



**Submission to Gas Industry Company on
Compliance and Enforcement
Arrangements**

From

Contact Energy

16 May 2006

Below are Contact's comments in respect of the specific questions raised in the Compliance Consultation Paper issued by the GIC. As indicated in the responses below, Contact has some fundamental concerns about the approach in the paper. In summary the core concerns are:

- Contact is very concerned about the potential for expansion of the GIC and its associated functions and the ability of the gas industry to continue to absorb ever-increasing costs. In regard to the proposed regimes, it must be borne in mind that the cost is being spread over a very small customer base.
- Contact does not want to see a replication of the cumbersome compliance practices within the Electricity Commission. In particular Contact does not believe there is much benefit in hours and hours spent by investigators on "breaches" where the affected parties have sorted matters out between themselves.
- Further, Contact does not believe there is value in major efforts spent on minor or trivial breaches; therefore, there is a need for some sort of "materiality" threshold with a "quick fix" process in place for minor matters.
- Contact has an over-riding concern about a compliance regime based on penalties and prosecutions rather than incentives and transparency. Financial penalties can be less effective and in some cases produce perverse outcomes. Therefore, the focus should be on encouraging compliance rather than penalising breaches.
- Contact reluctantly accepts that there ultimately needs to be some form of enforcement regime, but the fundamental drive should be to make this as efficient as possible by focussing on material items which cannot be adequately resolved between participants.

QUESTION	COMMENT
<i>Q 1: Do you agree that these are the likely needs of the gas industry for a compliance and enforcement regime for switching and registry?</i>	In principle.
<i>Q 2: Are there other needs for compliance and dispute resolution in the gas industry that would support a different outcome to the preferred model in any area, or support the other alternatives?</i>	Given the embryonic nature of a number of the arrangements under consideration, it is difficult to reach a view on this. It would be preferable if that assessment could be made once it is clearer as to which proposed model will apply. It would be unfortunate to rush to implement this alternative and find it was not appropriate. Contact submits that it may be better to address the issue of compliance under the switching regime and to defer consideration of a model for broader application until there is a clearer understanding of what it may be used for.
<i>Q 3: Do you think it is important to have a compliance regime which is scalable?</i>	To a degree. However it is more important that the proposed regime is right for the industry and its underlying arrangements than it is scalable. The gas industry is small and we need to constantly ensure that these regimes are “fit for purpose”. Accordingly, any body or compliance regime must be sufficiently defined to ensure that it remains appropriate given the nature of the industry.
<i>Q 4: Is this an appropriate objective for the proposed compliance regulations?</i>	In principle, this seems appropriate although Contact believes that it always must be measured against the size of the market and therefore what can be effectively sustained.
<i>Q 5: Are these assessment criteria appropriate for evaluating a suitable compliance and enforcement regime for the gas industry?</i>	In principle, although Contact believes that the primary emphasis should be given to cost effectiveness as well as minimising bureaucracy,

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<p><i>Q 6: Do you agree with our assessment of the options for decision maker?</i></p>	<p>It may not be appropriate in all situations. It is difficult to assess now whether one would reach the same conclusion in relation to all possible situations in which the industry may require some form of compliance function. Contact does not agree that the courts should rate lowly on credibility. In addition it seems odd to conclude that an industry body would rate differently from the Rulings Panel on timeliness. It is difficult to assess costs effectiveness of the Rulings Panel given that there are no details of likely cost. In addition Contact does not agree that the Rulings Panel would necessarily rate higher on expertise. In summary, this seems to be a somewhat superficial analysis which is intended to lead to the conclusion that a Rulings Panel should be the chosen alternative.</p> <p>Contact considers that the issue is a bit more complicated than presented and that there needs to be more detailed consideration of the types of matters that might arise and a bit more thinking about tailoring the regime for the nature of the issue. For example, it should be possible to deal with clear rule breaches without the need for a Rulings Panel being involved. Also, there should be some materiality threshold on matters before a process gets triggered. In Contact's view, running potentially expensive processes on matters without any financial consequence cannot be justified. The experience in the electricity industry has been that even trivial matters can result in the Rulings Panel engaging expensive advisers and taking months to make a decision. This is not a model that can be sustained by the gas industry.</p>
<p><i>Q 7: Do you agree with our assessment of the options for monitoring and reporting of breaches</i></p>	<p>Contact agrees that it is not appropriate to have a monitoring and surveillance function. However, Contact also believes that reporting should be voluntary, not mandatory. If neither party believes that a matter is worth reporting, then Contact considers that a compliance function does not need to be involved. In addition, only the parties affected should be permitted to report breaches. This would include a consumer provided it was affected by the acts of a supplier etc. However, if a consumer is not affected, then Contact sees no reason why they should have a right to be involved.</p>
<p><i>Q 8: Do you agree with our assessment of the options for administration and receipt of breach notices?</i></p>	<p>It is premature to be commenting on this level of detail. This needs to be assessed once broader issues are addressed.</p>
<p><i>Q 9: Do you agree with our assessment of the options for investigation of breaches, if so do you consider that the Gas Industry Co should have the option to have the investigative function in house rather than contracted out?</i></p>	<p>Contact does not agree that all breaches need separate investigation. Some will be very straightforward – e.g., did a switch occur by the correct time? In such cases it should be possible to deal with the matter without “investigation”. In addition, there should be thresholds to sift out trivial matters before an investigation is launched and the matter sent to the Rulings Panel. The role of the investigator needs to be very clear since there is a great risk that it results in a significant amount of expense such as legal cost.</p>

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<p><i>Q 10: Do you agree with our assessment of the options for early resolution and/or settlement</i></p>	<p>Contact is concerned that an appropriate balance is struck. Contact does not believe that the Rulings Panel must be involved in all resolutions. Trivial and technical breaches should not require industry debate. The scope of the Rulings Panel role needs to be well defined and limited to instances of material breach with a clear dispute. One size may not fit all in these circumstances and some clearer definition is required to ensure that the role of any panel is appropriately limited.</p>
<p><i>Q 11: Do you agree with our assessment of the options for enforcement?</i></p>	<p>May not be appropriate in all cases. For example, if the issue arises under a multilateral industry contract or a bilateral arrangement the affected party may be the more appropriate party to present the argument. It may be better to be less rigid about concluding that all circumstances the investigator prosecutes the breach and concentrate on specific types of issues and circumstances. For example, in a situation where there is a legal dispute Contact sees no value in having an investigator involved in that issue.</p>
<p><i>Q 12: Do you consider that these are appropriate functions for a Rulings Panel?</i></p>	<p>Contact does not agree that a Rulings Panel should be able to investigate and make orders that seem unrelated to breaches before it. If a panel is to be established, it should be restricted to responding to particular claims that fall within a defined jurisdiction. It should not be given a wider mandate to comment on and delve into matters that have not been raised as a consequence of alleged breaches.</p>
<p><i>Q 13: Do you consider that the Rulings Panel should have only a single member? If not, how many members should there be, and how should a quorum be defined?</i></p>	<p>Given that there is still considerable uncertainty as to the nature of the issues that a Rulings Panel may tackle, it is premature to fix this matter now. Consideration should be given to building in flexibility on this issue. Some indication of the sorts of the skills/ experience which the member(s) of the Rulings Panel should have would be helpful in determining the make up of the body, if established.</p>
<p><i>Q 14: Do you agree that the Gas Industry Co should appoint the member of the Rulings Panel and be able to remove them on the listed grounds?</i></p>	<p>See comments on Q13. Some of these detailed questions need to be reconsidered once the scope of the compliance regime is known. It would be better to address the material questions regarding the appropriateness of the regime first.</p>
<p><i>Q 15: Do you agree with a term of appointment of three to five years with a right of renewal?</i></p>	<p>See response above. This is a matter of detail which can be considered once the broader issues have been considered.</p>

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<p><i>Q 16: Do you concur with this limit on the liability of the Rulings Panel member and insurance arrangements?</i></p>	<p>In principle, provided a Rulings Panel is the appropriate forum. However, the arrangements need to ensure that the body has appropriate incentives to perform the role in accordance with minimum standards and expectations.</p>
<p><i>Q 17: Should the Rulings Panel have discretionary power to require a participant who has breached a rule, or unsuccessfully brought an action, to pay the Rulings Panel's costs in some circumstances?</i></p>	<p>As a matter of principle, Contact would prefer that there were limits on the extent of a Rulings Panel's discretion. In some circumstances (for example where the Independent Investigator has "prosecuted" an issue) it would seem unfair to impose costs on a party. Also the Rulings Panel must be under a discipline to minimise the extent of costs – if they are always a pass through it may be difficult to exercise this discipline.</p>
<p><i>Q 18: Do you agree with the mandatory payment of Rulings Panels in contractual dispute resolution, are there other cases where this should be the case?</i></p>	<p>Agree. However in this case there must be some control able to be exercised by the parties over the level of expenditure incurred by the Panel.</p>
<p><i>Q 19: Do you agree with this reporting requirement?</i></p>	<p>Yes.</p>
<p><i>Q 20: Do you agree the procedures of the Rulings Panel being contained in rules or that the Rulings Panel should be able to regulate its own procedures?</i></p>	<p>Contact has some concerns about the Rulings Panel setting its own rules. There need to be some checks and balances to avoid unnecessary expansion of functions.</p>
<p><i>Q 21: Do you agree with these procedural requirements?</i></p>	<p>In principle. However, considered in isolation from actual application it is hard to judge whether these will actually be appropriate.</p>

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<p><i>Q 22: Do you agree with the concept that the Rulings Panel can call on up to two suitably qualified industry experts to assist in hearing complex disputes?</i></p>	<p>This depends on the skills of the member(s) of the Panel itself. Having experts available adds to the potential cost of the function and such use should be based on an as required basis. If not, the administrative costs will become excessive.</p>
<p><i>Q 23: Do you agree with the list of factors for determining penalties in para 11.32, or are there others which should be included?</i></p>	<p>Need to take into account whether another financial penalty or other consequence under for example the industry agreement may apply. Also, in some situations, public disclosure of the breach may be an adequate form of penalty. This regime should be kept as light handed as possible.</p>
<p><i>Q 24: Do you agree with the proposal to enable the appointment of an investigator with the powers outlined in the Act?</i></p>	<p>Contact does not agree that all matters need ultimately to go to the Rulings Panel. Whether the proposed process will work in all cases is difficult to assess. Again, the process should be as light handed as possible. Minimal involvement should be required for clear breaches. A more streamlined process should be considered for breaches that have financial consequences below a certain threshold.</p>
<p><i>Q 25: Do you agree with the proposal to enable the appointment of an investigator with the functions outlined above?</i></p>	<p>See comments in Q24 above. Functions should be considered in light of a tighter regime.</p>
<p><i>Q 26: Are the proposed procedures for the investigator appropriate?</i></p>	<p>Should be reconsidered once there is greater clarity as to the areas in which the investigator will operate and the role in those respective areas. The extent of the “investigation” role needs to be well defined. It should be limited to notified breaches and not grow into a “fishing expedition”. It should be primarily reactive not proactive.</p>
<p><i>Q 27: Do you agree with the proposed appointment process?</i></p>	<p>The form of the contract will be of interest to the industry and it should therefore be consulted on its terms. There should be complete transparency of the costs. Contact is concerned about the discretion to use other experts and this should be minimised. The current approach carries considerable risk of excessive cost and inefficiency.</p>
<p><i>Q 28: Do you agree that the rulings Panel should have the discretion to award the cost of the investigative process on the grounds specified, or any other grounds?</i></p>	<p>Any discretion if given must be seen to be exercised fairly and the costs contained to the extent possible and reasonably incurred. The GIC should articulate how this will be managed.</p>

QUESTION	COMMENT
<i>Q 29: Do you agree with the reporting requirements?</i>	This information should be disclosed to the market as well.
<i>Q 30: Do you agree that this proposal provides for an appropriate level of involvement for the Gas Industry Co?</i>	If implemented, the independent investigator and ruling panel will need to be actively monitored and in this respect the GIC needs to represent the interests of the industry. It should determine that the functions are being performed in accordance with the relevant regulations and objectives and manage the costs of the function. This may include approving the use of external consultants and advisers.
<i>Q 31: Do you agree with the proposed administrative processes, or are there others which should be included?</i>	It is premature to be commenting on this level of detail. This needs to be assessed once broader issues are addressed.
<i>Q 32: Do you consider that the Gas Industry Co should have the reporting requirements outlined in this section, or any others?</i>	More regular reports may be warranted; e.g., quarterly reports of switching breaches. In Contact's view disclosure of breaches may be a more effective sanction than financial penalties and this may therefore justify more regular reports to the industry.