



SUBMISSION BY
GENESIS POWER LIMITED
trading as Genesis Energy

ON

Compliance and Enforcement Arrangements in the New
Zealand Gas Industry

18 May 2006

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Introduction

1. Genesis Power Limited trading as Genesis Energy welcomes the opportunity to provide comment to the Gas Industry Co on the recently released consultation paper Compliance and Enforcement Arrangements in the New Zealand Gas Industry.
2. Genesis Energy is a state-owned enterprise and one of New Zealand's largest energy retailers. As a gas retailer, Genesis Energy is the largest gas retailer with a substantial retail base of approximately 125,000 gas customers located in the North Island.

Executive Summary

3. Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide comments to the Gas Industry Company on the consultation paper entitled 'Compliance and Enforcement Arrangements in the New Zealand Gas Industry' dated 12 April 2006.
4. Genesis Energy is pleased to see the Gas Industry Company taking a pro-active approach to the issue of compliance and enforcement. There has clearly been a considerable amount of time and effort spent on the details within this consultation paper. With the likelihood of the progressive development of rules based around specific parts of the gas industry, Genesis Energy recognises the growing need for a clearer understanding of how compliance and enforcement will developed and be implemented. In this regard, the need for a compliance and enforcement regime is unquestioned. In practical terms Genesis Energy contends that this means the development of a compliance and enforcement regime that balances the effectiveness of ensuring integrity of the rules with the overall efficiency of the regime.
5. But Genesis Energy does not yet believe that the Gas Industry Company has got this balance quite right. Genesis Energy recognises that there are advantages, in terms of consistency and coherence to the implementation of a 'core' approach to compliance and enforcement whose elements can be generally applied to all industry approaches for which rules are developed. These factors could possibly warrant the adoption (albeit in slightly modified form) of the Electricity Commission model of compliance and enforcement.
6. However, in Genesis Energy's view, these advantages are outweighed by factors such as the nature of the co-regulatory model,¹ the size of the gas industry, and the specific nature of the issues around which rules may be developed. These factors point to a greater, not lesser reliance on industry participants and processes rather than the implementation of a core or 'boiler-plate' approach that will invariably be used as a template for other issue-specific rules if and when they are developed. Instead, Genesis Energy considers that these factors point to the desirability of a 'two-stage' analytical approach that:
 - a. First, has the Gas Industry Company setting, in consultation with industry participants, the analytical underpinnings or framework that will be generally applied by the Gas Industry Company in the future

¹ Which underpinned the establishment of the distinctive Gas Industry Company, as opposed to an Energy Commission.

development of any compliance and enforcement regime to be implemented;² and

- b. Second, have those responsible for the development of any rules deemed necessary for a specific industry arrangement apply the general compliance and enforcement framework to that arrangement to determine that arrangement's specific compliance and enforcement regime.

Genesis Energy considers that this process can build on much of what the Gas Industry Company has set out in its consultation paper.

7. Genesis Energy contends that its proposed approach would result in an outcome that is significantly more likely to be consistent with the intent of the co-regulatory model and the emphasis on industry self-reliance (at least in the first instance), ensure the development of a 'fit-for-purpose' compliance and enforcement arrangement that would be consulted upon in the overall context of the package of rules for each arrangement, and maintain an appropriate balance between the integrity of the rules developed and the overall efficiency of the specific arrangement and the overall compliance and enforcement framework.
8. Because Genesis Energy has reservations about the overall approach that the Gas Industry Company proposes to adopt we have chosen not to respond directly to the specific questions posed in the consultation paper.³

Genesis Energy's Approach

9. Genesis Energy has a strong interest in the operation of the Gas Industry Company and in ensuring that it operates in a manner that is consistent with its objectives and ultimately in the best interests of consumers. Within this context, a compliance and enforcement regime will, therefore, need to balance a variety of competing interests – those of government, industry and consumers – in a way that transparently makes the appropriate trade-offs. Therefore, in developing its response to the Gas Industry Company's consultation paper on compliance and enforcement, Genesis Energy was primarily (but not solely) guided by its consideration of the following issues:
 - a. The nature of the co-regulatory model and whether the proposal is consistent with it;

² Genesis Energy acknowledges it is possible that the requirements for this 'stage' may emerge as a result of the current consultation exercise being undertaken by the Gas Industry Company and that a further separate consultation round may not be required. Whether or not a further consultation round will be required falls to the judgement of the Gas Industry Company regarding the materiality of the difference in the approach it has consulted on from that outlined in this paper.

³ Instead, Genesis Energy has where relevant, linked the questions posed by the Gas Industry Company to the appropriate content in this submission.

- b. The specific and/or general applicability of the proposed compliance and enforcement regime and the relevance of such applicability; and
- c. The appropriate objective sought from the implementation of a compliance and enforcement regime.

Comments on the Gas Industry Company's Preferred Model

10. The Gas Industry Company, within the context of information on its regulatory framework, has outlined a preferred compliance and enforcement regime for the gas industry. While the development of this preferred regime is also done in the context of the soon-to-be-developed switching and registry rules, it is clear from the language in the consultation paper that the regime developed will, to a lesser or greater extent, be more generally applicable to other arrangements.⁴
11. The approach taken by the Gas Industry Company has raised some issues for Genesis Energy. These issues, and our suggestions regarding how they can be resolved to our satisfaction, are set out in the following sections.

Application of the Co-regulatory Model

12. Curiously, no mention is made in the consultation paper of the distinctive (and some would say relatively unique) nature of the regulatory framework within which the New Zealand gas industry operates and its implications for the development of a compliance and enforcement regime for the gas industry.
13. Genesis Energy finds this absence informative to the extent that it contends that this particular form of regulatory framework sets the over-arching framework for the operation of the Gas Industry Company as industry regulator, and how all of its interactions with industry participants and consumers must be framed. This was certainly the intention of Parliament in its consideration of the 'new' co-regulatory model. For example, the Commerce Select Committee noted that:

“The co-regulation model has been developed as a result of a consensus view in the gas sector that:

-
- co-regulation would share responsibility between Government and industry

⁴ This is no better demonstrated of this than in Case study two on page 53 of the Gas Industry Company's consultation paper where the preferred compliance and enforcement and regime is applied to a hypothetical breach of rules in the wholesale gas market.

- co-regulation would ensure that the incentives of the industry are aligned as far as possible with the outcomes sought by the Government.”⁵

14. Further, in noting the widespread support from the gas industry and consumer groups for the co-regulatory model, the Commerce Select Committee stated:

“Co-regulation has a number of advantages over the use of a central regulator including:

- assessing the benefits and costs to the industry of regulations and rules as the industry body can profit from the knowledge, experience and commercial interests of industry participants
- the establishment, operation and costs of the industry will be met directly by industry participants so governance structures are likely to be more efficient
- the Minister retains the power to directly recommend regulations or make rules for retail/consumer outcomes
- the industry has strong incentives to demonstrate leadership and cohesiveness to ensure the success of the co-regulatory model”⁶

15. The practical intention of co-regulation is to combine an effective threat of regulation in situations where the industry can not come to a voluntary agreement due to free riding, with leaving as much as possible in the hands of the industry. Therefore, the role of the Gas Industry Company is to provide the threat of regulation to make the industry participants come to an outcome consistent with the wishes of government.

16. In terms of the detail of the Gas Act, Genesis Energy considers that its drafting, both in terms of the language used and its specific clauses purposefully signalled the ability of the Gas Industry Company to give meaning to the co-regulatory model. In particular, the use of the word “may” instead of “shall” in such sections of the Act as section 43S(1)(a), as well as subsections 43G((2)(i) to (l) and section 43W(1).

17. Applying the intent of Parliament and delivering on the expected benefits will inevitably require the practiced judgment of the Gas Industry Company. However as a benchmark Genesis Energy considers that delivering on the co-regulatory model in practical terms means the existence of a peculiarly special ‘overlay’ that

⁵ Electricity and Gas Industries Bill, Government Bill, as reported from the Commerce Committee, page 7.

⁶ Ibid, pages 8 – 9.

must be afforded a place of pre-eminence in the day-to-day functioning of the Gas Industry Company.

Implications for Development of a Preferred Compliance and Enforcement Regime

18. Given this, any proposed intervention must by definition seek to actively demonstrate its application as the preferred (or even 'default') approach.⁷ Only where implementation of the co-regulatory model in practice fails to deliver on such factors as the Gas Industry Company's legislative or Government Policy Statement objectives or directions, should some other form of stronger regulatory intervention prevail. The onus is, therefore, on the Gas Industry Company to demonstrably prove that an industry-based or led solution will fail, rather than how a more interventionist approach by the Gas Industry Company as industry regulator will succeed.
19. In the context of the consultation paper, just as the Gas Industry Company should only regulate as a last resort, so it should enforce only as a last resort. In practical terms, this means that the primary reliance for a compliance and enforcement regime must be on contractual arrangements and on enforcement of compliance from within an industry-led arrangement. Such self-enforcement is to be preferred even if the approach to compliance by all participants has to be enforced through regulation.
20. By contrast, the Gas Industry Company's proposal jumps directly to enforcement by the Gas Industry Company and seems to be primarily designed to entrench it as the regulator. To this extent, it is disappointing that a minimal compliance system is given only passing consideration but largely dismissed out of hand, even though it is precisely what co-regulation is meant to achieve. In practice, it appears that the Gas Industry Company has largely treated the development of its preferred compliance and enforcement regime as the implementation of the framework already embodied in the Gas Act which in turn is substantially based upon the Electricity Commission compliance and enforcement model. Such a perception, even if not the reality, is unhelpful particularly given the intended difference between the approaches of the Electricity Commission and the Gas Industry Company.
21. This view, should it prevail, has implications for the approach adopted by Gas Industry Company with regard to its preferred compliance and enforcement regime. In essence, Genesis Energy does not believe that the case for the nature of the regulatory intervention as proposed by the Gas Industry Company has

⁷ It is important to note that this does not mean that in general implementation options should, or would not be considered - quite the contrary. What it does mean is that any options would relate to the implementation within the context of the co-regulatory model in the first instance, in preference to the implementation of options that embody a 'stronger' regulatory response.

been adequately made either specifically for the switching and registry arrangement or in general.

The 'Boiler-plate' Approach

22. Putting aside the issues that arise from the absence of the transparent consideration of the implementation of the co-regulatory model, further issues arise regarding the applicability of the approach outlined either more generally to other arrangements as they are developed or to the specific instance of the switching and registry arrangement. In general, these concerns relate to the appropriateness of developing a 'boiler-plate' approach to the Gas Industry Company's compliance and enforcement regime that will, possibly with modifications, be generally applicable across all of the industry arrangements developed by the Gas Industry Company. There are two aspects to this concern. These are:

- a. Genesis Energy recognises that a broadly consistent approach across all of the arrangements developed by the Gas Industry Company has some merit. However, Genesis Energy considers that this and any other merits must be balanced against the specific economic characteristics of the gas industry - most notably its relatively small scale and the narrow range of issues under the ambit of the Gas Industry Company.⁸ This would diminish the value, at this stage anyway, of the development of a generally applicable compliance and enforcement regime. Even if the proposed compliance arrangements made sense specifically for the switching and registry arrangement (for more on this see below), it is important that the Gas Industry Company transparently sets out a logic of compliance which presumes that why the same hands-on model (namely the Electricity Commission's model or some variant of it) will be the best every time; and
- b. The extreme difficulty in commenting on a 'preferred' approach in the absence of the context within which the approach would apply. In other words, while the work that the Gas Industry Company is undertaking on the switching and registry arrangement is the most advanced, and has triggered the need (appropriately) to consider the issue of compliance and enforcement, no rules have as yet been developed. While many aspects of the switching and registry arrangement have already been relatively well socialised within the industry, experience from the electricity sector suggests that the

⁸ Relative to, for example, the virtually all pervasive range of responsibility of the Electricity Commission over the operation of the electricity market – which includes responsibility over the areas of retail, wholesale, common quality, transmission, security of supply and energy efficiency.

devil will indeed be in the detail of the rules as they are developed and consulted upon. Therefore, until that time (that being the time that the rules are developed and consulted upon) the consideration of the appropriateness of a match between a 'preferred' approach and an arrangement whose specific details are as yet unknown can only be in the realm of educated guesswork.⁹ Genesis Energy does not consider this to be a sufficiently robust basis for agreeing to a preferred approach.

The Objective of a Compliance and Enforcement Regime

23. Finally, it is important that the purpose of introducing a compliance and enforcement regime is clear and to the greatest extent possible, unambiguous. The Gas Industry Company proposes that the purpose be:

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

24. Such an objective is generally sound. However, in Genesis Energy's view, its current wording does not fully capture the key trade-off inherent in the development and implementation of any compliance and enforcement regime between effectiveness in the pursuit of integrity of the rules and efficiency. A compliance and enforcement regime can be effective but not efficient. In other words, at some stage, there will be a 'tipping-point' where an otherwise effective (or 'fit for purpose') compliance and enforcement regime shifts from providing a net benefit to a net-cost in the pursuit of integrity of the rules.
25. While Genesis Energy recognises that 'cost-effectiveness' and 'efficiency' are listed as proposed criteria,¹⁰ Genesis Energy considers that the dimension of a trade-off needs to be more prominent in the objective statement. In light of this,

⁹ The uncertainty referred to here is, to a certain extent, recognised by the Gas Industry Company in paragraph 5.7, section 5, and paragraph 6.7 of section 6 of the consultation paper, where the Gas Industry Company states that:

“until the industry arrangements are fully developed we are uncertain as to the extent of the need for a dispute resolution process....”

and

“it is likely more complex compliance arrangements will be needed when the current work programme is complete, although the exact arrangements cannot yet be ascertained”

¹⁰ Though there is no explicit indication of the weighting (or at least some indication of relative importance) that the Gas Industry Company has applied in its application of the proposed criteria. Such an indication is important to the determination of the outcome of the analysis.

Genesis Energy suggests the following amendment to the Gas Industry Company's proposed objective:

~~"to establish against objective criteria a~~An effective efficient and effective compliance and enforcement regime that provides an appropriate balance between ~~to ensure the integrity of the rules and efficiency."~~

26. This suggested amendment is proposed on the basis that:
- a. Removal of the phrase "to establish against objective criteria" is suggested as it is simply a description of the process via which the objective is to be met, rather than the objective that is sought. As such it is an unnecessary element to the objective statement;
 - b. Insertion of the phrase "that provides an appropriate balance between the integrity of the rules and efficiency" is suggested (as noted above) to ensure that there is explicit recognition in the development and operationalisation of the compliance and enforcement regime of the need to recognise that a compliance and enforcement regime that is 'fit for purpose' (in other words it achieves what it is intended to) is essentially a series of trade-offs between ensuring integrity and managing compliance in a dynamic market; and
 - c. It is consistent with the Parliamentary expectation that the Gas Industry Company can profit from the knowledge, experience and commercial interests of industry participants.
27. The Gas Industry Company may question the relevance of this suggested amendment to its analysis in the development of a preferred compliance and enforcement regime. In Genesis Energy's view, while the change may be subtle it is nonetheless critical to the overall emphasis placed on the development of a compliance and enforcement regime. As such, it is quite possible that this shift in emphasis, if it had been considered in the Gas Industry Company's analysis, may have altered the outcome proposed.

A Proposed Way Forward

28. Genesis Energy considers that for the reasons outlined above, the proposed approach to adopt a preferred compliance and enforcement regime should (at least in part) be put to one side. Instead, Genesis Energy considers that factors such as the nature of the co-regulatory regime and the size of the industry (particularly relative to the electricity industry), means that there is no prima facie

case for the development of a generally preferable compliance and enforcement regime. Rather, Genesis Energy would expect:

- a. There to be developed and socialised an enduring, and generally applicable set of design principles and design criteria; and
- b. That these design principles and criteria would be applied to the specific instances of each arrangement, much as outlined in the consultation paper in terms of who is best placed to perform what function and how they will perform it.

29. Given this, it is clear that Genesis Energy does not consider the analysis undertaken by the Gas Industry Company to have been in vain – quite the contrary. With some modification, the information contained in section 7 (criteria for evaluation) and the early pages of section 8 (functions of a compliance regime including the process diagram on page 12) is considered to be generally appropriate. As is the approach of considering within the framework of the objective statement and criteria the options of who is best placed to perform what function (the balance of section 8) and how they will perform it (sections 11, 12 and 13). The key difference to Genesis Energy's preferred approach is that:

- a. The co-regulatory approach needs to be given its due emphasis as the point of difference in regulatory approach to the regulation of other sectors; and
- b. The framework (being the objective statement and the design principles and criteria) should be applied on an incremental, arrangement-by-arrangement basis as they are developed.

30. Indeed, on the face of it, this approach is not a million miles away from what the Gas Industry Company (at least implicitly anyway) applied in its recent consideration of the current gas specification (when reaching the conclusion that there is no need to reassess the current specification), and the model contract arrangements (when reaching the conclusion that such arrangements continue to be enforced through the Electricity and Gas Complaints Commission). In these cases, the Gas Industry Company concluded that consistent with the co-regulatory approach (amongst other things), that non-standard (that is, bespoke) compliance arrangements should continue to apply.

31. Genesis Energy recognises that these are both examples of the Gas Industry Company considering existing arrangements for which it determined that no rules or regulations needed to be developed. To that extent, they are not completely comparable to, for example, consideration of the switching and registry or wholesale gas market arrangements for which rules and/or regulations are likely to be developed. However, having said that, Genesis Energy is of the view that

they provide a prima facie case of there being no automatic presumption of a Gas Industry Company-based compliance in preference to an industry-based solution and that each case should continue to be considered on its own merits.

32. Genesis Energy contends that this approach neither:
- a. prevents the emergence of what the Gas Industry Company has set out as its preferred approach from the analysis of the specific arrangement – it is just that it would be only relevant to the particular arrangement under development;
- nor
- b. hinders a consistent approach from emerging across all arrangements over time – it is just that consistency should not be the deciding factor in the development of an overall regime. It may well, once the various small-scale arrangements have been in place for some time and the reality of the operation of the compliance and enforcement regime tested on a day-to-day basis, that some common elements or themes emerge that warrant the bringing together in a unified manner of a generally applicable compliance and enforcement regime. However, this should not be the default starting position but rather a point that is reached over time and with due consideration;
- nor
- c. prevents the Gas Industry Company (or the government) from implementing more rigorous regulations and/or rules to more directly enforce compliance with its arrangements should clear evidence emerge of the failure of the industry-based mechanisms.
33. Such an approach could be perceived by some commentators as a ‘cop-out’ or dismissed simply as an attempt by an industry participant to avoid future compliance. Genesis Energy can unequivocally state that such propositions could not be further from the truth. As noted above, Genesis Energy clearly accepts, given the likely future development of rules around specific arrangements, the impending need for the development of a well considered and thought-through approach to compliance and enforcement.
34. Neither is it a masked attempt to resurrect in a different context the self-regulatory framework that used to prevail in the electricity sector or somehow denies the shift towards a stronger regulatory framework. Genesis Energy clearly recognises that the Gas Industry Company is to all intents and purposes the gas industry regulator and is able to enforce, via regulation, compliance with its arrangements should that be considered warranted by the Gas Industry Company and the Minister of Energy. It is simply that Genesis Energy’s analysis suggests

that given the circumstances, the Gas Industry Company has not made a compelling case to warrant the approach that it has proposed.

35. Finally, as recognised by the Commerce Select Committee, the industry is keenly aware of the threat of further, stronger regulatory action by government (to the extent that gas issues could relatively easily be encompassed within an Energy Commission). Given this, the industry is strongly incentivised to ensure that its interests are aligned as far as possible with the outcomes sought by the Government. This combined with the fact that the industry has strong incentives to demonstrate leadership and cohesiveness to ensure the success of the co-regulatory model, act as powerful motivators. The approach developed by the Gas Industry Company effectively discounts the relevance of both of these drivers.

Specific Suggestions

36. Genesis Energy outlined above the need for the establishment of a compliance and enforcement 'framework' that should be generally applicable. However, the specifics of an over-all framework have yet to be articulated. While the details of such a framework need to be established in consultation with the industry, Genesis Energy broadly suggests, in addition to the suggested amendment to the objective statement (as outlined in paragraph 23 above), the following elements:
 - a. *Design principles:* At its most basic level, the need for a compliance regime is driven by a desire to ensure that the integrity of the overall regime (in this particular case, the regime that encompasses that portion of the New Zealand gas industry that is under the auspices of the Gas Industry Company). At a more specific level, the needs can be specified as a desire (or 'need') to:
 - i. support, promote and enhance the principle objective of the Gas Industry Company and the intent of the co-regulatory model;
 - ii. maintain the effective operation of the regime in terms of overall participant confidence;
 - iii. encourage transparency;
 - iv. incentivise compliance with the rules; and
 - v. ensure appropriate accountability for performance.

In essence, these factors can be considered as the over-arching design principles for the development of a compliance regime. To the extent that these are all well understood and generally accepted as reasons for why a compliance regime should be implemented, they outline the goals of such a regime, and would underpin the development of such a regime; and

- b. *Design criteria*: Genesis Energy suggests the following criteria:
- i. *Efficiency* (as distinct to and as a replacement of 'efficiency' and 'cost effective' as set out in the consultation paper): the cost of the compliance regime must be kept to the minimum required to achieve compliance. The regime must relate to the value at risk;
 - ii. *Flexibility* (as distinct to and as a replacement of 'scalability' as set out in the consultation paper): the compliance regime needs to be capable of developing (changing, growing or shrinking) over time to reflect evolving industry requirements;
 - iii. *Fairness*: the process by which the compliance regime is maintained must be unbiased. The decision-maker must be independent;
 - iv. *Transparency*: the process by which the compliance regime is maintained must be open and accessible to those who are held accountable. They must be clear and readily understood;
 - v. *Accountability*: control mechanisms must be woven into the compliance and enforcement regime to ensure that those performing functions or exercising powers under the regime are sufficiently accountable for their performance;
 - vi. *Efficacy*: the compliance and enforcement regime must ensure that the rules and decisions made under the regime are binding, robust and enforceable;
 - vii. *Certainty*: Similar outcomes on similar facts for consistency in application of rules and predictability of outcome for the stabilisation of the industry;
 - viii. *Meet objectives* (as per consultation paper); and
 - ix. *Timeliness* (as per consultation paper).

Consistent with the emphasis suggested in the revised objective statement, Genesis Energy considers that the revised 'efficiency' objective should, along with the 'meet objectives' criterion, be given the heaviest weightings.

Application of Proposed Approach to Switching and Registry

37. As noted above, Genesis Energy considers that it is highly problematic to develop a compliance and enforcement regime in a rules-vacuum. However, having said that, given the emphasis of the paper in terms of switching and registry, Genesis Energy considers that application of the approach set out in paragraph 28 above to switching and registry (even without its rules) is more likely than not going to deliver a different outcome than that reached by the Gas Industry Company.

38. Consistent with the co-regulatory model, the size of the industry, and the compliance and enforcement framework articulated above (being the objective statement and design principles and criteria), Genesis Energy considers there is an intermediate step of *mandatory self-governance* that while evocative of the self-regulatory regime of the electricity industry when operated under the auspices of the NZEM and MARIA, is clearly framed and appropriate to the distinctive co-regulatory model and its particular nuances.
39. This option involves the Gas Industry Company requiring mandatory participation in the Gas Industry Company's switching and registry arrangement. However, in terms of the specifics of compliance and enforcement, this would be left to be actioned between the participants of the arrangement either by enforcement of the terms of a multi-lateral contract or via inclusion of the appropriate terms into the rules or regulations. In essence, Genesis Energy envisages that unless costly or impractical, the primary reliance should (consistent with the co-regulatory model and the incentives that provides) be left to participants, even if this approach has to be enforced through rules and/or regulation. More specifically, this approach would rely on:
- a. Arbitration and if necessary, the courts as decision maker. These mechanisms would automatically address such issues as who would:
 - i. Investigate;
 - ii. Move the issue to resolution and settlement; and
 - iii. Enforce; and
 - b. Industry participants, service providers (for example, the registry service provider) and consumers (who could be given carefully defined rights under this approach) to detect and report breaches.¹¹
40. As there is no understanding how a 'real-life' compliance and enforcement regime will actually operate in practice, any suggestion that reliance upon these mechanisms will be more costly than any reasonable alternative (excluding doing-nothing) is purely hypothetical.
41. However, Genesis Energy acknowledges that this is a very high-level (if not cursory) application of its own proposed approach but time has not allowed a more in-depth assessment. Having said that, while recognising that this broad-

¹¹ Genesis Energy is unconvinced that any reporting regime should compulsorily require participants to report their own breaches on the basis that it appears somewhat heavy-handed. If this were the case, it is unclear what would happen if a participant believed that its actions were within the rules, but the decision maker later decided that it had breached the rules. It appears that in such situations, the participant would be exposed to potential penalties for non-reporting. Hence, the proposed regime puts all the risks associated with the inevitable grey areas of regulation on the participant.

brush application needs to be more rigorously tested, Genesis Energy contends that such an approach is consistent with the design principles and criteria outlined above, a clear improvement on the status-quo, and appropriate to the nature and scale of what is known of the proposed switching and registry arrangement.

Process Issues

42. Should the Gas Industry Company consider that the approach outlined above warrants further consideration, a transparent process needs to be established to achieve it. Primarily, the process is required to set, in consultation with industry participants, the analytical underpinnings or framework that will be generally applied by the Gas Industry Company in the future development of any compliance and enforcement regime to be implemented. Should the Gas Industry Company consider it appropriate, this could be done in a follow-up consultation round once the submissions received by the Gas Industry Company have been considered.
43. Given the substantial lead-time available before the switching and registry rules are developed and recommended to the Minister of Energy, Genesis Energy does not consider that a second consultation round would materially disadvantage any party.

Conclusion

44. Given the particular characteristics of the gas industry, Genesis Energy does not consider that there is a 'preferred' model for a compliance and enforcement regime either to support the yet-to-be developed switching and registry rules or any other industry arrangements that may be developed by the Gas Industry Company. Instead, the assessment of compliance and enforcement roles and who should perform them should be considered not in an analytical vacuum, but in the context of the rules that will be enforced by the proposed compliance and enforcement regime. Without such a context, it is extremely difficult to assess factors such as scale (that is, whether the proposed compliance and enforcement regime is commensurate with the size or scale of the arrangement) or even relevance.
45. More appropriately, Genesis Energy considers that the first step in considering if a compliance and enforcement regime is appropriate is to develop a generic set of principles and design criteria. Once these have been established the industry should then apply the principles and design criteria in order to formulate the most appropriate compliance and enforcement regime for that arrangement.
46. Given this, Genesis Energy suggests that the Gas Industry Company essentially 'decouple' the framework-setting elements of its consultation paper from its

application. This approach may be more time consuming than applying a preferred regime across the industry but it would help to provide the industry confidence that the regime is “fit for purpose” and not simply a fait accompli to be more generally applied at a later date for other arrangements.

47. Genesis Energy is happy to discuss any aspect of its submission further with the Gas Industry Company.
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Appendix A: Format for Submissions

QUESTION	COMMENT
Q 1: Do you agree that these are the likely needs of the gas industry for a compliance and enforcement regime for switching and registry?	It is clear that should the Gas Industry Company move to developing rules and/or regulations relating to the arrangements for which it has some responsibility, that a compliance and enforcement regime will be necessary. The key issue for Genesis Energy is the precise nature of that regime.
Q 2: Are there other needs for compliance and dispute resolution in the gas industry that would support a different outcome to the preferred model in any area, or support the other alternatives?	See response to Q 1 above.
Q 3: Do you think it is important to have a compliance regime which is scalable?	No. See paragraph 36 (b) of the covering submission. Genesis Energy supports an incremental approach. This implies that scalability is unlikely to be relevant. Flexibility is considered to be more appropriate as a design criterion.
Q 4: Is this an appropriate objective for the proposed compliance regulations?	No. See paragraph 36 (b) of the covering submission.
Q 5: Are these assessment criteria appropriate for evaluating a suitable compliance and enforcement regime for the gas industry?	See paragraph 36 (b) of the covering submission.
Q 6: Do you agree with our assessment of the options for decision maker?	No. Given Genesis Energy's support for a more incremental approach, it does not consider that the Gas Industry Company's approach to move immediately to develop a preferred compliance and enforcement regime, along with the specific details of who each party should be, is appropriate. See the attached submission for more details.
Q 7: Do you agree with our assessment of the options for monitoring and reporting of breaches	See response to Q 6 above.
Q 8: Do you agree with our assessment of the options for administration and receipt of breach notices?	See response to Q 6 above.

QUESTION	COMMENT
Q 9: Do you agree with our assessment of the options for investigation of breaches, if so do you consider that the Gas Industry Co should have the option to have the investigative function in house rather than contracted out?	See response to Q 6 above.
Q 10: Do you agree with our assessment of the options for early resolution and/or settlement	See response to Q 6 above.
Q 11: Do you agree with our assessment of the options for enforcement?	See response to Q 6 above.
Q 12: Do you consider that these are appropriate functions for a Rulings Panel?	No. Given Genesis Energy's support for a more incremental approach, it does not consider that the Gas Industry Company's approach to move immediately to develop a preferred compliance and enforcement regime, along with the specific details of how each party should approach its role, is appropriate. See the attached submission for more details.
Q 13: Do you consider that the Rulings Panel should have only a single member? If not, how many members should there be, and how should a quorum be defined?	See response to Q 12 above.
Q 14: Do you agree that the Gas Industry Co should appoint the member of the Rulings Panel and be able to remove them on the listed grounds?	See response to Q 12 above.
Q 15: Do you agree with a term of appointment of three to five years with a right of renewal?	See response to Q 12 above.
Q 16: Do you concur with this limit on the liability of the Rulings Panel member and insurance arrangements?	See response to Q 12 above.
Q 17: Should the Rulings Panel have discretionary power to require a participant who has breached a rule, or unsuccessfully brought an action, to pay the Rulings Panel's costs in some circumstances?	See response to Q 12 above.

QUESTION	COMMENT
Q 18: Do you agree with the mandatory payment of Rulings Panels in contractual dispute resolution, are there other cases where this should be the case?	See response to Q 12 above.
Q 19: Do you agree with this reporting requirement?	See response to Q 12 above.
Q 20: Do you agree the procedures of the Rulings Panel being contained in rules or that the Rulings Panel should be able to regulate its own procedures?	See response to Q 12 above.
Q 21: Do you agree with these procedural requirements?	See response to Q 12 above.
Q 22: Do you agree with the concept that the Rulings Panel can call on up to two suitably qualified industry experts to assist in hearing complex disputes?	See response to Q 12 above.
Q 23: Do you agree with the list of factors for determining penalties in para 11.32, or are there others which should be included?	See response to Q 12 above.
Q 24: Do you agree with the proposal to enable the appointment of an investigator with the powers outlined in the Act?	See response to Q 12 above.
Q 25: Do you agree with the proposal to enable the appointment of an investigator with the functions outlined above?	See response to Q 12 above.
Q 26: Are the proposed procedures for the investigator appropriate?	See response to Q 12 above.
Q 27: Do you agree with the proposed appointment process?	See response to Q 12 above.
Q 28: Do you agree that the rulings Panel should have the discretion to award the cost of the investigative process on the grounds specified, or any other grounds?	See response to Q 12 above.

QUESTION	COMMENT
Q 29: Do you agree with the reporting requirements?	See response to Q 12 above.
Q 30: Do you agree that this proposal provides for an appropriate level of involvement for the Gas Industry Co?	See response to Q 12 above.
Q 31: Do you agree with the proposed administrative processes, or are there others which should be included?	See response to Q 12 above.
Q 32: Do you consider that the Gas Industry Co should have the reporting requirements outlined in this section, or any others?	See response to Q 12 above.
