

Information Paper

Dealing with Exemptions under the Downstream Reconciliation and Switching Rules

March 2009

Introduction

The Gas (Downstream Reconciliation) Rules 2008 (the Reconciliation Rules) and the Gas (Switching Arrangements) Rules 2008 (the Switching Rules) provide for exemptions to be granted from the rules in certain circumstances. Exemptions provide a means for assisting the effective implementation and operation of the Rules, or addressing situations where the usual application of the Rules may not be appropriate. They can cover situations such as the implementation of a temporary workaround if it transpires that the Rules need to be changed to accommodate practical issues or, in the extreme, to be workable at all, and dealing with start-up and transitional issues, eg giving participants more time to get systems in place. This information note is intended as a guide to the policies and processes that will be applied by Gas Industry Co in dealing with exemption applications, including transitional exemptions initiated by Gas Industry Co.

Rule requirements

For the Reconciliation Rules, the provisions for the granting of standard and urgent exemptions to the Rules are set out in rules 19 to 22, and transitional exemptions in rule 81. Transitional exemptions are granted under rule 90 of the Switching Rules. These rules are set out in Appendix A attached, and cross-referenced where appropriate in the sections below. In summary:

- Standard exemptions are expected to apply to most situations and are subject to a full process including consultation (see further below). Standard exemptions must be applied for by allocation participants or the allocation agent – Gas Industry Co cannot grant standard exemptions on its own initiative.
- Urgent exemptions enable exemptions to be made prior to consultation being undertaken. After the completion of consultation, the exemption is either revoked, replaced or amended

by a standard exemption. Gas Industry Co has the discretion whether to treat an application for an exemption urgently.

- Under the Reconciliation Rules, transitional exemptions can be initiated by Gas Industry Co or applied for by participants. The Switching Rules only provide for transitional exemption applications to be made by switching participants. Both sets of Rules provide Gas Industry Co with a relatively wide discretion because they are limited to dealing with what are essentially temporary issues arising during the transitional period defined in the rules.

Decision-making powers

The majority of exemption decisions, decisions on the revocation, replacement or amendment of urgent exemptions, and transitional exemption decisions will be made by the Chief Executive of Gas Industry Co under a delegation from the Board of Gas Industry Co. However, contentious and complex exemption decisions will be made by a Board Subcommittee of Independent Directors.

A general authority to make urgent exemption decisions, including whether to consider an application on an urgent basis, has also been delegated by the Board to the Chief Executive.

Application form and initial handling of applications

The application form to be used for transitional exemptions under the Switching Rules is attached as Appendix B.¹

The application form to be used for exemptions under the Reconciliation Rules is attached as Appendix C. The same form is to be used for standard, urgent or transitional exemption applications. The form is clear about which parts of the form need to be completed for different types of exemptions.

General

All applications should preferably be submitted by email to exemptions@gasindustry.co.nz. If email is not available we will accept applications through the post addressed to:

Exemptions
Gas Industry Co
PO Box 10-646
Wellington

¹ Please note that only transitional exemptions are possible under the Switching Rules (urgent and standard exemptions do not exist under the Switching Rules).

On receipt, Gas Industry Co will assign a number to the application (for ease of reference) and acknowledge receipt by return email. The number for applications regarding the Reconciliation Rules will be in the form DRXX-YY-Z where XX is the year, YY is a unique number and Z is the type of application (S for standard, T for transitional and U for urgent). The number for applications regarding the Switching Rules will be in the form SWXX-YY-T where XX is the year and YY is a unique number).

Notwithstanding the information submitted on the application form, Gas Industry Co will seek such other information from the applicant as it considers necessary to properly consider the application. The application will not be put forward for consideration by the decision-maker until the requested information has been provided to Gas Industry Co's satisfaction.

Reconciliation Rules

In respect of exemption applications under the Reconciliation Rules, in the event that a decision is made:

- not to treat an urgent application on an urgent basis; or
- to treat an application for a standard exemption urgently;

the applicant will be advised, together with the reasons, and given an opportunity to provide any additional information before the decision-making process starts. Where an application is to be decided urgently, it is anticipated that there will be a turn around time of three days before decision-making starts (if it is urgent then it should be urgent!)

Under the Reconciliation Rules, Gas Industry Co is able to grant transitional exemptions on its own initiative. Gas Industry Co will, nevertheless, complete and publish an application form for such exemptions so that information is available to participants in the same form and level of detail as for other exemption applications.

Switching Rules

Only registry participants may apply for transitional exemptions under the Switching Rules. Unlike the Reconciliation Rules, Gas Industry Co is not able to grant transitional exemptions of its own volition. Once a transitional exemption application is received, the application will be processed as outlined in the '*General*' subsection above.

Consultation process

In respect of standard exemptions under the Reconciliation Rules, rule 19.3 requires Gas Industry Co to publish applications for standard exemptions and to then consult with parties who are representative of classes of person likely to be substantially affected by the granting of the exemption. Provision is made for Gas Industry Co to exclude any information it considers to be confidential or commercially sensitive. In general, Gas Industry Co will rely on participants to

identify any such information in their applications. Gas Industry Co will consult on all standard exemption applications under the Reconciliation Rules.

Neither the Reconciliation Rules nor the Switching Rules require Gas Industry Co to consult on transitional exemption applications before making a decision. For consistency, Gas Industry Co's policy in respect of transitional exemption applications under either the Reconciliation Rules or the Switching Rules, is to consult on applications unless it considers that the subject of an application is of limited interest to, or will not have a material impact on, other participants and/or their businesses.

Gas Industry Co is not required to consult on urgent exemption applications under the Reconciliation Rules, prior to granting an urgent exemption. However, any urgent exemption granted must have an expiry date which reasonably enables Gas Industry Co to consult on whether to revoke, replace or amend the exemption. Gas Industry Co will undertake that subsequent consultation as soon as practicable after the urgent exemption has been granted.

Exemption applications will be published under both the Reconciliation Rules and the Switching Rules. Publication will be achieved by placing the completed application form on the Gas Industry Co website. For standard and transitional applications under both sets of Rules, this will normally be accomplished by appending the application form to the consultation paper generated.

Consultation papers on exemption applications will generally be in the form set out in Appendix D.

The granting of exemptions is unlikely to affect any party other than participants and the service providers under the Rules. For simplicity, all of these parties will thus be notified, by email, of each application or the consultation paper. A list of these parties will be maintained by Gas Industry Co and regularly updated. Email notification to these parties may contain a link to the consultation paper published on the Gas Industry Co website.

The usual consultation period will be two to four weeks, but may be shorter if the exemption is straightforward, or if timing is an issue but not to the extent that would justify an urgent exemption. Submissions received will be published on Gas Industry Co's website.

The applicant and parties consulted will be advised by email when a decision on an exemption application has been made and a notice published on the Gas Industry Co website.

Decision-making process and criteria

For non-contentious and/or non-complex exemptions, recommendations on exemption applications will be submitted by the relevant Senior Adviser to the Chief Executive. For exemptions that are considered contentious and/or complex, recommendations will be submitted to the Board Subcommittee by the Chief Executive. In both cases, submission will

occur after the completion of external consultation and Gas Industry Co's internal consultation processes with its senior management team. External expert advice may be sought by Gas Industry Co where required.

Criteria for standard and urgent exemptions under the Reconciliation Rules

The general criteria specified in the Reconciliation Rules for **standard** exemptions are that Gas Industry Co must be satisfied that the exemption is desirable to better achieve the objectives set out in section 43ZN of the Gas Act 1992, and the purpose of the Rules (rule 19.2). The objectives of the Act are at a very general level and only apply indirectly to downstream reconciliation, whereas the purpose statement is much more explicitly relevant. Taking these together, the following practical criteria apply. The table indicates how the assessment against each criterion will be approached.

| Criterion | Act/Rule reference | Evaluation |
|--|-----------------------------------|---|
| Allocations are fairer | Rule 2 | Extent to which exemption enables all participants to have access to the process and to obtain fair outcomes. |
| Allocations are more efficient | Rule 2 Section 43ZN (a) of Act | Extent to which process operates more efficiently, ie with less cost and time, to achieve required outcomes. |
| Reliability of allocation and supply is enhanced | Section 43ZN (a) of Act | Extent to which the allocations are more reliable, ie produce consistent and expected results. |
| Other section 43ZN objectives | Section 43ZN of Act | Extent to which all of the other remaining objectives in s43ZN would be better achieved. |
| Departure from uniform processes | Rule 2 | Extent to which the proposed exemption is a departure from the uniform processes set out in the Rules, and whether such a departure is desirable in light of the consideration of the other criteria above. |
| Any other relevant considerations | | Consideration of any other matters which may be relevant to the decision on an exemption, subject to the requirements of rule 19. |

Each criterion will be evaluated qualitatively using statements such as 'outcome is slightly/moderately/strongly improved/reduced' or 'outcome is no change'. Additional text will be included as appropriate to explain the judgement made. If outcomes are all either improved or neutral then the exemption will normally be granted. If the outcomes are mixed, ie both positive and negative, then a decision will be made on the strength of the different arguments. If the outcomes are all either reduced or neutral then the exemption will normally be declined.

Exemptions may be granted **urgently** where Gas Industry Co considers it necessary or desirable (rule 20.1). In deciding whether it is necessary or desirable to consider an application urgently, even where not applied for as urgent, the following criteria will apply:

- the extent to which, on the face of it, a decision needs to be made more quickly than the standard process allows, in order to continue the effective operation of the Rules or avoid material disadvantage to the applicant or other parties;
- conversely, the extent to which it is considered that the effective operation of the Rules and the material interests of allocation participants will be better served by consulting before making a decision; and
- the extent to which it is possible to deal with any urgency issues raised by an applicant by other means available to Gas Industry Co other than granting an urgent exemption.

Urgent exemptions will be considered against the same criteria as standard exemptions, albeit in a tighter time frame and with information that is not as complete as would be expected for a standard exemption. For this reason, a lesser standard will be required to be met before an urgent exemption is granted. The key test is that, on balance, the granting of the exemption is necessary or desirable to better maintain the effective operation of the Reconciliation Rules (including the allocation system), and avoid disadvantage to allocation participants in the interim, before consultation can occur and full consideration is given by the decision maker.

Criteria for transitional exemptions under both the Reconciliation and Switching Rules

Express criteria for the consideration of **transitional** exemptions are not stated in either set of Rules – although the Rules require that a transitional exemption must be transitional in nature, provide alternative arrangements for complying with the rules and apply for a specified period. It is considered useful to both applicants and the decision-makers to have some principles established. The criteria for considering a transitional application under both sets of Rules will be as follows:

- a demonstrated inability to comply with a rule for reasons which are temporary, ie will be corrected or overcome by a defined time, and which will exist despite genuine attempts to comply, ie are not the result of a wilful intent to avoid compliance or inadequate attempts to achieve compliance;
- an alternative arrangement is defined for meeting the intended objective of the rule from which the exemption is sought, which is practicable (ie, fit for purpose), and consistent with effectively achieving the purpose of the relevant rules as a whole, and which is considered to be fair to other participants;

- granting the transitional exemption would not be materially inconsistent with the purpose of the particular rules²; and
- any other considerations that may be relevant to a decision on an exemption, subject to the requirements of rules 81 under the Reconciliation Rules and rule 90 under the Switching Rules.

Other information

Information other than that set out above for specific criteria may contribute to a decision, although should not over-ride the application of the criteria set out above. Other information of this type may include:

- the extent to which there are relevant precedents from prior decisions;
- the extent to which the issue underlying the exemption is generic, ie affects a number of participants, rather than just the applicant; and
- any relevant legal, policy or cost implications.

Advice and publication of decision

Both sets of Rules set out the information on a decision to grant an exemption which must be either published or notified to allocation or registry participants.

Under rule 19 of the Reconciliation Rules, Gas Industry Co must publish standard exemptions and the reasons for granting them. Under rule 20 of the Reconciliation Rules, Gas Industry Co must publish urgent exemptions before consulting on them, and then publish the determination whether to revoke, replace or amend the exemption and the reasons for that determination. Under rule 81 of the Reconciliation Rules, Gas Industry Co must give notice of a transitional exemption to allocation participants affected by the exemption, and the allocation agent. Rule 90 of the Switching Rules only requires Gas Industry Co to give notice to the registry participant which applied for the transitional exemption.

The general format applying to a decision to grant an exemption is set out in the template for the Decision Notice attached as Appendix E.

In practice, decisions on all types of exemption applications will be notified as follows and in this order:

² In applying this criteria to transitional exemption applications under the Switching Rules, Gas Industry Co will specifically consider the following factors (see rule 3):

- the extent to which the exercise of consumer choice is enabled or barriers reduced;
- the extent to which the process of switching retailers is made more efficient and timely; and
- the extent to which a successful switch is achieved (ie, one which meets the reasonable expectations of a consumer)

- the decision will be advised, by email, to the applicant;
- the decision will be advised to all participants, the registry operator or the allocation agent, by email; and
- the decision will be published on the Gas Industry Co website at the following locations as relevant:
 - <http://www.gasindustry.co.nz/work-programme/downstream-reconciliation?tab=310>
 - <http://www.gasindustry.co.nz/work-programme/switching-and-registry?tab=587>.

Although not required by the Rules, Gas Industry Co will also publish an information note when an exemption application is declined, so the reasons are publicly available.

List of Appendices

Appendix A – Rules covering exemptions

Appendix B – Application form for switching exemptions

Appendix C – Application form for reconciliation exemptions

Appendix D – Template for consultation document

Appendix E – Template for decision notice

Appendix A Rules covering exemptions

From the Gas (Switching Arrangements) Rules 2008

90. Transitional Exemption

- 90.1** A **registry participant** may apply in writing to the **industry body** for a transitional exemption from complying with one or more of these **rules**.
- 90.2** A transitional exemption applies for a period set out in the exemption and must set out alternative arrangements for complying with one or more **rules**.
- 90.3** In the application, the **registry participant** must set out the rule or rules from which it seeks an exemption, the detailed reasons for the exemption, the period for which the exemption is applied and the alternative arrangements proposed for compliance with the rules.
- 90.4** If, after considering the reasons, the **industry body** is satisfied that a transitional exemption should be granted, the **industry body** must by notice in writing grant the transitional exemption to the **registry participant** which, in addition to stating the alternative arrangements that will apply, may be subject to such other conditions as the **industry body** thinks fit.

From the Gas (Downstream Reconciliation) Rules 2008

19. Industry body may exempt allocation participant

- 19.1** Subject to rule 19.2, on the application of an allocation participant or the allocation agent, the industry body may, in its discretion and upon the terms and conditions (if any) that it thinks fit, exempt any allocation participant, class of allocation participants, gas gate or the allocation agent from complying with all or any of these rules.
- 19.2** The industry body may only grant an exemption under rule 19.1 if it is satisfied that the exemption is desirable to better achieve:
- 19.2.1** The objectives set out in section 43ZN of the Act; and
- 19.2.2** The purpose of the **rules**.
- 19.3** Prior to granting an exemption, the industry body must –

- 19.3.1 Publish** the application for the exemption, excluding any information it considers to be confidential or commercially sensitive; and
- 19.3.2** Consult with those persons it considers are representative of those classes of persons likely to be substantially affected by the granting of the exemption.
- 19.4** The industry body must publish an exemption, and the reasons for granting the exemption, as soon as practicable after the exemption is granted.
- 19.5** An exemption takes effect from the date specified in the exemption which may not be earlier than the date that it is published.

20. Urgent exemptions

- 20.1** The industry body may grant an exemption under rule 19.1 without complying with rule 19.3.2 if the industry body considers that it is necessary or desirable that the exemption applied for be made urgently.
- 20.2** In that case –
 - 20.2.1** The exemption must state that it is made in reliance on this rule; and
 - 20.2.2** The exemption must state an expiry date, which must be a date that, in the opinion of the industry body, reasonably enables the industry body to consult with the persons specified in rule 20.2.3 about the exemption; and
 - 20.2.3** The industry body must publish the exemption and consult with persons it considers are representative of those classes of persons likely to be substantially affected by the exemption; and
 - 20.2.4** As soon as practicable after consulting in accordance with rule 20.2.3, the industry body must:
 - (a) determine whether or not to revoke, replace, or amend the exemption; and
 - (b) publish its determination and the reasons for the determination.

21. Variation or revocation of exemptions

- 21.1** An allocation participant or allocation agent granted an exemption under rules 19 or 20 must notify the industry body of any error or change in any circumstances

material to the granting or continuing operation of its exemption as soon as practicable after it has become aware of that error or change.

- 21.2** An exemption may be varied or revoked, either on application by an allocation participant, allocation agent or on the initiative of the industry body.
 - 21.3** Rules 19 and 20 apply as if the variation or revocation were the granting of an exemption and with all other necessary modifications.
- 22.** List of exemptions
- 22.1** The industry body must publish a list of all current exemptions made under these rules.

81. Transitional exemption

- 81.1** Despite anything in rules 19 and 20 the industry body may, in its discretion and upon the terms and conditions (if any) that it thinks fit, exempt any allocation participant, class of allocation participants, gas gate or the allocation agent from complying with one or more of these rules during the transitional period.
- 81.2** A transitional exemption applies for the period set out in the exemption and must set out alternative arrangements for complying with one or more of the rules.
- 81.3** The industry body may by notice require an allocation participant or the allocation agent to set out in detail any reasons why an exemption is needed, the period for which the exemption should be in effect, and what alternative arrangements should apply.
- 81.4** If the industry body is satisfied that a transitional exemption should be granted, the industry body may by notice grant the transitional exemption to the allocation participant, class of allocation participants, gas gate or the allocation agent which, in addition to stating the alternative arrangements that will apply, may be subject to such other conditions as the industry body thinks fit.
- 81.5** If the industry body grants a transitional exemption under rule 81.4. it must give notice of the transitional exemption to the allocation participants affected by the exemption and the allocation agent.

Appendix B Application Form for Switching Exemptions

Gas Industry Company Limited

Application for an Exemption from the Gas (Switching Arrangements) Rules 2008

1. Name and contact details for the participant(s) seeking exemption:

Company name:

Phone:

Contact Name:

Fax:

Email:

Mailing Address:

2. Type of exemption sought: Transitional (under rule 90)

3. Provisions of the Switching Rules from which the exemption is sought:

4. State the reasons why you are seeking the exemption and why the exemption sought should be granted

Describe how the exemption sought may affect other participants (including service providers) and any costs and benefits to them:

Specify how long the exemption sought is to be in effect for. Give reasons for the period that you specify:

Specify what conditions and/or alternative arrangements relating to the exemption sought are appropriate:

Please email this form to exemptions@gasindustry.co.nz

Appendix C Application Form for Reconciliation Exemptions

| |
|--|
| <p>Gas Industry Company Limited</p> <p>Application for an Exemption from the Gas (Downstream Reconciliation) Rules 2008</p> |
| <ol style="list-style-type: none">1. Please complete a separate form for each type of exemption sought.2. Complete sections 1 to 4 of the form for all exemption types. Complete section 5 only in addition for urgent exemptions, and section 6 only in addition for transitional exemptions.3. Please provide all relevant information. Expand the sections of the form as necessary to provide reasonably full information, but detailed supporting information should be set out in attachments to the form.4. Gas Industry Co may request additional information after receiving and reviewing the application |
| <p>1. Name and contact details for the participant(s) seeking exemption:</p> <p>Company name: _____ Phone: _____</p> <p>Contact Name: _____ Fax: _____</p> <p>Email: _____ Mailing Address: _____</p> |
| <p>2. Type of exemption sought (delete all but one):</p> <p>Standard (under rule 19)</p> <p>Urgent (under rule 20)</p> <p>Transitional (under rule 81)</p> |
| <p>3. Provisions of the Rules from which the exemption is sought:</p> |
| <p>4. State the reasons on why you are seeking the exemption and why the exemption sought should be granted</p> |

(see notes attached which set out the requirements for different types of exemptions):

Describe how the exemption sought may affect other participants (including service providers) and any costs and benefits to them:

Specify how long the exemption sought is to be in effect for. Give reasons for the period that you specify:

Specify what conditions and/or alternative arrangements relating to the exemption sought are appropriate:

5. Additional information for an urgent exemption:

If your application is urgent, specify the date(s) by when a decision is needed:

State the reasons for seeking an urgent exemption rather than a standard exemption:

6. Additional information for a transitional exemption

State the reasons for seeking a transitional exemption rather than a standard exemption:

Please email this form to exemptions@gasindustry.co.nz

Appendix D Template for Consultation Document

Consultation Paper on Exemption Applications under the Gas (-----
-----) Rules 2008

Title: (Short Title)

Date:

1. Introduction

Rules references –purpose of consultation – brief context for application or group of applications being consulted on.

2. Making submissions

How to make a submission – cross reference to appendix – closing dates etc

3. Description and analysis of exemption(s) sought

The layout below applies if a single application is being consulted on. If several applications are being consulted on, the layout should be modified to best suit the circumstances.

3.1 Summary of application

Full applications appended – for each application:

| | |
|--------------------------|-------------------|
| GIC Code: | Applicant: |
| Exemption type: | |
| Exemption sought: | |
| Reasons: | |

3.2 Additional Information

Summarise additional information relevant to the application. May include information already available to Gas Industry Co or additional information requested from the applicant.

3.3 Issues

List issues that it is suggested will need to be considered when deciding on the applications

Appendix A: Recommended format for Submissions

Submission from (Company name and contact)

| Question | Comment |
|----------|---------|
| | |

Appendix B: Full Copies of Applications

Appendix E – Template for decision notice

The template below is written for the reconciliation exemptions but the same format, with appropriate substitutions, will be made for switching exemptions.

Gas (Downstream Reconciliation) Rules 2008 (Exemption) Notice 2008

Pursuant to rule – of the Gas (Downstream Reconciliation) Rules 2008, Gas Industry Company Limited ('Gas Industry Co') as the industry body appointed pursuant to s43ZL of the Gas Act 1992, gives the following notice.

Notice

1. Title and commencement

- (a) This notice is the [repeat title above].
- (b) This notice comes into force on [specify date].

2. Interpretation

- (a) In this notice, Rules means the Gas (Downstream Reconciliation) Rules 2008 made by the Minister of Energy under sections 43F, 43Q, and 43S of the Gas Act 1992 by notice published in the New Zealand Gazette, as may be amended from time to time.
- (b) Any term that is defined in the Rules and used, but not defined, in this notice has the same meaning as in the Rules.

3. Standard/Transitional Exemption

[Set out the terms and conditions of the exemptions granted.]

4. Reasons for granting the standard/transitional exemption

[Set out the reasons why the exemption was granted and why the particular terms and conditions chosen.]

DATED at Wellington this ----- of ----- 2008

For and on behalf of Gas Industry Company Limited