



Draft Decision Paper - Framework for gas retailer insolvency arrangements

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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'.

Submissions close: 28 November 2014

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Executive summary

Following the repeal of the Gas Governance (Insolvent Retailers) Regulations 2010 to address the failure of gas retailer E-Gas, Gas Industry Co embarked on a policy development process to identify the problems created by retailer insolvency, evaluate possible options in response, and determine a preferred approach.

On 16 April 2013, Gas Industry Co provided [advice](#) to the Minister of Energy and Resources (Minister) that permanent backstop regulation is not necessary for managing instances of retailer default, but that Gas Industry Co should develop (with assistance from the industry) drafting instructions for regulations that could be tailored and implemented under urgency in the rare circumstances they were needed. On 17 September 2013, the Minister endorsed Gas Industry Co's proposed approach.

Accordingly, Gas Industry Co convened the Insolvent Retailers Working Group (IRWG), whose purpose was to aid the development of a framework for gas retailer insolvency arrangements. As discussed below, the proposals in this paper follow from the IRWG's discussions.

Gas Industry has also considered the Electricity Authority's (EA) work on electricity retailer insolvency. There is limited scope for insolvency approaches to be coordinated, since the gas market differs markedly from the electricity market in that gas is sold via bilateral contracts, rather than through a gross pool. This difference means that there are different concerns in the event of a retailer insolvency. Further, the empowering provisions in the Gas Act 1992 (Gas Act) provide different regulatory powers than those that the EA is able to command.

Nevertheless, Gas Industry Co liaised with the EA to harmonise processes where that would be efficient (e.g. information exchange file formats).

Framework for gas retailer insolvency arrangements

The framework proposed in this paper has three elements:

1. *Amendments to the Switching Rules* that
 - Define what insolvency means in this context;
 - Prescribe the contents of a data exchange file format;
 - Enable the industry body to request information from the insolvent retailer; and
 - Allow the industry body to transfer vacant and inactive ICPs whose responsible retailer, as listed in the registry, is no longer trading.
2. *Drafting Instructions* for backstop regulations that:

- Are based on the previous insolvency regulations; but
- Are written more generically, to allow them to be tailored to a specific insolvency situation; and
- Reflect the suggestions and discussions in the IRWG meetings regarding transferred terms and conditions, the identification of recipient retailers, and the transfer of transmission capacity.

3. Amendments to the Reconciliation Rules that:

- Clarify that a retailer's obligations to provide allocation data survive that retailer's exit from the market, either through insolvency or other reason.

The amendments to the Switching Rules and Reconciliation Rules would be implemented following a Final Decision Paper. The drafting instructions would be utilised only if, and when, any gas retailer insolvency occurs, on recommendation by Gas Industry Co under section 43P of the Gas Act.

Consultation and next steps

This Draft Decision Paper seeks submitters' feedback on the proposed framework for insolvent retailer arrangements. After considering submissions, Gas Industry Co will finalise the Decision Paper and publish it on the Gas Industry Co website.

Submissions on this Draft Decision Paper must be provided no later than 5.00 pm on Friday, 28 November 2014.

Contents

1	Introduction	1
1.1	Background	1
1.2	Limited scope for harmonising arrangements in the gas and electricity markets	3
1.3	Scope of the empowering provision	6
1.4	Consultation requirements	6
1.5	Submissions	7
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2	Framework for insolvent retailer arrangements	8
2.1	Process outline	8
2.2	Proposed changes to the Switching Rules	10
2.3	Proposed drafting instructions	17
2.4	Proposed changes to the Reconciliation Rules	24
<hr/>		
3	Next Steps	26
	Appendix A: Submissions Template	27
	Appendix B: Draft Insolvent Retailers Drafting Instructions	31

1

Introduction

1.1 Background

On 18 October 2010 the E-Gas group went into liquidation. Due to concerns at the time about the possibility of a liquidator not being able to sell the customer base, the Minister requested that Gas Industry Co assist the (then) Ministry of Economic Development and Parliamentary Counsel Office to prepare a set of regulations for customer transfer as a backstop. The Gas Governance (Insolvent Retailers) Regulations 2010 (IR Regulations)¹ were made under urgency and came into effect on 15 November 2010.

Because the IR Regulations were made under urgency, there was a requirement to consult retrospectively and for a recommendation to be made to the Minister on whether the IR Regulations should be revoked, replaced or amended. In May 2011, Gas Industry Co [recommended](#) to the Minister that the IR Regulations be revoked, as they were targeted at a specific set of circumstances and would not be suitable in other insolvency scenarios. The Minister accepted this recommendation and agreed that Gas Industry Co should consider whether a generic regulatory solution was required to address retailer insolvency and, if so, what form it should take.

The first step in the policy development process was defining the issues that could arise due to a retailer insolvency. Gas Industry Co engaged Castalia Strategic Advisors to provide advice on whether normal insolvency processes could be relied upon to produce acceptable outcomes if a gas retailer became insolvent.² The Castalia paper found that normal insolvency processes should be sufficient in most cases, but there is a risk that gas retailer insolvency could lead to market failure if the insolvent retailer had stopped supplying gas, and customers of that retailer continued to consume gas. This situation would impose an externality cost on other retailers, since the consumption from consumers without a valid retailer would be reconciled as unaccounted-for gas and allocated to (and paid for by) other retailers.

From the Castalia report and industry consultation, Gas Industry Co developed and consulted on a series of possible options for addressing the identified problem. The preferred option was not to implement a permanent regulatory solution, but rather to be prepared to implement regulations urgently if the need arose. The preparation would take the form of drafting instructions that could be quickly tailored to an insolvency situation and implemented urgently if required. This option was recommended to the Minister and received his support. Gas Industry Co then convened a group of

¹ see The Gas Governance (Insolvent Retailers) Regulations 2010 [here](#)

² see Discussion Paper: Castalia Strategic Advisors report on Insolvent Retailers, published 22 June 2012, available [here](#)

industry stakeholders, the IRWG, to assist in developing detailed drafting instructions. Gas Industry Co thanks the IRWG members for their contributions.

The table below shows these milestone steps in the policy development and the main conclusions that were reached in each step.

Table 1 History of insolvent retailers policy development

Milestone	Key outcomes and conclusions
E-Gas entered liquidation Oct 2010	<ul style="list-style-type: none"> • Liquidator worked closely with industry participants and Gas Industry Co to keep trading while realising assets. • Conducted a sale process for the customer base that was ultimately successful.
Gas Governance (Insolvent Retailers) Regulations 2010 (IR Regulations) Nov 2010	<ul style="list-style-type: none"> • Regulations made by Government in short time-frame using urgent provisions in Gas Act. • Liquidator credited existence of regulations as significant influence in finalising sale of customer base.
Retrospective consultation on IR Regulations and Recommendation to the Minister Mar 2011 – May 2011	<ul style="list-style-type: none"> • Industry agreement that IR Regulations should be revoked, as they were specific to the E-Gas situation and not appropriate as an ongoing tool for managing retailer insolvency. • Further policy work required to assess desirability and possible content of a generic, long-term solution.
Castalia Strategic Advisors report and consultation June 2012	<ul style="list-style-type: none"> • The consumption of gas by ‘orphaned consumers’ (consumers who no longer have a supply contract with a solvent retailer) is a market failure, as it imposes costs on remaining retailers who have no contractual relationship with the orphaned customers; but • Since insolvent retailers have incentives to maximise the value of their business, and viable retailers have incentives to grow their business, it is likely that the customers of an insolvent retailer will be sold to another retailer. The outcome of orphan consumers occurring would therefore be a low probability outcome of a rare event (i.e. insolvency). • Permanent backstop arrangements may distort parties’ incentives in the case of an insolvency, leading to higher costs and/or a less efficient outcome; they may also lack the flexibility to manage the specific factors of any particular insolvency.
Options paper and consultation Dec 2012	<ul style="list-style-type: none"> • Normal insolvency arrangements are sufficient for managing most retailer insolvencies. • Permanent regulations for retailer insolvency are not needed; preferred option is drafting instructions that can be tailored and implemented in the rare event regulatory intervention is required. • Solution needs to be developed for non-consuming ICPs of the insolvent retailer; i.e., the vacant and inactive ICPs on the registry.

<p>Advice to Minister Apr 2013</p>	<ul style="list-style-type: none"> • Permanent backstop regulation is not necessary for retailer default; but • Gas Industry Co will develop, with industry input, drafting instructions for backstop regulations that could be tailored and implemented under urgency if required.
<p>Minister's response</p>	<p>Minister supported:</p> <ul style="list-style-type: none"> • recommendation that permanent regulation for gas retailer insolvency is not necessary; and • Gas Industry Co working with industry to develop drafting instructions for backstop regulations.
<p>Insolvent Retailers Working Group</p>	<p>Policy framework needs to include the following aspects, which may be best placed in the Switching Rules:</p> <ul style="list-style-type: none"> • process for transfer of all ICPs on the registry belonging to the insolvent retailer, irrespective of status; and • process, content, and format for obtaining information about the insolvent retailer's customer base. <p>Other points that were debated include:</p> <ul style="list-style-type: none"> • triggers for regulatory action following a retailer insolvency; • criteria for recipient retailers and whether there should be an opportunity to opt out; and • the terms and conditions that should apply to transferred customers. <p>These issues are discussed in more detail in the next section.</p>

The Drafting Instructions proposed in this document reflect the advice received from Simpson Grierson on specific issues that arose from IRWG discussions and in the course of the policy development.

1.2 Limited scope for harmonising arrangements in the gas and electricity markets

In parallel with Gas Industry Co's policy development on the insolvent retailer workstream, the EA, with assistance from its Retail Advisory Group, designed a process for managing retailer default situations: the Electricity Industry Participation Code 2010 (Code) changes came into effect on 16th December 2013 and are outlined in the text box on the following page. Because of the centrally-cleared nature of the electricity market, the problems arising from retailer insolvency in the electricity market are potentially more acute compared with the gas market. In addition, the volatility of spot electricity prices arguably increases the likelihood of retailer default in the electricity industry.

Having considered submissions³ on the Options Paper (2012) Gas Industry Co maintains its view that it is not appropriate or feasible to create a uniform regulated approach that reflects the EA's solution. A

³ see Insolvent Retailers Options Paper - Analysis of Submissions, 5 March 2013, available [here](#)

key difference lies in the fact that there is no gross pool at the heart of the wholesale market arrangements in the gas industry; instead, gas is sold via a system of bilateral contracts, supplemented with a nascent spot market. That structure readily allows for financial oversight by contract counterparties and creates the context for those counterparties to take action in response to an event of default.

However, the larger barrier to harmonising the arrangements is the scope of the empowering provision in the Gas Act for addressing retailer insolvency. Even if Gas Industry Co considered that the gas industry required an intervention along the lines of that implemented by the EA, the Minister is not authorised by the Gas Act to make regulations that would match the EA's policy response.

The key difference that makes a uniform regulatory response impractical is that the Gas Act limits a regulatory response to when a gas retailer has become insolvent, whereas the EA's approach has a number of trigger events, only one of which is insolvency.

Advice from the IRWG

IRWG advocated for some degree of alignment with the EA's processes within the limitations of what Gas Industry Co is empowered to recommend. As a result of liaising with the EA, the following aspects were either added or revised when compared with the IR Regulations:

- creating a format and process for information exchange between retailers and/or Gas Industry Co in the case of an insolvency;
- removing the requirement that orphan consumers are transferred to new retailers on the same terms, conditions and price as they had with the insolvent retailer; and
- considering a modification to the *de minimus* market share threshold below which (solvent) retailers are not required to accept customers of the insolvent retailer in a random allocation process.

Managing retailer default situations in the electricity industry

The Electricity Industry Participation Code includes a regulated process for addressing retailer insolvencies. The process is summarised below and more information can be found on the EA website.

A retailer default is initiated when a retailer does not fulfil financial obligations to the clearing manager, becomes insolvent, or the retailer's use-of-system agreement (UoSA) with a distributor is terminated because of a serious financial breach by the retailer (and certain other conditions are met).

All retailers are required to include clauses in their customer contracts allowing the EA or the retailer itself to assign a customer contract to another retailer.

In the event that a retailer has committed an event of default (essentially a failure to make payments as required or otherwise be insolvent) the EA will give the retailer notice to:

- remedy the event of default;
- or, failing that, assign all of its customer contracts to another retailer.

If the default is not remedied, or the customers not assigned, within seven days, the EA may take action to advise each customer of the retailer in default that:

- its retailer is in default;
- the customer should switch to another retailer within seven days; and
- if the customer fails to switch then the EA may assign the customer's contract to another retailer.

On expiry of the seven day notice period, the EA will arrange to assign all remaining customers to a new retailer, whether by tender or mandatory allocation process. The EA expects that this transfer will occur after a further three days; that is, on day 18 after the event of default.

Each of the above points is discussed in detail in chapter 2.

Subsequent consultation by the EA

In August of this year, the EA released a consultation document proposing amendments to its retailer default scheme. Among other things, that paper seeks to amend the Code so that the retail default provisions refer to trader events of default, rather than retailer events of default. Traders in this context are electricity industry participants that purchase electricity from the wholesale market; in many cases, traders are also retailers, as they sell the purchased electricity to retail customers. In some cases, however, traders have supply agreements with other retailers, who then supply their customers. The EA terms this type of retailer 'type 2'. The EA does not need to intervene if a type 2 retailer is unable to pay its debts or is insolvent, because the trader responsible for the ICPs will continue to remain responsible for them, and the wholesale market would not be exposed to any failure by the type 2 retailer.

In respect of type 2 retailers, the EA's proposal would appear to bring the EA scheme into greater alignment with the one Gas Industry Co has developed for gas retailer insolvencies, at least in terms of philosophy. In both cases, the insolvency of a retailer who does not participate in a centrally cleared market does not immediately trigger a regulatory intervention.

1.3 Scope of the empowering provision

Section 43G of the Gas Act provides that the purpose for which regulations may be made in respect of retailer insolvency is

Transition arrangements for insolvent gas retailers

*providing a system of transition arrangements for consumers **in the event of a gas retailer becoming insolvent**, and requiring industry participants to comply with that system, with the **objective of protecting consumers or managing the liabilities of other gas retailers** (emphasis added).*

Note that this empowering provision clearly limits the transition arrangements to situations in which a gas retailer has become insolvent – intervention is not possible for a potential or likely insolvency. Another key point to note is that the purpose for which such regulations may be made must have the objective of protecting consumers or managing the liabilities of other gas retailers. Any regulatory solution should also meet the principal objective of the industry body under the Gas Act, which is to ‘ensure that gas is delivered to existing and new customers in a safe, efficient, and reliable manner.’ The Government Policy Statement on Gas Governance 2008 (GPS 2008) expects Gas Industry Co to pursue, for the benefit of consumers, the outcome that ‘contractual arrangements between gas retailers and small consumers adequately protect the long-term interests of small consumers.’

In addition, any regulatory arrangement that Gas Industry Co recommends to manage retailer insolvency must be consistent with the Companies Act 1993, the Receiverships Act 1993, and the Corporations (Investigation and Management) Act 1989, as any such regulations will be subordinate to those Acts.

1.4 Consultation requirements

When making a recommendation for regulations under the Gas Act, Gas Industry Co is required to fulfil certain requirements. Section 43N requires an evaluation of proposed gas governance regulations, including identification of all reasonably practicable options to achieve the objective of the regulations and an assessment of those options, as well as their costs and benefits. Section 43L requires Gas Industry Co to undertake an assessment under section 43N and to consult with persons likely to be substantially affected by the proposed regulations.

However, with regard to the urgent regulations that may be made in the future, Gas Industry Co is not recommending regulations now. Instead, Gas Industry Co is laying the groundwork in preparation for the possibility that urgent regulations may be required. A recommendation for urgent regulation would be made, using section 43P of the Act, following a retailer becoming insolvent and would use the drafting instructions attached to this document (modified, where necessary, to take account of any particular features of the situation).

The process of consultation that Gas Industry Co has followed to date means that we have satisfied many of the requirements of sections 43L and 43N. However, as we do not propose to make a recommendation for regulations at this stage, strict adherence to 43L and 43N is not required at this time and, arguably, serves no statutory purpose. Any later recommendation for urgent regulations will

be required to be consulted-on retrospectively, and the statement of proposal for that consultation would need to meet the requirements of sections 43L and 43N. Retrospective consultation was what was done in 2011 in respect of the IR Regulations. Nevertheless, Gas Industry Co considers that there is value in seeking stakeholders' views now so as to have wide-ranging input into the drafting instructions.

The proposed framework does, however, include some changes to each of the Switching Rules and Reconciliation Rules. Those changes are, we believe, minor and will not adversely affect the interest of any person in a substantial way. Therefore, s43N(3) would apply, which means it is not necessary to meet the usual requirements of 43L and 43N. However, in this Draft Decision Paper we are consulting on those proposed changes and are seeking submitters' views on whether the changes are minor and will not adversely affect the interest of any person in a substantial way.

1.5 Submissions

Submissions are invited from stakeholders on the Draft Decision Paper. Submissions should be provided **no later than 5 pm on 28 November 2014**. Please note that submissions received after this date may not be considered.

Submissions can be made by logging on to the website (www.gasindustry.co.nz), navigating to the [Insolvent Retailers work programme](#) and clicking on 'Upload a submission'. Please be aware that Gas Industry Co has recently updated its website platform and you will need to register with the new website (your previous credentials will not work).

All submissions will be published on the website after the closing date. Submitters should discuss any intended provision of confidential information with Gas Industry Co prior to uploading their submissions. The recommended format for submissions is attached as Appendix A and may be downloaded in MS Word format from the same page on the website.

2

Framework for insolvent retailer arrangements

There are three aspects that Gas Industry Co has developed in conjunction with the IRWG: drafting instructions for regulations, and minor and technical changes to each of the Switching Rules and Reconciliation Rules. This section describes the issues identified by IRWG as relevant in a retailer insolvency and outlines the approaches proposed to address these issues, including the process outline, trigger system, information to be provided to the industry body in case of insolvency, system for transferring ICPs, effect of transfer on customers, and transmission capacity.

2.1 Process outline

Gas Industry Co proposes a two-step trigger approach to retailer insolvency based on discussions with IRWG and legal advice.

First trigger in the Switching Rules

When a gas retailer becomes insolvent, the insolvency practitioner (liquidator, administrator or receiver) could (a) decide to trade on, (b) decide to sell some or the entire customer base, or (c) disclaim customer contracts. In the latter two cases, any customers that are not included in the sale or whose contracts are disclaimed remain physically connected to the gas system but do not have a solvent retailer to pay for their gas consumption. In this paper, and in the attached Drafting Instructions, we refer to such customers as 'orphan consumers' – that is, consumers who no longer have a contract with a solvent gas retailer.

When a gas retailer becomes insolvent, it is important, as identified by IRWG members, to ensure that all of the insolvent retailer's customers, as well as all of its ICPs in the registry, are transferred to another retailer or retailers. Gas Industry Co must also monitor the situation and be prepared to act in case some or all of the insolvent retailer's customers are not sold or otherwise transferred to another retailer and therefore become orphan consumers. Further, Gas Industry Co must tailor the drafting instructions to the specific situation and, if necessary, prepare a plan for transferring orphan consumers. Finally, recipient retailers will need information about their transferred consumers, including address information and meter readings. For all of these reasons, Gas Industry Co proposes that it may require the insolvent retailer to supply information necessary for customer transition at the time an insolvency provider is appointed.

Gas Industry Co therefore proposes that the Switching Rules be amended to:

- require notification to the industry body when a retailer insolvency has occurred; and
- on receipt of such notification, enable the industry body to request customer information from the insolvent retailer, and to require the insolvent retailer to comply with that request.

The notification that a retailer insolvency has occurred is therefore the first trigger for regulatory action in the insolvent retailer policy framework. Because the information from the insolvent retailer will be required to inform any tailoring of the drafting instructions, it is essential that the information is able to be obtained under rules that already exist. More detail about the proposed changes to the Switching Rules is provided in section 2.2.

Urgent regulations and the second trigger

Gas Industry Co will monitor the insolvency situation. If all of an insolvent retailer's customers are sold to another retailer, and all of the insolvent retailer's ICPs on the registry are similarly transferred, then there is no need for further regulatory intervention. However, if some or all of the insolvent retailer's customers become orphaned, or if such an outcome is considered likely, then Gas Industry Co can recommend to the Minister that regulations be made urgently. The basis of these regulations will be the proposed Drafting Instructions, tailored to suit the particular parameters of the insolvency situation. Considerations for this tailoring include the number of orphan consumers likely to need transferring, their size (in terms of individual and aggregate consumption), and their locations (whether they are located throughout the North Island or are concentrated in certain areas or regions).

Once the regulations are put into place, the trigger for action by the industry body would be the existence of orphan consumers, which would commence a process that includes notifying all retailers, identifying recipient retailers, and transferring consumers. Transferred consumers would have a 30-day transition period during which those consumers can switch without penalty. Further detail about the process is given in section 2.3.

As the regulations will be made using the urgent regulation-making power under section 43P of the Gas Act, after the event Gas Industry Co (as the recommending body) will be required to consult retrospectively on whether the regulations should be revoked, replaced or amended and on the matters listed in section 43N before making a recommendation to the Minister. The recommendation must be made within six months of the regulations being made.

Other issues

The E-Gas insolvency highlighted the issue that, although all (or most) of an insolvent retailer's customers may be sold, there remains the issue of what to do with any vacant or inactive ICPs belonging to that retailer on the registry. Gas Industry Co therefore proposes, consistent with the recommendations of IRWG, to amend the Switching Rules to allow ICPs without a valid responsible retailer code to be transferred to another retailer.

Another issue is the integrity of the allocation process under the Reconciliation Rules. A retailer who is trading today incurs obligations under those rules to submit allocation data for the initial, interim, and final allocation runs, held one, four, and thirteen months, respectively, from the consumption month.

If a retailer ceases trading during that time – either through insolvency or otherwise – then there is a risk that some of its allocation data will not be submitted to the allocation agent. The uncertainty arises particularly because it is debatable whether the former retailer could be considered an industry participant once it ceases trading, and so the Gas Governance (Compliance) Regulations 2008 may not apply. Gas Industry Co therefore proposes amending the Reconciliation Rules to clarify the ongoing obligations for providing allocation data and creating an offence provision that would apply to non-industry participants.

Q1: Do you have any comments on the high-level process described in this section?

2.2 Proposed changes to the Switching Rules

Insolvency trigger

Any regulations under section 43G(2)(d) of the Gas Act must be triggered by reference to a gas retailer becoming insolvent; however, the Gas Act does not define 'insolvent.' Consistent with the Companies Act 1993, insolvency in this context would be generally understood to mean that:

- (a) *the gas retailer is unable to pay its debts as they become due in the normal course of business; and*
- (b) *the value of the gas retailer's assets is less than the value of its liabilities including contingent liabilities.*

The IR Regulations had no need to define insolvency, since they were enacted in response to a particular insolvency, after a liquidator had already been appointed. But the appointment of a liquidator is not the only reaction to or indicator of insolvency. Gas Industry Co has received legal advice suggesting that a broader definition may be considered for the term 'insolvent:'

Other appointments that might precede liquidator appointment include that of receiver or administrator. Furthermore, unless the shareholders appoint a liquidator, it can be some time before other creditors or interested parties can obtain the appointment of a liquidator by court order, and in the meantime the issues relating to the insolvency are in existence.

Adopting a broader definition might therefore allow a more timely response to an insolvency.

Further, Gas Industry Co agrees that 'it may be preferable that the requirement be that the [insolvent] gas retailer itself has an obligation to notify GIC upon insolvency.... Placing the obligation on gas retailers would at least mean that gas retailers would be motivated to put this trigger into their internal compliance arrangements, and there would be a greater awareness of it.' Gas Industry Co therefore proposes that the Switching Rules be amended to insert:

- a definition for insolvent retailer:

insolvent retailer means:

(a) a retailer that is unable to pay its debts as they become due in the normal course of business; and the value of the gas retailer's assets is less than the value of its liabilities including contingent liabilities; or

(b) a retailer for whom an insolvency practitioner (liquidator, administrator, or receiver) has been appointed.

- An obligation for an insolvent retailer to notify the industry body:

Under a heading of "Retailer insolvency"

98 Insolvent retailer to notify industry body

If a **retailer** becomes an **insolvent retailer**, the **insolvent retailer** must notify the **industry body** of that fact as soon as practicable.

- An obligation for other industry participants to notify the industry body of a potential retailer insolvency (similar to the triggers in the Electricity Code):

99. Gas producer or gas wholesaler to notify industry body

Any gas producer or gas wholesaler (as those terms are defined in the Gas Act 1992) must notify the **industry body** if a **retailer** is in default of its financial obligations under a contract as soon as practicable.

100. Allocation agent to notify industry body

The **allocation agent** must notify the **industry body** as soon as practicable if a **retailer** fails to provide consumption information under rules 31, 32, or 33 of the Gas (Downstream Reconciliation) Rules 2008.

Gas Industry Co considers that these changes to the Switching Rules would be minor and would not adversely affect the interest of any person in a substantial way, as they would not adversely affect retailers (or any other person) in a substantial way.

Q2: Do you have any comment regarding the insolvency trigger?

Q3: Should the obligation to report a retailer insolvency be placed on retailers only, to report their own insolvencies, or should gas producers, gas wholesalers, and the allocation agent also have reporting responsibilities (as proposed above)?

Q4: Do you agree that these changes to the Switching Rules would be minor and would not adversely affect the interest of any person in a substantial way?

Information provision

Notification of retailer insolvency to Gas Industry Co would trigger the next phase of the insolvency arrangements: the provision of customer information by the insolvent retailer.

Consistent with Gas Industry Co's twin objectives of protecting consumers or managing the liabilities of other gas retailers in the event of a retailer insolvency, Gas Industry Co needs to ensure that all of the insolvent retailer's customers, as well as all of its ICPs in the registry, are transferred to another retailer. Information about the insolvent retailer's customers will allow Gas Industry Co to:

- Monitor any transfers of customers from the insolvent retailer to another retailer, whether because of a sale of the customer base or another reason;
- Determine whether some or all of the insolvent retailer's customers have not been sold or otherwise transferred to another retailer and therefore have become orphan consumers;
- Tailor the drafting instructions for regulations to the specific situation;
- If necessary, prepare a plan for transferring orphan consumers using the urgent regulations; and
- Where consumers have been transferred under regulation, provide information to recipient retailers about their transferred consumers, including address information and meter readings.

IRWG agreed with Gas Industry Co that this requirement is best placed into the Switching Rules so that the information can be provided in the absence of insolvency regulations. IRWG members expressed concern that after a retailer becomes insolvent, it may no longer have the employees and systems in place to provide the required information. Placing the requirement in the Switching Rules will mean that retailers can build the required report as a routine compliance matter, so that running the report will take little effort on the part of an insolvent retailer.

IRWG discussed the possibility of having a standing data file format as the means of transferring information from the insolvent retailer to Gas Industry Co. A standing file format would be something that retailers would be able to build as part of the suite of file formats used for other data exchanges under the Switching Rules and the Reconciliation Rules. Using such a format would ensure that parties were prepared to respond to information requests by Gas Industry Co in the case of insolvency.

It was suggested that the data file format used could be based on the Electricity Information Exchange Protocol 4 ('EIEP4'). The EIEP4 is a format that allows electricity retailers to provide customer information to distributors. The Electricity Authority is considering a version of the EIEP4 for its own retailer insolvency arrangements.

However, while a file format similar to the EIEP4 could be adopted for the provision of customer names, addresses, and contact details, the EIEP4 lacks a number of data fields that would be required in the case of a gas retailer insolvency. The additional fields required include data fields regarding meter access, meter configuration, meter reading, and billing information.

Although there was agreement amongst IRWG members that the information contained in the EIEP4 would not be sufficient in the case of a retailer insolvency, there did not seem to be agreement about how the additional information should be provided, whether in a single consolidated file or in a supplement to a mirror EIEP4.

Gas Industry Co considers that, since additional fields are required, retailers will need to do some work on new file formats. Having all the required data in a single file format would therefore seem to create about the same amount of work as a gas version of the EIEP4 plus a supplementary file; and a single file would avoid the potential errors of needing to match up data from two different files.

Gas Industry Co also considers that it would be reasonable to make the requirement to be able to produce the report be effective 12 months after the file format is determined. This lead time would allow retailers to incorporate the building of the report into other scheduled IT changes to keep their costs down.

Gas Industry Co therefore proposes that the Switching Rules be amended to insert the following provisions:

101. Insolvent retailer to provide customer information to industry body

*101.1 Subject to rule 101.2, an **insolvent retailer** must provide to the **industry body** a report that in respect of each of its customers provides the data held by the **retailer** in respect of each of the parameters listed in Schedule 2 in the format determined by the **industry body** under rule 102.*

*101.2 Rule 101.1 comes into effect 12 months from the date that the **industry body publishes** a notice in the New Zealand Gazette, which must be after the file format is **published** in accordance with rule 102.*

102. Industry body to determine and publish file format

*The **industry body** must, after consulting with **registry participants**, determine and **publish** the file format for the report in rule 101.1.*

103. Industry body to maintain confidentiality of information

*The **industry body** must keep the information in the report referred to in rule 101.1 confidential to the **industry body** unless, and until, it is required to disclose that information as part of transferring orphan customers under regulation.*

104. Treatment of stranded ICPs

*Where there are **ICPs** on the registry with the **ICP** status of INACTIVE-TRANSITIONAL or INACTIVE-PERMANENT or ACTIVE-VACANT that do not have a valid **responsible***

retailer code (stranded **ICPs**), the **industry body** may transfer those **ICPs** using the following process:

104.1 The **industry body** must first offer **retailers** the opportunity to request stranded **ICPs**. Where one or more **retailers** requests receipt of stranded **ICPs** (requesting **retailers**), the **industry body** shall transfer the stranded **ICPs** in proportion to each requesting **retailer's** existing relative market share of active **ICPs**, as recorded in the **registry**.

104.2 If no **retailers** request stranded **ICPs** under rule 104.1 then the **industry body** shall transfer stranded **ICPs** to all trading **retailers** in proportion to each **retailer's** existing relative market share of active **ICPs**, as recorded on the **registry**.

Schedule 2 would be created with the following list of data fields (The existing schedule would be renamed Schedule 1).

ICP	Postal address town	ICP status code	Meter identifier
Customer name	Postal address postcode	Access Issues	Meter location code
Phone Number Home	Postal address country	Access Additional Information	Last actual reading date
Phone Number Work	Event date	Dog code	Meter pressure
Phone Number Mobile	Customer no.	Dog Note Additional Information	Number of registers
Fax number	Customer title	Hazard Description	For each register within the meter:
Email address	Surname	Distributor code	Record type
Postal free form	First name	Maximum hourly quantity	Register multiplier
Postal address unit	Finalled date	Network price/tariff code	Number of dials
Postal address num	Gas Gate	Loss factor code	Register content code
Postal address street	Allocation group	Annualised consumption estimate	Meter reading
Postal Box/RD	Dual fuel customer	Date of last bill	Billed reading
Postal address suburb	Curtaiment band	Billing type code	

Gas Industry Co considers that these changes would be minor and would not adversely affect the interest of any person in a substantial way, as they do not adversely affect any retailer in a substantial way. While there would be some cost to retailers in developing the new file format, there would be no additional costs of collecting the required information, as the data would already be in their billing systems. Further, there would be no ongoing costs of compliance; once the file format was developed, there would be no need to use it unless triggered by the retailer's insolvency. In order to keep costs down for retailers, it is proposed that there be a soft landing in the requirement to be able

to provide such a report. The proposed drafting provides for a 12-month period before the ability to produce such a report becomes mandatory.

Q5: *Do you agree that the Switching Rules be amended to include the ability for Gas Industry Co to require information from an insolvent retailer?*

Q6: *Do you agree with the proposed content of the report(s)? Are there items that should be added or deleted, and why?*

Q7: *Do you agree that these changes are minor and would not adversely affect the interest of any person in a substantial way?*

Ability to switch vacant and inactive ICPs

As highlighted previously, orphan consumers are not the only concern regarding a retailer insolvency. Retailers who are exiting the market are almost certain to be listed as the responsible retailer for a number of vacant and inactive ICPs on the gas registry. Since these ICPs are not associated with active customers (and therefore have no immediate value, in terms of revenue), they are more likely to be overlooked by the insolvency practitioner.

However, it is important that vacant and inactive ICPs also be transferred to an ongoing retailer. Occasionally, there is gas consumption at such an ICP and, without an operating retailer associated with the ICP, there is no other way for that consumption to be accounted for through the Reconciliation Rules. Also, a proportion of such inactive ICPs are re-livened and there needs to be either a responsible retailer to process that action or to respond to the associated switch request. Without such transfers, any consumption by an orphan consumer will become unaccounted for gas (UFG), the cost of which will be borne by all retailers operating at that gas gate. A better solution is to transfer vacant and inactive ICPs to solvent retailers, who will be able to monitor any gas usage at those ICPs. If gas consumption is found, then the new retailer can either convert the consumer to a customer or act to disconnect the ICP. In this way, gas consumption is either reported to the allocation agent or prevented, and thus the problem of UFG caused by orphan consumers has been addressed.

IRWG members discussed this issue and generally agreed that the best solution was to assign the vacant and inactive ICPs of the insolvent retailer to other retailers. Gas Industry Co agrees with IRWG's suggestion that an amendment be made to the Switching Rules to that effect.

Therefore, Gas Industry Co proposes that the Switching Rules be amended so that the industry body can transfer vacant and inactive ICPs where the responsible retailer listed on the registry is not a trading retailer. The ICPs would be offered to any retailer that wants them and otherwise allocated among all retailers randomly, in proportion to the customer market share of other retailers operating at that gas gate.

There may also be circumstances where there are ICPs that have a status that is other than inactive, vacant, ready or new and that have a responsible retailer who is no longer trading. Such ICPs may either have an incorrect status or may be ICPs at which gas is being consumed but for which there is no retailer recording and reconciling that consumption. Such ICPs either need to have their status updated or, in the case of ICPs at which gas is being consumed, be switched to a trading retailer. For these situations, Gas Industry Co proposes a regime of active monitoring to determine the correct status.

Gas Industry Co proposes amending the Switching Rules to insert the following provisions:

105. Treatment of indeterminate ICPs

Where the **industry body** identifies that there are **ICPs** with **ICP** statuses other than **INACTIVE-TRANSITIONAL** or **INACTIVE-PERMANENT** or **ACTIVE-VACANT** or **NEW** or **READY** that have a non-trading **retailer** as the **responsible retailer** (indeterminate **ICPs**) then the following process must be applied—

105.1 The **industry body** shall arrange for **meters** of indeterminate **ICPs** to be read at intervals so as to determine whether any gas is being consumed.

105.2 Where successive **register readings** for any **ICP** indicates that no consumption is taking place the **industry body** must change the **ICP** status to **INACTIVE-TRANSITIONAL** and transfer that **ICP** to a trading **retailer** using rule 104.

105.3 Where successive **register readings** indicate that consumption is taking place at an **ICP** the **industry body** shall—

105.3.1 Provide notice by registered letter to the address recorded for that **ICP** on the **registry** informing the occupant that:

- (a) if the occupant intends to use gas it must contract with a **retailer** within five **business days**; and
- (b) if the occupant fails to contract with a **retailer** within that time the **ICP** will be disconnected by the **responsible distributor**; and

105.3.2 Monitor the status of that **ICP** and if the **ICP** has not switched to a new **retailer** after five **business days** then the **industry body** shall –

- (a) instruct the **responsible distributor** to disconnect that **ICP** and notify the **industry body** when that has been done;
- (b) pay to the **responsible distributor** the standard disconnection charge posted on the **responsible distributor's** website or, in the event that no standard charge is published by the **responsible distributor**, such charge

as the **industry body** in its sole discretion considers reasonable for disconnection;

- (c) update the **ICP** status on the **gas registry** to **INACTIVE-TRANSITIONAL** to reflect that it has been disconnected and is inactive; and
- (d) transfer the **ICP** to a trading **retailer** using rule 104.

Gas Industry Co considers that these changes are minor and would not adversely affect the interest of any person in a substantial way. The cost of monitoring a share of the vacant and inactive ICPs transferred from the insolvent retailer would be marginal for other retailers, since they already monitor their own such ICPs. The monitoring of indeterminate ICPs would be the responsibility of the industry body, and such costs would be met by market fees and socialised among all retailers. These costs would be short-lived, as there is a proposed process for disposing of indeterminate ICPs in an efficient manner.

Q8: *Further, it is likely that the cost of monitoring would be offset by the savings gained from finding any instances of gas consumption at the monitored ICPs, which can then be prevented through disconnection or used to identify potential new customers. In other words, without the proposed change, any UFG caused by vacant and inactive ICPs of the insolvent retailer will be allocated to remaining retailers at the affected gas gate in proportion to their customer load. With the proposed change, gas consumption at those ICPs will be identified and prevented, providing a benefit to all retailers at the gate at the expense of minor monitoring costs. Accordingly, Gas Industry Co concludes that this changes does not adversely affect retailers in a substantial way. Do you agree with the proposed amendments to the Switching Rules?*

Q9: *Do you agree that the proposed change is minor and does not adversely affect the interests of any person in a substantial way? If not, please describe the substantial adverse effect.*

2.3 Proposed drafting instructions

Objective and format of Drafting Instructions

In contrast to the IR Regulations, which were specifically designed to ensure that E-Gas customers would continue to be supplied by a viable retailer in the wake of the E-Gas liquidation, the Drafting Instructions are deliberately generic, allowing them to be tailored to the specific aspects of a particular retailer insolvency.

There are no formal requirements to how drafting instructions should be formulated. In the event of insolvency, Gas Industry Co will assist the Ministry of Business, Innovation, and Employment (MBIE) to determine the parameters specific to the situation, and the regulations themselves will be drafted by Parliamentary Counsel Office.

For the purposes of this workstream - in agreement with IRWG - Gas Industry Co used the IR Regulations as the starting point.

Given that any retailer insolvency regulations will be subordinate to the various Acts that govern insolvency practices and arrangements, the regulations must not interfere with normal insolvency processes and, therefore, invoking the regulations would only be appropriate if some or all of the insolvent retailer's customer contracts were not sold to another retailer or were disclaimed or otherwise abandoned by the insolvent retailer.

Trigger for the transfer of orphan consumers

In the IR Regulations, the trigger for commencing the customer transfer process was the liquidator disclaiming customer contracts. As discussed previously, though, it is not always a liquidator that is appointed in the wake of a company insolvency, and liquidators are the only insolvency practitioners who have the ability to disclaim onerous property under the Companies Act 1993. The proposed drafting instructions therefore contain a trigger that focuses on the outcome (the existence of orphan consumers) rather than the process (how they came to be that way). Orphan consumer is defined in the proposed drafting instructions as a gas consumer associated with a particular ICP who does not have a customer contract with a solvent gas retailer. It is the existence of such consumers that triggers the transfer provisions.

Further, making the existence of orphan consumers the trigger makes clear that it is consumers that are transferred – those whose ICPs would be expected to be listed with the status of active contracted (ACTC) on the gas registry. This was a point discussed and agreed by IRWG: that the drafting instructions be clear that vacant and inactive ICPs of the insolvent retailer would not trigger the regulations. (As discussed in the previous section, Gas Industry Co is proposing an amendment to the Switching Rules to manage such situations.)

Q10: Do you agree with the proposed trigger?

System for transferring ICPs

The IR Regulations were worded in a way that suggested that Gas Industry Co could transfer customer contracts via random allocation in case the regulations are invoked. IRWG questioned Gas Industry Co's right to transfer customer contracts and suggested that the proposed Drafting Instructions refer rather to customers or ICPs instead.

Section 269(3) of the Companies Act 1993 provides:

A disclaimer under this section–

- (a) Brings to an end on and from the date of the disclaimer the rights, interests, and liabilities of the company in relation to the property disclaimed:*
- (b) Does not, except so far as necessary to release the company from a liability, affect the rights or liabilities of any other person.*

Gas Industry Co has received legal advice that “[t]he result of section 269(3)(a) is that there are no rights, interests or liabilities of the insolvent retailer to transfer, novate or assign.”⁴ The IR Regulations got around this point by providing that disclaimed contracts were deemed not to have been disclaimed.

However, the larger point is that orphan consumers can happen due to a number of factors, only one of which is the disclaiming of their customer contract. Gas Industry Co’s legal advice states that the wording of section 43G(2)(d) of the Gas Act is sufficiently wide to allow customers to be transferred from an insolvent retailer without that customer’s contract having to be disclaimed, particularly in light of the fact that disclaimer might not happen in any case. This is because there is a valid concern that consumers and other retailers may be prejudiced as soon as a retailer becomes insolvent, not just when the contracts are disclaimed. Obviously there is a balance here: any new insolvent retailer regulations will be subordinate to the powers of an insolvency practitioner and, therefore, it would not be possible to use the regulations to expropriate customers.

Consideration was given to both IRWG’s and the legal advice, and Gas Industry Co proposes to describe a system for transferring orphan consumers in the drafting instructions. Such transfers would need to follow either contracts being disclaimed or the contract no longer being performed. This approach avoids the issues raised with the transfer of customer contracts.

Further, since orphan consumers are defined so that each is associated with a single ICP, the Drafting Instructions make clear that the transfer is on an ICP-by-ICP basis. That is, gas consumers who have multiple ICPs (such as franchise operators, for example) will not be grouped for transfer; each ICP will be allocated independently. The focus in the Drafting Instructions is on a timely and efficient transfer process; gas consumers who would prefer to switch retailer for any reason are free to do so after the transfer (as outlined below).

Q11: Do you agree with the proposed approach of transferring orphan consumers on an ICP-by-ICP basis? If not, what alternative would you suggest that takes into account the need to transfer customers quickly and the limited resources at Gas Industry Co’s disposal?

Identifying recipient retailers

Clause 8(2) of the IR Regulations sets out that Gas Industry Co must identify the recipient retailers, who must have more than 10% of the total number of ICPs for which the registry shows the status “active-contracted.” Any other retailer can opt in if it wishes to be a recipient retailer. Gas Industry Co proposed to IRWG that the arrangements should keep the 10% threshold in the Drafting Instructions, clarifying that the 10% threshold may be applied in the following way:⁵

- retailers with a total volume market share of more than 10% of allocation group 1-3 customers would become recipient retailers for the allocation group 1-3 customers, while

⁴ The effect of 269(3)(b) is simply to preserve the counterparty’s right to sue the liquidator for lack of performance by the insolvent company.

⁵ See the meeting material of the IRWG meeting on 27th November 2013, [here](#).

- retailers with a total ICP count market share of more than 10% would receive allocation group 4-6 customers.

IRWG members suggested that Gas Industry Co consider a similar methodology to the EA's approach:⁶

- assigning orphan consumers to retailers based on market share in a region (no de-minimus threshold); but
- excluding a retailer if it satisfied the industry body that the transfer of orphan consumers would pose a serious threat to its financial viability.

Gas Industry Co has considered this proposal; however, it is not clear with what evidence and using what criteria the industry body could judge the financial viability of a retailer, particularly in the compressed timeframe that would be available. One of the key reasons that such a provision would be necessary in the electricity market relates to the need for electricity retailers to appropriately hedge their exposure to the wholesale market. The gas industry does not have equivalent wholesale market arrangements. Since wholesale purchases of gas are based on bilateral contracts, the gas market does not exhibit the price volatility of the electricity market, and there is little need to hedge in the gas market.

Gas Industry Co therefore does not intend to propose a scheme similar to the EA's. However, an alternative to the option outlined above involving 10% market shares is an alternative that would include all retailers, regardless of size, except that those with less than 5% of both ICPs and volume market shares could opt out of being a recipient retailer.

Gas Industry Co seeks feedback on which of these options submitters would prefer.

Q12: Should a de minimus threshold (of eg 5% or 10%) apply to recipient retailers? If yes, do you agree with the proposed separate approaches to allocation group 1-3 and allocation group 4-6 customers?

Q13: If not, do you prefer the option where all retailers are included, but those with less than 5% market share (by customers and volume) can opt out?

Random allocation of orphan consumers

The Drafting Instructions contain the general principles of allocating orphan consumers, depending on their allocation group:

- For orphan consumers in allocation groups 1-3, allocation will be based on the volume market share of recipient retailers (calculated using the latest available 12 months gas consumption, based on the most accurate available allocation information), within the same transmission pipeline.

⁶ Electricity Authority, Arrangements to manage a retailer default situation, Decisions and Reasons, 8 November 2013, pp 8-9, available [here](#).

- For orphan consumers in allocation groups 4-6, allocation will be based on recipient retailers' market share of active-contracted ICPs, within their network pricing categories and gas gates.

However, the degree to which these principles will be able to be satisfied in any particular transfer event depends on the number, size, and location of orphan consumers that need to be transferred. This is the crucial reason that standing insolvent retailer regulations is impractical: it is impossible to know these parameters in advance, and a transfer methodology that works in one situation may be completely unworkable in another. Gas Industry Co anticipates that if insolvent retailer regulations were ever required, this section would be tailored for the specific situation.

The Drafting Instructions specify that the industry body must publish its proposed allocation methodology in advance of the transfer. This would be the detail of how the allocation methodology would work and how many ICPs each recipient retailer can be expected to receive. Publishing the methodology in advance provides an opportunity for recipient retailers to review the methodology, which will help to ensure that any errors or omissions are identified prior to the transfer date. However, and given the compressed timeframe for effecting customer transfers, publishing the methodology will be for the sake of transparency only and will not allow for consultation.

Q14: Do you have any views on the proposed ICP allocation methodology?

Terms and conditions of supply of transferred consumers

At the transfer time, the insolvent retailer's customers are transferred to the recipient retailers allocated by Gas Industry Co. Under clause 11(2)(c) of the IR Regulations, the customer contract's terms were to apply until the end of the transition period or the customer's switching, whichever occurs first. The transition period was specified as 30 days following the notification by the recipient retailer of that retailer's terms, conditions and price.

The requirement for recipient retailers to supply based on the insolvent retailer's terms, conditions, and price was debated by IRWG. From the group's perspective, integrating the insolvent retailer's tariffs into their own systems for a short period of time would be difficult at best and may even be infeasible. A simple example of this is the case of loyalty schemes: if the insolvent retailer awarded points under a customer loyalty programme, for example, while the recipient retailer did not participate in such a programme, then it would not be possible for the recipient retailer to offer the same terms and conditions as the previous retailer.

Moreover, forcing the previous terms, conditions, and prices on the recipient retailers could be detrimental if the insolvent retailer's prices had been unsustainably low, as it could have been such low customer prices that caused or contributed to the insolvency in the first place. Additionally, even small customers can be on non-standard contracts, further complicating the recipient retailer's tariff system if terms and conditions need to be retained for the transition period. Further, in other cases of insolvency – such as in the telecommunication sector – customers of the insolvent service provider cannot expect to keep the terms and conditions of their previous provider. Finally, the EA now requires recipient retailers to transfer customers on 'standard or more advantageous' terms, according to

clause 11.15B(1)(b)(ii) of Part 11 of the amended Code.⁷ Taking all the above arguments into account, IRWG suggested that offering transferred customers either the recipient retailer's standard contract or more advantageous terms for the transition period may be the best solution.

Gas Industry Co is satisfied that requiring recipient retailers to honour the previous retailer's terms, conditions and prices is not a feasible option. Legal advice received by Gas Industry Co considered that the regulations can require recipient retailers to supply the transferred customers on their own standard terms or better, rather than the insolvent retailer's terms. The proposed Drafting Instructions reflect this advice and incorporate a similar provision to the one in the Code.

Q15: Do you agree with this approach? Why or why not?

IRWG discussed whether standard terms and conditions are available for allocation group 4 and larger customers, as this information is usually not displayed on retailers' websites. IRWG members confirmed that retailers have standard pricing plans for customers who match the size criteria for allocation group 4.⁸ However, customers with an expected annual consumption above 10TJ may not have standard terms and conditions and therefore section 9(1) of the proposed drafting instructions might not be straightforward to apply to this group of customers.

IRWG proposed that these customers would be incentivised to make their own arrangements to find another supplier promptly. Further, it is likely that such customers would be attractive to other retailers, so that such customers would be unlikely to become orphan consumers. Still, such an outcome is possible, so it is prudent to consider how such circumstances would be managed in the case where insolvent retailer regulations are triggered.

Gas Industry Co proposes a solution that requires the recipient retailer to supply transferred large consumers (with more than 10 TJ annual consumption) either on the same terms as similarly-sized customers of the recipient retailer or on terms that are agreed between the recipient retailer and the transferred consumer.

Q16: Do you agree that this is a reasonable approach to the transfer of large consumers? If not, what alternative would you suggest?

Information to be supplied to transferred consumers and other transitional matters

Clauses 8-11 in the Drafting Instructions remain largely unchanged from the equivalent provisions in the IR Regulations:

- Clause 8 sets out the notification requirements of the recipient retailer to the customers transferred from the insolvent retailer. The recipient retailer must notify the transferred

⁷ available [here](#)

⁸ consumer installations with expected annual consumption between 250GJ and 10TJ, according to rule 29.4.2 of the Reconciliation Rules

consumers about the transfer, the terms and conditions of supply, and the fact that the consumer can switch without penalty to another retailer during the transition period.

- Clause 9 provides that the recipient retailer must not charge the customer any fee or penalty relating to the cancellation or the switch.
- Clause 10 explains that after the transfer time, any dispute that a former customer of the insolvent retailer has or had with the insolvent retailer must be dealt with between the insolvent retailer and the customer. During the transition period, a recipient retailer need not continue or commence any review processes that are required or authorised under the insolvent retailer's contracts with any customer(s) transferred to it.
- Clause 11 provides that no new switches to or from the insolvent retailer may be entered on the registry after the notification date, but the industry body must ensure that that any switch already in progress is effected as soon as practicable.

Q17: Do you have any comments on clauses 8-11 of the proposed Drafting Instructions?

Transmission capacity

IRWG members were concerned that ensuring transmission capacity for recipient retailers might not be as straightforward as suggested by clause 17 of the IR Regulations. In particular, some retailers might not need additional capacity, but the formula in clause 17 provided for all of the insolvent retailer's reserved capacity to be allocated amongst all recipient retailers. Further, a shipper may have to request Vector to offer a Supplementary Agreement for transmission of gas in respect of specific end-users if they were being supplied under a Supplementary Agreement.

Gas Industry Co has drafted clause 12 of the proposed Drafting Instructions to reflect IRWG members' concerns and other editing suggestions;⁹ the proposed changes were mostly clarifications and phrasing changes.

Gas Industry Co proposes adding clause 13, which would allow recipient retailers to request reserved capacity from Vector, and, if the requested capacity is available, to pay a capacity reservation fee that is adjusted pro rata for the number of days remaining in the gas year. In this way, recipient retailers who require additional capacity to serve the transferred customers need not incur the expense of a full year of capacity reservation fees.

Q18: Do you have any comments on clause 12 in the proposed drafting instructions?

Q19: Do you agree with the proposal in clause 13 of the proposed drafting instructions?

⁹ see Appendix B, clause 12

2.4 Proposed changes to the Reconciliation Rules

Gas Industry Co has identified a residual problem created by a retailer insolvency: that of ensuring that the allocations performed under the Reconciliation Rules for the consumption months during which the insolvent retailer was trading are based on the most complete information possible.

A retailer that is trading today incurs obligations under the Reconciliation Rules to submit allocation data for the initial, interim, and final allocation runs, conducted one, four, and thirteen months, respectively, from the current consumption month. If a retailer ceases trading during that time – either through insolvency or otherwise – then there is a risk that some of its allocation data will not be submitted to the allocation agent. The uncertainty arises particularly because it is debatable whether the former retailer could be considered an industry participant once it ceases trading, and so the Gas Governance (Compliance) Regulations 2008 may not apply.

Gas Industry Co therefore proposes amending the Reconciliation Rules to clarify the ongoing obligations for providing allocation data and creating an offence provision that would apply to non-industry participants:

Under the heading of “Discharging insolvent retailer obligations”.

53A Where a retailer ceases trading, whether through insolvency or for some other reason, that retailer must meet its obligations under this Part for each of the consumption periods for which it was trading by —

53A1.1 either providing submissions according to the timeframes prescribed in rules 31, 32, 33 and 40; or

53A.2 by providing the data required by each of those rules for each of the consumption periods to the allocation agent, clearly identifying the consumption period to which each dataset pertains.

53B A retailer that ceases trading and is no longer an industry participant commits an offence punishable upon conviction by a fine up to \$20,000 if that retailer does not comply with the provisions in rule 53A.

Gas Industry Co considers that this proposed change is minor and will not adversely affect the interest of any person in a substantial way. It will not impose any new requirements on retailers; rather, it will clarify that the existing requirements survive after a retailer has ceased trading. It is expected that those obligations can be met relatively easily by the insolvent retailer (or insolvency practitioner if one is appointed). If the business is being wound-up then there will need to be a series of final meter reads (or estimated reads) to close off the accounts. Once those are obtained, the insolvent retailer has all of

the information necessary to create the data required by the Allocation Agent to process subsequent allocations and that data could be provide to the Allocation Agent or, perhaps, to the industry body.¹⁰

Q20: Do you agree with this proposal? Why or why not?

Q21: Do you agree that the change is minor and will not adversely affect the interest of any person in a substantial way?

¹⁰ There is one possible exception and that relates to the most recent consumption period: the SADS_V may not exist for the calculation of historical estimates. However, those SADS_V will be available as soon as the initial allocation for that consumption period has been published. Thus the problem is one of timing and that problem will be relatively short-lived.

3

Next Steps

This Draft Decision Paper sets out a proposed framework for addressing future gas retailer insolvencies. The core of the framework is predicated on an assessment that most insolvencies will be able to be managed by the provisions in the Companies Act and other legislation together with the normal commercial imperatives. However, the urgent regulation-making provisions in the Gas Act can be used, when needed, to address any market failure that results in orphan consumers. Accordingly, Gas Industry Co will use the feedback from submissions to fine-tune the drafting instructions so that we and the industry are well-placed in the event of a future insolvency.

The analysis has also identified a small number of minor and technical changes to the Switching Rules and the Reconciliation Rules that would materially assist the working of any urgent regulations as well as ensuring a tidy set of arrangements for managing the gas registry and the allocation system following the exit from the market of an insolvent retailer. Subject to the feedback in submissions, those changes will be recommended to the Minister along with the proposed amendments to the Switching Rules that were contained in the Statement of Proposal issued in August 2014.

Gas Industry Co expects to publish a final Decision Paper describing the framework later this year. That paper will differ in form from this Draft Decision Paper because it will focus on the aspects of the framework that relate to the recommendation for urgent regulations (as the changes to each of the Switching Rules and Reconciliation Rules will already be in train by then).

Appendix A: Submissions Template

Draft Decision Paper - Framework for gas retailer insolvency arrangements

Submission prepared by: (company name and contact)

QUESTION	COMMENT
Q1 Do you have any comments on the high-level process described in this section?	
Q2 Do you have any comment regarding the insolvency trigger?	
Q3 Should the obligation to report a retailer insolvency be placed on retailers only, to report their own insolvencies, or should gas producers, gas wholesalers, and the allocation agent also have reporting responsibilities (as proposed above)?	
Q4 Do you agree that these changes to the Switching Rules would be minor and would not adversely affect the interest of any person in a substantial way?	
Q5 Do you agree that the Switching Rules be amended to include the ability for Gas Industry Co to require information from an insolvent retailer?	
Q6 Do you agree with the proposed content of the report(s)? Are there items that should be added or deleted, and why?	

QUESTION	COMMENT
<p>Q7 Do you agree that these changes are minor and would not adversely affect the interest of any person in a substantial way?</p>	
<p>Q8 Further, it is likely that the cost of monitoring would be offset by the savings gained from finding any instances of gas consumption at the monitored ICPs, which can then be prevented through disconnection or used to identify potential new customers. In other words, without the proposed change, any UFG caused by vacant and inactive ICPs of the insolvent retailer will be allocated to remaining retailers at the affected gas gate in proportion to their customer load. With the proposed change, gas consumption at those ICPs will be identified and prevented, providing a benefit to all retailers at the gate at the expense of minor monitoring costs. Accordingly, Gas Industry Co concludes that this changes does not adversely affect retailers in a substantial way. Do you agree with the proposed amendments to the Switching Rules?</p>	
<p>Q9 Do you agree that the proposed change is minor and does not adversely affect the interests of any person in a substantial way? If not, please describe the substantial adverse effect.</p>	
<p>Q10 Do you agree with the proposed trigger?</p>	

QUESTION	COMMENT
<p>Q11 Do you agree with the proposed approach of transferring orphan consumers on an ICP-by-ICP basis? If not, what alternative would you suggest that takes into account the need to transfer customers quickly and the limited resources at Gas Industry Co's disposal?</p>	
<p>Q12 Should a de minimus threshold (of eg 5% or 10%) apply to recipient retailers? If yes, do you agree with the proposed separate approaches to allocation group 1-3 and allocation group 4-6 customers?</p>	
<p>Q13 If not, do you prefer the option where all retailers are included, but those with less than 5% market share (by customers and volume) can opt out?</p>	
<p>Q14 Do you have any views on the proposed ICP allocation methodology?</p>	
<p>Q15 Do you agree with this approach? Why or why not?</p>	
<p>Q16 Do you agree that this is a reasonable approach to the transfer of large consumers? If not, what alternative would you suggest?</p>	
<p>Q17 Do you have any comments on clauses 8-11 of the proposed Drafting Instructions?</p>	
<p>Q18 Do you have any comments on clause 12 in the proposed drafting instructions?</p>	

QUESTION	COMMENT
Q19 Do you agree with the proposal in clause 13 of the proposed drafting instructions?	
Q20 Do you agree with this proposal? Why or why not?	
Q21 Do you agree that the change is minor and will not adversely affect the interest of any person in a substantial way?	

Appendix B: Draft Insolvent Retailers Drafting Instructions

Explanatory note

These drafting instructions —

- define the circumstances that must be present for the industry body to initiate the transfer of gas consumers who no longer have a customer contract with a solvent gas retailer (termed “orphan consumers” in this document) to an alternate retailer;
- set out the procedures and methods by which the industry body must allocate orphan consumers to other retailers, which involves a random allocation customer load groups or subcategories, apportioned by retailers’ relative market shares;
- provide for the transmission capacity of the insolvent retailer to be provided to any retailer that requires extra capacity in order to supply its new customers; and allow such retailers to acquire additional transmission capacity at pro rata reservation rates;
- require the insolvent retailer to provide certain information to the industry body for consumer billing purposes and consumption reconciliation purposes; and
- provide for various transitional matters associated with the transfer of orphan consumers, including where orphan consumers are part-way through the process of switching to an alternative retailer.

Contents

1	Purpose	2
2	Interpretation	2
	<i>System for transferring orphan consumers</i>	3
3	Transfer by industry body of orphan consumers	3
4	Notice to retailers of proposed transfer	4
5	Industry participants to co-operate with industry body	4
6	Process for transferring orphan consumers	4
7	Transfer of orphan consumers	5
	<i>Effect of transfer on customers</i>	5
8	Recipient retailers to supply gas and give notice to transferred customers	5
9	Right of transferred orphan consumer to switch without penalty	6
10	Transitional issues relating to customers	6
11	Switches sought before transfer time	7
	<i>Information to be provided after transfer time</i>	Error! Bookmark not defined.
12	Meter reading information to be provided by insolvent retailer	Error! Bookmark not defined.
13	Consumption information to be provided by insolvent retailer	Error! Bookmark not defined.
	<i>Transmission capacity</i>	7
14	Transmission capacity of insolvent retailer	7
15	Additional transmission capacity	8

1 Purpose

The purpose of these drafting instructions is to aid in implementing regulations under urgency in the rare circumstance that they may be needed to manage the consequences of a gas retailer insolvency. They provide a system of transition arrangements for consumers who no longer have customer contracts with a solvent gas retailer (involving the transfer of such consumers to other gas retailers) in order to provide protection for all gas customers and to provide certainty and reduce risk for industry participants.

2 Interpretation

(1) In these drafting instructions, unless the context otherwise requires,—

Act means the Gas Act 1992

customer contract means a contract between a retailer and a customer for the supply of gas

industry body means the body approved by Order in Council under section 43ZL of the Act

insolvency practitioner means any of the following: administrator, liquidator or receiver and is registered under Section 316H of the Insolvency Practitioners Bill 2010 (2011 No 141-2)

insolvent retailer means a retailer for which an insolvency practitioner has been appointed

network tariff code means the load group code of the gas network, a combination of the area code and the function code determined by distribution services providers

notification date means the date on which the notice referred to in paragraph 5 is given

orphan consumer means a gas consumer associated with a particular ICP who does not have a customer contract with a solvent gas retailer

recipient retailers means those retailers to whom orphan consumers are or will be transferred

retailer means a gas retailer

switching rules means the Gas (Switching Arrangements) Rules 2008 made under section 43Q of the Act

transfer time means the date and time, as determined by the industry body, at which an insolvent retailer's ICPs are transferred or deemed to be transferred to recipient retailers

transferred orphan consumer means an orphan consumer transferred to a recipient retailer by the operation of regulation 7

transition period means a period starting at the transfer time and continuing for a period specified by the retailer of at least 30 days from the date on which the recipient retailer gives the notice to the transferred orphan consumer that it has been transferred to the recipient retailer.

Vector means Vector Gas Limited or any successor or assignee of Vector Gas Limited

- (2) A term that is used but not defined in these drafting instructions, but that is defined in the Act, has the meaning given in the Act.
- (3) A term that is used but not defined in these drafting instructions or the Act, but that is defined in the switching rules, has the meaning given in those rules.
- (4) A term that is used but not defined in these drafting instructions, but that is defined in the Gas (Downstream Reconciliation) Rules 2008, has the meaning set out in those rules.

System for transferring orphan consumers

3 Transfer by industry body of orphan consumers

- (1) The industry body may transfer, in accordance with the arrangements set out below, any orphan consumer to any other retailer.
- (2) The industry body may exercise the power in paragraph 3(1) only if—
 - (a) the ICPs are not transferred to other retailers, there is a real risk that gas supplied to those consumers will not be supplied under a valid contract with any retailer; and

- (b) the liquidator of the insolvent retailer has disclaimed these ICPs or the insolvent retailer has ceased trading as a gas retailer. [note that these criteria may need to be modified to fit the actual situation]

4 Notice to retailers of proposed transfer

If the industry body proposes to exercise the power to transfer orphan consumers, it must first notify the insolvent retailer and all other retailers of the proposal and the proposed transfer time.

5 Industry participants to co-operate with industry body

After the notification date, every industry participant must co-operate with the industry body in order to ensure that the industry body can effect the transfer of orphan consumers, including by providing any information specified by the industry body that the industry body requires for that purpose.

6 Process for transferring orphan consumers

- (1) The industry body must classify the orphan consumers by allocation group and –
 - (a) for orphan consumers in allocation groups 1-3, aggregate by transmission pipeline; and
 - (b) for orphan consumers in allocation groups 4-6, aggregate by network tariff codes and gas gates–

as at the day after the notification date.

- (2) The industry body must identify the recipient retailers, who must be—

Option A

- (a) retailers with a total volume market share of more than [5% or 10%] for allocation group 1-3 customers; and
- (b) retailers with a total customer market share of more than [5% or 10%] of allocation group 4-6 customers; and
- (c) any other retailer that notifies the industry body not later than 1 full working day after the notification date described in regulation 4.

Option B

- (a) each retailer, except that
- (b) retailers with less than 5% of the total number of ICPs for which the registry shows the status “active contracted” and with less than 5% of volume market share may elect not to be a recipient retailer, by notice to the industry body not later than 1 full working day after the notification date described in regulation 4.

- (3) The methodology that the industry body uses to determine which orphan consumers are transferred to which recipient retailers must be a system of allocation based on—

- (a) the orphan consumer’s classification as in paragraph 6(1); and

- (b) a pro rata allocation to recipient retailers that reflects, to the extent possible, the recipient retailers' relative market share (among the pool of recipient retailers) within each classification category, of –
 - (i) allocation group 4-6 ICPs for which the registry shows that the status is "active-contracted" as at the day after the notification date; and
 - (ii) allocated volumes for allocation groups 1 to 3, calculated using the latest available 12 consumption months of allocation information.
- (4) Within each classification category, the allocation of orphan consumers to recipient retailers must be random.
- (5) At least 48 hours before the proposed transfer time, the industry body must—
 - (a) publish on its Internet site a description of the methodology used to allocate orphan consumers to recipient retailers; and
 - (b) notify each recipient retailer of the number of orphan consumers within each classification category that, as a result of applying that methodology, it proposes to transfer to the recipient retailer.

7 Transfer of orphan consumers

- (1) At the transfer time, each orphan consumer is transferred to the recipient retailer allocated by the industry body to receive that orphan consumer.
- (2) The industry body must provide a schedule of transfers to the registry operator and the registry operator must update the data in the registry to reflect each transfer to a recipient retailer, despite anything to the contrary that may be stated in the switching rules.
- (3) The industry body must pass on whatever information it has received from the orphan consumer's previous retailer to whichever other industry participants require that information for the purpose of giving effect to the transfer of orphan consumers.
- (4) After the transfer time, a customer contract is deemed to have been formed and applies as if it were a contract freely entered into between the transferred orphan consumer and the recipient retailer, until the earlier of—
 - (a) the end of the transition period; or
 - (b) the date on which the transferred orphan consumer cancels the contract or switches to another retailer.

Effect of transfer on orphan consumers

8 Recipient retailers to supply gas and give notice to transferred orphan consumer

- (1) A recipient retailer to whom an orphan consumer is transferred must—
 - (a) For consumers in allocation groups 4-6, supply gas to the transferred orphan consumer during the transition period on either:

- i. the standard terms that the recipient retailer would normally have offered to the consumer immediately before the transfer occurred; or
 - ii. such other terms that are more advantageous to the consumer than the recipient retailer's standard terms; and
 - (b) For consumers in allocation groups 1-3, supply gas to the transferred consumer during the transition period on either
 - i. The same terms on which the recipient retailer supplies similarly-sized customers; or
 - ii. Other terms as agreed between the recipient retailer and the transferred consumer; and
 - (c) give written notice to the transferred orphan consumer of the matters set out in paragraph 8(2) as soon as practicable after the transfer time.
- (2) The notice to the transferred orphan consumer must set out the following information:
 - (a) that the consumer has been transferred to the recipient retailer;
 - (b) the transfer time, and the date when the transition period ends;
 - (c) that the recipient retailer will supply gas to the transferred consumer unless and until the consumer switches to another retailer;
 - (d) the terms and conditions that will apply to the transferred consumer's supply of gas;
 - (e) that the transferred consumer may at any time during the transition period cancel the contract or switch to an alternative retailer and that, if the consumer does so during the transition period, no fee or penalty will be imposed in respect of the cancellation or switch.
- (3) The notice must also include—
 - (a) a copy of the contract that will apply to the transferred consumer as described in paragraph 8(2)(d); and
 - (b) a list, supplied by the industry body, of alternative retailers, along with contact details for those retailers.

9 Right of transferred orphan consumer to switch without penalty

If, during the transition period, a transferred orphan consumer cancels the contract with the recipient retailer or switches to an alternative retailer, the recipient retailer must not charge the transferred consumer any fee or penalty relating to the cancellation or switch.

10 Transitional issues relating to transferred orphan consumer

- (1) After the transfer time, any dispute that a transferred orphan consumer has or had with its previous retailer must be dealt with between the consumer and the previous retailer or the liquidator of the previous retailer under the contract between the consumer and the previous retailer.

- (2) During the transition period, a recipient retailer need not continue or commence any review processes that are required or authorised under the transferred orphan consumer’s contract with the previous retailer.

11 Switches sought before transfer time

- (1) After the notification date, no switch request to or from the insolvent retailer may be entered on the registry by any retailer, including the insolvent retailer.
- (2) Subclause (3) applies, if, before the close of the notification date,—
- (a) an orphan consumer has sought a switch; and
 - (b) the switch has been entered on the registry; but
 - (c) the switch has not been completed.
- (3) If subclause (2) applies —
- (a) the industry body must take whatever steps necessary to ensure that the orphan consumer is moved, as soon as practicable, to the orphan consumer’s chosen retailer, and may determine the date on which the move is deemed to take effect; and
 - (b) to the extent that it is necessary or desirable, in order to ensure that the orphan consumer is moved as soon as practicable to the orphan consumer’s chosen retailer, the industry body and every industry participant may modify, or need not apply, the switching rules.
- (4) If, before the close of the notification date, a customer has sought a switch to the insolvent retailer and that switch has been entered on the registry but has not been completed, the switch must be cancelled by the registry operator.

Transmission capacity

12 Transmission capacity of insolvent retailer

- (1) A recipient retailer may require Vector to allocate to it some proportion of the reserved transmission capacity held by an insolvent retailer as at the notification date for a specific Receipt-Delivery Point, or, if the transmission services agreement is terminated or disclaimed before the notification date, the date of termination or disclamation.
- (2) The reserved transmission capacity must be apportioned by the aggregate gas volumes sold under all of the insolvent retailer’s contracts in respect of a specific Receipt-Delivery Point (excluding those (if any) that rely on a supplementary agreement to provide gas transmission). Each recipient retailer is entitled to the proportion of such reserved transmission capacity calculated by the following formula:

$$\frac{r}{\sum r_n} \times t$$

where—

t is the total reserved transmission capacity held by the insolvent retailer for a specific Receipt-Delivery Point as at the date referred to in subclause (1);

r is the aggregate gas quantity (GJ) sold by the insolvent retailer over the past 12 billing cycles in respect of a specific Receipt-Delivery Point to the consumers that have

been transferred to the recipient retailer (excluding those (if any) that rely on a supplementary agreement to provide gas transmission); and

Σr_n is the aggregate gas quantity (GJ) sold by the insolvent retailer over the past 12 billing cycles in respect of a specific Receipt-Delivery Point to all consumers that have been transferred to all (**n**) recipient retailers that request transmission capacity for that Receipt-Delivery Point within 14 days after the transfer time (excluding those (if any) that rely on a supplementary agreement to provide gas transmission) .

- (3) Vector must comply with a request by a recipient retailer within 15 business days after the transfer time.
- (4) Vector must promptly provide the industry body with a schedule of reserved transmission capacity held by the insolvent retailer for each Receipt-Delivery Point on the transmission system as at the notification date and must provide all practical assistance to allocate the insolvent retailer's reserved transmission capacity as at the notification date to recipient retailers.
- (5) Any allocation of reserved transmission capacity is deemed to have occurred at the transfer time.
- (6) Any reserved transmission capacity allocated to a recipient retailer in respect of a Receipt-Delivery Point must be provided on the same terms that apply to the reserved transmission capacity already being provided to the recipient retailer, or any other retailer, at that Receipt-Delivery Point (being the terms of the Vector Transmission Code).
- (7) If a recipient retailer receives a transferred consumer whose previous retailer relied on a supplementary transmission capacity agreement, then the recipient retailer may request, and be allocated, a proportion of that supplementary capacity in a similar manner as that described in subclauses (1) through (6).

13 Additional transmission capacity

- (1) A recipient retailer may request reserved transmission capacity from Vector in order to manage its obligations to serve transferred consumers.
- (2) To the extent that Vector has capacity available at the requested Receipt-Delivery Point(s), it must offer that capacity to the recipient retailer for a capacity reservation fee that is calculated as (in \$/GJ):

$$\frac{\text{(number of days remaining in gas year)}}{365} \times (\text{posted capacity reservation fee for that Receipt – Delivery Point})$$

where:

number of days remaining in gas year is the number of days from the notification date until 30 September, inclusive; and

the posted capacity reservation fee is as per the schedule published by Vector.