IPART

Independent Pricing and Regulatory Tribunal
New South Wales

Compliance and Enforcement Policy

Policy

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The Independent Pricing and Regulatory Tribunal (IPART)

IPART provides independent regulatory decisions and advice to protect the ongoing interests of the consumers, taxpayers and citizens of NSW. IPART's independence is underpinned by an Act of Parliament. Further information on IPART can be obtained from IPART's website: https://www.ipart.nsw.gov.au/Home.

Tribunal Members

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1 Our compliance and enforcement role

IPART is an independent regulator in New South Wales

The Independent Pricing and Regulatory Tribunal of New South Wales (IPART) provides independent regulatory advice and decisions to protect and promote the ongoing interests of the consumers, taxpayers and citizens of NSW.

We are the independent pricing regulator for water, public transport, and local government, as well as the licence administrator of electricity, gas, major public water utilities and WIC Act[1] licensees, and the scheme administrator and regulator for the Energy Savings Scheme.

We regulate entities within markets and those that are monopolies

We regulate entities that operate in competitive markets and those that are monopolies. In some cases we have a role in safety or public health regulation, in others protection of customers or consumers, and in others protection of the environment.

In our approach to holding regulated entities to account we aim to make the best use of our own resources, and at the same time avoiding imposing excessive costs on regulated entities, which would increase prices for customers and consumers.

This Policy applies across our compliance and enforcement functions

This IPART Compliance and Enforcement Policy applies to all of our regulatory functions where we have a compliance and/or enforcement role:

- Energy network utility regulation
- Energy Savings Scheme
- Public transport prices[2]
- Public water utility licences
- Public water utility prices
- Rail access
- WIC Act licensee prices
- WIC Act licences.

1 *Water Industry Competition Act 2006.*

2 IPART is responsible for determining maximum fares for trips made across all Opal Services. If Transport for NSW (TfNSW) proposes to change fares, it is required to submit a pricing proposal to IPART demonstrating compliance with our determination. IPART determines the maximum amount by which average fares can increase (in percentage terms). TfNSW can set individual fares either higher or lower than this amount, provided the average increase across all fares does not exceed it. IPART does not have a role in administrating the rules of Opal usage or service delivery.

This Policy sets our principles and approach to compliance and enforcement

The IPART Compliance and Enforcement Policy sets out our:

- principles of compliance and enforcement
- regulatory model
- compliance approach, and
- enforcement action decision-making framework.

This Policy interacts with other IPART documents

The IPART Compliance and Enforcement Policy outlines our general compliance and enforcement approach for the entities we regulate. We have processes and procedures in place that apply to specific industries and regulated entities with particular regulatory requirements and licence obligations. We will continue to update and improve our existing processes, procedures and guidelines related to compliance and enforcement. As we review our documents we will consult with stakeholders.

We exchange information with other regulators with common responsibilities or objectives

The activities of a number of government and non-government organisations are related to IPART's compliance activities. We cooperate with these other organisations and may share information, where appropriate. However, we will not disclose:

- information claimed to be, and assessed by IPART as, confidential, or
- personal information,

unless required or expressly authorised by law, or unless we have the agreement of the organisation or person that provided us with the information.

This exchange of information helps both these organisations and IPART to coordinate activities, avoid overlap in monitoring and reporting and ensure that regulation is efficient. We consider the approaches adopted by other regulators when setting our requirements for a regulated entity.

Where we identify that we can cooperate with another organisation, we may enter into a memorandum of understanding (MOU) to facilitate cooperation. MOUs clarify the roles and coordinate the activities of IPART and the relevant organisation and facilitate the exchange of information. We make our MOUs with other organisations available on our website, unless the other organisation does not agree.

The application of this Policy

This Policy sets out IPART's broad approach to its range of compliance and enforcement functions. It provides guidance to stakeholders on the approach we may take to our compliance and enforcement activities. Nothing in this Policy should be taken to bind IPART to any particular course of action.

We carry out compliance and enforcement functions under:

- *Electricity Network Assets (Authorised Transactions) Act 2015*
- *Electricity Supply (Safety and Network Management) Regulation 2014*
- *Electricity Supply Act 1995*
- *Gas Supply Act 1996*
- *Hunter Water Act 1991*
- *Independent Pricing and Regulatory Tribunal Act 1992*
- *Sydney Water Act 1994*
- *Transport Administration Act 1988*
- *Water Industry Competition Act 2006, and*
- *Water NSW Act 2014.*

This Policy does not cover specific aspects of our compliance and enforcement functions. This Policy must be read in the context of the above Acts and associated regulations and instruments. We publish specific guides relevant to the Energy Savings Scheme, water and energy licensing and compliance with the NSW Rail Access Undertaking with further detail specific to those areas. The specific guides prevail over this general policy in the event of any inconsistency.

Policy commencement and review

This IPART Compliance and Enforcement Policy takes effect from 19 December 2017 (the date of publication on IPART's website). We may review and amend this Policy from time to time.

2 Principles for compliance and enforcement

We base the principles that underpin our approach to compliance and enforcement on current best practice policies for regulation. We also align our approach with the NSW Government's approach to regulation outlined in *Guidance for regulators to implement outcomes and risk-based regulation*[3] and IPART's eight guiding principles[4].

We will focus on outcomes

When developing and implementing compliance and enforcement strategies we will:

- follow our legislative mandate
- seek to meet or support the achievement of the objectives of the legal instruments under which we regulate
- consider our core purpose for the regulated entities and for the beneficiaries of our regulation, and
- assess the options available to us.

We will prioritise according to risk

We will allocate our resources to deliver the greatest benefit, or to focus on the biggest risks to safety, public health, customers, consumers, or the environment.

We will be fair and transparent

We will consult with stakeholders to ensure that our compliance and enforcement strategies are relevant and targeted. We will seek information and input from regulated entities before making key decisions about compliance or enforcement actions and explain our decisions once we make them.

3 *Guidance for regulators to implement outcomes and risk-based regulation*, Department of Finance, Services and Innovation, October 2016.

4 The Guiding Principles are published on our website at https://www.ipart.nsw.gov.au/Home/About-IPART/Governance, and may be updated from time to time.

3 Our risk-based regulatory model

We apply a risk-based regulatory model to compliance and enforcement

We apply a risk-based regulatory model which allows us to:

- focus on allocating resources to areas of higher risk
- increase our efficiency, and
- tailor our enforcement response.

This allows us to make the best use of our resources to minimise excessive costs to regulated entities and avoid broader costs being imposed on the community.

We base our risk-based approach on evaluating the risk that each part of our regulatory function aims to reduce. We evaluate the risk by considering the likelihood of harm occurring in the absence of our regulatory controls and the potential consequence of that harm. We then consider how likely it is that a regulated entity will not properly implement a regulatory control.

We identify and document historical, current and emerging risks. This allows us to allocate resources in proportion to the risk and complexity of regulated entities and behaviours.

We consider the likelihood of harm

In assessing the risk of harm that each aspect of our regulatory function is intended to reduce, we consider the likelihood that a harm will eventuate in the absence of our compliance and enforcement framework. We apply the likelihood descriptors in Table 3.1.

Table 3.1 Likelihood of non-compliance descriptors

Descriptor	Likelihood within a 12 month period
Certain	100% likelihood or expected to occur in most circumstances
Likely	75% to 99% likelihood or will probably occur in most circumstances
Possible	50% to 74% likelihood or might occur occasionally
Unlikely	25% to 49% likelihood or could happen at some time
Rare	0% to 24% likelihood or may happen in only exceptional circumstances

We then consider the consequence of an event or hazard occurring

To evaluate the risk of harm that each aspect of our regulatory function is intended to reduce, we consider the consequence for the safety of people, their health, property, the environment, and to customers and/or consumers where relevant within the specific regulatory framework.

Consequence descriptors measure the effect that the event or hazard will have, that is the impact, or how bad the outcomes would be if it occurs. The descriptors provide for escalation of impacts between these levels (see Table 3.2).

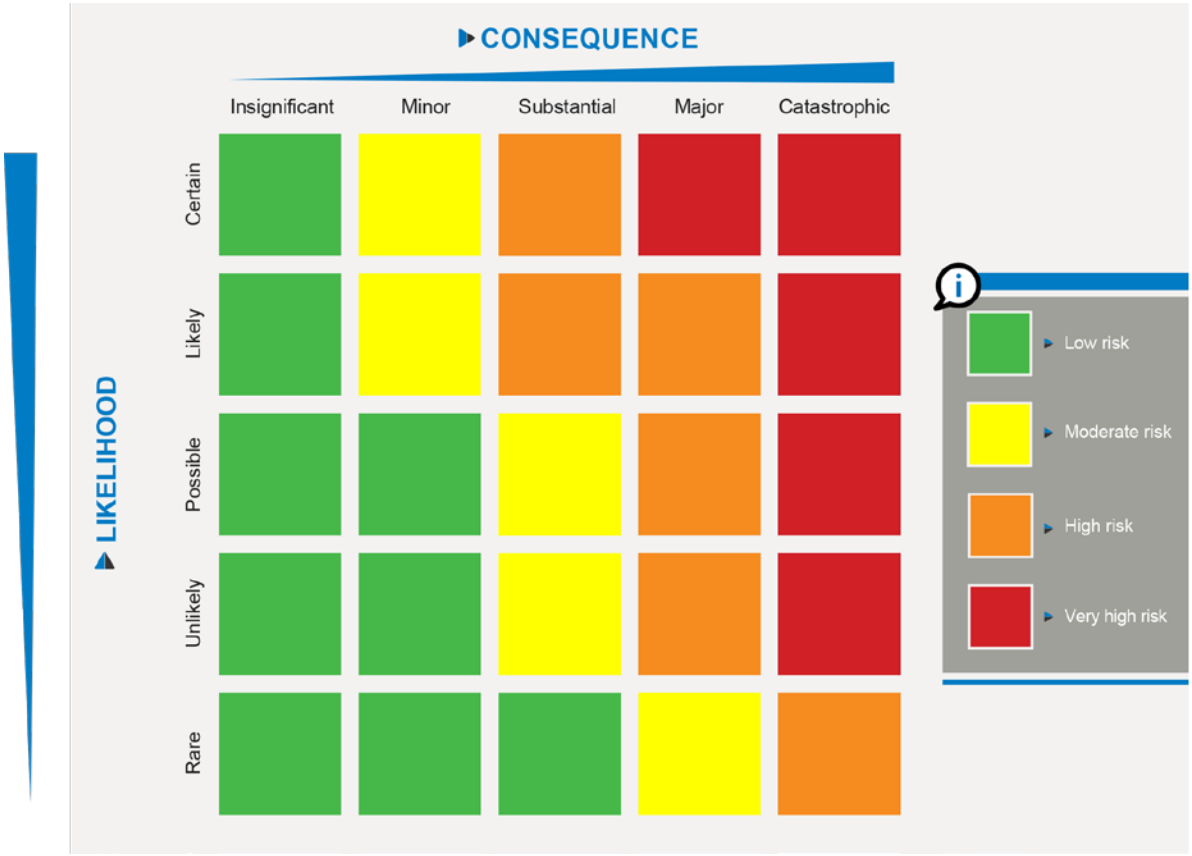
Table 3.2 Consequence descriptors

Descriptor	Consequence to safety, health, property, environment, customers and/or consumers
Catastrophic	Multiple people impacted by actual or potential fatality, severe injury/illness requiring life support, greater than 250 days off work per person or significant incapacity. Permanent or long term loss of private or public property >$50 million or that results in harm to the welfare of a large population. Permanent or long term, widespread, serious environmental harm. Widespread severe customer impact, including long term shutdowns of services that result in significant losses to the NSW economy. Widespread fraud or criminal activity resulting in significant financial loss for businesses or large numbers of NSW consumers.
Major	Actual or potential fatality, severe injury/illness to a person requiring life support, greater than 250 days off work or of incapacity of an individual. Loss of public or private properties (multiple owners) totalling greater than $1 million. Widespread, long term environmental harm, loss of amenity or cultural heritage. Wide-spread customer impact, including extensive shutdowns or extended disruptions to services. Widespread fraud, criminal activity or financial loss for a small number of NSW consumers.
Substantial	Extensive injuries requiring medical treatment (e.g. surgery), serious or permanent injury/illness, greater than 10 days off work or of incapacity. Property loss greater than $100,000. Long-term significant environmental or cultural heritage damage to a discrete area. Significant customer impact, including extensive shutdowns or extended disruptions to services, to a small number of individuals. Significant financial loss for NSW consumers.
Minor	Multiple medical treatments, non-permanent injury, less than 10 days off work or of incapacity. Property loss $100,000 or less. Small customer impacts, including disruptions to service, to a large population. Medium term damage to the environment or cultural heritage. Small financial loss for NSW consumers.
Insignificant	Single occurrence of medical treatment or first aid treatment, minor injury, no time off work. No material loss of property. Transient or minor damage to the environment or cultural heritage. Small customer impacts, including disruptions to service, to a small number of people. Immaterial financial loss for NSW consumers.

We identify the risk of harm from activities that we regulate

Once we have considered the consequence and likelihood we consider the overall risk of harm from an activity by applying the risk matrix in Figure 3.1. This is largely a function of consequence as even events or hazards that are highly likely are considered low risk if the consequences are not significant.

Figure 3.1 Risk matrix



We assess the expected level of compliance of regulated entities to better target compliance and enforcement

While our risk matrix informs us of how 'risky' the activities undertaken by a regulated entity may be in the absence of regulatory controls, we also need to consider how well a regulated entity is likely to comply with the regulatory controls that are then imposed on them to manage the risks.

We may consider the following to evaluate the likely level of compliance:

- Compliance history of the regulated entity.
- Incident and risk event numbers and frequency as reported to us by regulated entities.
- How comprehensive a regulated entity is in its reporting.
- Information that we collect during site visits and inspections.
- Results from independent audits.
- Stakeholder feedback on the performance of regulated entities.
- Complaints or allegations made to us or other relevant bodies about regulated entities.
- Data and other information about regulated entities provided by other regulators.
- Data and other information about regulated entities that is publicly available.
- The experience of the regulated entity in the market.
- Other relevant matters.

Applying our risk-based approach

We consider both the risk of harm and the level of compliance in determining how we target our compliance and enforcement response (see Figure 3.2).

Areas where there is a high risk of harm and a low level of compliance will be our highest priority to allocate compliance and enforcement resources. Areas with a low risk of harm and low level of compliance are our medium priority to allocate compliance and enforcement resources. Where the risk of harm is low and the level of compliance high, we have a low priority to allocate resources.

In exceptional circumstances we may find that the activities being undertaken by a regulated entity are high risk even when there is a high level of compliance from the regulated entity and increased compliance and enforcement activity by IPART will not reduce the level of risk associated with the activity. In these circumstances, a change to the legal or policy framework may be required and changes to the legal or policy framework are outside the scope of IPART's role as a regulator. This may require us to inform the relevant policy agency or make recommendations to the relevant Minister or to the Government.

Figure 3.2 Targeting compliance and enforcement responses

Source: Adapted from Victorian Competition & Efficiency Commission. *Smart regulation: Grappling with risk*. Supporting paper. Version 1. State of Victoria. April 2015.

Constraints on the application of our risk-based approach

In some cases the regulatory framework restricts our ability to apply a risk-based approach in full, for example, where the legislation mandates the frequency or scope of an audit, reporting, or other compliance action. In those cases we apply the risk-based approach where we can to inform our decisions, for example to inform the detailed scope of an audit rather than the frequency of an audit.

4 Our approach to compliance

Achieving and maintaining compliance is the responsibility of regulated entities

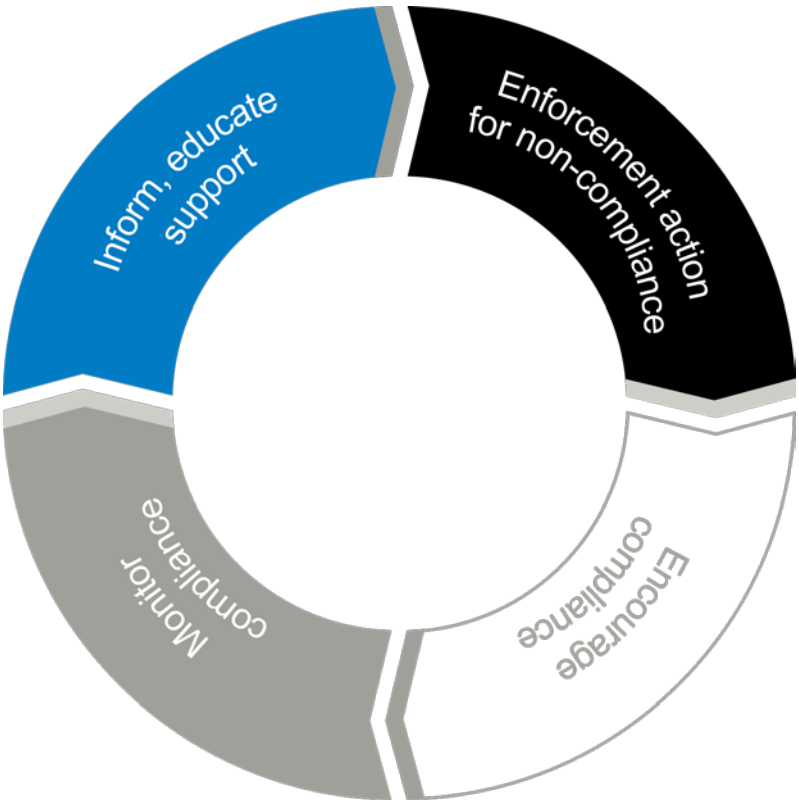
IPART aims to keep regulated entities accountable in accordance with their regulatory requirements. Compliance is the responsibility of the regulated entities themselves.

We employ a range of compliance tools to keep regulated entities accountable and consider the risk associated with their activities and the expected level of compliance when deciding which tools to employ and how to employ them.

We hold regulated entities to account

We focus our efforts on informing, educating and supporting the regulated entities to comply. We hold them to account by monitoring compliance through reporting and a risk-based audit process. Where the risk is high and the regulated entity fails to comply with its obligations, we will increase our compliance efforts and consider a range of enforcement actions, having regard to the materiality of any non-compliance that we identify. This approach is presented in Figure 4.1.

Figure 4.1 Approach to compliance



We inform, educate and support regulated entities

We have developed a number of tools and programs to assist regulated entities to understand and comply with their regulatory obligations. These include:

- published reports, guides and manuals
- stakeholder forums and working groups
- audit panels[5] with approved auditors, from which regulated entities can choose to undertake an audit
- auditor training and forums
- safety alerts, and
- IPART participation on external industry groups.

In order to provide transparent and consistent information about our approach to our stakeholders, including regulated entities, we publish our policies and guidelines. These generally apply to a specific industry or type of regulated entity and are available on our website.

We monitor compliance of regulated entities with their requirements

We monitor compliance and identify non-compliances using a number of proactive and responsive measures such as:

- periodic reporting by the regulated entity
- exception reporting by the regulated entity
- independent audits
- incident notifications by regulated entities, and
- considering complaints by affected stakeholders.

We use audits to monitor and identify non-compliance and confirm whether an entity has rectified a non-compliance or has closed out recommendations. Audits are not instruments of enforcement.

We also use information gathering powers where they are available.

We undertake activities that encourage compliance

We undertake activities to encourage regulated entities to comply.

Where we undertake compliance monitoring to determine the compliance of regulated entities we may report publicly on compliance results, including in annual reports to the Minister. In some cases there is a requirement for our compliance reports to be tabled in NSW Parliament.[6]

5 Audit Panels exist for electricity networks, Energy Savings Scheme participants and WIC Act licensees.

6 Including: energy networks, Energy Savings Scheme participants, Sydney Water, WIC Act licensees and Water NSW.

Some of our regulated entities are required to publish their performance against their regulatory obligations. From time to time we may also consider publishing information to inform the public or to encourage regulated entities to achieve high levels of compliance. This includes publishing details of our enforcement actions.

In deciding whether to make a public statement about a compliance issue, we will have regard to the interest of the regulated entity, the public interest and other matters we consider relevant.

We may decide to issue a media release regarding compliance issues. We will typically provide the regulated entity notice of at least one working day before issuing a media release, except in special circumstances or where warranted by the impact of the non-compliance.

We ensure there are real and tangible consequences for those entities that do not comply, including enforcement actions.

We can take enforcement action once we establish non-compliance

Once we establish non-compliance has occurred we can take enforcement action. The enforcement actions available to IPART, and our enforcement action decision-making framework is discussed in Section 5.

5 Enforcement action decision-making framework

We have enforcement functions

IPART has enforcement functions in relation to:[7]

- energy network regulation (including employment guarantees and electricity network safety)
- Energy Savings Scheme
- public water utility licences
- WIC Act licences
- public water utility prices (*to the extent that compliance with a price determination is a condition of the relevant operating licence*), and
- WIC Act licensee prices (*for declared monopoly services which have been referred to IPART for determination – currently only Sydney Desalination Plant Pty Ltd*).

We may take enforcement action

Enforcement action refers to action taken in response to a non-compliance with a regulatory requirement, licence requirement or a direction from IPART. Depending on the regulatory framework, the action available includes:[8]

- enforceable undertakings
- an order requiring an entity to take certain action to:
  - remedy a non-compliance
  - prevent continuance of a non-compliance
  - prevent recurrence of a non-compliance, or
  - prevent a future non-compliance
- an order imposing a monetary penalty
- suspension or cancellation of a licence/authorisation/accreditation, and
- prosecution of an offence.

These actions are generally available following a non-compliance with a condition of a licence (or other instrument) or following a non-compliance with a regulatory requirement.

7 IPART does not have any enforcement functions in relation to rail access compliance and public transport prices.

8 There are other actions available under particular regulatory frameworks – such as an order requiring surrender of Energy Savings Certificates in the Energy Savings Scheme. This action has specific procedural and evidentiary requirements under the relevant legislation.

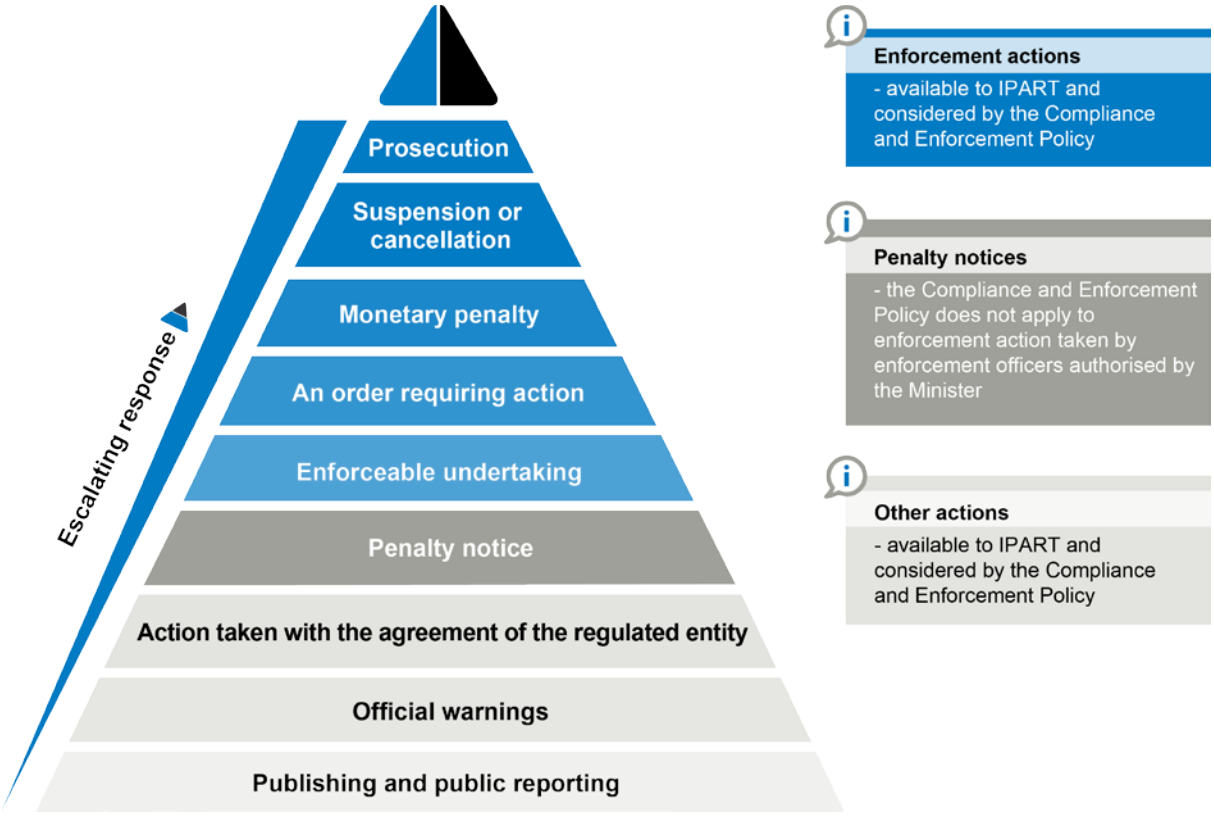
Where a non-compliance with a regulatory requirement is a criminal offence, we may consider bringing criminal proceedings, or referring a matter to the relevant prosecutorial authority for consideration.

We will also consider the following in addition to, or as alternatives to, enforcement action, such as:

- publishing decisions and public reporting (for instance, in annual reports to the Minister or in registers of enforcement actions)[9]
- official warnings, or
- action taken with the agreement of the regulated entity, for instance:
  - a voluntary undertaking, or
  - a deed under which the regulated entity agrees to take certain action.

Figure 5.1 presents the IPART enforcement pyramid.

Figure 5.1 IPART enforcement pyramid



Source: Adapted from Ayres & Brathwaite, *Responsive regulation: Transcending the deregulation debate*, New York, Oxford University Press, 1992.

9 In many cases, we are obliged to report on any non-compliances with licence conditions – see, for instance, section 88(1) of the *Electricity Supply Act 1995* or keep a register setting out certain enforcement action decisions – see, for instance, section 162 of the *Electricity Supply Act 1995* and clause 58(2) of the *Electricity Supply (General) Regulation 2014*.

This Policy does not apply to action taken by enforcement officers authorised by the Minister

This Policy applies to the enforcement action that the Tribunal may take in response to a non-compliance with a regulatory requirement. It does not apply to enforcement action taken by enforcement officers authorised by the Minister under a particular legislative framework.

Our decision making framework for enforcement action

Where we have established to IPART's satisfaction that a non-compliance has occurred (based on sufficient evidence), we would apply our risk-based approach and have regard to the following when deciding whether to take enforcement action and what action to take:

- our regulatory objectives
- materiality of the non-compliance – relevant matters include the consequences of the non-compliance
- conduct/culpability of the regulated entity – relevant matters include:
  - compliance history of the regulated entity (including whether the non-compliance has occurred previously and if we have previously taken enforcement action)
  - whether action has been taken by the regulated entity to remedy the breach,
  - level of cooperation of the regulated entity, and
- other relevant considerations, such as whether action has already been taken by the Minister (or other entity) in respect to the non-compliance.

  (see below for more detailed discussion)

For more serious conduct involving a criminal offence, the above list of matters would also be relevant in deciding whether to bring a prosecution and there are a range of additional procedural and evidentiary requirements we would observe.

We will consider our regulatory objectives

In deciding whether to take enforcement action and what type of action to take, we will consider our regulatory objectives, for instance, whether the objective of the enforcement action is to remedy the non-compliance, to deter, or help prevent, future non-compliances and/or punish the regulated entity (where, for example, it gained financially from the non-compliance).

We will consider the materiality of the non-compliance

We will consider the materiality of the non-compliance[10] in determining to take enforcement action and the type of enforcement action. In determining what enforcement action to take

10 Seriousness of the contravention is a mandatory consideration for electricity licence enforcement action, gas licence/authorisation enforcement action and public water utility licence enforcement action. It is not a mandatory consideration under ESS or Water Industry Competition Act 2006 regulatory framework but would in most cases be a matter considered relevant by IPART.

we will consider the materiality by assessing the consequence that has occurred or would be expected to occur as a result of a confirmed non-compliance (see Table 3.2).

We will consider the conduct and culpability of the regulated entity (including the compliance history of the regulated entity)

In most cases, we will consider the conduct and culpability of the regulated entity. This may include:

- any financial benefit gained as a result of the non-compliance,
- any effort to rectify the non-compliance and
- the level of cooperation of the regulated entity in any investigation of the incident.

We will also consider the compliance history of the regulated entity in terms of its track record of complying with regulatory requirements and licence obligations. In particular, we will consider:

- whether there have been repeated non-compliance with a requirement or obligation,
- whether any previous relevant non-compliances have been rectified,
- any previous actions we have taken with respect to past non-compliances, how an entity has responded to those actions and if an escalation in enforcement action is appropriate.

In some cases, we may only take action where a person has knowingly contravened a relevant requirement or knowingly authorised or permitted the contravention.[11]

Other relevant considerations

We will have regard to the objects, scope and purpose of the relevant legislation in determining to take enforcement action and the type of enforcement action.

Where the Minister (or some other entity) has concurrent enforcement functions, we will have regard to whether the Minister (or other entity) has taken enforcement action in respect of the non-compliance before deciding to take action.[12] If the Minister has already taken action with respect to the non-compliance, in many cases we are precluded from taking enforcement action under legislation.

We may publish enforcement decisions

Where we take enforcement action against a regulated entity, we may publish copies of those enforcement decisions. For instance, where we issue an order to a regulated entity to pay a monetary penalty, we may publish a copy of the order on our website.

In deciding whether to publish a copy of an enforcement decision, we will consider the public interest for, and against, disclosure of the enforcement decision and publish details

11 For instance, section 184 of the *Electricity Supply Act 1995*; sch 2, cl 8A of the *Electricity Supply Act 1995*; section 97 of *Water Industry Competition Act 2006*. This is not a comprehensive list.

12 This is a mandatory consideration for electricity licence enforcement action, gas licence/authorisation enforcement action, WIC Act licence enforcement action and public water utility licence enforcement action.

where we consider the balance of the public interest lies in favour of disclosure of the decision. We will, except in exceptional circumstances, provide notice to the regulated entity regarding the proposed publication of the enforcement decision.

We may also issue a media release where we decide to take enforcement action. When deciding whether to issue a media release, we would have regard to the interest of the regulated entity, the public interest and other matters considered relevant. We will typically provide the regulated entity notice of at least one working day before issuing a media release, except in special circumstances.

We may keep a registers of enforcement action

In some cases, we are required under legislation to keep a register of certain information concerning the enforcement action we take against regulated entities. For instance, in the Energy Savings Scheme, we are required to keep a register which includes information in relation to a person whose accreditation is suspended or cancelled. The register is to detail the reason(s) why the accreditation is suspended or cancelled. For private water utilities, we are required to include in the register of licences any enforcement action taken under the WIC Act.

Procedural approach

Our procedural approach to enforcement action is described below.

We would provide notice of proposed action and opportunity to provide submissions

We would provide written notice of the proposed enforcement action to the regulated entity and provide an opportunity to provide submissions on the proposed action. We would have regard to those submissions in deciding whether to take enforcement action and what enforcement action to take.

We consider the strength, reliability and source of the evidence

Before taking enforcement action, we will consider the strength, reliability and source of the evidence establishing a non-compliance. For instance, we will carefully consider the reliability of, and weight to be placed on, 'informer evidence'. We will often rely on audit evidence and may also apply our information gathering powers to source evidence.

We will only take enforcement action where there is adequate, probative evidence of a non-compliance. We will also consider any standard of proof specified in the legislation in respect of the non-compliance.

In some cases, we may only take enforcement action on the basis of an audit conducted under the relevant legislation. In such cases, we provide the regulated entity with an opportunity to comment on the findings of an audit report before the report is finalised.