



Draft Recommendation on 24 April 2015 MPOC Amendment Process Change Request

Date issued: 12 August 2015
Submissions close: 5pm, Wednesday 9 September 2015



About Gas Industry Co.

Gas Industry Co is the gas industry body and co-regulator under the Gas Act 1992. 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'.

Executive summary

Mighty River Power (MRP) has requested a change to the Maui Pipeline Operating Code (MPOC) to introduce a new code amendment process. MRP's Amendment Process Change Request (APCR) application states that '...the proposed amendment process is designed to promote an inclusive and collaborative change process as opposed to the current arrangement which can become adversarial.'

In essence, the APCR proposes to introduce a mandated code change development process into the MPOC and to replace the current code change approval mechanism (a recommendation from Gas Industry Co following consultation and analysis) with a vote by MPOC Parties.

On 16 June 2015, Gas Industry Co published and called for submissions on the APCR. Gas Industry Co received eight submissions: four in support (Genesis, Greymouth, Trustpower and Vector), three opposed (MDL, Nova and OMV), and one "reasonably ambivalent" (emsTradepoint). The APCR is particularly strongly opposed by MDL, which observes that the MPOC was instigated through a Government sponsored process, and changing it to allow it to be amended by vote, without any regulatory oversight, would be a major change to the rights and obligations of its Shippers and Welded Parties.

This Draft Recommendation provides our analysis of the APCR and consideration of the submissions. We conclude that on balance the APCR will not lead to overall improved outcomes relative to the Gas Act objectives and other relevant considerations. While benefits would arise from converging the MPOC and VTC code change arrangements, and from early stakeholder engagement on code changes, including Gas Industry Co participation, those benefits are outweighed by the dis-benefits arising from poor definition of the voting arrangement, the potential for inequitable and inefficient voting outcomes, and increased scope for disputes.

Accordingly, Gas Industry Co's Draft Recommendation, as considered and approved by our Independent Directors Committee, does not support the APCR.

Although none of the submitters has expressed any concern with Gas Industry Co processing the APCR, Gas Industry Co acknowledges that the APCR requires it to make a determination on its own role. Accordingly, there is scope for somebody to allege that this work entails a conflict of interest. As a means of managing this potential issue, Gas Industry Co has engaged an independent reviewer and an independent assessment of the Draft Recommendation by Sir John Hansen, is attached as Appendix D. That assessment concludes that there are likely no grounds for finding an actual or a perceived conflict and that the Draft Recommendation is robust and reasonable.

The APCR and all related material can be found on Gas Industry Co's website:

<http://gasindustry.co.nz/work-programmes/mpoc-change-requests/mpoc-change-request-apcr-24-april-2015/>

Gas Industry Co invites submissions on this Draft Recommendation by 5pm, Wednesday, 9 September 2015. Among other matters, we are particularly interested to receive submissions on why a voting regime will provide better outcomes than an independent assessment against the Gas Act objectives.

Following consideration of submissions, Gas Industry Co is targeting issuing its Final Recommendation on Tuesday, 6 October, 2015.

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1

Introduction

1.1 Purpose

This paper presents Gas Industry Co's Draft Recommendation in respect of the MPOC change request submitted by MRP on 24 April 2015, the Amendment Process Change Request (APCR). The APCR and all submissions are available on Gas Industry Co's website at <http://gasindustry.co.nz/work-programmes/mpoc-change-requests/mpoc-change-request-apcr-24-april-2015/>

Unless otherwise noted, capitalised terms used in this Draft Recommendation have the same meaning given to those terms in the MPOC.

1.2 Gas Industry Co's role under the MPOC

Section 29 of the MPOC assigns Gas Industry Co a role in respect of any MPOC change request; to consult on the change request with the gas industry and determine whether or not to support it. Gas Industry Co's Memorandum of Understanding with MDL (MoU) describes how the Company's role in relation to change requests will be performed. Although the MoU is not legally binding, Clause 2.3 of the MoU provides for Gas Industry Co to have regard to the objectives set out in section 43ZN of the Gas Act when it considers change requests. Gas Industry Co otherwise has broad discretion in determining what considerations could be relevant (consistent with its statutory powers and functions).

The MoU also sets out a process under which Gas Industry Co receives change requests; calls for submissions; issues a draft recommendation which includes an analysis of the issues under consideration and a cost-benefit analysis; considers further submissions; and makes a final recommendation to MDL. Gas Industry Co can supplement this process, including by calling for cross-submissions.

Under the MoU process, Gas Industry assesses whether a change request will bring improvements relative to the status quo. Gas Industry Co cannot reject a change request because it believes it is not ideal, or that there may be a better alternative, or that there are additional things that should be done.

A change request proceeds only where required by law or where Gas Industry Co makes a written recommendation supporting the change request. The MoU then provides that MDL also has sole discretion not to give its written consent to a change request if it considers the change would materially adversely affect its Maui pipeline business or tariffs or a Transmission Pipeline Welded Party's transmission pipeline business, the change would require MDL to incur capital expenditure, or to incur operating expenses or costs that cannot be recovered, or materially adversely affect the compatibility of MDL's open access regime with that of a TP Welded Party.

For further information on Gas Industry Co's role under the MPOC (including a [copy of the MoU](#)) please refer to Gas Industry Co's website at <http://gasindustry.co.nz/dmsdocument/4144>

1.3 Background

APCR application

In a letter dated 24 April 2015, Mighty River Power (MRP) requested that GIC consider and make a recommendation on proposed changes to the MPOC. The proposed changes relate to the process for making amendments to the MPOC. MRP says that its APCR '... is designed to promote an inclusive and collaborative change process as opposed to the current arrangement which can become adversarial'. Broadly, the proposal aims to align the MPOC code change processes with the new code change process introduced into the Vector Transmission Code (VTC) on 1 April 2015. (For readers unfamiliar with the change to the VTC amendment process a brief explanation is provided in Appendix B).

Possible conflict of interest

On 5 May 2015, Gas Industry Co notified industry stakeholders of the APCR. In that notification we identified a potential conflict because Gas Industry Co's role in considering the APCR would require it to opine on a matter that could significantly change that role. However, on legal review and discussion with both MRP and MDL, both of whom requested that Gas Industry Co continue to process the application, Gas Industry Co concluded that the situation could be effectively managed.

For added confidence, this Draft Recommendation has been assessed by an independent reviewer, former High Court judge Sir John Hansen. Sir John also performs the role of the Rulings Panel under the Gas Governance (Compliance) Regulations 2008. Sir John's assessment is provided in Appendix D. It concludes that there are likely no grounds for finding an actual or a perceived conflict and that the Draft Recommendation is robust and reasonable.

Sir John will also review the Final Recommendation, but, as with all MPOC change requests, the Final Recommendation on whether to 'support' or 'not support' the APCR will be taken by Gas Industry Co, through its Independent Directors Committee.

Context of the APCR

The APCR is one of a number of possible improvements to transmission access arrangements that the industry has been developing. Although not essential to the analysis in this Draft Recommendation, readers may find a brief outline of these initiatives helpful.

In late 2013, Gas Industry Co endorsed the recommendations of a Panel of Expert Advisers (PEA). Having analysed transmission issues for two years, the PEA settled on a problem definition and proposed that Gas Industry Co invite the industry to form a group to address it. The PEA anticipated progress would occur through successive MPOC and VTC changes, a process it called 'evolutionary convergence'.

On behalf of the industry, both Vector and MDL accepted Gas Industry Co's invitation to address the problems identified by the PEA. The resulting industry work group, the Gas

Industry Transmission Access Working Group (GITAWG), began the evolutionary convergence process early in 2014.

The GITAWG provided quarterly reports to keep stakeholders advised of progress. Its Quarterly Report to 31 March 2014 identified the code change process itself as one of its workstreams. It described it as follows:

Change Request Process

“Given the objective of evolving towards a harmonised set of capacity access and pricing arrangements across both pipelines, there is good cause for also evolving toward common governance arrangements for these issues.” [Advice from Panel of Expert Advisors – Report to Gas Industry Company, July 2013, pg76]

The Working Group considers that amending the change request processes in both the VTC and the MPOC, as an early step in changes to governance arrangements, will better facilitate further changes through a process which is unambiguous, timely, encourages participation by all parties and is flexible enough to allow drafting changes to a change request without the need to recommence the process.

It has agreed in principle to modifying the VTC change request having regard to the development of a shared understanding of the purpose and process of the change request process, including:

- A consultation period before submitting a change request to allow feedback to be taken into account
- Limitations on voting and appeal rights for parties who do not engage in meaningful participation at the consultation stage
- Appeals to be heard by a party independent to the GIC, at least in cases where there is a perceived conflict of interest (e.g. where the GIC has been involved in the change request process)
- All parties to the VTC to be parties to the MOU with the GIC for the hearing of appeals.

Maui has indicated that it is willing to consider adopting the same change request process once the new Vector process has been agreed.

The GITAWG’s improvements to the VTC code change process are now complete, and are described in Appendix B. However, as made clear in its submission on the APCR, MDL did not support those code change arrangements and does not support putting similar code change arrangements in place for the MPOC.

1.4 Outline of proposed changes

Readers should refer to the APCR documents¹ for a full description of the proposed change. Figure 1 summarises the current and the proposed code change processes. Fuller descriptions of each individual component of the proposal are provided in Chapter 4.

The main features of the APCR proposal are to:

¹ Available at: <http://gasindustry.co.nz/work-programmes/mpoc-change-requests/mpoc-change-request-apcr-24-april-2015/>

- Introduce a code change development process, before a Final Change Request (currently known as a Change Request) is submitted. The proposed process includes time limits, and allows for input from any stakeholder, including Gas Industry Co.
- Replace Gas Industry Co's role in recommending whether to support or not support a proposed change with a voting system backed up by a right for Parties to dispute any aspect of the code change.

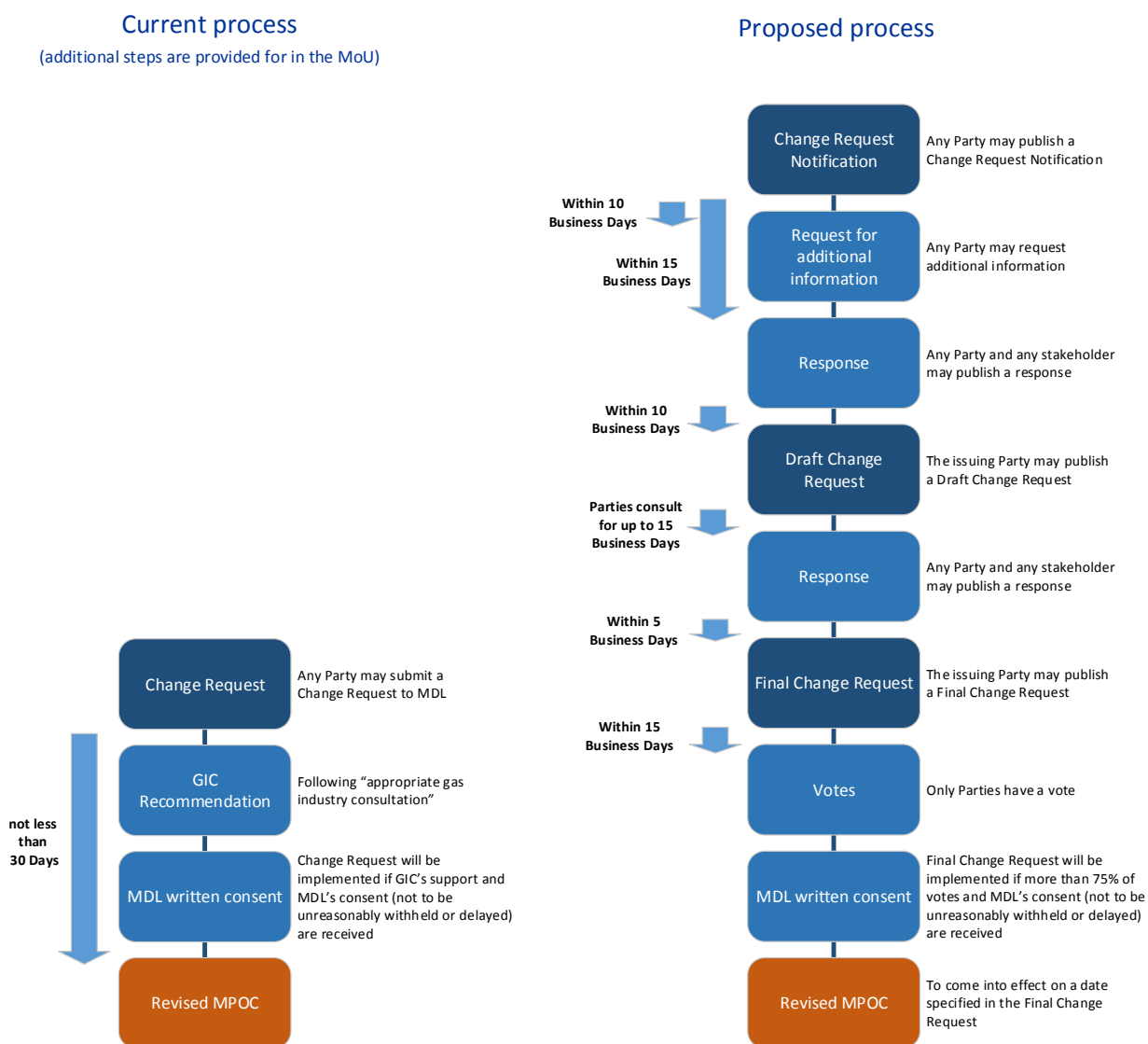


Figure 1 - comparison of existing and proposed code change processes

1.5 Submissions on the APCR

Submissions were received from:

- emsTradepoint
- Genesis Energy Limited (Genesis)

- Greymouth Gas New Zealand Limited (Greymouth)
- Maui Development Limited (MDL)
- Nova Energy Limited (Nova)
- OMV
- Trustpower Limited (Trustpower)
- Vector Limited (Vector)

All submissions can be accessed at <http://gasindustry.co.nz/work-programmes/mpoc-change-requests/mpoc-change-request-apcr-24-april-2015/>

A summary of submissions is provided in Appendix A.

1.6 Invitation for submissions on this Draft Recommendation and next steps

Gas Industry Co invites submissions on this Draft Recommendation, including Sir John's assessment. We are particularly interested to receive detailed explanations on:

- a) What benefits the proposed voting plus dispute rights regime would offer over the current regime of independent assessment against Gas Act objectives;
- b) Whether a definition of "related companies" could be added to the proposal as a "minor and technical" correction;
- c) Whether the balance of voting rights between Shippers and Welded Parties is appropriate, including because of relative ease of becoming a MDL Shipper;
- d) Whether there should be concerns about the transparency of votes;
- e) Whether the proposal would allow for Gas Act objectives to be given adequate consideration and influence outcomes. (The APCR would allow Gas Industry Co to submit on proposed change requests and for changes to be disputed by any party, seemingly on a wide range of grounds². Both would provide opportunities for a change to be assessed against the Gas Act objectives, but those processes may not guarantee outcomes in line with those objectives.);
- f) If it is sufficient that disputes related to code changes can only be between MDL and a non-MDL party (and not between two non-MDL parties, one of whom may have proposed the code change);
- g) Whether there should be concerns that an Expert can make decisions on code change disputes that could affect all parties to the code, not only the parties in dispute; and

² It appears that the APCR intends that any matter relating to an MPOC change can be raised as an Expert Dispute except for disputes about whether any Party (including MDL) has participated in good faith or not. These latter disputes can still be raised as ordinary Disputes, subject to negotiation (s23.2), and alternative dispute resolution (s23.3), but not to determination by an Expert (s23.4).

h) Whether the term “good faith” is sufficiently well understood to avoid undue disputes.

Submissions are due by 5pm, Wednesday 9 September 2015. Please note submissions received after this date may not be considered.

Gas Industry Co will electronically acknowledge receipt of all submissions. If you do not receive electronic acknowledgement of your submission within two business days, please contact Tim Herbert on 04 494 6580.

Gas Industry Co values openness and transparency, and usually places submissions on our website. If you intend to provide confidential information in your submission, please discuss this first with Ian Wilson at Gas Industry Co (04 494 2462).

Following consideration of submissions, Gas Industry Co will issue its Final Recommendation. The target date for this is Tuesday, 6 October 2015, but this is subject to any extra steps arising from submissions received.

2

Relevant Gas Act and GPS Objectives

The MoU provides for Gas Industry Co to have regard to relevant objectives specified in section 43ZN of Part 4A of the Gas Act when assessing code change requests. That section states:

43ZN Objectives of industry body in recommending regulations for wholesale market, processing facilities, transmission, and distribution of gas

The objectives of the industry body, in recommending gas governance regulations under section 43F, are as follows:

- (a) the principal objective is to ensure that gas is delivered to existing and new customers in a safe, efficient, and reliable manner; and
- (b) the other objectives are—
 - (i) the facilitation and promotion of the ongoing supply of gas to meet New Zealand's energy needs, by providing access to essential infrastructure and competitive market arrangements:
 - (ii) barriers to competition in the gas industry are minimised:
 - (iii) incentives for investment in gas processing facilities, transmission, and distribution are maintained or enhanced:
 - (iv) delivered gas costs and prices are subject to sustained downward pressure:
 - (v) risks relating to security of supply, including transport arrangements, are properly and efficiently managed by all parties:
 - (vi) consistency with the Government's gas safety regime is maintained.

We consider the relevant section 43ZN Gas Act objectives and 2008 Government Policy Statement on Gas Governance (GPS) outcome are:

- ensuring efficient and reliable gas delivery;
- providing access to essential infrastructure and competitive market arrangements;
- minimising barriers to competition; and
- enabling participants and new entrants to access transmission pipelines on reasonable terms and conditions.

We have also considered whether any objectives of the GPS may be relevant. Section 12 of the GPS states:

It is the Government's intent that these other policy objectives should apply to all Gas Industry Co recommendations for rules, regulations or non-regulatory arrangements for all parts of the gas industry. In addition, the Government adds the following objectives as follows:

- a) Energy and other resources used to deliver gas to consumers are used efficiently;
- b) Competition is facilitated in upstream and downstream gas markets by minimising barriers to access to essential infrastructure to the long-term benefit of end users;
- c) The full costs of producing and transporting gas are signalled to consumers;
- d) The quality of gas services where those services include a trade-off between quality and price, as far as possible, reflect customers' preferences; and
- e) The gas sector contributes to achieving the Government's climate change objectives as set out in the New Zealand Energy Strategy, or any other document the Minister of Energy may specify from time to time, by minimising gas losses and promoting demand-side management and energy efficiency.

We think that the objective most relevant to our evaluation is:

- Minimising barriers to access to essential infrastructure to the long-term benefit of end users.

We include these objectives in our analysis in section 4 and our conclusions in section 5.

3

Legal nature of MPOC and the founding principles of its code change process

Preliminary to our analysis, it is helpful to discuss the legal nature of the MPOC, and the background to the code change process. These are matters that have been raised in submissions (particularly by MDL) which:

- question whether the APCR is compatible with the legal nature of the MPOC; and
- suggest that the process leading to the inception of the MPOC should be borne in mind when changes to the code change process itself are being considered.

3.1 Legal nature of the MPOC

What submitters say

MDL notes that the APCR is wrong to characterise the MPOC as a multilateral contract.

...Contrary to what MRP expresses in its application, the MPOC is not a “multi-lateral contractual agreement between Maui Development Limited and the Code signatories”. Nor is it “essentially a contractual arrangement like any other albeit operating in a regulated environment.” Rather, the MPOC is a set of terms that are incorporated by reference into every bi-lateral contract between:

- MDL and each Shipper (Transmission Services Agreements, or “TSAs”), and
- MDL and each Welded Party (Interconnection Agreements, or “ICAs”).

MDL also points out that parties other than MDL do not have any contractual relationship with each other within the context of the MPOC.

OMV makes essentially the same points, but characterises the MPOC as a “quasi-regulatory” framework.

Gas Industry Co’s view

We agree with MDL’s description of the MPOC, and that MRP’s description of the MPOC as a multi-lateral contract is technically wrong. However, this would only be a major flaw in the APCR if some element of the proposal relies on that assumption. In particular, the legal drafting must not depend on the MPOC being a multi-lateral contract. We bear this in mind in our Chapter 4 analysis.

3.2 Founding principles of the code change process

What submitters say

The MDL submission provides an informative description of how the MPOC came into being. Essentially it was through a Government sponsored process. MDL notes that one intensely discussed matter at its inception was the code change process itself. Having considered a number of options – such as voting based arrangements, introducing a review panel, and embedding the Government Policy Statement in the MPOC – it was decided that code changes should be subject to a written recommendation from Gas Industry Co (following appropriate gas industry consultation).

MDL considers that now:

... The APCR risks doing something which the Government was alert to from the outset: the first GPS, dated 27 March 2003, required that the Maui open access arrangements “not be biased towards those with an existing contractual interest in the Maui pipeline”. The MPOC is a living document in place to guard the interests of gas users present and future. It is not the property of those that, at any given time, are subject to its terms. Replacing the status quo with a voting system – by which incumbent Maui Pipeline users can control how the MPOC evolves (or does not evolve) – would be manifestly inconsistent with this.

Gas Industry Co’s view

It is helpful to understand the genesis of the MPOC. The history MDL describes (and we do not comment on its completeness or accuracy) itself arose against a backdrop of the Crown’s role in what were known as the “Maui Strawman” negotiations, to allocate rights to remaining Maui gas field reserves. The outcome of those negotiations was closely connected with the follow-on development of the MPOC, and the Crown’s central role continued.

However, what matters to our analysis of the APCR is the MPOC’s current regulatory status. Nothing in MDL’s description suggests that Government intended that the MPOC change process should be immutable. Nor are there any MPOC provisions to suggest that the code change process itself has a special standing, or that it cannot be changed. Rather, the code change provisions are subject to the same change process as other code provisions, and changes can be made subject to a written recommendation from Gas Industry Co.

What matters for our current analysis is whether implementing the APCR would overall promote the relevant objectives in Part 4A of the Gas Act 1992, the GPS, and any other relevant considerations. We acknowledge at this point that Gas Industry Co’s current role in MPOC change requests forms part of a carefully crafted package reflecting the different interests in pipeline ownership and use. We discuss MDL objections to the voting scheme in the next chapter. Also, our analysis in Chapter 4 and our overall conclusion in Chapter 5 acknowledge that the genesis of the current arrangements and MDL’s opposition to the proposed change are material considerations in our assessment of the APCR.

4

Analysis

To aid analysis of the APCR we separate it into its main elements. Submissions on the APCR have been a useful aid to doing this, as has the GITAWG's "Principles of the Proposed Change Request Process and MoU" (produced in Appendix C for convenience). For each element we describe the current arrangement and the new arrangement proposed by the APCR, note what submitters have said, and present Gas Industry Co's view.

4.1 Who may propose a code change

The current situation is that the MPOC provides that only a Party can request an amendment to the MPOC.

The APCR proposes that, as at present, only a Party can propose a code change (new s29.3).

What submitters say

MDL submits that the current amendment process is not exclusive, as the APCR suggests. While it accepts that only Parties may propose a code change, it notes that the APCR would not change that.

MDL also notes that the proposed MPOC edits include wording such as "MDL or any Party", and that this drafting incorrectly suggest that MDL is not a Party.

Gas Industry Co view

We agree with MDL that the APCR does not affect who may propose a code change.

We agree with MDL that the "MDL or any Party" drafting is misleading. However, it appears that this could easily be corrected without altering the intent, so may be regarded as a 'minor and technical' issue.

4.2 Participation in the code change process

At present, the MPOC is silent on what process may be involved in developing a Change Request. However, once a Change Request is received by MDL, the MPOC provides that Gas Industry Co (or an entity granted formal jurisdiction) is to make a recommendation to support (or not support) that Change Request following appropriate gas industry consultation (s29.4(a)). There is no provision to change a Change Request once lodged (although the practice has been to permit minor and technical changes).

In contrast, the APCR does specify the process that will be followed to develop a Final Change Request. The first step is for a Party to publish a Change Request Notification. The Change Request Notification does not need to include a marked-up MPOC, only "...a summary of the proposed change (including the reasons for the proposed change and the intended effect and

impact of the proposed change) and the proposed date on which the proposed change would take effect, if approved..." (new s29.4).

Within 15 Business Days of a Change Request Notification being published, any Party "... may publish a response stating whether that Party supports the proposed change in principle, any specific objections to it, and any conditions to the Party's support for the proposed change." In addition, "... Gas Industry Company or any other stakeholder may publish a response setting out its views on the proposed change" (new s29.6).

The proposed new process then provides for the Party who issued the Change Request Notification to publish a Draft Change Request, which is to include an amended version of the MPOC (new s29.7). As with the Change Request Notification, any Party and any stakeholder (including Gas Industry Co) may publish a response to a Draft Change Request within 15 Business Days of it being issued.

Within 5 Business Days of the response deadline, the issuing party may publish a Final Change Request containing a summary of the proposed changes, their rationale, intended effect and impact, "having regard to any responses published under section 29.6". The Final Change Request is also to contain "a response to any substantive specific objection raised in any response..." and an amended MPOC (new s29.11).

Consultation on the proposal is over at this point. What follows is a vote by the Parties on whether they support the Final Change Request or not. Assuming all necessary pre-requisites are met, the change would then be implemented.

The current and proposed processes are illustrated in Figure 1.

What submitters say

Several submitters (Genesis, Nova, Trustpower, and Vector) consider that the APCR will promote an inclusive and collaborative approach to changes and allow Gas Industry Co to contribute to the design of code changes.

MDL comments that currently code amendments require the support of Gas Industry Co following appropriate gas industry consultation, but that there are no restrictions on the scope of that consultation. So it does not consider the APCR process to be more inclusive.

Gas Industry Co view

We agree that, other than requiring Gas Industry Co to conduct appropriate gas industry consultation, the MPOC does not specify what consultation process is required. However, as mentioned in Section 1.2, the MoU between Gas Industry Co and MDL, although not legally binding, describes the consultation process Gas Industry Co will follow. And the Parties are free to consult in advance of any Change Request being submitted to MDL.

The APCR proposes two important changes in this area. One is to remove any obligation on Gas Industry Co to consult – instead, it is the proposer of the code change who must consult. The second is to shift the requirement for consultation to the design and development phase of the code change – rather than after the proposal is finalised.

Although proponents of a code change can currently consult as widely as they choose when developing that change, there is no requirement on them to do so. They are not required to share their thoughts with other stakeholders, or seek input from them, when developing a proposal. The APCR explicitly provides for such sharing and input (by requiring publication of the Change Request Notification and Draft Change Request and permitting submissions on those proposals). This should allow for more collaborative solutions to be found.

Also, Gas Industry Co has focussed on adhering to its role as specified in the MPOC/MoU. Although the MPOC has no express prohibition on it, we have generally been cautious about becoming involved in prospective code changes because of any actual or perceived conflicts of interest that may arise when it comes to making a recommendation on that change to MDL. If the APCR is implemented, Gas Industry Co would no longer make recommendations on code changes, so we would no longer be so constrained in participating in the design and development stages of a code change (ie the consultation on the Change Request Notification and the Draft Change Request).

We support broader stakeholder input during the design and development stages of a change request. It should result in the Final Change Request being more well-considered, robust, and complete; contributing to the objective of ensuring efficient and reliable gas delivery.

While it could be argued that the proponent of a change request has little incentive to consider the concerns of stakeholders, at least those stakeholders can be more aware of the emerging change request and have a mechanism for registering any concerns they have and contributing to its development. We consider that these would be improvements on the status-quo. We also consider that, if the proponent of a change request consults genuinely, and fully considers submissions, this could result in MPOC changes that better achieve the Gas Act objectives of minimising barriers to competition and enabling participants and new entrants to access transmission pipelines on reasonable terms and conditions, while also positively affecting the GPS objective of minimising barriers to access to essential infrastructure to the long-term benefit of end users.

4.3 Voting

The current situation is that, subject to MDL's consent, an MPOC change is made on Gas Industry Co's recommendation (following consultation and assessment against the Gas Act objectives).

The APCR proposes that, subject to MDL's consent, an MPOC change is made if more than 75% of Parties support it.

The grounds on which MDL can withhold consent would also be somewhat changed, as shown in Table 1.

Table 1 **Grounds on which MDL can withhold consent**

Current (s29.4(b))	Proposed by APCR (new s29.14)
	MDL can withhold consent if (acting reasonably) MDL considers a Party has not participated in the process in good faith
MDL is not to unreasonably withhold or delay giving its consent	MDL is not to unreasonably withhold or delay giving its consent
<p>MDL can withhold consent if the proposed change would:</p> <ul style="list-style-type: none"> • Require MDL to incur capital expenditure • Require MDL to incur operating expenses or costs that cannot be recovered • Materially adversely affect <ul style="list-style-type: none"> ○ MDL's Maui Pipeline business or tariffs ○ A TP Welded Party's Transmission Pipeline business • Materially adversely affect the compatibility of MDL's and a TP Welded Party's open access regimes 	<p>Where MDL provides a written explanation, MDL can withhold consent if the proposed change would:</p> <ul style="list-style-type: none"> • Require MDL to incur capital expenditure • Require MDL to incur operating expenses or costs that cannot be recovered • Likely adversely affect <ul style="list-style-type: none"> ○ The structure of MDL's transmission services business structure or the structure or magnitude of MDL's transmission revenues ○ A TP Welded Party's Transmission Pipeline business ○ The compatibility of MDL's Transmission System open access regime and the open access regime on the Vector Transmission Pipeline System • Materially adversely affect the compatibility of MDL's and a TP Welded Party's open access regimes

What submitters say

emsTradepoint raises a number of potential concerns with the voting proposals:

- positive changes may be blocked because those opposing a change (to protect private positions) have the voting numbers;
- there is no requirement to assess a change against the Gas Act objectives;
- a Party who does not vote on a Final Change Request is deemed to have consented to it (new s29.12). In emsTradepoint's view this is contrary to good voting procedure which would allow a party to record an abstention; and
- a Party may have good reason to keep its vote private.

MDL strongly objects to replacing the Gas Industry Co's recommendation with a voting system. It considers that:

The requirement that all changes be supported by an independent regulator, on the industry's and the Government's behalf, was well-considered after a lengthy process. Its objective, which we support, is to ensure that evolution of the Maui open access regime set out in the MPOC, in the absence of specific Regulations for terms and conditions of access to the Maui Pipeline, remains consistent with Government policy objectives... The MPOC is a living document in place to guard the interests of gas users present and future. It is not the property of those that, at any given time, are subject to its terms. Replacing the status quo with a voting system – by which incumbent Maui Pipeline users can control how the MPOC evolves (or does not evolve) – would be manifestly inconsistent with this.

In addition, MDL considers the voting arrangements are poorly defined since:

- The APCR does not provide any basis for granting voting rights;
- The APCR limits “each Party and its related companies” to one vote, but the term “related companies” is not defined (would, for example, each of the Maui Mining Companies and Nova be considered as related companies and therefore limited to one vote). There may also be a conflict with the existing s1.2(f) which provides that where a Welded Party carries out other functions, such as being a Shipper, it will be treated as a separate person in each role; and
- The arrangements make no distinction between Welded Parties and Shippers, potentially allowing one group to vote on matters that only affect the other. Also, persons can easily become Shippers, potentially allowing those with a minor interest to rank equally with those who have a major interest.

Nova considers that the APCR does not adequately prescribe the voting mechanism. In particular:

- It is not clear who is entitled to vote;
- Shippers have undue weight – there should be even weighting across the gas supply chain from producers to consumers; and
- The voting may not work because of the divergent interest of Shippers and Welded Parties.

OMV, like MDL, considers that at the inception of the MPOC, Government considered it critical that an independent decision maker considered code changes. OMV sees the proposal, to put the future direction of the code in the hands of incumbent users with no requirement to observe Government objectives, as a retrograde step.

None of the submitters who support the APCR (Genesis, Greymouth, Trustpower or Vector) make any comment in relation to the voting proposals, nor are they discussed in the APCR application itself, except to note that they would closer align the MPOC arrangements with those now in the VTC.

Gas Industry Co view

In our view, the voting arrangements are central to the APCR. If the APCR is implemented, the voting arrangements will give users greater control to potentially determine the future direction

of the MPOC, and broaden the opportunities for dispute. At a minimum, it is very important that they are well designed and clearly drafted.

Also, voting is an entirely new concept to the MPOC (whereas voting has been a feature of the VTC since its inception), and would replace a quite different model (Gas Industry Co's independent review of each proposed change). So that aspect of the proposed change deserves careful attention.

Ambiguity about who can vote

Because of the ambiguity of the meaning of a "related company", we agree with Nova and MDL that it is not clear who would be entitled to a vote. Nor do we think that is a matter that can be remedied as a "minor or technical change". Whatever interpretation is put on the "related companies" term will have implications for voting that are likely to raise serious concerns for one or more stakeholders.

Confidentiality

We are not convinced that emsTradePoint's concerns over the proposed transparency of voting would be a problem. Secret ballots can protect against intimidation and coercion. On the other hand, voters have a responsibility to stakeholders to demonstrate that their vote matches their stated views, and is not duplicitous. In any case, we do not see this as a major issue, but would welcome the views of other submitters.

Control by existing users

We agree with MDL that the proposed MPOC voting regime is a very material change to the existing regime. However, while the APCR would give incumbent Maui Pipeline users more influence over how the MPOC evolves (or does not evolve), there would be countervailing restraints. In particular, MDL would have broader grounds on which it may withhold its consent to a change (see Table 1), Parties would be able to raise disputes in relation to code changes, and Gas Industry Co would retain its power to recommend regulation.

Nevertheless, we agree with Nova's concern that Shippers may have undue voting weight. Not only are Shippers more numerous than Welded Parties but, as MDL notes, it is very easy for anyone to become a Maui pipeline Shipper. While Shippers' interests will not always align, at times they will and, as Nova points out, Shippers and Welded Parties will at times have divergent interests. Also, as MDL notes, one group could vote on matters that only affect the other.

More generally we are concerned that end users, who are significant stakeholders, do not have a vote. Although they have an opportunity to influence code changes, there is no obligation on the promoter of a code change, or those who will vote on it, to give weight to their concerns. This is of specific concern when viewed against the GPS objective of minimising barriers to access to essential infrastructure to the long-term benefit of end users.

Gas Act objectives

We agree with emsTradepoint's concern that the APCR proposal does not include any requirement to assess proposed changes against Gas Act objectives (except in the case of a dispute where the new s23.5 requires the Expert to have regard to those objectives). This could lead to positive changes being blocked, as emsTradepoint suggest, or incumbents raising entry barriers or otherwise eroding competition.

While Gas Industry Co would be free to provide an assessment of proposed changes against the Gas Act objectives during the development process and signal when such changes appeared to be inconsistent with the Act's objectives, its views may not influence the final outcome. And, although Gas Industry Co will retain its co-regulatory powers to recommend alternative governance arrangements to the Minister if we believe the Act's objectives are not being met, the hurdle for such changes can be high.

Overall

We consider that the ambiguity about who can vote is a significant flaw in the APCR. However, a matter of more significance to Gas Industry Co is the voting regime concept itself.

Generalising from the specific points discussed above, we consider that such a voting regime:

- may raise equity concerns because:
 - MPOC changes will be proposed that affect some users more than others, so equal voting rights may be inappropriate; and
 - End users, who are significant stakeholders, will have no vote.
- may raise Gas Act concerns because:
 - in supporting or not supporting a proposed MPOC change, voters may not consider the Gas Act objectives to the extent that Gas Industry Co would;
 - existing users will have more influence over code changes, and may promote changes that protect their interests, adversely affecting competitive market arrangements, and raising barriers to competition including new entry. This would not be to the long-term benefit of end users; and
 - the hurdle is high for Gas Industry Co using regulatory options to unravel code changes that are adverse to the Gas Act objectives.

At this point we share MDL's concern about how the APCR may alter how the MPOC evolves, and do not think that either the APCR application or submissions in support address these concerns or fully explain why the introduction of a voting regime is justified. It may be that the APCR partly reflects dissatisfaction with the level of stakeholder engagement in developing the recent MDL market-based balancing change request (MBBCR). Advocates of the APCR may believe that, had it been in place, MDL would have explored alternatives to MBB more pro-actively, because it would have realised that the MBBCR would not have received the necessary majority vote. If these were relevant considerations it would have been helpful for the APCR application and/or submissions to address them.

4.4 Disputes related to code changes

The APCR application states that:

Disagreements on the outcome of an amendment request will be dealt with under the Disputes section of the Code, section 23 as are normal in contractual disagreements that cannot be resolved by negotiations. Section 23.3 of the current Disputes section allows for the use of an independent Expert Advisor to resolve disputes and it is our view that the Expert Advisor will undertake a role similar to that current[ly] played by the GIC.

The new s23.4(a)(vi) provides that disputes on “matters arising in relation to the changes to the Operating Code as specified in section 29” will be determined by an Expert. And the new s23.5 provides that the Expert³:

“...is assigned the role of determining the outcome of a dispute associated with a proposed amendment to the Operating Code. The Expert Advisor will evaluate such a dispute having regard to the objectives of Section 43ZN of the Gas Act 1992 and other relative [relevant?] considerations.”

What submitters say

MDL submits that:

- It is not clear if the dispute process is available for process disputes, substance disputes, or both.
- Disputes will be with MDL rather than the party promoting the change request.
- Experts are ordinarily tasked with resolving the meaning of a contract, but the APCR proposes the Expert evaluate disputes having regard to the Gas Act objectives. The Expert will effectively create a new contract, which is improper and legally unsound.
- It is not clear whether the code in operation during a dispute would be the pre-amendment version or the amended version.
- The new s23.7 proposes that an Expert’s decision may amend the MPOC, but Section 29 does not provide for the MPOC to be amended in that way.
- The new s29.11 requires the proposer of a code change, among other things, to include in any Final Change Request “...a response to any substantive specific objections raised...” in submissions on the Change Request Notification. This opens opportunities for dispute.

Gas Industry Co view

We agree with MDL that the APCR does not limit disputes to matters of process or to matters of substance. In the absence of any restriction, we assume that the APCR intends that any aspect

³ This is drafted as “Expert Advisor” rather than “Expert” but, as MDL points out, this must be a drafting error since only “Expert” is a defined term.

of a change request or the change request process is open to dispute.⁴ However, this could be usefully clarified in the drafting, and could be considered a “minor and technical” change.

We also agree that, as currently drafted, disputes can only be between MDL and another Party, and not between two non-MDL parties (since they have no contractual relationship). In our view this would effectively limit disputes on substance to instances where MDL is either the party who initiated the proposed change, or the party who raises the dispute. This does seem to create two standards: any Party can object to any aspect of a change request MDL has initiated, but only MDL can object to some aspect of a change request that another party has initiated.

We are not convinced that MDL’s concerns about the Expert having regard to Gas Act objectives are justified. However, we do agree with MDL’s underlying concern that normally an expert decision only affects the two parties in dispute, but in this case it would potentially affect all other parties subject to the terms of the MPOC (who, as discussed above, may not be able to dispute the change).

Since the APCR does not specify whether the pre-amendment version or the amended version of the MPOC applies during a dispute, we assume that a dispute should not prevent MDL from implementing a Final Change Request that has received sufficient votes. We agree with MDL that it would be disruptive if the dispute was subsequently upheld, requiring the changes to be reversed.

We agree that s29 should provide that the code can be changed as a result of an Expert ruling (to be compatible with the new 23.7). This should be a “minor and technical” matter.

We agree that requiring the proposer of a change request to include a response to substantive objections increases the scope for dispute (but only where one party to the dispute is MDL, as noted earlier).

We also believe that the introduction of a “good faith” standard to each Party participating in the code change process (new s29.2), and as one of the matters on which MDL may, if it believes the standard has been breached, withhold consent to a change request (new s29.14), could be problematic. The APCR application notes (in relation to the new s29.2) that “This is intended to promote a collaborative process for change requests which should enable consensus between the Parties and MDL.” And (in relation to the new s29.14) “This is to avoid the anomaly of MDL having to consent to a change and then raise a dispute against a change it has consented to, if it believes a Code signatory has not acted in good faith. It ensures that all Code signatories have the ability to dispute on the grounds of lack of good faith.” However, MDL observes that the term is not defined, and would be very difficult to define.⁵

⁴ The fact that the new s23.5 requires the Expert to evaluate disputes about proposed amendments “... having regard to the objectives of Section 43ZN of the Gas Act 1992...” lends weight to the interpretation that both process and substance disputes are possible, since the Gas Act objectives would appear to have little relevance to process disputes.

⁵ One of the principles developed by the GITAWG (see Appendix C) was that “Good faith participation means engaging on the change request, for example not issuing a second change request at the same time dealing with the same underlying issues.”, but “good faith” was not defined in the final VTC amendment.

We consider that the intention of introducing the good faith obligation is clear – essentially to mandate good behaviour. However, while we would expect a good faith obligation to imply that the parties behave openly and honestly, it may in practice be a difficult standard to apply, and would likely result in costly disputes. Also, we would not expect a good faith obligation to require altruistic behaviour, or to favour efficient outcomes such as those sought by the Gas Act objectives, so it would be no remedy for our concern (discussed in section 4.3) that incumbents could guide the MPOC in a directions that did not favour competition.

In all, we consider that the purpose and application of the disputes provision is vague and unsatisfactory, and therefore assess that the potential for disputes would be significantly increased, detracting from the objective of ensuring efficient and reliable gas delivery.

4.5 Alignment of Codes

The APCR does bring significant alignment of the code change processes.

What submitters say

Genesis and Vector both view the proposal as a positive step towards convergence.

MDL notes that:

As MRP points out, the PEA recommended code convergence and improved governance arrangements. It did not, however, envisage the removal of GIC from its role as the final decision maker (MDL and its veto powers apart) under the MPOC change process. Indeed, the PEA took the opposite view. In its Second Advice Report, at page 5, the PEA described GIC's role as final decision maker as an "important feature" of the Code governance arrangements.

Gas Industry Co view

We consider alignment of code governance arrangements as desirable and achievable. However, that is only one consideration in the context of our assessment of the APCR, while convergence is part of a broader and longer-frame process under Gas Industry Co's Gas Transmission Investment Programme.

We assessed the recently adopted VTC code amendment process as an improvement in the operation of the VTC. However, it does not follow that we believe the VTC code amendment process is ideal, or better than the MPOC arrangements. And, as is evident at several points in this analysis of the APCR, there are significant differences between the MPOC and VTC.

Broadly, the main differences between the per-1 April 2015 VTC and the MPOC were that:

- the VTC already had a voting regime in place whereas the MPOC does not (Voting has never been a feature of the MPOC and, until now, there has been no suggestion that it was needed.); and
- under the VTC, the Gas Act objectives were only expressly considered when a change request was appealed and referred to Gas Industry Co. Since very few change requests were

appealed, the influence of the Gas Act objectives on the VTC was therefore significantly less than on the MPOC, where every change request is considered by Gas Industry Co.⁶

We do not think that the PEA's views have been fully represented in the APCR application or in submissions. We are not aware that the PEA expressed an opinion about the best code change arrangements, only that there was scope to converge the governance arrangements, and various alternative ways of achieving convergence. For completeness we include the full text from Section 6 (Guiding principles for moving forward) of the PEA's Second Advice Paper relating to a common code development process:

6.4.1 Code development process

Evolving toward a common code development process for access and capacity pricing issues could occur in a number of different ways. These include:

- A distinct process could be used for determining common rules for these matters, with MPOC and VTC referencing to the rules produced under this process. This approach is already used to some extent at present within the codes. For example, both codes provide that suppliers will only inject, and pipeline owners will only accept, gas that meets specifications developed under a process managed by Standards New Zealand. This broad approach could be applied to matters such as the processes to be used for the ex ante allocation of capacity rights. A further point to note with this option is that it could be applied progressively, starting with an initial set of matters and widening the coverage over time. In conceptual terms, this would be equivalent to enlarging the intersection area shown in Figure 3. This may be attractive in reducing risks, and building confidence regarding common governance processes.
- The governance framework applying to one of the pipelines could be adopted as the 'host' for defining access and capacity pricing arrangements, and the other pipeline could agree to automatically adopt the provisions of the 'host' pipeline in respect of these matters. While this approach could be relatively simple to implement in some respects, it is hard to see why the 'follower' pipeline would wish to adopt that role. Accordingly, this option is not regarded as being especially workable.
- The code development processes within the MPOC and VTC could be conformed to a common approach in respect of pipeline capacity access and pricing matters (or more broadly). At first sight this might seem to be difficult, but there is already a high degree of commonality between the code development processes for the two pipeline systems (as shown in Table 3). In particular, both codes allow for any contracted party to propose a change, make GIC the ultimate decision maker (if there is disagreement) and provide limited veto rights for the pipeline owner (such as being required to incur costs which cannot be recovered). There is also much commonality in the IT system used now and that will be required in the future. This system is critically important for giving effect to code changes.

It may be possible to efficiently progress some operational convergence issues via existing code change provisions within the MPOC and VTC. However, the establishment of common code development processes for capacity access and pricing issues should

⁶ These differences point up the benefit that could emerge from developing a coherent vision for converged access arrangements, unbound from the limitations of individual, iterative code change processes. This was a theme in Gas Industry Co's May 2015 paper: Transmission Access; Options for Improvement, Paper #2.

be a priority matter, as this would facilitate overall progress and help to ensure that change processes are disciplined and coordinated.

5

Assessment

Our understanding is that supporters believe the main benefits of the APCR are that it would:

- make the code amendment process more inclusive and collaborative;
- allow Gas Industry Co to become involved in the design and development of code changes;
- allow code change proposals to evolve during the consultation process; and
- converge the MPOC and VTC governance arrangements, consistent with the PEA's recommendation.

Those opposed to the APCR believe the main dis-benefits are that it would:

- radically alter a government-approved process;
- provide no assessment against the objectives of the Gas Act or GPS;
- allow Parties to block, indefinitely stall, or not address controversial/necessary improvements;
- permit a voting block to introduce changes that favour its members but reduces overall industry efficiency;
- increase disputes;
- be against the PEA's wish to retain Gas Industry Co as final decision maker under the codes; and
- be unworkable in respect of resolving disputes.

These matters have all been discussed in Chapters 3 and 4. Here we draw together our views on the benefits and dis-benefits of the APCR. We note the relevant Gas Act and GPS objectives, and come to an overall assessment of the APCR.

5.1 Overall assessment

Drawing together the analysis of the previous chapter, we believe that the proposal has clear benefits and dis-benefits.

The main benefits are:

- **Requiring early engagement on code changes:** so improving the quality of the Final Change Request, and thereby contributing to the objective of ensuring efficient and reliable gas delivery.

- **Enabling Gas Industry Co to participate in the design of code changes:** so bringing a co-regulatory perspective, and thereby contributing to the objectives of minimising the barriers to competition and enabling participants and new entrants to access transmission pipelines on reasonable terms and conditions.
- **Alignment of the codes:** thereby enhancing efficiency by reducing costs.

The main dis-benefits are:

- **Poor definition of the voting arrangement:** by increasing uncertainty about who is entitled to vote, and thereby weighing against the objective of ensuring efficient and reliable gas delivery.
- **Potential for inequitable voting outcomes:** by giving each Party an equal vote regardless of the degree to which they would be affected by a proposed change, and not providing representation for non-Party stakeholders, thereby raising concerns that changes may not be to the long-term benefit of end users.
- **Potential for inefficient voting outcomes:** by giving incumbents greater influence on determining the future direction of code changes, and thereby raising concerns that the Gas Act objectives may not be adequately considered, particularly with regard to barriers to entry and competition.
- **Increasing the scope for disputes:** by moving from a regime where decisions cannot be disputed to one where they can, and introducing new terms that are poorly defined (“related companies” and “good faith”), thereby potentially increasing costs.

We consider the dis-benefits of the APCR clearly outweigh the benefits and conclude that the proposal overall does not advance the objectives of the Act.

6

Draft recommendation

On the basis of our analysis we do not believe that implementation of the APCR would overall promote the relevant objectives in Part 4A of the Gas Act 1992 and GPS (set out in Chapter 2) relative to the status quo. We reach this preliminary conclusion after appropriate consultation on the APCR, as required by MPOC s29.4, and carefully considering submissions. Our Draft Recommendation, considered and supported by Gas Industry Co's Independent Directors Committee, is therefore not to support the APCR.

Gas Industry Co's contractual role under the MPOC is limited to making a recommendation to supporting a change request (or not). It does not provide for conditional support. This Draft Recommendation should be read with this in mind.

7

Next steps

Gas Industry Co now wishes to test its analysis before making a final assessment of the proposal. The next steps are outlined in Table 2 below.

Table 2 **Next steps**

Item	Target Date
Publication of Draft Recommendation	Wednesday, 12 August 2015
Submissions due	Wednesday, 9 September 2015
Final Recommendation (target date - subject to any extra steps arising from submissions received)	Tuesday, 6 October 2015

In section 1.6 we identified some matters we would be particularly interested in receiving further submissions on.

Appendix A Summary of submissions on APCR

This brief summary identifies the salient points of industry submissions to provide context. However, it does not purport to cover all points made, or to represent any submission in a particular way, or to be the authoritative reference point on all submissions. All submissions are available for full reference at www.gasindustry.co.nz. The summary also does not capture all of the matters that Gas Industry Co has taken into account in its determination.

Submitter	Submission
emsTradePoint	<p>emsTradePoint is “reasonably ambivalent” on the APCR.</p> <p>Possible concerns could be that:</p> <ul style="list-style-type: none"> ○ The diversity of Maui pipeline users (Shippers and Welded Parties) make a voting deadlock more likely than under the VTC ○ The APCR does not allow for an assessment of the costs and benefits of a proposed code change ○ Counting parties who didn’t vote as a “yes” vote is not good practice, there should be a right to “abstain” ○ It appears votes would be public, a secret ballot is preferable.
Genesis	<p>Genesis supports the APCR.</p> <p>The proposed change will:</p> <ul style="list-style-type: none"> ○ align VTC and MPOC code change processes ○ promote an inclusive and collaborative approach to changes ○ enable GIC to provide input at the code change design stage.
Greymouth	<p>Greymouth supports the APCR.</p>
MDL	<p>MDL does not support the APCR.</p> <p>The current requirement that all changes be supported by an independent regulator, on the industry’s and the Government’s behalf, was well considered after a lengthy process.</p> <p>The MPOC is a set of standard terms incorporated by reference, it is not a multilateral contract (as the APCR incorrectly states).</p>

Submitter	Submission
	<p>The PEA described GIC’s role as final decision maker as an “important feature” of the code governance arrangements.</p> <p>There are a range of technical/drafting problems, including:</p> <ul style="list-style-type: none"> ○ whether application of the dispute resolution process to code change disputes is workable ○ whether the dispute resolution process would cover process disputes, substance disputes, or both ○ the voting arrangements ○ the meaning of “good faith”. <p>The current amendment process is not exclusive, as the APCR suggests.</p> <p>The claim in the APCR, that the amendment would not affect the rights and obligation of the parties to ICAs or TSAs, is false.</p>
Nova	<p>Nova considers GIC cannot support the APCR.</p> <p>The good points of the APCR are that:</p> <ul style="list-style-type: none"> ○ it enables code change to be developed in a collaborative, industry wide process, allowing incremental improvements during the process ○ GIC can provide its views as co-regulator and contribute to industry discussion through the process ○ it may lead to better solutions for significant changes. <p>Concerns related to the APCR are that:</p> <ul style="list-style-type: none"> ○ there is no clear definition on who is entitled to vote ○ the voting mechanism prioritises Shipper views rather than allowing for an even weighting across the gas supply chain ○ the interests of voting parties may not be as well-aligned as under the VTC <p>GIC needs to be absolutely confident that the APCR would not adversely affect the ownership or operation of the Maui pipeline.</p>
OMV	<p>OMV does not support the APCR.</p> <p>The APCR runs counter to Government policy and the advice of the PEA.</p>

Submitter	Submission
	<p>The MPOC is not a multi-lateral contract but better viewed as a “quasi-regulatory” framework incorporated into bi-lateral contracts.</p> <p>The APCR will not support Government’s stated intention that “the open access arrangements need to provide non-discriminatory access to all potential users and not be biased towards those with an existing contractual interest in the Maui pipeline”.</p> <p>The APCR would allow incumbent users to make changes with no obligation to observe Government objectives, including that “barriers to competition are minimised”.</p> <p>The PEA’s stated wish was that “both codes allow any contracted party to propose changes and make the GIC the final decision maker (subject to the requirements of the Gas Act, and limited rights of veto by the respective pipeline owner)”.</p>
Trustpower	<p>Trustpower supports the APCR.</p> <p>The proposed change will allow:</p> <ul style="list-style-type: none"> ○ GIC to determine its level of involvement in a code change ○ a wider range of views to be expressed ○ GIC to act as a co-regulator without the burdens of restrictions limiting its powers
Vector	<p>Vector supports the APCR.</p> <p>The proposed change will:</p> <ul style="list-style-type: none"> ○ mirror the VTC change process ○ enable real consultation and collaboration with other code signatories and allow input from interested parties ○ be consistent with ‘evolutionary convergence’ and will allow for streamlined joint code changes

Appendix B Changes to the VTC amendment process introduced on 1 April 2015

VTC code change arrangements

Parties to the VTC developed a somewhat different code change process to the one in the MPOC. Whereas all proposed MPOC changes are considered by Gas Industry Co, the original VTC code change arrangement was that changes could occur without any GIC involvement if 75% of shippers agreed to the change. However, GIC was assigned a role as appeals body under the VTC, considering any appeal against a proposed change that had, or had not, been adopted.

Gas Industry Co's original appellate role was set out in a Memorandum of Understanding (VTC MoU) between it and Vector, dated October 2008. The VTC MoU provided that, in performing its role, "Gas Industry Co shall have regard to the objectives specified in section 43ZN of the Gas Act". This provided alignment between our code change role and our other work in considering gas governance arrangements as the industry body under Part 4A of the Act.

GITAWG Review Process

In section 1.2 of this Draft Recommendation, we described how the GITAWG was formed to address problems identified by the PEA and, together with other reforms, considered how the VTC and MPOC code change processes could be improved and aligned.

Initially the GITAWG considered the VTC code change process. Early design work anticipated the inclusion of an appeal stage, like the then current arrangements. But, rather than Gas Industry Co considering the appeal, it would contract an independent body to do so. The GITAWG Quarterly Report to 30 June 2014 noted that the VTC signatories had agreed most of the code change principles but were still discussing items such as an appeal assessment framework, deadlock breaker and the definition of good faith. Appendix A to the paper set out the "Principles of the Proposed Change Request Process and MOU". The MOU would be between Vector, all Shippers and Gas Industry Co.

The 30 September 2014 Quarterly Report noted that the GITAWG had been discussing the "single issue" change request, which has been a source of disagreement for some time. The main concerns were that (a) contentious changes could be introduced by bundling them with other changes, and (b) parties did not feel that they had a real opportunity to voice their opinions on contentious issues.

The group decided the way to address these issues was through a 'collaborative approach' which '... recognises that the VTC is a commercial agreement and that the ideal amendment process is to achieve consensus between the parties... [and] allow other interested industry participants the opportunity to contribute to the consultation process.'

Another issue was that ‘...the VTC change request process excludes the GIC from the earlier stages of a change request because of their role in hearing change request appeals.’ The group believed that ‘... input from the GIC would be of more use during a consultative process, before the concept and drafting of a change has been finalised.

The group noted that the design options it was considering included:

- consultation with all stakeholders, including GIC (potentially through a formal report), with no appeal process (disputed changes would go through the standard dispute resolution procedure instead).
- consultation with all stakeholders, including GIC, with appeals heard by a body other than the GIC.
- consultation with stakeholders apart from the GIC, with appeals continuing to be heard by the GIC. A possible exception could be included for the GIC to contract out its appellate role for changes where it wants to participate in the consultation stage.

It was the first of these options that the group settled on. Its Quarterly Report to 31 December 2014 noted that it sought and received comments on its proposed new change request process from Gas Industry Co. It observed that:

The new change request process is very different from the existing process. Currently, there is no requirement for a party submitting a change request to consult on that change with anyone, including other parties to the VTC. A change is incorporated into the VTC if it receives the support of Vector and 75% of Shippers. A party unhappy with the outcome can appeal to the GIC, which (because of its role as adjudicator in the appeals process) is restricted from participating in the VTC change request process at any stage other than appeals, and cannot suggest any alternatives to the change request being appealed.

The Group believes that industry changes, including changes to the VTC, are better made through consultation, collaboration and consensus. In particular, we think that the lack of formal consultation between parties to the VTC, and the inability of the GIC to provide input at an early stage of developing a change request, tends to lead to disagreement and dysfunction around VTC changes. We believe that GIC involvement during the substantive stage of developing and drafting a change request will promote changes that are more co-ordinated with its vision for the Gas industry, and fulfil the objectives of the Gas Act.

The proposed new process includes:

- A formal consultation, with early notification of proposed changes and the ability for all parties to the VTC, as well as any other interested party including the GIC, to comment on both the substance and drafting of the change.
- Proposed changes, and all submissions on them, will be publicly available on either OATIS or the GIC’s website.
- Largely unchanged voting requirements for the adoption of a change request—75% of Shippers’ consent is required. Only parties to the VTC may vote.
- A requirement to participate in the process in good faith – and a failure to participate resulting in loss of voting rights.

- No appeals process. Disputes can be dealt with through the standard dispute resolution procedures.
- Prescribed timeframes designed to promote swift resolution of change requests. Where additional time is needed, there are allowances to extend the timeframes. Equally, where a change is seen as straight-forward and uncontentious, the parties to the VTC can agree to abbreviate the timeframes.

The GITAWG's Quarterly Report to 31 March 2015 reported that this new change request process had received the necessary support from Vector and its Shippers and would take effect as of 1 April 2015. A comparison of the original and re-designed arrangements is provided in Table 3.

Table 3 Re-design of VTC code change process

	Original arrangements	Re-designed arrangements
Process	<ul style="list-style-type: none"> • Change Request • Further information if requested by parties • Vote (75% threshold) • Possible Appeal • GIC Draft Recommendation • Consultation with stakeholders • GIC Final Recommendation 	<ul style="list-style-type: none"> • Change Request Notification • Input from stakeholders • Draft Change Request • Further input from stakeholders • Final Change Request <p>Vote (75% threshold)</p>
Who can propose change?	Any party to VTC	Any party to VTC
Stakeholder input?	Only on appeal	Yes, from design stage
Opportunity for GIC to influence change?	No Must support or not support proposal	Yes Can propose changes and alternatives
Assessment against Gas Act objectives?	Only on appeal ...but GIC's decision is binding	Only when GIC makes a submission on a Change Request Notification or Draft Change Request ... but GIC's analysis may not be acted on

Gas Industry Co views of changes to the VTC code change arrangements

The GITAWG asked Gas Industry Co view on the proposed change before it was voted in. Compared to the original VTC code change arrangements, we found the re-design to be⁷:

- **more consistent with the concept of co-regulation**
Co-regulation invites industry participants to work with the regulator to achieve

⁷ Related correspondence can be found here: <http://gasindustry.co.nz/work-programmes/vtc-change-requests-april-2015/change/>

Government's policy objectives. The original VTC appeal role only involved Gas Industry Co at the appeal stage, providing it had not been otherwise involved in the change process. In contrast, the re-designed arrangements allow Gas Industry Co to be involved at the design stage, before changes are developed into a formal change request. It also frees GIC to determine the extent of its involvement – for matters that are central to the Gas Act objectives this may be intense, and for matters that have little bearing on those objectives it can be minimal.

- **more transparent**

Because VTC changes were originally a matter between parties to the VTC, there was a perception of changes being discussed and decided behind closed doors, hidden from other stakeholders. The re-designed process provides for all VTC change proposals to be published for all stakeholders to consider.

- **more inclusive**

Rather than one shipper developing a change request in isolation, the re-designed process requires engagement with shippers before the proposal is formally framed in a change request. Also, although proposed changes are still voted on only by parties to the VTC, the re-design allows ample opportunity for any stakeholder (including GIC) to become involved. It also encourages early involvement rather than only at the appeal stage.

- **more likely to lead to collaborative solutions**

Since the re-design does not involve an appeals process, proponents of unpopular changes will need to canvas support by seeking collaborative solutions rather than hoping for a favourable GIC decision at the appeal stage.

- **more likely to lead to better solutions**

Since the re-design would allow all stakeholders to be involved at the design stage it can be expected that a wider range of options will be considered and that there will be more opportunity to evolve a proposal and iron out difficulties before it crystallises into a change request.

We recognised that the new arrangement would not give parties an opportunity to appeal to Gas Industry Co. However, 90% of VTC changes under the original arrangement had proceeded without Gas Industry Co being notified of them, so we assessed the loss of the appeal right as less than the advantages the re-design would bring. Also, if changes do go against the Gas Act objectives, Gas Industry Co has the power to recommend regulation where necessary.

VTC changes since the new code change process was introduced

Only one change to the VTC has since been proposed. On 1 May 2015 Vector issued a 'Change Request Notification' (CRN) under the new VTC amendment process, and invited submissions. The CRN comprised information on a new product for managing congestion on Vector transmission pipelines, also developed by the GITAWG.

Following consideration of submissions on the CRN, the next step of the new VTC amendment process is the issuing of a Draft Change Request. As with the CRN, Gas Industry Co or any other stakeholders may make a submission on a VTC Draft Change Request. Submissions on

this second round of consultation closed on 29 June and on 1 July Vector notified stakeholders. on behalf of the GITAWG, that

...the submissions received suggest there is some misunderstanding of the proposal within the wider industry. The GIC's submission indicates that responses provided to the substantive issues set out in their initial submission did not adequately address their concerns.

Vector and its Shippers want to ensure that any proposal adopted into the VTC is properly framed and well-communicated to the wider industry. To that end, they want to take more time to further engage with the GIC on the issues it has raised.

For the reasons set out above, Vector proposes to withdraw this change request by not issuing a final change request for voting within the prescribed time period.

Vector and its Shippers will seek to meet with the GIC in the near future to discuss the next steps on progressing these arrangements.

Appendix C GITAWG's Principles of the Proposed Change Request Process and MOU

The following is an extract is Appendix A of the GITAWG Quarterly Report to 30 June 2014.

Change Request Process: Principles

Goal

To provide a process for making changes to the VTC which:

- is clear and timely,
- encourages participation by all parties and
- is flexible enough to allow drafting changes (i.e. as the result of consultation) without the need to recommence the process.

Types of changes

- Changes required by law (including subordinate legislation) or court order - these will be effective when the change in law/court order is effective, but within 6 months Vector is to commence Change Request process to make any necessary changes to the VTC.
- Changes to any part(s) of the VTC initiated by Vector or a Shipper(s)

Consultation/Negotiation

The process should include a period for timely and meaningful consultation and/or negotiation, comprising:

- Clear timeframes for notification of change requests and responses (proposed timeline set out below)
- Clear obligations on all parties to *participate in good faith* and respond providing reasons for support or non-support and any conditions to support.

Good faith participation means engaging on the change request, for example not issuing a second change request at the same time dealing with the same underlying issues.

- Default of deemed support for any parties who do not participate in good faith.
- Initial format of change request for consultation to set out changes in principle rather than formal drafting, to encourage discussion and negotiation. This would be a matter of choice for the submitter as some straightforward changes may be appropriate to be submitted in formal draft in the first instance.

- Allowance for drafting changes during the process to reflect consultation without having to start the change request process again as long as a final draft to be voted on is provided ahead of the request to vote. Change request can be withdrawn at any time.
- Publication on OATIS (or otherwise made public) so end-users can consult with their shipper on any submissions the shipper makes.

Voting Rights

- Shipper(s) together with their related companies have one vote each (even if they hold more than one TSA).
- Anyone who does not vote in the timeframe will be deemed to support the change request
- Vector has one vote and may only withhold support for a change request as set out below

Reasons for Vector withholding support for a change request

Vector may only withhold support for a change request where:

- it is *reasonable* to do so, which will include but not be limited to, a change request:
 - that would require Vector to incur capex, or unrecoverable opex/costs
 - that would be likely to adversely affect the structure of Vector's transmission services, business structure or the structure or size of Vector's transmission revenue
 - that would be likely to adversely affect the compatibility with Maui pipeline regime

Whether Vector has reasonably withheld support can be appealed by any Shipper. This is an objective test as to whether or not Vector has reasonable grounds to withhold support. Further detail below.
- Vector considers there has been an "abuse of process" - this is a mechanism to ensure people don't undermine the process. It could also be described as a failure to participate in good faith. This is included here to mirror the right for Shippers to appeal on the basis of abuse of process.

Whether there has been an abuse of process (or failure to participate in good faith) can be appealed by any shipper. This is an objective test as to whether or not there has been an abuse of process.

Publication of vote and passing of change request

- Vector is to publish the results of the vote. A Change Request is passed unless:
 - Vector does not support the Change Request; or
 - 2 or more shippers [transporting gas] do not support the Change Request.

Requirement to be transporting gas is to prevent holdouts, but this needs to be discussed further so it is future-proofed and not unduly restrictive. This approach effectively creates two categories of shippers for the purposes of voting on proposed change requests—shippers that are transporting gas, and other shippers.

- A change request which has been passed will be effective on the date specified. A change request which has not been passed will not be effective unless successfully appealed

Appeals

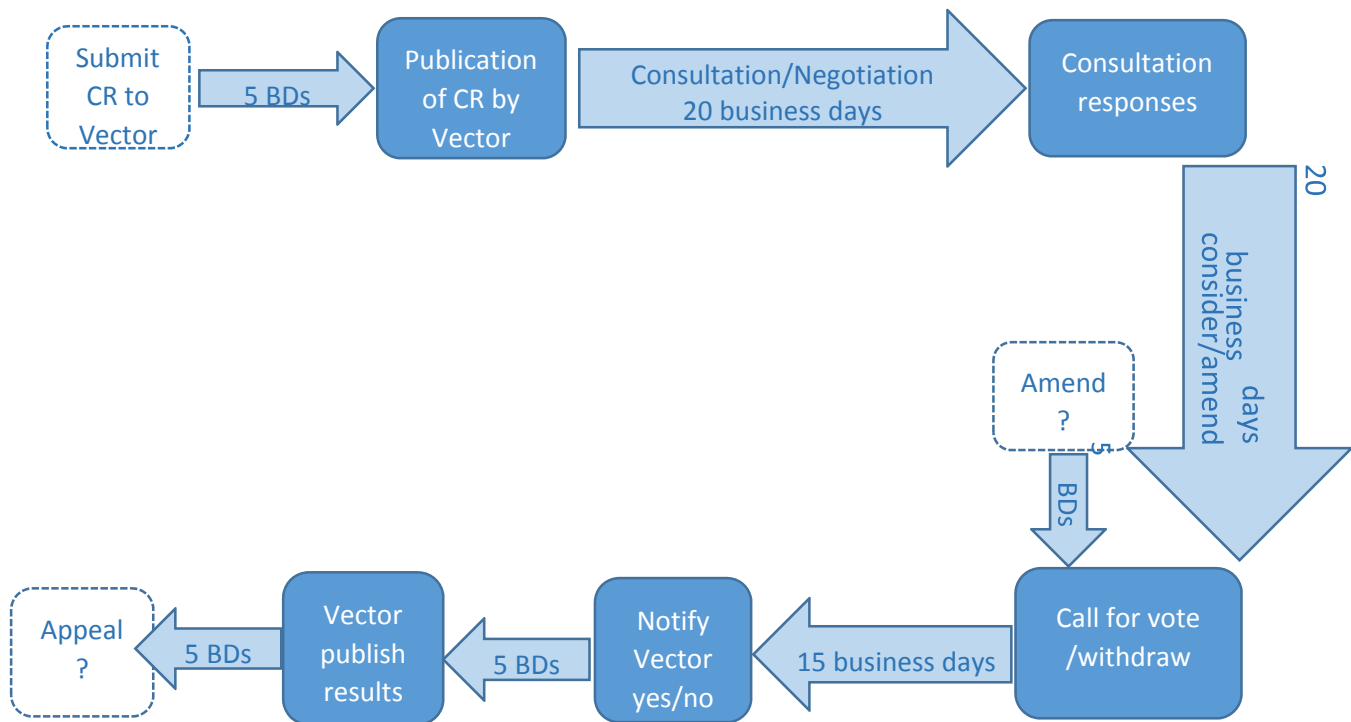
- Appeals are to be made to the GIC and either determined by GIC or an independent body contracted by the GIC (having regard to the MOU)
- Anyone who participated in the consultation and voted on the change request can appeal it – either for not being passed when it should have, or for being passed when it shouldn't have.
- Grounds for appeal are:
 - Vector unreasonably withheld support
 - There has not been an abuse of process (if Vector withheld support for this reason) or there has been an abuse of process (if the change request is passed)
 - Timeframes were incorrectly applied to any persons response or vote
- *GIC can refuse to consider/refer an appeal on the grounds it is not in good faith.*
- Only parties who participated in the change request process can make a submission on appeal.
- Parties to provide any additional information requested by the appeals body (with confidentiality covered in the MOU)
- Appeals body must decide on the whole change request appealed (not partially).
- Decision is final.

Notifications

Clarify what it means to publish and notify in the “notices” section.

Timeline

The suggested timeline for consultation and voting is as follows:



MOU: Principles

Parties

Vector, all Shippers and GIC. New shippers automatically become a party by holding a TSA and Shippers that cease to hold TSA cease to be a party. *The TSA template in VTC will need to be amended to cover this.*

Purpose

Appeals will continue to be determined with reference to GPS and Gas Act principles.

Effect

- The MOU is not binding, but GIC will follow it unless it has first consulted with Vector and Shippers.
- MOU is to be a living document and any party may propose a change to the MOU.
- Process for changes to follow that for VTC changes except:
 - Vector has same voting rights as Shippers
 - GIC consent is required to the change
 - No appeals?

Costs

- GIC to meet all costs (including any independent body it appoints).
- GIC can require any appellant to pay some or all of the costs it incurs or expects to incur and is not required to proceed until the appellant(s) has agreed.
- Any appellant(s) may seek a contribution to those costs from other parties (but appellant ultimately liable to GIC).

Independent Body

- GIC will contract an independent body to consider valid appeals
- Independent Body to be selected by GIC from a panel of independent experts nominated by GIC from time to time and accepted by a simple majority of Vector and Shippers.

Appeals Process

- Appeals to comply with process set out in Change Request process (e.g. as to grounds of appeal)
- Appellant to set out full arguments and all supporting information in its appeal.
- GIC to advise all parties of receipt within [1 business day] and within [15 BDs] notify if GIC or independent body (naming who) will consider the appeal (or if it is rejected for being not in good faith) and any additional information required.
- Within [20 BDs], parties to provide submissions and any additional information requested.
- Independent body can engage further with any parties it considers necessary and set such timeframes as it considers reasonable for return of information.
- Independent body to issue decision within [30 BDs] of receiving all information requested.
- The appeal must be allowed or declined in full and change request cannot be amended at appeal stage.
- Decision to be final, with no drafts/consultation
- More detail on the assessment framework for appeals will be developed (for example, whether a change is expected to be cost-benefit justified and/or materially better than the status quo).

Confidentiality

- Parties to identify any confidential information provided.
- GIC/independent body to keep information confidential unless:
 - The information is material to the decision – if this is the case GIC/independent body will liaise with the party to determine extent of disclosure, provided sufficient disclosure must be made to support the decision. Details on the protection of confidential and commercially sensitive information are being considered further.
 - Other usual exceptions for law, public knowledge and consent

Appendix D Independent assessment by Sir John Hansen

4 August 2015

Steve Bielby
CEO
Gas Industry Company Limited
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Re Mighty River Power Maui Pipeline Operating Code Change Request

On 24 April this year, Mighty River Power (MRP) wrote to Gas Industry Company Limited (GIC) requesting they consider and make recommendations on proposed changes to the Maui Pipeline Operating Code (MPOC). The purpose of the requested changes related to the process for making amendments to the MPOC.

GIC were concerned that because of their role in MPOC changes, there could be a conflict of interest arising. It is to be noted that none of the submitting parties suggested any such conflict. I was approached by GIC to provide my independent assessment as to whether any conflict of interest on the part of GIC arose within the draft recommendation. I agreed to carry this out, pursuant to a Terms of Reference.

This seems to me a prudent step for GIC to take, noting however no submissions have suggested grounds for actual conflict. I am quite satisfied there are likely no grounds for finding an actual or a perceived conflict. Indeed, I see nothing untoward in the analysis and conclusion that GIC keep its existing role in terms of creating a conflict.

GIC has a memorandum of understanding (MOU) with Maui Development Limited (MDL). That would be sufficient to fulfil my purpose but I think it appropriate to make some comment on the draft proposal. In this case it is apparent that GIC has followed the usual process under the MOU and the MPOC, apart from this independent review. Submissions were received that informed the draft recommendation, and there will be further opportunity for submissions on the draft recommendation once it is circulated. It is for GICs independent directors committee to approve both the draft and final recommendations. Clearly, this provides a further layer of independence.

In this case GIC has given significant consideration to all of the considerations received, some in support of the change request and some against.

It appears from the draft decision MDL suggested that because the MPOC came through a careful Government-sponsored process where the code change processes themselves were discussed at length, that GIC should not change such important and careful original arrangements. If the submission actually went that far, it would suggest that change would almost be impossible. In any event, I agree with GIC's

comments that this does not prevent it from supporting the APCR. Having said that, clearly it is an important factor for GIC to place in the balancing scales.

Both the benefits and disbenefits of the change have been carefully analysed by GIC, and it appears to me the conclusion not to support the suggested change is based on two matters. The first, is with drafting problems around the APCR, noting that GIC cannot amend an APCR. The second, is the potential change in the balance of interest by introducing a voting system weighted in favour of the shipping interest. GIC has also considered a number of other factors, most notably the objectives in the Gas Act in determining there would be no improvement on the status quo. That is not to say, however, that the concerns expressed could not be considered by a different route.

GIC was alive that similar changes were made to the Vector Transmission Code (VTC) by an APCR relatively recently. This was done by the VTC parties in agreement with each other, which GIC provided support on. However, it is clear from the draft recommendations that there are significant and fundamental differences with the VTC and the MPOC that means similar changes would not be an improvement if implemented for the Maui pipeline.

It seems to me that GIC's opinion is robust and reasonable, and can be supported by the submissions and evidence received. Importantly, it takes into account the Gas Act and the GPS objectives.

Considering the draft recommendation overall, I see no concerns in relation to any conflict of interest on the part of GIC.

Yours sincerely



Sir John Hansen