



COMPLIANCE ENFORCEMENT POLICY

Version 3

26 February 2021

TABLE OF CONTENTS

Version and effective date	2
1 INTRODUCTION.....	3
1.1 Purpose of the Compliance Enforcement Policy	3
1.2 Objectives of the Policy	3
1.3 Legislative, regulatory and licence obligations.....	3
1.4 Application of the Compliance Enforcement Policy	4
2 NON-COMPLIANCE.....	5
2.1 Detecting non-compliance	5
2.2 Compliance enforcement approach.....	5
2.3 Factors considered	7
3 RESPONDING TO COMPLIANCE CONTRAVENTIONS.....	8
3.1 Initial enquiries	8
3.2 Assessment of licensee’s response	9
3.3 Issuing a direction.....	9
3.4 Penalties and other enforcement action.....	10
3.5 Penalties for contravention of legislative and/or licence obligations 10	
3.6 Variation, suspension or cancellation of licence	11
3.7 Power to take over operations.....	11

VERSION AND EFFECTIVE DATE

Version and effective date

A version number and date of issue will identify every version of this Policy. This version, Version 3, became effective on 26 February 2021.

The Regulator¹ recognises that, as the energy industry, water and sewerage industry and respective regulatory environments change over time, this Policy may require further updating.

The Regulator intends to review and revise this Policy as appropriate and welcomes comment at any time regarding its content.

¹ The Regulator, for the purposes of this Policy, is the Tasmanian Economic Regulator appointed under section 9 of the *Economic Regulator Act 2009*.

1 INTRODUCTION

1.1 Purpose of the Compliance Enforcement Policy

This document sets out the policy framework that the Regulator intends to use when dealing with contraventions of compliance obligations by electricity, gas and water and sewerage licensees.

It guides licensees as to the types of processes the Regulator intends to follow in response to information it is provided, or has obtained, regarding compliance contraventions, and prior to taking enforcement action.

The Policy informs licensees of the factors the Regulator may take into account in deciding whether enforcement action should be taken and the form of that action.

1.2 Objectives of the Policy

The Regulator's Compliance Enforcement Policy seeks to:

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

1.3 Legislative, regulatory and licence obligations

Regulatory compliance is important as it demonstrates an entity's commitment to honest and responsible business conduct and ensures that the objectives of regulation are achieved. Regulated entities have a responsibility to identify and comply with their licence and regulatory obligations.

Under the *Electricity Supply Industry Act 1995* (ESI Act), the *Gas Industry Act 2019* (the Gas Industry Act), and the *Water and Sewerage Industry Act 2008* (W&SI Act), the Regulator has prescribed functions including monitoring and enforcing the compliance of regulated entities with their legislative and licence obligations. The legislative framework supports the Regulator in ensuring the prevention, identification and appropriate response to breaches of laws, regulations, codes or organisational standards and facilitates positive regulatory outcomes.

In order to fulfil its compliance enforcement function, the relevant Acts provide the Regulator with the power to:

- formally direct that an entity perform a certain act to ensure that it complies with its licence conditions or to better pursue the purposes of the legislation;

- vary/suspend/cancel an entity's licence where the legislation has been breached or where a licence condition has been breached;
- take an entity in breach of the legislation or licence conditions to court in order to get either or both: (a) a court imposed monetary fine (b) a court imposed injunction to require the entity to carry out, or refrain from carrying out, any activity; and
- impose a monetary penalty on an entity if the Regulator is satisfied that it has contravened its relevant Act or licence conditions

The Regulator has performance monitoring and reporting responsibilities in the electricity and natural gas industries as well as the water and sewerage sector. In all cases, the regime provides for the Regulator to determine a set of standard performance measures, following consultation, against which entities must report.

This takes the form of a performance reporting guideline in the electricity and water and sewerage sectors and a code requirement for gas. Regulated entities submit performance data and information as per the guideline, and raw data for the performance measures is collected via a standard template and subject to regulatory audits on a regular basis. The performance information is then collated and published in a comparative performance report.

The publication of performance information assists in meeting the objectives of the legislation to promote efficiency and sustainability in the industry sectors including the maintenance of appropriate service standards and promoting compliance with, where relevant, health, public safety and environmental obligations.

The Regulator seeks to coordinate formally with other industry regulators to avoid duplication and to achieve a more integrated approach. In performing and exercising its functions and powers the Regulator has regard to national regulatory obligations to which some entities must adhere, specifically those applicable to entities within the electricity sector. In the implementation of its Compliance Enforcement Policy, the Regulator will have regard to the National Electricity Rules, enforced by the Australian Energy Regulator, and avoid duplication of, or inconsistency with, its regulatory arrangements.

1.4 Application of the Compliance Enforcement Policy

The legislation does not dictate the process that the Regulator must follow in instances of non-compliance and the factors it must take into account in deciding which enforcement actions will be used. The ranges of enforcement actions available to the Regulator are varied, ranging from informal communication and discussions, monetary penalty, a formal direction, requiring a licensee to perform a certain act, through to licence cancellation and a court imposed monetary fine.

To better establish a culture of compliance, this Compliance Enforcement Policy provides details on:

- when and how non-compliance will be brought to the attention of the Regulator;

- what course of action will be followed once a non-compliance event is identified, i.e. the ‘general approach to non-compliance’; and
- the factors that will be taken into account in making decisions throughout the general approach to non-compliance.

2 NON-COMPLIANCE

2.1 Detecting non-compliance

The Regulator monitors compliance and detects, or is notified of, contraventions of compliance in a number of ways.

As part of the standard licensing conditions, licensees are required to report material breaches of legislative, regulatory or licensing obligations as soon as practicable. Licensees may also be required to prepare compliance plans which report on compliance with obligations. Compliance information, and the contravention thereof, can also be disseminated through the general good practice of the licensees concerned, that is, when the Regulator is notified of non-compliance by the licensee itself.

The Regulator will also become aware of non-compliance through complaints made by members of the public or customers, either directly or via the Tasmanian Ombudsman, and notification from other industry regulators.

In each circumstance, the matter will be dealt with in accordance with the Regulator’s general approach to non-compliance as set out in section 2.2 below.

2.2 Compliance enforcement approach

The Regulator’s Compliance Enforcement Policy is predicated on the following principles:

- the Regulator’s focus is on encouraging compliance;
- the Regulator will be both proactive and reactive in its approach to compliance matters;
- the Regulator will promote the highest reasonably practical monitoring standards;
- the Regulator will be consistent, transparent, unbiased and independent in its approach to compliance issues;
- licensees are responsible for their own compliance and demonstration of that compliance; and
- the Regulator’s compliance enforcement action will be appropriate to the specific circumstances, proportionate to the relevant issues and will be guided by relevant legislative and regulatory objectives.

The Regulator promotes self-regulation and encourages the licensees to act in accordance with their legislative and licence obligations through measures such as communication and education activities, timely provision of information and advice, persuasion, cooperative assistance and collaboration.

These measures help to:

- raise awareness of the benefits of complying with the legislative and licence requirements and the potential consequences of non-compliance;
- remove barriers to compliance (for example, lack of knowledge of regulatory obligations or how to comply);
- promote the objectives of the legislation; and
- overcome factors that encourage non-compliance (for example, lack of support for, or misunderstanding of, legislative objectives).

The core elements of this approach are:

- assisting licensees to understand their rights and obligations;
- making it as easy as possible for licensees to meet their obligations;
- supporting licensees who want to do the right thing; and
- actively pursuing those who opportunistically or deliberately contravene their legislative and regulatory obligations.

Where these compliance approaches fail, compliance enforcement mechanisms may be used. The Regulator will employ a range of responsive compliance enforcement sanctions that escalate in severity as the need arises. These sanctions rely on the deterrent effect of penalty-based instruments such as suspension or cancellation of licence, issue of directions and pecuniary penalties (fines).

The intended general approach to non-compliance, as outlined below, is based on an escalating response from the Regulator. The general approach outlines a range of enforcement actions available. Decisions will need to be made on a case-by-case basis as to whether this is followed or if certain steps are bypassed for more serious breaches. The compliance enforcement approach is further discussed under section 3 of this Policy “Responding to Compliance Contraventions”.

General approach to non-compliance

Initial communication with licensee to gain relevant facts



Regulator forms an opinion that non-compliance has or has not occurred



If no compliance contravention then no further action. If non-compliance identified then continue relevant enforcement action



Negotiations with licensee to agree on action plan to resolve compliance contravention



Failure to enter an agreed action plan, failure to fulfil obligation under agreed plan or the breach is sufficiently serious in the first instance - Regulator may issue a direction for the licensee to perform a specified action



Failure to comply with a direction constitutes an offence. A court can fine the licensee and order the action specified in the direction be performed and/or Regulator can vary, suspend or revoke the licence.

It is noted that the Regulator may also impose a monetary penalty on licensees in certain circumstances of non-compliance, such as where the non-compliance is material or sustained.

2.3 Factors considered

The Regulator aims to use the most appropriate compliance enforcement option in response to each compliance contravention.

Responses range from education and/or warnings to deterrent sanctions such as those noted in section 2.2 of this Policy.

The decision on the appropriate enforcement measure, in response to a compliance contravention, is made on a case-by-case basis, taking into account the following factors:

- materiality of the contravention;
- severity of the impact of the breach(es) on the regulatory policy objectives;
- seriousness of the harm caused by the compliance contravention, both to customers and members of the public;
- the prevalence of the type of contravention;
- the likely public concern about the seriousness of the compliance contravention;
- the efficacy of the proposed response option;

- whether the proposed response will promote compliance;
- intent and knowledge of the entity regarding the breach (level of malice or culpability);
- voluntary actions by the licensee to address non-compliance, upon becoming aware of the breach, and the mechanisms implemented by the licensee to prevent any recurrence of non-compliance;
- compliance history of the entity;
- likelihood of the contravention continuing or being repeated;
- whether the matter was self-reported; and
- likely effect of proposed enforcement action, that is, would the proposed action increase compliance in the future and assist in promoting a culture of compliance?

3 RESPONDING TO COMPLIANCE CONTRAVENTIONS

3.1 Initial enquiries

Wherever possible the licensee will be given the opportunity to respond to, or explain, the alleged compliance contravention prior to any decision on the enforcement measure to be applied.

Once the Regulator becomes aware of a suspected compliance contravention occurring, the Regulator or its delegate, will initially meet and/or discuss informally with the licensee the events that led to the suspected or actual contravention.

Matters to be addressed include:

- the circumstances surrounding the suspected contravention;
- the impact and incidence of the suspected contravention;
- the nature and extent of the suspected contravention;
- any remedial action already undertaken by the licensee; and
- the actual or anticipated date of the licensee's full compliance.

If the Regulator is satisfied that a suspected contravention did occur, the Regulator will negotiate an appropriate action plan to be taken by the licensee to rectify the contravention and seek to establish, where possible, mechanisms to prevent the conduct recurring.

Where the contravention is caused by something outside the control of the licensee, then the Regulator will negotiate with the licensee to rectify the contravention as soon as practicable.

To ensure that the Regulator and licensee have a common understanding as to what has been agreed in the initial meeting and/or discussions, the Regulator will write to the licensee immediately thereafter, setting out:

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

The licensee will be required to respond to the Regulator 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.

3.2 Assessment of licensee’s response

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

If the licensee has not rectified the compliance contravention, as agreed with the Regulator or if the Regulator considers the contravention to be serious, taking into account the factors listed in section 2.3, the Regulator may issue a direction to the licensee under section 14 of ESI Act, section 33 of the Gas Industry Act, or section 42 of W&SI Act.

The Regulator will consider whether to issue a direction, based on:

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

3.3 Issuing a direction

The legislation does not prescribe the matters that must be set out in a direction with respect to a compliance contravention. In the absence of this guidance, the Regulator will include within the direction information including, but not limited to:

- the nature of compliance obligation contravened;
- the activity or inactivity that the Regulator considers gave rise to the compliance contravention;

- the date the compliance contravention commenced and the period over which it occurred;
- the action that the Regulator requires the licensee to undertake in order to rectify the compliance contravention and the time within which that action is to be taken; and
- notice of the Regulator’s ability to take compliance enforcement action and the nature of the action options that will be considered by the Regulator.

The licensee must comply with the direction or risk the Regulator considering further compliance enforcement action. If the licensee complies with the direction, the Regulator will generally not proceed with further action.

3.4 Penalties and other enforcement action

Where the licensee does not comply with a direction issued by the Regulator, a court may impose a penalty upon the licensee and, where supported in the legislation, in addition to, or instead of such a fine, require the licensee to comply with the direction.

Section 114A of the ESI Act provides monetary penalties for non-compliance with a direction given under the Act. It also enables the court to make one or more orders to the electricity licensee (requiring them to either comply with the direction, to do or refrain from doing anything, or such other order as considered appropriate) instead of imposing a penalty.

Section 33 of the Gas Industry Act provides monetary penalties for non-compliance with a direction issued in accordance with that provision. Under the Gas Industry Act, penalties are imposed for non-compliance with the direction with an additional penalty for each day thereafter during which the offence continues.

The Regulator also has authority under section 33 of the Gas Industry Act to take any action that is reasonable and necessary to give effect to the direction and recover, in any court of competent jurisdiction, the associated costs from the licensee.

Section 42 of the W&SI Act provides for a monetary penalty for non-compliance with a direction given by the Regulator to an entity for the purposes of that Act.

3.5 Penalties for contravention of legislative and/or licence obligations

The legislation provides additional monetary penalty provisions that are applicable where entities contravene their licence obligations and/or the legislation.

Section 114B of the ESI Act provides for a monetary penalty where an entity does not comply with the conditions to which its licence under the ESI Act is subject. Further fine amounts apply for each day during which the offence continues.

Similarly, section 33 of the Gas Industry Act provides monetary penalties where an entity contravenes conditions to which its licence is subject and additional penalties for each day that the offence continues.

The monetary penalties above may be imposed by the Court. The Regulator may also impose a monetary penalty on a regulated entity where the Regulator is satisfied that the regulated entity has contravened the relevant Act or the conditions of the entity's licence, pursuant to section 7 of the ESI Act, section 41 of the W&SI Act and section 14 of the Gas Industry Act. A further penalty amount is applicable under those sections for each subsequent day on which the contravention continues.

3.6 Variation, suspension or cancellation of licence

In certain circumstances, where the compliance contravention has been (in the opinion of the Regulator) sufficiently serious, or where multiple contraventions have occurred, the Regulator may choose to vary the terms and conditions of the licence or suspend or cancel the licence.

Section 47 of the ESI Act provides that the Regulator may cancel a licence, or add to or vary the conditions of a licence.

Under the Gas Industry Act, the Regulator may suspend or cancel a licence (section 39) or vary the terms and conditions of the licence (section 31).

Section 41 of the W&SI Act provides the Regulator the power to suspend or cancel a licence. Variation of licence provisions are in section 40 of that Act.

3.7 Power to take over operations

In addition to the variation, suspension and cancellation of licence provisions, the legislation also provides the Regulator with the power to take over part or all of a regulated entity's operations.

Provisions are similar across the Acts for the various industries. For example, with reference to gas and electricity legislation, it is the Governor who issues the order authorising the Regulator's step-in powers. With respect to the water and sewerage legislation, it is the Minister. In addition, entities in each sector are afforded an opportunity to make a submission with respect to the proposed order.

The take-over provisions are provided under section 48 of the ESI Act, section 87 of the Gas Industry Act, and section 55 of the W&SI Act.