2018 Consultation on recommendations from the 5 year independent review

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Submissions received - Round 2

Prevent Educate Resolve

Contents

Submission

Independent 5-year review of Utilities Disputes Limited - Recommendations from the review and other Board proposed changes - Consultation Paper for Round Two

15 June 2018

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1 Introduction

Aurora Energy welcomes this opportunity to comment on Utilities Disputes Limited's (UDL) consultation paper *"Independent 5-year review of Utilities Disputes Limited - Recommendations from the review and other Board proposed changes - Consultation Paper for Round Two"* (the Consultation Paper).

No part of our submission is confidential and we are happy for it to be publically released.

If UDL has any queries regarding this submission, please do not hesitate to contact:

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2 Response to specific questions

Aurora Energy's responses to the specific questions posed in the Consultation Paper are set out in Appendix 1 to this submission.

3 Land complaint exclusions

Aurora Energy remains in disagreement with the Review's recommendation to remove the land complaint exclusions contained in appendix two of the Scheme Rules (the Exclusions). The analysis provided by UDL in the Consultation Paper has not swayed our position on the Exclusions.

We are disappointed that UDL continues to raise the removal of the Exclusions time and again, despite the Minister approving them on numerous occasions now. As with the ENA, we support Transpower's comments, below, in their response to the first round of consultation:

> *"The land complaint exclusions do not impact on the Scheme's approval for the reasons set out in our letter of 14 June 2016 (attached). We understand that by mid-2016 the EGCC Board had accepted that the presence of the exclusions did not put the Scheme's approval in jeopardy, as that was not raised as a justification for removing any of them in the EGCC Board's consultation paper released on 6 July 2016. We are therefore surprised the UDL Board has raised this unfounded concern again.*
>
> *The land complaint exclusions were approved by the Minister for a third time in September 2016. We wonder how many more times the Minister needs to approve them before this issue will be considered closed."*[1]

Retention of each of the Exclusions provides certainty for providers and users of the Scheme. A number of them also minimise double-handling of cases by UDL, in instances where there is a legislative provision which states the appropriate forum to determine the matter and eliminate the risk of resources and time being wasted by all parties in respect of attempted retrospective application of the Scheme Rules.

The safeguards proposed do not provide us with sufficient comfort that double-handling and squandering of time and resources will not occur. Our particular concern centres on the first safeguard which states that *"Where the commissioner believes that, all things, considered, there is a more suitable forum to consider the complaint then the default position is that it should be referred for consideration by that forum"*. This safeguard relies on the Commissioner exercising a discretion, and there is no guarantee that a complaint which would otherwise have fallen under one of the Exclusions would, in fact, be directed there. This is especially important given a provider's rights of appeal are curtailed under the Scheme Rules. In general, alternative forums will not deprive providers of procedural fairness.

[1] Transpower New Zealand Limited. (2018). Independent 5-year review of Energy Complaints Scheme. 6 April 2018, p4.

Appendix 1 - Questions for submitters and preferred form for responses

Principle/Area of document	#	Question	Submitter's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	We agree with the proposed approach in the Consultation Paper.
Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	We support the retention of natural justice in the Scheme Rules.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	We are comforted by the fact that the performance standards will not be removed until new performance measures have been developed.

Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	We disagree with the proposal to remove the Land Complaint Exclusions.
		Exclusion 1.1	As stated by UDL, the purpose of this exclusion is to prevent the retrospective application of the Scheme Rules to complaints that relate to existing works. We are not convinced that the exclusion should be removed. Its inclusion provides clarity and certainty to all users of the Scheme that complaints of this nature are outside of the Scheme's jurisdiction. We are concerned about the introduction of discretionary powers in relation to complaints which are at present automatically excluded under this provision. By introducing a discretionary element in terms of complaints of this nature, the risk is that time and resources are wasted by both the parties involved and UDL in reaching this conclusion. This exclusion should, in our view, remain.
		Exclusion 1.2	See our response to exclusion 1.1.
		Exclusion 1.3	See our response to exclusion 1.1.

		Exclusion 1.4	We agree with Trustpower's comments in its round one submission that the National Code of Practice for Utility Operators' Access to Transpower Corridors already contains a dispute resolution mechanism for complaints of this nature, which we consider to be the appropriate forum for such complaints. This exclusion should, in our view, remain.
		Exclusion 1.5	As stated by UDL, in this case the Environment Court is the appropriate forum for determinations of disputes of this nature given its legislative powers in relation to the compulsory acquisition of land under the Resource Management Act 1991 and the Public Works Act 1981. This is a clear legislative direction as to the appropriate forum for determinations of disputes of this nature. We see no need for the Commissioner to even consider whether disputes of this nature fall within the Scheme's jurisdiction and therefore, as we have raised above already, waste time and resources in determining that there is a more appropriate forum for the complaint to be heard. This exclusion should, in our view, remain.
		Exclusion 1.6	Regulation 30(1) of the Electricity (Hazards from Trees) Regulations 2003 specifically states that *"The functions of an arbitrator are … to hear and determine disputes between tree owners and works owners referred to the arbitrator under these regulations"*. This is clear legislative direction as to the appropriate forum for determinations of disputes of this nature. We see no need for the Commissioner to even consider whether disputes of this nature fall within the Scheme's jurisdiction and therefore, as we have raised above already, waste time and resources in determining that there is a more appropriate forum for the complaint to be heard. This exclusion should, in our view, remain.

		Exclusion 1.7	We consider that it is inappropriate for land owners to be able to complain about the maintenance programmes of lines companies. Asset management plans and maintenance programmes are prepared by lines companies by taking into account an array of factors and by specialists in their field of expertise. It is inappropriate for land owners who lack this technical expertise and knowledge of the internal drivers behind asset management plans and maintenance programmes to be able to lay complaints about them. While we are concerned about the wasting of time and resources, we are equally concerned that any decision that may be made by the Commissioner in relation to a lines company's asset management plan or maintenance programme based on the individual circumstances of a single complainant could have serious and far reaching consequences for not just the lines company involved in the dispute, but for all lines companies in New Zealand. This exclusion should, in our view, remain.
		Exclusion 1.8	Section 23F of the Electricity Act covers disputes about land access and specifically states in subsection (1) that *"The owner or occupier of land, or the owner of the works, may refer any dispute under sections 23 to 23E to the Environment Court*". Again, this is a clear legislative direction as to the appropriate forum for determinations of disputes of this nature. We see no need for the Commissioner to even consider whether disputes of this nature fall within the Scheme's jurisdiction and therefore, as we have raised above already, waste time and resources in determining that there is a more appropriate forum for the complaint to be heard. UDL suggests that *"while a court can appropriately deal with land value claims greater than $50,000, there will be smaller claims with a disproportionately significant impact on the land owner. For those complaints the Scheme is adequately resourced to competently interpret and apply legal precedent when applicable".* The Electricity Act does not draw any distinction when it comes to the monetary value of disputes and we do not believe that UDL should

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			attempt to do so. This exclusion should, in our view, remain.
		Exclusion 1.9	We agree with Transpower where it states on page 7 of its letter to UDL, dated 14 July 2016, that *"disputes about injurious affect … are nonetheless technical valuation issues that should be considered in a forum where the law and rules of evidence are required to be observed, cross examination of witnesses is available, and there are rights of appeal. The Land Valuation Tribunal has those attributes and is clearly the most appropriate forum"*. As with exclusion 1.8 above, we disagree with UDL attempting to draw distinctions as to the appropriate forum based on the monetary value of a dispute. This exclusion should, in our view, remain.
		Exclusion 1.10	We have no view in respect of this exclusion.
		Exclusion 1.11	We have no view in respect of this exclusion.
		Exclusion 2.1	We have no view in respect of this exclusion.
		Exclusion 2.1	We have no view in respect of this exclusion.

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Mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay	5	5. Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	We agree with this approach and proposed wording.

Independent 5-year review of Utilities Disputes Limited

Recommendations from the review and other proposed changes

Consultation Paper for Round Two

Prevent. Educate. Resolve.

Appendix 1 – Questions for submitters[1]

Principle/Area of document	#	Question	Submitter's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	We have no further comment.
Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	We have no further comment.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	We have no further comment.
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	We have no additional thoughts to add to the land complaint exclusions.
		Exclusion 1.1	N/A
		Exclusion 1.2	N/A
		Exclusion 1.3	N/A
		Exclusion 1.4	N/A
		Exclusion 1.5	N/A
		Exclusion 1.6	N/A

[1] Submissions are welcome across the range of matters addressed by this consultation paper and the associated background paper and are not limited to these questions specifically.

		Exclusion 1.7	N/A
		Exclusion 1.8	N/A
		Exclusion 1.9	N/A
		Exclusion 1.10	N/A
		Exclusion 1.11	N/A
		Exclusion 2.1	N/A
		Exclusion 2.1	N/A
Mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay	5	5. Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	We do agree to the boards approach in this regard. We have no additional comment in this regard.

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15 April 2018

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ENA submission on ROUND TWO of the independent 5-year review of Utilities Disputes Limited - Recommendations from the review and other Board proposed changes

The Electricity Networks Association (ENA) welcomes the opportunity to provide a submission to Utilities Disputes Ltd (UDL) on its proposed changes to the Energy Complaints Scheme documents arising from the independent 5-year review. ENA makes this submission on behalf of the New Zealand electricity distribution businesses (EDBs) and in support of any submissions individual EDBs may have made.

The ENA represents all of New Zealand's 27 EDBs or lines companies, who provide critical infrastructure to New Zealand residential and business customers. Apart from a small number of major industrial users connected directly to the national grid and embedded networks, electricity consumers are connected to a distribution network operated by an ENA member, distributing power to consumers through regional networks of overhead wires and underground cables. Together, EDB networks total 150,000 km of lines. Some of the largest distribution network companies are at least partially publicly listed or privately owned, or owned by local government, but most are owned by consumer or community trusts.

ENA has reviewed the round two consultation document and the changes proposed. We are pleased to see that UDL have agreed to retain the references to 'natural justice' within the scheme document. We note that the Board has agreed to take more time to consider changes to the levy structure and we will look for the opportunity to comment on these when they are consulted on in due course.

We are concerned that, despite the feedback UDL has received from ENA and other utility members of the scheme, UDL is continuing to propose changes to the land complaint exclusions contained

within the current scheme. We support and repeat Transpower's comments below in their response on the first round of consultation:

> "The land complaint exclusions do not impact on the Scheme's approval for the reasons set out in our letter of 14 June 2016 (attached). We understand that by mid-2016 the EGCC Board had accepted that the presence of the exclusions did not put the Scheme's approval in jeopardy, as that was not raised as a justification for removing any of them in the EGCC Board's consultation paper released on 6 July 2016. We are therefore surprised the UDL Board has raised this unfounded concern again.
>
> The land complaint exclusions were approved by the Minister for a third time in September 2016. **We wonder how many more times the Minister needs to approve them before this issue will be considered closed**." [Emphasis added]

We agree with Transpower and others that the scheme, complete with land complaint exclusions, had been approved by the relevant Minister on three separate occasions, and there is therefore no question of the scheme being 'approvable' in its current form. In addition, the utility members of the scheme have consistently and with good reason rejected UDL proposals to remove these exemptions, both in the first round of this current consultation and previous consultations held over the last few years, yet a proposal to do so seems to re-emerge at every opportunity.

We trust that on this occasion UDL will respect the clearly conveyed and well-reasoned arguments put forward by the scheme members to retain the land complaint exemptions, until some legislative change, legal or policy decision external to UDL genuinely necessitates such a review.

We and our members will be extremely disappointed if UDL persist in what we can only assume is an ideological crusade to expand the scope of the scheme beyond what is reasonable, prudent, and in the best interests of both scheme members and the general public.

Please let me know if ENA can be of any further assistance or if you wish to discuss any of the points we've raised in more detail. In the first instance please contact ENA's Senior Advisor Policy and Innovation, Richard Le Gros, at richard@electricity.org.nz, 04 555 0075.

Yours sincerely

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15 June 2018

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Sent via email: submissions@utilitiesdisputes.co.nz

Dear James

Recommendations from the 5-year review and other proposed changes

First Gas Limited welcomes the opportunity to make a submission to Utilities Disputes Limited ("Utilities Disputes") on its consultation paper "*Independent 5-year review of Utilities Disputes Limited: Recommendations from the review and other proposed changes".*

Support decision to review levies through a separate consultation process

We support the Utility Disputes Board's decision to further analyse the current levy system and undertake modelling of alternate levy options.[1] We consider that it is important that the levy system remains fit for purpose, and allows Utilities Disputes to:

- Recover costs in a timely manner;
- Incentivise efficiencies; and
- Only charge providers their reasonable attributable share of those costs.

We look forward to considering the results of the modelling and engaging in the future consultation on this matter.

Do not support proposals to extend the jurisdiction of the Scheme

As noted in our prior submission,[2] First Gas does not support the proposals to remove several exclusions from the disputes scheme.[3] We consider that these exclusions exist because

- The matters excluded from the Scheme are more appropriately considered in other forums, by those parties with the knowledge and experience to do so; and
- The exclusions reflect matters already covered by other entities or Acts. The exclusions therefore ensure there is no duplication by Utilities Disputes of work completed by other agencies.

To illustrate these points, we have provided further information on the alternative avenues consumers currently have to seek resolution of disputes This information is included in **Attachment 1** of this submission, along with our response to the consultation questions.

[1] Page 9 of Utility Disputes' consultation paper.
[2] *Proposed changes to the Energy Complaints Scheme* , First Gas submission to Utility Disputes Limited, 6 April 2018, http://firstgas.co.nz/wp-content/uploads/First-Gas-Submission-UDL-5yr-review-1.pdf
[3] Formerly the Electricity and Gas Complaints Commissioner Scheme, EGCC and now Utility Disputes.

Contact person

If you have any questions regarding this submission, please contact me on 06 215 4046 or via email at lynette.taylor@firstgas.co.nz, or Karen Collins, Regulatory Manager, on 027 472 7798 or karen.collins@firstgas.co.nz.

Yours sincerely

Lynette Taylor
Regulatory Advisor

Attachment 1: Response to consultation questions

Principle	#	Question	First Gas' response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	We agree that if providers breach the scheme rules, then they should be named. However, we consider that is unnecessary to name providers who have breached any scheme guidelines. Parties should only be held accountable for breaches of the rules, not voluntary guidelines, and naming them twice for a single breach is an unnecessary duplication. For continuous improvement purposes, we think it would be useful for Utility Disputes to regularly update or establish new guidelines to reflect the learnings from the breaches occurring throughout the year.
Natural justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	We support the Board's decision to retain the explicit reference to natural justice in the scheme rules.
Performance standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	We support the removal of the current performance standards as all parties agree that they are not effective measures of performance. We encourage the development of performance standards that are more meaningful and contribute to the ongoing efficiency of Utilities Disputes. We would welcome the opportunity to engage on this matter further.
Land complaint exclusions	4	Please add further thoughts on the land complaint exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further information that may be of relevance to the Board's consideration of these changes.	First Gas strongly recommends that the land complaint exclusions be retained in the scheme. We consider that these exclusions are necessary as: • Consumers already have suitable avenues to revolve land complaints, and consideration of land disputes is already covered by existing Acts and regulatory bodies. Therefore, bringing land complaints into Utility Disputes' jurisdiction creates a duplication of process; and • Land complaints usually cover complex and difficult issues that are best dealt with by agencies with experience in such matters and understand the precedents set on land matters. We expand on these points below.

Principle	#	Question	First Gas' response
			Existing avenues to resolve land disputes We understand that Utilities Disputes is concerned that retaining the exclusions will mean that the dispute resolution scheme is not meeting its purpose, being that: *"any person (including consumers, potential consumers, and owners and occupiers of land, but excluding members of the scheme) who has a complaint about a member has access to a scheme for resolving the complaint."*[4] At present, land-related complaints can be considered under several Acts, regulatory agencies and courts of law. For gas related land complaints, these avenues include the Gas Act 1992, the Resource Management Act 1991 (the RMA), the Public Works Act 1981 (the PWA), the Environment Court, the Maori land court, and the National Code of Practice for Utilities Operators' Access to Transport Corridors. Given these existing avenues are available, we do not believe it is necessary for a consumer complaint to also be heard under the energy complaints scheme. This approach is supported by the scheme's general rule 18(a) that allows for Utilities Disputes to refuse to deal with a complaint if "there is a more appropriate place to deal with the complaint". We do not consider that it is an efficient use of Utilities Disputes time and resources to duplicate the work of others. **Complexity of land disputes** From our perspective, land disputes often cover complex and difficult issues that should be dealt with by agencies who have knowledge and experience in these matters. Precedents will exist and be developed as complaints are heard over time, and it is important that any decision-making body take note of these precedents. Subsequently, we agree with the Review finding that alternative dispute resolutions schemes:

[4] Page 64, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre

Principle	#	Question	First Gas' response
			"are not well place to settle legal controversies as they are not legal bodies and it is not the place of alternative dispute resolution scheme to make legal precedents. Legal precedents are properly made by courts."[5] From our discussions, we understand that Utility Disputes currently does not have the suitable resources to deal with land complaints, therefore raising concerns about its capability to make decisions consistent with those made in the existing forums such as the Environment Court. **Support for safe guard measures** While we believe there is a strong case for retaining the land exclusions, should the Utilities Disputes Board remove the exclusions, we strongly support the inclusion of the five safeguards recommended by the Review.[6] One of the safeguards relates to a recommendation that a review team should review the schemes operation after a period of six months to determine if there should be any further changes to the scheme rules. We would endorse such a review but recommend that the review team be extended to include representatives from the Gas Industry Company (GIC), Ministry for Business, Innovation and Employment (MBIE), WorkSafe NZ, and the Commerce Commission. These other agencies have experience that would be relevant to this review and would provide useful insight as some of the exclusions fall within their ambit.
		Exclusion 1.1	We recommend that exclusion 1.1[7] be retained, as First Gas considers that the enforcement of the Gas Act via the courts is a more suitable forum for these matters. First Gas proactively works with all land owners that host our gas assets, with the intention that there would never be a complaint to answer. However, a landowner can currently seek that a complaint be heard in a court of law. These courts are the suitable forum for breaches of the Gas

[5] Page 26, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre.

[6] Pages 66 – 67, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre.

[7] Whether lines equipment was lawfully fixed or lawfully installed in terms of section 22 of the Electricity Act 1992 in respect of Electricity Works and section 23 of the Gas Act in respect of gas pipelines.

Principle	#	Question	First Gas' response
			Act and courts will make decisions that follow legal precedent. This view is consistent with the Review that states: *'While alternative dispute resolution schemes may routinely use and refer to law in their decisions, they are not well placed to settle legal controversies as they are not legal bodies and it is not the place of alternative dispute resolution schemes to make legal precedents. Legal precedents are properly made by courts'.*[8]
		Exclusion 1.2	As outlined in our response to exclusion 1.1, we recommend that this exclusion be retained as there is a more suitable forum for these matters to be considered. At present, First Gas holds easements for equipment fixed in, over, under or across land, and would consider any matter raised with us on a case by case basis. If we were unable to resolve the dispute, the landowners would have the following avenue of recourse: • They may raise matters with the Environment Court; or • If the land is Maori land, the matter may be raised in the Maori land court. We consider these courts to be the most suitable forum for any matter relating to rights for equipment to be held on land.
		Exclusion 1.3	We recommend retaining exclusion 1.3[9] as we believe the court system remains the appropriate place for such matters to be heard. Ownership of our assets has far reaching consequence for our networks and we note that determining ownership of assets, particularly older assets, can be complex as absolute definitive evidence may not be available. Currently, any dispute over the ownership of lines equipment would be subject to a hearing before the courts (like other disputes over other forms of asset ownership), and decisions made would be binding and aligned with precedent.

[8] Page 26, *Independent Review of Utilities Disputes Limited 2017*, Queen Margaret University Consumer Dispute Resolution Centre.
[9] Whether we own the lines equipment constructed before, or construction commenced before, 1 October 2006.

Principle	#	Question	First Gas' response
			If Utility Disputes could hear disputes of this nature, it would not be bound to follow any legal precedent or rulings. This could provide conflicting decisions and would be a less robust process for both parties involved. Should this exclusion be removed, we strongly agree with the recommendation of the Review that the test-case clause be retained.
		Exclusion 1.4	We recommend that exclusion 1.4 be retained. These matters are covered with provisions in the National Code of Practice for Utilities Operators' Access to Transport Corridors. It does not seem an efficient or practical use of Utilities Disputes' resources to duplicate this work.
		Exclusion 1.5	We recommend this exclusion[10] be retained as there is a more suitable forum for these matters to be considered. As an example, First Gas will occasionally seek to install equipment on private land. We will negotiate an easement or lease over the land following the requirements under the Land Transfer Act 1952. The easement supports our application to install and maintain lines equipment. This may occur under the Resource Management Act 1991 (the RMA) or the Public Works Act 1981 (the PWA). First Gas works closely with land owners to negotiate easements that are fair and reasonable. We are normally installing assets with a long life and are therefore investing in a substantive long-term relationship with land owners. Any land access agreement tends to have a reasonable value attached to it and land owners will usually seek their own legal and valuation advice. Whilst we have never had negotiations with land owners reach an impasse, if they were to do so, landowners can seek redress through the court system. Matters pertaining to the RMA and PWA are governed by provisions under those Acts and support by legal precedent. Disputes are heard by the Environment Court. Land owners may also request a hearing under the land valuation tribunal if the matter relates to the PWA.

[10] Matters relating to or arising from obtaining an easement.

Principle	#	Question	First Gas' response
			Any dispute is likely to be technical, complex and potentially affected by, or affecting legal precedent. We suggest the Environment Court remains the appropriate forum for these disputes.
		Exclusion 1.6	No comment.
		Exclusion 1.7	We recommend that exclusion 1.7[11] be retained. It is more efficient for statutory bodies such as the Commerce Commission and the Gas Industry Company, with the knowledge and experience of the gas networks to determine the adequacy and reasonableness of maintenance requirements. First Gas maintains its gas networks is to ensure that they operate in a safe manner and can reliably serve our customers. We report our maintenance plans for the next 10 years annually in our asset management plan (AMP). The AMP is part of the suite of assets information required to be disclosed by the Commerce Commission under Part 4 of the Commerce Act 1986. The AMP explains our approach to the life-cycle management of our assets including maintenance. It is available on our website[12] or by contacting First Gas. Alongside our own maintenance plans, as a gas network operator we are governed by requirements under the GIC and various New Zealand safety standards. In particular, Standards NZS 5258 and AS/NZS 4645 Gas Distribution guide the operation, construction and commissioning of the distribution pipelines while Standard AS/NZS 2885 Pipelines – Gas and liquid petroleum guides the operation, construction and commissioning of the transmission pipelines. The GIC and standards specify the minimum requirements to ensure the equipment and processes are maintained to a safe and effective level. We suggest these mechanisms ensure maintenance occurs to a level that would be considered adequate or reasonable. Regular audits are completed by a third party to ensure First Gas is meeting the requirements. We consider any work undertaken on these matters by Utility Disputes would be a duplication of this work, with Utility Disputes unlikely to have

[11] Whether the maintenance programme carried out by a Lines Company on Lines equipment is adequate or reasonable.
[12] http://firstgas.co.nz/about-us/regulatory/

Principle	#	Question	First Gas' response
			the skills needed to consider the matters as robustly as the existing government agencies and standards we operate under.
		Exclusion 1.8	No comment.
		Exclusion 1.9	We recommend that exclusion 1.9[13] be retained as there is a more suitable forum for these matters to be considered These matters are generally subject to commercial agreements and negotiated as part of the process when establishing an easement. Landowners generally seek separate legal advice and often their own valuations to aid in the negotiation process. The Gas Act 1992 establishes the process to follow in the default of agreement between parties. As with any contractual agreement, matters that are under dispute are best considered in the courts. It would create great uncertainty if Utilities Disputes could overturn commercial agreements.
		Exclusion 1.10	We recommend this exclusion[14] is retained as these matters are already under the purview of other mechanisms and consumers already have several means of redress: • Lines companies must provide an agreed level of service (quality standards) as set out by the Commerce Commission in their Default or Customised Price-Quality Paths (DPP/CPP). The Commerce Commission acts in the best interests of consumers and considers the level of service consumers should receive for the price they pay; • The GIC monitor the quality of gas we supply, and this is based on an industry standard. It is also subject to commercial contracts. the reasonable quality of gas and service is not a simple consideration and Utilities Disputes risks setting precedents that disrupt the other regulatory mechanisms and application of other Acts;

[13] Exclusion 1.9 refers to matters were changes to equipment carried out under the powers of the Gas Act 1992 have injuriously affected land in terms of section 51(1) of the same Act. This includes disputes about that amount of compensation that may be payable in relation to such injurious affection. Excepted from the exclusion are any disputes around matters of damage to land or property.

[14] Exclusion 1.10 relates to matters concerning the quality of electricity or gas supplied by a lines company or any interruption in that supply, and the provision of lines services.

Principle	#	Question	First Gas' response
			• Gas is an alternative fuel source and we are highly motivated to ensure we uphold our commercial agreements with our customers and our reputation with end consumers. Our commercial agreements specify the service provided; • If consumers have an issue they consider we have not resolved adequately, they have several avenues of redress open to them including raising the issue with the Commerce Commission; and • A further avenue open to consumers is to consider raising a matter under the Consumer Guarantees Act (CGA) managed by the Consumer Protection segment of MBIE. The CGA says that supply should be as safe and reliable as a reasonable consumer would expect it to be, and the quality of gas or electricity supplied must be such that it can be consistently used for the things that a reasonable consumer would expect to use gas or electricity for. There is precedent to what a 'reasonable consumer' would expect. If this exclusion were to be removed, we would have some concern that Utilities Disputes may inadvertently make a ruling that undermines rulings from other agencies, legal precedent, or commercial contracts.
		Exclusion 1.11	No comment.
		Exclusion 2.1	No comment.
		Exclusion 2.2	No comment
Mechanism to ensure Utilities Disputes can refer, and, where appropriate consider complaints about providers without delay	5	Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	No comment.

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15 June 2018

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Recommendations from the independent 5-year review and other Board proposed changes – round two of consultation

Genesis Energy Limited (**Genesis**) welcomes a second opportunity to provide comments to Utilities Disputes Limited (**UDL**) on its intentions regarding *Recommendations from the review and other Board proposed changes* (**consultation)**.

Following the first round of consultation, we appreciate UDL taking on board some of our suggestions and those of other stakeholders. In this second submission, we reiterate our request for UDL to clarify why it is not consulting on all [2017 independent review] recommendations. In our view it is essential that UDL addresses its intentions for the review to be completed appropriately.

We also reiterate our key message; as long as UDL remains focused on its core remit, Genesis agrees it provides an effective dispute resolution scheme with only minor improvements needed.

At its core, UDL's purpose is not to act as a consumer advocate, but to provide free and independent access to a dispute resolution service when complaints about providers have reached deadlock. We are of the view that the scheme must remain focused on this core purpose to ensure continued efficiency and effectiveness for the benefit of both consumers and providers.

While we appreciate that UDL wishes to improve access to its services, and encourage it to do so to vulnerable customers in particular, we are concerned that continuing to grow beyond its current reach into additional jurisdictions could distract from its core purpose, or confuse consumers and providers about the role UDL plays.

If you would like to discuss anything further, please contact me by email: margie.mccrone@genesisenergy.co.nz or by phone: 09 951 9272.

Yours sincerely

Margie McCrone
Regulatory Advisor

12 June 2018

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Independent 5 year review of UDL- Scheme Document Consultation Round 2

MainPower New Zealand Limited welcomes the opportunity to comment on the Independent 5 year Review of Utilities Disputes Limited Recommendations from the Review and Other Proposed Changes – Consultation Paper for Round 2 (the Consultation Paper).

MainPower has only submitted on question 4, the land complaints exclusion. In respect of all other matters covered in the Consultation Paper, MainPower supports the Board's position. MainPower's response to question 4 is set out in the attached table. We also note and support the Electricity Networks Association's submission on the Consultation Paper.

We do not consider that any part of this submission is confidential. If you have any questions or wish to discuss any aspect of this submission please contact Sarah Barnes (Regulatory Manager) telephone 03 311 8553; email sarah.barnes@mainpower.co.nz.

Yours sincerely

Sarah Barnes
Regulatory Manager

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Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	There is no evidence in the consultation paper either way to suggest that the land exclusions are causing difficulties for UDL or landowners. This is both in terms of difficulties for UDL in having the scheme approved by the Minister or landowners having problems with utilities providers and lacking a forum to pursue those issues. The review of the scheme by Queen Margaret University specifically stated that it was not considering the legal impact of removing the exclusion. If the Board is concerned that the retention of the exclusion impacts the approval of the scheme by the Minister then it should seek legal advice. Likewise it is difficult to assess whether there is a significant problem to be resolved in regard to landowners having access to a forum to resolve disputes with utilities providers. Until this is known the exclusions should remain. If there is a significant unresolved issue for landowners in addressing land disputes there needs to be a complete review of how to deal with land disputes with utilities providers including detailed consideration of the Public Works Act and the Resource Management Act. Our view at this stage is that Utility Disputes, as a body with expertise in alternative dispute resolution, may not be the most appropriate forum to deal with these issues as they are usually mixed questions of fact and law. Moreover we have concerns about claims being raised which have little or no merit, resulting in decisions that impact an EDB's business with no right of appeal. Finally, the analysis from Utilities Disputes suggests that some of the other scheme rules operate to exclude UDL from considering some potential land disputes, therefore is likely that removal of the land exclusions may fail to achieve the desired outcome anyway. When all these factors are considered cumulatively MainPower is of the view that the exemptions should remain unless there is evidence of a problem. As a much less preferred option the safeguards proposed in the review should be retained.

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meridian

15 June 2018

James Blake-Palmer
Manager – Stakeholder Engagement
Utilities Disputes
Wellington

By email: submissions@utilitiesdisputes.co.nz; j.blake-palmer@utilitiesdisputes.co.nz

Dear James

28 May 2018 consultation: Round two consultation on recommendations from the independent 5-year review of Utilities Disputes Limited and other Board proposed changes

Thank you for the opportunity to provide comments. This submission is made on behalf of Meridian and Powershop. As requested we have set out our responses in the Utilities Disputes' preferred form which we have reproduced as an appendix to this letter.

Please contact me if you have any questions.

Yours sincerely

Jason Woolley
Regulatory Affairs Manager
Meridian Energy Limited

Appendix 1 – Questions for submitters

Principle/Area of document	#	Question	Submitter's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	Yes. Meridian considers that Utilities Disputes should name providers in case notes. This was clearly recommended by the Review. We also believe that this can be useful information to people reading case notes and don't understand the unsupported assertions to the contrary. Further there is a clear and well understood process to the handling by Utilities Disputes of cases and the generation of case notes based on those cases. Providers are able to significantly influence, by their conduct in handling a case, what a case note ultimately says about them. To that extent the naming of providers in case notes is entirely fair. In contrast to its approach re cases it seems the Board does propose to name providers who breach Scheme rules. If we have understood the Round Two consultation paper correctly the Board has dropped the proposal to name providers who breach Scheme guidelines. This makes sense to us as, as far as we aware, there are no such guidelines in existence. In relation to Scheme rules Meridian still objects to the naming of providers. This was not something recommended by the Review and is not something explained in either the first round or second round consultation papers. For example, no indication is given by the Board of what Scheme rules the Board considers some providers to currently be in breach of or, more importantly, of what process would be followed in terms of giving providers the opportunity to comment on or contest alleged breaches of Scheme rules before the Board names them. Instead the Round Two consultation paper contains the slightly mysterious and still unexplained 'The Board considers providers who breach scheme rules should be named and it can already name providers that breach the scheme rules.' Has the Board alerted the relevant providers that it considers them to be in breach of the scheme rules? As we said in our submission on the first round consultation paper Meridian is concerned about the lack of any clear process here. Meridian considers the appropriate course in relation to providers in breach of Scheme rules is for the Commissioner to seek an order from the District Court requiring the relevant provider to comply. That is the prescribed process in the Act and would be fair to the providers involved.

Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	No.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	No.
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	Meridian has nothing to add.
		Exclusion 1.1	
		Exclusion 1.2	
		Exclusion 1.3	
		Exclusion 1.4	

		Exclusion 1.5	
		Exclusion 1.6	
		Exclusion 1.7	
		Exclusion 1.8	
		Exclusion 1.9	
		Exclusion 1.10	
		Exclusion 1.11	
		Exclusion 2.1	
		Exclusion 2.1	
Mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay	5	Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	We still don't understand why the deeming mechanism is necessary (there is a generous time limit on making complaints to the Scheme which would allow UDL to compel a new provider to join the Scheme (under threat of prosecution for breach of the statutory requirement to join the Scheme) and for the complainant to then submit their complaint). It is also not clear how UDL would enforce the deeming mechanism against providers who steadfastly refuse to join the Scheme and what would prevent other providers having to meet UDL's costs in these circumstances. Meridian would prefer to see UDL use the mechanism in the Act against providers who are unwilling to join.

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15 June 2018

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By email: submissions@utilitiesdisputes.co.nz

Powerco submission on the independent 5-year review of Utilities Disputes Limited - Recommendations from the review and other Board proposed changes - Round Two Consultation Paper

Powerco welcomes the opportunity to comment on the Utilities Disputes Ltd (UDL) round two consultation paper on its proposed changes to the Energy Complaints Scheme documents arising from the independent 5 year review.

Powerco supports the Electricity Networks Association (ENA) submission to the UDL.

Powerco supports the review of the Energy Complaints Scheme as it ensures that it remains 'fit-for-purpose' and achieves its intended objectives. While many of the proposed amendments advance the scheme we remain particularly concerned about the recommendation to remove land compliant exclusions from the scheme documents. Our key concerns regard road or level crossings, land agreements and injurious affect.

Appendix 1 includes our responses to the UDL's round two consultation questions. These responses are limited to land compliant exclusions and expand on the feedback we provided in round one. Please refer to our round one submission for comments on other recommendations.

If you wish to discuss our submission, please contact Nathan Hill (Nathan.Hill@powerco.co.nz).

Yours sincerely

Stuart Marshall

General Manager Regulation and Commercial

Appendix 1 – Questions for submitters and preferred form for responses

Principle/Area of document	#	Question	Submitter's response
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	We strongly disagree with the recommendation to remove the land complaint exclusions. Retaining these exclusions has not impacted on the approval of the Scheme, given that the exclusions are in the current Scheme document and the Scheme is currently approved. We are also not aware of any directive the Board has received from the Minster regarding removal of the land complaint exclusions. It is not inconsistent with the purpose of the dispute resolution scheme as contained in clause 1 of schedule 4 of the Electricity Industry Act and therefore is not unlawful.
		Exclusion 1.4	We do not believe that it is consistent with the spirit of the Scheme to attempt to deal with matters between local authorities and lines companies around network assets in the road. Any attempt to do so would also seem to either duplicate or compete with the dispute resolution provisions in the National Code of Practice for Utility Operators' Access to Transport Corridors; which does not seem to be an efficient use of Utilities Disputes' time and resources. The proposed safeguard, namely the Commissioner's discretion to decline to consider or consider further a complaint if there is a more appropriate forum, and a requirement that the Commissioner refer a complaint to that forum when satisfied does not alleviate our concerns. We submit that the National Code of Practice (and the dispute resolution procedures contained therein) is the most appropriate forum and this should be expressly acknowledge by the Scheme. Relevant complaints therefore should not be subject to an assessment of appropriateness as such would open the door for 'forum shopping' and the creation of conflict between the schemes.

		Exclusion 1.5	While we can understand Utilities Disputes having a role to play in "customer service" type complaints, we would not like to see this impacting on members' freedom to negotiate contract terms with landowners. By their nature, any negotiations for easement rights involve landowners having legal (and often valuation) advice – there is no need to duplicate that role. In fact in these situations the landowner is in a better position as they can choose to walk away from the negotiation at any stage. Given the Board's assertion that there are very few land complaints, it would seem the cost of Utilities Disputes resourcing to deal with such complex disputes when alternative forums already deal with such disputes negates any efficiency argument. As the Board will be aware, new costs imposed on lines companies will ultimately be borne by consumers. Further, the proposed safeguard does not alleviate our concerns as it is essentially an extension of rule 18. While UDL can decide that there may be a more appropriate forum they do not prevent UDL nonetheless from hearing a complaint albeit only initially. We do not consider that UDL is the appropriate body to be determining whether something is more appropriately dealt with in another forum as agreements in this situation are governed by contract. Easement agreements will either contain dispute resolution provisions in the instrument itself, or alternatively the default dispute resolution provisions in schedule 4 of the Land Transfer Regulations apply where an instrument is silent. The Land Valuation Tribunal and Environment Court have also been specifically identified as the appropriate forums for Public Works and Resource Management issues, as acknowledged by the Board. We do not agree that the exclusion prevents customer service complaints by landowners who have agreements in place. This is because the exclusion must relate to the land interest arrangements. Landowners who are also consumers will still have the same rights under the scheme as any other consumer. To enable landowners in these situations to access the Scheme interferes with contractual

			rights and may in fact not be available due to contractual dispute resolution mechanisms. We also consider that removing the exclusion goes beyond the scope of the UDL's purpose, which is concerned with complaints about providers in their provision of services and goods. To extend this to complaints about their negotiated arrangements for infrastructure more broadly oversteps the role of the Scheme as originally envisioned when the EGCC scheme was expanded. The driving force for the changes to the EGCC was a Government Policy Statement issued in 2004 which stated that: everyone…have access to a free, independent system for resolving complaints about electricity distribution…and electricity retailers…" (refer page 61). We do not consider that any of the exclusions impact the Commissioner's ability to decide whether a complaint falls within its jurisdiction as an exclusion is effectively stating that such a complaint is outside of its jurisdiction. The ability to determine whether a complaint falls within the Scheme's jurisdiction should not be interpreted so widely as to mean the Commissioner's ability to determine generally whether something falls within its jurisdiction means it has the final say on all disputes. If this were so, the exception in GR14 would be redundant, which makes clear that there are complaints that fall outside of UDL's jurisdiction. We do not consider the exclusions to be unlawful and do not agree with the Independent Review's interpretation of clause (1)(a) of Schedule 4 of the Electricity Industry Act 2010. The purpose of the dispute resolution scheme is to ensure that any person has access to a scheme. This purpose is not referring to the approved or regulated scheme set up by the Act. It is simply stating that individuals must have access to a scheme for resolving disputes. Therefore the Independent Review's argument that the presence of an alternative scheme does not negate a right to access the dispute resolution scheme is misconstrued and the exclusion does not prevent the Scheme from achieving approval. The mandatory considerations referred to by the Independent Review have also been misconstrued.

			The Act states that the Minister, in considering whether to grant approval to a scheme, must have regard to "whether the scheme is capable of meeting the purpose of the dispute resolution scheme as set out in clause 1". Have regard to does not mean that if there are some exclusions then the scheme cannot be approved, as it is one consideration among many. Further, the consideration "whether the scheme is capable of dealing with a wide range of complaints by persons entitled to make a complaint" envisions that there will be some complaints that fall outside of the Scheme. In this situation, the presence of exclusions does not defeat the purpose of the Scheme because those who may not access the Scheme in relation to the exclusions have access to other mechanisms for resolving disputes.
		Exclusion 1.8	We reiterate our previous comments that the Electricity Act already provides a mechanism for assessment of injurious affect and a dispute mechanism. We believe the removal of this exclusion will be very detrimental to lines companies and is not mitigated by being limited to injurious affect claims of less than $50,000, as this amount bears little relation to the cost impact on the lines company. An injurious affect ruling of any value could invalidate the lines company's replacement or upgrade, causing the lines company to lose its existing works protection and having to relocate the entire portion of line (if that was even possible) and jeopardising our ability to supply end consumers reliant on that line. Such decisions are incredibly complex (as developing case law has demonstrated) and can have wide reaching impacts on other similar activities; for this reason they should be reserved for the Land Valuation Tribunal and Environment Court, as specifically contemplated by the legislation. The Commissioner's discretion under rule 18 does not mitigate our concerns as we do not consider any complaint that requires an assessment of "injuriously affected" is appropriate for the Scheme and therefore such a decision concerning the appropriateness of a complaint should not be subject to UDL's discretion. Injuriously affected has been the subject of extensive litigation and the Courts continue to grapple with

			its interpretation. For this reason these decisions should be reserved for the existing judicial forums. For this reason, the proposed safeguard does not alleviate our concerns as we do not consider that UDL is the appropriate body to be determining whether something is more appropriately dealt with in another forum. As the Independent Review pointed out (refer page 26), alternative dispute resolution schemes "are not well placed to settle legal controversies as they are not legal bodies and it is not the place of alternative dispute resolution schemes to make legal precedents. Legal precedents are properly made by courts." These disputes can be highly technical (in terms of engineering, legal and valuation matters) and are likely to be beyond the current resources and expertise of the Scheme. Given the Board's assertion that there are very few land complaints, it would seem the cost of Utilities Disputes resourcing to deal with such complex disputes when alternative forums already deal with such disputes negates any efficiency argument. As the Board will be aware, new costs imposed on lines companies will ultimately be borne by consumers. We do not consider that any of the exclusions impact the Commissioner's ability to decide whether a complaint falls within its jurisdiction as an exclusion is effectively stating that such a complaint is outside of its jurisdiction. The ability to determine whether a complaint falls within the Scheme's jurisdiction should not be interpreted so widely as to mean the Commissioner's ability to determine generally whether something falls within its jurisdiction means it has the final say on all disputes. If this were so, the exception in GR14 would be redundant, which makes clear that there are complaints that fall outside of UDL's jurisdiction.

		Exclusion 1.9	We reiterate all our points above in relation to exclusion 1.8 but add the following point in relation to determinations of compensation payable. We do not consider the UDL an appropriate body to determine compensation. Section 57 of the Electricity Act enables a landowner to obtain compensation in certain circumstances if Powerco causes injurious affects to the underlying land. Determinations as to compensation are equally complex to determinations of injurious affection and are also dependent on such determinations. Therefore such complex questions are better left for the courts to determine and should not be subject to the discretion of UDL.

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14 July 2016

Heather Roy
Chair
Electricity and Gas Complaints Commissioner Scheme

Via email: chair@egcomplaints.co.nz

Dear Heather

Lines company jurisdiction exclusions

Thank you for your letter of 6 July responding to Alison Andrew's of 14 June. Alison is on leave and I am replying on her behalf as Acting Chief Executive.

We were very disappointed to learn that the EGCC Board resolved at its 27 June meeting to remove the lines company jurisdiction exclusions from the rules. However, we are pleased that further stakeholder feedback about that decision is being sought, and we take from that that the Board remains open to changing its view.

The attachment to this letter contains our responses to the EGCC Board's justifications for removing the exclusions. In summary, the Board's justifications are not convincing, and in some cases suggest the Board may have received incorrect advice about the scope and effect of the exclusions. We were, however, pleased that it is now accepted that the existing exclusions are not contrary to the Electricity Industry Act.

Your letter states that we have misinterpreted the 2011 Baljurda Consulting report. With respect, there is no misinterpretation. The passage from the report quoted in your letter was addressing a submission Transpower made at the time that an *additional* exclusion for environmental complaints be added to the rules. Although Baljurda Consulting disagreed with that, it certainly did not recommend that any of the exclusions already in the rules should be removed. In fact, as emphasised in your letter, Baljurda Consulting described the Scheme as "accessible" even with all of those exclusions in place.

Neither Baljurda Consulting nor any other independent reviewer of the Scheme we are aware of has ever recommended the removal of the exclusions that the Board has now resolved to remove.

We noted with interest, in the justifications appendix to your letter, reference to a further independent review of the Scheme scheduled for later in 2016. In our view the appropriateness of the exclusions is something that should be considered as part of that review. The exclusions should not be taken out of the rules now, as an adjunct to a process that has as its main focus the reconstitution of the Scheme so that it can accommodate disputes about access to shared properties for ultra-fast broadband connections. It is, in our view, premature to be making substantive changes to the rules beyond what is necessary to achieve that, particularly with the next independent review imminent.

As has been said in our previous correspondence, we consider the exclusions to be fundamental to the efficient operation of our business. We urge you and the other Board members to reconsider your decision to remove them.

Yours sincerely

John Clarke
Acting Chief Executive Officer

CC: Vena Crawley
Paul Goodeve
Linda Cooper
Nicky Darlow
Hon Simon Bridges, Minister of Energy and Resources
Hon Paul Goldsmith, Minister of Commerce and Consumer Affairs

EGCC Board justification	Transpower response
General justifications	
Prior Ministerial approval does not negate future changes	We have never suggested the Scheme rules cannot or should not be reviewed merely because they have previously been approved by the Minister. The point we made about Ministerial approval was directed at the (now abandoned) allegation that the exclusions are contrary to the Electricity Industry Act.
Historical reasons for exclusions to remain are not justified	This justification does not touch on the substantive reasons for the exclusions, which have not changed since the exclusions first came into the Scheme rules and are set out in Alison Andrew's letter to the Board of 14 June. In particular, neither of the following is relevant to the substantive reasons for the exclusions: • The constitution of the Scheme at the time the exclusions were added and who was and was not a member of the Scheme. • The presence or otherwise of the Land Code or Consumer Codes in the rules, and whether anything replaced them when they came out of the rules. The suggestion that the Electricity Commission originally approved the exclusions by accident because it was "focused on the higher level" is unsubstantiated. In any event, the exclusions were re-approved by the Minister in 2010.
There is a discretion to refer complaints to a more appropriate forum	The Commissioner's discretion is not a sufficient substitute for the automatic exclusion of complaints that are not appropriate for the Commissioner to consider. If discretionary exclusions were sufficient then, in the interests of "accessibility", the Scheme rules would contain no automatic exclusions at all. It is significant that even if the Commissioner decides there is a more appropriate forum for a complaint the Commissioner may still choose to consider the complaint. We have experience

	with the Commissioner choosing to accept jurisdiction over an environmental noise complaint that was clearly more appropriate for the local council to consider (and that the local council was considering). The rules should not be designed in a way that encourages the taking of test cases or judicial review against the Commissioner. In any event: • The rules give the Commissioner the discretion to refuse to allow a complaint to be progressed as a test case if the Commissioner does not agree with the Provider's reason for doing so. If the reason is that there is a more appropriate forum for the complaint and the Commissioner has already decided there is not, or has decided to consider the complaint regardless, then presumably the Commissioner would refuse to allow the test case to proceed. • It is not certain that the Commissioner's decisions are able to be judicially reviewed, given that the Scheme is an industry-led initiative.
Impact on member activities likely to be marginal	The Scheme rules do not say that the Commissioner does not have an injunctive function. The Commissioner has made injunctive determinations in the past, such as ordering a retailer to remove an advanced meter (Scheme Annual Report 2015/16, page 18). As it stands the Commissioner may make any recommendation or determination she wishes, subject only to the financial limit. A complainant can avoid the financial limit by couching its claim for relief in declaratory or otherwise unvalued terms. For example, a complainant could seek a determination: • that land is injuriously affected by a Transpower project, but not a determination of the extent of the injurious affect; or • that a Transpower project is not authorised under the Electricity Act and must be stopped.

	The historical data about the number of land complaints received by members and considered by the Commissioner are irrelevant because the exclusions are currently in place. The types of land complaint at issue are simply not captured by the historical data, and that data is no indication of the volume of land complaints likely to come to the Commissioner if the exclusions are removed. In any event, even a small number of land complaints could have a highly significant impact on our operations depending on their subject matter and the Commissioner's decisions about them.
Clause-by-clause justifications	
B.9.8(a) (lawful establishment under section 22 Electricity Act)	The limitation period in the Scheme rules will not necessarily exclude these complaints. A complainant challenging lawful establishment will be alleging an ongoing trespass that has been committed every day since the relevant line was built, including every day in the immediately preceding six years. The alleged trespass over that period will be within the limitation period, and for the Commissioner to adjudicate on the complaint she may need to consider the circumstances under which the line was originally built.
B.9.8(b) (lawful establishment other than under section 22 Electricity Act)	This exclusion is misquoted in the justifications document. The exclusion applies to lines to which section 22 *does not* apply. This exclusion should be retained because land complaints did not become subject to the Commissioner's jurisdiction until October 2006. For the reason set out above, it is not the case that the limitation period will exclude complaints of this kind.
B.9.8(c) (ownership of lines)	We have not submitted that this exclusion should be retained. We are content for it to be removed.
B.9.8(d) (local authority disputes involving roads and level crossings)	We have not submitted that this exclusion should be retained. We are content for it to be removed.

B.9.8(e) (negotiation and other acquisition of property rights)	We agree that the Environment Court is the appropriate forum for disputes arising under the Resource Management Act and Public Works Act. However, for the reasons set out above, it is not appropriate to leave the exclusion of such complaints to the Commissioner's discretion. This exclusion also relates to negotiations for obtaining interests in land. It would be inappropriate for the Commissioner to intervene in negotiations between lines companies and land owners, for example by forcing the lines company to accept an easement term it is unwilling to accept. The Commissioner's role should be limited to ensuring lines companies comply with their contractual obligations after they are agreed.
B.9.8(f) (dispensations under Tree Trimming Regulations)	We have not submitted that this exclusion should be retained. We are content for it to be removed.
B.9.8(g) (adequacy of lines company maintenance programmes)	Decisions about lines maintenance are operational in nature and involve the prioritisation of scarce resources across the lines company's entire network. Overall system security is often a consideration. It is therefore inappropriate for individual land owners to be able to call maintenance decisions into question or for the Commissioner to be able to impose maintenance requirements on lines companies. To the extent a maintenance decision is alleged to have created a safety issue then Worksafe is the most appropriate body to consider that. For the reasons set out above, it is not appropriate to leave the exclusion of such complaints to the Commissioner's discretion. This exclusion will not need to be reinstated following the upcoming independent review of the Scheme if it is not removed in the first place. If the Board believes there is "some justification" for retaining the exclusion then we suggest that is what the Board should do, and only remove it later if a clear reason for doing so comes out of the review.
B.9.8(h) (injurious affect in section 23(3)(b) Electricity Act)	This exclusion is misconstrued in the justifications document. The significance of injurious affect in section 23(3)(b) of the Electricity Act is different to its significance in section 57(1). In section 23(3)(b) the existence or otherwise of injurious affect is a gateway question for a lines company's right to upgrade a line without purchasing an easement or other property right from

	the land owner. Section 57(1), on the other hand, is about compensation if it is shown that injurious affect has been caused by anything the lines company has done under Part 3 of the Electricity Act. Section 23F of the Electricity Act says that disputes about injurious affect in the context of section 23(3)(b) may be referred to the Environment Court. That is clearly the most appropriate forum for such disputes, particularly given that injurious affect is a gateway question under section 23(3)(b). For the reasons set out above, it is not appropriate to leave the exclusion of these complaints to the Commissioner's discretion. If the Commissioner determines that a lines company upgrade project will cause injurious affect then the effect of that will be to enjoin the project on the land in question until such time as the land owner consents to the project. The land owner's consent need not be linked to the amount of injurious affect the Commissioner determines will be caused (assuming the Commissioner is even called upon to determine that). In our experience it is more common than not for land owners to have highly inflated expectations about the amount of compensation they should be paid. For purely pragmatic reasons (i.e. to avoid project delays and consequential costs), Transpower is sometimes required to purchase property rights from land owners at prices that are disproportionate to the amount of injurious affect to the land.
B.9.8(i) (injurious affect in section 57(1) Electricity Act)	As explained above, this exclusion relates to a different part of the Electricity Act than the exclusion in clause B.9.8(i) (namely, section 57(1)). It is not the case that the exclusions overlap. Although disputes about injurious affect in clause 57(1) are not gateway issues for Transpower's powers under the Electricity Act, they are nonetheless technical valuation issues that should be considered in a forum where the law and rules of evidence are required to be observed, cross-examination of witnesses is available, and there are rights of appeal. The Land Valuation Tribunal has those attributes and is clearly the most appropriate forum. For the reasons set out above, it is not appropriate to leave the exclusion of these complaints to the Commissioner's discretion.

B.9.8(j) (interruptions to and quality of supplied electricity) B.9.9(a) (electricity supply complaints against Transpower)	These clauses relate to the same subject matter, namely the exclusion of complaints about electricity supply by consumers directly against Transpower (including in the guise of land complaints). The Board's justification for removing this exclusion does not make sense. The justification draws no distinction between Transpower (a transmission provider) and local distributors, and on that basis concludes it would be "unfair" for Transpower to have the benefit of the exclusion when distributors do not. There are in fact fundamental differences between Transpower and distributors: Transpower does not provide services to consumers, other than a handful of very large industrial consumers such as the aluminium smelter in Bluff. Transpower's lines do not reach people's houses or the vast majority of businesses. Distributors, on the other hand, have a direct supplier-customer relationship with consumers and a direct physical connection with them. Unlike distributors, Transpower does not have contracts, or any other interaction as a supplier, with the vast majority of consumers. Transpower cannot therefore negotiate limitations or exclusions of liability with consumers that might otherwise be available (for example, with business consumers). Transpower does not have the systems or personnel necessary to deal with large volumes of consumer complaints. Distributors do. Also, as noted in Alison Andrew's 14 June letter, giving consumers direct recourse against Transpower through the Scheme is inconsistent with the regime in the Consumer Guarantees Act, under which consumers' recourse is only against their electricity retailers. That was a clear (and correct) policy decision by the Government when it reviewed the Act in 2013.
B.9.10 (land complaints against retailers)	We have not submitted that this exclusion should be retained. We are content for it to be removed.

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14 June 2016

Heather Roy, Vena Crawley, Paul Goodeve, Linda Cooper, Nicky Darlow
Electricity and Gas Complaints Commissioner Scheme

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Dear EGCC Scheme Board members

Lines company jurisdiction exclusions

As the Board will be aware, there is currently a proposal to remove from the rules governing the Scheme the long-standing jurisdictional exclusions relating to land complaints and to "retail" complaints against transmission operators. These exclusions are currently in clauses B.9.8 and B.9.9 of the Scheme Document.

We understand Scheme staff intend to discuss the exclusions with the Minister of Energy and Resources, Hon Simon Bridges, and the Minister of Commerce and Consumer Affairs, Hon Paul Goldsmith, prior to the Board voting on the changes to the Scheme in late June.

Transpower is strongly opposed to the removal of the exclusions due to the significant adverse effects this will have on our operations, the increased costs that will be borne by electricity and gas consumers, and the unintended consequences of changing a settled and well understood regime for consumer complaints. Accordingly, we encourage you to retain the existing jurisdictional exclusions.

The Government has already considered the extent of the Scheme and has approved the reasonable jurisdictional exclusions that Transpower is seeking to retain. Nothing has occurred since the Scheme was approved, and no evidence has been produced through the recent consultation processes, that suggests the existing exclusions are faulty in any respect or warrants their eradication from the Scheme.

Land complaints

We oppose the removal of the exclusions for land complaints relating to lawful establishment, injurious affect, negotiation or acquisition of property rights, and adequacy of maintenance programmes for the following reasons:

- The outcome of these complaints can have extremely significant implications for lines companies' operations across their entire network, the consequential costs of which could far exceed the value of an individual complaint. For example, a decision that a project injuriously affected a landowner's property could lead to a requirement for the lines company to buy expensive easements over the properties of all landowners in a similar position. These costs would ultimately be borne by electricity and gas consumers.

Given the potential consequences, these disputes should be considered in the courts, with full application of the law and the rules of evidence, cross-examination of witnesses and rights of appeal. None of those important safeguards exist under the Scheme.

- Opening up the Scheme to disputes of this nature creates an incentive for landowners to bring meritless or speculative complaints to the Commissioner in an attempt to hold up time-sensitive projects and induce lines companies to offer commercial settlements. There are no practical barriers to landowners doing this as the Scheme is free for complainants. Again, the additional costs would ultimately be borne by electricity and gas consumers.

- Importantly, there are other more appropriate and tested forums for disputes of this nature, in particular the Environment Court (which is stipulated in the Electricity Act and Public Works Act as the place for access and property right acquisition disputes) and the Land Valuation Tribunal. We do not think it is appropriate to leave the exclusion of these disputes to the Commissioner's discretion, as is proposed. Furthermore, there is nothing in the Scheme rules to say the Commissioner cannot consider a complaint even if she agrees there is a more appropriate forum.

Retail complaints

We oppose the removal of the exclusion for retail complaints against transmission operators for the following reasons:

- Transmission operators have no supplier-customer relationship with electricity or gas consumers (other than a few very large ones who are directly connected to the transmission network) and accordingly have no ability to manage their potential liabilities to them. Transmission operators do not have the systems or personnel to deal with large volumes of consumer complaints.

- Consumers already have remedies against their electricity and gas suppliers (retailers) under the Consumer Guarantees Act (CGA) through the guarantee of acceptable quality. Exposing transmission operators to consumer complaints would be inconsistent with the regime in the CGA whereby any liability passed to a transmission operator happens through the retailer indemnity, and not directly between the operator and the consumer. Disputes between retailers and transmission operators about the indemnity are already covered by the Scheme.

We are aware that some officials have suggested that the land and retail complaint exclusions are inconsistent with the Scheme requirements in the Electricity Industry Act, and in particular the requirement in section 95 and Schedule 4 that "any person" be able to make a complaint to the Scheme.

Transpower does not agree:

- "Any person" can make a complaint to the Scheme, but a person cannot make any type of complaint.

- Clause 5(1)(c) of Schedule 4 requires the Scheme to be able to deal with a "wide range" of complaints, not all complaints. Clause 13(1)(c) contemplates restrictions in the rules on "the kinds of complaints that the scheme will deal with".

- The Scheme already has Ministerial approval with the exclusions in place.

- The Scheme contains a number of other jurisdictional exclusions (including the financial limit of $50,000 and the "deadlock" requirement) that are not mentioned anywhere in the Act and which are not the subject of removal proposals.

The Scheme was always intended to have reasonable jurisdictional exclusions. Parliament confirmed this when the Electricity Industry Bill was reported from the committee of the whole House and the following significant change was made to clause 12 of Schedule 4 (now clause 13):[1]

12 Rules of approved scheme

(1) The rules of the approved scheme must provide for, or set out, the following:
…
~~(c) the kinds of complaints that the scheme will deal with, which must include—~~

~~(i) breaches of contract; and~~
~~(ii) breaches of statutory obligation; and~~
~~(iii) in the case of a complaint relating to electricity, breaches of the Act, the regulations, the Code, or the Electricity Act 1992; and~~
~~(iv) in the case of a complaint relating to gas, the Gas Act 1992 and regulations and rules made under that Act; and~~
~~(v) breaches of industry codes; and~~
~~(vi) breaches of the dispute resolution scheme's rules:~~

(c) the kinds of complaints that the scheme will deal with:
…

In our view, the deletion of the directive language as to the kinds of complaints the Scheme must cover and its replacement with generic language indicates Parliament's clear intention that reasonable jurisdictional exclusions, including for certain complaints about breaches of electricity and gas legislation, should be allowed.

Finally, we note that removal of the exclusions was not recommended in the independent review of the Scheme in 2011 by Baljurda Consulting. Baljurda Consulting was asked to consider the specific question "are the exclusions from jurisdiction still appropriate?" Evidently Baljurda Consulting thought they were, and under the same legislation that applies today.

We cannot over-emphasise how important these exclusions are to Transpower. We consider them to be fundamental to the efficient operation of our business, which directly benefits New Zealand electricity (and gas) consumers as a whole. We urge you not to vote to remove them.

Yours faithfully

Alison Andrew
Chief Executive Officer

CC Nanette Moreau, Electricity and Gas Complaints Commissioner
Hon Simon Bridges, Minister of Energy and Resources
Hon Paul Goldsmith, Minister of Commerce and Consumer Affairs

[1] Change made by Supplementary Order Paper 154, 7 September 2010.

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14 March 2016

Hon Heather Roy
Independent Chair
Electricity and Gas Complaints Commission
Wellington

By email: submissions@egcomplaints.co.nz

Dear Ms Roy

Establishment of Utilities Complaints Limited

This is Transpower New Zealand Limited's response to the EGCC Board's consultation on the above matter.

Transpower's detailed responses are enclosed with this letter in the tabular form in which the EGCC Board asked for them. In this letter and the tables:

- **UCS** means the proposed umbrella Utilities Complaints Service;
- **DRS** means a particular utilities dispute resolution scheme that comes under the UCS from time to time, including the ECS; and
- **ECS** means the proposed Energy Complaints Scheme.

The key points from Transpower's responses are:

1. The consultation paper does not present a compelling case for moving to a company structure. If that does happen then the EGCC Board needs to ensure that the additional costs of running the UCS are minimised.

2. In the company structure proposed the UCS Board will have too much power and not enough Provider representation. Representation on the UCS Board should be the same as on the EGCC Board, at least until other (non-energy) utilities come under the UCS umbrella, if they ever do.

3. If other utilities do come in then the utility-specific costs and liabilities under the UCS should be met only by the Providers who are members of the relevant DRS.

4. The jurisdictional exclusions for Transpower and land complaints under the EGCC Scheme are important and there for good reasons. They have been approved by the Minister in accordance with the Electricity Industry Act. They are certainly not illegal or arbitrary, as the consultation paper describes them. They should be retained.

Transpower considers that the timeline for this process is too short, especially given the notable omissions from the consultation paper around costs and the reasons for removing the jurisdictional exclusions. Transpower sent an email about that to James Blake-Palmer on 8 March calling for another round of consultation on the proposed changes. That submission is repeated.

Please do not hesitate to contact me if you would like to discuss anything in this response.

Yours faithfully

Chris Browne
Deputy General Counsel

Enc. Response tables

Questions for submitters	Yes/No	Comments
1. Do you agree with the Board's proposal that establishes a Company to operate the existing EGCC scheme?	No opinion, and see comment	The consultation paper does not present a compelling case for moving the EGCC Scheme to a company structure: • The fact that the company structure is more common overseas is not a good reason for change. • To the extent company governance is "readily understood by the general public" (which we doubt) that is irrelevant because the general public does not need to understand the governance of the UCS – only the Providers do. • We do not think it is necessary for a dispute resolution scheme to have shareholders for liability to "ultimately come back to". In any event, that is not the case for a limited liability company because shareholders are exposed only to the extent of their investments in the company. Furthermore, the shareholder in the company structure proposed is nominal and will not make any investment. The company structure is likely to bring with it additional costs and the EGCC Board should make sure those additional costs are minimised, particularly as there are no clear off-setting benefits. For example, we do not agree that the UCS Board should comprise professional independent directors, who will expect to be paid at market rates, in the expectation that other (non-energy) utilities will eventually come under the UCS umbrella. If other utilities do come in then at that point the make-up of the UCS Board can be looked at again. It is premature to make the change now.

2. Do you agree with the Board's proposal that the scheme be able to cover complaint handling for energy and other related services?	Qualified yes, and see comment	The UCS should continue to cover electricity and gas Complaints, subject to reasonable jurisdictional exclusions. We are unsure exactly what is meant by "energy and other related services".
3. Do you agree with the Board's proposal that the scheme be able to cover complaint handling for other utilities?	No opinion, and see comment	If other utilities are brought under the UCS umbrella the funding arrangements should be such that there is no cross-subsidising between the different DRSs. The Providers subject to a DRS should be fully responsible for funding the specific costs of the DRS, and should fund an equitable part of the common UCS costs only. The definition of "Utilities Sector" in clause 1.1 of the Constitution is too wide. "Necessary" goods and services include, for example, food and shelter, Complaints about which are presumably not intended to come within the UCS. See comment on question 1 also.
4. Do you agree with the Board's proposal that establishes an independent professional board?	No	As commented on question 1, an independent professional UCS Board will add cost to the UCS and should not be put in place until other utilities are brought under UCS' umbrella (and perhaps not even then). Unless and until other utilities come in the UCS Board structure should be the same as the EGCC Board structure, namely: • two directors representing consumers, appointed by the Minister; • two directors representing retailers and lines companies, nominated and elected by Providers; and

		• an independent Chair, appointed by the Board after consultation with the Minister. This will keep appropriate Provider and consumer representation on the UCS Board, which is important because the UCS Board (like the EGCC Board) will have significant functions and powers affecting Providers and consumers.
5. Do you agree with the Board's proposal that establishes a standing committee (Advisory Committee) to provide the board with industry and consumer advice and guidance?	Yes, and see comment	Each Advisory Committee should be required to have an equal number of consumer and Provider members, and the Provider members should be required to be fairly representative of the membership of the DRS(s) the Advisory Board relates to. The UCS Board's appointment of an Advisory Committee for each DRS should be made mandatory in the Constitution. At the moment it is merely something the UCS Board "may" do (clause 8.18 of the Constitution). The current Member Committee should be carried over as the first Advisory Committee for the ECS until replaced by the UCS Board.
6. If the name of the organisation were to change, what suggestions do you have?	No opinion	
7. Do you have any other comments you would like the Board to consider about the proposed changes?	Yes	In the next table we make several comments on specific parts of the documentation in response to the EGCC Board's additional questions. **General drafting** The standard of drafting in the documents is low. A thorough proof read and sense check is required. By way of example only:

		• "UCS" is used in the Constitution but not defined. It appears to be a different concept/entity than the company itself. • Clause 12.1 and clauses 12.2.1 and 12.2.2 of the Constitution cover part of the same ground. • In Part D of the General Rules, the rules flip flop between the Commissioner and "UCS" in terms of who is making decisions about dealing with Complaints. • Clause 27(a) of the General Rules conflates two separate exclusions. • Clause 33 of the General Rules (relating to Determinations) is out of place in the Recommendations section, and probably redundant anyway. • The ECS Rules refer to land complaints in rule 8 (replicating rule 13(b) of the General Rules) but not consumer complaints (rule 13(a) of the General Rules). That implies that consumer complaints are not covered by the ECS, which must be wrong. The drafting of the ECS Rules is particularly bad. More thought needs to be given to what the ECS Rules need to say, and do not need to say, given what is said in the other documents. The ECS Rules do not even state that the ECS is only for Providers of electricity and gas services, or what type of electricity and gas services are covered. **Constitution approval** As the Constitution is an integral part of the overall ECS rules, the initial Constitution as well as the General Rules and ECS Rules should be subject to Ministerial approval. We understand from the workshop on 7 March that the EGCC Board agrees with that. **Jurisdiction** • The unsubstantiated assertion in the consultation paper that the current Transpower and land complaint jurisdictional exclusions in the EGCC Scheme

		Document are contrary to the Electricity Industry Act is clearly wrong. If that were the case then the Minister would not have approved the EGCC Scheme and Scheme Document in the first place. The Electricity Industry Act states that the rules of the dispute resolution scheme "must provide for…the kinds of complaints that the scheme will deal with" (clause 13(1)(c) of Schedule 4). The Minister approves of what the EGCC Scheme Document currently says about that.
		
		The corollary of the assertion in the consultation paper is that the dispute resolution scheme contemplated in the Electricity Industry Act cannot have any jurisdictional exclusions unless the Electricity Industry Act refers to them specifically. If that is the case then how is the $50,000 financial limit or Deadlock rule permissible? How are any of the jurisdictional limitations permissible?
		
		At the workshop on 7 March there was reference to advice from MBIE that "legislative changes" now mean that the Transpower and land complaint jurisdictional exclusions are illegal. That is not mentioned in the consultation paper and no further information has so far been provided about it by the EGCC Board. We are not aware of any legislative changes that would have had that effect.
		
		• Transpower's current exclusion from consumer complaints (clause B.9.9 of the EGCC Scheme Document, and being the type of Complaint described in clause 13(a) of the General Rules) should be retained. It is not appropriate to expose Transpower (or gas transmission Providers) to consumer complaints:
		
		  • Transpower has no supplier-customer relationship with electricity consumers (other than a few very large ones who are directly connected to the grid) and accordingly has no ability to manage its liability to them or systems to deal with their Complaints.
		
		  • Exposing Transpower to consumer complaints would be inconsistent with the regime in the Consumer Guarantees Act whereby consumers only have remedies against their suppliers (retailers or distributors), and if any liability is

		sheeted home to Transpower it happens through the retailer indemnity.
		
		• The land complaint exclusions for disputes about lawful establishment, injurious affect, negotiation or acquisition of property rights, and adequacy of maintenance programme should be retained (clauses B.9.8(a), (b), (e), (g), (h) and (i)). These exclusions are important and have been in the EGCC Scheme Document since land complaints were introduced. There are good reasons for them:
		
		  • These disputes involve legal, land valuation and technical engineering issues (sometimes historical ones going back decades) that the UCS will not be resourced to deal with. The outcomes of these disputes can have extremely significant implications for lines companies' operations across their entire network.
		
		  • Opening up the scheme to disputes of this nature will encourage some landowners and occupiers to bring meritless or highly speculative Complaints to the Commissioner in an attempt to hold up time-sensitive projects and induce lines companies to offer commercial settlements. This increases the costs of projects, which are ultimately borne by consumers.
		
		  • There are other more appropriate forums for disputes of this nature, in particular the Environment Court (which is stipulated in section 23F of the Electricity Act as the place for access disputes) and the Land Valuation Tribunal.
		
		• A consumer complaint should not be able to be brought against Transpower (or a gas transmission Provider) in the guise of land complaint. That is the point of clause B.9.8(j) of the EGCC Scheme Document, which should be retained in some form.

Part of Scheme document	Current	Proposed	Comments/Questions
B	Terms of Reference / Jurisdiction	GR 2, 3, 13-18, 23, 24, 26, 30, 31, 37-41 GR12 – 16 applies to B.6 – B.9.10 SR 6 - Claim value limit	The Transpower and land complaint jurisdictional exclusions are certainly not "arbitrary", as asserted in the consultation paper. See response to question 7 in the preceding table.
B	Deadlock - A period before which *[should be "after which"]* the scheme can accept a complaint for consideration	GR Definitions - *Deadlock* GR 13, 16, 23	• The definition of "Deadlock" should specify when the clock starts running. This should be when the Provider first receives the Complaint. • A Complaint should not be deemed to have been "received" (or perhaps be a "Complaint" at all) until the Complainant has given the Provider sufficient information for the Provider to understand the nature of the Complaint and, at least broadly, what the Complainant wishes the Provider to do to resolve it.
B	Extending jurisdiction	GR 13, 14, 37 SR 6, 7	• Transpower supports the retention of the current $50,000 default jurisdiction limit for the ECS, including for indemnity disputes. • The Commissioner should only be able to accept a Complaint of a type described in clause 13(a) or (b) if the Complainant is the person to whom the goods or services were provided or who requested the goods or services (in the case of (a)), the affected landowner or occupier (in the case of (b)), or an appointed representative of that person (in either case). This is perhaps what clause 23(a) is trying, but failing, to say. Clause 23(a) is

			redundant because any Complaint is, by definition, made by a Complainant. At the very least the "insufficient interest" ground for discretionary exclusion in clause B.8.2 of the EGCC Scheme Document should be retained in clause 17 of the General Rules. • The Commissioner should not have jurisdiction to consider Complaints by insurers who are seeking to recover amounts paid to consumers or landowners or occupiers under insurance policies. • The exclusions in clauses 14(b) and (c) should also apply if the matter "is being dealt with" as part of another Complaint or in another forum. The words "already been dealt with" imply a requirement that the matter has already been fully considered when the new Complaint is made. • The exclusion in clause 14(c) should refer to local authorities, Government departments and Crown entities, which have various powers to receive and consider complaints (notably, in the case of local authorities, about breaches of planning laws). • The General Rules need to be clear that the term "value" (as used in clauses 14(e) and 37) means the cost to the Provider of doing the thing the Complainant wants the Provider to do or the thing the Determination requires the Provider to do (noting that a claim or Determination may not be as simple as the payment of an amount of money). Currently, for land complaints, this is covered in clause B.12 of the EGCC Scheme Document. • If the Complainant starts legal proceedings, or if any of the other things in clause 14(c) apply after the Commissioner has started dealing with a Complaint, the Commissioner should be required to stop dealing with it. It should not be a mere discretion, as is proposed in clause 17(d). • The current knowledge period in clause B.8.1 of the EGCC Scheme Document is 3

			months. This has been extended (without explanation) to 12 months in clause 17(e) of the General Rules. This implies that any delay less than 12 months cannot affect the admissibility of a Complaint. That is too long. The knowledge period should stay at 3 months (noting that the Commissioner still has the discretion to allow a longer delay on a case-by-case basis). • Clause 23(b) of the General Rules should be moved up to clause 14 and clause 26 should be moved up to clause 17. This will put all of the jurisdictional provisions in the same place in the General Rules.
B	Information about complaints	GR 25 – 29	• Clause 25 of the General Rules is questionable from a privacy law perspective. The current regime whereby Complainants are required to sign a waiver of confidentiality should be retained. There is a wider issue here about the extent to which Complainants will be bound by the rules of the UCS, including those that make some Recommendations and Determinations full and final settlements, without having expressly agreed to be bound (unlike Providers, who will agree to that through their Provider Agreements). A Complainant's act of bringing of a Complaint to the UCS may not, by itself, be sufficient to bind the Complainant to the rules. • Clause 28 of the General Rules is a significant change from clause B.27 of the EGCC Scheme Document (a change the consultation paper does not bring specifically to members' attention). Clauses B.27.1 (ability of parties to require the Commissioner to treat information as confidential) and B.27.3 (return of information after a Complaint is closed) of the EGCC Scheme Document should be retained in the General Rules. Removing those provisions will create a disincentive for the parties to a Complaint to share full information with the Commissioner. • The provisions in the General Rules relating to Providers' ability to withhold and protect confidential information should also apply to information provided under

			clause 46 of the General Rules.
B	Recommendations	GR 32 – 35	• Clause 34 of the General Rules should state that the Provider's compliance with a Recommendation that is accepted by the parties is in full and final settlement of the subject matter of the Complaint (clause B.33.6 of the EGCC Scheme Document, and as clause 39 of the General Rules does for Determinations). • All Recommendations should be required to be in writing and include reasons (clauses B.33.3 and B.33.4 of the EGCC Scheme Document).
B	Binding Decisions	Determinations - GR 30, 36 – 41 SR 7 - Claim value limit Accountability, Accessibility, Natural Justice	• All Determinations should be required to be in writing and include reasons (clauses B.42.2 and B.42.4 of the EGCC Scheme Document). • Clause 38 of the General Rules should make it clear that any punitive damages or money penalty awarded counts towards the value of the Determination under clause 37. • Appeals on questions of law should be allowed for Determinations of indemnity disputes (clause 41 of the General Rules). The relevant lines company and retailer will be the only parties to those disputes and appeals.
B	Test Cases	Removed	The test case provisions should be retained in the General Rules, or at least in the ECS Rules. The fact those provisions have not been used to date does not mean they will not be used in future or that the rationale for them (an "escape valve" for Providers to take high impact, otherwise non-appealable disputes to the courts) is no longer valid. These provisions will become more important if current jurisdictional exclusions are removed and/or other utilities come under the UCS umbrella.

C	Provider obligations/ Code of Conduct	GR 5, 8, 12, 27, 34, 36, 42-46, 48, 50-52
		
		SR 10, 11
		
		EIA s96, 97
			• The words "and public confidence in dealing with Providers" in clause 44 of the General Rules should be deleted. The UCS is for Complaints, and so beyond resolving them the UCS' functions should be limited to "good practice in relation to handling Complaints". The UCS should not get involved with how Providers deal with their customers generally or whether the way they do it garners public confidence.
			
			• Under the proposed company structure indemnities and insurance for directors and employees should be provided by the company (as contemplated in clause 12 of the Constitution) not the Providers. Accordingly, clause 48 of the General Rules should be deleted.
			
			• If clause 48 of the General Rules is retained then:
			
			  • the indemnity in it should not apply to the extent the company has indemnified or effected insurance for the relevant person and liability;
			
			  • Providers should only be required to indemnify a person for liabilities that relate to a DRS the Providers are subject to; and
			
			  • Providers should be severally, not jointly, liable under the indemnity (i.e. non-defaulting Providers should not pick up the liabilities of defaulting ones).
			
			• The ECS Rules need to state clearly that Providers who are members of the ECS cannot bring Complaints under it, other than indemnity disputes. The "generally" wording in clause 10 of the ECS Rules is unhelpful.
			
			• Clause 10 of the ECS Rules omits some important aspects of Part G of the EGCC Scheme Document (applicable to indemnity disputes) which should be retained. These are clauses G.8 (restriction on the Commissioner's costs orders), G.11 (confidentiality of information disclosed during the process) and G.22 (Determinations are automatically binding on both parties - the Complainant does

			not have the option to reject, which is the normal rule for Determinations). • To avoid doubt, clause 10 of the ECS Rules should state that indemnity disputes are to be treated as Complaints, and the retailers bringing them as Complainants, for the purposes of the appropriate parts of the General Rules (such as Parts G and H). However, not all parts of the General Rules will be applicable to indemnity disputes, which reinforces the need for a much more careful draft of the ECS Rules than has been presented in the consultation paper.
D	Fees / levies / costs	GR 38, 42, 43 SR - Appendix Transition arrangements	The proposed ECS levy and cost structure has not yet been provided. That needs to be provided and consulted on before any recommendation for change goes to the EGCC Board or Minister.
E	Governance	Constitution - Parts 7-9	• Appointments to the UCS Board should be in accordance with the current EGCC Scheme Document, at least until other utilities are added (see comment on question 4 in the preceding table). In no circumstances should the UCS Board be empowered to appoint its own members (clauses 7.7 and 7.8 of the Constitution). • The UCS Board should not be empowered to make changes to the Constitution (clause 10.1 of the Constitution) because that would be inconsistent with the Electricity Industry Act (clause 8 of Schedule 4). The Minister must approve, or be deemed to have approved after 45 days, any change to the overall ECS rules, even Minor Amendments to the Constitution. Mere consultation with the Minister is not enough. Providers should always be consulted on changes, including those the UCS Board considers are minor.

Appendix	Adoption deed	Provider agreement	The proposed Provider agreement has not yet been provided. That needs to be provided and consulted on before any recommendation for change goes to the EGCC Board or Minister.

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15 June 2018

The Board of Utilities Disputes Limited

By email: submissions@utilitiesdisputes.co.nz

Dear Directors

Independent 5-year review of Energy Complaints Scheme

This is Transpower's response to the Board's second-round consultation on the recommendations from the most recent independent 5-year review of the Energy Complaints Scheme (**Scheme**). We are grateful for another opportunity to comment on the review.

This response focuses on the review's recommendation to remove all land complaint exclusions (**Exclusions**) from the Scheme Rules.

We understand there will be future consultation on changes to the levy system, if any are proposed.

History of the Scheme

Appendix 2 of the consultation paper (the **Information Paper**) contains a detailed discussion about the old Land Code.

We are not sure what connection is being made between the Land Code and the Exclusions. The two were not connected. The Exclusions were justified independently of the Land Code, which is why the Exclusions have remained in the Scheme Rules even though the Land Code was removed in 2011. The Board should not make the mistake of thinking that the Exclusions have no relevance without the Land Code or that their retention was an administrative oversight in 2011.

The consultation paper states "consumers did not have a vote in the final approval of the changes [to the EGCC rules that introduced the Exclusions]." That is incorrect. Two bodies were involved in approving the changes in August 2006 – the Electricity Complaints Council (as to the deed part of the rules) and the Scheme Amendment Committee (as to the schedules). Although the Exclusions were introduced in the deed, the Commissioner's Terms of Reference in Schedule B of the EGCC rules had to be changed by the Scheme Amendment Committee to extend the Commissioner's jurisdiction to land complaints.

The Scheme Amendment Committee included six consumer representatives appointed by the Consumers' Institute (now Consumer NZ) along with six Scheme member representatives and

a non-voting chairperson. The changes needed to be approved by 10 of the 12 voting representatives. If the consumer representatives had objected to the Exclusions they would have voted against the changes and sent the Land Code Working Group back to the drawing board. The Scheme Amendment Committee unanimously approved the changes on 8 August 2006.

Discretionary exclusions, judicial review and test case procedure

The Information Paper refers frequently to the Commissioner's discretion to exclude certain complaints under General Rule 18. This discretion is put forward as a reason why some of the Exclusions are not needed.

As previously submitted, we do not agree that discretionary exclusions are an adequate substitute for mandatory ones. The door should not be left open for a complaint to be considered by the Commissioner in circumstances where the nature of the complaint means it will be routinely excluded on discretionary grounds. That approach serves only to increase the cost of administering the Scheme, Scheme members' costs of dealing with the Scheme and, potentially, complainant dissatisfaction with jurisdiction decisions the Commissioner is forced to make unnecessarily.

Nor should the Board make changes to the Rules that would tend to increase Scheme members' reliance on judicial review of the Commissioner or the test case procedure. Those options are expensive and distracting for both the Scheme and its members. It is also problematic for Scheme members that the test case procedure is only available to them if the Commissioner agrees (General Rule 42).

The Information Paper says the Environment Court is "likely" the most appropriate forum for disputes under the Resource Management Act, Public Works Act and Electricity Act. That is an understatement. The Environment Court is clearly the most appropriate forum for those disputes[1] and the mandatory jurisdictional exclusions in the Scheme Rules should acknowledge that.

Subversion of Commissioner's role

The Information Paper argues some Exclusions are inappropriate because they may "operate to prevent the Commissioner from undertaking her role of deciding whether a complaint is in jurisdiction". The concern is that lines companies will decide for themselves an Exclusion applies when perhaps it does not and fail to inform the complainant about the Scheme.

That is not a good or logical argument for removing an Exclusion. Either an Exclusion is justified on its face or it is not. If a meritorious Exclusion were removed then it would not be

[1] The Environment Court's jurisdiction is specified in section 23F of the Electricity Act (relating to disputes about access to land under Part 3), sections 174, 179 and 185 of the Resource Management Act (relating to disputes arising from designations and Transpower's decisions as a requiring authority) and sections 23 and 34 of the Public Works Act (relating to objections to compulsory acquisition and severed land applications). Furthermore, the compulsory acquisition of land under the Public Works Act is a Ministerial power, not a Transpower one.

available for the Commissioner to apply either. It would be analogous to treating a sprained ankle by amputating the leg.

Transpower's practice is to advise landowner complainants of Transpower's membership of the Scheme even where the complaint appears to be excluded. We communicate our belief that the complaint is excluded but note it is the Commissioner's role to decide. We believe it is important that we advise landowners of any applicable exclusions, otherwise we can find ourselves in the undesirable position of referring a landowner to the Scheme only to then resist the Commissioner's jurisdiction. The Board could consider writing this practice into the Rules. That would be an appropriate way to address the risk identified in the Information Paper. Removing Exclusions would not be.

When Transpower receives complaints from consumers our practice is to refer the complainant to their retailer, in accordance with General Rule 12(e).

Comments on Exclusions

The enclosed table contains our comments on the individual Exclusions. We have commented only from Transpower's perspective but many of our comments also apply to other electricity and gas lines companies.

Most of our comments in the table are not new. We submitted them to the EGCC Board in response to its previous proposals to remove the Exclusions. For completeness, we have enclosed our previous submissions, being our letters dated 14 June 2016 and 14 July 2016 (which were also enclosed with our response to the UDL Board's first-round consultation) and another letter dated 14 March 2016 in which the Exclusions are discussed under "Jurisdiction" (Question 7).

Board decision

We had expected the second-round consultation to include specific proposed changes to the Rules. That has not happened. The consultation paper suggests that the only aspect of the proposed changes the UDL Board intends to seek further views on are the levies, and otherwise intends to go straight to making recommendations to the Minister.

If that is the Board's intention then it would be bad process, in our view. It is important the Board at least notify Scheme members of the changes to the Rules it intends to recommend to the Minister before it does so. The words of the Rules (or absence of them, as the case may be) are important and Scheme members should be given an opportunity to comment on them before they are set in stone.

Yours sincerely

Chris Browne
Deputy General Counsel

Enc. Comments on individual Exclusions
Previous Transpower submissions (14 March, June and 14 July 2016)

Comments on individual Exclusions

Exclusion 1.1 (lawful establishment of existing works)	Section 22 of the Electricity Act does not speak only at the time the relevant existing works were constructed. Section 22 also protects existing works as they have been modified lawfully over time. Accordingly, if land complaints about section 22 were allowed then the lawfulness of any modifications to existing works would potentially be within the Scheme's jurisdiction. That would include complaints about the injurious affect of upgrades under section 23(3)(b) (see Exclusion 1.8 below). As noted in the Information Paper, those modifications may have occurred up to 15 years before the complaint and still not be excluded by clause 9(b) of the Scheme Rules.
Exclusion 1.2 (lawful establishment of other works)	This Exclusion applies to works that section 22 does not apply to, which is to say works that are not existing works. The Exclusion effectively applies to Transpower works for which construction commenced on or after 1 January 1988 and before 1 October 2006. The date of 1 October is significant because that is the date land complaints came into the EGCC scheme. We also note that the 15-year longstop period under the Limitation Act for acts or omissions that happened up to 1 October 2006 will not expire until 1 October 2021. To the extent the Exclusion may be interpreted as excluding complaints about recent modifications to old works, we agree it goes too far. However, consistent with the principle that complaints about acts and omissions that preceded the jurisdiction of the Scheme should not be allowed, we consider the Exclusion should be retained and simplified as follows: *relating to an act or omission that first occurred before 1 October 2006;*
Exclusion 1.3 (owner of works)	As previously submitted, we are content for this Exclusion to be removed.

Exclusion 1.4 (roads and level crossings)	As previously submitted, we are content for this Exclusion to be removed.
Exclusion 1.5 (acquisition of interests in land)	This Exclusion applies to more than just the processes under the Resource Management Act and Public Works Act. It also applies to the acquisition of interests in land by negotiation outside the Public Works Act process. We consider it inappropriate for the Scheme to be able to intervene in contractual negotiations between Transpower and a landowner. Complaints should be about Transpower's compliance with its obligations to landowners, not about how those obligations come into being. There is no "customer service element" to the latter. For example, we do not believe it would be constructive for the Scheme to participate in deciding how much Transpower should pay for an easement or what the terms of the easement should be.
Exclusion 1.6 (tree dispensations)	As previously submitted, we are content for this Exclusion to be removed.
Exclusion 1.7 (adequacy of maintenance)	Grid maintenance decisions are operational in nature, can be technically complex and involve commercial risk assessments and trade-offs in the context of Transpower's regulation by the Commerce Commission and Electricity Authority.[2] Grid maintenance decisions are properly treated as internal business decisions for Transpower. They are not appropriate for scrutiny by the Commissioner. It is not the case that complainants will always be "officious bystanders" and their complaints susceptible to exclusion under General Rule 18(b). If a landowner experiences an interruption due to an issue in the grid and complains about Transpower's maintenance programme, it could not be said that the landowner has an insufficient interest in the subject matter of the complaint. In that case the complaint would be a proxy for a consumer complaint against Transpower, which should not be permitted (see Exclusions 1.10 and 2.1 below).

[2] Transpower is subject to price-quality regulation by the Commerce Commission under Part 4 of the Commerce Act and has obligations under the Electricity Industry Participation Code (administered and enforced by the Electricity Authority) to maintain the grid in accordance with good electricity industry practice.

	As noted in the Information Paper, this Exclusion is limited in scope and does not operate to exclude complaints about Transpower's conduct when carrying out maintenance and other activities on a landowner's property. The Exclusion relates to Transpower's decisions about how to maintain the grid.
Exclusion 1.8 (injurious affect – section 23(3)(b))	The legal test for injurious affect is now settled following the High Court decision in the *Kapiti High Voltage Coalition* case.[3] What needs to be established is a permanent reduction in the value of the underlying land caused by the relevant work. Although the legal test is now clear, applying it is not straightforward. The test requires expert evidence from valuers, whose views frequently diverge. For those views to be tested properly the evidence needs to be given under oath, there needs to be an opportunity for cross-examination and the rules of evidence need to apply. None of those features exist in the Commissioner's complaint resolution process. Furthermore, the Commissioner is not obliged to follow the legal test for injurious affect at all; she must merely have regard to it. The Commissioner may decide it is fair and reasonable to make a finding of injurious affect without reliable valuation evidence to support it. There is no right of appeal from the Commissioner's determinations. It is important to note that injurious affect under section 23(3)(b) of the Electricity Act is a gateway issue for Transpower's right to upgrade a transmission line without negotiating and purchasing an easement or other property right from the landowner. If the Commissioner decides there is injurious affect (regardless of quantum) then Transpower cannot do the work without the landowner's consent. It is not just a question of compensation. It is potentially a question of whether the project can go ahead at all. The financial limit on the Commissioner's jurisdiction in Scheme Rule 7 would not be a significant obstacle for a determined complainant. For example, a complainant could simply

[3] *Kapiti High Voltage Coalition Incorporated* v *Kapiti Coast District Council* [2012] NZHC 2058.

	ask the Commissioner to determine whether there is injurious affect or not without quantifying its claim, or could say that it would not require Transpower to pay more than $50,000 for a property right (which may or may not turn out to be true later and does not get to what other terms and conditions of the property right the landowner may require). It is not clear the requirement in Scheme Rule 7 for the Commissioner to consider consequential costs extends to a consideration of the precedent effect of considering an injurious affect complaint or making a recommendation or determination in respect of it. An adverse recommendation or determination, or even a signal of the Commissioner's willingness to consider injurious affect complaints, could very significantly delay and/or escalate the cost of Transpower's upgrade projects, especially in urban areas where there are small land holdings and high levels of under-build.[4] Depending on the scope and terms of an injurious affect finding by the Commissioner it is possible that historic upgrade projects could also be affected. The Information Paper claims "the impact of this exclusion is limited". That could not be more wrong.
Exclusion 1.9 (injurious affect – section 57(1))	Although injurious affect under section 57(1) of the Electricity Act is not a gateway issue, our comments on Exclusion 1.8 about evidence, the Commissioner not being bound by the legal test for injurious affect, the lack of appeal rights and the insufficient protection provided by Scheme Rule 7 also apply to this exclusion. We note that section 57(1) is not limited to upgrade situations as section 23(3)(b) is. Section 57(1) applies to any work Transpower does under Part 3 of the Act, including non-upgrade maintenance.

[4] Auckland is an obvious case in point. Over the next 30 years Transpower is anticipating major maintenance work on its network in Auckland, including re-conductoring the Henderson-Otahuhu 220 kV line. See *Powering Auckland's Future: Auckland Strategy Direction* at www.transpower.co.nz/sites/default/files/publications/resources/AKLDEmergingStrategy.pdf.

Exclusion 1.10 (consumer complaints) Exclusion 2.1 (non-land complaints against Transpower)	These Exclusions relate to the same subject matter, namely complaints about electricity supply by consumers directly against Transpower (including in the guise of land complaints). The last vestiges of the argument that the Exclusions are not permitted under the Electricity Industry Act appear in the part of the Information Paper relating to these Exclusions. That argument is wrong for the reasons previously submitted to the EGCC Board and most recently submitted to the UDL Board in our response to the first-round consultation. Transpower is an important step removed from end consumers of electricity. We are not the same as electricity distributors (local lines companies). The Information Paper incorrectly equates Transpower with distributors on the basis that most distributors "do not have direct consumer relationships and instead work through third parties". We assume this is referring to most consumers being provided with distributor network services through interposed contracts transacted by retailers. However, interposed contracts contain important protections for distributors. For example, the Genesis interposed retail contract:[5] • sets expectations about when supply may be disrupted due to a network issue (clause 5.1); • contains a default notice period for planned network shutdowns (clause 5.1); • explains the situations in which the distributor may disconnect supply (clause 11.3); • defines force majeure events in respect of the network (clause 17.2); • requires the customer to comply with the distributor's technical requirements for connection (clauses 21.2 and 21.4);

[5] https://gesakentico.blob.core.windows.net/sitecontent/genesis/media/new-library-(dec-2017)/terms_and_conditions/pdfs/genesis-energy-standard-terms-and-conditions-from-10-april-2018.pdf

	• limits the distributor's non-Consumer Guarantees Act (CGA) liability to the consumer to $10,000 (clause 25.4); • excludes distributor CGA liability to business consumers (clause 25.5); and • makes the distributor's benefits under the contract directly enforceable by the distributor (clause 25.6). None of that is available to Transpower. We do not deal with the vast majority of consumers either physically or contractually, through third parties or otherwise. We do not have the systems or other resources to process large volumes of consumer complaints. Transpower's inability to limit its liability to consumers contractually (see the sixth bullet point above) is highly significant. It means our liability to consumers for alleged negligence is unbounded below the $50,000 jurisdiction limit of the Scheme (or any higher limit that may apply in future). Exposing Transpower to consumer complaints through the Scheme is not necessary to ensure "accountability by Transpower". Transpower's performance in terms of electricity supply quality and reliability is already regulated by the Commerce Commission and Electricity Authority. Transpower is also a State Owned Enterprise and subject to all the Crown and political scrutiny that goes with that. The fact the Electricity Industry Act does not specifically exclude consumer complaints against Transpower is irrelevant because the Act does not refer specifically to most of the non-controversial mandatory and discretionary exclusions either. Legislative guidance should instead be taken from the policy enacted in the CGA. That is, consumers' recourse for breach of the acceptable quality guarantee in respect of electricity is exclusively against their retailers. Retailers then have recourse against Transpower under the indemnity in section

	46A of the CGA to the extent the breach was caused by an issue in the grid. Allowing consumer complaints directly against Transpower through the Scheme would be wholly inconsistent with that policy.
Exclusion 1.11 (land complaints against retailers)	As previously submitted, we are content for this Exclusion to be removed.

Better together.

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15 June 2018

James Blake-Palmer
Manager-Stakeholder Engagement
Utilities Disputes Limited
WELLINGTON

Dear James

UTILITIES DISPUTES LIMITED (UDL) CONSULTATION ON RECOMMENDATIONS FROM THE FIVE YEAR REVIEW OF THE ENERGY COMPLAINTS SCHEME – SECOND ROUND OF CONSULTATION

Trustpower thanks UDL for the opportunity to provide feedback on the above topic.

Queen Margaret University Consumer Dispute Resolution Centre completed its review of UDL's energy complaints scheme in July 2017 (the **Review).** A first round of consultation on those recommendations which UDL considered required scheme rule changes closed in April 2018[1]. Having taken account of the views expressed in the submissions received during the initial round of consultation, the UDL Board has decided to undertake a second round of consultation on a set of more specific proposals.

We note that a number of refinements to the proposed scheme rule changes have been made by the UDL Board in response to points raised during the first round of consultation and consider that these address a number of the concerns we raised previously. Our responses to the specific questions asked in the second consultation paper are set out in the Appendix to this letter.

If you have any questions about these responses, please do not hesitate to contact me on 027 549 9330.

Regards,

Fiona Wiseman

Senior Advisor, Strategy and Regulation

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[1] As noted previously, we would have appreciated a more fulsome response from UDL as to its intentions on all aspects of the Review.

Principle/ Area of document	#	Question	Board's view (if available)	Submitter's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers	The Board considers that: a) providers should not be named in case notes; b) providers who breach scheme rules should be named and it can already name providers that breach the scheme rules; and c) providers who breach any scheme guidelines should only be named if in doing so the provider has breached scheme rules.	We agree with the UDL Board that providers should not be named in case notes. The intention of case notes is to provide anonymous examples of cases that UDL has considered. This enables providers and consumers to be informed around an issue which has resulted in a complaint, the approach taken to resolve the complaint and the outcome. Providing details of providers would not further the intention of providing case notes but rather would create potential privacy concerns as raised by other submitting parties during the first round of consultation. We still have concerns around UDL naming providers who breach the scheme rules (under either b) or c)). In particular we remain concerned that it is unclear: • what the problem is that the UDL Board is trying to solve by publishing details of providers who breach the scheme rules ("naming and shaming"). Are the current arrangements not enough of a deterrent and so additional sanctions are required? • how the arrangements would work in practice, particularly with respect to what requirements would need to be met prior to publication of a provider's details occurring.

				Regardless, we note that there is already a statutory obligation for providers to comply with the scheme rules and processes are in place for UDL to apply to a court for an order requiring compliance. As outlined in Meridian's submission during the first round of consultation, the application for an order from the court would in the ordinary course lead to the member or provider not in compliance being named. The second Consultation Paper does not shed any further light on why a different arrangement is required, nor on the question around what is meant by "Guidelines" that Meridian raised.
Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	The Board is intending to retain the explicit reference to natural justice in the scheme rules due to the overwhelming support receiving for doing so in submissions.	We support this decision.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	The Board believes that performance standards relating to cost per case and self-reporting of compliance should be removed from the scheme rules.	We support this decision.
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes		We have no comments.

Mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay	5	Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	The Board proposes a mechanism that it believes fits with the legislative framework, helps ensure providers contribute fairly and avoids delays where possible. The Board proposes after clause 13 of the General Rules, a new clause could be inserted that says: *"For the purposes of considering and determining a Complaint, "Provider" will include a business or undertaking in relation to which a Complaint has been received, which is obliged to become a Provider but which has not yet signed a Provider Agreement, and these rules will be interpreted accordingly."*	We support the UDL Board's decision to include the proposed clarification that a new provider who has not signed a provider agreement is captured under the arrangements. The changes as drafted appear to: • work with the broader legislative obligation for all providers to be subject to the dispute arrangements ;and • make clear that new entrants are captured by the arrangements.

18/048
File Ref: E5/14

13 June 2018

Utilities Disputes Limited
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REVIEW OF ENERGY COMPLAINTS SCHEME: SECOND CONSULTATION

Unison welcomes the opportunity to provide a submission to Utilities Disputes Limited (UDL) on the second consultation as part of the 5-year review of the Energy Complaints Scheme (the Scheme). Unison contributed to the Electricity Networks Association's (ENA) submission on the first consultation round, which represented the 27 Electricity Distribution Businesses (EDBs). There are two submission points Unison wishes to reiterate in this second consultation round – Land Complaint Exclusions and Levies.

1. Land Complaint Exclusions (Review Part 16)

Unison strongly submits that the land complaint exclusion should remain in place for the Scheme. The key reasons for this are set out below:

- **Industry / Court is better placed to manage these disputes.** Land complaints are often complex and technical in nature (due to interpretations of legislation and regulation) and likely to be beyond the resources of the Scheme. The industry and, if necessary, the Courts are better placed to reconcile such complaints, given the need for detailed industry knowledge. Legal precedents should be made in the Courts, as (noted by Northpower in their previous submission), there are often "significant wider legal implications for the network and its assets".

  Further to this, there are no rights of appeal under the UDL, but this safeguard does exist in the Court system. This further emphasises the need for these types of complaints to be dealt with in under the current process, and not under the Scheme.

- **Cost.** The inclusion of land complaints may result in a significant increase in complaints, mostly due to the accessibility of the UDL to consumers, compared to the perceived inaccessibility of the Courts. The potential costs (both financial and staff resource) on EDBs are likely to be significant. Ultimately, it is the consumers that bear the costs of this through prices. The current process of dealing with these complaints is efficient and ensures no additional costs are forced on EDBs.

- **Health and Safety.** There are additional complexities of land complaints with the more stringent health and safety practices that apply. These are applicable not just to EDBs, but to land owners as well where there are electrical assets located on farms. The referral of land complaints to UDL could have implications for health and safety, as well as EDB operations and processes.

Unison does note, however, that there is room for further industry collaboration and development of shared practices and processes for land access under various scenarios (e.g. planned maintenance versus unplanned outage access). This is an opportunity for improvement that we would support to ensure consistency in practice across the industry.

2. Levies (Review Part 14)

Unison concurs with previous submitters (specifically the Electricity Networks Association), that the levies for the Scheme should be practical and apply a 'user pays' principle. We agree that all scheme users should contribute to running costs, proportional to the users' use of the Scheme (the fixed cost). Additional variable costs should be applied for complaints. However, we are concerned that the current levy approach is flawed. Regardless of the outcome of the complaint referral to UDL (win, loss, or deadlock), the same costs are applied, which are usually disproportionate to the cost of the complaint. There should be a more balanced approach that encourages EDBs to challenge complaints to UDL, rather than settling to avoid a higher cost.

Unison encourages the UDL Board to consider these equitable, practical and 'user pays' factors when modelling and testing the alternative levy options.

For any questions relating to this submission, please contact Roanna Vining, Senior Regulatory Affairs Advisor by phone (06) 873 9329 or email Roanna.Vining@unison.co.nz.

Yours sincerely,

Nathan Strong
GENERAL MANAGER, BUSINESS ASSURANCE

15 June 2018

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Hon Heather Roy
Independent Chair
Utilities Disputes Limited
Wellington

By email: submissions@utilitiesdisputes.co.nz

Dear Madame Chair

Submission on the Independent Five-Year Review of Utilities Disputes Limited – Second Consultation

This is Vector Limited's (Vector) submission on the second consultation paper on the independent five-year review of Utilities Disputes Limited (Utilities Disputes), released on 28 May 2018.

We particularly welcome the intention of the Board of Utilities Disputes to undertake modelling and test different options before seeking further input on the levy system.

We set out in the Appendix our responses to the consultation questions using the submission template for this second consultation.

No part of this submission is confidential.

We are happy to discuss any aspects of our submission with managers or staff of Utilities Disputes. Vector's contact person for this submission is:

Ross Malcolm
Manager Customer Experience
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Tel: 09 978 7648

Yours sincerely
For and on behalf of Vector Limited

Richard Sharp
Head of Regulatory and Pricing

Appendix – Questions for submitters

Principle/Area of document	#	Question	Vector's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	Vector supports the view of the Board of Utilities Disputes (the Board) that providers should not be named in case notes. It is our view that the naming of providers would unnecessarily focus attention on the named providers and not on the purpose of the case notes which is to highlight relevant cases. In addition, naming the relevant providers may undermine the confidentiality of settlements.
Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	Vector welcomes the Board's intention to now retain the explicit reference to 'natural justice' in the scheme rules following overwhelming support from submitters in the first consultation round for its retention.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	Vector agrees with the Board that the performance standards relating to cost per case and self-reporting of compliance should be removed from the scheme rules. We also agree that the above measures should not be removed until new performance measures have been developed.

Principle/Area of document	#	Question	Vector's response
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	Vector strongly opposes the removal of the Land Complaint Exclusions (the Exclusions) for the reasons outlined below. In our view, the Exclusions operate for a justifiable reason, and there is no compelling reason for their removal that outweighs the reasons for their inclusion. **History of the Scheme and the Exclusions** The Regulatory Impact Statement in respect of the Electricity and Gas Complaints Scheme Class Exemption Regulations states (at [9]): *The policy rationale for establishing the EGCC Scheme is the recognition that electricity and gas consumers have a particular disadvantage in their ability to resolve complaints or disputes with suppliers, and that a specialised disputes resolution service, available to all consumers, is necessary to help resolve this disadvantage. The disadvantage can arise because of the presence of various market failure-related factors, including information and resource asymmetries, the lack of competitive alternatives for consumers and/or the presence of non-trivial switching costs, and the inability of generic consumer complaints mechanisms to satisfactorily deal with complaints or disputes due to the complex or specialised nature of the product or service.*

Principle/Area of document	#	Question	Vector's response
			In Vector's view, this statement continues to reflect the purpose of Utilities Disputes. Specifically, the Minister of Commerce and Consumer Affairs has recognised that Utilities Disputes is an appropriate forum for resolving disputes relating to the product or service a member provides. Complaints that fall under the Land Complaint Exclusions do not directly relate to the service Vector provides: they are more likely to relate to historical land related issues, for example. In our view, the appropriate question for the Board to consider is not whether the Exclusions are still justified, but whether, in circumstances where the Minister has (repeatedly) approved the Scheme on its current terms, an extension of Utilities Disputes' jurisdiction is justified. The onus is on the Utilities Disputes Board to establish that, and Vector considers that it has not done so. In Appendix 2 to the Board's consultation paper for round two ("**Consultation Paper**"), the history of the Exclusions is outlined. Without seeking to belabour the point, Vector notes that the background, in and of itself, should not be a reason to remove the Exclusions unless it can be shown there is a strong reason for the extension of Utilities Disputes' jurisdiction. In relation to the background and history of the Exclusions, Vector makes the following observations: • The Electricity Industry Act 2010 ("**2010 Act**") contemplates that there will be some complaints that will not be dealt with by the

Principle/Area of document	#	Question	Vector's response
			dispute resolution scheme contemplated by the Act. Section 95 of the 2010 Act is broad and contemplates complaints by any person concerning Transpower (except in its capacity as system operator) or any distributor or retailer. However, clause 13(c) of Schedule 4 states that the rules of the approved scheme must provide for or set out "the kinds of complaints that the scheme will deal with". It is inherent in this legislative requirement that there are kinds of complaints that the Scheme will not deal with. • The Scheme has received ministerial approval. This confirms that the Scheme meets the purpose of the dispute resolution scheme as set out in Act (contrary to the assertions of the Review). • Each of the Exclusions was initially included for good reasons. In most cases, those reasons remain unaffected by the passage of time. This is discussed in more detail below. **Nature of Utilities Disputes and land disputes** Utilities Disputes is an informal dispute resolution mechanism that aims to resolve disputes in an efficient, fair and timely manner. Utilities Disputes is bound, in dealing with complaints, to come to a "fair and reasonable" outcome, having considered all the circumstances of the case. That approach, while useful where considering low value questions in an

			accessible manner, is not well suited to complex questions of law that involve competing legal interests. The issues that would arise in the context of complaints that are currently subject to the Exclusions will often involve complex analysis of fact and law, including analysis of historical legislation, and common law principles and may also require expert evidence. The complexity of the issues that can arise in such cases is apparent from a review of Court decisions that address the subject matter of complaint that would be currently subject to the Exclusions. Vector notes the following relevant cases by way of example, each of which highlights the complexity of the issues that are likely to arise: • *Ryan Properties Investments Limited v Wellington Electricity Lines Limited* [2012] NZHC 114. In this case, the High Court was asked to determine whether a substation was lawfully fixed to land under section 22 of the Electricity Act 1992 (**"1992 Act"**) (currently covered by the first Exclusion) and which of the parties to the litigation owned the substation. The Court was required to go back to 1922 proclamations by the Governor-General, 1925 legislation, and a 1923 Order in Council in order to determine whether the substation was lawfully installed. In all, the Court considered eight separate primary sources of law including legislation, Orders in Council and proclamations, as well as resources interpreting those primary sources. • *Kapiti High Voltage Coalition Incorporated v Kapiti Coast District Council & Transpower New Zealand Limited* [2012] NZHC 2058. In

Principle/Area of document	#	Question	Vector's response
			this case, the High Court was asked to determine numerous questions under both the 1992 Act and the Resource Management Act 1991 ("**RMA**"). In a judgment spanning 83 pages, Williams J considered the application of multiple pieces of legislation dealt with issues including the application of section 22 of the 1992 Act (currently covered by the first Exclusion), the injurious affectation of works on land (including valuation of any such affect and three expert witnesses giving evidence in respect of valuation) under section 23 of the 1992 Act (currently covered by the eighth Exclusion) and the rights of Transpower New Zealand Limited under the RMA (currently covered by the fifth Exclusion). • *Westpower Limited v Graham* CA161/93, 15 November 1993. In this decision, the Court was asked to decide between two competing interests in respect of electrical equipment. Again, a detailed analysis of the historical rules in respect of the relevant equipment was required to make an assessment under section 22 of the 1992 Act. Reviewing each of the judgments above demonstrates the complexity of the law that Utilities Disputes would be required to consider if the Exclusions were removed. In order to identify the relevant sources of law and interpret them, the Court in each of the cases above had the benefit of formal pleadings, evidence and legal submissions from lawyers on behalf of each of the parties to the dispute. In Vector's view, it is impossible for Utilities Disputes to

			adequately consider the relevant rules of law while still providing an informal and efficient dispute resolution mechanism. Vector's concerns about the increased complexity of the cases Utilities Disputes would determine if the Exclusions were removed are heightened by the following: • The fact that Utilities Disputes is not required to determine cases in accordance with law, but with the objective of reaching an outcome that is "fair and reasonable in all the circumstances", and only "having regard to any legal rule or judicial authority that applies". Particularly in the complex areas of law covered by the Exclusions, the law (as enacted by Parliament and applied by the Courts) reflects a balancing of rights and obligations that is intended to produce fair and reasonable outcomes. Where the resolution of a complaint turns exclusively or largely on the proper interpretation and application of the law (as will often be the case in complaints currently subject to the Exclusions), the outcome should not be influenced by what Utilities Disputes thinks is fair and reasonable in the circumstances. Doing so would be to usurp the function of Parliament and the Courts. • The RMA and Public Works Act 1981 ("**PWA**") contain detailed processes to enable participation in decision making, provide a mechanism for making complaints, and enable the management of disputes. These processes and procedures demonstrate Parliament's endorsement of long standing principles that resource allocation matters and land use disputes should be determined in a transparent and open forum – the Courts.

Principle/Area of document	#	Question	Vector's response
			Removing the Exclusion would allow Utilities Disputes to inquire into land use matters, and make determinations about private property, undermining the role of decision-making bodies under those frameworks. Removing the Exclusion amounts to a fundamental change to how disputes about land are determined, and would usurp the intention of Parliament. • The fact that there is no right of appeal from a determination under the Scheme Rules. A decision-making procedure that does not contain a right of appeal is inappropriate for determining the types of complex cases that are currently subject to the Exclusions. Further, the only way for a party to challenge an incorrect determination is through judicial review. Judicial review is a much more narrow right of recourse against an incorrect determination than an appeal, and will usually require the complainant to establish that something went wrong in the decision-making process, and not only the outcome. The Review states "A scheme such as Utilities Disputes should only constrain the rights of justice of individual where there is evidence to demonstrate a realistic possibility of significant harm." Vector does not disagree, but submits that there is a possibility of real harm to providers should the Exclusions be removed in the form of an increased risk of legally incorrect determinations and the inability for the parties to appeal.

Principle/Area of document	#	Question	Vector's response
			Consequently, any extension of jurisdiction by Utilities Disputes could be subject to an application for judicial review in respect of the removal of the Exclusions. **Safeguards** The existing safeguards, and the new safeguards that are proposed, are insufficient to address Vector's concerns. Generally, Vector is concerned that each of the safeguards (discussed in more detail below) are an exercise of discretion by Utilities Disputes, rather than an automatic exclusion. By definition and design, they provide less protection to providers than an exclusion. Vector is concerned that, over time, application of the safeguards will be eroded such that they provide little meaningful protection. The Consultation Paper simply assumes in many instances that a discretion will be exercised. However, there is of course no guarantee that will be the case. More particularly: • *Suitable forum safeguard:* In Vector's submission, every case currently considered by the Exclusions is more suitably dealt with in another forum (in most cases the Environment Court or High Court). In forming this view, Vector emphasises the complexity of the legal questions that complaints covered by the Exclusions inevitably raise. Alternative forums to Utilities Disputes allow for

Principle/Area of document	#	Question	Vector's response
			the proper consideration of the complex issues that arise, including giving the decision maker the benefit of detailed submissions from lawyers who will identify the relevant law for the decision maker to apply. There is no logical reason for the removal of an exclusion that will simply see cases referred to an alternative forum. Such an approach would duplicate costs and result in the double handling of complaints. • *Test-case safeguard*: The *test*-case safeguard means that providers will be obliged to pay the legal costs of both parties in the event of a test case. Where the issues raised are complex and often require expert evidence, bearing the burden of costs for both parties, on a solicitor-client basis, will be disproportionate and unfair. Further, the suggestion that the test case procedure is a "safeguard for complaints that are currently subject to the Exclusions" is an implicit recognition that Utilities Disputes is not the appropriate forum for such complaints. • *Maximum value safeguard*: The operation of the maximum value safeguard will not operate to protect Vector for two main reasons: o the value of the claim (particularly in the case of injurious affectaion) is often not known until after a decision as to liability has been made, meaning that it will be difficult for the Commissioner to accurately screen the value of claims; and

Principle/Area of document	#	Question	Vector's response
			○ expert evidence will generally be required in respect of the valuation of land. Should the Board disagree with Vector's view, and remove the Exclusions, Vector agrees that the retrospectivity and six-month review safeguards are necessary. In addition, the complexity of the law that requires to be considered should the Exclusions be removed is likely to result in higher costs for Utilities Disputes and the relevant provider, and harm consumers as these additional costs are ultimately passed on to them. The Board should consider this potential unintended consequence in making a decision on this issue, and how any additional significant costs could be minimised and allocated fairly (should the Exclusions be removed) during the upcoming review of Utility Disputes' levy system.
		Exclusion 1.1	Vector disagrees with the analysis of the Board, which states that "it does not appear that this exclusion has any continued effect because of the time that has elapsed since it was included and the operation of other Scheme rules". Vector does not consider that the Board's analysis of the limitation issues is correct at law, notwithstanding the Scheme's emphasis on when the act or failure that gave rise to the complaint first occurred. Whether or not works were "lawfully installed" has a number of consequences that would not mean that every case relating to it is precluded by limitation issues. In particular, it

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			can determine whether the protection of existing works under section 22 of the 1992 Act applies, and therefore the ownership of those works, which can be relevant to access rights (for example under section 23(1) of the 1992 Act). Accordingly, in order to be able to determine whether a distributor has properly exercised an access right in 2018 (that being the "act that gave rise to Complaint" in terms of Scheme Rule 9) it may be necessary to determine the question of lawful installation. The effect of the Exclusion is, appropriately, to prevent the Board from having jurisdiction to determine that issue. In other words, the act or failure to act that is the subject of the complaint might have occurred within the limitation period, but in order to determine the legality of that act, it may be necessary to determine lawful installation. That view is confirmed by the fact that: • cases such as *Ryan Properties Investments Limited v Wellington Electricity Lines Limited* and *Kapiti High Voltage Coalition Incorporated v Kapiti Coast District Council & Transpower New Zealand Limited* would not have been heard in the Courts because of limitation issues if the Board's view was correct; and • at the time that the exclusion was introduced (in 2005), more than six years had passed since 1993 (six years was the relevant limitation period under the Limitation Act 1950). It must therefore have been contemplated that claims in relation to the lawful installation of works installed before 1993 would arise in 2005. The same logic applies now.

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			The third and fourth points in the Consultation Paper are discretionary in nature and will not necessarily be exercised. The reasons that are identified on page 20 of the Consultation Paper for the Exclusion continue to be persuasive, and there is no reason to derogate from that position now. Indeed, the only suggested justification for the removal of the Exclusion is limitation. That is not a valid justification, for the reasons set out above.
		Exclusion 1.2	For the same reasons as those set out above, Vector does not consider that the Board's view of the application of the Limitation Act 2010 is correct. The question of whether a lines company holds the legal right for lines equipment installed after 1993, or to which section 22 of the 1992 Act does not apply, may be relevant to a complaint raised in respect an act or omission done in 2018. The other protections outlined, again, are discretionary. Vector is concerned that Utilities Disputes will not exercise its discretionary power to have complaints heard in the most appropriate forum.
		Exclusion 1.3	Again, the analysis in respect of limitation issues around this clause is flawed. The question of whether Vector is the owner of equipment constructed before 1 October 2006 will clearly be relevant in determining what Vector is allowed to do in respect of that equipment now and in the future. The issue is

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			not that a complaint will be brought under this ground, but instead that a complaint would be made in respect of some action taken by Vector in 2018 (or the future) which turns on the question of ownership of the relevant equipment. In such a scenario, Utilities Disputes may (were the Exclusions removed) be required to make a determination as to ownership under this clause.
		Exclusion 1.4	Vector does not consider that the size of local authorities was the principal reason for this Exclusion, but instead their public nature. The Land Code Working Group (LCWG) stated: > In the LCWG's view, it remains appropriate that disputes arising under the sections of the Electricity Act and Gas Act dealing with roads and level crossings should be excluded from the expanded Scheme. The Scheme is aimed at private landowners to resolve disputes they have with electricity lines companies and gas lines companies. It is not appropriate for public bodies to be able to take advantage of the Scheme. In Vector's view, the Consultation Paper therefore misconstrues the principal reason for this Exclusion. There are a number of reasons for the Exclusion, which still apply: • the purpose of the Scheme, as noted in the Regulatory Impact Statement noted above, is to "even the playing field" between

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			consumers and providers. That is unnecessary in the case of public bodies; • the costs of providing the services are met by providers. It is not appropriate that providers are obliged to bear the cost of local authorities bringing complaints against them; • while Utilities Disputes is the approved scheme under the 2010 Act, it is not a branch of the judiciary. Vector considers that it is not appropriate for Utilities Disputes to exercise jurisdiction over complaints made by local authorities; • the Utilities Disputes complaints process is private and confidential and complainants and providers are not named in case notes. In the context of local authorities, who are responsible and answerable to the public, this privacy is inappropriate; and • the types of complaints that are subject to the Exclusion are more likely to involve balancing of public and private interests. Utilities Disputes is not the appropriate forum for that balancing exercise. Again, the discretionary nature of the proposed safeguards does not provide Vector with comfort in respect of complaints that may fall under this clause.
		Exclusion 1.5	The RMA and PWA both contain comprehensive processes for public participation, scrutiny, objections and complaints, including through the

Principle/Area of document	#	Question	Vector's response
			Courts. Those processes already contain appropriate safeguards. Further, Utilities Disputes oversight is not necessary or appropriate. In addition, it is inappropriate for Utilities Disputes to provide a parallel dispute resolution process, as this effectively enables complainants to mount a collateral challenge to decisions made under the established RMA and PWA processes. Further, any complaints heard by Utilities Disputes that seek to impugn decisions made by local authorities, Boards of Inquiries or the Minister of Lands will breach established principles of natural justice, as they effectively enable collateral attack. The discretionary nature of the proposed "suitable forum" safeguard provides insufficient protection against this risk. We cannot see a situation where a complaint involving RMA and PWA processes should be determined outside the current forums and processes. The current absolute Exclusion should be retained.
		Exclusion 1.6	The Electricity (Hazards from Trees) Regulations 2003 (**"Tree Regulations"**) provide for their own alternative dispute resolution mechanism in the form of arbitration. That mechanism is more specific to the issues that arise under the Tree Regulations and is more appropriate than having Utilities Disputes consider complaints under this clause. General Rule 15(c) provides an exclusion, but only where the subject matter of the complaint "**is being, or has already been**, dealt with" before the

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			arbitration. It does not provide for the circumstances in which an arbitration under the Trees Regulations has not been commenced. The other safeguards are discretionary and therefore inadequate. Vector remains of the view that there should be a clear and consistent rule in favour of arbitration under the Trees Regulations – and the Board appears to acknowledge this, saying "An alternative, free dispute resolution mechanism would in most cases appear appropriate…"
		Exclusion 1.7	Vector does not agree with the Board's statement that "When considering [a complaint about damage to land or safety arising from a maintenance issue] the Commissioner may consider the adequacy or reasonableness of a maintenance programme to determine whether a lines company has been negligent or not (where damage is claimed)." It does not make sense for Utilities Disputes to be able to consider the adequacy or reasonableness of maintenance programme in some cases and not others. Such a complaint is still a dispute "as to whether the maintenance programme carried out by a Lines Company on Lines Equipment is adequate or reasonable" in terms of the Exclusion, and complainants are not entitled to avoid the application of the Exclusion simply by claiming damages. This would involve the exact sort of "second guessing" the LCWG identified as being undesirable. The LCWG concerns were well founded. It is inappropriate for landowners to second guess a maintenance programme, the creation and execution of which involves a complex series of decisions by providers. Maintenance programmes of distributors are also able to be considered by

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			the Commerce Commission under Part 4 of the Commerce Act. The Commerce Commission, since November 2017, has prioritised and publicised its intention to consider "investment and maintenance" of providers' assets. There is no need for Utilities Disputes to also become involved in regulating maintenance programmes given the other regulatory oversight already in place. The Commerce Commission's remit under Part 4 reflects that these matters can only be considered on a network-wide basis and not in the context of an individual complaint to Utilities Disputes. The safeguards cited by the Board are inadequate. Worksafe is not a "forum" but a regulator and does not determine disputes between consumers and landowners.
		Exclusion 1.8	The meaning of "injuriously affect" in section 23(3) has been considered by the Court. For example, in *Fernwood Dairies Ltd v Transpower New Zealand Ltd* [2007] NZRMA 190, the Environment Court undertook a detailed analysis of that test, ultimately holding: > Subject to our discussion below we hold that 'injuriously affect' in section 23(3) means causing either any direct, non-trivial effects on land, or measurable effects on land value, as a result of the upgraded or replaced structures. Adverse effects on persons or personal

			property are not included except to the extent they are proved to be reflected in changes in land value. It appears to us that, potentially, injurious affects under section 23(3) fall into, at least, four categories: (1) encroachments - where the result of the work is to exclusively occupy more space on the underlying land than the existing works did before; (2) the effects of carrying out the maintenance (e.g. disturbance to pasture, creation of tracks); (3) effects on amenities that affect the underlying land (e.g. visual effects that affect land value); (4) the stigma effect (the result of public fears about power lines). As will be apparent, these are complex issues. Given the focus on land value, it is likely that detailed valuation evidence will be required to determine them. Utilities Disputes is not the appropriate forum for these types of issues. The Board considers that the safeguards would prevent harm to providers such as Vector. In forming that conclusion, the Board states that both the power to refer the complaint to a more appropriate forum and the $50,000 claim limit would protect providers. As will be apparent from the test above, it is quite possible that compensation will be under this limit (for example, under the second category identified by the Environment Court), but in any

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			event it does not enable the adequate screening of complaints, because it will not be possible to quantify the value of the injurious affectation at the outset of a complaint. If there will generally be a more appropriate forum for considering complaints that would fall within the ambit of both clauses 1.8 and 1.9, Vector submits that the exclusion should remain in place. Vector submits there is no need to deal with the complaint at a Utilities Disputes level just for it to be referred to the correct forum for determination. Finally, it is difficult to reconcile the Board's statement that it is "adequately resourced to competently interpret and apply legal precedent when applicable" with its acceptance that the meaning of "injurious affectation" is "yet to be tested legally", in light of *Fernwood Dairies Ltd v Transpower New Zealand Ltd*.
		Exclusion 1.9	As per Exclusion 1.8 above.
		Exclusion 1.10	Section 7A of the Consumer Guarantees Act 1993 (**"CGA"**) provides that electricity retailers must supply electricity of an acceptable quality. Electricity retailers are indemnified under section 46A of the CGA against the "responsible party" which may in some instances be a lines company. Accordingly, the CGA reflects a conscious policy decision by Parliament under which consumers cannot bring a claim against a lines company directly in relation to the matters covered by section 7A of the CGA.

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			The existing Exclusion reflects that policy decision and prevents a consumer making a complaint to Utilities Disputes that it would not be able to make under the CGA. The Consultation Paper asserts, in response to a submission by Transpower to similar effect, "this does not take into account that the CGA will not always apply." It is not clear what is meant by this statement. None of the Consultation Paper's "Analysis" contains a reason for disturbing the balance struck under the CGA. There is none, and the Exclusion should be retained. Were the exclusion to be removed, consumers might argue that they can bring a direct claim against Vector and other non-retailers. This would run contrary to the express intention of Parliament.
		Exclusion 1.11	-
		Exclusion 2.1	-
		Exclusion 2.1	-
Mechanism to ensure Utilities	5	5. Do you agree with the Board's approach and wording to implementing a	Vector agrees with the Board's proposed approach of prorating new providers' fixed levy depending on when they joined and allowing a

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Disputes can refer, and, where appropriate, consider complaints about providers without delay		mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	reasonable period of time for providers to undertake other required activities, e.g. promoting the scheme on their website. It would be helpful if Utilities Disputes can inform existing providers in a timely manner which providers will likely be joining, in the process of joining, or have recently joined, the scheme through the above process.

Appendix 1 Submission - Wellington Electricity submission on the independent 5-year review of Utilities Disputes Limited - round two consultation paper

Principle/ Area of document	#	Question	Submitter's response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	No further comment.
Natural Justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	Wellington Electricity supports the retention of the reference to natural justice within the scheme rules.
Performance Standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	Wellington Electricity opposes the removal of self-reporting but we are not opposed to the current methodology being reviewed. Accordingly, Wellington Electricity agrees with the board's proposal to review the self-reporting requirements prior to removal of the current protocol.
Land Complaint Exclusions	4	Please add further thoughts on the Land Complaint Exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further factual information that may be of relevance to the Board's consideration of these changes.	Wellington Electricity continues to be of the view that exclusions 1.1 to 1.9 should remain. We have set out our reasons in the relevant rows below. We also take this opportunity to note that there appears to be a significant typographical error in General Rule 14(b) and Scheme Rule 11 which we consider has the effect of preventing UDL from hearing any complaint where the lines company's actions are under an **easement**. The two rules refer to acts undertaken by lines companies when exercising rights under "any applicable gas or electricity **legislation or regulation**, or under an **access agreement** granted to the Lines Company by the owner or occupier". An easement is not a right under gas or electricity legislation or regulations, and is not an "access agreement". An easement is an interest in land; interests in land are not agreements. While an easement might derive from an agreement to grant that easement, it may also be

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			created without an agreement – eg. by a taking under the Public Works Act 1981 or, most-commonly, under a subdivision consent condition imposed under the Resource Management Act 1991. In any event, an agreement to grant the easement, if there is one, is not the same as the easement itself, and is not an "access agreement"; an agreement to grant an easement is not the same thing as an agreement granting access. Even if an easement were to be considered an "access agreement", easements granted by the predecessor in title to the current owner would not be "granted by the owner" and therefore out of jurisdiction. A registered lease, right of way or other registered right existing before the owner acquired the property would also fall foul of this provision and would be outside jurisdiction. We expect that this is a typographical error as easements are referred to in Appendix Two within the defined term "Land Agreement", which is used only in the proviso to exclusion 1.9. Given that UDL is considering amendments to these particular provisions, Wellington Electricity submits that the words "under an easement" be included ahead of the phrase "or under an access agreement granted to the Lines Company by the owner or occupier".
		Exclusion 1.1	Wellington Electricity does not support the removal of exclusion 1.1, for the following reasons: 1. As noted in the Consultation Paper, disputes about the lawfulness of the fixing or installing of existing works are highly complex, involve detailed legal and factual issues, are not well suited to alternative dispute resolution and can involve expensive and time-consuming research. Wellington Electricity repeats the comments made by the Land Code Working Group, as stated in the Consultation Paper, in this respect. 2. Disputes about the lawfulness of the fixing or installing of existing works are not necessarily historical, and the assumption in the Consultation Paper that Scheme Rule 9(b) or General Rule 15(d) will operate to prevent the complaint being heard may not be accurate. The definition of "existing works" in the Electricity Act 1992 refers to "any works that were wholly or partly in existence, or work on the construction of which commenced" before 1 January 1988 (for Transpower) or 1 January 1993 (for all other owners of existing works). The definition of "existing fittings" in the Gas Act 1992 is on similar terms.

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			Accordingly, so long as the works or fittings were *partly* in existence at the relevant date, they will be existing works or existing fittings, even though the owner of the works or fittings may have completed the construction of the works or fittings at any time after the relevant date. Section 23(1)(b) of the Electricity Act 1992 expressly provides a right of entry to land for the purpose of *completing* the existing works, and section 23A of the Electricity Act 1992 sets out notice requirements where the owner of the existing works intends to enter land "for the purpose of maintaining or *completing* the works". Further, any new fittings installed as "maintenance" (as defined in section 23(3) of the Electricity Act 1992) of existing works will, once installed, form part of the existing works and receive the protection afforded by section 22 of the Electricity Act 1992. Disputes could therefore arise as to whether those fittings were lawfully installed. Accordingly, Wellington Electricity submits that the Consultation Paper errs in assuming that disputes about whether lines equipment were lawfully fixed or installed relate only to acts or omissions occurring before 1 January 1988 (for Transpower) and 1 January 1993 (for everyone else). 3. Wellington Electricity also submits that the statement in the Consultation Paper that the time-barring exclusion in General Rule 15(d) will apply to all acts or omissions occurring more than 6 years before the complaint is made may not be correct. We do not see this as being as certain as assumed in the Consultation Paper. General Rule 15(d) is drafted in terms of when "the Complainant" became (or should have become aware) of the circumstances. If the Complainant acquired the property within the 6 year period before making the complaint, the Complainant may argue that the Complainant has only become aware, and could only have been aware, of the circumstances from the time that the Complaint acquired the property. The phrasing in General Rule 15(d) differs from that used in the Limitation Act 2010, which is (in the absence of the delayed discoverability provision) based on the date on which act or omission giving rise to cause of action occurred, rather than the date on which the claimant realised (or ought to have realised) that there was a claim.

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			In stating that the emphasis is on the *initial* act or failure act to act, we believe that the Consultation Paper has not accurately characterised the effect of General Rule 15(d). 4. In many cases with lines owned by local distributors, the value of the complaint will be under the $50,000 cap in Scheme Rule 7 but will often be close to that figure. Taking a common scenario as an example, the difference in the value of a residential property due to the location of an existing pole and overhead conductors could very easily be in the $40,000 to $50,000 range, meaning that high value and highly complex complaints that should properly be referred to a court are heard by UDL. 5. Wellington Electricity is concerned that the Consultation Paper places reliance on UDL determining that there is a more "appropriate place" to deal with a complaint under General Rule 18(a). This is a subjective test based on UDL's view, and is not a sound method for determining such matters. In Wellington Electricity's view, it would be improper to rely solely on General Rule 18(a) to ensure that all complaints about the lawfulness of the fixing or installing of existing works are not heard on the basis that they may be more properly heard by a court. 6. Parliament has mandated that disputes under sections 23 to 23E of the Electricity Act 1992 be referred to the Environment Court. It would be inconsistent with section 23F of the Electricity Act 1992 for UDL to have jurisdiction for such matters.
		Exclusion 1.2	Wellington Electricity does not support the removal of exclusion 1.2, for the following reasons: 1. The Consultation Paper incorrectly assumes that limitation provisions would apply. If electrical works were installed before 1 October 2006 without an appropriate property right, the continuing presence of those works may amount to a continuing trespass and each entry onto the land to access those works may be a further act of trespass. Limitation provisions only operate to prevent the claim of damages for the period before the limitation date, but still allow the occupier of the land to claim damages, probably in the form of *mesne profits*, for the period after the limitation date and an injunction preventing future trespass. 2. In order to assess whether the occupier of land is entitled to damages for trespass for the period after the limitation date, UDL or the courts would need to assess whether the

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			electrical works were lawfully installed even though the installation date was prior to the limitation date. This could be a highly complex factual and legal determination, and could require the review of matters occurring before 1 October 2006. 3. Damages for continuing trespass over a 6 year period (assuming that General Rule 15(d) applies to limit the claim to a 6 year period) could easily amount to close to or more than $50,000, as would the impact of an injunction. 4. We repeat our submission made at points 1, 3 and 5 in respect of exclusion 1.1.
		Exclusion 1.3	Wellington Electricity does not support the removal of exclusion 1.3 for the same reasons as set out at our submission on exclusion 1.2. In addition: 1. A determination about continuing trespass as referred to under our submission on exclusion 1.2 may necessarily involve a determination about historical line ownership, for the reasons set out in that submission. 2. Information about the "point of supply" to a consumer is complicated, with complex and often-misunderstood current and historical statutory provisions and a lack of information. Local distributors have a network-ownership interface with thousands of consumers that are sometimes highly complicated. In addition, historical documentary information may no longer be available. 3. We disagree with the conclusions in the Consultation Paper about the effect of the limitation provisions in the rules, for the reasons set out in our submission on exclusion 1.1.
		Exclusion 1.4	Wellington Electricity does not support the removal of exclusion 1.4 for the following reasons: 1. Parliament has mandated alternative dispute resolution provisions in sections 27 to 29 of the Electricity Act 1992 and there is no scope for UDL to have a role in determining a dispute. The appeal right under these provisions has a clear time limit, as does the right for a local authority or the New Zealand Transport Agency to impose reasonable conditions under section 25 of the Electricity Act 1992, creating operational certainty. Parliament has also created an offence for electricity operator non-compliance. Parliament has signalled (via the appeal right and the offence) that the appropriate

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			place for dealing with a dispute is in the District Court. In light of this, Wellington Electricity submits that providing jurisdiction to UDL would conflict with these processes and Parliament's intent, and would create operational uncertainty. 2. Similarly, Parliament has mandated that disputes about access to level crossings are to be referred to the District Court and disputes about relocation costs are to be referred to arbitration under the Arbitration Act 1996. Given these clear provisions, Wellington Electricity submits that disputes regarding these matters should be out of jurisdiction in all cases and it is not appropriate for UDL to hear them or to have the ability to consider hearing them. 3. These matters are legally complex, with overlapping statutory provisions governing the application of "reasonable conditions" as well as the Code imposed under the Utilities Access Act 2010 (see sections 24 and 24A of the Electricity Act 1992 and section 6(4) of the Utilities Access Act 2010). 4. Disputes about access to roads and level crossing are factually complex. We submit that UDL is not resourced to consider matters relating to roads or level crossings, and is not equipped to determine competing public interests. 5. Disputes between local authorities or the New Zealand Transport Agency and lines companies are likely to be of significant value and therefore either outside financial jurisdiction or only just within jurisdiction. This would be especially the case with transmission assets, but the value of a dispute relating to low voltage assets on roads would generally be close to or exceed $50,000. Wellington Electricity therefore submits that it would not be appropriate for high value complex decisions to be within jurisdiction. 6. Local authorities, Kiwirail and the New Zealand Transport Agency are not the type of landowner that the scheme was intended to benefit. There is no consumer protection benefit in extending jurisdiction to these disputes. 7. As indicated by Parliament in the relevant statutes, these types of disputes are unlikely to be progressing by alternative dispute resolution.

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		Exclusion 1.5	Wellington Electricity does not support the removal of exclusion 1.5 for the following reasons: 1. The acquisition of interests in land is a fully commercial process. Landowners have a sufficient protection in having the right to refuse to grant an interest in land and to require the payment of an agreed amount of compensation for the grant of the interest. As the negotiation of a contractual right is fully commercial, the scheme is not furthered by providing jurisdiction in this respect. 2. Where an interest in land is acquired under the Public Works Act 1981 by the Minister of Land Information (following a request by a lines company under section 186 of the Resource Management Act 1991), all actions to give effect to that acquisition – including all negotiations – are by the Minister, the Minister's officials or LINZ accredited suppliers. Any actions of the Minister, officials or accredited suppliers are not the actions of lines companies and cannot be imputed to the lines company which requested that the interest in land be acquired. Any issue with the fairness or soundness of an acquisition under the Public Works Act 1981 is a matter for the Environment Court under section 24(7)(d) of the Public Works Act 1981. Wellington Electricity is therefore strongly opposed to UDL having jurisdiction to hear complaints about disputes relating to the acquisition of land under the Public Works Act 1981. 3. Disputes about the acquisition of interests in land are highly unlikely to be within financial limits.

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		Exclusion 1.6	Wellington Electricity does not support the removal of exclusion 1.6 for the following reasons: 1. The Electricity (Hazards from Trees) Regulations 2003 already provides a suitable avenue and a detailed process for dealing with disputes. It could be unlawful for UDL to hear a dispute about a dispensation if the person hearing the dispute has not been appointed as an arbitrator under regulation 29 of the Electricity (Hazards from Trees) Regulations 2003. 2. Arbitrations relate to applications for dispensations where trees are located within the notice zone under the Electricity (Hazards from Trees) Regulations 2003. We submit that UDL is not resourced or equipped for dealing with this technical matter. 3. The Consultation Paper expressly acknowledges, with approval, that tree owners might forum-shop solely on the basis of cost. The costs of arbitration under the Electricity (Hazards from Trees) Regulations 2003 are met as the arbitrator orders, and therefore the tree owner is not necessarily disadvantaged as to costs should the tree owner commence an arbitration under these regulations. Further, to avoid any uncertainty on this point, we note that the Arbitration Act 1996 does not apply to arbitrations under the Electricity (Hazards from Trees) Regulations 2003 and therefore the costs involved in an arbitration are not necessarily burdensome.
		Exclusion 1.7	Wellington Electricity does not support the removal of exclusion 1.7 for the following reasons: 1. Lines companies are heavily regulated in respect of maintenance through disclosure requirements and the price-quality path under the Commerce Act 1986, safety management systems and other safety requirements under the Electricity (Safety) Regulations 2010 and the Health and Safety at Work Act 2015, and in other respects. Maintenance requirements are therefore subject to review by multiple bodies including the Commerce Commission and WorkSafe New Zealand. 2. In light of the above, it would be inappropriate for UDL to consider complaints about whether maintenance programmes were adequate or reasonable. UDL would be reviewing matters under the purview of other statutory entities and may make decisions in conflict with the decisions of those regulators. 3. We submit that UDL is not resourced to review maintenance programmes, given the

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			competing considerations relating to maintenance which are recognised by regulatory imposition.
		Exclusion 1.8	Wellington Electricity does not support the removal of exclusion 1.8 for the following reasons: 1. Despite judicial assistance over the past few years, disputes regarding injurious affection remain highly complex, require both factual and legal determination, and have significant ramifications. We submit that such disputes are not suitable for alternative dispute resolution. 2. We submit that UDL is not resourced to review whether land is injuriously affected. As the determination is partly a matter of valuation, UDL would need to seek valuation evidence, and the quality of that evidence would be open to challenge. Court decisions, including on section 23(3)(b) of the Electricity Act 1992, have indicated the variability in the quality of valuers. 3. The remedy for undertaking work in breach of section 23(3)(b) of the Electricity Act 1992 would be a finding of trespass, leading to an entitlement to damages and requiring either removal of the offending equipment or the grant or taking of an easement. Such a matter is therefore not suitable for review by UDL and would not be suitable for alternative dispute resolution. 4. A decision regarding an upgrade undertaken in breach of section 23(3)(b) of the Electricity Act 1992 would have significant precedent effect, especially if the upgrade was undertaken on multiple properties. 5. Complaints about works in breach of section 23(3)(b) of the Electricity Act 1992 often involve other matters. For example, in *Kapiti High Voltage Coalition v Kapiti Coast District Council and Transpower New Zealand Limited*, a group of landowners complained about alleged breaches of the district plan as well as section 23(3)(b) of the Electricity Act 1992 by Transpower, and the matters were heard together. Providing jurisdiction for some of those matters, but not others, would prevent UDL and the courts from hearing the full matter. In addition, the ability of landowners to group together, as occurred in the *Kapiti* case, deals with some of the cost concerns raised in the Consultation Paper.

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		Exclusion 1.9	Wellington Electricity does not support the removal of exclusion 1.9 for the following reasons: 1. Section 57 of the Electricity Act 1992 and section 51 of the Gas Act 1992 provide a code for determining whether compensation is payable and the quantum of that compensation. Parliament has mandated in section 57(2) of the Electricity Act 1992 and section 51(2) of the Gas Act 1992 that any claims for compensation "shall be made and determined" under the Public Works Act 1981. There is therefore no scope for UDL to have any jurisdiction in this matter. It would not be appropriate to leave it open to UDL to decide whether or not to consider a dispute under these provisions. 2. The entitlement to compensation under the Public Works Act 1981 involves legal and valuation determinations. Wellington Electricity submits that UDL is not resourced to review whether land is injuriously affected and the quantum of the compensation that may be payable for that injurious affection. UDL would need to understand Part 5 of the Public Works Act 1981 and would need to seek valuation evidence. As previously submitted, the quality of valuation evidence is variable and Wellington Electricity therefore submits that any determination about compensation for impacts on land should be left to the courts.
		Exclusion 1.10	Wellington Electricity does not support the removal of exclusion 1.10. The relationship between the electricity or gas supplier and the consumer is governed by the terms and conditions of the retailers' contract with the consumer.
		Exclusion 1.11	No further comment on this exclusion.
		Exclusion 2.1	No further comment on this exclusion.
		Exclusion 2.2	No further comment on this exclusion.
Mechanism to ensure Utilities Disputes can refer, and, where appropriate,	5	Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	Wellington Electricity supports the board's proposal.

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consider complaints about providers without delay			