

Guidelines for the use of Information Gathering Powers for Compliance Purposes

Version control

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Glossary of abbreviations and terms

Authority	Electricity Authority
the Act	Electricity Industry Act
the Code	Electricity Industry Participation Code

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Introduction

1. Under the Electricity Industry Act (the Act), the Electricity Authority (Authority) has the power to require participants to provide certain information for the purposes of carrying out its monitoring, investigation and enforcement functions under the Act.
2. In particular, for the above purposes, the Authority may require industry participants to provide certain information, to permit officers or employees to be interviewed, and to give all other assistance that may be reasonable and necessary to enable the Authority to carry out its functions and exercise its powers. The Authority also has the power in some situations to authorise an employee to search, under a warrant, any place named in the warrant as part of its investigation and enforcement functions.
3. These guidelines set out:
 - (a) an overview of the Authority's information gathering powers under Part 2 of the Act; and
 - (b) the general principles and procedures that the Authority must follow when using its information gathering powers under Part 2 of the Act.
4. The Authority has similar powers under Part 3 of the Act. Further information about the Authority's functions under Part 3 of the Act is set out in the Authority's guidelines on its functions under Part 3 of the Act.

Overview of information gathering powers

Information that the Authority may require

5. Under section 46 of the Act, the Authority may require an industry participant to:
 - (a) provide, within any reasonable time specified by the Authority, any information, papers, recordings, and documents that are in the possession, or under the control, of the participant and that are requested for the purpose;
 - (b) permit its officers or employees to be interviewed (which interview may be recorded) and ensure as far as possible that they are made available for interview and answer truthfully and fully any questions put to them; and
 - (c) give all other assistance and may be reasonable and necessary to enable the Authority to carry out its functions and exercise its powers.

Purposes for which the Authority may require information

6. The Authority may exercise the above powers for the following purposes (set out in section 45 of the Act):
 - (a) carrying out the Authority's monitoring functions, which are to:

- (i) monitor compliance with the Act, the regulations, and the Code;
 - (ii) undertake and monitor the operation and effectiveness of market-facilitation measures under section 16(1)(f); and
 - (iii) undertake industry and market monitoring, and carry out any other function referred to in section 16(1)(g) (i.e. carrying out reviews, studies, and inquiries into any matter relating to the electricity industry); and
- (b) carrying out the Authority's function of investigating breaches or possible breaches of, and enforcing compliance with, Parts 2 and 4 of the Act, the regulations, and the Code.

Power to search

7. The Authority may also authorise an employee of the Authority to search a place, under a warrant issued under the Act, for the purpose of ascertaining whether an industry participant has breached, or may breach, Parts 2 or 4 of the Act, the regulations, or the Code (section 47 of the Act). The purpose for which the Authority may authorise an employee to search a place is to carry out the Authority's function of investigating breaches or possible breaches of, and enforcing compliance with, Parts 2 and 4, the regulations, and the Code.

Use of powers to require information

8. The Authority must only use its powers to require information under section 46 for one of the purposes set out in section 46. Therefore, before requesting any information, the Authority must be satisfied that the information requested relates to a purpose set out in section 45.

Nature of information that Authority can request

9. The Authority may require an industry participant to provide any information, papers, recordings and documents that are in the possession, or under the control, of the participant. In general, information may consist of facts, knowledge and memory. A document means a document in any form whether signed or initialled or otherwise authenticated by its make or not, and includes:
- (a) any writing on any material;
 - (b) any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored;
 - (c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
 - (d) any book, map, plan, graph, or drawing; and

- (e) any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.
10. The Authority will seek legal advice if there is any doubt about the nature of the information that it can request.

Request for information

11. When the Authority requests any information, papers, recordings and documents from a participant, the Authority must set out the request in writing. The request must:
- (a) set out details of the information, papers, recordings and documents required;
 - (b) explain the reasons for the request (including the purpose for which the Authority is requesting the information and enough information to enable the participant to be satisfied that the request relates to one of the purposes under section 45);
 - (c) specify the statutory provision under which the request is made;
 - (d) specify the time and date by which the Authority requires the information; and
 - (e) specify the place to which the information must be delivered.
12. The Authority must send the request to the relevant participants' place of business.

Timeframe for responding to request

13. The Authority will provide no less than 10 working days for a participant to provide the requested information, unless the information is needed urgently for one of the purposes set out in section 45 of the Act. The length of time specified by the Authority will depend on the nature of the information sought and the resources likely to be required to process the notice (for example, where the information is likely to require substantial collation, the Authority should allow a longer period of time).
14. The Authority will consider requests from participants for extensions of time on a case-by-case basis. Requests for extensions should be in writing and include the participants' reasons for seeking the extension. Requests for extensions should be submitted to the Authority before the specified deadline in the request for information.

Use of information provided to the Authority under section 46

15. The Authority may only use the information obtained under section 46 for the purpose for which the information was sought. As outlined above, the purpose for which the information was sought must be one of the purposes listed in section 45 of the Act.

Subject to the Authority's legal rights and obligations, the Authority must ensure that:

- (a) all information obtained under section 46 (including voice recordings and transcripts obtained by the Authority from an interview under section 46(2)(b)) is used only for the purpose for which the information was sought;
 - (b) the Authority complies with its obligations under the Privacy Act 1993 and the Official Information Act 1982;
 - (c) it does not disclose any confidential information received, except to the extent that disclosure is required to enable the Authority or other person to carry out its obligations and duties under the Act, the regulations or the Code, or is otherwise compelled by law; and
 - (d) all information obtained under section 46 is securely stored and, where appropriate or required, disposed of in accordance with the Public Records Act 2005.
16. The Authority must require participants who provide information to the Authority to identify any information that the participant considers is confidential and the reasons why the participant considers that the information is confidential.

Privileges protected

17. Section 46 of the Act does not limit any claim of legal professional privilege over any information covered by a request for information or search warrant.
18. If the Authority requires an industry participant to do anything under section 46, neither the industry participant nor any officer or employee of the industry participant is excused from answering a question or giving any information or documents on the ground that to do so may incriminate or tend to incriminate the participant or the officer or employee. However, any self incriminating statement or document made or given by an officer or employee, or an industry participant as an individual, is not admissible as evidence in any criminal or civil proceedings against that person (section 48 of the Act).

Interviews of industry participants

19. For the purposes of carrying out the Authority's monitoring, investigation and enforcement functions outlined above, the Authority may require an industry participant to permit its officers or employees to be interviewed under section 46(2)(b) of the Act.
20. Any questions put to industry participants (or their officers or employees) in such interviews must relate to the purpose for which the Authority has required the person to attend the interview.

Request for participant to attend interview

21. When the Authority requires a person to attend an interview, the Authority must set out the request in writing. The request must:
 - (a) include an outline of the subject matter of the interview and the likely questions to be asked;
 - (b) specify the person who is required to attend the interview;
 - (c) explain the reasons for the request (including the purpose for which the Authority is requesting the interview and enough information to enable the participant to be satisfied that the request relates to one of the purposes under section 45);
 - (d) specify the statutory provision under which the request is made;
 - (e) specify a suggested time and date for the interview; and
 - (f) specify a suggested place for the interview.
22. The Authority must send the request to the relevant participants' place of business, as recorded in the register of industry participants.

Recording of interviews

23. An interview under section 46(2)(b) may be recorded.
24. The person conducting the interview must explain to the interviewee that the interview is to be recorded before the interview starts to be recorded.

Transcripts of interviews

25. If a transcript of the interview is created, the Authority must provide a transcript to the interviewee as soon as practicable and provide the opportunity for the interviewee to correct any mistakes in the transcript.

Attendance at interviews

26. Industry participants are required to ensure, as far as possible, that its officers or employees are made available for interview and that they answer truthfully and fully any questions put to them.
27. The Authority must allow a person who is required to attend an interview to have a legal representative accompany him or her to the interview.
28. The Authority must conduct interviews during usual business hours, unless there are exceptional circumstances that mean that the interviewee is unable to attend during usual business hours. The Authority must allow reasonable breaks during the interview.

Compliance with a requirement under section 46

29. If an industry participant fails to comply with a requirement of the Authority under section 46, the failure is treated as if it was a breach of the Code and the Authority may apply to the Rulings Panel for any order under section 54. The orders that the Rulings Panel may make under section 54 include private warnings, pecuniary penalties of up to \$200,000 and compliance orders.

Search powers

30. As set out above, the Authority may authorise an employee of the Authority to search a place, under a warrant issued under the Act, for the purpose of ascertaining whether an industry participant has breached, or may breach, Parts 2 or 4 of the Act, the regulations, or the Code.
31. The Authority may only authorise an employee to search a place for the purpose of carrying out the Authority's function of investigating breaches or possible breaches of, and enforcing compliance with, Parts 2 and 4 of the Act, the regulations, and the Code.
32. For an authorised employee to obtain a warrant, a District Court Judge, Justice, Community Magistrate, or a Court Registrar (not being a constable) must authorise that person to search a place specified in the warrant. To obtain such authorisation, there must be reasonable grounds to believe that it is necessary, for the purpose of ascertaining whether an industry participant has breached, or may breach, Parts 2 or 4, the regulations, or the Code, for an authorised person to search the particular place (section 47 of the Act).

Execution of warrant

33. A warrant issued under section 47 of the Act authorises the person named in the warrant to:
 - (a) enter and search the place specified in the warrant on one occasion within 30 days of the date of issue of the warrant at a time that is reasonable in the circumstances;
 - (b) use such assistance as is reasonable in the circumstances;
 - (c) use such force for gaining entry and for breaking open any article or thing as is reasonable in the circumstances;
 - (d) search for and remove documents or any article or thing that the person executing the warrant believes on reasonable grounds may be relevant;
 - (e) where necessary, take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant; and

- (f) (where necessary, require a person to reproduce, or assist any person executing the warrant to reproduce, in usable form, information recorded or stored in a document.
34. A person assisting the person executing the warrant also has the powers referred to in (c) to (e) above.
35. The person executing the warrant (and any person assisting that person) must ensure that the warrant is executed in accordance with the conditions specified in the warrant. The person executing the warrant must also:
- (a) have the warrant with him or her;
 - (b) produce the warrant on initial entry and, if requested, at any subsequent time;
 - (c) identify himself or herself to the owner or occupier or person in charge of the place if that person is present; and
 - (d) produce evidence of his or her identity.
36. The occupier or person in charge of the place searched must provide the person authorised to execute the warrant with all reasonable facilities and assistance in executing the warrant. The Authority expects that this may include, for example, identifying and locating the information required and reproducing information stored or recorded (for example information on a computer).

Searches carried out at a time when the owner or occupier is not present

37. If the search is carried out at a time when the owner or occupier is not present, the person executing the warrant must, before completing the search, leave in a prominent place at the place searched, a written notice stating:
- (a) the date and time when the warrant was executed; and
 - (b) the name of the person who executed the warrant.

Removal of documents, articles or things from the place searched

38. If a document, article or thing is removed from the place being searched, the person executing the warrant must, before completing the search, leave in a prominent place at the place searched a schedule of documents or articles or things that were removed during the search.
39. However, if it is not practicable to prepare a schedule before completing the search, or if the owner or occupier of the place being searched consents, the person executing the warrant may instead leave a notice stating that the documents/articles/things have been removed during the search and that, within 7 days of the search, a schedule will be delivered, left or sent which states what documents/articles/things have been

removed. If that is the case, the person executing the warrant must, within 7 days of the search, deliver a schedule to the owner or occupier, leave a schedule in a prominent position at the place searched, or send a schedule by mail to the owner or occupier of the place searched. The schedule must state:

- (a) the documents, articles, and things that have been removed;
- (b) the location from which they were removed; and
- (c) the location at which they are being held.

Use of information obtained in search

- 40. The Authority, or any person authorised by the Authority for the purpose, may inspect and take copies of any documents or extracts from them obtained pursuant to a warrant issued under section 47.
- 41. The Authority must ensure that it complies with paragraph 15 above in relation to any information obtained in a search.

Powers of investigators appointed to investigate breaches of the Code

- 42. Under regulation 13 of the Electricity Industry (Enforcement) Regulations 2010, an investigator appointed by the Authority to investigate allegations of breaches of the Code may exercise the powers of the Authority under sections 46 and 47 of the Act.