

# **Gas (Information Disclosure and Penalties) Amendment Bill**

Government Bill

As reported from the Economic Development, Science and Innovation Committee

## **Commentary**

### **Recommendation**

The Economic Development, Science and Innovation Committee has examined the Gas (Information Disclosure and Penalties) Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The bill would amend the Gas Act 1992. This Act is the principal piece of legislation that governs the gas industry in New Zealand. The gas industry is co-regulated by the Government and an approved industry body, the Gas Industry Company (GIC).

The Act empowers the making of a wide range of regulations relating to matters that govern the gas industry. However, several recent natural gas supply outages have raised concerns about the lack of transparency of information in the gas market. The outages include those at the Pohokura production station in 2018, as well as planned outages at other stations. Outages at gas production stations can affect gas availability and prices. They also affect the electricity market, which uses gas for thermal electricity generation which acts as back-up electricity supply during periods of high demand and when limited electricity storage is available. For example, the outage at the Pohokura production station led to increased prices for many consumers during the spring of 2018. Some power companies reported receiving only minimal information about how long the disruption was expected to last. The outage also reportedly cost its main customer around \$2 million a day in lost revenue.

The bill would expand the scope of regulation recommendation powers available to the GIC by inserting provisions enabling enhanced information disclosure about the

gas market. Information able to be disclosed would be matters that may have a significant downstream impact or may contribute to the risk of critical gas shortages. These provisions would enable regulations that could apply to all industry participants and non-industry participants.<sup>1</sup> They would not apply to domestic consumers. The types of information that might be required to be provided or disclosed are broad and non-exhaustive.

The bill would also amend the penalties regime under the Act for regulation or rule breaches by industry and non-industry participants. It would increase the \$20,000 civil pecuniary penalty limit for Gas Rulings Panel orders to \$200,000. It would also replace the current criminal penalty for non-industry participants with a civil pecuniary penalty. This aims to make the penalties for industry participants and non-industry participants more aligned.

### **Legislative scrutiny**

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

### **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Criminal penalty for breaching Gas Rulings Panel orders**

Under section 43X of the Act, the Gas Rulings Panel may make a number of orders against industry participants that breach gas governance rules or regulations. This includes the option to order an industry participant to pay a civil pecuniary penalty.

Section 43T of the Act enables regulations to be made which provide for a criminal penalty to be applied to either an industry participant or non-industry participant that breaches gas governance rules or regulations.

We were advised that, in some parts of the gas industry, the same consumer can be defined as an industry participant or a non-industry participant depending on the contractual settings for their gas purchases. However, under the current system, industry participants may be subject to either civil or criminal penalties, but non-industry participants are only subject to criminal penalties.

Clause 17 of the bill would insert new subpart 5 of Part 4A. This subpart would create a new civil pecuniary penalty that may be imposed by the High Court on non-industry participants for a breach of a gas governance regulation or rule that is identified by regulations made for the purpose of new section 43TA (see clause 13). Clause 12

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<sup>1</sup> Non-industry participant is not defined in the Act but applies to all consumers who do not meet the definition of industry participant in section 43D, and are not domestic consumers.

would remove section 43T, which empowers the making of regulations that specify criminal offences for breaches of rules or regulations. The effect of these clauses would be to remove the criminal penalty for non-industry participants, and make them subject to civil penalties. This would more closely align the penalties applying to industry and non-industry participants.

However, a consequence of repealing section 43T would be the revocation of regulation 51 of the Gas Governance (Compliance) Regulations 2008. Regulation 51 makes it a criminal offence for a participant to breach a requirement or an order of the Gas Rulings Panel. This penalty incentivises industry participants to comply with the Gas Rulings Panel requirements or orders.

The revocation of this criminal penalty was an unintended consequence of the repeal of section 43T. We recognise that it is important to encourage compliance with these requirements and orders. For this reason, we recommend the insertion of new section 43YA. New section 43YA would create a specific criminal penalty for an industry participant who fails to adhere to a Gas Rulings Panel order or requirement. Under the provision, every industry participant that breaches a requirement or order made by the Gas Rulings Panel would commit an offence and be liable to a fine not exceeding \$20,000. We also recommend inserting a transitional provision in Schedule 1AA, clause 3.

We believe that the addition of this new section would ensure sufficient compliance incentives for industry participants, even with the repeal of section 43T.

### **Concerns about further regulation of the industry**

Some submitters expressed concern that the regulation-making powers in the bill relating to information disclosure are broad, and go beyond what is needed to achieve the bill's purpose. They believe that additional disclosure requirements may be heavy-handed.

We sympathise with these concerns, as industry participants are already subject to a number of regulatory requirements. However, we believe the legislative regime is set up appropriately to consider non-regulatory options before imposing further regulations on participants.

Section 43N sets out a number of requirements that must be met before the GIC can recommend to the Minister that regulations should be made. In particular, the GIC is required to ensure that an industry-led solution is unlikely to satisfactorily achieve the objectives that a proposed regulation would. The GIC cannot recommend that regulations be made unless all other reasonably practicable options have been properly considered (including the benefits and costs of each option).

Additionally, the Minister also has discretion to accept or reject the recommendation, and the Government cannot make regulations on information disclosure requirements without having first received a recommendation to do so from the GIC.

We consider that these provisions provide appropriate safeguards and will make sure that any recommendations made by the GIC for new regulations are not beyond what is required. We therefore do not recommend any changes to the bill on this issue.

## **Appendix**

### **Committee process**

The Gas (Information Disclosure and Penalties) Amendment Bill was referred to the Economic Development, Science and Innovation Committee of the 52nd Parliament on 27 May 2020. The committee called for submissions with a closing date of 16 July 2020.

We reopened for submissions on 9 December 2020 after the opening of the 53rd Parliament. The closing date was 15 January 2021. We received and considered 11 submissions from interested groups and individuals. We heard oral evidence from four submitters at hearings via videoconference.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

### **Committee membership**

Jamie Strange (Chairperson)

Glen Bennett

Naisi Chen

Melissa Lee

Hon Todd McClay



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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~





*Hon Dr Megan Woods*

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Government Bill

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23	Regulations 82A and 82B revoked	8

**Schedule**

**New Schedule 1AA inserted**

**The Parliament of New Zealand enacts as follows:**

**1 Title**

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

**2 Commencement**

- (1) **Sections 4, 5, 7 to 11A, 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. 5
- (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. 10
- (4) An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

**Part 1  
Amendments to Gas Act 1992**

**3 Principal Act** 15

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 20

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

After section 3, insert:

**3A Transitional, savings, and related provisions** 25

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. 30

**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: 35

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)**  
In section 43J(1)(c), replace “43T” with “**43TA**”.
- 11A Section 43S amended (Supplementary empowering provision for regulations and rules)** 5  
In the heading to section 43S, replace “**empowering provision for**” with “**provision relating to**”.
- 12 Section 43T repealed**  
Repeal section 43T.
- 13 New section 43TA inserted (Supplementary empowering provision Regulations may provide for pecuniary penalties for consumers (other than domestic consumers))** 10  
After section ~~43T~~ 43S, insert:
- 43TA ~~Supplementary empowering provision~~ Regulations may provide for pecuniary penalties for consumers (other than domestic consumers)** 15
- (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): 20
- (b) prescribe, in relation to each of those provisions, the maximum pecuniary penalty that may be imposed under **subpart 5** for a breach:
- (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. 25
- (2) A maximum pecuniary penalty ~~prescribed under referred to in~~ **subsection (1)(b)** must not exceed \$200,000.
- 14 Section 43V amended (Privileges protected)**
- (1) In section 43V(3), after “given”, insert “by an individual”. 30
- (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”.
- 15A New section 43YA inserted (Offence to breach compliance orders)** 35  
After section 43Y, insert:

**43YA Offence to breach compliance orders**

Every industry participant that breaches a requirement or an order made under section 43X(1) commits an offence and is liable on conviction to a fine not exceeding \$20,000.

Compare: SR 2008/253 r 51

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**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**”.

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**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**

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(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—

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(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.

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(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).

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**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~~ Those matters include—

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(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:	5
(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.	
<b>43ZZU</b>	<b>Rules of civil procedure and civil standard of proof apply</b>	
(1)	A proceeding under this subpart is a civil proceeding.	10
(2)	The usual rules of court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).	
<b>43ZZV</b>	<b>Only 1 pecuniary penalty order may be made for same conduct</b>	
(1)	This section applies if conduct by a consumer (A) constitutes a breach of 2 or more provisions identified under <b>section 43TA(1)(a)</b> .	15
(2)	One or more proceedings under this subpart may be brought against A for the breach of any 1 or more of the provisions.	
(3)	However, A is not liable to more than 1 pecuniary penalty order for the same conduct.	
<b>18</b>	<b>New Schedule 1AA inserted</b>	20
	Insert the <b>Schedule 1AA</b> set out in the <b>Schedule</b> of this Act as the first schedule to appear after the last section of the principal Act.	
<b>Part 2</b>		
<b>Amendments to regulations</b>		
	Subpart 1—Gas Governance (Compliance) Regulations 2008	25
<b>19</b>	<b>Amendments to Gas Governance (Compliance) Regulations 2008</b>	
	This subpart amends the Gas Governance (Compliance) Regulations 2008.	
<b>20</b>	<b>Regulation 51 revoked (Offence to breach compliance orders)</b>	
	Revoke regulation 51.	
<b>21</b>	<b>Regulation 52 amended (Rulings Panel may order payment of civil pecuniary penalty up to \$20,000)</b>	30
(1)	In the heading to regulation 52, replace “\$20,000” with “\$200,000”.	
(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**

This subpart amends the Gas Governance (Critical Contingency Management) Regulations 2008. 5

**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**~~ made under **section 43F(2)(e) or (f)** or for the purpose of **section 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
- 3 Offences for breach of Ruling Panel's compliance orders**
- (1) Regulation 51 of the Gas Governance (Compliance) Regulations 2008 continues to apply as if it were still in force in relation to a breach that occurs before the commencement of **section 20** of the Gas (Information Disclosure and Penalties) Amendment Act **2020**. 35

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- (2) **Section 43YA** applies to a breach that occurs on or after the commencement of **section 20** of the Gas (Information Disclosure and Penalties) Amendment Act **2020**.
- (3) In this clause, **breach** means a breach of a requirement or an order made under section 43X(1).

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**Legislative history**

11 March 2020  
27 May 2020

Introduction (Bill 224–1)  
First reading and referral to Economic Development, Science  
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