

**ANALYSIS OF SUBMISSIONS ON THE CONSULTATION PAPER: CONSTITUTIONAL CHANGES
TO THE ELECTRICITY & GAS COMPLAINTS COMMISSION SCHEME APRIL 2007**

The Constitutional Change Working Group sent out a consultation paper entitled Constitutional Changes to the Electricity & Gas Complaints Commissioner Scheme April 2007

The consultation paper was sent to industry participants, industry groups, consumer advocacy groups, land owner groups and some government agencies.

The working group received responses from Contact Energy, Genesis Energy, Alpine Energy, Energy Direct, Powerco, Transpower , Waipa Networks, Federated Farmers, the Ministry of Consumer Affairs and Roger Donkin.

The working group wishes to thank all submitters for their comments and addresses specific issues raised below.

Submissions on the Proposal Paper			
Reference	Entity	Comment	Working group response
Q1. Do you agree with our assessment of who should have access to the Scheme, taking into account the requirements of the Act, the GPS and the EC?			
	Powerco	Powerco agrees philosophically that the expansion of the wording to catch landlords and others who don't have a contract is appropriate. However it is important to them that Land Complaints remain separate from Consumer Complaints.	The working group wishes to clarify that it is not intended that landowners and occupiers, as defined under the Land Code, be able to access the consumer side of the Scheme. The land owner under the definition of "Consumer Complaints" will only have access in respect of "the use or potential use" as a consumer. However, the working group acknowledges the concern raised and will reconsider the wording of the drafting.

	Federated Farmers	It believes the working group's approach to addressing this issue is counter-intuitive. The proposal gives no reasoning for why there should be limits on access to the Scheme.	The working group believes that it is appropriate to place some limits on access to the Scheme as it is not appropriate for every category of complaints to be considered within a consumer dispute resolution setting. The EC has proposed "materially affected" which is already one form of limitation on the Scheme. The working group proposes a different form of words, but not more limitation.
Q2. Do you agree that it is preferable not to use "materiality" as the connecting factor between the complainant and the complaint issue? Do you agree that limiting complaints to "a user or potential user ... in respect of that use or potential use" is appropriate? Is there another connecting factor that could be used?			
	Contact Energy	<p>Contact Energy acknowledges that the term "materiality" could cause uncertainty but instead, wants the clause to use "adversely affected". It wants there to be some detrimental consequence from the actions of the retailer or Lines Company before a complaint can be made.</p> <p>Contact Energy also wants to ensure that the complaint must relate to the supply of the electricity, lines services, or related services, that is, a complaint should not be able to be raised about general practices, environmental policies etc of the company.</p>	<p>The working group believes that the concept of "adversely affected" would come within the Commissioner's already existing discretion under B1.10.</p> <p>The working group agrees that it is not appropriate for a person to complain about an undertaking, practice or policy of a member that does not relate to that person's "use" or enjoyment of the Services.</p> <p>The working group believes that the words "in respect of that use" and the Commissioner's discretion under B1.10</p>

			would deal with this. However, it will continue to consider what may be an appropriate connecting factor in light of the EC's final criteria.
	Genesis Energy	Genesis Energy wishes to retain the test proposed by the EC. They agree that third parties should be able to complain, and see the "materially affected" threshold as being useful for hearing non contractual disputes while allowing for a limit.	Noted. The working group will reconsider the connecting factor issue following the publication of the EC's final criteria.
	Powerco	Powerco wants to retain the use of "materially affected".	Noted.
Q3. Do you agree with the proposed drafting of "Consumer?"			
	Contact Energy	Contact Energy believes that a Consumer Complaint should be limited to those that are contractual in nature. It comments that other disputes can be dealt with in other jurisdictions such as the dispute tribunal.	The working group believes that the Scheme will need to satisfy the requirements of the GPS in order to be approved. The GPS requires "everyone (including potential consumers)" to have access to the Scheme. This covers situations where no contract exists.
	Powerco	Powerco does not want to use the term "Land Owner" because of the risk that it will give Land Owners full access to the scheme's consumer complaints process. They want "Landlord" to be used.	Noted. The working group will consider the possibility of using a definition of "Landlord".
Q4. Do you agree with our assessment that it is appropriate for the Commissioner to consider only some issues relating to potential consumers?			
	Contact Energy	Contact Energy does not believe the Commissioner's jurisdiction should extend to areas where there is no legal or equitable duty or contractual relationship and/or there is no reasonable basis for implying either.	Noted.

	Genesis Energy	<p>Genesis Energy wants jurisdiction clearly and strictly limited. It does not agree with the proposed draft clause set out at paragraph 32 of the paper.</p> <p>Genesis Energy agrees that it is not appropriate for the EGCC to consider complaints where a company has refused to supply, and firmly believes that this extends to all aspects of the decision and the decision making process.</p> <p>It believes that matters relating to the collection and use of information (including disputes concerning credit information) should continue to be handled by the Privacy Commissioner.</p>	<p>Noted.</p> <p>The working group agrees that matters relating to the provision and accuracy of information and processes for gathering information could be dealt with under the Privacy Act. However the Privacy Act only applies to information about identifiable individuals. It does not apply to companies. The Scheme does.</p> <p>Clause B1.10(a) already gives the Commissioner discretion to decline to investigate a complaint that would be better dealt with by the Office of the Privacy Commissioner.</p>
	Federated Farmers	<p>Not entirely – the Working Group’s approach to addressing this concern seems counter-intuitive – the proposed amendment also lacks sufficient reasoning to support the change, especially in respect of why Clause B1.5 should continue to place restrictions on what the Commissioner does or does not have jurisdiction to consider.</p>	<p>As previously stated the working group believes that it is not appropriate that every type of complaint be addressed within a consumer dispute resolution forum.</p> <p>As mentioned above, the EC has proposed “materially affected” which is already one form of limitation on the Scheme. The working group proposes a different form of words, but not more limitation.</p>
	Roger Donkin	<p>Mr Donkin disagrees with limitation on jurisdiction in respect of refusal to supply. He says there should be only two grounds to refuse supply and both of these could easily be dealt with by the Commissioner: an inability of consumer or potential consumer to pay or guarantee payment and a consumer’s installation failing to comply with electrical safety standards.</p>	<p>The working group does not agree that the reasons for refusing supply or connection should be confined to the two reasons cited.</p>

<p>Q5. Do you agree with the proposed drafting that limits the Commissioner's ability to consider certain issues relating to potential consumers?</p>			
	<p>Contact Energy</p>	<p>The proposed provision only excludes complaints about a refusal to supply (i.e. a specific issue rather than some issues) and it specifically permits an issue that is arguably one for which another complaints body, the Privacy Commission, already exists.</p> <p>The limitations should be fully identified, including by reference to the existing provisions in B1.10 of the Constitution.</p>	<p>Noted.</p>
	<p>MCA</p>	<p>The MCA prefers that the EGCC has the jurisdiction to consider whether the retailer has correctly applied their procedure to an application by a potential consumer before a consumer is refused supply. For example the Commissioner should be able to check to see whether companies have applied their application policies consistency and correctly, provided accurate information and followed natural justice processes.</p> <p>However, MCA does not agree that the proposed drafting sufficiently allows for this.</p>	<p>Noted. However the working group does not believe it is appropriate to impose public law duties on companies involved in commercial contracting situations.</p>
<p>Q6. Do you agree with the proposed drafting of Consumer Complaint?</p>	<p>Contact Energy</p>	<p>We do not believe this addition is necessary as the intended point seems already to be covered by existing paragraph (a) of the definition of Consumer Complaint. However, if it is implemented then, as indicated above, we consider that it should state "<u>adversely affects...</u>"</p>	<p>Noted.</p>
	<p>Alpine Energy</p>	<p>Alpine Energy wants a reasonableness test.</p>	<p>Noted. The working group considers a reasonableness test to be unnecessary given the Commissioner's discretionary powers.</p>

	Powerco	Powerco submits that the proposed definition is too broad and, despite the ambiguity around the term “materiality”, would prefer the definition to refer to any “material action or omission”. The term “material” does not necessarily refer to monetary value and strengthens the Commissioner’s discretion. Powerco’s primary concern would be to ensure that Land Complaints were not captured in the definition of Consumer Complaint.	The working group believes the materiality of an act or omission is covered by the Commissioner’s discretion under B1.10(b) – where the complaint may be held by the Commissioner to be trivial, vexatious or, was not made in good faith. Refer to answer to question 3.
Q7. Do you agree with the proposal to redraft Land Complaint as suggested?			
	Contact Energy	We think this should also state “ <u>adversely</u> affects ...”	Noted.
	Alpine Energy	Alpine Energy wishes to retain unlawful.	Noted.
	Powerco	No. Powerco is concerned by any suggestion of widening the scope for Land Owner complaints. Lines companies “affect” Land Owners on a daily basis as a result of the presence of lines on private land. The definition of Land Complaint should be kept as narrow as possible so that it captures only unlawful activities. The EC concept of materiality goes at least some way towards recognising the need for limits. Further thought is needed as to how this concept of materiality could be integrated with the concept of “unlawfully affecting”.	Noted.
	Transpower	Removing “ <i>unlawfully</i> ” Transpower states that the reason why “unlawfully” was added to the definition of Land Complaint was to avoid the possibility of the Scheme creating new legal rights rather than being a mechanism for land owners and occupiers to protect their existing legal rights only. Transpower supports that principle. However, Transpower considers that the principle would be upheld by the constitution despite the	Noted.

		<p>removal of “unlawfully” because clause B1.2 requires the Commissioner to apply the law and Land Agreement in considering Complaints and granting remedies. Also, because clause B1.10 gives the Commissioner latitude to not investigate trivial or vexatious Complaints, Transpower is not concerned about the absence of a materiality threshold in the definition of Land Complaint.</p> <p>Accordingly, Transpower would not object to this change.</p>	
	Waipa Networks	<p>Waipa Networks believes that the term “affected” is too broad and could encourage complaints, for example, such as those in relation to the aesthetics of overhead power lines compared to underground. Suggests “unlawfully affected, and/or affected by an act or omission that contravenes what would be considered good industry practice” or similar.</p>	<p>Noted.</p> <p>The working group believes the concept of “affected” is covered by the Commissioner’s existing discretion under B1.10(b) – where the complaint may be held to be trivial, vexatious or not made in good faith.</p>
Q8. Do you agree with the proposed drafting of Clause 6 to provide for consultation with the EC?			
Q9. Do you agree with the proposed drafting of Clause 6 to provide consistency with any GPS and relevant benchmarks?	Contact Energy	<p>We would have thought it would be sufficient for the Scheme Amendment Committee to use “reasonable endeavours” or take “reasonable steps” rather than have to “do everything reasonably practicable on its part”, which seems a very strict standard to achieve.</p>	Noted.
	Genesis Energy	<p>Genesis Energy does not agree with the EGCC’s proposed drafting of Clause 6.</p> <p>Genesis Energy believes it is appropriate for the</p>	<p>Under the Electricity Act the GPS sets the objectives and outcomes for the EC in its role of governance of the electricity industry. The performance standards by</p>

		EGCC to have regard to relevant Government Policy Statements when considering changes to its constitution. It does not agree, however, that the constitution should be amended to expressly provide that the EGCC scheme must be consistent with the Government Policy Statement. The Government Policy Statement is not law, but an expression of the incumbent Government's expectations of the Electricity Commission. Believing that one must do nothing but act consistently with the Government Policy Statements implies a belief that those policy statements are law.	<p>which the EC will be judged are related to the GPS and the EC is empowered under section 158G of the Electricity Act to approve one or more dispute resolution systems.</p> <p>It makes sense for the EC to ensure that as it is required to meet its objectives and outcomes it should require that the dispute resolution system is not inconsistent with them.</p> <p>The working group believes it is prudent to proceed on this basis and include reference to the GPS in the constitution.</p>
	Transpower	<p>Transpower would not object to this change, subject to the amendments shown below:</p> <p>"Amendments to the Scheme shall not contain provisions that are inconsistent with the <u>current Government Policy Statement on Electricity Governance</u> or (<u>unless the Electricity Commission agrees otherwise</u>) any <u>criteria approved by the Electricity Commission for approving benchmarks for industry based customer dispute complaints resolution systems schemes</u> under section 158G of the <u>Electricity Act 1992</u>."</p>	The working group agrees with the suggested redraft.
Q10. Do you agree the drafting of the Constitution needs to allow for situations where there may not be a consumer contract?			
	Genesis Energy	<p>Genesis Energy does not sufficiently understand the approach mooted and, therefore cannot agree with the approach suggested.</p> <p>Genesis Energy does not understand the EGCC's proposal, and would appreciate further explanation.</p>	Noted. The working group will give further thought to the situation where a contract does not exist.

		Genesis Energy believes the EGCC may be suggesting that where there is a dispute but no contract, that the EGCC can either impose a contract on the parties (being a contract that the EGCC believes is pertinent), or failing that, apply good industry practice, in order to determine the dispute. If this is the EGCC's suggestion, Genesis Energy is extremely uncomfortable. It firmly believes the start point in resolving a dispute should be, if the matter is of a contractual nature, to try and determine what the two parties did agree to, and seek to resolve on that basis – not to arbitrarily apply something else.	
	Alpine Energy	No – cannot rely on contract obligations for complaint when no contract has been established.	Noted. The working group will give further thought to the situation where a contract does not exist.
	Powerco	Agree, provided Land Complaints remain separate from Consumer Complaints.	The working group's proposal is to ensure the separation of Consumer Complaints and Land Complaints.
	MCA	<p>Yes we agree that there should be an amendment. However, the wording of the amendment is confusing.</p> <p>For example: If there is no contract (potential customer), in what circumstances would you foresee a consumer contract being pertinent?</p> <p>The Code contains undertakings by companies for fair and reasonable dealings with consumers, but most clauses relate to provisions of a consumer contract, not contract formation and is unlikely to cover circumstances where there is no contract. Therefore, in determining complaints where there is no contract, the commission can look at the law, have regard to good industry practice (how does she determine what this is in the absence of guidelines in the Code?) and consider what is fair and reasonable.</p>	<p>Noted. The working group will give further thought to the situation where a contract does not exist.</p> <p>The Scheme's Commission intends instituting a review of the Electricity Consumer Code of Practice in 2007. This may result in new Code provisions that relate to situations where there is no contract.</p> <p>Where there is a complaint where Code provisions do not apply the Commissioner may consider applying legal principles such as negligence or <i>quantum meruit</i>. Where the Commissioner considers it appropriate to determine "good industry</p>

			practice” she must consult within the industry and, as she thinks fit, with the Board in accordance with B1.3. This has been done by surveying the members and obtaining expert opinions.
Q11. Do you agree that it would be preferable not to amend the Constitution to impose a confidentiality obligation on the parties unless this criterion is required by the EC?			
	Transpower	<p>As stated in the covering letter, Transpower is of the view that no changes should be made to the constitution unless and until they are required by the Electricity Commission.</p> <p>However, if the Electricity Commission were to require changes to the constitution to ensure confidentiality, Transpower would not object. In Transpower’s view the Scheme is more likely to achieve high quality outcomes if the parties are able to make full and frank disclosures without risking adverse public relations or precedent setting effects.</p>	Noted.
	Waipa Networks	Waipa Networks believe any party to a complaint should be able to apply for confidentiality, on a case by case basis, where sensitive information exists. The Commissioner would only be able to refuse such a request with good reason.	Noted.
Q12. Do you have any other comments to make regarding this proposal?			
	Genesis Energy	<p>Genesis Energy questions whether the EGCC, in proposing to amend its constitution now, is acting prematurely.</p> <p>Genesis Energy believes that it is prudent for the</p>	The working group does not intend proposing any changes to the Scheme’s Constitution until the EC has finalised its criteria. In the meantime it has chosen to consult with stakeholders principally to

		EGCC to wait until the Electricity Commission has finalised its criteria before embarking down a course of amending its constitution.	explore the issue of complying with the GPS and the definition of "Consumer". No further consultation will be undertaken until the final criteria have been released.
	Alpine Energy	Concerned that amendments provide a far wider reach for complaints which will increase costs to Line Co's etc and make compliance more expensive.	Noted.
	Transpower	Transpower does not support any of the changes proposed in the paper because the Electricity Commission has not asked for them to be made. In Transpower's view it is premature for the Commission to be proposing changes to the constitution of the Scheme.	See the response to Genesis Energy above.
	Federated Farmers	The timing of these proposed changes seems odd given the Electricity Commission has not given any indication of their specific requirements arising from the recent consultation. Federated Farmers is concerned the EGCC is considering implementing changes that may prove contrary to whatever results from the EC consultation on <i>Approval for Consumer Complaints Resdution Schemes</i> .	See the response to Genesis Energy above.
	MCA	MCA recommends that the proposed amendments also include consumer complaints against gas providers.	Noted.