

# Compliance and enforcement approach



## Document control

Published by NSW Department of Planning and Environment, NSW Resources Regulator

Title: Compliance and enforcement approach

First published: July 2017

Authorised by: Chief Compliance officer

RM8 reference: PUB17/313

Amendment schedule		
Date	Version	Amendment

© State of New South Wales through the NSW Department of Planning and Environment 2017.

This publication is copyright. You may download, display, print and reproduce this material in an unaltered form only (retaining this notice) for your personal use or for non-commercial use within your organisation. To copy, adapt, publish, distribute or commercialise any of this publication you will need to seek permission from the NSW Department of Planning and Environment.

Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (August 2017). However, because of advances in knowledge, users are reminded of the need to ensure that information upon which they rely is up to date and to check currency of the information with the appropriate officer of the NSW Department of Planning and Environment or the user's independent advisor.

# Purpose

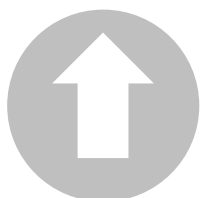
This policy sets out the principles that underpin the NSW Resources Regulator's compliance and enforcement processes and regulatory actions and forms part of our risk-based and outcomes-focused approach to compliance and enforcement.

It gives guidance on the high level compliance expectations, enforcement processes and regulatory methods that we will use to ensure that obligations under the legislation that we administer are met.

# Our objectives

The NSW Resources Regulator aims to:

- ensure a safe, sustainable and innovative mining, extractive and petroleum industry in NSW
- provide information and guidance about safety, environmental and other regulatory obligations to protect and support industry, workers, the community and the state
- promote confidence in how the industry is regulated
- make regulation transparent
- engage with and educate both industry and the community about best practice
- support industry to meet its regulatory obligations.



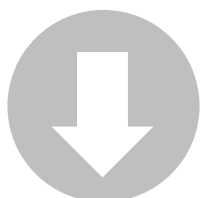
**Increase**

stakeholder and community confidence in our compliance programs



**Support**

the responsible operation and development of regulated industries



**Minimise**

harm to workers, the environment and the community

## About us

The NSW Resources Regulator is a stand-alone regulator within the Department of Planning & Environment responsible for compliance and enforcement activities across the mining, extractive and petroleum industry.

The NSW Resources Regulator was created to ensure that the regulatory functions of the Department have clear separation from industry development activities. This framework is designed to ensure a consistent and responsive regulatory approach and to provide increased transparency and community confidence in relation to our regulatory activities.

The primary focus of the NSW Resources Regulator is on compliance activities in relation to the following:

- Compliance with the Mining Act
- Regulating safety and health performance at NSW mines and petroleum sites (Mine Safety)

<h3>Vision</h3>	<h3>Mission</h3>
A safe and responsible mining, extractive and petroleum industry	To enable and support industry to understand and fulfil its obligations

Further information on the regulator is contained in our [strategic approach](#).

## Legislation and obligations

When undertaking exploration, extraction or production of minerals, industry participants are required to operate in accordance with certain standards and obligations. The obligations that are governed by the NSW Resources Regulator include:

- relevant legislation which confers the right to operate, being the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*<sup>1</sup> and associated regulations
- work health and safety obligations contained in the following Acts (and associated regulations):
  - *Work Health and Safety Act 2011*
  - *Work Health and Safety (Mine and Petroleum Sites) Act 2013*
  - *Explosives Act 2003*
  - *Radiation Control Act 1990*
- conditions or obligations contained in authorisations, approvals, permits, registrations or licences issued under the above legislation
- requirements contained in codes of practice, policies, and standards.

<sup>1</sup> The EPA is the lead regulator for all onshore petroleum exploration and production activities and is responsible for all compliance and enforcement activities under the Petroleum (Onshore) Act 1991, with the exception of work health and safety.

In addition to the above, there are also other obligations that we will be involved in, although governed by other agencies. This includes incidents notified to the NSW Resources Regulator under the obligations of other relevant legislation, for example the *Protection of Environment Operations Act 1997*.

While the laws we administer set minimum standards that industry participants must adhere to, we seek to encourage a positive compliance culture where industry participants demonstrate best practice by actively adopting measures and practices over and above legislative requirements to further minimise potential harms and risks.

## WHS framework

The Commonwealth, state and territory governments operate under harmonised work health and safety laws to improve work health and safety, provide consistent protection for Australian workers and reduce the regulatory burden. These laws are supported by a National Compliance and Enforcement Policy in order to ensure a nationally consistent approach to compliance and enforcement.

This Compliance and Enforcement Approach is consistent with the National Compliance and Enforcement Policy and the principles that underpin the approach that all work health and safety regulators will take to monitoring and enforcing compliance with the *Work Health and Safety Act* and Regulations.

The National Compliance and Enforcement Policy is available on the Safe Work Australia website at [safeworkaustralia.gov.au](http://safeworkaustralia.gov.au)

## Regulatory approach

Compliance is a whole-of-organisation responsibility and regulatory interventions occur in many different ways across the regulator. We recognise that ensuring compliance is a key consideration in the way we design our policies, systems and processes, communicate with stakeholders, present our information materials, and explain our approaches and decisions.

Importantly we understand that in order to positively influence compliance behaviours and promote high levels of safety and compliance, three conditions must be satisfied. Industry participants must:

---

<b>Know and understand</b> their obligations	→	Be <b>able</b> to comply	→	Be <b>willing</b> to comply
---	---	--------------------------	---	-----------------------------

---

We believe that the majority of industry participants want to do the right thing and will comply if they understand their rights and responsibilities – and we seek to provide industry with the tools and information that will allow it to achieve compliance with these obligations.

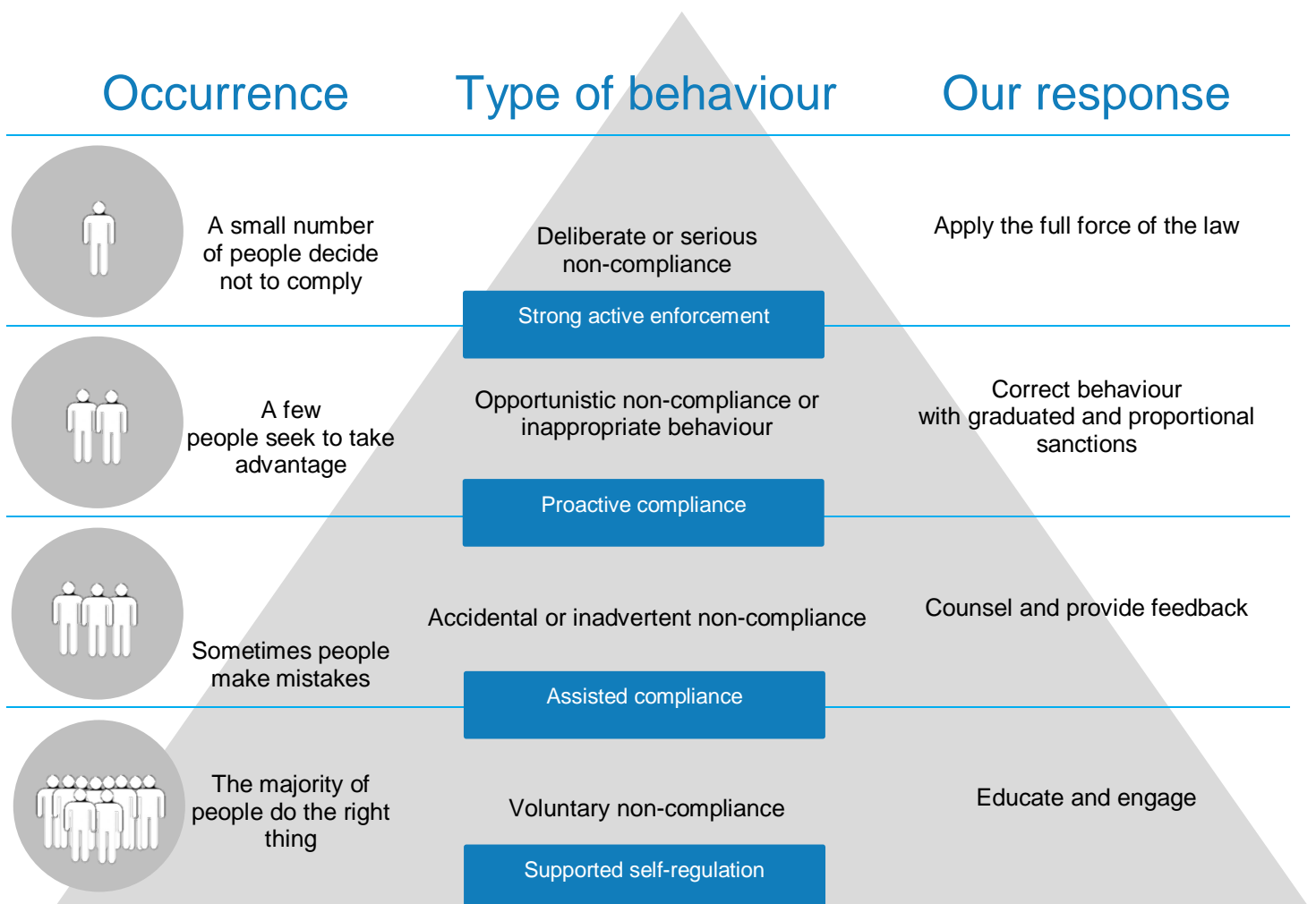
To assist industry, we produce regular reports on our activities and identify and publish our compliance priorities for each upcoming six-month period.

## Our responsive compliance model

The NSW Resources Regulator promotes voluntary compliance and good practice while applying escalating enforcement action that targets those who demonstrate more serious, repeated or sustained contraventions or other misconduct inconsistent with community expectations and the public interest.

Our compliance and enforcement actions are driven by a risk-based approach and we apply a flexible and robust intervention framework that can apply a variety of escalating enforcement actions to target specific risks or misconduct. In this context risk is measured by identifying the likelihood of a particular event occurring and the consequence (actual or potential) to the industry, workers, the community and the State should that event occur.

Our compliance model aims to put risk at the heart of all of our actions and decisions. We therefore seek to address low risk non-compliances through a collaborative process with industry involving education through advisory services and publication. Moderate and higher risk non-compliances will be dealt with in an escalating manner with increasingly severe enforcement action taken based on the level of risk and potential for harm. This model is known as a responsive compliance model and is demonstrated by the compliance pyramid below.



## Our values and principles

The NSW Resources Regulator, as part of the NSW public sector, is committed to upholding the core values of integrity, trust, service and accountability. In carrying out our compliance and enforcement functions we also have regard to the following principles:

<b>Accountability</b>	We are responsible for our compliance and enforcement activities and are answerable for our decisions, including where we take action or decide not to act. All of our decisions are based on the available evidence and we are willing to explain the reasons for our decisions and make available avenues of complaint or appeal.
<b>Consistency</b>	We endeavour to ensure consistency in the application of enforcement measures for matters of similar significance to provide certainty for industry and the community. However, this does not mean we adopt a one size fits all approach, and we will consider the circumstances and facts of each matter when deciding the nature of any regulatory action that may be appropriate.
<b>Constructiveness</b>	We provide support, advice and guidance to help industry comply with their regulatory obligations. We promote best practice within the NSW mining, exploration and petroleum sectors and seek to foster a capable, sustainable, socially responsible industry.
<b>Outcomes focused</b>	We measure our success by the quality of our outcomes rather than the quantity of our activities.
<b>Proportionality</b>	Compliance and enforcement actions will be proportionate to identified conduct, having regard to the level of harm, the seriousness of the wrongdoing or misconduct and relevant behavioural drivers.
<b>Targeted</b>	Our activities are focussed on areas of greatest risk and our strategic priorities and we use our limited resources effectively by adopting an intelligence-led, risk-based model.
<b>Responsiveness and timeliness</b>	We commit to conducting our activities as efficiently and as quickly as possible to reduce any further harms, minimise disruption and provide certainty to industry and stakeholders
<b>Transparency</b>	We will demonstrate impartiality, balance and integrity in all of our compliance and enforcement activities. Compliance expectations will be clearly communicated and our activities will be measured and publicly reported on to ensure that there is a clear understanding of what is expected from industry, and importantly, what industry and stakeholders can expect from us.

# Working with industry participants and stakeholders

The successful management of our diverse compliance activities relies on support from industry participants, key stakeholders and the community. This makes it vital that we have a strong, well-founded regime in place to ensure compliance with legislation and broader community standards.

Our role is to assist industry participants to be aware of, and comply with, any relevant requirements.

We support industry participants, other stakeholders, and the community by:

- Providing access to necessary information to help them understand regulatory requirements and expectations
- Providing consistent and authoritative guidance
- Applying a considered proportionate regulatory response/ intervention, rather than a one size fits all approach
- Communicating instances of non-compliance in an appropriate manner
- Engaging with them in the development of strategies and initiatives designed to influence positive compliance behaviours and maximise voluntary compliance
- Consulting in the development of risk-based compliance programs
- Demonstrating an appreciation and understanding of business and industry, including regulatory burden issues
- Streamlining regulatory processes and developing and tailoring incentives to encourage the mutual benefits of compliance
- Meeting our commitments and community and stakeholder expectations of us.

## Our compliance processes and governance arrangements

Our compliance and enforcement activities are undertaken within a strict governance framework to ensure efficient and effective allocation of resources and adherence to this policy document.

Decisions around when and how to deal with an allegation of non-compliance and enforcement processes for formal investigations are handled by specific governance and oversight committees.

## Assessing suspected failures to meet regulatory obligations

All allegations of irresponsible conduct, wrongdoing and failure to meet regulatory obligations reported to, or identified by, the NSW Resources Regulator are assessed by a governance committee against the following uniform criteria to determine how they will be handled, prioritised and resourced:

- whether the matter is within our jurisdiction
- whether we are the most appropriate agency to respond
- the objectives of the relevant legislation
- our regulatory priorities
- whether other action may be more appropriate and available regulatory options
- the seriousness of the alleged irresponsible conduct or wrongdoing and whether it is ongoing









- the apparent behavioural drivers behind the alleged misconduct
- the severity and scale of potential or actual harm
- the likelihood of continued or repeated non-compliance
- the likelihood and practicality of a successful outcome
- the specific and general deterrent impact of our actions
- the regulatory burden of any action and the impact that it would have on the industry participant and other stakeholders
- the person's or entity's compliance history
- whether the person or entity was licensed or authorised to undertake certain types of works or activities
- whether the resource requirements are proportionate to achieving the desired outcome
- community expectations and public interest considerations.

In relation to WHS matters, the following circumstances or allegations are priority areas for investigations<sup>2</sup>:

- work-related fatalities and serious injuries or where there is a risk of such outcomes
- non-compliance with inspectors' notices or directions
- offences against inspectors
- offences against health and safety representatives and matters relating to entry permit holders
- discrimination against workers on the basis of their work health and safety activities
- failure to notify incidents.

When considering how to deal with a matter the committee may determine one or more of the following actions including assigning a priority:

-  Note the material for intelligence
-  Take no further action
-  Refer to another agency
-  Take remedial action
-  Conduct preliminary inquiries
-  Commence a formal investigation

We do not investigate all matters reported to us and we adopt a risk-based approach to ensure finite resources are applied where the seriousness of alleged misconduct and risk of harm is greatest. We exercise discretion in determining whether we will commit resources to a formal investigation or take other action.

This may include, where appropriate, undertaking a causal investigation to enable the quick and full understanding of the causes of safety incidents and the publication of corresponding lessons to reduce the likelihood of recurrence. Causal investigations will only be considered where there is a clear need to communicate early learnings.

---

<sup>2</sup> As identified in the Safe Work Australia - National Compliance and Enforcement Policy

In relation to matters that do not involve serious work health or safety risks, we are less likely to pursue those that:

- are one-off, isolated events
- resulted in little or no harm and/or have already been rectified
- are more appropriately resolved directly between the parties involved
- involve issues more effectively dealt with by another agency.

## Determining enforcement action

Where a formal investigation is undertaken, a separate governance committee considers investigations findings and determines the most appropriate regulatory action, including determining to take no further action.

The committee considers the following criteria when considering investigation findings:

- reduce or remove an unacceptable risk of harm to workers, the environment or the community
- secure remedial and future compliance
- change the behaviour of the industry participant and others in the industry
- clarify the relevant law
- instil public confidence in our regulation of industry
- achieve specific and general deterrence.

## Enforcement toolkit

Our enforcement toolkit allows for a balanced enforcement approach which stops the improper conduct and promotes behavioural change, that is remedial and future compliance - rather than simply applying a punishment. This means that we may simultaneously apply multiple enforcement tools to achieve the desired compliance outcome.

Responses may be directed to a range of industry participants, including the mine or petroleum company or operator, to contractors, to people with statutory functions, to particular workers, or to a combination of these persons.

The range of compliance and enforcement actions available to us includes:

---

### Increased intensity of regulatory engagement

Increased frequency and scope of inspections, audits or other regulatory engagements (e.g. including meeting with company senior executives) may be used where the regulator has concerns around a specific risk or operation.

---

### Advisory letters

Issued to provide information and advice on regulatory obligations and good practice. Advisory letters are generally used where a specific allegation is undetermined or unsustainable but there remain general compliance concerns or identified opportunities for improved practice.

---

### Warning letters

Issued to advise an industry participant that they are currently in non-compliance and that they should take immediate action to remedy the breach. Warnings are issued prior to final enforcement action being determined by the regulator.

---

### Official cautions

Issued for low level non-compliances where, having regard to the circumstances,

the regulator has determined not take escalated action (i.e. issue a penalty notice or commence prosecution action).

Refer to the [Caution guidelines](#).

### Penalty notices

Are used as an effective and efficient method of dealing with less serious breaches of the legislation which warrant sanction but are not considered serious enough to warrant formal prosecution action. A person served with a penalty notice may elect not to pay the penalty and to have the matter dealt with by the court.

### Notices and directions

Directions and notices are issued under both the *Mining Act* and WHS legislation directing a party to do or not do something (including stop work orders). The aim of issuing a notice or direction is to ensure that a risk or non-compliance is remedied. These notices are not a sanction for non-compliant behaviour, and the regulator will also consider with other enforcement action is appropriate.

### Imposing additional controls such as licence conditions or orders

Additional controls and restrictions may be imposed on an authority, licence or permit to mitigate against specific or potential risks.

### Making public comments about irresponsible conduct or wrongdoing

Details of significant enforcement actions are published in order to maximise the deterrent effect, bring awareness to important health and safety issues and to reinforce key messages.

Refer to the [Public comment policy](#).

### Civil proceedings or court orders

Injunctions and other civil proceedings may be sought by the regulator to compel a person to comply with certain requirements or to recover costs.

### Suspension or cancellation of a licence, permit or authorisation

Suspension or cancellation of an authority may be sought where serious contraventions have occurred or where the authority holder is unwilling or unable to return to compliance. Suspension and cancellation are likely to occur in conjunction with other enforcement actions such as prosecution.

### Enforceable undertakings

An enforceable undertaking is a written, legally binding agreement proposed by a company or individual following an alleged contravention. The undertaking must be demonstrated to be the most effective and appropriate regulatory outcome in the circumstances.

Refer to the [Enforceable undertaking guidelines](#).

### Prosecution

Are undertaken for serious, ongoing or repeated breaches of legislation. Refer to the [Prosecution guidelines](#).