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## TRUSTPOWER SUBMISSION: GAS TRANSMISSION ACCESS CODE – GOVERNANCE OPTIONS

### 1 Introduction and Background

- 1.1.1 Trustpower Limited (**Trustpower**) thanks the Gas Industry Company (**GIC**) for the opportunity to submit on the “think piece” prepared by Concept Consulting: *Gas Transmission Access Code – Governance Options (the Report)*.
- 1.1.2 Trustpower entered the gas market in 2013 and we have successfully grown our customer base to around 30,000 customers. We are a multi-product retailer, including within the electricity and telecommunications industry, and as a result have extensive experience operating in different regulatory regimes and with the associated governance matters which may arise.
- 1.1.3 We note that although the report title refers to “Governance options” it in fact has a much narrower focus: namely the process to be followed in relation to amendments to the Gas Transmission Access Code (the **Code**) and the preferred decision maker on Code amendments.
- 1.1.4 The Report makes the following recommendations:
  - a) Any person that is bound by Code terms, gas users and gas market operators should be permitted to propose changes to the Code;
  - b) A similar process to that adopted in the Vector Transmission Code (**VTC**) that allows for Code change proposals to evolve post-initiation should be adopted; and
  - c) Final decision making on proposals should be made by an independent body based on a defined decision making criteria. Concept Consulting suggests GIC would be the most suitable candidate for this role.

### 2 Trustpower’s views

- 2.1.1 We appreciate the opportunity to provide feedback at the “think piece” level on the Report’s recommendations. We would have however preferred to see a few more parts of the jigsaw included within the Report as we think that the decisions on those matters could affect design of the Code change process. The views outlined in the remainder of our submission should be read in this context.
- 2.1.2 We are generally supportive of the recommendations by Concept Consulting in relation to the persons who should be able to initiate Code changes (subject to the clarifications set out in section 3 below). We however have reservations about the Concept Consulting recommendations that:

- a) an approach similar to that used in the VTC should be adopted for Code change proposals (until we have a greater understanding of how the matters discussed in section 4 below will be addressed); and
- b) the GIC is the most suitable candidate for the role of independent decision-maker. Our concerns on this matter are further outlined in section 5 below.

2.1.3 We also suggest that a stronger link between the design of the Code change process and the promotion of the objectives of the Code needs to be established during this initial design phase. Further details of our suggestions to achieve this are outlined in section 6 below.

2.1.4 Our response to the specific questions asked by the GIC are provided in Appendix A.

### **3 Initiation of Code change proposals**

3.1.1 Section 2 of the Report discusses the initiation of Code changes and suggests that gas users and gas market operators should be permitted to propose changes to the Code.

3.1.2 This section also observes that parties who *do not* have a contractual relationship with the transmission service provider (**TSP**), such as prospective shippers, are affected by the Code.

3.1.3 We agree, and further note that a circumstance may arise which would mean that a prospective shipper may not be able to join the Code unless a change to the Code is made. Therefore, we think it is essential that prospective shippers are included in the persons afforded Code proposal rights.

3.1.4 However, it is not clear from the Report if this is intended. Option 1 (which is where we think prospective shippers belongs) is only described as including parties who are (already) *“directly bound by the Code terms via transmission service or interconnection agreements”*.

3.1.5 This may just be a drafting issue.

### **4 Consultation and refinement of Code change proposals**

4.1.1 Section 3 compares and contrasts the Maui Pipeline Operating Code (**MPOC**) and the VTC Code change provisions and then makes a recommendation in favour of the VTC process.

4.1.2 We wonder if the Report casts its net too narrowly. We note there is no requirement in either process for the proposed code change to be referred to an industry working group.

4.1.3 Instead under both processes (as they are described in the paper) code changes are progressed via a formal “propose and respond” processes with the main difference being whether the initial proposal is “high level” or fully detailed.

4.1.4 Trustpower is a strong supporter of the development of code changes through a collaborative working group process before formal consultation on the specific drafting and regulatory impact analysis.

4.1.5 In our view working groups provide an opportunity for:

- a) The change proponent to explain its views and proposed approach;
- b) Stakeholders to understand the interests and perspectives (including areas of common ground as well as difference) of others; and
- c) All stakeholders to evolve their views in response to group interaction.

4.1.6 It follows that, all other things being equal, we would prefer an approach which expressly includes a working group step before formal consultation begins.

4.1.7 However before finalising our view on the best approach in this context, we would appreciate further clarification on how Commerce Act matters are intended to be addressed under the Code change processes.

- 4.1.8 This is one of the areas where we think there are parts of the jigsaw missing.
- 4.1.9 In our view the statutory exemption from the restrictive trade practice provisions of the Commerce Act in section 43ZZR of the Gas Act 1992 for “*any matter act or thing done in the course of or for the purpose of recommending any gas governance regulations or rules*” does not extend to Code changes.
- 4.1.10 This is because they are changes to an industry contract not changes made for the purposes of recommending legislation.
- 4.1.11 We would not support a process where there was a risk for industry participants of an inadvertent breach of the Commerce Act.
- 4.1.12 Nor does it make sense to go through an extensive Code change process if at the end of the process, persons who are not happy with the outcomes lodge a complaint with the Commerce Commission.
- 4.1.13 Thus our preference is for Commerce Act compliance to be addressed in parallel with the design of a preferred Code change process.

## 5 Independence of GIC

### 5.1 Bespoke guiding principles

- 5.1.1 Section 4 of the Report suggests there is a need to progress Code changes which are in the wider interest, without defining whether that wider interest refers to the contract counterparties, such as shippers and the pipeline owner, or existing and prospective contract counterparties, or other stakeholders including New Zealand Inc. or the long terms interests of consumers.
- 5.1.2 In addition to agreeing the intended “beneficiaries” of the new access arrangements it might also be valuable to have bespoke guiding principles for this contract (as opposed to generic gas governance reform objectives such as those set out in section 43ZN of the Gas Act).
- 5.1.3 This is another part of the jigsaw which we think it would be helpful to clarify before making a final decision on the most suitable Code amendment process. The greater the potential for conflicting objectives the more important it is to have independence in the decision-maker and sound processes for information sharing.

### 5.2 Independent decision making preferred over vote-based arrangements

- 5.2.1 We agree with the Report’s analysis of the difficulties of a vote based approach in the gas transmission context.
- 5.2.2 We also agree with the Report’s view that an independent decision-maker will perform better over time than a vote based approach and that the information disadvantage faced by an independent decision-maker can be addressed by the design of an open and transparent decision-making process.
- 5.2.3 However, we do not agree with the Report’s statement that the GIC “*would qualify as being independent because of the provisions of the Gas Act.*(emphasis added)
- 5.2.4 The Gas Act sets out the requirements Government found acceptable for composition of an industry body which makes recommendations for final approval by the Minister (in the case of rules) or by Cabinet (in the case of regulations) and which can by and large be disestablished at the Minister’s discretion.
- 5.2.5 The current circumstances are quite different as it is intended that an independent decision maker is the final arbiter of Code changes including changes which might be adverse to the interests of certain industry participants in favour of other industry participants.
- 5.2.6 To be absolutely clear, the views in this submission are a comment on how independence is generally defined in economic literature and under administrative law and not a comment on the role of the GIC under the Gas Act or on the skills and experience of any of the current members of the GIC.

### 5.3 Dimensions of independence

5.3.1 The Productivity Commission considered the dimensions of independent decision-making in a regulatory context in its August 2013 *“Regulatory institutions and practices issues paper”*.

5.3.2 The issues paper states that *“independence is not a binary condition: regulators could be more or less independent in a range of ways”* and sets out various dimensions of regulatory independence<sup>1</sup>.

5.3.3 These are applied to the GIC in the table below:

Dimension of independence	Description	Application to GIC as decision maker under Code	Level of independence
<b>Regulation Independence</b>	Degree to which regulator has discretion to set and adjust rules to achieve the objectives of regulation	Proposal is that the decision-maker would not itself initiate code changes <sup>2</sup>	Low/Moderate
<b>Budgetary independence</b>	Degree to which a regulator is protected from political or sector pressure through its funding arrangements	GIC has no secure funding but must seek funding through annual regulations each year. This in turn requires the support of <ul style="list-style-type: none"> <li>the Board (for the level of funds sought from the industry);</li> <li>the industry (via consultation); and</li> <li>the Minister (so the necessary regulations can be secured).</li> </ul>	Low
<b>Operational independence</b>	Degree to which a regulator is protected from interference from (a) politicians or (b) the industry.	GIC reports to the Minister but is unlikely to be subject to any significant political interference in this role.  However, there is the potential for industry influence though <ul style="list-style-type: none"> <li>collaborative decision-making at board level (as the board includes some but not industry participants) and</li> <li>the staff of the GIC report to a board which includes persons directly affected by Code changes</li> </ul>	(a) Moderate  (b) Low
<b>Institutional independence</b>	Degree of distance from government and the industry including in relation of the appointment and dismissal of board and staff.	Both independent and industry directors are appointed by the industry. The independent directors’ positions are remunerated.  The Board is responsible for the appointment of the Chief Executive and the also presumably has influence over other appointments	Low

<sup>1</sup> Figure 4.2 page 22

<sup>2</sup> We note that it is not entirely clear whether the decision maker will be able to make any amendments to proposed Code changes or whether they will simply make Yes/No decisions.

5.3.4 This analysis raises questions about whether the case for the appointment of the GIC to this role is as clear cut as is claimed in the Report.

#### **5.4 Public law requirements**

5.4.1 Another matter to consider at this stage of the design process is the requirements of administrative law. These principles require decision-makers exercising regulatory functions to avoid the appearance of pre-judgment and bias in their decision-making.

5.4.2 These administrative law principles apply where there is a financial interest in the outcome of a matter and also where there could be seen to be a possibility of bias on the part of one or more of the decision-makers irrespective of whether such bias actually exists.

5.4.3 Significantly the interest does not need to be material and could for example be derived from the fact that there is a close association between the members of decision-making body and parties of affected by the decision such as to raise questions about impartiality.

5.4.4 Failure to meet these requirements will mean the relevant decisions are susceptible to review by the courts.

5.4.5 Our view is that a higher threshold for impartiality is likely to be applied for a Code regulatory process than may be implied by the Gas Act in respect of the GIC where the role is advisory not determinative.

5.4.6 These administrative law requirements cannot be contracted out of and suggest that some caution should be exercised before assuming the GIC is the best candidate for this role.

5.4.7 Other options include a retired ACCC or Commerce Commissioner, a retired High Court Judge, a QC, the current Commerce Commission, or some other body formed specifically for this purpose.

5.4.8 This would leave the GIC free to provide overarching advice to the Minister on the performance of the new access arrangements.

### **6 Framework for developing governance arrangements**

6.1.1 Concept Consulting identifies in the Report the important role that any established objectives (or bespoke guiding principles) have in the context of assessing Code changes. There is however also a broader application of the objectives/guiding principles that does not appear to have been identified in the Report – that is the objectives/guiding principles could be used to assist in the initial development of the governance arrangements for the Code<sup>3</sup>.

6.1.2 We consider that applying the objectives/guiding principles during the development of the governance arrangements for the Code would establish a clear design framework for this phase of work. It would also ensure that the governance arrangements appropriately support the guiding principles that underpin the Code and do not unintentionally restrict development of the Code.

6.1.3 For example it may be necessary to quickly progress changes to the Code to address a material risk to security of supply<sup>4</sup>. A faster more streamlined process for Code amendments would be potentially required to support this occurring.

6.1.4 We recommend that any potential new governance arrangement should be directly assessed against the guiding principles to ensure alignment as part of the final decision making process.

We look forward to working with Concept Consulting and the GIC to further explore the issues raised in this submission over the upcoming weeks, including during the public workshop scheduled for 17 May 2017.

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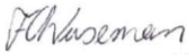
<sup>3</sup> We acknowledge that in the future amendments to the governance arrangement could be potentially progressed via the change process to ensure alignment with the objective/guiding principles, however this would be much better to address this from the offset.

<sup>4</sup> Assuming that ensuring security of supply is a guiding principle underpinning the development of the Code.

Please note that we wish to reserve the right to provide further comments on the proposed governance options following the public workshop.

For any questions relating to the material in this submission, please contact me on 027 549 9330.

Regards,

A handwritten signature in cursive script that reads "F. Wiseman".

**Fiona Wiseman**  
**Senior Advisor, Strategy and Regulation**

## Appendix A: Specific feedback on items in the Discussion Paper

Question	Feedback
<p>1. The report recommends that code changes could be proposed by parties bound by the terms of the code, gas users and gas market operators. Do you agree with the reasoning and recommendation</p>	<p>1.1 While we are generally supportive of the proposed arrangements, section 3 of our submission outlines an issue around prospective shippers needing to be able to potentially propose changes to the Code which we do not think is covered by current description of Recommendation One.</p>
<p>2. The report recommends that code changes should be consulted on and refined through a process similar to the current VTC process. Do you agree with the reasoning and recommendation?</p>	<p><i>Adoption of process similar to current VTC process</i></p> <p>2.1 We prefer a Code change process that allows proposals to evolve post-initiation. This ensures that proposals can benefit from the views and experience of other parties and avoids the inefficiency of having to start the process again if the submitting party decides to modify the proposal.</p> <p>2.2 However we would like to understand how the Commerce Act issues outlined in section 4 of our submission would be addressed in an iterative process.</p> <p>2.3 We consider that this needs to be addressed during this initial design phase to ensure a workable and robust Code change process is introduced.</p> <p><i>Role of working groups and enabling feedback on proposed drafting</i></p> <p>2.4 Consistent with paragraph 2.1 above, we strongly support the development of Code changes through a collaborative working group process and consider that a “working group step” should be expressly required to occur prior to formal consultation beginning. Refer to section 4 of our submission for further details.</p> <p>2.5 We also suggest that specific consideration be given to how the Code change process will ensure that any revised drafting would operate as intended. This could either be addressed during the development of Code changes (towards the end of the process to enable evolution of ideas post-initiation<sup>5</sup>) or during the decision making process.</p>

<sup>5</sup> One option would be to require the party developing the proposal to publish drafting in the Draft Change Request (or equivalent under the new process). This would enable interested parties to provide feedback prior to the Final Change Request being developed and submitted to the decision maker. Major changes to the drafting in the Final Change Request (as could be anticipated during an evolutionary process) would require further consultation potentially leading to multiple round of consultation on drafting occurring. This would not be the most efficient approach for ensuring useful input into any drafting.

Question	Feedback
	<p>2.6 Our preference would be for a “drafting consultation step” to be included during the decision making process as it would be more efficient to consult on the drafting when it is no longer subject to potential significant change as the proposal evolves.</p> <p>2.7 For example the decision maker could consult on the proposed drafting during the formal consultation period and require the submitting party to adjust the proposed drafting to address any misalignment between the drafting and the proposal that either the decision maker or other interested parties identify.</p> <p>2.8 We do not consider designing a governance regime that would rely entirely on the decision maker to ensure that the drafting aligns with the intent of the changes would be aligned with regulatory best practice which acknowledges the benefit that other parties can provide in developing regulatory changes.</p>
<p>3. The report recommends that proposed code changes should be assessed against the Gas Act s43ZN criteria, and that Gas Industry Co is best placed to make that assessment. Do you agree with the reasoning and recommendation?</p>	<p><i>GIC as the independent decision maker</i></p> <p>3.1 While we support an independent decision-maker being put in place, we have concerns around whether the GIC is the most suitable candidate for this role.</p> <p>3.2 Section 5.3 of our submission assesses the current GIC Board arrangements against the Productivity Commissions dimensions of independent decision-making and identifies that against this criteria the GIC has a relatively low score for its independence, thus raising similar issues as are identified in the report for the vote based approach.</p> <p>3.3 Other concerns relating to the requirements of administrative law with respect to pre-determination and bias in decision-making are outlined in section 5.4.</p> <p>3.4 We suggest that these matters receive detailed consideration prior to making any recommendation around the GIC becoming the decision maker for any Code amendments.</p> <p><i>Assessment criteria for Code changes</i></p> <p>3.5 We consider that bespoke guiding principles may be valuable to establish rather than relying on the more generic criteria outlined in section 43ZN of the Gas Act. This idea should be explored further in conjunction with industry.</p>

Question	Feedback
	<p>3.6 We also suggest that a second phase of design work which considers the detailed assessment criteria for decision making and associated processes should be undertaken to ensure that a robust decision making process is established from the offset.<sup>6</sup></p> <p>3.7 The tools used by an independent decision maker such as a cost benefit assessment (<b>CBA</b>) and sound consultation process play an important role in ensuring best practice regulatory decision making<sup>7</sup>. Ensuring that their role in the decision making process is clear prior to the commencement of the new arrangements would ensure consistency with the Government’s expectations for good regulatory practice<sup>8</sup>. We see no reason why these cannot be incorporated within the Code change process itself.</p> <p>3.8 Concept Consulting outlines a few matters which would need consideration, including when quantitative CBA would be used or how the independent decision-maker would be expected to interpret the objectives/guiding principles. We have identified a number of other matters which require consideration:</p> <ul style="list-style-type: none"> <li>• When a qualitative CBA will be used;</li> <li>• The consultation processes used to inform a CBA;</li> <li>• How the natural tensions between any decision making objectives (or guiding principles) will be balanced;</li> <li>• How submissions on the draft decision will be responded to;</li> <li>• How the views of interested parties will be taken into account in decision making<sup>9</sup>;</li> </ul>

<sup>6</sup> We note a second phase of governance design work would only be able to occur once fundamental decisions like those considered in the current paper are made, i.e. that an independent decision maker will be put in place.

<sup>7</sup> This is reinforced by the Governments expectations for regulatory agencies to provide advice and assurance of the robustness of the proposed change and implementation support. Refer to page 4: <http://www.treasury.govt.nz/regulation/informationreleases/pdfs/good-reg-practice.pdf>

<sup>8</sup> Refer to <http://www.treasury.govt.nz/regulation/informationreleases/pdfs/good-reg-practice.pdf>

<sup>9</sup> We note that this is particularly important if the GIC cannot make amendments to a proposal and relies on the submitting party to make any adjustments until the point of a final decision (including in response to its draft decision), i.e. if the GIC doesn’t consider an issue has been addressed properly will it simply have to reject the proposal at the final decision stage or could it work with the submitting party to properly address the issue?

Question	Feedback
	<ul style="list-style-type: none"> <li>How the consultation processes will ensure procedural fairness, i.e. reasons for a decision by the independent decision-maker should be published in a draft decision document to enable interested parties to respond.</li> </ul> <p>Note that this is not an exhaustive list and should be further developed with industry.</p>
<p>4. Are there any other matters that you believe are relevant to code changes and need to be considered?</p>	<p>4.1 We have not identified any further matters for consideration at this time.</p> <p>4.2 The Report is however very high level and we have some reservations as to how the proposed governance arrangement may work in practice.</p> <p>4.3 Ensuring continual input from industry during the detailed design phase will be vital to ensure the success of the final governance arrangements that are implemented.</p> <p>4.4 We strongly encourage the GIC to establish a working group which includes industry participants to provide advice during the detailed design phase.</p>