

# Queensland Competition Authority

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## Enforcement guidelines

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October 2015

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# 1 INTRODUCTION

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## 1.1 Background

Under the *Electricity Act 1994 (Qld)* (Electricity Act), *Gas Supply Act 2003 (Qld)* (Gas Act) the QCA is responsible for enforcing the Electricity Distribution Network Code and Gas Distribution Network Code (the Distribution Codes). Under the *National Energy Retail Law (Queensland) Act 2014* the QCA is responsible for enforcing certain Queensland-specific derogations to the National Energy Retail Law and National Energy Retail Rules, as explained in Chapter 3 (the Derogations).

These Guidelines outline our approach, and issues we may consider, when we are considering enforcement action for contraventions of the Distribution Codes or the Derogations.

### Commencement

These Guidelines replace the "Guidelines for pursuing civil penalties and referring matters to the regulator in relation to Industry Code contraventions" published by the QCA in August 2011.

They are designed to guide both electricity entities and retailers, and gas distributors and retailers, that are subject to the Distribution Codes and Derogations (businesses).

These guidelines will commence when published by the QCA and will apply until they are replaced or revoked. They are not legally binding on the QCA and are non-justiciable.

## 1.2 What we expect

We expect businesses to monitor their compliance with the applicable Distribution Codes and the Derogations, and where a business becomes aware, or suspect they have, contravened their obligations under a Distribution Code or a Derogation we expect to be informed within two business days. We recognise that businesses may not be able to provide comprehensive information on the actual, or suspected, contravention when it is initially reported. However, we expect businesses to provide the following information as soon as possible:

- the obligation that is the subject of the contravention
- the nature of the contravention and the reasons for it
- the date that the contravention occurred, including (where relevant) the date on which the it commenced and any days during which it continued before being identified by the regulated entity
- the extent and impact of the contravention, including the customer category affected, number of customers and/or other regulated entities that have or are likely to have been affected, the nature of that impact, and the impact, whether financial or non-financial (if any)
- details of actions taken, or planned to be taken, to rectify the contravention and to prevent it reoccurring
- the date, or if an actual date is not known the expected date, for completion of corrective action(s), and
- the name, position title and contact details (phone and email) of the primary contact for any enquiries in relation to the report.

In some cases we may request information in addition to the above, which may include updates on the status of corrective actions.

Reports should be submitted via our [website](#)<sup>1</sup>.

### 1.3 When we will take enforcement action

Where the contravention is minor, and where customer detriment has been ameliorated, there may be no benefit in the QCA taking formal enforcement action. In these cases we may opt to resolve the contravention administratively through a voluntary undertaking from the business. This may involve commitments from a business to improve internal operation procedures or conduct staff training.

A decision by QCA to resolve a matter administratively does not indicate acceptance or approval of the conduct, nor does it remove a business' responsibility for the breach. However, in such cases we reserve the right to take formal enforcement action in the event that information on which we based our initial assessment is subsequently found to have been incomplete, inaccurate, or misleading, or if the administrative action proves to be ineffective, or in other circumstances in QCA's discretion.

Where we consider the timeliness and content of the notification to the QCA, and/or response, by the business are not sufficient, or the contravention to be material, we will generally (but are not legally bound to) follow the procedures outlined in Chapter 2, or 3, of these Guidelines when we consider taking further enforcement action.

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<sup>1</sup> <http://www.qca.org.au/Submissions>

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## 2 GUIDELINES FOR BREACHES OF DISTRIBUTION NETWORK CODES

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The Electricity Act provides for the QCA to enforce provisions of the Electricity Distribution Network Code. Similarly, the Gas Act provides for the QCA to enforce provisions of the Gas Distribution Network Code. These Acts include similar enforcement systems and require us to publish guidelines on when we will apply to the Supreme Court of Queensland for a civil penalty order and/or refer a matter to the regulator.

These Guidelines set out the actions we may take under the Acts and the factors that we may take into account when deciding whether to apply to the Supreme Court for a civil penalty order or refer a matter to the regulator.

### 2.1 Actions we may take under the Electricity and Gas Acts

#### Issuing warning notices and Code contravention notices

Under the Electricity and Gas Acts we may give businesses a warning notice where we suspect that they have contravened, or are contravening, or are involved in an activity likely to result in a contravention of a Distribution Code. A warning notice can only be issued where QCA decides that the contravention (or likely contravention) is material, having regard to the QCA code objective and to other factors that QCA may choose to consider in reaching the decision.

We may give a business a code contravention notice where

- the business has not complied with a warning notice (including by failing to take steps reasonably necessary to remedy the contravention, or failing to give QCA a conduct assurance as requested, or otherwise not complying), and
- having considered any written submissions received from the business, we remain of the view that a Code contravention notice should be issued.

#### Pursuing civil penalties

We may apply to the Supreme Court for a civil penalty order against a business or individual for committing a material contravention (or attempting to do so), or for being involved in a material contravention, of a Distribution Code. We are able to take this action even where we have not issued a warning notice or code contravention notice.

#### Seeking injunctions

We may also apply to the Supreme Court for an injunction for a contravention (or attempted contravention) of a Distribution Code regardless of its materiality.

#### Referring matters to the regulator

Where the Supreme Court determines that a business has materially contravened a Distribution Code, we are required to refer the matter to the regulator.

Where we have issued a warning notice to a business we may refer the matter to the regulator. This referral may be made whether or not we have also applied to the Supreme Court for a civil penalty order or injunction or issued a Code contravention notice. However, if we have applied to the Supreme Court for a civil penalty order, the regulator cannot impose a similar penalty.

## 2.2 Factors that we will take into account in deciding whether to apply to the Supreme Court for a civil penalty order and/or injunction or refer matters to the regulator.

We will take full account of the particular facts and circumstances of the contravention (or attempted contravention) in deciding to whether to pursue a civil penalty order and/or injunction or refer the matter to a regulator, including the factors listed in Appendix A. Whilst it is important for businesses to understand which factors are likely to influence our view, this list is provided to improve transparency rather than be all inclusive or binding. We may take into account additional factors where we consider it appropriate.

## 2.3 Notification of our decision

If we decide to seek a civil penalty and/or injunction or refer a matter to the regulator we will notify the business. This notification will include:

- (a) the activity or inactivity that constitutes a contravention (including attempted contravention), or potential contravention, of the Distribution Code
- (b) our decision to apply for a civil penalty, injunction or refer a matter to the regulator and
- (c) the reasons for our decision.

### Public disclosure of our decision

Where we have sought a civil penalty, injunction, or a civil penalty has been imposed, in relation to a code contravention, we may at our sole discretion choose to publish our decision. In doing so, we will:

- (a) have regard to the interests of the business concerned
- (b) have regard to the public interest and
- (c) only release the decision publicly once the business has been notified.

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## 3 GUIDELINES FOR CONTRAVENTIONS OF THE DEROGATIONS

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### 3.1 Responsibility for enforcing compliance with the national energy laws

The Australian Energy Regulator (AER) has overall responsibility for monitoring and enforcing compliance with the National Energy Customer Framework (NECF), which includes the National Energy Retail Law (NER Law), National Energy Retail Regulations (NER Regulations) and National Energy Retail Rules (NER Rules).

However, the *National Energy Retail Law (Queensland) Act 2014* (the NERL (Qld) Act) requires the QCA to enforce certain Queensland-specific derogations from the NER Law and the NER Rules (the Derogations).

Specifically, the QCA is responsible for the following additional provisions:

- (a) under the NERL (Qld) Act:
  - (i) Part 2, Division 1A (Additional Queensland provisions about restrictions on sale of energy)
  - (ii) section 22A (Additional Queensland provisions about standing offer prices for particular retailers)
  - (iii) Part 2, Division 10A (Additional Queensland provisions about selling electricity using card-operated meters)
  - (iv) Part 2, Division 12A (Additional Queensland provisions about large customers)
  - (v) Part 3, Division 6A (Additional Queensland provisions about providing customer connection services for card-operated meter premises), and
- (b) under the NERL (Qld) Regulation:
  - (i) Schedule 5, Part 3, sections 152A and 152B of the modified NER Rules (General conditions for exempt sellers in the Ergon Energy distribution area and Origin Energy Electricity Limited retail area), and
  - (ii) Schedule 5, Part 4 of the modified NER Rules (Modification of application of Rules for electricity retailers and distributors offering particular contracts).

The NERL (Qld) Act grants the QCA the same functions and powers to monitor, investigate and enforce the Derogations as the AER has under the national energy laws<sup>2</sup>. This section of the Guidelines, which are provided in the interests of transparency, and are not binding on the QCA, set out the actions we may take and the factors that we may take into account when deciding on enforcement action.

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<sup>2</sup> The national energy laws are comprised of the *National Electricity (South Australia) Act 1996*, *National Gas (South Australia) Act 2008*, *National Energy Retail Law (South Australia) 2011*, National Electricity Rules, National Electricity (South Australia) Regulations, National Gas Rules, National Gas (South Australia) Regulations, National Energy Retail Rules and National Energy Retail Regulations.

## 3.2 Actions we may take under the NERL (Qld) Act

### Infringement notices

The QCA has the power to issue an infringement notice where we have reason to believe a civil penalty provision has been breached in relation to the Derogations. The recipient then has the option of paying the infringement penalty in full and obtaining immunity from action by the QCA in relation to the alleged breach of the civil penalty provisions. Failure to pay the infringement penalty in full is likely to result in the institution of court proceedings against the recipient. Payment of an infringement notice does not constitute an admission of an alleged breach or represent acceptance of liability in respect of an alleged breach.

Once an infringement notice is issued, we cannot separately initiate court proceedings in relation to the act or omission that is the subject of the notice prior to the expiry of that notice, unless we withdraw the infringement notice within a specified period or the recipient fails to comply with the notice.

We can, however, take further action if a breach reoccurs after the payment of the infringement notice.

### Court enforceable undertakings

We may seek and accept a voluntary formal commitment (enforceable undertaking) in writing from a business in connection with any of the Derogations. We cannot compel a business to give an enforceable undertaking, nor are we required to accept one.

If we consider that a business has not complied with an enforceable undertaking we can seek orders from the Supreme Court of Queensland including declarations of a breach or injunctions preventing further conduct. If the court finds an undertaking has been breached it can make any or all of the following orders:

- an order directing compliance with an enforceable undertaking
- an order directing payment of an amount up to any financial benefit that the business/person obtained directly or indirectly and that is reasonably attributable to the breach
- an order to compensate any other person who has suffered loss or damage as a result of the breach, and/or
- any other order that it considers appropriate.

### Civil proceedings

We can initiate civil proceedings in relation to any suspected contravention of the Derogations that are either a civil penalty provision or a conduct provision. We cannot initiate proceedings in respect of an offence provision. Proceedings may only be instituted within six years of the date on which an alleged breach occurred.

If the Court finds that there has been a breach of a civil penalty provision it can make a range of orders including a declaration of a breach of one of the Derogation provisions, as well as one or more of the following:

- an order for payment of a civil penalty
- an order to cease the act, activity or practice that constitutes the breach, within a specified period

- an order to take such action as the court requires for remedying the breach or preventing its recurrence
- an order to implement a specified compliance program, and
- an order for an injunction restraining the business/person from engaging in the conduct or requiring them to take some positive action in relation to the conduct.

The amount of any civil penalty will be determined by the Court, having regard to:

- the nature and extent of the breach, and the circumstances in which it took place
- the nature and extent of any loss or damage suffered as a result of the breach
- whether the business has been found to have breached the NER Law or associated laws previously, and
- in the case of a regulated entity, whether the business has established proper procedures and policies as required under the NER Law.

If certain conduct results in the breach of multiple civil penalty provisions, the QCA is entitled to commence proceedings in relation to each of those provisions; however, the business will not be liable to pay more than one civil penalty in respect of the same conduct.

### Revocation of retailer authorisation

In extreme cases a retailer authorisation may be revoked if we are satisfied that there has been a material failure by a retailer to meet its obligations, which creates a reasonable apprehension that the retailer will not be able to meet its obligations under the national energy laws in the future. Revoking a retailer authorisation prohibits a retailer from selling energy. We can only commence this process if we reasonably consider that grounds for revocation do exist.

We are required to provide notice to the retailer that we are considering revocation, including reasons why we consider that grounds for revocation exist. The retailer would have an opportunity to demonstrate why its authorisation should not be revoked and to present a proposal to address our concerns.

## 3.3 Factors that we will take into account in deciding whether to take enforcement action with respect to a contravention of the Derogations

We will take full account of the particular facts and circumstances of the contravention (including attempted contravention) in deciding whether to pursue enforcement action, including the factors listed in Appendix A.

Whilst it is important for businesses to understand which factors are likely to influence our view, this list is provided to improve transparency rather than be all inclusive or binding. Where appropriate, we may take into account additional factors.

## 3.4 Notification of our decision

Should we decide to undertake formal enforcement action with respect to the Derogations we will notify the business. This notification will include:

- (a) the activity or inactivity that constitutes a contravention, or potential contravention, of the Derogations
- (b) our decision to undertake enforcement action and the action taken, and



- (c) the reasons for our decision.

#### Public disclosure of our decision

Where we have undertaken formal enforcement action in relation to a contravention of the Derogations, we may choose to publish our decision. In doing so, we will:

- (a) have regard to the interests of the business concerned
- (b) have regard to the public interest and
- (c) only release the decision publicly once the offending business has been notified.

Where we revoke a retailer authorisation, we are obliged to publish on our website our decision to do so (including our reasons and any conditions imposed) as well as advise the Australian Energy Market Operator and the distributors concerned.

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## APPENDIX A: MATTERS THE QCA WILL CONSIDER

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In making decisions on enforcement action we may consider:

- (a) the effect of the contravention on Government policy objectives, the interests of customers and other market participants
- (b) whether the contravention was intentional
- (c) whether the business derived a benefit (financial or otherwise) from the contravention (including compliance costs avoided by the business)
- (d) whether the imposition of a civil penalty is likely to create an incentive to improve compliance and deter future contraventions
- (e) whether the business has taken steps to secure compliance either specifically or by maintaining a robust compliance system
- (f) whether the business' senior management were involved in the contravention
- (g) whether the business voluntarily reported the contravention or attempted to conceal it from the QCA
- (h) the compliance history of the business and whether the business has a corporate culture conducive to compliance, including the effectiveness of compliance programs, and whether corrective measures have been taken in response to past breaches
- (i) whether the business has taken appropriate action to remedy the contravention
- (j) the social and environmental impact of a contravention, where relevant
- (k) the level of cooperation extended by a business during the course of our investigation.