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Dear Maree

Approval of a Joint Electricity and Gas Complaints Resolution Scheme

Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide comments to the Electricity Commission and Gas Industry Company on their paper "Approval of a Joint Electricity and Gas Complaints Resolution Scheme" dated March 2008. Genesis Energy has reviewed the paper and attended the forum held by the Electricity Commission and Gas Industry Company on 15 April.

Genesis Energy is a state-owned enterprise with diverse interests in the energy sector. Genesis Energy is New Zealand's largest retailer in both the electricity and the reticulated natural gas sectors. Genesis Energy has more than half a million electricity customers and in excess of 130,000 gas customers. As a major retailer, Genesis Energy has a very strong interest in consumer outcomes. Genesis Energy is a member of the Electricity and Gas Complaints Commission scheme.

Genesis Energy understands that much of the impetus for the Electricity Commission and Gas Industry Companies' work comes from the government policy statements for electricity and gas respectively. Genesis Energy views on the effect of the policy statements on the policy environment for both regulatory agencies should be well known by now.¹

¹ Refer to Genesis Energy's submissions to MED on the draft gas GPS (dated February 2008) and draft electricity GPS (dated April 2008)

In the context of this consultation process, the government policy statements² are quite explicit and prescriptive about what the answer to the problem should be. This seems to have impaired the scope for the agencies to turn their minds to considering problems and options. Having worked through the consultation paper, Genesis Energy is left with some nagging doubts about the proposal that centre on a number of high-level questions, as listed below.

1. Does the proposed approach fit with the statutory schemes of the gas and electricity acts?
2. Are authority and accountability lines appropriate given the proposed scheme requirements?
3. Is the 'approved system' approach preferable to a regulatory approach (or indeed the status quo)?

Statutory Scheme

The consultation paper rightly points out that the legislation provides two routes towards achieving universal complaint resolution system coverage for consumers.

One route is the 'approved system' approach, able to be given effect in the Electricity Act 1992 through s158G:³

158G Complaints resolution system

- (1) Every electricity distributor and every electricity retailer must participate in a complaints resolution system that is approved by the Commission for the purpose of addressing complaints by any person (including potential consumers and owners and occupiers of land) relating to electricity retailers and electricity distributors.
- (2) This section applies provided the Commission has approved 1 or more complaints resolution system by notice in the *Gazette*.

The other route is the 'regulated system' approach, able to be given effect in the Electricity Act 1992 through s172D(27):⁴

- (27) providing for the establishment of, and participation by electricity distributors and electricity retailers in, a complaints resolution system (which may include codes of practice) for the purpose of addressing complaints by any person (including potential consumers and owners and occupiers of land) relating to electricity retailers and electricity distributors, and setting out minimum requirements in relation to that system, including—

² In the case of the electricity sector, Genesis Energy notes that the 2008 GPS remains in draft form.

³ The Gas Act has very similar wording in s43E.

⁴ The Gas Act has very similar wording in s43G(2)(a).

- (a) provision for compensation up to a maximum of \$20,000 to be awarded, and other actions to be taken, by the complaints resolution agency in relation to those complaints:
- (b) provision for rights of review, or rights of appeal on a question of law only, in relation to decisions relating to those complaints:

There are a number of features that differentiate the two approaches, but two key differences are:

1. a regulated system may include codes of practice; and
2. the instrument for approving a scheme is by Gazette notice, whereas the regulated approach requires (not surprisingly) regulations.

Genesis Energy's concern then is that the proposed approach appears to include features akin to codes of practice, but doesn't seem to anticipate placing those features into regulations. If the approval route is to be taken, then this would seem to imply that the complaints resolution system would need to be pared back to the point where it doesn't have any 'membership' requirements and it doesn't impose any standards on members beyond what is required by law.

To put it another way, for the approval mechanism in the Acts to be used it seems that the approved 'scheme' would need to more closely resemble something like the disputes tribunal than something like the electricity and gas complaints commissioner scheme. This is inconsistent with the pressure from the government policy statements to approve a scheme that "must incorporate a document that sets out the minimum standards of conduct for scheme members".

Genesis Energy acknowledges that the proposal does involve paring back the membership and standards-setting functions of any approved scheme. However, the residual 'scheme requirements' seem to over-reach the legislative authorities of s158G and s43E of the Electricity and Gas Acts respectively.

Lines of Authority and Accountability

While the above section discusses legal concerns, it is probably more important to consider the policy considerations that underpin the legislative schemes.

By approving a single complaints scheme, the Minister will in effect be establishing a legal monopoly. If the approved scheme has any membership requirements, or imposes any standards on its members, then those requirements and standards become potential barriers to entry. In this case, those barriers would apply to the gas pipeline, gas retail, electricity lines and electricity retail markets.

The appropriate location for any membership requirements and member standards is in legislation or delegated legislation. This ensures that authority and accountability ultimately flow back to parliament. To do otherwise, is to place inadequate checks and balances on decisions that could potentially produce significant anti-competitive outcomes.

The proposal involves a fairly complex set of governance arrangements for which the lines of authority and accountability are diffuse and seem questionable.

Aside from the issue of standards and requirements, the approved body would also charge members an annual fee. The proposed arrangements do not seem to provide the appropriate checks and balances to support this.

For the approved system approach to be viable, Genesis Energy suggests that:

1. any standards should be established by regulation, using appropriate authorities from the relevant legislation;⁵
2. the scheme to be approved should be stripped back to complaints resolution and should not involve any 'membership' requirements;
3. funding for the scheme should be via explicit legislative authorities such as the levy-setting powers in the gas and electricity acts.

Genesis Energy suggests that 'participation' in a system should not be read as meaning the same thing as 'membership' of a scheme.

Evaluating Policy Options

The questions raised above provide sufficient doubt for Genesis Energy to refrain from supporting the proposal. However, setting aside those doubts, the discussion paper does not provide a good basis for evaluating whether an approved scheme would be the best policy option in any event.

The paper has a tone of "here's your chance industry, and we'll regulate if you fall short of the mark". This regulation-as-threat approach is somewhat hackneyed.

It would be more useful if the paper were to paint a picture of what a regulated approach might look like (undoubtedly, there are a range of forms that this could take). Then it would be possible to evaluate a regulated approach vs. an "approval" approach vs. the status quo.

The paper does talk about the approval route being the "quickest and most effective route to establishing a single mandatory scheme for

⁵ The two options seem to be that the approval route is followed and the system simply applies the law, or the regulation route is followed in which case there may be a 'code of practice' specific to the system.

energy-based complaints".⁶ This seems to be the full extent of any attempt to set out a discussion on options evaluation. Genesis Energy suggests that this reads more as an attempt to justify the content of the GPS than to assist submitters to evaluate options.

If you would like to discuss any of these matters further, please contact me on 04 495 6357.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Carnegie'.

John A Carnegie
Regulatory Affairs Manager
Genesis Energy

⁶ Discussion paper, paragraph 4.9.

Appendix One – Responses to specific consultation questions

QUESTION	COMMENT
<p>Q1. Do you agree that the “overall objective” of the scheme should be to provide an independent, timely and cost-effective complaints resolution scheme that is in the long-term interests of gas and electricity consumers (including potential consumers) and the owners and occupiers of land?</p>	<p>Genesis Energy agrees that the scheme should aim to provide independent complaints resolution in a timely and cost-effective manner that serves the long-term interests of consumers.</p> <p>As always, there are limits on the extent to which of each these objectives may be pursued independently – good design requires thoughtful balancing of objectives.</p> <p><u>Independence</u></p> <p>The consultation paper, the government policy statement on gas governance, and the draft government policy statement on electricity governance all focus on two types of scheme independence:</p> <ol style="list-style-type: none"> 1. decision-making independent from industry; and 2. administration of the scheme independent from industry. <p>There does not seem to be much recognition of the question of independence from the executive branch of government or from the regulatory agencies. The shift from voluntary to ‘approved’ would alter any scheme’s independence, as would implementing the proposed governance arrangements.</p> <p>This broader question of independence is also interesting in the context of examining the ‘approved independent body’ model versus any permutations of the ‘regulated body’ model. Genesis Energy respectfully suggests that it would have been useful for the consultation paper to place these two models side-by-side for consideration, rather than take the rather hackneyed “we’ll give industry a chance, but threaten regulation as a backstop” approach.</p> <p>Nevertheless, Genesis Energy believes there could be merit in giving the approved independent body model an opportunity to deliver the goods. However, it would seem prudent for the regulatory agencies to simultaneously develop their thinking and inform the industry on what a regulated</p>

QUESTION	COMMENT
	<p>approach could look like. Genesis Energy suggests that in carrying out this work, the regulators should leverage off the work currently being undertaken by the Law Commission and the Ministry of Justice on their project examining tribunal reform. The President of the Law Commission observed in January this year that “They [tribunals] have just grown like Topsy. There has been no system, no plan, no coherence.”⁷ For a small country with limited resources, this should be cause for concern.</p> <p><u>Potential customers</u></p> <p>Genesis Energy suggests that including ‘potential customers’ within the jurisdiction of the scheme will prove problematic. This term is so broad that for many participants it effectively gives standing to everyone and anyone. For example, as Genesis Energy offers electricity retail services throughout New Zealand, anyone with legal capacity to form a contract is a potential customer. This broad jurisdiction invites vexatious or baseless complaints.</p> <p>Genesis Energy believes that jurisdiction should be limited by a suitable materiality threshold. Genesis Energy supports the Electricity Commission’s earlier proposal to include within the scheme’s jurisdiction “every person who has been materially affected by the acts or omissions of a retailer or lines company”. This remains broad, but ensures that the complainant meets some reasonable test of proximity.</p> <p>Some reasonable limitation of standing would align the scheme more closely with the well-established approach adopted by the courts.</p>
<p>Q2. Is the proposed scope of the scheme sufficient to cover all the necessary elements?</p>	<p><u>Potential customers</u></p> <p>As per Q1, Genesis Energy believes the scope should be altered with respect to ‘potential consumers’.</p>

⁷ Law Commission media release dated 16 January 2008 (accompanied publication of an issues paper reviewing existing tribunal arrangement). http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_131_381_PR%20UTF.pdf

QUESTION	COMMENT
	<p data-bbox="735 286 791 315"><u>LPG</u></p> <p data-bbox="735 356 1362 678">There seems little reason for the scheme to cover LPG at this stage. As far as Genesis Energy is aware, the existing industry-based schemes do not cover LPG. Considerable work will be required in any event to alter existing schemes to meet the Electricity Commission and Gas Industry Companies' requirements. Expanding the scheme to cover reticulated LPG would be an unnecessary additional hurdle.</p> <p data-bbox="735 719 1362 943">Genesis Energy believes it would be preferable to consider expanding the scope of any approved scheme to cover LPG <i>after</i> the initial scheme approval process. This would allow expansion to LPG to be considered as a standalone question and its merits weighed accordingly.</p> <p data-bbox="735 983 815 1012"><u>Prices</u></p> <p data-bbox="735 1052 1362 1144">Genesis Energy agrees that it is appropriate that the scheme does not examine the amount members charge for their services.</p> <p data-bbox="735 1184 999 1214"><u>Entry requirements</u></p> <p data-bbox="735 1254 1362 1576">Genesis Energy agrees that it is appropriate to limit the scope of any scheme code of practice. If membership of a scheme is to become compulsory, then that scheme becomes a legal monopoly. Any scheme membership requirements and codes of practice then become barriers to entry. Barriers to entry are not a problem <i>per se</i>, provided that they are reasonable and justified.</p> <p data-bbox="735 1617 1362 1939">If a monopoly scheme is to set its own membership requirements and codes of practice, then governance and accountability arrangements need to be designed to ensure that incumbents can't unreasonably exclude new entrants or penalise member sub-groups. These problems are of less concern when scheme membership is voluntary and the 'market for schemes' is fully contestable.</p> <p data-bbox="735 1980 1362 2031">Limiting the scope of scheme codes of compliance is one way of reducing</p>

QUESTION	COMMENT
	<p>opportunity for unreasonable barriers to entry.</p> <p>The regulatory design proposed by Electricity Commission and the Gas Industry Company is reasonably complex in terms of how accountability for, and oversight of, scheme rules (including codes of practice and membership requirements) flow.</p> <p>In a conventional regulated approach, a Minister of the Crown would have authority to establish rules. That authority would be delegated through legislation passed by Parliament.</p> <p>The proposed governance model involves 'regulatory oversight' by a joint committee of a Crown Entity and a co-regulatory body with sanction to trigger a special review or recommend that approval be revoked. In addition, there's an 'overseeing entity' with stakeholder members, industry members, consumer members and an 'independent' chair. The overseeing entity appoints the decision-maker and approves any changes to the scheme rules. The other significant piece of the puzzle is the set of approval criteria that are the subject of this consultation.</p> <p>This approach involves considerable overlap of, and interaction between, private and public interests. Genesis Energy is somewhat cautious about whether this approach is likely to deliver on the objectives being sought of the scheme and wonders whether a simpler approach could be preferable. However, the consultation paper is thin on material to assist in evaluating the merits of this approach versus any other.</p> <p>It appears that the main benefits of this approach are that it provides a 'running start' – implementation should be speedy and sunk costs from an incumbent scheme can be exploited rather than discarded. Without further analysis from the Electricity Commission and Gas Industry Company, it is difficult to develop a view on whether these benefits are likely to outweigh any detriments.</p>
Q3. Do you agree that the code of practice should	<u>1.2.3</u>

QUESTION	COMMENT
<p>include the particular features outline in Section 1.3 of the Proposed Requirements (Appendix C)?</p>	<p>The Gas Act does not have a definition for the term 'pipeline company'.</p> <p><u>1.3.2</u></p> <p>It is not clear why it would be desirable to require all members to make all consumers aware of payment options and services offered by social agencies. This is potentially quite onerous for the member and intrusive for the customer. It would seem more sensible only to require information to be made available at times when the customer may find such information useful.</p> <p>The final bullet point appears to go beyond the requirements in the Electricity Commission's guidelines on arrangements to assist low income and vulnerable consumers. It is not appropriate for approval of a consumer complaints scheme to be used as a vehicle to expand these obligations, both in terms of scope and in terms of sanction (the guidelines are voluntary at present and only apply to retailers). The gas sector does not have the benefit of a guideline on which interpretation of this bullet point could be founded.</p>
<p>Q4. Are there other requirements that should be included in the membership requirements?</p>	<p>Genesis Energy does not have any suggestions for additional requirements, but offers the following comments on the proposed requirements.</p> <p><u>2.1.2</u></p> <p>As per our comments on 1.3.2, this requirement appears onerous, obtrusive and unnecessarily prescriptive. Genesis Energy promotes the EGCC scheme on its credit letter, website, terms and conditions, acknowledgement letters, and via its call centre. Over-promotion of the scheme detracts from members' internal complaint handling systems.</p> <p><u>2.2.2</u></p> <p>Genesis Energy does not believe it is necessary to provide this information via invoices.</p>

QUESTION	COMMENT
	<p><u>2.4.2</u></p> <p>To protect against harm, the decision-maker should ensure that information identifying individual staff members is not disclosed.</p>
<p>Q5. Do you agree that the decision-maker should be able to make awards for compensation and reimbursement of expenses, and require members to take actions to make redress when a complaint is upheld?</p>	<p>Yes.</p>
<p>Q6. Do you agree that members should be required to self-monitor and report annually on their own compliance with the scheme rules?</p>	<p>Yes.</p>
<p>Q7. Do you agree that the scheme should have the right to identify and report on member compliance?</p>	<p>Yes.</p>
<p>Q8. Do you agree that member breaches should be reported to the governing body and published in the Annual Report?</p>	<p>Yes.</p>
<p>Q9. Do you agree that any persistent and material non-compliance by a member should be reported by the governing body to the Electricity Commission and/or Gas Industry Company as appropriate?</p>	<p>Yes, although the consultation paper does not make clear what the Electricity Commission or Gas Industry Company might do with this information. Such information would presumably be useful for informing future policy decisions, but neither agency has any ability to sanction a scheme member directly.</p>
<p>Q10. Do you agree with the functions of the Overseeing Entity as set out in Section 7.1.3 of the Proposed Requirements?</p>	<p>The functions appear to establish the overseeing entity as a standards-setting body for the gas and electricity sectors. Genesis Energy has some reservations as to whether section 158G of the Electricity Act and 43E of the Gas Act contemplate the Minister sanctioning a standards-setting body.</p> <p>Also, the degree to which the standard-setting authority of the overseeing body is devolved means the accountability</p>

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	<p>back to parliament is very diffuse.</p> <p>If Genesis Energy's reservations above are not well founded, then the functions otherwise seem appropriate other than the reference back to an essentially static set of scheme requirements (second-to-last bullet point). The status and authority of the scheme requirements is not clear. Given their effect, codification as rules or regulations would seem the appropriate approach. However, it is not clear that the Electricity Act or the Gas Act allow for this.</p>
<p>Q11. Do you agree with the composition and process for appointment of the members of the Overseeing Entity?</p>	<p>Refer Q10.</p>
<p>Q12. Do you agree that any changes to the scheme rules should be undertaken in consultation with stakeholders, the Electricity Commission and the Gas Industry Company?</p>	<p>Refer Q10.</p>
<p>Q13. Do you agree that the decision-maker should be appointed by the Overseeing Entity and the staff should be appointed by the decision-maker?</p>	<p>Refer Q10.</p>
<p>Q14. Is the balance between achieving a scheme that meets the needs of complainants and the need to limit costs satisfactory?</p>	<p><u>Accessibility vs. cost-effectiveness</u></p> <p>There appears to be a trade-off between accessibility and cost-effectiveness. If the scheme is entirely free for consumers, then this limits the ability of any scheme to meet the cost-effectiveness objective and the achievement standard "the scheme ensures incentives are correctly aligned to encourage efficient resolution by all parties" (8.1.3).</p> <p><u>Jurisdiction vs. cost-effectiveness</u></p> <p>The scheme's lack of jurisdiction over customers may similarly hamper the ability of the scheme to achieve the cost-effectiveness objective, or the achievement standard above. This is an inherent limitation of the 'approved independent body' approach</p>

QUESTION	COMMENT
	<p>described in Q1.</p> <p><u>Bolstering internal schemes</u></p> <p>Genesis Energy agrees that the scheme should have a user pay component to encourage resolution via members' internal dispute resolution processes. However, it is also important that the user pay component is not so large as to make the scheme financially unviable for members to use when necessary. In other words, accessibility is important for members as well as consumers.</p> <p>If members are incentivised to settle with unreasonable complainants rather than face the costs of using the scheme, then this is unlikely to serve the long-term interests of consumers. Consumers would ultimately be bearing the cost of appealing unreasonable complainants.</p> <p><u>Complainants vs. consumers</u></p> <p>One of the most pervasive factors influencing scheme costs is the balance struck between the interests of individual complainants versus consumers as a whole. If the scheme is overly weighted toward the interests of individual complainants, then this will be to the detriment of the long-term interests of consumers.</p>
Q15. Are there other performance standards that should be set out in 9.1.2?	It may also be appropriate to include an outer time limit for all complaints.
Q16. Do you agree that internal reviews of performance should be undertaken each year and reported in an Annual Report?	Yes.
Q17. Do you agree that independent reviews of scheme performance should be undertaken every three years and made widely available?	Yes.
Q18. Do you agree that 12 months' notice to the Electricity Commission and Gas Industry Company should be	Yes, although this may be difficult to achieve in practice.

QUESTION	COMMENT
provided before winding up the scheme?	
Q19. Do you agree that the scheme should be required to cooperate in the transition to a new set of arrangements?	Yes, to the extent that it reasonably can.
Q20. Do you agree that 12 months' notice of any revocation of approval is appropriate?	Yes.
Q21. Do you agree that approval should be granted for a period of five years?	Yes.
Q22. Do you agree that a call for applications should be made after four years of service?	Yes.