Breaches 2009-104, 2009-129, 2009-130, 2009-138, 2009-139, 2009-160, 2009-161, 2009-180, 2009-186, 2009-187, 2009-206, 2009-235

IN THE MATTER	of breaches of the Gas (Downstream Reconciliation) Rules 2008 and the Gas (Switching Arrangements) Rules 2008
BETWEEN	NZX Limited / M-Co for 2009-104, 138, 139, 160, 161, 186, 187, 206 and 235 Gas Industry Company Limited for 2009-129, 130 and 180 *Reporting Entities*
AND	Nova Gas Limited The Auckland Gas Company Limited *Participants to Alleged Breaches*
AND	Powerco Limited Vector Gas Limited Genesis Power Limited E-Gas Limited E-Gas 2000 Limited *Participants Joined as Parties*

Date of Hearing:	30 March 2010
Appearances:	J Kean – Investigator S Kos QC and JLW Wass – Counsel assisting the Rulings Panel J Palmer and C Teichert for Nova Gas Limited and The Auckland Gas Company Limited B Shepherd and K Shufflebotham for Vector Gas Limited M Sherwood King for Powerco Limited A Maseyk for Genesis Power Limited B Ross for E-Gas Limited and E-Gas 2000 Limited J Eves for Gas Industry Company Limited
Before the Rulings Panel:	The Honourable Sir John Hansen KNZM

Decision: 18 May 2010

DECISION

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[1] These alleged breaches give rise to a short but important and difficult issue of interpretation.

[2] The notices allege that Nova/AGCL failed to comply with various provisions of the Gas (Downstream Reconciliation) Rules 2008 and the Gas (Switching Arrangements) Rules 2008. There is a common element to all of the alleged breaches. In various parts of the North Island Nova operates pipeline networks and supplies various customers from those. Other participants do not have access to this network. Within the industry it is frequently described as a Bypass Network as it operates alongside the existing open access distribution networks that are subject to the various regulations.

[3] The investigator, and participants joined as parties, ("the proponents") take the view that Nova is a "gas distributor" as defined in the Gas Act 1992. As such, the Bypass Network is subject to the various regulations. Nova denies that it is a gas distributor, and therefore maintains no breaches have occurred.

[4] If Nova is not a "gas distributor", there are at least two important consequences. The first is that a different safety standard would apply to the Bypass Network than that which applies to the existing open access distribution networks. I do not think it unfair to describe that as a lower standard. That is not to suggest that Nova is doing anything other than applying the high safety standards applicable to the existing open access distribution networks. The point is that they would not be bound by those.

[5] The other significant aspect, given the broad general thrust of the regulatory reforms, is that if Nova is not a "gas distributor" it is not obliged to provide the registry with information relating to clients, and other matters, who it supplies through the Bypass Network. The consequence of this is a diminishing of competition.

[6] Because of the importance and complexity of the issue, I appointed Mr Kos Q.C. and Mr Wass to appear as counsel assisting me. I also had the support of an independent technical expert, Mr Stuart Dickson.

[7] The starting point must be the definitions contained in the Gas Act.

[8] "Gas distributor" is defined:

> any person who supplies line function services ***to any other person or persons***
>
> (Emphasis added).

[9] "Line function services" are defined as:

> (a) The provision and maintenance of pipelines for the conveyance of gas:
>
> (b) The operation of such pipelines, including the assumption of responsibility for losses of gas.

[10] The arguments advanced by the investigator and the other participating parties are similar in nature. Ms Kean, in her submissions, highlighted that in an open access distribution network the consumers receive the benefit of the delivery aspect of the delivered gas because the gas retailer buys line function services from the distributor. They are paid for by the

retailer on behalf of the consumer. They are subsequently recovered from the consumer by the retailer. She submits that in the case of the Nova Bypass Network, the distributor and the retailer are one and the same person, but the line function services are provided to a third party: the consumer. The effective submissions from the investigator and the other parties were to the effect that Nova is in fact supplying a bundled service. In other words, Nova wears the hat of distributor and retailer. Accordingly, it is submitted that whether supplied by an open or non-open access network, the consumer is receiving a bundled product, ie energy in the form of gas and a delivery service either procured by the retailer or directly by the consumer. Other retailers purchase the line function service and re-sell, while Nova provides the line function service itself and sells that as part of the bundle to the consumer.

[11] On the other hand, Mr Palmer for Nova submitted that the words of definition can readily be interpreted applying usual statutory interpretation principles. It is further submitted that even if there is a level of ambiguity, a purposive approach supports Nova's construction of the key provisions.

[12] It is Nova's argument that it would have to sell, or otherwise supply, line function service to a legally separate third party to come within the definition of "gas distributor". First, it says the existence of a physical connection with consumers does not necessarily mean that Nova supplies line function services to the consumer. Secondly, it submits its contracts with consumers are for the supply of delivered gas, not line function services. Thirdly it argues that the conveyance of gas for the purpose of selling delivered gas does not make it a gas distributor. Nova submits it has not sold line function services to any separate entity except in one case, to AGCL, which it says was the result of administrative error.

[13] Counsel assisting accepted that the construction submitted by Nova is the most natural reading of the words and makes more sense grammatically than the proponent's argument that the supply of gas to consumers involves the supply of line function services. Mr Kos submitted that the supply of delivered gas and the supply of the services by which that gas is delivered are separate and different concepts.

[14] However, he went on to submit that the alternative view expressed by the proponents was capable of adoption on the face of the rules, was not absurd and may be found to better express the purpose behind the rules.

[15] Mr Kos submitted that there was a third alternative. He considered the term "any other person" as argued for and contended by Nova could potentially be overly strict. He considered the term could refer to an entity performing a functionally different role in the gas supply chain, instead of capturing only a legally distinct entity. He submitted that this also fit within the purposes of the Act and regulations.

[16] The investigator and the participating parties submit that the Rulings Panel should take into account the change in circumstances that have occurred since the Act came into force. Specifically, the drafters of the rules took account of the need for the rules to apply to Bypass Networks such as Nova's. Mr Kos pointed out that Bypass Networks were not envisaged when the Act was drafted, and therefore the drafters would not have anticipated that gas would ever by supplied by a distributor directly to customers. The proponents

accordingly argued that the Rulings Panel should not accord excessive semantic emphasis to the use of "any other person".

[17] Mr Kos referred to s 6 of the Interpretation Act 1999, submitting this enables the interpreter legitimately to adopt an updated interpretation of the provision provided that is open on the words of the statute and accords with the statute's purpose. He argued that the definition of "gas distributor" was introduced before Closed Access Bypass Networks were contemplated, and in view of that, care should be taken before adopting a too strict interpretation. He submitted there was a reasonably strong argument the drafters wished to capture within the definition of "gas distributor" those companies who played the role of gas distributors and provided distribution services to the market generally.

[18] The next issue is which of the competing interpretations is the more internally consistent. The proponents submit the distinctions drawn by Nova do not produce the result that Nova submits. They say there is no reason why a person cannot be both a distributor and a pipeline owner, as they are separate concepts. They also submit that Nova artificially distinguishes between a gas distributor and a gas retailer. They submit that because gas distributors may sometimes also retail, that does not mean that all retailers are distributors. To be a distributor there is also the need to provide the line function services.

[19] They also argue that because certain rules may not apply directly to a Bypass Network, it does not mean the drafters did not intend the bulk of the rules to apply. They say that what Nova is doing is not a gas installation, as Nova argues, because they are smaller sub-components of the distribution network, not the reverse.

[20] Nova submits its interpretation distinguishes between the concept of gas distributor and pipeline owner and between distributor and retailer. Nova argues the rules never anticipated aggregated suppliers because certain rules are irrelevant to the operation of closed networks. Nova argues its entire network is a gas installation and therefore cannot be a distribution network.

[21] Mr Kos submitted that arguments based around textual consistency or inconsistency are of little assistance. In view of Mr Dickson's report he submitted that it was wrong to suggest that the Bypass Network constituted a gas installation.

[22] The proponents argue that the regulations are ambiguous. Accordingly, they submit that recourse must be made to the purposive interpretation. They submit that the drafters make it clear that the rules were to apply to Bypass Networks in relation to the Switching Rules, and while no such statement was made in relation to the Reconciliation Rules on the basis they were drafted second, it can be assumed the drafters had the same intention.

[23] The proponents submit that the rules were designed to enable the collection and process of information about gas distribution and for the imposition of safety standards. Such purpose would be compromised if certain participants would be excluded, they argued. They further argued that the whole regime is designed to maximise the availability of information and knowledge, to promote competition and to promote safety standards. To apply Nova's interpretation would leave them outside the clear purpose of the legislation.

[24] Nova's response is to point out that the drafters of the rules went ahead and made a conscious decision to adopt the existing definition in the Act.

[25] In relation to competition, Nova argues that the intention of the Act was to foster competition by opening up access to monopoly pipelines. They argue that Bypass Networks create competition and downward pressure; therefore they in themselves promote the objective of competition.

[26] Mr Kos submitted that the Rulings Panel should not dwell on the dispute as to whether it is the purpose of the rules or the Act that is determinative. He submitted both were relevant and the Rulings Panel should adopt an interpretation that promotes the objectives of both the Act and the rules if at all possible.

[27] He submitted that there was a strong argument put forward by the proponents that competition and safety would be better promoted if Nova was subject to the rules.

[28] Finally there is the issue of whether or not the position advanced by the proponents would produce unintended and illogical results. Nova submits that if their arguments were accepted it would extend the rules to a range of entities that operate what are called Embedded Networks, eg those in shopping malls or apartment blocks. Gas Industry Company recognised this was possible, but said that was not necessarily undesirable. The proponents argue that adopting their interpretation would not produce such a result.

[29] Mr Kos accepted that if Nova's interpretation was rejected there was a risk that Embedded Networks would be captured when this was clearly not intended by the drafters. But he said the definition of consumer installation in the Act would appear to exclude Embedded Networks. The Gas Act definition of a distribution system would exclude such Embedded Networks, and thirdly, the fact that the Embedded Networks may be caught by a "side wind" does not necessarily mean the scope of the term "gas distributor" does not include Closed Access Bypass Networks. If such was a consequence then Gas Industry Company has the authority to grant appropriate exemptions.

[30] The principles of legislative interpretation are well established and there was no great dispute between the parties as to them. The starting point is that the meaning of an enactment must be ascertained from its text and in the light of its purpose (Interpretation Act 1999 s 5(1)).

[31] Words should be given their natural and ordinary meaning (*R v King* 2008 2 NZLR 460 (CA)). Words should be interpreted in context. If the words have two or more possible meanings they should be given the one that best accords with the purpose of the legislation (*Bray v New Zealand Sports Drug Agency* [2001] 2 NZLR 160 (CA)). Finally the language can even be given a strained interpretation if the purpose of the Act requires it, provided the interpretation is one the words can legitimately bear.

[32] I agree with Messrs Palmer and Kos, that on a literal interpretation Nova is not a gas distributor. That arises from the plain meaning of the words and the interpretation contended for by the proponents' strikes me as artificial. For the purposes of the interpretation, Nova is clearly a person. While "supplies" is not defined, the normal meaning

of the term is "make (something needed) available to someone; provide with something needed" (Collins Oxford English Dictionary). Line function itself is defined as involving provision and maintenance and/or operation of pipelines for the conveyance of gas. In my view the reference "to any other person or persons" as both Messrs Palmer and Kos submitted must involve a person other than the supplier of the services. To say otherwise would involve a strained and artificial interpretation.

[33] Of more moment is whether or not later subsidiary legislation can alter the meaning of the clear words contained in the Gas Act. I accept that the purpose of the Act, as identified by the parties, is to increase the flow of information, promote competition and provide for safety. But the drafters of the rules were clearly aware of the definition in the Act and the clear limitations of it from the words used. Notwithstanding, they adopted the same definition in the regulations. But as Mr Palmer pointed out, rules, regulations and delegated legislation can only be used to interpret enabling legislation in limited circumstances. In *Interfreight Limited v Police* [1997] 3 NZLR 688 (CA) at 692-693, Tipping J stated:

> The circumstances in which regulations may be considered as an aid to the interpretation of a statute are limited. In short, the general rule is that the regulations must be contemporaneous with the statute, and the statute itself must be ambiguous: see Burrows, *Statute Law in New Zealand* (1st ed, 1992) at p 127; *Hanlon v Law Society* [1981] AC 124 per Lord Lowry at pp 193 — 194; and *Vergara v Attorney-General of Hong Kong* [1988] 1 WLR 919 per Lord Ackner in the Privy Council at pp 926 — 927.
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> In the present case the 1990 notice was not brought into force contemporaneously with s 69B, nor are the material terms of that section ambiguous. The matter can be summarised in the following way. In 1987 the statute and the notices were in harmony. The amendment to the statutory form of infringement notice in 1990 introduced a degree of superficial awkwardness, but no direct clash. When the notice was amended in 1990, there was also some degree of disharmony between its terms and the terms of the reminder notice. The 1990 notice does not control the statute. The converse applies. If there had been a real clash between the 1990 notice and the statute, the notice could well have been found to be ultra vires.
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> The points which we have made when dealing with Mr Hooker's submissions derive substantially from the submissions made by Mr France, which we accept. In our judgment, no reason has been shown to depart from the clear words of the statute. Those words must be allowed to mean what they say — hardly a revolutionary proposition.

[34] The rules are not contemporaneous. In my view the statute is not ambiguous.

[35] Nor do I think s 6 of the Interpretation Act assists:

> **6 Enactments apply to circumstances as they arise**
>
> An enactment applies to circumstances as they arise.

[36] Burrows, *Statute Law in New Zealand* (4ed 2009) at 398 states that the ambulatory principle applies subject to two important qualifications. The first is the words of the relevant Act must support the interpretation which is being placed on them. The second is the interpretation must be within the purpose of that Act.

[37] I accept Nova's submission that the words do not support the interpretation being sought by the proponents. Secondly, as counsel assisting accepts, the Act never had the purpose of regulating Bypass Networks to the same extent as gas distributors.

[38] What the proponents, and in part counsel assisting, contend for is that the Act should be interpreted in accordance with a certain policy view which is reflected in the relevant, but later, regulations. I do not consider such a policy decision is for the Rulings Panel. I concur with Heath J in *P v K* [2003] 2 NZLR 787 (HC) at [204]-[205] (a decision binding on me):

> [204] When legislation is clearly out of step with contemporary societal trends the Court has two choices. First, the Court can choose to interpret legislation on the basis indicated in s 6 of the Interpretation Act 1999 which provides: . .. . an enactment applies to circumstances as they arise. Secondly, if the Court is concerned that any decision which it may make in an endeavour to apply old legislation to contemporary circumstances may have unintended consequences, the Court can leave the societal problem for Parliament to resolve (after appropriate consultation) by legislation.
>
> [205] Policy is properly made by elected governments. Elected governments are responsible to the electors who, every three years, vote on the composition of Parliament. It is that direct constitutional responsibility which parliamentarians, and the Cabinet Ministers appointed from the ranks of Members of Parliament, have to the electorate which renders it more appropriate for Parliament to make policy choices for difficult societal problems. The Courts are not equipped with evidence of the extent of particular problems and must, where appropriate, limit their consideration of issues to the particular facts put before the Court on any particular case.

[39] I do not have evidence before me to make a policy decision, and the views of the parties are somewhat subjective.

[40] It is to be noted that the Act has been regularly amended since its introduction, but the legislature has not seen a need to amend the definition of "gas distributor". Indeed, the drafters of the regulations have mirrored that definition. As McGechan J noted in *Police v Wairarapa Transport Limited* HC Wellington AP232/97, 4 September 1997 at 13:

> However, while a Court will do what it can within purposive principles and s5(j), there are limits to the extent a Court can reshape plain language. There is a point past which the Court must leave weighing unsatisfactory policy outcomes to Parliament and to legislative amendment. That is the more so in situations such as the present, where policy considerations can involve complex compromises. I agree, for example, with MacDonald DCJ in *Hislop (Oamaru)* that reduction of driver fatigue would best be promoted by requiring complete

> rest breaks. That would be the ideal. However, the ideal is not always attainable. For all the Court can know, it might be quite impracticable as a matter of accepted economics of road transport to cut back driver hours "in motion" by deeming loading and unloading to come within "driving" classification. It is possible, at least for younger drivers and within reasonable limits, that a diversion to loading and unloading, with its quite different demands, could amount to a sufficient interruption to reduce driver fatigue. Perhaps, for some, "a change is as good as a rest". No studies preceding the legislation were put in evidence. The Court has no expertise. It simply cannot know, beyond possibly impracticable ideals, what realistic policy dictates may require. These are matters involving research and expertise which are better left to Government, and ultimately the legislature.

[41] Mr Kos referred to *Bennion on Statutory Interpretation* (5ed 2008). Noting that the passage of time since an enactment was drafted is one of the permissible reasons for adopting a "strained construction"; Mr Kos suggested that *Police v Wairarapa Transport Limited* is a far more black and white example than the meaning of "gas distributor" under the Switching Rules. However, *Statute Law in New Zealand* expresses a more conservative view on the extent to which the Court is permitted to strain construction of a provision. Mr Kos usefully referred to *Collins v British Airways Board* [1982] QB 734 which considered The Carriage by Air Act 1961, which incorporated the Warsaw Convention's Limitation of Liability for Loss or Damage to Registered Baggage. Neither word was defined. Lord Denning MR explained that originally airlines kept register books in which baggage was entered, but that had been discontinued. Lord Denning's solution was to strike out the words "registered" and "registration" wherever they occurred in the articles. However, by the time of the case in front of Lord Denning, the term "registered baggage" essentially had no meaning. That cannot be said in relation to "any other person". Plainly that does have a meaning.

[42] But it is suggested by counsel assisting that the definition adopted in the Gas Act 1992 was an efficient way of capturing gas distributors, because all of them at the time supplied line function services to other parties. He suggested that the inclusion of the phrase "to other persons" may not have been intended to constrain the scope of the entities captured, and therefore does not produce what Bennion described as a result which is altogether beyond the scope of the original enactment.

[43] Such a submission is helpful, but it seems to me, with respect, to go too far.

[44] To apply the interpretation put forward by the proponents would be to render the words "any other person or persons" practically meaningless. It would be to apply to them a meaning far removed from the terminology used. This in circumstances where the drafters of the regulations made a conscious decision to continue using the same definition even though aware of Nova's Bypass Network.

[45] While accepting that the situation is somewhat different from *Interfreight*, in that that was a case which contemplated whether or not subsequent regulation could be considered as an aid to interpretation whereas this is a case about whether the previous Act could bind the definition in a later regulation, I do not think that alters the position. The drafters have

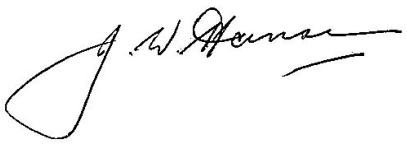
consciously adopted the earlier definition with the clear restraints of language inherent in them.

[46] To adopt the definition proposed by the proponents would be to override the clear language in the Act and would simply interpret in accord with the perceived policy in circumstances where there is no clear evidence of such policy before the Rulings Panel. Furthermore, I do not consider it is for the Rulings Panel to override the clear meaning of the language used in the definition of "gas distributor". I am conscious of the consequences of such a decision, but that seems to me a matter for the drafters of the Act and the regulations, not for the Rulings Panel. It is not for the Rulings Panel to rewrite completely the definition of "gas distributor" to meet perceived policy needs and contrary to clear language. What the proponents argue for is that the term "any other person or persons" should be read to mean "any other person or persons which includes yourself wearing another hat". That is a bridge too far and, as I have noted, would render the relevant words meaningless in their true sense. The words "cannot legitimately" bear the meaning that the proponents submit should be given to them. It follows that there has been no breach.

[47] Accordingly I would hold that Nova is not a gas distributor in terms of the definition, and therefore no breach has occurred. I have not commented on Mr Palmer's submission that the Nova network is a "gas installation". I do not need to do so but find that argument unattractive.

[48] I would, however, recommend to Gas Industry Company Limited that it urgently considers the necessary legislative amendment to bring the Closed Bypass Network within the definition of gas distributor so that the relevant regulations apply to it. I would assume that there would be an undertaking from Nova to abide by the higher safety standards applicable to gas distribution networks, and from what I understood from Mr Palmer, such standards are in fact already applied. There is also the need to consider the position relating to embedded networks.

[49] Memoranda as to costs are to be filed within 20 working days of the handing down of this decision.



The Honourable Sir John Hansen KNZM

Rulings Panel