



Discussion Paper

**Mechanisms to Implement a Central
Registry**

19 June 2006

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1 Executive Summary

Background

- 1.1 Gas Industry Co has previously sought industry feedback in respect of:
 - Alternatives to meet the deliverables under the Government Policy Statement on Gas Governance, dated October 2004 (“GPS”) with respect to switching arrangements; and
 - Cost benefit analysis of those alternatives.
- 1.2 Gas Industry Co committed to the industry that it would provide a separate opportunity for the industry to provide feedback on the alternative mechanism to implement the preferred approach (i.e. a central registry), which would be in the form of a mandatory arrangement.
- 1.3 Subsequently, Gas Industry Co has received feedback from the industry to suggest that some industry participants (Genesis and Nova) believe industry agreements should always pursue industry agreements ahead of rules or regulations under the Gas Act 1992 (“Gas Act”). These submitters believed that rules or regulations under the Gas Act are a fall-back to be used only where all industry arrangements (including contracts) fail.
- 1.4 Gas Industry Co believes the GPS requires that the most appropriate mechanism should be selected independently for each policy initiative. In some cases this will involve multi-lateral contracts amongst all affected participants and, in others, rules or regulations under the Gas Act will be required.
- 1.5 In relation to switching arrangements, Gas Industry Co sees a number of practical and legal difficulties with implementing those via multi-lateral industry agreements.
- 1.6 The purpose of this Discussion Paper is to seek that feedback and input from the industry on Gas Industry Co’s analysis of the alternatives available to implement a central registry.

2 Introduction and Purpose

Introduction

- 2.1 In the Government Policy Statement on Gas Governance, dated October 2004 (“GPS”), the Minister of Energy invites Gas Industry Co to:

“recommend arrangements, including rules and regulations where appropriate, in relation to the standardisation and upgrading of protocols relating to customer switching, so that barriers to customer switching are minimised.”

Switching & Registry Working Group

- 2.2 In response to that invitation, Gas Industry Co formed the Switching & Registry Working Group. The task of the Switching & Registry Working Group was to advise and assist Gas Industry Co to achieve the objectives and strategic priorities under the GPS in respect of switching arrangements. The Switching & Registry Working Group included industry and consumer representatives and an independent Chair. The Switching & Registry Working Group identified and assisted development of a preferred switching solution (i.e. a central registry).

Options Paper

- 2.3 Gas Industry Co has previously issued 2 papers seeking feedback from the industry. Firstly, a paper entitled “*Consultation Paper - Options for Switching in the New Zealand Gas Market*” (“Options Paper”). The Options Paper identified 4 alternatives for discussion and feedback, being:
- Do nothing – status quo;
 - Amend Reconciliation Code Part B (which contains the current switching process) to include enforcement/dispute resolution provisions and standard communications protocols and make into mandatory rules;
 - Develop a central registry for switching; and
 - Develop a central registry as above with further functionality to include allocation mechanisms.
- 2.4 The Options Paper made a recommendation to the industry that establishing a central registry would best meet the objectives of the GPS. Submissions were received from 10 parties in response to the Options Paper, which indicated industry support for development of a mandatory central registry as the preferred approach.

Cost Benefit Analysis Paper

- 2.5 Secondly, Gas Industry Co issued a paper entitled "*Consultation Paper on Cost Benefit Analysis of Switching and Registry Arrangements in the New Zealand Gas Market*" ("CBA Paper"). That cost benefit analysis was based on information provided by the industry and indicative software quotes received from software companies.
- 2.6 Submissions were received from 8 parties in response to the CBA Paper which confirmed continued industry support for development of a mandatory central registry.

Compliance Paper

- 2.7 Industry feedback has been received from submitters to the discussion paper "*Options for Compliance and Enforcement Arrangements in the New Zealand Gas Industry*" ("Compliance Paper") which indicates that some parts of the industry believe that Gas Industry Co should first explore the possibility of implementing a mandatory switching arrangement by a pan-industry arrangement.
- 2.8 It should be noted that, while the industry is questioning the mechanism to implement a central registry, it continues to support a mandatory central registry as the preferred approach to meet the deliverables under the GPS in respect of switching arrangements.

Purpose

- 2.9 The Options Paper informed the industry that they would be given a separate opportunity to provide feedback to Gas Industry Co on the mechanism to implement a central registry.
- 2.10 The purpose of this Discussion Paper is to seek input from the industry on Gas Industry Co's analysis of the alternatives available to implement a central registry.

Submission Requirements

- 2.11 Gas Industry Co invites submissions on the proposal and in answer to the specific questions by **5 pm on 3 July 2006**. Please note that submissions received after this date may not be able to be considered.
- 2.12 Gas Industry Co's preference is to receive submissions in electronic form (Microsoft Word format and PDF) and to receive one hard copy of the electronic version. The electronic version should be emailed with the phrase "Submission on Proposed Mechanism to Implement a Central Registry" in the subject header to info@gasindustry.co.nz and one hard copy of the submission should be posted to the address below:

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- 2.13 Gas Industry Co will acknowledge receipt of all submissions electronically. Please contact Rebecca Cottrell if you do not receive electronic acknowledgement of your submission within two business days.
- 2.14 Submissions should be provided in the format shown in Appendix A. Gas Industry Co values openness and transparency and therefore submissions will generally be made available to the public on Gas Industry Co's website. Submitters should discuss any intended provision of confidential information with Gas Industry Co prior to submitting the information.

3 Regulatory Context

The GPS

- 3.1 The GPS sets out the Government's policy for the development of New Zealand's gas industry, and its expectations for industry action. Paragraph 11 of the GPS specifically deals with switching arrangements and states:

"The Minister of Energy invites the industry body to recommend arrangements, including regulations and rules where appropriate, in the following areas:

- *the standardisation and upgrading of protocols relating to customer switching, so that barriers to customer switching are minimised....."*

- 3.2 In developing any arrangements, including regulations and rules where appropriate, Gas Industry Co needs to have regard to the Government's overall policy objective for the New Zealand gas industry which is:

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

- 3.3 Due to the diverse nature of what "arrangements" may be developed to meet the objectives set out in the GPS, the GPS does not provide direct guidance as to the mechanism that should be used to implement any such arrangements. The GPS does, however, contemplate that mechanisms for implementation will be assessed as it requires analysis of whether regulations and rules are the appropriate means of implementation. To undertake that analysis and in order to justify the appropriateness of regulations or rules (where applicable), Gas Industry Co must consider all mechanisms possible to implement such arrangements.
- 3.4 The date dictated by the GPS for delivery of switching arrangements consistent with the aims of the GPS was originally 31 August 2005. Gas Industry Co's Strategic Plan for 2005/2006, with the Minister of Energy's consent, moved that delivery date to 30 June 2007. Accordingly, Gas Industry Co and the industry must deliver switching arrangements that meet the requirements of the GPS by 30 June 2007.

The Gas Act 1992

- 3.5 The Gas Act 1992 ("Gas Act") allows the Government to directly regulate for retail and consumer issues to ensure effective outcomes for consumers. Section 43G of the Gas Act provides that the Minister of Energy can recommend to the Governor-General the making of regulations for the purpose of:

"Requiring all gas retailers to comply with, and give effect to, a system or set of rules that will enable any consumer or class of consumer to choose, and alternate, between competing gas retailers, with the objective of promoting competition in gas retail markets."

- 3.6 In exercising this power, the Minister of Energy must provide Gas Industry Co (as the industry body) with a reasonable opportunity to make recommendations on gas governance regulations in respect of switching arrangements (section 43J(2) of the Gas Act).
- 3.7 Accordingly, the Gas Act directly contemplates regulations and rules being a possible mechanism to implement switching arrangements in the New Zealand gas market.

4 Mechanisms for Implementing a Central Registry

Identification of Possible Mechanisms

- 4.1 There are a range of alternatives available to establish governing provisions, from one extreme consisting of voluntary industry arrangements such as codes of practice or protocols with no legal effect, to the other extreme, consisting of rules or regulations imposed by the Government under the authority of a statute.
- 4.2 In identifying and assessing possible alternatives, the first question is whether such arrangements should, or are required to be, voluntary or mandatory.
- 4.3 A central registry by definition requires all parties required to affect a switch of a retail customer ("Switching Participants") to participate fully in a central registry. As soon as one Switching Participant (which could include a new Switching Participant) refuses to participate, or does not comply fully with its obligations regarding information disclosure, a central registry no longer exists (i.e. not all information is in one place - the central registry).
- 4.4 Accordingly, any mechanism to implement a central registry must be mandatory.

Q 1 Do you agree that mechanisms to implement a central registry must be mandatory? If not, please explain.

- 4.5 Industry arrangements, including codes of practice, protocols and contracts can be voluntary or mandatory.
- 4.6 To be mandatory (i.e. of binding legal effect) all of the affected participants will need to be willing to sign-up to such an arrangement and the arrangement must contain some mechanism to make it binding on all future participants. In addition, it is prudent to provide a change mechanism so that the arrangement does not need to be re-executed where an amendment or update is required.
- 4.7 Gas Industry Co does not have the power under the Gas Act to approve or make binding on industry participants any industry arrangements, including codes of practice, protocols, contracts etc. The only tool Gas Industry Co has for making arrangements mandatory is to recommend that the Minister of Energy approve regulations or rules under the powers delegated to the Minister under the Gas Act.
- 4.8 Although technically it might be possible to make an industry arrangement mandatory by including it in the contractual arrangements of another party (e.g. asking distributors and/or transmission network owners to include a provision in their contractual arrangements that access to their networks requires compliance with a Gas Industry Co approved switching arrangement), this presents a whole new set of complexities, including:
- Requiring distributors and/or transmission network owners to agree to include a provision in their existing contracts requiring compliance with the Gas Industry Co approved switching arrangement and then getting those

distributors and/or transmission network owners to actually amend its existing and future contracts;

- Distributors and /or transmission network owners are effectively given a right of veto over any terms of that switching arrangements and any amendment or update to it over time;
- Such an arrangement will not be subject to the Gas Act; and
- The likelihood of it offending the “refusing to deal” provisions of the Commerce Act.

4.9 As a result, Gas Industry Co has identified 2 possible mechanisms to implement a central registry, being:

- A multi-lateral industry agreement (“Pan-Industry Agreement”); and
- Rules or regulations imposed by the Government under the authority of a statute (“Rules”).

4.10 In addition, Gas Industry Co has also considered a hybrid of those two alternatives, namely, a Pan-Industry Agreement executed by all relevant parties no later than 31 December 2006 or Rules will be implemented.

4.11 A description of these 2 alternatives (and the hybrid alternative) is set out in the table below:

Table 1 - Alternatives to Implement a Central Registry

Implementation alternative	Description
Pan-Industry Agreement	<ul style="list-style-type: none"> • Provisions covering switching arrangements would be set out in a legally binding multi-lateral industry agreement (“Pan-Industry Agreement”). • The Pan-Industry Agreement would be mandatory for Switching Participants.
Hybrid Pan-Industry Agreement with deadline for execution	<ul style="list-style-type: none"> • Provisions covering switching arrangements would be set out in a legally binding multi-lateral industry agreement. • The Pan-Industry Agreement would be mandatory for all Switching Participants. • All Switching Participants must execute the Pan-Industry Agreement no later than 31 December 2006 (with no exceptions) or Gas Industry Co will recommend Rules to the Minister.
Rules under the Gas Act	<ul style="list-style-type: none"> • Provisions covering switching arrangements would be set out in Rules. • The Rules would be binding on all Switching Participants.

Q 2 Do you agree Gas Industry Co has identified the most likely alternatives for mechanisms to implement a central registry? If not, please provide details of any other likely alternative mechanisms.

Analysis of Possible Mechanisms

Pan- Industry Agreement

Obtaining consensus as to the content of a Pan-Industry Agreement

- 4.12 A mandatory multi-lateral industry agreement would need to be drafted, negotiated, approved and then executed by all Switching Participants.
- 4.13 Differing commercial interests and the fact that allocation of costs is involved make achieving consensus of the content of the Pan-Industry Agreement problematic. A further issue arises where a new Switching Participant wishes to enter the market and has not been a party to drafting, negotiating and approving the original Pan-Industry Agreement. How will it be possible to force a new Switching Participant to execute and be bound by the Pan-Industry Agreement? As set out at paragraph 4.6 above, Gas Industry Co has no power to make a Pan-Industry Agreement binding on Switching Participants (existing and/or new) and there does not appear to be any other mechanism available to compel a new Switching Participant to execute and be bound by the Pan-Industry Agreement.

Pan-Industry Agreement with a Rules Fallback

- 4.14 To address the concern of “hold-out”, this alternative provides an incentive on the industry to reach consensus on the provisions to be included in the Pan-Industry Agreement and to execute the Pan-Industry Agreement. It should minimise the risk that the industry unnecessarily delays implementation of a central registry and Gas Industry Co, and the industry itself, as a consequence is unable to meet the deliverables under the GPS in respect of switching arrangements.

Commerce Act Risks

- 4.15 The difficulty under any Pan-Industry Agreement (on its own or with a Rules fallback) is risks associated with the Commerce Act. The following types of pan-industry arrangements between competitors may in principle raise issues under the Commerce Act:
- Arrangements which affect price;
 - Information sharing between competitors;
 - Cost allocation procedures;
 - Prudential provisions;
 - Admission and disciplinary requirements; and
 - Any other restrictions on participation.
- 4.16 A Pan-Industry Agreement which included any of these arrangements would require close examination to ensure that it did not have the effect of fixing prices, excluding competitors or otherwise lessening competition before it would be

possible to conclude with any confidence that an authorisation was not required. These types of arrangements are also likely to trigger, at the very least, a Commerce Commission investigation, if no authorisation is applied for.

- 4.17 The Commerce Commission has taken the view that any industry arrangement that is agreed between competitors has the potential to include restrictive trade practices, at the least requires some scrutiny from the Commission, and may require authorisation for it to become a legal arrangement. For example, the Commerce Commission:
- Accepted jurisdiction, and authorised, the Multilateral Agreement on Common Quality Standards, which was a self-regulatory arrangement designed by electricity industry participants to determine quality standards to apply to the transmission grid; and
 - Accepted jurisdiction in respect of the Electricity Governance Board Rulebook which involved an electricity governance rulebook incorporating industry voting arrangements, exclusionary provisions and arrangements for switching of retail customers.
- 4.18 Experience suggests that applications for authorisation of such arrangements are seldom as straightforward as hoped. There is inevitably someone opposed to the authorisation and the process tends to become protracted. For example, the application for authorisation of the electricity industry self-regulatory arrangement took 9 months.
- 4.19 The risks associated with entering into a Pan-Industry Agreement, without obtaining Commerce Act authorisation, are that a complaint may be made to the Commerce Commission or the Commerce Commission may decide to investigate of its own initiative. A Commerce Commission investigation alone will involve substantial delay, expenses and resource drain.
- 4.20 If the Commerce Commission (or the High Court) concludes that the Commerce Act has been breached, the provisions of the Pan-Industry Agreement in breach would be unenforceable and pecuniary penalties may be imposed.
- 4.21 The risks associated with obtaining an authorisation also include delay, expense and resource drain. The Commerce Commission may conclude that the Act does not apply, and it therefore does not have jurisdiction to give an authorisation, leaving the arrangement with no protection after the delay, expense and resource drain of the application. Alternatively, the Commerce Commission may grant an authorisation on conditions which require changes to the Pan-Industry Agreement. Those conditions may be unreasonable, impractical, onerous and/or result in further delay, expense and resource drain.
- 4.22 It is also important to bear in mind that it may be difficult to obtain authorisation of a detailed Pan-Industry Agreement in its entirety. The Commerce Commission will only authorise the specific provisions of the arrangement that are put to it for authorisation and will explicitly disclaim authorisation of the arrangement as a whole. This means that, the risks mentioned in paragraphs 4.17 and 4.18 will still exist in respect of non-authorised provisions of a Pan-Industry Agreement.

4.23 In principle, switching arrangements should not raise any concerns under the Commerce Act as both are designed to facilitate competition. While the Commerce Commission's previous determinations have been roughly consistent with this intuition, because they are so fact specific it is difficult to make any categorical predictions as to how they would approach switching arrangements in the gas industry.

Conclusion

4.24 Given the:

- Difficulty in reaching consensus and execution of voluntary and non-binding codes of practices and protocols let alone a pan-industry agreement which is legally binding;
- Nature of provisions that would need to be included in a Pan-Industry Agreement;
- Diverse nature of the parties that would be required to agree the provisions to be included in a pan-industry agreement and the fact that they include direct competitors;
- Inability to compel execution and compliance with the Pan-Industry Agreement for new Switching Participants; and
- Commerce Act risks associated with:
 - Applying for an authorisation (in terms of delay, expense and resource drain);
 - Any conditions that may attach to an authorisation granted by the Commerce Commission may be unreasonable, impractical, onerous and/or result in further delay, expense and resource drain;
 - An authorisation being revoked at any time by the Commerce Commission due to a material change in circumstances (therefore the risk runs the full life of the Pan-Industry Agreement);
 - All amendments to the Pan-Industry Agreement likewise may require authorisation or investigation;
 - Not applying for an authorisation results in no protection from the Commerce Act at the time of execution and for the life of the Pan-Industry Agreement; and
 - Any delay caused in obtaining an authorisation, or going through an investigative process to determine whether an authorisation is required, could jeopardise Gas Industry Co and the industry's ability to meet the deliverables under the GPS in respect of switching arrangements,

Gas Industry Co does not believe that implementation of a central registry by way of a legally binding Pan-Industry Agreement or a Pan-Industry Agreement with a Rules fallback are optimum mechanisms.

- | | |
|-----|--|
| Q 3 | Do you agree with Gas Industry Co's analysis of a Pan-Industry Agreement as a mechanism to implement a central registry? If not, please explain. |
| Q 4 | Do you agree with Gas Industry Co's analysis of a Pan-Industry Agreement with a Rules fallback as a mechanism to implement a central registry? If not, please explain. |

Rules

No Consensus of Content of Rules Risk

- 4.25 The risks associated with getting a divergent group of industry participants (often involving direct competitors) to agree to content and drafting of any pan-industry arrangement, including a Pan-Industry Agreement does not apply to the Rules alternative.
- 4.26 Gas Industry Co must comply with the process under section 43 of the Gas Act in making a recommendation for any regulation or rule to the Minister of Energy. This process involves:
- Making an assessment of:
 - the benefits and costs;
 - the extent to which the objective would be promoted;
 - any other matters considered relevantof the proposed regulation or rule against any reasonably practicable alternatives.
 - Preparing a statement of proposal containing specified matters and undertaking consultation with those persons likely to be substantially affected by the proposal.
 - Considering submissions from those persons, before making a recommendation to the Minister.
- 4.27 While the consultation requirements under the Gas Act (undertaken prior to Gas Industry Co recommending regulations or rules to the Minister of Energy for approval) provides an opportunity for the gas industry to express its views and have input on any proposed Rules, industry consensus on the content and drafting of Rules is not strictly required. This is the role envisaged under the Gas Act for Gas Industry Co.
- 4.28 Additionally, any new Switching Participant would automatically be bound by the Rules in respect of any participation in the central registry thereby negating any uncertainty as to binding new Switching Participants.

No Commerce Act Risk

- 4.29 As set out above at paragraphs 3.4 to 3.6 (inclusive), the Gas Act directly contemplates Rules as a mechanism to implement deliverables under the GPS in respect of switching arrangements.
- 4.30 Rules do not suffer from the same risks associated with voluntary arrangements or Pan-Industry Agreements. Section 43ZZR of the Gas Act authorises various matters for the purpose of section 43 of the Commerce Act 1986, including anything done by Gas Industry Co or an industry participant in the course of or for the purpose of recommending any gas governance regulations or rules, or complying with, enforcing, or otherwise administering any such regulations or rules.

No delay in ability to meet the deliverables under the GPS

- 4.31 Rules provide certainty as to Gas Industry Co and the industry's ability to meet the deliverables set by the Minister of Energy under the GPS. As Gas Industry Co will be primarily responsible for drafting any such Rules, it is wholly within its control to manage timelines and include industry feedback received as part of the consultation process under the Gas Act.

Conclusion

- 4.32 Given the Rules alternative:
- Does not suffer from risks associated with obtaining consensus of divergent parties (including direct competitors);
 - Does not suffer from the risks associated with attempting to bind new Switching Participants;
 - Does not suffer from any of the Commerce Act risks; and
 - Provides certainty as to ability and timing of Gas Industry Co and the industry meeting the deliverables under the GPS,

Gas Industry Co believes that implementation of a central registry by way of Rules recommended to the Minister of Energy under the Gas Act is the optimum mechanism.

Q 5 Do you agree with Gas Industry Co's analysis of Rules as a mechanism to implement a central registry? If not, please explain.

5 Preferred Approach

- 5.1 While Gas Industry Co has not made a final determination and based on the information set out in this Discussion Paper, Gas Industry Co's preferred approach, at this time, is to implement a central registry through Rules.

- 5.2 This Gas Industry Co preferred approach is subject to the feedback received from the industry in response to this Discussion Paper and any further information obtained prior to the final determination. The final determination will be made by the board of directors of Gas Industry Co.

Q 6 Do you agree with Gas Industry Co's preferred approach? If not, please explain what is your preferred approach and why.

6 Next Steps

- 6.1 If, after considering the submissions received in response to this Discussion Paper, the board of directors of Gas industry Co determines to implement a central registry by Rules, Gas Industry Co envisages the following indicative timeline for recommending Rules to the Minister of Energy under the Gas Act.

Table 2 – Indicative timetable to recommend Rules

Task		Indicative Date completed
1	Submissions on Discussion Paper close (2 weeks)	3 July 2006
2	Evaluate industry feedback received	12 July 2006
3	If Board resolves to recommend rules or regulations, draft rules or regulations and Proposal Consultation Paper for formal consultation under the Gas Act	16 August 2006
4	Issue the Proposal Consultation Paper (including draft rules or regulations)	18 August 2006
5	Submissions on Proposal Consultation Paper close (4 weeks)	15 September 2006
6	Evaluate industry feedback received	18 October 2006
7	If the Board resolves to recommend to the Minister the rules or regulations set out in the Proposal Consultation Paper: <ul style="list-style-type: none"> Send recommendation to the Minister (GPS Date) Registry system operational (process complete) 	31 December 2006 30 June 2007
8	If the Board resolves not to recommend to the Minister the rules or regulations set out in the Proposal Consultation Paper, reconsider alternative options identified in the Options Paper and any further options otherwise identified	Ongoing

Appendix A: Recommended Format for Submissions

To assist Gas Industry Co in the orderly and efficient consideration of responses, a suggested format for submissions has been prepared. This is drawn from the questions posed throughout the body of this consultation document.

Respondents are also free to include other material in their responses.

QUESTION	COMMENT
<i>Q 1: Do you agree that mechanisms to implement a central registry must be mandatory? If not, please explain.</i>	
<i>Q 2: Do you agree Gas Industry Co has identified the most likely alternatives for mechanisms to implement a central registry? If not, please provide details of any other likely alternative mechanisms.</i>	
<i>Q 3: Do you agree with Gas Industry Co's analysis of a Pan-Industry Agreement as a mechanism to implement a central registry? If not, please explain.</i>	
<i>Q 4: Do you agree with Gas Industry Co's analysis of Pan-Industry Agreement with a Rules fallback as a mechanism to implement a central registry? If not, please explain.</i>	

QUESTION	COMMENT
<i>Q 5: Do you agree with Gas Industry Co's analysis of Rules as a mechanism to implement a central registry? If not, please explain.</i>	
<i>Q 6: Do you agree with Gas Industry Co's preferred approach? If not, please explain what is your preferred approach and why.</i>	