



Independent Pricing and Regulatory Tribunal

# Energy and water licence compliance policy

**Water — Draft Compliance Policy**  
April 2013





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## Invitation for submissions

IPART invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

**Submissions are due by Friday 26 April 2013.**

We would prefer to receive them electronically via our online submission form <[www.ipart.nsw.gov.au/Home/Consumer\\_Information/Lodge\\_a\\_submission](http://www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission)>

You can also send comments by fax to (02) 9290 2061, or by mail to:

**Energy and water licence compliance policy**  
Independent Pricing and Regulatory Tribunal  
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Our normal practice is to make submissions publicly available on our website <[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)>. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed on the previous page.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. IPART will then make every effort to protect that information, but it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's submission policy is available on our website.



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# 1 Introduction

## 1.1 Background

IPART monitors compliance with licences granted under the:

- ▼ *Electricity Supply Act 1995*
- ▼ *Sydney Water Act 1994*
- ▼ *Hunter Water Act 1991*
- ▼ *Sydney Water Catchment Management Act 1998*
- ▼ *State Water Corporation Act 2004*
- ▼ *Central Coast Water Corporation Act 2006*<sup>1</sup>
- ▼ *Water Industry Competition Act 2006 (WICA)*.

IPART also monitors compliance with authorisations granted under the *Gas Supply Act 1996*.

In response to contraventions of a licence or authorisation condition IPART may impose monetary penalties or require certain other action from licence and authorisation holders. Action of this kind is referred to in this policy as 'enforcement action'. Before IPART takes enforcement action related to an electricity licensee, gas authorisation holder or public water utility IPART must establish that it has knowingly contravened the conditions of its licence or authorisation.<sup>2</sup> Knowing contravention is not required for IPART to take enforcement action for contraventions of licences granted under WICA.

In addition to or as an alternative to enforcement action, IPART may use its compliance monitoring and reporting powers to respond to a contravention of a licence or authorisation condition.<sup>3</sup> IPART may also make recommendations to the Minister on the actions, sanctions and/or remedial action to be taken in relation to such a contravention.<sup>4</sup>

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<sup>1</sup> Central Coast Water Corporation's licence is not likely to commence until 2017.

<sup>2</sup> *Central Coast Water Corporation Act 2006*, s40(5); *Electricity Supply Act 1995*, Schedule 2, cl8A(5); *Gas Supply Act 1996*, s13A(5); *Hunter Water Act 1991*, s17A(5); *State Water Corporation Act 2004*, s17(5); *Sydney Water Act 1994*, s19A(5); *Sydney Water Catchment Management Act 1998*, s29A(5).

<sup>3</sup> *Central Coast Water Corporation Act 2006*, s51(3); *Electricity Supply Act 1995*, s87; *Gas Supply Act 1996*, s75A(3); *Hunter Water Act 1991*, s18A(3); *State Water Corporation Act 2004*, s30(3); *Sydney Water Act 1994*, s31(2); *Sydney Water Catchment Management Act 1998*, s31(1); *Water Industry Competition Act 2006*, s16(7).

<sup>4</sup> *Central Coast Water Corporation Act 2006*, s51(2); *Electricity Supply Act 1995*, s77; *Gas Supply Act 1996*, s75A(2); *Hunter Water Act 1991*, s18A(2); *State Water Corporation Act 2004*, s30(2); *Sydney Water Act 1994*, s28(1); *Sydney Water Catchment Management Act 1998*, s30A(1). See also *Water Industry Competition Act 2006*, s85.

Ministers<sup>5</sup> administering the legislation listed above also have enforcement powers and are not bound by this policy.<sup>6</sup> IPART will not investigate or take enforcement action where the relevant Minister has exercised their enforcement powers for the same matter.<sup>7</sup>

## 1.2 Purpose of policy

This policy is not a legally binding document. It is intended to provide guidance to licensees and authorisation holders on:

- ▼ the processes that IPART proposes to follow in relation to compliance information it receives
- ▼ the procedures that IPART proposes to follow before taking action in response to that compliance information.

This policy also provides guidance for licensees and authorisation holders on the factors IPART will take into account in deciding whether to take action in response to a contravention of a condition of a licence or authorisation, and the form of that action.

In responding to potential licence contraventions, IPART endeavours to:

- ▼ ensure contraventions 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.

## 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 IPART's licensing activities. In turn, IPART's compliance monitoring is assisted by the receipt of information from these organisations.

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<sup>5</sup> The Governor also has enforcement powers (which may be exercised on the advice of the relevant Minister) with respect to certain public water utility's operating licences.

<sup>6</sup> The relevant Minister's (or Governor's) enforcement powers are provided for by *Central Coast Water Corporation Act 2006*, s39; *Electricity Supply Act 1995*, Schedule 2, cl8; *Gas Supply Act 1996*, s13; *Hunter Water Act 1991*, s17; *State Water Corporation Act 2004*, s16; *Sydney Water Act 1994*, s19; *Sydney Water Catchment Management Act 1998*, s29; *Water Industry Competition Act 2006*, s16.

<sup>7</sup> *Central Coast Water Corporation Act 2006*, s40(10); *Electricity Supply Act 1995*, Schedule 2, cl8A(9); *Gas Supply Act 1996*, s13A(9); *Hunter Water Act 1991*, s17A(10); *State Water Act Corporation 2004*, s17(10); *Sydney Water Act 1994*, s19A(10); *Sydney Water Catchment Management Act 1998*, s29A(10); *Water Industry Competition Act 2006*, s16(5).

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

- ▼ Department of Trade and Investment, Regional Infrastructure and Services
- ▼ NSW Fair Trading
- ▼ Energy & Water Ombudsman of New South Wales
- ▼ Office of Environment and Heritage
- ▼ NSW Ministry of Health
- ▼ Australian Energy Market Operator
- ▼ Department of Planning and Infrastructure.

Where more than one organisation is involved in aspects of the licensing regimes, this exchange of information helps to achieve coordination and avoids overlap in monitoring and reporting. IPART may enter into a memoranda of understanding (**MOU**) with organisations such as those listed above. MOUs are used to clarify the roles and coordinate the activities of IPART and the relevant organisation.

IPART 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 IPART and will apply until replaced or revoked.

Under the National Energy Customer Framework, it is anticipated that IPART's energy retail licensing functions will be transferred to the Australian Energy Regulator (AER). When this occurs, this compliance policy will no longer apply to electricity and gas retailers. However, the policy will still apply to distribution network service providers (**DSNPs**) and gas reticulators. There will also be no changes to the application of the policy to public water utilities and WICA licensees when IPART's energy retail licensing functions are transferred.

#### **1.5 Structure of this document**

The remainder of this document is divided into 3 sections:

- ▼ Section 2 provides guidance to public water utilities and electricity licensees
- ▼ Section 3 provides guidance to gas authorisation holders
- ▼ Section 4 provides guidance to WICA licensees.

## 2 Public water utilities and electricity licensees

This section describes IPART's processes and procedures for responding to compliance issues in relation to licences granted under the *Electricity Supply Act 1995*, *Sydney Water Act 1994*, *Hunter Water Act 1991*, *Sydney Water Catchment Management Act 1998*, *State Water Corporation Act 2004* and *Central Coast Water Corporation Act 2006*.

### 2.1 Establishing whether a contravention has occurred

IPART receives information about a licensee's actual or alleged contravention of a licence condition (**compliance information**) 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 government agencies and stakeholders
- ▼ media reports
- ▼ consumer and competitor complaints
- ▼ external audits of compliance.<sup>8</sup>

In some instances the source of information may clearly show that a contravention has occurred. In other instances it may be necessary for IPART to gather further information to establish whether there has been a contravention.

In such a case, IPART will usually seek further information by contacting the licensee directly. However, IPART may also seek further information from other sources (ie, other government regulatory agencies, and customers). IPART may also engage consultants or external auditors to assist with examining and investigating the activities of the licensee that may be relevant to the alleged contravention.

If IPART engages such consultants or auditors, they will be required to observe appropriate standards of confidentiality. The licensee will have an opportunity to comment on reports prepared by such consultants or auditors for the purposes of IPART's investigation.

### 2.2 Nature of the contravention and options for responding

IPART's response to a contravention will depend on the nature of the contravention.

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<sup>8</sup> The results and findings of external audits of compliance may be reported directly to the relevant Minister.

Before IPART takes enforcement action, IPART must establish that the public water utility or electricity licensee has knowingly contravened the conditions of its licence or authorisation.<sup>9</sup> A knowing contravention exists where the licensee has knowledge of the relevant facts constituting the contravention of its operating licence.

For most minor contraventions, IPART will normally use its compliance monitoring and reporting powers to remedy the issue (see section 2.3). For knowing contraventions, enforcement action may be considered (see section 2.4).

As an alternative to using its compliance monitoring and reporting powers or enforcement powers, IPART may decide to refer a contravention to another regulatory agency where we think that this agency is better suited to investigate the matter. For example, if the contravention involves public health, it may be appropriate to refer the matter to the NSW Ministry of Health to investigate using its own powers. Similarly the NSW Environment Protection Authority may be better placed to deal with contraventions involving environmental impacts.

Although every identified contravention of a condition of a licence will be reported to the Minister in some form,<sup>10</sup> IPART may also refer matters to the relevant Minister with a recommendation that the Minister<sup>11</sup> take enforcement action.

### 2.3 Compliance action

The types of action IPART may take under its compliance monitoring and reporting powers include:

- ▼ verifying resolution of contraventions through increasing the frequency of compliance reporting and/or audits
- ▼ seeking an undertaking from the licensee
- ▼ requiring development and implementation of a remediation plan to address contraventions.

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<sup>9</sup> *Central Coast Water Corporation Act 2006*, s40(5); *Electricity Supply Act 1995*, Schedule 2, cl8A(5); *Hunter Water Act 1991*, s17A(5); *State Water Corporation Act 2004*, s17(5); *Sydney Water Act 1994*, s19A(5); *Sydney Water Catchment Management Act 1998*, s29A(5).

<sup>10</sup> *Central Coast Water Corporation Act 2006*, s51(3); *Electricity Supply Act 1995*, s87; *Hunter Water Act 1991*, s18A(3); *State Water Corporation Act 2004*, s30(3); *Sydney Water Act 1994*, s31(2); *Sydney Water Catchment Management Act 1998*, s31(1).

<sup>11</sup> Or the Governor with respect to licences granted under the *Sydney Water Act 1994*, *Hunter Water Act 1991*, *Sydney Water Catchment Management Act 1998*, and *State Water Corporation Act 2004*.

Subject to the processes and procedures set out in any relevant guidelines, reporting manuals and other compliance documents issued by IPART, IPART will contact the licensee in relation to:

- ▼ the relevant licence condition that IPART considers the licensee has contravened
- ▼ the proposed action that the utility is undertaking and IPART's response to that action.

### 2.3.1 Compliance reporting and audits

IPART may require the licensee to advise what action it is taking to resolve the contravention and monitor the licensee to ensure that the contravention is addressed as soon as possible. This may include increasing the frequency and timing of compliance reporting and/or audits.

Guidance on IPART's compliance reporting requirements for electricity licences is available in separate reporting manuals.<sup>12</sup>

For public water utilities, IPART's audit guidelines explain the processes for reporting contraventions through a licensee's Annual Compliance Statement.

These guidelines are available on IPART's website and may be updated from time to time.

### 2.3.2 Undertakings

In some circumstances, IPART may request that a licensee provide an undertaking to IPART to address a contravention. An undertaking is a document that outlines a licensee's commitment to modify its practices and behaviour to ensure it complies with the conditions of its licence.

#### Essential terms

IPART generally requires that undertakings include terms that address the following matters:

- ▼ the activity which has given rise to the contravention and its consequences
- ▼ actions to prevent a recurrence of the contravention and to ensure systems are in place to detect future occurrences of the contravention
- ▼ the time period within which compliance with the undertaking is required
- ▼ acknowledgement that the Minister retains the power to take further action in respect of the contravention

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<sup>12</sup> At the time of publication IPART's reporting manuals for electricity licensees include the Electricity Standard Supplier Manual and the Electricity Retail Supplier Manual.

- ▼ IPART’s ability to terminate the undertaking (eg, if there has been a material change in circumstances or if the licensee provided information to IPART that was false or misleading or deceptive)
- ▼ IPART’s ability to monitor the licensee’s compliance with the undertaking.

Undertakings must be in writing and must be signed by senior management of a licensee with the appropriate authority to bind the licensee to the undertaking.

### Typical elements of undertakings

IPART will take care to ensure that obligations under the undertaking are reasonable and clearly expressed. IPART envisages that the following framework will accommodate the majority of undertakings:

**Table 2.1 Typical elements of undertakings**

Section	Content
Background	A brief description of the licensee and the licence held and the contravention that is to be addressed by the undertaking.
Undertaking	What the licensee undertakes to do, including the essential terms identified above.
Acknowledgement	Acknowledgement that the Minister retains the power to take further action.
Term	The period of the undertaking.

### Compliance with undertakings

IPART may monitor a licensee’s implementation of an undertaking to ascertain if it is complying with the undertaking. This monitoring may take the form of IPART requesting information or periodic reporting from the licensee and may also include audits of the licensee.

Where IPART has reason to believe that a licensee has not complied with an undertaking, IPART will notify the licensee. If IPART is satisfied that the licensee has breached a term of the undertaking, it may pursue enforcement action in accordance with its statutory powers, once knowing contravention has been established.

### Variations to, withdrawals from, and terminations of undertakings

Licensees may only withdraw or vary undertakings with the consent of IPART.

IPART retains the right to reject requests for variation or to terminate any undertaking.

### 2.3.3 Remediation plans

In some circumstances, where a contravention has been identified, IPART may request that the licensee develop and implement a remediation plan to resolve the contravention. The remediation plan should contain sufficient detail, for example establishing actions to be undertaken to rectify the contravention, allocation of responsibilities for these actions and timeframes for resolution of the contravention.

## 2.4 Enforcement action

IPART may impose a monetary penalty where a licensee has knowingly contravened a condition of its licence. The maximum monetary penalty IPART may impose for electricity licensees and public water utilities other than the Central Coast Water Corporation, 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.<sup>13</sup> For the Central Coast Water Corporation, the maximum monetary penalty IPART may impose is \$500,000 for the first day on which each contravention occurs and a further \$2,000 for each subsequent day (not exceeding 25 days) that the contravention continues.<sup>14</sup>

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

If IPART requires some other action by the licensee, the cost of that action cannot exceed the value of the monetary penalty that IPART could otherwise impose.<sup>15</sup>

Where IPART requires information to be sent to a customer, the licensee 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.<sup>16</sup>

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<sup>13</sup> *Electricity Supply Act 1995*, Schedule 2, cl8A(6); *Hunter Water Act 1991*, s17A(6); *State Water Corporation Act 2004*, s17(6); *Sydney Water Act 1994*, s19A(6); *Sydney Water Catchment Management Act 1998*, s29A(6).

<sup>14</sup> *Central Coast Water Corporation Act 2006*, s40(6).

<sup>15</sup> *Central Coast Water Corporation Act 2006*, s40(3); *Electricity Supply Act 1995*, Schedule 2, cl8A(3); *Hunter Water Act 1991*, s17A(3); *State Water Corporation Act 2004*, s17(3); *Sydney Water Act 1994*, s19A(3); *Sydney Water Catchment Management Act 1998*, s29A(3).

<sup>16</sup> *Central Coast Water Corporation Act 2006*, s40(4); *Electricity Supply Act 1995*, Schedule 2, cl8A(4); *Hunter Water Act 1991*, s17A(4); *State Water Corporation Act 2004*, s17(4); *Sydney Water Act 1994*, s19A(4); *Sydney Water Catchment Management Act 1998*, s29A(4).



In making its decision about what enforcement action to take, IPART will consider the following factors:

- ▼ the effect of the knowing contravention on Government policy objectives, the interests of customers and other market participants
- ▼ whether the licensee 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 licensee has taken steps to secure compliance either specifically or by maintaining a robust compliance system
- ▼ whether the licensee's senior management was involved in the contravention
- ▼ whether the licensee voluntarily reported the contravention or attempted to conceal it from IPART or other monitoring organisations
- ▼ the compliance history of the licensee
- ▼ whether the licensee 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 licensee during the course of IPART's investigation.

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

The remainder of this section outlines the processes IPART will typically follow when pursuing enforcement action for knowing contraventions. If, as part of the process outlined below, IPART forms the view that the licensee has contravened a licence condition but has not done so knowingly IPART will consider:

- ▼ taking compliance monitoring and reporting action (see section 2.3), or
- ▼ making recommendations to the Minister on the actions, sanctions and/or remedial action to be taken in relation to such a contravention.

### 2.4.1 Notice of contravention

IPART will advise the licensee that, in its opinion, a contravention has occurred that may require IPART to take enforcement action if it is established to be a knowing contravention. IPART will typically send the licensee a notice of contravention that contains:

- ▼ reference to the licence condition that IPART considers the licensee has contravened (**alleged contravention**) and the manner in which the contravention has arisen
- ▼ details of:
  - whether IPART considers that the licensee has knowingly contravened the licence condition, if appropriate, and/or
  - if IPART considers that the licensee has contravened the licence condition but has not done so knowingly, the circumstances in which IPART may consider a knowing contravention to arise
- ▼ a copy, or a summary, of the compliance information, as appropriate
- ▼ a copy, or a summary, of any other relevant material relating to the alleged contravention
- ▼ a request for any further information about the alleged contravention.

The licensee will be given an opportunity (up to 28 days, depending on the nature of the alleged contravention) in which to make submissions to IPART regarding the alleged contravention, including whether a knowing contravention has occurred. In its submissions to IPART, a licensee may indicate whether it agrees with or denies the allegations of contravention in the notice of contravention.

Where a licensee agrees with the allegations of contravention, its submissions to IPART should also include a description of:

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

### 2.4.2 Notice of proposed enforcement action

Following consideration of any response from the licensee to a notice of contravention, if IPART decides that:

- ▼ the licensee has knowingly contravened a condition of its licence and
- ▼ enforcement action is appropriate,

IPART will send a notice of proposed enforcement action to the licensee.

In this notice IPART will advise the licensee of the nature of the enforcement action that IPART is proposing to take and, as relevant:

- ▼ the licence condition that IPART considers the licensee has knowingly contravened
- ▼ the activity or inactivity that constitutes a knowing contravention of the licence condition
- ▼ the date on which IPART considers the knowing contravention first occurred
- ▼ details of remedial action (if any) IPART understands the licensee has taken with respect to the knowing contravention
- ▼ the date by which the licensee is to provide any further submissions to IPART with respect to the proposed enforcement action and the matters that should be addressed by those submissions, as set out below.

IPART will send a copy of this notice to the Minister.

Licensees will be given an opportunity (up to 28 days, depending on the nature of the contravention) to make submissions with respect to IPART's notice of proposed enforcement action. However, this period may be shortened in cases requiring expedited assessment or extended if special circumstances exist.

### 2.4.3 Confirmation of action

IPART will consider submissions provided by the licensee pursuant to section 2.4.2 and make a final decision about the action it will take. It will then notify the licensee of its decision.

IPART will notify the licensee of the following matters, as applicable:

- ▼ the licence condition knowingly contravened
- ▼ the activity or inactivity that constitutes a knowing contravention of the licence condition
- ▼ IPART's decision to take enforcement action, the details of that action, and the reasons for that decision

- ▼ the date on which any monetary penalty must be paid or the date by which the licensee must take action required by IPART
- ▼ the rights of appeal and how to seek such an appeal.

A copy of this notification will be sent to the Minister.

## 2.5 Use of publicity

IPART may use publicity when responding to compliance issues (including contraventions) in accordance with the following principles:

- ▼ in deciding whether to make a public statement about a compliance issue, IPART will have regard to the interests of the licensee concerned, the public interest, and the interests of other regulatory agencies, where relevant
- ▼ if IPART decides to respond to an enquiry about a compliance issue, it will represent the status of any investigation
- ▼ IPART will not comment on the likelihood of it taking enforcement action before making a decision in relation to compliance or enforcement action
- ▼ IPART may issue a media release when it decides to take compliance or enforcement action.

IPART will endeavour to provide the licensee concerned with one working day's prior notification of media releases, except in special circumstances or where warranted by the damage caused by a contravention.

IPART may publish details of compliance and enforcement action. In doing so, IPART may inform:

- ▼ the public of its approach to dealing with licensees holders that do not comply with the conditions of their licence
- ▼ the relevant industry about the compliance requirements that apply them and the consequences of failing to meet those requirements.

## 3 Gas authorisation holders

This section describes IPART's processes and procedures for responding to compliance issues in relation to authorisations granted under the *Gas Supply Act 1996*.

### 3.1 Establishing whether a contravention has occurred

IPART receives information about an authorisation holder's actual or alleged contravention of a condition of its authorisation (**compliance information**) 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 government agencies and stakeholders
- ▼ media reports
- ▼ consumer and competitor complaints
- ▼ external audits of compliance.<sup>17</sup>

In some instances the source of information may clearly show that a contravention has occurred. In other instances it may be necessary for IPART to gather further information to establish whether there has been a contravention.

In such a case, IPART will usually seek further information by contacting the authorisation holder directly. However, IPART may also seek further information from other sources (ie, other government regulatory agencies, and customers). IPART may also engage consultants or external auditors to assist with examining and investigating the activities of the authorisation holder that may be relevant to the alleged contravention.

If IPART engages such consultants or auditors, they will be required to observe appropriate standards of confidentiality. The authorisation holder will have an opportunity to comment on reports prepared by such consultants or auditors for the purposes of IPART's investigation.

### 3.2 Nature of the contravention and options for responding

IPART's response to a contravention will depend on the nature of the contravention.

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<sup>17</sup> The results and findings of external audits of compliance may be reported directly to the relevant Minister.

Before IPART takes enforcement action, IPART must establish that the authorisation holder has knowingly contravened the conditions of its authorisation.<sup>18</sup> A knowing contravention exists where the authorisation holder has knowledge of the relevant facts constituting the contravention of its authorisation.

For most minor contraventions, IPART will normally use its compliance monitoring and reporting powers to remedy the issue (see section 3.3). For knowing contraventions, enforcement action may be considered (see section 3.4).

As an alternative to using its compliance monitoring and reporting powers or enforcement powers, IPART may decide to refer a contravention to another regulatory agency where we think that this agency is better suited to investigate the matter. For example, if the contravention involves safety, it may be appropriate to refer the matter to Department of Trade and Investment, Regional Infrastructure and Services or NSW Fair Trading to investigate using their powers.

Although every identified contravention of a condition of an authorisation will be reported to the Minister in some form,<sup>19</sup> IPART may also refer matters to the relevant Minister with a recommendation that the Minister take enforcement action.

### **3.3 Compliance action**

The types of action IPART may take under its compliance monitoring and reporting powers include:

- ▼ verifying resolution of contraventions through increasing the frequency of compliance reporting and/or audits
- ▼ seeking an undertaking from the authorisation holder
- ▼ requiring development and implementation of a remediation plan to address contraventions.

Subject to the processes and procedures set out in any relevant guidelines, reporting manuals and other compliance documents issued by IPART, IPART will contact the authorisation holder in relation to:

- ▼ the relevant authorisation condition that IPART considers the authorisation holder has contravened
- ▼ the proposed action that the authorisation holder is undertaking and IPART's response to that action.

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<sup>18</sup> *Gas Supply Act 1996*, s13A(5).

<sup>19</sup> *Gas Supply Act 1996*, s75A(3).

### 3.3.1 Compliance reporting and audits

IPART may require the authorisation holder to advise what action it is taking to resolve the contravention and monitor the authorisation holder to ensure that the contravention is addressed as soon as possible. This may include increasing the frequency and timing of compliance reporting and/or audits.

Guidance on IPART's compliance reporting processes and procedures for gas authorisation holders is available in separate reporting manuals.<sup>20</sup> These are available on IPART's website and may be updated from time to time.

### 3.3.2 Undertakings

In some circumstances, IPART may request that an authorisation holder provide an undertaking to IPART to address a contravention. An undertaking is a document that outlines an authorisation holder's commitment to modify its practices and behaviour to ensure it complies with the conditions of its authorisation.

#### Essential terms

IPART generally requires that undertakings include terms that address the following matters:

- ▼ the activity which has given rise to the contravention and its consequences
- ▼ actions to prevent a recurrence of the contravention and to ensure systems are in place to detect future occurrences of the contravention
- ▼ the time period within which compliance with the undertaking is required
- ▼ acknowledgement that the Minister retains the power to take further action in respect of the contravention
- ▼ IPART's ability to terminate the undertaking (eg, if there has been a material change in circumstances or if the authorisation holder provided information to IPART that was false or misleading or deceptive)
- ▼ IPART's ability to monitor the authorisation holder's compliance with the undertaking.

Undertakings must be in writing and must be signed by senior management of an authorisation holder with the appropriate authority to bind the authorisation holder to the undertaking.

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<sup>20</sup> At the time of publication IPART's reporting manuals for gas authorisation holders include Natural Gas Retail Supplier Reporting Manual and Natural Gas Standard Supplier Reporting Manual.

## Typical elements of undertakings

IPART will take care to ensure that obligations under the undertaking are reasonable and clearly expressed. IPART envisages that the following framework will accommodate the majority of undertakings:

**Table 3.1 Typical elements of undertakings**

Section	Content
Background	A brief description of the authorisation holder and the authorisation held and the contravention that is to be addressed by the undertaking.
Undertaking	What the authorisation holder undertakes to do, including the essential terms identified above.
Acknowledgement	Acknowledgement that the Minister retains the power to take further action.
Term	The period of the undertaking.

## Compliance with undertakings

IPART may monitor an authorisation holder's implementation of an undertaking to ascertain if it is complying with the undertaking. This monitoring may take the form of IPART requesting information or periodic reporting from the authorisation holder and may also include audits of the authorisation holder.

Where IPART has reason to believe that an authorisation holder has not complied with an undertaking, IPART will notify the authorisation holder. If IPART is satisfied that the authorisation holder has breached a term of the undertaking, it may pursue enforcement action in accordance with its statutory powers, once knowing contravention has been established.

## Variations to, withdrawals from, and terminations of undertakings

Authorisation holders may only withdraw or vary undertakings with the consent of IPART.

IPART retains the right to reject requests for variation or to terminate any undertaking.

### 3.3.3 Remediation plans

In some circumstances, where a contravention has been identified, IPART may request that the authorisation holder develop and implement a remediation plan to resolve the contravention. The remediation plan should contain sufficient detail, for example establishing actions to be undertaken to rectify the contravention, allocation of responsibilities for these actions and timeframes for resolution of the contravention.



### 3.4 Enforcement action

IPART may impose a monetary penalty where an authorisation holder has knowingly contravened a condition of its authorisation. The maximum monetary penalty IPART 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.<sup>21</sup>

Where there has been a knowing contravention, IPART may also take other action. For example, IPART might require an authorisation holder to send information to customers or publish notices in newspapers.

If IPART requires some other action by the authorisation holder, the cost of that action cannot exceed the value of the monetary penalty that IPART could otherwise impose.<sup>22</sup>

Where IPART requires information to be sent to a customer, the authorisation holder 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.<sup>23</sup>

In making its decision about what enforcement action to take, IPART will consider the following factors:

- ▼ the effect of the knowing contravention on Government policy objectives, the interests of customers and other market participants
- ▼ whether the authorisation holder 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 authorisation holder has taken steps to secure compliance either specifically or by maintaining a robust compliance system
- ▼ whether the authorisation holder's senior management was involved in the contravention
- ▼ whether the authorisation holder voluntarily reported the contravention or attempted to conceal it from IPART or other monitoring organisations
- ▼ the compliance history of the authorisation holder
- ▼ whether the authorisation holder has taken appropriate action to remedy the contravention
- ▼ the social and environmental impact of a contravention, where relevant

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<sup>21</sup> *Gas Supply Act 1996*, s13A(6).

<sup>22</sup> *Gas Supply Act 1996*, s13A(3).

<sup>23</sup> *Gas Supply Act 1996*, s13A(4).

- ▼ the level of cooperation extended by an authorisation holder during the course of IPART's investigation.

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

The remainder of this section outlines the processes IPART will typically follow when pursuing enforcement action for knowing contraventions. If, as part of the process outlined below, IPART forms the view that the authorisation holder has contravened an authorisation condition but has not done so knowingly IPART will consider:

- ▼ taking compliance monitoring and reporting action (see section 3.3), or
- ▼ making recommendations to the Minister on the actions, sanctions and/or remedial action to be taken in relation to such a contravention.

#### 3.4.1 Notice of contravention

IPART will advise the authorisation holder that, in its opinion, a contravention has occurred that may require IPART to take enforcement action if it is established to be a knowing contravention. IPART will typically send the authorisation holder a notice of contravention that contains:

- ▼ reference to the condition of the authorisation that IPART considers the authorisation holder has contravened (**alleged contravention**) and the manner in which the contravention has arisen
- ▼ an explanation of:
  - whether IPART considers that the authorisation holder has knowingly contravened the authorisation condition, if appropriate, and/or
  - if IPART considers that the authorisation holder has contravened the authorisation condition but has not done so knowingly, the circumstances in which IPART may consider a knowing contravention to arise
- ▼ a copy, or a summary, of the compliance information, as appropriate
- ▼ a copy, or a summary, of any other relevant material relating to the alleged contravention
- ▼ a request for any further information about the alleged contravention.

The authorisation holder will be given an opportunity (up to 28 days, depending on the nature of the alleged contravention) in which to make submissions to IPART regarding the alleged contravention, including whether a knowing contravention has occurred. In its submissions to IPART, an authorisation holder may indicate whether it agrees with or denies the allegations of contravention in the notice of contravention.

Where an authorisation holder agrees with the allegations of contravention, its submissions to IPART should also include a description of:

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

### **3.4.2 Notice to discontinue contravention or take remedial action**

Following consideration of any response from the authorisation holder to a notice of contravention, if IPART decides that the authorisation holder has knowingly contravened a condition of its authorisation, IPART will send a notice to the authorisation holder that:

- ▼ sets out:
  - the authorisation condition that IPART considers the authorisation holder has knowingly contravened
  - the activity or inactivity that constitutes a knowing contravention of the condition of the authorisation
  - the date on which IPART considers the knowing contravention first occurred
  - details of remedial action (if any) IPART understands the authorisation holder has taken with respect to the contravention
- ▼ gives the authorisation holder a reasonable opportunity to:
  - discontinue the contravention, including specifying the date by which the contravention must be discontinued
  - take the steps (if any) as are specified in the notice to remedy the effects of the contravention.<sup>24</sup>

IPART will send a copy of this notice to the Minister.

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<sup>24</sup> See *Gas Supply Act 1996*, s14.

### 3.4.3 Notice of proposed enforcement action

IPART may consider taking enforcement action if an authorisation holder does not:

- ▼ discontinue the contravention, or
- ▼ take the steps (if any) as are specified in the notice issued under section 3.4.2 to remedy the effects of the contravention.<sup>25</sup>

In such a case, IPART will notify the authorisation holder of:

- ▼ IPART's proposal to take enforcement action and the nature of any such action
- ▼ the date by which the authorisation holder is to provide any further submissions to IPART with respect to the proposed enforcement action and the matters that should be addressed in those submissions, as set out below.

IPART will send a copy of this notice to the Minister.

Authorisation holders will be given an opportunity (up to 28 days depending on the nature of the contravention) to make submissions with respect to IPART's notice of proposed enforcement action. However, this period may be shortened in cases requiring expedited assessment or extended if special circumstances exist.

### 3.4.4 Confirmation of action

IPART will consider submissions provided by the authorisation holder pursuant to section 3.4.3 and make a final decision about the action it will take. It will then notify the authorisation holder of its decision.

IPART will notify the authorisation holder of the following matters, as applicable:

- ▼ the authorisation condition knowingly contravened
- ▼ the activity or inactivity that constitutes a knowing contravention of the authorisation condition
- ▼ IPART's decision to take enforcement action, the details of that action, and the reasons for that decision
- ▼ the date on which any monetary penalty must be paid or the date by which the authorisation holder must take action required by IPART
- ▼ the rights of appeal and how to seek such an appeal.

A copy of this notification will be sent to the Minister.

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<sup>25</sup> 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*, s13A.

### 3.5 Use of publicity

IPART may use publicity when responding to compliance issues (including contraventions) in accordance with the following principles:

- ▼ in deciding whether to make a public statement about a compliance issue, IPART will have regard to the interests of the authorisation holder concerned, the public interest, and the interests of other regulatory agencies, where relevant
- ▼ if IPART decides to respond to an enquiry about a compliance issue, it will represent the status of any investigation
- ▼ IPART will not comment on the likelihood of it taking enforcement action before making a decision in relation to compliance or enforcement action
- ▼ IPART may issue a media release when it decides to take compliance or enforcement action.

IPART will endeavour to provide the authorisation holder concerned with one working day's prior notification of media releases, except in special circumstances or where warranted by the damage caused by a contravention.

IPART may publish details of compliance and enforcement action. In doing so, IPART may inform:

- ▼ the public of its approach to dealing with authorisation holders that do not comply with the conditions of their authorisation
- ▼ the relevant industry about the compliance requirements that apply them and the consequences of failing to meet those requirements.

## 4 WICA licensees

This section describes IPART's processes and procedures for responding to compliance issues in relation to WICA licensees.

### 4.1 Establishing whether a contravention has occurred

IPART receives information about a WICA licensee's actual or alleged contravention of a licence condition (**compliance information**) from a range of sources, including:

- ▼ periodic audits
- ▼ annual exception reporting
- ▼ incident reporting
- ▼ exchange of information between other government agencies and stakeholders
- ▼ media reports
- ▼ consumer and competitor complaints.

In some instances the source of information may clearly show that a contravention has occurred. In other instances it may be necessary for IPART to gather further information to establish whether there has been a contravention.

In such a case, IPART will usually seek further information by contacting the licensee directly. However, IPART may also seek further information from other sources (ie, other government regulatory agencies, and customers). IPART may also engage consultants or external auditors to assist with examining and investigating the activities of the licensee that may be relevant to the alleged contravention.

If IPART engages such consultants or auditors, they will be required to observe appropriate standards of confidentiality. The licensee will have an opportunity to comment on reports prepared by such consultants or auditors for the purposes of IPART's investigation.

### 4.2 Nature of the contravention and options for responding

IPART's response to a contravention will depend on the nature of the contravention.

For most minor contraventions, IPART will normally use its compliance monitoring and reporting powers to remedy the issue (see section 4.3). For more significant contraventions, enforcement action may be considered (see section 4.4).

We may also decide to refer a contravention to another regulatory agency where we think that this agency is better suited to investigate the matter. For example, if the contravention involves public health, it may be appropriate to refer the matter to the NSW Ministry of Health to investigate using its own powers. Similarly, the NSW Environment Protection Authority may be better placed to deal with contraventions involving environmental impacts.

### 4.3 Compliance action

The types of action IPART may take under its compliance monitoring and reporting powers include:

- ▼ verifying resolution of contraventions through increasing the frequency of compliance reporting and/or audits
- ▼ seeking an undertaking from the licensee.

Subject to the processes and procedures set out in any relevant guidelines, reporting manuals and other compliance documents issued by IPART, IPART will contact the licensee in relation to:

- ▼ the relevant licence condition that IPART considers the licensee has contravened
- ▼ the proposed action that the utility is undertaking and IPART's response to that action.

#### 4.3.1 Compliance reporting and audits

IPART may require the licensee to advise what action it is taking to resolve the contravention and monitor the licensee to ensure that the contravention is addressed as soon as possible. This may include increasing the frequency and timing of compliance reporting and/or audits for a WICA licensee.

Guidance on IPART's compliance reporting processes and procedures for WICA licensees is available in separate reporting manuals.<sup>26</sup> These are available on IPART's website and may be updated from time to time.

IPART's guidelines for auditing WICA licensees are also available on our website.

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<sup>26</sup> At the time of publication IPART's reporting manuals for WICA licensees include the Network Operator's Reporting Manual and Retail Supplier's Reporting Manual.

### 4.3.2 Undertakings

In some circumstances, IPART may request that a licensee provide an undertaking to IPART to address a contravention. An undertaking is a document that outlines a licensee's commitment to modify its practices and behaviour to ensure it complies with the conditions of its licence.

#### Essential terms

IPART generally requires that undertakings include terms that address the following matters:

- ▼ the activity which has given rise to the contravention and its consequences
- ▼ actions to prevent a recurrence of the contravention and to ensure systems are in place to detect future occurrences of the contravention
- ▼ the time period within which compliance with the undertaking is required
- ▼ acknowledgement that the Minister retains the power to take further action in respect of the contravention
- ▼ IPART's ability to terminate the undertaking (eg, if there has been a material change in circumstances or if the licensee provided information to IPART that was false or misleading or deceptive)
- ▼ IPART's ability to monitor the licensee's compliance with the undertaking.

Undertakings must be in writing and must be signed by senior management of a licensee with the appropriate authority to bind the licensee to the undertaking.

#### Typical elements of undertakings

IPART will take care to ensure that obligations under the undertaking are reasonable and clearly expressed. IPART envisages that the following framework will accommodate the majority of undertakings:

**Table 4.1** Typical elements of undertakings

Section	Content
Background	A brief description of the licensee and the licence held and the contravention that is to be addressed by the undertaking.
Undertaking	What the licensee undertakes to do, including the essential terms identified above.
Acknowledgement	Acknowledgement that the Minister retains the power to take further action.
Term	The period of the undertaking.



## Compliance with undertakings

IPART may monitor a licensee's implementation of an undertaking to ascertain if it is complying with the undertaking. This monitoring may take the form of IPART requesting information or reporting from the licensee and may also include audits of the licensee.

Where IPART has reason to believe that a licensee has not complied with an undertaking, IPART will notify the licensee. If IPART is satisfied that the licensee has breached a term of the undertaking, it may pursue enforcement action in accordance with its statutory powers.

## Variations to, withdrawals from, and terminations of undertakings

Licensees may only withdraw or vary undertakings with the consent of IPART.

IPART retains the right to reject requests for variation or to terminate any undertaking.

## 4.4 Enforcement action

The Minister or IPART may impose monetary penalties. The maximum monetary penalty IPART may impose on a WICA licensee is \$500,000 for the first day on which each contravention occurs and a further \$20,000 for each subsequent day (not exceeding 25 days) that the contravention continues.<sup>27</sup>

The Minister or IPART may, instead of imposing a monetary penalty, require the licensee to take such action as the Minister or IPART (as the case may be) considers appropriate in the circumstances, including (for example) requiring the licensee to do any one or more of the following:

- ▼ to send specified information to customers
- ▼ to publish notices containing specified information
- ▼ to take specified action to rectify the contravention
- ▼ to take specified action to prevent any future contravention.

In response to a contravention, IPART also has the authority to cancel or suspend a WICA licence, but only with the concurrence of the Minister.

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<sup>27</sup> *Water Industry Competition Act 2006*, s16(1)(a).

In making its decision about what enforcement action to take, IPART will consider the following factors:

- ▼ the effect of the contravention on Government policy objectives, the interests of customers and other market participants
- ▼ whether the licensee 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 licensee has taken steps to secure compliance either specifically or by maintaining a robust compliance system
- ▼ whether the licensee's senior management was involved in the contravention
- ▼ whether the licensee voluntarily reported the contravention or attempted to conceal it from IPART or other monitoring organisations
- ▼ the compliance history of the licensee
- ▼ whether the licensee 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 licensee during the course of IPART's investigation.

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

The remainder of this section outlines the processes IPART will typically follow when pursuing enforcement action for what IPART considers are more significant contraventions. If, as part of the process outlined below, IPART forms the view that the licensee has contravened a licence condition, but the contravention is minor, IPART will consider taking compliance monitoring and reporting action (see section 4.3).

#### 4.4.1 Notice of contravention

IPART will advise the licensee that, in its opinion, a contravention has occurred that may require IPART to take enforcement action. IPART will typically send the licensee a notice of contravention that contains:

- ▼ reference to the licence condition that IPART considers the licensee has contravened (**alleged contravention**) and the manner in which the contravention has arisen
- ▼ a copy, or a summary, of the compliance information, as appropriate
- ▼ a copy, or a summary, of any other relevant material relating to the alleged contravention
- ▼ a request for any further information about the alleged contravention.

The licensee will be given an opportunity (up to 28 days, depending on the nature of the alleged contravention) in which to make submissions to IPART regarding the alleged contravention. In its submissions to IPART, a licensee may indicate whether it agrees with or denies the allegations of contravention contained in the notice of contravention.

Where a licensee agrees with the allegations of contravention, its submissions to IPART should also include a description of:

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

#### 4.4.2 Notice of proposed enforcement action

Following consideration of any response from the licensee to a notice of contravention, if IPART decides that:

- ▼ the licensee has contravened a condition of its licence and
- ▼ enforcement action is appropriate,

IPART will send a notice of proposed enforcement action to the licensee.

In this notice IPART will advise the licensee of the nature of the enforcement action that IPART is proposing to take and, as relevant:

- ▼ the licence condition contravened
- ▼ the activity or inactivity that constitutes a contravention of the licence condition
- ▼ the date on which IPART considers the contravention first occurred
- ▼ details of remedial action (if any) IPART understands the licensee has taken with respect to the contravention
- ▼ the date by which the licensee is to provide any further submissions to IPART with respect to the proposed enforcement action and the matters that should be addressed by those submissions, as set out below.

IPART will send a copy of this notice to the Minister.

Licensees will be given an opportunity (up to 28 days, depending on the nature of the contravention) to make submissions with respect to IPART's notice of proposed enforcement action. However, this period may be shortened in cases requiring expedited assessment or extended if special circumstances exist.

#### **4.4.3 Confirmation of action**

IPART will consider submissions provided by the licensee pursuant to section 4.4.2 and make a final decision about the action it will take. It will then notify the licensee of its decision.

IPART will notify the licensee of the following matters, as applicable:

- ▼ the licence condition contravened
- ▼ the activity or inactivity that constitutes a contravention of the licence condition
- ▼ IPART's decision to take enforcement action, the details of that action, and the reasons for that decision
- ▼ the date on which any monetary penalty must be paid or the date by which the licensee must take action required by IPART
- ▼ whether a recommendation to cancel or suspend the licence has been made to the Minister.

A copy of this notification will be sent to the Minister.

## 4.5 Use of publicity

IPART may use publicity when responding to compliance issues (including contraventions) in accordance with the following principles:

- ▼ in deciding whether to make a public statement about a compliance issue, IPART will have regard to the interests of the licensee concerned, the public interest, and the interests of other regulatory agencies, where relevant
- ▼ if IPART decides to respond to an enquiry about a compliance issue, it will represent the status of any investigation
- ▼ IPART will not comment on the likelihood of it taking enforcement action before making a decision in relation to compliance or enforcement action
- ▼ IPART may issue a media release when it decides to take compliance or enforcement action.

IPART will endeavour to provide the licensee concerned with one working day's prior notification of media releases, except in special circumstances or where warranted by the damage caused by a contravention.

IPART may publish details of compliance and enforcement action. In doing so, IPART may inform:

- ▼ the public of its approach to dealing with licensees that do not comply with the conditions of their licence
- ▼ the relevant industry about the compliance requirements that apply them and the consequences of failing to meet those requirements.

