GOUVERNEMENT DE LA REPUBLIQUE DU VANUATU

Autorité de Régulation des Services Publics
Ministère des Finances et de la Gestion Economique

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GOVERNMENT OF THE REPUBLIC OF VANUATU

Utilities Regulatory Authority
Ministry of Finance and Economic Management

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Our ref: C/URA/06/11061217

12 June 2012

Hon Moana Carcasses Kalosil
Minister of Finance and Economic Management
PMB 053
Port Vila, Vanuatu

By hand

Dear Honorable Minister,

RE: PROPOSED AMENDMENTS TO UTILITIES REGULATORY AUTHORITY ACT

I refer to our scheduled meeting on 30 May 2012, which you requested to discuss unspecified proposed amendments to the Utilities Regulatory Authority Act (the Act).

I was able to obtain the text of the proposed amendments (Annexure A) from other sources and now take this opportunity to provide you with the Authority's analysis and advice.

This has been prepared with the benefit of independent legal and other expert advice provided to the Authority. It is necessarily preliminary having regard to the bulk of the proposed amendments and the short notice.

Sincerely

Carmine Piantedosi
Chief executive Officer

Copy:
Honorable Sato Kilman, Prime Minister
Honorable Steven Kalsakau, Minister of Lands Geology Mines and Water Resources
Honorable Harry Iauko, Minister for Infrastructure and Public Utilities
George Maniuri, Director General Ministry of Finance and economic Management
Joe Ligo, Director General Ministry of Lands Geology Mines and Water Resources
Johnson Binaru, Director General Ministry of Infrastructure and Public Utilities
Ralph Regenvanu, Member of Parliament
Benjamin Shing, Director Department of Strategic Policy, Planning and Aid Coordination
Ishmael Alatoi Kalsakau, Attorney General,
Chairperson and Commissioners, Utilities Regulatory Authority

Executive Summary

General Conclusions

1. The proposed amendments have been drawn by UNELCO and KUTh.

2. The proposed amendments do not reflect any Government policy of which the Authority is aware, or in connection with which the Authority's advice has been sought.

3. The reason for the proposed amendments is based on contentious representations by UNELCO and KUTh, with which the Authority disagrees.

4. There has been no stakeholder consultation.

5. Many of the proposed amendments are poorly drawn; being uncertain in effect, duplicating, redundant and generally inconsistent with both the style and arrangement of the Act, and legislative style in Vanuatu.

6. Many of the proposed amendments have the general effect of severely weakening already limited regulatory control over electricity.

7. Many of the proposed amendments secure for UNELCO several critical protections from regulatory influence and impose upon the Authority a variety of critical administrative and operational burdens.

8. Many of the proposed amendments transfer a large measure of regulatory and contractual administration powers away from the Authority and back to the Government.

9. The proposed amendments have the general effect of undermining key reasons for the creation of the Authority.

10. The proposed amendments will *not* further the purposes of the Act or provide any ascertainable public benefit. They will, in fact, do just the opposite and have an anti-developmental effect. They represent a substantial return to the pre-2007 past.

11. Except for the few matters advised to be accepted (below), the proposed amendments should not further be entertained.

Summary of Specific Conclusions

Current	Proposed	Conclusion	A(ccept)/ R(eject)
1	1	Unnecessary New definitions support unnecessary substantive provisions – see 18	R
4	4	Unnecessary Inserted text supports inadvisable substantive provisions – see 20(6)	R
7(1)(g)	7(1)(g)	Unnecessary Inserted text refers to extremely remote and unimportant possibility which does not affect utilities and may be in fact be helpful in URA candidate selection and formulation of terms	R
9	9	Unnecessary Inserted text is over-drawn and duplicates already-applicable provisions of Leadership Code provisions	R
11	11	Unnecessary Inserted text is over-drawn and poorly drawn and duplicates already-applicable Leadership Code provisions	R
12(3)	12(3)	Unnecessary and inadvisable Deletion removes useful administrative tool from the Authority at no advantage to utilities Conceptually inconsistent with (unaltered) powers under 39 which are to same effect	R
12(4)	12(4)	Unnecessary and imprecise Insertion provides no additional remedial options to utilities beyond existing general law Depends on undefined words of uncertain meaning	R
13(1)	13(1)	Unnecessary Inserted text supports inadvisable substantive provisions – see 12(3)	R
	13(1A)	**Unnecessary and inadvisable** **Inserted provision is a serious confinement of the Authority's general and implied powers in relation to utilities** **Unusual legislative provision**	**R**

13(2)	13(2)	**Unnecessary and inadvisable** **Amendments are a serious confinement of the Authority's important information-gathering powers** **Removal of powers is contrary to the experience of three decades of history and appropriate regulatory design** **Removal of powers supports UNELCO and undermines the Authority in pending civil proceedings in Supreme Court** **Strong anti-developmental consequences**	**R**
13(3)	13(3)	Unnecessary Deleted text supports inadvisable substantive provisions – see 12(3)	R
	13(3)(a)	Partly unobjectionable, partly unnecessary Should be limited to protection of genuinely confidential information, otherwise unnecessary – see 20(6)	A (part), R
	13(3)(b)	Unobjectionable Probable that general law already makes sufficient provision	A
	14(3)(c)	Unnecessary Sufficient provision already made for discretionary consideration – see 1(3), 14(3)(a),(b), 37 Inserted considerations will add unnecessary complication in exchange for insubstantial protection to utility	R
	14(3)(d)	Unnecessary Sufficient provision duplicated elsewhere – see 37	R
15(6)	15(6)	Unobjectionable Of dubious necessity	A
	17(3)(c)	Unnecessary See 14(3)(c)	R
	17(3)(d)	Unnecessary See 14(3)(d)	R
18(1)	18(1)	Unnecessary Insertion is poorly drawn and entirely superfluous	R

18(2)	18(2)	Unnecessary No reason to delay introduction of new price as utility will have had ample advance notice through consultation under 37	R
	18(3)(b)	Unnecessary, impractical, inadvisable Insertion adds cost studies to benchmarking but UNELCO in possession of all necessary information for cost studies and has proposed to weaken information-gathering powers – insertion would have farcical effect in context of proposed 13(2) Sufficient provision for consideration of cost matters in consultation under 37	R
	18(3)(c)	Unnecessary See 14(3)(d)	R
	18(4)	Unnecessary Sufficient provision already made – see 37(4), 28 Insertions stylistically cumbersome, requiring new subsection and a several new definitions – all to no different effect	R
	18(5)	Unnecessary Sufficient provision already made – see 37(4), 28 Poorly drawn	R
19(2)	19(2)	Unnecessary – See 20(4)	R
	19(3)	Unnecessary and inadvisable Insertion of no effect - no existing statutory mandate for utility/utility disputes No reason to foreclose possibility that the Authority will be urged to mediate a utility/utility dispute by consent of the parties	R
	19(4)	Unnecessary and inadvisable Insertion is unusual and disproportionatein its effect on consumers A disincentive to consumer complainants and unlikely ever to be utilized	R
20(4)(b)	20(4)(b)	Unnecessary See 19(2)	R

20(5)	20(5)	Unobjectionable Should be limited to genuinely confidential information, otherwise unnecessary – see 13(3)(a)	A (part)
	20(6)(a)	Unnecessary Insertion states only the obvious Over-drawn	R
	20(6)(b)	Unnecessary and inadvisable No sound reason for inability to combine contractual and statutory regulation measures **A serious confinement of the Authority's powers in relation to utilities**	**R**
	20(6)(c)	Unnecessary and inadvisable **No sound reason to revert to pre-2007 Ministerial control over regulation,a serious infringement on regulatory independence** **Strong anti-developmental consequences and diminution of transparency** Contrary to lessons of history and best practice	**R**
21(6)	21(6)	Unnecessary and inadvisable Deletion permits utility lawfully to provide false + misleading information – highly unusual	R
21(7)	21(7)	Unobjectionable Dubious necessity	A
22(1)	22(1)	Unobjectionable Dubious necessity	A
22(4)	22(4)	Unnecessary and inadvisable Amendment permits utility to engage in anti-competitive conduct, contrary to intention of stimulating electricity competition	R
24	24	Unnecessary Deletion will remove a common provision to facilitate proof	R
25	25	Unnecessary Deletion will remove a common provision to facilitate proof and undermine advantages of whole procedure	R

26	26	Unnecessary Over-drawn	R
	27	Unnecessary Sufficient promotion of natural justice if reasons given only for internal review rather than all decisions Proposed widening of obligation will be unreasonably burdensome to the Authority, raises possibility of oppressive requests	R
27(1)	28(1)	Unnecessary and inadvisable Insertion permits review of traditionally non-justiciable prosecutions decisions, **serious impediment to the Authority's enforcement capabilities** **Contrary to good legislative practice** **Chilling consequences for enforcement of the URA Act**	**R**
	28(2)	Unnecessary Provides no additional protection to utilities beyond existing general law	R
27(1)	28(3)	Unnecessary Stylistic proposal only, insertion of "error of fact" superfluous, sufficient provision already made elsewhere	R
27(2)	28(4)	Unnecessary and inadvisable Amendment unreasonably widens scope of internal review beyond actual complaint Undermines certainty and finality, creates unnecessary points of dispute and delay	R
27(3)	28(5)	Unnecessary Proposal states the obvious, poor legislative style	R
27(4)	28(6)	Unnecessary Over-drawn, sufficient to incorporate by reference, sufficient provision already made	R
28	30	Unnecessary Relocation to facilitate inadvisable proposed 29	R

	29	Unnecessary and inadvisable – Inserted additional layer of intermediate review, borrowed from telecoms regulation but modified to remove finality Lack of finality administratively cumbersome and undermines certainty, finality, creates unnecessary points of dispute and delay	R
30	28	Unobjectionable Deletion unobjectionable but matter sufficiently addressed by 37(4), 28	A
30	28	Unnecessary Insertion duplicates existing general law, over-drawn	R
37	39	Unnecessary Heading alteration unjustified by content	R
37(2)	39(2)	Unobjectionable Dubious necessity	A
37(3)	39(3)	Unobjectionable	A
37(4)	39(4)	Desirable Identifies a likely typographical error – replacement of “may” with must is justifiable and consistent with likely intention	A
38(1)	40(1)	Unnecessary and inadvisable Presumably based on clearly incorrect assumption that judicial review precluded, no reason to remove immunity of URA **except unreasonably to depress the Authority’s activities**	R
38(2)	40(2)	Unnecessary and inadvisable Creates **personal liabilities, inconsistent with usual protections for persons exercising public functions** **Severe constraint to Authority’s activity**	R
	40(3)	Unnecessary See 38(1)	R

38	41(1)	Unnecessary Judicial review already amply provided for - probably based on incorrect assumption that judicial review precluded	R
38	41(2)	Unnecessary Inconsistent with proposed 12(3)(a), duplicates 38(1)(d), (2)	R
Schedule	Schedule	*Specification Port Vila, 11(57)*	
		Specification Port Vila, 16(73)	
		Malekula Concession, 24(107) Unjustified - removal of power from the Authority **will defeat the Authority's current position on issues of inappropriate use of prepaid meters and overcharging**	R
		Tanna Concession, 24 (106) Unjustified - removal of power from the Authority **will defeat the Authority's current position on issues of inappropriate use of prepaid meters and overcharging**	R
		Tanna Concession, 34(165), (166) Known typographical error but incorrect amendment	R
		Water, Schedule Port Vila	

Notes

The analysis below does not include proposed amendments which are purely mechanical, such as renumbering.

Section headings refer to current sections unless otherwise indicated.

The necessity or otherwise of proposed amendments is considered against:

1. The purpose of the Act;
2. The history of utilities regulation in Vanuatu;
3. International best practice; and
4. Local and international legislative drafting conventions.

Background

Utilities regulatory Authority

The Utilities Regulatory Authority (the Authority) was created in 2007 due to longstanding and notorious problems in the electricity sector. These were formally identified since at least 1976.[1] A series of reports by the United Nations Pacific Energy Development Programme[2] in the 1980s continued to identify problems, particularly with regard to the Government's ability to secure appropriate terms in concession contracts and to administer those contracts.

In 2004 the Asian Development Bank's Pacific Regional Energy Assessment describedVanuatu's electricity charges as among the highest in the World and noted (with emphasis added):

> **There are no effective regulations, laws, standards or codes governing the power sector**. Concession agreements between UNELCO and the government include provision for a weak regulator, the Electricity Commissioner, which has been unfilled for years… A national energy committee was established in 2002 but seems to be defunct. The National Advisory Committee on Climate Change functions as a *de facto* national energy committee but there is no effective overall coordination mechanism dealing with power sector regulation, electricity pricing, rural electrification policies, or petroleum supply and pricing issues.[3]

The European Commission's country strategy paper[4] for Vanuatu noted (with emphasis added):

> …the utilities operate in monopoly situations and **regulation is inadequate**. **Providing a regulatory framework and introducing competition where possible is part of the CRP reform process**.[5]

The Government's own Priority and Action Agenda for 2006[6]sought improved regulation, stating (with emphasis added):

> In comparison to many neighboring Pacific Island countries the quality of urban power, water and communications utilities in Vanuatu are of a high technical standard. But the costs to the consumer are also very high to the extent that these are generally believed to be hampering growth of enterprises, and constraining the development of tourism.

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[1] "Report on the Port Vila Electricity Supply", Coopers & Lybrand Associates and Merz & McLelland and Partners, February 1976; "Vanuatu Electricity Supply", Coopers & Lybrand Associates for United Nations Centre on Transnational Corporations, November 1981.

[2] "Port Vila Electricity Supply System: Comments on Tariffs and UNELCO", G F K Herrmann, PEDP Report VAN 85-2, April 1985; "Proposed Changes to the UNELCO Concession Agreement", J Worrall, PEDP Report VAN 85-3, May 1985; Comments on Negotiations between Government of Vanuatu and UNELCO-Vanuatu, G F K Herrmann, PEDP Report VAN 86-1, February 1986; "The UNELCOAgreement of August 1986 and Proposals to Amend or Extend the 1939 Agreement, G F K Herrmann, PEDP Report VAN 87-2, February 1987; "Electricity Supply Concession Agreement Between Government of Vanuatu and UNELCO: Analysis of the Situation in June 1989", G F K Herrmann, PEDP Report VAN 89-4, August 1989.

[3] Page vii.

[4] Country Strategy Paper and National Indicative Programme for the Period 2002-2007 http://ec.europa.eu/development/icenter/repository/print_vu_csp_en.pdf.

[5] Page 5.

[6]Priorities and Action Agenda for Vanuatu 2006 – 2015 "An Educated, Healthy and Wealthy Vanuatu".

Effective regulation and monitoring of concession agreements in electricity, water and telecommunications are seen as essential to improving services and reducing costs.[7]

For the power, water and telecommunications sectors the priorities are to:

1. Reduce the cost of services, particularly of electricity and communications including internet; and
2. **Improve the regulatory framework to more effectively enforce contract conditions**, and encourage additional competition in these sectors where possible;[8]

Proposed Amendments

Through my own inquires, I was able to obtain Annexure A. I will assume that this document contains the text of the unspecified amendments you intended to discuss with me. *I understand that you circulated this document widely on 28 April, but* ***not to the Authority or its Commission***.

The document is not in the style of documents usually produced by the State Law Office. It bears a "Disclaimer" that the draft was "for discussion purposes only". In these circumstances it was very surprising to learn of an email to the Prime Minister, the Attorney-General and numerous other recipients dated 28 April 2012 in which you stated:

> I have attached some amendment of the URA Act in order that URA concentrate on regulation and the Government on policies. The proposed changes are in line with the TRA [*sic, URA*] Act which give to the institution some more responsibility like to respond in time, accountability and legal liability, ethic and code of conduct and more so Transfer of some the function and power back to the Government.
>
> It is important that this consultation is made ASAP so that it can be presented to the Extraordinary Session of Parliament in June.

Apparently the proposed amendments are *already* Government policy. Examination of the Word document's electronic properties revealed that it was created by Jacques White of UNELCO. The title suggests that it incorporates suggestions (or a document) made by KUTh on 16 April 2012. It is not known whether the draft has been examined by any other stakeholders, such as VUI.

I note that the URA Act provides (with emphasis added):

> **12. Functions of the Authority**
>
> (1) The Authority has the following functions:
>
> (a) to exercise the functions and powers conferred by this Act or by any other Act in furtherance of the purposes of this Act;
> (b) **to provide advice, reports and recommendations to the Government relating to utilities;**
> (c) to inform the public of matters relating to utilities;
> (d) to assist consumers to resolve grievances;

[7] Pages 38-9.
[8] Page 42.

(e) to investigate and act upon offences under this Act.

Despite this provision, the Authority has not been advised of the amendments to be introduced to Parliament *this month*. Neither has its advice been sought in relation to the text or the underlying policy. If, as appears, UNELCO and KUTh are the sponsors of the proposed amendments, one would have thought that the Authority (not to mention other stakeholders) would be invited to comment.

I also note, in passing, that the Authority is currently undertaking a 5-year review of the URA Act of its own motion, having already received first-draft legal advice as to possible amendments.

Section 1

Section 1 contains the defined words and phrases used in the Act. There are several proposed additions here, which will be discussed below in the context of the substantive sections and proposed amendments to which they relate.

Section 4

It is proposed that subsection 4(3) be amended as follows:

4. Establishment of Authority

(1) The Utilities Regulatory Authority is established.

(2) The Authority

(a) is a body corporate with perpetual succession; and
(b) is to have a common seal; and
(c) may sue or be sued in its corporate name.

(3) Except as provided for under section 20(6)(c), t~~T~~he Authority is to act independently but must have regard to such policies as may be issued pursuant to section 3~~9~~5.

The sole function of this amendment is to facilitate the proposed addition of subs.20(6). That proposal will be discussed below. As will be seen, it is considered that subs.20(6) is inadvisable. Therefore, this proposed amendment to s.4 is unnecessary.

Section 7

Subparagraph (1)(g) is proposed to be amended as follows:

7. Termination and resignation of a Commissioner

(1) The Minister responsible for finance must, by 28 days notice in writing to a Commissioner, terminate the appointment of a Commissioner if he or she is satisfied that the Commissioner:

(a) …

(g) in respect of the Commissioners referred to in section 5(2), ceases to be a citizen of Vanuatu.

Section 5(2) provides that at least two commissioners must be citizens of Vanuatu.

Presumably the author of the proposed amendment considered that it was insufficiently clear that paragraph 7(1)(g) applies to the two Vanuatu citizens and worried that it could apply to the third commissioner. Theoretically, it could. This possibility does, however, seem so remote and fanciful that no justification for the amendment is evident. Neither is it necessarily problematic that this provision should apply to a commissioner who does not need to be a citizen, but who nevertheless happens to be. It may well be that the local citizenship of particular candidate is attractive due to the flexibility it confers with respect to one of the other positions. This may also be reflected in the length of an appointment or its other terms.

Accordingly, there seems no reason to make the proposed amendment. Neither is it easy to understand why a foreign-owned regulatee such as UNELCO (whose authorship of this particular amendment is indicated by its blue colour) should be interested in such an amendment. The policy issues inherent in the section are issues principally for the Government as they relate to the extent and terms of the devolution of public functions to non-citizens.

Section 9

The proposed amendments to this section are:

9. Remuneration, terms and conditions of appointment

(1) A Commissioner is to be paid in accordance with regulations made pursuant to paragraph 4~~3~~0(2)(b) and, if applicable, subsection 4~~3~~0(3).

(2) …

(5) The Commissioners are leaders for the purposes of the ~~obligations contained in Parts 2, 3 and 4 of the~~*Leadership Code Act* [CAP 240] and must comply with the requirements of that Act.

(6) Without limiting the generality of section 9(5), the obligations contained in Parts 2, 3 and 4 of the *Leadership Code Act* [CAP 240] are deemed to be included in the terms and conditions of appointment of a Commissioner.

(7) A Commissioner must at all times comply with the terms and conditions of his or her appointment when acting as a Commissioner or undertaking the functions and exercising the powers of the Authority.

It should be noted that the “marking-up” of subs.(5) is slightly misleading. It currently reads:

(5) The obligations contained in Parts 2, 3 and 4 of the Leadership Code Act [CAP240] are deemed to be included in the terms and conditions of appointment of a Commissioner.

So, the text of the current subs.(5) has simply been moved to subs.(6). Presumably this reflects the author's sense of preferable order. It does not, however, alter the effect of what is now subs.(5).Subsection (5) is, in substance, the new insertion, not subs.(6), as indicated.

Existing Subsection (5) (Proposed Subsection (6))

The current section has the effect that the obligations imposed upon "Leaders" under the Leadership Code are automatically imported into the terms and conditions under which commissioners are appointed – whether or not they are actually written-in to those terms and conditions. This confers added protection in private law (contract) to such protection as exists in public law (Leadership Code) against the potential misbehavior of a commissioner.

The proposed amendment simply moves subs.(5) to subs.(6) and adds the qualification that (6) does not limit (5). This qualification appears to be otiose as there is no conceivable way in which the (proposed) subs.(6) could interact in the manner addressed by the qualification.

Proposed Subsection (5)

This proposed subsection purports to make commissioners "Leaders" within the meaning of the Leadership Code. It is an unnecessary amendment because they already are.

The Code relevantly provides:

> 5. In addition to the leaders referred to in Article 67 of the Constitution, the following are declared to be leaders:
>
> (a) …
>
> (f) members and the chief executive officers (however described) of the boards and statutory authorities;

The author of the proposed amendments appears to wish to unnecessarily duplicate the already clear effect of s.5 of the Code. Even if it were thought that s.5 of the Code left room for uncertainty, that uncertainty is much more conveniently resolved by amendment to the Code.

The proposed amendment also contains the additional rider that commissioners "must comply with the terms of that [i.e. the Leadership Code Act] Act. This is otiose and contrary to normal legislative drafting style. It is sufficient to say that an Act applies without also having to state the obvious – viz. that the applicable act must be complied with.

Proposed Subsection (7)

Just as the rider to the proposed subs.(5), the proposed subs.(7) is entirely redundant. If there are certain terms and conditions applicable to commissioners it is not necessary also to say that the commissioners "must comply with them" or must comply with them *at all times*" or must comply with them *when acting as a commissioner, etc*". This is the obvious effect of terms and conditions of any contract. If they are not to be obeyed, why are they included?

Indeed, the proposed amendments do much to rob the terms and conditions of their certainty. By being overly prescriptive about their application, the proposed amendment creates possible situations in which the terms and conditions will *not* apply.

General

As in the case of the proposed amendments to s.7, it is difficult to understand why UNELCO (whose authorship is evident from the blue colour) should desire to effect such (unnecessary) amendments to provisions which affect only the relationship between the Government and the commissioners.

Section 11

It is proposed to insert a new subsection (8) to the section dealing with meetings of the URA:

> (8) If a Commissioner has a conflict of interest in a matter being considered, or about to be considered, at a meeting of the Authority:
>
> (a) the Commissioner must disclose the nature of that interest to the other Commissioners as soon as possible after the relevant facts have come to the Commissioner's knowledge;
>
> (b) the disclosure must be recorded in the minutes of the meeting; and
>
> (c) the Commissioner making the disclosure must not be present during the Authority's deliberation of the matter to which the disclosure relates, unless the other Commissioners determine otherwise, in the absence of the disclosing Commissioner (such a decision must be recorded in the minutes of the meeting).

The proposal sets out the detailed procedure to be adopted in the event that a commissioner has a conflict of interest in a matter being considered by the Authority's commission. This is, however, *already provided* under the Leadership Code:

> **DISCLOSURE OF PERSONAL INTEREST**
>
> 16. (1) A leader who has a personal business interest in a matter which he or she has to deal with in his or her official capacity as a leader, or who is likely to have a conflict of interest in relation to the matter, must disclose in writing

that interest:

(a) if the leader is a minister or member of Parliament, to the Parliament; or
(b) if the leader is a member of a local government or municipal council, to the Council; or
(c) if the leader is a member of a board, commission or other statutory body, to the other members of the body; or
(d) in the case of any other leader, to the person or body by whom he or she was appointed, or reports to.

(2) A leader referred to in paragraph (1)(b) or (c):
(a) must declare his or her interest to the other members of the council or body before the matter is dealt with by the council or body; and
(b) must not be present during the discussion of the matter; and
(c) is not entitled to vote on the matter.

First, there appears to be no good reason to provide for the same substantial procedure twice – more so in the light of the proposed amendment to subs.9(5). Second, it is poor legislative practice to state overlapping requirements in different terms, as it gives rise to the distinct possibility of conflict between laws. Third, the proposed amendment does nothing to alter or augment such administrative law remedies as might be available to an aggrieved person following from a conflict of interest having tainted a decision of the Authority.

Section 12

It is proposed to amend subs.(3) by the deletion of para.(a), and to insert a new subs.(4):

(3) The functions of the Authority may be performed on behalf of the Authority by:

~~(a) any individual authorised by the Authority or this Act to perform those functions from time to time; or~~

~~(b)~~ a~~ny~~ single Commissioner authorised by the Authority to perform those functions from time to time and such Commissioner shall be known as the Chief Executive Officer.

(4) The Authority must perform its functions efficiently and without unreasonable delay.

Paragraph 3(a)

It is difficult to understand why para.(3)(a) is proposed to be deleted. It allows the Authority the flexibility to appoint individuals to perform functions which would be cumbersome for the Authority to perform. So, for example, the Authority might appoint someone (e.g. a mediator) to help resolve a dispute under s.19. Such provisions are quite common in legislation and there seems no good reason why it should be deleted.

Further, the author of the proposed amendment has left s.39 intact – by which the same outcome might alternatively be achieved.

Subparagraph (4)

The proposal is to explicitly require the Authority to perform its functions "efficiently" and "without unreasonable delay". Neither term is defined. The word "efficient" could perhaps refer to resource efficiency, administrative efficiency or some other species of efficiency. Here, its linking to the concept of "delay" would probably be interpreted to indicate that what is intended by the amendment is fast(er) action by the Authority.

Such provisions are not uncommon in legislation, but its practical utility in this context is dubious. If, under the present Act the Authority is dilatory in acting then an aggrieved person could seek judicial review (in the nature of mandamus) to compel the Authority to act. *Under the proposed amendment the remedy for an aggrieved person would be exactly the same*, neither stronger nor weaker. The existence of the proposed subs.(4) would make no difference whatsoever to the general administrative law. Accordingly, there appears to be no justification for the proposed amendment.

Section 13

The proposed amendments to this section are the most important and go to the heart of the Authority's powers:

13. Powers of the Authority

(1) The Authority has power to itself do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

(1A) The Authority may require a utility to do those things expressly required by the terms of this Act.

(2) Without limiting subsection (1), the Authority may:

(a) where it is entitled to require a utility to do by the terms of any concession agreement under the Electricity Act, require that ~~a~~utility to furnish the Authority with specified information or documents or information; or information or documents of a specific kind, in the possession or control of the utility, relating to a regulated service or to the corporate structure, accounts or finances of the utility within the period specified in the written request for such information or documents (not being less than 14 days); or

(b) require a utility to confer with the Authority as to the manner in which it carries on any specified activity in relation to the regulated service; or

(c) do anything reasonably incidental to any of its powers.

(3) ~~The powers conferred by this Act may be exercised on behalf of the Authority by any individual authorised by the Authority or this Act to exercise those powers.~~Information furnished or a document provided to the Authority under this Act:

(a) must not be disclosed by the Authority except:

(i) with the written permission of the person from whom the information or document was obtained;

(ii) in the course of proceedings under Part 4;

(iii) where required by a court order;

(iv) where, in the opinion of the Authority, the information comprises, or will be reproduced in, aggregated data so that it does not identify any particular utility or other person; or

(v) where such disclosure is required by this Act or any other law; and

(b) is not admissible in evidence against a person in any criminal proceedings.

Subsection (1)

The insertion of the word “itself” appears to be designed to augment the proposed deletion of para.12(3)(a), but is redundant even if that deletion were effected. It should be obvious that a body given powers is the only body that can exercise those powers.

Proposed Subsection (1A)

The proposed insertion of subs.(1A) creates some confusion, both as to intention and effect. In order to consider the proposal, it is first necessary to consider the existing provisions in some depth.

Subsection (1) is a well-established statutory formula. It allows the Authority to do whatever might reasonably be ancillary to its functions. The list of such things is often impossible to imagine in advance. Even if the range of action can be imagined, it is difficult to provide comprehensively for it. So, it is common to find such provisions in regulatory and general legislation. They provide a general and broad[9] power with an inherent flexibility.

That does not mean, however, that it is utterly uncontrolled or uncontrollable. The words "necessary or convenient" have long been construed to import an objective standard of reasonableness. *Abson v Fenton* (1822-23) 1 Barne& Cress 195 is an early example, where Abbott CJ, delivering the judgment of the Court in deciding whether a road built under a necessary and convenient power, had to be built in a certain location held that the test was whether the direction chosen had been such as a person of reasonable and ordinary skill and experience would have selected beforehand. Significantly he said (p.20):

> ... This view of the subject will, on the one hand, exclude all wanton, capricious, and causeless injury...

[9] *Stonnington CC v Roads Corporation* [2010] VSC 454, [107] per Osborn J.

The importation of a concept of reasonableness into a power to do all things "necessary or convenient" has long since been settled in Commonwealth jurisprudence.[10]

So, the existing formula balances the need for flexibility with the possibility of judicial control for excess.

Against this background subs.(1A) purports to carve out of subs.(1) an important exception. Whereas subs.(1) would continue to allow the Authority to do what must be done to the world at large, subs.(1A) only permits the Authority to require *of a utility* that which is expressly provided for by the Act. This has the practical effect of reading subs.(1) into oblivion since it may be expected that the bulk of the Authority's actions would be taken in relation to a utility, the principal object of regulatory efforts.

Subsection (2)

The proposed amendment is to re-cast para.(a) so that the Authority's information-gathering powers are limited to those in the concession agreements. There are, of course, *no* such powers in the concession agreements.

Long regulatory experience in many countries show that the utilities control most of the specific information needed for regulatory purposes and have little interest in volunteering their dissemination unless they are required to. This information asymmetry is a critical regulatory issue,[11]especially in developing countries.[12]The failure to write sufficient information-gathering powers into regulatory legislation has been observed to be a factor behind the failures of European regulators by comparison with their US counterparts.[13] It has also been responsible for similar difficulties in regulatory experience in South America.[14]

This proposed amendment should be seen in the context of civil proceedings numbered 221 of 2012 currently pending before the Supreme Court of Vanuatu. There, the Authority is seeking information from UNELCO about its capital expenditure plans 2010-2014 for which it has already been paid

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[10] See for example *Esmonds Motors Pty Ltd v Commonwealth of Australia*[1970] HCA 15;(1970) 120 CLR 463, 466-7 per Barwick J.

[11]C Pechman,*Regulating Power: The Economics of Electricity in the Information Age* Boston, MA, 1993, 68-9; F A Wolak, "An Econometric Analysis of the Asymmetric Information, Regulator-Utility Interaction", *AnnalesD'Economie et de Statistique* 1994(34): 14-69;A R Fremeth, Information Asymmetries and Regulatory Decision Costs: An Analysis of U.S. Electric Utility Rate Changes 1980–2000, *Journal of Law Economics & Organization*, 2012(28(1)): 127-162.

[12] D Parker & C Kirkpatrick, "Researching Economic Regulation in Developing Countries: Developing a methodology for critical analysis", University of Manchester Centre on Regulation and Competition, Paper No.34, December 2002, p.12.

[13]Newbery, D. M., "Problems of liberalizing the electricity industry", *European Economic Review*, 46, May 2002, pp.919-27.

[14]D Parker & C Kirkpatrick, n.12 ;AEstache*et al*, "The Case for International Coordination of Electricity Regulation: Evidence from the Measurement of Efficiency in South America**",** *Journal of Regulatory Economics*, Vol. 25, No. 3, 2004; "J Millan*et al*, "Sustainability of the Electricity Sector Reforms in Latin America", paper presented to the Annual Meeting of the Board of Governors of the Inter-American Development Bank and Inter-American Investment Corporation, Santiago, March 2011, p.25; http://www6.iadb.org/res/publications/pubfiles/pubS-141.pdf

through the tariff. UNELCO's refusal to provide this basic information has led the Authority to commence proceedings, which are being vigorously resisted.

UNELCO's opacity, particularly in connection with the key issues of tariff levels and asset values, is not a new phenomenon. At least as far back as the mid 1980s UNELCO has persistently avoided sharing information:

> (a) UNELCO failed to provide data for a tariff review to which the Government was entitled in terms of the previous agreement… In the author's view, UNELCO's profits have probably been consistently higher than those which were accepted as reasonable in the 1976 report, on which the previous agreement was based. UNELCO's obvious determination to avoid an investigation of their costs tends to support this view. Without a detailed investigation of costs it is not possible to establish the real level of UNELCO's profits.
>
> (b) UNELCO revalues its assets annually on the basis of a French price index that is unrelated to conditions in Vanuatu or to most of the types of assets to which it is being applied. For a period of 13 years neither Vangov nor its consultants have had an opportunity to examine UNELCO's accounting records to verify that the application of the index has indeed in a realistic revaluation of its assets…[15]

Given this history, it is difficult to accept that a limitation on the Authority's information gathering-powers is wise.

Subsection (3)

The first limb of the proposal is to delete the existing text – which is considered to be inadvisable for the reasons discussed above in relation to subs.12(3).

The second limb is to insert new text which provides for (a) a comprehensive blanket of confidentiality upon information obtained through the use of s.12; and (b) a protection against the use of this information in criminal proceedings.

As to confidentiality, the protection of information that is genuinely confidential is understandable. Information in the nature of trade secrets, personal information, etc should be kept confidential. It is noted, however, that the effect of the proposed amendments to the balance of the section will have the effect that the only documents that can be obtained are those for which the concession agreements provide for access. If such a document is not already covered by a confidentiality provision in the concession agreements it is difficult to see why it should be covered now. Why should UNELCO be permitted to shrug off regulatory powers not provided by the concession agreements and yet at the same time secure additional protections?

As to the use of such documents in criminal proceedings, that is unobjectionable. It is noted, however, that regulatory prosecutions under the URA Act are not criminal proceedings.

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[15] "Electricity Supply Concession Agreement Between Government of Vanuatu and UNELCO: Analysis of the Situation in June 1989", G F K Herrmann, PEDP Report VAN 89-4, August 1989, p.2.

Section 14

It is proposed to amend the section as follows:

14. Safety standards

(1) The Authority may issue safety standards in relation to the safety of a regulated service in any place.

(2) A safety standard comes into force on the day on which it is published in the Gazette.

(3) The Authority must, in determining whether to issue any safety standard, have regard to:

(a) the cost and convenience of compliance with the safety standard; ~~and~~

(b) the nature and magnitude of the risk that is addressed.

(c) alternative mechanisms to the safety standard for addressing the risk; and

(d) any submission made by a utility in relation to the proposed safety standard.

Proposed Paragraph (3)(c)

There could, undoubtedly, be any number of fine considerations listed here. It is important to interpret the existing provision in the context of subs.1(3) and the consultation mechanism in s.37 (proposed 39). Accordingly, the matters listed in (a) and (b) are not conclusive of the matters to be considered. If a utility wishes to draw attention to an "alternative mechanism" in consultation they may do so. Indeed, the possibility of such an "alternative" is probably a subset of both of the existing paragraphs. There seems no justification to amend the section as proposed. Doing so will unnecessarily complicate the Authority's discretion.

Proposed Paragraph (3)(d)

This is already provided for by s.37 (proposed 39). Accordingly, it is superfluous.

Section 15

The sole proposed amendment is to insert a new subs.(6) as follows:

(6) A person acting in good faith in compliance with a safety order issued under this section is not liable to any action, claim or demand on account of any damage, loss or injury sustained as a result of that action.

This is almost certainly already the position at general law. Nevertheless, the proposed amendment is unobjectionable.

Section 17

The proposed amendments to this section are identical to those proposed in relation to s.14 and are unnecessary for the reasons stated there.

Section 18

The proposed amendments are extensive:

> **18. Maximum prices**
>
> (1) Subject to this section, the Authority may determine the maximum price which may be charged in relation to any aspect of a regulated service in any place.
>
> (2) The maximum price determined under subsection (1) is effective on the day ~~on~~ which ~~the~~ is 30 days after the determination is published in the Gazette.
>
> (3) The Authority must have regard to:
>
> (a) the price of similar services in any comparable location when determining maximum prices.
>
> (b) the costs of providing the regulated service (including infrastructure costs); and
>
> (c) any submission made by a utility in relation to the proposed maximum price.
>
> (4) The maximum price determined under subsection (1) in respect of the supply of electricity by a geothermal electricity producer to a utility must not be less than the geothermal base tariff.
>
> (5) The maximum price determined under subsection (1) in respect of the supply of electricity by a utility to a consumer must include full allowance for the price paid by the utility in respect of electricity produced by a geothermal electricity producer.

Subsection (1)

It is proposed to insert a qualification that the ability to determine price maxima are to be "subject to this section". Given that this is the section that provides such power it is difficult to see how it could be otherwise. Further, the proposed insertion creates confusion as to the relationship between this section and s.37. The proposed amendment is unnecessary.

Subsection (2)

It is difficult to understand why price maxima should not take place immediately they are set, rather than after 30 days. The utility would, of

course, have had ample notice of the possibility of a new price through the consultation process in s.37.

Proposed Paragraph (3)(a)

The intention here was to incorporate a benchmarking exercise, not a (more complex and expensive) cost study. In any event, all the information relevant to such an inquiry resides with UNELCO. Having regard to its historical disinclination to provide information (discussed elsewhere) and the proposed negation of the Authority's information gathering powers, it is difficult to see how this proposal could be either workable or justified.

It is noted that a utility could of course put any such relevant information to the Authority during the consultation phase under s.37.

Proposed Paragraph (3)(b)

This is superfluous for the reasons stated in relation to the proposed para.14(3)(d).

Subsection (4)

The meaning of the proposed new subsection is supported by the proposed new definition of "geothermal base tariff" in s.1 which means:

> the minimum price at which electricity produced from geothermal energy may be supplied by a geothermal electricity producer to a utility pursuant to the conditions of a geothermal production license granted by the Minister responsible for geothermal energy under section 20 of the Geothermal Energy Act [CAP 197];

There are a number of new allied definitions which are inconsequential.

Section 20 of the Geothermal Energy Act theoretically allows the Minister to set charges for geothermal energy. It follows that a maximum set under the URA Act should not be less than a minimum set under the Geothermal Act. Accordingly, the provision is unobjectionable, though it is noted that the effect of ss.37(4) and 28(b) and (c) is the same. It is difficult to see why a new subsection and several new definitions are required to achieve an outcome for which provision is already made.

It follows that the several new definitions proposed to be inserted in s.1 are unnecessary.

Subsection (5)

The proposed insertion aims to ensure that the maximum price set for a utility's supply of electricity to a consumer "includes full allowance" for the price it buys geothermal electricity.

First, it should be noted from the outset that the concession agreements with UNELCO do not allow the Authority to set maximum prices for electricity.

Accordingly, the scenario contemplated by the proposed amendment is so remote as to be inconceivable. Second, the concept of "full allowance" is absurdly imprecise. Third, the whole scheme of the consultation provision in subs.37(4) is to avoid the obviously unsatisfactory outcomes listed in s.28:

> (b) a price determined pursuant to section 18 will produce less income for the utility than the cost to the utility of providing the regulated service in the place to which it relates; and
>
> (c) a price determined pursuant to section 18 does not enable the utility to realise a reasonable profit on the regulated service to which it relates.

So, "full allowance" is already provided for.

Section 19

The proposed amendments are:

> **19. Complaint Resolution**
>
> (1) The Authority may, if requested by a person, assist that person to resolve any dispute with a utility in respect to a regulated service.
>
> (2) Without limiting subsection (1), the Authority may:
>
> (a) require the utility to answer any question; or
>
> (b) require the utility to provide any document in the possession or control of the utility; or
>
> (c) …
>
> (3) Notwithstanding subsection (1) and subsection (2), the Authority must not assist to resolve anydispute between two or more utilities, including a dispute between a utility and a geothermal electricity producer
>
> (4) For the purposes of subsection 19(1) the Authority may require the person in dispute with the utility to:
>
> (a) answer any question; or
>
> (b) provide any document in the possession or control of the person.

Subsection (2)

The proposed provision is unnecessary for the same reasons discussed in relation to subs.20(4), below.

Subsection (3)

It should be obvious that there is no statutory mandate for the Authority to become involved in any dispute other than with a consumer (as that word is

defined). There is no justification for the proposed amendment. Neither would it be wise so to foreclose the possibility that in a future utility/utility dispute the parties will not both want the Authority to mediate. Without the consent of all the parties the Authority could not do so.

Subsection (4)

This is unusually draconian to be required of a consumer complainant. The powers in this section are discretionary, as indicated by the word "may" in subs.(1). The Authority is not obliged to become involved in a dispute. If a consumer complainant was not forthright with documents or information then it is hardly likely that the Authority would decide to become involved.

Section 20

Section 20 is proposed to be amended radically:

20. Assignment of contractual rights

(1) The rights exercisable by the Government in the contracts described in Part A of Schedule 1 are assigned to the Authority.

(2) The rights exercisable by the Government in the contracts described in Part B of Schedule 1 are assigned to the Authority, but may only be exercised by the Authority upon receiving the written approval of the relevant Minister.

(3) The regulations may assign to the Authority other contractual rights exercisable by the Government in relation to a regulated service.

(4) The Authority may, if necessary or convenient to administer any contractual right assigned to it pursuant to subsection (1) or (2), or the regulations, require a utility to:

(a) answer any question; or

(b) provide any document in the possession or control of the utility,

within such period as specified by the Authority in the written notice requesting the document or information (not being less than 14 days).

(5) If the Authority is provided with information or documents in relation to, or in connection with, the Authority's functions and powers set out in Part C of Schedule 1, the Authority must provide a copy of the information or documents to the Minister responsible for finance but must otherwise treat the information or documents confidentially.

(6) Where the Authority is exercising its right under contract pursuant to this section 20, the Authority:

(a) must exercise that right in accordance with the terms of the contract;

(b) must not use statutory powers under this Act or any other Act, except as expressly provided for in this section;

(c) to the extent that the relevant Minister directs the Authority as to how the right is to be exercised, must exercise the right in accordance with such direction.

Disputes between a utility and the Authority in relation to the Authority's functions and powers set out in Schedule 1 will be determined in accordance with the provisions of the relevant contract.

Subsection (4)

The proposed addition purports to clarify that the documents which might be requested here must be in the "possession or control of the utility". A similar proposed amendment has been discussed above (re subs.13(2)). The author might fear that the Authority could request documents which the utility does not have. This is, however, a fanciful suggestion which perhaps obscures a potentially more sinister possibility – that UNELCO might promote this amendment in order to be able to put required documents beyond the reach of the "possession and control" test by the simple expedient of putting them in the hands of their parent company.

The other limb of the amendment is the insertion of a 14 day compliance period – but this is already contemplated by (and inconsistent with) para.21(6)(a) – which provides the more generous time frame of 21 days.

Subsection (5)

If a document were obtained from UNELCO pursuant to a power to obtain the document in the concession agreements, the Government would be free of any restrictions in their use of that document other than as may be specified in the concession agreements themselves. Why then should a superadded requirement of confidentiality be placed upon the Authority merely for acting as the Government's delegate? Indeed, why should such an additional requirement be accepted in the context of proposed amendments designed to limit the Authority's powers to those contained in the concession agreements? It is conceivable that a document so obtained might be disseminated for reasons consistent with the objects of the URA Act.

Subsection (6)

The amendment to para.(a) states only the obvious – that a contractual power exercised by the Authority must be exercised in accordance with the terms of the contract. The proposal is entirely redundant – how could a contractual power be exercised otherwise? Likewise, the undesignated text at the end of the subsection to the effect that disputes about contractual matters must be determined in accordance with the contract is so obvious that it goes without saying. These proposals are conspicuously inappropriate.

The amendment to para.(b) is highly unusual – it prevents the Authority using any of its statutory powers when it is also exercising contractual powers. This attempt to isolate statutory from contractual powers is bizarre. There is no reason why the Authority should not properly utilize either its (delegated) contractual options or its statutory options, or a blend of the two, according to circumstances.

The amendment to para.(c) is critically important. It permits the Minister to direct the Authority in the exercise of its delegated contractual powers. It is appropriate briefly to survey the history leading to the delegation of contract administration to the Authority in the first place.

The Government's inability properly to administer the concession contracts with UNELCO has long been notorious, and was a principal reason for the creation of the Authority. The suggestion that the Government's contractual powers be delegated, as they have now been, is an old one.

A 1989 report by the UN Pacific Energy Development Programme[16] was probably not the first such recommendation, noting that the Government had demonstrated "no serious intention"[17] to require UNELCO's compliance with its contractual obligations. It recorded that:

> UNELCO's continued disregard of provisions of the old and new agreements with which they do not feel inclined to comply, remains unchallenged. It appears that they have even stopped submitting the annual statistical returns required by the agreement, without any reaction from Government.[18]

The report discussed the possibility of appointing an Electricity Commissioner and creating an Electricity Act. That discussion is a continuing warning that seems no less compelling in the recent context of the URA:

> Government has failed to take action to enforce the terms of this agreement, and has failed to back with legal action the notices issued by the EC it once appointed. Without adequate support from Government and the Attorney-General, an officer appointed under an Electricity Act would be able to enforce neither the legislation nor the Agreement with UNELCO…
>
> …To add an Electricity Act which cannot be enforced to an agreement that is not being enforced would be an exercise in futility, and is probably worse than having no such legislation. It will involve additional costs, and it is unlikely that an able and qualified engineer would be willing to act as the electricity authority for any length of time under such circumstances.[19]

The acute disadvantage of the Government in relation to UNELCO in matters of contract administration is also observed in the several contractual variations and extensions made since Independence – all of which have been favorable to UNELCO but have failed to secure minimum benefits for the Government. The extraordinary history of the 1986 negotiations and the

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[16] Note 2.
[17] Page 2.
[18] Page 3.
[19] Pages 4-5.

squandered opportunities is detailed inearlier PEDP Reports.[20] Annex 1 of the 1987 report states:

> Reference 4 made some very specific proposals for incorporation into a new agreement, and there appears to have been an understanding that UNELCO had indicated that these proposals were, at least in principle, acceptable to them.
>
> A negotiating committee was set up in accordance with the proposals… and there was considerable surprise when, after much delay, the committee received a proposal for a new agreement from UNELCO in January 1986, which contained practically none of the changes foreshadowed…
>
> Reference 5… contains a comparison of the terms of the then existing contract and UNELCO's proposal, and concludes that UNELCO's proposal is more favourable to UNELCO than the existing contract. It urges that Government should not rush into a new concession, but should negotiate better terms. As long as there was no commitment, Government was negotiating from a position of strength, since UNELCO clearly was anxious to renew the existing concession.
>
> Regrettably, Government did not take the advice contained in these reports and also endorsed by its Negotiating Committee and, without the knowledge of the Committee, signed a new agreement with UNELCO… generally along the lines of UNELCO's earlier proposal.

The Government's disadvantage was unrelieved in subsequent years and in subsequent concession variations. In 2004 a report by Castalia Strategic Advisors[21] on infrastructure regulation in Vanuatu found complaints that the government lacked the expertise to supervise the concession contracts:

> Government officials and Ministers indicated a frustration that the Government is often not aware of its powers under the contract, or able to exercise them efficiently. For example, the Energy Unit in the Ministry of Land, Natural Resources and Energy is well regarded for its knowledge of the sector, has copies of the electricity concession contracts, and receives reports from UNELCO. However, the Unit told us that it lacks the expertise to supervise the contracts effectively. The engineer previously employed in the Unit left to take up a better paid opportunity overseas, leaving the Unit unable to reach an informed view on technical issues. The Unit does not have accounting or economic expertise, leaving it unable to check the application of the tariff indexation formula to its own satisfaction, or to form a view on efficient cost levels. Similarly, without access to legal capabilities the Unit is not able easily to interpret the contracts, or to challenge UNELCO in case it appears that the company is not complying with the contract.
>
> Other parts of Government with an interest in the electricity and water sector do not receive information on it, do not feel able to understand and monitor the contracts, and may be suspicious of UNELCO because they feel that the Government is not able to monitor the company effectively.
>
> It seems that the first task on the regulatory agenda should be to ensure that the Government has the capacity to analyze the information it already receives, and exercise the powers it already has.[22]

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[20] Note 2.
[21] "Infrastructure regulatory review for the government of Vanuatu", Castalia Strategic Advisors, July 2004.
[22] Page 33.

UNELCO's inexplicably strong influence over Government continues to be demonstrated by, amongst other things, the purported[23] extension of its concession in 2011.

Accordingly, there is absolutely no basis for faith that restoration of Ministerial control over contract administration will have any but the obvious effect of restoring the woeful pre-URA disadvantages. It does not matter that the proposal is for the Minister's directory power to be discretionary – history amply demonstrates how it is likely to be exercised.

Even though regulatory reform is first a political decision, it is beyond serious doubt that regulation must then be uncoupled from political considerations to be effective.[24] The World Bank refers to this as "separation of the provider and regulator."[25]

Section 21

There are two small proposed amendments to this section:

(6) A utility must not:

(a) fail to comply within 21 days; or

(b) provide any false or misleading information or document, in relation to any requirement imposed under section 19 ~~or subsection 20(4)~~.

(7) A utility must not engage in any conduct which is misleading or deceptive, or is likely to mislead or deceive a consumer in relation to the supply or proposed supply of a regulated service.

Subsection (6)

The section makes it an offence to provide false or misleading information or documents when required by either ss.19 or 20. This is entirely proper. The proposed deletion of the reference to s.20 will mean that *a utility can lawfully provide false or misleading information* to the Authority.

[23]Without tender, contrary to the provisions of the Government Contracts and Tenders Act.
[24]S Berg, "Infrastructure Regulation: Risk, Return, Performance," *Global Utilities,* May 2001.One of the observed problems facing developing countries is that, despite pervasive state intervention, those governments frequently lack the capacity for effective regulation. This gives rise to "anti-developmental conditions" in which powerful interests become allied to top political/bureaucratic officials seek predatory policies, coalescing to undermine regulatory capability: J Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*, 1988, Princeton NJ, Princeton University Press; J Migdal, "The State in Society: An approach to struggles for domination" in J Migdal, A Kohli& V Shue (eds) *State Power and Social Forces*, 1994, Cambridge, Cambrisge University Press; M Minogue, "Regulatory Reform in Developing Countries – is 'best practice' transferable?' in P Vass (ed) *Regulatory Review 2004/2005*, CRI Bath University, 2005, 311-330, 323. This would seem to be a compelling explanation of UNELCO's historical (and continuing) influence. The importance of regulatory independence is probably no less in industrialised economies: B Levy & P Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation," *Journal of Law, Economics, and Organization*, 1994, 10(2), 201-246.
[25]World Bank, "Making Services Work for Poor People," *World Development Report* (2004): 6-10.

Subsection (7)

The current section prohibits misleading and deceptive conduct. The object of the proscribed conduct is a "consumer" which is defined in s.1:

> **Consumer** means a person to whom a regulated service is or may be provided in consideration of a payment

So, a utility cannot do anything misleading or deceptive toward a consumer. There is otherwise no limit on the type of activity in which such conduct takes place.

The proposed amendment purports to limit the offence of misleading and deceptive conduct to such conduct as may be "in relation to the supply or proposed supply of a regulated service."Admittedly, it is difficult to conceive of misleading and deceptive conduct occurring *outside* such scope. On the other hand, that is not of itself a justification for amendment. It is acknowledged, however, that the proposed amendment is not otherwise objectionable and is consistent with commonly-seen formulae for similar provisions.

Section 22

Subsection (1)

The proposal is to make it a defence to contravene a safety standard in an emergency. The proposed amendment to paragraph (b) is, however, grammatically unsound by reference to the head text:

> (1) It is a defence to an offence under paragraph 21(1)(a) that the contravention was due to:
>
> (a) an accident and that reasonable precautions were made and due diligence was exercised to prevent such accident;
>
> (b) in response to an emergency.

It would be more appropriate if (b) were simply to read "an emergency". To this extent the proposed amendment is unobjectionable.

Subsection (4)

The proposal is to replace the conjunctive "and" with the disjunctive "or" between paragraphs (a) and (b). The current effect of the paragraph is that a defence will be established if the defendant can show both (a) and (b). The effect of the proposal is to make two defences – by showing *either* (a) or (b).

This would create the highly unusual result that is out of step with contemporary competition legislation. For example, anti-competitive behavior which in fact substantially lessens competition could be excused on the (mere) basis that it is in furtherance of a bona-fide joint venture.

Section 24

It is proposed to delete subs.(8). The function of this subsection is to facilitate proof in court proceedings. It provides that production of the *Gazette* (or a certified copy) is sufficient proof of the order, standard or determination made in it. This is a very common legislative provision designed to reduce the length and cost of hearings by providing that strict proof of the due promulgation of orders, standards and determinations is not necessary. It is difficult to imagine any reason why UNELCO (whose authorship is indicated by blue) would wish to delete this provision except to place a hurdle in the way of the URA should it ever take proceedings against UNELCO for breach. There is no good reason for the proposed amendment.

Section 25

It is proposed to delete subs.(4) in the section providing for infringement notices. The infringement notice method was conceived as a quick and informal mechanism to levy modest fines for low-level infractions – in the same manner as many countries will issue a minor road-traffic or parking infringement notices. Subsection (4) is intended to facilitate proof in the same spirit – to be quick and informal. So, if the recipient of an infringement notice does not pay by the due date (thus forcing the URA to initiate formal court action), the facts stated in the infringement notice are *prima facie* evidence. This does not mean that the other party cannot rebut that presumption by adducing any evidence of their choosing – it just means that the URA does not have to adduce formal proof of every factual element unless a particular matter is seriously in contention.

There appears to be no good reason to remove this subsection, which will only place an unnecessary hurdle in the way of the URA – one which is out of proportion to the whole scheme of the infringement notice system. It is also noted that the infringement notice system has not yet been invoked – so there can be no serious objection to its actual operation.

Section 26

The proposed amendments to this section are ostensibly to insert clarifications into subs.(1) and (2) which are obviously unnecessary. The meaning of “penalties recovered under this Part” can only mean penalties recovered *by the Authority*. The meaning of “costs recovered under this Part” can only mean costs *of the Authority*.

Proposed Section 27

It is proposed to insert an entirely new section requiring the URA to give reasons for its decisions:

27. Provision of reasons

(1) Any person aggrieved by a decision of the Authority may invite the Authority to give reasons for such decisions and the Authority shall, if it has not already provided reasons, comply within a reasonable time.

(2) Nothing in subsection (1) prevents the Authority providing reasons if supplementary reasons at any time without invitation.

The provision of reasons is a worthy goal and it has been said that the provision of reasons is an incident of natural justice. Reasons are a fundamental part of good administration.[26] A decision-maker which is required to be articulate is less prone to be influenced by caprice or purely emotive or impulsive reactions.[27] That being said, the provision of reasons does create an administrative burden and constant requests for reasons can easily be oppressive. It is not uncommon for a right to reasons (where provided by statute) to be qualified.

Section 27 of the current URA Act provides for internal review of certain decisions by aggrieved persons. If that internal review upholds or partially upholds the original decision *then* reasons must be given pursuant to subs.(4). This is also to be considered in the context of the requirement of prior consultation with utilities before making certain decisions, pursuant to s.37.

This arrangement, coupled with prior consultation, nevertheless represents a generous entitlement to reasons for aggrieved persons and ensures that the administrative cost of reasons is incurred only when the aggrieved party seeks internal review *after* comprehensively addressing stating their grievance in the manner contemplated by subs.(1). If the scheme were otherwise, then aggrieved parties could harass the Authority with multiple overlapping requests at all stages of any action whatsoever.

The prospect of oppressive requests for reasons is not fanciful when the proposed amendments to subs.27(1) are considered. These are discussed below.

It is noted that the proposed amendments to s.27 (renumbered s.28) include retention of subs.(4) requiring reasons.

Section 27 (proposed 28)

The proposed amendments to the current s.28 are comprehensive:

~~27.~~ 28. Internal review

(1) A utility aggrieved by any action taken pursuant to Part 3 or sections24, 25 or 39~~7~~ may of this Act, within 30 days of the action being taken, give a notice of grievance to the Authority ~~in writing that contains:~~

(2) A utility aggrieved by failure of the Authority to take an action pursuant to Part 3 or section 39 of this Act, may after 30 days following the giving of

[26] *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, 191 per Lord Denning MR.
[27] *Davis v Davis* (1963)5 FLR 398, 401 per Barry J.

notice by the utility requesting the action, give a notice of grievance to the Authority.

~~(1)~~(3) A notice of grievance must be in writing and must contain:

(a) a detailed description of any facts or matters supporting the grievance; and

(b) copies of any documents supporting the grievance; and

(c) a detailed description of any alleged error of law orerror of fact; and

(d) a detailed description of any relevant changed facts or circumstances since the action being the subject of the notice.

~~(2)~~(4) If the Authority receives a notice of grievance relevant action within the time prescribed by subsection (1), it must review the merits of the ~~grievance~~relevant action and may:

(a) revoke the action complained of in the notice of grievance; or

(b) amend or vary the action complained of in the notice of grievance; or
(c) take no further action.

~~(3)~~(5) The aggrieved person must be informed of the outcome of the review within 30 days of the date of notification under subsection (1) and, in the event that the Authority takes the action described in paragraphs (2)(b) or (c), the Authority must provide written reasons for its actions.

(6) If upon review, the Authority is satisfied ~~of any of the matters described in paragraphs 28(a) to (c) it~~ that:

(a) the cost and inconvenience of compliance with any standard is not reasonably proportionate to the issue it addresses; or

(b) a price determined pursuant to section 18 will produce less income for the utility than the cost to the utility of providing the regulated service in the place to which it relates; or

(c) a price determined pursuant to section 18 does not enable the utility to realise a reasonable profit on the regulated service to which it relates,

then the Authority must revoke, amend or vary the action complained of accordingly.

It is noted that the URA developed draft guidelines[28] for the conduct of internal review and circulated these to UNELCO and others for comment by 10 February 2012. No comments were received.

Subsection (1)

The current subsection limits internal review to decisions taken under Part 3 (Functions and Powers of the Authority) or s.37 (Consultation). The proposed amendment would significantly widen the scope of internal review to include decisions to prosecute breaches of the Act under ss.24 or 25. Prosecutorial

[28] "Review of Certain Actions- Internal Review", Draft Guideline, December 2011.

decisions are traditionally non-justiciable and it would be highly unusual to require a prosecuting authority to submit to internal (or external) review of its decision to prosecute. Indeed, it would be more unusual in these circumstances where the URA would subsequently have to provide reasons for its decision to prosecute.

In the case of the infringement notice procedure the possibility of internal review would become so burdensome as to erase all the advantages of that procedure.

It is noted that there is nothing preventing a party from making representations to the URA to revoke an infringement notice or discontinue legal proceedings.

Proposed Subsection (2)

Subsection (2) is designed to mirror subs.(1) where the matter complained of is a *failure to act* rather than an action. A power is not a dutyand the powers contained in Part 3 are discretionary rather than mandatory. So, for example, the power of a policeman to arrest someone is not the same as imposing a duty on the policeman to do so. The proposed amendment would be unusually burdensome.

It is noted that a party aggrieved by a failure of the URA to act where that failure can only be explained by arbitrary or otherwise impermissible grounds can seek judicial review.[29]

Proposed Subsection (3) (current subsection (1))

Subsection 3 contains the residue of the original subs.(1) that was split from it to facilitate the proposed subs.(2) – apparently for purely stylistic reasons.[30] There is, however, one small addition in para.(c); that a notice of grievance should state also errors of fact. This insertion is superfluous because of para.(a). It is not the purpose or effect of para.(c) to define the parameters of internal review or to confine it to errors of law. Any factual differences will emerge from what is required at (a). The purpose of para.(c) is only to state what might not otherwise be obvious to the URA, viz. whether any errors of law are raised.

Proposed Subsection (4) (current subsection (2))

This currently provides that the URA internally review the merits of the grievance submitted to it. The proposed amendment replaces “grievance” with “relevant action.” It is noted that this does not seem to contemplate the inaction which was the focus of the proposed subs.(2).

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[29] *Julius v Bishop of Oxford* (1880) 5 App Cas 214, 222-3 per Earl Cairns LC.

[30] It is noted that the whole scheme of what is now three subsections (1-3) could more elegantly have been accomplished by simply making subs.(1) read “…aggrieved by an action of the Authority under… or inaction under…”

The proposed amendment has the effect of widening the internal review to the whole of the action upon which it is based – whether or not it is the subject of any specific grievance or description in the notice of grievance. This merely creates unnecessary stumbling blocks for a review. The internal review should, sensibly, be confined to the points of grievance raised.

Proposed Subsection (5) (current subsection (3))

The proposed amendment states the obvious and is unnecessary.

Proposed Subsection (6) (current subsection (4))

There is no substantive amendment to this subsection. The matters incorporated by shorthand reference to paragraphs 28(a)-(c) are simply reproduced in longhand due to the proposed amendments to s.28 (proposed 29).

Section 28 (proposed 30)

The substance of this section has been relocated to facilitate the insertion of a new s.29. The proposed s.30 will be discussed below.

Proposed Section 29

Section 29 is entirely new. It is based on s.54 of the Telecommunications and Radio-communications Regulation Act 2009 ("TRRA") but has been altered significantly. The latter scheme was known to be suboptimal but was intended to be temporary[31] and was based on a very different market, more complex considerations and a much more competitive market than will exist for power or water in Vanuatu's foreseeable future. It must be remembered that UNELCO is a virtual monopoly and that features of one regulatory scheme are not necessarily interchangeable with another.

Due to the bulk of the proposed amendment, it will not be reproduced here. It appears to be substantially identical to the TRRA scheme with one important exception – finality. Under the TRRA provisions the possibility of external expert review was absolutely final. Under the proposed amendment it is yet another stage and does not preclude additional judicial review.

The proposal might be justifiable if, like in the TRRA, external review were final.

Proposed Section 30 (current 28)

The proposed section does no more than state what is already available under the general law of judicial review. It is not usual for legislation to do so.

[31]Pending design and consideration of a multi-disciplinary Pacific regulatory tribunal.

Unusually, the additional bases of judicial review currently provided by paragraphs 28(a)-(c) have been deleted – perhaps unintentionally? If UNELCO (whose authorship is indicated by blue) does not wish to avail itself of the possibility of invoking these grounds in its own protection, that would not seem to be a good reason for precluding other utilities from so doing.

Section 37 (proposed 39)

The proposed section is renamed, though no reason for the renaming is evident:

> **~~37.~~39. Consultation and Direction**
>
> (1) Subject to subsection 4(3), the Authority may obtain advice from or consult with any person including the Government.
>
> (2) Prior to exercising any of the powers contained in subsections 14(1), 17(1) or 18(1), the Authority must:
>
> (a) give notice of the material substance of the proposed exercise of such powers to all utilities potentially affected not less than 30 days prior to the exercise of the relevant power; and
>
> (b) afford all such utilities a reasonable opportunity to make submissions in relation to the exercise of such powers.
>
> (3) The Authority is to consider any submissions provided under paragraph (2)(b) prior to exercising the relevant power.
>
> (4) If upon consideration, the Authority is satisfied of any of the matters described in paragraphs 28(4)(a) to (c) it ~~may revoke~~ must abandon, amend or otherwise vary the proposed action accordingly.

These proposed amendments are minor amendments, mostly of style. They do little to alter the current provision. They are otherwise unobjectionable. The replacement of the word “may” with the word “must” is desirable and probably rectifies a typographical error.

Section 38 (proposed 40)

It is proposed that the section be amended as follows:

> **~~38.~~40. Protection from ~~legal actions~~ personal liability**
>
> (1) This section applies to each of the following persons:
>
> ~~(a) the Authority;~~
>
> ~~(b)~~(a) a Commissioner,
>
> ~~(c)~~(b) a safety inspector,
>
> ~~(d)~~(c) an employee of, or a person engaged by, the Authority under section 36,
>
> ~~(e)~~(d) a delegate of the Authority.

(2) The person ~~is not~~may be personally liable to an action, suit or proceeding in relation to an act or matter if:

(a) the act or matter is done or omitted to be done in the exercise or performance, or purported exercise or performance, of a power or function under this Act or any other law, and

(b) the act or matter is done or omitted to be done in good faith.

(3) This section 40 does not limit, alter or remove the liability of the Authority to any action, suit or proceeding.

The current section provides that the URA and its human agents were immune from suit provided they act in good faith in performance of their functions. This is a standard protection given to persons discharging public responsibilities.

The proposed amendment ***reverses*** the immunity provided by the section. The proposed subs.(2) explicitly makes the human agents of the URA *personally liable*. This is very unusual. Such a provision could be expected to have an unduly chilling effect upon the preparedness of the URA to take any steps whatsoever. It is also doubtful whether anyone would ever accept a position with the URA having regard to the risk of personal liability. There is no justification for the amendment.

The amendment to subs.(3) is redundant having regard to the proposed deletion of paragraph 38(1)(a) and the proposed insertion of s.40.

Section 41

This proposed amendment is to be read together with the proposed amendment to s.38 (proposed 40). It inserts a wholly new provision as follows:

41. Immunity of the Authority

(1) The Authority is not liable to any action of claim, other than by way of judicial review, arising from the exercise, intended exercise or failure to exercise of any of the functions or powers under this Act in good faith.

(2) Any person authorised by the Authority to act in its name is to have the same immunity as the Authority, to the extent of that authority.

Subsection (1)

It is clear that the author wishes to achieve the effect that the URA not be immune from judicial review. To this extent it is based on the incorrect assumption that s.38 (proposed s.40) has the effect of precluding judicial review. It does not.

One of the most fundamental assumptions underlying the law of judicial review is that it is the duty of superior courts to ensure that public powers are

exercised according to law. This principle is highly resistant to alteration. The courts traditionally resist interpreting any provision as an ouster of judicial review. The current s.38 is inadequate to oust judicial review. Indeed, s.28 explicitly preserves the right to seek judicial review.

Subsection (2)

This provision purports to confer immunity upon delegates of the Authority despite the author elsewhere (see proposed deletion of para.12(3)(a)) wishing to remove that possibility. In any event, s.38(1)(d) and (2) *have the same effect*. No justification for a duplicate provision can be seen.

Schedule 1

Specification, Port Vila
Concession Contract Malekula

It is proposed to delete art.24, para.107 from the Schedule. This provides:

> Apparatus for measuring and controlling energy and power shall be of a type approved by the competent authority of Vanuatu and supplied, installed and sealed by the Concessionaire.

By deleting this reference from the schedule, responsibility for such approval will revert to the Government.

This issue is topical due to UNELCO's unauthorized use of prepaid meters and likely overcharging in relation to them.

A reversion to the Government is likely sought to defeat the URA's regulatory oversight, having regard to the Government's poor history of enforcing concession agreements, as discussed above.

Concession Contract, Tanna

The proposed deletion of art.24, para.106 will have the same effect as the proposed deletion in the Malekula concession as these are counterpart clauses.

The proposed amendment of art.34, para.165,166 *identifies a known typographical error but proposes the incorrect remedial amendment*. Due to a slight misalignment of numbering in the otherwise identical Malekula and Tanna concession documents, the equivalent paragraphs of art.34 are as follows:

Malekula	Tanna	Legend	
164	163	Green	current
165	164	Blue	UNELCO proposed
166	165		
167	166		

The existing schedule refers to paragraphs 165 and 166 in Malekula and 165 and 166 in Tanna. It is assumed that this is an obvious typographical error because these paragraphs are misaligned. It is not completely clear whether the Malekula or the Tanna provisions were correctly identified. It is clear however that UNELCO's proposed amendment cannot be correct. This is because the delegation of responsibility for par.163 in Tanna makes no sense – because there is nothing her for the URA to do. The answer must be either that Malekula 165 and 166 are correct (and therefore the Tanna correct Tanna paragraphs should be 164, 165) or that Tanna 165 and 166 are correct (and therefore the correct Malekula paragraphs should be 166, 167).

Carmine Piantedosi
CEO, URA

Annexure Proposed amendments to Utilities Regulatory (Amendment) Act N 18 of 2010 + KUTh 16 4 12.doc (undated)

Disclaimer: This document is produced for discussion purposes only. The proposed amendments are marked in blue colour. KUTh's proposed amendments are in red colour.

Proposed amendments to the Act

Utilities Regulatory Authority (Amendment) Act No. 18 of 2010

REPUBLIC OF VANUATU

UTILITIES REGULATORY AUTHORITY
ACT NO. 11 OF 2007

Arrangement of sections

PART 1. PRELIMINARY

PART 2. UTILITIES REGULATORY AUTHORITY

PART 3. FUNCTIONS AND POWERS OF THE AUTHORITY

Division 1- Functions and powers

Division 2- Safety standards, orders, inspection and reliability standards

REPUBLIC OF VANUATU

Assent: 14/01/2008
Commencement: 11/02/2008

UTILITIES REGULATORY AUTHORITY
ACT NO. 11 OF 2007

An Act to establish the Utilities Regulatory Authority and for related purposes.

Be it enacted by the President and Parliament as follows:

PART 1 PRELIMINARY

1. Interpretation

(1). In this Act, unless the contrary intention appears:

Act means the Utilities Regulatory Authority Act and includes any regulations made under the Act;

annual report means the annual report referred to under subsection 353(1);

applicable contract means any extant contract relating to a utility made before, on or after the commencement of this Act and to which the Government is a party;

Authority means the Utilities Regulatory Authority established under section 4 and includes any individual employee, officer or delegate of the Authority performing any function or exercising any power of the Authority (except where the contrary intention appears);

benefits, in relation to paragraph 430(2)(b) means financial or other assistance in connection with housing, transport, insurance, long service leave and contributions made under the *Vanuatu National Provident Fund Act* [CAP 189];

Chairperson means that Commissioner appointed to be Chairperson and, in connection with a meetings of the Authority, includes a Commissioner appointed from time to time by the Chairperson in writing to be the latter's his or her proxy;

Commissioner means a Commissioner of the Authority;

comparable location means any place or a particular location in another country where the economic, geographical and other relevant conditions of supply of a regulated service (including the cost of supply) of a similar regulated service are, in the opinion of the Authority, not dissimilar;

competition includes actual or potential competition, including from overseas;

competitor means any person supplying or who may supply a regulated service in Vanuatu, including from overseas, and includes a related entity;

conduct includes omissions;

conflict of interest has the same meaning as under the Leadership Code Act [CAP 240];

consumer means a person to whom a regulated service is or may be provided in consideration of a payment;

critical infrastructure means any building, plant or equipment critical to the supply of a regulated service to a substantial section of the public;

geothermal base tariff means the minimum price at which electricity produced from geothermal energy may be supplied by a geothermal electricity producer to a utility pursuant to the conditions of a geothermal production licence granted by the Minister responsible for geothermal energy under section 20 of the Geothermal Energy Act [CAP 197];

geothermal electricity producer means the holder of a geothermal production licence;

geothermal energy has the same meaning as in the Geothermal Energy Act [CAP 197];

geothermal production licence means a licence issued under the Geothermal Energy Act [CAP 197] to produce electricity from geothermal energy;

emergency means any situation suggesting an immediate risk of:

(a). serious injury or death to any person; or

(b). serious environmental pollution; or

(c). serious damage to critical infrastructure;

Evaluation Committee means the evaluation committee referred to in section 8;

force majeure means circumstances beyond the control and without the fault or negligence of a person, including but not restricted to acts of God, hostilities, war (declared or undeclared), blockade, riots, insurrections, civil commotion, quarantine restrictions, epidemics, storms or earthquakes;

Government means an office, entity or instrument of the Executive Government including a ministry or a Minister;

impede means to hinder, obstruct, delay or otherwise prevent;

incident means an event which causes or nearly causes:

(a). serious injury or death to any individual; or

(b). serious environmental pollution; or

(c). serious damage to critical infrastructure;

Judicial Services Commission means the Judicial Services Commission referred to in Article 48 of the Constitution;

notice of grievance means a notice of grievance referred to under section 287;

penalty means a financial penalty;

place means any location in Vanuatu, including territorial waters;

public fund has the same meaning as in the Public Finance and Economic Management Act [CAP 244];

Public Service Commission means the Public Service Commission referred to in Article 59 of the Constitution;

regulated service means the supply of electricity or water to a consumer and includes all processes leading up to that supply;

related entity means:

(a). in relation to a utility, a person wholly or partially owned or controlled by, or who wholly or partially owns or controls, the utility; and

(b). in relation to a competitor, a person which is wholly or partially owned or controlled by, or who wholly or partially owns or controls, the competitor;

relevant Minister means:

(a). in respect of water, the Minister responsible for water resources; or

(b). in respect of electricity, the Minister responsible for electricity;

remedies means any one or all of the following:

(a). penalty; or

(b). injunction (including interim injunction); or

(c). declaration;

safety inspector means a safety inspector employed pursuant to subsection 16(1);

safety order means a safety order issued pursuant to section 15;

safety standard means a safety standard issued pursuant to section 14;

standard means a safety standard or a reliability standard;

utility means a person who supplies a regulated service to a consumer for payment and includes a related entity for the purposes of Part 4.

(2) **Safe and safety** refers to the risk of:

(a) serious injury or death to any individual; or

(b) serious environmental pollution; or

(c) serious damage to critical infrastructure.

(3) In this Act, unless the contrary intention appears:

(a) where this Act confers any power to make or set any determination, order, price, regulation or other instrument, the power includes the power to revoke, vary or otherwise amend the same; and

(b) where the Authority is required by this Act to have regard to any matter, such matter is not exhaustive of the matters to which regard may be had, but is to be afforded priority over any other matters.

2. Purpose

The purpose of this Act is to:

(a) ensure the provision of safe, reliable and affordable regulated services; and

(b) maximise access to regulated services throughout Vanuatu. ; and

(c) promote the long term interests of consumers.

3. Application of the Act

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

PART 2. UTILITIES REGULATORY AUTHORITY

4. Establishment of Authority

(1). The Utilities Regulatory Authority is established.

(2). The Authority

(a). is a body corporate with perpetual succession; and

(b). is to have a common seal; and

(c). may sue or be sued in its corporate name.

(3). Except as provided for under section 20(6)(c), t~~T~~he Authority is to act independently but must have regard to such policies as may be issued pursuant to section 3~~9~~5.

5. Composition of Authority

(1). The Authority consists of three Commissioners who must be appointed in writing by the Minister responsible for finance on the recommendation of the Evaluation Committee.

(2). At least two Commissioners must be citizens of Vanuatu.

6. Chairperson

(1). The Minister responsible for finance must appoint one of the Commissioners as the Chairperson on the recommendation of the Evaluation Committee.

(2). A Commissioner must not be appointed as a Chairperson for a third consecutive term.

(3). A Chairperson may resign by notice in writing to the Minister responsible for finance.

7. Termination and resignation of a Commissioner

(1). The Minister responsible for finance must, by 28 days notice in writing to a Commissioner, terminate the appointment of a Commissioner if he or she is satisfied that the Commissioner:

(a). is physically incapacitated to the extent that his or her ability to discharge the roles of the Commissioner is significantly impaired; or

(b). is mentally incapacitated; or

(c). is bankrupt or seeks any protection from, or enters into any compact with, their creditors; or

(d). fails to attend or remain present for the duration of any two meetings of the Authority in any 12 month period; or

(e). is a member of Parliament; or

(f). is a member of a Local Government Council or Municipal Council; or

(g). in respect of the Commissioners referred to in section 5(2), ceases to be a citizen of Vanuatu.

(2). The Minister responsible for finance may, by 28 days notice in writing to a Commissioner, terminate the appointment of the Commissioner if the Commissioner:

(a). commits a serious breach of the terms and conditions of his or her appointment; or

(b). persistently breaches one of the terms and conditions of his or her appointment.

(3). A Commissioner may resign by notice in writing to the Minister responsible for finance.

8. Evaluation Committee

(1). The Evaluation Committee consists of:

(a). an individual, not being a member of any political party, appointed by
the Judicial Services Commission; and

(b). an individual, not being a member of any political party, appointed by
the Public Service Commission; and

(c). the Governor of the Reserve Bank of Vanuatu.

(2). The Evaluation Committee must be guided only by merit and may recommend:

(a). an individual in respect of each vacancy in the Authority from time to
time; and

(b). terms and conditions of appointment in respect of each individual not inconsistent with section 9.

(3). An individual must not be recommended by the Evaluation Committee as a Commissioner if he or she has not given his or her consent to the Evaluation Committee to accept the appointment on such terms and conditions.

9. Remuneration, terms and conditions of appointment

(1). A Commissioner is to be paid in accordance with regulations made pursuant to paragraph 4~~3~~0(2)(b) and, if applicable, subsection 4~~3~~0(3).

(2). The term of appointment of a Chairperson is for a period of not less than three years and not more than five years and may be a full-time or part-time appointment.

(3). The term of appointment of a Commissioner, not being the Chairperson, is to be for a period of not more than five years and may be a full-time or part-time appointment.

(4). The terms and conditions of appointment of a Commissioner must be included in the instrument of appointment made pursuant to subsection 5(1).

(5). The Commissioners are leaders for the purposes of the ~~obligations contained in Parts 2, 3 and 4 of the~~ *Leadership Code Act* [CAP 240] and must comply with the requirements of that Act.

(6). Without limiting the generality of section 9(5), the obligations contained in Parts 2, 3 and 4 of the *Leadership Code Act* [CAP 240] are deemed to be included in the terms and conditions of appointment of a Commissioner.

(7). A Commissioner must at all times comply with the terms and conditions of his or her appointment when acting as a Commissioner or undertaking the functions and exercising the powers of the Authority.

10. Functions of the Chairperson

(1) The Chairperson is responsible for:

(a). the leadership of the Authority; and

(b). the provision of advice and reports; and

(c). the maintenance of high level relations with utilities; and

(d). the proper and efficient functioning of the Authority.

(2) The Chairperson holds a non-executive position in the Authority and the other 2 Commissioners hold executive positions.

11. Meetings

(1). The Authority is to meet at least once every three months at such place and time as the Chairperson may determine.

(2). The Chairperson must give 14 days written notice to the other Commissioners of meeting, including the time and place for the meeting.

(3). The Chairperson is to preside at all meetings of the Authority.

(4). At a meeting, a quorum consists of any two Commissioners, one of whom is the Chairperson.

(5). Decisions at a meeting are to be by majority of votes of those present and, if there is an equality of votes, the Chairperson has a casting vote.

(6). A Commissioner may nominate another Commissioner to be his or her proxy.

(7). The Chairperson may permit other persons to be present at, or participate in, a meeting, however, those persons are not entitled to vote.

(8). If a Commissioner has a conflict of interest in a matter being considered, or about to be considered, at a meeting of the Authority:

(c) the Commissioner must disclose the nature of that interest to the other Commissioners as soon as possible after the relevant facts have come to the Commissioner's knowledge;

(d) the disclosure must be recorded in the minutes of the meeting; and

(e) the Commissioner making the disclosure must not be present during the Authority's deliberation of the matter to which the disclosure relates, unless the other Commissioners determine otherwise, in the absence of the disclosing Commissioner (such a decision must be recorded in the minutes of the meeting).

~~(8)~~ (9). The Authority may otherwise determine and regulate its own procedures.

PART 3. FUNCTIONS AND POWERS OF THE AUTHORITY

Division 1- Functions and powers

12. Functions of the Authority

(1). The Authority has the following functions:

(a). to exercise the functions and powers conferred by this Act or by any other Act in furtherance of the purposes of this Act;

(b). to provide advice, reports and recommendations to the Government relating to utilities;

(c). to inform the public of matters relating to utilities;

(d). to assist consumers to resolve grievances;

(e). to investigate and act upon offences under this Act.

(2.) The Authority must not exercise its functions and powers conferred by this Act or by any other Act in furtherance of the purposes of this Act in a way to be detrimental to the utility business and interests of consumers.

(3). The functions of the Authority may be performed on behalf of the Authority by:

~~(a). any individual authorised by the Authority or this Act to perform those functions from time to time; or~~

~~(b)~~ a~~ny~~ single Commissioner authorised by the Authority to perform those functions from time to time and such Commissioner shall be known as the Chief Executive Officer.

(4). The Authority must perform its functions efficiently and without unreasonable delay.

13. Powers of the Authority

(1). The Authority has power to itself do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

(1A) The Authority may require a utility to do those things expressly required by the terms of this Act.

(2). Without limiting subsection (1), the Authority may:

(a) where it is entitled to require a utility to do by the terms of any concession agreement under the Electricity Act, require that ~~a~~ utility to furnish the Authority with specified information or documents or information; or information or documents of a specific kind, in the possession or control of the utility, relating to a regulated service or to the corporate structure, accounts or finances of the utility within the period specified in the written request for such information or documents (not being less than 14 days); or

(b) require a utility to confer with the Authority as to the manner in which it carries on any specified activity in relation to the regulated service; or

(5) (c) do anything reasonably incidental to any of its powers.

(3). ~~The powers conferred by this Act may be exercised on behalf of the Authority by any individual authorised by the Authority or this Act to exercise those powers.~~ Information furnished or a document provided to the Authority under this Act:

(a) must not be disclosed by the Authority except:

(i) with the written permission of the person from whom the information or document was obtained;

(ii) in the course of proceedings under Part 4;

(iii) where required by a court order;

(iv) where, in the opinion of the Authority, the information comprises, or will be reproduced in, aggregated data so that it does not identify any particular utility or other person; or

(v) where such disclosure is required by this Act or any other law; and

(b) is not admissible in evidence against a person in any criminal proceedings.

Division 2-Safety standards, orders, inspection and reliability standards

14. Safety standards

(1). The Authority may issue safety standards in relation to the safety of a regulated service in any place.

(2). A safety standard comes into force on the day on which it is published in the Gazette.

(3). The Authority must, in determining whether to issue any safety standard, have regard to:

(a). the cost and convenience of compliance with the safety standard; ~~and~~

(b). the nature and magnitude of the risk that is addressed.

(c) alternative mechanisms to the safety standard for addressing the risk; and

(d) any submission made by a utility in relation to the proposed safety standard.

15. Safety orders

(1). The Authority may issue safety orders in writing directing any person to do or refrain from doing any thing in relation to the safety of a regulated service.

(2). A safety order issued in relation to one person comes into force when it is served on that person.

(3). A safety order issued in relation to more than one person comes into force in relation to each of those persons when it is served on that person.

(4). The Authority must, in determining whether to issue any safety order, have regard to the cost and convenience of compliance with the safety order and to the nature and magnitude of the risk.

(5). To avoid doubt, a safety order issued in relation to more than one person may come into force in relation to a particular person in accordance with subsection (3), despite the order not having been served on one or more other persons in relation to whom the order has been issued.

(6) A person acting in good faith in compliance with a safety order issued under this section is not liable to any action, claim or demand on account of any damage, loss or injury sustained as a result of that action.

16. Safety inspection

(1). The Authority may employ a safety inspector on such terms and conditions as may be determined by the Authority.

(2). The safety inspector may inspect any premises, plant, equipment or vehicle connected with a regulated service and may carry out all or any of the following:

(a). enter upon any premises;

(b). take any sample of any substance;

(c). conduct any non-destructive test upon any plant or equipment at its location;

(d). bring with him or her any other individual for the purpose of advice or the conduct of any test;

(e). in a suspected emergency, obtain forcible entry to any premises or vehicle;

(f). in a suspected emergency, bring with him a member of the Police Force to facilitate his or her inspection.

(3). The safety inspector must make a full written record of all inspections.

(4). An inspection under this section may be conducted:

(a). at any time during normal business hours, with or without notice; or

(b). at any time, in a suspected emergency.

(5). In the event of an incident, the safety inspector must, as soon as reasonably possible, conduct an inspection of any premises, plant, equipment or vehicle possibly connected to the incident.

(6). The safety inspector may, in a suspected emergency, make or cause to make anything reasonably required to abate immediate dangers to safety of a regulated service.

17. Reliability standards

(1). The Authority may issue reliability standards in relation to the reliability of a regulated service in any place.

(2). A reliability standard comes into force on the day on which it is published in the Gazette.

(3). The Authority must, in determining whether to issue any reliability standard, have regard to:

(a) the cost and convenience of compliance with the reliability standard ~~and to~~

(b) the nature and importance of the reliability issue that is addressed.

(c) alternative mechanisms to the reliability standard for addressing the reliability issue; and

(d) any submission made by a utility in relation to the proposed reliability standard.

Division 3-Price, complaint resolution and contract administration

18. Maximum prices

(1). Subject to this section, the Authority may determine the maximum price which may be charged in relation to any aspect of a regulated service in any place.

(2). The maximum price determined under subsection (1) is effective on the day ~~on~~ which ~~the~~ is 30 days after the determination is published in the Gazette.

(3). The Authority must have regard to:

(a) the price of similar services in any comparable location when determining maximum prices.

(d) the costs of providing the regulated service (including infrastructure costs); and

(e) any submission made by a utility in relation to the proposed maximum price.

(4) The maximum price determined under subsection (1) in respect of the supply of electricity by a geothermal electricity producer to a utility must not be less than the geothermal base tariff.

(5) The maximum price determined under subsection (1) in respect of the supply of electricity by a utility to a consumer must include full allowance for the price paid by the utility in respect of electricity produced by a geothermal electricity producer.

19. Complaint Resolution

(1). The Authority may, if requested by a person, assist that person to resolve any dispute with a utility in respect to a regulated service.

(2). Without limiting subsection (1), the Authority may:

(a). require the utility to answer any question; or

(b). require the utility to provide any document in the possession or control of the utility; or

(c). require the utility to test, at the utility's cost, the accuracy of any meter or other equipment measuring the quantity or quality of a regulated service provided to the complainant; or

(d). require the utility to calibrate, at the utility's cost, any meter or other equipment measuring the quantity or quality of a regulated service provided to the complainant; or

(e). require a utility providing water to test, at the utility's cost, a sample of water as directed by the Authority.

(6) Notwithstanding subsection (1) and subsection (2), the Authority must not assist to resolve any dispute between two or more utilities, including a dispute between a utility and a geothermal electricity producer

(7) For the purposes of subsection 19(1) the Authority may require the person in dispute with the utility to:

(a) answer any question; or

(b) provide any document in the possession or control of the person.

20. Assignment of contractual rights

(1). The rights exercisable by the Government in the contracts described in Part A of Schedule 1 are assigned to the Authority.

(2). The rights exercisable by the Government in the contracts described in Part B of Schedule 1 are assigned to the Authority, but may only be exercised by the Authority upon receiving the written approval of the relevant Minister.

(3). The regulations may assign to the Authority other contractual rights exercisable by the Government in relation to a regulated service.

(4). The Authority may, if necessary or convenient to administer any contractual right assigned to it pursuant to subsection (1) or (2), or the regulations, require a utility to:

(a). answer any question; or

(b). provide any document in the possession or control of the utility,

within such period as specified by the Authority in the written notice requesting the document or information (not being less than 14 days).

(5). If the Authority is provided with information or documents in relation to, or in connection with, the Authority's functions and powers set out in Part C of Schedule 1, the Authority must provide a copy of the information or documents to the Minister responsible for finance but must otherwise treat the information or documents confidentially.

(7) Where the Authority is exercising its right under contract pursuant to this section 20, the Authority:

(d) must exercise that right in accordance with the terms of the contract;

(e) must not use statutory powers under this Act or any other Act, except as expressly provided for in this section;

(f) to the extent that the relevant Minister directs the Authority as to how the right is to be exercised, must exercise the right in accordance with such direction.

(8) Disputes between a utility and the Authority in relation to the Authority's functions and powers set out in Schedule 1 will be determined in accordance with the provisions of the relevant contract.

PART 4. OFFENCES

21. Offences

(1). A utility must not:

(a). contravene any safety standard; or

(b). contravene any reliability standard; or

(c). contravene any safety order.

(2). A utility must not impede a safety inspector.

(3). A utility must not advertise, propose, claim or demand a price in respect of any regulated service which exceeds a determination made under subsection 18(1).

(4). A utility and a competitor must not propose or enter into, any contract, arrangement or understanding that contains a provision which provides for the

fixing, controlling or maintaining of any price, discount, rebate or credit in respect of a regulated service.

(5). A utility must not, propose, or enter into, any contract, arrangement or understanding with any person, that contains a provision which provides that:

(a). goods or services of any kind are not to be supplied, or not to be supplied on the same price or condition; or

(b). a lease or other interest in or over a land is not to be granted, to a competitor of the utility.

(6). A utility must not:

(a). fail to comply within 21 days; or

(b). provide any false or misleading information or document, in relation to any requirement imposed under section 19 ~~or subsection 20(4)~~.

(7). A utility must not engage in any conduct which is misleading or deceptive, or is likely to mislead or deceive a consumer in relation to the supply or proposed supply of a regulated service.

(8). A person commits an offence if the person contravenes a provision under this section.

(9). A person who commits an offence under this section is liable on conviction to a fine not exceeding:

(a). VT50,000,000- in the case of a body corporate; and

(b). VT5,000,000- in the case of an individual.

(10). Subject to section 22, liability for the offences in this section is strict.

(11). In this section, utility is deemed to include an individual.

22. Defences

(1). It is a defence to an offence under paragraph 21(1)(a) that the contravention was due to:

(a) an accident and that reasonable precautions were made and due diligence was exercised to prevent such accident;

(b) in response to an emergency.

(2). It is a defence to an offence under paragraph 21(1)(a) or subsection 21(2)

that the contravention was due to a mistake of fact caused by reasonable reliance on information supplied by another, not being an officer or employee of the utility.

(3). It is a defence to an offence under subsection 21(3) that the price advertised, proposed, claimed or demanded was the subject of a genuine typographical or clerical mistake.

(4). It is a defence to an offence under subsections 21(4) and (5) that the provision:

(a). facilitates the purposes of a bona fide joint venture; ~~and~~ or

(b). does not have, and is unlikely to have, the effect of substantially lessening competition in any place.

(5). It is a defence to an offence under subsection 21(6) or (7) that an answer or documents required are the subject of legal professional privilege.

(6). If is a defence to an offence under section 21 that the contravention was due to force majeure.

23. Onus and standard of proof

(1). The onus of proving the commission of any offence under this Part is upon the Authority and the standard of proof shall be the balance of probabilities.

(2). The onus of proving any defence under this Part is upon the person raising it and the standard of proof is to be on the balance of probabilities.

24. Proceedings in respect of offences

(1) The Authority may commence a claim in the civil jurisdiction of the Supreme Court seeking any one or more remedies in respect of offences under this Part.

(2) The Authority may commence a claim in the civil jurisdiction of the Magistrates Court seeking a penalty within its financial jurisdiction.

(3) The court may impose a penalty if it finds an offence to have been proved, however all other remedies are in the court's discretion.

(4) The Authority may recover and be liable for costs in respect of proceedings under this section.

(5) Claims brought under this section are to be commenced, conducted and enforced in accordance with any applicable rules of court and, subject to this section, as nearly as possible in the same manner as other claims.

(6) Claims brought under this section are to be commenced within three years of the date of the alleged offence.

(7) No objection, other than as provided by any applicable rules of court, is taken to any defect in substance or form in the claim or any variance between the claim and any other document and the court is to permit any amendment or adjournment necessary to determine the real matters in issue.

~~(8) In respect of any claims brought under this Part, the production of a Gazette (or certified copy thereof) containing any standard issued, or determination made, pursuant to subsection 14(1), 17(1) or 18(1) is conclusive evidence of the fact and the terms of the standard or determination.~~

~~(9)~~(8) A person who suffers loss or damage by reason of any offence under this Part (even if no proceedings have been commenced under this section) may recover the amount of such loss or damage by claim in any court, according to its financial jurisdiction and may, to this end, apply to be joined to any proceedings commenced under this section.

~~(10)~~(9) If any class of persons have suffered loss or damage by reason of any offence in this Part, the Authority may recover the amount of such loss or damage on behalf of such class subject to any applicable rules of court provided that the Authority has first obtained the written consent of each of the persons on whose behalf such claim is made.

~~(11)~~(10) Nothing in subsections ~~(9~~8) or ~~(10~~9) limits, by implication, other remedies to which a person may be entitled.

25. Infringement notices

(1) The Authority may issue an infringement notice in respect of any single offence under this Part other than subsections 21(4) ~~and~~ (5) and (7).

(2) An infringement notice does not come into force unless it is served within three months of the date of the offence alleged in that notice.

(3) An infringement notice must:

(a). state the name of the person alleged to have committed the offence;

(b). state that it is issued on behalf of the Authority pursuant to this Act;

(c). include brief particulars of the alleged offence including the date, time and place (to the extent possible);

(d). refer to the subsection of section 21 by which the alleged offence is created;

(e). specify a penalty not greater than VT100,000 which is sought in respect of the alleged offence; and

(f). state that unless the penalty specified under paragraph (e) is paid within 28 days of the date of service of the infringement notice, the alleged offence is to be dealt with by a court.

~~(4) If the penalty specified in the infringement notice is not paid within the time required (or such further time as the Authority may allow) it is deemed, for the purposes of any proceedings brought under section 24 to be prima facie evidence of any facts described in it.~~

(~~5~~4) If the penalty specified in the infringement notice is paid within the time required (or such further time as the Authority may allow) it is a bar to the commencement of any proceedings brought under section 24 in respect of the same offence by the same person.

(~~6~~5) The Authority may, in its discretion:

(a). revoke an infringement notice; and

(b). extend the time for payment of the penalty specified in any infringement notice; and

(g) issue a new infringement notice in lieu of one which is revoked.

(~~7~~6) The payment by a utility of the penalty specified in an infringement notice is not, in any circumstances, evidence of the commission of any offence or of any act or omission.

26. Penalties payable to public fund

(1) All penalties recovered under this Part by the Authority must be paid into the public fund.

(2) Any cost of the Authority recovered under this Part is to be deposited in the bank account of the Authority.

PART 5. REVIEW OF CERTAIN ACTIONS

27. Provision of reasons

(3) Any person aggrieved by a decision of the Authority may invite the Authority to give reasons for such decisions and the Authority shall, if it has not already provided reasons, comply within a reasonable time.

(4) Nothing in subsection (1) prevents the Authority providing reasons if supplementary reasons at any time without invitation.

~~27.~~ 28. Internal review

(1) A utility aggrieved by any action taken pursuant to Part 3 or sections 24, 25 or 39~~7~~ may of this Act, within 30 days of the action being taken, give a notice of grievance to the Authority ~~in writing that contains:~~

(2) A utility aggrieved by failure of the Authority to take an action pursuant to Part 3 or section 39 of this Act, may after 30 days following the giving of notice by the utility requesting the action, give a notice of grievance to the Authority.

~~(1)~~(3) A notice of grievance must be in writing and must contain:

(a) a detailed description of any facts or matters supporting the grievance; and

(b) copies of any documents supporting the grievance; and

(c) a detailed description of any alleged error of law or error of fact; and

(d) a detailed description of any relevant changed facts or circumstances since the action being the subject of the notice.

~~(2)~~(4) If the Authority receives a notice of grievance relevant action within the time prescribed by subsection (1), it must review the merits of the ~~grievance~~ relevant action and may:

(a) revoke the action complained of in the notice of grievance; or

(b) amend or vary the action complained of in the notice of grievance; or

(c) take no further action.

~~(3)~~(5) The aggrieved person must be informed of the outcome of the review within 30 days of the date of notification under subsection (1) and, in the event that the Authority takes the action described in paragraphs (2)(b) or (c), the Authority must provide written reasons for its actions.

(6) If upon review, the Authority is satisfied ~~of any of the matters described in paragraphs 28(a) to (c) it~~ that:

(a) the cost and inconvenience of compliance with any standard is not reasonably proportionate to the issue it addresses; or

(b) a price determined pursuant to section 18 will produce less income for the utility than the cost to the utility of providing the regulated service in the place to which it relates; or

(c) a price determined pursuant to section 18 does not enable the utility to realise a reasonable profit on the regulated service to which it relates,

then the Authority must revoke, amend or vary the action complained of accordingly.

~~A utility that is aggrieved by any action taken pursuant to Part 3 or section 37 may, in addition to any other rights, apply to the Supreme Court for judicial review upon one or more of the following grounds as to which the onus of proof is upon the applicant:~~

~~(a). the cost and inconvenience of compliance with any standard is not reasonably proportionate to the issue it addresses; and~~

~~(b). a price determined pursuant to section 18 will produce less income for the utility than the cost to the utility of providing the regulated service in the place to which it relates; and~~

~~(c). a price determined pursuant to section 18 does not enable the utility to realise a reasonable profit on the regulated service to which it relates.~~

29. External expert review

(1) This section applies to a person who:

(a) is aggrieved by a decision of the Authority under section 18; and

(b) has sought and obtained internal review under section 28; and

(c) remains aggrieved by the decision to the extent of any part thereof was not revoked under section 28(4).

(2) A person to whom subsection (1) applies (an 'appellant') may, within 30 days, invite the Authority to have the merits of the decision in question reviewed in whole of in part by an independent expert.

(3) An invitation under subsection (2) must be in writing and shall contain all the material upon which the appellant relies.

(4) Upon receipt of an invitation under subsection (2) the Authority must, within 30 days, accept or decline the invitation in whole or in part and:

(a) if (and to the extent that) the invitation is accepted:

(i) identify a suitable independent expert (the 'expert') and ascertain the general method and quantum of his or her proposed fee structure; and

(ii) notify the appellant of the identity of the expert, giving reasonable particulars of his or her expertise, experience and proposed fee structure; and

(iii) offer the appellant 14 days within which to object to the expert; or

(b) if (and to the extent that) the invitation is declined, give reasons therefore.

(5) In deciding whether to accept or decline an invitation under subsection (4), the Authority is to consider:

(a) the importance and financial implications of the decision in question to the service provider; and

(b) the extent to which the decision in question turns on facts and issues within the province of any area of expertise related to regulated services or accounting; and

(c) the extent to which a delay in the implementation of the decision in question would negatively affect the interests of any utility or the extent of competition in any market.

(6) If an objection is made under subparagraph (4)(a)(iii) the Authority must, if it is satisfied that the objection is well founded, repeat the process described in paragraph (4)(a).

(7) The Authority is to appoint the expert but the appellant is liable for all fees and disbursements of the expert and must promptly pay directly to the expert such deposit or interim or other payments as the Authority may think fit and demand in respect thereto.

(8) The Authority may terminate a review under this section if the appellant:

(a) fails to pay in accordance with subsection (7); or

(b) engages in any correspondence or communication (other than relating solely to payment) not in the presence, or with the prior consent of, the Authority,

in either of which event no further or other review under this section will be available and any amount which is of becomes due and owing to the expert may be recovered by the Authority from the appellant as a debt.

(9) The expert must provide any person whose interests are or may be directly affected by the outcome of the review under this section an opportunity to provide evidence or make a submission in Port Vila.

(10) The expert must review the decision in question de novo and may:

(a) determine any questions of fact; and

(b) receive evidence from any person without regard to the laws of evidence; and

(c) schedule and conduct hearings without technicality; and

(d) subject to any Regulations, determine all matters of procedure; and

(e) obtain legal advice from the State Law Office as to his or her powers and duties under this section.

(11) Except as provided for in section 30, the decision of the expert is to be final and binding as to the decision in question and there is no appeal of any kind from such a decision.

(12) Subsection (11) does not preclude an application being made under section 30 of this Act for judicial review.

30. ~~28.~~ Judicial review

(1) A person aggrieved by:

(a) a decision of the Authority;

(b) a decision of an expert under section 29;

(c) the performance by the Authority of its functions or the exercise; or

(d) the failure of the Authority to perform its functions or exercise its powers,

may seek judicial review of the decision, action or inaction in the Supreme Court.

(2) No application for judicial review must be brought after 3 months of a decision being notified or published, as the case may be.

PART 6. FINANCE

~~29.~~31. Revenue

The revenue of the Authority consists of:

(a) funds appropriated by the Government; and

(b) costs recovered in respect of proceedings under Part 4; and

(c) funds assigned to it by the Minister responsible for finance by way of initial capital and budget allocation.

~~29~~ 31 A. Investment Support Fund

The investment support fund established under sections 6 of the Conventions listed below must be held by the Central Government Cashier at the Department of Finance and Economic Management:

(b) Convention relating to the Concession for the Generation and Public Supply of Electric Power in Luganville; and

(c) Convention relating to the Concession for the Generation and Public Supply of Electric Power in Port-Vila.

~~30.~~ 32. Budget

(1) The initial capital and the annual budget of the Authority must be approved by the Minister responsible for finance after consultation with the Council of Ministers.

(2) The Minister responsible for finance must not withhold funds to the Authority once allocated to it except in accordance with subsection 39(4) of the *Public Finance and Economic Management Act* [CAP 244].

(3) Any surplus funds held by the Authority at the end of the financial year must be returned to the public fund.

~~31.~~ 33. Accounting and audit

(1) The Authority must keep full and proper books of account.

(2) The Authority is to prepare and submit to the Minister responsible for finance, a financial report in respect of each financial year within three months after the end of that financial year.

(3) The financial report must be audited and certified by the Auditor General in accordance with the *Expenditure Review and Audit Act* [CAP 241].

~~32.~~ 34. Bank account

The Authority may open and operate a bank account if the Director-General of Finance and Economic Management expressly authorises the Authority to do so pursuant to subsection 43(4) of the *Public Finance and Economic Management Act* [CAP 244].

PART 7- MISCELLANEOUS

~~33.~~ 35. Annual report

(1) The Authority must submit to the Minister responsible for public utilities an annual report of its operations for a particular year within 60 days of the end of that financial year.

(2) Without limiting subsection (1), the report must include:

(a) a summary of the activities of the Authority; and

(b) financial statements of the Authority; and

(c) a report of the auditor; and

(d) a summary of court proceedings where the Authority had been a party to (if any); and

(e) a summary of major decisions taken by the Authority; and

(f) a list of staff of the Authority; and

(g) such other information as the Minister may direct in writing.

(3) The annual report must be tabled in Parliament at the next sitting following its presentation to the Minister responsible for public utilities.

~~34.~~ 36. Other reports

The Authority may from time to time provide any Minister with such reports other than the annual report if the Minister requests a copy of such report.

~~35.~~ 37. Policy

The relevant Minister may issue statements of general policy relevant to the functions and powers of the Authority that are not inconsistent with any provision in this Act.

~~36.~~38. Staff and application of Public Service Act

(1). The Authority may employ or engage such persons as it considers necessary to perform its functions or exercise its powers.

(2). The *Public Service Act* [CAP 246] does not apply to the Authority or any person employed or engaged by the Authority.

~~37.~~39. Consultation and Direction

(1) Subject to subsection 4(3), the Authority may obtain advice from or consult with any person including the Government.

(2) Prior to exercising any of the powers contained in subsections 14(1), 17(1) or 18(1), the Authority must:

(c) give notice of the material substance of the proposed exercise of such powers to all utilities potentially affected not less than 30 days prior to the exercise of the relevant power; and

(d) afford all such utilities a reasonable opportunity to make submissions in relation to the exercise of such powers.

(3) The Authority is to consider any submissions provided under paragraph (2)(b) prior to exercising the relevant power.

(4) If upon consideration, the Authority is satisfied of any of the matters described in paragraphs 28(4)(a) to (c) it ~~may revoke~~ must abandon, amend or otherwise vary the proposed action accordingly.

~~38.~~40. Protection from ~~legal actions~~ personal liability

(1) This section applies to each of the following persons:

~~(a) the Authority;~~

~~(b)~~(a) a Commissioner,

~~(c)~~(b) a safety inspector,

~~(d)~~(c) an employee of, or a person engaged by, the Authority under section 36,

~~(c)~~(d) a delegate of the Authority.

(2) The person ~~is not~~ may be personally liable to an action, suit or proceeding in relation to an act or matter if:

(c) the act or matter is done or omitted to be done in the exercise or performance, or purported exercise or performance, of a power or function under this Act or any other law, and

(d) the act or matter is done or omitted to be done in good faith.

(3) This section 40 does not limit, alter or remove the liability of the Authority to any action, suit or proceeding.

41. Immunity of the Authority

(3) The Authority, is not liable to any action of claim, other than by way of judicial review, arising from the exercise, intended exercise or failure to exercise of any of the functions or powers under this Act in good faith.

(4) Any person authorised by the Authority to act in its name is to have the same immunity as the Authority, to the extent of that authority.

~~39.~~42. Delegation

(1) The Authority may by signed instrument delegate to a person all or any of the powers or functions of the Authority under this Act or any other law.

(2) A delegate of the Authority is, in the exercise of the delegate's delegated powers or functions, subject to the directions of the Authority.

(3) A power or function delegated is, when exercised or performed by the delegate, deemed to have been exercised by the Authority.

(4) The delegation of a power or function does not prevent the exercise of the power or the performance of the function by the Authority.

~~40.~~43. Regulations

(1) The relevant Minister may make regulations:

(a) to give effect to the purpose and provisions of this Act; or

(b) as are necessary or convenient to be prescribed for carrying out or giving effect to this Act

(2) Without limiting subsection (1), the regulations may provide for all or any of the following:

(a) the prescription of penalties for certain offences to be sought by an infringement notice;

(b) the prescription of the remuneration, benefits and allowances of the Chairperson and other Commissioners, provided that the remuneration of the Chairperson shall not be less than that of a Director-General of a Ministry and shall not be more than that of the Governor of the Reserve Bank of Vanuatu at any time.

(3) Despite paragraph (2)(b), if the Chairperson is not a citizen of, nor currently resides in, Vanuatu the Minister responsible for finance may make regulations prescribing a supplement to be paid to the Chairperson if he or she is satisfied that it is reasonably necessary to attract a suitable candidate.

~~41.~~44 Commencement

This Act comes into force on the day on which it is published in the Gazette.

Schedule 1

Part A Powers conferred under subsection 20(1)

A1 Electricity

Instrument	**Function / power / responsibility**
Electricity Supply Act (as amended)	Section 5 Section 6
Convention relating to the Concession for the Generation and Public Supply of Electric power in Luganville	Section 12, paragraph 55
Specifications relating to the Concession for the Generation and public supply of electric power in Luganville	Section 3, paragraph 4 Section 3, paragraph 7 Section 3, paragraph 9 Section 4, paragraph 12 Section 7, paragraph 31 Section 8, paragraph 35 Section 11, paragraph 57 Section 11, paragraph 58 Section 12, paragraph 59 Section 13, paragraph 66 Section 14, paragraph 67 Section 14, paragraph 73 Section 17, paragraph 75 Section 18, paragraph 76 Section 18, paragraph 78 Section 21, paragraph 81

Convention relating to the Concession for the Generation and Public Supply of Electric power in Port Vila	Section 12, paragraph 55
Specifications relating to the Concession for the Generation and public supply of electric power in Port Vila	Section 3, paragraph 4 Section 3, paragraph 7 Section 3, paragraph 9 Section 4, paragraph 12 Section 6, paragraph 29 Section 7, paragraph 33 Section 10, paragraph 55 Section 10, paragraph 56 ~~Section 11, paragraph 57~~ Section 12, paragraph 64 Section 13, paragraph 65 Section 14, paragraph 71 ~~Section 16, paragraph 73~~ Section 17, paragraph 74 Section 17, paragraph 75 Section 17, paragraph 76 Section 20, paragraph 79
Agreement varying concession between the Government of the Republic of Vanuatu and the Honourable Minister of Lands, Geology, Mines, Energy and Rural Water Supply and Union Electrique du Vanuatu Limited (dated 25 September 1997)	Section 11
Concession contract for the Generation and Public Supply of Electric Power in Malekula Island	Article 2, Section 2.03, paragraph 12 Article 2, Section 2.03, paragraph 14 Article 9, paragraph 30 Article 18, paragraph 70 Article 19, paragraph 75 Article 23, paragraph 104 Article 23, paragraph 105 ~~Article 24, paragraph 107~~ Article 25, paragraph 119 Article 26, paragraph 120 Article 27, paragraph 128 Article 28, paragraph 129 Article 31, paragraph 154 Article 32, paragraph 160 Article 34, paragraph 165 Article 34, paragraph 166
Concession contract for the Generation and Public Supply of Electric Power in Tanna Island	Article 2, Section 2.03, paragraph 11 Article 2, Section 2.03, paragraph 13 Article 9, paragraph 29

	(h) Article 18, paragraph 69 (i) Article 19, paragraph 74 (j) Article 23, paragraph 103 (k) Article 23, paragraph 104 ~~Article 24, paragraph 106~~ Article 25, paragraph 118 Article 26, paragraph 119 Article 27, paragraph 127 Article 28, paragraph 128 Article 31, section 31.06, paragraph 153 Article 32, paragraph 159 Article 34, paragraph 1635 Article 34, paragraph 1646

A2. Water

Instrument	**Function / power / responsibility**
Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 7.2
Schedule of Conditions to the Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 2 Article 6 Article 9 ~~Article 16~~ Article 17 ~~Article 29~~ Article 33.1 Article 33.3 Article 33.4 ~~Article 34~~

Part B Powers conferred under subsection 20(2)

B1 Electricity

Instrument	**Function / power / responsibility**
Convention relating to the Concession for the Generation and Public Supply of Electric power in Luganville	Section 5, paragraph 20 Section 8, paragraph 38 Section 13, paragraph 62

Specifications relating to the Concession for the Generation and public supply of electric power in Luganville	Section 5, paragraph 24 Section 5, paragraph 27 Section 9, paragraph 43 Section 17, paragraph 60 (which has been incorrectly numbered and should read paragraph 69)
Convention relating to the Concession for the Generation and Public Supply of Electric power in Port Vila (as amended)	Section 5, paragraph 5.2, of amending agreement dated 25 September 1997 Section 5, paragraph 20 Section 7, paragraph 32 Section 8, paragraph 34 Section 9, paragraph 43 Section 13, paragraph 62 Section 17, paragraph 69
Specifications relating to the Concession for the Generation and public supply of electric power in Port Vila (as amended)	Section 5, paragraph 23, as varied by agreement dated 1 September 1998 Section 5, paragraph 26, as varied by agreement dated 1 September 1998 Section 7, paragraph 32
Concession contract for the Generation and Public Supply of Electric Power in Malekula Island	Article 6, paragraph 23 Article 7, paragraph 26 Article 31, section 31.07, paragraph 157
Concession contract for the Generation and Public Supply of Electric Power in Tanna Island	Article 6, paragraph 22 Article 7, paragraph 25 Article 31, section 31.07, paragraph 156

B2. Water

Instrument	**Function / power / responsibility**
Water Supply Act (as amended by the Water Supply (Amendment) Act No. 9 of 1993)	Section 11
Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 1.4.2 Article 7.3
Schedule of Conditions to the Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 22 Article 26 Article 34

Part C. Functions and powers to which subsection 20(5) applies

Instrument	**Function / power / responsibility**
Specifications relating to the Concession for the Generation and public supply of electric power in Luganville	(v) Section 3, paragraph 7 (vi) Section 3, pargraph 9

	(vii) Section 11, paragraph 57 (viii) Section 14, paragraph 67 (ix) Section 18, paragraph 76 (x) Section 18, paragraph 78
Specifications relating to the Concession for the Generation and public supply of electric power in Port Vila	(xi) Section 3, paragraph 7 (xii) Section 3, pargraph 9 (xiii) Section 10, paragraph 55 (xiv) Section 13, paragraph 65 (xv) Section 17, paragraph 74 (xvi) Section 17, paragraph 75 Section 17, paragraph 76
Agreement varying concession between the Government of the Republic of Vanuatu and the Honourable Minister of Lands, Geology, Mines, Energy and Rural Water Supply and Union Electrique du Vanuatu Limited (dated 25 September 1997)	Section 11
Concession contract for the Generation and Public Supply of Electric Power in Malekula Island	(xvii) Article 2, Section 2.03, paragraph 12 (xviii) Article 2, Section 2.03, paragraph 14 (xix) Article 23, paragraph 104 (xx) Article 26, paragraph 120 (xxi) Article 31, paragraph 154
Concession contract for the Generation and Public Supply of Electric Power in Tanna Island	xxii) Article 2, Section 2.03, paragraph 11~~2~~

	(xxiii) Article 2, Section 2.03, paragraph ~~14~~13 (xxiv) Article 23, paragraph 103 (xxv) Article 26, paragraph 119 (xxvi) Article 31, paragraph 153 Article 32, paragraph ~~160~~159
Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 7.2
Schedule of Conditions to the Contract for the Management and Operation of the Water Supply Service in Port Vila	Article 2 Article 6 Article 9 ~~Article 16~~ Article 17 ~~Article 29~~ Article 33.1 Article 33.3 Article 33.4 Article 34