IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Constitutional Case 17/238
SC/CNST
Civil Case No. 17/474SC/CC

BETWEEN: UNION ELECTRIQUE DU VANUATU LTD
(T/A UNELCO SUEZ)
Claimant
AND: REPUBLIC OF VANUATU
First Defendant
AND: UTILITIES REGULATORY AUTHORITY
Second Defendant

Hearing: 2nd June 2017

Before: Justice Chetwynd

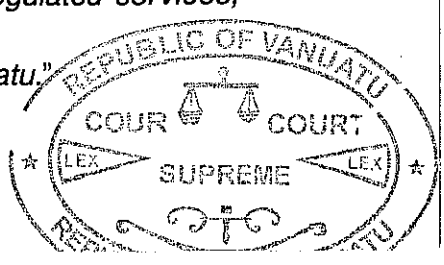
Counsel: Mr North QC, Mr Heuzenroeder and Mr Hurley for the Applicants/Claimants
Mr Kilu and Mr Tabi for the First Respondent/Defendant
Mr Blake for the Second Respondent/Defendant

JUDGMENT

1. Before the Court are two matters, a Constitutional Application (17/238 SC/CNST) and a Civil Claim (17/474 SC/CC). They are being heard together following an order made to that effect on 3rd March 2017 and on the basis that the decision in one proceeding will affect the other and that they deal with related subject matter. The Applicant/Claimant in both is Union Electrique du Vanuatu Ltd ("UNELCO") with the First Respondent/Defendant being the Republic of Vanuatu ("the ROV") and the Second Respondent/Defendant the Utilities Regulatory Authority ("the URA"). Both proceedings involve the Utilities Regulatory Authority (Amendment) Act which is No.19 of 2016 ("the Amending Act"). The Constitutional matter challenges the validity of the Amending Act and the Civil matter challenges the Rules made under the Amending Act by URA.

2. By way of background, the URA was set up in 2008 by the Utilities Regulatory Authority Act No 11 of 2007 ('the Original Act"). The purpose of the Original Act was:-

> ***"2. Purpose***
>
> *The purpose of this Act is to regulate certain utilities to:*
> *(a). ensure the provision of safe, reliable and affordable regulated services; and*
> *(b). maximise access to regulated services throughout Vanuatu."*



The vehicle of regulation was the URA. There have been a number of cases involving UNELCO and the URA and so there is no real doubt about the meaning of "utilities" or about the function of the URA [1]. There does not seem to be any dispute that the URA has been funded partly by money from aid donors since its formation. It is submitted by both ROV and the URA that when the URA was set up the ultimate aim was for it to be self-sustaining or funded in a manner which, at the very least, meant it did not require permanent support from aid donors. In an effort to achieve that aim the Government passed the Amending Act. This is explicit in the explanatory note from the Minister of Infrastructure and Public Utilities.

> *"The purpose of amending this Act is to achieve financial independence and sustainability..."*

3. On 28th November 2016 during the Second Extraordinary Session of 2016, Parliament met, debated and (according to the Minutes of proceedings) passed unanimously the Utilities Regulatory Authority (Amendment) Act. One of the main provisions in the Amending Act was section 29B. It reads:-

> ***"29B Fees***
>
> *(1) The Authority may assess fees on utilities in accordance with this section and may prescribe the rules to assess the fees. A person must comply with the rules prescribed by the Authority.*
> *(2) The prescribed rules are to be approved by the Minister of Finance and Economic Management.*
> *(3) The fees assessed on a utility by the Authority under subsection (1) must not exceed 2% of that utility's annual revenue for the previous calendar year from the regulated service.*
> *(4) The fees assessed on a utility by the Authority pursuant to subsection (1) is to be included as a component of that utility's cost when determining maximum price pursuant to section 18.*
> *(5) The penalty paid by a utility pursuant to subsection 29C, paragraph 25(3)(e) or subsection 25(4) must not be included in that utility's cost when determining the maximum price.*
> *(6) The Authority may prescribe such other reasonable fees, expenses or costs to relevant parties when performing its functions or providing any service under this Act.*
> *(7) If a provision of a concession agreement conflicts with a provision under this section, the provisions of this section prevail."*

4. There does not seem to be any dispute that the intended effect of section 29B was to allow the URA to impose a fee on a utility (limited to 2% of the utility's annual

[1] See *Union Electrique Du Vanuatu Ltd v Republic of Vanuatu* [2016] VUCA 50; Civil Appeal Case 3472 of 2016 (18 November 2016)

revenue) but that the fee would be, *"included as a component of that utility's cost when determining maximum price pursuant to section 18."* In simple terms, the fee would be passed on to the consumer to pay. Obviously it was intended the fee would initially be paid by a utility but recovered as part of the pricing mechanism.

4. So far as the Constitutional case is concerned, UNELCO says that the Amending Act, *"seeks to empower the URA to impose or alter taxation and expend public funds, otherwise than by under a law passed by Parliament"* and that this is contrary to Article 25 of the Constitution of Vanuatu. At first blush this does seem an extraordinary claim to make as quite clearly the fees were going to be paid as the result of the passing of the Amending Act. UNELCO say that it is not that simple and due regard must be had to Article 25 of the Constitution which says:-

> ***"25. Public finance***
>
> *(1) Every year the Government shall present a bill for a budget to Parliament for its approval.*
>
> *(2) No taxation shall be imposed or altered and no expenditure of public funds shall be incurred except by or under a law passed by Parliament.*
>
> *(3) No motion for the levying or increase of taxation or for the expenditure of public funds shall be introduced unless it is supported by the Government.*
>
> *(4) Parliament shall provide for the office of Auditor-General, who shall be appointed by the Public Service Commission on its own initiative.*
>
> *(5) The function of the Auditor-General shall be to audit and report to Parliament and the Government on the public accounts of Vanuatu.*
>
> *(6) The Auditor-General shall not be subject to the direction or control of any other person or body in the exercise of his functions."*

5. The operation of Article 25 says UNELCO means, "*...the main issue concerns fundamental constitutional principles of representative and responsible government, and the supremacy of Parliament*". This conclusion is based on the argument that *"... the Constitution creates in all essential aspects a Westminster system of Government, where elected members of Parliament, as an element of responsible and representative government control the Executive arm of Government (of which URA is a part). Part of the supremacy of Parliament is through the "power of the purse"...*" In support of this argument concerning "*principles of utmost constitutional importance*" UNELCO cite the history of the struggles of the English Parliament against Kings of England occurring over 400 years ago and the statements of a very learned professor of law from Bond University writing about the Constitutional systems of the Australian States and Territories.

6. In 1997 His Lordship the Chief Justice, as Acting Chief Justice, presided over the case of *Virelala v The Ombudsman* [2] where he said:-

> *"It has to be remembered that it is a Constitution that we are interpreting. Fundamentally, thus, the task of interpreting a written Constitution, which is comparatively short and expressed in reasonably wide language setting out guiding principles, such as Vanuatu's Constitution, is not an easy task. The Constitution is a form of law. In fact, it is the Supreme Law of the Republic of Vanuatu (Article 2 of the Constitution).*
>
> *The interpretation of the Constitution is the sole preserve of the Supreme Court, as delegated by the people to it through the Constitution, and the Court has to be responsive to the constitutional values. The Court when interpreting the Constitution must adopt a broad-oriented and purposive approach directed towards advancing the constitutional objectives taking due account to the country circumstances and resources."*

That, His Lordship said, was the general rule when concerned with the interpretation of the Constitution. As to the character and nature of the Constitution he said:-

> *"Vanuatu's Constitution is comparatively short and expressed in reasonably wide language setting out guiding principles. It is 95 Articles and two (2) short schedules going to 25 pages.*
>
> *As a matter of comparison, Vanuatu and Papua New Guinea are two (2) `Parliamentary democracies. They adopt Unitary System of Government as opposed to Federal System of Government. Papua New Guinea's Constitution comprises 275 Articles and effectively 38 schedules running to 135 pages. It sets out quite clearly the System of Hierarchy of (legal) norms: Constitution, organic laws, Acts of Parliament, underlying laws, etc. ... .*
>
> *Papua New Guinea's Constitution is one of the longest and detailed Constitutions in the world and in my view is tantamount to a Code.*
>
> *Another comparison can be made between Vanuatu's Constitution of 1980 and the Commonwealth of Australia's Constitution Act, 1900. The latter's Constitution comprises of 128 Articles with a short schedule. But the fundamental difference between the two Constitutions, is that the Australia's Constitution (Commonwealth of Australia Constitution Act, 1900) sets out a Federal System of Government with specific powers and the states governments with general powers.*
>
> *In Melbourne Corporation v. The Commonwealth [(1947) [1947] HCA 26; 74 C.L.R. 31], the enumerated powers doctrine was developed on the basis that the Constitution, contemplating a Federation of co-ordinate governments, predicated the continued existence of the states with their powers. Accordingly, a Commonwealth powers could not be so interpreted as a power*

[2] *Virelala V Ombudsman* [1997] VUSC 35; Civil Case 004 of 1997 (22 September 1997)

for prejudicial treatment. In other words, a Commonwealth power must be interpreted as a power of a Federal Government in a Federation with member States, not as a power of a Unitary Government where there are no constituent States.

Although, in Australia, the Courts promote the doctrine of inter-independence of powers in a series of powers these days, [see for examples: Johnston Fear & others v. The Commonwealth (1943)67 C.L.R. 314, at p.317; Pidoto v. State of Victoria (1943)68 C.L.R. 87; Attorney General (Vict.) v. The Commonwealth (Marriage Act Case) [1962] HCA 37; (1962) 107 C.L.R. 529, followed in this regard by Russel v. Russel; Farrelly [1976] HCA 23; (1976) 134 C.L.R. 495], the Australia's Constitution Act 1900 (Commonwealth) creates a system of enumerated powers which, for the purposes of comparison with Vanuatu's Constitution, can also be considered as a Code.

Having said that, I accept the view that the Constitution is the law behind the law and is still evolving.

On that basis, I share the view that the Constitution is to be interpreted and applied by keeping in mind and be in line with:

"...the progress of the country, and adapt themselves to the new developments of times and circumstances "; [see R. v. Brislan; exp., Williams (1935)54 C.L.R. 262 at p.282].

In this case, I too, must read powers and provisions in the Constitution in an organic, developing or progressive manner.

Subject to the Constitution, Parliament of Vanuatu is given plenary powers under Article 16(1) of the Constitution to make laws for the peace, order and good government of Vanuatu. The expression "subject to the Constitution" means that the powers of the Parliament are limited and that its limits are not to be transcended."

7. In 2001 in the case of *Tari v Natapei* [3] the Court of Appeal said :-

"The Republic of Vanuatu is a Constitutional Parliamentary Democracy. The Constitution is the foundation document. As clause 2 of it notes, the Constitution is the Supreme law of the Republic of Vanuatu".

The Court also dealt with how the Constitution is applied:-

"Where there is room for debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments in other places have operated in the past or operate now. But any of that is in all circumstances and at all times subject to the clear and unambiguous words of the Constitution which is the Supreme Law."

[3] *Tari v Natapei* [2001] VUCA 18; Civil Appeal Case 11 of 2001 (1 November 2001)

Later the Court added:-

> *"The Courts in upholding the law and enforcing the provisions of the Constitution, will necessarily have regard to the entire constitutional frame work and to the manner in which similar organs or Governments operate in other parts of the world. But it is only when the Constitution itself is not clear about rights and responsibilities in this independent State, that precedents from other jurisdictions will be of assistance."*

8. If we then come up to date, the Court of Appeal in the case of *Silas v Public Service Commission* [4] has confirmed all that was said in the above cases :-

> *"As we have noted the Judge in the Supreme Court used s. 21 of the Interpretation Act to assist in interpreting Article 57(4). This was the wrong approach to interpreting the Constitution. The Constitution is the Supreme Law of Vanuatu, above all other laws. It must be interpreted in its own right. The starting point is obviously the Constitution and the ending point of the interpretation exercise of a provision of the Constitution is also the Constitution itself. The use of an ordinary statute to interpret the Constitution undermines the Constitution as Supreme Law. Ordinary statutes cannot be used as interpretative aids when interpreting the provisions of the Constitution. This is consistent with the decisions of this Court in Tari v Natapei [2001] VUCA 18; In re the Constitution, Kalpokas v Hakwa [2002] VUCA 12 and Hakwa v Masikevanua [2002] VUSC 92 and others."*

9. The issue then is whether or not Article 25 is clear about the rights and responsibilities which are at the centre of this case. If it is clear then I have no need to do more than consider the erudite discourse put forward by counsel for UNELCO concerning the power of the purse and the developments in Stewart England or what learned authors think about the Constitutions of Australia and America. If there is ambiguity such considerations may be relevant and will need deeper scrutiny.

10. I am of no doubt that Article 25 is quite clear in its meaning and effect. I see no reason why it is, *"necessarily implicit in the operation of the Vanuatu Constitution"*, that, *"all monies raised are to be paid into the public fund as a consolidated revenue fund and paid out by means of a Supply Act"*.

11. When looking at constitutions of some of our geographic neighbours it is plain to see that they require the Authority of Parliament to raise taxes and that the revenue from those taxes is paid into a consolidated fund. For example Article 100 of the Solomon Islands Constitution requires payment into the consolidated fund, as does the Kiribati Constitution. It is interesting to note that despite that requirement in both of those Constitutions Parliament can set up "special funds". In other words money, public funds, can be paid into a fund which is not the consolidated fund. The

[4] *Silas v Public Service Commission* [2014] VUCA 9; CAC 08 of 2014 94 April 2014)

Fiji Constitution does require payment into the consolidated fund. In Tonga, except in exceptional circumstances, there is a requirement for the Legislative Assembly to authorise payment out of the Treasury but no requirement revenue is paid into a consolidated fund. As a final example, in Papua New Guinea *the raising and expenditure of finance...shall be regulated by an Act of the Parliament*. There are also detailed provisions in the Papua New Guinea Constitution relating to budgeting, accounting and expenditure. However, there is no requirement that revenue is paid into a consolidated fund.

12. It is plain from Article 25 of the Constitution of the Republic of Vanuatu that every year the Government is required to present a budget. It is clear that Parliament, and only Parliament, can authorise the imposition or alteration of taxes or expenditure of public funds. Any legislation to levy a tax or increase a tax or to authorise expenditure of public funds cannot be introduced into Parliament unless it is supported by the Government. There is no requirement that public money is paid into a consolidated fund but it is patently clear that Parliament has control of it. In addition and probably because our Parliament is not in continual sitting, Parliament has passed legislation which delegates financial management, subject to Parliamentary control, to Government or to the executive.

13. The Public Finance and Economic Management Act [Cap 244] ("the PFEMA") is an extensive piece of legislation dealing with public resources and public money and there are references to it in the Original Act. UNELCO says that the URA is a Government Agency. There does not seem to be any real reason not to so describe it. Clearly it has some of the attributes of an undisputed Government Agency but on the other hand it lacks certain features. For example the Public Service Act [Cap 246] does not apply to the URA or any person employed by or engaged it. There is no doubt the Original Act required the URA, *"to act independently"*, and so describing the URA as Government Agency is probably unhelpful and unnecessary. What is important to note, in this context, is that the PFEMA applies to the URA. Public Money is defined in the PFEMA as :

> *"...all the resources and entitlements owned by , owed to or held by the State, or held by any ministry, agency, or any other person for or on behalf of the Government, a ministry or agency and includes public resources."*

The PFEMA also includes in the definition of Government Agency *a corporation (whether established by statute or not)* that has *a significant financial interdependence with the State,* or has *significant use or control of public money*. There is no doubt that any bank account opened and operated by virtue of section 32 of the Original Act is deemed a public fund by the reference to section 43(4) of the PFEMA. Any surplus funds appropriated by the Government (s. 29(a)) must be returned to "*the public fund*". The URA is within the definition of a Government Agency for the purposes of the PFEMA because there is no question it has use or control of public money.

14. There is also the Public Accounts Committee. That is set up by the Expenditure Review and Audit Act [Cap 241] ("the ERA Act") which is described as, *"An Act to provide for a committee to review public expenditure and establish the Office of the Auditor-General, and to provide for their objectives, functions and powers".* The purposes of the Act are set out in section 3:-

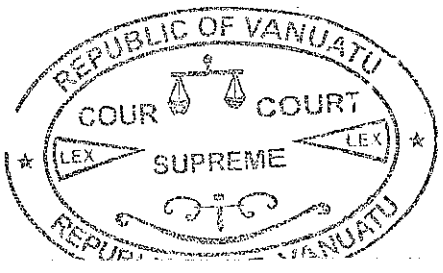
> *The purposes of this Act are to give effect to the principle of the Executive Government's responsibilities to the public through Parliament to:*
>
> *(a) make available such information as will enable Parliament to be informed of the scrutiny of public expenditure and the management of public money;*
>
> *(b) promote the accountability of ministries and ministers of the State, where public expenditure and public money are concerned;*
>
> *(c) promote the accountability of local authorities and agencies in the management of public money, money and resources of such authorities and agencies.*

15. There is no doubt that the URA is subject to the provisions of the ERA Act. At section 2(1) we see the definition:-

> *""agency" includes an office or instrument of the Executive Government other than a ministry and also includes an Organisation or corporation (whether established by statute or otherwise) and any subsidiary of a corporation where the Organisation or corporation either:*
>
> *(a) is substantially owned or controlled by Government; or*
>
> *(b) has a significant financial in interdependence with the State by virtue of an allocation in an Appropriation Act; or*
>
> *(c) has significant use of or controls public money;"*

Using, as it does, public money, I cannot see how the URA can be anything but a Government Agency for the purposes of the ERA Act.

16. The submissions by UNELCO seem premised on the proposition that the URA holds public money and that it can do whatever it wants to with that money. The suggestion is that the URA has absolutely no fiscal constraints. The implication in the UNELCO's submissions is that neither Parliament nor the Executive have any fiscal control over the URA. From the above it can be plainly seen that is not the case.



17. In addition, it must be noted that apart from the controls in the PFEMA and/or the ERA Act, Section 30 is added to the Original Act by the Amending Act and requires annual budgets to be prepared and provided to the Minister of Finance and Economic Management. Section 31 of the Original Act requires full books of account to be kept and for audited financial reports to be produced every year. The auditing of the financial report must be carried out by the Auditor General in accordance with the ERA Act (s. 31(3)). The Auditor General, after being "*appointed by the Public Service Commission on its own initiative*" [5] carries out the mandated function to *"audit and report to Parliament and the Government on the public accounts of Vanuatu"* [6] and whilst doing so is not *"subject to the direction or control of any other person or body"* [7] . I also note the Auditor General is, by section 20(1) of the ERA Act, "*charged with the review and audit functions as provided for under"* that Act. The Annual report required by section 33 must also include financial statements, and a report of the auditor. The URA is not fiscally free to do whatever it wants, it is probably subject to far more financial controls than the utilities it regulates.

18. To my mind this colouring of the URA as a maverick organisation is part and parcel of UNELCO's unfortunate branding of Dr. Bhatia (the CEO of URA) as biased. It has appeared in other cases and has been noted by the Court of Appeal. In submissions before me in this case it is said :-

> *"It is telling that the scheme in the Amending Act was (as admitted) designed by Dr Bhatia...specifically to take the URA outside the scope of responsible and representative government".*

Despite that quite sweeping comment there are no specific provisions that UNELCO point to which takes the URA "*outside the scope or responsible and representative government*". The submissions continue by reference to Dr Bhatia's sworn statement and a comment he makes to the effect that the URA :-

> *"...must not be beholden to or obliged to any vested interest, not even the government who could influence its decisions by virtue of financial leverage".*

These comments are, say UNELCO, at least from the perspective of a constitutional lawyer :-

> *"...most extraordinary statements"*

Rather than treating those comments as the expression of a desire to do the best for consumers as opposed to Government, or anyone else, UNELCO seem almost to see them as portents of doom for the civilised world as we know it. Dr Bhatia's further comments in the sworn statement talk of a regulatory organisation's need to be, *"... permanent and sustainable".* Whilst it may be considered as idealistic and

[5] Article 25(4) of the Constitution
[6] Article 25(5) of the Constitution
[7] Article 25(6) of the Constitution

even naïve of Dr Bhatia's to believe the URA can be completely free of Government financial infuence his comments are not that *"extraordinary"*. UNELCO would do well to recognise the comments for what they are and accept that they, UNELCO, are on the opposite side of the regulatory fence to the URA.

19. UNELCO also argues the URA will be raising a tax without any control because even though the tax is camouflaged by being called a fee, *"it is the compulsory extraction of money by a public authority for public purposes, enforceable by law, and which is not a payment for services rendered"*. UNELCO does not accept the fee is a fee for the provision of regulatory services to the consumer who will bear the cost. It seems to adopt this view simply because the fee is *"imposed on the utility"*. However, there is no question the intention of the Amending Act is to ensure that the fees paid by the utility are recoverable by the utility. So, even though the fee is imposed on the utility in the first place, the fee is not ultimately paid by the utility. It is paid by the consumer. There are many examples of taxes being raised in this way, VAT springs to mind. VAT is paid on the supply of regulated services by it but it is not a tax on the utility itself.

20. UNELCO also say that the services which give rise to the fee are vague in nature and are not provided at the request of the consumer. This means that the financial charge imposed cannot be a fee. I do not accept that argument. It is a common occurrence for Governments to impose fees for such services. For example, fees are raised for air safety and regulatory services by the Civil Aviation Act by the imposition of a charge added to the fare paid by a passenger. Similar fees are raised in the Maritime Act for marine services. The Telecommunications Act and the Telecommunications and Radiocommunications Regulation Act have similar provisions to pay for their regulatory obligations.

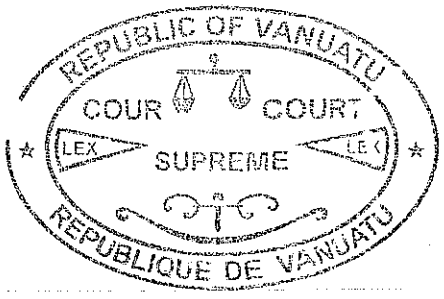
21. The question must be does it matter that the fee is a tax or a fee or even a fee in the nature of a tax. The Amending Act has been passed by Parliament authorising the imposition of a charge and really it matters not whether it is labelled a fee or a tax. Article 25 of the Constitution authorises Parliament to pass legislation which imposes a tax ***and*** provides for the spending of the revenue or public funds. There is no suggestion the legislation was introduced without the support of the Government of the day. Provided the URA does not impose a fee, levy, tax or charge in excess of the 2% set out in the Amending Act I do not see how the fee, levy, tax or charge is unconstitutional or contrary to the requirements set out in Article 25. At the risk of boring the reader by repetition, it is difficult to understand how legislation can be unconstitutional when it imposes a fee or a tax and when it is introduced to Parliament and supported by Government. I am a little surprised that UNELCO do not see the irony of challenging the supremacy of Parliament (i.e. by saying it could not pass the Act it chose to pass) by arguing the supremacy of Parliament should not be challenged.

22. UNELCO also argues that the imposition by Parliament of the tax or fee is in conflict with its concessions. The first leg of their argument is that it does not matter if an "*entity can mitigate or defray a tax purportedly placed upon it*" and that argument is advanced apparently on the basis that an "invalid tax" is still a tax. This, presumably, is UNELCO being the champion of the consumer.

23. Secondly say UNELCO, the Court of Appeal has interpreted section 18 of the Original Act as having no application to UNELCO's concessions. I have to admit that I have difficulties with the Court of Appeal decision in *UNELCO v Republic of Vanuatu and URA* [2016] VUCA 50 but I put that down to my "legal" upbringing being heavily influenced by the Treaty of Rome and in particular, in the context of that case Articles 81 (formerly Art. 85) and 82 (formerly Art 86) with their prohibitions on cartels, anticompetitive agreements, and abuse of dominant positions. However even with that possible inflection put firmly to one side I do not read the Court of Appeal judgment as being as restrictive as UNELCO suggests and certainly not in the circumstances as set out in this case. I prefer the submissions of the Second Respondent who argue it is fundamentally wrong to say that section 18 of the Original Act has no application to UNELCO's concessions. I agree that the URA cannot determine maximum tariffs in a manner inconsistent with the concessions but equally I do not accept anything in the Amending Act is inconsistent with the concessions.

24. UNELCO's submissions that the provisions of Amending Act conflict with the concessions seem to be premised on the fees being an illegal tax. As I have indicated earlier, I do not believe it matters whether the fee is a fee or a tax or a fee in the nature of a tax and I do not accept the distinction that UNELCO make between the effect of the tax and the nature of the tax. In my view there is no conflict with the imposition of a fee (or tax) on consumers collected by UNELCO and paid out by UNELCO to the URA. Again I prefer the submissions of the URA on that issue.

25. As to the separation of powers arguments, my view is that UNELCO rather over eggs the cake. The suggestion seems to be that the URA will not only be the judge and jury but that it will be the policeman and the hangman as well. There are other examples of legislation where the failure to pay a fee (or tax) gives rise to a penalty. A topical one (at the time this judgment was being written) is the Road Traffic (Control) Act [Cap 29] which, by section 35, imposes a 25% penalty if road tax is paid a month late or 50% if paid 2 months late. After that failure to pay road tax becomes an offence. A mechanism such as set out in section 35 of the Road Traffic (Control) Act or section 29C of the Amending Act is an accepted and acceptable legislative device to ensure payment. The URA has pointed out other examples of this legislative device found in the Immigration Act, The Fisheries Act and the Tobacco Control Act.



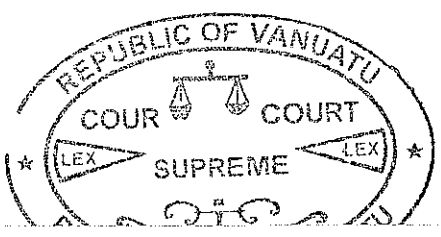
26. The submissions by UNELCO simply ignore the provisions of section 29C(4). If a utility wants to contest the amount of the penalty they can do so. The URA;'s only remedy is to recover the penalty by,"*...action in a court of law*". As the URA submits, Parliament can provide for the imposition of a penalty for late payment but ultimately enforcement is a matter for the courts. There are already provisions in sections 24(1) and 24(2) relating to "*...remedies in respect of offences*" under part 4 of the Original Act which lead to that conclusion.

27. As to the Rules, I accept that if the Amending Act is invalid then the Rules cannot stand. As is clear from the foregoing comments, but to avoid any doubt I will say I so here, I do not find the Amending Act to be invalid.

28. Finally, so far as the Rules are concerned, I do not accept the basic argument put forward by UNELCO that, in effect, only the relevant Minister can make Rules. UNELCO has in its Reply to Republic's Submission's denied this is the argument it relies on. It says there are far more formalistic arguments about the Rules which refer to the contractual rights of the Government set out at section 40 of the Original Act. However, I am not persuaded that the basic propositions put by the URA and the ROV are incorrect. Here we are dealing with the financial viability and sustainability of the URA. Parliament has decided that the administrative aspects of the amendments governing that viability and sustainability are best managed by the arm of the executive which has responsibility for the State's finances, the Ministry of Finance and Economic Management through its Minister. The Minister is responsible to Parliament. UNELCO says that Parliament has not done that because the Rules are not just rules they are delegated legislation and must be implemented through section 40. It is a circuitous argument with no foundation.

29. The argument also seems to be based primarily on the lack of authority to force a utility to audit its accounts. I am not convinced by that argument and its suggested implications either because, for one thing, it ignores the provisions of section 13. Those provisions were challenged in *Union Electrique Du Vanuatu Ltd v Republic of Vanuatu* [2016] VUCA 50 but were upheld by the Court of Appeal. UNELCO's response appears accept the argument a request can require an audit with one hand and reject it with the other by seeming to say a Rule can't be made to require an audit but a section 13 request might force one.

30. In all the circumstances and in so far as the Constitutional Application and Claim in Case No. 238 of 2017 is concerned, I decline to make the declarations or orders sought by the Applicant UNELCO in paragraphs 1 to 9. In relation to the Civil Claim in Case No. 474 of 2017 I also decline to make the declarations sought and I refuse to grant the injunction requested. In relation to both cases I order the costs of the First and Second Defendants in Case No 238 of 2017 and the First and Second Defendants in Case No 474 of 2017 to be paid by the Applicant and Claimant in



those cases respectively. The costs are to be taxed on a standard basis if not agreed.

Dated at Port Vila this 21st day of July, 2017.

BY THE COURT

David Chetwynd
Judge

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