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Hon Heather Roy
Independent Chair
Utilities Disputes Limited
Wellington

By email: submissions@utilitiesdisputes.co.nz

Dear Madame Chair

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

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

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

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

No part of this submission is confidential.

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

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Yours sincerely
For and on behalf of Vector Limited

Richard Sharp
Head of Regulatory and Pricing

Appendix – Questions for submitters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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