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Enforcement Policy

VERSION: 2.6

Issued: August 2021

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Version history

Version No.	Date	Comment	Pages
1.0	15/04/2002	Original Document	21
2.0	31/04/2003	Amended for ESCOSA	25
2.1	June 2004	Amended to incorporate gas supply industry and Railways (Operations and Access) Act	25
2.2	01/7/04	Approved at Commission Meeting No 19/2004 (25/6/04)	22
2.3	2/04/09	Amended to incorporate the Barley Exporting Act 2007 and remove all references to the Gas Pipelines Access (SA) Act and clarify roles and powers of the Commission	24
2.4	1/07/12	Amended to incorporate the Water Industry Act 2012, provisions relating to the NECF and remove all references to the Barley Exporting Act 2007 and to clarify the role and powers of the Commission	20
2.5	05/09/13	Amended to clarify the role and powers of the Commission	19
2.6	August 2021	New functions included and updated to new template	20

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Glossary of terms

AAR Act	Means the <i>AustralAsia Railway (Third Party Access) Act 1999 (SA)</i> , as in force from time to time and, where the context allows, includes all Regulations and Proclamations made under that Act.
Commission	Essential Services Commission, established under the <i>Essential Services Commission Act 2002</i> .
Electricity Act	Means the <i>Electricity Act 1996 (SA)</i> , as in force from time to time and includes all Regulations and Proclamations made under that Act.
ESC Act	<i>Essential Services Commission Act 2002</i> .
Essential services	Means any of the following: <ul style="list-style-type: none"> ▶ electricity services ▶ gas services ▶ water and sewage services ▶ maritime services ▶ rail services ▶ grain handling services, and ▶ any other services prescribed for the purpose of this definition.
Gas Act	Means the <i>Gas Act 1997 (SA)</i> , as in force from time to time and includes all Regulations and Proclamations made under that Act.
LG Review Act	Means the <i>Statutes Amendment (Local Government Review) Act 2021</i> , as in force from time to time, and, where the context allows, includes all Regulations and Proclamations made under that Act.
Licensee	Means a person who holds a licence issued pursuant to Part 3 of the Electricity Act or Gas Act and Part 2 of the Barley Act .
Maritime Access Act	Means the <i>Maritime Services (Access) Act 2000 (SA)</i> , as in force from time to time, and, where the context allows, includes all Regulations and Proclamations made under that Act.
National Electricity Law	Means the National Electricity Law, as contained within the <i>National Electricity (South Australia) Act 1996</i> .
National Electricity Rules	Has the meaning given to that term in the National Electricity Law .
PDI Act	Means the <i>Planning, Development and Infrastructure Act 2016</i> , as in force from time to time, and, where the context allows, includes all Regulations and Proclamations made under that Act.
ROA Act	Means the <i>Railways (Operations and Access) Act 1997 (SA)</i> , as in force from time to time, and, where the context allows, includes all Regulations and Proclamations made under that Act.
Regulated entity	Includes a Licensee , an “access provider” under the AAR Act , an “operator” under the ROA Act , and a “regulated operator” under the Maritime Access Act .

Regulated industry	Means a specified industry, or specified industries, consisting of, involved in or related to the provision of essential services , declared by an Act to constitute a regulated industry for the purposes of the ESC Act .
Water Industry Act	Means the <i>Water Industry Act 2012 (SA)</i> , as in force from time to time and includes all Regulations and Proclamations made under that Act.

1 Introduction

1.1 Purpose of the Policy

The **Commission's** central objective in undertaking enforcement activity is to encourage and facilitate a culture of compliance by **regulated industries** and other industries that provide **essential services** in which the **Commission** has a regulatory role, to ensure the protection of the long term interests of South Australian consumers. The **Commission** is committed to achieving and maintaining compliance with all the legislative and regulatory instruments for which it is responsible in a fair, consistent and proper manner.

The purpose of this Policy is to outline the:

- ▶ statutory powers of the Commission relating to enforcement
- ▶ range of available strategies and measures for promoting and facilitating compliance with the regulatory regime administered by the Commission
- ▶ range of enforcement sanctions available to the Commission in the event of non-compliance and how and when they should be applied
- ▶ criteria against which enforcement decisions are made to ensure fair, consistent and proper decision-making, and
- ▶ procedures that will be followed by the Commission in the event of an alleged breach of a statutory obligation.

It is important to note that this document is to be used as a guide only. It is not intended to limit in any way the **Commission's** powers or discretion to enforce compliance with the provisions of the relevant Acts or other regulatory instruments.

Through reporting on compliance activities in its annual report, the **Commission** is accountable to the public on its commitment to effective industry regulation and the protection of consumer's long term interests.

1.2 Objectives of the ESC Act

The **ESC Act** requires that in performing its functions under the **ESC Act**, the **Commission** have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of **essential services**.

The **ESC Act** also provides that at the same time, the **Commission** must have regard to the need to:

- ▶ promote competitive and fair market conduct
- ▶ prevent misuse of monopoly or market power
- ▶ facilitate entry into relevant markets
- ▶ promote economic efficiency
- ▶ ensure consumers benefit from competition and efficiency
- ▶ facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment, and
- ▶ promote consistency in regulation with other jurisdictions.

Therefore, in its monitoring and enforcement activities, the **Commission** needs to consider its primary objective and have regard to the enumerated matters.

1.3 Role of the Commission

The **Commission**, as a statutory authority, has the generic functions and powers vested in it by the *Essential Services Commission Act 2002* (**ESC Act**) and additional functions and powers arising from industry regulation Acts such as:

- ▶ the *Electricity Act 1996* (**Electricity Act**)
- ▶ the *Gas Act 1997* (**Gas Act**)
- ▶ the *Water Industry Act 2012* (**Water Industry Act**)
- ▶ the *AustralAsia Railway (Third Party Access) Act 1999* (**AAR Act**)
- ▶ the *Railways (Operations and Access) Act 1997* (**ROA Act**)
- ▶ the *Maritime Services (Access) Act 2000* (**Maritime Access Act**).
- ▶ *Planning, Development and Infrastructure Act 2016* (**PDI Act**), and
- ▶ *Statutes Amendment (Local Government Review) Act 2021* (**LG Review Act**).

Many of these industry regulation Acts contain offence provisions.

Broadly speaking, the role of the **Commission** is to set prices, issue licences and establish service standards and conditions for the industries that it is empowered to regulate.

To be effective in its role as regulator, the **Commission** must be able to respond to non-compliance by a **regulated entity** by enforcing legislation and its regulatory decisions under that legislation.

1.4 Definitions and Interpretation

In this Policy, words and phrases presented in a bold italic font such as **this** are defined for the purposes of interpreting this Policy in the Glossary. The Glossary seeks to provide clarity and reduce the risk of ambiguity in the interpretation of this Policy.

The Policy seeks to provide definitions consistent with those given in industry regulation Acts. Where words and phrases are not defined in the glossary to this Policy, they shall have the meaning given to them by the relevant industry regulation Act or any other applicable regulatory instrument.

2 Powers of the Commission

2.1 Statutory Enforcement Powers of the Commission

To ascertain the precise enforcement powers of the **Commission**, it is helpful to examine the functions and powers vested in the **Commission** by each of the industry regulation Acts which currently fall within its regulatory purview.¹

2.1.1 ESC Act

Pursuant to the **ESC Act** the Commission has the following functions:

- ▶ to regulate prices and perform licensing and other functions under relevant industry regulation Acts
- ▶ to monitor and enforce compliance with and promote improvement in standards and conditions of service and supply under relevant industry regulation Acts
- ▶ to make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operations of a **regulated industry** and other industries that provide **essential services** in which the **Commission** has a regulatory role, or regulated entities
- ▶ to provide and require consumer consultation processes in **regulated industries** and other industries that provide **essential services** in which the **Commission** has a regulatory role, and to assist consumers and others with information and other services
- ▶ to advise the Minister on matters relating to the economic regulation of regulated industries, including reliability issues and service standards
- ▶ to advise the Minister on any matter referred by the Minister
- ▶ to administer the ESC Act
- ▶ to perform functions assigned to the Commission under the ESC Act or any other Act, and
- ▶ in appropriate cases, to prosecute offences against the ESC Act or a relevant industry regulation Act.

Thus, according to the **ESC Act**, the **Commission** has the following clear enforcement powers:

- ▶ to monitor and enforce compliance with standards and conditions of service and supply in the industries in which it has a regulatory role
- ▶ to enforce pricing determinations under the **ESC Act** by written order, and
- ▶ to conduct prosecutions for contraventions of the **ESC Act** and relevant industry regulation Acts.

2.1.2 Electricity Act

Section 6A of the **Electricity Act** sets the **Commission** the functions of:

- ▶ price regulation and other functions and powers conferred by the **Electricity Act**, such as;
 - licensing of electricity entities
 - monitoring and reporting on the performance of licensed entities
 - making industry codes
 - administering the Residential Energy Efficiency Scheme (REES)

¹ This section will be updated as new industry regulatory responsibilities are given to the Commission by the Government.

- setting the Electricity Retailer Feed-In Tariff Premium, and
- ▶ fulfilling any other functions and powers conferred by regulation under the **Electricity Act**, such as setting conditions relating to market contracts without an early termination fee that are required to be offered.

2.1.3 Gas Act

Section 6A of the **Gas Act** sets the **Commission** the functions of:

- ▶ price regulation and other functions and powers conferred by the **Gas Act**; such as;
 - licensing of gas entities;
 - monitoring and reporting on the performance of licensed entities;
 - making industry codes;
 - administering the Residential Energy Efficiency Scheme (REES); and
- ▶ fulfilling any other functions and powers conferred by regulation under the **Gas Act**, such as setting conditions relating to market contracts without an early termination fee that are required to be offered.

2.1.4 AAR Act

While railway services are **essential services**, the industry of providing a railway infrastructure service is not a **regulated industry** for the purposes of the **ESC Act**. Therefore, the enforcement powers conferred upon the Commission pursuant to the **ESC Act** do not apply in relation to the Commission's role under the **AAR Act**. The **Commission's** functions and powers under the **AAR Act** apply in accordance with the statutory scheme set out in the **AAR Act**. The **AAR Act** assigns the following specific functions to the **Commission**:

- ▶ monitoring and enforcing compliance with the AustralAsia Railway (Third Party Access) Code (the Railway Code), and
- ▶ fulfilling any other functions contemplated by the Railway Code.

Pursuant to this Act, the **Commission** has a clear power to monitor and enforce compliance with the Railway Code.

2.1.5 ROA Act

The industry of providing for the operation of railways and access to railway services is not a regulated industry for the purposes of the **ESC Act**. The Commission was proclaimed as the Regulator for the purposes of the **ROA Act** on 18 March 2004. The Commission's functions and powers in the **ROA Act**, therefore, apply in accordance with the statutory scheme in the **ROA Act**. The **ROA Act** assigns the following specific functions to the Commission:

- ▶ monitoring and enforcing compliance with Part 3 of the **ROA Act** – general rules for conduct of business
- ▶ monitoring the costs of rail services under the **ROA Act**
- ▶ making an application to the Supreme Court for appointment of an administrator where a rail operator becomes insolvent, ceases to provide railway services or fails to make effective use of the infrastructure of the State
- ▶ establishing pricing principles
- ▶ establishing requirements for information about access to rail services and determining the price to be charged for such information

- ▶ conciliation of access disputes and referral of disputes to arbitration, and
- ▶ fulfilling any other functions and powers conferred by regulation under the **ROA Act**.

The **Commission** is also granted the right to apply to the Supreme Court for injunctive or compensatory remedies where there has been a contravention of a provision of the **ROA Act**. Thus, the **Commission** has a general enforcement power in relation to those functions it is given under the **ROA Act**.

2.1.6 Maritime Access Act

The **Maritime Access Act** assigns the following functions to the **Commission**:

- ▶ monitoring and enforcement of compliance with the **Maritime Access Act**
- ▶ issuing of standards for the provision of a maritime service
- ▶ conciliation and arbitration (if the **Commission** decides to act as arbitrator) of an access dispute involving a regulated maritime service, and
- ▶ review of the access regime for maritime services after three years.

Thus, pursuant to the **Maritime Access Act**, the **Commission** has a general compliance, monitoring and enforcement role in relation to the Act. However, the Commission's enforcement and compliance powers under the **ESC Act** only apply to those parts of the Act that are concerned with "essential maritime services", as they are defined in the Act as **regulated industries** for the purposes of the **ESC Act**. In relation to maritime services that are not defined as **essential services** by the **Maritime Access Act**, the Commission's role is limited to performing the functions expressly assigned to it by that Act.

2.1.7 Water Industry Act

The Water Industry Act assigns the following functions to the Commission (in addition to those granted under the **ESC Act**):

- ▶ the licensing, price regulation and other functions and powers conferred by the Act, and
- ▶ any other functions and powers conferred by regulation under the Act.

Pursuant to the **Water Industry Act**, the **Commission** may suspend or cancel a licence in certain circumstances. There are also circumstances in which the **Commission** has the power to take over operations of a water industry entity.

If it appears to the **Commission** that a person has contravened a provision of Part 4 of the **Water Industry Act**, the **Commission** may issue a warning notice to that person.

2.1.8 PDI Act

The PDI Act assigns the regulatory function to determine funding arrangements for any infrastructure delivery schemes established by the State Government.²

2.1.9 LG Review Act

The Commission has functions relating to the provision of advice on the appropriateness of amendments to, and revenue sources for, local councils' long-term financial and infrastructure and asset management plans.³

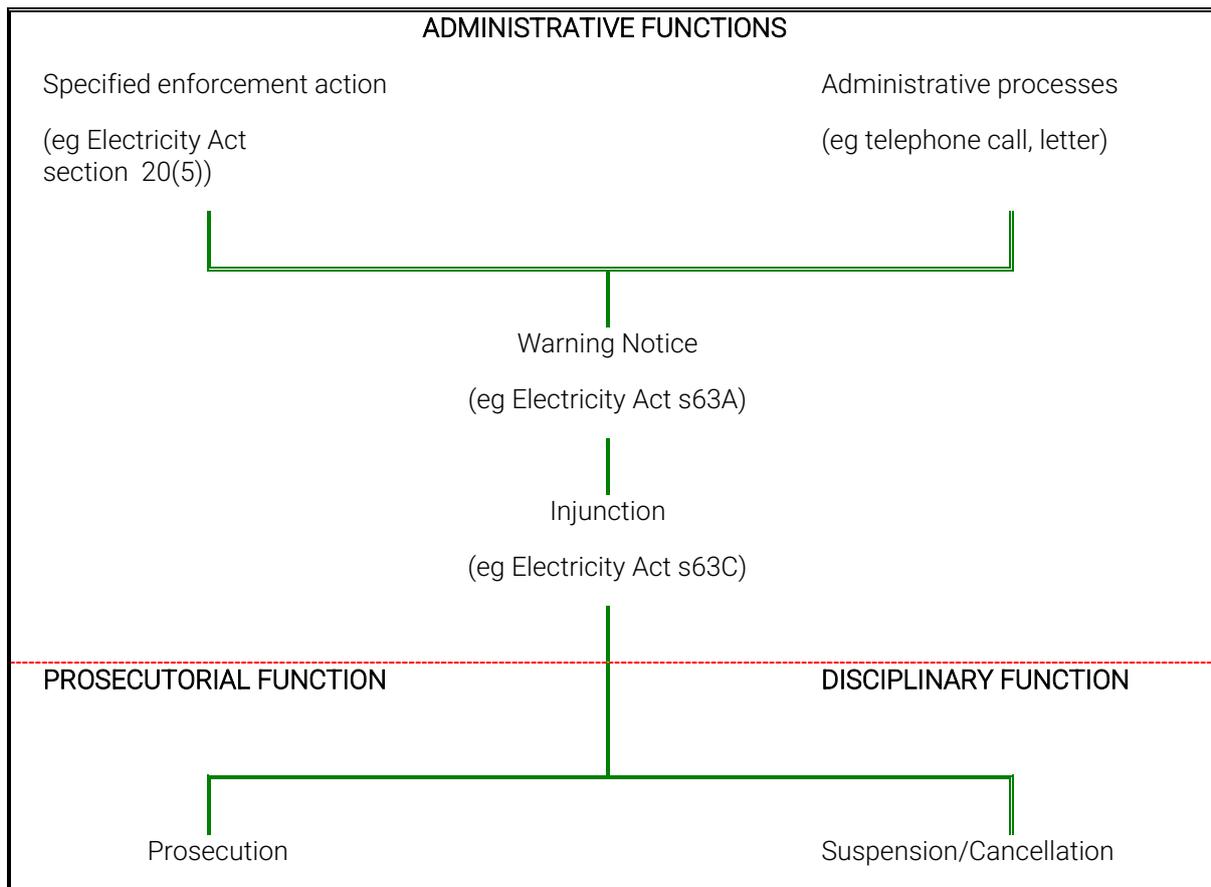
² Not yet commenced, as the enabling regulations are not in place.

³ Received Royal assent on 17 June 2021, but not yet commenced.

3 Schematic Overview

The **Commission's** enforcement processes comprise three distinct functions:

- ▶ Administrative functions – the exercise of functions/roles which are prescribed under legislation or arise in the ordinary course of performance of a legislative function, such as licensing.
- ▶ Disciplinary functions – the exercise of powers granted under legislation to protect the public.
- ▶ Prosecutorial functions – the exercise of powers granted under legislation to bring punitive action against an entity which does not comply with legislative requirements.



3.1 Interplay between enforcement functions

As a general rule, exercise of the **Commission's** administrative functions is a necessary precursor to the escalated prosecutorial or disciplinary functions. However, the **Commission** may, at its discretion or where expressly required to do so by legislation, commence an enforcement action at the prosecutorial or disciplinary level. In exercising its discretion, the **Commission** will, without limitation, have regard to the following matters:

- ▶ The seriousness of the consequences of the alleged contravention or offence for South Australian consumers, and
- ▶ The seriousness of the impact of any enforcement action on the alleged contravener or offender.

4 Compliance strategies

4.1 Introduction

The role of enforcement must be considered within the context of a range of strategies that, as a whole, are designed to promote and facilitate compliance. While flexibility is important, as a general rule the **Commission** will approach compliance by way of the following range of strategies:

- ▶ education, information and assistance
- ▶ monitoring of legislative compliance
- ▶ audit, and
- ▶ application of prosecutorial and disciplinary enforcement measures.

4.2 General Compliance Strategies

4.2.1 Education, information and assistance

Information and education are effective tools in ensuring compliance with regulatory requirements. To this end, measures will be taken to ensure that those bound by new regulatory requirements are made aware of their legal obligations and the rationale for new regulation or regulatory decisions.

In addition, specific support is provided to those needing assistance with regulatory requirements, i.e. preparation of compliance reports, interpretation of licence conditions and advice relating to regulatory documents.

4.2.2 Compliance Monitoring

The **Commission** has in place a system of compliance monitoring for the electricity and gas supply industries in accordance with Energy Industry Guideline No. 4, Compliance Systems and Reporting and for the water industry in accordance with Water Industry Guideline No. 1, Compliance Reporting. Each **Licensee** is required to submit reports to the **Commission** that attest to its compliance with its licence conditions and demonstrate that appropriate compliance systems are in place. Each **Licensee** is required to report any instances of non-compliance with licence conditions as part of this reporting process.

The Information Kit: SA Rail Access Regime sets out the compliance system relevant to those operators who are subject to the **ROA Act**, whilst the Rail Industry (Tarcoola-Darwin) Guideline No. 4: Compliance Systems and Reporting sets out the system with which operators who are subject to the **AAR Act** must comply.

At this time it is not the intention of the **Commission** to put into effect similar compliance reporting arrangements for the **regulated entities** under the **Maritime Access Act**. However, the **Commission** will continue to closely monitor a regulated operator's performance in reporting timely and accurate information as required under the existing access price information and regulatory accounts guidelines.

4.2.3 Audit

The **Commission** may request, or may itself undertake, an audit of certain activities to ensure compliance with specific aspects of the regulatory regimes.

4.2.4 Collection of Information

Pursuant to Part 5 of the ESC Act, the Commission may, by written notice, require a person to give to the Commission, within a time and in a manner stated in the notice, information in the person's possession that the Commission reasonably requires for the performance of its functions.

The **Commission** is entitled to collect information that:

- ▶ could affect the competitive position of a **regulated entity** or other person, or
- ▶ is commercially sensitive for some other reason.

However, it will consider such information confidential information and will not disclose such information otherwise than as authorised under Part 5 of the **ESC Act**.

The power of the **Commission** to make a requirement under Part 5 of the **ESC Act** includes, for the purposes of an inquiry conducted by the **Commission** under Part 6 of the **ESC Act**, the power to require a person to attend before the **Commission** at a specified time and place to answer questions or produce documents or records as required by the **Commission**.

Information classified by the **Commission** as being confidential information is not liable to disclosure under the *Freedom of Information Act 1991*.

4.3 Administrative Enforcement Measures

Despite the above measures that are intended to promote and encourage compliance, the **Commission** recognises that there will be instances of non-compliance that require enforcement measures to ensure compliance with the regulatory regime. In the event of clear non-compliance, the **Commission** will assess each circumstance on its merits and, depending upon the gravity of any offence, apply an enforcement measure within the context of a series of alternatives.

Where possible, warnings and a collaborative approach to compliance will be preferred to prosecution and suspension or cancellation of a licence but the **Commission** will proceed with these latter measures in appropriate circumstances and when other measures have not had the desired effect. The following enforcement measures are available to the **Commission**.

4.3.1 Verbal warnings

Verbal warnings will generally be issued by the **Commission** where a breach has occurred for the first time or it is of a less serious (or technical) nature and future compliance is likely. A detailed note will be made on the relevant file that a verbal warning has been issued and a copy forwarded to the **regulated entity**. At the time of issuing the verbal warning, the **regulated entity** will be advised that it is intended that no further action will be taken subject to immediate action (i.e. within several business days) being taken to remedy the breach.

4.3.2 Written warnings

A formal letter, containing full details of the alleged breach, will generally be issued by the **Commission** in circumstances where there has been more than a trivial, but not a serious, breach of a licence condition or repeated instances of unremedied breaches of trivial matters. The **regulated entity** will be required to sign and return a copy of the letter to the **Commission**. The letter will require that the alleged breach be remedied by a particular date and that appropriate compliance measures be put in place to avoid any future breaches.

4.3.3 Public reporting

Adverse public reporting is a very effective enforcement measure and will be pursued by the **Commission** when there is clear factual evidence to ground any breach or offence allegations. The **Commission** produces an annual report on the performance of regulated electricity and gas businesses in South Australia. This would be the most likely forum in which public reporting of continuing breaches or offences would take place. Such reporting would most likely be pursued after attempts to remedy the breach had been undertaken by the **Commission** and these measures had not resulted in compliance. However, the **Commission** may also seek to name offenders in State or national newspapers or in relevant industry publications.

4.3.4 Warning Notices

The **ESC Act** and relevant industry regulation Acts provide that the **Commission** may issue formal written Warning Notices to a **regulated entity** where it appears to the **Commission** that the **regulated entity** has been guilty of a contravention of the Act.

The **Commission** will use this measure where, in the **Commission's** view, the alleged contravention is of a more serious nature or where previous enforcement actions have not lead to compliance.

In such cases a written Warning Notice will be sent to the **regulated entity** warning that the **regulated entity** will be prosecuted unless:

- ▶ if the contravention is capable of being rectified, the **regulated entity** takes the action specified in the Warning Notice to rectify the contravention within a specified period, and
- ▶ the **regulated entity** gives the **Commission** an assurance, in the terms specified in the Warning Notice and within the period specified in the Warning Notice, that the **regulated entity** will avoid in future such contravention.

4.3.5 Injunctions

The **ESC Act**, the **Water Industry Act**, the **Electricity Act**, the **Gas Act**, the **AAR Act** and the **ROA Act** contain provisions for the **Commission** to seek an injunction from the District Court where it appears that a **regulated entity** has engaged or proposes to engage in conduct that constitutes or would constitute a contravention of the Act.

If the District Court is satisfied of the **Commission's** case, it may grant an injunction requiring the **regulated entity** to take certain action to remedy the adverse consequences of contravention. The Acts outline the types of actions which may be required by an injunction sought by the **Commission**:

- ▶ the refunding of an amount wrongly paid as a result of contravening the Act
- ▶ the payment of compensation to a person who has suffered loss, damage or injury as a result of the contravention
- ▶ the disclosure of information, and
- ▶ the publication of advertisements relating to the contravention.

In the ordinary course, a risk of bringing injunctive action is that the applicant may be required to give an undertaking as to damages. However, the industry regulation Acts expressly provide that the **Commission** will not be required to provide such an undertaking when seeking an injunction under the Act.

The **Commission** will use its injunctive powers in the most serious cases of contravention which do not, in the **Commission's** view, warrant prosecution or disciplinary action. Injunctions may also be sought as a part of any prosecution where appropriate.

4.4 Prosecution and Disciplinary Action

Prosecution and disciplinary action are not measures which exist along an escalating scale of enforcement powers. The power to prosecute for contravention of an Act and the power to discipline a **regulated entity** for unacceptable conduct, which might include the contravention of an Act, are coexistent powers capable of simultaneous exercise. That is to say, a prosecution and disciplinary action might be commenced at the same time, or might be commenced one after the other.

In every case, the **Commission** has discretion to undertake prosecution and/or disciplinary action; the power to prosecute encompasses the power not to prosecute, and the power to discipline encompasses the power not to discipline.

The **Commission** would generally be minded, in circumstances where an alleged breach of an Act is the conduct complained of, not to undertake disciplinary action until and unless a conviction for that breach has been imposed under a prosecution. This is due to the fact that a prior conviction for the actions complained of may serve to satisfy any requirements for making out proper cause for disciplinary action.

4.4.1 Prosecution

The purpose of a prosecution is to punish the person or **regulated entity** for contravention of an Act. Prosecutions are therefore punitive in nature, with punishment being imposed on the offender if an alleged contravention is proven in Court. Punishments imposed under a prosecution are intended not only to have a direct punitive impact on the offender but are also aimed at deterring others from engaging in similar conduct.

In general, prosecution will only apply in the following circumstances:

- ▶ in very serious or exceptional cases where other less formal measures have not resulted in compliance or are not considered to be desirable, or
- ▶ where it is clear that the evidence is available to satisfy the relevant burden of proof (beyond reasonable doubt).

However, it is to be noted that, while the trivial nature of an infringement may be a factor in a decision not to prosecute, repeated contraventions may result in a decision to proceed with a prosecution.

The **Commission** has discretion to decide whether or not to approach the relevant Minister or the Attorney-General to request that a prosecution for an alleged breach be initiated.

The most important factor in any decision to prosecute under any of the abovementioned Acts, should be whether the evidence available supports a prima facie case for prosecution. The resources available for prosecutorial action are finite and should not be squandered on pursuing inappropriate matters. Advice provided by the Crown Solicitor's Office as to whether or not the case demonstrated a prima facie case would be material in any decision to proceed with a prosecution.

If there are any mitigating factors (i.e. that the **Licensee** has co-operated and used its best endeavours to address the breach) that the **Commission** believes the court should take into account in determining an appropriate penalty, the **Commission** will bring these matters to the attention of the Minister or the Attorney-General during the prosecutorial process.

If it is determined that a prosecution is not supported on the available evidence, the **Commission** may determine that no further action should be taken.

4.4.2 Disciplinary Action

The guiding principle for disciplinary actions is that such action is to be taken entirely for the protection of the public. Disciplinary actions are therefore entirely protective in nature; notwithstanding that the exercise of the disciplinary function may involve a great deprivation to the **regulated entity**, there is not considered to be any element of punishment involved in disciplinary processes.

As a result, disciplinary actions will only be commenced by the **Commission** where the outcome of a successful action will enhance the long-term interests of South Australian consumers of **essential services**, having regard to the factors specified in section 6(1)(b) of the **ESC Act**.

Clearly, these enforcement measures are drastic and it is intended that they be imposed only in circumstances where there has been a serious and exceptional breach. Examples of serious breaches which might give rise to the **Commission** instituting disciplinary measures are:

- ▶ ongoing failure to comply with a mandatory licence condition
- ▶ operating without a licence, and
- ▶ deliberately misleading the **Commission**.

5 Enforcement criteria

5.1 Matters for Consideration

Enforcement decisions must be made fairly, consistently and properly. The following factors will be considered by the **Commission** in determining whether or not to impose any enforcement measure and the nature of that measure. (The relevance of and weight to be accorded to each matter (or any other factors) will depend upon the particular circumstances of each case). The order of the following matters does not indicate a priority of one over another:

- ▶ whether the offence is a trivial infringement
- ▶ whether there was a deliberate decision to infringe an obligation
- ▶ whether there is a history of non-compliance (or compliance) with the South Australian regulatory regime
- ▶ whether the public could realistically expect some punitive action to be imposed as a result of the breach
- ▶ whether the offence is remedied quickly or there is a demonstrated willingness to remedy the non-compliance
- ▶ whether there was a failure to put reasonable measures in place to avoid a contravention
- ▶ whether there is an appropriate compliance program in place
- ▶ whether the offence was inadvertent or accidental
- ▶ whether a prosecution would be likely to create an incentive for compliance and deter future breaches
- ▶ whether the offence was beyond the person's control, i.e. as a consequence of a force majeure event or incident
- ▶ any gain (financial or otherwise) made as a result of the contravention
- ▶ the degree of harm (actual or potential) in the event of continuing non-compliance (including financial loss to consumers)
- ▶ whether the person promptly and voluntarily disclosed the offence and co-operated with the investigation of the offence by the Commission
- ▶ the estimated length, complexity and expense involved in an investigation and prosecution, and
- ▶ the factors set out in section 6 of the **ESC Act**.

6 Procedures for prosecuting an offence

This section outlines briefly the procedural steps that would be followed if the **Commission** decided to prosecute an offence.

In South Australia offences are divided into three categories (in ascending order of seriousness): summary offences, minor indictable offences and major indictable offences by the *Summary Procedures Act 1921*. These classifications determine how the offence will be dealt with and tried in a court.

6.1 Summary Offences

Any offence for which the maximum penalty is or includes a period of imprisonment not exceeding two years, or a fine of less than \$120,000, is prima facie, a summary offence by virtue of section 5 of the *Summary Procedures Act, 1921 (SA)*.

The **Commission** may approach the relevant Minister (to whom the Act is committed) or the Attorney-General and request that he or she initiate a prosecution of the alleged breach.

Before a final decision to prosecute could be taken it would be necessary to undertake an investigation directed at establishing whether the elements of the offence could be made out to satisfy the requisite burden of proof. The Crown Solicitor's Office would undertake the investigation and general prosecutions work for summary offences. Of course, the advice provided by the Crown Solicitor's Office as to whether or not the case demonstrated a prima facie case would be material in any decision to proceed with a prosecution.

When a decision to prosecute has been taken, a summary offence must be initiated by a complaint and heard by a Magistrate. The complaint contains a statement and particulars of the specific offence. For the summary offences, the complaint must be lodged within 2 years of the date on which the offence is alleged to have been committed.

6.2 Indictable Offences

Section 5 of the Summary Procedures Act, 1921 provides that, with some exceptions, offences that are punishable by a period of 5 years or less of imprisonment or where the maximum fine exceeds \$120,000 are minor indictable offences. Most offences which include a period of imprisonment of greater than five years are classified as major indictable offences.

The **Commission** may approach the relevant Minister (to whom the Act is committed) and request that the Minister initiate a prosecution of the alleged breach. The Attorney-General or the Director of Public Prosecutions (DPP) could also be requested to initiate a prosecution instead of the relevant Minister.

As above, a thorough investigation would need to be undertaken to establish that sufficient evidence existed to warrant the prosecution. Once satisfied of this, a decision would need to be taken by the relevant Minister, Attorney-General or DPP to proceed with the prosecution.

An indictable offence must be initiated by an information in the Magistrates Court. The information contains a statement of the specific offence with which the defendant is charged. It must refer to the section of the appropriate Act that creates the offence. The information also lists the particulars as to the nature of the offence charged.

If the defendant has been charged with a minor indictable offence, the defendant may elect to have the matter dealt with in a superior court or the matter will be dealt with in the Magistrates Court.

The DPP would have the power to take over some prosecutions, namely some of those charging a minor indictable offence. The DPP must take over in the case of a person who has elected to have the matter dealt with as an indictable offence and has been committed to stand trial. (The DPP does not become involved at the committal stage when a Magistrate is deciding whether there is sufficient evidence to send the matter to trial).

The DPP or Crown Solicitor's Office would be requested (if the DPP were to delegate authority to the Crown Solicitor) to undertake the investigation and general prosecutions work for minor indictable offences.



The Essential Services Commission
Level 1, 151 Pirie Street Adelaide SA 5000
GPO Box 2605 Adelaide SA 5001
T 08 8463 4444

E escosa@escosa.sa.gov.au | W www.escosa.sa.gov.au