



## COVERSHEET

<b>Minister</b>	Hon Megan Woods	<b>Portfolio</b>	Energy and Resources
<b>Title of Cabinet paper</b>	Options for Amending the Gas Act 1992 Release of Discussion Document	<b>Date to be published</b>	18 June 2019

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
1 May 2019	Options for Amending the Gas Act 1992 Release of Discussion Document	Office of the Minister for Energy and Resources
May 2019	Discussion Document Options for Amending the Gas Act 1992	Ministry of Business, Innovation and Employment
1 May 2019	DEV-19-MIN-0096 Minute	Cabinet Office

### Information redacted

**YES / NO** (please select)

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982.

## **IN CONFIDENCE**

Office of the Minister of Energy and Resources  
Chair, Cabinet Economic Development Committee

### **Release of Discussion Document: Options to amend the Gas Act 1992**

#### **Proposal**

1. This paper seeks agreement to the release of a public discussion document that seeks the views of the gas industry and other stakeholders on three issues relating to the Gas Act 1992 (the Act).
2. These issues relate to emerging challenges for the Act, improvements to information disclosure in the gas market, and potential changes to the Act to ensure that the penalties regime for the gas industry is fit-for-purpose.

#### **Executive Summary**

3. The Act regulates the use of any gas as a fuel in New Zealand, making it an important piece of legislation for enabling the uptake of alternative fuels in New Zealand (such as hydrogen). It sets out the co-regulatory arrangement for the gas industry where an approved industry body, the Gas Industry Company (GIC), co-regulates the industry alongside the government.
4. Under this arrangement, the GIC is responsible for overseeing the governance of the gas market, while matters such as gas safety remain with the Government. The GIC can only recommend governance arrangements for particular purposes, as set out in the Act. The GIC is required to consider non-regulatory interventions before making these recommendations so the empowering provisions in the Act provide a 'regulatory backstop' where necessary.
5. I am seeking Cabinet's agreement to release a public discussion document which canvases three issues:
  - 5.1. Potential regulatory issues posed by emerging technologies and alternative fuels (such as hydrogen) for the Act. Assuming there are no immediate issues with the Act, any views will inform a longer-term programme of work to determine how best to regulate these technologies and fuels.
  - 5.2. Potential new regulation-making powers under the Act to require the release of information that promotes transparency in the gas wholesale market, including information on planned and unplanned outages, market volumes and prices.
  - 5.3. Potential improvements to the penalties able to be applied in regulations that govern the gas industry, to ensure that there are strong incentives for

compliance, particularly for the management of acute situations where there are critical gas supply shortages.

6. I intend to release the discussion document in late April 2019 and will report back to Cabinet in July seeking final policy decisions for inclusion in an Amendment Bill.
7. Subject to the outcome of consultation, I intend for the issues around information disclosure and the penalties regime to be addressed through an Amendment Bill.
8. My officials have not identified any issues that would require immediate amendments to the Act<sup>1</sup> based on known hydrogen projects in development. Assuming no immediate amendments to the Act are needed to support emerging technology or alternative fuels, any feedback received through consultation will inform the Government's wider work around decarbonising our energy sector (particularly through the use of hydrogen) and transitioning to a low emissions economy by 2050.

## **Background**

### *The Gas Act 1992*

9. The Act regulates the use of any gas as a fuel in New Zealand. It provides for the regulation of the gas industry, and for the supply and use of gas. It also protects the health and safety of the public in connection with the supply of gas and prevents damage to property in connection to the supply and use of gas.
10. The Act sets out the Government's co-regulatory approach for governance of the industry, where an approved industry body co-regulates the industry alongside the Government. This body has been the Gas Industry Company (GIC) since December 2004.
11. Alongside the GIC's industry governance role, the Act provides WorkSafe New Zealand with roles and responsibilities associated with energy safety and work-related health and safety.
12. The Act is part of a much broader regulatory regime for the use of gas in New Zealand. Other relevant legislation includes the Health and Safety at Work Act 2015 and the Hazardous Substances and New Organisms Act 1996.

1 There will need to be further consideration of what changes will need to be made to the regulations under the Act. For example, the Gas Safety and Measurement Regulations will need to be updated to manage hydrogen safety. It is also likely that the gas governance regulations will need to be tweaked to clarify that they do not apply to hydrogen gas, except then it is blended with natural gas. Neither of these changes require changes to the Act itself.

## Co-Regulation of the Industry

13. The co-regulatory model is relatively unusual. The GIC must adhere to the Government's objectives for the Gas Industry as set out in the Act and the Gas Governance Policy Statement on Gas Governance 2008. The ultimate objective of which is:

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

14. The GIC has the ability to recommend gas governance arrangements to the Minister of Energy and Resources, which must align with the ultimate objective above. The GIC can only recommend governance arrangements for particular purposes, as set out in the Act and must first consider whether non-regulatory options will achieve similar aims to regulatory options. There is a process in the Act for this to occur, including consultation with a wide variety of stakeholders.
15. Gas Governance regulations are made via Order in Council, and gas governance rules are made by the Minister publishing a notice in the *New Zealand Gazette*. Several gas governance arrangements have been made under the co-regulatory model, such as regulations for the management of gas critical contingency events, customer switching, reconciliation, and for general compliance matters.

## Discussion Document

16. I seek Cabinet's agreement to the release of a discussion document titled *"Options to amend the Gas Act 1992"*. The issues covered in the document are largely technical in nature, with the primary audience being gas industry stakeholders. I do not anticipate significant interest from the wider public.
17. The discussion document seeks views from stakeholders in three areas:
  - 17.1 Potential regulatory issues posed by emerging technologies and alternative fuels (such as hydrogen) for the Act. Assuming there are no immediate issues with the Act, any feedback will inform a longer-term programme of work to determine how best to regulate these technologies and fuels.
  - 17.2. Potential new regulation-making powers under the Act to require the release of information that promotes transparency in the gas wholesale market, including information on planned and unplanned outages, market volumes and prices.
  - 17.3. Potential improvements to the penalties able to be applied in regulations that govern the gas industry, to ensure that there are strong incentives for compliance, particularly for the management of acute situations where there are critical gas supply shortages.
18. I intend to report back to Cabinet in July 2019 seeking agreement to final policy decisions. Further information around the issues being covered by the discussion document is set out below.

### *Emerging challenges for the Act*

19. The paper seeks the views of stakeholders on the challenges to the Act posed by emerging technologies and by alternative fuels. The Act was originally designed primarily to regulate the use of natural gas and LPG, but the definition of 'gas' under the Act is sufficiently broad that it would also cover the use of hydrogen if it were to be used as an alternative fuel.
20. Consultation questions in the discussion document seek to identify regulatory barriers to facilitate the emergence of such technologies and fuels. It will also help to identify key stakeholders to engage with as this work progresses. The views of stakeholders will inform a longer-term programme of work to determine how best to regulate such emerging technologies or fuels. For example, feedback may suggest that the Act is unsuitable for the regulation of a hydrogen industry, and that in future, hydrogen may require its own legislation.
21. The Act is the key piece of legislation for ensuring that hydrogen or other alternative fuels can emerge over time, but is a relatively small part of the broader regime. I also seek to ensure that it is adequate to enable the gas sector to make the most of emerging technologies.

### *Information disclosure*

22. In July 2018, I instructed the GIC to investigate the current information disclosure requirements and to identify if these requirements are adequate.
23. The GIC has subsequently initiated a programme of work to identify whether current arrangements related to information disclosure in the gas sector are sufficient and how any improvements to the information disclosure regime may be made. On 6 March 2019, the GIC released an options paper seeking industry views on concepts for information disclosure, and identifying specific information disclosure issues. Amending the Act to create new<sup>2</sup> regulation-making powers for information disclosure aligns with the GIC's work programme.
24. The discussion document seeks stakeholder views on allowing much broader information disclosure regulations to be made under the Act than currently possible. Due to the co-regulatory model in the Act, the details of any such requirements would be developed by the GIC and recommended to the Minister of Energy and Resources following the process set out in the Act.

### *Penalties regime*

25. The discussion document seeks views on options to improve the penalties regime for the regulation of the gas industry, particularly in respect of parties that breach the gas critical contingency regulations.
26. The Act has two penalty systems for gas governance arrangements:

<sup>2</sup> The Parliamentary Counsel Office may determine extending or adapting an existing power is the most appropriate method to amend the Act to achieve the policy intent. The use of new here is used to denote that the Act does not currently allow for the kind of general market disclosure rules that the GIC is currently consulting on.

- 26.1. Industry Participants can be subject to the Gas Rulings Panel for breaches of gas governance arrangements. The current penalty for a breach of gas governance rules or regulations is \$20,000. Industry Participant<sup>3</sup> is a defined term under the Act, and covers a broad range of actors in the industry. The Gas Rulings Panel can also issue compensation orders to those affected by a breach. Compensation orders are issued by the Gas Rulings Panel and allow the compensation of any person affected by a breach of gas governance rules or regulations by an Industry Participant.
- 26.2. Non-industry participants can be convicted by the High Court and charged a maximum fine of \$20,000 for breaching gas-governance regulations. Non-industry participants range in scope and type, from large companies to smaller commercial users.
27. This approach criminalises actions for non-industry participants (residential consumers are exempted) that are civil matters for industry participants. To date this penalty system for non-industry participants has never been tested in court.
28. Penalties are important as they are one of the primary incentives to ensure that stakeholders comply with the gas governance regulations, primarily in relation to the management of situations where there are critical shortages of gas.
29. An independent Critical Contingency Operator (CCO) has been appointed on an ongoing basis to manage critical contingency processes, including declaring situations where there is critical contingency. Critical contingencies occur where there is a shortage of gas relative to demand, requiring intervention to ensure that there is sufficient gas in the transmission system to supply distribution networks and residential consumers.
30. The CCO has the power to issue notices that require users to curtail their use of gas, using a banded approach once these situations are declared. If gas users do not follow gas curtailment notices in the worst case, this can cause depressurisation of parts of the gas distribution system. Depressurisation of the transmission and urban distribution networks would cause significant disruption to affected consumers (including residential) who may be without gas for months at a time, as the network needs to be recertified before being re-pressurised.
31. The discussion document seeks stakeholder's views on a number of changes to the penalties regime to ensure that it is fit-for-purpose. These proposed changes to the Act are:
- 31.1. Increasing the \$20,000 penalty for industry participants to \$200,000. This is the level of the equivalent penalty under the electricity regime. This would act as a stronger incentive for compliance.

**3 Industry Participant** means a gas retailer, a gas distributor, a gas producer, a pipeline owner, a gas wholesaler, a person who purchases gas directly from a gas producer or gas wholesaler or on any wholesale gas market, a service provider appointed under any gas governance regulations, and a gas metering equipment owner.

31.2. Creating variable charging penalties under the act e.g. daily or per gigajoule penalties. These types of penalties are provided for in other sections of the Act.

31.3. Creating a new civil pecuniary fine penalty. A new penalty of this type would decriminalise actions for non-industry participants bringing the penalty into line with similar actions from industry participants.

32. Residential consumers would continue to be excluded from the penalties regime.

33. The paper also seeks general feedback on other penalties contained in the Act.

### **Consultation**

34. The Treasury, Te Puni Kōkiri, Ministry for the Environment, Ministry of Justice, the Gas Industry Company, the Electricity Authority, the Commerce Commission, Te Arawhiti, the Environmental Protection Authority, Ministry for Primary Industries, and the Ministry of Transport were consulted on the contents of this paper and the attached discussion document.

35. The Department of Prime Minister and Cabinet has been informed.

### **Financial Implications**

36. There are no financial implications with this paper.

### **Legislative Implications**

37. I will report back to Cabinet seeking policy decisions following the release of the discussion document.

### **Impact Analysis**

38. A Regulatory Impact Statement will be developed after consultation when I report back to Cabinet seeking final policy decisions.

### **Human Rights**

39. The proposals in this paper are not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Gender Implications**

40. There are no gender implications with this paper.

### **Disability Perspective**

41. There are no disability implications with this paper.

## **Publicity**

42. I plan to release the attached discussion document to the public with a press release. In addition, MBIE will email interested stakeholders. The discussion document will be published on MBIE's website.

## **Proactive Release**

43. I intend to proactively release this paper within 30 business days from the date that Cabinet considers this paper to coincide with the release of the discussion document.

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## Recommendations

The Minister of Energy and Resources recommends that the Committee:

### The Gas Act 1992

1. **Note** the Gas Act 1992 regulates the use of gas as a fuel in New Zealand and that the definition of gas is quite broad, and would include fuels such as biogas and hydrogen.
2. **Note** the co-regulation model with the industry means that an industry body, the Gas Industry Company (GIC), can only recommend regulations and rules for a range of purposes under the Act.

### Emerging technologies and alternative fuels

3. **Note** I intend for the Gas Act 1992 to allow New Zealand to make the most of the opportunities presented by hydrogen, as well as other emerging technologies or low-carbon alternative fuels.
4. **Note** the attached discussion document seeks stakeholder views on the suitability of the Gas Act 1992 in regulating the use of relevant emerging technologies and alternative fuels in New Zealand.
5. **Note** if there are no immediate issues identified through consultation, any feedback will inform a longer-term programme of work to determine how best to regulate these technologies and fuels.

### Targeted changes to the Act

6. **Note** the gas supply shortages in 2018 have highlighted concerns regarding information disclosure in the gas industry, and that legislative amendment will be required to provide regulatory empowering provisions to support the GIC's work programme on information disclosure.
7. **Note** I wish to make some changes to ensure changes that I wish to make to ensure that the penalties regime for both industry participants and non-industry participants incentivises the appropriate behaviour.
8. **Note** the attached discussion document will seek stakeholder's views on both of these issues.

### Release of discussion document

9. **Agree** to release the attached discussion document titled 'Options for amending the Gas Act 1992' for public consultation, subject to any minor technical or editorial changes that may be required.
10. **Invite** the Minister of Energy and Resources to report back to the Cabinet Economic Development Committee in July 2019 with the outcomes of this consultation and any proposed policy changes.

11. **Note** MBIE will work with the Ministry of Justice on the design of any offences or penalties under the Gas Act 1992.

Authorised for lodgement

Hon Dr Megan Woods

**Minister of Energy and Resources**

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**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HIKINA WHAKATUTUKI



# Discussion document

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## Options for amending the Gas Act 1992

May 2019

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# How to have your say

## Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 5pm on Friday 7 June 2019. Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example, references to independent research, facts and figures, or relevant examples.

Please include your contact details in the cover letter or e-mail accompanying your submission. You can make your submission:

- Completing the online summary submission form which can be found at [www.mbie.govt.nz/](http://www.mbie.govt.nz/).
- By sending your submission as a Microsoft Word document to: [Resource.Markets.Policy@mbie.govt.nz](mailto:Resource.Markets.Policy@mbie.govt.nz)
- By mailing your submission to:

Resource Markets Policy  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140

Please direct any questions that you have in relation to the submissions process to [Resource.Markets.Policy@mbie.govt.nz](mailto:Resource.Markets.Policy@mbie.govt.nz).

## Use and release of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on progressing changes to the Gas Act 1992. MBIE intends to upload PDF copies of submissions received to its website at [www.mbie.govt.nz](http://www.mbie.govt.nz).

MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text; and
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

## Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to the Gas Act 1992. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

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# Commonly used acronyms

**The Act** – The Gas Act 1992 (available on [legislation website](#))

**AGS** – Ahuroa Gas Storage Facility, owned by Gas Services New Zealand limited (a subsidiary of First Gas)

**CCS** – Carbon Capture Storage

**CCM** – Critical Contingency Management

**CCO** – Critical Contingency Operator (see: <https://www.cco.org.nz/>)

**Commerce Act** – Commerce Act 1986 (available on [legislation website](#))

**CMA** – Crown Minerals Act 1991 (available on [legislation website](#))

**EA** – the Electricity Authority, the regulator responsible for governance of the electricity industry (see: <https://ea.govt.nz>)

**GIC** – Gas Industry Company, the approved industry body under part 4A of the Act (<https://gasindustrycompany.co.nz>)

**GJ** – Gigajoule

**GPS** – Government Policy Statement on Gas Governance 2008 (available [here](#))

**IB** – Industry Body, referring to the approved industry body in the Act

**MW** - Megawatt

**PJ** – Petajoule

**Minister** – Refers to the Minister of Energy and Resources

**TJ** – Terajoule

**UTS** – Undesirable Trading Situation (see more [here](#))

**GSA(s)** – Gas Supply Agreement(s)

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# List of consultation questions

1. This paper is largely technical and is aimed at an audience that is relatively familiar with the gas industry. Some sections may not be relevant to all readers.
2. The consultation questions contained in this paper are listed in full below:

## Emerging challenges for the Gas Act 1992

**Question one:** What emerging technologies or alternative fuel sources are likely to be covered by the Act's definition of "Gas"?

**Question two:** What aspect(s) of the Act could be a barrier to the uptake of emerging technologies or alternative fuels?

**Question three:** What aspects should be amended or changed to facilitate the emergence of new technologies and alternative fuels?

**Question four:** How will your business be impacted if changes to the Act are not made in the short-term (e.g. two to three years)?

**Question five:** Does the Act cause any issues with complying with any requirements under other legislation?

**Question six:** Are you or your organisation involved in the development or deployment of emerging technologies or alternative fuels?

**Question seven:** Are you interested in being contacted as MBIE develops a longer-term programme of regulatory work around the development of emerging technologies and alternative fuels relating to the Act?

## Information disclosure

**Question eight:** What concerns do you have about the flow and availability of information available to you or your organisation regarding situations that may affect the price and/or availability of gas supply?

**Question nine:** Do you support the inclusion of an additional regulation/rule making power in the Act to require broader disclosure of information from the gas industry?

## Penalties under the Gas Act 1992

**Question ten:** What concerns do you have about the current penalty regime for gas governance arrangements provided for by the Act?

**Question eleven:** Are there other factors, such as contractual arrangements between parties, that mitigate any concerns about the penalties regime?

**Question twelve:** Aside from the penalties for breaching gas governance arrangements, are there any other penalties under the Act that you consider are not fit-for-purpose?

**Question thirteen:** Do you consider it still appropriate for the Gas Rulings Panel to only have one member if the penalties are increased to higher levels?

**Question fourteen:** Do you support the addition of daily or volumetric penalties to the Act to enhance the flexibility of penalties available? What would be an appropriate minimum or maximum rate, if any?

**Question fifteen:** Are there circumstances where the Act should impose a criminal offence on either industry participants or on non-industry participants? What are these?

**Question sixteen:** Do you support the addition of a civil pecuniary fine as an additional penalty to improve the effectiveness of the penalties regime? If not, why not?

**Question eighteen:** What are your views on expanding the definition of industry-participant to include all large gas users (e.g. any user averaging over a certain level of consumption per day)? If so, what would be an appropriate threshold?

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# Part 1. Purpose and Context

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1. The purpose of the discussion document is to obtain your views on several issues relating to the Gas Act 1992 (**the Act**). This paper is separated into several different sections and all sections may not be relevant to all stakeholders.

## 1.1. Section Guide

2. Part one of this document sets out some background and context to the Gas Act 1992 (**the Act**) regulatory regime. It does not contain any consultation questions so may be less relevant to those with good familiarity with the regulatory regime.
3. Part two discusses **emerging challenges** for the Act and seeks stakeholders views on how the regulatory regime provided for by the Act interacts with emerging technologies and the potential uptake of emerging technologies and alternative gaseous fuels, such as hydrogen or biogas. MBIE's thinking on these issues is at an early stage.
4. Part two is intended for a wide range of stakeholders, including industry participants, consumers, experts, and those who are pursuing the development of alternative fuel technologies. Submitters' views on these matters will inform MBIE's initial thinking on how emerging technologies and alternative fuels fit into the Act.
5. Parts three and four cover largely technical issues with the Act. The intended audience for these sections is primarily industry participants and large consumers. Specifically:
  - 5.1. Part three discusses **information disclosure**. This part discusses options to enable increased information disclosure, particularly information relating to factors that may significantly impact the wholesale gas market
  - 5.2. Part four discusses **changes to the penalty regime** provided for by the Act. This part discusses potential changes to the level and type of penalties able to be imposed, for both industry participants and consumers.

## 1.2. How your views will be used

6. Your views will inform MBIE's advice to the Minister of Energy and Resources on how to proceed with the issues discussed in this document. Your views will inform the development of any proposed changes to the Act. Any changes to the Act will follow the Standard legislative process.<sup>1</sup>
7. If changes to the Act are required, any necessary transitional provisions for the Act will be considered to ensure that all current gas governance arrangements continue to be in legal force after the Act is amended.

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<sup>1</sup> More information on this process is available on the New Zealand Parliament [website](#).

## 1.3. Introduction to the Gas Act

The Gas Act is part of a broader regulatory system

8. The Act forms a key part of the legislative system for the use of gas in New Zealand. It provides for the regulation, supply and use of gas, the regulation of the gas industry, and to protect the health and safety of members of the public in connection with the supply and use of gas in New Zealand.
9. The Act defines gas as any fuel that is supplied through pipes or in containers and is a gas at a temperature of 15 degrees Celsius and an absolute pressure of 101.325 kilopascals. The Act is primarily designed for the regulation of natural gas and liquefied petroleum gas (**LPG**), but would regulate the use of alternative fuels such as hydrogen and biogas.
10. The Act interacts with a number of other pieces of legislation for the management and use of gas in New Zealand. These include:
  - 10.1. The Crown Minerals Act 1991 (**CMA**) which provides for the exploration and development of petroleum in New Zealand.
  - 10.2. Various energy safety aspects are covered under the Health and Safety at Work Act 2015 and underpinning regulations, for example:
    - 10.3. Gas, is defined as a flammable substance under the Hazardous Substances and New Organisms Act 1996.
    - 10.4. The Health and Safety at Work (Pipelines) Regulations 1999 provide for the management of hazardous gases being transported via pipelines. The Health and Safety at Work (Hazardous Substances) Regulations 2017 provide for the safe use, handling, and storage of hazardous substances. These regulations fall under the Health and Safety at Work Act 2015.
  - 10.5. The Plumbers, Gasfitters and Drainlayers Act 2006 covers occupational regulations for people engaged in gas fitting.
11. The Act was introduced in 1992 as a result of reforms that primarily deregulated the market through the removal of the exclusive retail franchise areas, a move to market-based pricing and the introduction of a regulatory regime centred on information disclosure. This mirrored the deregulation of the electricity and telecommunications industries.
12. In 2004, the Act was substantially amended to introduce a 'co-regulatory' model for the gas industry. This approach means that an industry body (**IB**) 'co-regulates' the gas industry by recommending gas governance arrangements to the Minister of Energy and Resources (**the Minister**). Arrangements include rules and regulations and can be made for a variety of purposes as set out in sections 43F and 43G of the Act.
13. The Gas Industry Company (**GIC**) has been the approved IB since December 2004. Its role is to:

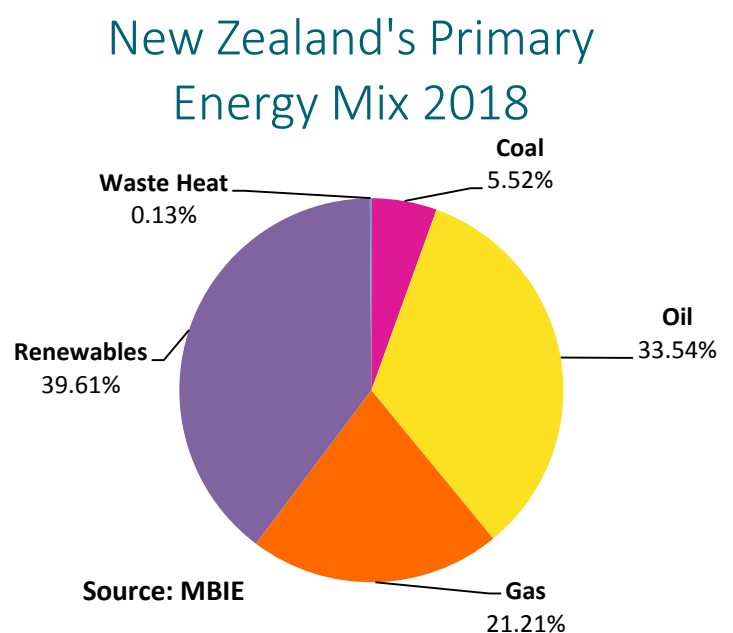
- develop arrangements, including regulations where appropriate, which improve the operation of gas markets, access to infrastructure, and consumer outcomes;
- develop these arrangements with the principal objective to ensure that gas is delivered to existing and new customers in a safe, efficient, reliable,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

### Industry Body Recommendation Process

14. Gas governance arrangements are recommended by the GIC to the Minister of Energy and Resources. The GIC must follow the process as set out in the Act (Section 43I– 43S of the Act) for recommending new arrangements to be made. In particular, this process includes a requirement that the GIC is satisfied that the objectives of the regulation is unlikely to be achieved by means other than regulation (such as an industry voluntary arrangement).
15. Gas Governance Regulations are made by Order in Council, as laid out in section 43F or 43G. Gas Governance Rules are made pursuant to section 43Q and 43R of the Act, where the Minister may publish a notice in the New Zealand Gazette stipulating the details of the new rules made. The GIC can also implement non-regulatory arrangements.
16. The GIC must fully consult with relevant stakeholders, in accordance with Section 43L of the Act, before making any recommendations. The Minister must then decide to either accept or reject this recommendation. MBIE provides advice to support the Minister in making this decision.
17. Since the GIC's establishment, a number of gas governance arrangements have been developed for the gas industry. These arrangements can be found [here](#).
18. This process will have to be followed for any of the proposed changes in this document to be brought into legal effect.

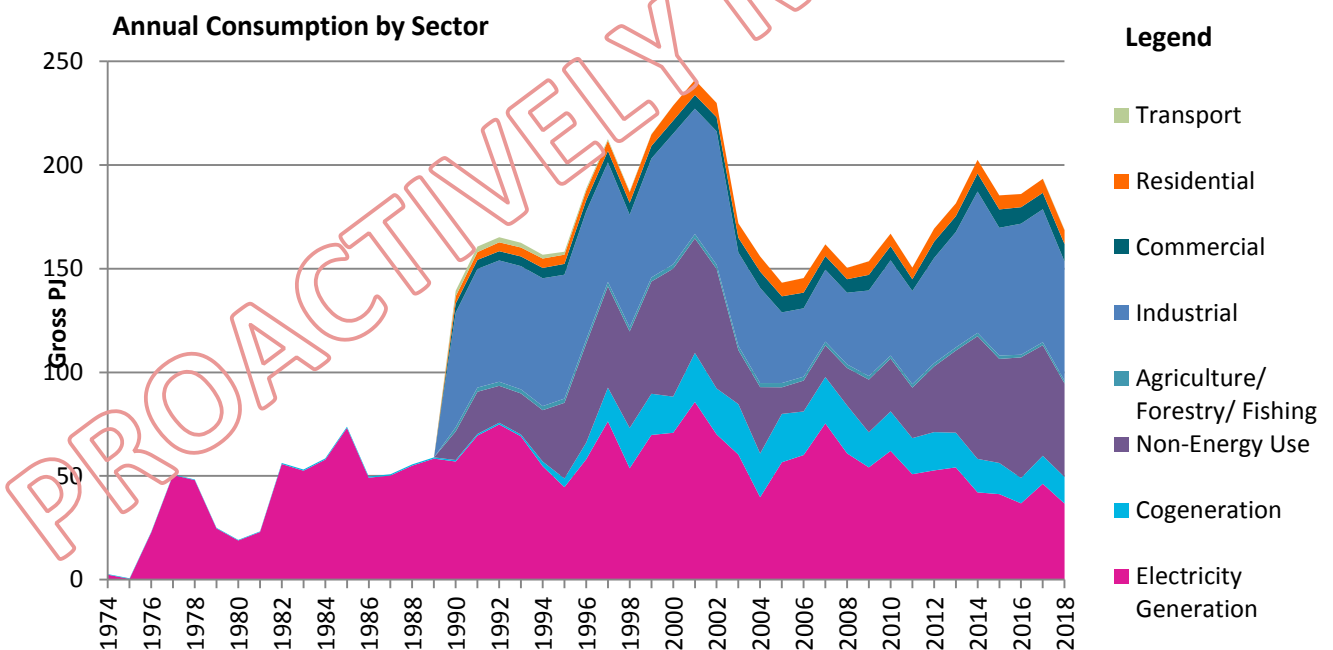
### 1.3.1 Role of Natural Gas in New Zealand's Energy Mix

19. Natural gas currently contributes approximately 22 per cent of New Zealand's primary energy needs, and provides over 286,000 New Zealand homes and businesses with energy.
20. All of New Zealand's petroleum production is based out of the Taranaki region, with producing fields both onshore and offshore. The Pohokura field provides approximately 40 per cent of the natural gas supply alone. Several



hundred production and exploration wells have been drilled since 1950.

21. Consumers in the North Island are serviced by the former Maui and Vector transmission systems which are now solely owed by First Gas Limited. Gas distribution networks are owned by First Gas, Vector, Powerco, and GasNet. Nova Energy owns a number of small private pipelines.
22. There are approximately 150,000 LPG customers in New Zealand who are serviced through bottles or through small reticulated networks (in the South Island). New Zealand's domestic production of LPG is supplemented by international imports when demand outstrips supply, or vice-versa.
23. New Zealand's natural gas production is currently all for the domestic market, and there are no regasification facilities for the importation of LNG<sup>2</sup>. This means that natural gas industry prices are not subject to global commodity trends (such as the Asian commodity price for LNG). This may change if there were to be a significant new find which justified the investment in export infrastructure, or conversely, if the demand for gas justified investment in supplementing domestic supply.



Source: MBIE, 2018

24. New Zealand's upstream exploration and production activities are affected by global factors, particularly the global oil price. Methanex New Zealand (**Methanex**) also directly links the industry to global markets, accounting for close to half of the domestic demand when at full capacity and exports all of its production.
25. Methanex is the largest consumer of natural gas in New Zealand, with the capacity to produce a maximum of 2.4 million tonnes of methanol a year for the international market.

<sup>2</sup> The development of regasification facilities in New Zealand has been previously investigated by Contact Energy and Genesis Energy in the mid-2000s but was uneconomic at that time.

Methanex is generally the second to be affected by gas curtailments (after the Ahuroa Gas Storage Facility (**AGS**)) and scale back its operations.

26. Gas producers rely heavily on Methanex's large and reasonably stable demand requirements in order to provide a flat demand for gas to support exploration and production investment decisions. Consumption of gas for industrial purposes and electricity generation dominate demand. Residential and commercial users combined only make up a small proportion of overall demand.
27. The use of natural gas for electricity generation has declined as the Southdown and Otahuhu gas-fired generation facilities have been decommissioned. New developments include the proposed Taranaki clean energy plant utilising the novel Allam cycle technology, and Todd Generation's 100MW natural gas peaking plant currently under construction in Taranaki.

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## Part 2. Emerging challenges for the Act

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### 2.1. Purpose of this part

28. MBIE is at the early stages of considering how emerging technologies and alternative fuel technologies (such as biogas or hydrogen) will be impacted by the regulatory regime provided for by the Act. We are in the process of developing a longer term programme of work to understand these challenges and what opportunities present, which your views will help inform.
29. This section is intended for a broad range of stakeholders who may have an interest in the development of emerging technologies and alternative fuels. We are interested in a wide range of views on this subject. We are also seeking to identify stakeholders who would be interested in being involved with this work as it progresses.

### 2.2. Emerging technologies and alternative fuels

30. New Zealand is part of an international transition to lower emissions economies. The Government has committed to establishing an Independent Climate Commission (ICC) and setting a 2050 net zero emissions target. The Government has also committed to achieving 100 per cent renewable electricity generation by 2035 (in a normal hydrological year).
31. New Zealand's energy mix has changed over the last decade and will continue to change as demand for energy grows, new technologies are adopted, and new electricity generation is built as New Zealand makes the transition to a lower emissions economy. These trends will create challenges and opportunities for some regulatory regimes as they stand today.

#### 2.2.1. Background

32. Legislation and regulation can either act as a key enabler or barrier to the uptake of emerging technology and industries. Emerging technologies represent major opportunities and challenges for businesses and government. There have been numerous investigations into how current legislative systems treat emerging technologies and industries.
33. An example of how new industries can require legislative change in New Zealand is the success of Rocket Lab in developing a small vehicle for satellites to launch from New Zealand. New Zealand previously had no regulatory regime for space and high altitude activities, and Rocket Lab's plans necessitated the Government to create the relevant legislative regime.



34. Emerging technologies can also prove disruptive for legislative systems. The development of artificial intelligence, machine learning and the ‘internet-of-things’ has provided challenges for the Privacy Act, with a Bill to reform it currently before Parliament.<sup>3</sup>
35. In the energy sector, several energy companies have commissioned reports exploring what the future might look like for New Zealand, and are investigating alternative or supplementary natural gas supplies.<sup>4</sup>

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What emerging technologies or alternative fuel sources are likely to be covered by the Act’s definition of “Gas”?

## 2.2.2. Hydrogen

36. Internationally, hydrogen is gaining more attention as an alternative fuel to natural gas, particularly for use in heavy vehicles where battery EV’s may not be economical or technically feasible. Alongside the reduction in carbon emissions, the utilisation of hydrogen as a fuel has numerous public health benefits through the reduced emissions of sulphur dioxide, nitrogen dioxide and particulate matter (primarily PM2.5 and PM10), which can have adverse impacts on human health.
37. There is also increasing attention focused on the transmission and distribution of hydrogen through existing infrastructure. To date, such transmission has not been achieved at a large scale internationally. Some hydrogen transmission does occur around the world, but the hydrogen is largely used for industrial purposes. It is worth noting that town gas, that was used widely before natural gas, was produced from coal and contained a reasonably large proportion of hydrogen. Town gas was in wide use in New Zealand until the 1970s when natural gas began to replace it.
38. One leading project for the transmission and distribution of hydrogen for commercial and residential consumers is the H21 study in Leeds. This study is being led by Northern Gas Networks and is a feasibility study into the technical and economic possibilities of converting the existing gas supply in Leeds to hydrogen. The hydrogen in this instance is likely to be formed via steam methane reforming, with Carbon Capture and Storage (CCS) being used to store the carbon dioxide generated.
39. Hydrogen can be mixed with natural gas for distribution and transmission. A key technical barrier for hydrogen transmission and distribution is embrittlement. It is understood that the mixture can be up to 15 per cent hydrogen with natural gas for transmission and

<sup>3</sup> See: [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_77618/privacy-bill](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_77618/privacy-bill)

<sup>4</sup> Relevant reports include:

- Transpower’s Te Mauri Hiko report is available [here](#).
- First Gas and Powerco’s Gas Infrastructure futures in a net zero New Zealand report is available [here](#).

distribution in steel piping before hydrogen embrittlement occurs.<sup>5</sup> This is not an issue in polyethylene piping.

40. There are a number of hydrogen projects at the planning and pre-implementation stage in New Zealand. The Government is also working separately to develop a national strategy for hydrogen. While we are participating in this cross-Government work programme, we are eager to seek your views specifically in relation to the Act.

### 2.2.3. Biogas

41. Biogas is a type of bioenergy that is made from renewable organic material and is primarily a mixture of methane and carbon dioxide. Generally, bioenergy comes from energy dense trees and crops, or from by-products of other processes. Biogas currently makes up a very small proportion of New Zealand's energy supply, providing 3.66PJ per annum (or approximately 0.4 per cent of primary energy supply) in 2017. To date it has not been deployed at any significant scale.
42. There are two primary types of biogas in New Zealand:
  - 42.1. **Sludge gas** – derived from the anaerobic fermentation of biomass and solid wastes from sewage, such as cattle effluent. The Tirau dairy processing facility uses it for process heat applications, and several municipal waste water treatment plants utilise it to generate electricity.
  - 42.2. **Landfill gas** – derived from the fermentation of biomass and other organic solid waste at landfills. Several sites around New Zealand collect landfill gas and use turbines to produce electricity.
43. Biogas is specifically provided for under the definition of gas as a fuel in the Act. However, to date, biogas has not been used on a large scale, particularly in the context of mixing with natural gas. We are interested in understanding any challenges to the regulatory regime if this were to occur.

### 2.2.4. Challenges for the Act

44. The Act defines gas as any fuel that is supplied through pipes or in containers and is a gas at a temperature of 15degrees Celsius and an absolute pressure of 101.325 kilopascals. The Act was originally designed to regulate the use of natural gas and LPG, but the definition above would also fit the use of hydrogen as an alternative fuel. The Act explicitly excludes gas when it is regulated by the Land Transport Act 1998, so may not be directly relevant to the deployment of hydrogen vehicle technologies.<sup>6</sup>

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<sup>5</sup> Hydrogen embrittlement occurs due to the adsorption of hydrogen atoms of a metal, with a resulting reduction of load bearing capability. More information is available here:

[https://www.energy.gov/sites/prod/files/2014/03/f12/09\\_sofronis\\_pipe\\_steels.pdf](https://www.energy.gov/sites/prod/files/2014/03/f12/09_sofronis_pipe_steels.pdf)

<sup>6</sup> See section 3(2)(a)(iii) of the Act.

45. We are starting a programme of work to consider how the development and uptake of alternative fuels in New Zealand fits into the current regulatory regime. We are, therefore, interested in whether the deployment of alternative fuels and uptake of emerging technologies could be impacted by, or create challenges for, the regulatory regime under the Act.
46. We are also interested in your views on any amendments to the Act that may need to be made in the short term (e.g. two to three years) in order to facilitate the emergence of new technologies and alternative fuels.

2	What aspect(s) of the Act could be a barrier to the uptake of emerging technologies or alternative fuels?
3	What aspects should be amended or changed to facilitate the emergence of new technologies and alternative fuels?
4	How will your business be impacted if changes to the Act are not made in the short-term (e.g. two to three years)?

47. We are interested in identifying any regulatory or legislative issues relevant to the adoption of alternative fuels at an early stage to guide our future work.
48. We are particularly interested in how the Act may interact with other regulatory systems. There are several interconnecting regulatory regimes that relate to the use of gas in New Zealand and it is likely that any partial or full switch to alternative fuels (such as hydrogen or biogas) would interact with these other pieces of legislation. We are also interested in any issues that the Act may currently cause with complying with other pieces of legislation.

5	Does the Act cause any issues with complying with other legislation?
6	Are you or your organisation involved in the development or deployment of emerging technologies or alternative fuels?
7	Are you interested in being contacted as MBIE develops a longer-term programme of regulatory work around the development of emerging technologies and alternative fuels relating to the Act?

## Part 3. Information Disclosure

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49. This section seeks your view on potential changes to improve the information disclosure regime provided for by the Act. Consideration of changes to information disclosure requirements provided for under other pieces of legislation, such as under Part 4 of the Commerce Act 1986 (**the Commerce Act**) and the CMA are out of scope of this review. A brief outline of current information disclosure requirements is included as background information.
50. Your submission will help inform a final recommendation to the Minister on potential changes to the gas governance arrangements in the Act to ensure that fit-for-purpose information disclosure arrangements can be made. The GIC would be responsible for recommending any new or amended gas governance arrangements as a result of these changes.
51. The inclusion of new regulatory empowering provisions does not predetermine the GIC's ongoing consideration of whether current market arrangements related to information disclosure are sufficient.

### 3.1. Current information disclosure requirements

52. Part 4A of the Act already provides several empowering provisions for making information disclosure arrangements:
  - 52.1. Section 43F sets out the governance arrangements which may be made relating to the wholesale gas market. The relevant regulation making provision is section 2(a)(iii) which provides for the provision and disclosure of data and other market information. This is a relatively narrow regulation making provision limited to the wholesale gas market.
  - 52.2. Section 43G provides for other gas governance arrangements to be made for the disclosure of information by gas transmitters, distributors and retailers on tariff and other charges. As with section 43F, this regulation making power is relatively narrow in scope and application.
53. There are also other information disclosure obligations that sit outside of the Act but are relevant for various gas industry participants. Which provisions are relevant depends on what segment of the industry stakeholders participate in, and the structure of the firm itself. Dependent on type of the company (e.g. publicly listed, privately owned etc), the various industry participants may be required to provide information as follows –
  - 53.1. Publicly listed companies will have continuous market disclosure requirements, dependent on the type of information involved.

- 53.2. Industry participants that are gas distributors and gas transmitters will have information disclosure requirements in line with their relevant price-quality pathway.
- 53.3. MBIE may obtain information from gas producers, gas wholesalers, gas distributors and gas retailers (other than gas refuellers) for statistical purposes.
- 53.4. Gas producers will have various information reporting requirements via their mining permit/license under the CMA.
- 53.5. Clause 13.2A of the Electricity Industry Participation Code requires electricity industry participants to publicly disclose information they have about themselves that they expect would have a material impact on prices in the wholesale market, if it became public. However, there are exclusions to the obligation in clause 13.2A, including if the information is subject to a confidentiality obligation.

## 3.2. Why are we interested in improving information disclosure?

### Gas production outages

- 54. In 2018, the gas market experienced supply constraints due to two unscheduled curtailments at the Pohokura gas field, and issues with wells in the Maui gas field. Together these reduced the supply of gas available to the market as well as the capacity to meet large swings in seasonal demand required by some industrial gas users. Over the same period the Kupe field also reduced its gas flow from 77 terajoules (TJ) per day to around 55 TJ per day while it completed a planned statutory inspection over November.
- 55. The reduction in gas supply had a range of impacts on the wider energy sector. These production outages did not result in a gas critical contingency event, so mandatory gas curtailment was not required, however, some larger consumers brought forward planned outages and voluntarily reduced their gas demand to help alleviate supply tightness.
- 56. The supply shortfall occurred despite strong gas spot market prices, which should have encouraged producers to make more gas available to the market (if there was more gas available). Spot prices reached historic highs of around \$30 per gigajoule (GJ) on very small traded volumes, compared to the normal spot prices for natural gas which ranges from \$6 to \$10 per GJ.
- 57. When combined with the lower than normal hydro lake storage (due to dry spring conditions toward the end of 2018), wholesale electricity prices were pushed up to around \$300MWh. This is higher than the typical price over similar periods, and much higher than the average wholesale price of around \$80 per MWh experienced in previous years. This situation resulted in two retail power companies being unable to meet the prudential security requirements of the Electricity Authority (EA). It also led to several electricity industry

participants lodging an undesirable trading situation claim (**UTS**) with the EA. The EA has subsequently determined that no UTS occurred.

There are concerns that information disclosed during these outages was not sufficient

58. A wide range of stakeholders and sector commentators have noted that there was limited timely information publicly available about gas supply issues. The timely provision of information underpins effective and efficient market behaviour, which aligns with the Government's objectives set out in the GPS, specifically "*that delivered gas costs and prices are subject to sustained downward pressure.*"
59. We share the concerns of sector stakeholders about the timely disclosure of information that may materially impact wider markets for gas and electricity. In July 2018, the Minister wrote to the GIC asking it to investigate current information disclosure requirements, and inquired as to the GIC's view of whether or not current regulations are adequate<sup>7</sup>.

Gas Industry Company's work on information disclosure

60. The GIC reported back in August 2018 that it considers that regulations of the type the Minister asked the GIC to investigate could not be made under the Act. MBIE agrees with this assessment.<sup>8</sup>
61. The GIC has initiated a workstream to investigate whether current market arrangements related to information disclosure are sufficient, or whether further arrangements are required. The GIC is required under the Act to consider non-regulatory options before recommending formal regulations or rules to the Minister.<sup>9</sup>
62. The GIC has released an options paper document setting out potential options for information disclosure for gas industry stakeholders to consider, including whether the current information disclosure requirements for the gas sector are sufficient, or whether a new set of arrangements are required.<sup>10</sup> The options presented in this paper do not predetermine any recommendations about information disclosure that the GIC, in consultation with the industry, may choose to pursue. Any changes to the Act made as a result of the options presented will allow the GIC to recommend information disclosure arrangements using the process set out in section 43I to 43P of the Act.

### 3.3. The problem

63. We are concerned about the limited ability for systematic information disclosure to occur from upstream gas producers, particularly as it impacts the wholesale market and decisions by a wider range of stakeholders, for example, the national electricity grid operator in its decisions on managing electricity transmission. We consider the current empowering

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<sup>7</sup> The Minister's letter to the GIC and the GIC's response can be found [here](#).

<sup>8</sup> See footnote above.

<sup>9</sup> Section 43N(1)(c) of the Act.

<sup>10</sup> Further information on the GIC's consultation on information disclosure can be found [here](#).

provisions for rules and regulations unlikely to be sufficiently broad as to enable systematic information disclosure.

64. We are concerned about the flow of information between gas industry participants and sectors directly impacted by events in the gas market (such as the electricity sector). Some industry participants may have greater access to information than others, thereby giving them an unequal basis upon which to inform market decisions. This may undermine efficient market behaviour to the detriment of consumers.
65. Inefficient market behaviour may also impact downstream consumer behaviour, which can in turn impact economic security of supply. Economic security of supply refers to the prices that consumers will be exposed to due to increased prices for gas through the wholesale market, and will likely increase energy costs and the cost of goods produced using gas. This is contrary to the objective under the GPS that delivered gas costs and prices are subject to sustained downward pressure.

### 3.4. Proposed changes to the Act

66. We are interested in your view on the potential addition of a provision to that Act that would enable broader information disclosure gas governance arrangements. This would enable the GIC to recommend either rules or regulations should it determine that additional information disclosure requirements are necessary.
67. We consider the Act should provide appropriate regulation empowering provisions even if the GIC determines that a non-regulatory intervention is more suitable.

#### 3.4.1. New provisions for governance arrangements

68. The new provisions would enable broader information disclosure gas governance regulations. The proposed empowering provisions would likely be included in section 43G of the Act "*other gas governance regulations*". We consider the new provisions should apply to all industry participants. This means that governance arrangements could be made for both gas producers and gas users.
69. We envision that the GIC would determine information required under any new governance arrangement, with the empowering provision sufficiently broad to enable the GIC to recommend the disclosure of information as it sees fit. In the case that an Energy Commission is established (instead of the industry co-governance model), as provided for under subpart 3 of the Act, it is intended that the Energy Commission would be able to recommend these arrangements as well.

## Questions

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What concerns do you have about the flow and availability of information available to you or your organisation regarding situations that may affect the price and/or availability of gas supply?

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Do you support the inclusion of an additional regulation/rule making power in the Act to require broader disclosure of information from the gas industry?

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## Part 4. Penalties under the Gas Act 1992

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70. This section seeks your views on potential amendments to the Act to ensure the penalties regime for gas governance arrangements is fit-for-purpose. The relevant sections of the Act are sections 43X and 43T. As the Act sets out the maximum penalties able to be imposed by regulations or rules, any change in type or increase in the penalties able to be included in gas governance arrangements requires legislative amendment. A full list of the gas governance regulations and rules to which these offences relate can be found on the GIC website.<sup>11</sup>
71. The intended audience for this section is industry-participants and larger gas consumers who may or may not be industry participants.
72. Implementation of any potential changes to the penalties regime in the Act will enable the GIC to consider these penalties when recommending gas governance arrangements to the Minister, following the process set out in the Act.

### 4.1. Current penalties

73. The Act provides for a range of offences and associated penalties, with maximum penalties ranging from \$10,000 to \$500,000. There are two sections of the Act relevant to offence provisions and gas governance arrangements:
- 73.1. Section 43X(1)(e) provides for the Rulings Panel<sup>12</sup> to order an industry participant to pay a non-civil pecuniary penalty not exceeding \$20,000. The Rulings Panel can also order an industry participant to pay a sum by way of compensation to any other person.
- 73.2. Section 43T establishes that any regulations or rules may provide for offences punishable on conviction with a fine exceeding \$20,000. These fines may be applied to both industry participants and non-industry participants.
74. Industry participants have generally demonstrated good compliance with gas governance arrangements; with alleged breaches before the Rulings Panel having declined since the Gas Governance (Compliance) regulations were introduced in 2008. Section 43T penalties have never been tested in the High Court.
75. Examples of the type of offences under the Act:
- 75.1. Regulation 51 of the Gas Governance (Compliance) Regulations 2008, if a participant breaches a requirement imposed or order made by the Rulings Panel under section 43X(1) of the Act a fine of up to \$20,000 may be imposed.

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<sup>11</sup> More information available [here](#).

<sup>12</sup> The details of which are provided for in the Gas Governance (Compliance) regulations 2008.

- 75.2. Regulation 82B of the CCM regulations, a non-industry participant who fails to stop using gas when instructed to do so during a critical contingency event commits an offence and a fine of up to \$20,000 may be imposed by the High Court.
- 75.3. Section 57(1)(a) states that failure, without reasonable excuse, to comply with information disclosure requirements in regulations made under section 55 of the Act (regulations relating to information disclosure) may result in a fine of up to \$200,000 and a fine not exceeding \$10,000 for each day or part of a day during which the offence continues.

## 4.2. Penalties for Industry Participants

### 4.2.1. Background

76. Section 43(X)(1) of the Act sets out the orders that the Rulings Panel may issue after considering any complaint or matter referred to it, if an industry participant is alleged to have breached gas governance arrangements. The maximum \$20,000 non-civil pecuniary fine is a key compliance tool for gas governance arrangements.
77. The Rulings Panel is established under the Gas Governance (Compliance) Regulations 2008. The current panel comprises of only one member, the Hon Sir John Hansen DCNZM, a retired High Court judge.
78. The penalty provisions apply to all gas governance arrangements under the Act. Any changes to the penalties under the Act (such as increasing the maximum enabled under the Act) would apply to all gas governance arrangements. The changing of the penalties to reflect new penalties under the Act is a matter for the GIC to determine.
79. This consultation is primarily driven by concern that the maximum penalty for breaching a curtailment notice issued by the Critical Contingency Operator (**CCO**) is not an effective incentive for industry participants to comply with curtailment notices. Industry participants are generally large businesses with significant operating costs and the penalty represents a relatively small fine compared to other costs for the business.
80. Concerns around the suitability of the current penalty may be mitigated by other factors, such as the ability for the Rulings Panel to order an industry participant to pay a sum to compensate any other person.

### Critical Contingency Management

81. The management of critical contingency events is provided for by the Gas Governance (Critical Contingency Management) Regulations 2008 (**CCM Regulations**)<sup>13</sup>. The purpose of these regulations is to achieve effective management of critical gas outages and other security of supply contingencies without compromising the long term security of supply. This is achieved through the appointment of a CCO, which has a range of powers. The most

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<sup>13</sup> <http://www.legislation.govt.nz/regulation/public/2008/0426/23.0/DLM1683495.html>

important of these powers is the ability to direct industry participants to curtail gas consumption during critical contingency events.

82. Breaches of these orders come with a maximum penalty for breaching gas governance arrangements, a \$20,000 fine. Sections 82A and 82B of the regulations provide offences for non-industry participants, which are discussed in the next section of this paper.
83. If alternative fuel sources are not available, a gas disruption event and subsequent curtailment will cause significant business disruption. For example, the last major critical contingency event that led to a sustained period of supply disruption was the Maui Pipeline Disruption event in October 2011 which lasted for six days. MBIE estimates that the gross cost of the outage to the economy was \$200 million<sup>14</sup>

#### 4.2.2. Why we are interested in making changes

84. If an industry participant breaches the CCM regulations, those breaches may be referred to the Rulings Panel under the Gas Governance (Compliance) Regulations 2008 (**Compliance Regulations**). The Rulings Panel may order the industry participant to pay a non-civil pecuniary penalty not exceeding \$20,000, in addition to the Rulings Panel ordering an industry participant to pay a sum by way of compensation to any other person. To provide an indication of the scale of the penalties under the Act, the Electricity Rulings Panel may order non-civil pecuniary penalties of up to \$200,000 in relation to a breach of the Electricity Industry Participation Code.
85. The fixed limit of the penalty may create a perverse incentive. In a situation where an industry participant has breached the CCM regulations, the penalty, per unit of gas consumed, decreases as more gas is consumed by the participant that is in breach of regulations. This may cause inefficient use of gas during a critical contingency event which can have severe consequences for the gas transmission and distribution network.
86. However, this perverse incentive may be somewhat mitigated by the ability for the Rulings Panel to also make orders for compensation.
87. While the changes are primarily being considered in the CCM context, any changes to the Act would affect all gas governance arrangements. The GIC is responsible for determining what level of penalty is appropriate.

10 What concerns do you have about the current penalty regime for gas governance arrangements provided for by the Act?

11 Are there other factors, such as contractual arrangements between parties that mitigate any concerns about the penalties regime?

<sup>14</sup> The Maui pipeline outage review is [here](#).

### 4.2.3. Options

88. This section outlines a series of options for penalties for industry participants. These options are not necessarily mutually exclusive. Your views on these options will help inform final recommendations to the Minister.

#### Option one – Status quo

89. The first option is to retain the status quo. The maximum penalty for breaching gas governance arrangements would remain at \$20,000. The penalty would remain relatively low and much lower than the equivalent for electricity industry participants.
90. The regime would continue to rely on civil liability arrangements and compensation orders from the Rulings Panel to act as sufficient deterrents to non-compliance for industry participants.

#### Option 2 – Changing the penalties

91. The two sub-options below increase the penalty level provided for under the Act, and are not mutually exclusive. Increasing the penalties will ensure they are fit-for-purpose.

##### Option 2A – Increase the limit on penalties for industry-participants

92. Option 2A is to increase the maximum penalty to \$200,000. This would result in the maximum penalty able to be applied under the Act being equivalent to the maximum penalty under the Electricity Industry Act 2010.<sup>15</sup> This option would also align the penalty with other penalties provided for under the Act, under section 57. This section contains penalties of up to \$200,000.
93. This option increases the size of the penalty greatly and would likely increase incentives for compliance with gas governance arrangements.
94. Any changes to the penalties provided for under the rules or regulations will need to be recommended by the GIC as a result of the rule and regulation making provisions under the Act. This would allow the GIC to recommend regulations providing for a penalty of up to \$200,000 for any breach of gas governance regulations or rules - if it considers it appropriate to do so.
95. This option would enable the Rulings Panel to impose much larger penalties, noting the equivalent panel for the Electricity Industry Act 2010 is made up of five members, where the Gas Rulings panel only has one.

##### Option 2B – provide for variable penalties under the Act

96. This option would enable the GIC to recommend gas governance arrangements imposing penalty provisions on a per unit basis.

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<sup>15</sup> Section 54(1)(d) of the Electricity Industry Act 2010.

97. In some situations, it may be better to have a fixed penalty and a daily rate penalty to remove the perverse incentive of non-compliance becoming cheaper the longer the period of non-compliance. Excluding any contractual or liability arrangements that may be in place, the cost to the business per unit volume of gas consumed becomes lower the longer the industry participant is in breach of the governance arrangements. A simple example would be an industry participant not following curtailment orders from the CCO.
98. We envisage that there are, broadly, two types of per unit penalties that could be provided for:
- 98.1. Penalties that apply an additional per day penalty - provided for in other sections of the Act<sup>16</sup>, where a maximum of \$10,000 per day fine can be imposed if non-compliance with the provisions continues.
- 98.2. Penalties that apply based on each unit of gas consumed. This could take the form of a certain percentage mark-up on the critical contingency price of gas in context of the CCM regulations.<sup>17</sup>

## Questions

- |           |                                                                                                                                                                                          |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>12</b> | Aside from the penalties for breaching gas governance arrangements, are there any other penalties under the Act that you consider are not fit-for-purpose?                               |
| <b>13</b> | Do you consider it still appropriate for the Gas Rulings Panel to only have one member if the penalties are increased to higher levels?                                                  |
| <b>14</b> | Do you support the addition of daily or volumetric penalties to the Act to enhance the flexibility of penalties available? What would be an appropriate minimum or maximum rate, if any? |

<sup>16</sup> Section 57(1)(a) and 57(1)(b) where failure, without reasonable excuse, to comply carries a fine of \$200,000 and a further fine of \$10,000 for each day or part of the day for which offending continues.

<sup>17</sup> See regulations 67 and 71 of the CCM regulations.

## 4.3. Penalties for non-industry participants

99. This section outlines issues with the current penalties provided for by the Act for non-industry participants and seeks your feedback on these issues. Penalties outside those contained provided under the Gas Industry Governance section of the Act (Part 4A) are outside the scope of discussion document.
100. The GIC is responsible for implementing any changes made to the Act via the recommendation making process for gas governance arrangements in the Act.

### 4.3.1. Background

101. Section 43T of the Act has been used to promulgate regulations setting out offences for non-industry participants. This section could also be used to create criminal offences for industry participants, but to date has not been used for this.
102. Section 43T was introduced in 2004 alongside the rest of part 4A of the Act and was subsequently amended by the Criminal Procedure Act 2011. This penalty means that if a non-industry participant has breached a gas governance arrangement, they face a criminal conviction in the High Court and a maximum fine of \$20,000. This is unlike the penalties discussed in the previous section which go through the Rulings Panel and do not result in a criminal conviction.<sup>18</sup>

### Penalties for non-industry participants under the CCM Regulations

103. The type of consumers that are not considered industry participants in the Act range from small commercial users to some large industrial facilities (such as a dairy processing facility).
104. Section 43T has been used to apply to create penalties for non-industry participants (i.e. consumers<sup>19</sup>) under the CCM regulations.<sup>20</sup> The CCM regulations are currently the only regulations that provide offences for consumers (note that under the CCM regulations, residential consumers are explicitly excluded). This offence has been included due to the magnitude of the economic disruption and cost if a downstream gas network were to depressurise during a critical contingency. These offences have not been utilised since introduced into the CCM regulations in 2013 (82A) and in 2014 (82B).
105. The defences provided in section 82B for alleged breaches mean the consumer will be charged with a strict liability offence. The prosecution is not required to prove 'mens rea'<sup>21</sup>, but the defendant can escape liability if they can show the existence of a defence or an absence of fault. Strict liability offences are usually used to enforce requirements of regulatory regimes.

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<sup>18</sup> Section 43(X)(1) of the Act.

<sup>19</sup> Consumer is a defined term under the Act under Part 1 – preliminary provisions.

<sup>20</sup> See regulations 82A and 82B of the Gas Governance (Critical Contingency Management) Regulations 2008.

<sup>21</sup> Known as the mental element – the prosecution is required to prove that the defendant went about the breach with specified intent.

106. The prospect of criminal conviction for contravention of gas governance arrangement is likely to present a strong deterrence for non-industry participant's consumers. However, the costs and burden of proof required for criminal conviction may act as a barrier to these cases being pursued through the High Court. It is also important to note that, as with industry participants, general liability obligations may also act as a deterrent for breaches of gas governance rules or regulations.
107. There are no analogous penalties under the Act for non-industry participants to the \$20,000 fine able to be imposed by the Rulings Panel under the Act. The Rulings Panel cannot apply penalties to non-industry participants.

#### What is the difference between an industry participant and a gas consumer?

108. Industry participants and consumers are both defined terms in the Act. Some parts of the gas industry are more clearly defined as industry participants than others. Where it is less clear is in the case of gas consumers. For these types of consumers, the contractual relationships in place, rather than the nature of a consumer, can determine whether it is an industry participant or not.
109. The way in which these penalties are currently included in the gas governance arrangements creates an situation where contractual settings determines what penalty applies:
- 109.1. If a consumer were to purchase gas from a gas retailer, rather than through a gas producer, wholesaler, or on the wholesale market, it is a non-industry participant. This means it would be subject to criminal prosecution through the High Court if it is found to have breached gas governance regulations or rules.
- 109.2. If the same consumer decided to shift to purchasing gas directly from a gas wholesaler, then this would make it an industry participant. This means it would be subject to the Rulings Panel's determinations if it has found to have breached gas governance arrangements and subject to a fine.
110. The current system creates an inequitable situation where two different penalty regimes may apply, dependent on the contractual arrangements of the consumer. While we consider that a criminal offence may be appropriate for some types of conduct, it may be inappropriate to assign criminal conduct to gas governance breaches when the equivalent penalty for industry participants is a fine from the Rulings Panel.

#### 4.3.2. Why we are interested in making changes

111. We are concerned that the penalties provided for non-industry participants are not suitable given the nature of potential breaches of the gas governance arrangements, and the current regime for industry participants. We are interested in your views on potential changes to the Act that could be made to ensure fit-for-purpose penalties for non-industry participants.
112. While non-industry participant offences have not previously been tested in court, we consider it prudent to consider the effectiveness of penalties for such offences, alongside changes to the penalties for industry participants.

#### 4.3.3. Setting maximum penalties to the same level

113. We propose that any changes to the maximum level of the fine able to be made for industry-participants are also made for the criminal penalty under section 437. This ensures that the penalties regime is consistent, and that penalties that may be applied under the Rulings Panel are commensurate in terms of penalty with those that may be applied through the High Court.
114. Note that these penalties are the maximum penalties able to be imposed. This cap represents the maximum penalty that the GIC will be able to recommend to be included in gas governance arrangements.

#### 4.3.4. Options

115. This section presents options for changing the penalty regime for non-industry participants. We have developed several options (not all of which are mutually exclusive) to address the identified issues.

##### Option one: Status Quo

116. Option one is to make no changes to the penalties that may apply to non-industry participants. This option would retain the criminal aspect of non-industry participant breaches of gas regulations and rules, and not introduce any additional penalties under the Act.
117. This would retain the strong deterrent of criminal conviction if a consumer (excluding industry participants) breaches gas governance rules or regulations. Option one would retain the inequity between penalties for industry participants and non-industry participants.
118. This option does not necessarily represent a 'do nothing' option as the maximum penalty able to be imposed by the court may also be amended if the penalties for industry participants are changed.



## Option two: Introduce a new penalty for non-industry participants

119. Option two is to introduce a new penalty into the Act which would allow for a civil pecuniary penalty that may be used to apply to non-industry participants. This would enable the GIC to recommend governance arrangements containing penalties for non-industry participants that are not criminal offences. This would allow for greater alignment between the industry participants regime and the non-industry participants regime.
120. This type of penalty would mean that instead of the criminal standard of proof required under 43T (i.e. beyond reasonable doubt), the High Court would apply a civil standard of proof (the balance of probabilities). This may result in greater willingness to commence a High Court process to prosecute breaches, if any were to occur.
121. This option would introduce more flexibility into the penalties regime provided for by Act and enable the inequities presented by the current offence systems provided for by the Act to be addressed. This option would be a targeted change to the Act

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Do you support the addition of a civil pecuniary fine as an additional penalty to improve the effectiveness of the penalties regime? If not, why not?

## Option three: Amend the definition of 'industry-participant' to include all large gas consumers

122. Option three would be to shift the definition of industry participants to include all large consumers of gas (for example, >10TJ per day). This would mean that all large consumers of gas, regardless how they purchase gas, would be included under the Rulings Panel's jurisdiction. This would essentially remove the inequities presented by having two different penalty systems for different types of gas consumers.
123. Small consumers (i.e. less than 10TJ a day) would still be subject to the penalty provided by section 43T and residential consumers would remain excluded. Criminal penalties would still be able to be applied under Section 43T if the GIC were to determine that this was appropriate and recommend this governance arrangement.
124. We are interested in your views on whether this change would have any broader consequences for industry participants, or for large consumers who would now be classified as industry participants. We are also interested in your views on what an appropriate threshold for gas consumption is for a consumer to be considered an industry participant..

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What are your views on expanding the definition of industry-participant to include all large gas users (e.g. any user averaging over a certain level of consumption per day)? If so, what would be an appropriate threshold?