

ENERGY AND WATER LICENCE COMPLIANCE POLICY



**INDEPENDENT PRICING AND REGULATORY TRIBUNAL
OF NEW SOUTH WALES**

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LICENCE COMPLIANCE POLICY**


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TABLE OF CONTENTS

1	INTRODUCTION	1
1.1	Background	1
1.2	Purpose of policy	1
1.3	Relationships with other organisations	2
1.4	Commencement and period of operation	3
2	MONITORING AND ENFORCING COMPLIANCE (ELECTRICITY AND WATER)	4
2.1	Responding to compliance information	4
2.2	Preliminary notice and investigation	5
2.3	Tribunal assessment and notice of contravention	6
2.4	Tribunal assessment and notice of enforcement action	7
3	MONITORING AND ENFORCING COMPLIANCE (GAS)	8
3.1	Responding to compliance information	8
3.2	Preliminary notice and investigation	9
3.3	Tribunal assessment and notice of contravention	10
3.4	Responding to continued contraventions – notice of proposed enforcement action	11
3.5	Tribunal assessment and enforcement action notice	11
4	FACTORS INFLUENCING ENFORCEMENT DECISIONS	13
4.1	Factors that will influence the Tribunal’s enforcement decisions	13
5	OPTIONS FOR RESPONDING TO CONTRAVENTIONS	15
5.1	Undertakings	15
5.2	Tribunal imposes penalty or requires remedial action	17
5.3	Matter referred to Minister with recommendation for enforcement action	18
6	THE USE OF PUBLICITY	19

1 INTRODUCTION

1.1 Background

The Tribunal monitors compliance with licences issued under:

- the *Electricity Supply Act 1995*
- the *Sydney Water Act 1994*
- the *Hunter Water Act 1991*
- the *Sydney Water Catchment Management Act 1998*.

The Tribunal also monitors compliance with authorisations issued under the *Gas Supply Act 1996*.

The Tribunal is obliged to report all contraventions of licence or authorisation conditions to the Minister.¹ The timing of this reporting will largely depend on the nature of the contravention. For example, serious compliance matters may be reported to the Minister immediately upon Tribunal receipt of information, whereas breaches of a less serious nature may be reported to the Minister as part of a periodical compliance reporting arrangement.²

The Tribunal may impose monetary penalties and require other action from licence and authorisation holders where the holder has knowingly contravened the conditions of its licence or authorisation.³ Action of this kind is referred to in this policy as 'enforcement action'.

1.2 Purpose of policy

This policy is not a legally binding document. It is intended to provide guidance to licence and authorisation holders on the processes of investigation the Tribunal proposes to follow in relation to compliance information it receives and the procedures it proposes to follow prior to taking enforcement action. This policy also provides some guidance for licence and authorisation holders of the factors the Tribunal will take into account in deciding whether enforcement action should be taken and the form of that action.

The Minister⁴ has separate enforcement powers in relation to licences and authorisations and is not bound by this policy.⁵

This policy is not intended to provide guidance to licence and authorisation holders as to the exercise of the Tribunal's compliance monitoring and reporting functions under section 87 of the *Electricity Supply Act 1995*, section 75A of the *Gas Supply Act 1996*, section 31 of the *Sydney*

¹ *Electricity Supply Act 1995*, s87(1); *Gas Supply Act 1996*, s75A(3); *Sydney Water Act 1994*, s31(2); *Hunter Water Act 1991*, s18A(3); *Sydney Water Catchment Management Act 1998*, s31(3).

² For example, the Electricity Annual Licence Compliance Report submitted pursuant to section 88 of the *Electricity Supply Act 1995*.

³ *Electricity Supply Act 1995*, Schedule 2, cl8A(5); *Gas Supply Act 1996*, s13A(5); *Sydney Water Act 1994*, s19A(5); *Hunter Water Act 1991*, s17A(5); *Sydney Water Catchment Management Act 1998*, s29A(5).

⁴ The Governor also has enforcement powers with respect to water licences.

⁵ The Minister's (or Governor's) enforcement powers are provided for by *Electricity Supply Act 1995*, Schedule 2, cl8; *Gas Supply Act 1996*, s13; *Sydney Water Act 1995*, s19; *Hunter Water Act 1991*, s17; *Sydney Water Catchment Management Act 1998*, s29.

Water Act 1994, section 18A of the *Hunter Water Act 1991* or section 31 of the *Sydney Water Catchment Management Act 1998*. It is also not intended to provide guidance to licence and authorisation holders as to any use of incentive reporting arrangements under the Tribunal's energy reporting manuals.⁶

The Tribunal will follow the procedures outlined in this policy when investigating compliance matters and when it is considering taking enforcement action in response to a knowing contravention of a condition of licence or authorisation. It may depart from the procedures in this policy where it proposes to resolve a compliance matter by means other than enforcement action.

For example, for water licences, the Minister has typically issued directives relying on the Tribunal's recommendations in the Operating Licence Audit Report. These recommendations and the Minister's use of directives to address compliance issues fall outside the scope of this policy.

For energy licence and authorisation holders the Tribunal may respond to a compliance issue by increasing the frequency of compliance reporting for a particular business. This use of the Tribunal's compliance monitoring powers falls outside the scope of this policy.

1.3 Relationships with other organisations

The activities of a number of government and non-government organisations that monitor or regulate NSW energy and water businesses are related to the Tribunal's licensing activities. In turn, the Tribunal's compliance monitoring is assisted by the receipt of compliance information from these organisations.

Those organisations from which the Tribunal may receive or exchange compliance information include:

- Department of Energy and Utilities (DEUS)
- Energy & Water Ombudsman of New South Wales (EWON)
- Office of Fair Trading
- Gas Market Company (GMC)
- Department of Infrastructure, Planning and Natural Resources (DIPNR)
- Department of Environment and Conservation (DEC)
- NSW Health.

Where more than one body is involved in aspects of the licensing regimes, this exchange of information helps to achieve coordination and avoids overlap in monitoring and reporting. The Tribunal has entered into memoranda of understanding (MOU) with a number of the organisations listed above. The MOUs clarify the roles of each organisation and set out procedures to coordinate the activities of each agency.

⁶ Energy licence and authorisation holders must report in accordance with the Tribunal's reporting manuals: Ministerially imposed retail supplier condition 5; Ministerially imposed DNSP condition 7; under a written direction of the Tribunal pursuant to section 33 of the *Gas Supply Act 1996*.

The Tribunal will address issues of confidentiality in exchanging information with these organisations.

1.4 Commencement and period of operation

This policy will commence when published by the Tribunal and will apply until replaced or revoked.

2 MONITORING AND ENFORCING COMPLIANCE (ELECTRICITY AND WATER)

The Tribunal has regulatory functions to monitor and report to the Minister on electricity and water licensees' compliance with the conditions of their licences. The Tribunal may impose monetary penalties or take other enforcement action in the event of a knowing contravention. These enforcement powers may be exercised after:

- the licensee has been given notice of proposed action
- the licensee has been given a reasonable opportunity to make submissions with respect to the proposed action
- the Tribunal has given due consideration to any such submissions and other prescribed matters.

A knowing contravention exists where the licensee has knowledge of the relevant facts constituting the contravention.

2.1 Responding to compliance information

The Tribunal receives compliance information⁷ from a range of sources, including:

- formal self-reporting of compliance through periodic compliance reports
- informal self-reporting of compliance
- exchange of information between other agencies such as the EWON, the DEUS, the Office of Fair Trading, the DEC and NSW Health⁸
- media reports
- consumer and competitor complaints
- external audits of compliance.⁹

In responding to compliance matters, the Tribunal endeavours to:

- ensure contraventions of licences and authorisations are remedied
- minimise loss and inconvenience to consumers and other affected parties
- establish mechanisms to prevent the conduct recurring
- deter others from similar conduct
- address compliance matters consistently
- promote a culture of compliance amongst licensees and authorisation holders.

The appropriate course of action for the Tribunal in responding to compliance issues will ultimately depend on a number of matters including the nature of the contravention, its impact and the business' response to the problem.

⁷ Information about a business's actual or alleged contravention of a licence condition.

⁸ See section 1.3 for further detail about the Tribunal's relationship with these organisations.

⁹ The results and findings of external audits of compliance may be reported directly to the Minister.

2.2 Preliminary notice and investigation

Upon receipt of information about a business's compliance, the Tribunal will generally undertake a preliminary investigation. The purpose of a preliminary investigation is to establish the basic facts relating to the compliance information received and whether or not a contravention has occurred which would warrant the Tribunal proceeding to issue a notice of contravention.

The nature and extent of investigation will depend on a variety of factors, including the source and level of detail of compliance information received and cooperation of a business with requests for information. For example, self-reported non-compliances will usually not require preliminary investigation where a business has provided all the information necessary for the Tribunal to assess whether there has been a knowing contravention. Further information may be requested where the business has not provided sufficient information for the Tribunal to make this assessment.

The preliminary investigation process will generally involve the following steps:

1. The business will be given a preliminary notice which may include:
 - notification of the matter that is under investigation
 - a copy, or a summary, of the compliance information, as appropriate
 - a copy of any other relevant material relating to the matter under investigation
 - notification that the business is required to submit information to the Tribunal.
2. The business will be given an opportunity (usually 28 days) in which to make submissions to the Tribunal regarding the compliance matter.
3. The Tribunal may request that the business provide information to it (or an external auditor), meet with the Tribunal's staff and/or appoint consultants or external auditors to examine those activities of the business that are relevant to the matter under investigation.¹⁰ The business will be given an opportunity to comment on an auditor's or consultant's report except where the report is confidential or privileged.

It may be necessary for the Tribunal to expedite its preliminary investigation for matters requiring urgent resolution or to dispense with some of these procedures in exceptional circumstances.

Any auditors or consultants involved in the preliminary investigation process will be required to observe appropriate standards of confidentiality.

In its submission to the Tribunal, a business may:

- indicate whether it agrees with or denies the allegations of non-compliance outlined in the preliminary notice
- outline any other matters it wishes the Tribunal to consider in determining whether or not a contravention has occurred.

¹⁰ Auditors or consultants may be appointed by the Tribunal under: *Electricity Supply Act 1995*, s87; *Sydney Water Act 1994*, Part 6 Division 2; *Hunter Water Act 1991*, Part 5 Division 1B; *Sydney Water Catchment Management Act 1998*, Part 4, Division 2.

Where a business agrees with allegations of non-compliance made in a preliminary notice, its submissions to the Tribunal should also include a description of:

- the nature and extent of non-compliance, including the impact on customers and/or other licence or authorisation holders
- the reasons for any non-compliance
- remedial action already taken
- the actual or anticipated date of full compliance.

As part of its preliminary investigation, the Tribunal may contact relevant third parties, such as customers and/or other licence or authorisation holders, to ascertain the impact of the compliance matter on these parties. The Tribunal will address issues of confidentiality relating to information obtained through its investigations.

2.3 Tribunal assessment and notice of knowing contravention

This section outlines the process for assessing information obtained through the preliminary notice and investigation stage and the procedure for notifying businesses of the Tribunal's assessment.

The Tribunal will consider the information before it, including any submission made by the business, to determine whether a knowing contravention has occurred. If the Tribunal is satisfied that, after considering the information before it, there has not been a knowing contravention of the conditions of the licence, the business will be notified.

If the Tribunal is satisfied that a business has knowingly contravened a condition of its licence, the Tribunal will also consider whether enforcement action¹¹ should be taken in respect of the contravention. The business will be issued a notice of knowing contravention that addresses, as relevant:

- the licence condition contravened
- the activity or inactivity that constitutes a contravention of the licence
- the date on which the Tribunal considers the relevant contravention first occurred
- detail of remedial action (if any) the Tribunal understands the business has taken with respect to the contravention
- notice of the Tribunal's intention in relation to taking enforcement action and the nature of any enforcement or other action that is being considered by the Tribunal
- the date by which submissions with respect to any proposed enforcement action must be received by the Tribunal
- matters that should be addressed by the business' submissions.

¹¹ The Tribunal's enforcement powers extend to imposing monetary penalties and requiring other action from licence and authorisation holders where the holder has knowingly contravened the conditions of its licence or authorisation: *Electricity Supply Act 1995*, Schedule 2, cl 8A; *Sydney Water Act 1994*, s 19A; *Hunter Water Act 1991*, s 17A; *Sydney Water Catchment Management Act 1998*, s29A.

Businesses will usually be given 28 days in which to make submissions with respect to proposed enforcement action, however this period may be shortened in cases requiring expedited assessment or extended if special circumstances exist.

If appropriate in the circumstances, the Tribunal may also indicate that it seeks an undertaking from the business in addition to or as an alternative to enforcement action. In such a case, the business' submissions should address its views regarding the appropriateness and terms of an undertaking.

The Tribunal may also respond to a knowing contravention of a licence condition using its compliance monitoring and reporting powers in addition to or as an alternative to taking enforcement action. For example, the Tribunal may report the contravention to the Minister or, for electricity licensees, increase the frequency compliance reporting for the business concerned.

2.4 Tribunal assessment and notice of enforcement action

This section describes the process the Tribunal will take upon receipt of a submission following a proposed enforcement action notice, including notification of the Tribunal's final decision in relation to taking enforcement action.

The Tribunal will consider the information before it, including any submission from the business, to make a final decision in relation to taking enforcement action.

If the Tribunal considers that enforcement action is appropriate, it will notify the business of the following matters:

- the licence condition contravened
- the activity or inactivity that constitutes a contravention of the licence
- the Tribunal's decision to take enforcement action and the details of that action
- the reasons for the Tribunal's decision
- the date on which a monetary penalty must be paid or the date by which required action from the business must be taken
- the rights of appeal and how to seek such an appeal.

If the Tribunal considers that an undertaking from the business is appropriate in addition to or as an alternative to enforcement action, this will be raised with the business, consistent with the procedures in chapter 5.

The Tribunal may also respond to a knowing contravention of a licence condition using its compliance monitoring and reporting powers in addition to or as an alternative to taking enforcement action.

3 MONITORING AND ENFORCING COMPLIANCE (GAS)

The *Gas Supply Act 1996* prescribes different procedures that must be followed prior to the Tribunal taking enforcement action with respect to contraventions of the conditions of natural gas authorisations from those applying to water and electricity licences. This chapter reflects those different procedures.

The Tribunal's powers to impose monetary penalties or take other enforcement action in the event of a knowing contravention of a gas authorisation condition are set out in sections 13A and 14 of the *Gas Supply Act 1996*. These enforcement powers may be exercised after:

- notice of the contravention has been given to the authorisation holder
- the authorisation holder has been given a reasonable opportunity to discontinue the contravention and take such steps (if any) as are specified in the notice to remedy the effects of the contravention
- the authorisation holder has failed to discontinue the contravention or take those steps
- the authorisation holder has been given notice of proposed enforcement action
- the authorisation holder has been given a reasonable opportunity to make submissions with respect to the proposed enforcement action
- the Tribunal has given due consideration to any such submissions and other prescribed matters.

A knowing contravention exists where the authorisation holder has knowledge of the relevant facts constituting the contravention.

3.1 Responding to compliance information

The Tribunal receives compliance information¹² from a range of sources, including:

- formal self-reporting of compliance through periodic compliance reports
- informal self-reporting of compliance
- exchange of information between other agencies such as the EWON, the DEUS, the Office of Fair Trading and the GMC¹³
- media reports
- consumer and competitor complaints
- external audits of compliance.¹⁴

¹² Information about a business's actual or alleged contravention of an authorisation condition.

¹³ See section 1.3 for further detail about the Tribunal's relationship with these organisations.

¹⁴ The results and findings of external audits of compliance may be reported directly to the Minister.

In responding to compliance matters, the Tribunal endeavours to:

- ensure contraventions of authorisations are remedied
- minimise loss and inconvenience to consumers and other affected parties
- establish mechanisms to prevent the conduct recurring
- deter others from similar conduct
- address compliance matters consistently
- promote a culture of compliance amongst authorisation holders.

The appropriate course of action for the Tribunal in responding to compliance issues will ultimately depend on a number of matters including the nature of the contravention, its impact and the business' response to the problem.

3.2 Preliminary notice and investigation

Upon receipt of information about a business's compliance, the Tribunal will generally undertake a preliminary investigation. The purpose of a preliminary investigation is to establish the basic facts relating to the compliance information received and whether or not a contravention has occurred which would warrant the Tribunal proceeding to issue a notice of contravention.

The nature and extent of investigation will depend on a variety of factors, including the source and level of detail of compliance information received and cooperation of a business with requests for information. For example, self-reported non-compliances will usually not require preliminary investigation where a business has provided all the information necessary for the Tribunal to assess whether there has been a knowing contravention. Further information may be requested where the business has not provided sufficient information for the Tribunal to make this assessment.

The preliminary investigation process will generally involve the following steps:

1. The business will be given a preliminary notice which may include:
 - notification of the matter that is under investigation
 - a copy, or a summary of the compliance information, as appropriate
 - a copy of any other relevant material relating to the matter under investigation
 - notification that the business is required to submit information to the Tribunal.
2. The business will be given an opportunity (usually 28 days) in which to make submissions to the Tribunal regarding the compliance matter.
3. The Tribunal may require the business to provide information to it and/or meet with the Tribunal's staff to examine those activities of the business that are relevant to the matter under investigation.

It may be necessary for the Tribunal to expedite its preliminary investigation for matters requiring urgent resolution or to dispense with some of these procedures in special circumstances.

In its submission to the Tribunal, a business may:

- indicate whether it agrees with or denies the allegations of non-compliance outlined in the preliminary notice
- outline any other matters it wishes the Tribunal to consider in determining whether or not a contravention has occurred.

Where a business agrees with allegations of non-compliance made in a preliminary notice, its submissions to the Tribunal should also include a description of:

- the nature and extent of non-compliance, including the impact on customers and/or other licence or authorisation holders
- the reasons for any non-compliance
- remedial action already taken
- the actual or anticipated date of full compliance.

As part of its preliminary investigation, the Tribunal may contact relevant third parties, such as customers and/or other licence or authorisation holders, to ascertain the impact of the compliance matter on these parties. The Tribunal will address issues of confidentiality relating to information obtained through its investigations.

3.3 Tribunal assessment and notice of knowing contravention

This section outlines the process for assessing information obtained through the preliminary notice and investigation stage and the procedure for notifying businesses of the Tribunal's assessment.

The Tribunal will consider the information before it, including any submission made by the business, to determine whether a contravention has occurred. If the Tribunal determines that a business has contravened a condition of its authorisation, the business will be given a notice of knowing contravention that addresses the following matters, as relevant:

- the authorisation condition contravened
- the activity or inactivity that constitutes a contravention of the authorisation
- the date on which the Tribunal considers the relevant contravention first occurred
- detail of remedial action (if any) the Tribunal understands the business has taken in respect of the contravention
- the date by which the contravention must be discontinued
- the steps (if any) that the authorisation holder must take to remedy the effects of the contravention.

The Tribunal may consider whether suitable undertakings from the business will assist to resolve the matter.

The Tribunal may also respond to a knowing contravention of an authorisation condition using its compliance monitoring and reporting powers. For example, the Tribunal may report the contravention to the Minister or increase the frequency compliance reporting for the business concerned.

3.4 Responding to continued contraventions – notice of proposed enforcement action

This section describes the procedure the Tribunal will follow in responding to continued contraventions after a notice of contravention has been given, including notifying a business of proposed enforcement action.

If after being given a notice of contravention, an authorisation holder does not discontinue the contravention or take such steps to remedy the effects of the contravention as required, the Tribunal may consider taking enforcement action.¹⁵ The business will be notified of:

- the Tribunal's intention in relation to taking enforcement action and the nature of any enforcement or other action that is being considered by the Tribunal
- the date by which submissions in respect of any proposed enforcement action must be received by the Tribunal
- matters that should be address by the business' submissions.

Businesses will usually be given 28 days in which to make submissions with respect to proposed enforcement action, however this period may be shortened in cases requiring expedited assessment or extended if special circumstances exist.

If appropriate in the circumstances, the Tribunal may also indicate that it seeks an undertaking from the business in addition to or as an alternative to enforcement action. In such a case, the business' submissions should address its views regarding the appropriateness and terms of an undertaking.

The Tribunal may also respond to a continued knowing contravention of an authorisation condition using its compliance monitoring and reporting powers as an alternative to or in addition to taking enforcement action.

3.5 Tribunal assessment and notice of enforcement action

This section describes the process the Tribunal will follow upon receipt of a submission from a business in relation to proposed enforcement action, including notification of the Tribunal's final decision in relation to taking enforcement action.

The Tribunal will consider the information before it, including any submission from the business, to make a final decision in relation to taking enforcement action.

If the Tribunal considers that enforcement action is appropriate, it will notify the business of the following matters:

- the authorisation condition contravened
- the activity or inactivity that constitutes a contravention of the authorisation
- the date on which the Tribunal considers the relevant contravention first occurred
- the Tribunal's decision to take enforcement action and the details of that action

¹⁵ The Tribunal's enforcement powers extend to imposing monetary penalties and requiring other action from authorisation holders where the holder has knowingly contravened the conditions of its authorisation: *Gas Supply Act 1996*, s 13A.

- the reasons for the Tribunal's decision
- the date on which a monetary penalty must be paid or the date by which required action from the business must be taken
- the rights of appeal and how to seek such an appeal.

If the Tribunal considers that an undertaking from the business is appropriate in addition to or as an alternative to enforcement action, this will be raised with the business, consistent with the procedures in chapter 5.

The Tribunal may also respond to a continued knowing contravention of an authorisation condition using its compliance monitoring and reporting powers as an alternative to or in addition to taking enforcement action.

4 FACTORS INFLUENCING ENFORCEMENT DECISIONS

This chapter outlines the matters that may be considered by the Tribunal in deciding whether to take enforcement action in respect of electricity and water licences and natural gas authorisations. Businesses notified of proposed enforcement action should address these matters (as relevant) in their submission to the Tribunal.

4.1 Factors that will influence the Tribunal's enforcement decisions

The Tribunal's power to take enforcement action against licence and authorisation holders is limited to situations where these businesses have knowingly contravened the conditions of their licence or authorisation.¹⁶ A knowing contravention exists where the licensee or authorisation holder has knowledge of the relevant facts constituting the contravention. The Tribunal must also consider the seriousness of the contravention when imposing a monetary penalty.¹⁷

Before taking enforcement action¹⁸ the Tribunal must be satisfied that action is appropriate despite:

- any penalty or claim for compensation to which the business is, or may be, subject
- the substance and cost of any action the business has taken in respect of the contravention.¹⁹

The Tribunal will take full account of the particular facts and circumstances when deciding whether to take enforcement action and the form that action should take. In making its decisions, the Tribunal will also consider the following factors:

- the effect of the contravention on Government policy objectives, the interests of customers and other market participants
- whether the business derived a benefit (financial or otherwise) from the contravention
- whether enforcement action is likely to create an incentive to improve compliance and deter future contraventions
- whether the business has taken steps to secure compliance either specifically or by maintaining a robust compliance system
- whether the business's senior management were involved in the contravention
- whether the business voluntarily reported the contravention or attempted to conceal it from the Tribunal or other monitoring organisations
- the compliance history of the business

¹⁶ *Electricity Supply Act 1995*, Schedule 2, cl8A(5); *Gas Supply Act 1996*, s13A(5); *Sydney Water Act 1994*, s19A(5); *Hunter Water Act 1991*, s17A(5); *Sydney Water Catchment Management Act 1998*, s29A(5).

¹⁷ *Electricity Supply Act 1995* Schedule 2, cl8A(8); *Gas Supply Act 1996* s13A(8); *Sydney Water Catchment Management Act 1998* s29A(8); *Hunter Water Act 1991* s17A(8); *Sydney Water Act 1994* s19A(8).

¹⁸ The Tribunal's enforcement powers extend to imposing monetary penalties and requiring other action from licence and authorisation holders where the holder has knowingly contravened the conditions of its licence or authorisation: *Electricity Supply Act 1995*, Schedule 2, cl8A; *Gas Supply Act 1996*, s13A; *Sydney Water Act 1994*, s19A; *Hunter Water Act 1991*, s17A; *Sydney Water Catchment Management Act 1998*, s29A.

¹⁹ *Electricity Supply Act 1995* Schedule 2, cl8A(7); *Gas Supply Act 1996* s13A(7); *Sydney Water Catchment Management Act 1998* s29A(7); *Hunter Water Act 1991* s17A(7); *Sydney Water Act 1994* s19A(7).

Independent Pricing and Regulatory Tribunal

- whether the business has taken appropriate action to remedy the contravention
- the social and environmental impact of a contravention, where relevant
- the level of cooperation extended by a business during the course of the Tribunal's investigation.

Whilst it is important for businesses to understand which factors are likely to influence the Tribunal's view on enforcement action, the factors listed above are not intended to be all-inclusive or binding. The Tribunal will determine an appropriate response based on all of the circumstances of the matter under consideration. This means that where appropriate, the Tribunal may take into account factors that are not listed above. This list is intended to improve transparency rather than provide a formula for enforcement decisions.

5 OPTIONS FOR RESPONDING TO CONTRAVENTIONS

This chapter applies to electricity and water licensees and to natural gas authorisation holders.

5.1 Undertakings

Undertakings may be considered by the Tribunal as an alternative to or in addition to enforcement action. They may also assist to resolve compliance matters that arise in other circumstances.

The Tribunal will provide details of an undertaking to the Minister in accordance with its statutory obligations.²⁰ The Minister retains the power to take further action and this will be expressly recognised in any agreement between the Tribunal and the business.

In deciding whether to enter into an undertaking with a business, the Tribunal will consider such factors as:

- the nature of the compliance issue or contravention, particularly the impact on third parties and consumers
- the compliance history of the business
- whether an undertaking will assist in the rapid resolution of the compliance issue or contravention
- the apparent good faith of the business.

Whilst it is important for businesses to understand which factors are likely to influence the Tribunal's view on undertakings, the factors listed above are not intended to be all-inclusive or binding.

5.1.1 Acceptance of undertakings

If appropriate in the circumstances, the Tribunal may seek an undertaking from a business in addition to or as an alternative to enforcement action or at other times. This option may be raised in a notice of proposed enforcement action (see section 2.3) and notice of contravention (see section 3.3) or informally by the Tribunal.

The business will be given an opportunity to make written submissions to the Tribunal on the appropriateness of an undertaking and its terms. The Tribunal will consider the business' submissions in deciding whether to pursue an undertaking.

²⁰ The Tribunal must report to the Minister on the extent to which businesses comply, or fail to comply, with licence/authorisation conditions: *Electricity Supply Act 1995*, s87(1) ; *Gas Supply Act 1996*, s75A(3); *Sydney Water Act 1994*, s31(2); *Hunter Water Act 1991*, s18A(3); *Sydney Water Catchment Management Act 1998*, s31(1).

5.1.2 Essential terms

Undertakings must include terms that address the following matters:

- the activity which has given rise to the contravention or compliance issue and its consequences
- actions to prevent a recurrence and to ensure systems are in place to detect future contraventions
- the time period within which compliance with the undertaking is required
- acknowledgement that the Minister retains the power to take further action
- the ability of the Tribunal to withdraw from the undertaking if there has been a material change in circumstances or if the business provided information to the Tribunal that was misleading or deceptive
- monitoring of compliance with the undertaking (see section 5.15).

Undertakings must be in writing and must be signed by senior management of a business with authority to enter the undertaking.

5.1.3 Unacceptable terms

Terms that will not be accepted by the Tribunal include:

- that the business denies contravening a condition of licence or authorisation
- terms that impose significant obligations on the Tribunal, including on-going supervision which is excessive.

5.1.4 Typical elements of undertakings

The Tribunal will take care to ensure that obligations under the undertaking are reasonable, clearly expressed and have not been obtained unfairly.

The Tribunal is not committed to a fixed formula for undertakings, but will tailor each to the particular circumstances of the matter and the desired outcomes. The Tribunal envisages that the following framework will accommodate the majority of undertakings:

Background	<ul style="list-style-type: none"> • A brief description of the business and the licence or authorisation held. • The activity that is to be resolved by the undertaking.
Undertaking	What the business undertakes to do, incorporating elements under section 5.1.2.
Acknowledgement	Acknowledgement that the Minister retains the power to take further action.
Term	The period of the undertaking.

5.1.5 Compliance with undertakings

To ensure undertakings are complied with, the Tribunal may monitor implementation and effectiveness. This may take the form of requests for information from Tribunal staff.

Where the Tribunal has reason to believe that a business has not complied with an undertaking the Tribunal will attempt to resolve the matter by consultation. If the Tribunal is satisfied that the business has breached a term of the undertaking, it may pursue enforcement action within its statutory powers.²¹

5.1.6 Variations to undertakings

Variations to undertakings may be necessary where:

- they are subsequently found to be difficult to comply with
- compliance with the undertakings will not be achieved by the required date
- there has been a change in circumstances that impacts the undertakings in some way.

Businesses may withdraw or vary undertakings with the consent of the Tribunal. The Tribunal retains the right to reject requests for variation or to terminate any undertaking.

5.2 Tribunal imposes penalty or requires remedial action

The Tribunal may impose a monetary penalty where a business has knowingly contravened a condition of licence or authorisation.²² The maximum monetary penalty the Tribunal may impose is \$10,000 for the first day on which each contravention occurs and a further \$1,000 for each subsequent day (not exceeding 30 days) that the contravention continues.²³

Where there has been a knowing contravention, the Tribunal may also take other action. For example, the Tribunal might require a business to send information to customers or publish notices in newspapers.

If the Tribunal requires some other action by the business, the cost of that action cannot exceed the value of the monetary penalty that the Tribunal could otherwise impose.²⁴ Where the Tribunal requires information to be sent to a customer, the business may satisfy that requirement by sending the information to the customer with the next account or other information scheduled to be sent to the customer.²⁵

²¹ The Tribunal's enforcement powers extend to imposing monetary penalties and requiring other action from licence and authorisation holders where the holder has knowingly contravened the conditions of its licence or authorisation: *Electricity Supply Act 1995*, Schedule 2, cl8A; *Gas Supply Act 1996*, s13A; *Sydney Water Act 1994*, s19A; *Hunter Water Act 1991*, s17A; *Sydney Water Catchment Management Act 1998*, s29A.

²² *Electricity Supply Act 1995*, Schedule 2, cl8A(1) & (2); *Gas Supply Act 1996*, s13A(1) & (2); *Sydney Water Act 1994*, s19A(1) & (2); *Hunter Water Act 1991*, s17A(1) & (2); *Sydney Water Catchment Management Act 1998* s29A(1) & (2).

²³ *Electricity Supply Act 1995*, Schedule 2, cl8A(6); *Gas Supply Act 1996*, s13A(6); *Sydney Water Act 1994*, s19A(6); *Hunter Water Act 1991*, s17A(6); *Sydney Water Catchment Management Act 1998*, s29A(6).

²⁴ *Electricity Supply Act 1995*, Schedule 2, cl8A(3); *Gas Supply Act 1996*, s13A(3); *Sydney Water Act 1994*, s19A(3); *Hunter Water Act 1991*, s17A(3); *Sydney Water Catchment Management Act 1998*, s29A(3).

²⁵ *Electricity Supply Act 1995*, Schedule 2, cl8A(4); *Gas Supply Act 1996*, s13A(4); *Sydney Water Act 1994*, s19A(4); *Hunter Water Act 1991*, s17A(4); *Sydney Water Catchment Management Act 1998*, s29A(4).

5.3 Matter referred to Minister with recommendation for enforcement action

Although every contravention of a condition of licence or authorisation will be reported to the Minister in some form, the Tribunal may also refer matters to the Minister with a recommendation that the Minister²⁶ take enforcement action. The Tribunal may refer matters to the Minister if it believes it is appropriate because of the nature or scale of the contravention.

²⁶ or the Governor with respect to water licences.

6 THE USE OF PUBLICITY

The Tribunal may use publicity when responding to compliance issues in accordance with the following principles:

- in deciding whether to make a public statement about a compliance issue, the Tribunal will have regard to the interests of the business concerned, the public interest, and the interests of other regulatory agencies, where relevant
- if the Tribunal decides to respond to an enquiry, it will accurately represent the status of any investigation
- the Tribunal will not comment on the likelihood of it taking enforcement action prior to making a formal decision in relation to enforcement action
- the Tribunal may issue a media release when it decides to take enforcement action
- if the Tribunal has issued a media release in relation to an investigation, it will generally issue a media release when it decides not to take enforcement action
- the Tribunal may outline its responsibilities in relation to licence and authorisation compliance.

The Tribunal will endeavour to provide the business concerned with one working days' prior notification of media releases, except in special circumstances or where warranted by the damage caused by a contravention.

As part of its compliance monitoring and reporting role, the Tribunal may publish details of compliance activity and enforcement action. In doing so, the Tribunal informs:

- the public of what the Tribunal is doing about businesses that do not comply with the conditions of their licence or authorisation; and
- industry about the standards expected of them and the consequences of failing to meet these standards.