



**TRANSPOWER**

*Keeping the energy flowing*

Transpower House  
96 The Terrace  
PO Box 1021  
Wellington 6140  
New Zealand  
P 64 4 495 7000  
F 64 4 495 7100  
[www.transpower.co.nz](http://www.transpower.co.nz)

*Patrick Strange  
Tel: 04 495 6970  
Fax: 04 495 6978  
[patrick.strange@transpower.co.nz](mailto:patrick.strange@transpower.co.nz)*

26 February 2010

Committee Secretariat  
Finance and Expenditure Select Committee  
Parliament Buildings  
WELLINGTON

## **Submission on Electricity Industry Bill**

Transpower New Zealand Limited (Transpower) is the owner and operator of the national transmission grid, and System Operator for New Zealand's electrical power system. We are directly affected by the Bill in both these respects. Through our roles at the centre of the industry we have an informed view of what works and what does not in terms of the practicalities of governing and mobilising the industry, and providing incentives on market participants to contribute to overall system reliability and security.

We wish to appear before the Committee to speak to our submission.

## **We support most aspects of the Bill**

In particular, we support:

- The intent of the changes to the governance arrangements for the industry
- The establishment of the Electricity Authority (the Authority)
- The independence of, and narrower objective for, the Authority
- Grid investment approvals by the Commerce Commission
- The establishment of the Electricity Industry Participation Code (the Code), and the Authority, rather than the Minister, being responsible for approving technical Code amendments
- The System Operator taking responsibility for information and forecasting on security of supply, and for emergency management
- The establishment of the Security and Reliability Council (the SRC)
- The Authority being advised on Code amendments by industry working groups and the SRC.

Our focus will be on implementing our new responsibilities and regulatory relationships in accordance with the new legislation.

Nevertheless, we have some areas of concern, broadly relating to making the intent of the Ministerial Review of the Electricity Market (the Review) work, and preventing unintended consequences.

## **Making the intent of the Review work**

Our first three concerns relate to issues that are fundamental to the intent of the Review.

### ***Overlap between Authority and Commerce Commission regulation of Transpower***

We support the clear separation of roles in the regulation of Transpower, but submit that in three significant areas this intent has not been reflected in the Bill:

- The Bill should amend the Commerce Act to include a clear statement of Transpower's grid planning role (as set out in the Government Policy Statement on Electricity Governance). This will mitigate the risk of the regulatory regime evolving in unintended ways and drifting back to the current role confusion.
- The Bill requires the Commerce Commission to apply only those quality standards set by the Authority. This removes all discretion from the Commerce Commission to determine the quality measures it believes would be most suitable as part of Transpower's price-quality regulation. Instead, the Commerce Commission should only be required to take account of the Authority's quality measures.
- The Bill makes changes to the Commerce Act to include the System Operator and its functions in the definitions of "Transpower" and "electricity lines services". This would create costly and unnecessary duplication of price-quality and information disclosure regulation of the System Operator.

### ***Regime for approval of grid investments***

The Bill provides for the transfer of grid investment approvals from the Electricity Commission to the Commerce Commission. While the Bill addresses the long-term position for Commerce Commission approvals, we have concerns about the legislative framework. The Bill should:

- include a clear provision allowing Transpower to recover from its transmission customers the costs of grid investments approved by the Commerce Commission;
- recognise that: (a) the Commerce Commission may wish to modify and simplify the current approval processes in Section III of Part F of the Electricity Governance Rules (EGRs); and (b) in future, statements of opportunities and the grid planning assumptions that they include will not be produced by the Authority; and
- allow for the "fast-track" approval of grid investments costing less than \$20 million (as set out in the Government Policy Statement on Electricity Governance).

### ***Governance of Code amendments***

The Bill provides for replacing the EGRs with the Code and that the Authority makes and administers the Code. We support removing the Minister from making decisions on detailed and technical rules but have concerns about the extent of the powers afforded to the Authority.

We submit that the Authority should not propose and approve its own amendments (at least not without constraints) but rather have the power to alter draft rules proposed by the industry if it determines that the alteration would better meet the objectives of the change. In addition, tighter guidance is required on the consultation requirements for the Authority to ensure industry working groups and others are listened to and their views taken into account.

### ***Preventing unintended consequences***

Our other four concerns relate to issues that we believe are not germane to the intent of the Review, and largely were not canvassed in either the Discussion Paper or the Cabinet Paper on the Review. The manner in which the Bill addresses these issues may have significant adverse consequences. In the following four areas we submit, generally, that the well tried and tested status quo be retained.

#### ***Liability exposure for participants***

In the Bill the pecuniary penalty limit for Code breaches has been raised from \$20,000 to \$2 million, the existing service provider tort immunity has been contracted significantly and existing participant liability protections in current regulations have not been carried over. Any of these would adversely affect participants' commercial positions and would, over time, be passed through in higher consumer prices. Also, system security may be adversely affected if providers withdraw from offering essential ancillary services due to the increased risks of doing so. There is a risk too of stifling the innovation we are hoping to see from smaller players and new entrants, especially on the demand side.

The current liability exposure for participants should be retained.

#### ***Information gathering powers of the Authority***

The Bill provides the Authority with powers to obtain information from any person for any purpose linked to its general functions. There are no boundaries on confidentiality, costs to participants or legal privilege. We are concerned that these unbridled powers may lead to 'fishing expeditions', causing added costs for participants and diverting the Authority into operational and technical matters.

We are concerned also that participants' provision of confidential information to Transpower may be impeded, with adverse consequences for system security and grid planning.

The Authority's information-gathering powers in the Bill should be limited to Code compliance and enforcement matters.

#### ***Expansion of the consumer and landowner complaints scheme***

The Bill contemplates expanding the scope of the consumer and landowner complaints scheme to include, for example, the System Operator. We see no benefit from this but there would be significant costs, and consequently we submit that the status quo be retained.

***Some changed and inconsistent definitions***

The Bill includes new definitions for many of the key building blocks of the industry, including Transpower, service providers and ancillary service agents. These new definitions create a risk of confusion with no clear benefit and significant costs. We submit that the status quo definitions be retained.

**Submissions by clause**

The remainder of our submission (attached) is in a clause-by-clause format and includes some issues additional to the main ones summarised above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Patrick Strange', written in a cursive style.

Patrick Strange  
Chief Executive

## Submission on Electricity Industry Bill by clause

This part of Transpower’s submission should be read in conjunction with the summary of the main issues above.

### Contents

<b>1</b>	<b>Preliminary Provisions</b> .....	<b>7</b>
	Clause 2 – Commencement.....	7
	Clause 5 – Definition of “Transpower” .....	7
	Clause 6 – Definition of “ancillary service agent” .....	8
	Clause 7 – References to electricity industry .....	8
<b>2</b>	<b>Industry Participants</b> .....	<b>8</b>
	Clause 9 – Industry participants.....	8
	Clause 10 – Transpower is System Operator .....	10
<b>3</b>	<b>Electricity Authority</b> .....	<b>11</b>
	Clause 17 – Objective of Authority .....	11
	Clause 18 – Functions of Authority .....	11
	Clause 21 – Co-operation with Authority.....	12
<b>4</b>	<b>Making and amending Code</b> .....	<b>12</b>
	Clause 37 – Content of initial Code.....	12
	Clause 41 – Authority amends Code.....	14
	Clause 42 – Consultation on proposed amendments.....	15
	Clause 44 – Authority to publish consultation charter .....	16
<b>5</b>	<b>Authority’s powers and procedures</b> .....	<b>17</b>
	Clause 48 – Investigation of complaints: procedure in regulations.....	17
<b>6</b>	<b>Ruling Panel’s powers and procedures</b> .....	<b>18</b>
	Clause 55 – Bringing complaints and disputes to the Panel .....	18
	Clause 56 – Remedies and orders of Rulings Panel.....	18
	Clause 57 – Restrictions on remedies.....	19
	Suggested new clauses – Carry-over of Part 6 of the EGR Regulations .....	20
<b>7</b>	<b>Dispute resolution</b> .....	<b>21</b>
	Clause 97 – Complaints about Transpower, distributors, and retailers .....	21
	Clause 99 – Compliance with rules and binding settlements .....	21
	Schedule 4 Clause 1 – Purpose of dispute resolution scheme .....	22
	Schedule 4, Clause 8(3) – Grounds for withdrawing approval .....	22
	Schedule 4, Clause 12 – Rules of approved scheme.....	22

<b>8</b>	<b>Transitional and Consequential Provisions</b> .....	<b>24</b>
	Suggested new clause 135A – Recoverability of approved investment costs..	24
<b>9</b>	<b>Amendments to Commerce Act 1986</b> .....	<b>25</b>
	Clause 148 – New heading and sections 54R and 54S substituted.....	25
	Section 54R .....	25
	Section 54S .....	27
	Clause 143 – Interpretation for subpart.....	28
	Clause 144 – Meaning of electricity lines services .....	28
	Clause 149 – New section 54V substituted.....	29
<b>10</b>	<b>Other comments on the Bill</b> .....	<b>29</b>

## Definitions

In this clause-by-clause analysis, unless the context requires otherwise:

**Act** means the Electricity Act 1992;

**Bill** means the Electricity Industry Bill;

**Cabinet Paper** means the December 2009 Cabinet paper relating to the Ministerial Review of the Electricity Market;

**Code** means the Electricity Industry Participation Code;

**Discussion Paper** means the August 2009 discussion paper relating to the Ministerial Review of the Electricity Market;

**EGR Regulations** means the Electricity Governance Regulations 2003; and

**EGR Rules** means the Electricity Governance Rules 2003; and

**SOSPA** means the System Operator Service Provider Agreement between Transpower and the Electricity Commission.

## 1 Preliminary Provisions

### Clause 2 – Commencement

We oppose this clause because clauses 37 and 38 (content and certification of initial Code) need to come into force when the Bill is passed.

We submit that clause 2 be amended as follows:

#### **2 Commencement**

(1) Except as provided in subsection (2) of this section, this Act comes into force on 1 October 2010.

(2) Sections 37 and 38 of this Act come into force on the day after the date on which this Act receives the Royal assent.

Consequential amendments would be required to clause 38.

### Clause 5 – Definition of “Transpower”

We oppose this clause because of the reference to Transpower’s subsidiaries in the definition of “Transpower”.

In most contexts in the Bill it does not make sense to include Transpower’s subsidiaries in the definition of “Transpower”. Specifically, clauses 9(1)(b) (Transpower is industry participant), 10(1) (Transpower is System Operator), 47(1) (transmission agreements), 97(1) (complaints about Transpower) and 98(1) (membership of disputes resolution scheme) should apply only to Transpower New Zealand Limited or its successors. See also our comments below on clauses 9 and 10.

We note that in the EGR Regulations and Rules, “Transpower” means Transpower New Zealand Limited only (regulation 4(2) of the EGR Regulations and rule 1/A of the EGR Rules).

We submit that the definition of "Transpower" be amended as follows:

***Transpower** means Transpower New Zealand Limited or any ~~subsidiary of, or~~ successor to, that company*

### **Clause 6 – Definition of "ancillary service agent"**

We oppose this clause because the definition of "ancillary service agent" is too broad.

The provider of "an arrangement or service that supports the operation of the electricity market or the security of the electricity system" could be, for example, the licensor of software to the System Operator or an individual system operations consultant. That is clearly not intended.

"Ancillary service agent" is defined in the EGR Rules, and universally understood in the electricity industry, to mean the provider of an ancillary service (frequency keeping, instantaneous reserve, voltage support, over frequency reserve or black start).

We submit that the definition of "ancillary service agent" be:

***ancillary service agent** means a person who provides any ancillary service (as defined in the Code)*

### **Clause 7 – References to electricity industry**

We support the intent of this clause but consider that the words "refer primarily to" do not create a strong enough presumption as to meaning.

We submit that clause 7 be amended as follows:

#### **7      *References to electricity industry***

*In this Act, unless the context otherwise requires, references to the electricity industry are references ~~refer primarily~~ to businesses involved in the generation, transmission, distribution, and retailing of electricity, and not to retail consumers or those directly engaged in electrical work.*

## **2 Industry Participants**

### **Clause 9 – Industry participants**

We oppose this clause in so far as:

- Transpower is listed as an industry participant in its own right in clause 9(1)(b);
- the combined effect of clauses 9(1)(h) and 9(2) and the definition of "industry service provider" in clause 5 is to exclude the System Operator as a service provider; and
- clause 9(2) extends the set of service providers to encompass facilities and services providers other than market operators and the System Operator.

Transpower is an industry participant in its capacity as a grid owner (clause 9(1)(e)), the System Operator (clause 9(1)(h)) and, potentially, another type of service provider (clause 9(1)(i)). Outside of that Transpower is not a participant, meaning that clause 9(1)(b) is both unnecessary and inaccurate. Also, due to the second limb of the definition of "industry service provider" in clause 5, Transpower can never be a service provider in any capacity if clause 9(1)(b) is retained.

Under the current law the System Operator is a service provider like any other, although the role is not contestable (regulation 30 of the EGR Regulations). The System Operator is appointed by the Electricity Commission under the SOSPA in the same way as all other service providers are appointed under their service provider agreements. The various rights and obligations of service providers under the current law (including those in Part 2 of the EGR Regulations to be carried over to the Code under clause 37(1)(a)(ii)) apply equally to the System Operator and other service providers. There is no policy basis Transpower knows of to justify the System Operator now being treated differently. See also our comments below on clause 10.

Under the current law the only service providers are those described in clauses 9(2)(a) and 9(2)(g) (loosely, "market operators") and the System Operator (regulation 30 of the EGR Regulations). The persons described in clauses 9(2)(b) to 9(2)(f) are subject to various types of regulation, but not to regulation as service providers (such as service provider regulation under Part 2 of the EGR Regulations). Transpower is particularly concerned about the potential effects (in terms of cost and availability) of extending service provider regulation to ancillary service agents and load aggregators, who are critical to system security. There is no policy basis that Transpower is aware of that justifies the expanded set of service providers.

We submit that clause 9 and the definition of "industry service provider" in clause 5 be amended as follows (with appropriate re-numbering):

***industry service provider*** means a person who—

- (a) *provides a service or performs a role in the electricity industry that is recognised in the Code, including the people listed in section 9(2); but*
- (b) *is not any of the industry participants identified in section 9(1)(a) to (g)*

**9 Industry participants**

- (1) *The following are industry participants for the purposes of this Act:*
  - (a) *a generator:*
  - ~~(b) *Transpower:*~~
  - (c) *a distributor:*
  - (d) *a retailer:*
  - (e) *any other person who owns lines:*
  - (f) *a person who consumes electricity that is conveyed to the person directly from the national grid:*
  - (g) *a person who buys electricity from the clearing manager:*
  - ~~(h) *the System Operator:*~~
  - (i) *any industry service provider identified in subsection (2).*

- (2) *The following industry service providers are industry participants:*
- (a) *a market operation service provider:*
  - (b) *the System Operator:*
  - ~~(b) *a metering equipment provider:*~~
  - ~~(c) *an ancillary service agent:*~~
  - ~~(d) *a person that operates an approved test house:*~~
  - ~~(e) *a load aggregator:*~~
  - ~~(f) *a trader in electricity:*~~
  - (g) *any other industry service provider identified in regulations made under section 116.*
- (3) *The Authority is not an industry participant, except to the extent that it performs functions as an industry service provider.*

Consequential amendments would be required throughout the Bill.

### **Clause 10 – Transpower is System Operator**

We oppose this clause because:

- clause 10(1) deems Transpower to be the System Operator even in the absence of appointment as such by the Authority under a service provider agreement; and
- clause 10(4) obliges the System Operator to comply with the high level security of supply obligations in clause 10(2) in addition to its specific security supply obligations in the Code.

The Electricity Commission has appointed Transpower as the System Operator under the SOSPA. Among other things, the SOSPA sets out how much Transpower is paid for the role. An effect of clause 10(1) is that if the SOSPA for some reason comes to an end, or the Authority and Transpower cannot agree on a renewed SOSPA under clause 18(1)(h) in due course, Transpower will still have all of its System Operator obligations under the Code but no way of recovering its costs.

It is unclear why the System Operator's clause 10(2) security of supply obligations are treated differently to the other new Code matters listed in clause 45. In contrast to the other new matters, the high-level clause 10(2) obligations are enforceable as stand-alone obligations even though clauses 10(3) and 37(1)(b) contemplate they will be particularised in the initial Code. This will result in the System Operator having two overlapping sources for its security of supply obligations, which may or may not be exactly congruent.

We submit that clause 10 be amended as follows:

#### **10 *Transpower is System Operator***

- (1) *The Authority must appoint Transpower as the System Operator.* ~~*The System Operator is Transpower.*~~

- (2) *As well as acting as System Operator for the electricity industry, the System Operator must—*
- (a) *provide information, and short- to medium-term forecasting on all aspects of security of supply; and*
  - (b) *manage supply emergencies.*
- (3) *The Code must—*
- (a) *specify the functions of the System Operator; and*
  - (b) *specify how the System Operator's functions are to be performed; and*
  - (c) *set requirements relating to transparency and performance.*
- ~~(4) *A failure to comply with subsection (2) is to be treated, for the purposes of enforcement under this Part, as a breach of the Code.*~~

We note that the redrafted clause 10(1) above reflects the current wording in regulation 30(2) of the EGR Regulations.

### **3 Electricity Authority**

#### **Clause 17 – Objective of Authority**

We support this clause because we believe the long-term benefit of electricity consumers is provided for by promoting competition in and efficiency of the electricity market and security of supply. The focussed objective means the Authority's mandate will be appropriately constrained.

We expect the Authority to consult with industry about how the objective will drive the exercise of its functions (for example, agreeing an understanding of "long-term benefit of consumers", which we assume means "consumers of electricity"). This exercise should reflect the Commerce Commission's conferences on input methodologies, at which agreement was sought with interested parties as to what the Commerce Commission's purpose statement means.

#### **Clause 18 – Functions of Authority**

We support the list of Authority functions in clause 18(1) but consider that the approval of investment proposals should be expressly carved out. We oppose clause 18(2)(a) (Authority may be the market administrator if the Authority "considers it appropriate").

The transfer of the investment approval function to the Commerce Commission is stated in proposed section 54R(1) of the Commerce Act (clause 148 of the Bill) but is not stated in any clause of the Bill applicable to the Authority. For completeness, it should be.

The market administrator role is operational. When the Electricity Commission was formed, the market administrator role was like all the other services provided by an external service provider. It was the Electricity Commission that decided to internalise it. We submit that the Authority should not retain this role, which has an operational rather than governance focus.

We submit that clause 18 be amended as follows:

**18 Functions of Authority**

...

~~(1A) *It is not a function of the Authority to approve grid upgrade plans or capital investment proposals by Transpower.*~~

(2) *Instead of, or as well as, contracting for market operation services, the Authority may itself perform—*

~~(a) *the functions of the market administrator, if the Authority considers it desirable to do so; and*~~

~~(b) *any other market operation service, but only on a temporary basis (such as when there is no current contract, or the contractor is unable or unwilling to perform the service).*~~

**Clause 21 – Co-operation with Authority**

We oppose this clause because it provides the Authority with wide powers to obtain any information or assistance from any person for any purpose linked to its general functions, with no boundaries on confidentiality, cost or legal privilege. Furthermore, it will be an offence not to comply, attracting a fine of up to \$20,000.

If clause 21 is retained there will be an opportunity for Authority “fishing expeditions” leading to distracting and possibly expensive information gathering exercises not linked to any particular Code breach allegation or even suspicion. There may also be a chilling effect on the provision of information to Transpower and other participants (who, we submit, are most likely to be the targets of clause 21 requests) with potential adverse consequences for system security and grid planning.

Overall, clause 21 is an unreasonable incursion into participants’ and non-participants’ rights and expectations as to confidentiality and privacy. We question the clause’s legitimacy in terms of section 21 of the New Zealand Bill of Rights Act 1990 (right to be free from unreasonable search and seizure).

To the extent the Authority may require access to information for Code compliance and enforcement reasons, the Authority already has the necessary powers under clause 51 (which reflects the current limited powers of the Electricity Commission). It is relevant also that for Transpower and other State-Owned Enterprises in the electricity industry the Authority will have recourse to the Official Information Act for general information requests. For service providers there may also be negotiated information supply provisions in their contracts with the Authority.

We submit that clause 21 be deleted.

**4 Making and amending Code**

**Clause 37 – Content of initial Code**

We support the intent of this clause but submit that the following changes need to be made.

Transpower suggests the inclusion of an additional clause 37(1)(d) to preserve dispensation and equivalence arrangements granted under the EGR Rules, in addition to the exemptions already preserved by clause 37(1)(c). Without such a clause all existing dispensations and equivalence arrangements would fall away with the revocation of the EGR Rules and participants would need to re-apply for them under the Code. In the interim, participants would not have the benefit of their dispensations and equivalence arrangements.

We suggest additional wording in clause 37(2) to provide certainty that changes the Commerce Act made by the Bill are relevant considerations for the initial Code.

Under the EGR Rules the Electricity Commission is responsible for statements of opportunities. Cabinet has decided that responsibility for statements of opportunities, and therefore the grid planning assumptions they contain, is to be moved to the MED. References to statements of opportunities and grid planning assumptions should therefore be removed in the transfer of the EGR Rules to the Code.

Under rule 11 of Section III of Part F of the EGR Rules the Electricity Commission is responsible for maintaining the centralised data set (a database of electricity market information). Most of the centralised data set information comes from the System Operator, and maintaining the centralised data set is an operational rather than a governance function. We therefore consider that responsibility for the centralised data set should go to the system operator under the Code.

We submit that clause 37 be amended as follows:

**37 Content of initial Code**

(1) *The Code made under section 39 must comprise—*

...

(c) *Provisions to give effect to any exemptions granted under subpart 1 of Part 10 of the Electricity Governance Regulations 2003;*

(d) Provisions to give effect to any dispensations granted and equivalence arrangements approved by the System Operator under Section III of Part C of the Electricity Governance Rules 2003.

(2) *The Code must include whatever changes to the text of the enactments referred to in subsection (1)(a) are necessary or reasonably required to ensure that the Code is—*

(a) *consistent with this Act (including the amendments to the Commerce Act 1986 made by this Act) and the regulations; and*

(b) *accurate and coherent; and*

(c) *addresses any transitional issues.*

- (3) The initial Code must not include references to statements of opportunities or grid planning assumptions (as defined in the Electricity Governance Rules 2003) or incorporate any rights or obligations in respect of them.
- (4) In the initial code the Electricity Commission's centralised data set obligations under rule 11 of Section III of Part F of the Electricity Governance Rules 2003 are to become obligations of the system operator.

### **Clause 41 – Authority amends Code**

While we support the provision for the Authority to amend the Code, we oppose this clause in so far as the Authority can also be the proposer for the amendments, such that the Authority is empowered to make Code changes of its own volition.

By way of comparison:

- in Australia the independent rule-making agency (the Australian Energy Market Commission) cannot propose rule changes; and
- in the UK electricity market (governed by licence) the Gas and Electricity Market Authority and Secretary of State can only modify license conditions with the consent of the licensee.

Both overseas jurisdictions allow for the decision-maker to make changes to the proposal ("a more preferred rule" in Australia "subject to conditions" in the UK) if it thinks the changes better meet the objectives against which the proposal is assessed.

In New Zealand, this model would empower industry participants, the Security and Reliability Council, other advisory groups and the Minister to propose Code amendments, with the Authority being responsible for administering a transparent consultation and decision-making process around the proposals. A proposal by the Authority for a Code amendment would have to be taken to the industry, the Security and Reliability Council or the Minister for them to initiate the proposal.

Should the Authority retain discretion to propose amendments to the Code, we consider that it should be required to consult with industry on its Code amendment agenda through the process of producing its statement of intent. This will ensure the industry has a forward view on the Authority's market development programme.

We submit that clause 41 be amended and, new clauses 41A and 41B be added, as follows:

#### **41 Authority amends Code**

- (1) *The Authority may amend the Code at any time, subject to sections 41A, 41B and 42...*

#### **41A Authority may propose amendments to Code**

- (1) *The Authority must consult on its Code amendment agenda annually through the production of its statement of intent under the Crown Entities Act 2004 and, subject to subsection (2), may only propose Code amendments consistent with its statement of intent.*

- (2) The Authority may propose amendments to the Code otherwise than in accordance with subsection (1) if:
- (a) it considers the amendment corrects a typographical error in the Code;  
or
- (b) it considers the amendment otherwise involves only non-material changes to the Code.

**41B Others may propose amendments to Code**

- (1) The Authority must consider amendments to the Code proposed by the security and reliability council, any other advisory group established by the Authority, an industry participant, or the Minister (a **proponent**).
- (2) Each proposal must be signed by the proponent and contain:
- a. a statement of the issue the proposal is addressing; and
- b. a description of the proposed amendment including how it addresses the issue; and
- c. the expected benefits and costs of the amendment; and
- d. the impacts of the amendment on industry participants; and
- e. a draft of the proposed amendment.
- (3) The Authority may request further information from the proponent about the proposal and agree with the proponent the time within which that information must be provided.
- (4) The Authority may treat proposals from different proponents together as one proposal.
- (5) The Authority may reject a proposal only if:
- (a) it considers the proposal addresses matters outside the proper ambit of the Code; or
- (b) it considers the proposal is inconsistent with the objective of the Authority.
- (6) The Authority may make a Code amendment that is different (including materially different) to the proposal only if the Authority is satisfied that the amendment will be likely to better contribute to the achievement of the Authority's objective and the objectives of the proposal.
- (7) Unless otherwise agreed with the proponent, the Authority must, within 30 days of receiving a proposal:
- (a) decide whether to accept, reject or amend the proposal; and
- (b) publicise and notify the proponent of that decision, together with full reasons for the decision.

**Clause 42 – Consultation on proposed amendments**

We oppose this clause in so far as:

- there is no link between Code amendments and the objective of the Authority;
- clause 42(3) provides the Authority with too much discretion to decide that a regulatory statement is not necessary; and
- previous Electricity Commission consultation processes are not preserved.

On the second point, the Electricity Authority's assessment that the amendment has "widespread support" should not be sufficient to justify the absence of a regulatory statement. The purpose of the regulatory statement is to reveal the type and incidence of costs and benefits to provide the decision-maker with sufficient information for the decision, rather than to ascertain levels of support.

On the third point, we note that under the EGR Rules the Electricity Commission is required to consult on the System Operator's annual ancillary services procurement plan, which is typically complete by September. For the 2010/2011 procurement plan, it would be unfortunate if the Authority needed to repeat the consultation process under clause 42, particularly given the reasonably tight timeframe between the Act coming into force (1 October 2010) and the required commencement date of the procurement plan (1 December 2010).

We submit that clause 42 be amended as follows:

**42 Consultation on proposed amendments**

- (1) Subject to subsections (3) and (4) and section 43, bBefore amending the Code, the Authority must—
  - (a) publicise a draft of the proposed amendment; and
  - (b) prepare and publicise a regulatory statement.
- (2) The regulatory statement required for a proposed amendment to the Code must include the following:
  - (a) a statement of the objectives of the proposed Code amendment and how the Code amendment meets the objective of the Authority:
  - (b) an evaluation of the costs and benefits of the proposed Code amendment:
  - (c) ~~an evaluation~~ description of alternative means considered for achieving the objectives of the proposed amendment.
- (3) Despite subsection (1), the Authority need not comply with subsection (1)(b) if it is satisfied on reasonable grounds that—
  - (a) the nature of the amendment is technical and non-controversial; or
  - ~~(b) there is widespread support for the amendment among the people likely to be affected by it; or~~
  - (be) there has been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views have been considered.
- (4) In amending the Code the Authority need not repeat consultation processes already undertaken by the Electricity Commission.

**Clause 44 – Authority to publish consultation charter**

We support the consultation charter but oppose this clause in so far as:

- there is insufficient guidance as to the contents of the charter; and
- clause 44(2) allows the Authority to disregard the charter.

Consultation on Code changes, whether proposed by the Authority or someone else, is a fundamental requirement. Clause 44(2) is contrary to the statements in the Discussion Paper and Cabinet Paper about the importance of stakeholder engagement and the use of advisory groups in development of the Code.

We submit that clause 44 be amended as follows:

**44 Authority to publish consultation charter**

- (1) *The Authority must develop, issue, and make publicly available a consultation charter that includes guidelines, not inconsistent with this Act, relating to the processes for amending the Code and consulting on proposed amendments.*
- (2) *The Authority must not amend the Code unless the Authority has complied with the consultation charter for the amendment. However, no amendment to the Code is invalid merely because—*
  - ~~(a) —there was no consultation charter at the time the amendment was consulted on or made;~~ or
  - ~~(b) —the Authority failed to comply with the charter.~~

A consequential amendment would be required to clause 46(2) to ensure the Minister is required to comply with clause 44, and therefore the consultation charter, when exercising powers under clause 46.

## 5 Authority's powers and procedures

### Clause 48 – Investigation of complaints: procedure in regulations

We oppose this clause because clause 48(1) provides that the Authority must investigate all Code breach complaints regardless of merit. This may lead to undue attention being given to spurious complaints, creating unnecessary costs for the Authority and participants.

Under the current law (regulation 67 of the EGR Regulations) the Electricity Commission has the discretion not to investigate complaints.

We submit that clause 48 be amended as follows:

**48 Investigation of complaints: procedure in regulations**

- (1) *The Authority may monitor compliance with the Code by industry participants and, subject to subsection (2), must investigate complaints of breaches of the Code.*
- (2) *The Authority may decline to investigate a complaint of an alleged breach—*
  - (a) that relates to a matter that has been, or that the Authority considers is more properly, dealt with by any other person; or*
  - (b) if the Authority considers that the complainant has failed to establish a prima facie case for the alleged breach; or*
  - (c) that the Authority decides does not otherwise warrant any further action being taken.*

- (3) If the Authority declines to investigate a complaint of an alleged breach under subsection (2), the Authority must inform the complainant—
- (a) that the Authority intends to do no more in relation to the complaint;  
and
- (b) of the reasons for that intention.
- (42) The Authority's procedures relating to monitoring compliance with the Code, and investigating and taking enforcement action against breaches or possible breaches of the Code, are set out in sections 51 to 54 and regulations made under section 119.

## **6 Ruling Panel's powers and procedures**

As discussed in this part of our submission, the Bill significantly increases participants' operational risks by increasing their liability exposures. Transpower is very concerned about this aspect of the Bill, which was not foreshadowed in either the Discussion Paper or Cabinet Paper. We are not aware of any policy justification for these changes.

Exposing participants to more liability will inevitably increase their costs of operations, particularly for Transpower in its capacity as System Operator. There are security implications too, as the changes will discourage offers by ancillary service providers, or at least significantly increase ancillary service availability costs. All additional costs will be allocated to and passed on by participants and will ultimately be borne by consumers. Also, coupled with the new appeal right in clause 66(1), the changes can be expected to increase litigation across the industry.

We note that the explanatory note for the Bill says (incorrectly) that the remedial powers of the Rulings Panel "are the same remedial powers as it currently has and they will continue to be subject to limitations set out in the regulations". We agree that the Rulings Panel's remedial powers, and participant's liability exposures generally, should not change, but clearly this intent has been carried through in the Bill.

### **Clause 55 – Bringing complaints and disputes to the Panel**

We oppose clause 55(2) because participants should not have a direct route to the Rulings Panel.

Currently, breach complaints must go through the Electricity Commission first and complainants only have direct access to the Rulings Panel if the Electricity Commission declines to lay a formal complaint (regulation 92 of the EGR Regulations). This clause would bypass the filtering effect of the Authority and therefore may involve participants in more Rulings Panel proceedings, and not necessarily meritorious ones.

We submit that clause 55(2) be deleted.

### **Clause 56 – Remedies and orders of Rulings Panel**

We oppose this clause, which provides that the Rulings Panel may award a pecuniary penalty of up to \$2 million for a Code breach. The current limit for EGR Rules breaches is \$20,000 (section 172KE(1)(e) of the Act).

We submit that clause 56(1)(d) be amended as follows:

- (d) *make a pecuniary penalty order requiring an industry participant to pay a pecuniary penalty to the Crown of an amount not exceeding ~~\$20,000~~\$2 million:*

### **Clause 57 – Restrictions on remedies**

We oppose this clause because the combined effect of clauses 57(3) and 57(4)(b) is to constrain the service provider tort immunity to breach of statutory duty claims brought by participants against the System Operator. Under the current law (section 172KG of the Act) all service providers have immunity from all tort claims, and significantly negligence claims, brought by other participants.

Before entering into its original SOSPA in December 2003, Transpower raised with the Ministry for Economic Development its concern about the absence of tort protection for the System Operator in the then Electricity and Gas Industries Bill. As a condition of entering into the SOSPA, Transpower was granted an indemnity against System Operator tort liability by the Crown, the scope of which was commensurate with the protection now in section 172KG of the Act. Subsequently, Transpower's submission to the Commerce Select Committee that section 172KG be added to the Act was accepted, and the section came into force on 18 October 2004.

Broadly, the points made by Transpower to the Commerce Select Committee in 2004 were that:

- the System Operator often operates under significant real-time pressure. Insurance for mistakes made in that context is very expensive, if not impossible, to obtain;
- the System Operator's potential liability for cascade failure is extremely high;
- the System Operator role exists solely for the purposes of the industry rules and therefore liability should be limited to the regime in the industry rules (which is detailed and extensive); and
- the electricity governance regimes in Australia, the UK and Ireland all impose significant limitations on the extent of service provider liability.

This history illustrates the vital importance of tort protection to the System Operator, and we suggest to other service providers also, and the previous acceptance of that stance by Government.

We submit that clause 57 be amended as follows:

#### **57 Restrictions on remedies**

- (1) *The remedies that the Rulings Panel may impose under section 56 are the only remedies in respect of a breach of the Code.*
- (2) *No one may bring an action for breach of statutory duty that arises out of, or relates to, a breach of the Code.*

- (3) *No industry participant may bring an action in tort against a service provider~~the system operator~~ that arises out of, or relates to, any act, matter, or thing done, or required or omitted to be done, by the service providers~~system operator~~ in its role as service providers~~system operator~~, or in the course of it ~~providing market operation services~~, provided that the act or omission is not a fraudulent act or omission by the service providers~~system operator~~.*
- (4) *This Subsections (1) and (2) does not limit the recovery of—*
- (a) *a debt owing under any regulations made under section 119; or*
  - (b) *damages in tort other than breach of statutory duty; or*
  - (c) *damages for breach of contract, or for any other wrong, that arises from an act or omission that is also a breach of the Code.*

### **Suggested new clauses – Carry-over of Part 6 of the EGR Regulations**

Part 6 of the EGR Regulations, which contains a number of limitations, exclusions and considerations for participant liability, is missing from the list of provisions to be carried over to the Code under clause 37(1)(a)(ii).

While the intention may be to re-make the Part 6 liability provisions in regulations under the new Act, Transpower proposes that the Part 6 liability provisions be enacted in the new Act instead, for the following reasons:

- Part 6 deals with very important issues that go to the financial risks of participants. The carrying over of the Part 6 liability provisions should not be left to regulations, which may not be subject to the same scrutiny as the Bill.
- Unless the Part 6 liability provisions are carried over in the new Act there is a risk there will be a delay after commencement of the new Act before the necessary regulations are made. During that time participants will face unlimited liability. In a worst case scenario the provisions would not be carried over at all.
- Participants require certainty from the outset as to what changes, if any, are proposed to the Part 6 liability provisions. For example, the current proposal to increase the pecuniary penalty limit by a factor of 100 in clause 56 may indicate an intention to increase the Part 6 limitations by the same order of magnitude.
- The uncertainty and risks around ancillary service provider liability may have a chilling effect on the availability of ancillary services and hence system security.
- Not carrying over the Part 6 liability provisions in the Act would be inconsistent with the treatment of the pecuniary penalty limit, which is in clause 56(1)(d) of the Bill (albeit set inappropriately high). It would also be inconsistent with the treatment of other liability-related matters in clauses 57 to 62.

Specifically, we submit that regulations 110 to 132 of the EGR Regulations be carried over in Subpart 4 of Part 2 of the Bill.

## 7 Dispute resolution

In discussing Subpart 1 of Part 4 and Schedule 4 of the Bill we refer to the Electricity and Gas Complaints Commissioner (**EGCC**) Scheme, the regulatory approval of which takes effect on 1 April 2010. The EGCC Scheme took over five years to obtain regulatory approval, which required consensus from the electricity and gas industries, the Electricity Commission, the Gas Industry Company and the Ministry of Consumer Affairs.

We think it would be an undesirable outcome, and represent an enormous waste of effort, if the approval of the EGCC Scheme were put at risk as a result of the passing of the Bill, particularly as there is no guarantee that any alternative scheme (voluntary or regulated) could achieve a better balancing of industry, consumer and regulator interests than the EGCC Scheme.

### Clause 97 – Complaints about Transpower, distributors, and retailers

We oppose this clause because it does not reflect the real scope of the EGCC Scheme in terms of its members or those who may make complaints.

Transpower is a member of the EGCC Scheme in its capacity as a grid owner (i.e. a person who has transmission lines on other parties' property). Transpower is not a member of the scheme in its capacity as the system operator, and complaints about system operations are not and should not be within the scheme's scope.

Despite current section 158G of the Act also referring to the scheme receiving complaints from "any person", the EGCC Scheme in fact only deals with complaints from consumers, land owners and land occupiers. There is, however, no restriction on the type of consumer, land owner or land occupier who may make a complaint.

We submit that clauses 97(1) and (2) be amended as follows:

- (1) *Any person described in subsection (2) may make a complaint to the dispute resolution scheme concerning ~~Transpower or any~~ grid owner, distributor or retailer.*
- (2) *The persons who may make a complaint are ~~any persons (including consumers, potential consumers, and owners and occupiers of land)~~, except members of the dispute resolution scheme.*

Consequential amendments would be required to clauses 1(a) and 12(1)(a) of Schedule 4.

### Clause 99 – Compliance with rules and binding settlements

We support the intent of this clause but consider that it should be clarified in clause 99(3) that the District Court cannot modify a binding settlement in a way that would take the settlement beyond the jurisdiction of the scheme.

We submit that clause 99(3) be amended as follows:

- (3) *If a District Court is satisfied that the terms of a binding settlement are manifestly unreasonable, the court's order under subsection (2)(b) may modify the terms of the binding settlement, provided that the terms of the settlement may not be modified in such a way that would take the settlement beyond the jurisdiction of the dispute resolution scheme.*

### **Schedule 4 Clause 1 – Purpose of dispute resolution scheme**

We oppose this clause in so far as:

- clause 1(a) does not reflect the real scope of the EGCC Scheme in terms of those who may make complaints (see comments on clause 97 above); and
- clause 1(b) requires the scheme to be “efficient and effective”.

Efficiency and effectiveness are subjective concepts in this context and therefore inappropriate foundations on which to base the approval, or revocation of approval, of a scheme. We note that these standards are not referred to in current legislation or the Government Policy Statement on Electricity Governance.

We submit that clause 1 of Schedule 4 be amended as follows:

#### **1 Purpose of dispute resolution scheme**

*The purpose of the dispute resolution scheme is to ensure that—*

- (a) *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; and*
- (b) *the scheme is accessible, independent, fair, and accountable, ~~efficient, and effective.~~*

Consequential amendments would be required to clause 5(2) of Schedule 4.

### **Schedule 4, Clause 8(3) – Grounds for withdrawing approval**

We oppose this clause in so far as the grounds for withdrawing approval of a scheme in clauses 8(3)(b) and (d) are vague and overly broad.

In terms of clause 8(3)(b), it is unclear when “broad support” for the scheme would be lost. For example, would it be enough if North Island lines companies withdrew their support for the scheme even if consumers, landowners, retailers and other lines companies were happy with it?

In terms of clause 8(3)(d), it seems that a single failure to comply with the rules of the scheme, no matter how minor, triggers the Minister’s power to withdraw approval. It is relevant that the rules of the EGCC Scheme include many administrative provisions about how members deal with each other as well as substantive provisions about how complaints are dealt with.

We submit that clauses 8(3)(b) and (d) be deleted.

### **Schedule 4, Clause 12 – Rules of approved scheme**

We oppose this clause in so far as:

- clause 12(1)(a) does not reflect the real scope of the EGCC Scheme in terms of those who may make complaints (see comments on clause 97 above);
- clause 12(1)(c) does not reflect the real scope of the EGCC Scheme in terms of the types of electricity-related complaint it is empowered to receive;
- 12(1)(f) does not allow for confidential or legally privileged information to be protected;

- there is insufficient acknowledgement of the limits on the jurisdiction of the EGCC Scheme, including financial limits; and
- the rules of the scheme cannot themselves bind complainants to accepting a resolution or decision.

The EGCC Scheme is not empowered to consider electricity-related complaints about industry governance or operational matters (except in so far as such complaints can be said to relate to the provision of retail services or line function services to consumers). For example, the legislative breaches that fall within the definition of "Land Complaint" in the EGCC Scheme rules are limited to breaches of the Act, the Electricity Act (Hazards from Trees) Regulations 2003 and the Electricity Regulations 1997. Disputes about industry governance and operational matters are not within scope because there are more appropriate and better resourced forums for dealing with such disputes, notably the Electricity Commission (Electricity Authority) and Rulings Panel.

The EGCC Scheme has several jurisdictional limits. Very important to Transpower are the exclusion of consumer complaints against Transpower and the financial limit of \$20,000 per complaint. We note that the \$20,000 limit is currently referred to in section 172D(27) of the Act but not in the Bill.

The EGCC Scheme rules are a contract between the retailer and lines company members of the scheme. Complainants are not party to the contract. Accordingly, if clauses 12(1)(j) and (l) are to be effective (which they should be) they need to be stand-alone clauses in the Bill

We submit that clause 12 be amended, and new clause 12A be added, as follows (with appropriate re-numbering):

**12 Rules of approved scheme**

- (1) *The rules of the approved scheme must provide for, or set out, the following:*
- (a) *that any ~~person (including consumers, potential consumers, and owners and occupiers of land, but excluding members of the scheme,~~ may make a complaints for resolution by the scheme:...*
  - (c) *the kinds of complaints that the scheme will deal with, which, subject to subsection (2), 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, the Electricity Act 1992~~ and regulations made under that Act; 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:...*
  - (f) *that any information may be considered in relation to a complaint and any inquiry made that is fair and reasonable in the circumstances, subject to reasonable protections for confidential or legally privileged information:...*

- ~~(j) that a resolution of a complaint about a member of the scheme is binding on the complainant concerned if the complainant accepts the resolution or has agreed to be bound by a final decision and a final decision is made:...~~
- ~~(l) that, if a complainant accepts a resolution or has agreed to be bound by a final decision and a final decision is made, the complainant may not seek or obtain any other resolution of the complaint through any court or tribunal:...~~
- (2) The rules of the approved scheme may provide for, or set out, reasonable limits on the jurisdiction of the scheme, including limits as to the type of complaint that can be made against certain members and financial limits. The jurisdiction of the approved scheme is not required to include any complaint the value of which exceeds, or is likely to exceed, \$20,000.

**12A Resolutions and decisions binding on complaints**

- (1) A resolution of a complaint about a member of the approved scheme is binding on the complainant concerned if the complainant accepts the resolution or has agreed to be bound by a final decision and a final decision is made.
- (2) If a complainant accepts a resolution or has agreed to be bound by a final decision and a final decision is made, the complainant may not seek or obtain any other resolution of the complaint through any court or tribunal.

## **8 Transitional and Consequential Provisions**

### **Suggested new clause 135A – Recoverability of approved investment costs**

We propose the inclusion of a provision in the Bill confirming that:

- the costs of grid investments approved by either the Electricity Commission or Commerce Commission are recoverable through the transmission pricing methodology; and
- the Commerce Commission is empowered to amend previous Electricity Commission investment approvals.

The recoverability of approved investment costs is currently guaranteed by rule 17.1 of Section III of Part F of the EGR Rules. This is a critical rule for Transpower. Although rule 17.1 ostensibly is carried over to the Code under clause 37(1)(a)(i), it is not certain that the effectiveness of the rule will survive the transition. Rule 17.1 only refers to Electricity Commission-approved investments – it does not cater for the transfer of the investment approval function to the Commerce Commission.

Furthermore, in our view it is inappropriate for such an important provision to be in the Code, which (under the Bill as it currently stands) may be changed by the Authority without Ministerial or Parliamentary oversight.

Also, the Bill needs to ensure that the current practice whereby Transpower can apply to the Electricity Commission for variations (scope and cost) on approved investments remains in place for those projects until they are commissioned.

We submit that the following new clause be added to the Bill:

**135A Recovery of investment costs by Transpower**

- (1) Approved costs incurred by Transpower in relation to an approved investment in the grid (irrespective of when the costs were incurred or whether the investment was approved by the Electricity Commission before the commencement of this Act or the Commerce Commission after the commencement of this Act) are recoverable by Transpower from designated transmission customers on the basis of the transmission pricing methodology and are to be paid by designated transmission customers accordingly.
- (2) Approval by the Electricity Commission or Commerce Commission of grid investment or expenditure may not be revoked or amended except with the consent of Transpower.
- (3) Subject to subsection (2), the Commerce Commission may revoke or amend the Electricity Commission's previous approval of any grid investment or expenditure.

## **9 Amendments to Commerce Act 1986**

### **Clause 148 – New heading and sections 54R and 54S substituted**

#### *Section 54R*

Transpower supports new section 54R because it puts into effect the policy decision in the Cabinet Paper that grid investment approvals should fall under the purview of the Commerce Commission as the economic regulator. This is consistent with the Australian and UK regimes.

However, we consider that the section can be improved in the following ways:

- Amendments are required to ensure that both grid upgrade plans and other capital expenditure proposals by Transpower are captured.
- An important statement in the Government Policy Statement on Electricity Governance is that Transpower, and not its regulator, is responsible for grid planning and assessing options for grid investment. The regulator's role is to review and approve (paragraph 82 of the Government Policy Statement on Electricity Governance).

We consider that this important division of responsibility should be codified in the Bill, for both the transitional and long-term regimes, to mitigate the risk of perpetuating the duplication of technical analysis that has become a significant governance problem in recent years.

- The current grid investment test (GIT) is in Schedule F4 of Section III of Part F of the EGR Rules, which should be clarified.

- Clause 6 of the GIT references statements of opportunities. As discussed above (clause 37) Cabinet has decided that statements of opportunity should no longer be a regulator function. We therefore suggest the Commerce Commission not be required to comply with clause 6 of the GIT.
- Clause 37(1)(a)(i) provides for the whole of Section III of Part F of the EGR Rules to be incorporated into the Code. However, incorporating the current provisions relating to investment approvals contained in Section III of Part F would seem not to be intended because clause 35(2)(c) of the Bill states that the Code may not “purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986”.

We infer that the Bill does not contemplate any particular grid investment approvals process being undertaken by the Commerce Commission, other than the application of the GIT until a new input methodology for grid investment approvals is determined. We therefore suggest additional words to clarify that the Commerce Commission may use a grid investment approvals process consistent with its general approach to economic regulation under Part 4 of the Commerce Act.

- The administrative settlement between the Commerce Commission and Transpower is a contract and cannot therefore be amended by the Commerce Commission unilaterally.
- The meaning of “commencement date” in new section 54R needs to be clarified.

We submit that new section 54R of the Commerce Act proposed in clause 148 be amended as follows:

**54R Approval of Transpower’s grid upgrade plans and capital expenditure proposals**

- (1) *The role of the Electricity Commission in approving grid upgrade plans and capital expenditure proposals by Transpower is transferred to the Commerce Commission on the commencement date.*
- (1A) Transpower will undertake the detailed planning for all grid upgrade plans and capital expenditure proposals, including proposing investments and assessing proposed investments and alternative projects.
- (2) *Subsections (1) and (1A) applies both to new plans and proposals and to plans and proposals that ~~are~~ were under consideration by the Electricity Commission before the commencement date.*
- (3) *Until the input methodology required by section 54S is determined, when considering proposals for grid upgrades the Commerce Commission—*
  - a. *must apply the grid investment test set out in Schedule F4 of Section III of Part F of the Electricity Governance Rules 2003 (as immediately before their revocation by ~~this Act~~ the Electricity Industry Act 2010), except for clause 6 of the test; and*
  - b. *need not repeat processes already undertaken by the Electricity Commission; and*

- c. may determine content and process requirements that differ from the content and process requirements for proposals for grid upgrades that applied under Section III of Part F of the Electricity Governance Rules 2003 immediately before their revocation by the Electricity Industry Act 2010.
- (4) *The Commission, by agreement with Transpower, may amend any administrative settlement with Transpower that is referred to in section 54M to give effect to the policy stated in subsection (1); but subsection (1) takes effect on the commencement date whether or not an administrative settlement has been amended.*
- (5) *To avoid doubt, nothing in this section affects the transfer from the Electricity Commission to the Authority of all other roles relating to transmission, such as setting grid reliability standards and the transmission pricing methodology*
- (6) In this section, "commencement date" means the date the Electricity Commission was disestablished by [section 130(1)] of the Electricity Industry Act 2010.

### Section 54S

Paragraphs 87 and 88 of the Government Policy Statement on Electricity Governance state the Government's objective for a streamlined process for grid investment approvals where the expected total cost of the project is less than \$20 million.

We consider that this policy intent should be codified in the Bill, since Transpower will be working with the Commerce Commission on a grid investment input methodology that covers process and consultation as well as the requirements for assessing the costs and benefits of the investment.

We submit that new section 54S of the Commerce Act proposed in clause 148 be amended as follows:

#### **54S Commerce Commission to prepare input methodology for grid upgrade plans and capital expenditure proposals**

- (1) *The Commerce Commission must determine an input methodology for Transpower's grid upgrade plans and capital expenditure proposals.*
- (2) *The input methodology must include—*
- a. *requirements that must be met by Transpower, including the scope and specificity of information required, the extent of independent verification and audit, and the extent of consultation and agreement with consumers; and*
  - b. *the criteria the Commerce Commission will use to evaluate grid upgrade plans and capital expenditure proposals; and*
  - c. *time frames and processes for evaluating grid upgrade plans and capital expenditure proposals, including what happens if the Commerce Commission does not comply with those time frames; and*
  - d. a streamlined approval process for evaluating grid upgrade plans and capital expenditure proposals involving capital expenditure of less than \$20m.

- (2A) To avoid doubt, subsection (2)(d) does not limit the Commerce Commission's discretion to include in the input methodology a streamlined approval process for evaluating grid upgrade plans and capital expenditure proposals involving capital expenditure of \$20m or more.
- (3) *The input methodology must be determined no later than 1 October 2011; but the Minister may, on the written request of the Commerce Commission, extend the deadline once by a period of up to 3 months, in which case notice of the extension must be given in the Gazette.*
- (4) *Subpart 3 of Part 4 applies to the input methodology as if it were an input methodology referred to in section 52T, except as provided in subsection (2) of this section.*

### **Clause 143 – Interpretation for subpart**

We oppose this clause.

The proposed addition to section 54B of the Commerce Act confirms that “Transpower” in the Commerce Act includes the System Operator role. An effect of that is to require the System Operator to be subject to price-quality regulation under the Commerce Act after the administrative settlement expires (section 54M(3)).

The System Operator is already subject to price-quality control through its System Operator Service Provider Agreement (SOSPA) with the Electricity Commission, which will continue with the Electricity Authority. It is unnecessary and costly to duplicate that control through the Commerce Act and Commerce Commission. This is evident from the administrative settlement agreed between Transpower and the Commerce Commission which, in relation to the System Operator, simply says that the System Operator may not recover more from the Electricity Commission than allowed for under the SOSPA.

We submit that new section 54B(2) of the Commerce Act added by clause 143 be amended as follows:

- (2) *references in this subpart to Transpower ~~exclude~~include references to Transpower in its role as system operator under the Electricity Industry Act 2010.*

### **Clause 144 – Meaning of electricity lines services**

We oppose clause 144(1).

The proposed new section 54C(1) of the Commerce Act deems System Operator services to be “electricity lines services” in the Commerce Act. An effect of that is to subject the System Operator to information disclosure regulation under the Commerce Act (section 54F).

Information provision with respect to both operational and commercial performance of the System Operator should be a matter for the Authority (under the Code and the SOSPA, and supported by the Security and Reliability Council) and not for the Commerce Commission under the Commerce Act. We note that the System Operator will continue to be subject to its performance review obligations (its monthly self-reporting in particular) under Part 2 of the EGR Regulations, which is to be carried over to the Code under clause 37(1)(a)(ii) of the Bill.

Proposed new section 54C(1) of the Commerce Act is unnecessary and would create costly and confusing duplication of information disclosure regulation for the System Operator.

We submit that clause 144(1) be deleted.

#### **Clause 149 – New section 54V substituted**

We oppose this clause.

Proposed new section 54V(4) of the Commerce Act requires the Commerce Commission to include in a section 52P determination relating to price-quality regulation for Transpower “only the quality standards set by the Authority for Transpower”.

We believe that this is inappropriate because it removes all discretion from the Commerce Commission to determine the quality measures that it believes would be most suitable as part of Transpower’s price-quality regulation. Instead, the measures that must be used would be determined, and potentially amended, by another entity (the Electricity Authority) with different objectives. The situation created would also be undesirable in so far as the availability and reliability service measures in the Code for interconnection assets, and the equivalent measures in Transpower’s benchmark (connection) agreements, are not enforceable under the Code or agreements but would effectively be enforceable as part of price-quality regulation under the Commerce Act 1986.

Current section 54M(6) of the Commerce Act (to be repealed by clause 147 of the Bill) requires the Commerce Commission to “give effect to” the Electricity Commission’s quality standards for Transpower. While that gives the Commerce Commission greater discretion than proposed section 54V(4), in our view it still constrains the Commerce Commission’s discretion inappropriately and imports significant doubt in terms of where the line is between giving effect to the Electricity Commission’s quality standards and creating new ones.

In our view, it is appropriate for the Commerce Commission to take into account the Electricity Authority’s quality standards, but no more. The deletion of proposed new section 54V(4) would achieve that outcome because proposed new section 54V(2)(a) already requires the Commerce Commission to take into account the Electricity Authority’s quality standards (reflecting current section 54V(2)(a) and (b) of the Commerce Act).

We submit that new section 54V(4) of the Commerce Act added by clause 149 be deleted.

## **10 Other comments on the Bill**

**Clause 55(1)(a):** Receiving complaints about breaches of the regulations is not clearly a function of the Authority (see clauses 18(1) and 48(1), for example).

**Clause 58(2)(e):** Only previous breaches “by the relevant industry participant” should be relevant to the amount of pecuniary penalty.

**Clause 60(1)(b):** The cross-reference to clause 49 is incorrect. It should be to clause 50.

**Clause 60(2):** This clause is redundant given clause 63.

**Clause 61(1):** This clause does not clearly allow a suspension order to apply to some of the participant's rights only. A suspension order should suspend "all or specified" rights under the Code (using the same words as clause 61(2)).

**Clause 65:** A right of appeal against Authority decisions is missing (see section 172KJ of the Act).

**Clause 66(3):** A right of appeal linked to the Rulings Panel's and Authority's general dispute resolution functions is missing (see section 172KL(b) of the Act).

**Clause 73:** This clause should be expanded to confirm that nothing in the whole Bill (as opposed to just Part 2 of the Bill) limits access to judicial review (see section 172KI of the Act).

**Clause 99(2)(b) and elsewhere in the Bill:** The words "binding settlement determined by the scheme" are problematic in so far as they combine the separate concepts of a voluntary settlement between the parties to a complaint and a determination of the complaint by the scheme. For example, a determination under the EGCC Scheme is not handed down unless the parties to the complaint fail to settle.

**Clauses 120(5) and 121(4):** These provisions (material incorporated by reference) should also apply to the regulation-making powers under clauses 119 and 122.

**Schedule 4, clause 12(1)(k):** The alternative action by a complainant may not be court action (for example, the complainant may pursue the complaint through the Disputes Tribunal or the Ombudsman).

**Schedule 4, clause 15:** The rules of the scheme should set out the content requirements for the annual report, as the EGCC Scheme rules do currently.

**Schedule 4, clause 16(2):** The protection of privacy and confidentiality should also apply to the contents of the annual report under clause 15.

**Schedule 4, clause 17(3):** The reference to a "reserve scheme" appears to be a typographical error. This should be "regulated scheme".