



# Department of Industry Regulatory Policy

How the Department of Industry delivers quality regulation

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## 1 Introduction

This document sets out the Department of Industry's policy for achieving compliance with the legislation administered by the Department's regulators. We do this by applying outcomes-focused and risk-based regulatory principles. All the Department's regulators will apply this policy to establish their strategic priorities and to effectively and efficiently achieve regulatory outcomes.

The Department's regulators seek to build community confidence as trusted, credible, effective, efficient and transparent regulators.

Application of this policy and associated regulator policies and strategies, will better mitigate risks to the community, lead to economic growth and jobs, sustain the State's natural resources and environment and deliver greater certainty for the regulated, and wider, community.

To achieve these outcomes for the community, the Department expects the regulated community to comply with regulatory requirements and the Department's regulators are expected to take appropriate action to address instances of non-compliance.

The Department is committed to applying regulatory best practice, supported by monitoring and analysis. This policy:

- sets out the outcomes-focused and risk-based regulatory framework that each of the Department's regulators follow;
- presents best practice regulatory policy that is applicable to all of the Department's regulators;
- includes definitions of regulatory terms to ensure consistent understanding across all of the Department's regulators and their stakeholders;
- provides cross-references to the Department's regulators' policy, strategy and planning documents;
- addresses the requirements of the NSW Quality Regulatory Services Initiative through the application of the regulatory framework.

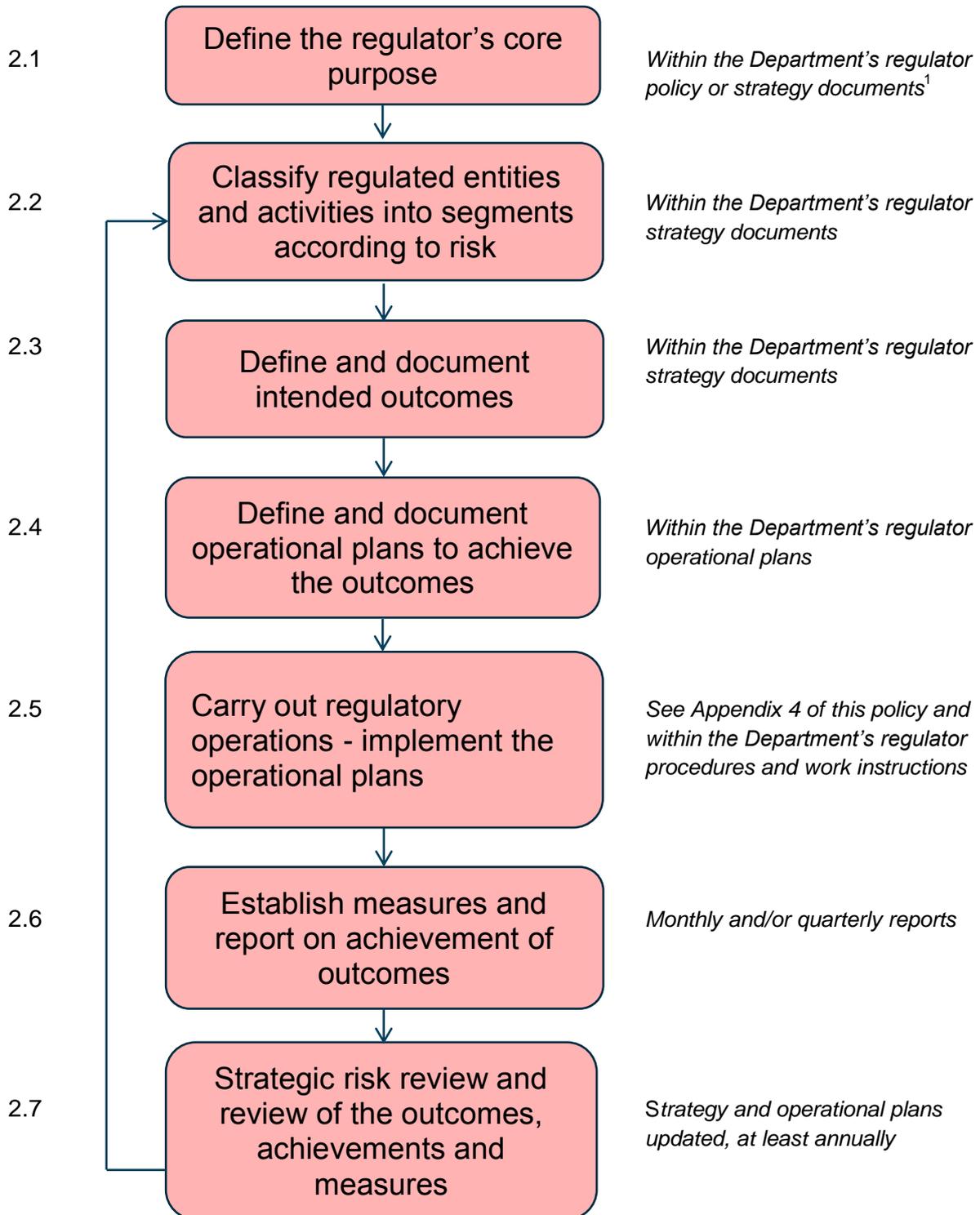
Refer to Appendix 3 for the Department's Regulatory document structure.

Each of the Department's regulators follows this policy's regulatory framework steps:

1. Define the regulator's core purpose
2. Classify regulated entities and activities into segments, according to risk
3. Define and document intended regulatory outcomes
4. Define and document operational plans to achieve those outcomes
5. Carry out regulatory operations - implement the operational plans
6. Establish measures and report on achievement of outcomes
7. Carry out a strategic risk review and review of the outcomes, achievements and measures.

## 2 Regulatory Framework

Each of the Department of Industry’s regulators implements the following process to achieve an outcomes-focused and risk-based regulatory approach.



<sup>1</sup> Refer to appendix 3 for a map/key to the regulators’ policy, strategy, operational planning, procedure and work instruction documentation

## 2.1 Core Purpose Statement

A core purpose statement describes the reasons for the existence of a particular regulator, or regulatory regime. This is normally found in the objects of the relevant legislation. The core purpose statement communicates to the community that the regulator is working towards a clear and specific goal. For example: “To administer safe, sustainable and ethical hunting in NSW.”

The Department’s regulators document their core purpose statement(s) in their policy, or strategy, documents.

## 2.2 Classify regulated entities according to risk

The Department’s regulators first apply regulatory risk-based principles by classifying regulated entities (or activities), into segments according to the consequence (impact, or harm) of non-compliance within that segment.

This classification into segments, based on consequence, is then used to prioritise licensing, compliance monitoring, education and enforcement resources, based on an assessment of both the probability and consequence of non-compliance.

The Department’s regulators describe, within their strategy documents, how the regulated community is classified into risk-based segments to maximise regulator effectiveness.

## 2.3 Define and document intended outcomes

Once the segments are defined, each regulator describes its intended outcomes for each segment, in “outcome statements”<sup>2</sup> which describe what a regulator expects to achieve, for a specific target group, through a regulatory action or initiative. For example:

*“Reduce the incidence of food-borne illnesses among vulnerable populations by undertaking risk-based inspections of nursing home facilities.”*

A defined segment should have achievable long, medium and short term outcomes.

Initiatives are then documented to achieve the outcomes. The reason for selecting a particular initiative to achieve an outcome also needs to be documented. The regulator explains the rationale for how the initiative is designed to contribute to the outcome through a “contribution story”<sup>2</sup>.

Each of the Department’s regulators describes, within their strategy documents, the outcomes statements and the reasons for selecting the regulatory initiatives to achieve the outcomes (contribution stories).

## 2.4 Make Operational Plans to achieve the outcomes

The Department’s regulators plan regulatory activities and allocate resources to initiatives and programs to achieve the regulatory outcomes identified in the outcome definition process.

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<sup>2</sup> Refer to “Guidance for regulators to implement outcomes and risk-based regulation” NSW Finance, Services and Innovation, October 2016

In general, more resources are allocated to higher consequence segments and the entities with a higher likelihood of non-compliance within those segments.

Operational plans are prepared annually as part of the Department's corporate planning cycle. The operational details within these plans are not published in order to maintain maximum deterrence.

## **2.5 Carry out regulatory operations - implement the operational plans for each segment**

The Department's regulators carry out regulatory operations in accordance with their operational plans.

Appendix 4 of this policy describes the tools the Departments regulators employ to achieve regulatory outcomes within the regulatory lifecycle of a licence, including the full range of tools available when dealing with non-compliance (a breach of the law).

Regulators report regularly against the achievement of operational plans and may adjust the plans throughout the year to take into account changes in priorities that arise from unforeseen strategic priority changes and information gained through compliance monitoring activities.

## **2.6 Establish measures and report on achievement of outcomes**

The Department's regulators regularly report progress towards outcomes and also report regulatory achievements.

The Department's reporting framework includes the following key elements:

- measures and targets relating to regulatory activity
- measures and targets relating to regulatory outcomes
- summary reports containing strategic analysis
- regulator performance against good regulatory practice.

## **2.7 Strategic risk review and review of the outcomes, achievements and measures**

At least annually, the Department's regulators review the achievement and the relevance of the outcomes, usually in preparation for the corporate planning cycle for the next financial year and the associated outcome setting process.

The regulatory planning cycle includes a risk identification and assessment process, where known and emerging regulatory risks are identified, assessed and incorporated into the strategic planning process as appropriate. Current and emerging risks are identified through a range of corporate planning forums, analysis of internal and other data and accumulated community feedback. Where appropriate, specific stakeholder input may be sought proactively from time to time.

## Appendix 1 Department of Industry Regulatory Principles

Regulatory principles support and influence the way we perform our functions, exercise our powers and engage with the NSW community.

We apply the principles to complement the NSW Public Sector's core values of service, integrity, trust and accountability and the Department's Code of Conduct.

### **1.1 Committing to regulatory best practice**

We are committed to building the trust of the NSW community and fostering mutual respect between the Department and the regulated community.

We seek to understand the expectations of the community through engagement on key issues. We strive to meet those expectations through our regulatory framework and our assessment of segment and individual entity regulatory risk.

We will ensure that we have the skills, systems, processes and equipment to implement our regulatory approach efficiently and effectively.

We will periodically review our regulatory approach, systems and activities, based on whether we have achieved our outcomes, feedback from the community, and whether our framework and approach achieves best practice for regulators.

### **1.2 Taking a risk-based and strategic approach to regulation and decision-making**

We will employ a risk-based and intelligence-led approach to regulation to ensure our finite resources are applied to their greatest effect. We will focus proactively where the consequences of non-compliance are greatest and where the likelihood of non-compliance is highest.

Taking a risk-based approach to administering regulation will also result in individuals and businesses not being inconvenienced by unnecessary regulatory activities.

### **1.3. Taking an outcomes-focused approach to regulation**

We will clearly define regulatory outcomes to guide the application of licensing, compliance monitoring, education and enforcement activities to achieve the overall regulatory purpose.

We will invest in the development of the Department's staff to ensure we have the skills and the knowledge of the desired regulatory outcomes to choose an appropriate and proportionate response to non-compliance.

We will regularly report on progress towards the achievement of regulatory outcomes.

### **1.4 Accepting accountability**

We are accountable for our compliance and enforcement activity which means we are answerable for our decisions, including when we take action, the type of action we take, or when we decide not to take action.

Our decision-making will be made within effective processes of corporate governance to maintain objectivity, independence and integrity.

We will employ processes which provide procedural fairness and natural justice. We will make decisions based on evidence and will ensure that appropriate records are kept of our regulatory activities so that decisions can be readily accessed and scrutinised.

### **1.5 Providing transparency**

We will publish our policies and priorities and information that explains what the community and regulated entities should expect from a regulatory process.

We will promote improved awareness of our regulatory activities. Where legislation allows, the results of enforcement actions may be made public to deter future non-compliance as well as to build the credibility of, and confidence in, our regulatory approach and processes.

We will use plain language and be clear and concise when we communicate with the community and industry. When non-compliance is detected, we will be clear about what is required, the time frames and the consequences of continuing non-compliance.

### **1.6 Acting in a timely way**

We will conduct licensing, compliance monitoring, education and enforcement activities in a timely way to minimise harmful impacts, maximise deterrence, minimise disruption and provide certainty to the regulated and wider community.

We acknowledge that licensing is a significant regulatory tool and that regulated entities and the wider community value timeliness in assessing and issuing licences.

We commit to timely compliance and enforcement action to maintain the principle of fairness to those involved.

### **1.7 Balancing the need for consistency with the need for flexibility**

We aim for high levels of consistency in decision making, based on the development of clear policies and standard processes that take into account the specific circumstances of a situation, to produce sensible, predictable and fair results.

### **1.8 Demonstrating proportionality and exercising discretion in regulatory decision-making**

We expect people and organisations to comply with regulatory requirements. We commit to taking regulatory action that is proportionate to the circumstances of the regulatory breach. The more serious the offence, the more serious should be the response.

We strive to achieve fairness in regulatory outcomes while ensuring we act in the public interest.

### **1.9 Acting within the law**

We will act within the legal remit of statutory power when undertaking enforcement activity and will not require entities to observe requirements that are not authorised by law.

## Appendix 2 Definitions

### **Effective and Efficient regulator**

A regulator is *effective* when licensing, education, compliance monitoring and responses to non-compliance activities achieve the intended regulatory outcome.

A regulator is *efficient* when licensing, education, compliance monitoring and responses to non-compliance activities are conducted with maximum productivity, minimum wasted effort or expense and with the minimum optimal burden on the regulated community.

### **Regulatory Compliance**

Adhering to the requirements of laws, licence and certificate conditions, industry and organisational standards and codes.

### **Licence**

For the purposes of this policy, a licence is taken to be a licence, registration, notification, authorisation, accreditation, permit, approval, certificate or other instrument issued by a regulator to allow an entity to carry out a regulated activity.

### **Culpability**

The level of responsibility associated with a non-compliance. This includes previous behaviour, duration of the behaviour, knowledge of the seriousness of their actions, evidence of motivation for the non-compliance, willingness to act to remediate the harm.

### **Remedial Action**

As directed by the regulator, actions taken to fix the effects of a non-compliance.

### **Corrective Action**

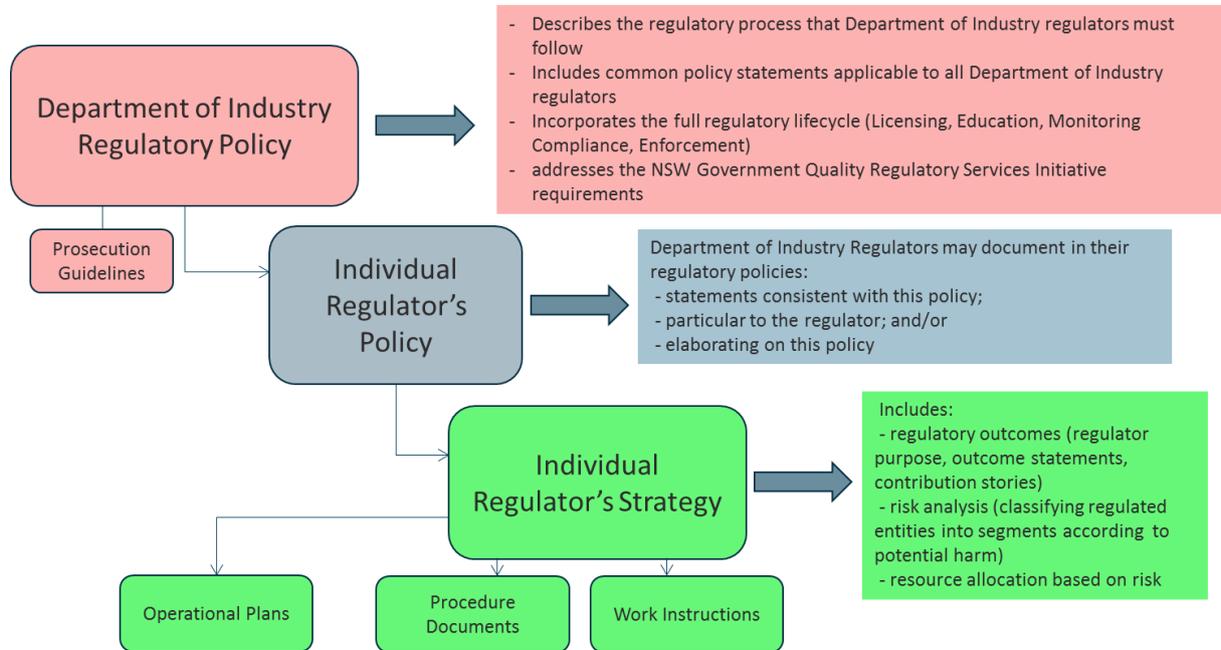
Actions taken by the regulated entity to ensure the non-compliance does not recur. This usually requires causal analysis and changes to systems, as well as the required remedial action.

### **Quality Regulatory Services Initiative (QRSI)**

The QRSI is a NSW Government initiative that maintains a focus on regulatory outcomes to reduce regulatory burden on those that are compliant, prioritises resources towards those that present the highest risk and promotes flexible and innovative responses to non-compliance. This Department of Industry Regulatory Policy is designed to meet or exceed the requirements of the QRSI.

Appendix 3 Department of Industry regulator strategy and planning documents

### Department of Industry Regulatory Documents



## Appendix 4 Carrying out regulatory operations – the regulatory lifecycle model

A regulatory requirement, referred to in this policy as a licence, is normally required when the regulatory scheme dictates that the risks to consumers, third parties, the community, and/or the environment are sufficiently high to require increased monitoring by the regulator.

The regulatory model in figure 1 depicts the activities undertaken by the Department’s regulators to address the risks associated with a licence holder’s activities.

It should be noted that not all regulated activity requires a licence - a licence is generally not required for activities that have lower non-compliance consequences. Regulators assign licensing, compliance monitoring, education and enforcement resources to these activities commensurate with the scale of the activity and the consequences.

Regulators also allocate resources to informing/educating the community about the need to comply with regulatory requirements not associated with a licence (general regulatory requirements), monitor compliance with those requirements and carry out enforcement activities as required.

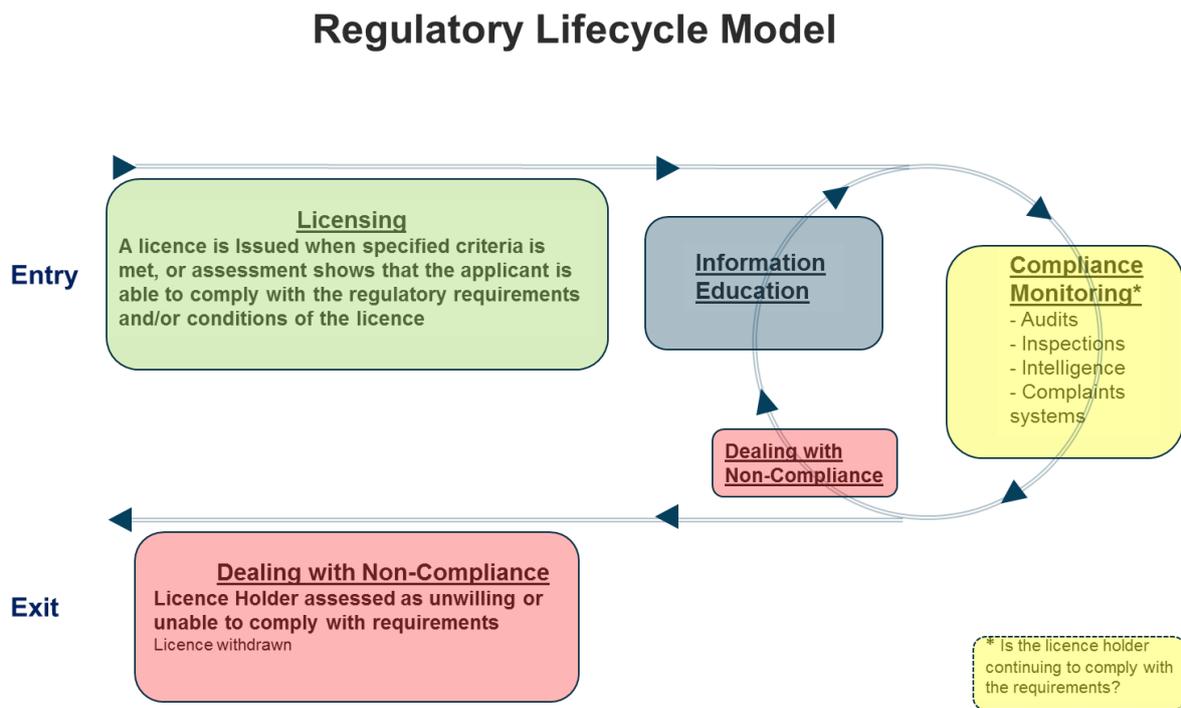


Figure 1

### 4.1 Licensing

A licensing scheme for a category of activity is normally required when the risks are sufficiently high to require increased oversight by the regulator. There must be a clear rationale for the licence and regulators must efficiently administer the licensing scheme, so that it achieves its objectives with the minimum necessary burden on society.

Each of the Department's regulators describes, within their strategy documentation, the rationale for each of the licence types that they administer, based on the desired regulatory objective for each licence.

The regulators issue licences to individuals or entities once it is assessed that the regulated entity is able to comply with the requirements associated with the licence, thought necessary to mitigate the risks.

Timeliness in the licence assessment and issuing process is important. The Department's regulators provide clear information on what is required to obtain a licence and also clear information on expected processing times for a licence.

## 4.2 Monitoring Compliance

Monitoring compliance is an essential part of the Department's regulators' role. Information gained during compliance monitoring assists in:

- detecting instances of non-compliance in a timely manner
- determining the level of and trends in compliance
- identifying when and what type of education responses or enforcement action may be required
- identifying where action may be required to avoid or mitigate harm
- assessing and reviewing the effectiveness of targeted operations, education and information programs.

Each of the Department's regulators allocates compliance monitoring resources to the regulated community segments, according to the priorities identified in their risk-based and outcome-focused strategies and operational plans.

### *Pro-active monitoring*

The Department's regulators undertake a range of pro-active, planned monitoring and inspection programmes to determine the level of compliance within a regulated community.

Pro-active monitoring can include:

- inspections/audits carried out at regular intervals, determined on the basis of a risk rating
- follow up audits or more frequent auditing of identified poor performers, or high risk activities or businesses
- programmes targeting a particular regulated community.

Inspections and audits can be conducted on an announced or unannounced basis.

The Department's regulators may use external resources to assess compliance and performance. These include accredited third party auditors and certifiers.

The Department's regulator policy, strategy and procedural documents describe the types of audits and inspections that are employed by the regulators.

### *Reactive monitoring*

Reactive monitoring and inspections are undertaken in response to complaints, incidents or other intelligence.

The Department's regulators maintain systems and procedures for logging complaints from the community and regulated entities. Complaint information is prioritised according to risk-based principles and complaints are investigated accordingly. Priority is given to situations

that have the potential to cause serious harm and patterns of similar incidents that may suggest ongoing or broader issues.

#### *Intelligence systems*

The Department's regulators employ intelligence systems to gather information about a regulated entity, or group of regulated entities, to determine an appropriate regulatory strategy, response or to inform operational planning.

The Department's regulator policy, strategy and procedural documents describe how the regulator employs intelligence systems.

### **4.3 Education and information**

The Department seeks to maximise voluntary compliance through a cooperative and collaborative approach and promotes engagement with the community and regulated entities as an important way to influence compliance behaviours.

Education activities aim to build a capacity within the regulated community to play an informed and active role in complying with regulations. Activities include the provision of information resources and tools to assist regulated entities to be aware of their rights, to make sure they are aware of the requirements, and to help provide certainty in planning for the future. This helps them meet their obligations and avoid inadvertent non-compliance.

The Department's regulator strategies, operational plans and procedural documents describe how the regulator allocates education and information resources to segments, according to risk-based and outcome-focused priorities.

Education activities may include:

- providing information and tools to assist the regulated community to be aware of their rights and the law, and to help provide certainty in planning for the future
- engaging with the regulated community to build capacity, such as through workshops and sharing of best practice
- promoting and reinforcing good regulatory practices
- promoting the benefits of complying with legislation
- highlighting the potential consequences of not complying with legislation.

Wherever possible, the Department works in partnership with peak bodies and stakeholder groups to gain support for, and achieve, compliance.

The Department provides regulatory information through targeted information on regulators' websites, information sheets, newsletters and brochures, through social media and media releases.

Compliance officers also play an important role in informing and educating regulated entities of their obligations and the consequences of non-compliance.

### **4.4 Dealing with non-compliance – regulatory decision-making**

A graduated and proportionate approach to non-compliance is employed, based on the severity of the non-compliance (its impact on the environment and potential harm to people or property) and the regulated entity's culpability, cooperation and approach to the non-compliance. See figure 2. A non-compliance is a breach of the law and must be treated as

such - every non-compliance that is detected requires a decision, by the regulator, on what response to take.

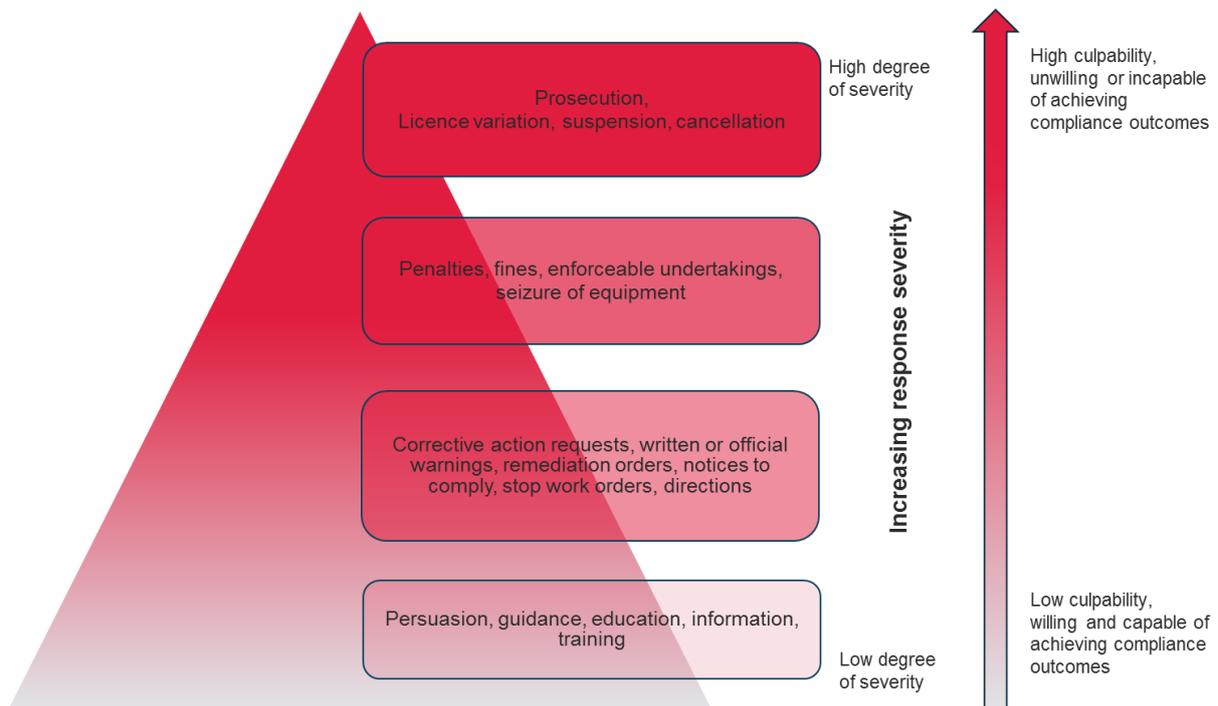


Figure 2

The following factors are considered when deciding the response to non-compliance:

- the seriousness of the non-compliance, based on its actual or potential impacts on the community
- the potential or actual risk of public harm caused by the non-compliance
- voluntary remedial action implemented to address the non-compliance, mitigate the harm and any mechanisms put in place to prevent a recurrence
- cooperation demonstrated by the person involved
- compliance history of the person - in general and with respect to the specific incident
- whether the person has made false or misleading statements about the non-compliance
- the person's willingness to comply with requirements
- the person's ability to comply with requirements
- timeframe over which the offence was committed
- any mitigating or aggravating circumstances
- public interest and community expectation about the action taken to provide specific or general deterrence.

Responses to non-compliance, in increasing severity, include:

- corrective action requests
- warnings (written and verbal)
- remediation orders
- stop work orders
- notices to comply
- directions
- penalties and fines
- enforceable undertakings

- suspension and cancellation of shares
- seizure of equipment
- licence action (including cancellation or restriction)
- prosecution.

These regulatory responses allow a balanced approach to non-compliance which stops the improper conduct and promotes changes in attitudes and behaviours, rather than simply applying a punishment. Combinations of the actions may be undertaken, for example licence action and prosecution.

At the more severe end of the response spectrum, enforcement activities aim to deter non-compliant behaviour (in the entity involved and other regulated entities), consistent with legislation. Enforcement decisions must be based on evidence, which will be admissible and sufficient to establish that an offence has been committed. Wherever possible, reasons for decisions are able to be provided and avenues for review explained.

#### Licence Action

If the licence holder is no longer willing or able to comply with the regulatory requirements a decision may be taken to vary, suspend, apply licence conditions, or cancel the licence. When the Department's regulators vary, suspend, or cancel a licence, the primary purpose will be to protect persons, property or the environment and not for punitive or disciplinary purposes.

#### Prosecution

The overall goal of a prosecution undertaken by the Department is to deter non-compliance and to assist in maintaining community confidence in the regulatory oversight provided by the Department. Prosecution is a strategic response the Department may choose, based on the circumstances and supporting evidence.

The Department's Prosecution Guidelines detail the approach that the Department will take when considering and undertaking prosecution action.

## Appendix 5 NSW Quality Regulatory Services Initiative (QRSI) cross-reference

<b>QRSI Requirement</b>	<b>Department of Industry Regulatory Policy Reference</b>
2.1 Defining regulatory outcomes	2.1 2.3 Appendix 1.3
2.2 Identifying risks	2.2 2.7 Appendix 1.2
2.3 Assessing risks	2.2 Regulator strategy documents Appendix 1.2
2.4 Linking your work to outcomes: a contribution story	2.3 Regulator strategy documents
2.5 Identifying measures	2.6
2.6 Allocating resources	2.4 Regulator strategy documents and operational plans
2.7 Tailoring the enforcement response	Appendix 1.8 Appendix 4.4
2.8 Monitoring, reporting and continual improvement	2.6 2.7 Appendix 1.1