



The Hon Katrina Hodgkinson MP

Minister for Primary Industries
Minister for Small Business

IM13/14115



Mr James Cox
Chief Executive Officer
Independent Pricing and Regulatory Tribunal
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21 JUN 2013

Dear Mr Cox

Thank you for your letter of 3 April 2013 (your reference: 12/516) seeking comment on IPART's draft revision of the Energy and Water Licence and Compliance Policy.

IPART's draft revised Policy raises no new issues of concern for the NSW Office of Water. However, the Office of Water has suggested a minor addition for Chapter 2.2 where it states that: "IPART may decide to refer a contravention to another regulatory agency where we think that this agency is better suited to investigate the matter". It is recommended that the following sentence be inserted at the end of the fourth paragraph of Chapter 2.2.

"Regardless of any proposed action by IPART, details of any alleged breach of legislation that comes to its attention will be reported without delay to the appropriate regulatory authority."

The Sydney Catchment Authority has offered a number of comments on the draft revision, which are summarised in the attachment to this letter.

I trust that these comments will be taken into consideration prior to issuing a final Policy.

Yours sincerely

Katrina Hodgkinson MP
Minister for Primary Industries

Encl.

Draft Revision of the Energy and Water Licence and Compliance Policy Sydney Catchment Authority

2.1 Establishing whether a contravention has occurred (page 4):

In this section it states IPART receives compliance information about a licensee's actual or alleged contravention from various sources. The section should clearly state that in all cases where a breach of licence may have occurred IPART needs to satisfy itself of the breach occurring before taking any action.

2.3 Compliance Action (page 5-6):

There are clear distinctions in Section 29A of the *Sydney Water Catchment Management Act 1998* (SWCM Act) in relation to licence contraventions which are innocent or minor (section 29) and those which are committed knowingly (section 29A). The policy would benefit from clear distinction in relation to compliance action for alleged contraventions of an innocent or minor nature and those which are knowingly committed and what constitutes 'knowing'.

The policy could also note that contraventions might result in recommendations or Ministerial Directions.

2.3.2 Undertaking (page 6)s:

IPART does not have legislative powers in relation to undertakings with regard to the SCA. The concept of enforceable undertakings introduces an additional layer of regulatory compliance and penalty exposure which is not authorised by legislation.

There are concerns in relation to the type of action which IPART proposes to take concerning compliance action in the form of undertakings. It is noted that a breach of an undertaking may result in compliance action. The initial remedy which IPART has in relation to a breach which has been knowingly committed is to impose a fine (section 29A (1)). Instead of imposing a fine IPART may require the SCA to do other things which include the sending of information to customers and the publication of notices in newspapers (section 29A (2)).

The intention of IPART to regulate licence compliance, in the absence of enabling legislation, by means of an enforceable undertaking is outside the class of regulatory actions and tools contemplated by the SWCM Act.

2.4 Enforcement Action:

A knowing contravention is said to exist where the licensee has knowledge of the relevant facts constituting the contravention of its operating licence. The knowledge of relevant facts does not of itself constitute a breach of a licence. It is how the facts are used which is relevant. Section 29A (5) of the SWCM Act provides that action may only be taken under section 29A if the SCA knowingly contravened its operating licence.

The manner in which the section is drafted implies an element of intention on the part of the licensee to commit a deliberate act in the knowledge that a particular act or omission would constitute a breach of the licence. This should underpin the policy which should be clear about at what point in the process IPART makes a decision on the factors it will take into account in deciding if enforcement action is warranted (having regard to those matters listed on page 9). There should be a flow chart which sets out the regulatory steps.

IPART is not able to take action under section 29A unless it has considered those matters taken into account in section 29A (7). Clarification is required from IPART as to why those matters listed on page 9 of the draft Policy are relevant consideration for the purpose of the SWCM Act when considering if regulatory action should be taken.

2.4.1 Notice of contravention:

The SWCM Act provides in section 29A (9) that IPART must not take any action unless the Sydney Catchment Authority (SCA) has been given a notice and a reasonable time to make submissions in response to the notice. Section 29A (9) does not make reference to those matters which should be addressed in any submission of reply by the SCA. The draft Policy, in stipulating a timeframe and the matters to be addressed in a submission of reply, goes beyond what is currently authorised under the legislation.