

## 2014 EGCC consultation – preferred form for submissions

Your name/company name: **Transpower New Zealand Limited**

Questions for submitters	Yes/No	Comment
1. Do you agree that the EGCC indemnity dispute process should be mandatory for both parties if one party refers the indemnity dispute to the EGCC and it meets the criteria for the Commissioner to consider it?	Yes	-
2. Do you agree that the existing financial limits for complaints should apply to Indemnity Disputes?	-	Transpower has no view on the quantum of the financial limit. However, the Scheme document should be clear about whether the financial limit relates to individual Indemnity Disputes or to all Indemnity Disputes that relate to the same underlying event and involve the same retailer and lines company.
3. Do you agree with the Board's proposed levy system for indemnity disputes?	No	<p>Transpower agrees with adopting a “user-pays” approach to the Commissioner’s costs of dealing with Indemnity Disputes, as proposed in the consultation document. However, other comments in the consultation document and the proposed changes to the Scheme document do not clearly give effect to this intention.</p> <p>The consultation document suggests that Indemnity Disputes levies will be calculated on the same basis as the levies for Complaints but we do not see this reflected in the proposed changes to the Scheme document. In any event, it is not obvious how the staged levies regime for Complaints could port over to Indemnity Disputes. To the extent the proposed changes to the Scheme document address the funding of Indemnity Disputes, it seems the approach is for the Commissioner to take an ex-post view on costs actually incurred in individual disputes and who they should be allocated to. This differs fundamentally from setting staged levies for Indemnity Disputes up-front based on past volumes. We doubt that “levy” is the appropriate word to use in the context of dealing with the costs of Indemnity Disputes.</p> <p><b>We submit that</b> the Scheme document should address the costs of Indemnity Disputes in this way:</p> <p style="text-align: center;"><b>Costs</b></p>

		<p>[X].1 The Scheme Members who are the parties to an Indemnity Dispute:</p> <p>[X].1.1 must pay the costs incurred by the Commissioner in dealing the Indemnity Dispute (<b>Indemnity Dispute Costs</b>), whether the Indemnity Dispute is withdrawn or resolved by agreement between the parties or by a binding settlement issued by the Commissioner; and</p> <p>[X].1.2 must each pay the part of the Indemnity Dispute Costs the Commissioner orders them to pay.</p> <p>[X].2 The Commissioner must order the Scheme Members who are the parties to an Indemnity Dispute to pay the Indemnity Dispute Costs in equal shares unless the Commissioner considers there are compelling reasons for the Indemnity Dispute Costs to be paid in different proportions.</p> <p>[X].3 For the avoidance of doubt, Indemnity Dispute Costs relate to the costs incurred by the Commissioner in dealing with Indemnity Disputes only. The Commissioner may not order any Scheme Member who is party to an Indemnity Dispute to pay any part of the costs incurred by any other Scheme Member in relation to the Indemnity Dispute, other than the costs the Scheme Member may be entitled to be indemnified for under the Consumer Guarantees Act 1993.</p> <p>We consider that the starting position on costs should be that they are shared equally between the parties to the Dispute (clause [X].2). We also consider that the costs to be recovered should be the costs incurred by the Commissioner, not the costs that one or other of the parties may have chosen to incur (other than the indemnity cost itself) (clause [X].3). That is what we understand “user pays” to mean. If there is to be a discretion for the Commissioner to make a ruling as to a party’s costs, <b>we submit that</b> a clause along the lines of clause B.45 would be appropriate (i.e. a capped discretion).</p>
4. Do you agree that reporting of Indemnity Disputes to the responsible Minister should be limited to the number of cases considered?	Yes	
5. Do you have any other comments or concerns about the proposed changes you would like the Board to	<p>Yes. Our comments go to:</p> <ul style="list-style-type: none"> <li>Overall structure of the Scheme document</li> </ul>	<p><u>Overall structure of the Scheme document</u></p> <p>Transpower agrees with the approach of separating in the Scheme document the provisions relating to Indemnity Disputes from the provisions relating to Complaints, to the</p>

<p>consider?</p>	<ul style="list-style-type: none"> <li>• Test cases and other matters not carried over in proposed Part G</li> <li>• Procedures</li> <li>• Confidentiality</li> <li>• Consultation process</li> </ul>	<p>extent it is practicable to do so. The proposed changes to the Scheme document do this by introducing a new Part G.</p> <p>Part G relates mostly to matters that, for Complaints, appear in Part B (Commissioner's terms of reference). <b>We submit that</b> it would therefore make for a more logical and user-friendly document for the Part G matters to be added to Part B in a new Subpart that deals with Indemnity Disputes only. If this is done then the existing provisions in Part B would need to be divided into Subparts that deal with Complaints only and with matters common to both Complaints and Indemnity Disputes. We think this could be easily done and would have the added benefit of making it very clear which parts of Part B are applicable to Complaints, Indemnity Disputes or both.</p> <p>We have set out this proposed structure in the Appendix to this document. As part of it we suggest a different definition of Indemnity Dispute (using the words used in the provisions of the electricity and gas legislation rather than cross-referring to those provisions) and clearly carving Indemnity Disputes out of the definition of Complaint.</p> <p><u>Test cases and other matters not carried over in proposed Part G</u></p> <p>Perhaps even more so than Complaints, Indemnity Disputes may involve issues with important consequences for Scheme Members or important or novel points of law. Accordingly, <b>we submit</b> that an equivalent of the test case regime that applies to Complaints (clauses B.46 to B.51) should be included in the Scheme document for Indemnity Disputes. However, given that such test cases will be between Scheme Members, we consider that the parties should each bear their own costs of an Indemnity Dispute test case unless the court decides otherwise based on the merits of the dispute.</p> <p><b>We submit</b> that the following provisions in Part B applicable to Complaints should also have equivalents for Indemnity Disputes (there being no full equivalents in proposed Part G):</p> <ul style="list-style-type: none"> <li>• Clauses B.3 to B.5 relating to the range of matters the Commissioner may consider.</li> <li>• Clause B.13 relating to amounts that do not count towards the financial limit of the Commissioner's jurisdiction.</li> <li>• Clause B.29 relating to responding to general queries.</li> </ul>
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Procedures

**We submit that:**

- Proposed clause G.5 or its equivalent in Part B should require the Commissioner's process to have the features in clauses G.5.3 to G.5.5 (legal representation and keeping informed) as they are fundamental to due process. "May" should be "must" for these matters (as in clause B.17 for Complaints).
- There should be a specified timeframe for the Commissioner notifying the parties of an Indemnity Dispute under proposed clause G.6 or its equivalent in Part B. Two Working Days would be appropriate.
- The timeframe for responding to the Commissioner's requests for information under proposed clause G.8 or its equivalent in Part B should be longer than 10 Working Days. The nature of the information requested for Indemnity Disputes is likely to be more complex and technical than for Complaints, and there will be no rush as far as the consumer is concerned because by this point they will already have their remedy from the retailer. We suggest a baseline of 20 Working Days with an express discretion for the Commissioner to extend that.
- The Scheme document should expressly acknowledge the possibility of an Indemnity Dispute being withdrawn at any time before the issuing of a binding settlement.

Confidentiality

Proposed clauses G.7 to G.11 do not deal with the issue of confidentiality very coherently or consistently. **We submit** that these clauses or their equivalents in Part B should be redrafted so that:

- there is one set of confidentiality obligations and exceptions that apply to both the parties to the Indemnity Dispute and the Commissioner;
- the confidentiality provisions apply to both the information provided by the parties and the terms of any negotiated or binding settlement;
- there is no requirement on the parties to disclose the terms of a negotiated or agreed settlement to the Commissioner;

		<ul style="list-style-type: none"><li>• there is a mechanism for commercially sensitive information provided to the Commissioner by a party not to be disclosed to the other party; and</li><li>• the Commissioner is expressly prohibited from disclosing any confidential information provided by a party or the details of any negotiated or binding settlement in Scheme publications (for example, the annual report).</li></ul> <p><u>Consultation process</u></p> <p>We are aware the Commissioner is working to a legislated start date of 17 June 2014 for Indemnity Disputes. However, we were surprised at the short consultation period (two weeks) allowed for these important changes to the Scheme document. The CGA amendments and resulting changes to the EGCC framework potentially have major impacts for Transpower and other Scheme Members. A longer consultation period would have been appropriate.</p> <p>We encourage the Commissioner to consider a second consultation round, especially if there are substantial changes to the amendments proposed for the Scheme document (as we submit there needs to be and expect there will be). The next chance Scheme Members get to look at and comment on the changes should not be when they are in their final and approved form.</p>
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## Appendix – Structure and other changes to Part B (unchanged unless marked)

### Definitions

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Complaint An expression of dissatisfaction related to Services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected, but does not include an Indemnity Dispute.

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Indemnity Dispute A dispute between Scheme Members concerning the application of the indemnity in section 46A of the Consumer Guarantees Act 1993.

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### PART A THE ELECTRICITY AND GAS COMPLAINTS COMMISSIONER SCHEME

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The structure of this document is as follows:

- **Part A** sets out the background to the establishment of the Scheme, the purpose and principles of the Scheme, a diagram of the Scheme and key to interpretation of the Scheme.
- **Part B** sets out the Terms of Reference that the Electricity and Gas Complaints Commissioner must follow when considering a Complaint against a Scheme Member or an Indemnity Dispute referred to the Commissioner by a Scheme Member.
- **Part C** sets out the Code of Conduct for Complaint Handling that Scheme Members must follow.
- **Part D** sets out the fees, levies and other costs that Scheme Members must pay.
- **Part E** establishes the Board of the Electricity and Gas Complaints Commissioner Scheme which is responsible for providing a complaints resolution scheme. It sets out the functions, duties and obligations of the Board including appointment of the Commissioner.
- **Part F** outlines Scheme Members' participation in the Scheme and the winding up of the Scheme. An Adoption Deed for persons applying to become a Scheme Member is included in the Appendix to Part F.

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### PART B COMMISSIONER'S TERMS OF REFERENCE

#### PART B1 COMPLAINTS

##### Commissioner's role

B.1 The Commissioner's principal role in relation to Complaints is to:

B.1.1 consider, at no charge to the Complainant, any Complaint; and

B.1.2 facilitate the resolution of Complaints in accordance with the Scheme.

B.2 The Commissioner may delegate any of the Commissioner's functions in relation to Complaints except making a recommendation under B.32 or a binding decision under B.34 to B.37.

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#### PART B2 INDEMNITY DISPUTES

[Provisions relating to indemnity disputes. As well as most of the content of proposed Part G, Part B2 should include the provisions proposed above for costs, test cases and the other matters not currently proposed to be carried over.]

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## **PART B3 COMMISSIONER'S OTHER RESPONSIBILITIES**

### **Responsibilities and requirements**

B.52 The Commissioner is responsible for:

...

B.52.4 promoting the Scheme and the Commissioner's Complaint-handling procedures generally, and in such a way as to be sensitive to people who are disadvantaged or who have special needs, including liaising with organisations working with or consisting of people who may not be able to find out about the Commissioner by standard means; and

...

B.52.11 keeping systematic records of all Complaints, Indemnity Disputes and enquiries, their progress and outcomes; and

...

B.52.15 providing written reports of recommendations and binding decisions on Complaints (excluding confidential information for which consent has not been given under clause B.27.1 of these Terms of Reference) to Scheme Members and to any interested bodies for the purpose of:

(a) educating Scheme Members, Consumers, Land Owners and Land Occupiers;

(b) demonstrating consistency and fairness in decision-making; and

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