

Gas (Information Disclosure and Penalties) Amendment Bill

Government Bill

Explanatory note

General policy statement

Introduction

The Gas (Information Disclosure and Penalties) Amendment Bill contains amendments to the Gas Act 1992 (the **Act**), administered by the Ministry of Business, Innovation, and Employment. The Bill makes amendments to Part 4A of the Gas Act 1992, which sets out the co-regulatory model that the government has entered into with the natural gas industry.

Prolonged natural gas supply outages at the Pohokura production station in 2018, combined with planned outages at other production stations and dry spring conditions, led to record gas spot market prices and high electricity wholesale prices. These outages have highlighted a number of issues in relation to the transparency of information in the gas market, which can have a wide range of effects.

Policy to be given effect by the Bill

The policy to be given effect in this Bill was informed by a discussion document that was released in 2019 titled *Options for amending the Gas Act 1992*. Policy issues consulted on arose from concerns held by a wide range of stakeholders about information transparency due to the Pohokura outages.

The purpose of the Bill is to strengthen the regulation-making powers in the Act to provide for enhanced information disclosure requirements for the gas market and to ensure that settings around enforcement and penalties are suitably robust.

The Bill amends section 43F of the Act, which sets out the scope of regulation-making powers, to enable gas governance arrangements to be made that provide for a broad regime for the disclosure of information about matters that may have a significant downstream impact or may contribute to the risk of critical gas shortages. The

Bill also clarifies the existing policy intent that regulations made under section 43F for arrangements relating to outages and other security of supply contingencies may apply across all industry participants and consumers (excluding domestic consumers).

The Bill also amends the penalty regime for industry participants by increasing the maximum pecuniary penalty able to be imposed by the Gas Rulings Panel from \$20,000 to \$200,000. This amendment addresses concerns about the low level of civil pecuniary penalty able to be issued by the Gas Rulings Panel, particularly for situations where a wide range of consumers may be affected by a potential breach. The Bill brings the penalty limits into alignment with the equivalent penalty under the Electricity Industry Act 2010.

The Bill introduces a new civil pecuniary penalty to replace the current criminal penalty, with a maximum of \$200,000. The intention is for this penalty to be used to deter breaches of regulation by consumers who are not classified as industry participants. The Bill also makes a number of supporting changes to enforcement provisions in the Act, and seeks to clarify current practices around these.

There are also a number of other elements in the Bill that are designed to ensure that new arrangements can be put in place as soon as practicable and there are no gaps in the penalty regime:

- the Bill ensures that actions taken for the purpose of making a recommendation for new gas governance arrangements in relation to new information disclosure requirements, or changes to the arrangements for managing critical contingency events, will be treated as being made under the provisions that the Bill proposes. This is important for ensuring that new arrangements can be put in place as soon as possible;
- the Bill makes a number of consequential amendments to gas governance regulations to update the provisions relating to penalties.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2020&no=224>

Regulatory impact assessment

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment on 17 October 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <https://www.mbie.govt.nz/dmsdocument/7309-gas-act-1992-information-disclosure-and-penalties-regulatory-impact-summary>
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides for when the Bill comes into force. The new provisions that provide for regulation-making powers come into force on the day after the date of Royal assent. Other amendments relating to those regulations will come into force by Order in Council after those regulations are made (but no later than 6 months after Royal assent).

Part 1

Amendments to Gas Act 1992

Clause 3 provides for the Part to amend the Gas Act 1992.

Clause 4 repeals the redundant definition of Corporation and consequentially amends the definition of gas wholesaler.

Clause 5 inserts *new section 3A*. *New section 3A* and *new Schedule IAA* (inserted by *clause 18*) provide for transitional matters. The transitional provisions include providing that actions taken by the gas industry body before the enactment of the Bill in preparation for making a recommendation relating to the new regulation-making powers in the Bill are valid. These actions include consultation under section 43L of the Act and undertaking an assessment of the proposed new regulations under section 43N of the Act.

Clause 9 amends section 43F, which relates to gas governance regulations. The amendments—

- clarify that gas governance regulations can provide for arrangements relating to outages and other security of supply contingencies in relation to any markets for gas (not just wholesale markets). The arrangements can involve duties for both industry participants and consumers (other than domestic consumers):
- insert a broad new empowering provision that allows gas governance regulations to require data and information to be provided and disclosed by any industry participant or consumer (other than a domestic consumer). The information may include volume, price, and other market information, forecasts, information about actual or potential outages, information about risks to security of supply, and information to help other industry participants or consumers to make informed decisions.

Clause 12 repeals a provision that allows gas governance regulations to provide for offences and fines of up to \$20,000 for breaches of gas governance regulations or rules. Instead, *clause 13* inserts *new section 43TA* to allow regulations to provide for the High Court to impose a pecuniary penalty on consumers (other than domestic

consumers) for breaches of the gas governance regulations or rules. The regulations will specify the maximum penalty, which must not exceed \$200,000.

Clause 14 amends section 43V, which relates to the protection of privileges. The amendment aligns the provision with section 48 of the Electricity Industry Act 2010 and the Evidence Act 2006. The Electricity Industry Act 2010 preserves the privilege against self-incrimination in relation to individuals (not bodies corporate). The amendment to section 43V similarly narrows the protection of the privilege to individuals.

Clause 15 increases the maximum level of civil pecuniary penalty that the Rulings Panel can order an industry participant to pay. The amount is increased from \$20,000 to \$200,000.

Clause 17 inserts *new subpart 5 of Part 4A*. This subpart provides for when and how the High Court may impose pecuniary penalties on consumers for breaches of the gas governance regulations or rules (including the factors that the court must have regard to). The High Court may not impose penalties on domestic consumers or industry participants.

Clauses 6, 7, 8, 10, 11, and 16 provide for consequential amendments to the principal Act.

Part 2

Amendments to regulations

This Part provides for consequential amendments to the Gas Governance (Compliance) Regulations 2008 and the Gas Governance (Critical Contingency Management) Regulations 2008.

Hon Dr Megan Woods

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Part 2

Amendments to regulations

Subpart 1—Gas Governance (Compliance) Regulations 2008

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Schedule

New Schedule 1AA inserted

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Gas (Information Disclosure and Penalties) Amendment Act **2020**.

2 Commencement

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- (1) **Sections 4, 5, 7 to 11, 13, 16, and 18** come into force on the day after the date of Royal assent.

- (2) The rest of this Act comes into force on a date or dates to be appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made appointing different dates for different provisions and for different purposes.
- (3) However, any provision that has not earlier been brought into force comes into force immediately after the expiry of the 6-month period that starts on the date of Royal assent. 5

Part 1 Amendments to Gas Act 1992

3 Principal Act 10

This Part amends the Gas Act 1992 (the **principal Act**).

4 Section 2 amended (Interpretation)

- (1) In section 2(1), repeal the definition of **Corporation**.
- (2) In section 2(1), definition of **gas wholesaler**, replace paragraph (a) with:
- (a) means any person who supplies gas to any other person or persons for the purpose of resupply by the other person or persons (whether or not the person who so supplies the gas is also a gas retailer); and 15

5 New section 3A inserted (Transitional, savings, and related provisions)

After section 3, insert:

3A Transitional, savings, and related provisions 20

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

6 Section 43B amended (Outline of Part)

After section 43B(5), insert:

- (5A) **Subpart 5** enables the High Court to impose pecuniary penalties on consumers (other than domestic consumers) for a breach of gas industry regulations or rules. 25

7 Section 43C amended (Outline of regulation-making powers)

In section 43C(1), after the item relating to regulations on transmission and distribution of gas, insert: 30

Regulations on arrangements relating to outages and other security of supply risks
Regulations on information disclosure for the whole gas industry

8 Section 43D amended (Interpretation)

In section 43D, definition of **gas governance regulations**, replace “43T” with “**43TA**”.

9 Section 43F amended (Gas governance regulations for wholesale market, processing facilities, transmission, and distribution of gas)

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(1) In the heading to section 43F, replace “**and distribution of gas**” with “**distribution of gas, security of supply, and disclosure**”.

(2) Repeal section 43F(2)(a)(vi).

(3) After section 43F(2)(d), insert:

Arrangements relating to outages and other security of supply risks

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(e) providing, in relation to wholesale or any other markets for gas, for arrangements relating to outages and other security of supply risks, including imposing requirements in connection with those matters on any industry participant or consumer (other than a domestic consumer):

Information disclosure for whole gas industry

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(f) providing for the provision and disclosure of data and information by any industry participant or consumer (other than a domestic consumer).

(4) After section 43F(2), insert:

(3) The data and information referred to in **subsection (2)(f)** may include, for example, any of the following to the extent that it relates to the gas industry:

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(a) volume, price, or other market information:

(b) forecasts of supply or demand:

(c) information about actual or potential outages:

(d) information about risks to security of supply:

(e) information about an industry participant or a consumer (other than a domestic consumer) that has, or may have, a significant impact on other industry participants or consumers:

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(f) information to help other industry participants or consumers (other than domestic consumers) to make informed decisions in connection with the gas industry.

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(4) Nothing in subsection (2)(a) to **(e)** or section 43G limits **subsection (2)(f)**.

10 Section 43I amended (Which gas governance regulations can be made if there is no industry body or Commission)

In section 43I(b), replace “43T” with “**43TA**”.

11 Section 43J amended (Which gas governance regulations can be made if there is industry body but no Commission)

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In section 43J(1)(c), replace “43T” with “**43TA**”.

- 12 Section 43T repealed**
Repeal section 43T.
- 13 New section 43TA inserted (Supplementary empowering provision for pecuniary penalties for consumers (other than domestic consumers))**
After section 43T, insert: 5
- 43TA Supplementary empowering provision for pecuniary penalties for consumers (other than domestic consumers)**
- (1) Any regulations made under this subpart may do 1 or more of the following:
- (a) identify provisions of regulations made under this subpart, or provisions of rules made under section 43Q, for the purposes of **subpart 5** (which allows the High Court to impose a pecuniary penalty on a consumer (other than a domestic consumer) for a breach of those identified provisions): 10
- (b) prescribe, in relation to each of those provisions, the maximum pecuniary penalty that may be imposed under **subpart 5** for a breach: 15
- (c) prescribe a defence to a proceeding under **subpart 5** or prescribe other matters relating to when a breach gives rise to liability for a pecuniary penalty under that subpart.
- (2) A maximum pecuniary penalty prescribed under **subsection (1)(b)** must not exceed \$200,000. 20
- 14 Section 43V amended (Privileges protected)**
- (1) In section 43V(3), after “given”, insert “by an individual”.
- (2) In section 43V(3)(a) and (b), replace “person” with “individual”.
- 15 Section 43X amended (Rulings Panel may make certain orders)**
In section 43X(1)(e), replace “\$20,000” with “\$200,000”. 25
- 16 Section 43ZP amended (What Minister can do with industry body recommendations about wholesale market, processing facilities, transmission, and distribution of gas)**
In the heading to section 43ZP, replace “and distribution of gas” with “distribution of gas, security of supply, and disclosure”. 30
- 17 New subpart 5 of Part 4A inserted**
After section 43ZZR, insert:

Subpart 5—High Court may impose pecuniary penalty on certain consumers for breach of gas industry regulations or rules

43ZZS When High Court may order certain consumers to pay pecuniary penalty

- (1) The High Court may, on the application of the Secretary or the Commission, order a consumer (other than a domestic consumer) to pay to the Crown the pecuniary penalty that the court determines to be appropriate if the court is satisfied that the consumer has breached—
- (a) a provision of the gas governance regulations that is identified under **section 43TA(1)(a)**; or
 - (b) a provision of the rules made under section 43Q that is identified under **section 43TA(1)(a)**.
- (2) The maximum amount of a pecuniary penalty for a breach of a provision is the amount prescribed under **section 43TA(1)(b)** for that provision.
- (3) The court may not order an industry participant to pay a pecuniary penalty under **subsection (1)** (*see instead* section 43X, which allows the Rulings Panel to take action if an industry participant has breached any gas governance regulations or rules).

43ZZT Considerations for High Court in deciding on amount of pecuniary penalty

- (1) The High Court must have regard to all relevant matters when deciding on an appropriate pecuniary penalty to impose on a consumer (A).
- (2) These matters include—
- (a) the severity of the breach:
 - (b) the impact of the breach on industry participants and consumers:
 - (c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:
 - (d) the circumstances in which the breach occurred:
 - (e) any previous breach of the regulations or rules by A:
 - (f) the length of time the breach remained unresolved:
 - (g) A's actions on learning of the breach:
 - (h) any benefit that A obtained, or expected to obtain, as a result of the breach.

43ZZU Rules of civil procedure and civil standard of proof apply

- (1) A proceeding under this subpart is a civil proceeding.
- (2) The usual rules of court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).

43ZZV Only 1 pecuniary penalty order may be made for same conduct

- (1) This section applies if conduct by a consumer (A) constitutes a breach of 2 or more provisions identified under **section 43TA(1)(a)**.
- (2) One or more proceedings under this subpart may be brought against A for the breach of any 1 or more of the provisions. 5
- (3) However, A is not liable to more than 1 pecuniary penalty order for the same conduct.

18 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act. 10

Part 2

Amendments to regulations

Subpart 1—Gas Governance (Compliance) Regulations 2008

19 Amendments to Gas Governance (Compliance) Regulations 2008

This subpart amends the Gas Governance (Compliance) Regulations 2008. 15

20 Regulation 51 revoked (Offence to breach compliance orders)

Revoke regulation 51.

21 Regulation 52 amended (Rulings Panel may order payment of civil pecuniary penalty up to \$20,000)

- (1) In the heading to regulation 52, replace “\$20,000” with “\$200,000”. 20
- (2) In regulation 52(1), replace “\$20,000” with “\$200,000”.

Subpart 2—Gas Governance (Critical Contingency Management)
Regulations 2008

22 Amendments to Gas Governance (Critical Contingency Management) Regulations 2008

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This subpart amends the Gas Governance (Critical Contingency Management) Regulations 2008.

23 Regulations 82A and 82B revoked

Revoke regulations 82A and 82B.

Schedule
New Schedule 1AA inserted

s 18

Schedule 1AA
Transitional, savings, and related provisions

5

s 3A

Part 1
Provisions relating to Gas (Information Disclosure and Penalties)
Amendment Act 2020

- 1 Action taken by gas industry body before enactment is valid for purposes of new regulations** 10
- (1) Any action taken by the industry body for the purposes of making a recommendation relating to regulations under any of **sections 43F(2)(e) and (f) and 43TA** (as in force immediately after the commencement of this clause) must be treated as having been validly taken by the industry body under, and for the purposes of, sections 43I to 43P. 15
- (2) However, the industry body may make the recommendation relating to those regulations only after the commencement of this clause.
- (3) **Subclause (1)** applies even if the action is taken before the Gas (Information Disclosure and Penalties) Amendment Act **2020** is enacted. 20
- 2 Rulings Panel not required to take into account amount of previous civil pecuniary penalties**
- (1) This clause applies when the Rulings Panel is making a decision under section 43X in relation to a breach of any gas governance regulations or rules committed on or after the commencement of **section 15** of the Gas (Information Disclosure and Penalties) Amendment Act **2020**. 25
- (2) The Rulings Panel is not required to take into account under section 43X(2) the amount of any civil pecuniary penalty imposed under section 43X before the commencement of **section 15** of the Gas (Information Disclosure and Penalties) Amendment Act **2020**. 30