

Guidelines for Pursuing Civil Penalties and Referring Matters to the Regulator in Relation to Contraventions of the Electricity and Gas Industry Codes

Introduction

Background

The Queensland Government recently amended the *Electricity Act 1994* and the *Gas Supply Act 2003* to coincide with the introduction of full retail competition in Queensland.

These amendments provided for the Queensland Competition Authority to enforce provisions of the Electricity and the Gas Industry Codes. The amended Acts include a three stage enforcement system of warning notices, Code contravention notices and Supreme Court proceedings.

Under the legislation, warning notices, Code contravention notices and Supreme Court proceedings for a civil penalty can be given/sought for a material contravention of a Code. Supreme Court proceedings for an injunction are available for both material and non-material contraventions. The legislation also permits the Authority to refer a matter to either the Supreme Court or the Regulator (in this context, the Director-General of the Department of Mines and Energy) if an action by a distributor or retail entity is likely to result in a contravention of a Code.

Section 120ZD of the *Electricity Act 1994* (as amended) and section 270ZC of the *Gas Supply Act 2003* (as amended) require the Authority to publish on its website guidelines about when it will:

- apply to the Supreme Court for a civil penalty order; and
- refer matters to the Regulator.

Purpose of the Guidelines

These guidelines set out the factors that the Authority will take into account in deciding whether a civil penalty order or referral to the Regulator will be sought.

The Authority considers the enforcement provisions of the legislation to be measures of last resort to ensure compliance by electricity and gas businesses with the Industry Codes.

In the normal course of events, the Authority would anticipate that a distributor or retailer would promptly inform the Authority of any contravention of an Industry Code together with the steps that it proposes to take to ensure such contraventions are corrected and avoided in future. The Authority expects that in most, if not all circumstances, further actions to resolve the contravention would not be needed.

However, where the Authority considers such actions are not sufficient, the Authority will follow the procedures outlined in these guidelines when considering applying for a civil penalty order or referring matters to the Regulator.

The guidelines are not legally binding on the Authority and are non-justiciable.

Commencement and Period of Operation

The guidelines will commence when published by the Authority and will apply until replaced or revoked by the Authority.

The Authority's Guidelines

The *Electricity Act 1994* (as amended) and the *Gas Supply Act 2003* (as amended) provide for the Authority to give electricity and gas businesses a warning notice if the Authority suspects that:

- a business has contravened/is contravening an Industry Code, or is involved in an activity likely to result in such a contravention; and
- the contravention/likely contravention is, or is likely to be, a material¹ contravention of an Industry Code.

Following the issuing of a warning notice, the Authority may give an electricity or gas business a Code contravention notice if the business has not complied with the warning notice and, having considered any submissions received during the warning period, the Authority remains of the view that a Code contravention notice should be issued.

Following the issuing of a Code contravention notice, the Authority may also apply to the Supreme Court for civil penalty orders. The Authority may, at that time, consider further submissions in response to the Code contravention notice.

The Authority may also apply to the Supreme Court for an injunction for any contravention of an Industry Code whether or not it is material.

Guidelines for Pursuing Civil Penalties

In deciding to pursue a civil penalty order, the Authority will take full account of the particular facts and circumstances of the contravention/attempted contravention. In making a decision, the Authority will also consider:

- the effect of the contravention on Government policy objectives, the interests of customers and other market participants;
- whether the contravention was intentional;
- whether the business derived a benefit (financial or otherwise) from the contravention;
- whether the imposition of a civil penalty is likely to create an incentive to improve compliance and deter future contraventions;
- whether the business has taken steps to secure compliance either specifically or by maintaining a robust compliance system;
- whether the businesses' senior management were involved in the contravention;

¹ Materiality will be determined by the Authority on a case by case basis.

- whether the business voluntarily reported the contravention or attempted to conceal it from the Authority;
- the compliance history of the business;
- whether the business has taken appropriate action to remedy the contravention;
- the social and environmental impact of a contravention, where relevant; and
- the level of cooperation extended by a business during the course of the Authority's investigation.

Whilst it is important for businesses to understand which factors are likely to influence the Authority's view on pursuing civil penalties, the factors listed above are not intended to be all inclusive or binding. This list is intended to improve transparency rather than provide definitive criteria by which the Authority would determine whether to pursue civil penalties. Where appropriate, the Authority may take into account factors that are not listed above.

Guidelines for Referring Matters to the Regulator

Where the Supreme Court determines that an electricity or gas business has materially contravened an Industry Code (or is likely to), the Authority is required to refer the matter to the Regulator.

The Authority may also refer to the Regulator a suspected material contravention or likely material contravention for which it has given a warning notice (whether or not a Code contravention notice has been given or proceedings in the Supreme Court have been commenced by the Authority in respect of this contravention). In referring a matter to the Regulator, the Authority will consider the same factors as listed above in making its decision and will consider any submissions received during the warning period.

Notification of the Authority's Decision

The Authority will notify the electricity or gas business of its decision to seek a civil penalty and/or refer a matter to the Regulator. This notification will include:

- the activity or inactivity that constitutes a contravention, or potential contravention, of the Industry Code;
- the Authority's decision to apply for a civil penalty or refer a matter to the Regulator; and
- the reasons for the Authority's decision

Public Disclosure of the Authority's Decision

Where the Authority has sought a civil penalty or a civil penalty has been imposed on an electricity or gas business in relation to an Industry Code contravention, the Authority may choose to publish the decision. In doing so, the Authority will:

- have regard to the interests of the business concerned and the public interest; and
- only release the decision publicly once the offending business has been notified.