



Statement of Proposal

Amendments to the Gas Governance (Compliance) Regulations 2008

Date issued: 31 May 2012
Submissions close: 13 July 2012





About Gas Industry Co.

Gas Industry Co is the gas industry body and co-regulator under the Gas Act. Its role is to:

- develop arrangements, including regulations where appropriate, which improve:
 - the operation of gas markets;
 - access to infrastructure; and
 - consumer outcomes;
- develop these arrangements with the principal objective to ensure that gas is delivered to existing and new customers in a safe, efficient, reliable, fair and environmentally sustainable manner; and
- oversee compliance with, and review such arrangements.

Gas Industry Co is required to have regard to the Government's policy objectives for the gas sector, and to report on the achievement of those objectives and on the state of the New Zealand gas industry.

Gas Industry Co's corporate strategy is to 'optimise the contribution of gas to New Zealand'.

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Executive summary

The April 2008 Government Policy Statement on Gas Governance (GPS) seeks as an outcome that gas governance arrangements are supported by appropriate compliance and dispute resolution processes.

In May 2007 Gas Industry Co recommended to the Minister of Energy that the Governor-General make regulations to provide for the enforcement of the gas governance rules and regulations recommended by Gas Industry Co, in accordance with section 43(2)(G)(k) of the Gas Act 1992 (the Act).

The Gas Governance (Compliance) Regulations 2008 (the Compliance Regulations) currently provide for the monitoring and enforcement of the following gas governance arrangements:

- the Gas (Switching Arrangements) Rules 2008; and
- the Gas (Processing Facilities Information Disclosure) Rules 2008; and
- the Gas (Downstream Reconciliation) Rules 2008; and
- the Gas Governance (Critical Contingency Management) Regulations 2008.

The Compliance Regulations allow for a range of persons to allege breaches of the above gas governance arrangements by industry participants.¹ That range includes service providers, Gas Industry Co, consumers, and other persons.

The Compliance Regulations establish:

- A Market Administrator, which has the responsibility for receiving notices of alleged breaches of the rules, attending to administrative tasks, determining the materiality of alleged breaches, and attempting to resolve any immaterial breach with the agreement of parties.
- One or more Investigators, who investigate material or unresolved immaterial alleged breaches, endeavour to settle the matter, and refer settlements and unresolved alleged breaches to the Rulings Panel.
- A Rulings Panel, which approves or rejects settlements, determines unresolved alleged breaches, and may order remedies and/or financial penalties and compensation.

In Gas Industry Co's view, the Compliance Regulations generally work well and according to their purpose. There is currently a very high level of compliance with the existing gas governance rules and regulations. However, after three years of operations, there is an opportunity to:

- (a) tidy up the Compliance Regulations to clarify and enhance their operation, and rectify drafting errors and anomalies; and

¹ In the case of the Gas Governance (Critical Contingency Management) Regulations 2008 the Compliance Regulations also allow for persons other than industry participants to have breaches alleged against them. This is to encourage compliance by end users with directions from their retailer to stop using gas during Critical Contingency events.

- (b) consider a change to the mandatory breach reporting requirements on the Allocation Agent and Gas Registry Operator² to ensure that the compliance costs of alleging breaches of the type that are unlikely to raise a material issue do not outweigh the benefits of alleging the breaches in terms of impact and harm caused.

With respect to the mandatory breach reporting requirements on the Allocation Agent and Gas Registry Operator, experience has shown that these requirements have led to many minor breaches being reported; and these breaches have ultimately been determined as 'not material' by the Market Administrator. Gas Industry Co agrees that there are likely to be efficiencies in introducing a threshold regime to manage the volume of these minor incidents that must be notified by the Allocation Agent and Gas Registry Operator as alleged breaches.

The proposal in this paper is to introduce a threshold regime for breaches reported by the Allocation Agent and the Gas Registry Operator only; mandatory reporting requirements on the Critical Contingency Operator would remain unchanged because of the likely nature of alleged breaches under the Gas Governance (Critical Contingency Management) Regulations 2008.

Gas Industry Co considers it important that the specific rules that require mandatory breach reporting remain in place. However the proposal is to introduce a threshold or threshold regime whereby Gas Industry Co may issue guidelines on these thresholds or thresholds within which the Allocation Agent and Gas Registry Operator are not required to allege breaches. As noted, the primary purpose of this proposal is to reduce the compliance costs on industry participants and the Market Administrator for matters that are unlikely to raise a material issue, and where the costs of processing the alleged breach are likely to outweigh the benefits in terms of impact and harm caused.

It is accordingly proposed to insert an empowering provision into the Compliance Regulations to enable the promulgation of guidelines. Before any guideline is introduced (or once introduced, a guideline is amended) Gas Industry Co will issue a draft and consult with affected industry participants.

If a threshold regime is introduced, and guidelines are established, Gas Industry Co will be required to monitor trends carefully to ensure any pattern of de-facto rule change behaviour is addressed.

Gas Industry Co invites submissions on the proposals and answers to the specific questions contained in Appendix A. Submissions are sought by **5pm on 13 July 2012**. A Word version of the submissions template can be found here <http://gasindustry.co.nz/work-programme/compliance-policy?tab=406> .

After considering submissions, and making any changes as a result, Gas Industry Co expects to make a Recommendation to the Minister of Energy and Resources to amend the Compliance Regulations.

² Regulation 11 contains the mandatory reporting requirements on service providers. It refers to the Registry Operator, Allocation Agent, and Critical Contingency Operator. For the purposes of this proposal, only the Registry Operator and Allocation Agent will be subject to the threshold regime. Mandatory reporting requirements will still apply to the Critical Contingency Operator.

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1

Introduction

1.1 Background

The first set of gas governance rules introduced following a recommendation from Gas Industry Co was the Gas (Switching Arrangements) Rules 2008. One outcome sought by the April 2008 Government Policy Statement on Gas Governance (GPS) is that gas governance arrangements are supported by appropriate compliance and dispute resolution processes. Accordingly, at the same time as it recommended rules for switching, Gas Industry Co recommended regulations to provide for the enforcement of those and other gas governance rules and regulations recommended by Gas Industry Co.

The Gas Governance (Compliance) Regulations 2008 came into effect on 11 September 2008. In accordance with section 43(2)(G)(k) of the Gas Act 1992 (the Act), they provide for the monitoring and enforcement of the following gas governance arrangements:

- the Gas (Switching Arrangements) Rules 2008 (Switching Rules); and
- the Gas (Processing Facilities Information Disclosure) Rules 2008; and
- the Gas (Downstream Reconciliation) Rules 2008 (Reconciliation Rules); and
- the Gas Governance (Critical Contingency Management) Regulations 2008 (the CCM Regulations).

The Compliance Regulations allow for a range of persons to allege breaches of the above gas governance arrangements by industry participants (and end users in the case of the CCM Regulations). That includes participants, service providers, Gas Industry Co, consumers, and any other persons.

The Compliance Regulations establish:

- A Market Administrator, who has the responsibility for receiving notices of alleged breaches of the rules; attending to administrative tasks; determining whether or not alleged breaches raise a material issue; and attempting to resolve any alleged breaches that do not raise material issues with the agreement of parties. Gas Industry Co currently performs the function of Market Administrator.
- One or more Investigators, who investigate breach allegations that are unresolved or raise a material issue; endeavour to settle the matter; and refer settlements and unresolved breach allegations to the Rulings Panel.

- A one member Rulings Panel appointed by the Minister, who approves or rejects settlements; determines unresolved breach allegations; and may order remedies.

Gas Industry Co, the Market Administrator, Investigators, Rulings Panel and industry participants have had over three years' experience of operating under the Compliance Regulations. In Gas Industry Co's view the Compliance Regulations generally work well and according to their purpose. Partly as a result of earlier enforcement activity, there is also now a high level of compliance with the existing gas governance rules and regulations.

However, there is an opportunity to:

- (a) tidy up the Compliance Regulations to clarify and enhance their operation, and rectify drafting errors and anomalies; and
- (b) consider a change to the mandatory breach reporting requirements on the Allocation Agent and Gas Registry Operator³ to ensure that the compliance costs of alleging breaches of the type that are unlikely to raise a material issue do not outweigh the benefits of alleging the breaches in terms of impact and harm caused.

A recommendation for changes to rules or regulations is subject to the same requirements and processes as apply to proposed new rules as set out in section 43N of the Act. These are set out more fully in Section 2 of this paper.

The proposed amendments have been identified from the following sources:

- Gas Industry Co analysis of the operation of the Compliance Regulations.
- Observations of the Rulings Panel.
- Industry feedback.

As a result of the critical contingency event on the Maui pipeline in October 2011, Gas Industry Co is undertaking a review of the CCM Regulations. The outcome of that review may result in consequential amendments to the Compliance Regulations. If that occurs, there will be an opportunity to consider other possible amendments to the Compliance Regulations. However Gas Industry Co is of the view that it is important to address the changes proposed in this paper now, as part of a process of continuous improvement to the compliance regime. The threshold regime in particular will have benefits to the industry in terms of reducing compliance costs and enhancing efficiency.

1.2 Submissions

Submissions on the proposed amendments are invited from stakeholders. Submissions should be provided no later than **5pm on 13 July 2012**.

Please note that submissions received after this date will not be considered.

³ Regulation 11 contains the mandatory reporting requirements on service providers. It refers to the Registry Operator, Allocation Agent, and Critical Contingency Operator. For the purposes of this proposal, only the Registry Operator and Allocation Agent will be subject to the threshold regime. Mandatory reporting requirements will still apply to the Critical Contingency Operator.

A template for submissions is attached at appendix A. A word version of this template can be found here <http://gasindustry.co.nz/work-programme/compliance-policy?tab=406> .

All submissions will be published on the website after the closing date. As such, submitters should discuss with Gas Industry Co any aspect of their submission that may contain confidential information prior to uploading their submission.

1.3 Next steps

Following the release of this Statement of Proposal and receipt of submissions, those submissions will be analysed. Gas Industry Co may publish a separate submission analysis, or may include the analysis in its recommendation to the Minister of Energy and Resources.

2

Legislative Requirements

2.1 Regulatory objective

When considering the development of a gas governance arrangement – either regulatory or non-regulatory – Gas Industry Co establishes a ‘regulatory objective’ for the relevant workstream. The question asked is, were a given workstream to result in a recommendation for regulations, what would be the purpose or objective of that set of regulations? Any non-regulatory arrangement that is developed should also seek to achieve this objective.

This outcome of ensuring gas governance arrangements are supported by appropriate compliance and dispute resolution processes is the regulatory objective underpinning all of the proposals set out in this document.

Objective setting is guided by the Gas Act, which sets out a principal objective and certain other objectives in section 43ZN. That provision describes these as the ‘objectives of the industry body [when] recommending regulations under section 43F’. Gas Industry Co must also have regard to the Government Policy Statement on Gas Governance (‘GPS’), which sets out the Government’s objectives and outcomes for governance of the New Zealand gas industry, and its expectations for industry action.

The current proposal is for regulations based on section 43G(2)(k) of the Gas Act. When making recommendations under section 43G(2)(k), Gas Industry Co is not obliged to make a recommendation that specifically meets the objectives in section 43ZN. However these objectives guide much of our policy development, and are expanded upon by the GPS, to which the industry body must have regard when making a recommendation.

The Government’s overall policy objective for the gas industry, taking into account the combined effect of the objectives in the Act and the GPS, is:

To ensure that gas is delivered to existing and new customers in a safe, efficient, fair, reliable, and environmentally sustainable manner.

In regard to compliance, the GPS states the following outcome:

Gas governance arrangements are supported by appropriate compliance and dispute resolution processes.

Gas Industry Co considers that the proposed amendments will improve the operation of the Compliance Regulations that support the gas governance regime.

2.2 Empowering provision

Section 43G(2)(k) of the Act provides that regulation may be made '*providing for compliance with gas governance regulations and rules to be monitored and enforced by the industry body [or the Commission] or any other person or court, and the powers and procedures of that person or court*'. The proposed amendments to the Compliance Regulations come within the scope of this section.

2.3 Gas Act requirements

A recommendation to amend rules or regulations is considered to be the same as a recommendation for making those regulations in the first place. As such, the provisions relating to the assessment of a recommendation by the industry body (Gas Industry Co) apply. These requirements are set out in sections 43L and 43N of the Act.

Under section 43L(1), before making a recommendation, Gas Industry Co must:

- (a) undertake an assessment under section 43N; and
- (b) consult with persons that the industry body (Gas Industry Co) thinks are representative of the interests of persons likely to be substantially affected by the proposed [rule changes]; and
- (c) give those persons the opportunity to make submissions; and
- (d) consider those submissions.

Section 43N(1) requires that, before making a recommendation to the Minister, Gas Industry Co must:

- (a) seek to identify all of the reasonably practicable options for achieving the objective of the [rule change]; and
- (b) assess those options by considering:
 - (i) the benefits and costs of each option; and
 - (ii) the extent which the objective would be promoted or achieved by each option; and
 - (iii) any other matters considered to be relevant; and
- (c) ensure that the objective of the [rule change] is unlikely to be satisfactorily achieved by any reasonably practicable means other than the making of the [rule change]; and
- (d) prepare a statement of proposal for the purpose of consultation under section 43L(1).

However, under section 43N(3), a simplified process can apply in the following circumstances:

The industry body ... is not required to comply with subsection (1) if it is satisfied that the effect of the recommendation is minor and will not adversely affect the interests of any person in a substantial way.

Gas Industry Co considers that the proposed amendments to the Compliance Regulations outlined in this document are a mix such that section 43N(1) may apply to the proposal to introduce a threshold regime, and section 43N(3) applies to minor drafting and clarification amendments.

3

Proposed minor amendments

Amendment 1

Description of changes

Amend regulation 10(2) to remove the words 'by other means' when referring to the way in which Gas Industry Co becomes aware of an alleged breach and notifies the market administrator.

Reason for change

These words are redundant. The key point is that Gas Industry Co can allege a breach when it becomes aware one may have occurred.

Coverage by section 43N(3) of the Act

This change removes redundant wording and is considered to be of minor effect. Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 2

Description of change

Amend the heading of regulation 11 to ensure coverage of the Critical Contingency Operator and allow for the addition of future service providers that may need to report alleged breaches by referring to 'certain service providers'.

Reason for change

Regulation 11 refers to the mandatory requirement on the Registry Operator, the Allocation Agent, and the Critical Contingency Operator to allege breaches. The heading of regulation 11 currently refers to the Registry Operator and the Allocation Agent, but not to the Critical Contingency Operator. Further it is possible that future gas governance arrangements may require the appointment of one or more further service providers that will be under a similar reporting obligation, hence the proposal to change the heading to 'certain service providers'.

Coverage by section 43N(3) of the Act

This change generalises the heading of the regulation and is considered to be of minor effect. As headings are for guidance only, Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 3

Description of change

Clarify that the notice requirements set out in regulation 12(1)(b) apply to the notice issued under regulation 13(1).

Reason for change

This proposal is to tidy up and clarify that the information provided to participants by the Market Administrator under regulation 13(1) in relation to an alleged breach is the same information that is provided to the party allegedly in breach by the Market Administrator under regulation 12(1)(b).

Coverage by section 43N(3) of the Act

This change is considered to be of minor effect and provides clarity in drafting. Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 4

Description of change

Amend regulation 13(2) and (3) to modify the wording so that it reads that a participant may become a party to an alleged breach not to a breach notice.

Reason for change

It is more correct to say a participant is joining an alleged breach action rather than a breach notice.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 5

Description of change

Amend the regulations to include the industry body as a party from who information can be sought, and who will be provided with all notices and documents that are circulated to industry participants, and parties joined.

Reason for change

In order for the compliance regime to operate effectively, the industry body needs to have access to relevant information, and be able to provide information to the Market Administrator, Investigator, and Rulings Panel. This also reflects the industry body's role in monitoring and administering the gas governance arrangements.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 6

Description of change

Amend regulation 19(1)(k), which sets out the matters the Market Administrator must take into account when determining materiality, to clarify that the reference to orders are that of the Rulings Panel.

Reason for change

The proposed amendment clarifies that the orders referred to are those of the Rulings Panel under Part 4A of the Gas Act.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 7

Description of change

Amend the mandatory requirement that the Allocation Agent and Gas Registry Operator must be one of the parties who agree to a settlement under regulations 21 and 32.

Reason for change

Under regulations 21 and 32, any settlements must be agreed by the notifying participant or other person who alleged the breach, the participant allegedly in breach, and any other participant who has joined as a party. Where the Allocation Agent and Gas Registry Operator have alleged a breach they are caught by these provisions. The Allocation Agent and Gas Registry Operator have indicated to Gas Industry Co that they often have no view on whether the relevant alleged breaches should be settled. It can also be onerous for the Market Administrator and Investigator to obtain their agreement. The mandatory requirement would be removed but this would not preclude their involvement in the settlement process if they choose. The Allocation Agent and Registry Operator would however have a positive obligation placed on them to specify when they want no further involvement in the settlement process.

The Critical Contingency Operator would still be subject to the mandatory requirements, given the circumstances under which it alleges breaches.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect and remove an unnecessary cost on the Allocation Agent and Gas Registry Operator. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 8

Description of change

Amend regulation 46 to address the situation where the Investigator who investigated an alleged breach must personally speak to his or her report if requested by the Rulings Panel.

Reason for change

Regulation 46 specifies what the rights of those entitled to be heard under regulation 39(2) are. It then states the Investigator who investigated must, if requested by the Rulings Panel, speak to his or her report and recommendation. This does not anticipate a situation where the original Investigator is unavailable, due, for example, to illness or their resignation from the role. On the face of it, a replacement Investigator has no standing to be heard, and the Rulings Panel can only work off the papers. The proposed change ensures the Rulings Panel is not constrained in this way.

Coverage by section 43N(3) of the Act

This change is considered to be of minor effect and will improve the practical operation of the Compliance Regulations. Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 9

Description of change

Delete 'Participants may make' from the heading in regulation 49.

Reason for change

This is a drafting error in the cross-referencing of provisions. Regulation 49 refers to the rights of 'persons' referred to in regulation 39(2). These 'persons' are not limited to 'industry participants' as indicated by the heading.

Coverage by section 43N(3) of the Act

This change is considered to be of minor effect. Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 10

Description of change

Delete references to 'Internet site' from regulations 81(4), 82(2) and (4), and 83(2).

Reason for change

This is redundant wording as the definition of 'publish' at regulation 4 includes the industry body's Internet site.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 11

Description of change

Include a new power for the Market Administrator and Investigator to be able to amend breach notices in very limited circumstances.

Reason for change

Currently neither the Market Administrator nor Investigator can amend breach notices once submitted. This means the Rulings Panel can only consider the specifics of an alleged breach as it is described in the breach notice at the time it was submitted. So where errors arise such as minor typographical mistakes, or incorrect referencing to a party, these cannot be rectified. The proposed change would avoid the situation where the breach notice needs to be withdrawn, corrected and the breached alleged afresh which wastes time and resources. The scope of the power to amend breach notices would be clearly defined.

Coverage by section 43N(3) of the Act

These changes are considered to be of minor effect. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

Amendment 12

Description of change

Include a new power for the Market Administrator and Investigator to be able to consolidate breach notices in very limited circumstances.

Reason for change

On occasion, subsequent to the notice being submitted, circumstances arise such that further breaches are alleged relating to substantially the same matter. A separate investigation must be carried out, and any consolidation of matters can only occur once the matter is referred to the Rulings Panel. This creates inefficiencies.

The scope of the power would be clearly established. It is proposed to limit it to alleged breaches of rules and regulations that arise out of the same factual set of circumstances or events.

Coverage by section 43N(3) of the Act

This change is considered to be of minor effect. Gas Industry Co does not consider it will adversely affect any person in a substantial way.

Amendment 13

Description of change

Amend the Compliance Regulations to modify the interrelationship between the definition of participant, the CCM Regulations, and the notice requirements in regulation 13 to ensure the Market Administrator can comply with them.

Reason for change

The definition of participant in regulation 4 includes consumers in the event of an alleged breach of the CCM Regulations. Regulation 13 then requires the Market Administrator to notify all participants of the content of a notice given under regulation 12. Regulation 16 sets out what this notice must contain.

As the October 2011 outage on the Maui pipeline demonstrated, it is not practically possible for the Market Administrator to identify every consumer let alone hold their contact details. It is proposed to add a caveat to the requirement that inserts an element of practicality and best endeavours to this requirement. One option could be to issue public notices.

Coverage by section 43N(3) of the Act

Gas Industry Co does not consider the proposed change will adversely affect any person in a substantial way. It is a practical improvement to the current statutory arrangements and reflects the reality of not being able to identify all possible consumers.

Amendment 14

Description of change

Include a new provision in the Compliance Regulations that would enable a participant to join a matter at a later stage than the Regulations currently provide for under regulation 13 (that is, at the time a breach is alleged to the Market Administrator). The effect will be that, in certain circumstances, a participant could join once a matter is referred to the Investigator and/or the Rulings Panel.

Reason for change

There are a number of reasons why a participant may wish to join at a later stage than when the initial breach allegation is referred to the Market Administrator. For example, on further consideration a participant may conclude that they may have been affected by the behaviour that resulted in the alleged breach.

There have been instances where participants have joined as a party once a matter has been referred to the Rulings Panel. The process by which this occurs is by consent. It is proposed to

include in the Regulations a provision that explicitly states a participant may apply to the Rulings Panel to join once a matter has been referred to the Rulings Panel.

There may also be valid reason why a participant may wish to join at the stage that a matter has been referred to the Investigator. It is similarly proposed to include in the Regulations a provision that explicitly states a participant may apply to the Investigator Rulings Panel to join once a matter has been referred to the Investigator.

It would be important to ensure that an application to join at a later stage is premised on valid grounds. That is, there is good reason why they did not join at the time the alleged breach was referred to the Market Administrator. This would remain the default position.

One option would be to include a requirement that the participant considers that they have been affected by the alleged breach (as is the requirement in regulation 13(2)), but also could not have reasonably anticipated that impact at the time the alleged breach was reported to the Market Administrator. The decision to enable a participant to join would then be an exercise of statutory discretion by the Investigator or Rulings Panel.

Coverage by section 43N(3) of the Act

These changes are designed to improve the operation of the compliance regime. Gas Industry Co does not consider they will adversely affect any person in a substantial way.

4

Proposed introduction of a threshold regime

4.1 The proposed threshold regime

Under the Compliance Regulations, industry participants, Gas Industry Co, consumers, and other persons, *may* allege breaches of the gas governance rules and regulations. Certain service providers *must* allege any breaches of which they become aware.

This requirement has meant that the Allocation Agent and the Gas Registry Operator automatically generate certain reports on their systems. For example, each month Gas Industry Co receives a report from the gas registry of all switching notices that have triggered a breach due to being received on, or containing, a date which does not fall within the prescribed times set out in the Switching Rules. The mandatory wording in the Compliance Regulations means no discretion can be applied.

With experience, it has become apparent that in certain circumstances a breach may be inadvertent or unavoidable, and negligible harm is caused. For example, a backdated move switch may result in a retailer not being able to provide an end trading notification to the Allocation Agent by the required time. Or a retailer may be delayed in providing an initial response to a gas switching notice (GNT) to acknowledge and accept a switch, but the retailer will still complete the switch on time by providing a gas transfer notice (GTN) in accordance with the customer and requesting retailer's wishes. Records show that rule breaches such as these have, to date, been found 'not material' by the Market Administrator.

Once a breach is alleged, the Compliance Regulations specify a process that must be followed by the Market Administrator and industry participant(s) so as to arrive at a determination of whether a breach is material or not. Industry participants regard this process as inefficient and costly for breaches that are clearly minor.

The costs of processing minor breaches that are of the type unlikely to raise a material issue and which are ultimately borne by industry participants and potentially passed on to consumers, typically outweigh the benefits in terms of impact and harm caused. Gas Industry Co is proposing to amend the Compliance Regulations to enable it to set thresholds for the mandatory reporting of breaches of particular rules under the Reconciliation Rules and the Switching Rules.

The rules themselves are not problematic and perform an important function in the overall governance regime. For example, the timeframes for switching notices are acknowledged by the industry as adequate (they are broadly similar to those in the electricity industry switching arrangements). However, introducing an element of discretion in the form of thresholds, under

which service providers would not have to allege certain minor breaches to the Market Administrator, would reduce compliance costs where those costs would outweigh harm and would create efficiencies for industry participants and the Market Administrator. These minor breaches would also be unlikely to raise a material issue by virtue of their nature.

Compliance with the affected rules will still be required and Gas Industry Co will monitor this closely. We will still receive from the Allocation Agent and Gas Registry Operator statistics on all apparent breaches, even if certain of them fall below the threshold(s) and are not alleged. If it appears that the threshold level is being abused by one or more participants, resulting in a trend toward de-facto rule change, Gas Industry Co will be under an obligation to revoke the relevant threshold setting and the relevant service provider will be required to recommence breach reporting based on strict compliance. As noted, an important component will be the isolated and minor nature of breaches that qualify (as identified by the history of the Market Administrator's determinations on materiality).

The thresholds will not apply to the Critical Contingency Operator. Where a breach lies within a threshold another industry participant may still allege the breach (as can Gas Industry Co, consumers, and other persons) and any threshold will be of no relevance to the Market Administrator's determination.

The proposal is to create an empowering provision in the Compliance Regulations to introduce a threshold regime. Gas Industry Co would then work to develop any guideline(s), including consultation with industry.

4.2 Statutory requirements

The Gas Act requires Gas Industry Co to identify all reasonably practicable options for achieving the objective of any proposed regulation, where the proposal does not fall within the category of minor under section 43N(3) of the Act. The full process under section 43N(1) requires Gas Industry Co to:

- identify all reasonably practical options for achieving the objective of the regulation , and
- assess those options according to a set of criteria set out in section 43N(1)(b).

The results of this process are then detailed in a Statement of Proposal.

Gas Industry Co considers there is a strong argument that the proposed threshold regime would fit within the definition of a minor amendment under section 43N(3) of the Gas Act. Specifically that, while the proposal will reduce the numbers of breaches alleged by service providers, this would *'not adversely affect the interests of any person in a substantial way'*. The proposal creates efficiencies for industry in terms of compliance costs and administrative imposition. However we have decided to take a cautious approach to the classification of this proposal under the Gas Act and include the full assessment required by 43N(1). Nevertheless, we are seeking submissions on whether or not submitters see as a minor change that will not adversely affect the interests of any person in a substantial way, and thus is an amendment that properly falls under section 43N(3).

4.3 Identification of reasonably practicable options

In considering all reasonably practicable options for developing a solution to a problem, the solution may be regulatory or non-regulatory. Any possible solution should seek to achieve the objectives set out in section 43ZN of the Gas Act and in the Government Policy Statement on Gas Governance issue in April 2008.

As noted above, the objective of the proposal to introduce a threshold regime is to reduce the incidence of minor breaches being reported by the Allocation Agent and Gas Registry Operator, and therefore create efficiencies in the gas industry where the costs associated with alleging certain types of breaches outweigh the benefits of doing so.

Gas Industry Co has identified three possible options:

- maintain the status quo;
- amend the Compliance Regulations so that alleged breach reporting requirements on the Allocation Agent and Gas Registry Operator is permissive rather than mandatory; or
- introduce an element of discretion for the Allocation Agent and Gas Registry Operator via the use of a threshold regime, which would be implemented through guidelines issued by Gas Industry Co (the preferred option).

4.4.1 Status Quo

The status quo would not achieve the policy objective however, as there is no provision in the Compliance Regulations that enables service providers to exercise discretion. The reporting requirements are strictly mandatory. Retaining the status quo would not achieve the objective of creating efficiencies in the breach reporting process.

Gas Industry Co does not support the retention of the status quo.

4.4.2 Voluntary reporting by the Allocation Agent and Gas Registry Operator

The second option is to amend the Compliance Regulations so that no mandatory reporting by the Allocation Agent and Gas Registry Operator is required and, as with the reporting requirements on participants⁴, consumers, other persons, and the industry body⁵, alleged breach reporting is voluntary.

If service providers were not required to allege breaches then the question arises of whether any such breaches would be alleged? The operations of the gas registry, for example, would not be made untenable by breaches of the Switching Rules; hence there would be no incentive for the Gas Registry Operator to voluntarily allege breaches. This would lead to a situation where switches could be frustrated by one or more retailers overrunning timeframes whilst endeavouring to win back outgoing customers. These kinds of issues predated the Switching Rules and, in some instances, continued after those rules went live until enforcement activity provided the necessary

⁴ Regulation 9.

⁵ Regulation 10.

incentives for all participants to comply. Mandatory reporting of alleged breaches by the Gas Registry Operator was a key part of that transition to the current orderly arrangements.

Gas Industry Co does not support the introduction of a regime that has the potential to undermine the rules or weaken the incentives to comply with them. If the reporting requirements on the Allocation Agent and Gas Registry Operator were no longer mandatory, Gas Industry Co would be concerned that any future non-compliance would be harder to address than was the situation in calendar 2009. Moreover, having changed the Switching Rules in that way, if subsequent behaviour indicated that the change needed to be reversed then that change cannot be implemented quickly because of the processes mandated in the Gas Act.

Gas Industry Co does not support a change from the original design of the Compliance Regulations that would introduce voluntary reporting of alleged breaches by the Allocation Agent and Gas Registry Operator.

4.4.3 The introduction of a threshold regime

This option, which is the preferred option, recognises the good work that has been done in the industry in terms of overall compliance with the rules, but acknowledges that invariably inadvertent breaches will occur that cause no harm. The costs of processing these alleged breaches outweigh the benefits of them having been alleged. A threshold regime in respect of mandatory reporting by the Allocation Agent and Gas Registry Operator would be introduced via an amendment to the Compliance Regulations, with the protection that any particular threshold can be amended or revoked by Gas Industry Co at any time if abuse of the regime is detected. A key principle underpinning the regime is that continued compliance with all rules and regulations is expected.

Gas Industry Co will be required to monitor trends and react to any 'compliance creep' that is detected. Further there are certain protections in the requirement for general mandatory reporting of apparent breaches (but not alleging breaches within thresholds) across all the Rules by the Allocation Agent and Gas Registry Operator. The purpose of the proposal is to target a small, select group of minor rule breaches; not a relaxation of general compliance across all the Rules.

The threshold regime is preferred because Gas Industry Co believes it strikes the right balance between minimising the costs of processing associated with breaches that are unlikely to raise material issues, while retaining strong incentives for industry participants to hold the gains they have made in compliance to date. The agility of the threshold regime to respond to apparent moves toward de facto rule changes is the key difference between this option and the others.

Participants, consumers, other persons and Gas Industry Co would still be able to allege a breach at any time, regardless if the rule breached fell within the threshold regime.

4.4 How would the objective be promoted or achieved by each option?

4.5.1 Status Quo

The status quo would not achieve the policy objective of creating efficiencies in the breach reporting process as there is no provision in the Compliance Regulations that enable the Allocation

Agent and Gas Registry Operator to exercise discretion. The reporting requirements are strictly mandatory.

4.5.2 Voluntary reporting by certain service providers

The second option is to amend the Compliance Regulations so that no mandatory reporting by the Allocation Agent and Gas Registry Operator is required, and as with the reporting requirements on participants⁶, consumers, other persons, and the industry body⁷, alleged breach reporting is voluntary.

The primary objective of the proposal is to create efficiencies in the breach reporting process by introducing a threshold regime. As noted earlier, the rules themselves are not problematic and perform an important function in the overall governance regime.

Removing mandatory reporting in its entirety may create short-term efficiencies. However, it would likely have the effect of undermining a regulatory regime that is working well and the long-term costs would far outweigh the benefits. As noted, if the reporting requirements on the Allocation Agent and Gas Registry Operator were no longer mandatory, Gas Industry Co would be time constrained in its ability to reverse the change because of the process requirements in the Gas Act, should de-facto rule change behaviour emerge.

4.5.3 Allowing for a threshold regime

The preferred option would best meet the objective of creating efficiencies in the breach allegation process. Any unintended consequences of the threshold regime in terms of de-facto rule change behaviour could be quickly remedied by a positive obligation on Gas Industry Co to revoke a threshold guideline.

There are added protections in that the Allocation Agent and Gas Registry Operator will still be required to allege the majority of breaches. Participants, consumers, other persons and Gas Industry Co can still allege breaches.

4.5 Cost/benefit analysis

Retailers have provided Gas Industry Co with information indicating there would be cost savings and efficiency gains from the introduction of a threshold regime. This would be achieved primarily through a reduction in time spent processing alleged breaches that are minor and where no harm is caused. In aggregate it is estimated that participants' costs would reduce by some \$70,000 in aggregate per annum as a direct result of introducing the threshold regime.

There would be some cost to Gas Industry Co in developing any Guideline, but Gas Industry Co is of the view that this would be small, can be met within current baseline, and the benefit would outweigh this cost.

There would also be some cost for the service providers to amend their current alleged breach reports, although these changes are likely to be relatively minor. Again Gas Industry Co does not

⁶ Regulation 9.

⁷ Regulation 10.

consider that this cost would be significant or outweigh the benefits of having to process this class of alleged breaches.

4.6 Any other means other than the proposed amendments?

It is not possible to introduce a threshold regime without amending the Compliance Regulations. The mandatory reporting requirement is clear, and a policy cannot override legislation.

5 Implementation

Set out below is an indicative timetable for the proposed changes to the Compliance Regulations. The aim is to have the amendments set out in this document approved by the Minister by the end of 2012, subject to the nature of the feedback in submissions altering the timetable. Of course, the introduction of any thresholds will need to be preceded by the publication of guidelines and any necessary changes to the Gas Registry Operator's and Allocation Agent's systems.

Gas Industry Co notes that industry participants and other stakeholders are likely to be aware of the general nature of the proposed changes. The minor changes have been published on Gas Industry Co's website, and the proposal to introduce a threshold regime for mandatory reporting by the Allocation Agent and Gas Registry Operator was discussed with industry participants during the Retail Gas Governance Forum hosted by Gas Industry Co on 7 December 2010.

Approximate date	Activity
1 June 2012	Statement of Proposal issued outlining proposed amendments to the regulations, allowing six (6) weeks for submissions.
16 July 2012	Closing date for submissions.
September/October 2012	Subject to the approval of the Board of Gas Industry Co, recommendation issued.
Late 2012	Proposed amendments to the Compliance Regulations are approved by the Minister and gazetted.
	Proposed amendments to the Compliance Regulations take effect (28 days after being gazetted). Note: The date amendments to the Compliance Regulations come into effect will be dependent on the Ministerial approval timeframe.

Appendix A Template for Submissions

To assist Gas Industry Co in the orderly and efficient consideration of submitters' responses, a suggested format for submissions has been prepared an electronic copy of which is available on our website. This is drawn from the questions posed throughout this Consultation Document. Submitters are also invited to include any other comments in their responses to this Consultation Document.

Name of organisation:

Contact person:

Email address:

Phone:

Could you please provide comment as to whether you agree with the amendment proposals? If not, please indicate which specific proposal or proposals you disagree with and provide reasons why.

PROPOSAL	COMMENT
Q1: The proposal to amend regulation 10(2) to remove the words 'by other means'.	
Q2: The proposal to amend regulation 11 so that the heading refers to 'certain service providers'.	
Q3: The proposal to clarify that the notice requirements in regulation 12(1)(b) apply to the notice issued under regulation 13(1).	
Q4: The proposal to amend regulations 13(2) and (3) so that a participant becomes a party to a breach and not a breach notice.	
Q5: The proposal to include the industry body as a party from who information can be sought, and to who will be provided with all notices and documents that are circulated to industry participants, and parties joined.	
Q6: The proposal to amend regulation 19(1)(k) to include reference to orders of the Rulings Panel.	
Q7: The proposal to amend the mandatory requirement on the Allocation Agent and Gas Registry Operator to agree to a settlement under regulations 21 and 32.	
Q8: The proposal to amend regulation 46 to remove the requirement for the Investigator who investigated the alleged breach to speak to his or her report if requested by the Rulings Panel.	
Q9: The proposal to delete wording in regulation 49 to ensure correct cross-referencing.	

PROPOSAL	COMMENT
Q10: The proposal to remove the references to 'internet site' from regulations 81(4), 82(2) and (4) and 83(2).	
Q11: In relation to the proposal to include a new power for the Market Administrator and Investigator to amend breach notices in very limited circumstances.	
Q12: The proposal to include a new power for the Market Administrator and Investigator to be able to consolidate breach notices in very limited circumstances.	
Q13: The proposal to modify the interrelationship between the definition of participant, the Gas Governance (Critical Contingency Management) Regulations 2008, and the notice requirements in regulation 13.	
Q14. The proposal to include a new provision that would enable a participant to join a matter at a later stage than the Regulations currently provide for under regulation 13.	
Q15 The proposal to include a new threshold regime for otherwise mandatory reporting of alleged breaches by the Allocation Agent and the Gas Registry Operator.	
STATUTORY CLASSIFICATION	COMMENT
Gas Industry Co is seeking submissions on whether or not submitters see the proposal to introduce a threshold regime as a minor change that will not adversely affect the interests of any person in a substantial way, and thus is an amendment that properly falls under section 43N(3).	