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

CIVIL APPEAL CASE No.17 OF 2014

BETWEEN: **DIGICEL (VANUATU) LIMITED**
Appellant

AND **TELECOMMUNICATIONS AND RADIOCOMMUNICATIONS REGULATOR**
Respondent

AND **TELECOM VANUATU LIMITED**
First Interested Party

AND **ATTORNEY GENERAL**
Second Interested Party

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: *Mr D Goddard QC and Mr Gary Blake for Appellant*
Mr E Braun and Mr Justin Ngwele for Respondent
Mr John Malcolm for First Interested Party
Mr Frederick Gilu for Second Interested Party

Date of Hearing: *6 November 2014*
Date of Judgment: *14 November 2014*

JUDGMENT

INTRODUCTION

1. This appeal ultimately turns upon the particular circumstances which existed before the commencement of the Telecommunications and Radiocommunications Regulation Act 2009 (TRRA) on 27 November 2009. It decides the basis of intercommunication charges for land line and mobile phones to mobile phones between 25 June 2010 and 25 June 2012. As those charges have, of course, already been made to end users, the practical consequences concern only the financial adjustment to be made between the two

licencees Digicel (Vanuatu) Limited (Digicel) and Telecom Vanuatu Limited (TVL) for that period.

2. The decision about the applicable interconnection charges for the period is found in the Final Determination of 9 July 2010 as amended by the decision called Decision 1 of 1 February 2011. Both the Final Determination and Decision 1 were made by the Telecommunication and Radiocommunications Regulator (the Regulator) established under the TRRA. There is no dispute about the validity of the Final Determination and Decision 1.

3. The case in the Supreme Court, and on appeal, arises because the Regulator, at the invitation of TVL, proposes to consider reviewing generally the Final Determination. The Regulator on 14 July 2011 published Draft Decision 2 (Draft Decision) which it is said on his behalf, only indicates a decision to internally review the Final Decision. The Draft Decision also indicates a proposal to consider a *"cost- modelling"* methodology in that review.

4. Digicel says that, in that particular circumstances, the Regulator is not entitled to take either of those steps. The primary judge in the Supreme Court disagreed and summarily dismissed Digicel's claim.

5. For the reasons which follow, in our view Digicel's claims are correct. Accordingly we allow the appeal, and set aside the Supreme Court orders. With the consensus of the parties, the orders we make have final effect, so there is no need to refer the matter back to the Supreme Court for further hearing.

6. As the introduction indicates it is the particular circumstances explained below which existed before the TRRA came into force which lead to our conclusion. Consequently, this decision does not involve any general conclusions on the extent of the powers of the Regulator under the TRRA, or which would apply to any dispute other than the present one.

SUMMARY AND CONCLUSIONS

7. This appeal flows from a decision of a judge of the Supreme Court striking out the claims of Digicel in an application for Judicial Review of certain decisions or proposed decisions of the Regulator and certain consequential orders. To the extent necessary, leave to appeal from that decision has been given.

8. Digicel is a provider of telecommunication services to the public in Vanuatu. It holds a licence granted on 14 March 2008 under the Telecommunications Act 1989 (the former Act). The former Act was replaced by TRRA.

9. Telecom Vanuatu Ltd (TVL) is also a provider of telecommunication services to the public in Vanuatu, and has done so for many years.

10. The Telecommunications Regulator under the former Act became the Regulator for the time being under the TRRA: see Section 58 (2). For the purposes of this appeal, the parties have treated the office of the Regulator as a continuing one, and it is not necessary to distinguish between the two offices.

11. Digicel and TVL both held licences issued under the former Act. They entered an Inter-connection Agreement (ICA) effective for four years from 25 June 2008. Under the ICA, the prices for interconnection were agreed for two years, and if either Digicel or TVL wanted them reviewed for the second two year period of the term of the ICA, they could give notice of their proposal to do so. Digicel gave such a notice to TVL. They could not agree on prices for interconnection for the second two year term. The ICA provided a process and method then for the interconnection prices to be fixed by the Regulator.

12. The Regulator issued the Final Determination on 9 July 2010 on that issue. It is common ground that, in making the Final Decision, the Regulator:

(a) decided on interconnection prices for a range of services;
(b) used a comparative bench-marking method to make that decision; and
(c) fixed a glide path to adjust the then current interconnection prices to the new prices set under the Final Determination.

13. Digicel on 6 August 2010 requested the Regulator to conduct an internal review of the Final Determination, by which it asked (amongst other things) to have the Regulator change the glide path as fixed by the Final Determination. TVL made no such request at the time. The Regulator did conduct an internal review, and on 31 January 2011 published Decision 1 modifying the glide path in relation to introduction of the new interconnection prices for mobile termination, that is for calls from mobile or land line which ended at a mobile telephone.

14. On 7 March 2011 TVL wrote to the Regulator requesting, amongst other things, a review of Decision 1. The Regulator at that time declined to further review Decision 1.

15. However, on 14 July 2011 the Regulator issued the Draft Decision. It is that document which prompted the Judicial Review proceedings. Digicel brought those proceedings, saying that:

(1) The Regulator was not empowered to internally review Decision 1; and
(2) The Regulator was not empowered to address the matter which the Draft Decision indicated the Regulator proposed to address, and alternatively was not entitled to do so in the manner the Regulator suggested was being considered, including reviewing the Final Determination.

16. In short, it was said that the Regulator simply could not proceed as was proposed or contemplated by the Draft Decision.

17. The complaint of Digicel is not about the procedural fairness of the process adopted, or proposed to be adopted, by the Regulator in relation to the Draft Decision. It is about the power of the Regulator to have undertaken the process leading to the publication of the Draft Decision, or to continue that process either at all or in the manner he proposes.

18. On this appeal the Regulator said that, despite the clear expression in the Draft Decision that the Regulator was conducting an internal review of Decision 1, the process being undertaken was, and was only, a review of the Final Determination. The Regulator said that the review of the Final Determination was being undertaken at the request of TVL made on 7 March 2011 and in later correspondence. That assertion by the Regulator does

not appear to have been understood by, or to reflect the argument before, the primary judge. The primary judge identified the four grounds of judicial review of Digicel as being:

(a) The Regulator had no power to carry out an internal review of the prior internal review (namely Decision 1) under section 52 of the TRRA;

(b) Alternatively, the Regulator in conducting a further internal review of Decision 1 must be confined to the subject matter of the earlier review request, to the extent that he had succeeded, namely the glide path process;

(c) Alternatively, the Regulator in conducting any further review of the Final Determination is bound to apply the ICA according to its terms, rather than exercising powers under the TRRA unrestricted by the terms of the ICA; and

(d) Alternatively, if the Regulator is entitled under the TRRA to conduct a general review of interconnection prices, in the particular circumstances and despite the Draft Decision indicating that the Regulator was considering a method for determining interconnection prices other than by benchmarking, namely the cost-modelling method, the Regulator was not entitled under Section 30 of the TRRA to do so.

19. On each of those four matters, the primary judge determined that there was not sufficient merit in any of the contentions to allow the Judicial Review proceeding to be maintained, and so it was struck out.

20. The Notice of Contention by the Regulator confirmed that, by the process reflected in the Draft Decision, he was not reviewing internally Decision 1 but was reviewing the Final Determination.

21. Consequently, it is not necessary to consider the lawfulness of the Regulator internally reviewing a previous internal review (Decision 1) under s.52 of the TRRA. The issues (a) and (b) addressed in the judgment at first instance do not need to be addressed further. It must be said that there are clear expressions in the Draft Decision that the Regulator was reviewing Decision 1, so there is no criticism of the primary judge for considering

them. But the Regulator now says those references were made in error, despite their very clear terms, and the Court proceeded on that basis.

22. The Regulator by Notice of Contention also says that Digicel is not directly affected by the Draft Decision, because it is only provisional and does not indicate what outcome there may be, or how that outcome may be reached when the review process is complete. The Regulator says that the process is being undertaken under section 30 of the TRRA, and that the process as it continues will include giving to Digicel and TVL procedural fairness.

23. We do not accept the contention that Digicel is not, presently, a person aggrieved by the process the Regulator had decided to undertake as indicated by the Draft Decision, or by the decision to consider on a review of the interconnection charges for the period 25 June 2010 to 25 June 2012 the use of a cost-modelling process. The decisions are premised on the Regulator being entitled to review the Final Determination under s.30. For the reasons which appear below, we do not consider that the Regulator is entitled to do so. Digicel's interests under its licence and the ICA are being affected directly by the process proposed, because we have concluded that those interests mean that the Regulator is not entitled to proceed in that way in respect of the interconnection charges for that period. That is because the TRRA shows an intention to give full effect to the licences of Digicel and TVL and to the ICA.

24. In procedural terms, it is the Regulator which was the respondent in the Judicial Review proceeding and the respondent to this appeal, because it is the decisions or potential decisions of the Regulator apparently taken at the instance of TVL which will affect Digicel's rights and interests. If the Regulator is allowed to proceed, TVL might achieve its financial objective, which is to change in some material way the outcome of the Final Determination and Decision 1.

25. For reasons which appear below, we have reached the view that the particular decisions taken by the Regulator, and the proposed further action which the Regulator plans to take, are not authorised by section 30 of the TRRA under which he says he has acted and proposes to act. That does not flow from any restriction on his powers and functions under the TRRA Act generally applying. It flows from the fact the rights and

entitlements of Digicel (and TVL) under their respective licences and under the ICA, and as recognized by the former Act, were preserved by the transitional provisions of the TRRA. Consequently, we consider that the Regulator is in error in considering that it is open to the Regulator to use section 30 of the TRRA (as the Regulator says he is doing and proposes to do) to review the Final Determination and to review and determine the appropriate interconnection charges between Digicel and TVL for the period 25 June 2010 to 25 June 2012.

26. In short, in our view, the TRRA was not intended to, and did not, have any effect on the rights and interests and obligations of Digicel and TVL under their licences or under the ICA as accommodated by the former Act in respect of the period relevant to the Judicial Review proceeding.

27. Consequently, the appeal should be allowed and the orders of the primary judge should be set aside.

28. Although the appeal was from a decision striking out the claims of Digicel, so that strictly speaking allowing the appeal would then lead to the matter being remitted to the Supreme Court for further hearing, the parties were agreed that, if the Court of Appeal reached a firm view on the merits of the particular grounds of Judicial Review application, it should make final orders. For obvious reasons, that is eminently sensible. As we have reached such a conclusion, instead of remitting the matter to the Supreme Court, we propose to declare that the Regulator is not entitled to further review the Final Determination as varied by Decision 1 in respect of the interconnection charges in relation to the period 25 June 2010 to 25 June 2012.

29. We have no reason to think that the Regulator, in the circumstances, will not give effect to that declaration. Accordingly, we do not presently consider it necessary or appropriate to additionally make an injunctive order against the Regulator as Digicel sought that is making a permanent injunctive order in terms of interlocutory injunctive relief originally given in the Supreme Court. The Supreme Court clearly has jurisdiction to give effect to the declaration which we have made if that becomes necessary.

30. On the appeal, and the hearing in the Supreme Court, TVL and the Attorney General appeared as interested parties. TVL supported the decision of the Regulator, not surprisingly as the Regulator was proceeding in the way TVL had asked the Regulator to proceed. Having participated in that way, it is of course obliged also to give effect to the declaration we have made and is bound by it.

31. The Attorney General appeared as an interested party to make submissions on matters which he considered were significant and which might not otherwise have been put forward by the parties or by TVL. In the event, the Attorney General did not consider it necessary to make any submissions. He also indicated that he would, of course, abide the court's decision.

32. In view of the outcome of the appeal, and in light of the submission on costs, it is our view that the costs of Digicel of the appeal and of the application for Judicial Review should be paid jointly by the Regulator and by TVL on the standard costs basis. Such costs should be taxed if not agreed. We consider that a joint order for costs is appropriate taking into account that the real commercial dispute is between Digicel and TVL, that the Regulator took the action leading to the Draft Decision, and proposed to proceed as was said at the invitation of TVL, and that TVL adopted the submissions of the Regulator as to the correctness of the Regulator's proposed action. In this matter, and unlike some others, the Regulator has adopted the principal role in identifying the constructional and other issues confronting the Court, and in promoting the correctness of the actions which the Regulator has taken and proposes to take and which are subject of the Judicial Review application. The question as to how the costs are actually borne between TVL and the Regulator is a matter for them. We have not overlooked the Regulator's submissions that the Regulator has limited resources and it's simply performing a statutory function in a manner in which he considers it appropriate to do. Where there is a natural contradictor, such as TVL is, the Regulator could have adopted a role which was a little more passive, leaving it to TVL to *"make the running"*. The Regulator did not do so. In an active way he defended the actions he took at TVL's invitation. In our view the order for costs best reflects the justice of the case.

33. It is now necessary to explain in a little more detail the Regulator's position and why in our view it is not correct in the particular circumstances. That involves a more detailed

reference to the TRRA, and then to the matters which were in place before the TRRA came into force, and then our consideration of the particular issues.

THE TRRA

34. The TRRA establishes a new regulatory frame work for telecommunications and radiocommunications in the Republic of Vanuatu. Its objects are to facilitate the development of the telecommunications sector and to manage the radio frequencies in Vanuatu in order to promote national, social and economic development.

35. The TRRA, like comparative legislation in other countries, establishes the Regulator as an independent authority to regulate telecommunications and radiocommunications in Vanuatu subject to the provisions of the TRRA. The functions of the Regulator include implementing investigations and enforcing the provisions of the TRRA. The Regulator is given a range of investigative powers and significant determinative and enforcement roles. It is not necessary to refer to them in detail except to those dealing with interconnection in Part 6.

36. Part 6 of the TRRA, addresses interconnection by all service providers. ***Section 26*** provides a structure for the providers of telecommunication services to the public to make an interconnection agreement for the provision of interconnection with other telecommunication providers. In practical terms, that means that telephone calls between public users of Digicel services should connect with public users of TVL services and vice versa. It is obviously in the public interest and supports national social and economic development.

37. The procedure under Section 26 requires Digicel and TVL to negotiate in good faith an interconnection agreement. In addition, under section 27, the Regulator may require a service provider to specify the terms and conditions of a *"reference interconnection offer"* (RIO), and if one is not specified within 90 days the Regulator may under a specified process fix the terms of the applicable RIO. The Regulator may also require changes to an RIO from time to time. Section 27 (8) allows a service provider to adopt and impose the current RIO terms for interconnection, instead of following the option allowed for by Section 26. The RIO procedure is not directly relevant to the present appeal as it was not engaged. Under Section 28, an interconnection agreement must be

provided to the Regulator, and (subject to protecting confidential information) be published by the Regulator. Section 29 contains specific requirements for interconnection agreements.

38. Section 30 addresses how the Regulator should either approve an RIO, or determine an RIO, under Section 27 or how the Regulator should resolve any dispute over prices where negotiation under Section 26 does not lead to an agreement. As it featured significantly in the submissions of the Regulator, Section 30 is set out in full. It provides:-

> *"30. Interconnection charges*
>
> *(1) If there is any dispute over prices for interconnection provided by access providers or where the Regulator is to determine these prices under Section 27, the Regulator must determine the prices by benchmarking against cost-oriented prices for interconnection in other jurisdictions selected by the Regulator.*
>
> *(2) The Regulator may use any other method of calculation or determination of the prices, but only where the Regulator determine that it is unable to identify an appropriate selection of cost-oriented prices in other jurisdictions."*

39. Finally, in Part 6, Section 32 provides that an interconnection agreement that does not comply with any provision of the TRRA or any licence is void. It is not suggested that Section 32 is directly relevant to the present issues.

40. Nor is it necessary to address the extent to which the Regulator has a role to play where, despite the agreement of two providers under Section 26 or the acceptance by a provider of an RIO as proposed by another provider under Section 27, the Regulator has concerns about the terms of some of them. It was debated whether the Regulator is confined to addressing disputes between access providers only to the extent that their agreement is not complete. It is not necessary to resolve that. It may be that the Regulator has some oversight role by reason of Section 29, or perhaps more widely. The reasons below explain why, on this appeal, we do not need to address those questions even though they were addressed at some length in the course of submissions.

41. We observe that, having regard to Section 32, it may be desirable to provide that the term or terms of an interconnection agreement which do not comply with Section 29 are void, rather than that the whole of the agreement is void, so that the Regulator may substitute such term or terms for the void terms as the Regulator decides do satisfy the TRRA and the applicable Regulations and is satisfied that they are reasonable terms and conditions. The consequences of total voidness of an interconnection agreement in those circumstances may be avoided.

42. The next part of the TRRA to consider is Part 10: Review of Decisions of the Regulator. It was also significantly referred to in the submissions.

43. Section 51 requires the Regulator to give reasons for a *"decision"* at the invitation of a person aggrieved by that decision. In this matter the Regulator gave reasons for his decisions as were made, or proposed to be made, in any event.

44. Section 52 provides the structure for the Regulator to reconsider a decision, in the nature of an internal review. It enables a person aggrieved by a decision to ask that it be reconsidered. If such a request is made within 30 days of the decision *"being notified or published"*, the Regulator must do so. If the request is made outside that period, the Regulator has a discretion whether or not to do so. Any invitation to reconsider a decision must be in writing and must *"contain all the material upon which the invitation is based"*. That requirement of *"front loading"* is common, as it assists in prompt decision-making in the common interests of providers and users of the services.

45. Section 53 allows for judicial review by the Supreme Court of a decision of the Regulator, subject to certain limitations. If there is an application for judicial review of a decision, the Regulator is not entitled to internally reconsider the decision under Section 52. The time limit for a judicial review application is 3 months from a decision being notified or published. As noted, judicial review is not available in certain circumstances. The parties identified those potentially relevant to this appeal as being those specified in Section 53 (3) (d), (e) and (f). They provide:-

> *"(3) Judicial review must not be available in respect of:*
>
> *(a) (not presently relevant)*
>
> *(b) " "*
>
> *(c) " "*

(d) a decision under subsection 52(3), declining to reconsider a decision; or

(e) a decision under subsection 52(5), except to the extent of any variance, revocation or new decision ; or

(f) any decision of the Regulator under section 54 or an expert appointed by the Regulator under subsection 54(7); ..."

46. It should also be noted that Section 54 provides an alternative to the Judicial Review of a decision of the Regulator if the decision is made under Part 15 (dealing with the amendment, revocation and renewal of licences), or Part 6 or Part 7. After internal review under Section 52, if the person remains aggrieved by the Regulator's decision, that person may within 30 days invite the Regulator to have the merits of the decision reviewed in whole or in part by an independent expert. The Regulator has 30 days to accept or decline an invitation. Section 54 (4) specifies criteria for the Regulator to consider before doing so. If the Regulator accepts the invitation, Section 54 then sets out a process for identifying the independent expert, and for the independent expert to carry out the review of the decision or the referred part of it. Section 54 (11) makes the expert's decision final and binding. If the Regulator does not accept the invitation to appoint an independent expert, although presumably judicial review under Section 53 may still be available, in practical terms it is likely that the 3 months period fixed by Section 53 will by then have expired.

47. Finally, it is necessary to note the savings and transitional provisions in section 58. They are as follows:-

(1) Every document, regulation and act of authority made under the Telecommunications Act [CAP 206] and relevant to any matter set out in this Act continue and have effect under the corresponding provisions of this Act until such time as they altered, amended or cancelled, as the case may require, under the provisions of this Act.

(2) The Telecommunications Regulator appointed under the Telecommunications Act [CAP 206] is, upon the date on which this Act comes into force, the Regulator and is to remain so until 30 September 2010 or such sooner time as the terms of his appointment may provide.

48. As we have noted, the Regulator says that he is reviewing the Final Determination, and proposes to continue to do so, under section 30. In doing so, he also says he is entitled to consider, and if appropriate to adopt, a methodology for fixing interconnection prices different from the benchmarking method. Again, it is important to recall that his decision to do so concerns only the period 25 June 2010 to 25 June 2012, being the second half of the period specified in the ICA.

THE STATUS OF THE ICA

49. Much of the following detail is taken from the Regulator's sworn statement of 18 August 2011.

50. The former Act was, of course, in force at the time the ICA was made.

51. On 19th December 2007 the Republic of Vanuatu entered into a Settlement Agreement with TVL and two other entities *"to end the monopoly in the Telecom Sector"*. By the Settlement Agreement, the Republic of Vanuatu gave up its shareholding in TVL in exchange for TVL agreeing to end its monopoly of the telecommunication market earlier than July 2012 (a right which otherwise existed under a Franchise Agreement of 20 November 1992) and for a licence to provide telecommunication services in the telecommunications market. It indicated that the Republic of Vanuatu proposed to issue a new mobile telecommunications licence (as was issued to Digicel in March 2008). That licence to Digicel is in the form contemplated by the Settlement Agreement at clause 7.2 and in Schedule B to the Settlement Agreement. The Settlement Agreement also identified the licence to be issued to TVL as being in the form set out in Schedule A to that Agreement. Both licences were issued in accordance with section 16 of the former Act.

52. Clause 8.4 of the Settlement Agreement stated that the Republic of Vanuatu did not have the entitlement to make any changes to the law (including through the proposed new legislation which became the TRRA) which might affect the prices for interconnection services to TVL (and other things) during the period of its licence.

53. Clause 8.4 therefore makes it clear that Parliament had in mind the then proposed new legislation which become the TRRA, and contemplated that the rights under the Settlement Agreement and under the proposed new licences would continue to exist in their terms, and be recognised and given effect to under the TRRA.

54. In addition, the Settlement Agreement provided for an interconnection agreement in the form of an Interim Interconnection Agreement as set out in Schedule 3 to the Settlement Agreement. Clause 9 obliged TVL to enter into an interconnection agreement with a new mobile services provider (which became Digicel) in those terms. It also ensured that the new mobile services provided would also enter into the same interconnection agreement.

55. Both the new TVL licence and the Digicel licence are in fact in terms of Schedule A and Schedule B to the Settlement Agreement respectively.

56. Clause 19.1 then provided for disputes between them to be resolved by them applying to the Regulator for assistance. In addition, each licence required the licencee to develop and propose an RIO, subject to the Regulator requiring changes to it. That anticipates the Regulator's role as provided in section 27 of the TRRA, discussed above. Again it is a clear indication that legislation in the form of the TRRA was then contemplated, and it was intended that subject to such specific provision as the one just mentioned, the rights and processes under the ICA and under the licences were to be preserved by the TRRA.

57. The ICA of March 2008 also was relevantly in terms of Schedule 3 to the settlement agreement. It operated for 4 years from 25 June 2008. It provided for interconnection pricing by clause 5.1 for a period two years from 25 June 2008, and for the period 26 June 2008 for the next two years that pricing was to continue unless either TVL or Digicel wished to change it. In that event, that party was to give notice by not earlier than March 2010 both to the other party and to the Regulator. Clause 5.2 (e) - (h) provided:

> " *(e)* *If the parties have not reached agreement on any such changes within 20 Working Days of commencement of those negotiations, then either party may refer the dispute to the Regulator for determination.*

(f) *The parties must be given the opportunity to provide written submissions (and if required by the Regulator, oral submissions) on the dispute. The Regulator must use best endeavours to complete a draft determination within 20 Working Days of notice of the dispute and to provide that to the parties for comment. The parties will then have 5 Working Days to provide written comments on the draft determination.*

(g) *The Regulator shall use best endeavours to complete the determination within 40 Working Days of notice of the dispute.*

(h) *The Regulator must determine any changes to the prices based on the benchmarking of countries that have applied cost-based pricing methodologies and the Regulator must include in his or her consideration countries that are comparable to Vanuatu that have applied such methodologies."*

58. It is clear that the Republic of Vanuatu specifically addressed both in the Settlement Agreement, and by its Schedules, the fact that there would be issued licences to TVL and Digicel to provide competition in the market of telecommunication services and users. It specifically provided for the terms of their licences, including the requirement for interconnectivity of the users through their network. It also specifically provided for an interconnection regime which would exist between them for the four years from 25 June 2008, and in particular for the second two years of that period from 25 June 2010. Moreover, as can be seen by the terms of the licences, the RIO procedure now found in section 27 of TRRA was recognised as a procedure which the Regulator would be able to implement if appropriate for interconnection charges in the longer term.

59. As noted above, Digicel under the ICA gave notice to TVL that it wanted to review the interconnection charges for the period 25 June 2010 to 25 June 2012. Digicel and TVL were not able to agree upon those charges for that period. On the 30 April 2010 Digicel requested the Regulator to determine those charges, pursuant to clause 5.2 (e) of the ICA. The Final Determination of the Regulator was his decision on that dispute.

60. The Regulator's reasons in the Final Determination show that the procedure prescribed by clause 5.2 of the ICA was followed, including the use of the benchmarking approach specified by clause 5.2(h). The Regulator at that point said that that approach was broadly consistent with section 30 of the TRRA. TVL had proposed a different methodology to determine the pricing, namely cost modelling, but the Regulator said that even then section 30 (1) would have required benchmarking in any event as the Regulator was not unable to identify an appropriate selection of cost-oriented prices in other jurisdictions. Also as noted, on 6 August 2010, Digicel sought internal review of four decisions which it said were effectively made in the Final Determination. It invited the Regulator to review internally the Final Determination using the powers under section 52 of the TRRA. Presumably because they are regarded as purely procedural, it has been accepted by Digicel, TVL and the Regulator that those powers were available to be invoked in that way. As we have noted TVL subsequently sought to invoke those powers, but because its request to the Regulator was outside the 30 days period, the Regulator declined to undertaken a further internal review. Decision 1 was made on that internal review requested by Digicel.

CONSIDERATION

61. It is clear that the Transitional Provisions of the TRRA addressed what should happen to the status of documents which existed under the former Act.

62. The analysis of the events which preceded and led up to the issue of licences to both Digicel and TVL under the former Act, and to the making of the ICA, make it extremely unlikely that Parliament would have overlooked that background when it enacted the TRRA. There are indications in those documents that it did not overlook that background.

63. Section 58 (1) of the TRRA says that every document made under the former Act and relevant to any matter in the TRRA continues to have effect until it is altered amended or cancelled, as the case may require, under the TRRA. It does not therefore contemplate that the rights and obligations of either Digicel or TVL under their respective licences or under the ICA should be changed, or in some way diminished, by the introduction of the TRRA. The reverse is the case.

64. That, of course, is consistent with responsible government as reflected in the fundamental principle that legislation should not operate retrospectively to change existing rights and interests, unless it clearly expresses an intention to do so.

65. In this matter, the ICA provided the process and structure for the decision by the Regulator fixing interconnection prices for the period 25 June 2010 and 25 June 2012, where (as here) Digicel and TVL could not agree on those prices. It also provided for the methodology (bench-making) to be adopted. The Regulator, by the Final Determination, made such a determination. There is scope to accept, as we do, that the Regulator under the TRRA is the Regulator to perform that function. That was accepted by all parties. There is also scope to accept, as we do, that the Regulator's function under the ICA as allowed by the former Act was preserved by the general powers contained in s. 7 of the TRRA.

66. That approach is consistent with section 8 of the Interpretation Act [Cap. 132] as it corresponds with the intention of Parliament, in particular in section 58 (1) of the TRRA and the legislative history of the TRRA. It also gives effect to section 11 of the Interpretation Act because it ensures that the repeal of the former Act and its replacement by the TRRA does not affect what was done under the former Act or any rights, privileges or obligations or liabilities acquired or accrued under the former Act.

67. In view of that conclusion, it is not necessary to address the other contentions advanced by Digicel or by the Regulator and TVL.

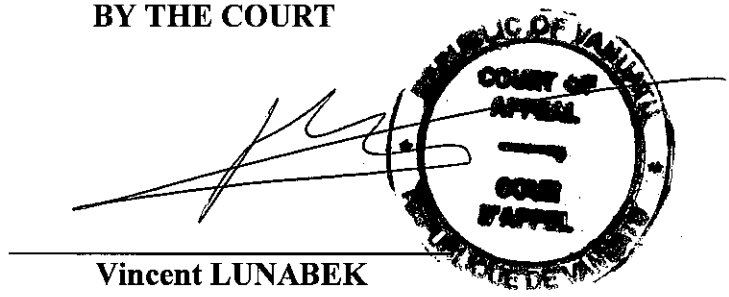
68. In short, in our view, the Final Determination (as amended by Decision 1) represents the outcome of the procedure prescribed under the ICA and the licences of Digicel and TVL for deciding interconnection rates for the period 25 June 2010 to 25 June 2012. It is a process contemplated by the Settlement Agreement and performed (in the events which happened) by the Regulator under the former Act, and now under s. 7 of the TRRA. Section 30 of the TRRA was not intended to, and does not operate to allow the Regulator at the request of TVL outside the terms of the ICA to decide to review the interconnection rates for that period, either in a benchmarking method or on any alternative methodology.

CONCLUSION

69. As we indicated in the Summary above, the appeal should be allowed and the orders made by the Supreme Court set aside. In the particular circumstances we make the declaratory order and the costs order there referred to.

DATED at Port-Vila this 14th day of November 2014

BY THE COURT



Vincent LUNABEK
Chief Justice