



**Submission to Electricity Commission:**

**Approval method for consumer complaints  
schemes**

From

**Contact Energy Limited**

9 March 2007

## **Introduction**

Contact Energy Limited (“Contact”) welcomes this opportunity to comment on the submissions received by the Electricity Commission in relation to its consultation paper *Approval method for consumer complaints resolution schemes*.

Contact is a founding member of the Electricity and Gas Complaints Authority (“EGCA”), which is currently in the process of applying to have its complaints scheme approved by the Electricity Commission.

We support the Commission’s moves to establish a transparent and consistent process for approving complaints schemes. This is particularly important where there is more than one scheme. Because every scheme will have slightly different mechanisms and processes the fundamental basis and governing principles for those schemes should be the same. The approval process will assist to achieve this.

### **Fundamental object of a complaints scheme is to resolve disputes**

It is trite, but important, to say that the fundamental objective of a complaints scheme is to provide an impartial and timely method for resolving legitimate complaints as an alternative to seeking to enforce legal rights. Subject to our comments below, Contact considers the Australian benchmark criteria used by the Commission provide a reasoned basis for assessing whether any residential consumer complaints scheme will achieve this objective.

However, the benchmark principles and the suggested standards do not appear to recognise that different considerations and process might be appropriate for residential consumers and for commercial consumers and businesses. While we recognise it is difficult to draw bright lines, Contact considers that the benchmark principles and the process suggested are inappropriate for commercial customers. We submit that the Commission should investigate whether different benchmarks and standards should be adopted for such consumers and whether schemes should be approved only for domestic (residential) consumer complaints.

## Specific comments

While we are generally comfortable with the criteria, in Contact's view there are a number of criteria that should be of particular importance:

(a) *Ongoing compliance*

We support the Commission's view that initial compliance is only the first step – a scheme must demonstrate ongoing compliance with the approval requirements to maintain its approval.

To achieve this we suggest that the achievement standard for a scheme's annual report (Benchmark 4.3) require the scheme to include in its annual report a description of its compliance with the approval criteria over the relevant period. This should also be reflected in benchmarks 5.11 and 5.13 which require biennial review and reporting. Contact considers annual reporting to the Commission and stakeholders is more appropriate than biennial reporting, and should be in addition to an independent review every three years (benchmark 6.11).

This will ensure transparency and a further incentive for any scheme to administer itself in accordance with the benchmarks.

(b) *Impartial decision maker*

The decision maker must be impartial.

Benchmarks 2.1-2.4 set out the way in which the Commission will assess whether a decision maker is independent and impartial. The focus in the standards suggested by the Commission is on ensuring the decision maker is not able to be influenced by scheme members.

We agree with this approach but note it is equally important that the decision maker should not be a "consumer champion" or become one. Furthermore, the Commission should take an active interest in ensuring the decision maker retains his or her independence on an ongoing basis. For example, the decision-maker should have no affiliation or involvement in any consumer or industry lobby group.

While it might be suggested that there is likely to be a disparity between the parties in relation to financial resources, commercial experience or awareness of the issues, the scheme itself is the mechanism for addressing these concerns. The adjudication process itself must be impartial. We agree with benchmark principle

3.4 which requires both parties to understand the case being put by the other side. However, this principle is not necessarily consistent with principles 3.8 and 3.9 which require that scheme members can be compelled to provide information while complainants only “encouraged” to provide information. Contact considers an impartial process should require the provision of all relevant information by both parties.

(c) *Consistency of outcome between schemes*

Contact does not object to the existence of more than one scheme as a matter of principle. Indeed, Contact supports contestability in services as this generally drives the best outcomes for participants.

However, where there are “competing” complaints schemes, we consider it is important that if the same complaint were brought under different complaint schemes, the same result (but not necessarily the same remedy) would eventuate. To achieve this, it is important to ensure complaints schemes act within the existing legal framework (both statutory and case law) to minimise the chances of discrepancies of outcomes occurring.

In this respect we note principle 3.1 which provides that the decision-maker must base determinations on what is “fair and reasonable, having regard to...the law”. It is imperative that a decision-maker acts within existing laws and interpretations of those laws. This requirement should be specifically linked to benchmark 5.2 which specifies that the scheme must have mechanisms for referring relevant complaints to other, more appropriate forums. Where a scheme is required to adjudicate on a matter which is novel or requires interpretation of a particular provision or area of the law, and where such a situation leads to legitimately different views, there should be an obligation on the complaints scheme to seek a ruling from the court. This will help to ensure consistency in outcome for all participants.

(d) *Clear mandate, jurisdiction and terms of reference*

To minimise consumer confusion, it is important that any scheme has a clear mandate and jurisdiction. We support the requirement for clear terms of reference (benchmark 2.10) but consider that the benchmark does not go far enough. Not only should there be an obligation to consult with affected parties and the Commission if a scheme wishes to extend its jurisdiction or mandate, the scheme should have to apply for an amended approval from the Commission in order to be able to make such an extension.

(e) *Level of detail in achievement standards – Question 2*

We accept that there needs to be some achievement standards in relation to the benchmark criteria. However, a balance needs to be struck between providing more detail and inhibiting the ability for schemes to adjust their processes as they develop and gain experience. With this in mind we note:

- (i) In some cases, it does not appear to us that the achievement standards add any additional detail to the benchmark criteria. See for example principle 1.10 – 1.19 and 3.1-3.2. The existence of two layers can promote confusion as to whether the scheme should seek to attain the standard or the benchmark principle. We consider that overall standards should only be used to provide additional detail not to simply restate the benchmark principle in other words.
- (ii) The benchmark agreements appear to repeat themselves in many places (e.g., 1.9 and 1.14). In the interests of promoting simplicity and tractability, we suggest the Commission investigate rationalising the number of benchmark principles into a necessary few.

(f) *Legal representation*

Contact agrees with the Commission that in most situations it is desirable to avoid legal representation at any hearings (principle 1.20). However, we do not consider there is a need for principle 1.22, which provides that a scheme member will pay the legal costs of a complainant if the scheme member is the first party to seek legal representation. We submit this principle should be removed because it is redundant, likely to create confusion and likely to create adverse incentives for the parties to a dispute.

- (i) Principle 1.22 is redundant

In practice most cases will be decided on the record with no formal hearing taking place. This has been Contact's experience with the EGCA. As a result this principle is (practically) redundant.

- (ii) Principle 1.22 creates confusion

Principle 1.22 refers to the scheme member "requests" to be legally represented. In most complaint cases the scheme member will rely on

internal legal advice and, in some extreme cases, external legal; support in preparing the case and presenting a submission.

The same applies to a complainant who can receive assistance in preparing his or her submission from any source.

However, this is not the same as “representation” at a hearing. The principle creates the potential for some confusion. There should be no scope for a scheme to determine that assistance in preparing a submission amounts to “legal representation”. If the benchmark principle is not removed, this should be made clear.

- (iii) Principle 1.22 has the potential to create perverse incentives if interpreted as catching advice

Retaining Principle 1.22 would shield complainants from the costs of their complaint particularly if “legal advice” were interpreted by a scheme as a form of representation .... This position is exacerbated by the fact that the benchmark as drafted imposes on the scheme member an unlimited liability for a complainants’ legal costs so there would be nothing to stop a complainant engaging a QC and requiring the scheme member to fund that expense”.

This position would be exacerbated by the fact that the benchmark as drafted imposes on the scheme member an unlimited liability for a complainants’ legal costs. If a scheme took the view that internal counsel help in dealing with a complaint amounted to legal representation, then there would be nothing to stop a complainant engaging a QC and requiring the scheme member to fund that expense.

- (g) *Ongoing compliance*

It follows from this that not only is initial compliance with a range of criteria important, but that any approved scheme continues to be monitored to ensure it is complying with those criteria on an ongoing basis. We therefore support the Commission’s proposal at paragraph 36 to monitor and audit schemes on an ongoing basis.