

Compliance Enforcement Policy

Electricity, Gas and Water Licences

June 2011

Economic Regulation Authority

 WESTERN AUSTRALIA

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Role of the Economic Regulation Authority

The Economic Regulation Authority (**Authority**) is the independent economic regulator for Western Australia. The Authority was established on 1 January 2004 under section 4 of the *Economic Regulation Authority Act 2003 (ERA Act)*.

The Authority has two distinct parts: the Governing Body and the Secretariat. The Governing Body determines the policies, controls the affairs and otherwise performs the functions of the Authority and consists of a full-time Chairman (Head of the Governing Body) and two part-time members.

The Governing Body is assisted by the Secretariat, which consists of a Chief Employee and public service officers appointed or made available under Part 3 of the *Public Sector Management Act 1994*. The Secretariat's staff are the initial point of contact for the Authority's day-to-day dealings on matters relating to gas, electricity, rail and water regulation.

The Authority's responsibilities are set out in the ERA Act. One such responsibility is to administer the electricity, gas and water licensing schemes under the relevant licensing legislation:

- *Electricity Industry Act 2004 (Electricity Act)*, which governs the operation and regulation of electricity generation, transmission, distribution, retail and integrated regional licences;
- *Energy Coordination Act 1994 (Gas Act)*, which governs the operation and regulation of gas distribution and gas trading licences; and
- *Water Services Licensing Act 1995 (Water Act)*, which governs the operation and regulation of water supply, sewerage, irrigation and drainage licences.

With reference to the Authority's licensing functions; section 26(1) of the ERA Act requires that the Authority have regard to:

- promoting regulatory outcomes that are in the public interest;
- the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets;
- encouraging investment in relevant markets;
- the legitimate business interests of investors and service providers in relevant markets;
- promoting competitive and fair market conduct;
- preventing abuse of monopoly or market power; and
- promoting transparent decision-making processes that involve public consultation.

The Authority has discretion as to the weight it gives to each of the above matters when making its decision in relation to a particular matter.

Purpose of this Policy

This policy replaces the August 2008 version of the Authority's *Electricity, Gas and Water Industry Licensing Compliance Policy*.

This policy seeks to:

- outline the general compliance enforcement provisions in the electricity, gas and water licensing legislation;
- inform licensees, consumers and other stakeholders about the Authority's approach to compliance and compliance enforcement;
- describe how the Authority investigates compliance issues;
- guide decision making and action by the Authority in the application of enforcement options; and
- ensure consistency of compliance enforcement across electricity, water and gas sectors.

This policy is not binding on the Authority. The Authority may, in certain circumstances, depart from the procedures in this policy where the Authority considers that circumstances dictate that a different approach, within the scope of its legislative mandate, would better achieve the Authority's compliance enforcement objectives.

Legislative enforcement powers

The legislation governing the administration of the electricity, gas and water licensing schemes include powers to enforce compliance by the licensees with their legislative and licence obligations. These powers are the same for all three licensing schemes, comprising a three-stage approach:

- serving a notice of contravention;
- applying penalties for failure to comply with the notice of contravention, including one or more of:
 - serving a letter of reprimand;
 - payment of a monetary penalty up to \$100,000;
 - rectification of the contravention at the expense of the licensee;
- cancellation of a licence.

Details of the enforcement provisions in the electricity, gas and water legislation can be found in Appendix 1.

Approach to compliance

Compliance model

The Authority's compliance framework for regulated utilities is modelled on the Organisation for Economic Co-operation and Development (OECD) publication entitled [Reducing the risk of policy failure: challenges for regulatory compliance](#)¹. The OECD specifies that there are three conditions for effective compliance

- Condition 1 — the licensee must know and understand its obligations.
- Condition 2 — the licensee must be willing to comply.
- Condition 3 — the licensee must be able to comply.

Fulfilment of these three conditions is expected to facilitate a culture of compliance by a licensee that is regulated by the Authority. Consistent with the development of a culture of compliance, the Authority encourages the voluntary adoption by licensees of the *Australian Standard AS3806-2006 Compliance Programs*, which provides guidance on how to put in place a flexible and effective compliance program within a business.

The Authority has adopted an educational and persuasive approach to compliance that encourages licensees to implement a compliance framework in order to meet their licence obligations. This approach includes the publication by the Authority of guidelines and manuals that assist licensees to understand their obligations in relation to their licence and provide a framework for licensees to monitor and report on their compliance to the Authority. The Authority also encourages open and constructive dialogue with the licensees that it regulates and other interested stakeholders.

Enforcement principles

The implementation of the Authority's enforcement policy is governed by the following principles:

- Fairness: the Authority seeks to balance voluntary compliance with enforcement while responding to many competing interests.
- Timeliness: the process of investigating and resolving compliance matters is conducted as quickly as possible, consistent with gathering the information needed to make informed decisions.
- Consistency: the Authority will be consistent in its approach to enforcing compliance by licensees.
- Confidentiality: unless there are exceptional circumstances, investigations into suspected contraventions will be conducted confidentially and the Authority will not publicly comment on matters that it is investigating until a decision has been made.

¹ [Reducing the risk of policy failure: challenges for regulatory compliance](#) examines how the adoption of 'business-friendly' regulatory measures can bring about the achievement of policy objectives more cost-effectively. It is located on the OECD website at

http://www.oecd.org/LongAbstract/0,3425,en_2649_37421_1910826_1_1_1_37421,00.html

- Transparency: the Authority will make public all decisions that result in formal enforcement action being taken against a licensee.

Enforcement aims

In enforcing compliance, the Authority's aims are to:

- stop contraventions as promptly as possible;
- ensure that licensees take the necessary measures to prevent future recurrence of the contravening behaviour;
- deter future contraventions;
- encourage licensees to develop and maintain appropriate compliance systems; and
- where warranted, apply appropriate penalties.

Detecting contraventions

The Authority monitors compliance and detects, or is notified of, possible contraventions through a number of different pathways. These include, but are not limited to, compliance information provided by licensees, independent audit reports, referrals from government agencies and the energy ombudsman, complaints from consumers and other market participants and the media.

Licence Compliance Reports

The Authority has published electricity, gas and water compliance reporting manuals. The purpose of the reporting manuals is to consolidate the compliance obligations applicable to each type of licence into a single document and to provide a framework for licensees to report on their compliance with applicable obligations to the Authority. To assist with reporting, compliance obligations are grouped into three classes: Type 1 (immediately reportable); Type 2 (annually reportable) and NR (not reportable).²

Contravention of Type 1 Obligations

Type 1 obligations cover obligations that, if contravened, would result in a threat to the health and safety of a person, major damage to property or significant loss or disruption to customers. Licensees are required to immediately report a contravention of a Type 1 obligation to the Authority. The licensee is then required to provide a written report to the Authority within five business days of the initial notification, detailing:

- the licence obligation that has been contravened;
- the nature and extent of the contravention;
- the impact of the contravention including the number of customers and other licensees affected;
- the reasons for the contravention;
- the actions the licensee has taken/will take to rectify the contravention;
- the actions that the licensee has taken/will take to prevent future recurrence of the contravention; and
- the date the licensee has, or expects to, comply again fully with the obligation that has been contravened.

Annual Compliance Reports

Licensees are required to submit an annual compliance report, for the year ending 30 June, in respect of the Type 1 and Type 2 obligations applying to their licence(s). Consistent with the Type 1 report, the licensee is required to provide: details of the impact of the contravention; the cause of the contravention; action taken to rectify the contravention; actions taken to prevent future recurrence of the contravention; and the date by which the licensee expects to fully comply with the obligation.

² For further information on the classifications applicable to electricity, gas and water licences refer to page 6, Electricity Compliance Reporting Manual:
http://www.erawa.com.au/2/281/51/electricity_licensing_regulatory_guidelines.pm

Annual Licence Performance Reports

Licensees are required to submit an annual report on their performance against the non-financial performance standards (indicators) applicable to the licence. The performance standards are found in the relevant compliance manual and licensees are required to submit an annual return, for the year ending 30 June, to the Authority by the due date. The Authority also publishes handbooks containing performance indicator definitions and relevant calculations to assist licensees with preparing their annual performance report(s).

Licence Compliance Audits and Asset Management System Reviews

The electricity, gas and water licensing legislation require licensees to arrange for an independent audit once every 24 months (or a longer period³ that the Authority has approved). The licensee is then required to provide the report prepared by the auditor to the Authority for its approval. Licence compliance audits (**audit**) for electricity and gas licences are referred to as performance audits, while those for water licences are referred to as operational audits.

The electricity, gas and water licensing legislation also requires licensees, other than electricity retail licensees and gas trading licensees, to arrange for an independent audit once every 24 months (or a longer period that the Authority has approved) of the effectiveness of their asset management systems (**review**). The licensee is then required to provide the report prepared by the auditor to the Authority for its approval.

The Authority has published the *Audit Guidelines: Electricity, Gas and Water Licences* (**guidelines**) to regulate the conduct of audits and reviews. The guidelines describe a three-stage audit process: approval of the independent auditor by the Authority; approval by the Authority of the audit/review plan prepared by the auditor and the approval by the Authority of the final audit/review report.

Compliance with the licence is assessed using a scoring system prescribed by the Authority. It is mandatory for the auditor to make recommendations in relation to obligations that have been rated non-compliant, or asset management processes that are rated ineffective, and licensees are required to prepare a plan addressing the auditor's recommended actions for the Authority's approval.

When approved, the Authority publishes a copy of the audit/review report on its website and, as required by the legislation, provides a report to the relevant Minister on the audit/review and any action that has been taken by the Authority in relation to the audit/review findings.

Information provided by other agencies

The activities of a number of government and non-government organisations that monitor or regulate Western Australian electricity, gas and water service providers are relevant to the Authority's licensing activities. The effectiveness of the Authority's compliance monitoring is assisted by the receipt of information from these organisations.

³ The Authority also has discretion to reduce the audit/review period in response to an unsatisfactory audit/review report, see the Authority's Audit Guidelines: Electricity, Gas and Water Licences for more information.

The Authority has put in place memoranda of understanding (**MoU**) with the following organisations:

- Energy Ombudsman (Western Australia) (**EOWA**);
- Department of Commerce;
- Office of Energy; and
- Department of Water.⁴

The MoU includes provision for the parties to consult on matters that are relevant to the licensed activities for which they are responsible. The Authority has quarterly meetings with the Department of Water and the EOWA, which includes discussion of complaints received by these organisations.

The Electricity Act and the Gas Act require the EOWA to bring to the attention of the Authority substantial breaches of electricity or gas licences, or codes of conduct made under the Electricity Act or the Gas Act.

The Authority also meets regularly with government and non-government agencies that have involvement in the utility sectors that are regulated by the Authority, including:

- Department of Health; and
- Western Australian Council of Social Service.

Complaints

The Authority may receive complaints regarding alleged contraventions of a licence from a number of sources including, but not limited to:

- customers or customer representatives;
- energy market participants, other than licensees;
- licensees; and
- third parties who are neither customers, licensees, nor energy market participants.

The Authority will generally refer individual customer complaints regarding energy and water to the relevant service provider. Where residential and small business customers have already tried to resolve the complaint with their service provider, the Authority will refer energy complaints to the EOWA and water complaints to the Department of Water. If, in the opinion of the Authority, the complaint relates to licence contraventions that are significant or systemic in nature then the Authority may investigate the matter further.

The Authority will assess complaints from energy market participants, licensees and third parties to determine whether the alleged conduct constitutes a licence contravention. If this is not the case, the Authority will consult with the complainant to determine whether there is an alternative regulator or agency to whom the complaint should be directed.

⁴ Under the present regulatory framework, the Department of Water provides a dispute resolution service in relation to water services.

Media

The Authority monitors the media on an ongoing basis. From time to time it is possible that media reports may involve matters that may disclose potential contraventions of a licence.

Prioritisation of action by the Authority

The Authority will generally investigate significant or systemic licence contraventions. However, there may be times when resource constraints mean that the Authority has to make decisions about where to direct its resources in order to provide the greatest overall benefit for customers and market participants, including licensees. To assist with the prioritisation process, the Authority will give priority to licence contraventions that satisfy one or more of the following factors:

- significant detriment to customers;
- detriment to disadvantaged or vulnerable customer groups;
- significant impact on the business operations of other licensees;
- demonstration of a deliberate disregard for the licensing legislation;
- significant new or emerging regulatory issue;
- the licensee involved has a history of previous licence contraventions;
- failure to act might result in other licensees contravening their licence; or
- action by the Authority is likely to deter similar contraventions by other licensees.

Situations where the Authority may decide not to take action in relation to a complaint, referral or other information that it receives include:

- the information provided to the Authority, or able to be obtained by the Authority, is insufficient to continue the investigation of the contravention;
- the contravention appears to be accidental, of limited detriment to customers and of limited advantage to the licensee. In this instance the Authority will draw the potential contravention to the attention of the licensee and encourage the licensee to take the necessary action to rectify the contravention and to prevent future recurrence; or
- the licensee has promptly implemented measures to rectify the contravention and to prevent future recurrence.

In situations where the Authority does not pursue enforcement it may place the licensee on notice about the Authority's concerns and the possibility of future investigation and action should the contravention continue.

The Authority is less likely to pursue potential contraventions that:

- are singular events unless the contravention has arisen as a result of deliberate action by the licensee;
- involve issues that are more effectively dealt with by another regulator or agency;
- result from actions by third parties that are beyond the reasonable control of the licensee; or
- primarily involve contractual disputes, private right disputes or other matters that do not fall within the Authority's regulatory scope.

Compliance enforcement approach

Determining whether a contravention has occurred

In reaching a decision whether to investigate a suspected contravention, the Authority may need to gather additional information relating to the contravention. This information may be provided by the complainant or the agency that has referred the matter to the Authority for investigation, or the Authority may need to approach the licensee to obtain information.

To obtain information from the licensee, the Authority may elect to exercise its powers under the licence to require the licensee to provide information to the Authority regarding the suspected contravention. If this is the case, then the Authority will inform the licensee of the general nature of the alleged contravention, but reserves the right to protect the identity of the complainant and the specific details of the alleged contravention.

When the required information has been obtained, the Authority will review the information to decide whether a contravention has occurred. At this stage in the investigative process there are two possible outcomes:

- if the Authority is of the view that there is insufficient evidence of a contravention, or that no contravention has occurred, then it will take no further action; or
- the Authority may decide that a contravention has occurred and commence enforcement action.

Meeting with the licensee prior to taking enforcement action

If the Authority decides that a contravention has occurred that requires enforcement action then the Authority may, at its discretion, meet with the licensee to discuss the contravention prior to taking enforcement action. The meeting provides an opportunity for the Authority to obtain further information about the cause(s) of the contravention and the impact of the contravention on customers, licensees and other stakeholders. The meeting also provides an opportunity for the licensee to inform the Authority about the action that it has taken, or intends to take, to rectify the contravention and prevent future recurrence.

However, in some cases, for example following the receipt of a licence operational audit report or performance audit report, the Authority may decide that it already has sufficient information available to arrive at a decision about the enforcement action that it will take without meeting the licensee.

Taking enforcement action

When it is deciding the most appropriate course of action in respect of a contravention, the Authority will make reference to the prioritisation criteria detailed above. Application of the criteria will generally result in one of three enforcement actions:

1. No enforcement action will be taken.
2. Informal enforcement action will be taken.
3. Legislative enforcement action will be taken.

Each of these options is discussed in more detail below.

No enforcement action

The Authority may decide that, although it is satisfied that a contravention has occurred, it will not take any further enforcement action in respect of the matter. The Authority may, at its discretion, make public its decision not to take enforcement action in these circumstances.

Informal enforcement action

The Authority has the discretion to deal with contraventions through a negotiated outcome with the licensee. This will usually involve agreeing an action plan with the licensee that will rectify the contravention and implement measures to prevent future recurrence. The action plan will include monitoring and reporting obligations to enable the Authority to monitor the progress of the licensee towards implementing the agreed plan. The Authority may, at its discretion, make public its decision to take informal enforcement action with due regard to its policy of transparent decision making.

Legislative enforcement action

In respect of licence compliance audits and asset management system reviews, the legislation provides scope for the Authority to reduce the period of time between audits/reviews if it is not satisfied by the level of compliance demonstrated by the licensee.

The licensing legislation includes provision for the Authority to serve a notice of non-compliance if a licensee contravenes a licence (see Appendix 1).

Reducing the interval between licence audits and reviews

The Authority has the discretion to vary the period of time between audits and reviews in response to the level of compliance, or asset management effectiveness, disclosed by an audit or review. Under normal circumstances the interval between audits/reviews is 24 months. However, the Authority may reduce this to a shorter interval if there is an unacceptable level of compliance/effectiveness.⁵

The Authority will publish its decision to reduce the audit/review interval at the same time as the audit/review report is published on the Authority's website.

Serving a notice of contravention

Under section 32 of the Electricity Act, section 11ZB of the Gas Act and section 39 of the Water Act (see Appendix 1 for more details), the Authority may serve a notice requiring the licensee to rectify the contravention within a specified period of time.

A notice will specify the contravention, the action that the licensee is required to take in order to rectify the contravention, the date by which the contravention is to be rectified and, optionally, the action the licensee is required to take to prevent future recurrence of the contravention. The Authority will publish a copy of the notice on its website.

⁵ The criteria that the Authority applies when deciding whether to reduce the audit/review period in response to an unsatisfactory audit/review report, can be found in the Authority's Audit Guidelines: Electricity, Gas and Water Licences.

Further legislative enforcement action

If, in the opinion of the Authority, a licensee fails to comply with a notice of contravention, the legislation provides discretion for the Authority to take further enforcement action, including one or more of the following:⁶

- serving a letter of reprimand;
- a monetary penalty;
- rectification of the contravention by the Authority at the expense of the licensee.

The legislation prohibits the Authority from imposing a monetary penalty or rectifying the contravention at the licensee's expense unless the Authority notifies the licensee of the proposed action and gives the licensee reasonable time to make submissions on the matter.⁷

Cancellation of a licence

Section 35 of the Electricity Act, section 11ZE of the Gas Act and section 42 of the Water Act provide for the Governor of Western Australia to cancel a licence if he or she is satisfied that the licensee has failed to comply with a term or condition of the licence and the failure is material in terms of the operation of the licence as a whole.

In circumstances where the Authority is of the view that a licensee:

- has not responded to compliance enforcement action that the Authority has previously taken;
- demonstrates conduct that leads the Authority to conclude that the licensee presents a persistent and ongoing significant risk to the health and safety of the public;
- demonstrates conduct that shows a persistent and ongoing disregard for their licence obligations;
- in the case of a company, is an externally administered corporation within the meaning of the *Corporations Act 2001 (Cth)*;
- has within a period of 12 months been convicted of more than three offences for which the prescribed punishment is a fine of \$10,000 or more or imprisonment for 12 months or more,

then the Authority may recommend to the relevant Minister that the licence is cancelled.

⁶ See section 32(2) of the Electricity Act, section 11ZB(2) of the Gas Act and section 39(2) of the Water Act.

⁷ See section 33 of the Electricity Act, section 11ZC of the Gas Act and section 40 of the Water Act.

APPENDICES

Appendix 1: Enforcement Provisions in the Licensing Legislation

Electricity Licences

The Authority's powers in respect of a contravention of an electricity licence are set out in sections 32, 33 and 34 of the Electricity Act:

32. Failure to comply with licence

- 1) If, in the opinion of the Authority, a licensee contravenes a licence, the Authority may cause a notice to be served on the licensee requiring the licensee to rectify the contravention within a specified period.
- 2) If, in the opinion of the Authority, a licensee fails to comply with a notice under subsection (1), the Authority may, subject to section 33, do one or more of the following -
 - a) serve a letter of reprimand on the licensee;
 - b) order the licensee to pay a monetary penalty fixed by the Authority not exceeding \$100,000;
 - c) cause the contravention to be rectified to the satisfaction of the Authority.
- 3) Persons authorised by the Authority in writing may enter any premises and do all things that are necessary for the purposes of subsection (2)(c).
- 4) The Authority may recover -
 - a) a penalty imposed under subsection (2)(b); or
 - b) the costs and expenses of any action taken under subsection (2)(c), in a court of competent jurisdiction as a debt due by the licensee to the State.

33. Right of licensee to make submissions

The Authority is not to take any action under section 32(2)(b) or (c) unless the Authority has -

- a) notified the licensee of the proposed action and the reasons for it; and
- b) given the licensee a reasonable opportunity to make submissions on the matter.

34. Exception where public health endangered

If, in the opinion of the Authority, the health or safety of members of the public is or may be at risk as a result of the contravention of a licence, the Authority may cause the contravention to be rectified under section 32(2)(c) without -

- a) serving notice on the licensee under section 32(1); or
- b) complying with section 33.

Gas Licences

The Authority's powers in respect of a contravention of a gas licence are set out in sections 11ZB, 11ZC and 11ZD of the Gas Act:

11ZB. Failure to comply with licence

- 1) If, in the opinion of the Authority, a licensee contravenes a licence, the Authority may cause a notice to be served on the licensee requiring the licensee to rectify the contravention within a specified period.

- 2) If, in the opinion of the Authority, a licensee fails to comply with a notice under subsection (1), the Authority may, subject to section 11ZC, do one or more of the following -
 - a) serve a letter of reprimand on the licensee;
 - b) order the licensee to pay a monetary penalty fixed by the Authority not exceeding \$100,000;
 - c) cause the contravention to be rectified to the satisfaction of the Authority.
- 3) Persons authorised by the Authority in writing may enter any premises and do all things that are necessary for the purposes of subsection (2)(c).
- 4) The Authority may recover -
 - a) a penalty imposed under subsection (2)(b); or
 - b) the costs and expenses of any action taken under subsection (2)(c),
in a court of competent jurisdiction as a debt due by the licensee to the Crown.

11ZC. Right of licensee to make submissions

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

11ZD. Exception where public health or safety endangered

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

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

Water Licences

The Authority's powers in respect of a contravention of a water licence are set out in sections 39, 40 and 41 of the Water Act:

39. Failure to comply with licence

- 1) If, in the opinion of the Authority, a licensee contravenes a licence, the Authority may cause a notice to be served on the licensee requiring the licensee to rectify the contravention within a specified period.
- 2) If, in the opinion of the Authority, a licensee fails to comply with a notice under subsection (1), the Authority may, subject to section 33, do one or more of the following -
 - a) serve a letter of reprimand on the licensee;
 - b) order the licensee to pay a monetary penalty fixed by the Authority not exceeding \$100,000;
 - c) cause the contravention to be rectified to the satisfaction of the Authority.
- 3) Persons authorised by the Authority in writing may enter any premises and do all things that are necessary for the purposes of subsection (2)(c).
- 4) The Authority may recover -
 - a) a penalty imposed under subsection (2)(b); or
 - b) the costs and expenses of any action taken under subsection (2)(c),
in a court of competent jurisdiction as a debt due by the licensee to the Crown.

40. Right of licensee to make submissions

The Authority is not to take any action under section 39(2)(b) or (c) unless the Authority has notified the licensee of the proposed action and given the licensee a reasonable opportunity to make submissions on the matter.

41. Exception where public health endangered

If, in the opinion of the Authority, the health or safety of members of the public is or may be at risk as a result of the contravention of a licence, the Authority may cause the contravention to be rectified under section 39(2)(c) without -

- c) serving notice on the licensee under section 39(1); or
- d) complying with section 40.

Licence Cancellation

The legislation governing the administration of the electricity, gas and water licensing schemes includes powers for the Governor of Western Australia to cancel a licence if the licensee has failed to comply with a term or condition of the licence and the failure is material in terms of the operation of the licence as a whole.⁸

⁸ Section 35 of the Electricity Act, section 11ZE of the Gas Act and section 42 of the Water Act

Amendment Record

Date	Details of the amendment
18 February 2011	First draft for internal review and comment
17 March 2011	Second draft incorporating internal comments
2 June 2011	Final draft that includes amendments to: incorporate the comments in submissions made following the release of the second draft for public consultation; further clarify the intent of the document; and address typographical errors and formatting issues.