IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-64
[2026] NZHC 2463

UNDER	Part 4 of the Commerce Act 1986
IN THE MATTER	of an appeal against an Input Methodologies Determination of the Commerce Commission
BETWEEN	FIRST GAS LIMITED Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	11 August 2026
Counsel:	T D Smith and S D J Peart for appellant J D Every-Palmer KC, R S May and J W Harrell for respondent
Judgment:	20 August 2026

JUDGMENT OF RADICH J
(Leave to appeal and stay pending appeal)

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[1] In its judgment on 7 May 2026, the Court[1] allowed First Gas Ltd's appeal against the Commerce Commission's 2023 input methodology determinations for gas pipeline businesses[2] under s 52Z of the Commerce Act 1986 (the Act).[3] The Commission now seeks:

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1 Sitting with lay members Dr Jill Walker and Professor Stephen King.
2 *Gas Transmission Services Input Methodologies (IM Review 2023) Amendment Determination 2023* [2023] NZCC 36; and *Gas Distribution Services Input Methodologies (IM Review 2023) Amendment Determination 2023* [2023] NZHC 37.
3 *First Gas Ltd v Commerce Commission* [2026] NZHC 1224 [the judgment].

(a) leave to appeal from the judgment to the Court of Appeal on questions of law pursuant to ss 52Z(6) and 97 of the Act; and

(b) if leave is granted, an order staying enforcement of the judgment until the determination of the appeal by the Court of Appeal.

[2] The applications are opposed by First Gas.

The application for leave to appeal

[3] The Commission proposes three questions of law:

(a) whether this Court incorrectly decided the appeal by reference to the certainty purpose of s 52R without making a threshold finding that the appellant's input methodology was at least no worse than the Commission's input methodology at promoting the long-term benefit of consumers under 52A;

(b) whether this Court erroneously reversed the onus of proof by requiring the Commission to either show that the appellant's input methodology was materially worse under s 52A or justify its amendments through "compelling" new evidence or analysis under s 52R; and

(c) whether this Court adopted the wrong approach to the interpretation of the certainty purpose in s 52R.

The legal framework

[4] In a judgment on 1 April 2026, I granted leave to airport companies to appeal from this Court's judgment of 19 December 2025 in which it dismissed appeals against a 2023 input methodology determination made by the Commission for airport services.[4]

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4 *New Zealand Airports Association Inc v Commerce Commission* [2026] NZHC 845 [the airport services leave decision]. The airport services appeal was heard immediately before the gas pipeline appeal, to which this decision relates. The members of the Court were the same for both appeals.

[5] In the airport services leave decision, I described the legal framework for appeals from input methodology determinations under pt 4 of the Act.[5] I will not repeat that description here in full but, by way of summary:

(a) In the underlying appeal, the Court could only exercise its powers if it was satisfied that an amended or substituted input methodology is, or would be, materially better in meeting the purpose of pt 4 of the Act in s 52A (essentially promoting the long-term benefit of consumers), the purpose of input methodologies in s 52R (essentially, promoting certainty for suppliers and consumers), or both.[6]

(b) The focus is solely on the materially better ground. The Court does not consider whether the Commission erred in its determination.[7] It is a full merits review.

(c) By way of contrast, the second right of appeal — from this Court under ss 52Z(6) and 97 to the Court of Appeal — is available only with leave and only on a point of law.

(d) When determining whether to allow a second appeal, the Court must have regard to the factors in s 97(2) of the Act, including whether any questions of law or general principle are involved, the importance of the issues to the parties and the amount of money in issue.

(e) Limiting the second appeal in this way aligns with Parliament's concern to have a regime which promotes accountability but which avoids gaming and recognises the need for finality in litigation.

(f) The need for there to be a seriously arguable question of law moves the emphasis away from error correction to ensuring that guidance is available on the interpretation of the statutory scheme.

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5 *New Zealand Airports Association Inc*, above n 4, at [4]–[11].

6 Commerce Act 1986, s 52Z(4).

7 *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [157].

The substantive judgment

[6] The weighted average cost of capital (WACC) is a significant element of the pricing mechanisms that pt 4 of the Act prescribes for goods or services in markets where there is little or no competition and little or no likelihood of a substantial increase in competition.[8]

[7] The pricing — for gas pipeline businesses in this case — is set through determinations by the Commission that prescribe input methodologies for the cost-based pricing exercise that is involved.

[8] The Commission had, since pt 4 of the Act was introduced, set a WACC for both gas pipeline businesses and electricity lines businesses at a percentile above the midpoint to reflect the potential asymmetric costs to consumers of setting a WACC that is higher or lower than the true WACC.

[9] Initially, the Commission selected the 75th percentile of the WACC range for both types of business. It reduced the WACC to the 67th percentile following a review in 2014.[9] It maintained that position until its input methodology reviews in 2023 in which it decided to apply an uplift to the 65th percentile for electricity lines businesses but to adopt the midpoint estimate, with no uplift, for gas pipeline businesses. As was said in the judgment, effectively, the Commission decided the gas pipelines were no longer considered to be "similar enough" to electricity networks for the same uplift to be applied.[10]

[10] Describing the materially better test, referred to above, the Court said in the judgment that:[11]

> If the alternative input methodology was materially better or at least no worse at meeting the s 52A purpose and was better at meeting the s 52R purpose, the appeal would succeed.

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8 The latter part of that sentence being a reference to s 52 of the Act.
9 See the judgment, above n 3, at [35]-[38].
10 The judgment, above n 3, at [214].
11 At [178].

[11] The question for the Court was whether the input methodology proposed by First Gas — at the 65th or 67th percentile[12] — would in terms of s 52Z of the Act be materially better:

(a) in meeting the purpose of pt 4 in s 52A;[13]

(b) in meeting the purpose of input methodologies themselves in s 52R,[14]

(c) or both.

[12] In the judgment, the Court found that:

(a) it did not have sufficient information to conclude that an uplifted WACC would be materially better at delivering the outcomes in s 52A;[15] but

(b) an uplifted WACC better meets the s 52R purpose in providing certainty and promoting confidence.[16]

[13] For those reasons, the Court was satisfied — in terms of s 52Z(4) of the Act — that an uplift in the WACC to the 65th percentile is materially better in meeting the purpose of s 52R of the Act. Accordingly, in terms of s 52Z(3)(b)(i) of the Act the appeal was allowed.

A jurisdictional issue

[14] The Court's final orders are being issued alongside this decision. That is because, following delivery of the judgment a process followed to settle upon the precise form of the orders. As the Court said in the judgment, the amended input methodologies that follow from the Court's decision needed to be the subject of further

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12 The judgment, above n 3, at [7].
13 Being, by way of summary, to promote the long-term benefit of consumers in markets referred to in s 52 by promoting outcomes that are consistent with outcomes produced in competitive markets.
14 Being, broadly, the promotion of certainty for suppliers and consumers in relation to the regulation of goods or services under pt 4 of the Act.
15 At [224].
16 At [232].

input from the parties.[17] Accordingly, the parties were directed to file a joint memorandum on the precise form of the orders that would follow by 5 June 2026.

[15] That was done and the orders have now been settled by the Court (sitting with the lay members) alongside consideration of the stay application — because of the substantial issues raised by the Commission on that application.

[16] First Gas had submitted that s 52Z(6) of the Act provides a right of appeal with leave from "any decision or order of the High Court" and that, in the absence of the final orders, the provision had not been triggered. However, as I see it the judgment was a decision that falls within the terms of s 52Z(6) as it determined First Gas' appeal.

[17] In any event, the formal orders have been issued alongside this decision and so the underlying issue raised by First Gas no longer arises.

First proposed ground of appeal

[18] The Commission says that the judgment recorded, in its view correctly, that the s 52R purpose is "conceptually subordinate" to the s 52A purpose.[18] Therefore, the Court said that it could only consider s 52R if satisfied that the proposed input methodology was "at least no worse" at meeting the s 52A purpose.[19] Yet, the Commission says, the Court did not find that the First Gas input methodology was "no worse" than the Commission's at fulfilling the s 52A purpose. Rather, the Commission says, the Court concluded that it was unable to be satisfied one way or the other.[20]

[19] First Gas says that this interpretation on the part of the Commission is not required by the text or by the purpose of the Act. It refers to the words in s 52Z(4) which enables an appeal if the Court is satisfied that the amended methodology is materially better in meeting the purpose of pt 4, the purpose in s 52R or both. It says that the use of "or both" indicates that the clauses are to be read disjunctively. First Gas says that the judgment did not say that the Court could only consider s 52R if

17 At [235].
18 At [177].
19 At [178].
20 At [224].

satisfied that the proposed input methodology was "at least no worse" at meeting a s 52A purpose statement. Rather, it is said that the Court made the point that if it considers that the amended methodology will be worse at meeting the s 52A purpose, then the appeal will fail.[21]

[20] First Gas says that in approaching its task, the Court was able to consider relevant s 52A factors first, excluding considerations of certainty[22] and to then turn to consider regulatory certainty in terms of s 52R.

[21] However, the Commission's position is that, arguably, the Court erred by allowing the appeal under s 52R when it could not rule out the possibility that the decision would be a worse outcome in terms of s 52A.

[22] I accept that this is a framework question of law. It looks at the relationship between ss 52A and 52R and the Court's treatment of that relationship in the decision. It is a material point of principle of the kind envisaged by s 97(2)(a) of the Act. I accept that it can properly fall to be tested on appeal.

Second proposed ground of appeal

[23] The Commission says that, arguably, the Court erred by requiring the Commission to establish positively that First Gas' input methodology was worse at fulfilling the s 52A purpose and/or that the Commission's input methodology was justified under s 52R by "compelling new evidence or analysis".[23] In this sense, the Commission says that the Court erred by shifting the onus from First Gas on to the Commission in circumstances, in which, under s 52Z(4), the onus is on an appellant to prove that their proposed input methodology is materially better.

[24] First Gas says that the Court did not alter the onus. Rather, it was satisfied by First Gas that the input methodology proposed by it was materially better because changing the WACC uplift without an improved evidence base would undermine

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21 At [178].

22 First Gas refers to certainty considerations being a part of s 52A as well as forming a central part of the s 52R considerations.

23 A reference to the judgment, above n 3, at [231].

confidence in pt 4 regulation and, in turn, adversely affect the long-term benefits of consumers.[24]

[25] In this sense, First Gas says, an onus was not placed on the Commission to justify the change but reflected the Court's acceptance of First Gas' submissions that the evidence given by the Commission for the change in its reasons paper lacked merit, particularly in circumstances in which there had been significant evidence leading to earlier decisions through which WACC uplifts had been put in place.

[26] The issue that arises from the points the Commission raises is whether the Court did in effect require the Commission to justify the differences with prior input methodologies and whether, in so doing, it created an inappropriate presumption in favour of the status quo, absent evidence to the contrary. Whether or not that is the case is in my view a question of law that is appropriate to be the subject of an appeal.

The third proposed ground of appeal

[27] The Commission says that, in its interpretation and application of s 52R, the Court erred in adopting a broad conception of s 52R certainty that overlaps with the "incentives to invest" factor in s 52A; which conflates continuity among successive input methodologies in different regulatory periods; and which creates a presumption that input methodology amendments undermine certainty.

[28] The Commission takes certainty under s 52R to mean that input methodologies must deal with matters in sufficient detail to enable suppliers to apply them on their face.[25]

[29] First Gas, on the other hand, says that the Court has never suggested that s 52R is limited to whether an input methodology is clear in its terms or impacts and that the passages cited from *Wellington International Airport* merely record that s 52T(2) — which does relate to clarity — serves that purpose.

24 A reference to the judgment, above n 3, at [233].
25 Referring to *Wellington International Airport Ltd*, above n 7, at [214].

[30] First Gas refers also to the Commission's decision being inconsistent with its own framework paper where it explained that the Commission's three key underlying economic principles, which date back to when the first input methodologies were set in 2010, will "increase regulatory predictability and certainty, consistent with the s 52R IM purpose".[26]

[31] First Gas does not regard the Court as having failed to distinguish between continuity in the WACC uplift for gas pipeline services between regulatory periods and equivalence with gas and electricity services. It sees the Court as having considered both matters as being relevant to the Court's overall evaluative judgment. And First Gas sees the Court as having taken into account the fact that s 52Y requires the Commission to review input methodologies at least every seven years. It sees the Court as having recognised that certainty was not absolute.

[32] However, the Commission says that, through the approach it has taken, the Court has created an unintended overlap between s 52A and s 52R and that, in that sense, the judgment sits in tension with the Court's merits judgment in the airport case where it recognised that promotion of certainty is not a standalone purpose and must instead be considered alongside the need to promote the long-term benefit of consumers within s 52A.[27]

[33] Ultimately, I accept that the meaning of certainty in s 52R, and its relationship to the certainty that is promoted by the Commission's framework for calculating the WACC under s 52A, is a reasonable question of law to raise.

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26 Commerce Commission *Part 4 Input Methodologies Review 2023: Framework paper* (13 October 2022) at [4.4]. The Commission also stated in this paper that promoting certainty is "to an extent implicitly inherent in section 52A", at [2.22]–[2.24].

27 *New Zealand Airports Association Inc v Commerce Commission* [2025] NZHC 239 [the airport services merits decision] at [131]–[132].

Public interest considerations

[34] I turn now to look at the public interest considerations in s 97(2). They reflect considerations more broadly expressed for other statutory appeals when leave is required.[28]

[35] In the airports leave judgment, I referred to the fact that relatively small numerical adjustments within input methodologies can result in material changes to the returns that are allowed.[29]

[36] However, First Gas says that in this case any public interest in a further appeal does not outweigh the costs and delay. It says that the Commission's true complaint is with the Court's evaluative judgment, that, in any event the Court's reasoning on the issue of certainty is equally applicable to s 52A (such that the outcome would be the same either way), that a further appeal is unlikely to provide material guidance, that there are alternative mechanisms for the Commission to consider a different WACC percentile if it wishes, and that a grant of leave would itself cause uncertainty over the regulatory WACC.

[37] First Gas refers also to the fact that the input methodology determination in question relates to the regulatory period which will be subject to review by 2030. It says that if an appeal is not determined until, say, mid-2028 then the uncertainty and lack of confidence will have continued for most of the seven year input methodology period, despite First Gas pursing a successful appeal. In many ways, this submission overlaps with the matters to be taken into account in considering the Commission's application for a stay.

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28 See for example *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1601 at [16] as applied in *Major Electricity Users' Group Inc v Commerce Commission* [2014] NZHC 1765 at [37(b)].

29 The airport services leave judgment, above n 4, at [50].

[38] As I see it, not only will it be important for the Commission, regulated suppliers and consumers to have clarity on the points raised, but, in this particular case, the alternative methodology implemented through the Court's decision would see gas pipeline businesses being permitted to charge consumers about $10.5 million more per year.

[39] Moreover, the points on appeal are relevant to input methodology amendments in the future and I do accept the Commission's point that the articulation of relevant legal principles will have implications beyond the context of this case.

[40] Accordingly, public interest considerations do weigh in favour of granting leave.

[41] For these reasons, the application for leave to appeal is granted.

The application for a stay

[42] The Commission applies for an order under r 20.10(2)(b) of the High Court Rules for a stay of execution of the judgment until determination of its appeal.[30] Its primary position is that s 53(2) of the Act operates, in effect, as a mandatory and automatic stay. However, if the Court does not agree with its view on the application of s 53(2), then it seeks a stay in order, primarily, to avoid a scenario where it is required to reset its default price-quality path (DPP) several times.[31]

[43] It seeks to avoid the following scenarios:

(a) The Commission is required to reset the relevant DPP (DPP 4) immediately, but the original input methodology is later reinstated as a result of the Court of Appeal's decision;

30 Jurisdiction is provided also through r 12(3)(a) of the Court of Appeal (Civil) Rules 2005.

31 Default price-quality paths (DPPs) under ss 53O and 53P of the Act, set out the requirements that apply to regulated suppliers, regulatory timeframes and the input methodologies that apply.

(b) DPP 4 is reset now, the amended input methodology is confirmed in the Court of Appeal and then the Supreme Court reverses the Court of Appeal's decision (necessitating another reset); or

(c) DPP 4 is reset now, the Court of Appeal overturns the High Court decision (prompting the reset to be unwound) and then the Supreme Court later reinstates the High Court's decision (leading to a third reset).

[44] The Commission sees the prospect of multiple input methodology amendments and resets of DPP 4 as being inconsistent with the purpose of input methodologies in s 52R — to promote certainty for suppliers and consumers — and views it as a waste of public resources.

[45] First Gas disagrees with the Commission's interpretation of s 53. It says that, to the contrary, the provision excludes the jurisdiction of the High Court to grant a stay.

[46] First Gas says that, even if the Court has jurisdiction to grant a stay, a stay ought to be refused as a matter of discretion. It says that it is entitled to the fruits of its success; that waiting for the appellate process to conclude would largely deny that; and that the economic cost to it — and to other suppliers of gas pipeline services and to consumers — will be adverse if a stay is put in place.

The current state of affairs

[47] The Commission published its DPP 4 determinations on 27 May 2026. Under s 53M(7) of the Act, it was required to do so by 31 May 2026, to ensure that DPP 4 would be in effect at the expiry of DPP 3 on 30 September 2026. DPP 4 applies for a five-year period from 1 October 2026. As required by s 53 of the Act, the Commission applied the midpoint estimate of the WACC in its DPP 4 decision.

[48] If the Court's orders take immediate effect, the Commission will be required to reset DPP 4 to reflect the amended input methodology. Evidence for the Commission explains that it is not possible for DPP 4 to be reset by the start of the regulatory year on 1 October 2026. That means that, unless a stay is granted and the

Commission ultimately prevails in its appeal, some form of claw-back will need to be implemented.

[49] The Commission says that resetting DPP 4 will require significant effort and expenditure on its part.

Section 53

[50] Section 53 of the Act is in the following terms:

> **53 Input methodology applies pending outcome of appeal**
>
> (1) The High Court may not stay the application of section 52S with respect to any input methodology published as referred to in section 52W until any appeal against it is finally determined.
>
> (2) Section 52S continues to apply with respect to every input methodology published as referred to in section 52W until any appeal against the input methodology is finally determined.

[51] Under s 52S, every input methodology relating to the supply of particular goods or services that is published as referred to in s 52W must be applied by the suppliers and by the Commission.

[52] Section 52W(1) provides that input methodologies (together with amendments to, and revocations of, input methodologies) are secondary legislation. Section 52W(2) then provides:

> …
>
> (2) The secondary legislation must be published under the Legislation Act 2019,—
>
> (a) if it is made by the Commission, within 10 working days after the Commission makes its determination; or
>
> (b) if it is made by the High Court on appeal, within 10 working days after the Commission receives a copy of the High Court's decision.

[53] In this way, the amended input methodology that results from the judgment is secondary legislation and must be published.[32]

[54] The Commission's interpretation of s 53(1) is that it applies to its input methodology decision while an appeal to the High Court is proceeding. It may not be stayed during that appeal process.

[55] It says that s 53(2) then provides that the input methodology will *continue* to apply until any appeal against it is finally determined. It says that the qualifier "finally" indicates that an input methodology which is subject to *further* appeal rights should not be acted on until all of those rights have been determined.

[56] First Gas emphasises the interaction of s 52W with s 53. It says that, where an input methodology has been amended on appeal, it is *that* input methodology — published under s 52W — to which s 53 refers. If that is so, then the operation of s 53 is reversed: it is the *High Court's* amended input methodology that may not be stayed.

[57] I think that must be right when the text of s 53 is read in light of its purpose and context.[33] Under s 52W, an amended input methodology made by the High Court on appeal *must* be published 10 days after the Commission receives the decision.[34] It is *that* input methodology which must be applied by suppliers and by the Commission under s 52S. It is *that* input methodology which may not be stayed under s 53 until any appeal against it is finally determined.

[58] Put another way, while the High Court appeal is proceeding, s 53 operates as a stay against the input methodology in question being changed. If it is changed as a result of the appeal, then s 52W *must* be applied. And that means that, from that point, it is the *amended* input methodology that may not be stayed pending the determination of any further appeal.

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32 The Legislation Amendment Act 2026 provides for the repeal of s 52W(2) on 2 November 2026, as part of a set of measures to standardise procedures for publication of secondary legislation. Following repeal, the relevant timing for publication will, under new Legislation Act 2019 provisions, be "as soon as practicable after the [input methodology] is made". The change will not affect the reasoning in this decision.

33 Legislation Act 2019 s 10.

34 In this way, it takes effect before the expiry of the 20-day period for the filing of an appeal under r 20.3(1)(b) of the High Court Rules.

[59] Furthermore, I see First Gas' approach as better aligning with the legislative purpose. The Commission refers to the purpose of input methodologies contained in s 52R — essentially to promote certainty for suppliers and consumers in relation to pt 4 regulation — as being undermined through DPP resets. However, First Gas says that the purposes of the appeal provisions were to strengthen regulator accountability, and to improve certainty, timeliness and predictability for businesses.[34] It says that certainty, timeliness and predictability are harmed, rather than enhanced, if the Commission can obtain a stay (particularly an automatic stay) pending an appeal from a High Court judgment allowing an input methodology appeal.

[60] First Gas adds that the possible gaming risks associated with allowing appeals and which s 52(1) sought to avoid[35] do not arise once the High Court has allowed an appeal.

[61] I agree with First Gas' submissions on legislative purpose. As I see it, the text of s 53, read in light of its purpose and context leads to the conclusion that the stay sought by the Commission may not be granted.

The Court's discretion in granting a stay

[62] In any event, had the application turned on the exercise of the Court's discretion to grant a stay, I would not in all of the circumstances have exercised it in favour of a grant.

[63] The discretion to grant a stay must be exercised "in a manner which, on the balance of all the factors involved, best meets the overall justice of the present case".[36] Relevant factors will include whether the appeal may be rendered nugatory by the lack of a stay; the bona fides of the applicant; whether the successful party will be injuriously affected by a stay; the effect on third parties; the novelty and importance

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34 Commerce Amendment Bill 2008 (201-1) (explanatory note) at 3.
35 Commerce Amendment Bill 2008 (201-2) (select committee report) at 5.
36 *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 41 (CA) at 42.

of the questions involved; the public interest in the proceeding; the overall balance of convenience; and the apparent strength of the appeal.[37]

[64] The Commission does not suggest that its appeal would be rendered nugatory if a stay was not granted. Rather, it is most concerned with what it sees as disruption if it is required to do what the Court has ordered. As is reflected in [43] above, it observes that, if a stay is granted, then once the appeal is finally determined, DPP 4 will either be reset or not. If a stay is not granted, then DPP 4 will be reset now and would be reset again if the Commission prevails on appeal and possibly a third time if First Gas prevails in the Supreme Court. If First Gas prevails in the Court of Appeal, a second reset may still be required if the Commission prevails in the Supreme Court.

[65] The Commission submits that granting a stay keeps open the simplest outcome (no resets), avoids the most disruptive outcome (three resets) and avoids the most significant disadvantages for the parties and for consumers.

[66] The Commission refers to the expenditure of resources required on its part in resetting DPP4. It says that, if price paths for gas pipeline businesses are be reset to reflect an updated WACC, then the Commission will be required to make other adjustments to the input methodology as required to promote the long-term benefit of consumers as required by s 52A of the Act. That may include, the Commission says, adjusting the shape of the price path — "smoothing" it — to manage any price shock for consumers. It says that a reset would involve it taking a number of steps, each of which requires expert analysis, modelling, preparation and publication, following which there would be consultation, a draft decision and then a final determination and reasons paper.

[67] As Mr Clark, a senior manager at the Commission, has outlined in his evidence, a reset would require the Commission to, among other things:

(a) recalculate the parameters that flow into the price path model;

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37 *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 86, (2014) 22 PRNZ 296 at [25].

(b) decide starting prices and rates of change for each gas pipeline business;

(c) memorialise those calculations and decisions in a draft determination accompanied by a detailed explanation of its reasons for its decisions that can be engaged with during consultation;

(d) solicit, review and consider submissions from the public;

(e) revise the decision as appropriate to address those submissions;

(f) publish the final determination and accompanying explanation of reasons.

[68] The Commission goes on to say that any interim prejudice, if a stay is granted and First Gas' appeal is ultimately successful, will be limited to the shortfall in allowable revenue it may experience between the High Court judgment and the Commission's appeal being dismissed (while a stay is in effect). It sees any such prejudice as being curable, primarily through s 53ZB(3) which provides that, when resetting a DPP, the Commission must apply claw-back. The Commission makes the sound point that, in accordance with the pt 4 purpose, the Commission must adhere to the principle of financial capital maintenance that, therefore, it could not apply claw-back arbitrarily.

[69] First Gas acknowledges that, if a stay is granted and the appeal succeeds, no resets would be required, whereas there would only be one reset if the appeal fails. It acknowledges that, if the stay is declined and the appeal succeeds, two resets would be required. And it observes that only one reset would be required if there is no stay and the appeal fails.

[70] First Gas says that the only prejudice identified by the Commission to itself if the stay is not granted, is the additional effort and expense in undertaking consultation as referred to above.

[71] Mr Gerritsen, a senior manager for Frist Gas, says that it is an overstatement to say the reset process requires a "substantial expenditure" of resources. He observes in his evidence that determining starting prices and annual rates of change in the context the DPP4 determination occupied 11 of 214 pages in the Commission's draft reasons paper and 14 of 244 pages in the Commission's final decisions reasons paper. He makes the point that, given the limited scope of the exercise to update the DPP for the new WACC percentile that has already been specified in court orders — that this is not a process that should consume significant time or resources.

[72] There is much to be said for that view. The more material prejudice in my view would be to First Gas, other suppliers of pipeline services and to consumers.

[73] If a stay was granted, it would be likely to be in place for something in the order of two years, and potentially longer. If for example an appeal was not determined until mid-2028, all but the final 30 months of the seven-year input methodology will have been subject to the Commission's methodology despite the successful appeal.

[74] There is the claw-back provision in s 53ZB, as mentioned, but the statutory definition of "claw-back" in s 52D of the Act provides a discretion to allow recovery for "some or all" of any revenue shortfall.

[75] More significant though is the fact that claw-back would need to be achieved through price rises. With a declining customer base for gas, implementing rises to recover the maximum allowable revenue will become increasingly difficult with time.

[76] Evidence for First Gas shows that deferring the price rises — and necessarily increasing them as time shortens — leads to a realistic risk that the shortfall would not be able to be recovered economically. That is a risk that will apply to all gas pipeline businesses.

[77] The position of consumers needs to be factored into the equation also. Allowing the Court's final orders to be given effect pending an appeal will not necessarily increase the volatility of prices experienced by consumers. Mr Gerritsen

has explained that First Gas is only able to change its prices once every 12 months under its contracts and, accordingly, any adjustments required to accommodate final orders, or any outcome on appeal, will not add to the number of price adjustments that consumers experience.

[78] Mr Clark for the Commission and Mr Gerritsen for First Gas have both given evidence about the implications of a stay, or otherwise, for the profile of recovery. The position is that, if the Court grants a stay but the Commission is ultimately unsuccessful, then consumers will experience something of a price shock when the uplifted WACC is applied to prices and claw-back is applied for the balance of the regulatory period.

[79] The price shock, in terms of the increase in allowable revenue, will increase over time because the total number of customers for gas pipeline services is expected to decline. Moreover, there will be potential inequities between consumers who disconnect from the network after 1 October 2026 but before any reset and consumers who connect after the reset. The latter group will pay for the claw-back without having any benefit of any underpayment.

[80] If the Court declines a stay but the Commission is ultimately successful in reinstating its input methodology, then consumers will experience lower prices from the reset date.

[81] Ultimately, I see that applying the higher costs now will result in a more even sharing of costs overtime, reducing the likelihood that they will fall on a smaller group of future consumers and that a scenario of that type will, in turn, better meet the purpose of pt 4 of the Act. An approach of this sort is consistent with comments made by the Commission in its decision on the DPP4 reset, in the context of adjustments to the costs of economic asset lives which saw some costs being brought forward in time.[38]

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38 Commerce Commission *Gas DPP4 reset: Default price-quality paths for gas pipeline businesses from 1 October 2026 — Final decision – reasons paper* (27 May 2026) at [3.8] and [3.43].

Outcome on stay application

[82] Given s 53 of the Act, and in the exercise in any event of the Court's discretion, the Commission's application for stay is declined.

Costs in the substantive proceeding and on this application

[83] In the judgment, the Court made directions for memoranda on costs to be filed in the absence of agreement between the parties.[39]

[84] First Gas has calculated its costs on a 3B basis. However, the Commission's position is that it should not be liable to pay costs as an unsuccessful party to an appeal under pt 4 of the Act. It relies for that proposition, on *Commerce Commission v Southern Cross Medical Care Society*, in which — in the context of an appeal from a voluntary clearance determination under pt 5 of the Act — the Court of Appeal concluded that the Commission ought not be exposed to an adverse costs order for unsuccessfully opposing an appeal.[40]

[85] Memoranda have been filed on the issue. However, the parties agree that, if as is now the case, leave to appeal is granted, then the determination of costs should await the outcome of an appeal. Accordingly, I make the costs orders set out below.

Orders

[86] I make the following orders:

(a) the application for leave to appeal is granted;

(b) the appeal may be brought in the terms of the draft notice of appeal filed with the notice of application for the purpose of addressing the issues set out in [3] above;

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39 The judgment, above n 3, at [237].

40 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) at [20]–[21].

(c) the Commission's application for a stay of enforcement the judgment (including the Court's formal orders judgment) is declined; and

(d) the issue of costs in this proceeding, including costs on this application, is deferred until the appeal is determined in the Court of the Appeal. Within four weeks of the determination of the appeal, the parties are to file a joint memorandum of counsel either recording that the issue of costs has been resolved by agreement or, in the event that costs cannot be resolved, proposing timetabled dates for memoranda on costs.

[redacted]

Radich J

Solicitors
Chapman Tripp for Appellants
Luke Cunningham Clere for Respondents