2)(a) of the URA Act as the source of power for the request. It requested:

> Statutory accounting for UNELCO's electricity concessions in Port Vila, Tanna and Malekula and consolidated accounts;
>
> - The statutory accounting for COFELY Vanuatu for the period 2012 – 2013;
> - A description of the Copra Oil supply claim and costing associated to the process;
> - A description of the group structure detailing the shareholding and participation from the mother company and other shareholders in UNELCO and any affiliated company in Vanuatu.

156. The request of 5 June 2014 also identified Sections 6 and 13 (2) (a) of the URA Act as its source of power. It requested:

- The oil purchase contract with COFELY Vanuatu;
- A description of the group structure detailing UNELCO's affiliates in Vanuatu;
- The statutory accounting for COFELY Vanuatu for the period of 2010 – 2013;
- Copies of the relevant loan documents between UNELCO and COFELY Vanuatu in relation to point (d) on page 4 of UNELCO's statutory accounts;
- Identification of any loans or financial transactions between UNELCO and COFELY Vanuatu;
- Identification of any transactions since January 2013, whether documented or not, entered into between UNELCO and its affiliates in Vanuatu for the provision of service (s), discounts offered, lease (s), good (s), vehicle (s), shared personal and any other business arrangement (s) and copies of any documents relating to such transactions.

157. The particular objection to item 2 in the request of 23 May 2014 and item 3 in the request 5 June 2014 relates to the same information, namely the statutory accounting for COFELY Vanuatu for the period 2010 to 2013.

158. The contention of UNELCO is that each of the Requests for financial information is invalid because it is inconsistent with the Electricity Consession, because it is not authorized by section 13 of the URA Act, (largely because its information seeking power should be confined to information regarding safety under section 15 of the URA Act), because it would deprive UNELCO of its rights of property in the grid under the Electricity Concession and under the Water Concession, and finally to the extent to which reliance is placed upon the Financial Support Rules, it is not authorized by them.

159. The last point may be quickly disposed of. The Regulator did not say in its contentions that its source of power to make the contested Requests for Financial Information arose from the Financial Support Rules themselves.

160. As a supplementary contention, it is said that neither of the 2 Requests for Financial Information which are challenged specified a period of response of not less 21 days, as required by section 13 (2) (a) of the URA Act. The Court does not intend to address that alternative contention. It is evident that no such specified period was included in each of those requests. That defect, if it be a defect, can be readily addressed if the two Requests for Financial Information are otherwise valid. It is doubtful that they are invalid because they do not express a period not less than 21 days by which the specified information should be provided, but it may make their enforcement difficult. That can be readily addressed.

161. The more significant issue is whether the Requests were authorized by section 13 (2) (a) of the URA Act. It provides in section 13 (2)(c) that the Regulator has power to do all things that a necessary or conveniently done for or in connection with the performance of its functions.

162. The nature of the functions of the Regulator is variously expressed in the URA Act. Section 13 (2)(a) reads:

> *"(2) Without limiting subsection (1), the Authority may;*
>
> *(a) require a utility within a specified period, which must not be less than 21 days to furnish the Authority with specified information or documents, or information or documents of a specified kind, in the possession or control of the Utility or any of its related entities relating to a regulated service or to corporate structure, accounts or finances of the Utility;*
>
> ....."

163. In its submissions on this topic, UNELCO has by reference adopted its submissions elsewhere that Section 13 is not a source of power on the part of the Regulator, because it has no consequential supporting penalty provision, even if it were otherwise consistent with the Electricity Concession. It is difficult to see how that argument, involving propositions about the primary, secondary and third stages of regulatory powers, readily applies to this

issue. Put very broadly, the proposition is that, in fulfilling the functions and exercising the powers in sections 12 and 13 of the URA Act, those functions and powers can only be exercised where there is a *"third stage"* provision containing sanctions for non-compliance. There is no direct sanction for non-compliance with a notice issue under section 13 (2) (a).

164. It is the view of the Court that, in the seeking of information such as that contained in the two Requests for Financial Information, section 13 should not be so constrained. On its terms, (subject to the specified period being omitted) the Notices do not demonstrably relate to information which could not reasonably concern the Regulator in fulfilling its purposes. That includes item 2 in the Request of 23 May 2014 and item 3 in the Request of 5 June 2014.

165. In its contentions, UNELCO does not seek to assert that, either on their face or by reference to other material before the Court, those Requests for Financial Information were not made by the Regulator to fulfil or better serve it fulfilling its functions, and in turn the purposes of the URA Act. On the issue of inconsistency, UNELCO has invited attention to clauses 6 and 17 of the Electricity Concession as demonstrating the inconsistency for which it contents. Those sections require the extensive provision of information by UNELCO from time to time. It is not necessary to set it out in detail.

166. The trial judge at [26] of his reasons noted that one of the purposes of the URA Act is the provision of safe reliable and affordable regulated services. He noted that there was some material to suggest that UNELCO had loaned a significant sum of money to COFELY Vanuatu, and that the Regulator wanted to understand the extent of that transaction, including whether COFELY Vanuatu is a related entity. That reflects a focus on the particular item in each of the two Information Requests which was identified as that of the most concern to UNELCO. As the trial judge observed, the Regulator is entitled to explore that issue. UNELCO has not pleaded that, in seeking information of that character, the Regulator is not motivated by fulfilling its functions, or that measured objectively it could not reasonably have sought that information in to the fulfilment of its functions.

167. There is no basis for the assertion that the seeking of that information deprives UNELCO of any rights of property which it enjoys under the Electricity Concession.

168. In relation to the Requests for Information, it is our view that the appropriate order is to dismiss the application of UNELCO. As we indicate in the order section of these reasons, each of the matters will be remitted to the trial judge to give effect to these reasons for judgment, and where necessary to make appropriate orders in relation to the counter claim of the Regulator.

Financial Support Decision

169. The Court has referred to Sections 13(2) (a) above. Section 13(2) (c) empowers the Regulator to do anything reasonably incidental to any of its powers.

170. The written submissions of the Regulator on this aspect of the appeal directed attention to its written submissions to the trial judge on the same topic. They identify that the Financial Support Rules were introduced to ensure that revenue collected from consumers for services provided by Regulated Service providers are "*utilised prudently and in a way which does not prejudice the provision of safe, reliable and affordable regulated services*", as the introductory words to the Financial Support Decision Records.

171. It is our view that the scope of the Financial Support Rules, on the material apparently provided to the trial judge, are not authorised. They are very prescriptive. They assert the entitlements not simply to require a regulated entity, including UNELCO, to be a one purpose company, but also to intervene in existing and potentially long standing contractual obligations undertaken by the UNELCO in the past and to require those commitments to be altered or withdrawn from.

172. It is somewhat limp to rely upon purpose (a) in Section 2, namely the provision of safe reliable and affordable regulated services, to justify the existence of such powers. Section 12 describes the functions of the Regulator, and relevantly, they concern only the exercise of the functions and powers conferred by the Act in furtherance of the purposes of the Act. The power which has been identified is that in section 13 (2) (a) and (c). The first of those powers does not authorise the control of contractual arrangements entered into, or to be entered into, by a regulated service provider as it concerns only the procuring of information. The "*catchall*" in Section 13 (2) (c) is not shown, on the material to which the Court's attention was drawn, to be available to support the Financial Support Decision.

173. That is not to say that circumstances may not be disclosed which may warrant the exercise of that power, either by Regulation, or perhaps by exercise of the powers of the Regulator in Section 13. There is at present no material to show any connection between the rights which are asserted on the part of the Regulator in relation to present and future contractual arrangements of a regulated service provider and the identified purposes of the Act.

174. Accordingly, the Court disagrees with the decision of the trial judge on what was identified as a preliminary question. Having regard to that conclusion, and in the absence of other issues raised in relation to the validity of the Financial Support Decision, it would be appropriate for the Supreme to make a declaratory order to that effect.

175. The appropriate orders will be addressed in the "*Conclusions*" section of these reasons.

Dispute Resolution Decision

176. The Dispute Resolution Decision established a dispute resolution process which, the Regulator says, is to assist a consumer in resolving a dispute with UNELCO. It is, the Regulator says an update on a previously existing consumer dispute resolution process.

177. The Regulator further says that the procedure prescribed seeks to provide a cost effective means for a consumer to seek address for a complaint without the time and cost involved in court proceedings.

178. It is not the role of the Court of Appeal to comment on the quality of the dispute resolution procedure as imposed by the Dispute Resolution Decision, provided it is within power. It is a quite formally expressed structure. It does not usurp the jurisdiction of the Court, as it acknowledges that a dispute may go to the Supreme Court, consistently with the Electricity Concession that a dispute with customers shall be submitted to the Minister for consideration, and in the event of persistent disagreement the parties are entitled to the Supreme Court clause 79.

179. There are three respects in which the Dispute Resolution procedure appears to go beyond that which is contemplated by the Electricity Concession.

180. First, it confines the parties to a *"right to appeal"* from the order of the appeal committee to a competent Court. That, in the view of the Court, restricts the nature of the jurisdiction which is contemplated by the Electricity Concession where, in the event of persistent dispute, the parties are entitled to go to the Supreme for adjudication of their dispute. The way it is expressed, the *"right to appeal"* is limited to an appeal from an appeal committee (which itself must make an assessment based on the record rather than its own investigation). To the extent which that process seeks to limit the right of a consumer or of UNELCO to take its dispute to the Supreme Court for a determination on the merits, that is inconsistent with the Electricity Concession.

181. The second aspect concerns the reverse onus of proof which is imposed upon UNELCO. The entitlement of UNELCO under the Electricity Concession is to have the Minister (and, it may be assumed, the Regulator by delegation of the Minister if appropriate) participate in and manage a dispute resolution process under the Electricity Concession. If UNELCO or the consumer is dissatisfied, either is entitled to apply to the Supreme Court for resolution of the dispute on the merits. The imposition of a burden of proof upon UNELCO to disprove the consumer complaint is not within the contemplation of the clause of the Electricity Concession referred to.

182. Thirdly, an interim order is said to be binding on the disputing parties, and presumably it therefore is intended to obliged UNELCO (or the consumer) to respond in accordance with the interim order prior to resolution of the dispute. To the extent that the interim order provision in the Dispute Resolution process imposed by the Dispute Resolution Decision contemplates that, again it is not consistent the Electricity Concession.

183. The trial judge said at [24] of his reasons that sections 12 and 13 of the URA Act entitled the Regulator to set up a dispute resolution process and that it did not usurp the jurisdiction of the Court. That judgment did not specifically address the contentions as to the consistency or otherwise of the Dispute Resolution Rules under the Dispute Resolution Decision with the Electricity Concession.

184. In the view of the Court, the Dispute Resolution Decision, in general terms, was authorised by section 19 of the URA Act. It expressly empowers the Regulator, if requested by a person, to assist that person in resolving any dispute with the Utility in respect to a regulated service. We do not consider that it is reasonable incidentally to the exercise of those powers under section 13 (2) (c) that the *"assistance"* could involve the right to make an interim and binding determination with which UNELCO or the consumer must abide, the right to restrict the nature of access to the Court to an appeal from a decision of the Regulator which has followed its complaint resolution rules, or the right to impose on the Regulator a formal onus of disproof of a complaint. Section 19 (2) provides particular things which the Regulator may insist on UNELCO doing to facilitate its complaint resolution obligation.

185. On that basis, in the view of the Court, the Dispute Resolution Rules to that extent are beyond the power of the Regulator. Those are matters which are readily addressed. It is the view of the Court that it is appropriate in the circumstances to provide the Regulator with an opportunity to revise the Dispute Resolution Decision to have regard to the reasons for the conclusion reached on this topic.

Conclusion

186. For the reasons given the Court proposes to allow the appeal in some respects as it has indicated and dismiss the appeal in other respects again for the reasons it has indicated.

187. In the course of submissions, counsel for UNELCO raised the question as to whether, in the light of reasons for judgment of the Court of Appeal, the decisions of Regulator which might be set aside by the orders of the Court should be remitted to the trial Judge or remitted to another Judge. That is the matter for Chief Justice. As the Court of Appeal has addressed in detail the contentions which were advanced in support of, and against, each of the

Regulator's Decisions which were challenged in the JR claims, it should be relatively straight forward now to make orders finally disposed of each of the JR claims in appropriate forms.

188. It is necessary to note that the Court of Appeal has not made final orders disposing of each of the JR claims for two reasons. In each case there is a counter-claim by the Regulator which has not been a subject of the appeal. It is necessary for each matter to be remitted to the Supreme Court for that aspect of the claims to be addressed. Again, the Court of Appeal anticipates that, in the light of these reasons, the appropriate orders will be agreed between the parties (that is, agreed as appropriate having regard to the reasons for decision now published), and can readily be made.

189. The second reason is that, in certain of the JR claims there was an outstanding issue of bias. In the course of submissions, the Court remarked that the allegations of bias or ostensible bias on the part of the Regulator might properly be understood as allegations that the Regulator took a particular view of the Regulator's powers under the URA Act and vigorously pursued them. To have adopted that position is not to have demonstrated bias or extensible bias. It is not clear to this Court that the allegations as now particularised will advance the interest of UNELCO. That is a matter for it. In any event, as the Court now understands the position, the allegations of bias or apprehended bias are confined to the Water Tariff Decision, the BDI Decision and the Solar Decision. On each of these matters, as the reasons above indicate, UNELCO has been successful in any event.

190. The other contention expressed in the written submissions, and which, on its face, remains unaddressed in relation to certain of the JR claims is the contention UNELCO variously made either that the powers of the Regulator which might otherwise be found to exist should be constrained and interpreted in a way consistent with the constitutional right of UNELCO to preserve its contractual property rights under the Electricity Concession and the Water Concession. It appears to the Court of Appeal that, by reason of the decisions which are now made as set out above, there was no room for, or need for, those issues to be pursued. The effect of section 3 of the URA Act is to impose a construction of that Act in a way which does not interfere with the asserted constitutional rights of UNELCO. Nor do the reasons of the Court of Appeal provide any basis, as it understands the position, for UNELCO now to advance any claim that, by reason of valid exercise of powers by the Regulator, its asserted constitutional rights have been impaired in a way which entitles it to some form of compensation.

191. Accordingly, as the Court of Appeal presently understands it, the short position is that the Supreme Court should now be able to make orders which disposes of each of the JR proceedings.

192. There is one further aspect upon which the Court makes comment. In the course of submissions, counsel for the Regulator asserted that, if its powers were significantly constrained by the decision on the JR claims, it may be that the Regulator has little relevant role in relation to the regulation of the supply of electricity and water to consumers in Vanuatu, because of the existing contractual arrangements under the Electricity Concession, the Water Concession, and a number of similar concessions.

193. That, of course, is a matter for the Republic. It exercised judgments about what was appropriate by the terms of the various concessions.

194. Certain of the decisions of the Regulator under review sought to obviate the consequences which might otherwise follow from the application of section 3 of the URA Act by endeavouring to assess the actual economic consequences to UNELCO of the decisions of the Regulator, and to impose a pricing structure within the decision of the Regulator which, upon analysis, would not disadvantage in a material way UNELCO. In other words, and put coarsely, if its decisions were cost neutral, they could be valid.

195. That is not, at present, an available basis for the Regulator to proceed simply because the legislative prescription in section 3 of the URA Act is quite clear. It is not for the Court of Appeal to indicate whether, if a different legislative prescription were made, and it was a requirement not based on inconsistency but so that decision making by the Regulator was required to be made in a manner which did not diminish the economic entitlement of UNELCO under the Electricity Concession or the Water Concession, the role of the Regulator might be enhanced. For these matters, part of the relevant inconsistency has been the entitlement to access the arbitral process.

196. In any event, there is a significant role for the Regulator to act as the contradictor on any arbitration under either the Electricity Concession or the Water Concession. It is apparent that, within the Republic, the expertise to undertake that function lies with the Regulator.

197. It is also important to note the nature and content of the Arbitration Final Decision made in relation to the Electricity Concession referred to above. That involved, as noted, the selection of appropriate guiding criteria for the arbitration (a reasonable rate of return) and then the identification of the relevant building blocks to achieve that outcome, the identification of the relevant criteria in relation to those building blocks, and the application of that detailed analysis by reference to the evidential material. The submissions of the parties on this Appeal did not need to, and did not, comment upon the quality of that process. It may be that, if a different legislative regime were established and the Regulator were to fulfil a function broadly as now covered within the Arbitration Final Decision, the principles and analysis, and the processes undertaken, to reach the Arbitration Final Decision would not be materially different from those which were in fact undertaken.

198. Finally, as to costs, as UNELCO has succeeded in part and has not succeeded in part upon this appeal, the Court considers it appropriate to make no order as to the costs to the appeal.

199. In the matter, generally, each of the issues arising under the several JR claims is remitted to the Supreme Court for further hearing and determination in accordance with these reasons for judgment. There is no order as to costs of the appeal.

DATED at Port Vila this Friday 18th day of November, 2016

BY THE COURT

Vincent LUNABEK
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL