

APPENDIX 1 – OVERSEAS ENFORCEMENT REGIMES

1. US - FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission (**the Commission**) is an independent federal agency located within the Department of Energy.

The source of the Commission's electricity enforcement powers include Title 18, Chapter I of the Code of Federal Regulations (**the regulations**) and the *Federal Power Act*.

1.1 Power of investigation

The Commission has the power under the regulations to conduct investigations into any matter falling within its jurisdiction, either on its own initiative, or at the request of any individual, business or government entity. Investigations may be of a preliminary or formal nature.

Preliminary investigations may be commenced without following any particular process but the Commission's officers do not have the power to compel testimony during a preliminary investigation.

Formal investigations are commenced by issuing an order that specifies the basis for investigation, the matters under investigation, the officers who have the power to conduct the investigation and the nature of their powers.

Formal investigation officers have the power to administer oaths and affirmations, subpoena witnesses, take evidence, and require production of any books, papers, correspondence, memoranda, contracts, agreements or other records relevant or material to an investigation.

Persons compelled to produce documents may request that these are kept confidential. Material obtained during an investigation is to be treated as non-public except to the extent the Commission orders public disclosure, the information or documents are made a matter of public record during the course of an adjudicative proceeding, or disclosure is required by legislation.

A person has the right to submit statements and make submissions prior to an adverse finding against them following the investigation.

At the conclusion of an investigation, if the Commission finds there has been a breach of the provisions of any of the Acts it administers, or the rules, opinions or orders, it "may institute administrative proceedings in the courts, refer matters to other authorities, or take other appropriate action".

Staff actions taken during formal investigation proceedings (other than a decision or ruling of the presiding officer) are to be taken as a final agency action and subject to rehearing¹.

The Commission also has powers of investigation under the *Federal Power Act*. This Act states:

“the Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation.”

The Commission’s investigation powers under this Act includes compelling attendance by witnesses, administering oaths, taking evidence, and requiring production of documents.

To enforce an order issued during an investigation, the Commission is required to apply to a Court.

The Commission does not have the power to enter a premises or seize material forcibly.

1.2 Power to impose civil penalties under the regulations

The Commission has the power to impose civil penalties on licensees or permittees (including those that should be, but are not, licensees or permittees) for breaches of any rule or regulation under Part I of the *Federal Power Act*, license term or condition, or compliance order.

The maximum penalty that the Commission may impose is US \$10,000 for each day a violation continues.

The Commission must provide notice of any intended penalty to enable a person to make submissions prior to the penalty being imposed.

If the penalty is not paid after 60 days, the Commission may seek an order from the District Court to have the penalty affirmed, and/or enforced.

2. EUROPEAN UNION

The principal EC directive which specifically relates to the electricity sector sets out the common rules for the internal market in electricity.

¹ Part 385.1902

This directive requires member states to adopt common rules for the transmission, supply and storage of electricity; and provides a framework for the organisation and functioning of the sector, market access, and the granting of authorisations to participate in the industry. According to the principle of subsidiarity, each member state is able to determine how to implement the common rules at a national level in accordance with its particular circumstances.

The directive does not specifically require member states to establish any particular enforcement regime although it is implicit in the directive that the rights and obligations provided for would be enforced as the member state determines.

3. UK - OFGEM AND THE GAS AND ELECTRICITY MARKETS AUTHORITY

The Office of Gas and Electricity Markets (**Ofgem**) operates under the direction and authority of the Gas and Electricity Markets Authority (**the Authority**). The Authority has both sectoral regulatory responsibilities (licensing), and competition law responsibilities.

When exercising its concurrent competition powers, the Authority may only have regard to matters covered by its sectoral duties provided they are matters to which the Director General of Fair Trading could have regard in exercising his or her powers under the *Competition Act*.

The Authority's electricity industry sectoral regulatory responsibilities are provided for under the *Electricity Act 1989 (the Act)*. The objectives set out in the Act provide that the principal objective of the Authority is to "protect the interests of consumers" and to "promote effective competition" having regard to "the need to secure that all reasonable demands for electricity are met", and "the need to secure that license holders are able to finance the activities which are imposed by [the legislation]".

The Act contains provisions requiring the Authority to make orders under the most appropriate Act. It is also prohibited from levying financial penalties if a penalty has already been levied for that matter under another Act, and must not impose a penalty under the Act if it is satisfied that it would be more appropriate to proceed under the *Competition Act*.

3.1 Standard licence conditions

Ofgem has responsibility for ensuring licensees comply with their licence conditions and requirements. Standard licence conditions are contained in a determination by the Secretary of State under section 33(1) and (2) of the *Utilities Act 2000*.

The determination specifies 54 standard conditions including:

- procedure for payment and calculation of fees to the Authority;

- compliance with grid and distribution codes;
- compliance with pooling and settlement agreement run off, balancing and settlement code;
- provision of information to the Authority, and record keeping;
- prohibition on discrimination in selling electricity, and cross subsidies; and
- publication of information to customers, marketing, contracts, bill payment and complaint handling.

3.2 Power to obtain information

Under section 28 of the Act, the Authority has the power to obtain information from a licensee where it appears to the Authority that the licensee may be:

- in contravention of any relevant condition or requirement;
- failing to achieve any standard of performance prescribed under regulations concerning “such standards of performance in connection with the activities of electricity suppliers [and distributors] so far as affecting customers or potential customers of theirs, as in the Authority’s opinion ought to be achieved in individual cases”².

The requirement to provide information in accordance with the Act is also included as condition 13 of the standard licence conditions.

The Authority cannot require information to be produced, which the holder of that information would not be required to produce in civil proceedings in court.

The Authority also has a power, with the consent of the Secretary of State, to obtain information for any purpose connected with the revocation, suspension or expiry of a licence where it is requisite or expedient to do so.

To exercise that power, the Authority must serve a notice signed by the Director General on the person required to produce the information specifying:

- the documents to be produced; and

² Sections 39 and 39A

- the time, date and place where they are to be produced.

A person who refuses to comply with a notice requiring information to be furnished to the Authority is liable on conviction to face a fine³. The Director General may apply to a court for such an order as the court thinks fit requiring the default to be made good.

The Act does not provide the Authority with powers to enter premises or seize material forcibly.

3.3 Enforcement orders

Under section 25 of the Act, if the Authority is satisfied that a licensee is contravening, or is likely to contravene, a licence term or condition, it is required to issue either a final or provisional enforcement order.

The order is to state:

- that the licensee is to do, or not to do, such things as are specified in the order or are of a description so specified; and
- the time the order takes effect (which is to be the earliest practicable time).

In determining whether to issue a final or provisional order the Authority is to have regard to:

- the extent to which any person is likely to suffer loss of damage as a result of the contravention; and
- the fact that the provisions of sections 25 and 27 preclude the availability of remedies (other than for negligence) in respect of a contravention of a licence condition or requirement.

Under section 26 of the Act, the Director is required, before issuing a final order or confirming a provisional order, to give notice to a licensee that set outs:

- relevant conditions or requirements which the licence holder is contravening;
- the acts or omissions which constitute the contravention; and
- other facts which justify the order.

³ not exceeding level 5 on the standard scale

Licenses are to be given at least 21 days to make representations or objections to the order.

Under section 27 of the Act, a licensee may apply to a court within 42 days of the date of service of the order to have the order set aside on the grounds that the Authority was not within its power or failed to comply with the procedures specified in the Act when issuing the order.

Failure to comply with an order can expose the licensee to action (including a claim for damages) by any person who suffers loss or damage as a result of that failure⁴.

3.4 Penalties

Under section 27A of the Act, the Authority may impose a penalty on a licensee where it is satisfied that the licensee:

- is in contravention of any relevant condition or requirement; and
- has failed to achieve any standard of performance prescribed under regulations concerning “such standards of performance in connection with the activities of electricity suppliers [and distributors] so far as affecting customers or potential customers of theirs, as in the Authority’s opinion ought to be achieved in individual cases”⁵.

The Authority must give a licensee an opportunity to make representations or objections before imposing a fine by issuing a notice that states:

- that it proposes to impose a penalty and the amount;
- the relevant condition or requirement, or standard of performance in question;
- the acts, omissions, and facts which, in the opinion of the Authority, constitute the contravention and justify the imposition of the penalty and amount; and
- the period (not less than 21 days) during which representations and objections may be made.

If the Authority varies the penalty, it must issue a notice of variation stating the proposed variation and reasons for it, and provide at least 21 days for representations and objections to be made.

If the Authority proceeds with imposing the penalty it must issue a notice that states:

⁴ Section 27(5)

⁵ Sections 39 and 39A

- that a penalty has been imposed and its amount;
- the relevant condition or requirement, or standard of performance in question; and
- the acts, omissions, and facts which, in the opinion of the Authority, constitute the contravention and justify the imposition of the penalty and amount; and
- the date by which the penalties is to be paid.

Licenses are to be given to be given at least 42 days to pay the penalty, and may (within 21 days) make an application to the Authority for it to specify different dates by which different portions of the penalty are to be paid. The penalty is not required to be paid until the application has been determined⁶.

The amount of a penalty must be:

- reasonable in all the circumstances of the case;
- not greater than 10% of the licensee's annual turnover; and
- determined in accordance with the provisions of an order made by the Secretary of State, which has been approved by a resolution of both House of Parliament.

Under section 27B of the Act, the Authority is required to publish a statement of policies with respect to the imposition of penalties and determination of their amount. A penalty notice must be served within 12 months of the contravention⁷.

Licenses may apply to a court within the 42 days to have the penalty quashed or varied, or for a variation of the payment dates, on the grounds that⁸:

- the Authority has not acted within its power or complied with the procedures listed under section 27A, and the interests of the licence holder have been substantially prejudiced by the non-compliance; and
- the due dates are unreasonable.

The penalty is not required to be paid until the court application has been determined.

Under section 27F of the Act, the Authority is required to apply to a court to seek recovery of unpaid penalties as a civil debt owed to it.

⁶ Section 27D(2)

⁷ Section 27C

⁸ Section 27E

APPENDIX 2 – ENFORCEMENT REGIME FOR TELECOMMUNICATIONS SPECIFIC REGULATION

1. Introduction

The enforcement structure set up under Part 6 of the proposed National Electricity Law (**Part 6**) for the sector specific regulatory regime for electricity markets is significantly different from the enforcement structure of Parts XIB and XIC of the *Trade Practices Act 1974 (TPA)* (**Parts XIB and XIC**) which set up a sector specific regulatory structure for telecommunications.

In 1996, Parts XIB and XIC were enacted to give the ACCC additional powers to regulate telecommunications markets. At the time, it was determined that other provisions of the TPA, in particular Part IV, were not sufficient to deal with unique features of telecommunications markets.

The additional powers were given to the ACCC only to the extent necessary to address weaknesses in the existing powers. The additional powers came about after a closely scrutinised process, with the most recent scrutiny being the review of Parts XIB and XIC undertaken by the Productivity Commission in 2001. Therefore, Parts XIB and XIC provide a generally accepted and best practice framework from which to analyse the appropriateness of any sector specific regulation in networked industries.

The key risk in relation to sector specific regulation is ensuring that such regulation is appropriate for and proportionate to the unique features of the markets to which the regulation applies. In the 2001 review of Parts XIB and XIC by the Productivity Commission, the Productivity Commission referred to this risk when it warned against the risk of “regulatory error and overreach” associated with sector specific regulation⁹.

The key differences between enforcement provisions of Part 6 and Parts XIB and XIC are broadly as follows:

- (a) Part 6 provides a civil penalties regime by use of infringement notices that is vastly different from the civil penalties regime under Parts XIB and XIC; and
- (b) Part XIB requires the ACCC to issue certain enforcement guidelines which are largely absent from Part 6.

⁹ Productivity Commission, *Report on Telecommunications Competition Regulation*, (PC 2001d) Report No. 16, page 151

2. Civil penalties regime

As a starting point, Part 6 provides an enforcement regime very similar to Parts XIB and XIC by setting up a regime for the determination of contraventions and imposition of civil penalties by the courts¹⁰. However, Part 6 goes much further than Parts XIB and XIC by giving the AER the power to issue pecuniary penalties through infringement notices¹¹.

Parts XIB and XIC do not give the ACCC any powers to issue pecuniary penalties without first seeking a Federal Court order to that effect¹². In fact, under Part XIB, the ACCC generally issues a competition notice in respect of a certain activity before it brings any action in the Federal Court for breach of the Part XIB competition rule¹³. In many ways, the competition notice provisions act as a check on the ACCC's powers by encouraging the ACCC to undertake analysis of an alleged breach through a competition notice before commencing enforcement action. That is, a competition notice is a non-pecuniary regulatory tool designed to correct anti-competitive behaviour quickly before taking strict enforcement action through the courts.

In contrast to the exclusive jurisdiction of the Federal Court to enforce Parts XIB and XIC, Part 6 gives the AER a parallel alternative enforcement mechanism through the use of infringement notices¹⁴. The only limitation on the AER is that infringement penalties not be in excess of \$20,000¹⁵. However, there are no limitations on the number of infringement notices or a cap on infringement penalties that may be issued in respect of one general breach. The only other restraint is that the AER cannot take court action in respect of a matter that is the subject of a standing infringement notice¹⁶. In effect, the AER's parallel enforcement mechanism applies to all civil breaches and not just a subset of civil breaches.

Even though competition notices and infringement notices have vastly different objectives and consequences, they both have the same low issuing threshold whereby the regulator can issue them if it has a mere "reason to believe" that a contravention has occurred or is occurring¹⁷. Competition notices are primarily a corrective instrument designed to correct anti-competitive behaviour quickly. The only impact which a competition notice has on enforcement proceedings is through the operation of a Part B Competition Notice. A Part B Competition Notice issued by the ACCC will act as presumptive evidence of the information contained in it and can be used in court by a litigant or the ACCC against the party in contravention in an award for damages or

¹⁰ Sections 60, 61 and 62 of NEL

¹¹ Section 73 of NEL

¹² Section 151BX of TPA

¹³ Sections 151AKA and 151AL of TPA

¹⁴ Section 76 of NEL

¹⁵ Section 75 of NEL

¹⁶ Section 76 of NEL

¹⁷ Section 151AL(3) of TPA and Section 73(1) of NEL

penalties¹⁸. Given that a competition notice is primarily a corrective instrument and that, ultimately, only a court can determine liability for a breach of the Part XIB competition rule, this low threshold may be justified. On the other hand, an infringement notice immediately quantifies a penalty figure without a judicial inquiry¹⁹. Given this, allowing the ACCC to issue infringement notices on such a low threshold cannot be justified and amounts to inappropriate and disproportionate regulation.

Under Part 6, a broad category of individuals is capable of being held to be involved in a breach of a civil penalty provision²⁰. This category of individuals is similar to the category of individuals capable of being held to be involved in a contravention of the Part XIB competition rule²¹. Under Part XIB, this broad liability only applies after the ACCC has issued a competition notice and the Federal Court issues an enforcement order. However, under Part 6, the power applies absent of any of the procedural fairness checks found under Part XIB.

3. Guidelines

Part XIB places significant procedural requirements on how the ACCC should issue competition notices and otherwise enforce the Part XIB competition rule. Despite the fact that breaches of Part 6 give rise to significantly greater AER powers than under Part XIB, Part 6 does not require the AER to comply with any guidelines. The only requirements imposed on the AER are of an administrative nature and relate to the format and timing of infringement notices²².

The primary procedural requirement on the ACCC under Part XIB is to publish guidelines for issuing competition notices²³ and to comply with such guidelines in undertaking its functions²⁴. Part XIB requires that the guidelines address the appropriateness of the ACCC issuing a competition notice as opposed to taking some other form of action under the TPA. In 2004, the ACCC published its most recent version of the *Telecommunications Competition Notice Guidelines*. This clearly and transparently sets out the objectives of the ACCC and the factors which the ACCC will take into consideration in deciding whether to issue a competition notice as opposed to taking some other form of enforcement action.

The Productivity Commission in its 2001 review of Parts XIB and XIC noted that the primary objective in requiring the ACCC to publish and observe enforcement guidelines is to make the process of issuing competition notices more transparent. The emphasis placed on considering whether it is appropriate to issue a competition notice as opposed to taking some other action

¹⁸ Section 151AN of TPA

¹⁹ Section 151AL(3) of TPA

²⁰ Section 66(1) of NEL

²¹ Section 151BW of the TPA

²² Sections 74 and 78 of the NEL

²³ Section 151AP(2) of the TPA

²⁴ Section 151AP(1) of the TPA

under the TPA means that the ACCC is encouraged to use its telecommunications specific powers only where other powers are not effective. The absence of such limitations on the power of the AER under Part 6 means that Part 6 is very likely to result in regulatory error and regulatory overreach.

Part 6 is also different from the enforcement structure of Parts XIB and XIC because of the lack of emphasis on corrective measures under Part 6. For example, under Part XIB, the ACCC may issue advisory notices to a party to advise that party of the actions it should take to avoid being in breach of the Part XIB competition rule²⁵. An advisory notice has no evidentiary or enforcement value and is merely a corrective instrument available to the ACCC. Part 6 concentrates wholly on the imposition of pecuniary measures for alleged breaches of the NEL and ignores the value which corrective instruments make in regulating markets. Under Part 6, the AER does not play the role of a facilitator of effective competition as the ACCC does under Parts XIB and XIC. Rather, the AER's only role is a strict policing of the NEL. Such a role is not conducive to the effective development of networked industries which are characterised by co-operative features of interconnection and interoperation.

²⁵ Section 151AQB of the TPA

APPENDIX 3 - CATEGORIES OF CODE BREACHES

1. CATEGORY A

Fine not to exceed \$20,000. NECA may impose fines on its own authority. The reasoning given for breaches being accorded with category A status includes:

- In practice the breach is likely to have little impact on the operation of the market;
- The breach would be best dealt with summarily by NECA;
- The most significant impact is likely to be on the participant guilty of the code breach;
- Non-compliance is best dealt with as a dispute; and
- The ability of NECA to issue contravention notice is sufficient to ensure compliance.

The types of offences which have been accorded category A status include:

- Most of the metering requirements in chapter 7 (The more serious are category B); and
- Failure to participate in central dispatch, provide non-commercial or non-confidential information to other market participants, self-commitment of slow-start generating units, and failure to pay compensation to NEMMCO in relation to directions and reserve contracts.

2. CATEGORY B

Fine not to exceed \$50,000 and \$10,000 for each day the breach continues. Only the Court/Tribunal may impose the penalty. The reasoning for according category B status includes:

- Breach could lead to material deterioration of service;
- The breach is best dealt with by the Court/Tribunal as other sanctions may need to be applied, the penalty may need to be upgraded for repeated breaches, or the threat of a daily-accruing penalty is needed to encourage compliance;
- The breach could compromise system security, the imminent capital decisions of other participants, or schedules and settlements, but is insufficient to warrant a class C classification; and

- An order for compliance by the Court/Tribunal is likely to be the most effective remedy. Large monetary penalties are unlikely to be effective, or of secondary significance.

Examples of breaches which have been accorded Category B status include:

- Failure to provide credit support;
- Failure to comply with procedure for self de-commitment of slow start generating units;
- Failure to comply with operation and maintenance responsibilities; and
- Failure to comply with obligation to consult NEMMCO re Control and Monitoring requirements.

3. **CATEGORY C**

Fine not to exceed \$100,000 and \$10,000 for each day the breach continues. Only the Court/Tribunal may impose the penalty. The reasoning given for according Category C status includes:

- There is a potential for the breach to cause serious market distortions, severely affect the orderly operation of the market, lead to interruptions to supply, and financially impact on many market participants;
- The breach concerns an obligation related to system security; and
- Breach concerns a fundamental obligation of a generator under the Code. There needs to be scope for the maximum fine and wide range of Court/Tribunal orders.

Examples of breaches which have been accorded Category C status include:

- Failure to comply with participant obligations regarding interim settlements;
- Failure of market participants and NSPs to provide PASA information;
- Failure to respect a panel or independent expert's determination;
- Failure to advise of circumstance which adversely affects secure operation of power system; and
- Unauthorised disclosure of confidential information.

4. **CATEGORY D**

Fine not to exceed \$1,000,000 and \$50,000 for each day the breach continues. Only the Court/Tribunal may impose the penalty.

This penalty class applies solely to the provision requiring bids and rebids to be made in good faith.