



Consumer Law Reform Additional Paper

October 2010

Electricity and the Consumer Guarantees Act

1. In June 2010, the Ministry of Consumer Affairs released the discussion paper “Consumer Law Reform”. The discussion paper included a brief section on electricity and the Consumer Guarantees Act 1993 (CGA) (section 12.1.6, page 109). It sought submitters’ views on amending the CGA to provide that both electricity retailers and lines companies should be liable for the quality guarantees set out in the Act. This paper addresses submissions made on this proposal and recommends a solution.

Setting the scene

2. Electricity supply faults result in costs that are allocated among consumers and electricity industry participants. The electricity industry participants prefer the costs borne by consumers, and consumers generally do bear the cost of the inconvenience of the “normal” power cuts and faults that consumers reasonably expect from time to time. If asked, consumers would probably choose not to pay the price necessary to secure a close to 100% reliable electricity supply.
3. It is not reasonable to expect consumers to bear the costs of more unusual events, such as power “spikes” that damage electrical appliances or cause fires, or longer than usual power cuts.
4. The CGA separates different aspects of the supply of electricity into a good and a service to protect consumers from the costs of unusual electricity supply faults, and to allocate those costs to retailers and lines companies. The CGA says that retailers which contract with consumers are suppliers of electricity as a good, and lines companies which own or operate the line that is connected to the consumers’ premises are the providers of a service.¹
5. The way the supply of electricity is categorised under the CGA means that consumers have statutory guarantees from retailers that electricity will be of acceptable quality (the “goods” guarantee), and from lines companies that they will provide line function services with reasonable skill and care (the “service” guarantee).
6. The CGA creates a theoretical incentive for retailers and lines companies to minimise the costs from faults. In the case of retailers in particular, their ability to respond to the incentive is limited, because nothing they do directly affects the quality of the electricity they supply. In any event any costs and losses allocated from consumers to retailers or lines companies will ultimately be borne by other

¹ Consumer Guarantees Act 1993, section 2 definition of “supplier” – paragraph (c).

consumers (through the prices they pay) or by retailer or lines company shareholders (if the costs are not recoverable through prices).

7. Treating retailers as suppliers of electricity as a good, and lines companies as providers of services under the CGA is convenient, but it is not particularly consistent with the treatment of the suppliers of other goods and services under the CGA. Electricity is not a conventional good. It is not a physical object which can be held, examined or (for most practical purposes) stored like other goods. The quality of electricity as a good relates to the reliability of its supply, and whether it has the technical attributes necessary to power electrical appliances sufficiently and safely. A failure in the quality of electricity occurs when its supply is interrupted, or when the electricity causes damage to electrical appliances or property.
8. Lines companies clearly provide a service, because lines companies are paid for the use of their assets to deliver electricity, rather than selling anything consumers physically receive. Treating lines companies as providers of a service to consumers is unusual however because most lines companies do not contract with customers under the regulated market structure in New Zealand – the lines and retail companies are split, and most lines companies contract with retailers rather than consumers. They are therefore deemed under the CGA to be suppliers of services to consumers when their lines are connected to the consumers' premises, even though the lines companies do not generally have contracts with consumers.²
9. The remedies usually available to consumers of goods and services under the CGA also have limited application to electricity. Retailers cannot repair or replace electricity which does not meet the acceptable quality guaranteed for goods under the CGA. Unlike most other goods, the consumer cannot reject and return electricity to the retailer. Obtaining a refund for the price of the electricity is not likely to be a satisfactory remedy. With breaches of the service guarantee from lines companies, the consumer has no contract with the lines company to cancel, and the right to have a service "remedied" under the CGA will not compensate the consumer for any loss or inconvenience from a service disruption.
10. The remedy which is most likely to be relevant for breaches of the goods and services guarantees under the CGA is the right to claim for any consequential loss or damage which is reasonably foreseeable.³
11. The fact that the characterisation of retailers and lines companies under the CGA might be different from other suppliers of goods and services is irrelevant to the broader policy question. The underlying issue is whether the loss allocation between retailers, lines companies and consumers that is inherent in the goods guarantee and the services guarantee under the CGA is effective, logical or efficient.

Problems with the application of the CGA to electricity

12. The discussion paper outlines the problems that have been identified in relation to the application of the CGA to the electricity industry. In brief,
 - i. Electricity retailers are concerned that they are responsible for faults over which nothing they do directly affects the quality of the electricity supplied.

² The Electricity Industry Act 2010 includes provisions including the opportunity for distribution lines companies to also act as retailers, but the practice is not yet widespread.

³ Consumer Guarantees Act 1993 19 sections 18(4) (for goods) and 32(c) (for services).

- ii. Electricity retailers have not been able to negotiate indemnities with the lines companies that are more likely to be actually responsible for the faults the retailers are liable for, because lines companies are natural monopolies.
 - iii. There is a gap between the “goods” guarantee and the “services” guarantee under the CGA, which means retailers have more responsibility and liability than the lines companies, so even if lines companies indemnify retailers to the extent of lines companies’ own responsibility under the CGA, the indemnity would not cover the full extent of retailers’ liability for breaches of the CGA acceptable quality guarantee.
13. Similar problems were raised in submissions by retailers on the Electricity Industry Bill. In response to these submissions, the Commerce Committee recommended that Parliament should add a section to the Bill requiring the new Electricity Authority to consider forcing lines companies to indemnify retailers in agreements between them (called use of system agreements) for retailers’ liability to consumers for breaches of acceptable quality caused by faults on the lines companies’ networks.
14. However this is an indirect solution, which may or may not be effective. A more appropriate solution is to amend the CGA as the source of the responsibility or liability being imposed on retailers and lines companies.⁴ An amendment to the CGA would also be more permanent than indemnities in use of system agreements, which can be renegotiated.

Should electricity be covered under the CGA?

15. Some submissions on the discussion paper suggested that electricity should be removed from the CGA, so the statutory guarantees under the CGA would not apply to electricity at all. The Government’s policy remains, as it has been since the CGA was enacted, that consumers should not have to bear all the costs associated with faults in the supply of electricity, and they should have a guarantee that their electricity will be of acceptable quality, and that lines companies should be responsible for their own reasonable skill and care. The 2003 amendment to the CGA confirmed this policy.
16. Failures in the quality of electricity can cause actual physical damage to consumers’ electrical appliances and property, can risk injury to people and cause inconvenience. The situations described in the recent High Court case of *Contact v Jones*⁵ are examples where consumers suffered actual physical damage from the poor quality of their electricity. In those situations, if there had been no coverage under the CGA guarantees, the individual consumers would have had to bear the losses caused by the faulty electricity.⁶
17. The examples in *Contact v Jones* illustrate why the Government believes that the guarantees in the CGA should apply to electricity. The relevant consumer policy principle is that consumers ought to be able to have confidence that the electricity supplied to them will be of the quality they could reasonably expect. The position under the CGA is that individual consumers have a guarantee that their electricity will be of acceptable quality regardless of the cause of the defect (except for

⁴ Of course the CGA is not the source of the natural monopoly status of the lines companies, or of the market structure which makes it unusual for lines companies to contract with consumers.

⁵ *Contact Energy v Jones HC WN CIV 2007-485-2761*.

⁶ We understand retailers are unlikely to have contractual liability to compensate consumers for consequential losses or damage from problems with their electricity supply.

defects which a reasonable consumer would expect). Consumers also have a guarantee that lines companies will use reasonable skill and care when they provide their services. The CGA allocates the cost associated with these defects to retailers and lines companies (and in doing so effectively spreads them to other consumers through their prices, or to retailer or lines company shareholders).

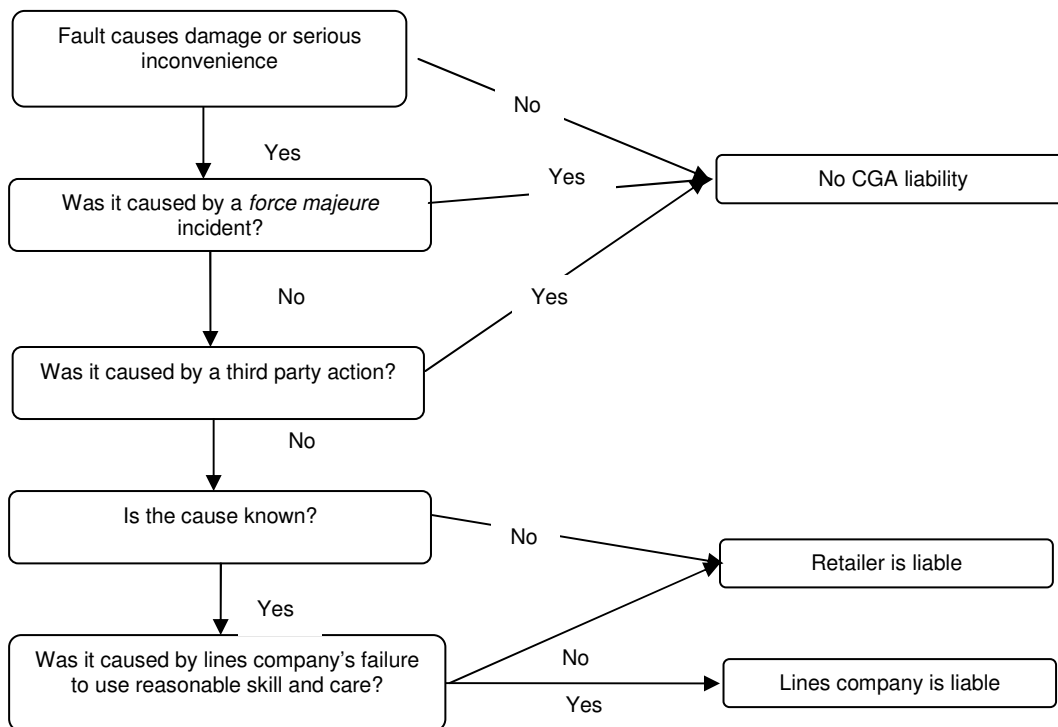
18. Some submissions suggested that electricity should only be covered by the “service” guarantee and should not be considered a good under the CGA because the quality of the “good” is entirely dependent on the quality of the service delivering the electricity. There is some logic to this in terms of the categorisation of goods and services but there is no logic in terms of the outcome from a consumer policy point of view. The consequence would be to significantly shift the burden of the costs associated with electricity faults on to individual consumers because the coverage of the service guarantee is less than the coverage of the goods guarantee under the CGA. The service guarantee standard of reasonable skill and care is effectively a negligence standard; suppliers of services guarantee that they will not be negligent.⁷
19. The disadvantages of the service guarantee compared to the non-fault goods guarantee for electricity are that,
 - Individual consumers would have to prove that the service provider (usually, the lines company) has not met a reasonable standard of skill and care. It would be very difficult for consumers without technical and legal expertise to meet the burden of proving that a lines company has breached the service guarantee, and
 - Individual consumers will have to meet the cost of electricity faults where the fault is not caused by a lack of reasonable skill and care by a lines company, or the cause cannot be determined.
20. If there was only a service guarantee, then no supplier would be responsible for the acceptable quality of electricity. This would be an unacceptable outcome.
21. The Government’s policy is to protect individual consumers from the burden of damage from unreasonable electrical faults, not just electrical faults caused by a lines company not providing a service with reasonable skill and care. The acceptable quality guarantee provides consumers with more accessible and more extensive protection than just a service guarantee.

⁷ Reasonable skill and care is the negligence standard. Negligence cases also involve difficult questions about whether there is a duty of care, whether there are policy reasons that might negate a duty of care, and the relationship between contract and negligence remedies. None of these issues are relevant to the service guarantee under the CGA even though the guarantee uses negligence language.

What does the guarantee of acceptable quality for electricity cover?

22. Some concerns about the allocation of liability for faults to retailers and lines companies seem to be based on the assumption that any electrical fault will be a breach of acceptable quality. The acceptable quality guarantee for goods under the CGA is not an absolute guarantee. The definition of acceptable quality in section 7 of the CGA includes various elements. The elements that are relevant for electricity are that it should be as,
- fit for all the purposes for which it is commonly supplied;
 - free from minor defects; and
 - safe,
- as a reasonable consumer, fully acquainted with the nature of the supply of electricity, would expect.
23. It is generally accepted that the guarantee of acceptable quality under the CGA does not necessarily amount to a guarantee of “gold plated” supply of any goods, including electricity. It is useful to explore what the guarantee of acceptable quality means in practice for electricity.
24. Prior to *Contact v Jones*, the Electricity and Gas Complaints Commissioner’s⁸ proposed a decision making process for claims under the CGA. The proposed process distinguished between the goods guarantee and the services guarantee as set out in Diagram 1 below. Faults caused by a third party or *force majeure* events were considered to be expected by a reasonable consumer fully acquainted with the nature of the electricity supply, and so were not regarded as being covered by the guarantee.

Diagram 1



⁸ The Electricity and Gas Complaints Commission (EGCC) is the complaints resolution body approved under the Electricity Act 1992, Gas Act 1992, and Electricity Industry Act 2010 to consider disputes between consumers and electricity retailers and distributors.

25. In 2007, the major retailers sought guidance from the High Court about the extent of liability under the CGA, using five examples where the Commissioner had found retailers liable according to this decision making process.⁹ There was no actor to whom the cause of the fault and the resulting damage to the consumer's property could be attributed in any of the examples in the case. In practice, the fault could not be attributed to any third party, or to a failure of the lines company to use reasonable skill and care. Miller J said that the CGA acceptable quality guarantee protects the consumer regardless of whether the cause can be attributed to a particular person. The cause of a breach is not determinative of whether the acceptable quality guarantee has been breached and the cause is only sometimes relevant to whether a consumer is entitled to a remedy (in Miller J's opinion the cause of the breach is just one of the factors).
26. Miller J proposed some factors relevant to determining whether a fault would breach the acceptable quality guarantee. He considered that replacing the Commissioner's proposed test with the factors he proposed will result in less faults and outages coming within the acceptable quality guarantee than under the Commissioner's approach (which only excluded third party and *force majeure* events and lines company breaches of reasonable skill and care).
27. Miller J said that electricity has certain characteristics that a reasonable consumer fully acquainted with the nature of the electricity supply will know about. Reasonable consumers will know that,
- lines are often overhead and single circuit,
 - there are planned outages for maintenance,
 - voltage fluctuates when lines wear down,
 - lines are susceptible to birds, possums, vegetation and storms,
 - the system will be unstable after an outage, and
 - the system is susceptible to third party damage.
28. In short, consumers will know about some of the characteristics of the transmission and distribution systems, and how they can affect the quality of electricity they receive. This does not mean that a consumer would expect all the faults that are caused by something happening in, or to, the transmission and distribution system.
29. Miller J listed seven factors that a consumer would consider when deciding whether a fault was expected or not.
- i. What are the purposes to which electricity is commonly put? [*Expensive, voltage-sensitive appliances, such as computers, are becoming more commonplace. Consumers would not expect appliances like these to be regularly damaged by electrical surges.*]
 - ii. What was the nature and extent of the risk posed by the fault? [*Safety is an important factor. A consumer may expect small outages where supply is cut and household appliances do not run, but they may not expect a large spike to cause a fire and risk the lives of the occupants of the house.*]
 - iii. What was the extent, duration and frequency of the fault or outage? [*Short outages, planned or unplanned, are common and acceptable, but*

⁹ *Contact Energy v Jones HC WN CIV 2007-485-2761*

may become unacceptable where they happen frequently or last for longer than expected.]

- iv. The reliability of the distribution system is a factor, particularly in relation to the quality standards set by the Commerce Commission, and the nature of the connection to the consumer's premises? [*Consumers in rural areas can expect more outages because they are often supplied by a single circuit consisting of long overhead lines. Urban consumers may be on several circuits supplied by underground lines and so expect better quality supply.*]
 - v. The cause of the fault is relevant to whether a consumer would expect it to happen. [*Unlike the Commissioner, Miller J does not say that a consumer would expect all faults caused by a third party or force majeure events. While these may explain the cause of an outage, other factors such as the nature, extent and consequences of the fault may make it unexpected.*]
 - vi. Will a consumer be willing to pay the price necessary to eliminate all faults of the sort that occurred? [*Like any other good, a consumer cannot expect better quality without paying more. It may be impossible or very expensive to prevent some types of interruptions (for example, some outages can only be prevented by adding another circuit to the entire system). Other prevention measures may be inexpensive, such as securing key towers and transformers, so a consumer would prefer to pay that price to avoid outages caused by an animal or person interfering with towers or transformers.*]
 - vii. Has the supplier informed the consumer of something that will add to the consumer's knowledge of possible defects? [*A key issue in the case was whether retailers would be liable for damage caused by surges, where they had advised consumers to use surge protection equipment with some appliances. Miller J accepted that the supplier may not be liable where they draw specific defects to the consumer's attention, by explaining how often events will occur, how severe they will be, and what sort of damage may result. But clauses in retailers' current contracts purporting to inform customers of risks to sensitive appliances were not specific enough to satisfy this requirement. Whether a consumer should be expected to use surge protectors also depends on the price and availability of the device.*]
30. It is significant that most of the factors that Miller J says a reasonable consumer will know about, and most of the factors a consumer would consider in deciding whether a fault is expected, relate to the lines and equipment provided by lines companies to deliver electricity, rather than the direct activities of the retailer.
31. Many "normal" faults could be expected by a reasonable consumer, and they will not be covered by the acceptable quality guarantee as it is interpreted by Miller J. It is also clear that not all faults will be in this category, and unexpected faults are covered by the acceptable quality guarantee. The test can only be applied on a case by case basis so it is not possible to determine what proportion of faults that will be covered by the guarantee of acceptable quality.

Addressing the industry's concerns

32. As far as the allocation of cost associated with faults between lines companies and retailers is concerned, Miller J accepted the CGA provides, that a lines company's responsibility will be less than a retailer's and that retailers will be responsible for faults that fall through the gap between the guarantees for goods and for services. Consumers have to prove a lack of reasonable skill and care by the lines company to recover under the services guarantee, while they only have to prove loss from an unexpected fault to recover from a retailer. Miller J said that generally a retailer will be liable unless it can prove there was another contributing cause (in which case the retailer may be able to recover money from the person who caused the fault).
33. As outlined above, retailers have three broad concerns about the current situation under the CGA.
- i. Electricity retailers are concerned that they are responsible for faults over which they have no control, and where nothing they do directly affects the quality of the electricity supplied.
 - ii. Electricity retailers have not been able to negotiate indemnities with the lines companies that are more likely to be actually responsible for the faults the retailers are liable for, because lines companies are natural monopolies.
 - iii. There is a gap between the "goods" guarantee and the "services" guarantee under the CGA, which means retailers have more responsibility and liability than the lines companies, so even if lines companies did indemnify retailers to the extent of lines companies' own liability under the CGA, the indemnity would not cover the full extent of retailers' liability for breaches of the CGA guarantees.

34. These concerns are addressed below.

Electricity retailers' liability for faults over which they have no control

35. It is likely that retailers will be liable under the acceptable quality guarantee for faults that they could not have prevented. The liability will extend to reasonably foreseeable consequential losses and damages.
36. Fault is not a determinative factor for responsibility under the acceptable quality guarantee in the CGA. The CGA is intended to increase consumer confidence by making sure suppliers are responsible for faults in goods supplied to consumers. The acceptable quality guarantee is not an absolute guarantee, because reasonable consumers fully acquainted with the state and condition of the goods and the relevant circumstances of their supply may expect there to be some problems or faults.
37. The fact that retailers have no control over the quality of the electricity they supply is irrelevant from a consumer's point of view. From a consumer policy point of view, retailers should be responsible under the acceptable quality guarantee in the CGA for electricity they sell, and consumers should have ready access to a remedy against retailers. Retailers of electricity are in a similar position to retailers of other goods in this respect.¹⁰

¹⁰ Except for the fact that the lines companies which can influence the quality of the electricity supplied are natural monopolies, so there are no alternative lines companies in any particular location.

38. Retailers having responsibility for faults they have no control over does create some incentives. It encourages retailers to fully inform consumers about possible defects and risks, and how to mitigate them, and to put pressure on other parts of the industry (including themselves as generators) to improve electricity quality to a standard expected by a reasonable consumer.
39. However the disconnection between the retailers' responsibility and the lines company which is more likely to have control over the causes of the breaches of the acceptable quality guarantee reduces the effectiveness of any incentive to actually reduce the breaches. It would be appropriate to increase the responsibility of lines companies for acceptable quality, without reducing the remedies of consumers against retailers.

Electricity retailers' inability to negotiate for indemnity with lines companies

40. Most submitters have sympathy for retailers' inability to negotiate with monopoly lines companies to cover the costs of breaches of the acceptable quality guarantee which are actually caused by the lines companies.
41. One solution is for retailers to be indemnified by lines companies where the breach of the acceptable quality guarantee is caused by an event on a lines company's network. The lines company may have breached its own service guarantee of reasonable skill and care in causing the loss, but that is not necessarily the case.
42. From a policy perspective, putting more responsibility on to the party that is the cause of the defect creates an obvious incentive to reduce faults. It is important however, to ensure that consumers are not required to prove that the lines company breached the standard of reasonable skill and care in order to have any remedy at all.
43. A statutory indemnity would give retailers the opportunity to put the responsibility for breaching the acceptable quality guarantee on to the lines companies, while preserving the primary remedy for consumers against the retailer. Retailers will still require consumers to show that acceptable quality had been breached in the first instance. Lines companies should be free to argue that a particular fault was not a breach of the acceptable quality guarantee or was not caused by an event on their network, but the retailers are in a better position to argue these points with lines companies than consumers.
44. If the indemnity is a statutory indemnity, it would remove the risk identified by retailers that they cannot negotiate indemnities with monopoly lines companies.
45. Another option would be to limit the indemnity, so lines companies would only indemnify retailers to the extent of their reasonable skill and care guarantee. This would be consistent with the status of lines companies as the suppliers of services under the CGA. This would mean the retailers would have no indemnity from lines companies for faults which are not caused by a failure of reasonable skill and care by lines companies, and which therefore fall through the gap between guarantee for the service and the good. The indemnity would only apply where the retailer can prove that a lines company has breached its duty to provide line function services with reasonable skill and care.
46. The limited indemnity proposal would reinforce the distinction between the acceptable quality guarantee from retailers as suppliers of goods, and lines

companies as suppliers of services that guarantee their reasonable skill and care under the CGA. There does not seem to be a clear policy justification for leaving the residual acceptable quality liability with the retailer, when the retailer has no ability to manage that risk. Arguments attempting to determine the practical difference between the acceptable quality guarantee from retailers and the reasonable skill and care guarantee from lines companies in particular cases are likely to be protracted and inefficient.

47. Even if the precise cause of a particular fault is uncertain, it is clear that the lines company is more likely than the retailer to be able to determine the cause, and to manage the risk.
48. The position of Transpower needs to be considered separately. The lines companies which are deemed to be suppliers of services under the CGA are the electricity distributors whose lines are connected to consumers' premises. Transpower is technically a lines company for some purposes, because it provides transmission line services. However Transpower is not a lines company for the purposes of the CGA because its lines are not connected to consumers' premises.
49. In terms of the incentive effects of lines companies being responsible for their own negligence of breaches of reasonable skill and care, there is no distinction between distribution line services and transmission line services. The retailers have argued that they ought to be indemnified by any lines company which has caused retailers loss (through their guarantee of acceptable quality), whether the lines company is a distributor or Transpower. This is logical from a consumer law perspective.
50. It is foreseeable that lines companies and Transpower will dispute possible liabilities under a statutory indemnity of retailers, and disputes in the electricity industry are fairly common. The Electricity and Gas Complaints Commission has expertise and experience in resolving complaints about electricity and the CGA. Its expertise and experience could be used to settle disputes between lines companies and retailers. The EGCC already considers CGA responsibility between retailers and lines companies where parties disagree. We propose that lines companies and retailers should have the ability to refer indemnity disputes to the EGCC.
51. If the indemnity includes Transpower as a transmission line company, the jurisdiction of the EGCC will need to be extended to cover retailer and Transpower indemnity disputes.

The gap between the “goods” and “services” guarantees

52. The CGA generally requires retailers and other suppliers to compensate consumers for breaches of the acceptable quality guarantee in the first instance. Liability for the cause of the defect may be resolved up the supply chain (typically with manufacturers – which is not a meaningful option for electricity under the CGA), or the cost may be spread among consumers through the prices they pay. It is unusual for the supply chain for a good to involve suppliers of services (which is what lines companies are deemed to be under the CGA), rather than manufacturers.
53. The number of electrical faults that breach the acceptable quality guarantee from retailers is likely to reduce following the interpretation of the guarantee in Miller J's judgement in *Contact v Jones*, but the acceptable quality standard is still higher than the reasonable skill and care standard required of lines companies under the

CGA at present. A breach of the acceptable quality standard would also be easier for consumers to prove than a breach of the reasonable skill and care guarantee.

54. There has been no case law on exactly what the reasonable skill and care guarantee means for line companies under the CGA. It is clearly similar to a negligence standard, which would require the lines companies to be shown to be at fault for consumers to be able to recover under the guarantee. The market standard for lines companies generally will be relevant, and they may be influenced by regulatory factors such as the requirements of the Electricity Safety Regulations. The *Contact v Jones* case also referred to the quality standards in the Commerce Commission's price control regime, although it is not obvious how they would be relevant.
55. The consequence of the differences between the acceptable quality guarantee and the reasonable skill and care guarantee is that retailers are more likely to be liable to consumers than lines companies, even though it is lines companies that have the ability to manage the actual risks. This puts the responsibility, and the incentives, in the wrong place.
56. A principles-based approach would be to remove the distinction between electricity and a good and a service, and provide that anyone supplying electricity to consumers, whether they are retailers or lines companies, are supplying the good. The acceptable quality guarantee would therefore apply to electricity generally and the lesser reasonable skill and care guarantee would no longer be relevant.
57. There is still a problem with lines companies not being direct contractors with consumers, because the acceptable quality guarantee as it is currently explained in the CGA only applies to suppliers with contracts of sale to consumers. Some lines companies have direct contracts with consumers, but they are relatively rare. Of course, Transpower will never have a contract with consumers.
58. If anyone supplying electricity is supplying a good there would therefore still be a place for a statutory indemnity from the lines companies in favour of the retailers that gives the retailers the ability to recover from the lines companies the amounts the retailers have paid to consumers under the acceptable quality guarantee. This would adjust the current arrangements and lead to more appropriate outcomes. Consumers would still have primary recourse to the retailers from which they purchase electricity, and the issue of needing to prove breaches of reasonable skill and care by lines companies would no longer exist. The retailers would have the ability to shift the costs to the parties in the best position to manage those costs.
59. Providing for lines companies to be responsible (either directly to consumers, or indirectly through an indemnity of retailers) for the standard of acceptable quality should be more likely to increase the quality of electricity supplies for consumers than the "goods" guarantee from retailers. The lines companies clearly have more control than retailers over the quality of electricity. Under the CGA as it currently stands, the fault-based reasonable skill and care recourse consumers have against lines companies under the services guarantee is secondary to the no-fault recourse consumers have against retailers under the acceptable quality guarantee. The purpose of the CGA is to increase the confidence in consumers when they purchase goods and services, and providing non-fault recourse against the retailers which the consumers contract with is more effective in achieving that purpose than the fault-based recourse available against the lines companies. But it is not a logical or efficient outcome if that means lines companies can avoid

responsibility for their own actions, or events that they have the opportunity to manage.

60. Some non-consumer owned lines companies consider that any responsibility under the CGA will impose a cost on them, which they are not able to effectively recover through their charges due to the Commerce Commission's regulation of overall revenue. The same issue applies to Transpower, although Transpower is not currently a lines company which is a supplier of services for the purposes of the CGA.
61. In our view, preventing consumers from recovering their losses from lines companies' failure to exercise reasonable skill and care would be a perverse outcome of regulation and the Commerce Commission must be able to be relied on to deal with the non-discretionary liabilities of lines companies sensibly. The Commerce Commission's price control regime which directly or indirectly applies to lines companies includes a quality element, and sheeting home the actual costs of lines companies failing to meet standards of acceptable quality (or reasonable skill and care) is likely to be consistent with the Commerce Commission's approach to regulating lines companies.

Conclusion

62. Providing consumers with remedies against electricity retailers under the acceptable quality guarantee in the CGA is consistent with the principles of the CGA. The fact that electricity retailers have no control over the faults for which they are liable is not relevant to the application of the acceptable quality guarantee to retailers and other suppliers of goods generally.
63. Lines companies also have responsibilities under the services guarantee in the CGA, but it is impractical for consumers to prove that lines companies have breached the standard of reasonable skill and care. It is also unnecessary for consumers to pursue lines companies when retailers are likely to be liable under their acceptable quality guarantee if the lines company has breached its reasonable skill and care guarantee and the consumer has suffered a loss.
64. Electricity retailers can therefore be seen as covering the responsibilities of lines companies under the CGA, and it is logical that lines companies should indemnify electricity retailers for guarantee payments the retailers are required to make as a result of events on lines companies' networks. The same logic applies to Transpower as a provider of transmission services, although it is currently not covered as a lines company providing services under the CGA.
65. If the indemnity only covered breaches of reasonable skill and care by lines companies, retailers would still be left covering acceptable quality guarantee payments to consumers where it is not possible to prove that the lines company breached the reasonable skill and care standard. This puts the incentives and responsibilities in the wrong place. Lines companies are more likely than retailers to be able to address the causes of breaches of the acceptable quality guarantee, and if that is the case, lines companies should indemnify retailers for the amounts paid to consumers.
66. Lines companies should not be liable to retailers under the indemnity if the acceptable quality guarantee has not in fact been breached, or if the event that caused the breach did not occur on their network. Indemnity disputes between lines companies and retailers could be resolved by the EGCC.

67. A more principles-based solution would be to reverse the distinction between electricity as a good and a service under the CGA, and to provide that any supplier of electricity is supplying it as a good (and is therefore subject to the acceptable quality guarantee). An indemnity from the lines company to the retailers would still be appropriate in this case, because most lines companies do not have contracts directly with consumers.

68. We would welcome any additional feedback on this paper, supported by qualitative evidence where possible.

Recommendations

69. We recommend that:

- i. The acceptable quality guarantee that applies to electricity as a good continues as it provides appropriate remedies for consumers.
- ii. The lesser responsibility of lines companies under the reasonable skill and care guarantee is not appropriate.
- iii. The CGA is amended to remove the distinction between electricity as a good and as a service, so anyone supplying electricity to a consumer should be supplying it as a good, and will therefore be subject to the acceptable quality guarantee.
- iv. Retailers have the benefit of a statutory indemnity from lines companies in respect of payments made to consumers by retailers under the acceptable quality guarantee where the breach of acceptable quality was caused by an event on the lines companies' networks.
- v. Transpower is included in the CGA as a lines company providing services to consumers for the purposes of an indemnity to retailers for losses from a breach of the acceptable quality standard caused by an event on its network.
- vi. The jurisdiction of the Electricity and Gas Complaints Commission is extended to include indemnity disputes between retailers and lines companies (including Transpower) in respect of the CGA guarantee.