

DRAFT ELECTRICITY, GAS AND WATER INDUSTRY LICENSING COMPLIANCE POLICY

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Economic Regulation Authority



WESTERN AUSTRALIA

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1 INTRODUCTION

1.1 PURPOSE OF THIS POLICY

This policy is not a legally binding document. It is intended to provide general guidance to electricity, gas and water service providers (licensees) as to the types of processes of investigation the Economic Regulation Authority (Authority) would follow in relation to compliance information it is provided or has obtained and the types of procedures it would follow prior to taking enforcement action.

This policy provides general guidance for licensees in respect of some of the factors the Authority may take into account in deciding whether enforcement action should be undertaken and the form of that action.

This document is not binding on the Authority and should not be relied upon or taken as an expectation that the Authority will act in a particular way.

The Authority in some circumstances may 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 suit the Authority's legislative and operational objectives.

1.2 OBJECTIVES OF THIS POLICY

The objectives of this policy are:

- to provide an indication to licensees, consumers and industry on how the Authority may make decisions on enforcement action;
- to guide decision making and action by the Authority's representatives in the use of enforcement options;
- to ensure consistency of compliance arrangements between electricity, water and gas sectors; and
- to provide an outline of the general compliance provisions in the existing legislation.

1.3 THE ECONOMIC REGULATION AUTHORITY

The Authority consists of a three-member Governing Body and a Secretariat which facilitates the Governing Body's decision-making.

The Governing Body is independent of Government and is appointed by the Governor. The Secretariat is made up of a General Manager and staff.

The Authority's responsibilities are set out in the *Economic Regulation Authority Act 2003* (ERA Act). One such responsibility is to ensure compliance with electricity, gas and water licences issued under:

- the *Electricity Industry Act 2004* (Electricity Act), in relation to electricity generation, electricity transmission, electricity distribution, electricity retailing and integrated regional electricity operations;

- the *Energy Coordination Act 1994* (Gas Act) in relation to gas distribution and gas trading; and
- the *Water Services Licensing Act 1995* (Water Act) in relation to operating licences for water supply services, sewerage services, irrigation services and drainage services.

Decisions that are made by the Authority include:

- issuing a notice of contravention of a licence condition under section 32 of the Electricity Act, section 11ZB of the Gas Act and section 39 of the Water Act;
- deciding whether to proceed with, and determining the nature of, any enforcement action once a notice has been issued under section 32(2) of the Electricity Act, section 11ZB(2) of the Gas Act and section 39(2) of the Water Act; and
- deciding whether to refer a matter to the responsible Minister recommending that a licence be cancelled by the Governor.

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

- the need to promote 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;
- the need to encourage investment in relevant markets;
- the legitimate business interests of investors and service providers in relevant markets;
- the need to promote competitive and fair market conduct;
- the need to prevent abuse of monopoly or market power; and
- the need to promote transparent decision-making processes that involve public consultation.

In addition, the Authority has discretion as to the weight it gives to each of the above matters when taken into consideration.

1.4 RELATIONSHIPS WITH OTHER ORGANISATIONS

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

For example, the Authority may receive compliance information from:

- the Western Australian Office of Energy Safety;
- the Western Australian Department of Industry and Resources;

- the Energy Ombudsman;
- the Western Australian Department of Consumer and Employment Protection; and
- the Western Australian Department of Water.

1.5 AUTHORITY'S APPROACH TO COMPLIANCE AND ENFORCEMENT

The Authority's licensing compliance policy is predicated on the following principles:

- The Authority's focus is on encouraging compliance.
- The Authority will be both proactive and reactive in its approach to compliance matters.
- The Authority and its representatives are accountable for promoting the highest reasonably practicable monitoring standards.
- The Authority will be consistent, transparent, impartial and independent in its approach to compliance issues.
- Licensees are largely responsible for their own compliance, and demonstration of that compliance.
- The Authority's compliance enforcement action will be appropriate to the specific circumstances, proportionate to the issues and will be guided by relevant legislative and regulatory objectives.

The Authority's approach has been modelled on the three conditions for effective compliance that are set out in the Organisation for Economic Co-operation and Development's publication entitled [Reducing the risk of policy failure: challenges for regulatory compliance](#)¹:

- 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; and

Fulfilment of these three conditions will facilitate a culture of compliance by a licensee. 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 provide guidance on how to put in place a flexible and effective compliance program within a business.

The Authority recognises that it is difficult to determine the attitude and motivation of licensees in relation to compliance issues and therefore its approach needs to focus on a process to resolve the issues that all parties would recognise to be thorough, fair, co-operative and transparent.

The Authority is committed to adopting an educational and persuasive enforcement approach because it believes that this works better than a punitive approach in

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 web site at

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

accomplishing long-term compliance. However, it may be necessary to impose disciplinary measures if compliance is not forthcoming.

The appropriate course of action for the Authority in responding to situations of non-compliance will depend ultimately on a number of matters including the nature of the problem, its impact and the licensee's response to the problem. For example, subject to the materiality of the contravention, it is likely the Authority would adopt a very different approach to a deliberate contravention, i.e. where the licensee knowingly failed to comply with its licence or other relevant regulatory instrument or the licensee deliberately 'turned a blind eye', than an accidental contravention, i.e. where the licensee was unaware of the contravention.

1.6 MEDIA INQUIRIES INTO MATTERS UNDER INVESTIGATION

All media inquiries will be dealt with in accordance with the Authority's Communication and Media Policy and this manual. In addition, all staff will abide by the *Australian Government Investigation Standards*² regarding the provision of information to the media concerning matters under investigation or closed investigations.

1.7 STRUCTURE OF THIS POLICY

This policy is structured as follows:

- section 2 provides a high level summary of the licensing enforcement process;
- section 3 details the licence compliance process for the electricity industry;
- section 4 details the licence compliance process for the natural gas industry; and
- section 5 details the licence compliance process for the water industry.

2 SUMMARY OF THE LICENSING ENFORCEMENT PROCESS

There are four stages to the Authority's enforcement process, being:

- if non-compliance is suspected or identified, a meeting is arranged between the licensee and the Authority's representative;
- if non-compliance continues following the meeting between the licensee and the Authority's representative, a non-compliance notice is issued by the Authority;
- if non-compliance continues in contravention of the Notice, the Authority will commence the statutory process to impose a penalty or implement an alternate enforcement measure; and
- if non-compliance continues in the face of the penalty or other enforcement measure, or repeated non-compliance has occurred, then the Authority may recommend to the Governor that the licence be cancelled.

These steps are summarised directly below.

² http://www.afp.gov.au/services/investigation/major_fraud/investigation_standards.html

2.1 INITIAL MEETING

When information about a suspected contravention is received the Authority will meet informally with the Licensee to discuss the events that led to the suspected or actual contravention. Further information may be required to understand what transpired in the suspected or actual contravention. The Authority will seek this information informally or if necessary through a statutory notice under the ERA Act. The Authority is cognizant that requests for information may generate additional costs to licensees or be difficult to comply with and will only seek information that is relevant to finalise its investigation.

If, after this initial meeting, the Authority is satisfied that a suspected contravention did occur but has been rectified, or can be rectified, the Authority may agree on the appropriate actions to be taken by the licensee to rectify the contravention without the issuance of a non-compliance notice.

It may be necessary to have more than one meeting to fully investigate a suspected or actual contravention. In all cases the Authority will minute the outcomes of these meetings including any agreed actions to be taken by the licensee to rectify the contravention.

2.2 ISSUING A NOTICE

If the licensee has not rectified the contravention as agreed with the Authority or the Authority considers the contravention to be serious, the Authority may issue a notice of contravention under the relevant Act.

In deciding whether to issue a notice of contravention, the Authority will take certain matters into account including the Authority's:

- understanding and reasonable interpretation of the licence conditions;
- understanding of the relevant events giving rise to the alleged licence contravention;
- reasonable opinion as to whether the alleged contravention could have been prevented by the licensee including the compliance systems of the licensee;
- opinion as to whether the alleged contravention was caused by a third party's action;
- assessment of the impact of the alleged contravention on customers, market participants, the environment or other stakeholders; and
- assessment of the compliance history of the licensee.

In circumstances where the Authority decides to issue a notice of contravention, the notice will set out:

- the licence condition(s) that has been contravened;
- the action or inactivity that the Authority considers gave rise to the contravention;

- the date the contravention commenced and the period over which it occurred; and
- the Authority's ability to take enforcement action and the type of enforcement action options that will be considered by the Authority.

2.3 IMPOSITION OF PENALTIES OR OTHER ENFORCEMENT ACTION

If a licensee satisfies the Authority that it has rectified the contravention and the contravention is not a repeat occurrence, then the Authority will generally not take further action.

Should a licensee continue the activity or inactivity that is causing a contravention beyond the rectification date specified in the Authority's notice, the Authority may consider imposing a penalty or other enforcement action on a licensee.

If the Authority determines that enforcement action is warranted, consistent with its legislative power, it may decide upon the appropriate form of penalty, which may include one or more of the following:

- a letter of reprimand, stating that the contravention is not acceptable;
- an order to pay monetary penalties not exceeding \$100,000; and
- an order that the licensee immediately rectifies the contravention to the satisfaction of the Authority.

If the Authority proposes to impose a monetary penalty or orders the contravention to be rectified, it will prepare a notice to the licensee advising of the proposed enforcement action (other than a letter of reprimand) and the reasons for it. The licensee will be given a reasonable opportunity to make submissions on that notice.

Depending on the response from the licensee to that notice, the Authority will then decide whether to impose the penalty on the licensee.

2.4 LICENCE CANCELLATION

In certain circumstances, where the licence contravention has been sufficiently serious, and/or where multiple contraventions have occurred, the Authority may take action to have a licence cancelled.

Some examples of a serious contravention are:

- where a licensee knowingly acted in such a manner has resulted in severe harm, injury or death to a customer(s); or
- where a licensee for whatever reason is unable or unwilling to continue to provide the licensed activities required.

Cancelling a licence involves a three step process:

1. Firstly, the Authority must notify the responsible Minister that there are grounds for licence cancellation.

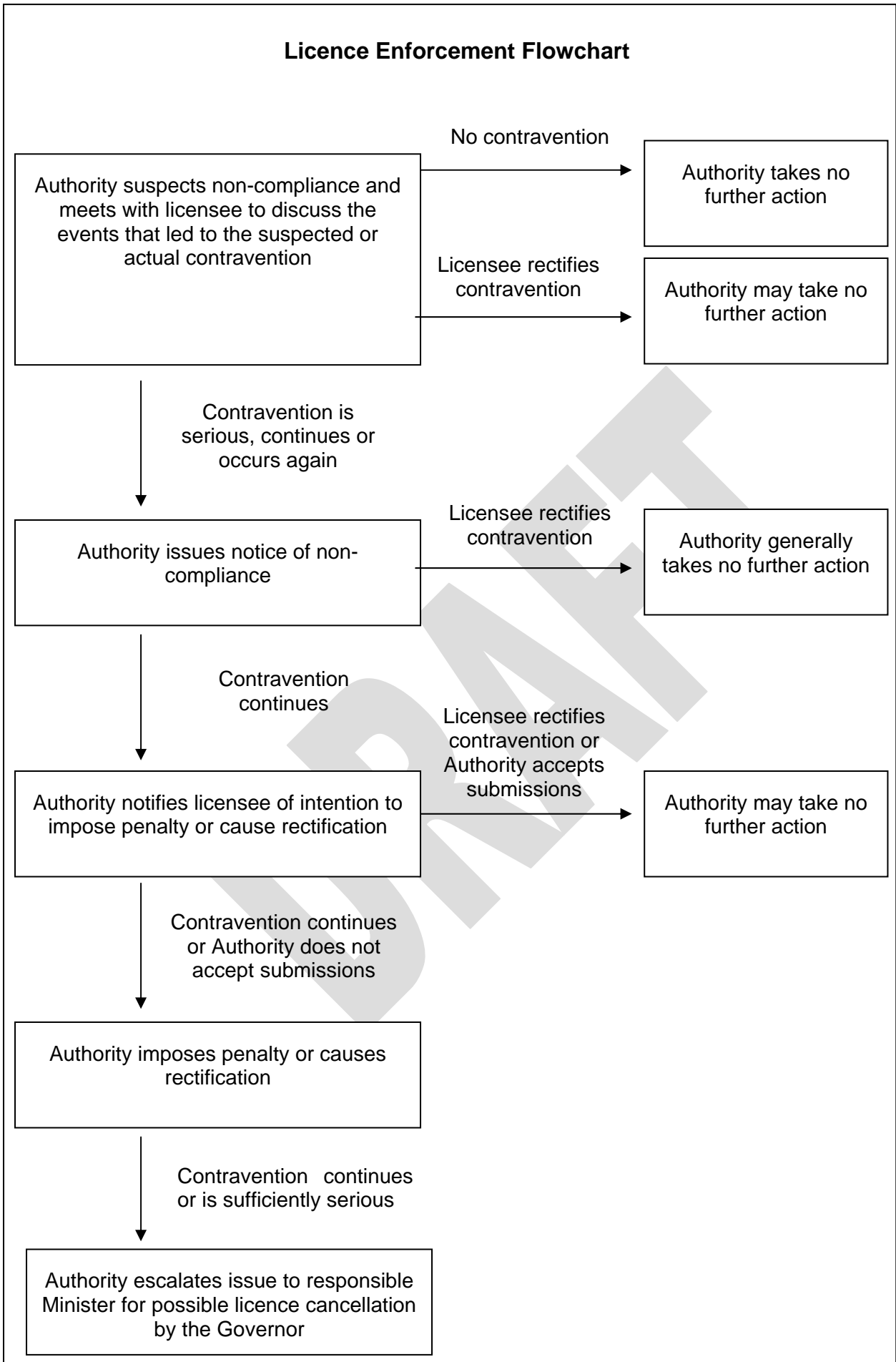
2. Secondly, the responsible Minister must agree with the grounds and notify the Governor that such an action is justified.
3. Thirdly, the Governor must be satisfied that the preconditions for cancellation under the relevant statute are met.

A licence cancellation is a last resort option in the enforcement process where all other actions to reach a solution have failed including this licensing enforcement process. A notice of the cancellation is subsequently published in the Government Gazette.

The licensing enforcement process is set out in the flowchart below.

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Licence Enforcement Flowchart



3 LICENSING COMPLIANCE – ELECTRICITY

The electricity licensing regime is administered by the Authority and is set out in the Electricity Act. The Authority's role, among other things, is to:

- license suppliers of electricity in Western Australia, where these suppliers are not otherwise exempt from the requirement to be licensed;
- administer the electricity licensing scheme in accordance with the Electricity Act;
- enforce compliance with electricity licence obligations;
- monitor and report to the responsible Minister on the operation of the licensing scheme;
- inform the responsible Minister about any failure by a licensee to meet performance criteria or other requirements of its licence; and
- determine various customer protection arrangements and enforce these arrangements through the licence framework.

The Electricity Act allows for five licence classifications:

- Generation;
- Transmission;
- Distribution;
- Retail; and
- Integrated Regional.

3.1 LICENSING FRAMEWORK

The responsibilities of the Authority in respect of an electricity licence contravention are set out in sections 32, 33 and 34 of the Electricity Act.

Section 32 of the Electricity Act states that:

- 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.

Section 33 of the Electricity Act states that 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.

Section 34 of the Electricity Act states that 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.

The Electricity Act does not provide specific guidance on the process to be taken by the Authority once it has been decided that an electricity licence contravention has occurred, or on the process that should be adopted from the time the Authority suspects that an electricity licence contravention has occurred on the basis of information received about the licensee.

3.2 CLASSIFICATIONS OF ELECTRICITY LICENCE CONDITIONS

In May 2007, the Authority issued an Electricity Compliance Reporting Manual in order to provide:

- a consolidated list of the terms and conditions of each type of electricity licence to assist licensees with identifying the compliance obligations relevant to the licence(s) they have been granted;
- categorisation of licence conditions to assist with reporting obligations;
- a self-assessment framework for licensees to facilitate compliance with licence conditions and report non-compliance to the Authority on a self-reporting basis; and
- the reports that licensees must provide to the Authority and the timing of these reports.

The manual details the Authority's approach to monitoring the compliance behaviour of Western Australian electricity licensees. The structure and content of the manual draws heavily on the national reporting requirements developed by the Steering Committee on

National Regulatory Reporting Requirements . This manual is available on the Authority's web site³.

The Authority has classified all electricity licence conditions as Type 1, 2 or non-reportable (NR), depending on the assessed impact of a potential electricity licence contravention on the legislative intent.

An electricity licence condition is categorised as Type 1 where:

- the consequences of non-compliance would cause major damage, loss or disruption to customers; or
- the consequences of non-compliance would endanger or threaten to endanger the safety or health of a person.

Type 1 contraventions must be reported immediately to the Authority.

An electricity licence condition is categorised as a Type 2 where:

- the consequences of non-compliance impact the efficiency and effectiveness of the licensee's operations or service provision but do not cause major damage, loss or disruption to customers; or
- the regulatory obligation is not otherwise classified as a Type 1 or Type NR non-compliance.

A contravention of a Type 2 condition must be reported annually to the Authority.

Reclassification of Type 2 as a Type 1 may occur in circumstances of systemic non-compliance.

An electricity licence condition is categorised as a NR if it is not otherwise categorised as a Type 1 or Type 2 and where:

- the consequences of non-compliance are relatively minor; or
- compliance with the obligation is immeasurable; or
- the non-compliance is required to be reported to the Authority under another instrument, guideline or code; or
- the non-compliance is identified by a party other than the licensee; or
- the licensee only needs to use its reasonable endeavours or best endeavours to achieve compliance or where the obligation does not otherwise impose a firm obligation on the licensee.

A contravention of this type of electricity licence condition does not need to be reported to the Authority.

Reclassification of type NR as a Type 2 may occur where there is:

³ http://www.era.wa.gov.au/2/281/51/regulatory_guid.pm

- systemic non-compliance; or
- a failure to resolve non-compliance promptly.

Licensees are required to submit one annual compliance report to the Authority each year as detailed below.

Annual Compliance Reports

A licensee is required to submit an annual compliance report to the Authority that:

- confirms that it has complied with all of its electricity licence conditions during the previous year, other than those specifically referred to in the report;
- identifies any Type 1 and Type 2 electricity licence conditions that have been contravened during the previous year and provides details of:
 - the electricity licence obligation that has been breached;
 - the nature and extent of the breach;
 - the impact of the breach including the number of customers and other licensees affected;
 - the reasons for the breach;
 - the actions that the licensee has taken to rectify the breach;
 - the actions taken to prevent reoccurrence of the breach; and
 - the date the licensee has, or expects to, comply again fully with the electricity licence obligation that has been breached.

This report must be signed off by the licensee's Senior Executive Officer and be provided to the Authority by 31 August immediately following the financial year that is the subject of this report.

The format of the annual compliance report is detailed in the Electricity Compliance Reporting Manual.

Reports on the licensee's annual operating statistics are to be provided to the Authority by 20 September immediately following the financial year that is the subject of this report.

3.3 PATHWAYS THROUGH WHICH THE AUTHORITY BECOMES AWARE OF NON-COMPLIANCE

The Authority may become aware of non-compliance through a number of ways including:

- self-reporting of compliance through annual compliance reports;
- non-periodic self-reporting of compliance. This may occur when a licensee becomes aware of any contravention but must occur where a Type 1 electricity licence obligation is contravened;

- external audits of compliance as required under:
 - clause 18 of the Distribution Licence;
 - clause 15 of the Generation and Transmission Licence;
 - clause 22 of the Retail Licence; and
 - section 26 of the Integrated Regional Licence.
- exchanges of information with other agencies, such as those listed in section 1;
- media reports; or
- consumer or competitor complaints.

3.4 INITIAL MEETING

Once the Authority becomes aware that a suspected electricity licence contravention has occurred, the Authority will immediately arrange an informal meeting with the licensee.

The Authority will meet with the licensee to discuss the action that led to the suspected contravention. At the meeting, the Authority will seek to understand the circumstances surrounding the suspected contravention, the nature and extent of the suspected contravention, the impact and incidence of the suspected contravention, any remedial action already taken by the licensee and the actual or anticipated date of the licensee's return to full compliance.

If the Authority is satisfied that the suspected contravention did occur then it will seek to:

- ensure that the contravention of the electricity licence is remedied as soon as practical;
- minimise loss and inconvenience to consumers and other affected parties as a consequence of the contravention; and
- establish, where possible, mechanisms to prevent the conduct recurring.

At the meeting, the licensee and the Authority will agree on any actions to be taken by the licensee. These may include:

- rectifying the contravention immediately; or
- where the contravention is caused by something outside the licensee's control, agreeing to rectify the contravention as soon as practicable.

To ensure that the Authority and the licensee have a common understanding as to what has been agreed in the meeting, the Authority will write to the licensee immediately following the meeting. The advice will set out:

- the Authority's understanding of the nature of the contravention and when it occurred; and
- any actions agreed to be taken by the licensee.

The licensee will be required to respond to the Authority by a stipulated date. The response from the licensee should advise either that action has been taken to rectify the contravention, or where the contravention is outside the control of the licensee, the date by which the licensee believes the contravention will be remedied.

3.5 ASSESSMENT OF THE LICENSEE'S RESPONSE

If the licensee has rectified the contravention, then the Authority may decide that no further action is required.

If the licensee has not rectified the contravention as agreed with the Authority or if the Authority considers the contravention to be serious, the Authority may issue a notice of contravention under section 32(1) of the Electricity Act.

The Authority will consider whether to issue a notice, based on:

- the information provided by the licensee following the meeting with the Authority;
- any subsequent or prior discussions between the Authority and the licensee;
- any contact between the Authority and relevant third parties, including customers, other market participants or Government agencies (acknowledging that procedural fairness requires that the licensee has an opportunity to reply to any allegations); and
- other material available to the Authority or brought to its attention.

The Authority may take certain matters into account before deciding to issue a notice, including the Authority's:

- understanding and reasonable interpretation of the electricity licence conditions;
- understanding of the relevant events giving rise to the alleged electricity licence contravention;
- reasonable opinion as to whether the alleged contravention could have been prevented by the licensee including the compliance systems of the licensee;
- assessment of the impact and incidence of the contravention on customers, market participants, environment or other stakeholders; and
- assessment of the compliance history of the licensee.

3.6 NOTICE OF CONTRAVENTION

The Electricity Act does not prescribe the matters that must be set out in a notice of contravention. In the absence of this guidance, the Authority will include within the Notice of Contravention information including, but not limited to:

- the electricity licence condition contravened;
- the activity or inactivity that the Authority considers gave rise to the contravention;
- the date the contravention commenced and the period over which it occurred;

- notice of the Authority's ability to take enforcement action and the nature of the enforcement action options that will be considered by the Authority;

The licensee must comply with the notice or risk the Authority considering enforcement action under section 32(2) of the Electricity Act. If the licensee complies with the notice, the Authority will generally not proceed with further action.

The Authority reserves the right to publish information about any substantiated contravention and any actions taken to remedy that contravention.

3.7 PENALTIES OR OTHER ENFORCEMENT ACTION

When considering whether to take enforcement action, the Authority may take into account the following issues:

- the effect of the contravention on customers, market participants, the environment or other stakeholders;
- whether the licensee is suspected to have derived a benefit from the contravention;
- the level of cooperation extended by the licensee to the Authority;
- the compliance history of the licensee;
- whether the breach was caused by a third party's actions;
- whether any remedial action taken by the licensee has been sufficient and appropriate; and
- whether the licensee voluntarily reported the contravention.

If the Authority proposes to impose a monetary penalty or causes the contravention to be rectified, it will prepare a letter to the licensee advising that an enforcement action is proposed and the reasons for it. The licensee will be given a reasonable opportunity to respond to that notice.

Depending on the response from the licensee to that notice, the Authority will then decide whether to impose the penalty on the licensee.

The Authority does not need to provide notice to the licensee and the licensee does not need to be given an opportunity to make a submission on the matter where the public's health or safety is, or may be at risk and the Authority intends to cause the contravention to be rectified.

3.8 LICENCE CANCELLATION

In certain circumstances, where the electricity licence contravention has been (in the opinion of the Authority) sufficiently serious, or where multiple contraventions have occurred, the Authority may take action to seek to have an electricity licence cancelled.

Section 35(1) of the Electricity Act provides that the Governor may cancel an electricity licence if he or she is satisfied that the licensee:

- is in default;
- has failed to pay a licence fee;
- in the case of a company, is an externally-administered body corporate as defined in section 9 of the *Corporations Act 2001* (Cwlth); or
- has within a period of 24 months been convicted of more than 3 offences for which the prescribed punishment is a fine of \$10,000 or more or imprisonment for 12 months or more.

Section 35(2) of the Electricity Act provides that a licensee is in default if the Governor is satisfied that:

- the licensee has failed to comply with a term or condition of the licence;
- the failure is material in terms of the operation of the licence as a whole;
- the responsible Minister has given to the licensee written notice of the failure and the fact that in the responsible Minister's opinion the failure is material in terms of the operation of the licence as a whole; and
- the licensee has not, within the time specified in the notice, either remedied the failure or shown cause why the licence should not be cancelled.

Cancelling an electricity licence is a three step process:

1. firstly, the Authority must notify the Minister for Energy that there are grounds for electricity licence cancellation.
2. secondly, the Minister for Energy must agree with the grounds and notify the Governor that such an action is justified.
3. thirdly, the Governor must be satisfied that the preconditions for cancellation under the Electricity Act are met.

An electricity licence cancellation is a last resort option in the enforcement process where all other actions to reach a solution have failed.

A notice of the cancellation is published in the Government Gazette.

4 LICENSING COMPLIANCE – GAS

The Authority's role as set out in section 11(AA) of the Gas Act is to:

- administer the licensing scheme;
- monitor and report to the responsible Minister on the operation of that licensing scheme and on compliance by licensees with their licences;
- inform the responsible Minister about any failure by a licensee to meet performance criteria or other requirements of its licence; and
- undertake any other functions conferred on the Authority.

Licences under the Gas Act are classified as follows:

- Distribution⁴, which authorises the licensee to:
 - construct a distribution system and to transport gas through the system; or
 - transport gas through an existing distribution system and, if required, to make alterations to the system, and to operate and maintain the system; or
- Trading⁵, which authorises the licensee to sell gas to small use customers transported through a distribution system.

The Governor can exempt a person or group from the requirement to hold a gas distribution and/or trading licence (gas licence). It is expected that the need for such exemptions will be limited, and they will only be considered if compelling circumstances exist. Once the Governor makes an order for an exemption, it will be published in the Government Gazette and tabled in Parliament.

4.1 LICENSING FRAMEWORK

The principal obligations of the Authority in the case of a gas licence contravention are set out in sections 11ZB, 11ZC and 11ZD of the Gas Act.

Section 11ZB of the Gas Act states that:

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

⁴ A distribution licence is required by any person or group intending to construct, alter or operate a gas distribution system or transport gas through a gas distribution system operating at a pressure of less than 1.9 megapascals. A gas distributor having pipelines operating at pressures equal to or greater than 1.9 megapascals requires a gas transmission pipeline licence granted under the provisions of the *Petroleum Pipelines Act 1969*, administered by the Department of Minerals and Energy.

⁵ A trading licence is required to sell gas transported through a gas distribution system to small use customers, namely customers who consume less than 1 terajoule of gas per year. This equates to about \$15,000 in annual gas consumption for gas consumers in the South West of the State and includes all residential gas consumers.

- 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 but not exceeding \$100,000; and/or
 - 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.

Section 11ZC of the Gas Act states that the Authority is not to take any action under section 11ZB(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.

Section 11ZD of the Gas Act states that 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 gas 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.

The Gas Act does not provide guidance on the process by which the Authority would decide that a gas licence contravention has occurred, or on the process that should be followed from the time the Authority suspects that a gas licence contravention has occurred on the basis of information received about the licensee.

4.2 CLASSIFICATIONS OF GAS LICENCE CONDITIONS

In May 2007, the Authority issued a Gas Compliance Reporting Manual in order to provide:

- a consolidated list of the terms and conditions of each type of gas licence to assist licensees with identifying the compliance obligations relevant to the licence(s) they have been granted;
- categorisation of licence conditions to assist with reporting obligations;
- a self-assessment framework for licensees to facilitate compliance with licence conditions and report non-compliance to the Authority on a self-reporting basis; and
- the reports that licensees must provide to the Authority and the timing of these reports.

The manual details the Authority's approach to monitoring the compliance behaviour of Western Australian gas licensees. The structure and content of the manual draws heavily on the national reporting requirements developed by the Steering Committee on National Regulatory Reporting Requirements. This manual is available on the Authority's web site.⁶

The Authority has classified all gas licence conditions as Type 1, 2 or non-reportable (NR), depending on the assessed impact of a potential gas licence contravention on the legislative intent.

A gas licence condition is categorised as Type 1 where:

- the consequences of non-compliance would cause major damage, loss or disruption to customers; or
- the consequences of non-compliance would endanger or threaten to endanger the safety or health of a person.

Type 1 contraventions must be reported immediately to the Authority.

A gas licence condition is categorised as a Type 2 where:

- the consequences of non-compliance impact the efficiency and effectiveness of the licensee's operations or service provision but do not cause major damage, loss or disruption to customers; or
- the regulatory obligation is not otherwise classified as Type 1 or Type NR non-compliance.

A contravention of a Type 2 condition must be reported annually to the Authority.

Reclassification of Type 2 as a Type 1 may occur in circumstances of systemic non-compliance.

An gas licence condition is categorised as a NR if it is not otherwise categorised as a Type 1 or Type 2 and where:

- the consequences of non-compliance are relatively minor; or
- compliance with the obligation is immeasurable; or
- the non-compliance is required to be reported to the Authority under another instrument, guideline or code; or
- the non-compliance is identified by a party other than the licensee; or
- the licensee only needs to use its reasonable endeavours or best endeavours to achieve compliance or where the obligation does not otherwise impose a firm obligation on the licensee.

A contravention of this type of gas licence condition does not need to be reported to the Authority.

⁶ http://www.era.wa.gov.au/2/281/51/regulatory_guid.pm

Reclassification of type NR as a Type 2 may occur where there is:

- systemic non-compliance; or
- a failure to resolve non-compliance promptly.

Licensees are required to submit one annual compliance report to the Authority each year as detailed below.

Annual Compliance Reports

A licensee is required to submit an annual compliance report to the Authority that:

- confirms that it has complied with all of its gas licence conditions during the previous year, other than those specifically referred to in the report;
- identifies any Type 1 and Type 2 gas licence conditions that have been contravened during the previous year and provides details of:
 - the gas licence obligation that has been breached;
 - the nature and extent of the breach;
 - the impact of the breach including the number of customers and other licensees affected;
 - the reasons for the breach;
 - the actions that the licensee has taken to rectify the breach;
 - the actions taken to prevent reoccurrence of the breach; and
 - the date the licensee has, or expects to, comply again fully with the gas licence obligation that has been breached.

This report must be signed off by the licensee's Senior Executive Officer and be provided to the Authority by 31 August immediately following the financial year that is the subject of this report.

The format of the annual compliance report is detailed in the Gas Compliance Reporting Manual.

4.3 PATHWAYS THROUGH WHICH THE AUTHORITY BECOMES AWARE OF NON-COMPLIANCE

There are a number of pathways by which the Authority can become aware that a licensee is not complying with its gas licence conditions in the gas industry. These include, but are not limited to:

- self-reporting of compliance through periodic compliance reports. For distribution licences, the performance audit and/or review of the asset management system, provides a reasonable opportunity for licensees to self-report. There is no such requirement for trading licensees;

- non-periodic self-reporting of compliance. This can occur anytime for a gas distribution or a gas trading licensee when it becomes aware of a contravention of any gas licence obligation and notifies the Authority;
- external audits of compliance;
- exchanges of information between other agencies and the Authority;
- media reports; or
- consumer or competitor complaints.

4.4 INITIAL MEETING

Once the Authority becomes aware that a suspected gas licence contravention has occurred, the Authority will immediately arrange an informal meeting with the licensee.

The Authority will meet with the licensee to discuss the action that led to the suspected contravention. At the meeting, the Authority will seek to understand the circumstances surrounding the suspected contravention, the impact and incidence of the suspected contravention, the nature and extent of suspected contravention, any remedial action already taken by the licensee and the actual or anticipated date of the licensee's full compliance.

If the Authority is satisfied that the suspected contravention did occur then it will seek to:

- ensure that the contravention of the gas licence is remedied as soon as practical;
- minimise loss and inconvenience to consumers and other affected parties as a consequence of the contravention; and
- establish, where possible, mechanisms to prevent the conduct recurring.

At the meeting, the licensee and the Authority will agree on any actions to be taken by the licensee. These may include:

- rectifying the contravention immediately; or
- where the contravention is caused by something outside the licensee's control, agreeing to rectify the contravention as soon as practicable.

To ensure that the Authority and the licensee have a common understanding as to what has been agreed in the meeting, the Authority will write to the licensee immediately following the meeting. The advice will set out:

- the Authority's understanding of the nature of the contravention and when it occurred; and
- any actions agreed to be taken by the licensee.

The licensee will be required to respond to the Authority by a stipulated date. The response from the licensee should note either that action has been taken to rectify the contravention, or where the contravention is outside the control of the licensee, the date when the licensee believes the contravention will be rectified.

4.5 ASSESSMENT OF THE LICENSEE'S RESPONSE

If the licensee has rectified the contravention, the Authority may decide that no further action is required.

If the licensee has not rectified the contravention, as agreed with the Authority or if the Authority considers the contravention to be serious, the Authority may issue a notice of contravention under section 11ZB(1) of the Gas Act.

The Authority will consider whether to issue a notice, based on:

- the information provided by the licensee following the meeting with the Authority;
- any subsequent or prior discussions between the Authority and the licensee;
- any contact between the Authority and relevant third parties, including customers, other market participants or Government agencies (acknowledging that procedural fairness requires that the licensee has an opportunity to reply to any allegations); and
- other material available to the Authority or brought to its attention.

The Authority may take certain matters into account before deciding to issue a notice, including the Authority's:

- understanding and reasonable interpretation of the gas licence conditions;
- understanding of the relevant events giving rise to the alleged gas licence contravention;
- reasonable opinion as to whether the alleged contravention could have been prevented by the licensee including the compliance systems of the licensee;
- assessment of the impact and incidence of the contravention on customers, market participants, environment or other stakeholders; and
- assessment of the compliance history of the licensee.

4.6 NOTICE OF CONTRAVENTION

The Gas Act does not prescribe the matters that must be set out in a notice of contravention. In the absence of this guidance, the Authority will include within the Notice of Contravention information including, but not limited to:

- the gas licence condition contravened;
- the activity or inactivity that the Authority considers gave rise to the contravention;
- the date the contravention commenced and the period over which it occurred;
- notice of the Authority's ability to take enforcement action and the nature of the enforcement action options that will be considered by the Authority;

The licensee must comply with the notice or risk the Authority considering enforcement action under section 11ZB(2) of the Gas Act. If the licensee complies with the notice, the Authority will generally not proceed with further action.

The Authority reserves the right to publish information about any substantiated contravention and any actions taken to remedy that contravention.

4.7 PENALTIES OR OTHER ENFORCEMENT ACTION

When considering whether to take enforcement action the Authority may take into account the following issues:

- the effect of the suspected or admitted contravention on customers, market participants, the environment and other stakeholders;
- whether the licensee is suspected to have derived a benefit from the suspected or admitted contravention;
- the level of cooperation extended by the licensee to the Authority;
- the compliance history of the licensee;
- whether the breach was caused by a third party's actions;
- whether any remedial action taken by the licensee has been sufficient and appropriate; and
- whether the licensee voluntarily reported the contravention.

If the Authority proposes to impose a monetary penalty or causes the contravention to be rectified, it will prepare a letter to the licensee advising that an enforcement action is proposed and the reasons for it. The licensee will be given a reasonable opportunity to respond to that notice.

Depending on the response from the licensee to that notice, the Authority will then decide whether to impose the penalty on the licensee.

The Authority does not need to provide notice to the licensee and the licensee does not need to be given an opportunity to make a submission on the matter where the public's health or safety is, or may be at risk and the Authority intends to cause the contravention to be rectified.

4.8 LICENCE CANCELLATION

In certain circumstances, where the gas licence contravention has been (in the opinion of the Authority) sufficiently serious, or where multiple contraventions have occurred, the Authority may take action to seek to have a gas licence cancelled.

Section 11ZE(1) of the Gas Act provides that the Governor may cancel a gas licence if he or she is satisfied that the licensee:

- (a) is in default;
- (b) has failed to pay a licence fee;

- (c) in the case of a company, is an externally-administered body corporate as defined in section 9 of the Corporations Act 2001 (Cwlth); or
- (d) has within a period of 24 months been convicted of more than 3 offences for which the prescribed punishment is a fine of \$10,000 or more or imprisonment for 12 months or more.

Section 11ZE(2) of the Gas Act provides that a licensee is in default if the Governor is satisfied that:

- (a) the licensee has failed to comply with a term or condition of the gas licence;
- (b) the failure is material in terms of the operation of the gas licence as a whole;
- (c) the Minister has given the licensee written notice of the failure and the fact that in the Minister's opinion paragraph (b) applies to it; and
- (d) the licensee has not, within the time specified in the notice, either remedied the failure or shown cause why the Gas Licence should not be cancelled.

Cancelling a gas licence is a three step process:

1. firstly, the Authority must notify the Minister for Energy that there are grounds for gas licence cancellation.
2. secondly, the responsible Minister for Energy must agree with the grounds and notify the Governor that such an action is justified.
3. thirdly, the Governor must be satisfied that the conditions for cancellation under the Gas Act are met.

A licence cancellation is a last resort option in the enforcement process where all other actions to reach a solution have failed.

A notice of the cancellation is published in the Government Gazette.

5 LICENSING COMPLIANCE – WATER

All organisations providing water, sewerage, drainage or irrigation services in Western Australia must either obtain an operating licence from the Authority or an exemption from the operating licence requirement from the Minister for Water Resources.

The Authority's role as set out in section 4 of the Water Act is to:

- administer the licensing scheme;
- monitor and report to the Minister on the operation of that licensing scheme and on compliance by licensees with their operating licences;
- monitor:
 - the performance of the water services industry and of those participating in that industry; and
 - the performance of providers of water services, and, for the purposes of such monitoring, to consult with interested groups and persons; and

- inform the responsible Minister about any failure by a licensee to meet performance criteria or other requirements of its operating licence; and
- undertake any other functions conferred on the Authority.

Under section 15 of the Water Act, operating licences may be issued for:

- water supply services;
- sewerage services;
- irrigation services; or
- drainage services.

An operating licence is required by any person or group providing a water service in a 'controlled area'. Controlled areas have been defined in relation to the type of service they cover (water supply, sewerage, irrigation or drainage) and include virtually all residential areas throughout Western Australia.

5.1 LICENSING FRAMEWORK

The principal obligations of the Authority in the case of an operating licence contravention are set out in sections 39, 40 and 41 of the Water Act. Section 39 of the Water Act states that:

- 1) if, in the opinion of the Authority, a licensee contravenes an operating 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 40, 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; and/or
 - 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.

Section 40 of the Water Act states that the Authority is not to take any action under section 39(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.

Section 41 of the Water Act states that 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 an operating licence, the Authority may cause the contravention to be rectified under section 39(2)(c) without:

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

The Water Act does not provide guidance on the process by which the Authority will decide that an operating licence contravention has occurred, or on the process that should be adopted from the time the Authority suspects that an operating licence contravention has occurred on the basis of information received about the licensee.

5.2 PATHWAYS THROUGH WHICH THE AUTHORITY BECOMES AWARE OF NON-COMPLIANCE

There are a number of pathways by which the Authority can become aware that a licensee is not complying with its operating licence conditions in the water industry. These include, but are not limited to:

- self-reporting of compliance. This can occur anytime a licensee becomes aware of a contravention of any operating licence obligation and notifies the Authority;
- external audits of compliance;
- exchanges of information between other agencies such as the Department of Water
- media reports; or
- consumer or competitor complaints.

5.3 INITIAL MEETING

Once the Authority becomes aware that a suspected operating licence contravention has occurred, the Authority will immediately arrange an informal meeting with the licensee.

The Authority will meet with the licensee to discuss the action that led to the suspected contravention. At the meeting, the Authority will seek to understand the circumstances surrounding the suspected contravention, the nature and extent of suspected contravention, the impact and incidence of the suspected contravention, any remedial action already taken by the licensee and the actual or anticipated date of the licensee's full compliance.

If the Authority is satisfied that the suspected contravention did occur then it will seek to:

- ensure that the contravention of the water licence is remedied as soon as practical;
- minimise loss and inconvenience to consumers and other affected parties as a consequence of the contravention; and

- establish, where possible, mechanisms to prevent the conduct recurring.

At the meeting, the licensee and the Authority will agree on any actions to be taken by the licensee. These may include:

- rectifying the contravention immediately; or
- where the cause of the contravention is outside the licensee's control, agreeing to rectify the contravention as soon as practicable.

To ensure that the Authority and the licensee have a common understanding as to what has been agreed in the meeting, the Authority will write to the licensee immediately following the meeting. The advice will set out:

- the Authority's understanding of the nature of the contravention and when it occurred; and
- any actions agreed to be taken by the licensee.

The licensee will be required to respond to the Authority by a stipulated date. The response from the licensee should advise either that action has been taken to rectify the contravention, or where the contravention is outside the control of the licensee, the date by which the licensee believes the contravention will be remedied.

5.4 ASSESSMENT OF THE LICENSEE'S RESPONSE

If the licensee has rectified the contravention, then the Authority may decide that no further action is required.

If the licensee has not rectified the contravention, as agreed with the Authority or if the Authority considers the contravention to be serious, the Authority may issue a notice of contravention under section 39 of the Water Act.

The Authority will consider whether to issue a notice, based on:

- the information provided by the licensee following the meeting with the Authority;
- any subsequent or prior discussions between the Authority and the licensee;
- any contact between the Authority and relevant third parties, including customers, other market participants or Government agencies (acknowledging that procedural fairness requires that the licensee has an opportunity to reply to any allegations); and
- other material available to the Authority or brought to its attention.

The Authority may take certain matters into account before deciding to issue a notice, including the Authority's:

- understanding and reasonable interpretation of the operating licence conditions;
- understanding of the relevant events giving rise to the alleged operating licence contravention;

- reasonable opinion as to whether the alleged contravention could have been prevented by the licensee including the compliance systems of the licensee;
- assessment of the impact and incidence of the contravention on customers, market participants, environment or other stakeholders; and
- assessment of the compliance history of the licensee.

5.5 NOTICE OF CONTRAVENTION

The Water Act does not prescribe the matters that must be set out in a notice of contravention. In the absence of this guidance, the Authority will include within the Notice of Contravention information including, but not limited to:

- the operating licence condition contravened;
- the activity or inactivity that the Authority considers gave rise to the contravention;
- the date the contravention commenced and the period over which it occurred;
- notice of the Authority's ability to take enforcement action and the nature of the enforcement action options that will be considered by the Authority;

The licensee must comply with the Notice of Contravention or risk the Authority considering enforcement action under section 39(2) of the Water Act. If the licensee complies with the notice, the Authority will generally not proceed with further action.

5.6 PENALTIES OR OTHER ENFORCEMENT ACTION

When considering whether to take enforcement action, the Authority may take into account the following issues:

- the effect of the suspected or admitted contravention on customers, market participants, the environment and other stakeholders;
- whether the licensee is suspected to have derived a benefit from the suspected or admitted contravention;
- the level of cooperation extended by the licensee during their initial meeting;
- the compliance history of the licensee;
- whether the breach was caused by a third party's actions;
- whether any remedial action taken by the licensee has been sufficient and appropriate; and
- whether the licensee voluntarily reported the contravention.

If the Authority pursues a monetary penalty or causes the contravention to be rectified, it will prepare a letter to the licensee advising that an enforcement action is to be taken. The licensee will be given sufficient time to respond to that notice.

Depending on the response from the licensee to that notice, the Authority will then decide whether to impose the penalty on the licensee.

The Authority does not need to provide notice to the licensee and the licensee is does not need to be given an opportunity to make a submission on the matter where the public's health or safety is, or may be at risk and the Authority intends to cause the contravention to be rectified.

5.7 LICENCE CANCELLATION

In certain circumstances, where the operating licence contravention has been (in the opinion of the Authority) sufficiently serious, or where multiple contraventions have occurred, the Authority may take action to seek to have an operating licence cancelled.

Section 42(1) of the Water Act provides that the Governor may cancel an operating licence if he or she is satisfied that the licensee:

- (a) is in default;
- (b) in the case of a company, is an externally-administered body corporate as defined in section 9 of the *Corporations Act 2001* of the Commonwealth; or
- (c) has within a period of 24 months been convicted of more than 3 offences for which the prescribed punishment is a fine of \$10,000 or more or imprisonment for 12 months or more.

Section 42(2) of the Water Act provides that a licensee is in default if the Governor is satisfied that:

- (a) the licensee has failed to comply with a term or condition of the operating licence;
- (b) the failure is material in terms of the operation of the operating licence as a whole;
- (c) the Minister has provided the licensee written notice of the failure and the fact that in the Minister's opinion paragraph (b) applies to it; and
- (d) the licensee has not, within the time specified in the notice, either remedied the failure or shown cause why the Operating Licence should not be cancelled.

Cancelling an operating licence is a three step process:

1. firstly, the Authority must notify the Minister for Water Resources that there are grounds for an operating licence cancellation.
2. secondly, the Minister for Water Resources must agree with the grounds and notify the Governor that such an action is justified.
3. thirdly, the Governor must be satisfied that the conditions for cancellation under the Water Act are met.

A licence cancellation is a last resort option in the enforcement process where all other actions to reach a solution have failed.

A notice of the cancellation is published in the Government Gazette.

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