Vector Limited
101 Carlton Gore Road
PO Box 99882, Newmarket
Auckland 1149,
New Zealand
www.vector.co.nz

Corporate Telephone
+64-9-978 7788

Corporate Facsimile
+64-9-978 7799

Todd McClay MP
Chairperson
Commerce Committee
Parliament Buildings
Wellington

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Submission on the Consumer Law Reform Bill

Introduction

1. Vector Limited ("**Vector**") welcomes the opportunity to provide this submission on the Consumer Law Reform Bill ("**the Bill**"). Vector requests the opportunity to present to the Committee in support of this submission.

2. Vector is a leading New Zealand infrastructure group. We own and manage a unique portfolio of energy and fibre optic assets in New Zealand. Our assets perform a key role in delivering energy and telecommunications services to more than one million homes and businesses across New Zealand. We are a significant provider of:

   - electricity distribution services;
   - gas transmission and distribution services;
   - electricity and gas metering installations and data management services;
   - natural gas and LPG; and
   - fibre optic networks in Auckland and Wellington, delivering high speed broadband services.

3. Vector's submission on the Bill is focused on the new provisions that are proposed to apply to electricity and gas supply under the Consumer Guarantees Act 1993 ("**CGA provisions**").

4. Vector's contact person for this submission is:

Bruce Girdwood
Manager Regulatory Affairs
Tel: 04 803 9038
Email: bruce.girdwood@vector.co.nz

Executive Summary

5. Vector makes the following key points in relation to the CGA provisions:

a) The CGA provisions do not improve consumer protection because electricity and gas consumers are already able to be compensated by retailers for breaches of the acceptable quality guarantee.

b) The main effect of the CGA provisions will be to re-allocate risk within the electricity and gas industries by means of requiring electricity and gas network businesses to indemnify retailers for their CGA liability where the cause of the liability is a network fault. On this basis the amendments are not unreasonable in principle.

c) However, Vector strongly submits that questions of cost and risk allocation within the industry are best left to the specialist industry regulators (i.e. the Electricity Authority ("**EA**") and the Gas Industry Company ("**GIC**")). Vector **recommends** the Bill does not provide an indemnity but requires the industry regulators to develop an indemnity within a specified timeframe (where they are not already in place).

d) Importantly, the EA has already developed regulations that have resolved much of the problem that the Bill aims to resolve. Overlapping regulation and legislation imposes unnecessary costs on industry participants and, ultimately, consumers. This is undesirable and should be avoided. Our recommended approach would avoid any overlap.

e) If the indemnity clauses do remain in the Bill, Vector's second preference is that they are amended to align with the regulations developed by the EA, which are better considered and more practicable and were developed through consultation with electricity stakeholders.

f) Vector has seen and supports the Electricity Networks Association's ("**ENA**") proposal for a liability cap to be included in the CGA for electricity and gas. A cap would ultimately reduce costs to consumers as it will reduce insurance costs for network businesses that try to insure against the indemnity risk.

g) We also consider that the whole electricity and gas supply chains should be covered by the Bill. There is no logical justification to capture electricity and gas transportation companies but not electricity generators

or gas producers as they could cause an outage that is deemed to be a breach of the acceptable quality guarantee.

h) Finally, Vector considers that the proposed new definition of acceptable quality of electricity and gas in the Bill is reasonable. However, the Bill (apparently inadvertently) prevents electricity and gas network businesses from being able to contract out of the CGA with business customers, which they are currently able to do under section 43A of the CGA. To resolve this and two other matters, this submission describes some detailed improvements that could be made to the Bill.

Background to the legislation

6. It may be helpful to the Committee if we outline some of the recent history behind the electricity and gas acceptable quality guarantee provisions in the CGA.

The retailer is currently required to compensate the consumer…

7. Under the present CGA as it applies to electricity and gas, if there is a breach of the acceptable quality guarantee the retailer is required to compensate the consumer.

… except for breaches of the reasonable skill and care standard.

8. The CGA also provides that electricity distributors must provide line function services (i.e. the provision, maintenance and operation of electricity lines) to a level of reasonable skill and care. This is a lesser standard than the acceptable quality guarantee and compensation tends to only need to be paid in circumstances such as negligence.

Electricity retailers raised concerns about their liability…

9. Around 2009/10 some electricity retailers raised concerns that they were liable to pay compensation to consumers for breaches of the acceptable quality guarantee that were caused by events outside of their control. For example, breaches could be caused by a failure on a distribution or transmission network, or a failure of a generation plant, but the retailer was the party that had to pay compensation.

… which led to two separate legislative responses.

10. Two work streams were instituted to address this issue:

a) The Electricity Industry Act 2010 required the EA to regulate to ensure that contracts between electricity distributors and electricity retailers included provisions indemnifying retailers in respect of liability under the CGA for breaches of the acceptable quality guarantee, where those breaches were caused by faults on an electricity distributor's network; and

b) The Ministry of Consumer Affairs included provisions in the Bill (what are now clauses 36 and 41 of the Bill)[1] to address the issue.

11. The EA regulated on this issue by inserting requirements into the Electricity Industry Participation Code on 28 October 2011 ("**Code requirements**").[2] These Code requirements will come into force on 1 May 2012 for existing retailer-distributor contracts[3] and provide that all retailer-distributor contracts are deemed to include a mandatory clause indemnifying retailers for liability costs incurred due to faults on the distributor's network. Importantly, these Code requirements have already resolved the issue that the Bill aims to resolve in relation to electricity distributors.

The electricity and gas clauses have little to do with consumer protection

The CGA indemnities do not improve consumer protection...

12. Vector notes that the retailer indemnities in the Bill do not improve consumer protection. The indemnities do not change the ability of a consumer to gain compensation for a breach of the acceptable quality guarantee from their retailer.

... and their main effect will be to re-allocate risk within the electricity and gas industries, which is an issue best left to the specialist industry regulators.

13. The only change is that under the Bill the retailer will be able to recover its liability costs from an upstream party. The actual effect of the indemnities is to change the party within the electricity and gas industries that ultimately bears the cost of compensating consumers.

14. While this is not unreasonable in principle, Vector considers that the appropriate allocation of risk and liability within an industry is a matter best dealt with by the specialist industry regulators – in this case the EA and the GIC.

Nor will they lead to quality of supply improvements for consumers...

15. The Committee should also be very wary of claims that the indemnities put forward in the Bill will improve quality of supply for consumers. Electricity and gas network businesses are regulated by the Commerce Commission which sets the maximum prices they can charge or revenues they can make for delivering a constant quality of service. The Commerce Commission has taken the view that there is no consumer willingness to pay for an improved quality of service and has therefore decided not to provide any funds to improve the quality of supply. This means that network businesses will have

[1] Section 41 of the Consumer Law Reform Bill, proposed new section 46A of the CGA.
[2] Electricity Industry Participation Code, Clause 12A.6 and Schedule 12A.1 of Part 12A.
[3] The requirements came into force on 1 December 2011 for new retailer-distributor contracts.

little or no funds with which to improve quality of supply, even if the Bill does give them a slightly greater incentive to reduce outages on their networks. Therefore, we do not believe the Bill would improve quality of supply for consumers.

Comparison of the indemnity clause in the Bill and the equivalent clause in the Electricity Industry Participation Code

Overlapping regulation is not desirable and should be avoided.

16. Overlapping regulation should be avoided wherever possible. If the Bill is enacted in its current form and the equivalent Code requirements are not amended, there will be two similar but not identical legislative requirements governing the indemnity that electricity distributors must provide to retailers regarding CGA liability. This would be an undesirable situation which could create confusion and costly disputes. For example, under the Code requirements disputes are resolved through the standard contractual dispute mechanism while under the Bill disputes are to be resolved through the Electricity and Gas Complaints Commission ("**EGCC**") – as a result there are likely to be questions regarding the jurisdictional authority of the adjudicating party in any dispute.

17. At Appendix A of this submission, Vector attaches Schedule 12A.1 of the Electricity Industry Participation Code, for information.

The Electricity Industry Participation Code requirements are preferable...

18. The text of the indemnity in the Consumer Law Reform Bill was drafted first and then, due to delays in the progress of the Bill, was adapted and improved by the EA when it drafted the Code requirements. While the clauses are very similar, the drafting of the EA's Code requirements is more recent and, in our view, preferable.

19. The EA's Code requirements are preferable for the following reasons:

    a) The Code requirements do not specify the party that determines whether there has been a breach of the acceptable quality guarantee (this is unnecessary as it can be determined through standard contractual dispute mechanisms, as is the case for any other good or service – see below).

    b) The Code requirements provide for disputes to be settled by the standard contractual dispute resolution mechanism already in place between retailers and distributors. There is no need for the EGCC to become involved in resolving disputes between the parties – the EGCC's core role is to assist with the resolution of consumer complaints, not complaints between energy suppliers. The arbitration task between firms is not a core

EGCC function and would distract from their current work in resolving complaints from "small consumers" for amounts less than $20,000[4].

c) The Code requirements include requirements for retailers to consult with distributors and keep them informed about any claim for a breach of the acceptable quality guarantee. This is a good initiative that will promote joint working and "no surprises" between retailers and distributors.

20. The improved drafting of the EA's Code requirement demonstrates the value in allowing specialist industry regulators to address this issue in consultation with industry stakeholders, rather than leaving it to broader legislation.

... although the Electricity Industry Participation Code does not apply as broadly as the clauses in the Bill.

21. However, the Code requirements only apply to electricity distributors while the Bill also applies to Transpower and suppliers of gas. This is a situation that can be resolved with careful drafting if required.

Options for improving the indemnity clause in the Bill

Vector's preferred approach: The Bill requires the industry regulators to act.

22. Vector's preferred approach is for the Bill to require the EA and the GIC to extend the current EA indemnity to cover all parties in the electricity and gas supply chains. It could be crafted in a similar manner to section 42(2) of the Electricity Industry Act 2010, which required the Electricity Authority to undertake certain tasks within a set timeframe or explain to the Minister for Energy and Resources why the tasks had not been completed.

23. This approach is superior to the proposal put forward in the Bill as it allows a specialist industry regulator to develop targeted indemnity proposals that are likely to be more effective than the broader provisions in the bill. It also avoids any risk of duplicating the existing Code requirements.

Vector's second preference: If clauses on electricity and gas indemnity under the CGA remain in the Bill, they should be amended to mirror the better provisions of the Electricity Industry Participation Code.

24. If the Bill retains clauses providing an indemnity for electricity and gas CGA liability, Vector **recommends** the clauses are amended to bring them into line with the EA's Code requirements, specifically:

a) The Bill should not specify the party that determines whether there has been a breach of the acceptable quality guarantee.

b) The Bill should not require the EGCC to become involved in resolving disputes between the parties. Resolution through standard contractual

[4] This can be increased to $50,000 with the agreement of the company involved.

mechanisms is preferable and parties should be able to decide how to resolve their disputes. Retailers (called "shippers" in the gas industry) and transmission service operators generally do have such contractual relationships.

c) Retailers should be required to consult with upstream parties and keep them informed about any claim for a breach of the acceptable quality guarantee that may affect the upstream party.

25. These amendments can be achieved by:

a) Replacing subclause 1(a) of the new section 46A of the CGA with wording that is equivalent to clause (1) of Schedule 12A.1 of the Electricity Industry Participation Code.

b) Deleting subclause (5) of new section 46A of the CGA.

c) Inserting wording that is equivalent to clause (4) of Schedule 12A.1 of the Electricity Industry Participation Code.

Liability cap

26. Vector has seen and supports the proposal from the ENA for a cap on electricity and gas CGA liability to be included in the Bill. As the ENA points out, a result of the new indemnity is that distributors will most likely incur additional insurance expenses to cover payments for claims. The problem for distributors is that we are uncertain of the extent of liability, which from an insurance perspective could mean substantial increases in public liability premiums, the costs of which would be passed on to consumers. A liability cap would provide more certainty as to the likely cost of the indemnity and thus reduce insurance premiums and costs to consumers overall.

The whole electricity and gas supply chains should be covered by the Bill

27. If the Bill goes ahead broadly as drafted, there is no logical reason to draw the line at any point within the electricity or gas supply chains. If electricity and gas transportation businesses are potentially liable then electricity generators and gas suppliers should be also. These parties can also cause failures of supply that may impact on consumers in ways that are considered to be breaches of the acceptable quality guarantee.[5] Electricity and gas transportation businesses and retailers have no control over the actions of generators or gas suppliers so should not be liable for failures they cause (to

[5] For example, a failure of a major electricity generation unit can cause widespread power outages, as occurred on 13 December 2011 when there was an incident at Huntly power station and many thousands of customers lost power. An example in the gas industry is where the Pohokura gas field ceased operating during an extreme weather event on 3 March 2012, disrupting supplies to the gas transmission system.

do so would be to just retain the current problem, where one party is liable for the actions of another, further up the supply chain).

The new definition of acceptable quality of electricity and gas

28. Vector agrees with the new approach in sections 35 and 36 of the Bill that (a) electricity and gas, other than non-reticulated gas, are not to be treated as goods; and (b) the supply of gas and electricity is not to be treated as the supply of a service. We also broadly welcome the additional details on the scope of the acceptable quality guarantee. In our view, the inclusion of these additional details clarifies the scope and nature of the acceptable quality guarantee as it applies to electricity and gas. This should reduce disputes and uncertainty regarding the nature of the acceptable quality guarantee.

29. However, we believe there are areas where these new sections can be improved and these are discussed below.

Amendments are required to retain the ability of suppliers of line function services to contract out of the CGA with business customers.

30. The re-definition of all suppliers of electricity as suppliers of goods causes one problem, which seems to be unintentional. At present, sections 43 and 43A of the CGA permit "non-contracting suppliers of services" to contract out of the CGA with business customers. Electricity and gas distributors have made use of this ability in their contractual arrangements. However, new section 7B(3) of the CGA would require that the provisions of Part 4, including section 43 and 43A only apply as if electricity and gas were goods. This would have the effect that while retailers are able to contract out of the CGA with businesses, distribution and transmission businesses would not have that ability. Vector **recommends** the following wording is added to the end of new section 7B(3) to address this issue:

> "Persons supplying line function services may be treated as a non-contracting supplier of services for the purposes of section 43A."

Amendment is required to new section 7A(3)(c).

31. Vector does not believe that the wording of new section 7A(3)(c) is workable. For gas in particular, safety regulations do not set tolerances for all plausible sources of fluctuations. Vector **recommends** the wording:

> "but that fluctuations are acceptable only within tolerances permitted by gas and electricity safety regulations"

is deleted as it is not practicable given the provisions of current safety regulations. The Committee can have comfort that this wording is, in any case, unnecessary as case law[6] already provides that whether fluctuations of

6 HC Wellington, 24 April 2009, Miller J, CIV 2007-485-2761, at [104].

supply are outside specified safety tolerances is a factor that should be taken into account when reaching a view of what reasonable consumers would accept.

Amendment is required to new section 7A(4)(b)(i).

32. Vector also has concerns regarding the wording of the proposed new section 7A(4)(b)(i). This section addresses situations where customers are likely to experience a supply of gas or electricity that is "significantly worse" than that experienced by other customers. In those circumstances, the acceptable quality guarantee will not apply if suppliers of electricity or gas services "specifically explained to the consumer the ways in which the supply is likely to be significantly worse." The equivalent section in the current CGA is section 7(2), which refers to defects being "specifically drawn to the consumer's attention". It is unclear why the wording has been changed for the electricity and gas provisions and we consider that the new wording is likely to be challenging – i.e. what does "specifically explained" mean? It could be interpreted as a requirement to personally contact each relevant consumer, which is not practicable given the number of consumers supplied by the electricity and gas industries.

33. Vector **recommends** the wording "specifically drawn to the consumer's attention" is used instead as it is consistent with the wording elsewhere in the CGA.

Yours sincerely,

Bruce Girdwood
Manager Regulatory Affairs

APPENDIX A: SCHEDULE 12A.1 OF THE ELECTRICITY INDUSTRY PARTICIPATION CODE

Schedule 12A.1 cl 12A.7

Distributor indemnity in use-of-system agreements

Every **use-of-system agreement** is deemed to include the following clause:

Distributor indemnity

(1) If—
- (a) there has been a failure of the acceptable quality guarantee in section 6 of the Consumer Guarantees Act 1993 in the supply of electricity to a Consumer by the Retailer (a "failure"); and
- (b) the failure was wholly or partially the result of an event or condition associated with the Distributor's Network; and
- (c) the failure was not a result of the Distributor complying with a rule or order with which it was legally obliged to comply; and
- (d) the Consumer obtains a remedy under Part 2 of the Consumer Guarantees Act 1993 in relation to the failure against the Retailer; and
- (e) that remedy is a cost to the Retailer (a "remedy cost"),

the Distributor indemnifies the Retailer for the remedy cost.

(2) The amount of the Distributor's liability under this indemnity is limited to the proportion of the remedy cost that is attributable to the event or condition associated with the Distributor's Network.

(3) However,—
- (a) if the Distributor pays compensation to a Consumer ("payment A") in respect of a service provided directly by the Distributor to the Consumer; and
- (b) the Retailer incurs remedy costs in relation to the Consumer for a failure of acceptable quality that arose from the same event or circumstance that led to the payment of payment A; then
- (c) the amount that the Retailer would otherwise recover from the Distributor in respect of that Consumer must be reduced by the amount of payment A.

(4) If a Consumer makes a claim against the Retailer that the Retailer wishes to be indemnified for under this indemnity (a "claim"), the Retailer will:
- (a) as soon as reasonably practicable, give written notice of the claim to the

Distributor specifying the nature of the claim in reasonable detail; and

(b) consult with and keep the Distributor informed in relation to the claim.