



## **Consultation Paper**

# **Constitutional Changes to the Electricity & Gas Complaints Commissioner Scheme**

**April 2007**

## **Constitutional Changes to the Electricity & Gas Complaints Commissioner Scheme**

### **A. Introduction and Summary of Proposal**

1. The Electricity & Gas Complaints Commission intends to seek approval of the scheme from the Electricity Commission in response to the publication of the approval criteria in relation to consumer complaint resolution systems.
2. The Electricity & Gas Complaints Commission has convened a working group to steer through the constitutional changes required to meet the EC approval criteria. The members of the working group are:

Mel Orange	Meridian Energy; Council Board member
Peter Browne	The Lines Company; Council Board member
Pat Hanley	Consumer representative; Electricity & Gas Complaints Commission
Bill Bevan	Whitireia Community Law Centre

3. This paper has been prepared by the working group. It discusses and indicates the constitutional changes the scheme will need to undergo in order to comply with the Electricity Commission's approval criteria.
4. The scheme will also need to apply to the Minister of Energy to be approved as a consumer complaint resolution system in regards to gas. This will be a separate process and is not covered by this consultation paper.
5. The purpose of this paper is to consult on the constitutional change requirements with persons that the working group considers are representative of the interests of persons likely to be substantially affected by the proposal. The Electricity & Gas Complaints Commission endorse this consultation paper and will be undertaking a wider consultation with stakeholders on the detailed amendments to the scheme's constitution later in 2007.
6. The working group invites submissions on the proposal, preferably including answers to the specific questions in Appendix A, by **5pm 27 April 2007**. Please note that submissions received after this date may not be considered.
7. To assist in structuring responses, key questions have been included in the paper and listed in Appendix A. Submitters are invited to respond to the questions in Appendix A and are welcome to include additional material in their response.

8. The working group's preference is to receive submissions in electronic format (Microsoft Word and/or pdf) to [s.cuthbert@egcomplaints.co.nz](mailto:s.cuthbert@egcomplaints.co.nz)

If you wish to submit a hard copy of the submissions, this should be posted to the address below.

Susan Cuthbert  
Electricity & Gas Complaints Commission  
PO Box 6144  
Wellington  
Tel: 04 914 4520  
Fax: 04 472 5854

9. The working group will acknowledge receipt of all submissions electronically. Please contact Susan Cuthbert if you do not receive electronic acknowledgement of your submission within two business days.
10. Your submission is likely to be made available to the general public on the Electricity and Gas Complaint Commission's website. [www.egcomplaints.co.nz](http://www.egcomplaints.co.nz)  
Please clearly indicate any information that is provided on a confidential basis.
11. In this paper:

"Commission" refers to:	Electricity & Gas Complaints Commission
"Commissioner" refers to:	Electricity & Gas Complaints Commissioner
"Constitution" refers to:	Constitution of the Electricity & Gas Complaints Commissioner Scheme that is made up of the Deed, the Rules (Schedule A), the Terms of Reference (Schedule B), the Codes of Practice (Schedules C, CA & CB) and the Dispute Resolution Protocols (Schedules D, DA & DB)
"EC" refers to:	Electricity Commission
"GPS" refers to:	Government Policy Statement for Electricity Governance
"Scheme" refers to:	Electricity & Gas Complaints Commissioner Scheme

## **B. The Proposal to Amend the Constitution**

12. The proposal is as follows:
- 12.1 Amend the definition of "Consumer" to include users and potential users of electricity and line function services (including Land Owners of such users or potential users) in respect of that use or potential use.
- 12.2 Insert a clause in the Commissioner's Terms of Reference that provides that the Commissioner does not have the jurisdiction to review and comment on the decision of member companies to not supply services to potential consumers, but

may determine matters relating to the provision and accuracy of information and the processes for gathering information about a consumer, including credit history.

- 12.3 Amend the definition of "Consumer Complaint" to add a part (d) to include any action or omission of a member company that affects the complainant.
- 12.4 Amend the definition of "Land Complaint" from "unlawfully affected" to "affected".
- 12.5 Amend the definition of "Land Complaint" to make it clear that the land owner or occupier's rights applies to chattels and not just their rights in respect of the land.
- 12.6 Amend Clause 6 of the Deed to provide for consultation with the Electricity Commission.
- 12.7 Amend Clause 6 of the Deed to ensure that any changes to the Constitution are consistent with the GPS and benchmarks.
- 12.8 Amend B1.2(b) of the Terms of Reference to provide for the situation where there is no consumer contract in existence between the member company and complainant.
- 12.9 Insert a clause requiring the parties to the complaint not to disclose information, if required by the EC.

#### **C. The Reasons for Amending the Scheme's Constitution**

13. Under the Electricity Act 1993 and the Government Policy Statement on Electricity Governance published October 2006, the EC is responsible for approving one or more consumer complaints systems.
14. The EC published a consultation document in December 2006 entitled *Approval Method for Consumer Complaints Resolution Schemes* by which the EC sought feedback from industry participants and consumer representatives on its proposed approach for evaluating consumer complaints resolution systems. Submissions for the proposal closed on 9 March 2007. The EC has not set a timeline for finalising these criteria.
15. The working group has analysed the draft approval criteria in order to assess what changes would need to be made to the Constitution in order for the scheme to be approved. Some of the approval criteria can be satisfied via internal policies and practices that the Commissioner's office will be implementing.

#### **D. Specific Proposals**

16. The Electricity Act 1992 and the GPS provide for the EC to approve one or more consumer complaints resolution schemes.

17. Section 158 of the Electricity Act provides:

(1) *Every electricity distributor and every electricity retailer must participate in a complaints resolution system that is approved by the [Electricity] Commission for the purpose of addressing complaints by any person (including potential consumers and owners and occupiers of land) relating to electricity retailers and electricity distributors.*

18. The GPS stipulates a number of requirements for the electricity consumer complaint resolution system. Paragraph 21 provides:

*“The Government expects everyone (including potential consumers and owners and occupiers of land) to have access to a free, independent system for resolving complaints about electricity distributors (including Transpower) and electricity retailers, whether or not they have a consumer contract with the retailer or distribution company”.*

19. In addition to the Electricity Act and the GPS, the EC has proposed that the Australian Benchmarks for Industry-Based Customer Dispute Resolution Schemes be used to evaluate any applicant consumer complaints system. The EC has added “achievement standards” to the benchmarks to clarify what level of achievement the EC expects schemes to reach. It is not clear at this stage whether these achievements standards will be made mandatory.

20. While the approval criteria, incorporating the benchmarks and achievement standards, are still in the process of being considered by the EC, it is clear that the Electricity Act and GPS are set criteria. For this reason this paper concentrates on the “every person” requirement under the Act and GPS. There are other amendments that will potentially need to be made to the Constitution. While these are dependent on the EC’s final criteria, the working group considers it worthwhile setting them out in brief below in order to seek interested parties’ feedback.

#### **Definition of “Consumer”**

21. The EC paper raises the issue of who ought to have access to an electricity complaints resolution system. The Constitution currently limits access to the Scheme to a person who is in a contractual relationship (or in the case of disconnections, was in one) with a retailer or lines company. Potential customers who attempt to switch are also included in the definition.

22. “Consumer” is defined in the Constitution as:

*“In the case of an electricity Consumer:*

(a) *a Person who is supplied, or who applies to be supplied, with electricity by an Electricity Retailer in accordance with a Consumer Contract for consumption of electricity;*

- (b) *a Person who is supplied, or who applies to be supplied, with Line Function Services for electricity in accordance with a Consumer Contract;*
- (c) *a Person using the Services supplied under that Consumer Contract or paying part or all of the fees for the Services provided under the Consumer Contract; and*
- (d) *a Person in relation to a Consumer Complaint under paragraph (b) or (c) of the definition of "Consumer Complaint" who:*
  - (i) *has been disconnected in error by an Electricity Company Council member (whether or not that Council member has a Consumer Contract with the Consumer); or*
  - (ii) *has been transferred (switched) without consenting to the transfer from his or her Electricity Retailer Council Member to another Electricity Retailer Council Member".*

23. Since inception of the Scheme, various situations have fallen outside the Commissioner's jurisdiction such as where:

- a person moves into a property and uses electricity that has continued on from the previous occupant's supply
- a person uses electricity at their property but cannot find out who the supplier is, despite trying
- the landlord signs up on behalf of the tenant and the tenant wishes to make a complaint, and vice versa
- a person wishes to make a complaint about their supply but another flat which shares the same meter has the supply contract
- a caregiver is managing a person's account and has suffered loss
- a person wants to complain about the electricity supplier transferring the flat's account into their name without their agreement
- the electricity supplier insists a person pay for the replacement of a pole that serves that person's property where the pole is not on the person's land and the person is a landlord
- a landlord wants to complain about the electricity supplier who in disconnecting one tenant ends up disconnecting all the apartments
- a landlord wants to complain about the electricity company removing a meter from their property
- a person wants to complain about a company that refused to supply him/her because of a bad credit history that the person refutes

24. In all these instances the complaints did not fit within the Commissioner's jurisdiction because the complainant did not have a contractual relationship with the supplier.<sup>1</sup>

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Note that where the complainant has consumed the electricity, recovery of money for the energy used can occur under the legal principle of quantum meruit but the complaint will only fall within the Commissioner's jurisdiction where the complainant falls within the definition of "Consumer".

25. The EC paper states that the scheme must apply to “everyone” who is materially affected by the action/omission of a retailer or lines company. Section 158G of the Electricity Act does not contain any limits on the term “everyone” except the words “*any person (including potential customers and owners and occupiers of land)*”.
26. The working group does not consider that the legislation was intended to allow any person at all to complain about the actions of an electricity retailer or lines company. That would be too broad and make the Scheme unworkable and overloaded. For example, a creditor of an electricity company is “affected” by the actions of the company.
27. Nor is the Commissioner’s current discretion broad enough to deal with this issue. Under clause B1.10 of the Constitution, the Commissioner has discretion not to investigate a complaint if she considers that a complaint is trivial or vexatious or not made in good faith or where the complainant does not have a sufficient interest in the subject matter of the complaint. This clause provides some protection against the opening of floodgates to the Scheme, but it is not enough protection. For example, a complaint by the creditor in the above example might not be trivial and the creditor would have a sufficient interest in the complaint.
28. Rather, instead of an overly broad approach, the working group considers that the legislation intends to ensure that all electricity consumers or potential consumers of retail and/or lines functions services are covered by the Scheme, regardless of whether a supply contract is in place. The working group also believes that it only makes sense if the person complaining has a sufficient interest in the complaint. For example, it would not be workable if a person could complain about another person’s issue.
29. The EC’s use of “material affection” appears to be aimed at providing a connecting factor between the complainant and the complaint issue. The difficulty is that, although the paper states that the GPS requirements have been woven into the achievement standards, there is no achievement standard or definition for what is meant by “materially affected”. This could result in a lack of clarity in the access to the Scheme. There is also the concern that the use of ‘materiality’ may result in a focus on monetary value issues whereas often what is material to the customer has no financial value.
30. For these reasons the working group does not consider the concept of “materiality” to be particularly helpful and proposes not to use it in the definition of “Consumer”. However, there needs to be some limits on access to the Scheme. The working group proposes to include in the definition of “Consumer” users and potential users of electricity and line function services (including Land Owners of such users or potential users) in respect of that use or potential use. So, for example, a potential user will have access to the Scheme but only in relation to complaints about that potential use. A landlord of such potential user will also have access to the Scheme but again only in relation to complaints about that potential use, not generally. The working group proposes amending the definition of “Consumer” by deleting current (d) and substituting:

*“a Person who is a user or potential user of electricity or line functions services who has been affected by the action or omission of an Electricity Retailer Council Member or Lines Company Council Member in respect of that use or potential use:*

- *whether or not the person has a Consumer Contract with that Retailer or Lines Company, and*
- *including (without limitation):*
  - *a person who has been disconnected in error by an Electricity Company Council member or has been transferred (switched) without consenting to the transfer from his or her Electricity Retailer Council member to another Electricity Retailer Council Member;*
  - *A Land Owner of such user or potential user.”*

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?

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?

Q3: Do you agree with the proposed drafting of the definition of “Consumer”.

### **Potential customers**

31. The working group is aware that opening the Scheme up to complaints made by potential consumers could mean the Commissioner is called upon to consider complaints where a member company has refused to supply a person. The working group does not consider it appropriate for the Commissioner to review or comment on commercial decisions not to supply a person. This is akin to the Clause B1.5 in the Commissioner’s Terms of Reference that provide that the Commissioner does not have jurisdiction to review and comment on the amount a member company charges for services. However, it would be appropriate for the Commissioner to determine such matters that relate to the provision or accuracy of information, including processes to check credit histories.

32. The working group propose a new clause to be inserted:

*“The Electricity and Gas Complaints Commission does not have the jurisdiction to review and comment on the decision to not supply Services in relation to Consumer Complaints, but the Electricity and Gas Complaints Commissioner may determine matters relating to the provision and accuracy of information and the processes for gathering information about a Consumer, including credit history”.*

Q4: Do you agree with our assessment that it is appropriate for the Commissioner to consider only some issues relating to potential consumers?

Q5: Do you agree with the proposed drafting that limits the Commissioner's ability to consider certain issues relating to potential consumers?

**Definition of "Consumer Complaint"**

33. The EC has proposed that materiality be the test as to whether the complainant has sufficient interest in a complaint. As previously discussed, the working group is concerned that the use of 'materiality' could result in a lack of clarity and/or a focus on monetary value issues. Instead, the working group's view is that the definition of "Consumer" as amended limits the definition of "Complainant" to consumers and potential consumers in respect of that use or potential use. Given this limit, the working group proposes that the definition of "Consumer Complaint" be amended by adding a new sub part (d):

*"any action or omission of a Retailer or Lines Company that affects the Complainant".*

Q6: Do you agree with the proposed drafting of Consumer Complaint?

**Definition of "Land Complaint"**

34. The definition of "Land Complaint" provides that the Lines Company has "unlawfully affected" the land owner or occupier's rights. This may not be as broad as the "materially affected" requirement set out in the EC's paper. If this clause requires amendment the proposal is to amend the definition from "unlawfully affected" to "affected".
35. The proposal is also to amend the definition of "Land Complaint" to make it clear that the land owner or occupier's rights applies to chattels and not just their rights in respect of the land.

Q7: Do you agree with the proposal to redraft Land Complaint as suggested above?

**Clause 6 - Consultation with the Electricity Commission**

36. Approval criteria 2.10 in the EC paper provides that changes to a scheme's design be undertaken in consultation with relevant stakeholders including members and the overseeing entity (which includes consumer representatives) and the EC.
37. Clause 6 of the Deed deals with amendments to the Scheme. Broadly, under clause A6.2 the Commission can propose amendments to the Scheme. Once proposed, a Scheme Amendment Committee is established consisting of six Board members, six consumer representatives and the Council chairperson as chair of the committee. If the amendment is not approved by the committee it may,

under defined circumstances, be referred to the Council for consideration and vote.

38. Under A6.3 where the Commission proposes an amendment to the Scheme, it must consult with the Ministry of Consumer Affairs, Council Members, consumer representatives, Land Owners and Land Occupiers and any others that the Commission considers should be consulted. While there is no constitutional requirement for the Commission to consult with the Electricity Commission and Gas Industry Company, due to these entities not existing at the time the Scheme was created, informal consultation currently takes place.
39. The proposal is to include the Electricity Commission and the Gas Industry Company in the Commission's consultation process. The suggestion is to amend clause 6 to provide:

*"Before making any amendments to the Scheme, the Scheme Amendment Committee will do everything reasonably practicable on its part to advise all persons and organisations who in its opinion will be affected by the amendment of the proposed terms (including the Electricity Commission, the Gas Industry Company, the Ministry of Consumer Affairs) and give such persons and organisations a reasonable opportunity to make submissions to the Scheme Amendment Committee on the proposed amendment".*

Q8: Do you agree with the proposed drafting of Clause 6 to provide for consultation with the EC?

#### **Clause 6 - Consistency with GPS**

40. There is no requirement in the Constitution for amendments to be consistent with the GPS or the benchmarks as required by approval criteria 2.10. The proposal is to amend clause 6 to provide:

*"Amendments to the Scheme shall not contain provisions that are inconsistent with the Government Policy Statement or any approved benchmarks for industry-based customer dispute resolution schemes".*

Q9: Do you agree with the proposed drafting of Clause 6 to provide consistency with any GPS and relevant benchmarks?

#### **No Consumer Contract in some situations**

41. B1.2(b) – This clause requires the Commission to apply the Consumer Contract, with certain modifications. There will not necessarily be a Consumer Contract under the amended Scheme therefore the proposal is to amend B1.2(b) by adding a new (d)

*“... in relation to a Consumer Complaint where there is no Consumer Contract, having regard to any pertinent Consumer Contract or, where there is no relevant Consumer Contract, good industry practice prevailing in New Zealand”.*

Q10: Do you agree the drafting of the Constitution needs to allow for situations where there may not be a consumer contract?

### **Confidentiality**

42. The EC paper requires that parties to a complaint agree not to disclose information gained during the course of mediation, conciliation or negotiation to any third party, unless required by law to disclose such information. This will require amendment to the scheme if it is finalised as a criterion. However, the working group is not convinced that this benchmark is appropriate to a complaints resolution scheme and would prefer that the principle of transparency be generally applied unless otherwise considered appropriate by the Commissioner on a case-by-case basis.

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?

### **The Electricity Consumer Code of Practice**

43. The Scheme’s Commission intends instituting a review of the Electricity Consumer Code of Practice (Schedule C) in 2007. This is likely to result in a separate proposal to amend the Constitution.
44. For this reason, and the practical reason that the Electricity Consumer Code booklet will need to be re-published, the working party does not intend proposing amendment to Schedule C unless it is unavoidable. Any necessary amendments will become evident upon the EC finalising their criteria.

### **Definition of Complainant**

45. The EC paper introduces a different definition of “complainant” than used in the Scheme. The definition is based on the ISO 10002 definition. If this definition were to be adopted as one of the approval criteria, it would introduce some internal inconsistencies within the Constitution that would need to be addressed in drafting.

## **E. Timing and Next Steps**

46. The timeframe for completing the amendments to the Constitution is dependent upon the EC finalising the approval criteria. Once the EC has published the approval criteria, the Commission will undertake further consultation with stakeholders of the Scheme.

## **F. Constitutional Change Processes**

47. The Constitution for the Scheme contains detailed arrangements on how the Scheme must be amended. There are two processes involved depending on which parts of the Constitution are being amended. Any redraft of the Constitution to incorporate the proposals set out in this paper could involve both processes.
48. The first process involves amendments to the Deed (the main body of the Constitution) and the Protocols (Schedules D, DA & DB to the Constitution) which, subject to a limited exception, can be amended by a resolution of 75% of the total number of votes able to be cast by each joint class of member at a general meeting or by a written resolution by all members.
49. For all other parts of the Constitution (the Rules of the Electricity & Gas Complaints Commission (Schedule A), the Terms of Reference (Schedule B), and the Codes of Practice (Schedules C, CA & CB), the Commission may propose amendments.
50. Where amendments are proposed by the Commission, the amendments are put to the Scheme Amendment Committee (representing both industry and consumers) for approval. If not approved, this may involve referring the amendment to the Council for approval (subject to 5 out of the 6 consumer representatives approving the amendment also). Where such amendment is referred to the Council, an amendment will be approved by resolution of 50% of the total number of votes able to be cast in each joint class of member or a written resolution of 50% of each joint class or member.

Q12: Do you have any other comments to make regarding this proposal?

## Appendix A: Format for Submissions

To assist the working group in the orderly and efficient consideration of stakeholders' responses, a suggested format for submissions has been prepared. This is drawn from the questions posed throughout the body of this consultation paper.

Question	Comment
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?	
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?	
Q3. Do you agree with the proposed drafting of "Consumer"?	
Q4. Do you agree with our assessment that it is appropriate for the Commissioner to consider only some issues relating to potential consumers?	
Q5. Do you agree with the proposed drafting that limits the Commissioner's ability to consider certain issues relating to potential consumers?	
Q6. Do you agree with the proposed drafting of Consumer Complaint?	
Q7. Do you agree with the proposal to redraft Land Complaint as suggested?	
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?	
Q10. Do you agree the drafting of the Constitution needs to allow for situations where there may not be a consumer contract?	
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?	
Q12. Do you have any other comments to make regarding this proposal?	