



Statement of Proposal

**Switching Arrangements for the  
New Zealand Gas Industry  
Part2  
Compliance and Enforcement  
Arrangements**

31 August 2006

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# 1 Executive Summary

## Background

- 1.1 In response to the Government's desire for the Gas Industry Co to review switching arrangements in the New Zealand retail gas market and a broader industry acknowledgement of the inefficiency and sub-optimal performance of the current switching arrangements, Gas Industry Co has undertaken a review of switching arrangements for retail gas customers in New Zealand.
- 1.2 The review undertaken by Gas Industry Co of switching arrangements is described in a document titled "Statement of Proposal for Switching Arrangements for the New Zealand Gas Industry" (referred to as the "Switching Proposal" in this paper) which is being released contemporaneously with this document. The Switching Proposal is Part 1 of a two part suite of documents; Part 2 is this paper (referred to as the "Compliance Proposal").
- 1.3 The Switching Proposal describes the Proposal of the Gas Industry Co to develop rules, to be recommended to the Minister of Energy under the Gas Act, governing retail gas customer switching. These draft rules named the "Gas (Switching Arrangements) Rules" are contained in the Switching Proposal and are referred to in this paper as the 'switching rules'.
- 1.4 In parallel with the development of the Switching Proposal, Gas Industry Co has considered the need for compliance and enforcement arrangements to support the switching arrangements.
- 1.5 The Gas Industry Co has determined the regulatory objective for compliance and enforcement is to provide a high degree of confidence that the proposed switching rules will be adhered to, and thereby contribute to the better achievement of the Government's policy objectives for the retail sector of the gas industry (referred to the 'Regulatory Objective' in this paper).
- 1.6 The Gas Industry Co has reviewed possible options to provide for compliance and enforcement of the proposed switching rules in order to identify the most reasonably practicable option.
- 1.7 The review undertaken by Gas Industry Co included:
  - issuing of a Consultation Paper titled "Compliance and Enforcement Arrangements in the New Zealand Gas Industry" ( referred to as the "Consultation Paper" in this paper)<sup>1</sup>;
  - consideration of submissions in response;

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<sup>1</sup> All documents available on the Gas Industry Co website

- issuing of a Decision Paper titled “Decision Paper on Modified Arrangements for Compliance and Enforcement Arrangements for Retail Gas Market Registry and Switching” (referred to as the “Decision Paper” in this paper); and
- holding of an Industry Workshop.

## The Proposal

- 1.8 The Gas Industry Co has concluded, after an assessment of the costs and benefits, that a regulatory compliance regime best meets the Regulatory Objective. A tailor made compliance regime for the reporting, investigation and determination of breaches of the switching rules is proposed.
- 1.9 Central to this regime are the:
- Market Administrator which has responsibility for receiving notices of reported breaches of the rules, attending to administrative tasks, determining the materiality of breaches, and attempting to resolve any immaterial breach with the agreement of the parties;
  - Investigator who investigates material or unresolved immaterial breaches, endeavours to settle the matter, refers settlements and unresolved breaches to the Rulings Panel; and
  - Rulings Panel which, approves or rejects settlements, determines unresolved breaches and orders remedies.
- 1.10 The benefits of this Proposal are a high level of compliance with the switching rules in order to realise the net benefits of the switching arrangements set out in the Switching Proposal, including efficient switching and tracking of customers and the quantities of gas they purchase. Good compliance with these rules will minimise delays in customer switching, provide more accurate bills for, and lead to less problems for, customers switching between suppliers. The result should be more efficient and fair outcomes for consumers.
- 1.11 The Gas Industry Co therefore proposes to recommend regulations to the Minister of Energy under the Gas Act, governing compliance and enforcement for the switching rules.

## Legislative Requirements

- 1.12 The Gas Industry Co must comply with s43M of the Gas Act when making a recommendation for Gas Governance Regulations, which requires consideration of s43ZN – s43ZP. Those sections specify what the objectives of the Gas Industry Co must be when making a recommendation.
- 1.13 Prior to Gas Industry Co recommending rules or regulations to the Minister of Energy under the Gas Act 1992 (“Gas Act”), it must also comply with section 43L of the Gas Act. That section requires Gas Industry Co to, among other things, consult with those persons it thinks are “*representative of the interests of persons reasonably likely to be substantially affected*” by the proposed rules or regulations.

1.14 This paper constitutes the formal consultation required under section 43L(1)(b) of the Gas Act.

## 2 Regulatory Objective

### The Gas Act and GPS on Gas Governance

#### General objectives and outcomes

- 2.1 The Government Policy Statement (referred to as the “GPS” in this paper) sets out the Government’s objectives and outcomes for governance of the New Zealand gas industry, and its expectations for industry action. Under section 43ZO of the Gas Act, Gas Industry Co must have regard to those objectives and outcomes when making recommendations for gas governance rules or regulations.
- 2.2 The Government’s overall policy objective for the gas industry, as stated in the Gas Act and the GPS is:
- “To ensure that gas is delivered to existing and new customers in a safe, efficient, fair, reliable, and environmentally sustainable manner.”*
- 2.3 Section 43G(2)(c) of the Gas Act also refers to the ‘objective of promoting competition in gas retail markets’.
- 2.4 Paragraph 5 of the GPS adds that, consistent with this overall objective, the Government is seeking certain specific outcomes which include:
- (c) *Barriers to competition in the gas industry are minimised to the long-term benefit of end-users;*
- .....
- (g) *The quality of gas services and in particular trade-offs between quality and price, as far as possible, reflect customers’ preferences;”*

#### Specific switching objectives

- 2.5 Paragraph 11 of the GPS specifically deals with switching arrangements and states:
- “The Minister of Energy invites the industry body to recommend arrangements, including regulations and rules where appropriate, in the following areas:*
- *The standardisation and upgrading of protocols relating to customer switching, so that barriers to customer switching are minimised....”*

#### Regulatory Objective of this Statement of Proposal

- 2.6 Consideration of any compliance and enforcement arrangements to support the switching rules needs to fit within the Government's overall policy objective for the gas industry and the specific outcomes it is seeking for the retail sector as outlined above.

- 2.7 The Gas Industry Co has determined the regulatory objective for compliance and enforcement is to provide a high degree of confidence that the proposed switching rules will be adhered to, and thereby contribute to the better achievement of the Government's policy objectives for the retail sector of the gas industry (referred to as the 'Regulatory Objective' in this paper).
- 2.8 Gas Industry Company believes that the establishment of an efficient and effective compliance and enforcement regime will meet this Regulatory objective.

**Q1:** *Do submitters agree with this Regulatory Objective? If not, what do you think the regulatory objective should be?*



## 3 Legislative Framework

### The Gas Act 1992

#### Power to make regulations for compliance and enforcement

3.1 The specific powers in the Gas Act which allow the Government to directly regulate retail and customer issues to ensure effective outcomes for customers are described in section 2 of the Switching Proposal.

3.2 In addition, section 43G of the Gas Act provides that the Minister of Energy can recommend to the Governor-General the making of regulations for the purpose of:

*“Providing for compliance with gas governance regulations and rules to be monitored and enforced by the industry body or the Commission or any other person or court, and the powers and procedures of that person or court.”*

*“Providing procedures for resolving disputes between industry participants; providing for the operation and facilitation of those dispute resolution procedures by a person, and the powers and procedures of that person.”*

#### Specific provisions relating to enforcement and compliance

3.3 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:

- contemplate that a Rulings Panel<sup>2</sup> might be established;
- include limits on investigation powers for monitoring and enforcing compliance with gas governance regulations and rules, obligations on industry participants to co-operate with any investigation, and privileges protection (sections 43U to 43W);
- contain a list of the orders that the Rulings Panel can make (sections 43X and 43Y);
- impose limits on tort claims against service providers (section 43Z); and
- establish rights of judicial review and appeal to the Courts (sections 43ZA to 43ZJ).

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<sup>2</sup> A Rulings Panel is defined in s43D as “any Rulings Panel established under gas governance regulations”. Whilst the Act contemplates a Rulings Panel, the identity of the decision maker could be Gas Industry Co or any other person or court.

## Supplementary Powers

- 3.4 In addition, under section 43S of the Gas Act, any regulation or rule made under Subpart 1 of Part 4A of the Gas Act (which includes rules or regulations for switching arrangements) includes supplementary empowering provisions. Those provisions include the ability for rules or regulations to
- “(a) provide for 1 or more persons or bodies or groups of persons to carry out functions in relation to those regulations or rules, 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 participants, and reporting requirements:*
  - (b) provide for systems, processes and procedures (including dispute resolution procedures), and the keeping, supply and disclosure of information, in relation to any matters specified in this subpart:*
  - (c) prescribe the form and manner in which information is to be disclosed:*  
....
  - (e) prescribe when and for how long information must be disclosed:*
  - (f) exempt or provide for exemptions (including provide for the revocation of exemptions), on any terms and conditions, of any person or class of persons from all or any of the requirements in regulations or rules made under this subpart:*
  - (g) provide for the supply of information for the purpose of administration and enforcement of this Act, and regulations and rules made under this Act:*
  - (h) provide for transitional provisions:*
  - (i) provide for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.”*

## Conclusion

- 3.5 Gas Industry Co therefore believes the collective powers set out in the Gas Act support the proposed draft regulations for compliance and enforcement of the switching rules set out in this paper.

## Legal requirements when recommending Rules or Regulations

### Section 43L consultation

- 3.6 Prior to Gas Industry Co recommending rules or regulations to the Minister of Energy under the Gas Act, it must first comply with section 43L(1) of the Gas Act. That section requires Gas Industry Co to:
- (a) “undertake an assessment under section 43N; and*
  - (b) consult with persons the recommending body thinks are representative of the interests of persons reasonably likely to be substantially affected by the proposed regulations; and*

- (c) *give those persons an opportunity to make submissions; and*
- (d) *consider those submissions.”*

### Section 43N(1) assessment

3.7 The assessment under section 43N(1) of the Gas Act, requires Gas Industry Co to:

- “(a) *seek to identify all reasonably practicable options for achieving the objective of the [rule or] regulation; and*
- (b) *assess those options by considering-*
  - (i) *the benefits and costs of each option; and*
  - (ii) *the extent to which the objective would be promoted or achieved by each option; and*
  - (iii) *any other matters that the industry body or the Commission considers relevant; and*
  - (iv) *ensure the objective of the [rule or] regulation is unlikely to be satisfactorily achieved by any reasonably practicable means other than the making of the [rule or] regulation ( for example, by education, information, or voluntary compliance); and*
  - (v) *prepare a statement of proposal for the purpose of consultation under section 43L(1).”*

### Section 43N (2) Statement of Proposal

3.8 A statement of proposal must, under section 43N(2) of the Gas Act, contain:

- (a) *“a detailed statement of the proposal; and*
- (b) *a statement of the reasons for the proposal; and*
- (c) *an assessment of the reasonably practicable options, including the proposal, identified under subsection (1); and*
- (d) *other information that the industry body or the Commission considers relevant.”*

3.9 This paper constitutes a statement of proposal for the purposes of section 43N(2) of the Gas Act (referred to as the ‘Proposal’ in this paper).

### Rules and Regulations

3.10 Primarily the Gas Act empowers the Minister of Energy to make gas governance regulations, but section 43Q(1) of the Gas Act allows the Minister of Energy to make a rule for all or any of the purposes for which a gas governance regulation may be made.

3.11 Under section 43Q(2) of the Gas Act, in deciding whether to make a recommendation for a rule, the Minister must only have regard to the following:

- “(a) *the importance of the rule, including whether the rule has a material effect on the rights and interests of individuals:*
- (b) *the subject matter of the rule, including whether the rule contains detailed or technical matters rather than matters of general principle:*
- (c) *the application of the rule, including-*
  - (i) *whether the rule applies principally to a particular group (e.g. industry participants) rather than the general public:*
  - (ii) *whether the benefits of publication in accordance with section 43R rather than the Acts and Regulations Publication Act 1989 outweigh the costs of publication by that method:*
- (d) *the expertise and rule-making procedures of the recommending body.”*

3.12 Gas Industry Co considers that the proposed compliance and enforcement arrangements:

- are important in that they:
  - govern the rights of individuals in respect of the imposition of remedies;
  - govern investigative powers and obligations to co-operate with investigations, including a right of entry into industry participants premises, as specified by the Act;
  - govern the possible remedies, including compensation, available to a consumer affected by a participant’s breach of the rules, as specified by the Act; and
  - create a dispute resolution body defined by the Gas Act.
- have a subject matter which contains matters of general principle in the determination of rule breaches and disputes rather than technical or detailed matters;
- govern how disputes between industry participants will be resolved, and the integrity of the rules maintained; and
- have a wider application than industry participants as consumers and other affected persons including the Gas Industry Co have a right to report rule breaches.

3.13 Given the above Gas Industry Co believes that it is most likely and appropriate that the Minister of Energy will conclude that the new compliance and enforcement arrangements should be implemented by regulations.

3.14 Gas Industry Co notes that this is the approach taken in respect to the compliance and enforcement arrangements in the electricity sector.

### Terminology used in this paper

3.15 The terminology used in this Proposal is defined in the Gas Act, the draft Regulations and otherwise throughout the paper.

## 4 Background

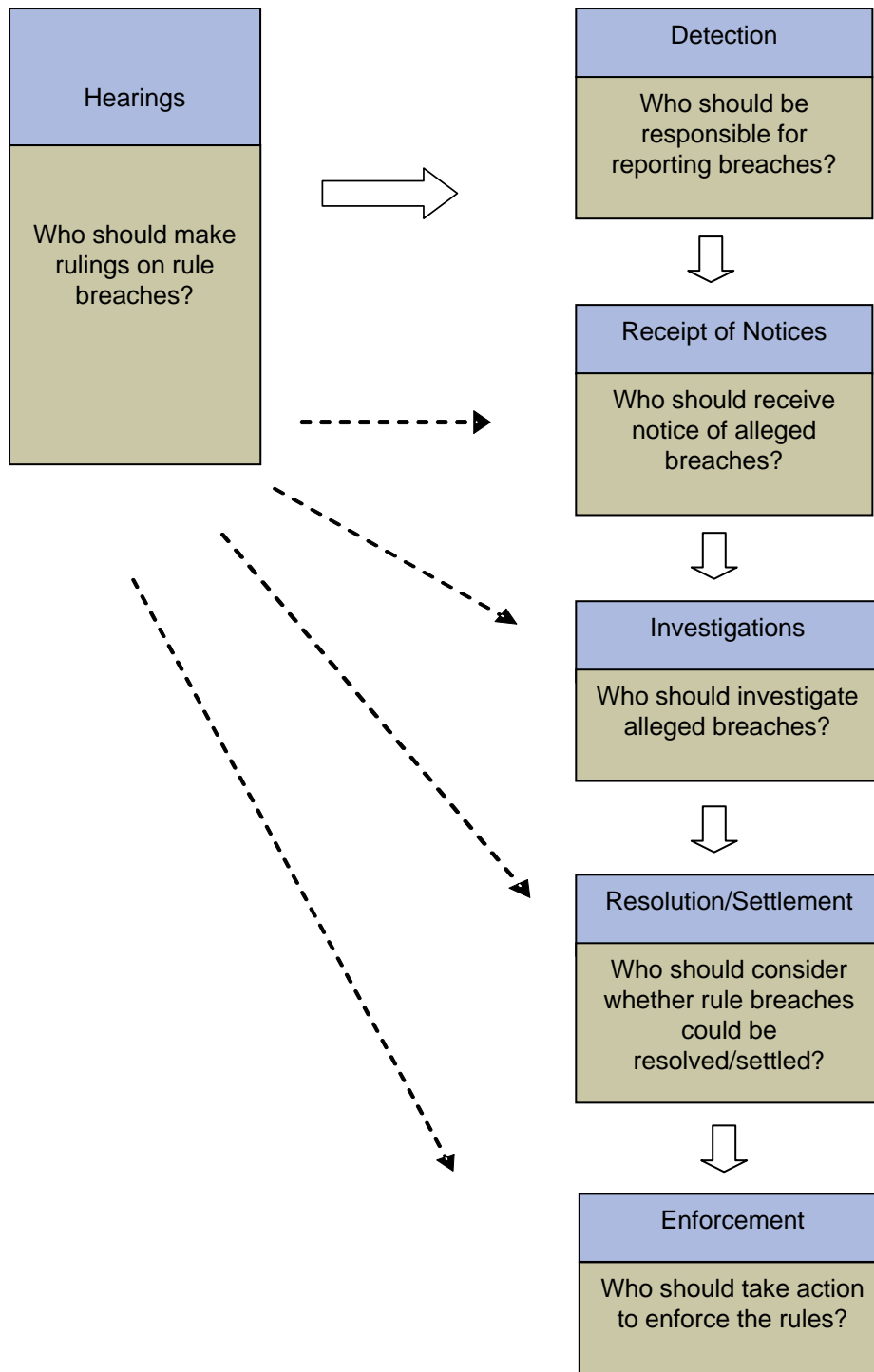
### Current Compliance Arrangements

- 4.1 The background to the development of current switching arrangements, and the issues identified with current switching arrangements are set out in section 4 of the Switching Proposal.
- 4.2 Currently enforcement and compliance for switching, as with other arrangements in the gas industry proceeds in reliance of bilateral enforcement of contractual terms through contracts with the monopoly pipeline businesses. Compliance with these codes and protocols has largely been poor. This is partly because of the muted incentives on various parties to enforce them via the courts system.
- 4.3 There is currently no industry governance structure to support and enforce compliance. Notwithstanding that the current arrangements lack participant support and are not adhered to, there is no compliance mechanism or reporting/audit framework to support them.
- 4.4 This is one of a number of factors identified in the current switching arrangements which contribute to not achieving the GPS objective.

### Functions of a Compliance and Enforcement Regime

- 4.5 The development of compliance and enforcement arrangements proceeded on the basis that any compliance and enforcement regime involves several functions.
- 4.6 Although it is possible to consider each function and the options for each function separately, in practice there are strong linkages between the functions and how they are best organised. The approach taken was to focus on developing a preferred position for each key function in sequence, starting with the most important function. In this way, the interdependency of the functions was taken into account when the preferred design option was developed.
- 4.7 The most important function, and the one that tends to drive the preferred compliance option, was the decision maker role – who decides whether a breach of the rules has occurred and makes a ruling on the appropriate sanction? The proposed compliance arrangements were developed according to the process diagram outlined in Figure 1.

Figure 1: Developing the Compliance Regime



## 5 Identification of Reasonably Practicable Options (section 43N(1))

### Process undertaken by Gas Industry Co

- 5.1 In identifying the reasonably practicable options for a compliance and enforcement regime as required by section 43N(1)(a) of the Gas Act the Gas Industry Co followed the following process:
- Consultation Paper;
  - submissions on the paper;
  - response to submissions;
  - Decision paper;
  - industry workshop; and
  - identification of the reasonably practicable options.
- 5.2 This section of this paper details each of the stages in turn.
- 5.3 The identification of reasonably practicable options for a compliance and enforcement regime that achieves the Regulatory Objective is connected with the proposed switching arrangements. Gas Industry Co believes that the proposed switching rules are the most suitable mechanism for affecting mandatory switching arrangements. The processes undertaken by Gas Industry Co to reach this view are set out in section 5 of the Switching Proposal.
- 5.4 For the purpose of the consideration of appropriate compliance and enforcement arrangements in this paper, Gas Industry Co proceeds on the underlying basis that the proposed switching rules will achieve the statutory objectives set out in section 3 of this paper and are the most reasonably practicable option pursuant to section 43N.

### Consultation Paper

- 5.5 The Gas Industry Co issued the Consultation Paper in parallel with consultation with the gas industry on options for switching arrangements. The Consultation Paper identified options which could support the proposed switching arrangements, and any other future industry arrangements recommended by the Gas Industry Co.
- 5.6 The Consultation Paper considered a range of compliance requirements and options, from voluntary compliance with enforcement of contractual terms at the election of the parties (the status quo), through to a very comprehensive compliance regime including monitoring and surveillance.

- 5.7 The potential options were analysed against the Regulatory Objective.
- 5.8 The Consultation Paper outlined the key functions of a compliance scheme, considered all the practical options for how those functions might be organised, evaluated the options for each function against qualitative assessment criteria, identified cost efficiencies where possible and developed a preferred compliance and enforcement model.
- 5.9 The assessment criteria the Gas Industry Co used to evaluate the options were: meet the statutory objectives<sup>3</sup>, credibility, efficiency, timeliness, expertise in decision making, cost effectiveness, and scalability.
- 5.10 The Consultation Paper included a preferred model and alternative options for consideration by stakeholders.
- 5.11 In summary the compliance model proposed in the Consultation Paper had the characteristics set out in Table 1.

**Table 1: The Compliance Model proposed in the Consultation Paper**

Function	Preferred option for body to undertake the function	Description of the Compliance model proposed
Detection and reporting of rule breaches	Participant in breach  Other participants.  Consumers/other affected persons.  Service providers, e.g. service provider who runs the central registry.	There should be an obligation on participants to self-report and report other breaches that they become aware of.  Any consumer or affected person should be able to report or claim a breach of the rules.  The service provider 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.

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<sup>3</sup> The statutory objectives are set out in section 3 of this paper.



Function	Preferred option for body to undertake the function	Description of the Compliance model proposed
Investigation of breaches	Independent Investigator	<p>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.</p> <p>The independent Investigator should be required to follow a set of procedures, set out in the rules, when investigating possible breaches.</p>
Early resolution and/or settlement	Independent Investigator	<p>The independent Investigator should have powers to recommend to the Rulings Panel that:</p> <ul style="list-style-type: none"> <li>• trivial or vexatious complaints be rejected;</li> <li>• early resolution of breaches that are not in dispute be approved;</li> <li>• settlement of disputes between parties about alleged breaches be approved; and</li> <li>• an unresolved breach be considered by the Rulings Panel.</li> </ul>
Decision	Rulings Panel	<p>A one member Rulings Panel should hear and determine rule breaches and order remedies.</p> <p>The Rulings Panel can seek the assistance of industry experts on complex disputes.</p>

### Submissions on the Consultation Paper

- 5.12 Submissions were received from 8 parties in response to the Consultation Paper: Nova Gas, Contact Energy, Genesis Energy, Wanganui Gas, Vector, Powerco, Mighty River Power, and the Electricity and Gas Complaints Commission.
- 5.13 All submissions were published on the Gas Industry Co website.
- 5.14 While being broadly supportive of improved compliance and enforcement for switching arrangements and the analysis in the consultation paper, in general submitters:
- supported the assessment criteria, although they considered there should be greater emphasis on cost effectiveness and less on scalability;
  - were reluctant to support the proposed model because they considered it was premature when the scope of the issues under switching and registry was unclear pending the development of those arrangements and determination of the implementation mechanism;

- strongly preferred an early resolution process for immaterial/minor breaches which have no impact on the system or any person, without recourse to a formal investigation process. This was regarded as a more pragmatic and cost effective way of resolving immaterial breaches;
- preferred voluntary reporting of breaches by participants, to avoid running potentially expensive processes on matters that have no system or financial consequence; and
- supported bilateral contractual enforcement in the courts system rather than a Rulings Panel.

### Response to Submissions

- 5.15 The Gas Industry Co considered the submissions under the assessment criteria and determined that the compliance model would only apply to switching arrangements and should be implemented by regulation in order to meet the Regulatory Objective. The reasons for the Gas Industry Co decision to proceed by way of regulation are set out in section 7 of this paper.
- 5.16 The Gas Industry Co also determined to modify the model in two areas: the responsibility for reporting breaches, and by introduction of a pre-investigation early resolution process. These two modifications are discussed in detail below.

### Responsibility for reporting of breaches

- 5.17 In relation to the reporting of breaches switching participants it was decided that a voluntary reporting regime was justified under the assessment criteria. A voluntary regime avoids unnecessary duplication of reported breaches.
- 5.18 Under the proposed model the Registry Operator<sup>4</sup> has a mandatory obligation to report breaches of the rules. The Registry Operator is in a position to detect a substantial number of rule breaches. Consumers, other affected persons and the Gas Industry Co may also report breaches. Consumers are likely to detect those breaches which the Registry Operator may be unable to detect, such as inaccuracy of meter reads.
- 5.19 Gas Industry Co considers the above should provide a sufficiently comprehensive overview of the system without compromising the assessment criteria, and provide a compliance structure more targeted at reporting breaches of importance.
- 5.20 An incentive to report breaches is that self reporting will be a mitigating factor when determining remedies. If necessary, the switching rules could be amended in the future to require mandatory reporting by a switching participant of a specific rule breach.

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<sup>4</sup> The Registry Operator is the service provider contracted to the Gas Industry Co to provide the services of the central registry.

### Pre-investigation early resolution process

- 5.21 In response to submissions a 'pre-investigation early resolution process' was introduced to the model. This process is designed to deal with breaches assessed to fall below a materiality threshold which do not justify or need for a full scale investigation process.
- 5.22 This process is assigned to the Market Administrator (either Gas Industry Co or the body appointed by Gas Industry Co) who will perform the administrative tasks associated with breach notices, and determine the materiality of an alleged breach.
- 5.23 Breaches which are not considered material can be resolved by the Market Administrator with the agreement of the parties or by taking no action, where appropriate. Material breaches or unresolved breaches will be referred to investigation.
- 5.24 Gas Industry Co considers that this is a cost effective process for dealing with breaches as it can be performed by an internal resource in conjunction with a range of relatively minor administrative tasks. It also allows for pragmatic industry solutions to be developed for immaterial breaches, and reduces the need for more expensive investigations.
- 5.25 Although where Gas Industry Co is the Market Administrator there is a potential for the perception of conflict of interest in the cases which involve industry participants whose members are on the board of the Gas Industry Co, the Company considers that on balance this is a minimal risk as in practice the Board will not be involved in the day-day discussions on materiality.

### Decision Paper

- 5.26 Following analysis of the submissions, the Gas Industry Co decided to proceed with the modified compliance model to support switching rules.
- 5.27 On 19 June 2006, Gas Industry Co issued a Decision Paper which summarised the Board's response to the submissions on the consultation paper and described how the compliance model had been modified to take into account some of the key concerns raised in the submissions.
- 5.28 This modified compliance model is explained in the Statement of Proposal.

### Industry Workshop

- 5.29 The Gas Industry Co then held an industry workshop on 24 July 2006 to explain the modified compliance model.

### Identification of Reasonably Practicable Options

- 5.30 Having concluded the process outlined above, Gas Industry Co believes it has considered a range of options against the assessment criteria set out in section 5.9, in order to assess which option best meets the Regulatory Objective.

5.31 The identification, analysis and assessment of all reasonably practicable options are set out in section 7 of this paper.

## 6 Statement of the Proposal (section 43N(2))

6.1 This paper constitutes a Statement of Proposal for the purposes of section 43N(2) of the Gas Act which requires:

- a detailed statement of the Proposal;
- a statement of the reasons for the Proposal;
- an assessment of the reasonably practicable options, including the Proposal; and
- other information that Gas Industry Co considers relevant.

### Detailed Statement of the Proposal

6.2 The Proposal is for a recommendation to the Minister of Energy under the Gas Act to approve regulations providing for compliance and enforcement governance arrangements for switching rules. These regulations are referred to in the remainder of this paper as the 'compliance regulations' and are set out in Appendix 4 to this paper. The remainder of this section summarises the Proposal at a high level.

### Participant coverage

6.3 All parties required to affect the switch of a customer between retailers will be required to participate in the Gas Registry<sup>5</sup> (including gas distributors, gas retailers supplying customer installations connected to gas distribution systems and all meter owners with meters recording gas consumption at those customer installations). (Refer section 6 of the Switching Proposal).

6.4 All switching participants bound by the switching rules will be bound by the compliance regulations. Consumers, other affected persons and Gas Industry Co will have the right to invoke the compliance regulations.

### Overview of compliance proposal

6.5 The Proposal involves a tailor made compliance regime for the reporting, investigation and determination of breaches.

6.6 Central to this regime are the:

- Market Administrator who has responsibility for receiving notices of a reported breach of the rules, attending to administrative tasks, determining the

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<sup>5</sup> The Gas Registry will be the central data base of record to facilitate switching established under the switching rules to record the details of all switching participants.

materiality of a breach, and attempting to resolve any immaterial breach with the agreement of the parties;

- an Investigator who investigates material or unresolved immaterial breaches, endeavours to settle the matter, refers settlements and unresolved breaches to the Rulings Panel; and
- a Rulings Panel which determines unresolved breaches and orders remedies.

### Reporting of breaches

- 6.7 Switching participants may report an alleged breach of the rules (a breach) by a switching participant to the Market Administrator by notice in writing. Consumers or other persons affected by the breach, and the Gas Industry Co may also notify the Market Administrator of an alleged breach of the rules it becomes aware of.
- 6.8 The Registry Operator will have a mandatory requirement in the service provider contract<sup>6</sup> and under the switching rules to regularly report breaches of the switching rules to the Market Administrator. The regularity of such reports will be set out in the service provider contract.
- 6.9 All of the above will be regarded as breach notices.

### Market Administrator

- 6.10 The Gas Industry Co shall initially perform the role of Market Administrator, but shall have the right to appoint another body to undertake this role in the future.

### Administration of breach notices

- 6.11 The Market Administrator will be responsible for notifying the participants allegedly in breach of the breach notice and publishing the notice. Such publication allows any participant who is affected by the breach to join as a party to the proceedings.
- 6.12 The Market Administrator has the power to seek further information about the circumstances of the breach.

### Determination of materiality of the breach

- 6.13 The Market Administrator is required to determine whether a breach raises a material issue by considering various factors e.g. impact on the market, or the time that has lapsed (see the compliance regulations for a full list of these factors).
- 6.14 Where the breach is considered immaterial, the Market Administrator may either take no action, where appropriate, or attempt to resolve the breach by agreement of the parties.

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<sup>6</sup> Service provider contract is the contract between the Gas Industry Co and the person responsible for running the central registry, as defined in the Switching Proposal.

- 6.15 The Market Administrator must refer the breach for Independent investigation if:
- the breach raises a material issue;
  - the Market Administrator has insufficient information to determine whether the breach is material; or
  - the Market Administrator decides that an immaterial breach warrants further investigation for other reasons.
- 6.16 This process is designed to filter breach allegations that do not raise material issues so they are not automatically referred to the investigation process and therefore the Rulings Panel for approval. Such intent is expressed in the compliance regulations.

### Early Resolution

- 6.17 The Market Administrator may use any process to achieve an agreement to resolve immaterial breaches. Every settlement must be in writing and published to enable transparency of the settlement process.

### Investigator

- 6.18 The Gas Industry Co will approve one or more persons who may be selected by the Market Administrator to carry out independent investigations of breaches of the switching rules. An approved Investigator will be selected on a case-by-case basis by the Market Administrator to investigate a referred breach. Any appointed Investigator must be free of any conflicts of interest to investigate the breach.

### Investigation

- 6.19 The Investigator is required to undertake an investigation into the facts of the breach. The Gas Act sets out the limits on the powers of investigation, right of entry into premises, the obligations on the participants to co-operate, and the protection of privileges.
- 6.20 The Investigator has the power to obtain the services of an external auditor or technical expert to assist in the investigation, subject to the approval of the Market Administrator.

### Settlement

- 6.21 The Investigator must endeavour to effect a settlement using any process agreed by the parties, any settlement must be in writing and referred to the Rulings Panel for its approval.
- 6.22 The Rulings Panel may approve or reject a settlement.
- 6.23 The Investigator has the power to recommend the Rulings Panel reject the settlement if he/she considers it is not in the best interests of the gas industry or public.

- 6.24 Any settlement approved by the Rulings Panel must be published.
- 6.25 Where the Rulings Panel rejects a settlement it may refer it back to the Investigator to further endeavour to achieve a settlement within a limited timeframe (after which it is referred to Rulings Panel for determination), direct the Investigator to abandon the investigation, or determine the breach itself.
- 6.26 The Investigator is to refer any unresolved breach to the Rulings Panel and submit an investigation report. The Rulings Panel is to consider the Investigator's report. The contents required in this report are specified in the compliance regulations. Based on this report the Rulings Panel decides whether to hold a hearing of the breach or determine it on the basis of written submissions.

### Determination by Rulings Panel

- 6.27 The Rulings Panel is to regulate its own procedures in accordance with the principles of natural justice. However the regulations contain specific requirements such as:
- pre-hearing statements and materials;
  - private hearings;
  - urgent hearings;
  - evidence not otherwise admissible;
  - rights of parties to be heard; and
  - power to request further information.
- 6.28 The Gas Industry Co may approve technical experts, external auditors or other persons as industry experts to assist the Rulings Panel.
- 6.29 The Rulings Panel may obtain the advice or assistance of an approved industry expert when determining a breach, with the agreement of the Gas Industry Co.
- 6.30 The orders for penalties and remedies that the Rulings Panel may make are set out in the Act, and participants must comply with any order and decisions.
- 6.31 All decisions are to be published subject to any confidentiality requirements.

### Appointment of Rulings Panel

- 6.32 One person (plus an alternate in the case of sickness or unavailability), who is suitably qualified and independent, may be appointed by the Gas Industry Co as the member of the Rulings Panel for up to five years.
- 6.33 There are a number of general provisions in the regulations in respect of the Rulings Panel, such as liability, right of removal and resignation, right to remuneration, cost and performance objectives, reporting requirements,



confidentiality powers, disclosure of interests, validity of acts, ceasing to hold office and other applicable miscellaneous provisions.

6.34 There are also provisions requiring confidentiality of information.

### Appeal and judicial review rights

6.35 The appeal and judicial review rights are contained in the Gas Act.

### Funding

6.36 The regulations provide that the costs of the Market Administrator, Investigators and the Rulings Panel are to be paid by the Gas Industry Co and are recoverable from industry participants pursuant to levy regulations made under the Act.

### Reasons for the Proposal

6.37 The aim of the Proposal is to meet the Regulatory Objective. In formulating the Proposal the Gas Industry Co has assessed a range of options and identified the most reasonably practicable option. For the reasons set out in detail in section 7 of this paper:

- continuation of the status quo (bilateral contracting with enforcement via the court system or a voluntary compliance regime) does not meet the Regulatory Objective, as it does not ensure compliance nor protect the integrity of the proposed switching arrangements; and
- a regulation or rules based compliance regime is required to meet the Regulatory Objective.

6.38 The Gas Industry Co's view is that:

- the most comprehensive regime (including surveillance, monitoring and auditing) is too costly at this time;
- a properly scoped moderately comprehensive regime would best meet the Regulatory Objective; and
- although many variations of a moderately comprehensive compliance regime are possible, the Proposal represents what the Gas Industry Company considers to be the appropriate balance between costs and comprehensiveness.

6.39 The analysis applied by the Gas Industry Co in reaching this view is set out in Appendix 2.

6.40 Accordingly, Gas Industry Co has concluded that the most reasonably practical option to meet the Regulatory Objective is to recommend the compliance regulations to the Minister of Energy for approval under the Gas Act. In order to recommend such regulations, Gas Industry Co is required to comply with the Gas Act and prepare and consult on this Statement of Proposal.

### Assessment of the reasonably practicable options

- 6.41 An assessment of the reasonably practicable options, including the Proposal, is set out in section 7 of this paper.

### Other information that Gas Industry Co considers relevant

- 6.42 The Gas Industry Co does not believe that any other information is relevant to making an assessment of the Proposal under section 43N(2) of the Gas Act.

### Conclusion

- 6.43 The Gas Industry Company considers that the Proposal best meets the Regulatory Objective and that no other options identified and analysed in section 7 meet that objective more cost efficiently.

- Q2:** *Do submitters agree with the analysis of the Proposal? If not, please state your reasons.*
- Q3:** *Do submitters agree this Proposal complies with section 43N of the Gas Act? If not, please state your reasons.*
- Q4:** *Do submitters have any other information that they consider is relevant to the assessment of the Proposal?*

## 7 Assessment of the Reasonably Practicable Options

7.1 This section describes and analyses:

- the options considered, including regulatory and non-regulatory options;
- assesses the relative benefits and costs of each of those options;
- identifies the most reasonably practicable option (the Proposal);
- confirms that the chosen most reasonably practicable option meets the Regulatory Objective; and
- discusses whether the Regulatory Objective could be achieved by any reasonably practicable means other than the making of the regulation.

7.2 The analysis in this section complies with Section 43N (1)(b) and (c) of the Gas Act, which requires that, before making a recommendation to the Minister for a gas governance regulation, the Gas Industry Co must:

- seek to identify all reasonably practicable options for achieving the objective of the regulation;
- assess those options by considering the benefits and costs of each option;
- consider the extent to which the Regulatory Objective would be achieved by each option;
- consider any other matters that the Gas Industry Co considers relevant; and
- ensure that the Regulatory Objective is unlikely to be satisfactorily achieved by any reasonably practicable means other than the making of the regulation.

7.3 The analysis of the options in this section is limited to consideration of compliance and enforcement. However, in assessing the reasonably practicable options it is important to understand that the compliance arrangements are designed to support the establishment of the switching arrangements. The Switching Proposal details the switching and registry arrangements and the benefits and costs of those arrangements in detail.

7.4 As noted in the cost benefit analysis in section 7.14 of this paper the key benefit of an effective compliance regime is that it gives more assurance that 100% of those benefits described in the Switching Proposal will be attained.

### The Options considered – including Regulatory and Non-Regulatory Options

7.5 The Gas Industry Co considered the following options:

- A voluntary compliance and enforcement arrangement, either by maintaining the status quo or establishing a voluntary compliance regime; or

- A regulated compliance and enforcement arrangement which could range from a minimal to a very comprehensive compliance regime.

### Assessment of the options

- 7.6 The Gas Industry Co considered whether the status quo or establishment of a voluntary compliance regime could achieve the Regulatory Objective. Achievement of the Regulatory Objective relies on compliance with the switching rules. The Gas Industry Co's view is that continuation of the status quo or the establishment of a voluntary regime would not adequately ensure adherence to the switching arrangements.
- 7.7 Any voluntary multilateral arrangements are unlikely to be achieved given the:
- difficulty in reaching consensus and execution of a pan-industry compliance agreement which is legally binding;
  - nature of provisions that would need to be included;
  - diverse nature of the parties that would be required to agree the provisions to be included in a pan-industry compliance agreement and the fact that they include direct competitors;
  - inability to compel new switching participants to execute and join the pan-industry compliance agreement; and
  - possible Commerce Act risks associated with such an agreement.
- 7.8 Furthermore as the only reasonably practicable option for switching arrangements was decided in the Switching Proposal to be implementation by rules under the Gas Act, it follows in part, that the compliance regime to support these rules should also be regulated under the Gas Act.
- 7.9 The Gas Industry Co has identified the following flaws in either continuation of the status quo or establishment of a voluntary regime:
- consumers may pursue a switching complaint with the Electricity and Gas Complaints Commission and seek a personal remedy, but there is no jurisdiction within the Commission to order a switching participant to comply with the proposed switching rules or to publicly identify the switching participant who is in breach of the rules. Gas Industry Co considers that consumers should be able to report a breach of the rules and seek to have them enforced;
  - Gas Industry Co considers that it, as the industry body appointed to co-regulate the gas industry, should be able to report any rule breaches it becomes aware of by any source for investigation; and
  - Gas Industry Co considers that the Registry Operator should be required to report any rule breaches it detects when operating the central registry as a means of ensuring comprehensive compliance with the central registry and switching system.

- 7.10 A voluntary enforcement regime would only involve participants monitoring compliance with the arrangements and taking enforcement action against parties not complying with the arrangements.
- 7.11 There is a wide range of potential options for a regulated compliance arrangement based on regulations under the Gas Act. As explained in section 4 of this paper the Consultation Paper considered a full range of compliance requirements and options.
- 7.12 The assessment criteria outlined earlier in section 5.9 were used to develop the detailed design and functions of the compliance arrangements.
- 7.13 The analysis of the detailed design options against these criteria is set out in Appendix 2. This analysis considers the cost effectiveness of the options. On the basis of this analysis the Gas Industry Co considers that the Proposal is the most cost-effective of the reasonably practicable options. In particular:
- the Gas Industry Co view is that a very regulated comprehensive regime (e.g. a regime including surveillance, monitoring and auditing) would be too costly at this time to meet the efficiency and effectiveness elements of the Regulatory Objective; and
  - the proposed regulated compliance regime on the other hand will efficiently overcome the flaws of a voluntary regime/status quo highlighted above.

#### Assessment of the relative Cost and Benefits

- 7.14 The proposed compliance regulations are the Gas Industry Co's preferred regulated regime. For the purpose of assessing whether a voluntary regime or a moderately comprehensive regulated regime is preferred, the Gas Industry Co analysed a voluntary regime against the proposed regulated compliance arrangements and undertook a cost benefit analysis.
- 7.15 The Gas Industry Co has concluded that the proposed regulated compliance arrangements will offer a positive net benefit, relative to a voluntary enforcement arrangement, as outlined in the following Table 2:

**Table 2: Assessment of the relative Costs and Benefits**

Option	Proposal for regulated compliance	Voluntary Enforcement and Compliance
Administrative Compliance Costs	<p>The Proposal will involve some administrative compliance costs as described and estimated in Appendix 1. The Proposal has been specifically designed to keep these to a minimum, consistent with achieving a good level of compliance. The estimated cost is between \$0.26m and \$0.86m net present value, with a high degree of uncertainty. To the extent that the compliance arrangements can be applied to other arrangements and rules, the costs attributable to switching and registry are likely to reduce.</p>	<p>Bilateral enforcement removes the need for a central compliance function and administrative costs.</p>
Participant Costs	<p>Under the Proposal, participants will need to maintain internal compliance mechanisms and resources to deal with compliance issues as they arise. The Proposal attempts to keep these to a minimum by providing a materiality threshold and processes for early resolution and settlement. The objective is to focus internal compliance activity on the important outcomes.</p>	<p>Under bilateral enforcement participants will still need to maintain internal compliance mechanisms and resources to deal with compliance issues as they arise. The cost of these arrangements would depend upon the extent to which participants enforce the arrangements on a bilateral basis, but the Gas Industry Co expects that they could be higher than under the Proposal, because of duplication of enforcement efforts. However, if enforcement results in legal proceedings this can be costly for participants.</p> <p>If participant costs were low relative to the Proposal, it is likely that compliance would be poor, reducing the benefits of the switching and registry arrangements.</p>
Switching and Registry Benefits	<p>The benefits of the Proposal are the benefits identified in the Switching Proposal. The most likely range of the benefits relating to improvements in retail competition has been estimated to be between \$1.93m and \$4.51m (net present value) on a conservative basis. These estimates assume relatively high compliance levels. In addition the other benefits relate to improvements in customer satisfaction.</p>	<p>Under bilateral enforcement the benefits of the switching and registry arrangements will depend upon the extent to which bilateral enforcement achieves the benefits detailed in the Switching Proposal. This is a matter of judgement; however the Gas Industry Co considers that experience in the gas sector suggests that compliance is likely to be poor and that only a proportion of the benefits will be achieved.</p>

Option	Proposal for regulated compliance	Voluntary Enforcement and Compliance
Overall Net Benefit	The assessed overall net benefit of the Proposal relative to the bilateral enforcement option depends on a series of judgements about costs and outcomes and is difficult to estimate. However, the Gas Industry Co notes that the estimated administrative costs of the Proposal are most likely to be between 15% and 20% of the identified quantifiable benefits of the switching and registry arrangements. These benefits have been estimated using conservative assumptions.	In order to prefer a bilateral enforcement arrangement, on the basis of a benefit cost analysis, one would need to make a judgement that participant costs would be no higher than under the Proposal and that the majority of the benefits of the switching and registry arrangements could be delivered with a bilateral enforcement process. The Gas Industry Co does not subscribe to this view.

7.16 This assessment of the costs and benefits of the Proposal draws on the assessment of the costs and benefits of the Switching Proposal outlined in Part 1. In particular, the assessment draws on the quantification of the net benefits provided in Appendix 2 (of Part 1). Part 1 points out that only those benefits that it was practical to quantify were included in the assessment in Appendix 2.

7.17 The benefits that were identified as difficult to quantify were the benefits to consumers of a clearer set of rules governing customer switches, a more timely switching process, and more accurate billing information. Accordingly, the Gas Industry Co considers that the assessment of the benefits in Table 2 is conservative.

7.18 It is intended that the compliance regulations will provide a benchmark compliance model for consideration as a compliance and enforcement scheme for other rules and arrangements as they are developed by Gas Industry Co in pursuit of the objectives in the Government Policy Statement and Gas Act. If this occurs the establishment costs attributable to the switching arrangements are likely to reduce. This would have the effect of increasing the net benefits of the compliance proposed for switching.

#### Identification of the most reasonably practicable option (the Proposal)

7.19 The Gas Industry Co has concluded that the proposed compliance arrangement, relative to a voluntary compliance and enforcement regime:

- will produce benefits significantly exceeding the costs;
- will produce a significantly higher level of compliance; and
- will better deliver the Regulatory Objective.

7.20 Accordingly, the Gas Industry Co considers that the most reasonably practicable option is a regulated moderately comprehensive compliance regime, and the preferred regime is that set out in the Proposal for the reasons set out in Appendix 2.

## Extent to which the Chosen Option for a Compliance Regime meets the Regulatory Objective

7.21 The criteria used to evaluate the benefits of the proposed regulated compliance regime and to determine the design of each of the functions within the regime are set out in Table 3.

**Table 3: Assessment criteria**

Criteria	Benefits of the proposed compliance regime
Meet the Regulatory Objective	Provide for transparency of the 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
Timeliness	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 effectiveness	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

7.22 The Regulatory Objective is likely to be achieved if the compliance arrangements:

- establish a standardised process for remedies (including remedies available to a consumer affected by a participant's breach of the proposed switching rules), investigations (including requiring participants to co-operate with investigations) and dispute resolution
- deliver a high degree of compliance with switching rules that have been developed to meet the statutory objectives;
- promote a high degree of transparency around the compliance process so that parties can observe the level of compliance and the consequences of rule breaches; and



- deliver a high degree of transactional efficiency. In other words the costs of the regime are appropriately balanced against the benefits of the regime.

7.23 The Gas Industry Co considers the compliance arrangements proposed in this paper 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

7.24 The proposed compliance arrangements should deliver a high degree of credibility to switching arrangements because they provide for:

- an independent Rulings Panel to make decisions on breaches of the switching rules and appropriate sanctions;
- the appointment of independent Investigators to investigate all allegations of material rule breaches;
- any affected consumer or person and the Gas Industry Co to make allegations about breaches of the rules;
- early resolution and/or settlement of immaterial breaches by the Market Administrator;
- early resolution and/or settlement of material breaches to be approved by the Rulings Panel; and
- all decisions (apart from administrative ones) about investigations and rulings on material or unresolved immaterial breaches to be made independently from industry participants and the Gas Industry Co.

### Efficiency

7.25 The proposed compliance arrangements should support efficiency in the gas industry arrangements because they promote:

- a high degree of compliance with the switching rules that have been developed to meet the statutory objectives; and
- 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

7.26 The proposed compliance arrangements should deliver timely decisions about possible breaches of the switching rules because they provide for:

- immediate notification of breaches to the Market Administrator;
- timely resolution of immaterial breaches by the Market Administrator;

- timely appointment of Investigators as required for material or non resolved immaterial breaches;
- time frames for reporting investigations to the Rulings Panel;
- scope for early resolution and settlement of breaches; and
- a dedicated available Rulings Panel to determine disputes.

### Appropriate Expertise

7.27 The proposed compliance 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 Investigators on a case by case basis; and
- Market Administrator to oversee immaterial breaches and to perform most of the administrative tasks associated with breaches.

### Cost Effectiveness

7.28 The proposed compliance arrangements should deliver a cost effective arrangement with a high degree of transactional efficiency because they provide for:

- the early resolution of immaterial breaches by the Market Administrator without the need for a full scale investigation process;
- the appointment of Investigators on a case by case basis, rather than establishing an investigations infrastructure in advance;
- reliance on voluntary reporting by switching participants, reporting by consumers and other affected persons, reporting by Gas Industry Co, and mandatory reporting by the Registry Operator, instead of a monitoring and surveillance function; and
- a single member Rulings Panel, with the power to appoint expert advisers on a case by case basis.

### Scalability

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

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

- 7.30 The Gas Industry Co's view is that the proposed compliance arrangements would meet the Regulatory Objective.
- 7.31 The assessment of the extent to which the Proposal meets the Regulatory Objective is set out in Table 4:

**Table 4: Extent to which Proposal meets Regulatory objective**

Regulatory Objective	Extent to which Regulatory Objective is met by Proposal
<p>To establish a compliance and enforcement regime which provides a high degree of confidence that the proposed switching rules will be adhered to, and thereby contribute to the better achievement of the Government’s policy objectives for the retail sector of the gas industry.</p>	<p>The Proposal is designed to deliver a high level of compliance with the switching rules in order to realise the net benefits of the switching arrangements set out in the Switching Proposal, including efficient switching and tracking of customers and the quantities of gas they purchase. Good compliance with these rules minimise delays in customer switching, provide more accurate bills for, and lead to less problems for, customers switching between suppliers. The result should be more efficient and fair outcomes for consumers.</p> <p>To the extent that customer choice is facilitated by the switching and registry arrangements and the associated compliance arrangements, customers should be more able to express preferences for particular quality and price packages.</p> <p>The switching rules provide for the standardisation and upgrading of the protocols for customer switching and are designed to minimise the barriers to customer switching. The proposed compliance arrangement is designed to provide a high degree of confidence that these outcomes will be achieved.</p> <p>The way the Rulings Panel, Market Administrator, Investigator, and reporting requirements all interrelate, means the Gas industry Co are confident that the Proposal will result in an effective and efficient compliance regime that provides a reasonably high level of compliance with the switching rules and hence ensures their integrity.</p>

7.32 As well as ensuring the benefits of the switching regime, as detailed in the Switching Proposal, are achieved, a compliance and enforcement regime will also result in more efficient and fair outcomes for consumers by:

- providing a high degree of confidence that the proposed switching rules will be adhered to: and
- allowing transparency of the level of non-compliance.

7.33 Overall, the Gas Industry Co has concluded that the Proposal will deliver the Regulatory Objective to a large extent.

**Other matters considered relevant**

7.34 Gas Industry Co does not believe that any other matter other than the matters detailed in this Proposal is relevant to making an assessment of the Proposal under section 43N(1) of the Gas Act.

## Regulatory Objective achieved by any reasonably practicable means (other than regulation)

- 7.35 For the reasons set out above Gas Industry Co does not believe that the Regulatory Objective can be satisfactorily achieved by any reasonably practicable means other than the making of the Proposal set out in this paper.

## Conclusion

- 7.36 The Gas Industry Co considers that the Proposal meets the Regulatory Objective and that no other options identified and analysed meets this objective more effectively than the Proposal.

- Q5:** *Do submitters agree that the benefits relative to the costs of the Proposal are likely to be superior to a voluntary compliance and enforcement regime?*
- Q6:** *Do submitters agree that the Proposal will lead to a higher level of compliance than a voluntary compliance and enforcement regime?*
- Q7:** *Do submitters agree that the benefits relative to the costs of the Proposal are likely to be superior to alternative designs? If not, please specify which particular aspects of the design should be amended, stating reasons.*
- Q8:** *Do submitters agree that the Proposal meets the Regulatory Objective? If not, why?*

## 8 Proposed Draft Regulations

### Summary of proposed Draft Regulations

- 8.1 The purpose of the proposed compliance regulations is to enable switching participants to invoke a process to determine whether the switching rules are being complied with, and obtain remedies if they are not. Consumers, other affected persons and the Gas Industry Co will also have the right to invoke the process to pursue a breach of the switching rules.
- 8.2 The principal elements of the compliance regulations are:
- **Establishment of roles:** establish the roles and appointment of persons to these roles, to undertake functions for the compliance and enforcement of the switching rules, being the Market Administrator (Gas Industry Co), Investigator and Rulings Panel;
  - **Reporting provisions:** provide a process for switching participants, consumers and other affected persons, the Registry Operator, and the Gas Industry Co to report alleged breaches of the switching rules to the Market Administrator;
  - **Early resolution pre-investigation for immaterial breaches:** govern the process for the Market Administrator to receive breach notices, undertake associated administrative functions<sup>7</sup>, determine the materiality of reported breaches, and to attempt to resolve immaterial breaches with the agreement of the parties;
  - **Referral of material breaches for investigation:** govern the process of referral by the Market Administrator of material breaches or unresolved immaterial breaches to an Investigator for investigation;
  - **Settlement and investigation process:** govern the process for an Investigator appointed on a case by case basis to investigate the alleged material breach, attempt to resolve the matter with the agreement of the parties, to refer any settlement or unresolved breach to the Rulings Panel;
  - **Enforcement:** require the Investigator to provide an investigation report to the Rulings Panel, to speak to this report at any hearing if required, and parties to have a right of representation;
  - **Determination:** govern the process for the Rulings Panel to approve or reject a settlement, to consider and determine an unresolved breach, if necessary by way of a hearing and with assistance of approved independent industry experts, and order any remedies including penalties; and

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<sup>7</sup> e.g. notify switching participants by publishing the alleged breach

- **Administration:** prescribe the proceedings and powers of the Rulings Panel, set out the publishing requirements of the Market Administrator, Investigator and Rulings Panel in order to provide necessary transparency of their respective decisions, and set out the reporting requirements of each body to the Gas Industry Co.

**Q9:** *Do submitters believe the proposed compliance regulations adequately reflect and govern the Proposal? If not, please provide all drafting amendments in mark-up.*

## Funding

- 8.3 The proposed compliance regulations contemplate an ongoing cost to Gas Industry Co for providing the services of the Market Administrator, any appointed Investigator, and the Rulings Panel.
- 8.4 The Gas Industry Co is proposing to provide the funding for these services and then recover those costs through the levy under section 43ZZE of the Gas Act. Such costs are intended to be borne by all industry participants in a manner which will be consulted on separately under the levy process.
- 8.5 The Rulings Panel has the power under the Gas Act to award the reasonable costs of any investigations or proceedings before the Rulings Panel against the participant in breach of the switching rules.
- 8.6 The Rulings Panel is only able to award costs in proceedings before it, not when approving any settlements referred from the Investigator.
- 8.7 It will be open to both the Market Administrator and any appointed Investigator to, where appropriate, attempt to include any costs associated with the provision of their services as part of any terms of settlement and in this manner obtain costs against the breaching participant.

**Q10:** *Do submitters agree with the funding option for the Proposal? If not, please state your reasons.*

## **9 Next Steps**

- 9.1 The table in section 9 of the Switching Proposal sets out the indicative timelines and milestones for the delivery of the Proposal as defined within Gas Industry Co's Strategic Plan.



## 10 Submission Requirements

- 10.1 Gas Industry Co invites submissions on the Proposal and any answers to the specific questions contained in Appendix 3 by **5:00 pm** on **Monday 9th October 2006**. Please note that submissions received after this date may not be able to be considered.
- 10.2 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 the Proposal for Compliance and Enforcement Arrangements for the New Zealand Gas Industry" in the subject header to [submissions@gasindustry.co.nz](mailto:submissions@gasindustry.co.nz) and one hard copy of the submission should be posted to the address below:
- Gael Webster  
Gas Industry Co  
Level 9, State Insurance Tower  
1 Willis Street  
PO Box 10-646  
Wellington  
New Zealand  
Tel: +64 4 494 2468  
Fax: +64 4 472 1801
- 10.3 Gas Industry Co will acknowledge receipt of all submissions electronically. Please contact Gael Webster if you do not receive electronic acknowledgement of your submission within two business days.
- 10.4 Submissions on the specific questions should be provided in the format shown in Appendix 3. Submissions on the draft Regulations should be provided separately in mark-up in the form of redrafted regulations (with any comments).
- 10.5 Gas Industry Co values openness and transparency and therefore submissions will generally be made available to the public on Gas Industry Co's website. Submitters should discuss any intended provision of confidential information with Gas Industry Co prior to submitting the information.

# Appendix 1: Assessment of costs of the Proposal

The administrative costs of the proposed compliance arrangement have been assessed using the same parameters as used for the benefit and cost analysis for the proposed switching and registry arrangements. This involves an analysis period of five years and a discount rate of 9.0%. Although the costs will obviously last for much longer than five years, in order to accurately contrast the costs with the benefits, it is necessary to use the same timeframe.

The actual costs are somewhat speculative and will depend upon the number of breaches of the rules, the extent to which alleged breaches are resolved or settled early in the process, the number of investigations, and the number of decisions required of the Rulings Panel. On the one hand, during the early phase of the new switching arrangements there might be relatively low reporting of breaches and costs might build up over time as a result of participants and consumers becoming more aware of possible breaches. On the other hand, there might be a higher level of breaches during the early phase of the arrangements if retailer systems struggle to cope with rules that have not have been applied previously. Over time, as retailer systems improve, the level of reported breaches could fall.

The uncertainty suggests a relatively wide range of possible costs. The estimate of costs has therefore been built up using a wide range of costs for each function forming part of the compliance Proposal. The analysis suggests that the net present value cost is likely to be between \$0.26m and \$0.86m as outlined on the following table.

Item	Daily rate	Low		High	
		Days	Annual cost	Days	Annual cost
Market Administration	\$500	50	\$25,000	100	\$50,000
Rulings Panel	\$2,500	5	\$12,500	20	\$50,000
Investigations	\$1,500	20	\$30,000	80	\$120,000
Annual Total			\$67,500		\$220,000
Net Present Value Cost			\$262,551		\$855,723

These costs have been estimated for a stand-alone compliance regime in support of the switching and registry arrangements. They therefore assume a certain level of standing costs associated with establishing the market administration function, the Rulings Panel and a body of potential Investigators. To the extent that the compliance arrangement is extended to cover other rules and arrangements, these standing costs will be spread over a wider base. However, for the purpose of this analysis, it is assumed that the costs are all attributable to the switching and registry arrangements.

# Appendix 2: Assessment of Detailed Design of Compliance Arrangements

## Options for Decision Maker

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

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).

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; and
- 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

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.

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

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; and

- 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.

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.

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

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.

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.

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).

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; and
- 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.

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); and
- 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

The most likely options have been evaluated against the assessment criteria set out in Table 3 of the Compliance Proposal (referred to as the ‘assessment criteria’) and the result is set out in Table 1. This table suggests a convincing case in support of an independent Rulings Panel to make decisions about breaches and sanctions.

**Table1: Evaluation of Decision Maker Role**

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

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 Regulatory Objective.

The potentially significant costs and delays in using the courts, and the likelihood that the switching rules (hereafter referred to as the ‘rules’ in this Appendix) will be of a technical nature, both work against the other options.

The Rulings Panel could also be given the power to arbitrate on bilateral disputes between switching participants (hereafter referred to as ‘participants’ in this Appendix) which do not arise from breaches of the rules, where future rules or industry arrangements provide for this.

### Options for Monitoring and Detection of Breaches

The integrity of the 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

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.

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.

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 Regulatory Objective and objectives of the Gas Act and the GPS.

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

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.

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.

Voluntary reporting is effective in targeting those breaches which are significant or repetitive and with sufficient impact on participants to warrant reporting.

## Self reporting

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.

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

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 the Registry Operator to report all breaches could provide a ready overview of the system and workability of the rules.

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

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.

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

The most likely options have been evaluated against the assessment criteria and the result is set out in Table 2. 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 Regulatory Objective, and the cost effectiveness of the arrangement.

**Table 2: 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

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.

However the Gas Industry Co should have the right to report a breach for investigation where it becomes aware of a breach and considers it warrants investigation.

The proposed approach is to provide for voluntary reporting of breaches by all participants and mandatory reporting by the Registry Operator. The Registry Operator would have an obligation to report all breaches of the rules that it becomes aware of, whether they are its own breaches or breaches by participants.

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

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

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

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.

There are several options for establishing an independent body tasked with managing compliance. The options include:

- the Gas Industry Co;
- the Rulings Panel; and
- an Independent Investigator.

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

The most likely options have been evaluated against the assessment criteria and the result is set out in Table 3. This table suggests that deciding on who should receive notices of possible breaches is mostly concerned with the cost effectiveness of the arrangements.

**Table 3: 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

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.

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

## Options for Investigation of Breaches

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

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

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.

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

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.

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 participants.

### Independent Investigator

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.

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

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.

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

The most likely options have been evaluated against the assessment criteria and the result is set out in Table 4. 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, while keeping costs low.

**Table 4: Evaluation of Investigator**

Criteria	The Parties	Gas Industry Co	Independent Investigator	Rulings Panel
Objectives	Poor	Good	Good	Moderate
Credibility	Poor	Moderate	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

The preferred model is a hybrid between the Gas Company Co and an Independent Investigator depending on the nature of the breach. Both are evaluated favourably against the assessment criteria.

It is proposed that the Gas Company Co, an industry body with knowledge of the industry and rules, is well placed to filter breach allegations that do not raise material issues. This role would be undertaken as Market Administrator and as an extension of the administrative tasks described in the previous section. Such a role for the Gas Industry Co as co-regulatory body is consistent with the company's purposes set out in the constitution, and has minimal risk of creating conflicts of interests for industry board members.

This would enable provision of a fast and efficient resolution service for breaches that do not raise material issues (it is anticipated that some of these minor /technical breaches will be included in reports from the Registry Operator). This option still allows for material breaches to be referred to an Independent Investigator for an independent investigation, and this is where the risk of conflict potential is greater as the matters under investigation are likely to be of greater consequence to industry participants.

This Market Administrator role for Gas Industry Co is preferred on the grounds that it should be more efficient both in terms of cost and in terms of securing the required expertise. It allows for an in-house reporting and resolution service for minor breaches, and a "pay as you go" approach for investigations that enables Gas Industry Co to ensure that the expertise is suited to each case.

The Rulings Panel is not preferred because of the concerns outlined above.

## Options for Early Resolution and/or Settlement

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 report breaches. 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.

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

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

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.

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

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.

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.

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.

### Market Administrator

The above also applies to the preliminary process where the Market Administrator considers immaterial breaches and endeavours to achieve an early resolution of these breaches. However, there will not be a full investigation of the breach on the basis that the facts are reasonably obvious and no investigation is required. If the facts are not obvious or complex then that is a ground for the Market Administrator to refer the breach for an Independent investigation.

## The Rulings Panel

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.

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

The most likely options have been evaluated against the assessment criteria and the result is set out in Table 5. This table suggests that the party best-placed to recommend early resolution and settlement of disputes is the Market Administrator for immaterial breaches and the Independent Investigator for material or unresolved breaches.

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 Market Administrator in the first instance for immaterial breaches and then the Independent Investigator in respect of material breaches.

**Table 5: Evaluation of Early Resolution and Settlement**

<b>Criteria</b>	<b>The Parties</b>	<b>Independent Investigator Market Administrator</b>	<b>Rulings Panel</b>
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

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.

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 of material breaches was acceptable from an industry perspective.

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.

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

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.

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

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.

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

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.

The Independent Investigator would assume the role similar to a 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

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.

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

The most likely options have been evaluated against the assessment criteria and the result is set out in table 6. This table suggests that the party best-placed to assume the role of prosecution when a ruling is required is the Independent Investigator.

**Table 6: 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

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

## Appendix 3: Recommended format for submissions on Compliance Proposal

To assist Gas Industry Co in the orderly and efficient consideration of stakeholders' responses, a suggested format for submissions has been prepared, an electronic copy of which is available on our website. 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.

**Submission from:** (company name and contact person)

QUESTION	COMMENT
<p><b>Q1:</b> Do submitters agree with this Regulatory Objective? If not, what do you think the regulatory objective should be?</p>	
<p><b>Q2:</b> Do submitters agree with the analysis of the Proposal? If not, please state your reasons?</p>	
<p><b>Q3:</b> Do submitters agree this Proposal complies with section 43N of the Gas Act? If not, please state your reasons.</p>	
<p><b>Q4:</b> Do submitters have any other information that they consider is relevant to the assessment of the Proposal?</p>	
<p><b>Q5:</b> Do submitters agree that the benefits relative to the costs of the Proposal are likely to be superior to a voluntary compliance and enforcement regime?</p>	



<p><b>Q6:</b> Do submitters agree that the Proposal will lead to a higher level of compliance than a voluntary compliance and enforcement regime?</p>	
<p><b>Q7:</b> Do submitters agree that the benefits relative to the costs of the Proposal are likely to be superior to alternative designs? If not, please specify which particular aspects of the design should be amended, stating reasons.</p>	
<p><b>Q8:</b> Do submitters agree that the Proposal meets the Regulatory Objective? If not, why?</p>	
<p><b>Q9:</b> Do submitters believe the proposed compliance regulations adequately reflect and govern the Proposal? If not, please provide all drafting amendments in mark-up.</p>	
<p><b>Q10:</b> Do submitters agree with the funding options for the Proposal? If not, please state your reasons</p>	
<p><b>Q11:</b> Do you have any other comments on the Proposal?</p>	

# Appendix 4: Draft Gas Compliance Regulations

## Draft Gas (Compliance) Regulations 2006

### Contents

#### Regulations

#### 1 Title

These regulations are the Gas (Compliance) Regulations 2006

#### 2 Commencement

These regulations come into force on [insert date of commencement].

#### 3 Purpose

These regulations provide for the monitoring and enforcement of the Gas (Switching Arrangements) Rules 2006 made by the Minister of Energy under section 43Q of the Gas Act 1992, as may be amended from time to time.

#### 4 Interpretation

(1) In these regulations, unless the context otherwise requires, —

**Act** means the Gas Act 1992

**breach notice** means any notice given under regulation 8 or 9 or 10

**co-regulatory body** means the industry body approved by the Governor General, by Order in Council made on the recommendation of the Minister of Energy under section 43ZL of the Act, to provide for co-regulation of the gas industry by the Government and that industry body

**consumer** means a person who purchases gas for consumption;

**investigator** means any investigator approved under regulation 21

**notifying participant** means a participant that gives a breach notice under regulation 8

**market administrator** means the co-regulatory body or any other person appointed by the co-regulatory body to be the market administrator

**participant** means a switching participant as defined in the rules

**publish** means, in relation to a document, to make that document available at no cost —

(a) on the co-regulatory body's website at all reasonable times; and

(b) in any other manner that the co-regulatory body may decide

**registry operator** means the service provider appointed by the co-regulatory body to establish, maintain, and operate the registry

**rules** means the Gas (Switching Arrangements) Rules 2006 as amended from time to time and includes every schedule to the rules, any code of practice and any technical code and every amendment to deletion of, or addition to, any of the rules

**Rulings Panel** or **Panel** means the Panel established by regulation 54.

- (2) Any term that is defined in the rules and used, but not defined, in these regulations has the same meaning as in the rules.
- (3) Any term that is defined in the Act and used in these regulations, but not defined in these regulations or the rules, has the same meaning as in the Act.

## **5 Role of market administrator**

- (1) The role of the market administrator is to —
  - (a) receive breach notices; and
  - (b) provide a filter so that breach allegations that do not raise material issues are not automatically referred to the investigation process and the Rulings Panel; and
  - (c) provide a fast and efficient resolution service for complaints that do not raise a material issue; and
  - (d) refer complaints that do raise material issues to investigators for investigation.
- (2) To avoid any doubt, the co-regulatory body does not have a conflict of interest by reason of the fact that it may be carrying out the role of market administrator.

## **6 Breaches**

- (1) In these regulations, unless the context otherwise requires, a reference to a participant that has breached a provision of the rules is a reference to a participant that —
  - (a) has contravened the provision; or
  - (b) has attempted to contravene the provision; or
  - (c) has aided, abetted, counselled, or procured any other participant to contravene the provision; or
  - (d) has induced, or attempted to induce, any other participant, whether by threats or promises or otherwise, to contravene the provision; or
  - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other participant of the provision; or
  - (f) has conspired with any other participant to contravene the provision.

- (2) In these regulations, unless the context otherwise requires, a reference to a breach (including an alleged breach) of the rules refers only to a breach —
  - (a) that was discovered, or ought reasonably to have been discovered, within 3 years of the date of the breach; and
  - (b) that occurred within 10 years of the date of any investigation or other proceedings under these regulations.

## **Part 1**

### **Reporting and investigation of breaches**

*Participants must investigate complaints made to them*

#### **7 Participants must investigate complaints made to them**

- (1) Any person may complain, in writing, to a participant about any business activity of the participant that the person believes might constitute a breach of the rules.
- (2) The participant must ensure that the complaint is promptly, thoroughly, and fairly investigated by the participant, and that appropriate action is taken.
- (3) The participant must promptly notify the person who made the complaint in writing of the result of the investigation and the action (if any) taken by the participant.

*Voluntary reporting to market administrator of breaches of rules*

#### **8 Participant may notify market administrator of alleged breach**

- (1) If any participant believes, on reasonable grounds, that it or another participant has breached the rules, that participant may notify the market administrator as soon as possible.
- (2) The notice must be in writing and must specify —
  - (a) the participant that is alleged to have breached the rules; and
  - (b) the rule allegedly breached; and
  - (c) the circumstances relating to the alleged breach; and
  - (d) the date and time on which the alleged breach occurred.

*Consumer or other person may report to market administrator breach of rules*

## **9 Voluntary reporting of breaches of rules**

- (1) Any consumer or other person (other than a participant) may notify the market administrator if the consumer or other person believes, on reasonable grounds, that —
  - (a) a participant has breached the rules; and
  - (b) that the consumer or other person is affected by that alleged breach.
- (2) The co-regulatory body may notify the market administrator of an alleged breach of the rules by a participant of which the co-regulatory body becomes aware of by other means.

### *Mandatory reporting to market administrator of alleged breaches*

## **10 Registry operator must notify market administrator of alleged breach**

- (1) If the registry operator believes, on reasonable grounds, that any participant has breached the rules, then the registry operator must notify the market administrator of the alleged breach as soon as possible.
- (2) The notice must be in writing and must specify —
  - (a) the participant that is alleged to have breached these regulations or the rules; and
  - (b) the rule allegedly breached; and
  - (c) the circumstances relating to the alleged breach; and
  - (d) the date and time on which the alleged breach occurred.
- (3) The registry operator may include notices under subclause (2) in regular reports to the market administrator as agreed between the registry operator and the market administrator.

## **11 Market administrator must notify participant allegedly in breach**

- (1) If the market administrator receives a breach notice, the market administrator must —
  - (a) acknowledge receipt of the breach notice by any manner considered appropriate by the market administrator; and
  - (b) notify the participant allegedly in breach of the following:
    - (i) the name of the notifying participant; and
    - (ii) the rule allegedly breached and the circumstances relating to the alleged breach; and

(iii) the date and time the alleged breach occurred.

(2) The market administrator must use reasonable endeavours to give the acknowledgement and notice within 5 working days of receiving the breach notice.

## **12 Alleged breach must be published and affected parties may join as parties**

(1) At the same time as the market administrator gives notice under regulation 11(1)(b), the market administrator must publish the contents of that notice.

(2) Within 5 working days after the market administrator publishes the content of the notice under subclause (1), any participant may notify the market administrator that it considers that it is affected by the alleged breach and wishes to become a party to the breach notice.

(3) The participant is then joined as a party to the breach notice.

## **13 Market administrator may request further information**

The market administrator may request information about the circumstances of the alleged breach from any of the following:

(a) the notifying participant or other person that gave the breach notice:

(b) the participant who is allegedly in breach:

(c) the registry operator:

(d) any other participant that has joined as a party to the breach notice

*Market administrator to determine materiality*

## **14 Market administrator to determine materiality**

(1) The market administrator must determine whether an alleged breach raises a material issue on the information provided in the breach notice and any other information obtained in accordance with regulation 13.

(2) If, in the opinion of the market administrator, the alleged breach does not raise a material issue, the market administrator may, in its discretion,—

(a) determine to take no action on the alleged breach; or

(b) attempt to resolve the alleged breach with the agreement of the parties in accordance with regulation 17.

(3) If, in the opinion of the market administrator, the alleged breach raises a material issue, the market administrator must refer the alleged breach to an investigator for investigation.

- (4) If the market administrator is unable to determine whether an alleged breach raises a material issue because the market administrator does not have sufficient information, the market administrator must refer the alleged breach to an investigator for investigation.
- (5) If, in the opinion of the market administrator, the alleged breach does not raise a material issue, the market administrator may still refer the alleged breach to an investigator for investigation if the market administrator considers the alleged breach warrants investigation.

#### **15 Factors to be taken into account when determining materiality**

The market administrator must, in determining whether or not an alleged breach raises a material issue, take into account the following factors:

- (a) the severity of the alleged breach:
- (b) whether the alleged breach had a material impact on the operation of the market:
- (c) whether the alleged breach appears to have been intentional or malicious:
- (d) whether the participant allegedly in breach took remedial action immediately, or soon after, following discovery of the breach:
- (e) whether the alleged breach has a potential anti-competitive effect:
- (f) whether the alleged breach has resulted in costs being borne by other participants or persons:
- (g) whether the breach is admitted:
- (h) whether the alleged breach was an isolated event, or indicates a systemic problem with compliance with the rules:
- (i) whether the breach allegation is frivolous or vexatious or is not made in good faith:
- (j) whether, considering the length of time that has elapsed between the date when the alleged breach became known to the participant allegedly in breach and the date when the alleged breach was reported to the market administrator, an investigation of the alleged breach is no longer practicable or desirable:
- (k) whether the participant allegedly in breach has been or is subject to any other orders under these regulations:
- (l) the likelihood that the same breach or a similar breach may occur in the future:
- (m) whether the participant allegedly in breach has benefited from the breach:
- (n) the complexity of facts warrant investigation:
- (o) any other factors that the market administrator considers relevant.

#### **16 Decision to be expeditious and in a fair and reasonable manner**



- (1) The market administrator must make its determination under regulation 14 expeditiously and in a fair and reasonable manner.
- (2) If regulation 14(2) applies, the market administrator must notify the following parties of his or her determination as soon as practicable:
  - (a) the notifying participant or other person that gave the breach notice; and
  - (b) the participant allegedly in breach; and
  - (c) any other participant that has joined as a party to the breach notice under regulation 12.

**17 Market administrator to use informal resolution process**

- (1) If regulation 14(2)(b) applies, the market administrator must endeavour to resolve the alleged breach with the agreement of the following parties:
  - (a) the notifying participant or other person that gave the breach notice; and
  - (b) the participant allegedly in breach; and
  - (c) any other participant that has joined as a party to the breach notice under regulation 12.
- (2) In effecting an agreement, the market administrator may use any process that the market administrator thinks fit.
- (3) Every settlement must —
  - (a) be in writing; and
  - (b) specify the details of any breach of the rules that is admitted by a participant; and
  - (c) record the terms of the settlement.
- (4) The persons referred to in subclause (1) must notify their acceptance of the terms of the settlement in writing to the market administrator.

**18 Market administrator must publish decisions**

When the market administrator has made its determination under regulation 14 the market administrator must —

- (a) notify the co-regulatory body of its determinations in a monthly report to the co-regulatory body; and
- (b) publish its determination.

*Provisions relating to referral of alleged breaches to investigator*

**19 Market administrator to refer alleged breaches to investigator**

- (1) This regulation applies if —
- (a) the market administrator determines under regulation 14(3) that an alleged breach raises a material issue in relation to compliance with the rules and must be referred to an investigator for investigation; or
  - (b) the market administrator determines under regulation 14(4) or 14(5) that the alleged breach will be referred to an investigator for investigation.
- (2) The market administrator must —
- (a) refer the alleged breach to an approved investigator selected by the market administrator for investigation; and
  - (b) notify the following parties that the alleged breach has been referred to an investigator, providing the identity of that investigator and contact details:
    - (i) the notifying participant or other person that gave the breach notice; and
    - (ii) the participant allegedly in breach; and
    - (iii) (any other participant that has joined as a party to the breach notice under regulation 12; and
  - (c) provide the investigator with all relevant materials provided to or created by the market administrator concerning the alleged breach.

**20 Right to refer alleged breach to investigator directly**

- (1) This regulation applies if —
- (a) the market administrator has determined not to take any action on the alleged breach; or
  - (b) the attempt of the market administrator to resolve the alleged breach with the agreement of the parties in accordance with regulation 17 has been unsuccessful within 35 days after the breach was published under regulation 12.
- (2) The following parties may require the market administrator to refer the alleged breach to the investigator:
- (a) the notifying participant or other person that gave the breach notice; or
  - (b) the participant allegedly in breach; or
  - (c) any other participant that has joined as a party to the breach notice under regulation 12.

- (3) If subclause (2) applies, regulation 19(2) applies to the market administrator.

## **21 Approval and selection of investigators**

- (1) The co-regulatory body must approve 1 or more persons as investigators who have the requisite skills and experience to carry out an independent investigations of alleged breaches.
- (2) In selecting an approved investigator under regulation 19, the market administrator must take reasonable steps to ensure that the investigator selected is free of conflicts of interest in carrying out the investigation.

## **22 Investigator may appoint other persons to give advice**

In carrying out an investigation, the investigator may, subject to the agreement of the market administrator, appoint any external auditor, technical expert, or other persons that the investigator thinks fit to give advice or assistance to the investigator.

## **23 Investigator must keep information confidential**

- (1) The investigator must keep, and must ensure that every person appointed by an investigator under regulation 22 keeps, confidential all information provided or disclosed to them, except to the extent that disclosure —
- (a) is required to enable the investigator or other person to carry out its obligations and duties under these regulations or the rules; or
  - (b) is otherwise compelled by law.
- (2) The investigator must require participants that provide or disclose information to the investigator to identify any information that the participant —
- (a) considers to be confidential; and
  - (b) considers should not be included in the investigator's report under regulation 35(3).

## **24 Funding of market administrator**

- (1) The co-regulatory body must fund the market administrator and any investigators selected by the market administrator.
- (2) The co-regulatory body may recover the costs of that funding from industry participants via levy regulations made under the Act.
- (3) Nothing in this regulation limits the ability of the Rulings Panel to make orders under section 43X of the Act relating to the reasonable costs of an investigation.

**25 Investigator must investigate**

The investigator must conduct an investigation of the facts surrounding the notified alleged breach.

**26 Party must co-operate with investigation**

Every participant must co-operate fully with any investigation carried out by the investigator, in accordance with section 43U of the Act.

**27 Privileges protected**

Privileges are protected in accordance with section 43V of the Act.

**28 Limits on investigation powers**

The investigation powers of the investigator are limited by section 43W of the Act.

*Procedures if alleged breach resolved by settlement*

**29 Informal resolution process**

- (1) The investigator must endeavour to effect an informal resolution (a "settlement") of every alleged breach under investigation by agreement between —
- (a) the notifying participant or other person that gave the breach notice; and
  - (b) the participant allegedly in breach; and
  - (c) any other participant that has joined as a party to the breach notice under regulation 12.
- (2) In effecting a settlement, the investigator may use any process that the investigator thinks fit, after consultation with the persons referred to in subclause (1).

**30 Settlements must be written, etc**

- (1) Every settlement must —
- (a) be in writing; and
  - (b) specify the details of any breach of the rules that is admitted by a participant; and
  - (c) record the terms of the settlement.
- (2) The persons referred to in regulation 29(1) must notify their acceptance of the terms of the settlement in writing to the investigator.

**31 Rulings Panel decides whether to approve settlements**

- (1) The investigator must provide to the Rulings Panel —
  - (a) a copy of the settlement; and
  - (b) a report containing as much of the information specified in regulation 36(3) as the investigator reasonably considers relevant in the circumstances of the matter.
- (2) The investigator may make a recommendation to the Rulings Panel that the Rulings Panel should not approve the settlement on the ground that the settlement is not in the best interests of the gas industry or the public.
- (3) The Rulings Panel must either —
  - (a) approve the settlement, in which case the settlement is final and binding on all participants; or
  - (b) reject the settlement.

### **32 Settlements must be published**

- (1) The co-regulatory body must publish the terms of every settlement approved by the Rulings Panel under regulation 31.
- (2) However, the Rulings Panel may direct the co-regulatory body not to publish any part, or all, of any particular settlement if the Rulings Panel considers that there are special circumstances that justify the non-publication.

### **33 What happens if Rulings Panel rejects settlement**

If the Rulings Panel rejects a settlement under regulation 31(3), it must —

- (a) direct the investigator to further endeavour to effect a settlement under regulation 29; or
- (b) direct the investigator to abandon the investigation; or
- (c) determine the alleged breach itself under regulations 35 to 46.

### **34 What happens if investigator unable to effect settlement**

- (1) If, within the timeframe specified in subclause (2), an investigator is unable to effect a settlement between the parties, the investigator must refer the alleged breach to the Rulings Panel for determination.
- (2) The timeframe is —
  - (a) within 30 working days (or any longer period that the investigator agrees in writing) of the alleged breach being referred to the investigator under regulation 19; or

- (b) if applicable, within 10 working days of the investigator further endeavouring to effect a settlement under a direction given under regulation 33(a).

*Procedure if alleged breach is determined by Rulings Panel*

**35 Process if Rulings Panel to determine alleged breach**

- (1) This regulation applies if the Rulings Panel —
  - (a) decides under regulation 33(c) that it will determine an alleged breach itself; or
  - (b) must determine an alleged breach under regulation 34 because an investigator has been unable to effect a settlement between the parties.
- (2) The investigator must provide to the Rulings Panel a report and recommendation sufficient to enable the Rulings Panel to determine the alleged breach.
- (3) The report must, to the extent reasonably practicable, specify or contain the following:
  - (a) the rule allegedly breached; and
  - (b) the participant allegedly in breach; and
  - (c) the estimated date and time the breach allegedly occurred; and
  - (d) the relevant issues raised by the participant allegedly in breach in response to the allegations of breach; and
  - (e) the comments made to the investigator by any other person in response to the relevant issues raised by the participant allegedly in breach; and
  - (f) any additional information that the investigator considers relevant to the decision of the Rulings Panel as to how the matter may be dealt with by the Rulings Panel; and
  - (g) the investigator's assessment of the impact of the conduct alleged to constitute the breach on the other participants; and
  - (h) the investigator's assessment of the likelihood of the alleged breach recurring; and
  - (i) details of any similar situations previously dealt with by the Rulings Panel, including any settlement approved by the Rulings Panel under regulation 31(3) in response to those situations (if known by the investigator); and
  - (j) a copy of all correspondence with the investigator or market administrator relating to the alleged breach.

- (4) The investigator must use reasonable endeavours to give the report to the Rulings Panel within 5 working days of —
- (a) the Rulings Panel deciding that it will determine the alleged breach; or
  - (b) the investigator referring the alleged breach to the Rulings Panel for determination under regulation 34.
- (5) The investigator must forward a copy of the report to the following parties as soon as practicable:
- (a) the notifying participant or other person that gave the breach notice; and
  - (b) the participant allegedly in breach; and
  - (c) any other participant that has joined as a party to the breach notice under regulation 12.

### **36 Rulings Panel to set date for considering alleged breach**

- (1) If regulation 35(1) applies, the Rulings Panel must set a date for considering the alleged breach, and must give to the persons referred to in subclause (2), at least 20 working days written notice of the place, date, and time at which the Rulings Panel will consider the alleged breach.
- (2) The following persons are entitled to be heard at the hearing or to provide written submissions and evidence if the matter is not set down for a hearing:
- (a) the notifying participant or other person that gave the breach notice;
  - (b) the participant allegedly in breach;
  - (c) any participant that has joined as a party to the breach notice under regulation 12;
  - (d) the investigator who investigated the alleged breach.

## **Part 2**

### **Proceedings of Rulings Panel**

#### **37 Rulings Panel may regulate own procedures**

- (1) The Rulings Panel may regulate its own procedures, except as otherwise provided in these regulations, and subject to the requirements of natural justice.
- (2) The Rulings Panel must provide a summary of its procedures to the co-regulatory body and the co-regulatory body must publish those procedures.

### **38 Rulings Panel must conduct hearings**

- (1) The Rulings Panel must set a matter that is being considered by the Rulings Panel down for a hearing —
  - (a) if the Rulings Panel considers that it is appropriate for any participant to be given an opportunity to be heard; or
  - (b) if any participant requests a hearing in respect of the matter.
- (2) Hearings must be in public, unless the Rulings Panel directs otherwise.
- (3) If a matter is not set down for a hearing, the Rulings Panel must consider and decide the matter on the basis of the written submissions and evidence that it has received.

### **39 Pre-hearing statements and materials**

- (1) If a matter is set down for a hearing, the Rulings Panel must ensure that the persons referred to in regulation 36(2) have been provided with —
  - (a) a statement of the matter under consideration; and
  - (b) a copy of all relevant material collected or prepared during the course of the investigation of the matter up to the time the statement is provided.
- (2) The Rulings Panel must comply with subclause (1) —
  - (a) not less than 10 working days before the hearing; or
  - (b) if the Rulings Panel, in its discretion, decides that an urgent hearing is desirable, as soon as practicable.

### **40 Private hearings may be opposed**

- (1) If the Rulings Panel considers that a hearing should be private, it must advise the co-regulatory body and the co-regulatory body must publish the decision of the Rulings Panel and the grounds for that decision.
- (2) If a participant disagrees with this decision, it may make a written submission to the Rulings Panel setting out the reasons for its disagreement, within 5 working days of the decision being published.
- (3) The Rulings Panel must consider the submission and then advise the co-regulatory body of its decision.
- (4) The co-regulatory body publish any further decision of the Rulings Panel and the grounds for that further decision.

### **41 Urgent hearings**



If the Rulings Panel considers that the subject matter of a hearing involves a significant area of dispute, or a matter of urgency, it must arrange for the hearing to take place as soon as practicable after the request for the hearing is made.

#### **42 Evidence not otherwise admissible**

- (1) The Rulings Panel, in carrying out any hearing, may receive in evidence any statement, document, or information that would not be otherwise admissible as evidence that may in its opinion assist it to deal effectively with the matter.
- (2) This regulation is subject to regulation 27.

#### **43 Rights of persons entitled to be heard at Rulings Panel hearing**

- (1) Subject to regulations 38 to 40, any person that is entitled to be heard under regulation 36(2) at any hearing of the Rulings Panel, —
  - (a) is entitled to be represented:
  - (b) must be given a reasonable opportunity to make written and oral representations:
  - (c) is entitled to call witnesses and to cross-examine any witness called against it:
  - (d) is entitled to make a plea to the Rulings Panel in mitigation of penalties:
  - (e) is entitled to have any other person present to give evidence.
- (2) At any hearing of the Rulings Panel, the investigator who has investigated the alleged breach must, if requested to do so by the Rulings Panel, speak to his or her report and recommendation provided under regulation 35(2).

#### **44 Rulings Panel may request further information**

- (1) The Rulings Panel may request the investigator to obtain any further information if the Rulings Panel considers that, in relation to any matter before it, the Rulings Panel does not have sufficient information for it to determine what action to take under regulation 47.
- (2) The Rulings Panel may make the request of its own initiative or following an application by any person referred to in regulation 36(2).
- (3) Participants must provide any information reasonably requested by the Rulings Panel or the investigator under this regulation.
- (4) Subclause (3) is subject to regulation 27.

#### **45 Rulings Panel may seek advice**

- (1) The co-regulatory body may approve as industry experts any external auditor, technical expert, or other person to give advice or assistance to the Rulings Panel as and when required.

- (2) In determining an alleged breach of the rules, the Rulings Panel may, subject to the agreement of the co-regulatory body, employ or otherwise seek advice or assistance from not more than 2 industry experts approved by the co-regulatory body.

**46 Participant may make written submissions**

- (1) Any person referred to in regulation 36(2) may make written submissions to the Rulings Panel on the subject of any penalty or order that the Rulings Panel may make in relation to that matter.
- (2) Any submission under this regulation must be made by the date set by the Rulings Panel as the closing date for submissions.

**Part 3**

**Decisions Of Rulings Panel**

**Orders that Rulings Panel may make**

**47 Rulings Panel may make certain orders**

The Rulings Panel may, after considering any matter referred to it in respect of an allegation that a participant has breached the rules, make any order specified in section 43X(1) of the Act.

**48 Offence to breach compliance orders**

Every participant commits an offence, and is liable on summary conviction to a fine not exceeding \$20,000, who breaches an order made under section 43X(1) of the Act.

**49 Rulings Panel may order payment of civil pecuniary penalty up to \$20,000**

- (1) The Rulings Panel may require a participant to pay to the Crown a civil pecuniary penalty of an amount not exceeding \$20,000 in any case where that participant has breached any provision of the rules.
- (2) When ordering payment of a civil pecuniary penalty, the Rulings Panel must —
- (a) take account of the level of civil pecuniary penalties it has ordered in any similar situations; and
  - (b) (seek to order payment of a civil pecuniary penalty that is commensurate with the seriousness of the case.
- (3) In making that assessment, the Rulings Panel must have regard to the following matters:
- (a) the severity of the breach:

- (b) the impact of the breach on other participants:
- (c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:
- (d) the circumstances in which the breach occurred:
- (e) any previous breach of the rules by the participant:
- (f) whether the participant disclosed the matter to the market administrator:
- (g) the length of time the breach remained unresolved:
- (h) the participant's actions on learning of the breach:
- (i) any benefit that the participant obtained, or expected to obtain, as a result of the breach:
- (j) any other matters that the Rulings Panel thinks fit.

#### **50 Rulings Panel decisions**

- (1) The Rulings Panel must use reasonable endeavours to make its final decision on each matter under its consideration within 40 working days of the date that it has received all written and oral submissions on the matter.
- (2) The Rulings Panel must give the decision, in writing and together with the reasons for the decision, to the persons that were entitled to be heard under regulation 36(2).
- (3) The Rulings Panel must notify the decision to the co-regulatory body as soon as practicable after it has made a final decision.

#### **51 Decisions must be published**

- (1) The co-regulatory body must publish the terms of every decision made by the Rulings Panel under this Part, together with the reasons for the Panel's decision, within 10 working days of receiving the decision from the Rulings Panel.
- (2) However, the co-regulatory body must not publish any part, or all, of any particular decision if the Rulings Panel advises the co-regulatory body that there are special circumstances that justify the non-publication.

#### **52 Participants must comply with orders and directions**

- (1) Every participant must comply with every order relating to it, including any direction or arrangement made by the Rulings Panel for the purpose of giving effect to the order.
- (2) Every participant must perform any action, or make any payment, directed by the Rulings Panel within 10 working days of receiving notice of the direction, or any longer period that the Rulings Panel allows.

**53 Sums to be paid by party are debt due**

- (1) Any sum due to be paid by a participant under these regulations is a debt due by the participant and is recoverable as such in court.
- (2) A failure by a participant to pay a sum due to be paid under these regulations is a breach of these regulations.
- (3) A sum that is not paid when due bears interest at the prescribed rate (within the meaning of section 87 of the Judicature Act 1908).

**Part 4**

**Rulings Panel**

**Establishment of Rulings Panel**

**54 Establishment of Rulings Panel**

- (1) A Rulings Panel is established.
- (2) The Rulings Panel is a body corporate with perpetual succession.

*Functions of Rulings Panel*

**55 Functions of Rulings Panel**

The functions of the Rulings Panel are to —

- (a) determine, in accordance with these regulations, whether a participant has committed a breach of the rules:
- (b) propose to the co-regulatory body that it recommend to the Minister that a change should be made to any regulation or rule that the Rulings Panel considers, in the course of conducting any hearing of a matter, to be necessary or desirable:
- (c) exercise any other functions or powers conferred on the Rulings Panel by these regulations.

*Membership of Rulings Panel*

**56 Membership of Rulings Panel**

- (1) The co-regulatory body must, by written notice, appoint one person with the characteristics described in regulation 64 to be the member of the Rulings Panel.
- (2) A member of the board of the co-regulatory body may not be the member of the Rulings Panel.
- (3) The appointment is effective from the latest of —
  - (a) the date specified in the notice of appointment; or
  - (b) the day that the appointee provides the co-regulatory body with written consent to the appointment and a written undertaking to be bound by these regulations.

#### **57 Alternate member**

- (1) The co-regulatory body may appoint as an alternate member of the Rulings Panel, a person with the characteristics described in regulation 64 who may act as the alternate of the member of the Rulings Panel in accordance with this regulation.
- (2) The alternate member may act in place of the member, but only if the member is unable by illness, absence, or other reason to act as the member.
- (3) The alternate member is to be treated as the member of the Rulings Panel for the purposes of the performance or exercise of any function, duty, or power under these regulations.
- (4) Unless the context otherwise requires, a reference to a member in these regulations also includes a reference to the alternate member.
- (5) No appointment of a person under this regulation as the alternate member and no acts done by that person or the Rulings Panel while that person is the alternate member, may in any proceedings be questioned on the ground that the occasion of the person's appointment had not arisen or had ceased.

#### **58 Restrictions on membership of Rulings Panel**

The following persons are disqualified from being the member of the Rulings Panel:

- (a) a person who is an undischarged bankrupt:
- (b) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, a company under section 382, 383, or 385 of the Companies Act 1993:
- (c) a person who is subject to a property order made under section 10, 11, 12, 30, or 31 of the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act:
- (d) a person who has been convicted of an offence punishable by imprisonment for a term of 2 years or more or who has been sentenced to imprisonment for any other offence, unless that person has obtained a pardon or served the sentence or otherwise suffered the penalty imposed on the person:

- (e) a person who has failed to disclose all interests under regulation 64:
- (f) a person who is not a natural person.

#### **59 Term of appointment**

- (1) The member of the Rulings Panel —
  - (a) holds office for the term specified in his or her notice of appointment, which may be up to 5 years; and
  - (b) may be reappointed; and
  - (c) continues in office despite the expiry of his or her term of office until—
    - (i) the member is reappointed; or
    - (ii) the member's successor is appointed; or
    - (iii) the co-regulatory body informs the member by written notice that the member is not to be reappointed and no successor is to be appointed.
- (2) This clause is subject to regulation 62.

#### **60 Removal and resignation of member**

- (1) The co-regulatory body must remove the member of the Rulings Panel in the event of that member's serious misconduct, inability to perform the functions of the office, or if the member becomes a person to whom any of the paragraphs in regulation 58 apply.
- (2) The co-regulatory body must state its reasons in any notice of removal.
- (3) The co-regulatory body must fill the vacancy created by a removal as soon as possible.
- (4) The member of the Rulings Panel may resign from office by written notice to the co-regulatory body signed by the member.
- (5) The resignation is effective on receipt by the co-regulatory body of the notice, or at any later time specified in the notice.

#### **61 No compensation**

The member of the Rulings Panel is not entitled to any compensation or other payment or benefit relating to his or her removal from office.

#### **62 Member ceasing to hold office**

The member of the Rulings Panel ceases to hold office if he or she —

- (a) resigns in accordance with regulation 60; or
  - (b) is removed from office in accordance with regulation 60 or any other enactment; or
  - (c) becomes disqualified from being a member under regulation 58; or
- otherwise ceases to hold office in accordance with any enactment.

### **63 Validity of acts**

The acts of a person as the member of the Rulings Panel are valid even if —

- (a) the person's appointment was defective; or
- (b) the person is not qualified for appointment.

### **64 Characteristics of Rulings Panel**

The Rulings Panel —

- (a) must have the requisite knowledge, skills, and experience to carry out the functions to be performed by the Rulings Panel; and
- (b) must act impartially in carrying out those functions.

### **65 Member of Rulings Panel must not be interested**

- (1) No person may be appointed as the member of the Rulings Panel if that person —
  - (a) has a material financial interest in a participant; or
  - (b) is a director, officer, member, employee, or trustee of a participant; or
  - (c) is otherwise directly or indirectly materially interested in a participant.
- (2) The member is "interested" in a matter relating to the Rulings Panel if, and only if, the member —
  - (a) is a party to, or will or may derive a material financial benefit from the matter; or
  - (b) has a material financial interest in another party to the matter or in a person to whom the matter relates; or
  - (c) is a director, officer, member, or trustee of another party to, or a person who will or may derive a material financial benefit from the matter; or
  - (d) is the parent, child, or spouse of another party to, or a person who will or may derive a material financial benefit from the matter; or
  - (e) is otherwise directly or indirectly materially interested in the matter.

### **66 Obligation to disclose interest**

- (1) The member of the Rulings Panel who is interested in a matter relating to the Rulings Panel must —
  - (a) disclose the nature of the interest in accordance with regulation 67 as soon as practicable after the member becomes aware that he or she is interested; and
  - (b) immediately step aside from any deliberations or decision of the Rulings Panel in relation to the matter.
- (2) If subclause (1) applies, the alternate member must act in place of the member.

#### **67 Method of disclosure of interest**

- (1) If regulation 66 applies, the member must disclose the details listed in subclause (2) in an interests register and to the co-regulatory body.
- (2) The details are —
  - (a) the nature of the interest and the monetary value of the interest (if the monetary value can be quantified); or
  - (b) the nature and extent of the interest (if the monetary value cannot be quantified).

#### **68 Remuneration and expenses of Rulings Panel member**

The member of the Rulings Panel is entitled to receive, from the funds of the Rulings Panel, —

- (a) remuneration and other benefits for services as a member at a rate and of a kind determined by the co-regulatory body; and
- (b) reasonable and actual travelling and other expenses relating to the performance of his or her duties and responsibilities as a member..

*Other matters relating to Rulings Panel*

#### **69 Funding of Rulings Panel**

- (1) The co-regulatory body must fund the Rulings Panel.
- (2) The co-regulatory body may recover the costs of that funding from industry participants via levy regulations made under the Act.

#### **70 Powers**

The Rulings Panel has all the powers necessary to enable it to perform its functions.



*Miscellaneous provisions*

**71 Rulings Panel to keep information confidential**

The Rulings Panel must keep confidential all information provided or disclosed to it under these regulations except to the extent that disclosure —

- (a) is required to enable the Rulings Panel to carry out its obligations and duties under these regulations; or
- (b) is necessary for complying with regulations 66 and 67; or
- (c) is otherwise compelled by a law other than these regulations.

**72 Rulings Panel may prohibit publication of information**

- (1) The Rulings Panel may prohibit the publication or communication of any information or document —
  - (a) that is, or is intended to be, supplied or given or tendered to, or obtained by, the Rulings Panel under these regulations; or
  - (b) in connection with any notification, investigation, report, or procedure under Part 1 or 2 or 3.
- (2) The Rulings Panel may make the prohibition only after it has had regard to the following factors:
  - (a) whether the information or document is confidential, commercially sensitive, or otherwise unsuited to publication or communication; and
  - (b) whether the publication or communication is required to enable the Rulings Panel to carry out its obligations under these regulations; and
  - (c) whether the publication or communication is compelled by a law other than these regulations; and
  - (d) the rules of natural justice.
- (3) The Rulings Panel may make the prohibition —
  - (a) on the application of any participant or on its own application; but
  - (b) only after notifying each participant that the Rulings Panel considers would be affected by the publication, communication, or prohibition; and
  - (c) only after having regard to any views that the participant may make known to the Rulings Panel within the time specified by the Panel.

**73 Liability of Rulings Panel member**

No member or employee of the Rulings Panel is personally liable for —

- (a) any liability of the Rulings Panel; or
- (b) any act done or omitted to be done by the Rulings Panel, any member, or any employee of the Rulings Panel, in good faith in pursuance or intended pursuance of the functions, duties, or powers of the Rulings Panel.

#### **74 Rulings Panel costs and performance objectives**

- (1) As early as practicable before the beginning of each financial year, the co-regulatory body and the Rulings Panel must agree on a budget for the expenses anticipated by the Rulings Panel, and on any performance objectives for the next 12 months.
- (2) Each month, the Rulings Panel must provide the co-regulatory body with a written report on actual costs incurred during the month compared with budgeted costs.
- (3) If the Rulings Panel anticipates incurring expenditure in excess of any budgeted amount, it must notify the co-regulatory body and apply for a variation to the agreed budget.

#### **75 Rulings Panel reports quarterly on other matters**

At the end of each quarter of the financial year, the Rulings Panel must provide the co-regulatory body with —

- (a) a summary of the decisions made by the Rulings Panel during that quarter, including details of all awards of costs and compensation; and
- (b) a summary of the current workload of the Rulings Panel, ability to meet performance objectives, and resources; and
- (c) any other matters of concern.

#### **76 Rulings Panel reports annually**

At the end of each financial year, the Rulings Panel must provide the co-regulatory body with an annual report —

- (a) summarising the performance of the Rulings Panel against budget for the financial year; and
- (b) summarising the decisions of the Rulings Panel during the financial year; and
- (c) summarising the performance of the Rulings Panel during the financial year against agreed performance objectives; and
- (d) commenting on any area of these regulations or the rules where the Rulings Panel considers that a change is required.