

Western Australia

Energy Coordination Act 1994

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Energy Coordination Act 1994

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Energy Coordination Act 1994

An Act to provide for —

- **a scheme for licensing the supply of gas in certain areas of the State;**
- **the conferral of functions on the Economic Regulation Authority in respect of the licensing scheme;**
- **the facilitation of competition in the retail gas market by provision for appropriate arrangements between businesses operating in that market, a marketing code of conduct and a scheme for the resolution of certain customer disputes;**
- **other regulation of the gas supply industry;**
- **a public officer to coordinate and advise on energy policy and with functions under certain written laws relating to energy supply and in relation to the promotion of energy research; and**
- **a public officer with functions under certain written laws relating to energy safety,**

and to confer powers, and make related provisions.

[Long title amended by No. 20 of 1999 s. 4; No. 53 of 2003 s. 13 and 92; No. 67 of 2003 s. 62.]

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Energy Coordination Act 1994*¹.

2. Commencement

This Act comes into operation on such day as is fixed by proclamation¹.

3. Terms used in this Act

(1) In this Act, unless the contrary intention appears —

“**Authority**” means the Economic Regulation Authority established by the *Economic Regulation Authority Act 2003*;

“**Coordinator**” means the Coordinator of Energy referred to in section 4;

“**Director**” means the Director of Energy Safety referred to in section 5;

“**distribution licence**” means a licence having the classification referred to in section 11D(1)(a);

“**distribution system**” means —

- (a) a system of pipelines, mains, and gas service pipes, designed to operate at a pressure of less than 1.9 megapascals, for the transportation of gas to customers; or
- (b) any other part of the gas distribution system (as defined in section 90 of the *Gas Corporation Act 1994* repealed by section 93 of the *Gas Corporation (Business Disposal) Act 1999*) at the time when a distribution licence is first issued for all or any part of that system (regardless of the pressure at which it is designed to operate),

and any associated apparatus, facilities, structures, plant, or equipment;

“electricity” includes electrical energy of any kind however produced, stored, transported or consumed;

“energy” means electricity, gas and thermal energy however derived;

“gas” means any gas or mixture of gases, whether naturally occurring or manufactured, intended for use —

- (a) as a fuel; or
- (b) in any chemical process;

“inspector” means a person designated as an inspector under section 12;

“licence” means a distribution licence or trading licence;

“licensee” means the holder of a licence and any transferee of the licence under section 11R;

“Minister” has a meaning that is modified by subsections (2) and (3);

“small use customer” means a customer whose consumption of gas is less than 1 terajoule per year;

“supply”, in relation to gas, means —

- (a) the transportation of gas through a distribution system; or
- (b) the sale of gas transported through a distribution system;

“supply area” means an area for the time being constituted as such under section 11A;

“trade secret” means any knowledge or information —

- (a) relating to technology, marketing, energy, or energy resources or reserves; or
- (b) as to the business of the person concerned, the disclosure of which by a person performing functions under this Act might reasonably be expected to adversely affect the business or interests of the person concerned;

“trading licence” means a licence having the classification referred to in section 11D(1)(b).

- (2) A reference in a provision of this Act to the Minister is a reference to —
- (a) if, for the time being, different Ministers administer the provision in respect of different matters — the Minister administering the provision in respect of the matter in respect of which the provision is being applied; or
 - (b) if paragraph (a) does not apply — the Minister administering the provision.
- (3) A reference in a regulation made under section 26 to the Minister is a reference to —
- (a) if, for the time being, different Ministers administer section 26 in respect of different matters — the Minister administering section 26 in respect of the matter in respect of which the regulation is being applied; or
 - (b) if paragraph (a) does not apply — the Minister administering section 26.
- (4) Subsections (2) and (3) do not limit the operation of section 12 of the *Interpretation Act 1984*.

[Section 3 amended by No. 20 of 1999 s. 5; No. 58 of 1999 s. 47; No. 53 of 2003 s. 14, 66 and 118; No. 67 of 2003 s. 62; No. 28 of 2006 s. 167.]

Part 1A — Coordinator of Energy

[Heading inserted by No. 28 of 2006 s. 168.]

4. Coordinator of Energy

A Coordinator of Energy is to be appointed under Part 3 of the *Public Sector Management Act 1994*.

[Section 4 inserted by No. 28 of 2006 s. 168.]

4A. Coordinator's functions

The functions of the Coordinator are —

- (a) to assist the Minister in planning and coordinating the provision of energy in the State;
- (b) to perform the functions vested in the Coordinator by or under this Act or any other written law;
- (c) to advise the Minister on all aspects of energy policy, including —
 - (i) the energy needs of the State;
 - (ii) ways of using energy and sources of energy, including renewable energy;
 - (iii) the introduction and encouragement of competition in the energy industry;
 - (iv) ways of promoting and achieving open access to transmission and distribution systems;
 - (v) ways of achieving greater efficiency in the use of energy;
 - (vi) the use of energy policy to assist in achieving other policy objectives of government;
 - (vii) matters relating to the operation of relevant legislation;
- (d) for the purposes of paragraphs (a), (b) and (c) —
 - (i) to monitor the operation of the State's energy industry and its participants; and

s. 4B

- (ii) to consult with interested groups and persons;
- (e) to promote energy research and development as provided by Schedule 1;
- (f) to promote the development of commercial applications of renewable energy;
- (g) to produce and publish information and reports on energy-related matters;
- (h) to maintain a collection of the information and reports referred to in paragraph (g) and the information and reports produced by the Solar Institute formerly established by the *Solar Energy Research Act 1977*;
- (i) to provide support in the resolution of disputes about energy-related matters.

[Section 4A inserted by No. 28 of 2006 s. 168.]

4B. Staff for the Coordinator

Officers may be appointed or made available under Part 3 of the *Public Sector Management Act 1994* to enable the Coordinator to perform his or her functions.

[Section 4B inserted by No. 28 of 2006 s. 168.]

4C. Delegation by the Coordinator

- (1) The Coordinator may by instrument in writing delegate to an officer referred to in section 4B the performance of any of his or her functions including functions under a written law, but not including the power to delegate under this section.
- (2) The Coordinator's powers under subsection (1) also extend to delegation of functions to the Director.
- (3) A delegation may be general or as otherwise provided by the instrument of delegation.
- (4) A delegate remains subject to the direction and control of the delegator.

- (5) Performance of a function by a delegate is to be treated as performance by the delegator.

[Section 4C inserted by No. 28 of 2006 s. 168.]

4D. Minister may give directions to the Coordinator

- (1) The Minister may give directions in writing to the Coordinator with respect to the performance of his or her functions, either generally or in relation to a particular matter, and he or she is to give effect to any such direction.
- (2) The text of any direction given under subsection (1) is to be —
- (a) laid before each House of Parliament within 14 sitting days of that House after the direction is given; and
 - (b) included in the annual report submitted by the relevant accountable authority under Part 5 of the *Financial Management Act 2006*.

[Section 4D inserted by No. 28 of 2006 s. 168; amended by No. 77 of 2006 s. 17.]

4E. Minister to have access to information from Coordinator

- (1) The Minister is entitled —
- (a) to have information in the possession of the Coordinator; and
 - (b) where the information is in or on a document, to have, and make and retain copies of, that document.
- (2) For the purposes of subsection (1) the Minister may —
- (a) request the Coordinator to furnish information to the Minister;
 - (b) request the Coordinator to give the Minister access to information; and
 - (c) for the purposes of paragraph (b) make use of the staff referred to in section 4B to obtain the information and furnish it to the Minister.

s. 4E

(3) The Coordinator is to comply with a request under subsection (2) and make staff and facilities available to the Minister for the purposes of paragraph (c) of that subsection.

(4) In this section —

“document” includes any tape, disk or other device or medium on which information is recorded or stored mechanically, photographically, electronically or otherwise;

“information” means information specified, or of a description specified, by the Minister that relates to the functions of the Coordinator.

[Section 4E inserted by No. 28 of 2006 s. 168.]

Part 2 — Director of Energy Safety

[Heading amended by No. 28 of 2006 s. 169.]

[4.] *Repealed by No. 28 of 2006 s. 170.]*

5. Director of Energy Safety

A Director of Energy Safety is to be appointed under Part 3 of the *Public Sector Management Act 1994*.

[6.] *Repealed by No. 28 of 2006 s. 170.]*

7. Director's functions

The functions of the Director are —

(a) those vested in the Director by or under —

(i) the *Electricity Act 1945*;

(ii) the *Gas Standards Act 1972*; and

[(iii) deleted]

(iv) any other written law;

and

(b) the provision of advice on safety and technical standards in the gas supply industry to the Authority.

[Section 7 inserted by No. 65 of 1998 s. 89; amended by No. 67 of 2003 s. 62; No. 74 of 2003 s. 10(3)(a).]

8. Staff

Officers may be appointed or made available under Part 3 of the *Public Sector Management Act 1994* to enable the Director to perform their functions.

[Section 8 amended by No. 28 of 2006 s. 171.]

9. Delegation

- (1) The Director may by instrument in writing delegate to an officer referred to in section 8 the performance of any of his or her

s. 10

functions including functions under a written law, but not including the power to delegate under this section.

[(2) repealed]

- (3) A delegation may be general or as otherwise provided by the instrument of delegation.
- (4) A delegate remains subject to the direction and control of the delegator.
- (5) Performance of a function by a delegate is to be treated as performance by the delegator.

[Section 9 amended by No. 28 of 2006 s. 172.]

10. Minister may give directions

- (1) The Minister may give directions in writing to the Director with respect to the performance of his or her functions, either generally or in relation to a particular matter, and he or she is to give effect to any such direction.
- (2) The text of any direction given under subsection (1) is to be —
 - (a) laid before each House of Parliament within 14 sitting days of that House after the direction is given; and
 - (b) included in the annual report submitted by the relevant accountable authority under Part 5 of the *Financial Management Act 2006*.

[Section 10 amended by No. 20 of 1999 s. 7; No. 67 of 2003 s. 62; No. 5 of 2005 s. 39; No. 28 of 2006 s. 173; No. 77 of 2006 s. 17.]

11. Minister to have access to information

- (1) The Minister is entitled —
 - (a) to have information in the possession of the Director; and

- (b) where the information is in or on a document, to have, and make and retain copies of, that document.
- (2) For the purposes of subsection (1) the Minister may —
- (a) request the Director to furnish information to the Minister;
 - (b) request the Director to give the Minister access to information; and
 - (c) for the purposes of paragraph (b) make use of the staff referred to in section 8 to obtain the information and furnish it to the Minister.
- (3) The Director is to comply with a request under subsection (2) and make staff and facilities available to the Minister for the purposes of paragraph (c) of that subsection.
- (4) In this section —
- “**document**” includes any tape, disc or other device or medium on which information is recorded or stored mechanically, photographically, electronically or otherwise;
 - “**information**” means information specified, or of a description specified, by the Minister that relates to the functions of the Director.

[Section 11 amended by No. 28 of 2006 s. 174.]

Part 2A — Licensing of gas supply

[Heading inserted by No. 20 of 1999 s. 8.]

Division 1A — Role of Economic Regulation Authority

[Heading inserted by No. 67 of 2003 s. 62.]

11AA. Functions of Authority

The functions of the Authority under this Part are —

- (a) to administer the licensing scheme provided for in this Part;
- (b) to monitor and report to the Minister on the operation of that licensing scheme and on compliance by licensees with their licences;
- (c) to inform the Minister about any failure by a licensee to meet performance criteria or other requirements of its licence; and
- (d) the other functions conferred on the Authority by this Part.

[Section 11AA inserted by No. 67 of 2003 s. 62.]

Division 1 — Supply areas

[Heading inserted by No. 20 of 1999 s. 8.]

11A. Constitution of supply areas

- (1) The Governor may by order published in the *Gazette* —
 - (a) constitute an area as a supply area;
 - (b) add an area to, or excise an area from, a supply area; or
 - (c) cancel the status of an area as a supply area.
- (2) An order is not to be made under subsection (1) excising an area from a supply area or cancelling the status of an area as a supply area unless the Governor is satisfied that the supply of gas

provided in the area in question will, after the excision or cancellation, continue to be of an acceptable standard.

- (3) Section 42 of the *Interpretation Act 1984* applies to an order under subsection (1) as if the order were a regulation.

[Section 11A inserted by No. 20 of 1999 s. 8.]

11B. Areas need not be continuous

A supply area may be one continuous area or be made up of 2 or more separate areas.

[Section 11B inserted by No. 20 of 1999 s. 8.]

11C. Consultation

Where it is proposed that an order be made under section 11A, the Minister must, before the order is made, consult with any licensee who will be materially affected by the proposed order.

[Section 11C inserted by No. 20 of 1999 s. 8.]

Division 2 — Licence classification and area of operation

[Heading inserted by No. 20 of 1999 s. 8.]

11D. Classification of licences

- (1) Licences are classified as follows —
- (a) distribution, which authorises the licensee —
 - (i) to construct a distribution system and to transport gas through the system; or
 - (ii) to transport gas through an existing distribution system, and if required for that purpose to make alterations to the system,and to operate and maintain the system; or
 - (b) trading, which authorises the licensee to sell to small use customers gas transported through a distribution system.

- (2) A licence is to be designated by reference to one of the classifications referred to in subsection (1).

[Section 11D inserted by No. 20 of 1999 s. 8.]

11E. Area to which licence applies

A licence is to be designated to apply to —

- (a) one or more supply areas; or
- (b) one or more parts of one or more supply areas,

specified in the licence.

[Section 11E inserted by No. 20 of 1999 s. 8; amended by No. 74 of 2003 s. 50(2).]

Division 3 — Licensing requirements

[Heading inserted by No. 20 of 1999 s. 8.]

11F. Licensing extends to statutory providers

The requirements of this Division apply to a person despite the fact that the person, in supplying gas, is performing a function that —

- (a) is authorised or provided for by or under a written law; or
- (b) has been approved under a written law.

[Section 11F inserted by No. 20 of 1999 s. 8.]

11G. Requirement for licence

- (1) A person must not in a supply area or part of a supply area —
- (a) construct, alter or operate a distribution system; or
 - (b) transport gas through a distribution system,

except under the authority of a distribution licence granted by the Authority that applies to that area or that part of that area.

Penalty: \$100 000 and a daily penalty of \$5 000.

- (2) A person must not in a supply area or part of a supply area sell to small use customers gas transported through a distribution system except under the authority of a trading licence granted by the Authority that applies to that area or that part of that area.
Penalty: \$100 000 and a daily penalty of \$5 000.

[Section 11G inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11H. Power to exempt

- (1) The Governor may by order published in the *Gazette* exempt any person or class of persons from all or any of the provisions of section 11G.
- (1a) An exemption may be expressed to apply —
- (a) generally; or
 - (b) only in respect of a specified supply area or a specified part of a supply area.
- (1b) An order under subsection (1) may provide for circumstances in which, and conditions subject to which, an exemption is to apply.
- (1c) An exemption is of no effect at any time when a condition to which it is subject is not being observed.
- (2) The Governor must not make an order under subsection (1) unless he or she is satisfied that it would not be contrary to the public interest to do so.
- (3) The Governor, in determining whether the making of the order would not be contrary to the public interest, may take into account one or more of the following matters —
- (a) environmental considerations;
 - (b) social welfare and equity considerations, including community service obligations;
 - (c) economic and regional development, including employment and investment growth;

- (d) the interests of gas customers generally or of a class of gas customers;
 - (e) the interests of any licensee, or applicant for a licence, in respect of the supply area or part of a supply area to which the order, if made, would apply;
 - (f) the importance of competition in gas industry markets;
 - (fa) the policy objectives of government in relation to the supply of gas;
 - (g) any other matter that he or she considers relevant.
- (4) Section 43(4) and (7) to (9) of the *Interpretation Act 1984* apply to an order under subsection (1) as if the order were subsidiary legislation.

[Section 11H inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 4; No. 67 of 2003 s. 62.]

11I. Transitional provision

- (1) This section applies to every person (an “**existing operator**”) that immediately before the commencement of an order under section 11A is undertaking any activity that, after that commencement, is required to be licensed under section 11G.
- (2) An existing operator that wishes to apply for a licence in respect of an activity referred to in subsection (1) must do so within 4 months after the commencement of the relevant order.
- (3) An existing operator is to be treated as if the person were the holder of the relevant licence —
 - (a) until the expiry of 12 months after the commencement of the relevant order; or
 - (b) until —
 - (i) a licence of that kind is granted to the person or is refused; and
 - (ii) in the case of a refusal, the time for an application under section 11ZH for review of the

decision expires without an application being made or an application is made but is unsuccessful,

whichever happens first.

- (4) For the purposes of paragraph (b)(ii) of subsection (3) an application is unsuccessful if it —
- (a) results in the refusal referred to in paragraph (b)(i) of that subsection being confirmed; or
 - (b) is withdrawn, discontinued or dismissed.

[Section 11I inserted by No. 20 of 1999 s. 8; amended by No. 55 of 2004 s. 296.]

Division 4 — Licence application, grant, etc.

[Heading inserted by No. 20 of 1999 s. 8.]

11J. Restriction on operation of this Division and Division 8

This Division and Division 8 have effect subject to sections 90 and 92 of the *Gas Pipelines Access (Western Australia) Act 1998*.

[Section 11J inserted by No. 20 of 1999 s. 8.]

11K. Authority to consider public interest

- (1) The Authority must not exercise a power conferred by this Division unless the Authority is satisfied that it would not be contrary to the public interest to do so.
- (2) The Authority, in determining whether the exercise of the power would not be contrary to the public interest, may take into account one or more of the matters referred to in section 11H(3).

[Section 11K inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11L. Application for licence

- (1) An application for a licence is to be —
 - (a) made in a form approved by the Authority; and
 - (b) accompanied by the prescribed application fee.
- (2) Without limiting subsection (1)(a), an applicant for a licence is to inform the Authority of —
 - (a) the nature of the business activities undertaken or to be undertaken by the applicant in the gas industry in the State;
 - (b) in the case of an application for a trading licence —
 - (i) the methods or principles that the applicant proposes to apply in determining its prices or charges; and
 - [(ii) deleted]*
 - (c) the methods or standards that the applicant proposes to apply in supplying gas; and
 - (d) in the case of an application for a distribution licence, the nature and extent of the construction, alteration, operation or maintenance of a distribution system undertaken or to be undertaken for the transportation of gas.
- (3) The applicant must also provide such other information (including information as to surveys carried out) as the Authority may require for the proper consideration of the application.

[Section 11L inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 27; No. 67 of 2003 s. 62.]

11M. Terms and conditions of licence

- (1) A licence is subject to such terms and conditions as are determined by the Authority.

(2) Without limiting subsection (1), the terms and conditions may include provisions relating to any matter provided for by Schedule 1A.

[(3) repealed]

- (4) The terms and conditions of licences that —
- (a) have the same classification under section 11D(1); and
 - (b) apply in the same supply area or part of a supply area,
- must be substantially similar, except to the extent that the Authority considers that —
- (c) it is not practicable to make them substantially similar; or
 - (d) a difference is necessary to reflect particular supply circumstances.
- (5) The terms and conditions of a licence must not be inconsistent with —
- (a) the Gas Pipelines Access (Western Australia) Law; or
 - (b) regulations made under section 15 of the *Gas Standards Act 1972*.

[Section 11M inserted by No. 20 of 1999 s. 8; amended by No. 58 of 1999 s. 48; No. 53 of 2003 s. 5 and 94; No. 67 of 2003 s. 62; No. 74 of 2003 s. 50(3).]

11N. Authority may grant more than one licence for supply area

- (1) Subject to regulations made under section 11WM, the Authority may grant in respect of a supply area or part of a supply area more than one licence of a particular classification.
- (2) In subsection (1) —
- “classification”** means a classification referred to in section 11D(1).

[Section 11N inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 63; No. 67 of 2003 s. 62.]

110. Duration of licence

A licence may be granted or renewed for such period as the Authority thinks fit, but the period cannot exceed —

- (a) in the case of a distribution licence, 21 years from the date of its grant or renewal; or
- (b) in the case of a trading licence, 10 years from the date of its grant or renewal.

[Section 110 inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11P. Renewal of licence

- (1) An application for the renewal of a licence is to be —
 - (a) made in a form approved by the Authority; and
 - (b) accompanied by the prescribed application fee.
- (2) An applicant must also provide such other information as the Authority may request for the proper consideration of the application.

[Section 11P inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 6; No. 67 of 2003 s. 62.]

11Q. Licence fee

- (1) A licensee must pay to the Authority the prescribed licence fee —
 - (a) within one month from the day of grant or renewal of the licence; and
 - (b) within one month from each anniversary of that day during the term of the licence.
- (2) Regulations made under section 26 may prescribe different licence fees for each of the classifications referred to in section 11D(1).

- (2a) Without limiting section 45A of the *Interpretation Act 1984*, the fee prescribed under subsection (1) may be determined so as to allow the recovery by the State of retail competition implementation costs.
- (2b) The operation of subsection (2a) extends to retail competition implementation costs that were incurred before the commencement of section 35 of the *Energy Legislation Amendment Act 2003*.
- (3) The Authority may recover any outstanding licence fee in a court of competent jurisdiction as a debt due by the licensee to the Crown.
- (4) In this section —
“retail competition implementation costs” means —
 - (a) costs incurred for the purpose of developing and implementing policies intended to bring about a competitive retail gas market; and
 - (b) costs incurred for any other prescribed purpose, being a purpose ancillary to the purpose mentioned in paragraph (a).

[Section 11Q inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 35; No. 67 of 2003 s. 62.]

11R. Transfer of licence

- (1) A licence cannot be transferred except with the approval of the Authority.
- (2) Approval for the purposes of subsection (1) may be given on such terms and conditions as are determined by the Authority.
- (3) An application for approval to transfer a licence is to be —
 - (a) made in a form approved by the Authority; and
 - (b) accompanied by the prescribed application fee.

- (4) An applicant must also provide such other information as the Authority may request for the proper consideration of the application.

[Section 11R inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 7; No. 67 of 2003 s. 62.]

11S. Decisions as to grant, renewal or transfer

- (1) Subject to section 11K, the Authority must grant, renew or approve the transfer of a licence if the Authority is satisfied that the applicant —

- (a) has, and is likely to retain; or
- (b) will acquire within a reasonable time after the grant, renewal or transfer, and is then likely to retain,

the financial and technical resources to undertake the activities authorised, or to be authorised, by the licence.

- (2) The Authority must take all reasonable steps to make a decision in respect of an application for —

- (a) the grant or renewal of a licence; or
- (b) approval to transfer a licence,

within 90 days after the application is made.

- (3) The duties imposed on the Authority by subsections (1) and (2) apply only if —

- (a) an application has been made in accordance with section 11L, 11P or 11R, as the case may be;
- (b) section 11WE or 11ZQG does not prohibit the grant or renewal of the licence or the approval of the transfer; and
- (c) where a requirement has been made under section 11L(3), 11P(2) or 11R(4), the relevant information has been provided to the Authority.

[Section 11S inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 8; No. 67 of 2003 s. 62.]

11T. Notice of decisions

- (1) The Authority must ensure that notice of the grant, renewal or transfer of a licence is published in the *Gazette* as soon as is practicable after the grant, renewal or transfer.
- (2) The notice is to include —
 - (a) the date of the grant, renewal or transfer;
 - (b) the name and business address of the licensee;
 - (c) the term of the licence;
 - (d) the supply area or areas, or the part or parts of a supply area, to which the licence applies; and
 - (e) the place where a copy of the licence and any plan may be inspected under section 11U.
- (3) The Authority must ensure that written notice of a decision to refuse to grant, renew, or approve the transfer of, a licence, together with a statement of the reasons for the decision, is given to the applicant within 14 days after the decision is made.

[Section 11T inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11U. Licences to be available for inspection

The Authority is to make available at its office for inspection by members of the public during normal office hours —

- (a) a copy of every licence, as in force from time to time; and
- (b) if any supply area or part of a supply area to which a licence applies is specified by reference to a plan, a copy of the plan.

[Section 11U inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11V. Other laws not affected

- (1) The grant, renewal or transfer of a licence does not affect the licensee's obligations to comply with any other written law in relation to the matters covered by the licence.
- (2) Without limiting subsection (1) or sections 90 and 92 of the *Gas Pipelines Access (Western Australia) Act 1998*, a licence has effect subject to the Gas Pipelines Access (Western Australia) Law.

[Section 11V inserted by No. 20 of 1999 s. 8.]

11VA. Amendment of licence on application of licensee

- (1) A licensee may apply to the Authority at any time for amendment of the licence.
- (2) An application —
 - (a) is to be made in a form approved by the Authority; and
 - (b) is to be accompanied by the prescribed application fee.
- (3) The applicant must also provide such other information as the Authority may require for the proper consideration of the application.
- (4) The Authority may grant the application if —
 - (a) it has been made in accordance with subsection (2); and
 - (b) where a requirement has been made under subsection (3), the relevant information has been provided to the Authority.
- (5) Regulations made under section 26 may require the Authority, before it makes a decision on an application under this section, to undertake public consultation in accordance with the procedure specified in the regulations.

[Section 11VA inserted by No. 53 of 2003 s. 9.]

11W. Amendment of licence

- (1) The Authority may, on its own initiative, determine that a licence is to be amended.
- (2) A licence must specify the procedure to be followed in making such a determination, including the manner in which an amendment is to be notified to the licensee, and the determination may only be made in accordance with that procedure.
- (3) An amendment cannot take effect until it is notified to the licensee under the procedure referred to in subsection (2).
- (4) If a licence is amended under this section the Authority must ensure that notice is published in the *Gazette* indicating the nature of the amendment and the place where a copy of the licence may be inspected under section 11U.
- (5) This section applies to the substitution of a new licence for an existing licence in the same way as it applies to the amendment of a licence.

[Section 11W inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 10; No. 67 of 2003 s. 62.]

11WA. Regulations about public consultation

Regulations made under section 26 may require the Authority, before it makes a decision on any application for the grant, renewal or transfer of a licence under this Division, to undertake public consultation in accordance with the procedure specified in the regulations.

[Section 11WA inserted by No. 67 of 2003 s. 62.]

Division 4A — Supply contracts for small use customers

[Heading inserted by No. 53 of 2003 s. 28.]

Subdivision 1 — Preliminary

[Heading inserted by No. 53 of 2003 s. 28.]

11WB. Terms used in this Division

In this Division, unless the contrary intention appears —

“**customer**” means a small use customer;

“**non-standard contract**” means a contract entered into between a licensee and a customer, or a class of customers, that is not a standard form contract;

“**standard form contract**” means a contract that is approved under section 11WF.

[Section 11WB inserted by No. 53 of 2003 s. 28.]

Subdivision 2 — Requirements for supply contracts

[Heading inserted by No. 53 of 2003 s. 28.]

11WC. Regulations as to supply contracts

- (1) The regulations may provide for and in relation to —
 - (a) the terms, conditions and provisions of —
 - (i) a standard form contract; and
 - (ii) a non-standard contract,under which the holder of a trading licence supplies gas to customers;
 - (b) the right of a customer at his or her discretion to rescind a contract during a specified period after it is entered into (a “**cooling-off period**”);
 - (c) the supply of gas, and payment for gas supplied, during a cooling-off period;

- (d) the format of, and manner of expression to be used in, a contract referred to in paragraph (a); and
 - (e) the provision of information about contracts by the holder of a trading licence to customers.
- (2) The regulations may provide —
- (a) for and in relation to the standards of service that the holder of a trading licence is to provide to customers in connection with the supply of gas; and
 - (b) for the inclusion in contracts referred to in subsection (1)(a) of requirements that the licensee comply with any such standard.
- (3) The regulations may apply, adopt or incorporate any provision of a code or a standard that is contained in another document, and may do so —
- (a) with or without modification; or
 - (b) as the provision is in force —
 - (i) at the time when the regulations are made; or
 - (ii) from time to time.

[Section 11WC inserted by No. 53 of 2003 s. 28.]

11WD. Form of contract to be submitted with application for grant, renewal or transfer

- (1) An applicant for the grant or renewal of a trading licence must submit with the application a draft of the standard form contract under which the applicant will supply gas to customers pursuant to the licence.
- (2) Where an application is made under section 11R for the transfer of a trading licence to be approved, the proposed transferee must submit with the application a draft of the standard form contract under which the proposed transferee will supply gas to customers pursuant to the licence if the transfer is approved.

[Section 11WD inserted by No. 53 of 2003 s. 28.]

11WE. Licence application not to be granted unless standard form contract approved

Despite section 11S, the Authority is not to grant or renew, or approve a transfer of, a trading licence unless —

- (a) the applicant or the proposed transferee has submitted a draft form of contract as required by section 11WD; and
- (b) the Authority has approved the standard form contract under which the applicant or proposed transferee will supply gas to customers pursuant to the licence.

[Section 11WE inserted by No. 53 of 2003 s. 28.]

11WF. Approval of standard form contract

- (1) Subject to subsection (2), the Authority may at its discretion approve or refuse to approve a standard form contract submitted under section 11WD.
- (2) The Authority is not to give an approval if it considers that the standard form contract —
 - (a) will not meet the requirements of the regulations in respect of such contracts; or
 - (b) will be inconsistent with —
 - (i) this Act or any other written law; or
 - (ii) any term, condition or provision of the licence concerned.

[Section 11WF inserted by No. 53 of 2003 s. 28.]

11WG. Licence conditions

- (1) It is a condition of every trading licence that, subject to any exception provided for in the regulations, the licensee must not supply gas to a customer otherwise than under —
 - (a) a standard form contract in a form that has been approved under this Division; or
 - (b) a non-standard contract that complies with this Act.

- (2) It is also a condition of every trading licence that the licensee must comply with a direction given to the licensee under section 11WI.
- (3) For the purposes of subsection (1)(b), a non-standard contract complies with this Act if it —
 - (a) meets the requirements of the regulations in respect of such contracts; and
 - (b) is not inconsistent with —
 - (i) this Act or any other written law; or
 - (ii) any term, condition or provision of the licence concerned.

[Section 11WG inserted by No. 53 of 2003 s. 28.]

11WH. Amendment or replacement of standard form contract

- (1) The holder of a trading licence may submit to the Authority for approval —
 - (a) any amendment to the standard form contract approved under this Subdivision; or
 - (b) a replacement for the standard form contract so approved.
- (2) Section 11WF applies to an amendment or a replacement submitted under subsection (1) in the same way as it applied to the standard form contract or the original standard form contract.

[Section 11WH inserted by No. 53 of 2003 s. 28.]

11WI. Authority may direct that amendment be made

- (1) This section applies if, in the opinion of the Authority, a standard form contract approved under this Subdivision —
 - (a) no longer meets the requirements of the regulations in respect of such contracts; or

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- (b) is no longer consistent with —
 - (i) this Act or any other written law; or
 - (ii) any term, condition or provision of the licence concerned.
- (2) The Authority may direct the holder of the trading licence concerned —
 - (a) to submit an appropriate amendment to the form of contract to the Authority for approval under section 11WH(1); and
 - (b) to do so within a specified period.
- (3) In subsection (2)(a) —
 - “appropriate amendment”** means an amendment —
 - (a) specified by the Authority; or
 - (b) otherwise determined by the Authority to be suitable for approval.

[Section 11WI inserted by No. 53 of 2003 s. 28.]

Subdivision 3 — Default supplier

[Heading inserted by No. 53 of 2003 s. 28.]

11WJ. Terms used in this Subdivision

In this Subdivision —

“delivery point” means a point on a pipeline in a distribution system at which gas is withdrawn from that system and delivered to the holder of a trading licence;

“retail market rules” and **“retail market scheme”** have the same meanings as they have in section 11ZOA.

[Section 11WJ inserted by No. 53 of 2003 s. 28.]

11WK. Deemed contract where customer takes gas without making arrangements

- (1) This section applies if a customer commences to take a supply of gas at premises without entering into a contract for that supply with the holder of a trading licence.
- (2) The gas is deemed to be supplied under the standard form contract of the default supplier for the delivery point in respect of those premises, as determined under the provisions mentioned in section 11WL.
- (3) The contract referred to in subsection (2) continues in force until —
 - (a) it is terminated; or
 - (b) the supply of gas to the customer at the premises by the default supplier becomes subject to a non-standard contract with that supplier.
- (4) The regulations may provide that, where this section applies, any term, condition, or provision of a standard form contract —
 - (a) does not have effect; or
 - (b) has effect as if it had been modified as provided for in the regulations.

[Section 11WK inserted by No. 53 of 2003 s. 28.]

11WL. Determination of default supplier

Retail market rules are to require —

- (a) that a default supplier be determined in accordance with the rules for each relevant delivery point;
- (b) that the default supplier so determined is to be the holder of a trading licence that supplies gas at that delivery point; and
- (c) that a register be established and maintained, in accordance with the rules, showing the name of the

default supplier for the time being determined for each delivery point.

[Section 11WL inserted by No. 53 of 2003 s. 28.]

Division 4B — Exclusive licences

[Heading inserted by No. 53 of 2003 s. 64.]

11WM. Regulations may authorise an exclusive licence

- (1) The Governor may, on the recommendation of the Minister, make regulations designating —
 - (a) one or more supply areas; or
 - (b) any part of a supply area,as an area in respect of which an exclusive licence may be granted for a specified period.
- (2) The specified period (the “**period of exclusivity**”) is not to exceed 10 years.

[Section 11WM inserted by No. 53 of 2003 s. 64.]

11WN. Requirements for regulations

- (1) The Minister may, under section 11WM, recommend the making of regulations in respect of a distribution licence or a trading licence only if he or she considers that —
 - (a) without the grant of an exclusive licence of that kind in respect of the area during the period of exclusivity there will be no supply of gas through a distribution system, or a limited supply, in the area during that period;
 - (b) it is not contrary to the public interest that an exclusive licence of that kind have effect in respect of the area during the period of exclusivity; and
 - (c) the regulations will provide for an open and competitive tender process to be carried out to determine the person to whom the licence is to be granted.

- (2) Regulations made under section 11WM —
- (a) are to set out the requirements to be observed, in addition to the other provisions of this Part, before an exclusive licence may be granted; and
 - (b) may provide for the terms and conditions of an exclusive licence in addition to those otherwise provided for by this Part.

[Section 11WN inserted by No. 53 of 2003 s. 64.]

11WO. Application for and grant of licence

- (1) An application for an exclusive licence may only be made if the Minister has determined that he or she is satisfied that all of the requirements of the regulations to be observed before such an application may be made have been complied with.
- (2) Despite section 11S, an exclusive licence may only be granted by the Authority under that section if the Minister has determined that he or she is satisfied that all of the requirements of the regulations relevant to the grant of the licence have been observed.
- (3) A determination under subsection (1) or (2) is to be made by instrument published in the *Gazette*.

[Section 11WO inserted by No. 53 of 2003 s. 64.]

11WP. Prohibition of further licences

If —

- (a) an exclusive licence is granted in respect of an area in accordance with regulations made under section 11WM; and
- (b) the licence is not cancelled under section 11ZE or surrendered,

no other person is to be granted a licence of the same kind to have effect in respect of that area during the period of exclusivity.

[Section 11WP inserted by No. 53 of 2003 s. 64.]

11WQ. Trade practices exemption

For the purposes of the *Trade Practices Act 1974* of the Commonwealth and the Competition Code —

- (a) the grant of an exclusive licence as provided by regulations made under section 11WM; and
- (b) conduct authorised or required by or under any such licence,

are specifically authorised to the extent that the grant or conduct would otherwise contravene that Act and that Code.

[Section 11WQ inserted by No. 53 of 2003 s. 64.]

Division 4C — Recovery of costs

[Heading inserted by No. 53 of 2003 s. 36.]

11WR. Regulations may authorise recovery of costs

- (1) The regulations may make provision —
 - (a) for and in relation to the fixing of prices, fees and charges by the holder of a distribution licence to reflect costs to which this section applies; and
 - (b) authorising the holder of a distribution licence to recover those prices, fees and charges from the holders of trading licences or any class of such holders.
- (2) Regulations made under subsection (1) may apply to costs to which this section applies that were incurred before the commencement of section 36 of the *Energy Legislation Amendment Act 2003*.
- (3) This section applies to costs prescribed by the regulations, being costs of and incidental to the development, acquisition and implementation by the holder of a distribution licence of the information technology systems, including computer software,

required for the facilitation of competition in the retail gas market.

[Section 11WR inserted by No. 53 of 2003 s. 36.]

Division 5 — Interruption etc. of supply

[Heading inserted by No. 20 of 1999 s. 8.]

11X. Interruption etc. of supply

- (1) A licensee may interrupt, suspend or restrict the supply of gas provided by the licensee if in the licensee's opinion it is necessary to do so because of an accident, emergency, potential danger or other unavoidable cause.
- (2) A licensee is not liable for any loss or damage that arises from any such interruption, suspension or restriction except to the extent that an agreement to which the licensee is a party provides otherwise.
- (3) A licensee must take reasonable steps to minimise the extent or duration of any such interruption, suspension or restriction.
- (4) This section is in addition to —
 - (a) the provisions of section 48 of the *Energy Operators (Powers) Act 1979* that apply to a licensee by operation of section 11ZO; and
 - (b) any contractual rights that the licensee may have to interrupt, suspend or restrict the supply of gas,

and does not limit those provisions or rights.

[Section 11X inserted by No. 20 of 1999 s. 8.]

Division 6 — Duties included in licences

[Heading inserted by No. 20 of 1999 s. 8.]

11Y. Asset management system

- (1) It is a condition of every distribution licence that the licensee is to —
 - (a) provide for an asset management system in respect of the licensee's assets;
 - (b) notify details of the system and any substantial changes to it to the Authority; and
 - (c) not less than once in every period of 24 months (or such longer period as the Authority allows) calculated from the grant of the licence, provide the Authority with a report by an independent expert acceptable to the Authority as to the effectiveness of the system.
- (2) An asset management system is to set out the measures to be taken by the licensee for the proper maintenance of assets used in the supply of gas and in the operation and maintenance of, and, where relevant, the construction or alteration of, the distribution system.

[Section 11Y inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11Z. Compliance with technical standards

It is a condition of every licence that the licensee is to comply with the standards prescribed under the *Gas Standards Act 1972* to the extent that those standards apply to the supply of gas by the licensee.

[Section 11Z inserted by No. 20 of 1999 s. 8; amended by No. 74 of 2003 s. 10(3)(b).]

11ZA. Performance audit

- (1) It is a condition of every licence that the licensee is to, not less than once in every period of 24 months (or such longer period as the Authority allows) calculated from the grant of the licence, provide the Authority with a performance audit conducted by an independent expert acceptable to the Authority.
- (2) A performance audit is an audit of the effectiveness of measures taken by the licensee to meet —
 - (a) the standards referred to in section 11Z; and
 - (b) performance criteria specified in the licence.
- (3) The Authority is to present to the Minister a report on each performance audit within 2 months after its receipt of the audit.

[Section 11ZA inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

Division 6A — Last resort supply arrangements

[Heading inserted by No. 53 of 2004 s. 37.]

11ZAA. Terms used in this Division

In this Division, unless the contrary intention appears —

“last resort supply plan” means a plan that meets the requirements of section 11ZAC;

“supplier of last resort” has the meaning given by section 11ZAC(1);

“supply area” includes a part of a supply area.

[Section 11ZAA inserted by No. 53 of 2003 s. 37.]

11ZAB. Authority to ensure supply plan in place

The Authority is to ensure that, for each supply area in which there are small use customers, there is at all times a last resort supply plan that has been approved or determined by the Authority under section 11ZAG.

[Section 11ZAB inserted by No. 53 of 2003 s. 37.]

11ZAC. Requirements for last resort supply plan

- (1) A last resort supply plan for a supply area is one that deals with the supply of gas to small use customers in the area by the holder of a trading licence (a “**supplier of last resort**”) if the plan comes into operation under section 11ZAD.
- (2) A last resort supply plan must set out the arrangements, and make the provisions, that are necessary for the supply of gas as mentioned in subsection (1).
- (3) A last resort supply plan must —
 - (a) make provision for any matter or circumstance that is prescribed; and
 - (b) otherwise comply with the regulations.
- (4) A last resort supply plan is of no effect to the extent that it is inconsistent with —
 - (a) this Act or another written law; or
 - (b) an access arrangement under the Gas Pipelines Access (Western Australia) Law.

[Section 11ZAC inserted by No. 53 of 2003 s. 37.]

11ZAD. How plan brought into operation

- (1) The Authority may, by order published in the *Gazette*, determine that a last resort supply plan for a supply area comes into operation on a day specified in the order.
- (2) An order may be made under subsection (1) only if the licence of the supplier to whose small use customers the plan applies —
 - (a) has been cancelled under section 11ZE;
 - (b) has expired and has not been renewed; or
 - (c) has been surrendered.

- (3) An order under subsection (1) in respect of a last resort supply plan is to specify the name of the supplier to whose small use customers the plan applies.

[Section 11ZAD inserted by No. 53 of 2003 s. 37.]

11ZAE. Designation of licensee as supplier of last resort

- (1) The Authority may, by notice in writing to the holder of a trading licence for a supply area —
- (a) designate the holder as the supplier of last resort for that area; or
 - (b) cancel a designation so made.
- (2) The Authority is to consult with the licensee before a notice is given under subsection (1).
- (3) A designation of a licensee cannot be expressed to have effect for more than 2 years, but on the expiry of a designation the licensee may be re-designated, whether once or more than once.

[Section 11ZAE inserted by No. 53 of 2003 s. 37.]

11ZAF. Functions of supplier of last resort

The functions of a supplier of last resort for a supply area are —

- (a) to prepare a draft last resort supply plan for that area and submit it to the Authority within 3 months after the supplier is designated or within such longer period as the Authority may allow;
- (b) to consult with the Authority with a view to obtaining approval of the draft plan; and
- (c) to carry out the arrangements and other provisions in the last resort supply plan approved or determined by the Authority under section 11ZAG, if the plan comes into operation under section 11ZAD.

[Section 11ZAF inserted by No. 53 of 2003 s. 37.]

11ZAG. Approval or determination of plan

- (1) The Authority may —
 - (a) approve a draft last resort supply plan submitted under section 11ZAF; or
 - (b) request that it be amended and approve it in an amended form.
- (2) If a plan has not been approved by the Authority within a period that it considers reasonable and notifies to the supplier concerned, the Authority may determine the contents of the last resort supply plan.

[Section 11ZAG inserted by No. 53 of 2003 s. 37.]

11ZAH. Amendment of plan by supplier

- (1) With the approval of the Authority, the supplier of last resort for a supply area may amend the last resort supply plan for that area.
- (2) The supplier of last resort must submit any proposed amendment to the Authority for approval.
- (3) If an amendment is so submitted the Authority may —
 - (a) approve it;
 - (b) request that it be changed and approve it in a changed form; or
 - (c) refuse to approve it.

[Section 11ZAH inserted by No. 53 of 2003 s. 37.]

11ZAI. Authority may make amendment

The Authority may at any time, after consultation with the supplier of last resort for a supply area, amend the last resort supply plan for that area.

[Section 11ZAI inserted by No. 53 of 2003 s. 37.]

11ZAJ. Licence condition

It is a condition of every trading licence that applies in a supply area that —

- (a) if the licensee is designated under section 11ZAE; and
- (b) so long as the designation remains in force,

the licensee will perform the functions of the supplier of last resort for that area, and in particular will carry out the arrangements and provisions in the last resort supply plan if it comes into operation under section 11ZAD.

[Section 11ZAJ inserted by No. 53 of 2003 s. 37.]

11ZAK. Provision may be made by regulation

The regulations may make provision for and in relation to —

- (a) the preparation and approval process for a last resort supply plan under sections 11ZAF and 11ZAG, and the amendment of a plan;
- (b) last resort supply arrangements under a plan, including for and in relation to —
 - (i) the commencement of arrangements;
 - (ii) notification to small use customers and other affected persons of matters relating to the arrangements, including —
 - (I) the commencement of arrangements;
 - (II) the effect of the arrangements and steps that will or may be taken; and
 - (III) rights, powers, duties and procedures that apply under the arrangements;
 - (iii) the identification of the small use customers affected by the commencement of arrangements and the provision of identifying information to the supplier of last resort;

- (iv) the transfer of small use customers to the supplier of last resort and the nature of the relationship between them;
- (v) the terms and conditions of supply of gas under the arrangements, including those relating to pricing and the imposition of charges;
- (vi) the recovery of costs by the supplier of last resort;
- (vii) the duration and cessation of any obligation to supply gas under the arrangements; and
- (viii) other rights, powers and duties of —
 - (I) the Authority;
 - (II) the supplier of last resort;
 - (III) small use customers; and
 - (IV) other persons,in connection with the carrying out of the arrangements or the operation of a last resort supply plan.

[Section 11ZAK inserted by No. 53 of 2003 s. 37.]

Division 7 — Enforcement

[Heading inserted by No. 20 of 1999 s. 8.]

11ZB. Failure to comply with licence

- (1) If, in the opinion of the Authority, a licensee contravenes a licence, the Authority may cause a notice to be served on the licensee requiring the licensee to rectify the contravention within a specified period.
- (2) If, in the opinion of the Authority, a licensee fails to comply with a notice under subsection (1), the Authority may, subject to section 11ZC, do one or more of the following —
 - (a) serve a letter of reprimand on the licensee;

- (b) order the licensee to pay a monetary penalty fixed by the Authority but not exceeding \$100 000;
 - (c) cause the contravention to be rectified to the satisfaction of the Authority.
- (3) Persons authorised by the Authority may enter any premises and do all things that are necessary for the purposes of subsection (2)(c).
- (4) The Authority may recover —
 - (a) a penalty imposed under subsection (2)(b); or
 - (b) the costs and expenses of any action taken under subsection (2)(c),

in a court of competent jurisdiction as a debt due by the licensee to the Crown.

[Section 11ZB inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11ZC. Right of licensee to make submissions

The Authority is not to take any action under section 11ZB(2)(b) or (c) unless it has notified the licensee of the proposed action and given the licensee a reasonable opportunity to make submissions on the matter.

[Section 11ZC inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11ZD. Exception where public health or safety endangered

If, in the opinion of the Authority, the health or safety of members of the public is or may be at risk as a result of the contravention of a licence, the Authority may cause the contravention to be rectified under section 11ZB(2)(c) without —

- (a) serving notice on the licensee under section 11ZB(1); or
- (b) complying with section 11ZC.

[Section 11ZD inserted by No. 20 of 1999 s. 8; amended by No. 67 of 2003 s. 62.]

11ZE. Cancellation of licence

- (1) The Governor may cancel a licence if he or she is satisfied that the licensee —
 - (a) is in default as defined in subsection (2);
 - (b) has failed to pay a licence fee as required under section 11Q;
 - (c) in the case of a company, is an externally administered corporation within the meaning of the *Corporations Act 2001* of the Commonwealth; or
 - (d) has within a period of 24 months been convicted of more than 3 offences for which the prescribed punishment is a fine of \$10 000 or more or imprisonment for 12 months or more.
- (2) For the purposes of subsection (1)(a) a licensee is in default if the Governor is satisfied that —
 - (a) the licensee has failed to comply with a term or condition of the licence;
 - (b) the failure is material in terms of the operation of the licence as a whole;
 - (c) the Minister has given to the licensee written notice of the failure and the fact that in the Minister's opinion paragraph (b) applies to it; and
 - (d) the licensee has not, within the time specified in the notice, either remedied the failure or shown cause why the licence should not be cancelled.
- (3) If a licence is cancelled under this section the Authority must ensure that notice of the cancellation is published in the *Gazette*.

- (4) Regulations may be made under section 26 providing, in the event of a licence being cancelled, for —
- (a) the vesting of assets, rights and interests of the former licensee in a person (including the Minister as a corporation) for the purpose of enabling gas to be supplied after the cancellation, except where a last resort supply plan under Part 2A Division 6A applies;
 - (b) the conferral of powers and duties for that purpose;
 - (c) the discharge or assignment of liabilities;
 - (d) the disposal of property; and
 - (e) all matters that are necessary or convenient for dealing with the consequences of the cancellation and the vesting referred to in paragraph (a).
- (5) If —
- (a) a distribution licence is cancelled under this section; and
 - (b) regulations of the kind referred to in subsection (4)(a) are made,

Division 9 applies, with all necessary changes, for the purpose of enabling gas to be supplied after the cancellation, as if references in that Division to a licensee were references to the person in whom the assets, rights and interests of the former licensee are vested under the regulations.

[Section 11ZE inserted by No. 20 of 1999 s. 8; amended by No. 10 of 2001 s. 220; No. 53 of 2003 s. 38; No. 67 of 2003 s. 62.]

11ZF. Duty to leave system in safe condition

- (1) Following the cancellation of a distribution licence under section 11ZE, the former licensee —
- (a) is to ensure that any distribution system constructed or operated by the former licensee under the licence is left in a safe condition; and

- (b) is not to remove any part of such a system except with the approval of the Minister.
- (2) If, in the opinion of the Minister, a former licensee contravenes subsection (1), the Minister may cause the contravention to be rectified to the satisfaction of the Minister.
- (3) Persons authorised by the Minister may enter any land or premises and do all things that are necessary for the purposes of subsection (2).
- (4) The Minister may recover the costs and expenses of any action taken under subsection (2) in a court of competent jurisdiction as a debt due by the former licensee to the Crown.

[Section 11ZF inserted by No. 20 of 1999 s. 8.]

[11ZG. Repealed by No. 67 of 2003 s. 62.]

Division 8 — Review

[Heading inserted by No. 20 of 1999 s. 8.]

11ZH. Review of Authority's decision

[(1) repealed]

- (2) A person adversely affected by a decision of the Authority —
 - (a) to refuse to grant or renew a licence;
 - (aa) to refuse to approve —
 - (i) a standard form contract under section 11WF; or
 - (ii) an amendment to or replacement for a standard form contract under section 11WH;
 - (b) to refuse to approve the transfer of a licence;
 - (ba) to refuse to amend a licence under section 11VA;
 - (c) as to the length of the period for which a licence is granted or renewed;
 - (d) as to any term or condition of a licence; or

- (e) to amend a licence under section 11W,
may apply to the State Administrative Tribunal for a review of
the decision.
- (2a) A licensee may apply to the State Administrative Tribunal for a
review of a direction given to the licensee by the Authority
under section 11WI.
- (3) The President is to ensure that, when dealing with an application
under subsection (2) or (2a), the Tribunal is constituted by
3 persons, being —
- (a) a presiding member who may be either a judicial
member or a senior member who is a qualified person;
and
 - (b) 2 other Tribunal members each of whom has relevant
expertise in industry, commerce or accounting.
- (4) Without limiting the *State Administrative Tribunal Act 2004*, if
a Tribunal member referred to in subsection (3)(b) is unable for
any reason to continue with the proceeding the Tribunal
constituted of the presiding member and the other member
referred to in subsection (3)(b) may, if the presiding member so
determines, continue and complete the proceeding.
- (5) A person chosen to act as a sitting member of the Tribunal who
has a conflict of interest in relation to an application under
subsection (2) or (2a) before, or about to come before, the
Tribunal must disclose the nature of the conflict to each party
concerned in the proceeding.
Penalty: \$10 000.
- (6) A person chosen to act as a sitting member of the Tribunal who
has a conflict of interest in relation to an application under
subsection (2) or (2a) before the Tribunal must not take part in
the proceeding or exercise any powers in relation to the
proceeding unless each party to the proceeding consents.
Penalty: \$10 000.

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- (7) For the purposes of this section, a person has a conflict of interest in relation to an application if the person has any direct or indirect interest, pecuniary or otherwise, that conflicts or could conflict with the proper performance of the person's functions in relation to that application.
- (8) Section 144 of the *State Administrative Tribunal Act 2004* does not apply in relation to an application under subsection (2) or (2a).
- (9) Terms used in this section relating to members of the Tribunal have the meanings given to them in section 3(1) of the *State Administrative Tribunal Act 2004*.

[Section 11ZH inserted by No. 20 of 1999 s. 8; amended by No. 53 of 2003 s. 11 and 29; No. 67 of 2003 s. 62; No. 55 of 2004 s. 297.]

Division 9 — Powers in relation to land

[Heading inserted by No. 20 of 1999 s. 8.]

11ZI. When this Division applies

The powers conferred by this Division may, subject to section 11ZE(5), only be exercised in relation to a distribution licence.

[Section 11ZI inserted by No. 20 of 1999 s. 8.]

11ZJ. Power of public authority to grant easements etc.

- (1) A public authority may grant to a licensee, on such terms and conditions as are agreed between the authority and the licensee, a relevant interest in respect of land held by the public authority in fee simple.
- (2) In this section —
“public authority” means —
 - (a) a Minister of the Crown;

- (b) an agency, authority or instrumentality of the Crown in right of the State or a local government; or
- (c) a body, whether corporate or unincorporate, that is established or continued for a public purpose by or under a written law and prescribed for the purposes of this definition;

“relevant interest” means a lease, easement, licence or other authority necessary or expedient to enable the licensee to construct, alter, operate or maintain a distribution system.

[Section 11ZJ inserted by No. 20 of 1999 s. 8.]

11ZK. Taking of interest or easement for purposes of licence

- (1) For the purpose of enabling a licensee to supply gas as authorised by a licence, an interest in land or easement over land may be taken under Part 9 of the *Land Administration Act 1997* as if for a public work within the meaning of that Act.
- (2) The power conferred by subsection (1) may only be exercised on the recommendation of the Minister.
- (3) Any costs and expenses incurred in the taking of an interest or easement under subsection (1) —
 - (a) are to be paid by the licensee; and
 - (b) may be recovered in a court of competent jurisdiction as a debt due by the licensee to the Crown.
- (4) For the purposes of subsection (1) a reference to an interest in land in Part 9 of the *Land Administration Act 1997* includes an easement over land.

[Section 11ZK inserted by No. 20 of 1999 s. 8; amended by No. 28 of 2006 s. 175.]

11ZL. Vesting of interest or easement

- (1) Despite anything in Part 9 of the *Land Administration Act 1997*, on the taking of an interest in land or easement over land under section 11ZK, the interest or easement vests in the licensee.

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- (2) Part 9 of the *Land Administration Act 1997* applies, with all necessary changes, in relation to the recording or registering of the interest or easement taken under section 11ZK.

[Section 11ZL inserted by No. 20 of 1999 s. 8.]

11ZM. Proceedings and liability

- (1) Proceedings in respect of compensation, or otherwise for the purpose of complying with Parts 9 and 10 of the *Land Administration Act 1997*, are to be taken against the licensee.
- (2) The licensee is liable in respect of the taking of an interest in land or easement over land under section 11ZK to the same extent as the Minister responsible for the administration of the *Land Administration Act 1997* would have been liable if the taking had been for the purpose of a public work.

[Section 11ZM inserted by No. 20 of 1999 s. 8.]

11ZN. Easements in gross

An easement may be taken under section 11ZK without there being a dominant tenement and there may be made appurtenant or annexed to any such easement another easement or the benefit of a restriction as to the user of the land.

[Section 11ZN inserted by No. 20 of 1999 s. 8.]

Division 10 — Extension of *Energy Operators (Powers) Act 1979* to licensees

[Heading inserted by No. 20 of 1999 s. 8.]

11ZO. Extension of certain provisions of *Energy Operators (Powers) Act 1979*

- (1) A reference to an energy operator in a provision of the *Energy Operators (Powers) Act 1979* referred to in Part 1 of Schedule 2 includes —
- (a) the holder of a distribution licence;

- (b) any transferee of a distribution licence under section 11R; and
 - (c) any person in whom the assets, rights and interests of a former holder of a distribution licence are vested under regulations referred to in section 11ZE(4).
- (2) A reference to an energy operator in a provision of the *Energy Operators (Powers) Act 1979* referred to in Part 2 of Schedule 2 includes —
- (a) the holder of a trading licence;
 - (b) any transferee of a trading licence under section 11R; and
 - (c) any person in whom the assets, rights and interests of a former holder of a trading licence are vested under regulations referred to in section 11ZE(4).
- (3) Regulations may be made under section 26 in terms that —
- (a) restrict the operation of, or add a further requirement to, a prescribed provision in relation to a licensee or class of licensees;
 - (b) impose conditions or restrictions on the doing of any thing authorised by a prescribed provision by a licensee or a member of a class of licensees;
 - (c) prohibit a licensee or a member of a class of licensees from doing any thing authorised by a prescribed provision; or
 - (d) require a consent or approval to be obtained for the doing of, or the manner of doing, any thing authorised by a prescribed provision.
- (4) In subsection (3) —
- “licensee”** includes a person referred to in subsection (1)(c) or (2)(c);

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“prescribed provision” means a provision of the *Energy Operators (Powers) Act 1979* referred to in Part 1 or 2 of Schedule 2.

[Section 11ZO inserted by No. 20 of 1999 s. 8; amended by No. 58 of 1999 s. 75.]

Part 2B — Gas supply: retail market schemes

[Heading inserted by No. 53 of 2003 s. 15.]

Division 1 — Preliminary

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOA. Terms used in this Part

In this Part, unless the contrary intention appears —

“approved” means approved by the Authority under Division 3;

“contravene” includes fail to comply with;

“formal entity” means a formal entity referred to in section 11ZOF(1)(b);

“gas business operator” means —

- (a) a gas market participant;
- (b) a gas transmission operator; and
- (c) a prescribed person within the meaning in section 11ZOD(1)(b);

“gas distribution operator” has the meaning given by section 11ZOC(1)(a);

“gas market participant” has the meaning given by section 11ZOC(1);

“gas transmission operator” has the meaning given by section 11ZOD(1)(a);

“member”, in relation to a retail market scheme, means a gas market participant who is bound by agreement to comply with the relevant provisions of the scheme as required by section 11ZOC(1);

“relevant provisions”, in relation to a person, means the provisions of a retail market scheme or retail market rules, as the case may be, that are applicable to the person;

“retail gas operator” has the meaning given by section 11ZOC(1)(b);

“retail market rules” means rules of the kind described in section 11ZOG, as from time to time amended, that have effect as part of a retail market scheme;

“retail market scheme” means a scheme of the kind described in section 11ZOF.

[Section 11ZOA inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(3).]

Division 2 — Purpose and content of a retail market scheme

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOB. Purpose of retail market scheme

The purpose of a retail market scheme for a distribution system is to ensure that the retail gas market that is supplied through that system is regulated and operates in a manner that is —

- (a) open and competitive;
- (b) efficient; and
- (c) fair to gas market participants and their customers.

[Section 11ZOB inserted by No. 53 of 2003 s. 15.]

11ZOC. Persons required to comply with a retail market scheme

- (1) Each of the following persons (a **“gas market participant”**) must be bound by agreement, as provided by section 11ZOF(1)(a), to comply with the relevant provisions of an approved retail market scheme for a distribution system —
 - (a) a person (a **“gas distribution operator”**) who is required to hold a distribution licence for that system; and
 - (b) a person (a **“retail gas operator”**) who sells gas that is transported through that system.

- (2) This section has effect subject to —
- (a) section 11ZOE; and
 - (b) any exemption granted under section 11ZOS.

[Section 11ZOC inserted by No. 53 of 2003 s. 15.]

11ZOD. Persons required to comply with retail market rules

- (1) The following persons must comply with the relevant provisions of the retail market rules made as part of any approved retail market scheme for a distribution system —
- (a) a person (a “**gas transmission operator**”) who operates a pipeline that is used to transport gas into that distribution system for supply to customers of retail gas operators;
 - (b) any other person (a “**prescribed person**”) who —
 - (i) is prescribed; or
 - (ii) belongs to a class of persons that is prescribed, for the purposes of this paragraph.
- (2) Without limiting section 43(7) of the *Interpretation Act 1984*, regulations made for the purposes of subsection (1)(b) may —
- (a) prescribe a person in terms that retail market rules apply to the person; or
 - (b) prescribe a class of persons in terms that retail market rules apply to persons belonging to the class,
- subject to any specified exception or limitation.
- (3) This section has effect subject to any exemption granted under section 11ZOS.

[Section 11ZOD inserted by No. 53 of 2003 s. 15.]

11ZOE. Exception to requirement for a scheme

A retail market scheme is not required to be in force for a distribution system if —

- (a) there is no more than one person who is required to hold a distribution licence for that system; and
- (b) there is no more than one person who sells gas that is transported through that system.

[Section 11ZOE inserted by No. 53 of 2003 s. 15.]

11ZOF. Elements of retail market scheme

- (1) A retail market scheme for a distribution system is to consist of —
 - (a) one or more agreements made between persons who are gas market participants in relation to that system;
 - (b) a formal entity (whether a company, partnership, trust or otherwise) to provide the structure through which the scheme is administered; and
 - (c) a set of retail market rules.
- (2) An agreement for the purposes of subsection (1)(a) may take the form of a provision by which a person, on becoming a member of a formal entity, is taken to agree to specified matters.
- (3) The documentation for the matters mentioned in subsection (1)(a) and (b) is to set out —
 - (a) the arrangements and understandings between the gas market participants concerned;
 - (b) their mutual rights and obligations; and
 - (c) all necessary incidental and supplementary provisions,to achieve the purposes set out in section 11ZOB.
- (4) Without limiting subsection (3), provision is to be made in the documentation for a retail market scheme for —
 - (a) the administration of the scheme;

- (b) the cost of administration to be met by the gas market participants who are members of the scheme;
- (c) how those costs are to be borne as between the gas market participants concerned;
- (d) reporting to the Authority on the operation of the scheme;
- (e) the resolution of disputes and questions that may arise between the gas market participants concerned;
- (f) the scheme to be accessible to any gas market participant in relation to the relevant distribution system; and
- (g) any other matter that is prescribed.

[Section 11ZOF inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOG. Requirements for retail market rules

- (1) Retail market rules for a distribution system are to set out in relation to the operations of the relevant gas business operators —
 - (a) the systems, practices, procedures and processes; and
 - (b) rights and obligations of the gas business operators and their customers,that are to be in place to achieve the purposes set out in section 11ZOB.
- (2) Without limiting subsection (1) provision is to be made for and in relation to —
 - (a) the roles and functions of each kind of gas business operator;
 - (b) the transfer of customers between retail gas operators, including —
 - (i) the procedures to be followed;
 - (ii) the information to be provided; and

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- (iii) requirements for the consent of a customer to be obtained to the taking of any specified step in respect of the customer;
 - (c) the collection, management and use of data arising from the metering of gas flow;
 - (d) the provision of access to, and copies of, the data referred to in paragraph (c);
 - (e) the rights, powers and obligations of gas business operators, and the procedures that are to apply, in respect of an imbalance during a particular period between —
 - (i) the amount of gas of an operator that is entered on behalf of the operator into a distribution system or part of a distribution system; and
 - (ii) the amount of gas that is withdrawn by the operator from,
that system or that part of a system;
 - (f) the keeping, retention and auditing of records;
 - (g) the resolution of disputes and questions that may arise;
 - (h) subject to Division 3, the requirements to be observed in making an amendment to, or replacing, the retail market rules;
 - (i) monitoring compliance with the retail market rules;
 - (j) the enforcement of the retail market rules, including by the imposition of penalties; and
 - (k) any other matter that is prescribed.
- (3) Retail market rules are of no effect to the extent that they are inconsistent with this Act or another written law.
- (4) Retail market rules are not subsidiary legislation for the purposes of the *Interpretation Act 1984*.

[Section 11ZOG inserted by No. 53 of 2003 s. 15.]

11ZOH. Regulations for retail market scheme or rules

Regulations may be made —

- (a) authorising the inclusion in a retail market scheme or in retail market rules of a provision —
 - (i) of a particular kind;
 - (ii) having a particular effect or operation; or
 - (iii) relating to a particular matter or particular circumstances;

or

- (b) making any provision that —
 - (i) facilitates the operation of a retail market scheme or retail market rules; and
 - (ii) cannot be included in the scheme or rules under the provisions of section 11ZOF or 11ZOG.

[Section 11ZOH inserted by No. 53 of 2003 s. 15.]

Division 3 — Preparation, approval, review and amendment of retail market schemes

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOI. Submission of retail market scheme for approval

- (1) A proposed retail market scheme for a distribution system may be submitted to the Authority for approval by —
 - (a) the members of; or
 - (b) the formal entity for,the proposed scheme.
- (2) A retail market scheme is not to be submitted under subsection (1) unless the gas market participants concerned have agreed to be bound by the scheme.

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- (3) A retail market scheme for a distribution system is not to be submitted under subsection (1) unless the gas market participants concerned have consulted with —
- (a) any gas transmission operator whose pipeline is used to transport gas into that system; and
 - (b) a prescribed person within the meaning in section 11ZOD(1)(b) in relation to that system.
- (4) Consultation under subsection (3) is only required —
- (a) in relation to the provisions of the retail market rules that will apply to —
 - (i) the gas transmission operator; or
 - (ii) the prescribed person within the meaning in section 11ZOD(1)(b),as part of the scheme; and
 - (b) in the case of a person referred to in paragraph (a)(ii) to the extent that the person —
 - (i) is required by the regulations to be consulted under subsection (3); or
 - (ii) meets any criteria in relation to the requirement for consultation that are prescribed for the purposes of this subparagraph.

[Section 11ZOI inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOJ. Approval of retail market schemes

- (1) Where a proposed retail market scheme is submitted under section 11ZOI, the Authority may —
- (a) in accordance with sections 11ZON and 11ZOP, approve the proposed scheme; or
 - (b) request that it be amended.

- (2) If, following a request under subsection (1)(b), the scheme is submitted with amendments, the Authority may —
 - (a) in accordance with sections 11ZON and 11ZOP, approve the amended scheme; or
 - (b) request that it be further amended.
- (3) If, following a request under subsection (2)(b), the scheme is submitted with further amendments, the Authority is to —
 - (a) approve the amended scheme; or
 - (b) refuse to approve it,in accordance with sections 11ZON and 11ZOP.
- (4) The Authority is to cause notice of the approval of a retail market scheme to be published in the Gazette.

[Section 11ZOJ inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOK. Commencement of retail market schemes

- (1) A retail market scheme comes into force on a day determined by the Authority by instrument in writing.
- (2) The Authority may from time to time, by further instrument in writing, amend an instrument made under subsection (1).
- (3) An instrument made under subsection (1) or (2) is to be published in the *Gazette*.

[Section 11ZOK inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOL. Submission of amendment for approval

- (1) The members for the time being of an approved retail market scheme may —
 - (a) prepare an amendment to the scheme; and
 - (b) submit the amendment to the Authority for approval.

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- (2) An amendment to a retail market scheme is not to be submitted under subsection (1) unless the provisions of the scheme relating to proposals for amendment of the scheme have been complied with.
- (3) An amendment to the retail market rules made as part of a scheme for a distribution system is not to be submitted under subsection (1) unless the members of the scheme have consulted in relation to the amendment with any of the following who would be affected by the amendment if it is approved —
- (a) a gas transmission operator whose pipeline is used to transport gas into that system; and
 - (b) a prescribed person within the meaning in section 11ZOD(1)(b).
- (4) Consultation is required under subsection (3) with a person referred to in subsection (3)(b) only to the extent that the person —
- (a) is required by the regulations to be consulted under that subsection; or
 - (b) meets any criteria in relation to the requirement for consultation that are prescribed for the purposes of this paragraph.
- (5) In this section and in section 11ZOM —
- “amendment”** includes a replacement for the whole or part of the retail market scheme.

[Section 11ZOL inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOM. Approval of amendment

Where an amendment is submitted under section 11ZOL, the Authority is to, in accordance with sections 11ZOO and 11ZOP —

- (a) approve it;

- (b) request that it be changed and approve it in a changed form; or
- (c) refuse to approve it.

[Section 11ZOM inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZON. Prerequisites to approval of scheme

The Authority may approve a retail market scheme under section 11ZOJ only if the Authority is satisfied —

- (a) that the provisions of the scheme —
 - (i) comply with this Act; and
 - (ii) are suitable for the purposes of section 11ZOB;
- (b) any other principle, criterion or requirement that is prescribed for the purposes of this paragraph has been met; and
- (c) the consultation required by section 11ZOI(3) has taken place and —
 - (i) each person required to be consulted has agreed, if the scheme is approved, to comply with the relevant provisions of the retail market rules made as part of the scheme; or
 - (ii) if any person required to be consulted has not so agreed, that person has been given a reasonable opportunity in the course of the consultation to provide reasons for not agreeing and any reasons so provided have been considered.

[Section 11ZON inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

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Division 3 Preparation, approval, review and amendment of retail market schemes

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11ZOO. Prerequisites to approval of amendment

- (1) The Authority may approve an amendment to a retail market scheme under section 11ZOM only if the Authority is satisfied that —
 - (a) if the amendment is made the provisions of the scheme —
 - (i) will comply with this Act; and
 - (ii) be suitable for the purposes of section 11ZOB;
 - (b) any other principle, criterion or requirement that is prescribed for the purposes of this paragraph has been met.
- (2) The Authority may approve an amendment to any retail market rules under section 11ZOM only if the Authority is satisfied that the consultation required by section 11ZOL(3) has taken place and —
 - (a) each person required to be consulted has agreed to the amendment; or
 - (b) if any person required to be consulted has not so agreed, that person has been given a reasonable opportunity in the course of the consultation to provide reasons for not agreeing and any reasons so provided have been considered.

[Section 11ZOO inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOP. Matters to which Authority is to have regard

The Authority is also to have regard to —

- (a) any principles, criteria or requirements that are prescribed for the purposes of this paragraph; and

(b) such other matters as the Authority considers relevant, when determining whether or not to give an approval under section 11ZOJ or 11ZOM.

[Section 11ZOP inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOQ. Review of scheme

- (1) The Authority must carry out a review of a retail market scheme as soon as is practicable after the third anniversary of its commencement.
- (2) The purpose of a review is to re-assess the suitability of the provisions of a scheme to achieve the purposes set out in section 11ZOB.

[Section 11ZOQ inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

Division 4 — Enforcement

[Heading inserted by No. 53 of 2003 s. 15.]

Subdivision 1 — Enforcement of requirements for membership of scheme

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOR. Membership required

- (1) A gas distribution operator contravenes this section if the operator —
 - (a) transports gas through a distribution system; and
 - (b) is not a member of an approved retail market scheme in force for that system.
- (2) A retail gas operator contravenes this section if the operator —
 - (a) sells gas that is transported through a distribution system; and

- (b) is not a member of an approved retail market scheme in force for that system.
- (3) Subsections (1) and (2) have effect subject to —
 - (a) section 11ZOE; and
 - (b) any exemption granted under section 11ZOS.
- (4) A person who contravenes this section is liable to a penalty under section 11ZOT.

[Section 11ZOR inserted by No. 53 of 2003 s. 15.]

11ZOS. Power to exempt

- (1) The Authority may by order published in the *Gazette* exempt —
 - (a) a gas business operator; or
 - (b) a class of gas business operators,from any of the provisions of sections 11ZOC, 11ZOD and 11ZOR.
- (2) An order under subsection (1) may provide for circumstances in which, and conditions subject to which, an exemption is to apply.
- (3) The Authority may only make an order under subsection (1) if satisfied that the grant of an exemption —
 - (a) would be consistent with the objects of section 11ZOB; and
 - (b) would not be contrary to the public interest.
- (4) In determining the question mentioned in subsection (3)(b) the Authority may take into account one or more of the matters referred to in section 11H(3).
- (5) An exemption is of no effect at any time when a condition to which it is subject is not being observed.
- (6) An order under subsection (1) is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

- (7) An order by which an order under subsection (1) is revoked may contain provisions of a transitional or supplementary nature in relation to the application of a provision of this Part to any gas business operator, or class of gas business operators, affected by the revocation.

[Section 11ZOS inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZOT. Enforcement of section 11ZOR

- (1) If, in the opinion of the Authority, a person who is a gas distribution operator or a retail gas operator has contravened section 11ZOR, the Authority may cause a notice to be served on the person requiring that the contravention be rectified within a specified period.
- (2) If, in the opinion of the Authority, the person fails to comply with a notice under subsection (1), the Authority may in writing order the person to pay a daily monetary penalty fixed by the Authority, but not exceeding \$10 000.
- (3) For the purposes of subsection (2), the daily penalty is a penalty for each day on which the person acts in contravention of section 11ZOR.
- (4) The Authority is not to make an order under subsection (2) unless the person has been —
- (a) notified in writing of the proposed order; and
 - (b) given a reasonable opportunity to show why the order should not be made.
- (5) The Authority may recover a penalty imposed under subsection (2) in a court of competent jurisdiction as a debt due by the person to the Crown.

[Section 11ZOT inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

Subdivision 2 — Enforcement of retail market scheme and rules

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOU. Authority may impose penalty for breach

- (1) This section applies if, in the opinion of the Authority —
 - (a) a person who is a gas market participant contravenes a relevant provision of a retail market scheme; or
 - (b) a person who is —
 - (i) a gas transmission operator; or
 - (ii) a prescribed person within the meaning in section 11ZOD(1)(b),contravenes a relevant provision of retail market rules.
- (2) The Authority may cause a notice to be served on the person requiring that the contravention be rectified within a specified period.
- (3) If, in the opinion of the Authority, the person fails to comply with a notice served under subsection (2), the Authority may —
 - (a) serve a letter of reprimand on the person; or
 - (b) in writing order the person to pay a monetary penalty fixed by the Authority, but not exceeding \$100 000.
- (4) The Authority is not to serve a letter or make an order under subsection (3) unless the person has been —
 - (a) notified in writing that the Authority proposes to take action under subsection (3); and
 - (b) given a reasonable opportunity to show why such action should not be taken.
- (5) The Authority may recover a penalty imposed under subsection (3)(b) in a court of competent jurisdiction as a debt due to the Crown by the person concerned.

[Section 11ZOU inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

Subdivision 3 — Prohibition of certain conduct in relation to a retail market scheme

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOV. Conduct preventing or hindering operation

- (1) A person to whom this section applies must not engage in conduct (the “**prohibited conduct**”) for the purpose of —
 - (a) preventing or hindering;
 - (b) attempting to prevent or hinder; or
 - (c) conspiring with others to prevent or hinder,the operation of a retail market scheme in accordance with section 11ZOB.

- (2) A person to whom this section applies must not —
 - (a) aid, abet, counsel or procure a person to engage in the prohibited conduct;
 - (b) induce, or attempt to induce, a person, whether by threats or promises or otherwise, to engage in the prohibited conduct; or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, the engagement of a person in the prohibited conduct.

- (3) This section applies to —
 - (a) a gas business operator in relation to the retail market scheme concerned;
 - (b) a person who is party to an agreement with such a gas business operator relating to the supply or distribution of gas; or
 - (c) an associate of —
 - (i) a gas business operator referred to in paragraph (a); or
 - (ii) a person referred to in paragraph (b).

[Section 11ZOV inserted by No. 53 of 2003 s. 15.]

11ZOW. Interpretation of section 11ZOV

- (1) In section 11ZOV —
- (a) a reference to engaging in conduct is a reference to —
 - (i) doing or refusing to do any act, including —
 - (I) refusing to supply a service; or
 - (II) without reasonable grounds, limiting or disrupting a service;
 - (ii) making, or giving effect to a provision of, a contract or arrangement;
 - (iii) arriving at, or giving effect to a provision of, an understanding; or
 - (iv) requiring the giving of, or giving, a covenant;
 - (b) a reference to refusing to do an act includes a reference to —
 - (i) refraining (otherwise than inadvertently) from doing that act;
 - (ii) making it known that that act will not be done.
- (2) In section 11ZOV(3)(c) —
- “associate”** has the meaning it would have under Part 1.2 Division 2 of the *Corporations Act 2001* of the Commonwealth if sections 13, 14, 16(2) and 17 of that Act were repealed.

[Section 11ZOW inserted by No. 53 of 2003 s. 15.]

11ZOX. Establishing purpose of conduct

- (1) For the purposes of section 11ZOV, a person is taken to engage in conduct for a particular purpose if —
- (a) the conduct is or was engaged in for that purpose or for a purpose that includes, or included, that purpose; and
 - (b) that purpose is or was a substantial purpose.

- (2) A person may be taken to have engaged in conduct for the purpose referred to in section 11ZOV even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from —
 - (a) the conduct of the person or of any other person; or
 - (b) other relevant circumstances.
- (3) Subsection (2) does not limit the manner in which the purpose of a person may be established for the purpose of section 11ZOV.

[Section 11ZOY inserted by No. 53 of 2003 s. 15.]

11ZOY. Remedies for breach of section 11ZOV

- (1) Criminal proceedings (including proceedings under section 177 of *The Criminal Code*) do not lie against a person by reason only that the person has contravened section 11ZOV(1) or (2).
- (2) The remedies set out in Schedule 2A are available where a person has contravened section 11ZOV(1) or (2).
- (3) Nothing in this section or Schedule 2A affects the right of a person —
 - (a) to bring civil proceedings in respect of any matter or thing; or
 - (b) to seek any relief or remedy,if the cause of action arises, or the relief or remedy is sought, on grounds that do not rely on section 11ZOV.

[Section 11ZOY inserted by No. 53 of 2003 s. 15.]

Division 5 — Directions

[Heading inserted by No. 53 of 2003 s. 15.]

Subdivision 1 — Directions to amend retail market scheme

[Heading inserted by No. 53 of 2003 s. 15.]

11ZOZ. Authority may direct amendment

- (1) The Authority may in writing direct the members of a retail market scheme to make a specified amendment to the scheme, and to do so within a specified time.
- (2) The Authority must consult with the members concerned before giving a direction under subsection (1).
- (3) The members must comply with a direction given to them under subsection (1).

[Section 11ZOZ inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZP. Non-compliance with direction for amendment

- (1) If, in the opinion of the Authority, the persons who are required to comply with a direction under section 11ZOZ fail to do so, the Authority may in writing order each of them to pay a daily monetary penalty fixed by the Authority, but not exceeding \$2 000.
- (2) For the purposes of subsection (1) the daily penalty in respect of a person is a penalty for each day on which —
 - (a) the person carries on business; and
 - (b) the direction given under section 11ZOZ is not complied with.
- (3) The Authority is not to make an order against a person under subsection (1) unless the person has been —
 - (a) notified in writing of the proposed order; and

- (b) given a reasonable opportunity to show why the order should not be made.
- (4) The Authority may recover a penalty imposed under subsection (1) in a court of competent jurisdiction as a debt due by the person to the Crown.
- (5) In subsection (2)(a) —
 “business” means —
 - (a) in the case of a gas distribution operator, the transport of gas through the relevant distribution system; and
 - (b) in the case of a retail gas operator, the sale of gas that is transported through the relevant distribution system.

[Section 11ZP inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

Subdivision 2 — Directions as to operation of retail market scheme

[Heading inserted by No. 53 of 2003 s. 15.]

11ZPA. Directions to governing body of a scheme

- (1) The Authority may, by notice in writing to the governing body of a scheme, give directions as to —
 - (a) the provision of information or reports, or the making of periodical returns, to the Authority by the governing body;
 - (b) the attendance of a nominee of the Authority as an observer at meetings of the governing body;
 - (c) the provision of meeting papers and related material to the Authority in advance of meetings; or
 - (d) any other prescribed matter.
- (2) A direction may only be given under this section so far as the Authority considers it is necessary or expedient —
 - (a) to achieve any of the purposes set out in section 11ZOB;

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- (b) for monitoring the operation of a retail market scheme;
or
- (c) for keeping the Authority informed as to —
 - (i) the affairs of a formal entity, including its financial affairs; or
 - (ii) proposals that will affect the conduct of its affairs.
- (3) The Authority must consult with the governing body concerned before giving a direction under subsection (1).
- (4) The Authority is to cause —
 - (a) notice of the giving of a direction under this section; and
 - (b) a description of the nature of the direction,to be published in the *Gazette* within 14 days after the direction is given.
- (5) A governing body must comply with a direction given to it under this section.
- (6) The Authority may, in writing, revoke or amend a direction given under this section.
- (7) In this section —
“governing body of a scheme” means the governing body of the formal entity mentioned in section 11ZOF(1)(b) for a retail market scheme.

[Section 11ZPA inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZPB. Enforcement of directions

- (1) If, in the opinion of the Authority, a governing body of a formal entity fails to comply with a direction given to it under section 11ZPA the Authority may in writing order the formal entity to pay a monetary penalty fixed by the Authority, but not exceeding \$100 000.

- (2) The Authority is not to make an order under subsection (1) unless the formal entity has been —
 - (a) notified in writing of the proposed order; and
 - (b) given a reasonable opportunity to show why the order should not be made.
- (3) The Authority may recover a penalty imposed under subsection (1) in a court of competent jurisdiction as a debt due to the Crown by the formal entity.
- (4) References in this section to a formal entity include, in the case of an entity that is not a body corporate, the members of the entity.

[Section 11ZPB inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

Division 6 — Review of certain decisions

[Heading inserted by No. 53 of 2003 s. 15.]

[11ZPC. Repealed by No. 55 of 2004 s. 298.]

11ZPD. Review of decision to refuse approval

- (1) If the Authority refuses to approve a retail market scheme under section 11ZOJ the gas market participants concerned, or the formal entity for the proposed scheme, may apply to the State Administrative Tribunal for a review of the decision.
- (2) If the Authority refuses to approve an amendment to a retail market scheme under section 11ZOM the members of the scheme, or the formal entity for the scheme, may apply to the State Administrative Tribunal for a review of the decision.

[Section 11ZPD inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(2); No. 55 of 2004 s. 301.]

11ZPE. Review of direction to amend scheme

If the Authority gives a direction under section 11ZOZ for the amendment of a retail market scheme, the members of the scheme, or the formal entity for the scheme, may apply to the State Administrative Tribunal for a review of the direction.

[Section 11ZPE inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(2); No. 55 of 2004 s. 301.]

11ZPF. Review of penalty

- (1) If the Authority makes an order imposing a penalty on a person under section 11ZOT(2), 11ZOU(3)(b) or 11ZP(1), the person may apply to the State Administrative Tribunal for a review of the decision.
- (2) If the Authority makes an order imposing a penalty on a formal entity under section 11ZPB(1), the governing body of the formal entity may apply to the State Administrative Tribunal for a review of the decision.

[Section 11ZPF inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(2); No. 55 of 2004 s. 301.]

11ZPG. Time for making application

An application under this Division must be made within 14 days after the applicant received notice in writing of the decision or direction of the Authority.

[Section 11ZPG inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(2).]

11ZPH. Conduct of review

The provisions of section 11ZH, other than subsections (1), (2) and (2a), apply for the purposes of a review under this Division in the same way as they apply to a review and proceedings under subsection (2) of that section.

[Section 11ZPH inserted by No. 55 of 2004 s. 299(3).]

Division 7 — Regulations for operation of retail gas market

[Heading inserted by No. 53 of 2003 s. 15.]

11ZPI. Regulations for retail gas market

- (1) On the recommendation of the Authority, regulations may be made in relation to a distribution system that are necessary or convenient to ensure that the retail gas market that is supplied through that system is regulated and operates in a manner that is —
 - (a) open and competitive;
 - (b) efficient; and
 - (c) fair to gas market participants and their customers.
- (2) Without limiting subsection (1), regulations made in relation to a distribution system may —
 - (a) provide for and in relation to matters that are required to be provided for by a retail market scheme, including those described in section 11ZOG;
 - (b) prohibit the continued operation of an approved retail market scheme for that system except as may be provided for in the regulations; and
 - (c) provide for the punishment of a contravention of the regulations, including by the imposition of monetary penalties as provided in section 11ZOU.

[Section 11ZPI inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZPJ. Grounds for Authority's recommendation

- (1) The Authority may under section 11ZPI recommend the making of regulations for a distribution system only if the Authority considers that —
 - (a) any approved retail market scheme for that system —

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- (i) has ceased to be suitable for the purposes of section 11ZOB; or
 - (ii) is not being implemented in a manner that is suitable for those purposes;
- or
- (b) the formal entity for an approved retail market scheme for that system —
 - (i) is not functioning effectively; or
 - (ii) is subject to external administration under the *Corporations Act 2001* of the Commonwealth.
- (2) A recommendation made by the Authority under section 11ZPI is not liable to be challenged, reviewed or called in question in any court.

[Section 11ZPJ inserted by No. 53 of 2003 s. 15; amended by No. 53 of 2003 s. 19(1).]

11ZPK. Regulations override scheme etc.

Regulations made under section 11ZPI for a distribution system have effect despite, and to the exclusion of —

- (a) the provisions of any approved retail market scheme that would otherwise apply to that system; and
- (b) any provision of this Part, other than Division 1 and this Division.

[Section 11ZPK inserted by No. 53 of 2003 s. 15.]

Part 2C — Code of conduct for marketing of gas to small use customers

[Heading inserted by No. 53 of 2003 s. 31.]

11ZPL. Terms used in this Part

In this Part —

“**code of conduct**” means the code of conduct approved under section 11ZPM;

“**committee**” means the committee established under section 11ZPO;

“**customer**” means a small use customer;

“**gas marketing agent**” means —

- (a) a person who acts on behalf of the holder of a trading licence (“**licensee**”) —
 - (i) for the purpose of obtaining new customers for the licensee; or
 - (ii) in dealings with existing customers in relation to contracts for the supply of gas by the licensee;
- (b) a person who acts —
 - (i) on behalf of one or more customers; or
 - (ii) as an intermediary between one or more customers and a licensee,
 in respect of the supply of gas to the customer or customers;
- (c) a person who engages in any other activity relating to the marketing of gas that is prescribed for the purposes of this definition; and
- (d) a representative, agent or employee of a person referred to in paragraph (a), (b) or (c);

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“**marketing**” includes engaging or attempting to engage in any of the following activities by any means, including door to door or by telephone or other electronic means —

- (a) negotiations for, or dealings in respect of, a contract for the supply of gas to a customer;
- (b) advertising, promotion, market research or public relations in relation to the supply of gas to customers.

[Section 11ZPL inserted by No. 53 of 2003 s. 31.]

11ZPM. Code of conduct

- (1) The Authority may, in consultation with the committee, approve a code of conduct under this section.
- (2) The code of conduct is to regulate and control the conduct of —
 - (a) the holders of trading licences; and
 - (b) gas marketing agents,with the object of —
 - (c) protecting customers from undesirable marketing conduct; and
 - (d) defining standards of conduct in the marketing of gas to customers.
- (3) The code of conduct may contain such ancillary and incidental provisions as are necessary or expedient for the purposes of subsection (2).
- (4) Subsection (1) has effect subject to section 53 of the *Energy Legislation Amendment Act 2003*.

[Section 11ZPM inserted by No. 53 of 2003 s. 31.]

11ZPN. Code is subsidiary legislation

The code of conduct is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

[Section 11ZPN inserted by No. 53 of 2003 s. 31.]

11ZPO. Consultative committee

- (1) The Authority is to establish a committee to advise it on matters relating to the code of conduct.
- (2) The Authority —
 - (a) is to prescribe the membership, constitution and procedures of; and
 - (b) may discharge, alter, or reconstitute,the committee.
- (3) The Authority may determine that a member of the committee is to receive remuneration or an allowance, and if the Authority so determines it is to fix the remuneration or allowance on the recommendation of the Minister for Public Sector Management.
- (4) Subject to this section, the committee may determine its own procedure.
- (5) The Authority is to provide the committee with such support services as it may reasonably require.
- (6) This section has effect subject to section 54 of the *Energy Legislation Amendment Act 2003*.

[Section 11ZPO inserted by No. 53 of 2003 s. 31.]

11ZPP. Licence condition

It is a condition of every trading licence that the licensee is to comply with the provisions of the code of conduct that apply to the licensee.

[Section 11ZPP inserted by No. 53 of 2003 s. 31.]

11ZPQ. Enforcement of code of conduct against marketing agents

The code of conduct may provide —

- (a) that the contravention of a provision of the code of conduct by a gas marketing agent constitutes an offence; and

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(b) that an offence is punishable by a penalty not exceeding —

(i) \$5 000 for an individual; and

(ii) \$20 000 for a body corporate.

[Section 11ZPQ inserted by No. 53 of 2003 s. 31.]

11ZPR. Code may provide for vicarious liability

The code of conduct may provide for and in relation to the liability of the holder of a trading licence, in the absence of excusatory circumstances, for an act or omission of the licensee's gas marketing agents that contravene the code of conduct.

[Section 11ZPR inserted by No. 53 of 2003 s. 31.]

11ZPS. Code may include presumption of authority

The code of conduct may provide for a presumption that a person who carries out any marketing activity in the name of or for the benefit of —

(a) the holder of a trading licence; or

(b) a gas marketing agent,

is to be taken, unless the contrary is proved, to have been employed or authorised by that licensee or gas marketing agent to carry out that activity.

[Section 11ZPS inserted by No. 53 of 2003 s. 31.]

11ZPT. Authority to monitor compliance

It is a function of the Authority to monitor and enforce compliance with the code of conduct.

[Section 11ZPT inserted by No. 53 of 2003 s. 31.]

11ZPU. Comment to be sought on amendment or replacement of code

- (1) Whenever the Authority proposes to exercise the power —
- (a) to amend the code of conduct; or
 - (b) to repeal and replace it,
- the Authority must —
- (c) refer the proposed amendment or replacement to the committee for its advice; and
 - (d) have regard to any advice given by the committee.
- (2) Before the committee gives its advice to the Authority, it must, in accordance with section 11ZPW, give any interested person an opportunity to offer comments on the amendment or replacement.
- (3) The committee must take into account any comments received under subsection (2) in formulating its advice.

[Section 11ZPU inserted by No. 53 of 2003 s. 31.]

11ZPV. Review of code

- (1) The committee must carry out a review of the code of conduct as soon as is practicable after —
- (a) the first anniversary of its commencement; and
 - (b) the expiry of each 2 yearly interval after that anniversary.
- (2) The object of a review is to re-assess the suitability of the provisions of the code of conduct for the purposes of section 11ZPM(2).
- (3) The committee must, in accordance with section 11ZPW, give any interested person an opportunity to offer comments relevant to the review.

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- (4) The committee must take into account any comments received under subsection (3) in carrying out the review.
- (5) The committee must prepare a report based on the review and give it to the Authority.

[Section 11ZPV inserted by No. 53 of 2003 s. 31.]

11ZPW. Further provisions about opportunity to comment

For the purposes of sections 11ZPU(2) and 11ZPV(3) —

- (a) an interested person is a person —
 - (i) who the committee considers has a particular interest in the amendment, replacement or review; or
 - (ii) who is determined by the Authority, by notice in writing to the committee, to have such an interest;
- (b) an opportunity to offer comments is an opportunity to furnish written comments to the committee within —
 - (i) a period specified by the Authority by notice in writing to the committee; or
 - (ii) in the absence of such a notice, a period determined by the committee.

[Section 11ZPW inserted by No. 53 of 2003 s. 31.]

Part 2D — Gas industry ombudsman scheme

[Heading inserted by No. 53 of 2003 s. 32.]

Division 1 — Preliminary

[Heading inserted by No. 53 of 2003 s. 32.]

11ZPX. Terms used in this Part and Schedule 2B

In this Part and in Schedule 2B, unless the contrary intention appears —

“approved scheme” means a scheme approved under section 11ZPZ;

“customer” means —

- (a) a small use customer; and
- (b) if a dispute or complaint is prescribed for the purposes of section 11ZPZ(1)(d) a person who is involved in that dispute or complaint as a customer;

“customer contract” means —

- (a) a standard form contract; or
- (b) a non-standard contract,
within the meaning in section 11WB;

“gas industry ombudsman” has the meaning given by section 11ZPZ(1);

“gas marketing agent” has the meaning given by the definition of that term in section 11ZPL.

[Section 11ZPX inserted by No. 53 of 2003 s. 32.]

11ZPY. Regulations as to gas industry ombudsman scheme

The regulations may provide for and in relation to —

- (a) the establishment and operation of a scheme of the kind referred to in section 11ZPZ; and

Energy Coordination Act 1994

Part 2D Gas industry ombudsman scheme

Division 2 Approval of gas industry ombudsman scheme

s. 11ZPZ

- (b) the functions of the gas industry ombudsman under such a scheme.

[Section 11ZPY inserted by No. 53 of 2003 s. 32.]

Division 2 — Approval of gas industry ombudsman scheme

[Heading inserted by No. 53 of 2003 s. 32.]

11ZPZ. Authority may approve scheme

- (1) The Authority may, by instrument in writing, approve a scheme that provides for a person (the “**gas industry ombudsman**”) to investigate and deal with —
 - (a) disputes and complaints under customer contracts;
 - (b) disputes between —
 - (i) customers and licensees; or
 - (ii) customers and gas marketing agents;
 - (c) complaints by customers about —
 - (i) licensees; or
 - (ii) gas marketing agents;and
 - (d) any other kind of dispute or complaint (whether or not under a customer contract) that is prescribed by the regulations.
- (2) A scheme may treat a failure to make a decision within a specified period as a decision of a particular kind.
- (3) A scheme may be made applicable to a dispute or complaint that arose before the commencement of the scheme, but not earlier than 12 months before that commencement.
- (4) The Authority may, by instrument in writing, approve an amendment to an approved scheme.
- (5) Notice of an approval under subsection (1) is to be published in the *Gazette*.

- (2) Where an application is so made the gas industry ombudsman may, in respect of the decision or complaint —
- (a) make any order or determination;
 - (b) give any direction; or
 - (c) decline to deal with a matter on any ground,
- that is provided for by the scheme.

[Section 11ZQB inserted by No. 53 of 2003 s. 32.]

11ZQC. Jurisdiction of courts

- (1) Nothing in this Part or in an approved scheme affects the jurisdiction of a court.
- (2) The gas industry ombudsman must decline to deal with a matter if —
- (a) it has been or is being dealt with by a court; or
 - (b) in his or her opinion the matter should be dealt with by a court.

[Section 11ZQC inserted by No. 53 of 2003 s. 32; amended by No. 59 of 2004 s. 141.]

11ZQD. Enforcement against marketing agents and others

- (1) The regulations may make it an offence for a gas marketing agent to fail to comply with a decision or direction of the gas industry ombudsman under an approved scheme.
- (2) If a dispute or complaint involving a person other than a licensee or a gas marketing agent is prescribed for the purposes of section 11ZPZ(1)(d), the regulations may make it an offence for the person to fail to comply with a decision or direction of the gas industry ombudsman under an approved scheme.
- (3) Regulations made for the purposes of this section may provide for penalties for an offence against the regulations not exceeding —

