



Consultation Paper

**Compliance and
Enforcement
Arrangements in the
New Zealand Gas
Industry**

12 April 2006

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1 Executive Summary

Background

- 1.1 The Gas Industry Co has been working on a range of new industry arrangements the most developed of these new arrangements is the proposal to establish a central registry and associated customer switching rules. In order to implement the new registry and customer switching arrangements, it is necessary to consider how they will be enforced to ensure compliance. Should these arrangements be contained in rules and regulations, there will need to be a compliance regime that will support the arrangement. Part 4A of the Gas Act provides that the Governor General, on the recommendation of the Minister, can make regulations in these areas.
- 1.2 Part 4A of the Gas Act specifically contemplates the formation of a Rulings Panel and an investigative function and sets out a clear framework for the establishment of a compliance regime.
- 1.3 The purpose of this consultation paper is to seek input from stakeholders on the Gas Industry Co proposal for a compliance and enforcement regime to support rules and arrangements developed by the industry. The paper identifies the various functions of a compliance regime and the compliance model preferred by the Gas Industry Co compared with alternative options.
- 1.4 For ease of reference questions have been summarized in Appendix A but submitters may comment where they see fit. Any submissions are to be received by 16 May 2006.

Functions of Compliance

- 1.5 We have outlined the key functions of a compliance regime, considered all the practical options for how those functions might be organised, evaluated the options for each function against assessment criteria and developed a preferred compliance and enforcement regime.
- 1.6 As the functions are interdependent we first considered who should be in the decision maker role - who decides whether a breach has occurred and makes a ruling on the appropriate sanction, then we considered the other functions. These are: monitoring and detection of breaches, administration and receipt of breaches, investigation of breaches, early resolution and settlement of breaches, and the enforcement role.

Approach to Design

- 1.7 We have evaluated the options for each function against qualitative assessment criteria and identified cost efficiencies where possible.
- 1.8 The assessment criteria we have used to evaluate the options are: to meet the objectives of the Gas Act, credibility, efficiency, timeliness, expertise in decision making, cost effectiveness, and scalability.
- 1.9 In this manner we have developed the preferred model and where appropriate we have provided alternative options for consideration by stakeholders.

Preferred Model

- 1.10 The preferred model is for mandatory reporting by industry participants (including service providers) of breaches they commit or observe, and voluntary reporting by consumers or other persons. Such reports would be received by the Gas Industry Co as the central administrative body and notified to the industry, in order that an industry participant could become an interested party to the investigation.
- 1.11 All reports of breaches would be referred to an independent investigator who is to be appointed by Gas Industry Co on a case by case basis to investigate, and then to endeavour to informally resolve the breach.
- 1.12 The independent investigator is required to recommend to the Rulings Panel an early resolution or settlement of the breach, or a referral of an unresolved breach to the Rulings Panel for its consideration.
- 1.13 The investigator would have the power to recommend rejection of a settlement in the wider interests of the industry, and the Rulings Panel would have the power to reject a settlement on the same grounds.
- 1.14 The Rulings Panel would comprise one member with the power to appoint up to two independent experts (industry and/or technical) to assist the panel. The Gas Industry Co may appoint an alternate for the member.
- 1.15 The Rulings Panel may decide to have a hearing of the matter, in which case the investigator would be required to put all the information on the matter to the Rulings Panel (a prosecuting role), or decide the matter on the papers. Parties to the breach would have the right of representation before the Rulings Panel. Participants would have the right of joinder as interested parties.
- 1.16 All decisions of the Rulings Panel would be published. This would include all recommendations of early resolution and settlement accepted by the Rulings Panel.
- 1.17 The Rulings Panel is subject to judicial review and appeals on questions of law as provided in the Gas Act.
- 1.18 We consider that the set of arrangements proposed in this paper will lead to a good level of compliance, provide a high degree of transparency around the process, and minimise transaction costs as far as possible while meeting the desire for a high level of compliance.

Roles

- 1.19 We have described the anticipated roles for the Rulings Panel, Independent Investigator, and Gas Industry Co to support this preferred model. In this section we have proposed matters such as their status, terms of appointment, functions, procedures, funding and accountability, and reporting requirements.
- 1.20 The Gas Act provides for these matters to be included in any rules made under Part 4A. All of these matters will be refined during the process of drafting the rules to support the appropriate compliance model determined after consideration of industry

response. We have therefore determined that stakeholder input on these matters at this stage of the consultation process would be useful.

- 1.21 Draft rules in support of the finalised compliance model will be circulated to stakeholders in a further consultation paper.

2 Introduction & Purpose

- 2.1 The Gas Industry Co is in the process of developing proposed arrangements for the gas industry in accordance with the Government's invitation in the Government Policy Statement on Gas Governance of October 2004 (GPS).
- 2.2 Over the next two years, the Gas Industry Co will be working with the industry to develop market arrangements for the gas industry which may be created in the form of regulations and rules or may be given effect to by non-regulatory means e.g., contract or voluntary arrangements. Any industry arrangement that is contained within regulations or rules will need associated arrangements to monitor and encourage compliance and provide for dispute resolution.¹
- 2.3 The purpose of this consultation paper is to seek input from stakeholders on the Gas Industry Co proposal for a suitable compliance and enforcement regime to support rules and arrangements developed by the industry.
- 2.4 This paper identifies the various functions of a compliance regime and the compliance model preferred by the Gas Industry Co, described at a concept level and qualitatively evaluated against a set of criteria recommended by the Board. Alternative options are considered and stakeholder views are sought on these.
- 2.5 For clarification, this paper proceeds on the understanding that this compliance model could support both rules and regulations and other non regulatory arrangements developed in the future by the industry. The applicability of the compliance model will be addressed and discussed with stakeholders as the market arrangements in each area are developed. The suitability of the Rulings Panel as a dispute resolution forum is also considered in this context.
- 2.6 Submissions will be used to assist in selecting the appropriate compliance model. When this model is identified and approved by the Board, the Gas Industry Co will issue a further consultation paper seeking stakeholder submissions on draft the rules and/or regulations to support this model.

¹ The finalised compliance regime will apply to the administration of rules and regulations approved by the Minister of Energy and non-regulatory arrangements approved by the industry. It will have no application to any actions taken by the Gas Industry Co in discharging its functions under the Gas Act by developing policy and recommending rules or regulations to the Minister.

3 Background

- 3.1 The industry currently relies on MDL (as owner of the Maui pipeline) and NGC (as owner of the NGC transmission pipeline) to enforce existing pan-industry arrangements. In effect, MDL and NGC require parties who wish to ship gas across their pipelines, or physically connect to their pipelines, to enter contracts that incorporate a range of standard terms, including some industry agreed codes and protocols.
- 3.2 Under these arrangements, enforcing the codes and protocols against non-compliant parties essentially involves either MDL or NGC taking action for breach of contract and demonstrating specific damages. The incentives of these parties to take action against their customers for the benefit of other customers are weak. This means that compliance with some arrangements, e.g. the reconciliation code, is poor.
- 3.3 The need for a coherent and consistent framework and effective enforcement mechanisms was recognized by the Minister of Energy in his recent speech to the New Zealand Power Conference. In his speech the Minister stated:
- “You will know that the Gas Industry Company is the central component of the new co-regulatory regime. I’m pleased to note that the company has now moved past its establishment phase, and is diligently applying itself to the development of the necessary arrangements, including regulations and rules. I therefore expect that this year I will receive a number of recommendations from the company on an array of industry arrangements. I think that it’s important, at this juncture, to re-iterate that the Gas Industry Company is first and foremost a regulator – one which develops regulations and ensures enforcement and compliance with those regulations.”*
- 3.4 The Gas Industry Co has been working on a range of new industry arrangements designed to facilitate the establishment of more efficient production, trading and sales of gas. The most developed of these new arrangements is the proposal to establish a central registry and associated customer switching rules. In order to implement the new registry and customer switching arrangements, it is necessary to consider how they will be enforced to ensure compliance. Should these arrangements be contained in rules and regulations, there will need to be a compliance regime that will support the arrangement. Part 4A of the Gas Act specifically provides that the Governor General, on the recommendation of the Minister, can make regulations in these areas.
- 3.5 It is also important to consider the wider suitability of the compliance regime to ensure that it has scalability to be suitable for future arrangements and dispute resolution.
- 3.6 For the purposes of this paper references to the Gas Industry Co include any future energy commission as envisaged under the Gas Act.

4 Submission Requirements

- 4.1 The Gas Industry Co invites submissions on this consultation document, preferably including answers to the specific questions in Appendix. A, by **5:00 pm on Tuesday 16th May 2006**. Please note that submissions received after this date may not be able to be considered.
- 4.2 To assist in structuring responses, key questions have been included in the options paper and listed in Appendix A (which is a word document for ease of response). Submitters are invited to respond to these questions in Appendix A and are welcome to include additional material in their responses.
- 3.2 The Gas Industry Co's preference is to receive submissions in electronic form (Microsoft Word format and pdf) and to receive one hard copy of the electronic version. The electronic version should be emailed with the phrase "Submission on Compliance and Enforcement" in the subject header to info@gasindustry.co.nz and one hard copy of the submission should be posted to the address below:

Gas Industry Company Limited
Level 9, State Insurance Tower
1 Willis Street
PO Box 10 646
Wellington
New Zealand
Attention: Gael Webster
Tel: +64 4 494 2466
Fax: +64 4 472 1801

- 4.3 The Gas Industry Co will acknowledge receipt of all submissions electronically. Please contact Gael Webster on 04 4942468 if you do not receive electronic acknowledgement of your submission within two business days.
- 4.4 The Gas Industry Co values openness and transparency and, therefore, submissions will generally be made available to the public on the Gas Industry Co's website. Where respondents intend to provide confidential information as part of their submissions, we ask that you discuss this with Gas Industry Co prior to lodging your formal submission.

5 Regulatory Context

Legal Framework for Compliance and Enforcement

- 5.1 The Gas Industry Co is able to make recommendations to the Minister of Energy on a range of matters affecting governance of the gas sector.
- 5.2 Subpart 1 of Part 4A of the Gas Act sets out a broad compliance framework for any rules and regulations relating to market arrangements which are made pursuant to Part 4A. The provisions within the Act include:
- Investigation powers for monitoring and enforcing compliance with gas governance regulations and rules (sections 43U to 43W);
 - A list of the orders that the Rulings Panel can make (sections 43X and 43Y);
 - Limits on tort claims against service providers (section 43Z);
 - Rights of appeal to the Courts (sections 43ZA to 43ZJ).
- We note that the Rulings Panel is defined in s43D as “any Rulings Panel established under gas governance regulations”.
- 5.3 However, Part 4A also anticipates that further governance arrangements may need to be developed and therefore provides for a range of regulation-making powers which include:
- Providing for compliance with gas governance regulations and rules to be monitored and enforced by Gas industry Co or any other person or court, and the powers and procedure of that person or court (section 43G(2)(k));
 - Providing for dispute resolution procedures (section 43G(2)(i) and (j)).
- 5.4 The creation of a Rulings Panel and the appointment of investigators and the proposed compliance provisions set out in this consultation paper are within the scope of regulation-making powers identified above.
- 5.5 We note that s43S of the Gas Act allows for one or more persons or bodies to carry out functions in relation to the regulations or rules made under subpart 43, and for matters concerning their establishment, constitution, functions, members (including their appointment, removal, duties, and protection from liability), procedures, employees, administration and operation, funding by industry participants, and reporting requirements. These matters are considered in section 11-13 of this paper.
- 5.6 Whilst the Act contemplates a Rulings Panel, the scope of the decision maker could be Gas industry Co or any other person or court. The issue of who should be the entity responsible for compliance is discussed further in section 8 below.
- 5.7 Consideration of dispute resolution procedures is also included as an adjunct to the compliance and enforcement regime. Until the industry arrangements are fully developed we are uncertain as to the extent of the need for a dispute resolution process but consider that the proposed model should allow for dispute resolution before the Rulings Panel.

Consultation Requirements

5.8 The Act also sets out the detailed process by which regulations (or rules) are made. These requirements provide important background to consideration of the issues and options for progressing the Gas Industry Co's work in the area of compliance and dispute resolution. In summary:

- Regulations are made by the Governor General by Order in Council made on the recommendation of the Minister.
- Rules are made by the Minister by notice in the Gazette.
- There is no statutory authority for the Gas Industry Co to make regulations or rules itself; however it can recommend regulations or rules to the Minister.

5.9 Before recommending regulations or rules, the Gas Industry Co would need to, amongst other things:

- have regard to its statutory and GPS objective; and
- seek to identify all reasonably practicable options for achieving the objective of the regulation and undertake an assessment of the costs and benefits of each option; and
- ensure that the objective of the regulation is unlikely to be satisfactorily achieved by any reasonably practicable means other than the making of the regulation (for example, by education, information, or voluntary compliance); and
- consult with persons that the recommending body thinks are representative of the interests of persons likely to be substantially affected by the proposed regulation.

For the purposes of the remainder of this paper reference to rules include rules and/or regulations made under the Gas Act.

6 Needs Analysis

- 6.1 In order to determine the need for a compliance regime we have considered the likely breaches of Switching and Registry arrangements. Likely breaches include:
- Failure by participants to comply with rules e.g.
 - Input information
 - Notification of a switch
 - Accuracy standards
 - Failure by the service provider to perform obligations running the registry.
- 6.2 Depending on the arrangements developed the persons likely to detect a breach are likely to include: industry participants in breach, industry participants who observe the breach or who are affected by it, consumers, and the registry service provider.
- 6.3 These breaches are relatively perfunctory in nature and could readily be determined by a single decision maker on the basis of papers rather than a hearing. An example of this type of breach is included as case study one in Appendix B.
- 6.4 It is likely more complex compliance arrangements will be needed when the current work programme is complete, although the exact arrangements cannot yet be ascertained. It is likely that breaches of new wholesale markets, trading rules, or breaches of the arrangements established to replace the National Gas Outage Contingency Plan will have significant potential consequences for participants and the integrity of the market as a whole. An example of this type of dispute is included as case study two in Appendix B.
- 6.5 In developing a compliance and enforcement regime for present needs, we need to also consider its suitability for other arrangements in progress. We have accommodated this in the proposals set out below by allowing the principal decision maker to invite independent experts to assist in his or her decision-making role on a case-by-case basis.
- 6.6 Gas Industry Co also recognises the importance of taking a balanced approach between the needs to ensure the integrity of the rules and the operational and commercial considerations of the industry.
- 6.7 Future rules or arrangements may give rise to the need for dispute resolution procedures; therefore we consider the functions and powers of the Rulings Panel should extend to dispute resolution between industry participants. We seek stakeholder input as to the desirability of a Rulings Panel having this function.

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?

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?

Q 3: Do you think it is important to have a compliance regime which is scalable?

7 Criteria for Evaluation

7.1 We propose that the broad objective of the compliance and enforcement regime is:

“to establish against objective criteria an efficient and effective compliance and enforcement regime to ensure the integrity of the rules”.

7.2 The following criteria are proposed to evaluate the benefits of the proposed compliance regime:

Criteria	Benefits
Meet objectives of s43ZN of Gas Act and of the Gas Industry Co	Provide for overview of general level of compliance with rules and efficiency of gas system
Credibility	Similar outcomes on similar facts for consistency in application of rules and predictability of outcome for the stabilisation of the industry Conflict free and impartial decision maker
Efficiency	Avoidance of unnecessary formal processes
Timely	Dedicated investigation and decision making bodies readily available for resolution of industry disputes
Expertise in decision making	Technical expertise of decision maker (with access to industry expertise) creates a pool and retention of industry knowledge which promotes more efficient and better decision making
Cost effective	Provide for early resolution of disputes Appropriate trade off between costs and quality of compliance Cost and penalties should relate to value at risk
Scalability	Flexible to cater for future arrangements

Q 4: Is this an appropriate objective for the proposed compliance regime?

Q 5: Are these assessment criteria appropriate for evaluating a suitable compliance and enforcement regime for the gas industry?

8 Functions of a Compliance Regime

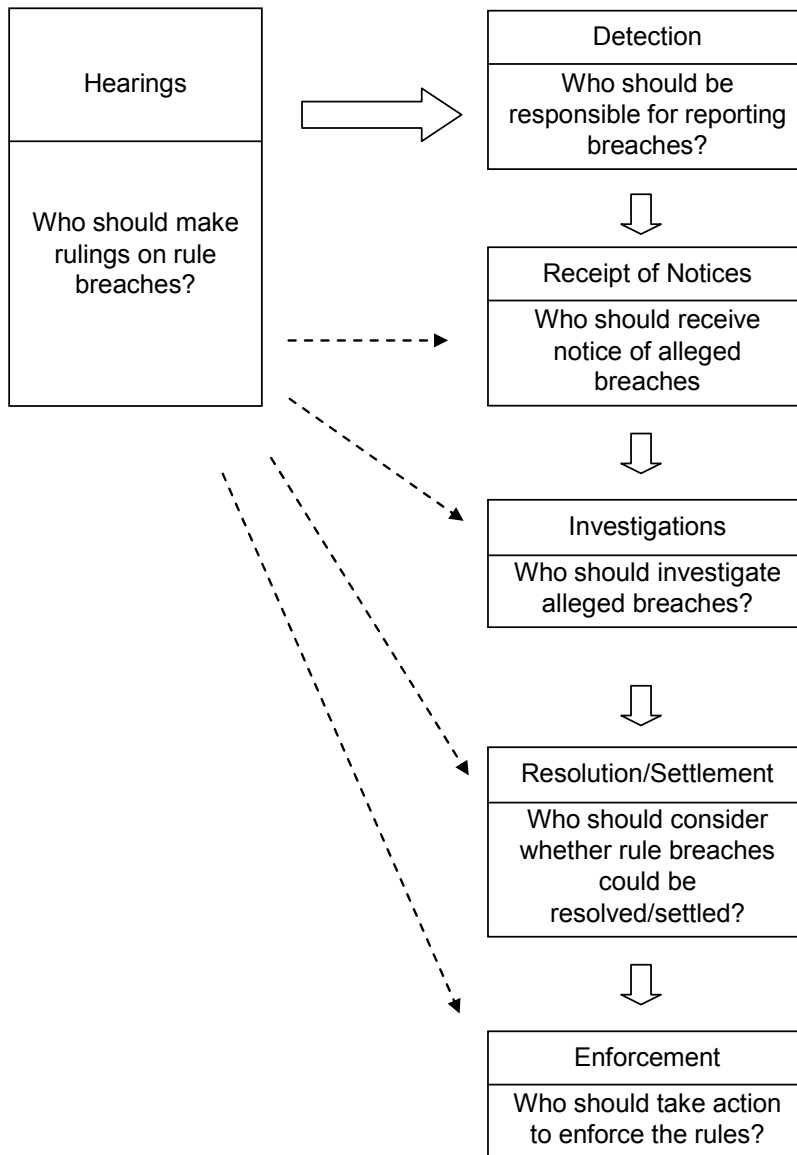
Introduction

- 8.1 This section outlines the key functions of a compliance regime, evaluates the options for each function against the criteria outlined in section 7 and develops a preferred compliance and enforcement regime.
- 8.2 Any compliance and enforcement regime involves several functions that need to be considered. We have identified several key functions that we consider are necessary for an effective compliance regime and then considered all the practical options for how those functions might be organised. The functions are set out in Table 1.

Approach to Developing the Compliance Regime

- 8.3 Although it is possible to consider each function and the options for organising each function separately, in practice there are strong linkages between the functions and how they are best organised. Our approach has therefore been to focus on developing a preferred position for each key function in sequence, starting with what we regard as the most important function. In this way, the interdependency of the functions has been taken into account as we developed the preferred design.
- 8.4 The most important function and the one that tends to drive the preferred compliance regime is the decision maker role – who decides whether a breach of the rules has occurred and makes a ruling on the appropriate sanction? We have therefore started with this question and developed the preferred compliance regime according to the process diagram outlined in Figure 1.
- 8.5 In developing the preferred compliance regime we have applied the criteria outlined in section 7 at each step in the process described in Figure 1. The preferred compliance regime is summarized in section 9 and an overall assessment against the criteria is outlined in section 10.
- 8.6 During the design process we found it useful to contemplate the two extremes of a compliance regime, and then consider practical options that lie between the extremes. The extreme options appear to be, on the one hand a continuation of the status quo with no organised compliance arrangement, and on the other hand a fully comprehensive compliance scheme including all the functions outlined in Table 1.
- 8.7 The continuation of the status quo involves relying on the parties to enforce the rules against each other on a bilateral basis, with the courts required to ultimately resolve disputes. This arrangement would lead to low direct costs, potentially high costs for participants enforcing the rules against, and potentially low compliance.

Figure 1: Developing the Preferred Compliance Regime



8.8 Under a comprehensive compliance regime a monitoring and surveillance function as well as all the functions described in Table 1, would be included. Such an arrangement is likely to lead to high direct costs, but potentially low costs for participants.

8.9 We concluded that neither of these extremes was likely to provide the most efficient outcome and that the optimum form of compliance regime for the gas industry was likely to lie somewhere between the extremes.

Table 1: The Functions of a Compliance Regime

Function	Options for Accountability	Comment and Issues
Detection and reporting of breaches	<ul style="list-style-type: none"> Participant in breach (self-reporting) Other participants Consumers or other persons Service Providers Monitoring function 	<p>At its minimum, a compliance regime could rely on participants, consumers and Service Providers to enforce the rules through the courts, with affected parties required to demonstrate damages.</p> <p>Under a more comprehensive regime incorporating a Rulings Panel (or similar body), the options include possible obligations on participants to self-report and report breaches by other parties. It would also be possible to establish a compliance monitoring function to detect breaches.</p>
Recipient of notices	<ul style="list-style-type: none"> Party in breach Gas Industry Co Independent investigator Rulings Panel 	<p>A minimal compliance regime would simply involve the party in potential breach of the rules receiving notice from the damaged party.</p> <p>A more comprehensive regime requires a central body to receive notice of potential breaches.</p>
Investigation of breaches	<ul style="list-style-type: none"> Discovery process Gas Industry Co Independent investigator Rulings Panel 	<p>A minimum compliance regime would simply involve the damaged party undertaking a discovery process in order to investigate and take action through the courts.</p> <p>A more comprehensive regime requires somebody with powers to investigate potential breaches.</p>
Early resolution and/or settlement	<ul style="list-style-type: none"> Bilateral between parties Independent investigator Rulings Panel 	<p>A minimum compliance regime could involve the parties agreeing to settle any claim (possibly with mediation and/or arbitration) rather than take action through the courts.</p> <p>A more comprehensive regime could include somebody with powers to consider breaches and resolve them directly with the party in breach, or to settle potential breaches between the parties (rather than proceed to a hearing).</p>
Enforcement	<ul style="list-style-type: none"> Damaged party Independent investigator Rulings Panel 	<p>A minimum compliance regime would involve the damaged party seeking damages for any breach.</p> <p>A more comprehensive regime requires a person with powers to prosecute for a breach of the rules.</p>
Hearings	<ul style="list-style-type: none"> Courts Rulings Panel Industry Committee 	<p>A minimum compliance regime would involve the parties arguing the case in the courts.</p> <p>A more comprehensive regime requires a body with the power to hold a hearing, consider the arguments of the parties, and make a binding ruling.</p>

Options for Decision Maker

8.10 Section 5 outlines that the Gas Act provides for the decision maker under any new compliance arrangement to be the approved industry body or the Energy Commission, or any other person or court. In this section we consider the respective merits of the most likely entities for this role.

Courts

8.11 The courts are the traditional forum for resolving disputes. Judges have the necessary “judicial” skills and are (and are seen to be) independent. There are established procedures for using the courts, an established appeal system, and a well developed system for reporting judgments (and therefore establishing precedents to guide other persons).

8.12 On the other hand, use of the courts has the following disadvantages:

- Court procedures are generally formal, and this can make use of the courts more expensive than other dispute resolution processes;
- It can take longer to have a matter heard by a court than by other dispute resolution processes, due to the competing demands on the court’s time from other disputes or criminal matters. Decisions are not always timely;
- Judges generally do not specialise in the kinds of disputes they hear, therefore this could result in longer and more expensive proceedings and delayed judgments.

Industry body or Energy Commission

8.13 The Gas Act contemplates that the approved industry body (currently the Gas Industry Co) or any potential Energy Commission could be the decision making body in any compliance arrangement.

8.14 However, it is generally accepted that a body that creates rules should not have the role of interpreting them. Further, the Gas Industry Co has a board comprising a mixture of independent directors and industry representatives. Industry representatives would clearly have a conflict in many rulings.

Rulings Panel

8.15 The Gas Act also contemplates that a Rulings Panel will be established and provide, among other things, that:

- The Rulings Panel may make certain orders and, before making any order, must take into account its previous decisions in respect of any similar situations;
- An industry participant affected by a decision of the Rulings Panel may appeal that decision to the High Court on the grounds of lack of jurisdiction or a question of law.

- 8.16 A possible disadvantage with a Rulings Panel is that it involves the creation of a standing body of person(s) who may need to be paid some sort of retainer, whether or not there are any disputes to refer to them.
- 8.17 The main advantage of a Rulings Panel is that it enables issues to be dealt with relatively quickly by a person or group of persons who are familiar with the gas industry. This suggests that issues are likely to be dealt with efficiently, at relatively low cost and in a timely fashion. Familiarity with the gas industry may also lead to better quality decisions, especially over time.

Mediation and Arbitration

- 8.18 Mediation involves the parties to a dispute voluntarily agreeing to discuss it in front of a third party mediator, who tries to facilitate a settlement. None of the parties is bound to accept any suggestion of the mediator, who also has no power to make a decision on the dispute.
- 8.19 Arbitration involves the parties to a dispute agreeing on one or more persons who will hear the parties' arguments and decide the dispute. The decision is binding on the parties, but it is open to a party to challenge an arbitrator's decision in the courts on some limited grounds.
- 8.20 Mediation is not covered by an Act of Parliament, whereas arbitration is governed by the Arbitration Act 1996. Any gas industry arrangements to which mediation and/or arbitration applied would need to include provisions establishing how the mediation and/or arbitration was to be conducted (in case of arbitration, to the extent that this is not already established by the Arbitration Act).
- 8.21 The advantages of mediation and/or arbitration are that:
- They enable a dispute to be dealt with generally more quickly (and therefore less expensively) than by means of court proceedings;
 - The parties to the dispute can generally choose who is to be the mediator or arbitrator, and can thus ensure that someone who is experienced in the matter will be chosen. In the case of gas industry arrangements, the role of choosing the mediator or arbitrator could potentially be undertaken by the Gas industry Co rather than the parties.
- 8.22 The disadvantages of mediation and/or arbitration are that:
- Different mediators or arbitrators will usually be chosen for different disputes, and there will be no build up of expertise in the person or body hearing the disputes. This disadvantage could be avoided if Gas Industry Co was given the role of appointing the mediators and arbitrators (or of appointing a panel of persons from whom the parties must chose a mediator or arbitrator);
 - As mediation and arbitration is generally a private matter, there is no reporting of settlements and decisions reached, and therefore no development of precedents to guide other persons. The gas industry arrangements could possibly overcome

this disadvantage by requiring settlements and decisions to be reported to the industry.

Evaluation

8.23 The most likely options have been evaluated against the criteria set out in section 7 and the result is set out in Table 2. This table suggests a convincing case in support of an independent Rulings Panel to make decisions about breaches and sanctions.

Table 2: Evaluation of Decision Maker Role

Criteria	Courts	Industry Body	Rulings Panel	Mediation and Arbitration
Objectives	Poor	Poor	Good	Poor
Credibility	Poor	Poor	Good	Poor
Efficiency	Moderate	Moderate	Good	Moderate
Timeliness	Poor	Moderate	Good	Moderate
Expertise	Poor	Moderate	Good	Moderate
Cost effectiveness	Poor	Moderate	Moderate	Moderate
Scalability	Good	Good	Good	Good

8.24 The key issues that drive this outcome are the need for an independent body with expertise and familiarity with the gas industry, timely decision making, and a level of compliance that supports achieving the objectives set out in the Gas Act, the constitution of the Gas Industry Co and the GPS.

8.25 The potentially significant costs and delays in using the courts, and the likelihood that the rules will be of a technical nature, works against the other options.

8.26 The Rulings Panel could be given the power to arbitrate on bilateral disputes between industry participants which do not arise from breaches of the rules, where the rules or industry arrangements provide for this.

Options for Monitoring and Detection of Breaches

8.27 The integrity of regulations and rules (here for convenience simply called “rules”) requires that breaches of those rules can be identified so that appropriate action can be taken. A monitoring regime does not necessarily need to identify all breaches, but it must be sufficiently robust to support the integrity of the rules. In this section we consider the respective merits of the most likely options for this role.

Monitoring and Surveillance Function

8.28 In some industries and markets it is common to include a monitoring and surveillance function. Such a function usually involves establishing a dedicated team of investigators and instituting a proactive monitoring of participant and service provider compliance with the rules. If breaches of the rules are detected, further investigations

are instituted and all information would be put before some party (for example the Rulings Panel) to establish what further action should be taken.

- 8.29 The need for proactive monitoring and surveillance of the rules by an industry body or otherwise depends on an assessment of the degree of tolerance for breaches of the rules, the incentives for rule compliance, the costs of providing such a service and the likely benefits of early detection.
- 8.30 The main advantages of a monitoring and surveillance function are likely to be a high level of compliance with the rules and strong alignment with the objectives of the Gas Act and the GPS.
- 8.31 The main disadvantage of a monitoring and surveillance function is likely to be the cost of implementing the arrangement and consequent costs for participants.

Participant Reporting

- 8.32 Some compliance regimes rely on participants to report breaches of the rules. In some cases participant reporting is voluntary, while in other cases it is obligatory for any participant observing a breach of the rules to report that breach. In effect it becomes a breach of the rules if a participant observes a breach and fails to report that breach.
- 8.33 The main advantage of a participant reporting regime is the low cost involved. Participants who are active in the gas sector will be trading with other participants, and are likely to become aware of rule breaches through the normal course of business. Including an obligation to report breaches can be effective in encouraging high levels of compliance.

Self reporting

- 8.34 A self reporting system places an obligation on participants to report, not only the rule breaches they observe from other participants, but also any breach of the rules they commit themselves. Most participants in the gas sector will have risk management and compliance systems that detect any breaches of rules. Self reporting compliance arrangements can offer a low cost means of achieving high levels of compliance.
- 8.35 A self reporting obligation also creates transparency and provides a useful overview of how the rules are working. If a significant problem is identified with the rules then this can be taken up by the Gas Industry Co. A requirement to self report can also help to address possible disincentives for participants to report breaches.

Service Provider reporting

- 8.36 Generally any service providers will be at the centre of the arrangements and will be well placed to detect rule breaches. This is certainly true of the new switching and registry arrangements. A mandatory requirement on service providers to report all breaches could provide a ready overview of the system and workability of the rules.

8.37 Service providers are often bound by the rules and a rule breach reporting obligation can be readily incorporated in the rules. Service Providers usually have a strong interest in servicing an arrangement with good compliance.

Consumer reporting

8.38 Some rules, particularly those relating to switching consumers from one supplier to another for example, are included predominantly to protect the interests of consumers. Other parties may have low interest in observing compliance with those rules. To overcome concerns of this nature it is commonplace to allow consumers (and often any third party) the right to notify a breach of the rules. In some cases, this right may be limited to situations where the consumer is affected by the breach and it is often the case that some person has the power to reject vexatious and /or frivolous claims.

8.39 Consumers will also have rights of complaint under the consumers' complaint service. It will therefore be necessary to design any third party rights to allege rule breaches carefully to ensure that the two jurisdictions do not overlap inefficiently.

Evaluation

8.40 The most likely options have been evaluated against the criteria set out in section 7 and the result is set out in Table 3. This table suggests that deciding on a breach detection system is effectively a trade-off between achieving a high level of compliance and alignment with the Gas Act objectives, and the cost effectiveness of the arrangement.

Table 3: Evaluation of Breach detection

Criteria	Monitoring	Participant	Self-reporting	Service Providers	Consumers
Objectives	Good	Moderate	Moderate	Moderate	Poor
Credibility	Good	Moderate	Moderate	Moderate	Poor
Efficiency	Moderate	Good	Good	Good	Good
Timeliness	Good	Good	Good	Good	Poor
Expertise	Good	Moderate	Good	Good	Poor
Cost effectiveness	Poor	Good	Good	Good	Good
Scalability	Good	Good	Good	Good	Good

8.41 Providing a proactive monitoring and surveillance arrangement in order to ensure a high level of compliance is likely to impose a significant cost, both directly and for participants. It is suggested that this level of cost is not justified for the gas industry, particularly at this point in time.

8.42 The proposed approach is to provide for mandatory reporting of breaches by all participants and Service Providers. Participants and Service Providers would have

an obligation to report all breaches of the rules that they become aware of, whether they are their own breaches or breaches by other participants. An obligatory reporting system should help to achieve compliance and the objectives of the Gas Act, while keeping cost and complexity to a minimum.

- 8.43 It is proposed that any other person (including consumers) should also be able to report a breach of the rules.

Options for Administration and Receipt of Breach Notices

- 8.44 In any compliance system it needs to be clear, if a breach is detected and needs to be reported, who should receive notice of any alleged breach. The main options to act as the recipient of breach notices include the affected party, the Gas Industry Co, another independent party, or the Rulings Panel. In this section we consider the respective merits of the most likely options for this role.

Affected party

- 8.45 In a relatively minimal compliance system, without any centralised compliance arrangements, it would be normal for the affected party to be notified of any alleged breach, by the party detecting the breach. In these circumstances the resolution of that breach, and any remedy, would become a matter for bilateral enforcement between the parties.

Independent body

- 8.46 The advantage of having an independent body tasked with receiving breaches and notifying industry participants is that that body can manage compliance in the overall interest of the industry (including consumers). It may be the case that the industry as a whole has an interest in pursuing a breach, but that no individual industry participant has a sufficient incentive to use their own resources to pursue the matter.
- 8.47 There are several options for establishing an independent body tasked with managing compliance. The options include:
- the Gas Industry Co;
 - the Rulings Panel;
 - an independent investigator.
- 8.48 The functions required of this central body are receipt of the report of breach, notification to the industry (if required), and then processing of the breach for investigation.

Evaluation

- 8.49 The most likely options have been evaluated against the criteria set out in Section 7 and the result is set out in Table 4. This table suggests that deciding on who should receive notices of possible breaches is mostly concerned with the cost effectiveness of the arrangements.

Table 4: Evaluation of Recipient

Criteria	Affected Party	Gas Industry Co	Independent Party	Rulings Panel
Objectives	Good	Good	Good	Poor
Credibility	Moderate	Good	Good	Good
Efficiency	Moderate	Good	Moderate	Moderate
Timeliness	Good	Good	Good	Good
Expertise	Good	Good	Good	Good
Cost effectiveness	Good	Good	Moderate	Moderate
Scalability	Good	Good	Good	Good

8.50 The Gas Industry Co has administrative resources, is involved in many matters with industry participants, and is well-placed to take on the role of receiving notice of possible breaches of the rules. Because the receipt of notices is essentially an administrative role, issues of a possible conflict with industry representatives on the board do not arise. Establishing another independent body, or assigning the role to the Rulings Panel appear to be an unnecessary and higher cost alternative.

8.51 It is proposed that the Gas Industry Co take on the administrative role of receiving breach notices.

Options for Investigation of Breaches

8.52 The investigative function is contemplated by the Gas Act which sets out obligations on industry participants who are being investigated and limits investigation powers.

8.53 Once a notice of a potential breach of the rules is received some party needs to be assigned the role of investigator. The investigator examines the issues around the potential breach and needs to have powers of discovery in order to gather all the facts. In this section we consider the respective merits of the most likely options for this role.

The Parties

8.54 The minimal option involves relying on the parties to a dispute or self-reported breach to undertake the investigation and present all the information to the Rulings Panel for a ruling. In a dispute situation the parties would need some power of discovery in order to make this option workable.

8.55 Although there is an option that precludes an investigation and allows direct reference of the breach to the Rulings Panel this is likely to be inefficient. Minor breaches could be readily resolved by some independent party and/or admission of breach and it seems sensible to provide arrangements to provide for those outcomes. There could be significant delays in a hearing if insufficient information is provided to the decision

maker. It is consistent with the good judicial practice in dispute resolution to have discovery or investigation prior to a hearing and to assist in the settlement process.

Gas Industry Co

- 8.56 It would be possible to assign the role of investigator to the Gas Industry Co. The Gas Industry Co is an existing function with staff who are experienced in gas industry matters and rules. There are several compliance models that involve the regulator assuming the investigation role and this is the model adopted under electricity industry governance in New Zealand.
- 8.57 However, a conflict may emerge for the Gas Industry Co under this model because of the industry representatives on the board. Any investigation function needs to be independent (and seen to be independent) of the industry participants.

Independent Investigator

- 8.58 It would be possible to appoint an independent investigator to investigate potential breaches of the rules on a case by case basis. Under this model, the Gas Industry Co could appoint investigators without creating a conflict for the industry representative board members.
- 8.59 An advantage of an independent investigator, appointed on a case by case basis, is that the role can be developed in response to the need, rather than establishing a resource in advance. The Gas Industry Co would, however, need to establish one or more potential resources that would be suitable for appointment.

Rulings Panel

- 8.60 Another option is to provide the Rulings Panel with the power to investigate breaches of the rules itself. Many functioning compliance systems have adopted this model. The advantage of this arrangement is that compliance could be managed within one function and using one set of resources.
- 8.61 The main disadvantage of using the Rulings Panel in this role is that there is potential for development of bias and improper reliance on information obtained in the investigation process, and a risk of costs escalating. The incentive to resolve breaches quickly, and in advance of any hearing, may be reduced by a possible preference of the Rulings Panel to have hearings of matters. The functions of investigation and rulings are more efficiently managed if kept separate.

Evaluation

- 8.62 The most likely options have been evaluated against the criteria set out in section 7 and the result is set out in Table 5. This table suggests that deciding on who should investigate possible breaches of the rules is mostly concerned with how best to achieve credibility and independence in the investigation process.

Table 5: Evaluation of Investigator

Criteria	The Parties	Gas Industry Co	Independent Investigator	Rulings Panel
Objectives	Poor	Moderate	Good	Moderate
Credibility	Poor	Poor	Good	Moderate
Efficiency	Moderate	Good	Good	Good
Timeliness	Good	Good	Good	Good
Expertise	Good	Good	Good	Good
Cost effectiveness	Good	Moderate	Moderate	Moderate
Scalability	Good	Good	Good	Good

8.63 Our preferred model is the appointment of an independent investigator on grounds that it should be more efficient both in costs and in terms of securing the required expertise. It allows for a “pay as you go” approach and it enables Gas Industry Co to ensure that the expertise is suited to each case. It also separates Gas Industry Co from the investigative/settlement function and this should reduce potential concerns about the independence of the Board.

8.64 The Rulings Panel is not preferred because of the concerns outlined in paragraph 8.61.

Options for Early Resolution and/or Settlement

8.65 It is often efficient in compliance systems to incorporate options for early resolution and settlement of breaches, rather than requiring all breaches to proceed for a ruling and/or a hearing by the Rulings Panel. This is particularly so in a system that includes an obligation to self-report and report breaches by other parties. Many breaches could prove to be technical in nature, or it may be that no other party has suffered as a consequence of the breach. In these circumstances, the option of an early resolution can help to reduce costs.

8.66 In other situations where there are two parties to a dispute about a possible breach, it is often efficient to allow for a settlement between the parties

8.67 In this section we consider the respective merits of the most likely options for a party to assume the role of proposing early resolution or settlement of a possible breach.

The parties

8.68 The minimal option involves simply allowing the parties to a breach to propose an early resolution or settlement. In the case of a self-reported breach, the rules could provide for the participant to admit the breach and propose a remedy. Where there is more than one party involved they could negotiate a bilateral or multilateral settlement amongst themselves.

8.69 Under this arrangement it may be necessary, in order to maintain confidence in the regime, to publish all resolutions and settlements. It may also be necessary to allow interested parties to lodge objections or to participate in some other manner.

Independent Investigator

8.70 Sometimes there will be only one party to the breach, being the participant who is in breach and self-reported. If an independent investigator has investigated the circumstances of the breach, that person will be well-placed to consider appropriate remedies. Once the breach has been investigated an appropriate resolution could be negotiated with the investigator subject to prescribed criteria. Such resolution may be achieved by an agreed change in practice, a warning, an agreed penalty payment or compensation payment, or other remedial options.

8.71 Should there be a number of similar breaches overtime, the independent investigator is likely to have a clear knowledge of the circumstances, experience with the appropriate remedy, and could be well-placed to develop an efficient alternative to relatively expensive hearings as the compliance regime evolves.

8.72 Settlement may also achieve a wider understanding of the parties' positions and allow better long-term relationships than judicial intervention. It is the preferred option in most dispute resolution forums.

The Rulings Panel

8.73 It would be possible to provide for the Rulings Panel to take on the role of early resolution and settlement of disputes. Upon receipt of all the information from the Investigator, the Rulings Panel could then work with the parties to avoid a formal hearing.

8.74 However, this a mediation role which tends to require a different skill set from adjudication. For this reason, these roles are often separated. If they are retained within one body it is usually required that the adjudicator be a different person than the mediator in order to ensure an open process and to encourage full and frank discussion in the mediation process.

Evaluation

8.75 The most likely options have been evaluated against the criteria set out in section 7 and the result is set out in Table 6. This table suggests that the party best-placed to recommend early resolution and settlement of disputes is the Independent Investigator.

8.76 Our preferred model is to include provision for early resolution of a breach, and a settlement process between the parties, and to assign this role to the Independent Investigator.

Table 6: Evaluation of Early Resolution and Settlement

Criteria	The Parties	Independent Investigator	Rulings Panel
Objectives	Poor	Good	Moderate
Credibility	Poor	Good	Moderate
Efficiency	Moderate	Good	Good
Timeliness	Good	Good	Good
Expertise	Good	Good	Good
Cost effectiveness	Good	Moderate	Moderate
Scalability	Good	Good	Good

8.77 We also recommend transparency of settlements to allow the Gas Industry Co to have a wider view of the efficacy of the compliance arrangements and their functioning.

8.78 A significant issue is to ensure that the needs of the industry are met by these processes. There is a risk that early resolution and/or settlement will assist the parties, but preclude the opportunity for the wider industry to debate and be involved in the issues raised. Also, significant powers would reside in the investigator if he/she has the final say on whether the settlement/early resolution was acceptable from an industry perspective.

8.79 It is therefore proposed that the investigator should have an obligation to refer all early resolutions and settlements to the Gas Industry Co or Rulings Panel for acceptance or rejection. Our preferred model is for the Rulings Panel to have this function.

8.80 It is anticipated that a significant number of these referrals would lead to approval of the investigator’s recommendations (especially where there is a large volume of similar breaches with the same proposed resolution).

Options for Enforcement

8.81 If a breach is not settled or is not subject to early resolution, then it will need to proceed to the Rulings Panel for consideration and this could involve a formal hearing process. In this situation somebody needs to present the evidence and argue the case that a breach has occurred. This is effectively the role of a prosecutor.

8.82 In this section we consider the respective merits of the most likely options for a party to assume the role of prosecutor when an issues needs to proceed for resolution by the Rulings Panel.

The affected party

- 8.83 The minimal option involves the affected party presenting the information to the Rulings Panel and arguing the case for an appropriate penalty. The other party to the breach would have rights to defend the proceedings.
- 8.84 In many circumstances there would be a risk under this arrangement that some breaches were not dealt with, or not dealt with effectively, because no party was inclined to take action. Further, if there is no party actually affected by a rule breach then there may be no incentive for any participant to pursue the breach.

The Independent Investigator

- 8.85 The Independent Investigator will have all the information available, remains independent of the parties to any dispute, and appears to be a logical candidate to take on the role of prosecutor when a ruling is required.
- 8.86 The Independent Investigator would assume the role of prosecutor at any hearing and all parties (the party in breach, the affected party, and any other interested parties) should have rights to present views to the Rulings Panel and/or attend hearings.

The Rulings Panel

- 8.87 Under some compliance regimes the rulings body takes on the role of presenting and considering the merits of the case, effectively acting as prosecution and judge at the same time. European justice systems often involve this approach. However, this approach is inconsistent with New Zealand's jurisprudence which prefers to retain separation between the prosecution role and the rulings role.
- 8.88 Under this model the Rulings Panel would take on the role of examining and cross-examining witnesses at a hearing. Other parties would need to have rights to present evidence in support of either side, and the Independent Investigator would need to be available for examination by the Rulings Panel and cross-examination by the parties to the dispute.

Evaluation

- 8.89 The most likely options have been evaluated against the criteria set out in section 7 and the result is set out in. This table suggests that the party best-placed to assume the role of prosecution when a ruling is required is the Independent Investigator.

Table 7: Evaluation of Enforcement Role

Criteria	Affected Party	Independent Investigator	Rulings Panel
Objectives	Poor	Good	Moderate
Credibility	Poor	Good	Moderate
Efficiency	Moderate	Good	Moderate
Timeliness	Good	Good	Good
Expertise	Good	Good	Good
Cost effectiveness	Moderate	Good	Moderate
Scalability	Good	Good	Good

8.90 Our preferred model is that the Independent Investigator should have the power to prosecute a breach that is not resolved earlier.

Q 6: Do you agree with our assessment of the options for decision maker?

Q 7: Do you agree with our assessment of the options for monitoring and reporting of breaches?

Q 8: Do you agree with our assessment of the options for administration and receipt of breach notices?

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?

Q 10: Do you agree with our assessment of the options for early resolution and/or settlement?

Q 11: Do you agree with our assessment of the options for enforcement?

9 Preferred Approach to Compliance Regime

9.1 Table 8 summarises and sets out our preferred approach to the functions required for an effective compliance regime. In practice, the functions are interrelated, and need to be considered as a whole.

Table 8: The Preferred Compliance Regime

Function	Preferred Option	Description
Detection and reporting of breaches	Participant in breach Other participants Consumers/other person Service Providers	Anyone should be able to report or claim a breach of the rules. There should be an obligation on participants to self-report and report other breaches that they become aware of. Service Providers should also be required to report breaches of the rules. A monitoring and surveillance arrangement is not recommended.
Recipient of notices and administration	Gas Industry Co	The Gas Industry Co should provide an administrative point for receiving reports, notices and claims that the rules have been breached and perform the administrative functions of notifying the industry of investigations and decisions.
Investigation of breaches	Independent investigator	The Gas Industry Co should appoint an independent person to investigate breaches of the rules. This person could be selected from a panel of suitable persons established for the purpose. The independent investigator should be required to follow a set of procedures, set out in the rules, when investigating possible breaches.
Early resolution and/or settlement	Independent investigator	The independent investigator should have powers to recommend to the Rulings Panel that: Trivial or vexatious complaints be rejected; Early resolution of breaches that are not in dispute be approved; Settlement of disputes between parties about alleged breaches be approved; An unresolved breach be considered by the Rulings Panel.

Function	Preferred Option	Description
Enforcement	Independent investigator	If an alleged breach is not resolved or settled, the independent investigator should have powers to recommend referral of the matter to the Rulings Panel. The independent investigator would assume the role of “prosecutor” at any hearing.
Hearings	<ul style="list-style-type: none"> • Rulings Panel 	<p>A Rulings Panel should be established to:</p> <ul style="list-style-type: none"> • Approve or reject recommendations from the independent investigator to rule out trivial or vexatious complaints, resolve breaches not in dispute, and settled disputes; • Convene hearings to consider unresolved breaches of the rules or decide matters on the papers; • Make rulings as to whether breaches have occurred; • Impose penalties, award compensation and impose other remedies under the Gas Act. <p>The Rulings Panel should be required to adopt certain processes set out in the rules and apply a set of criteria to all rulings. Any affected parties would be entitled to be heard at hearings.</p> <p>The Rulings Panel should comprise one suitably qualified person, with the power to appoint technical experts to assist with hearings, and advise the Panel.</p>

10 Summary Assessment of Preferred Model

10.1 This section summarises the overall evaluation of the preferred compliance model against the assessment criteria.

10.2 Overall it concludes that the proposal is likely to meet the assessment criteria well.

Objectives of the Gas Act and the Gas Industry Co

10.3 In order to meet the objective of the Gas Act and those set out in the GPS and in the Constitution of the Gas Industry Co, it is necessary to establish a compliance regime that is capable of supporting the policy objectives set out in the Act and the GPS.

The principle objective of the Act is that gas “*is delivered to existing and new consumers in a safe, efficient and reliable manner*”. In the context of a compliance regime it is considered that the principle objective is essentially a pursuit of an economically efficient delivery of gas over time.

10.4 Economic efficiency is promoted when individual persons can observe and bear the costs of their actions and make informed decisions. This is promoted by the concepts of allocative efficiency, productive efficiency and dynamic efficiency. A compliance regime is likely to contribute to these objectives if it:

- Delivers a high degree of compliance with other rules that have been developed to meet these objectives;
- Promotes a high degree of transparency around the compliance process so that parties can observe the level of compliance and the consequences of rule breaches;
- Delivers a high degree of transactional efficiency. In other words the costs of the regime are appropriately balanced against the benefits of the regime.

10.5 The preferred set of arrangements proposed in this document should lead to a good level of compliance, provide a high degree of transparency around the process, and minimise transaction costs as far as possible while meeting the desire for a high level of compliance.

Credibility

10.6 The preferred set of arrangements should deliver a high degree of credibility to gas industry arrangements because they provide for:

- An independent Rulings Panel to make decisions on breaches of the rules and appropriate sanctions;
- The appointment of Independent Investigators to investigate all allegations of rule breaches;
- Any person to make allegations about breaches of the rules;
- Any early resolution and/or settlement to be approved by the Rulings Panel;

- All decisions (apart from administrative ones) about investigations and rulings to be made independently from industry participants and the Gas Industry Co.

Efficiency

10.7 The preferred set of arrangements should support efficiency in the gas industry arrangements because they promote:

- A high degree of compliance with other rules that have been developed to meet the Gas Act and GPS efficiency objectives;
- A high degree of transparency around the compliance process so that parties can observe the level of compliance and the consequences of rule breaches;

Timeliness

10.8 The preferred set of arrangements should deliver timely decisions about possible breaches of the rules because they provide for:

- Immediate notification of breaches to the Gas Industry Co;
- Timely appointment of investigators as required;
- Time frames for reporting investigations to the Rulings Panel;
- Scope for early resolution and settlement of some breaches.

Appropriate Expertise

10.9 The preferred set of arrangements should deliver the appropriate expertise because they provide for:

- Appointment of a Rulings Panel member with the power to appoint expert advisers on a case by case basis;
- Appointment of Independent Investigators on a case by case basis.

Cost Effectiveness

10.10 The preferred set of arrangements should deliver a cost effective arrangement with a high degree of transactional efficiency because they provide for:

- The appointment of Independent Investigators on a case by case basis, rather than establishing an investigations infrastructure in advance;
- Not establishing a monitoring and surveillance function, and relying on an extensive and obligatory regime of self-reporting, reporting other participants and reporting from Service Providers;
- A single member Rulings Panel, with the power to appoint expert advisers on a case by case basis.

Scalability

10.11 The preferred set of arrangements should deliver a readily scalable arrangement because they provide for:

- The appointment of Independent Investigators on a case by case basis;
- The appointment of technical expertise on a case by case basis to support the Rulings Panel.

11 Role of the Rulings Panel

11.1 This section outlines the proposed role of the Rulings Panel consistent with the preferred compliance regime. There are a wide range of alternatives to the detailed arrangements described below in this section and sections 12 and 13.

11.2 All of these matters will be refined during the process of drafting the rules to support the appropriate compliance model determined after consideration of industry response. We have therefore determined that stakeholder input on these matters at this stage of the consultation process would be useful.

11.3 The following sets out our proposals for the role of the Rulings Panel.

Status

11.4 It is proposed that the rules/regulations would establish a gas industry Rulings Panel as a body corporate with perpetual succession and with the characteristics outlined in this section.

Functions

11.5 We propose the functions of the Rulings Panel would be to:

- Receive and decide on recommendations from the Independent Investigator about breaches (to accept early resolution where a breach is admitted, accept or reject settlements between parties to the dispute, allow referral to Rulings Panel for a decision). This approval role for the Rulings Panel ensures that it can represent the interests of the industry as a whole (including consumers) in deciding whether it is appropriate for the parties to be able to agree a settlement, or whether the matter should proceed to a hearing that may result in a formal order by the Rulings Panel (e.g. a civil pecuniary penalty to be paid to the Crown);
- Decide whether to proceed to hold a hearing or to receive written submissions and decide the dispute on the papers;
- Make rulings (e.g. order compensation, impose civil pecuniary penalty, and order costs) as provided by the Act;
- Make other such orders set out in s43X of the Act (e.g. recommend rule changes, issues warnings, impose record keeping requirements);
- Arbitrate on bilateral disputes (dispute resolution as contemplated in s43G (i) and (j)).

Membership

11.6 We propose the Rulings Panel member must have appropriate skills, knowledge and experience to undertake a specialised industry judicial role, be independent of the industry and have no conflicts of interest.

11.7 For efficiency, and in order to build industry expertise, the Rulings Panel should comprise one member with the power to appoint up to two advisors, who may be

technical experts or provide other expert assistance. Such advisors would be required to be independent and free of any conflicts of interest in the matter.

- 11.8 Appointment of one member will keep costs to a minimum, however depending on the complexity of the disputes; additional costs will arise where the assistance of an independent expert adviser is sought.
- 11.9 An alternative is to provide for two or three members (with one being the chair), to establish a quorum, and to provide for the panel to meet in divisions. We note that it can be difficult to attract a reasonable number of suitably qualified people to act on a panel that offers irregular work and requires independence from gas industry participants.
- 11.10 We anticipate that there would be less call for industry experts if there were more members on the Rulings Panel as we consider there is likely to be more experience and skill across three persons. However if a retainer is paid to each member and there is no call for these services there would be a greater upfront cost which may or may not be offset against time spent.
- 11.11 The industry experts would be selected by the Rulings Panel member on a case by case basis where the complexities of the case required. We propose that the Gas Industry Co have the function to approve the industry advisers selected by the Rulings Panel on a case by case basis.

Appointment

- 11.12 It is proposed that the Gas Industry Co appoint the member of the Rulings Panel. We would expect the Board would pass a resolution to delegate this power to a sub committee of independent directors on the Board.
- 11.13 The Gas Industry Co should have the power to remove a member of the Rulings Panel without compensation for fraud or other serious misconduct, inability to perform functions of office, unfit to hold position etc.
- 11.14 The Gas Industry Co should have the power to appoint an alternate for the member of the Rulings Panel to cover possible absences due to ill health or travel.
- 11.15 There are a number of well canvassed considerations when determining an appropriate term of appointment to a statutory type body. In order to attract the right person some flexibility may be desirable in fixing this somewhat arbitrary term. We propose that the term of appointment be for a period between three and five years with a right of renewal for a further period by agreement.
- 11.16 Notwithstanding the inability to predict the number of breaches and likely workload of the incumbent, a longer appointment provides a greater degree of certainty around work commitments for the incumbent. This period should also allow sufficient time for a build up of expertise and efficiency.

Liability

- 11.17 It is proposed that members of the Rulings Panel would have no personal liability when acting in good faith in the course of their duties and that appropriate insurances be available for the Rulings Panel members to be funded by the gas industry.

Funding and Accountability

- 11.18 The member is to receive market rate remuneration on a time spent basis. However the industry may need to pay an annual retainer to obtain the commitment of availability by the Rulings Panel member, particularly in view of the unpredictability of workflow and the requirement to maintain independence. If such a retainer was paid we propose it be offset against time worked.
- 11.19 The nature of the funding arrangements for industry arrangements is still being developed, however it is likely that the Gas Industry Co would fund the Rulings Panel and would recover those costs through the levy under section 43ZZE of the Gas Act.
- 11.20 The Rulings Panel, at its own discretion, would be able to award costs. It is proposed that the Rulings Panel have a discretionary power to charge individual parties for the Rulings Panel's costs where the participant initiated the case and was unsuccessful, or where the circumstances of a participant's breach warranted those costs being imposed.
- 11.21 In arbitration/dispute resolution proceedings it is proposed that the participants who invoke the proceedings pay the costs of the Rulings Panel, on the basis that it is at their election that they use this forum to resolve their contractual disputes.

Reporting

- 11.22 The Gas Industry Co and the Rulings Panel member must agree a budget and performance measures prior to each financial year. The Rulings Panel would be required to report to the Gas Industry Co regularly on performance, decisions and workload.

Procedures of Rulings Panel

- 11.23 It is proposed that the principle procedural requirements of the Rulings Panel be prescribed in rules and that the Rulings Panel should have a residual power to regulate its own procedures provided they are consistent with the provisions in the rules and the requirements of natural justice. This would allow for any additional procedures to be established if the prescribed procedures are lacking.
- 11.24 The Rulings Panel should also have the power to vary these procedures in a particular case by notice to the parties. This is likely to be used for procedural requirements in respect of the time for submissions and reply and fixing of a hearing date.
- 11.25 The principle procedural requirements we propose for the Rulings Panel are :
- It must set a date for considering the recommendations of the investigator and publish the decision;

- Where the Rulings Panel rejects a settlement or accepts a recommendation for referral, the Rulings Panel must consider whether to have a hearing or to determine the dispute on the papers;
- It must set a hearing date and notify the parties;
- There should be timing requirements for submissions and reply, for the hearing, and for the decision;
- In order to ensure that proceedings are settled without undue delay, it is proposed to require the Rulings Panel to use reasonable endeavours to reach a final decision (in writing with reasons) within 40 working days of the completion of any hearing or the receipt of submissions;
- It may receive evidence that would not otherwise be admissible if, in the opinion of the Rulings Panel, that evidence would assist to deal effectively with the matter;
- It should have power to hear expert witnesses. It may be appropriate for the Rulings Panel to have the power to require witnesses to swear on oath;
- It should have the power to hold an urgent hearing where there is a matter of urgency;
- It should have the power to adjourn a hearing or consideration of a matter;
- It should have the power to reject vexatious or trivial matters;
- It should have the power to issue a draft decision for comment;
- It should have the power to hold a directions conference;
- It should have the power to seek further information from the investigator and/or the parties when deciding on a recommendation from the investigator. This would allow the Rulings Panel to communicate to seek clarity around non contentious matters. This power to request further information should also extend to when the Rulings Panel is conducting a hearing or considering a matter on the papers;
- The parties to the dispute and any interested parties should be entitled to representation at any hearing of the Rulings Panel, be provided with all relevant material collected during the investigation and the investigators report and recommendation, and be entitled to provide written submissions where there is no hearing;
- Hearings should be in public unless the Rulings Panel directs otherwise;
- Parties should be able to make submissions on the question of penalties and orders that the Rulings Panel may impose;
- Decisions made by the Rulings Panel should be published so that the operations of the panel are as transparent as possible. The Rulings Panel would have

discretion to withhold confidential information from the published decision, or to avoid publication in special circumstances;

- It must publicise the terms of every early resolution and settlement unless there are special circumstances. It is envisaged the Rulings Panel would forward decisions to the Gas Industry Co for publication on its website;
- Participants would be required to comply with orders and directions from the Rulings Panel within a specified time (or within such longer time period as the Rulings Panel specifies). This provides a firm deadline for compliance;
- Where the Rulings Panel requires a participant to pay a sum of money, that sum can be recovered by the payee as a debt due.

11.26 We note the Gas Act requires the Rulings Panel to take into account past decisions by itself or the industry body when making a decision.

11.27 We note the right to seek judicial review of a Rulings Panel decision and to take an appeal to the high court on a question of law are contained in the Gas Act.

Independent Expert Advisers

11.28 The use of expert advisers is only contemplated for those disputes of some complexity (and perhaps initial disputes for guidance). Routine disputes would be decided on the papers or by a hearing before the Rulings Panel member only.

11.29 We propose the following general provisions in respect of these expert advisers:

- The Gas Industry Co to have the role of nominating suitably qualified and independent industry advisers, which list would be publicly available;
- The Rulings Panel to have the discretion to select up to two industry advisers from this list to assist in a hearing and that such discretion be exercised according to criteria. The criteria would include whether the complexity of the case warrants it, or whether the dispute has wide ramifications for the industry as a whole;
- The industry advisers to have no decision making powers;
- The selected industry adviser to be funded in the same manner as the Rulings Panel and remunerated on a time spent basis;
- The selection by the Rulings Panel would take into account any possible conflicts of interest.

Orders

11.30 Section 43X of the Gas Act provides for the range of orders that the Rulings Panel can make when considering a breach of the rules/regulations, and s43Y prohibits any other orders for a breach of the rules or regulations. These orders are set out here for completeness:

“(1) A Rulings Panel may, after considering any complaint or matter referred to it in respect of any allegation that an industry participant has breached any gas governance regulations or rules,—

(a) decide that no action should be taken:

(b) issue a private warning or reprimand to an industry participant:

(c) issue a public warning or reprimand to an industry participant:

(d) impose additional or more stringent record-keeping or reporting requirements under or in connection with any gas governance regulation or rule:

(e) order an industry participant to pay a civil pecuniary penalty not exceeding \$20,000:

(f) order an industry participant to pay a sum by way of compensation to any other person:

(g) order an industry participant that is found not to be complying with the gas governance regulations or rules to take any action that is necessary to restore it to a position of compliance:

(h) make an order terminating or suspending the rights of an industry participant under any gas governance regulation or rule:

(i) make orders regarding the reasonable costs of any investigations or proceedings:

(j) propose to the industry body or the Commission that it recommend to the Minister that a change should be made to a regulation or rule.

(2) In making any such decision, the Rulings Panel must take into account its previous decisions in respect of any similar situations previously dealt with by the industry body, the Commission, or the Rulings Panel.”

11.31 Where the Rulings Panel is not considering a breach of the rules or regulations but some other applications for instance an arbitration /dispute resolution it may need the power to determine a wider range of remedies. There may also need to be a prescribed framework for decision making under these arrangements.

Penalties

11.32 Where the Rulings Panel is deciding the amount of a civil pecuniary penalty to impose on a participant for breach of the rules, it is proposed that the regulations provide a range of matters that the Rulings Panel must consider before determining the amount. Those matters should include:

- The severity of the breach
- The impact of the breach
- The extent to which the breach was inadvertent, negligent or deliberate
- The circumstances in which the breach occurred
- Any previous breach of the rules by the participant

- The length of time the breach remained unresolved
- The participant's actions on learning of the breach
- Any benefit that the participant obtained, or expected to obtain, as a result of the breach
- Any other matters that the Rulings Panel thinks fit.

The questions asked below in sections 11-13 are intended to suggest key areas where alternative options might be considered. Submitters should feel free to comment on any area or suggest alternative approaches that are not covered below.

Q 12: Do you consider that these are appropriate functions for a Rulings Panel?

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?

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?

Q 15: Do you agree with a term of appointment of three to five years with a right of renewal?

Q 16: Do you concur with this limit on the liability of the Rulings Panel member and insurance arrangements

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?

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?

Q 19: Do you agree with the proposed reporting requirements?

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?

Q 21: Do you agree with these procedural requirements?

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?

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?

12 Role of the Investigator

- 12.1 This section outlines the proposed role of the independent investigator consistent with the preferred compliance regime. The Gas Act in S43W contemplates the appointment of an investigator by either the Industry Body or a future Energy Commission to undertake investigations for the purposes of monitoring or enforcing any gas governance regulations.
- 12.2 It also sets out limits on these powers and sets out requirements on industry parties to “*co-operate fully with any investigation carried out, for the purposes of monitoring or enforcing any gas governance regulation or rules, by the industry body or the commission, or by an investigator appointed under those regulations,...*” For ease of reference these provisions are attached as Appendix C.
- 12.3 The following sets out our proposals for the role of the independent investigator.

Status

- 12.4 It is proposed that the independent investigators will be contractors to the Gas Industry Co under contract for services.

Functions

- 12.5 It is proposed that the investigator function is to investigate in accordance with the powers set out in the Gas Act and the proposed rules, any alleged breach referred to the investigator by the Gas Industry Co for the purpose of determining compliance with the rules and regulations.
- 12.6 The investigator role is to ascertain the facts surrounding the alleged breach and to endeavour to effect an informal early resolution or settlement of the matters under investigation. An early resolution of an admitted breach may entail the payment of a penalty or compensation. (It is envisaged that a precedent for appropriate remedies in early resolutions and settlements will evolve over time).
- 12.7 The investigator must prepare a report of the findings of the investigation and make a written recommendation sufficient to enable the Rulings Panel to decide whether to approve an early resolution or settlement, or to accept referral of the matter to the Rulings Panel.
- 12.8 The investigator has the discretion to recommend rejection of a settlement where he/she considers that there is a wider public or industry interest concerning the integrity of the rules in having the matter referred to the Rulings Panel. This would enable the Rulings Panel to benefit from the investigator’s view of the breach.

Procedures

- 12.9 It is proposed the compliance officer (an employee of the Gas Industry Co whose primary role is to receive notice of breaches) would undertake the necessary notification provisions, rather than the investigator, in order to encourage as may administrative tasks being performed by Gas Industry Co as possible. Accordingly the compliance officer must notify the participants who notified the complaints officer of the breach and the participant allegedly in breach that the breach has been referred to an identified investigator, and to publish this information to the industry.

- 12.10 We propose that any participant may notify the compliance officer within 10 working days of notice of breach being publicised that it wishes to become a party to the investigation where that participant establishes a sufficient degree of interest. The compliance officer would then advise the investigator of this application.
- 12.11 The investigator must then promptly commence the investigation after this period of 10 days has expired.
- 12.12 We note that investigation powers are provided by sections 43U to 43W of the Gas Act; however procedural requirements will be needed to specify time limits on participants to comply with requests for information during the investigation process, we suggest 15 days.
- 12.13 The investigator will be required to report findings to the parties and then endeavour to effect a settlement using any process they think fit within a reasonable timeframe. Any settlement must be in writing and signed by the parties.
- 12.14 Where a participant admits the breach of the rule and no other industry participants are interested in the matter then it is envisaged that this investigative process would be kept to a minimum and an early resolution decided between the investigator and the participant in breach.
- 12.15 The Rulings Panel or any party to the investigation may require the matter to proceed to the Rulings Panel for a formal hearing (or written submissions) of the Rulings Panel. If it is the Rulings Panel that initiates a hearing (or proceeds on written submissions), the investigator must provide the Rulings Panel with all information that supports the case. If another party initiates the hearing, it is the responsibility of that party to provide information in support of the case; however the investigator may be called upon by the Rulings Panel to provide additional information.
- 12.16 The investigator may acquire information in the course of its activities that is confidential to particular parties. It is proposed the investigator should be bound to keep information provided to it confidential, with some limited exceptions (such as where it is compelled by law to disclose the information).
- 12.17 The investigator may appoint other persons to give advice or to assist the investigator with the approval of the Gas Industry Co.

Appointment

- 12.18 It is proposed that the investigator must have the requisite skills, experience and independence from industry participants or interested parties necessary to fulfil the investigative function.
- 12.19 It is proposed that the Gas Industry Co appoint one or more independent investigators under a contract of service. We envisage a contract of service which provides a framework for repeat appointments of the investigator to investigate alleged breaches of the rules as they arise. In some cases this may be a bundle of breaches referred at one time.
- 12.20 The investigator may appoint another person (e.g. a technical expert) to provide advice to the investigator subject to criteria e.g. the complexity of the alleged breach warrants it.
- 12.21 The investigator is to receive market rate remuneration on a time spent basis. It is not envisaged that a retainer would be necessary to attract an incumbent.

Funding

- 12.22 The nature of the funding arrangements for industry arrangements is still being developed, however it is likely that the Gas Industry Co would fund the investigator and would recover those costs through the levy under section 43ZZE of the Gas Act.
- 12.23 It is proposed that the Rulings Panel have the discretionary power to charge individual parties for the investigative costs where the participant initiated the case and was unsuccessful, or where the circumstances of a participant's breach warranted those costs being imposed.

Reporting Requirements

- 12.24 The Gas Industry Co and the investigator must agree performance measures for the services provided. The investigator would also be required to report to the Gas Industry Co regularly within the period of the contract of service on performance, decisions and workload.

Q 24: Do you agree with the proposal to enable the appointment of an investigator with the powers outlined in the Act?

Q 25: Do you agree with the proposal to enable the appointment of an investigator with the functions outlined above?

Q 26: Are the proposed procedures for the investigator appropriate?

Q 27: Do you agree with the proposed appointment process?

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?

Q 29: Do you agree with the reporting requirements?

13 Role of the Gas Industry Co

- 13.1 The preferred compliance model proposes a minimal level of involvement for the Gas Industry Co in the compliance and enforcement process. It will be responsible for the administrative function, making appointments, and reviewing performance of the investigator and Rulings Panel.
- 13.2 By virtue of this administrative role it will acquire an overview of the overall level of compliance with the rules and the cost of providing a compliance regime.
- 13.3 The following sets out our proposals for the role of the Gas Industry Co under the preferred compliance model.

Functions

- 13.4 It is proposed that the Gas Industry Co will be responsible for the following functions:
- Receipt of notice of breach of a rule;
 - Processing of the notices of breach;
 - Appointment of (and if necessary removal of) the member of the Rulings Panel;
 - Appointment of independent investigators;
 - Selection and publication of a list of independent expert advisers to assist the Rulings Panel where required;
 - Responsibility for setting performance measures and review of performance, setting budgets, and receipt of regular reports in respect of both the independent investigator and Rulings Panel member;
 - Provision of administrative and communication services (website) to enable the Rulings Panel to meet its responsibility to publish its decisions.

Procedures

- 13.5 It is proposed that notice of breach be by email in a standard format to the designated compliance officer employed by Gas Industry Co.
- 13.6 It is proposed that the compliance officer must acknowledge receipt of the breach, notify the participant that is alleged to be in breach of the proposed investigation, notify affected parties of the breach by publication of notice of the breach, refer alleged breach to an independent investigator for investigation and record the date of referral.
- 13.7 The Gas Industry Co must enter into appropriate contractual arrangements with the investigator. It is proposed that the contract would contain performance measures for the investigator to be reviewed annually. They would include:
- timeframes for the investigation process,
 - use of resources,
 - compliance with criteria for making recommendations,

- quality of reports,
 - meeting notification and publication requirements, and
 - presentation of information in hearings before the Rulings Panel.
- 13.8 The Gas Industry Co must enter into appropriate contractual arrangements with the member of the Rulings Panel. It is proposed that these contractual arrangements would contain performance measures for the Rulings Panel to be reviewed annually. They would include:
- timeliness of hearings and decision making,
 - efficient use of industry representatives in accordance with guidelines,
 - quality and regularity of reports,
 - meeting notification and publication requirements, and
 - the effectiveness of decisions of Rulings Panel (assessed by number of successful applications for judicial review or appeals).
- 13.9 The Gas Industry Co would have no power to review the decisions of the independent investigator or Rulings Panel; we note judicial review and limited appeal rights are available to participants against decisions of the Rulings Panel. This along with very limited ground for removal of the Rulings Panel member creates the necessary degree of independence of the Rulings Panel from the Gas industry Co.

Reporting Requirements

- 13.10 It is proposed that the Gas Industry Co would include in its annual report a report on the effectiveness and costs of the compliance regime.
- 13.11 This section of the annual report would disclose:
- The number of reported breaches;
 - The number of referrals to the investigators;
 - The number of recommendations from the investigator to the Rulings Panel and rejections;
 - The number of Rulings Panel hearings and decisions (on the papers);
 - The monetary amount spent on investigations, the Rulings Panel and independent expert advisors;
 - The range of remedies imposed by the Rulings Panel;
 - Changes in appointments.

Q 30: Do you agree that this proposal provides for an appropriate level of involvement for the Gas Industry Co?

Q 31: Do you agree with the proposed administrative processes, or are there others which should be included?

Q 32: Do you consider that the Gas Industry Co should have the reporting requirements outlined in this section, or any others?

Appendix A: Format for Submissions

To assist the Gas Industry Co in the orderly and efficient consideration of stakeholders' responses, a suggested format for submissions has been prepared. This is drawn from the questions posed throughout the body of this consultation document.

Respondents are also free to include other material in their responses.

Recommended Format for Submissions

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>	
<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>	
<i>Q 3: Do you think it is important to have a compliance regime which is scalable?</i>	

QUESTION	COMMENT
<p><i>Q 4: Is this an appropriate objective for the proposed compliance regulations?</i></p>	
<p><i>Q 5: Are these assessment criteria appropriate for evaluating a suitable compliance and enforcement regime for the gas industry?</i></p>	
<p><i>Q 6: Do you agree with our assessment of the options for decision maker?</i></p>	
<p><i>Q 7: Do you agree with our assessment of the options for monitoring and reporting of breaches</i></p>	
<p><i>Q 8: Do you agree with our assessment of the options for administration and receipt of breach notices?</i></p>	

QUESTION	COMMENT
<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><i>Q 10: Do you agree with our assessment of the options for early resolution and/or settlement</i></p>	
<p><i>Q 11: Do you agree with our assessment of the options for enforcement?</i></p>	
<p><i>Q 12: Do you consider that these are appropriate functions for a Rulings Panel?</i></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>	

QUESTION	COMMENT
<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><i>Q 15: Do you agree with a term of appointment of three to five years with a right of renewal?</i></p>	
<p><i>Q 16: Do you concur with this limit on the liability of the Rulings Panel member and insurance arrangements?</i></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>	

QUESTION	COMMENT
<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><i>Q 19: Do you agree with this reporting requirement?</i></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><i>Q 21: Do you agree with these procedural requirements?</i></p>	
<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>	

QUESTION	COMMENT
<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><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><i>Q 25: Do you agree with the proposal to enable the appointment of an investigator with the functions outlined above?</i></p>	
<p><i>Q 26: Are the proposed procedures for the investigator appropriate?</i></p>	
<p><i>Q 27: Do you agree with the proposed appointment process?</i></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>	

QUESTION	COMMENT
<i>Q 29: Do you agree with the reporting requirements?</i>	
<i>Q 30: Do you agree that this proposal provides for an appropriate level of involvement for the Gas Industry Co?</i>	
<i>Q 31: Do you agree with the proposed administrative processes, or are there others which should be included?</i>	
<i>Q 32: Do you consider that the Gas Industry Co should have the reporting requirements outlined in this section, or any others?</i>	

Appendix B: Working Examples

For the purposes of testing the options for a compliance regime we have developed two hypothetical case studies as working examples.

Case study one

Retailer A notifies Retailer B that a domestic customer of Retailer B has signed up for gas supply from Retailer A and therefore needs to be switched to Retailer A. Retailer B fails to provide the consumer switching information via the central registry (as required by the new rules). The switch can not be completed as per the rules.

The effect of this failure by Retailer B is that :

Customer is billed twice for gas use in the period from signing up until Retailer B belatedly notifies registry.

Lines company uses the registry as basis for calculating lines charges for this ICP and invoices Retailer B. This raises the likelihood of a dispute between Retailer A & B as to who pays the lines charges for what period.

Retailer A can't offer the promised level of service to the new customer and is likely to argue that lines charges should be paid by Retailer B who failed to notify the switch.,

Under the preferred model the customer can pursue complaint through EGCC under proposed consumer contract arrangements. The service provider who is running the registry is likely to detect the non-notification without any direct consequence to its service.

Retailers and Lines company are all likely to detect breach and enter into dispute. Under the preferred model this breach would be reported by all participants and the service provider to the Gas Industry Co, and then referred to an independent investigator for investigation.

If the dispute was not settled, the investigator would recommend it be referred to the Rulings Panel. If it was settled the investigator would most likely recommend the settlement be accepted by the Rulings Panel. The Rulings Panel would have the power to reject this settlement if it was in the wider industry interest.

Case study two

If there is a gas field outage and shipper A then continues to take gas despite the field no longer injecting into the transmission and distribution system. Shipper A will be effectively taking another shipper's gas (in this case Shipper B) rather than gas they have contracted to buy.

In an ex post fair price determination procedure there is likely to be a dispute as to what constitutes a fair price that Shipper A should pay for the gas that they have taken.

Shipper A and Shipper B need a forum in which to resolve this dispute.

It is proposed that they should be able to resolve this dispute using the Rulings Panel working within a prescribed framework for decision making to be developed by the industry.

Appendix C: Provisions of Gas Act Relating to Investigation Process

43U Party must co-operate with investigations

Every industry participant must co-operate fully with any investigation carried out, for the purposes of monitoring or enforcing any gas governance regulations or rules, by the industry body or the Commission, or by an investigator appointed under those regulations,—

- (a) by providing, within any reasonable time specified by the industry body, Commission, or investigator, all information, papers, recordings, and documents concerning the matter that are in the possession, or under the control, of the industry participant and that are requested for the purpose of the investigation; and
- (b) by permitting its officers or other employees to be interviewed (which interview may be recorded) and by ensuring as far as possible that they are made available for interview and answer truthfully and fully any questions put to them; and
- (c) by giving to the industry body or the Commission, or any person authorised by the industry body or the Commission, at all reasonable times, full access to any premises (subject to complying with any safety requirements that apply to visitors to those premises) at which the industry participant carries on business or maintains records; and
- (d) by giving all other assistance that may be reasonable and necessary to enable the matter to be fully investigated.

43V Privileges protected

- (1) Section 43U does not limit any claim for legal professional privilege.
- (2) A person is not excused from answering a question or giving any information or document on the ground that to do so may incriminate or tend to incriminate that person.
- (3) However, a self-incriminating statement or document made or given—
 - (a) is not admissible as evidence in criminal or civil proceedings against that person; and
 - (b) may not be used against the person in any proceedings before the Rulings Panel, except for information provided under any self-reporting obligation under those regulations.

43W Limits on investigation powers

- (1) The industry body or the Commission may authorise, in writing, any person or persons to exercise all or any of the powers referred to in section 43U(b) or (c) in respect of an industry participant.
- (2) An authorised person must, before entering premises under section 43U(c), give reasonable notice to the owner or occupier of the premises (at least 4 days before entry) of his or her intention to enter the premises.
- (3) An authorised person must, on first entering any premises under section 43U(c) and, if requested, at any later time, produce to the person apparently in charge of the premises

the authorisation under subsection (1).

- (4) If an authorised person enters any premises under section 43U(c) and is unable, despite reasonable efforts, to find any person apparently in charge, the authorised person must, before leaving the premises, leave a written notice stating—
 - (a) the authorised person's identity; and
 - (b) the address of premises where the authorised person may be contacted; and
 - (c) the date and time of entry; and
 - (d) the reasons for entering.
- (5) Section 43U(c) does not authorise an authorised person to enter a home, except with the consent of an occupier or under the authority of a warrant.
- (6) An authorised person may apply for a warrant by written application on oath.
- (7) A District Court Judge, Justice, or Community Magistrate, or a Court Registrar (not being a constable) who is satisfied that there are reasonable grounds to believe that it is necessary, for the purpose of ascertaining whether or not an industry participant has breached, or may breach, the gas governance regulations or rules, for an authorised person to search any place may, by warrant, authorise that person to search a place specified in the warrant.