



# Compliance policy

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# 1 Introduction

## 1.1 Role of the Department of Planning, Industry and Environment

The Department of Planning, Industry and Environment is responsible for effective and sustainable major development planning to support a growing NSW. In doing this, the department work with local communities, business sectors and government agencies to coordinate the orderly and sustainable development of NSW.

The *Environmental Planning and Assessment Act 1979* (the Act) establishes the department as the State's lead planning body. This requires long-range thinking, integrated planning, clear and consistent policies and balanced assessment. Broadly, the department's role is to:

- make plans to guide development on behalf of the Minister for Planning
- develop and implement policy, based on evidence, to drive sustainable development in NSW
- assess proposals for state significant projects – referred to in the Act as state significant development and state significant infrastructure
- monitor and regulate the carrying of out of these projects to ensure their compliance with the Act (for example, the requirement in the Act to obtain planning approval and achieve compliance with conditions of approved projects).

The department promotes continuous improvement of the assessment process for state significant projects to reduce the assessment timeframes whilst ensuring high environmental standards through robust compliance operations. As an example, in 2015 the Act was strengthened to include the introduction of three tiers of offences and higher penalties, alternative sentencing options for the Land and Environment Court and new powers for councils.

The department undertakes compliance and enforcement to ensure acceptable environmental and public interest outcomes. As part of this role, the department collaborates with agencies at a local, state and Commonwealth level.

The department ensures that projects approved by the Minister are carried out according to the project approval or development consent, collectively referred to in this document as an 'approval'. In doing so, the department's compliance teams monitor projects to determine whether they are complying with conditions of approval, and to investigate and enforce compliance.

The department is committed to monitoring and enforcing compliance in a fair, consistent and equitable manner with rigour and integrity.

Compliance activities can identify the effectiveness of approvals and opportunities for continuous improvement and investigate broader policy responses to emerging compliance issues. The planning cycle is shown in Figure 1.



Figure 1. Planning cycle.

## 1.2 Department's Compliance Framework

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In performing its compliance role, the department's focus is to monitor, promote and enforce compliance in the carrying out of state significant projects. These projects require the approval of the Minister, the IPC or delegate. The department's compliance function is designed to ensure that the proponents of these projects have obtained the necessary planning approvals and are complying with their conditions. The department retains this role even where the approval is ultimately granted by the Independent Planning Commission or by the court in place of the Minister.

There are other developments where the planning approval of the Minister or the Secretary is required for example, development in NSW Alpine areas and the department performs a compliance role in relation to these.

For other development where a council is the consent authority including those determined by Planning Panels, it is the council that monitors, promotes and enforces compliance in the carrying out of that development. Council may also assume regulatory responsibility of projects approved by the Minister or delegate if deemed appropriate.

The department uses a risk and outcomes-based approach to align with the NSW Government's commitment to prioritise resources toward those that present the highest risk to regulatory compliance and reduce regulatory burden on those that are in compliance. This risk-based approach also provides an opportunity to collaborate with other co-regulators on policies, tools, monitoring and regulation to ensure a whole of government approach to regulation.

The department is committed to monitoring and enforcing compliance in a fair, consistent and equitable manner with rigour and integrity. Its compliance team undertakes its compliance activities in four main categories:

- **Strategic** – to inform the future assessment of other similar projects or future modifications to approved projects.
- **Programs** – to promote voluntary compliance, and address systemic issues relating to groups of projects based on industry type, geographic location, impact types or other issues.
- **Proactive** – to promote proponent-specific compliance and prevent non-compliance through ongoing monitoring activities, trend-based audits, inspections and education campaigns.
- **Reactive** - in response to incidents, complaints alleging non-compliance, and in response to referrals received from other NSW Government agencies and councils.

### What we do

In performing its compliance role in relation to state significant infrastructure and development projects for which the Minister or the Planning Secretary is the consent authority, the department:

- develops and implements compliance and enforcement policies and guidelines relating to the Act;
- develops tools to guide a proactive compliance and enforcement program;
- initiates strategic audits or programs to assess environmental performance or promote broader compliance by industry;
- reviews and follows up reports required by the conditions of approval;
- undertakes proactive and reactive inspections, audits and programs;
- investigates and follows up complaints referred from community members and other agencies as well as local councils;
- investigates and takes enforcement actions as appropriate to deter and remedy identified breaches, including breaches of conditions of approval and failure to obtain approval;
- conducts industry and issue-specific educational programs; and
- collaborates with other government regulators and councils to achieve an effective and efficient whole of government compliance approach.

## 1.3 Purpose of the Compliance Policy

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This Compliance Policy outlines the department's risk-based approach to and priority setting process for compliance and enforcement.

This policy is designed to guide the department's decision-making so that its compliance activities and actions are risk-based, responsive, effective, efficient and collaborative. It is intended to:

- lead to departmental compliance activities that are credible, understandable, and consistently applied
- promote compliance by proponents of state significant development and infrastructure projects
- help explain to the community, businesses, government agencies and councils the department's compliance framework and how and why it conducts its compliance activities.

The other related guideline that provides information about linked activities associated with compliance and enforcement are the *DPIE Prosecution Guidelines*.

## 1.4 Key relationships

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The department works with other government agencies, local councils and the community to inform its compliance activities. Each level of government, local, state and Commonwealth, has different responsibilities and interaction with the planning system as well as responsibilities to protect the environment and community.

**State and Commonwealth agencies:** There are a number of state and Commonwealth agencies that are co-regulators, as well as advisory agencies with an interest and/or role in the regulation of state significant development and infrastructure projects. The department collaborates with these agencies on issues of mutual concern to gather information, co-ordinate compliance actions and reduce regulatory duplication.

**Local councils:** Where a council is the consent authority for a development, the ongoing compliance and monitoring of that development is the responsibility of the relevant local council. There is however collaboration at a strategic and policy level between councils and the department to inform and improve their respective compliance and enforcement programs. Council may also assume regulatory responsibility of projects approved by the Minister or delegate if appropriate. There also may be times when local council evidence may be used in deciding on appropriate departmental action.

## 1.5 Compliance Principles

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The department aims to undertake its regulatory role in a clear and responsive manner, guided by the following principles:

1. **Proportional** – enforcement action will be proportionate to the level of harm, the risk posed to the community and the environment, the seriousness of the non-compliance and the culpability of the offender.
2. **Targeted** – compliance activities will be focused on those operations which, based on the likelihood of harm towards the environment or community, pose the greatest risk.
3. **Effective and efficient** – compliance and enforcement activities will utilise evidence from a range of sources and applied in a timely manner to obtain the best outcomes for the environment and the community and maximise the effectiveness of any deterrence.
4. **Transparent** – compliance and enforcement expectations will be clearly explained to proponents, and our compliance and enforcement activities will be publicly reported on the Department's website regularly.
5. **Certain and consistent** – compliance investigations will be conducted in a fair, efficient and consistent manner to ensure the public has confidence in the Department in administering its regulatory role and proponents of state significant infrastructure and developments know what to expect when a breach occurs.
6. **Ethical and accountable** - the expectations of, and conduct and behaviours of departmental staff, will be in accordance with its *Code of Conduct for NSW Government Sector Employees*.
7. **Collaborative** - compliance activities will be undertaken collaboratively with other regulators and government agencies to achieve effective and efficient whole of government outcomes

## 2 Alignment to corporate vision and objectives

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The compliance principles are consistent with the department's vision in its *Corporate Plan (2018-20)*: *As stewards of the physical and cultural treasures of NSW, we create great places and experiences for all, plan for a changing and thriving NSW, inspire strong and resilient communities and regions, and ensure the responsible and sustainable use of our state's resources.*

The *Corporate Plan* outlines five goals to achieve this vision, namely:

1. Create a strong and vibrant NSW by planning, designing, implementing and coordinating delivery of local infrastructure to support integrated regions and communities.
2. Provide a sustainable natural environment and promote the safe discovery and development of geological resources.
3. Provide energy and water security through the sustainable use and access to affordable and reliable supply.
4. Foster excellence in arts, screen and culture by developing and supporting a vibrant, accessible and thriving sector.
5. Value and invest in our people, systems and processes.

The *Corporate Plan* stresses consistency, transparency and clarity of planning rules and decisions, timely decisions and greater policy certainty.

The department's business model, which specifically references compliance and enforcement, is built around four themes:

- Evidence and design - highlighting the Compliance policy as a key component.
- Engagement and reputation.
- Customer facing delivery- highlighting compliance and enforcement of development conditions for state significant assessment and stakeholder collaboration as part of local activation and delivery.
- Corporate support.

A clear Compliance policy and effective, credible and transparent compliance and enforcement functions are essential to the achievement of the department's goals.

## 3 Compliance model – risk-based regulatory approach

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The department uses an outcomes and risk-based regulatory approach and methodology to prioritise and target its compliance actions and improve the efficiency and effectiveness of its regulatory action.

The department views risk in relation to its compliance function in terms of:

- consequence (the risk created, or severity of the harm caused to human health or safety, the economy, the community and the environment). This considers the actual or potential impacts on human health or safety, the economy, environment, community and amenity. It also considers the scale and duration of any harm or impact.
- likelihood (the chance of a non-compliance or an incident occurring). This takes into account, for example, the compliance history of the operator, the business systems in place to identify and management risk, the competence of the operators and the level of resources the business dedicates to compliance and maintenance.
- the harm caused to the integrity of the planning system when breaches occur.

For its proactive compliance activities, priority is given to those developments posing the biggest risk to the community and the environment, as well as towards those operators that have a history of noncompliance<sup>1</sup>. When the department undertakes proactive compliance activities, it generally does so in consultation with relevant state

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<sup>1</sup> NSW Premier & Cabinet July 2014, Guidance for regulators (Ibid).

and Commonwealth regulators to improve the outcome as well as the efficiency and use of government resources and to reduce regulatory duplication.

For its reactive compliance actions, factors considered include the nature of the complaint or reported incident, the time elapsed since the alleged breach, the potential for systemic problems, patterns of conduct and whether co-regulators are investigating the same matters.

### 3.1 Risk assessment and ranking

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To guide its proactive auditing, monitoring and educational compliance activities, the department uses a risk assessment and ranking methodology to assist compliance staff in undertaking a systematic approach to the monitoring state significant infrastructure and developments.

The methodology provides for a ranking of each development based on its potential risk to the community and the environment.

Risk Assessments ensure the department's efforts are focused on those projects that have a risk of:

- not complying with conditions of approval
- poor environmental performance
- impacting on significant/sensitive areas.

## 4 Departmental investigation and compliance monitoring approaches

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Investigations are an important part of the department's regulatory function and are to be conducted in a manner that is:

- objective, fair and impartial
- consistent with the presumption that an alleged offender is innocent until proven otherwise
- within the delegated authority of the investigating officers
- in accordance with the law
- respectful of individuals.

### 4.1 Investigative powers and tools

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Departmental investigation officers<sup>2</sup> have powers to conduct site inspections, audits, and to investigate issue-specific potential breaches of the Act.

Officers have the power to enter and search premises, conduct interviews, obtain information and records, and require persons to answer questions.

The tools that investigation officers use to monitor compliance and detect breaches include:

- a) site inspections (including unannounced)
- b) review and analysis of monitoring reports and other available data
- c) Reviewing the findings and recommendations of independent third-party audits
- d) reviewing community feedback
- e) referrals from other agencies or regulatory authorities.

<sup>2</sup> S9.14 of the EP&A Act allows the Planning Secretary to appoint persons as investigation officers with general or specific investigative powers.

## 4.2 Compliance monitoring

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The department uses compliance monitoring to determine the level of compliance with state significant infrastructure and development consents and other requirements of the Act.

Compliance monitoring activities:

- identify non-compliance with state significant infrastructure and development consents
  - assist to identify proponent or sector wide trends
  - investigate broader policy responses to emerging compliance issues.
- identify the opportunities for improvement

For effective compliance, conditions of approval need to be clearly articulated, reasonable, measurable, and enforceable. For state significant infrastructure and development projects, conditions of approval generally require environmental monitoring and reporting together with independent auditing and expert review of environmental performance. The level of monitoring and reporting required of a proponent in conditions of approval is designed to be consistent with the significance of the project and the level of potential harm if a breach occurs.

The department undertakes its own compliance monitoring. It conducts inspections of approved projects, reviews required compliance reporting and conducts audits and other programs to ascertain the level of compliance and environmental performance.

## 4.3 Assessment of potential breaches

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Matters of potential non-compliance come to the attention of the department through:

- the department's inspection and audit programs
- reviewing monitoring reports, incident reports and independent audits required to be submitted by proponents
- information on potential breaches from other government agencies and councils
- complaints made by members of the public.

Where a potential breach is identified, the department will conduct a preliminary assessment to determine whether the department or a co-regulator is the lead agency. When the department is the lead agency, an investigation will be carried out to obtain the necessary evidence to establish whether a breach has occurred and the facts surrounding the incident.

The key element of any investigation into a potential breach (and the subsequent selection of an appropriate regulatory response) is determining whether there is sufficient evidence to prove the elements of the breach. This means that all the elements of a non-compliance with a condition of approval, or an alleged unauthorised use must be proven beyond reasonable doubt for criminal enforcement (such as a penalty notice or prosecution) or on the balance of probabilities for civil enforcement (such as an order or civil enforcement proceedings).

On completion of an investigation, the facts and evidence collected are analysed, evaluated and used to determine the appropriate regulatory response. Based on the significance of an actual breach, the department will determine appropriate action, including any relevant enforcement.

Further information about the types of regulatory responses and enforcement action is covered in Part 5.

## 4.4 Determining the significance of a breach

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Once the department has determined, based on the evidence, that a breach has occurred, there are two criteria that are used to determine the significance of a breach: the level of harm or potential harm (severity), and the culpability of the offender (compliance history, financial benefit, timeframe of the non-compliance, whether the harms is still occurring or has been reduced, foreseeability, intention).

The level of significance of a breach guides the appropriate response necessary to remedy the breach and/or to reprimand an offender.

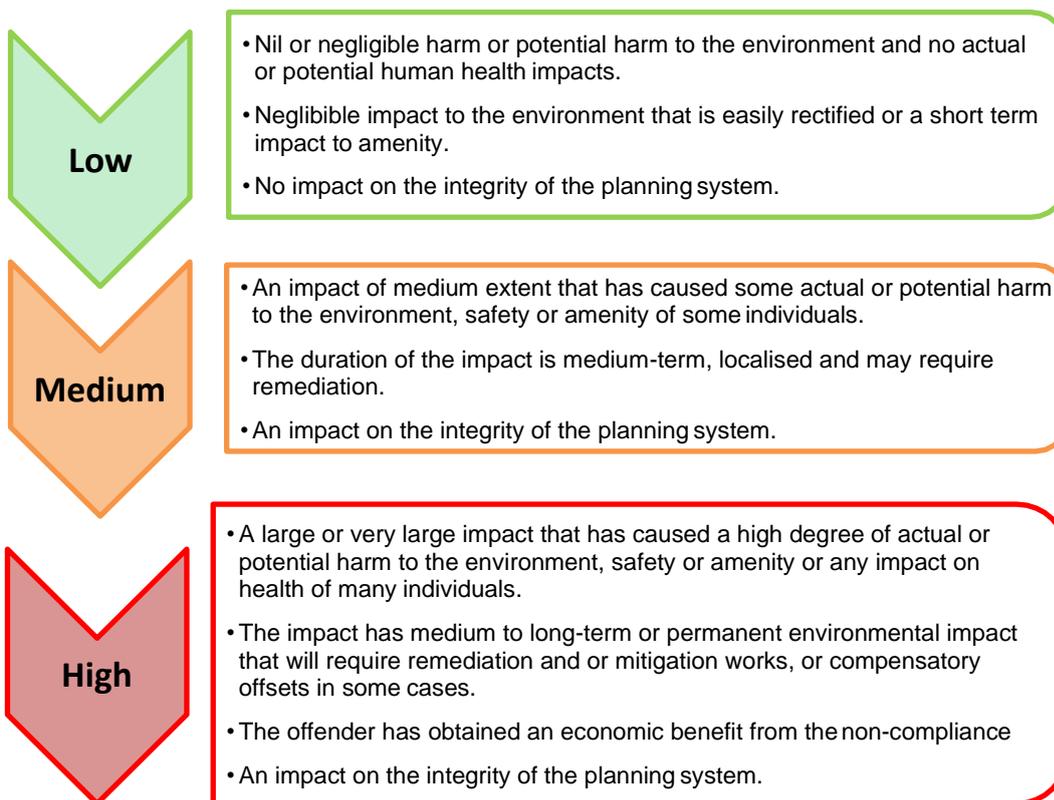
Where the offender has failed to obtain an approval, or has obtained an approval but the development exceeds the size or scale of that approval, the department will view this as significant potential harm because the actual

impact of the development, and the need for further mitigation measures, will not have not been assessed. This may be the case whether or not there is any actual environmental harm.

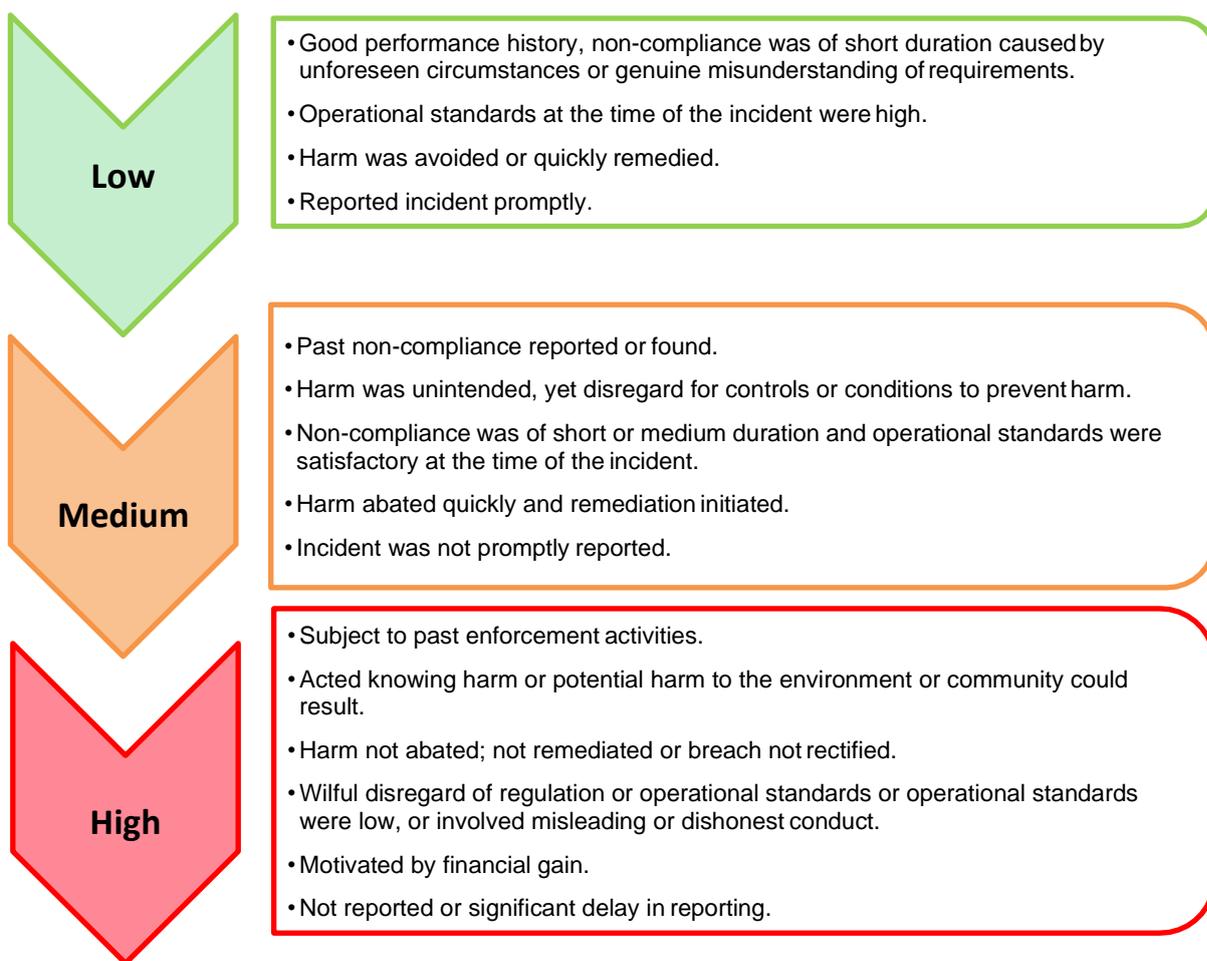
Significant potential or actual harm may also occur, where the breach causes harm to the integrity of the planning system, for example where an applicant fails to disclose political donations which affects transparency of the planning system.

#### 4.4.1 Determining the degree of harm from the offence

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## 4.4.2 Determining the culpability of the offender



A breach will be assessed against the elements in these criteria for making decisions about the appropriate regulatory response.

## 5 Regulatory responses

The outcomes of the regulatory responses broadly are fivefold to:

- restrain or remedy a breach
- punish an offender for breaking the law (by issuing a fine or imposing a penalty)
- prevent and provide a deterrent to potential future breaches
- preserve the integrity of the planning system
- build community confidence that state significant projects are appropriately regulated.

When the evidence shows that a breach has been committed, it is necessary to determine the appropriate response for the particular breach to achieve the appropriate outcomes. The department will also consider the role of all parties involved in the breach including contractors and consultants.

The regulatory response is escalated according to the significance of a breach and the appropriate outcome, with the hierarchy of responses shown in Figure 2.

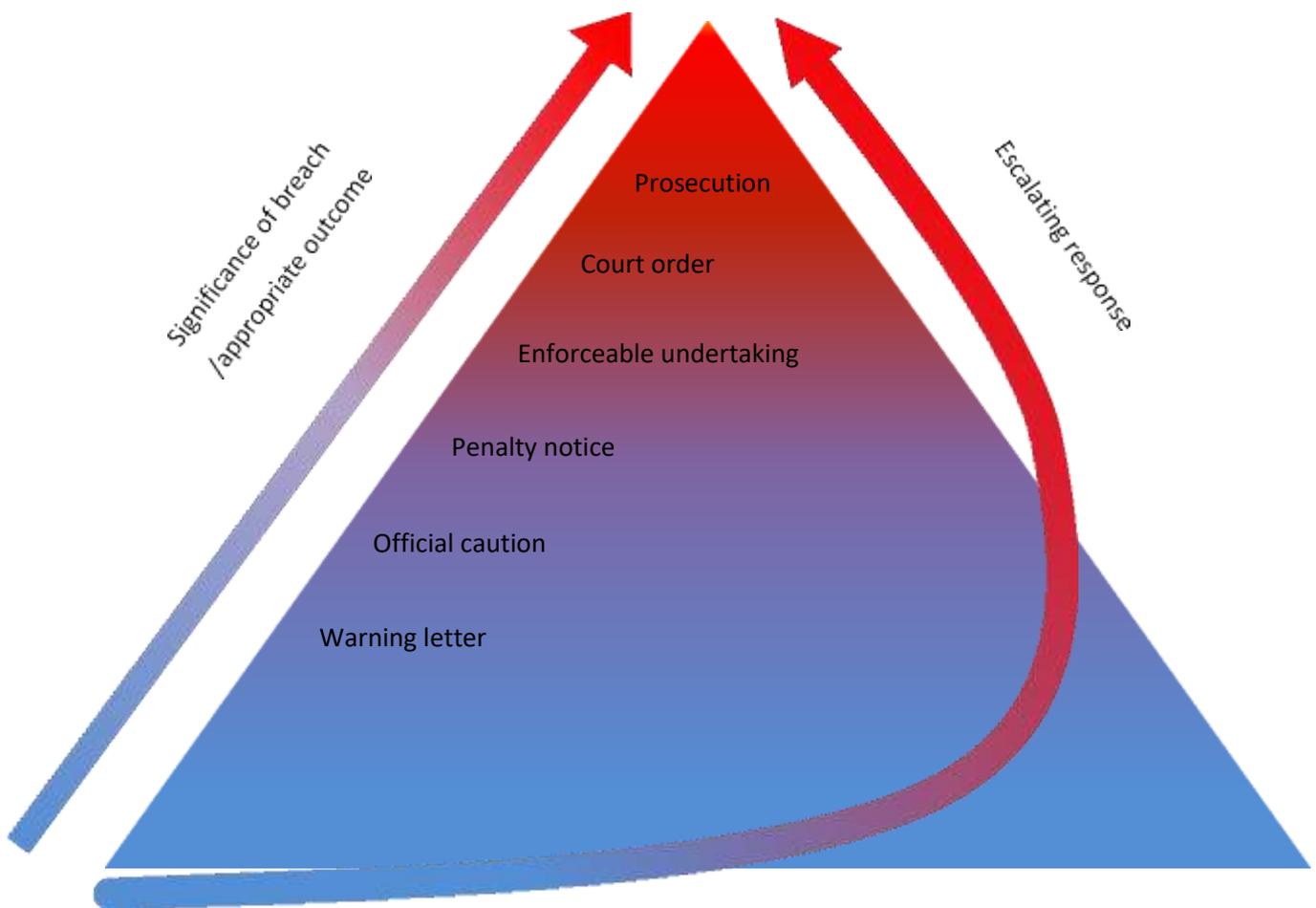
The applicability of, and weight given to each factor will depend of the facts of each case. The severity of the breach and the culpability of the offender are determined by the evidence collected during an investigation.

The department applies the principles of natural justice, also known as procedural fairness, when discharging its regulatory duties under the Act and which include:

- providing a fair hearing – allowing an alleged offender to present their case, either through a show cause process, a notice of intention to issue an order, interview, formal written requests or informal written requests for information
- impartiality in the decision-making process – officers are to be unbiased and not hold a vested interest in the outcome of a process
- decisions based on evidence – decisions must be based on the evidence provided not on irrelevant issues and there must be a rational basis upon which the decision-maker has decided to accept the evidence as credible
- acting in good faith – at all times departmental officers are to act in good faith.

The figure below illustrates the escalating regulatory response to demonstrate the types of action that the department may initiate, based on the significance of the breach.

**Figure 2.** Escalating regulatory response to a breach – source adapted from Ian Ayres & John Braithwaite (1992), *Responsive Regulation: Transcending the deregulation debate*, Oxford University Press, New York



## 5.1 Regulatory and enforcement options

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The department aims to improve environmental and public interest (social and economic) outcomes when it undertakes enforcement action. To achieve this, a number of options are available:

### **No breach/no enforcement action**

In cases where the outcome of an investigation is that a breach has not occurred or there is insufficient evidence to establish that there has been a breach at all, then no formal enforcement action is taken.

### **Informal action**

Informal action will not be made publicly available. In cases where informal action is taken against a contractor to a proponent on a project, the proponent for the respective project will be informed of the investigation including the outcome.

### **Non-compliance recorded**

For very minor non-compliances that are administrative and do not go to the integrity of the planning system, or for other minor non-compliances that resulted in no or minimal impacts on the community or the environment, informal action may be appropriate. These non-compliances are generally voluntarily reported, rectified and have controls put in place to prevent any recurrence. The department records the decision as well as the rationale and advises the proponent of the outcome of its investigation.

### **Warning letter**

A warning letter is issued where a breach of a minor nature is identified, but where it is determined that no formal enforcement action is necessary. This may arise in situations where the degree of harm and the culpability of the offender are minimal, and the breach has been remedied quickly by the offender.

### **Formal action under EP&A Act (criminal)**

The community will be advised of formal enforcement outcomes, through monthly reporting on the department's website.

### **Official caution**

A caution is an enforcement tool available under the provisions of the *Fines Act 1996*. A caution can be used when a penalty notice *could* be issued for the breach but the investigations officer elects to issue a formal caution instead based on analysis of the circumstances. This may include instances where a company has an excellent track record, the breach results in no harm, the impact on the integrity of the planning system is low, or where an incident is promptly rectified by the responsible party, or when a simple action can bring about compliance. The seriousness of the breach would need to be on the low end of the scale of harm to the community or the environment and the offender has had good performance to date. This written caution would outline that further breaches can lead to escalating enforcement action, such as issuing a penalty notice.

Official cautions are to be issued in accordance with the *Caution Guidelines under the Fines Act 1996* issued by the NSW Attorney General.

### **Penalty notice**

A penalty notice (PN) is a financial penalty of up to \$15,000 issued for specific, minor breaches of the Act<sup>3</sup>. A PN requires payment by a certain date, and can be contested in the court. The department would issue a penalty notice when:

- the cause of and responsibility for the breach is clear;
- the breach is of minor consequence;
- a financial penalty is considered an effective deterrent to future breaches; and
- the investigation officer has sufficient evidence to provide all elements of the offence beyond reasonable doubt.

Penalty notices are not appropriate for more serious offences where a breach is:

- causing or is likely to cause significant harm to the community or environment
- ongoing and not within the alleged offender's capacity to remedy quickly
- warranting a higher penalty than the fine prescribed for a penalty infringement notice.

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<sup>3</sup> Refer Schedule 5 of the *Environmental Planning and Assessment Regulation 2000*.

The *Prosecution Guidelines* provide more detail on factors to be considered in issuing a PN.

## Prosecution

Prosecutions are taken for the more serious offences where there is sufficient evidence, there is a significant breach and the reason to prosecute serves the public interest. The offender may have been subject to other enforcement actions that have failed to deter further breaches, or the breach may have had a significant impact on the integrity of the planning system. The department's decisions to prosecute will be consistent with its '*Prosecution Guidelines*'. These guidelines also provide guidance on the use of discretion and lay out the factors relevant to a decision to prosecute.

Upon conviction, the Land and Environment Court can impose financial penalties of up to \$5 million for a corporation or \$1 million for an individual.

The *EP&A Amendment Act 2014* also provides alternative sentencing options for the Land and Environment Court including to:

- publicly name and shame offenders
- educate offenders on their legal obligations
- require restoration of any damage caused
- recover any monetary benefit obtained by the offender from the commission of the offence.

Prosecution proceedings can also be taken in the Local Court; however the maximum penalty is \$110,000.

## Formal action under EP&A Act (Civil)

### Enforceable undertaking

The Planning Secretary (or delegate) may accept an enforceable undertaking under s 9.5 of the Act. An enforceable undertaking allows the offender to acknowledge issues involved in the contravention and to propose solutions to address the conduct. It provides an alternative form of enforcement action where it is in the public interest to establish appropriate remedies to address the breaches which will result in a more efficient and timely outcome.

### Order

The Minister (or delegate) can issue an order to a relevant person to remedy or refrain from doing a specified breach under the Act. Orders are used as a preventive step when there is a sufficient amount of evidence that a breach is occurring or is about to occur and the breach has the potential to result in harm to the community or the environment. Orders are tailored to the significance of the breach and are used for potential breaches of medium to high significance and can be in conjunction with other enforcement options.

Orders must be complied with within a specified timeframe and failure to do so can result in a penalty notice being issued or civil or criminal proceedings in the Land and Environment Court of NSW. There is a right of appeal to the Land and Environment Court of NSW attached to orders.

### Court order

In circumstances where there has been or there is an imminent risk of a serious breach of the Act, the Secretary can apply to the Land and Environment Court for a Court Order in civil enforcement proceedings. The department may seek a court order to enforce an existing order issued by the department or in an emergency situation to prevent serious harm to the community, environment or to protect public safety. The department considers court orders to be an alternative to the issuing of an order in certain cases where offenders have been un-cooperative or immediate action is required. Failure to comply with a court order can lead to contempt of court proceedings and/or criminal prosecution that can lead to imprisonment.

### Council enforcement

As additional enforcement context, a local council may bring proceedings for breaches of the Act or regulations, which relate to its regulatory powers and functions (i.e. offences relating to breach of orders, development consents for which it is the consent authority and planning instruments).

Councils have the power to take enforcement action in relation State Significant Developments. They can take civil enforcement proceedings and prosecute.

## 6 Accountability

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This section briefly outlines the department's internal governance and accountability mechanisms, which provide the departmental oversight for its enforcement decisions (not to be confused with other legislative or court-based accountability mechanisms).

Governance: Compliance activities will necessarily involve the use of discretion by investigative officers and other decision-makers within the department. To ensure the appropriate oversight, only senior officers with the delegated authority are authorised to approve an enforcement action. Further, the department will seek legal advice internally and often from counsel prior to proceeding with the more serious enforcement action such as prosecution. In addition, all investigation officers receive specialised training regarding their duties and obligations under the law.

The department has a number of internal policies that govern the behaviour and guide the conduct of its staff, including:

- code of conduct and ethics
- *Disclosing interests and managing conflicts of interest policy*
- *Complaints handling policy and guidelines.*

In summary, these policies require departmental investigation officers to behave in an ethical manner, formally disclose conflicts of interest and to report and effectively handle any complaints received. The [Complaints Handling Policy](#) outlines the formal review process for handling a complaint made against the department or its staff.

Performance measurement and reporting: The department has in place compliance performance reporting in line with its transparency principle. To keep the community informed, the department regularly publishes on its [website](#) details of compliance activities undertaken. The website also contains a summary of the activities taken in the year to date. The website also details inspections undertaken and their locality, formal enforcement action taken and the results of audits and programs undertaken.

Where court action is taken the department will report on the outcome at the conclusion of the court proceedings.

Public disclosure is an integral part of both specific and general deterrence. The disclosure of information relating to the department's compliance and enforcement activities is undertaken in accordance with the requirements of the [Government Information \(Public Access\) Act 2009 and Regulation](#).

The department will review its performance against the principles and objectives of this policy and will implement continuous improvement based on feedback received from the community, business, industry, local government, and internal reviews.

If you have any comments regarding this policy please email the Director of Compliance, at [compliance@planning.nsw.gov.au](mailto:compliance@planning.nsw.gov.au)

## Appendix 1 Additional resources

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1. DPE Prosecution Guidelines Source: [www.planning.nsw.gov.au/~media/Files/DPE/Guidelines/compliance-and-enforcement-prosecution-guidelines-2010-10-29.ashx](http://www.planning.nsw.gov.au/~media/Files/DPE/Guidelines/compliance-and-enforcement-prosecution-guidelines-2010-10-29.ashx)
2. Attorney General Caution and Internal Review Guidelines: [www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd\\_publications/lpclrd\\_guidelines.aspx](http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_publications/lpclrd_guidelines.aspx)
3. [AS/NZS 19011:2014 Guidelines for auditing management systems](#)
4. Environmental Planning and Assessment Act: [www.austlii.edu.au/au/legis/nsw/consol\\_act/epaaa1979389/](http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/)