

Regulatory Institutions Network

**APPLICATIONS OF RESPONSIVE
REGULATORY THEORY IN AUSTRALIA
AND OVERSEAS: UPDATE**

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HOW TO USE THIS DOCUMENT

This update of Applications of Responsive Regulation (2010)¹ provides an expanded set of examples of responsive regulation applications or aspects of responsive thinking, both in Australia and overseas. At a time when deregulation is on the political agenda in Australia and other parts of the world, we considered it useful to review:

- the range of responsive regulation applications;
- aspects of and developments in responsive regulatory practice; and
- links to users' websites across areas of regulation.

The purpose is to facilitate discussion and the exchange of ideas around better regulation. We hope it will be useful to practitioners and policy makers around the world who are interested in regulation.

We also hope we can contribute to building a network of responsive regulation innovators and developers. We would like this document to start a dialogue about the next wave of regulatory practice that strengthens connections between regulation and democracy.

HOW THIS DOCUMENT WAS COMPILED

Material has been collected from users' websites and public documents. We have tried to faithfully represent the purpose of the regulatory activity and to communicate something of the users' preferred styles for their compliance activities through their own words. We have included risk-based approaches where they have sought to maintain something of the essence of responsive regulation, that is, there is evidence of responsiveness to the whole and to what regulatees have to say about their specific situation.

We have not evaluated nor commented on the success of the applications described here. It is difficult to assess whether responsive regulation principles have been translated into practice in each example or whether it has simply been endorsed aspirationally. It is best to use the links that are provided to make direct contact with those who have developed the applications to find out more.

OUTLINE

The document has three parts.

Part 1 briefly revisits responsive regulation and some of its more important developments. It is not a literature review nor does it aim to represent the theoretical and empirical discussions that have taken place around responsive regulation over the past two decades. It is but a 'taster.' Major sources of information are referenced in the text.

Part 2 presents summaries of applications of responsive regulation that we could find on the web. The examples cover a wide range of social, environmental and economic domains. That said, the list is not exhaustive. It simply provides some insights into how practitioners have implemented the approach.

Part 3 briefly explains some additional regulatory terms that are used in the examples of Part 2 and in the broader literature, often in conjunction with responsive regulation. We hope this makes it easier for time-poor readers browsing through this document.

¹ Wood, C., M. Ivec, J. Job, and V. Braithwaite. 2010. 'Applications of responsive regulatory theory in Australia and overseas.' *Regulatory Institutions Network Occasional Paper No. 15*, Australian National University.

PART 1 INTRODUCTION

Responsive Regulation: Twenty Years On

Recent reviews of responsive regulation in the academic literature^{2 3} are the best place to start for those who wish to ground themselves in the development of and debates about responsive regulation. The theory of responsive regulation has evolved over the past twenty years. Practitioners have played a central role in this process. One purpose of this compendium is to reveal some of this adaptation and innovation by a wide variety of different kinds of regulatory agencies in implementing responsive regulation.

Linking scholars developing the theory and practitioners using and innovating with the theory is one of the strengths of responsive regulation. Responsive regulation originated in empirical work in the 1980s paying attention to how regulators who did their jobs well achieved positive results.⁴ It was a theory grounded in practice. New modifications, some of which appear in the following applications, will open our minds to new ways of doing responsive regulation and hopefully foster a new wave of theory and practice.

Many people thinking of using a responsive regulatory approach ask if we can prove that it works. Abundant evidence supports the principles of responsive regulation in the social sciences (social learning theory, self-regulatory theories, reintegrative shaming theory) and economics (cost-benefit, deterrence and exchange theories), but it is not an “off-the-shelf” program that can be transferred from one context to another without preparation and consultation. John Braithwaite’s recently released RegNet working paper explores the evidence question with restorative justice and responsive regulation.⁵

Responsive regulatory principles have to be implemented in a way to suit context. The essence of responsive regulation is listening and adapting in response to the problem we are trying to fix and to the people who can fix it. Responsive regulation is bespoke regulation, where the regulators listen to those they are regulating and choose a course of action to correct the deficiency that they are observing. The first challenge is to get those being regulated to share the concern. Once achieved, regulator and regulatee work out a plan to solve the problem. Included in this phase is explicit recognition and acceptance that the regulator will apply sanctions and use coercive means according to the law if all else fails. Because of its context sensitive nature, evaluating responsive regulation involves doing the evaluation in situ, while it is happening, and adjusting responses to achieve the outcome required. Dorf and Sabel (1998) call this democratic experimentalism.⁶ If the regulatory intervention works, ideas and methods may be transferred elsewhere, but not without the basic process of listening and adaptation that is necessary to support the regulatory intervention. At this point Christine Parker argues that triple loop learning can take place, where regulatory lessons about what works can be shared across organizations for experimentation.⁷

² Special issue, Responsive Regulation. 2011. *UBC Law Review* 44(3).

³ Special issue, Twenty Years of Responsive Regulation: An Appreciation and Appraisal. 2013. *Regulation and Governance* 7(1). <http://onlinelibrary.wiley.com/doi/10.1111/rego.2013.7.issue-1/issuetoc>

⁴ Braithwaite, J. 1985. *To Punish or Persuade: Enforcement of Coal Mine Safety*. Albany: State University of New York Press.

⁵ Braithwaite, J. 2014. Restorative Justice and Responsive Regulation: The question of evidence. RegNet Working Paper, No. 51, Regulatory Institutions Network, Australian National University.

⁶ <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1119&context=facpub>

⁷ Single loop learning occurs in situ, double loop learning occurs when the same process is used to solve problems elsewhere in the organization. Parker, C. 2002. *The Open Corporation: Effective Self-regulation and Democracy*. Cambridge: Cambridge University Press.

The Ideas Behind Responsive Regulation and the Regulatory Pyramid

The basic idea of responsive regulation is simply illustrated in Ayres and Braithwaite's widely recognised 'regulatory pyramid' (below).⁸



FIGURE 1: Example of a regulatory pyramid.

Source: Update of Ayres, I. and J. Braithwaite. 1992. *Responsive Regulation: Transcending the Deregulation Debate* p. 35.

The idea of a pyramid is that the base is solid, firmly grounded in democratic deliberation and anchored through agreement that harm is being done and that harm must be stopped. Because harms emerge and fade over time, the basis of regulatory intervention is always open to democratic contestation. For this reason, the base of the pyramid respects dialogue with both the community and with those who are not complying with regulatory requirements. Listening is present at every level of the pyramid, with regulatory authorities being particularly open to learning about the effects of their regulation at the base. Listening is accompanied by the regulatory response of explanation, giving and seeking advice, and persuasion. It is at this level that regulation that is not reasonable or fair can be identified and improved. These processes give regulatory interventions public legitimacy as opposed to their legal legitimacy through law.

If the problems around law or rule breaking are not resolved at the bottom of the pyramid and harm is continuing to occur, regulatory interventions become more forceful. Pressures to comply are ratcheted up to the middle levels of the pyramid where a range of sanctions may be used from mild administrative sanctions to more punitive sanctions, increasing the pressure to elicit compliance. At the very top of the pyramid is the most intrusive intervention. This involves incapacitation where the regulatory intervention removes the rights of individuals and/or associated entities to continue conducting business.

⁸ Ayres, I. and J. Braithwaite. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.

Responsive regulation expects regulators to focus most of their activity at the bottom of the pyramid because this is where the hearts and minds of those being regulated are won. Regulators only escalate up the pyramid to more forceful or interventionist measures if absolutely necessary. At first opportunity, regulators de-escalate and return to a position that is essentially co-producing regulatory outcomes⁹. The preference for being at the bottom of the pyramid may need to be overridden. For example, if a child is being sexually abused or if toxic waste is being discharged into a waterway, action is required immediately to stop further harm: Timeliness of an intervention to prevent harm trumps low-interventionist dialogue.

Through approaching regulation as a process that is responsive to the culture, conduct and context of regulatees, less interventionist responses should suffice in most cases to counter harm. In other words, 'soft words before hard words, and carrots before sticks' should ensure compliance by most people most of the time. At the same time, responsive regulatory pyramids incorporate a range of interventionist regulatory strategies that are practical and context appropriate in terms of their fairness and deterrent value.¹⁰

Principles Guiding Regulation

From its inception responsive regulation has been an approach that calls on evidence from economics and the social sciences on how best to regulate individuals and organizations. Important economic principles of compliance are *deterrence* to discourage some choices and *incentives* to make other choices more attractive. The primary social principles of compliance are *educating* to ensure people know *what is expected* by regulators, *praising* and *encouraging* so that people feel they have the *ability* or *efficacy* to comply, *persuading* people to see value in what is being asked of them so that they are *willing* to comply, and *socializing* individuals through *material and social rewards and punishments* to abide by the laws of their society.

The logic of regulatory pyramids relies on the peak of the pyramid to activate these compliance principles. The peak of the pyramid represents the ultimate constraint on pursuing a course of action that is in breach of the rules. Providing it is a credible sanction, that is, those being regulated believe that the regulator can and will use this power, it serves a number of functions. In a societal sense, it signals the seriousness of a breach of rules. It reminds those being regulated of their obligations and of the course of action they should pursue, as agreed in the social compact at the base of the pyramid. Should social pressures fail, economic pressures come into play. It is costly to escalate to the top. It is rational for the regulatee not to carry the costs of non-compliance, and return to a cooperative stance at the base of the pyramid that respects the law sooner rather than later.

Sometimes, a regulated individual or entity will display persistent defiance of a regulatory authority. This means a regulatee refuses to conform in spite of social pressure and in spite of the economic/social costs. A drug dealer, for instance, who continues business dealings from prison could represent a person showing persistent defiance. The point is that there will be instances where defiance continues through the middle levels of the pyramid and right to the peak of the regulatory pyramid. If this proves to be a systemic problem in a regulatory space, as opposed to a problem faced with a particularly difficult individual or entity, the first check is to ensure that there is solid support for the regulation at the base of the pyramid in the cultural context in which the regulator is working. In other words, regulation may be tainted with a lack of legitimacy. If regulation is seen as legitimate, most defiance is dealt with effectively through fair and reasonable dialogue and responsiveness further down the pyramid before escalation has occurred to the top.¹¹

⁹ Gunningham, N. 2007. "Prosecution for OHS Offences: Deterrent or Disincentive", *Sydney Law Review* 29: 359-90, online at: http://sydney.edu.au/law/slr/slr29_3/Gunningham.pdf

¹⁰ Sparrow, M. 2000. *The Regulatory Craft: Controlling Risks, Managing Problems and Managing Compliance*. Washington DC: The Brookings Institution.

¹¹ Braithwaite, J. 2002. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.

Nine Implementation Principles for Responsive Regulation

To sum up, effective regulatory pyramids depend on the implementation of the following principles:¹²

Principle 1: Think in context, don't impose a preconceived theory.

Principle 2: Listen actively – with empathy, minimise resistance, nurture hope and optimism. Structure dialogue to give voice to stakeholders, settle agreed outcomes and how to monitor them, build commitment (help actors find their own motivation to improve), communicate firm resolve to stick with a problem until it is fixed.

Principle 3: Engage those who resist with fairness, show respect by construing their resistance as an opportunity to learn how to improve regulatory design.

Principle 4: Praise those who show commitment, support innovation, nurture motivation for continuous improvement, help leaders pull laggards up through new ceilings of excellence.

Principle 5: Signal that you prefer to achieve outcomes through support and education to build capacity.

Principle 6: Signal, but do not threaten, a range of sanctions to which you can escalate; signal that the ultimate sanctions are formidable, and are used when necessary but only as a last resort.

Principle 7: Engage partners and draw on widening networks of regulatory support as you move up the pyramid.

Principle 8: Elicit active responsibility for making outcomes better in the future, resorting to passive responsibility (holding actors responsible for past actions) when active responsibility fails.

Principle 9: Learn, evaluate how well and at what cost outcomes are achieved, and communicate lessons learnt.

Regulatory Pyramids of Sanctions and Supports

The escalation of sanctions as a means of enforcing compliance needs to be reinforced by activities that reward positive behaviour and contributions. This has led to the addition of a 'pyramid of supports,'¹³ a hierarchy of strategies that build on strengths within a system. In recent discussions, pyramids of sanctions (sometimes called enforcement pyramids) and pyramids of supports (sometimes called strengths-based pyramids) are part and parcel of practising responsive regulation. These are two mutually reinforcing sets of activities. Pyramids of supports utilise levers such as praise and recognition rather than disapproval to win compliance.

Regulators may see an organization that is non-compliant because of lack of awareness, poor capacity, or unwillingness to invest in fixing the problem. Nevertheless there may be other areas where the organization has excelled, moving beyond compliance on these issues. Regulators can use a pyramid of sanctions to escalate pressure on the organisation (or an individual) to comply, while praising and recognizing excellence in other areas using a pyramid of supports. Through using both sanctions and supports, the regulator recognizes the organization's capacity to perform well and avoids stigmatizing the organization unfairly.

¹² Braithwaite, J. 2011. "The essence of responsive regulation", *UBC Law Review* 44(3): 475-520.

https://www.anu.edu.au/fellows/jbraithwaite/documents/Articles/essence_responsive_regulation.pdf

¹³ Healy, J. 2011. *Improving Health Care Safety and Quality: Reluctant Regulators*. Aldershot: Ashgate.

Braithwaite, J., T. Makkai and V. Braithwaite. 2007. *Regulating aged care: Ritualism and the new pyramid*. Cheltenham, UK: Edward Elgar.

Responsive regulators take into account the circumstances and context, behaviour and culture of those being regulated. Within one organization, there may be responsible actors who are committed to high standards, there may be those who are resistant, there may be others who are disengaged and game playing in their dealings with the regulator. Responsive regulation allows for adaptation to all these different ‘postures’,¹⁴ always encouraging the more positive postures in an effort to elicit cooperation and compliance, but ready to use deterrence measures should that be necessary to prevent harm.

A responsive regulatory framework, with pyramids of supports and sanctions, can be developed by regulators to address non-compliance issues in consultation with industry groups and stakeholders. This ensures the sanctions and supports have legitimacy within the regulatory community. The following three examples from nursing home regulation, medicines regulation, and licensing and accreditation in health care show the range of sanctions and supports that may be used through a pyramid structure.

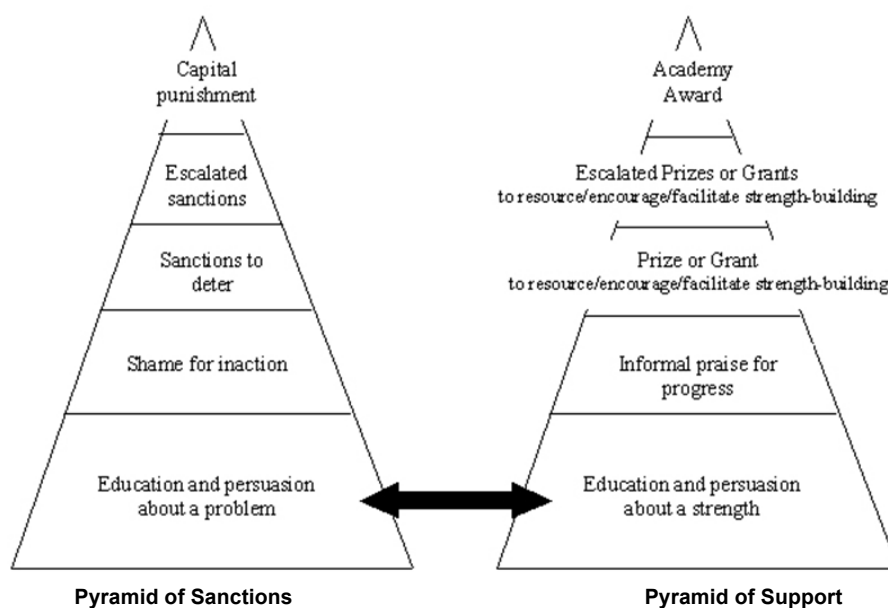


FIGURE 2: Regulatory pyramids of sanctions and supports used in nursing home regulation.

Source: Braithwaite, J., T. Makkai and V. Braithwaite. 2007. *Regulating Aged Care* p. 319.

¹⁴ Braithwaite, V. 2009. *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy*. Cheltenham, UK: Edward Elgar; Braithwaite, V. 2014. “Defiance and motivational postures”. In D. Weisburd & G. Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice*. New York: Springer.

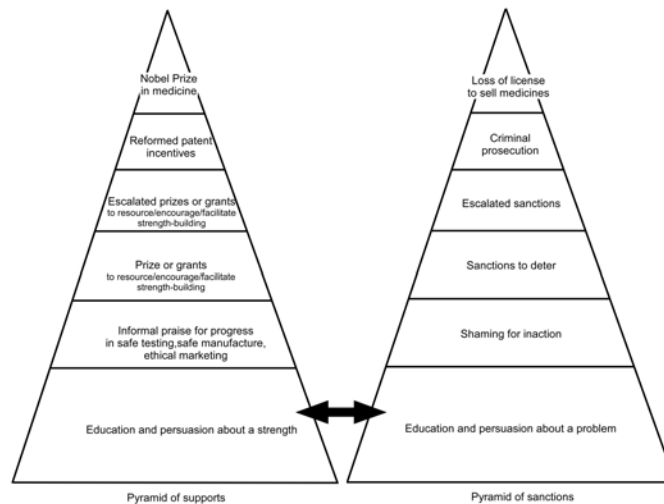


FIGURE 3: Pyramids of supports and sanctions in the regulation of medicines.

Source: Dukes, G., J. Braithwaite and J.P. Moloney. 2014. *Pharmaceuticals, Corporate Crime and Public Health* p. 289.

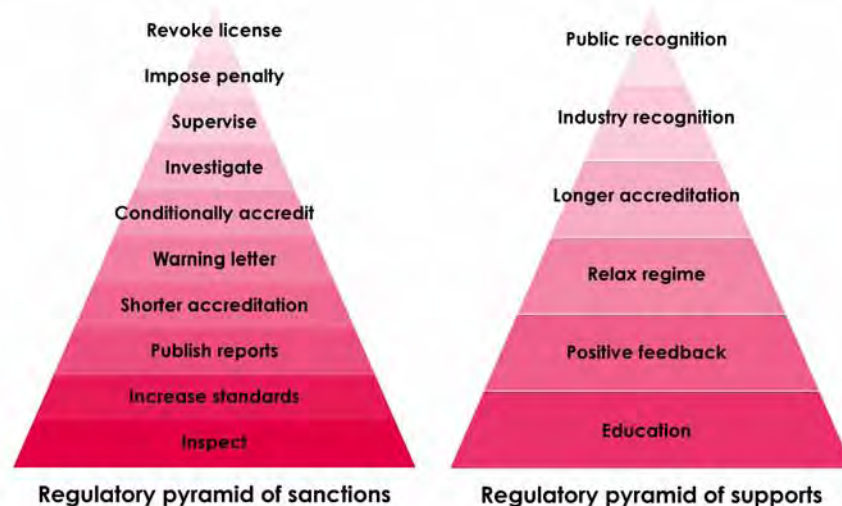


FIGURE 4: Regulatory pyramids of sanctions and supports in licensing and accreditation in health care.

Source: Healy, J. 2011. *Improving Health Care Safety and Quality* p. 221.

Pyramids of supports offer the very important advantage of raising the bar, while at the same time acknowledging the pathways that can support organisations as they try to get over that bar.¹⁵ We found some examples of regulating through support. One notable example is the South Australian Environment Protection Agency, which is using a continuum of compliance from using the full force of the law to recognition and reward (see section 4.6). Similarly, there are many examples of awards and recognition for best practice, which represents the upper levels of pyramids of supports. The Australian Aged Care Quality Agency holds ‘Better Practice Awards’ that promote quality and encourage innovation¹⁶ and Safe Work Australia holds annual awards that recognise demonstrated commitment to continuous improvement and work health and safety.¹⁷ Other regulators tacitly recognized ‘good behaviour’ with the reward of lack of intrusion. Depending on the context, there may be greater scope for regulators to recognise productive contributions, even in the midst of shortcomings. Strengths-based regulation, formally conceived, has considerable scope for development in Australia.

¹⁵ Braithwaite, J. 2008. *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*. Cheltenham, UK: Edward Elgar.

¹⁶ <http://www.aacqa.gov.au/for-providers/better-practice-awards>

¹⁷ <http://www.safeworkaustralia.gov.au/sites/swa/media-events/awards/pages/awards>

PART 2 SUMMARIES OF APPLICATIONS

1. ADMINISTERING REGULATION

1.1. National Audit Office (Australia)

The Australian National Audit Office (ANAO) is a specialist public service practice. It provides a range of audit and assurance services to the Parliament and Commonwealth public sector agencies and statutory bodies.

ANAO developed a *Better Practice Guide to Administering Regulation* in 2007 and used the idea of an enforcement pyramid in a framework to assist Australian Government regulators improve their regulatory administration. The updated guide *Administering Regulation. Achieving the Right Balance* (2014) has retained the enforcement pyramid despite 'a period of change in regulatory approach' by government (p. i):

There is no 'one-size-fits-all' approach to addressing non-compliance. It is generally accepted that regulators need a range of response options that are proportionate to the risks presented by an entity's non-compliance. (45)

Flexibility in responding to non-compliance is enhanced when a regulator has a range of responses. In addition, flexibility in addressing non-compliance enables the response to:

- be proportionate to the risks posed by the non-compliance;
- recognise the capacity and motivation of the non-compliant entity to return to compliance; and
- signal the seriousness with which the regulator views the non-compliance.

The figure below describes a set of graduated responses a regulator may use to address non-compliance, a hierarchy of responses. It also suggests a pattern of using lower level responses to address most instances of non-compliance, while reserving more punitive measures for serious non-compliance, or if lower level responses fail to achieve the desired regulatory outcomes.

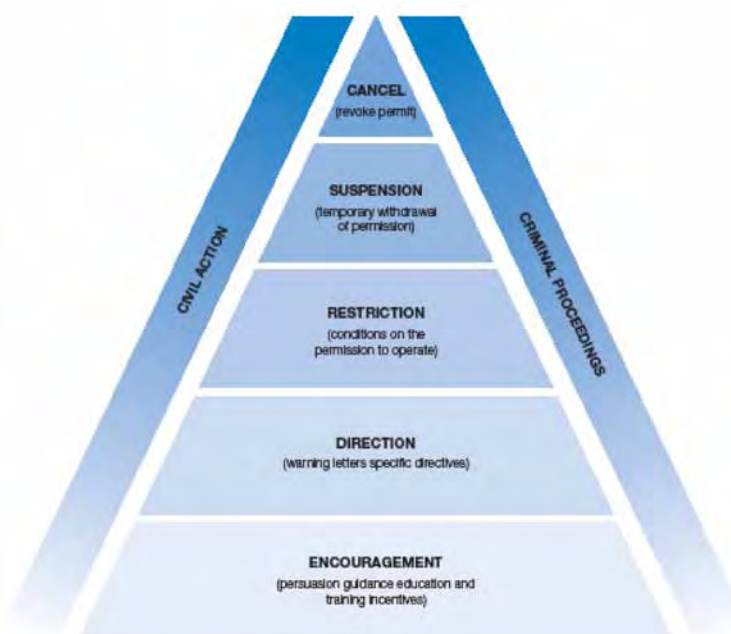


FIGURE 5: ANAO Graduated response to non-compliance.

Source: ANAO 2014 *Administering regulation, Achieving the right balance: Better practice Guide* p. 46 (Based on the enforcement pyramid in I. Ayres and J. Braithwaite, *Responsive Regulation* 1992 p. 35.)

FOR MORE INFORMATION:

Australian National Audit Office

<http://www.anao.gov.au>

Australian National Audit Office (2007) *Administering Regulation: Better Practice Guide*, Australian Government:

http://www.anao.gov.au/uploads/documents/Administering_Regulation_.pdf

Australian National Audit Office (2014) *Administering regulation, Achieving the right balance: Better practice Guide*, Australian Government:

<http://www.anao.gov.au/Publications/Better-Practice-Guides/2013-2014/Administering-Regulation>

1.2. Department of Premier and Cabinet: Better Regulation (New South Wales)

The New South Wales Department of Premier and Cabinet has developed *The Guide to Better Regulation*. Their approach does not emphasise responsiveness and does not use a pyramid approach to escalate or de-escalate, but it does make the important point that options for achieving compliance involve ‘non-regulatory’ approaches that should be tried or considered first. ‘Regulatory’ is used here narrowly to refer to rules and the traditional enforcement of rules through formal sanctions.

The NSW government articulates characteristics of good regulation in their *Guide to Better Regulation*, and more specifically through the following seven Better Regulation principles (which are outlined in the Guide):

The Guide to Better Regulation assists agencies to develop regulation which is “required, reasonable and responsive” (3), by providing details on how to apply the above principles to cut red tape.

FOR MORE INFORMATION:

Department of Premier and Cabinet, NSW Government, Better Regulation:

http://www.dpc.nsw.gov.au/programs_and_services/better_regulation

Department of Premier and Cabinet, NSW Government, Red tape reduction:

http://www.dpc.nsw.gov.au/programs_and_services/better_regulation/red_tape_reduction

Better Regulation Office (2009) *Guide to Better Regulation*, Department of Premier and Cabinet, NSW Government:

http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0009/16848/01_Better_Regulation_eGuide_October_2009.pdf

1.3. The Table Of Eleven (The Netherlands)

In an effort to improve ‘compliance friendliness’, the Dutch Ministry of Justice and Erasmus University pioneered the development of the *Table of Eleven* key determinants of compliance. This is used to (a) guide reviews of compliance and enforcement relating to existing legislation and (b) as an analytical tool in the development of new regulation.

The Table recognizes the complex set of factors that can lead to non-compliance and that should be considered in relation to a regulatory intervention. The Table of Eleven is a more formal version of ‘smart regulation’: Regulators need to understand the complexity of the problem in terms of causes and consequences, and strategically choose many points of intervention to elicit compliance. (See Part 3 for more information on smart regulation)

The Table of Eleven recognises the importance of knowledge, persuasion, norms and informal controls in regulatory contexts and the role played by regulatory actors beyond government in keeping voluntary compliance levels high.

The three levels outlined in the Table of Eleven are:

- 1. Spontaneous compliance dimensions:** factors that affect the incidence of voluntary compliance, that is, compliance that would occur in the absence of enforcement.
- 2. Control dimensions:** determine the probability of detection of non-complying behaviour (for example by third parties or inspectors).
- 3. Sanctions dimensions:** the expected value of sanctions for non-compliance, that is, (a) the probability of a sanction being imposed where non-compliance is detected and (b) the severity and type of likely sanctions.

FOR MORE INFORMATION:

Jacobs, S.H. (1999) *Regulatory Reform in the Netherlands*, OECD.

<https://books.google.com.au/books?id=fJPWAgAAQBAJ>

OECD (2009) *Better Regulation in the Netherlands*, (part of an OECD review of better regulation in Europe):

<http://www.oecd.org/dataoecd/0/13/43307757.pdf>

OECD (2002) *Regulatory Policies in OECD Countries: from Interventionism to Regulatory Governance*, (part of OECD review of regulatory reforms) (chapter 5, p.79 for the Table of Eleven):

<https://www.wbginvestmentclimate.org/uploads/7.RegulatoryPoliciesOECDCountries.pdf>

1.4. The Regulator's Code of Practice (Ontario, Canada)

The Ontario *Regulator's Code of Practice* was released in 2011 to help guide Ontario's regulatory ministries and related organizations. The Code is relevant to legislative development, policy, compliance promotion/communication, licensing, audit, inspection, investigation, and enforcement activities.

According to the Ministry of Labour website, the Code aims to create a more collaborative partnership between regulators and their regulated community to make compliance as easy and straightforward as possible. The Code provides (a) a set of organizational values, (b) elements of professionalism, (c) service principles and (d) best practices.

The Code combines a compliance-focused approach with risk-based targeting to help achieve maximum compliance while supporting and creating fewer burdens for businesses that want to follow the law.

A compliance-focused approach asks regulators to focus on the objectives of regulatory law and policy and then consider the most innovative, efficient and effective method of achieving compliance.

FOR MORE INFORMATION:

Ontario Ministry of Labour, Regulator's Code of Practice:

<http://www.labour.gov.on.ca/english/about/regulatorscode.php>

Ontario Ministry for Economic Development and Trade/Open for Business in consultation with Ontario's regulatory ministries (2011) *Regulator's Code of Practice: Integrity in Pursuit of Compliance*:

<https://dr6j45jk9xcmk.cloudfront.net/documents/779/regulators-code-of-practice-en.pdf>

1.5. The Hampton Review (2005): 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (UK)

The Hampton Review led to the creation of the Better Regulation Executive¹⁸, which aims to reduce administrative burdens on business whilst still holding government departments and regulators to account (Lord 2009). The Review also led to the creation of the Regulators Compliance Code (2007) now superseded by a 2014 version.

In his Executive Summary, Hampton acknowledged the positive components of the UK government's existing regulatory system but highlighted six problem areas, two of which are especially relevant to the field of responsive regulation:

- *regulators lack effective tools¹⁹ to punish persistent offenders and reward compliant behaviour by business;* and
- *the structure of regulations, particularly at [a] local level, is complex, prevents joining up, and discourages business-responsive behaviour.*

¹⁸ <https://www.gov.uk/government/groups/better-regulation-executive>

¹⁹ i.e. insufficient levels in the regulatory pyramid

Hampton promoted New Zealand's Workplace Health and Safety Strategy, which makes reference to regulatory approaches which embrace responsiveness and which address motivational posturing in their compliance-building strategies:

...we need to ensure that regulators use a flexible approach to intervention, depending on the motivations and responses of individual employers.(26)

Further, the Review acknowledged that the gradual adoption of more responsive regulation has led to a general acceptance among business and regulators that inspections are inefficient in low-risk/high performing businesses and that risk assessments should instead inform inspectors' work programmes. The Review focuses heavily on risk. It cites documents such as the Environment Agency's *Delivering for the environment*, and the Health and Safety Commission's *A strategy for workplace health and safety to 2010 and beyond* as examples of where the case for a more risk-based approach has been strongly made (p.27). The Review recommends that all regulatory agencies should adopt such an approach on the following grounds: (a) it provides an effective framework that enables regulators to relate their enforcement activities to the achievement of objectives; (b) it ensures resources are targeted in a manner that prioritises the highest risks; and (c) it helps to evaluate new regulatory challenges and risks.

FOR MORE INFORMATION:

Baldwin, R. and J. Black (2008) "Really Responsive Regulation", *The Modern Law Review* 71(1): 59-94.
<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2008.00681.x/abstract>

Better Regulation Executive (2007) *Regulators' Compliance Code: Statutory Code of Practice for Regulators*, Department for Business Enterprise & Regulatory Reform:
http://www.merseyfire.gov.uk/asp/pages/protection/pdf/Compliance_code2.pdf

Hampton, P. (2005) *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury:
http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/bud_bud05_hampton.htm

Lord, V. (2009) "The Hampton and Macrory Reviews: A Summary", *The Regulator, The Kingsley Napley Regulatory Law Update*:
[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR(2).pdf)

Better Regulation Executive (2006) *Regulatory Justice: Sanctioning in a post-Hampton World*, London: Cabinet Office:
<http://webarchive.nationalarchives.gov.uk/20060731065559/http://cabinetoffice.gov.uk/regulation/documents/pdf/macrory060524.pdf>

1.6. The Macrory Review (2006): 'Regulatory Justice: Making Sanctions Effective' (UK)

The Hampton Review recommended that the Better Regulation Executive (BRE) should undertake a comprehensive review of regulators' penalty regimes. Accordingly, the BRE established a Penalties Review, under the guidance of Professor Richard Macrory. The Penalties Review findings were the basis for the recommendations outlined in the *Macrory Review* (BRE 2006).

The Macrory Review outlined strategies for improving compliance among UK businesses. A multi-tiered approach was recommended to improve the responsiveness of the regulatory system. The recommendations called for an increase in the number and variety of sanctions, below that of criminal prosecution, as a means of enabling regulators to deal effectively with non-compliance in cases where criminal prosecution is not warranted. Macrory also recommended that pilot schemes be established to promote restorative justice for regulatory non-compliance. The Macrory Recommendations subsequently helped form the basis of the Regulatory Enforcement and Sanctions Act, Part 3 (Lord 2009).

Macrory concluded:

The reforms suggested by this review are not intended to transform sanctioning systems overnight, but to bring into them the flexibility, efficiencies and responsiveness that can facilitate the full implementation of the Hampton agenda. This will result in better deterrence options for regulators, better compliance for business and better outcomes for the public. (9)

These proposals are not about making it easier to penalise businesses but to create a system of sanctions that is more responsive and proportionate to the nature of the non-compliance. (47)

Principle 3 of his recommendations is to pursue 'Responsive Sanctioning', that is:

A sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction. (30)

Under his section on 'The Role and Importance of Sanctions within the Regulatory System', Macrory discusses the "limited range of enforcement tools" available to regulators:

Over the course of my review, I have received evidence and submissions from many stakeholders including regulators, businesses, academics and many others that have supported my view that regulators have a limited range of enforcement sanctions within their toolkits. (17)

Macrory backed his recommendation for a greater number and range of enforcement tools and compliance strategies as follows:

Criminal prosecutions remain the primary formal sanction available to most regulators. While this sanction is appropriate in many cases, the time, expense, moral condemnation and criminal record involved may not be appropriate for all breaches of regulatory obligations and is burdensome to both the regulator and business. While the most serious offences merit criminal prosecution, it may not be an appropriate route in achieving a change in behaviour and improving outcomes for a large number of businesses where the non-compliance is not truly criminal in its intention. (18)

FOR MORE INFORMATION:

Better Regulation Executive (2006) *Regulatory Justice: Sanctioning in a post-Hampton World*, London: Cabinet Office:

<http://webarchive.nationalarchives.gov.uk/20060731065559/http://cabinetoffice.gov.uk/regulation/documents/pdf/macroy060524.pdf>

Better Regulation Taskforce (2005) *Regulation – Less is More: Reducing Burdens, Improving Outcomes – BRTF Report to the Prime Minister*: <https://drive.google.com/open?id=0BxGINTrvTRpRVVdKV3A5Zm9TOEU>

Department for Business Innovation & Skills (BIS) Improving Compliance among Businesses (Macrory Review): <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/whatwedo/bre/reviewing-regulation/compliance-businesses/page44102.html>

Lord, V. (2009) “The Hampton and Macrory Reviews: A Summary”, *The Regulator, The Kingsley Napley Regulatory Law Update*:

[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR(2).pdf)

Macrory, R. (2006) *Regulatory Justice: Making Sanctions Effective*, London: Cabinet Office:

<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file44593.pdf>

1.7. The Regulatory Enforcement and Sanctions Act (2008) (UK)

As a result of the Macrory recommendations, Part 3 of the Regulatory Enforcement and Sanctions Act (2008) (RESA) provides regulators with new civil sanctioning powers to complement the existing criminal sanctions, as a means of better enforcing compliance across regulated businesses. It aims to provide:

flexibility to regulators when dealing with businesses whose conduct falls short of the standards required of them. The range of sanctions gives regulators the ability to respond on a case by case basis, allowing the application of appropriate sanctions for minor breaches, whilst retaining the ability to prosecute major breaches in the criminal courts. (The Regulator, September 2009, 1)

In this way, the Act is an example of where the regulatory pyramid has been expanded to include a wider range of enforcement and compliance tools.

FOR MORE INFORMATION:

The Regulatory Enforcement and Sanctions Act (RESA) 2008:

<http://www.legislation.gov.uk/ukpga/2008/13/contents>

The Regulatory Enforcement and Sanctions Act (RESA) 2008 explanatory notes:

<http://www.legislation.gov.uk/ukpga/2008/13/notes/division/1/1>

Hill, N. (2009) “RESA 2008: An overview of Part 3”, *The Regulator, The Kingsley Napley Regulatory Law Update*:

[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR(2).pdf)

1.8. Statutory Code of Practice for Regulators (2007) (UK)

The purpose of this code is to promote efficient and effective approaches to regulatory inspection and enforcement that improve regulatory outcomes, for example, reduction in accidents/disease, less pollution, without imposing unnecessary burdens. The Code is based on the recommendations in the Hampton Report (see Section 1.5 above). Regulators should ensure that their sanctions and penalties policies are consistent with the principles set out in the Macrory Review (see Section 1.6 above). This means that sanctions and penalties policies should reflect the key characteristics of responsive regulation such as:

- aim to change the behaviour of the offender;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

In 2014, a new regulator code was produced by the UK government:

The Regulators' Code provides a flexible, principles-based framework for regulatory delivery that supports and enables regulators to design their service and enforcement policies in a manner that best suits the needs of businesses and other regulated entities.

Our expectation is that by clarifying the provisions contained in the previous Regulator's Compliance Code, in a shorter and accessible format, regulators and those they regulate will have a clear understanding of the services that can be expected and will feel able to challenge if these are not being fulfilled.(2)

FOR MORE INFORMATION:

Better Regulation Executive (2007) *Regulators' Compliance Code: Statutory Code of Practice for Regulators*, Department for Business Enterprise & Regulatory Reform:

http://www.merseyfire.gov.uk/asp/asp/pages/protection/pdf/Compliance_code2.pdf

Better Regulation Delivery Office, Statutory Guidance Regulators' Code:

<https://www.gov.uk/government/publications/regulators-code>

Better Regulation Delivery Office (2014) *Regulator's Code*, Department for Business Innovation and Skills:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf

1.9. Department of Internal Affairs: Achieving Compliance. A Guide for Compliance Agencies in New Zealand (2011)

Sponsored by the Department of Internal Affairs, this best-practice guide presents the approaches used by effective compliance agencies and highlights core components and principles of best-practice compliance management. The guide is intended for New Zealand government agencies that work in compliance. It reflects the work of a number of regulatory agencies and compliance practitioners and recommends the principles and guidelines outlined be adapted to an individual agency's own particular character, functions and objectives, and own particular regulatory environment.

A responsive regulatory approach and the enforcement pyramid is a central feature in the guide.

FOR MORE INFORMATION:

Department of Internal Affairs in Consultation with other Government Bodies (2011) *Achieving Compliance: A Guide for Compliance Agencies in New Zealand*:

[https://www.dia.govt.nz/diawebsite.nsf/Files/Achieving Compliance - A Guide for Compliance Agencies in New Zealand/\\$file/AchievingComplianceGuide_17July2011.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Achieving%20Compliance%20-%20A%20Guide%20for%20Compliance%20Agencies%20in%20New%20Zealand/$file/AchievingComplianceGuide_17July2011.pdf)

1.10. Department of Local Government (Western Australia)

The Department of Local Government is responsible for the regulation of the Western Australian local government sector. The Compliance Framework was developed to ensure that the integrity of the local government sector is of the highest order.

Our aim is to build good governance by promoting and enforcing compliance and by encouraging all local governments to move beyond minimum compliance through continuous improvement. We also aim to ensure that there is proper accountability of local governments to their communities (1)

Our intention in publishing this Framework is to:

- *Demonstrate our commitment to using our powers in a way that is, and importantly is seen to be, firm, fair and consistent*
- *Enhance the transparency of our compliance process (1)*

The Department of Local Government offers the figures below to illustrate its Compliance Model (A) and Compliance Approach (B). The Compliance Model assumes that most in the sector are willing and able to comply. Where that is not the case, the response needs to be matched to the compliance issue. Educate and inform are the responses chosen when there are genuine efforts to be compliant. Equally, the full force of the law will be brought to bear on non-compliance that is serious or systemic or repetitive breaches. A strong statement of commitment to procedural fairness is part of the Framework (p. 2).



FIGURE 6(A): Compliance Model.

Source: Department of Local Government *Compliance Framework* Government of Western Australia p. 3

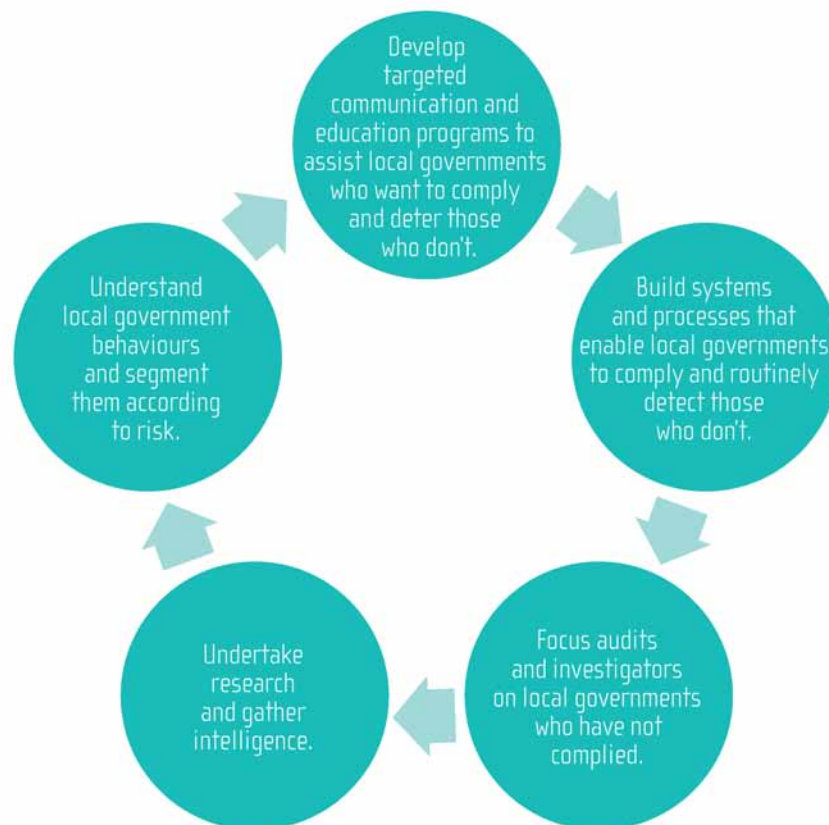


FIGURE 6(B): Compliance Approach.

Source: Department of Local Government *Compliance Framework* Government of Western Australia p. 3

FOR MORE INFORMATION:

Department of Local Government and Communities *Compliance Framework*:
<https://www.dlg.wa.gov.au/Content/LG/ComplianceFramework/Default.aspx>

2. PUBLIC HEALTH AND SAFETY

2.1. Food

2.1.1. Australia and New Zealand Food Safety Regulation

The Productivity Commission found that Australian and New Zealand food safety regulators generally used a cooperative, graduated approach to achieving compliance that involved responsive and self-regulatory strategies.

This meant that the Australian and New Zealand Ministerial Forum on Food Regulation were increasingly making efforts to deliver outcomes that minimised adverse impacts on business and provided assistance with compliance.

Most regulators included in the study accepted that effective enforcement must include both ‘deterrence’ and ‘education or persuasion’ strategies. They also believed that enforcement policies should consist of an escalation of sanctions as depicted in the following pyramid, developed by Gilligan, Bird and Ramsey²⁰ and included in their final report:

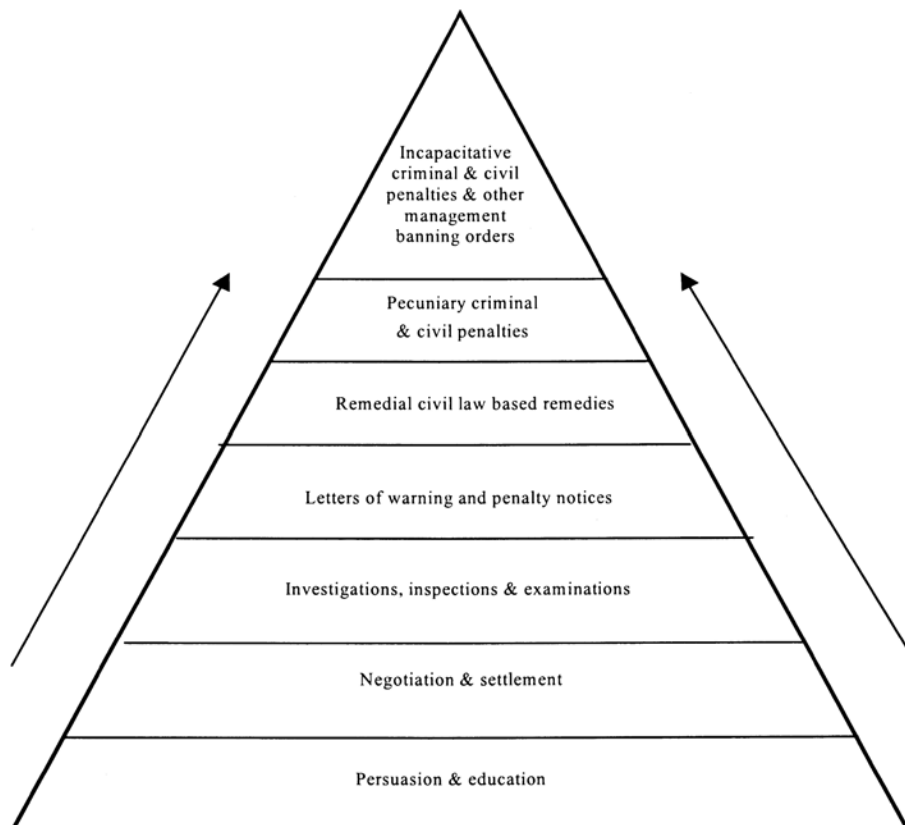


FIGURE 7: Enforcement pyramid regarding directors’ duties under the Corporations Law: An example of a regulatory enforcement pyramid from education or persuasion through deterrence with escalating sanctions.

Source: Gilligan, G., Bird, H. and I. Ramsey. 1999. *University of New South Wales Law Journal* 22(2): 417-61.

²⁰ Gilligan, G., Bird, H. and I. Ramsey. 1999. “Civil penalties and the enforcement of directors’ duties”, *University of New South Wales Law Journal* 22(2): 417-61. http://www.unswlawjournal.unsw.edu.au/sites/default/files/3_gilligan_et_al.pdf

The Productivity Commission also found that regulators in all jurisdictions favoured the use of education and warnings over site-inspections and punitive approaches. For example, data collected for the NSW Food Authority, Victorian Department of Health and NT Department of Health and Families indicates a preference for education and informal advice over verbal warnings and a preference for verbal over written warnings.

FOR MORE INFORMATION:

Productivity Commission (2009) Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety Research Report, Australian Government:

<http://www.pc.gov.au/projects/study/regulation-benchmarking/food-safety/report>

Australia and New Zealand Ministerial Forum on Food Regulation (2013) Overarching Strategic Statement for the Food Regulatory System, Department of Health:

<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-stategic-statement#principles>

Implementation Sub-Committee Enforcement Guideline Working Group (2009) Australia and New Zealand Food Regulation Enforcement Guideline, Version 8:

[http://www.health.gov.au/internet/main/publishing.nsf/Content/36E7BF5C3B397261CA257BF0001C960C/\\$File/Australia-and-New-Zealand-Enforcement-Guideline.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/36E7BF5C3B397261CA257BF0001C960C/$File/Australia-and-New-Zealand-Enforcement-Guideline.pdf)

2.1.2. Department Of Health (Western Australia)

The Department of Health and local government are the primary enforcement agencies for various food businesses in Western Australia. Enforcement policy and guidelines inform the Department of Health's regulatory approach.

This Guideline provides a framework for enforcement agencies to utilise in order to provide consistency in enforcement activity across Western Australia.

This [Compliance and Enforcement] Guideline provides for a graduated but proportionate application of enforcement options, generally commencing with, for example, milder options and then progressively applying the more severe enforcement action. The more serious enforcement options open to enforcement agencies, such as prosecution, are generally used for the more serious matters or after the exhaustion of other enforcement options.

This Guideline provides a range of compliance and enforcement options to enforcement agencies in response to food safety compliance failures. Consistency in the application of approach will allow the measures to be tailored to the individual circumstances so that enforcement is proportionate to the circumstances in which the non-compliance occurs and the degree of risk posed by the non-compliance.

The outcome based food safety legislations allows food businesses to have a high level of flexibility in order to achieve compliance with the legislative requirements, avoiding any unnecessary costs or difficulties. Outcomes based legislation requires enforcement agencies to have a sound understanding of both the law and food science. Therefore a high level of training and support is needed to ensure the law is enforced and that the objectives of the legislation are achieved. (1)

The Guideline considers low and high non-compliance along with low and high risk in relation to food safety (p. 2). Low risk and low non-compliance is likely to avoid surveillance and close scrutiny. Inspection will be complaint based only. High non-compliance and low risk will be monitored through regular audits and assessments. The same treatment is associated with low non-compliance and high risk. High risk and high non-compliance will attract priority treatment (p. 2).

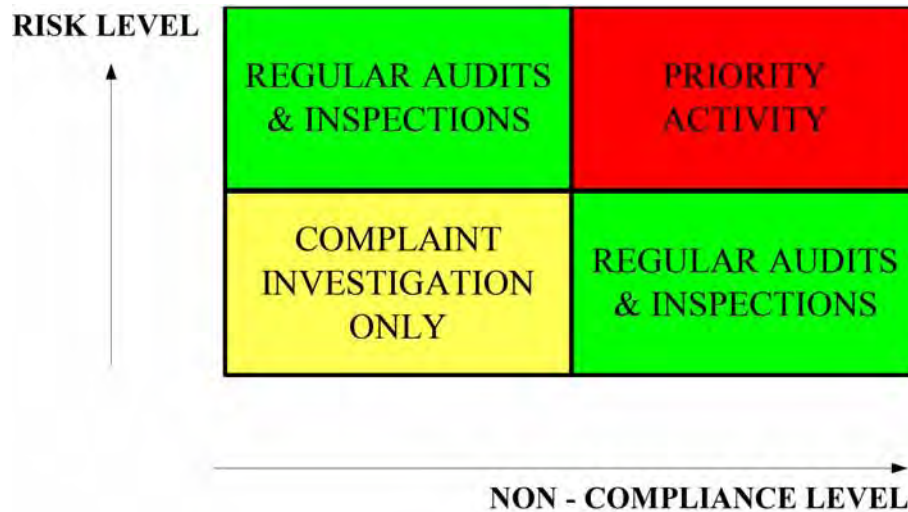


FIGURE 8: The graduated nature of enforcement responses in concert with the seriousness of the non-compliance.
Source: Western Australia Department of Health 2014 Compliance and Enforcement Guideline for Enforcement Agencies p. 5

FOR MORE INFORMATION:

Western Australia Department of Health, Compliance and enforcement of food legislation:
http://www.public.health.wa.gov.au/3/1701/2/compliance_and_enforcement_of_food_legislation_in_.pm

Western Australia Department of Health (2014) *Compliance and Enforcement Policy* Government of Western Australia
<http://www.public.health.wa.gov.au/cproot/6012/2/DOHComplianceandEnforcementPolicyVersion3.pdf>

Western Australia Department of Health (2014) *Compliance and Enforcement* Guideline for Enforcement Agencies p. 5
<http://www.public.health.wa.gov.au/cproot/6011/2/ComplianceandEnforcementGuidelineVersion3.pdf>

2.1.3. Dutch Food And Consumer Product Safety Authority (The Netherlands)

Mascini and Van Wijk (2009) refer to the widespread use of responsive regulation in the Netherlands, pointing to the use of the approach by the Dutch tax office, labor inspectorate and environmental inspection agency (p.27).

However, in their 2009 article on The Netherlands’ Food and Consumer Product Safety Authority, the authors identify a series of obstacles to regulating responsively:

First, it is not always clear which enforcement style should be utilized because inspectors apply enforcement styles inconsistently. Second...inspectors may not succeed in applying the most suitable style. They can encounter language barriers or ambiguous or rigid rules, or the application of the most apt style can interfere with achieving higher priority goals. Third, it is clear that negative unintended consequences are not restricted to businesses targeted for a deterrent approach by inspectors. They often occur even when inspectors wish to act persuasively because regulatees tend to perceive their behavior as more coercive than intended by inspectors. (42)

The authors argue that these difficulties are not restricted to their case study but highlight an underlying problem with the applicability of responsive regulation theory.

FOR MORE INFORMATION:

Mascini, P. and E. Van Wijk (2009) "Responsive regulation at the Dutch Food and Consumer Product Safety Authority: An empirical assessment of assumptions underlying the theory", *Regulation & Governance* 3: 27-47: <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2009.01047.x/abstract>

2.1.4. Liquor Sales (New Zealand)

In 1998, the Alcohol and Public Health Research Unit (APHRU), funded by the New Zealand Health Research Council completed an investigation into the application of 'responsive regulation' theory to the Sale of Liquor Act 1989. The investigation's findings prompted a series of recommendations, which contributed to the review and amendment of the Act.

In particular, it was recommended that responsive regulatory strategies be applied to the following aspects of the Act:

- the criteria and conditions under which each licence is granted;
- the right of objection by members of the public to the grant or renewal of a licence; and
- the Liquor Licensing Authority's powers of sanction.

FOR MORE INFORMATION:

Hill, L. and L. Stewart (1998) "Responsive Regulation" Theory and the Sale of Liquor Act, *Social Policy Journal of New Zealand*, 11, 49-65: <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj11/reponsive-regulation-theory-sale-liquor-act.html>

2.1.5. Department Of Agriculture (Australia)

The Department of Agriculture's mission is to sustain the way of life and prosperity of all Australians through (a) leading the development of policy advice and provide services to improve the productivity, competitiveness and sustainability of agriculture, fisheries, forestry and related industries; and (b) helping people and goods move in and out of Australia while managing the risks to the environment and animal, plant and human health. Below are two applications of responsive regulation from within this portfolio.

2.1.5.1. Biosecurity

The Department of Agriculture provides biosecurity inspection and quarantine for international passengers, cargo, mail, animals, plants, and animal or plant products arriving in Australia. It also inspects and certifies a range of agricultural products exported from Australia.

From the introduction of the Department's *Biosecurity Compliance Strategy*, the role is to:

safeguard Australia's animal and plant health status to maintain overseas markets and protect the economy and environment from the impact of exotic pests and diseases, through risk management, inspection and certification, and the implementation of emergency response arrangements for Australian agricultural, food and fibre industries. (iv)

The Department's regulatory philosophy is to manage compliance by encouraging stakeholders to voluntarily comply with biosecurity requirements and dealing with non-compliance appropriately. The Department's approach to implementing its compliance programs is based on the responsive regulation model and is described on its website and in its *Biosecurity Compliance Strategy*.

The department uses a risk-based approach that increasingly takes into account the behavior and motivations of stakeholders. The model guides the department to assist stakeholders to comply with the law through responsive and effective regulatory programs. The department recognises that the way it interacts with stakeholders can influence the behaviour of individuals and organizations. (4)

The compliance model assumes that most stakeholders will comply, or try to comply, with their obligations. The department's objective is to encourage compliance, and, in so doing, work toward reducing the cost of compliance for those who do the right thing. (4)

However, the department recognizes that it is not appropriate to respond to all compliance issues in the same way, and uses strong enforcement techniques to deal with serious non-compliance where deliberate fraud occurs. (4)

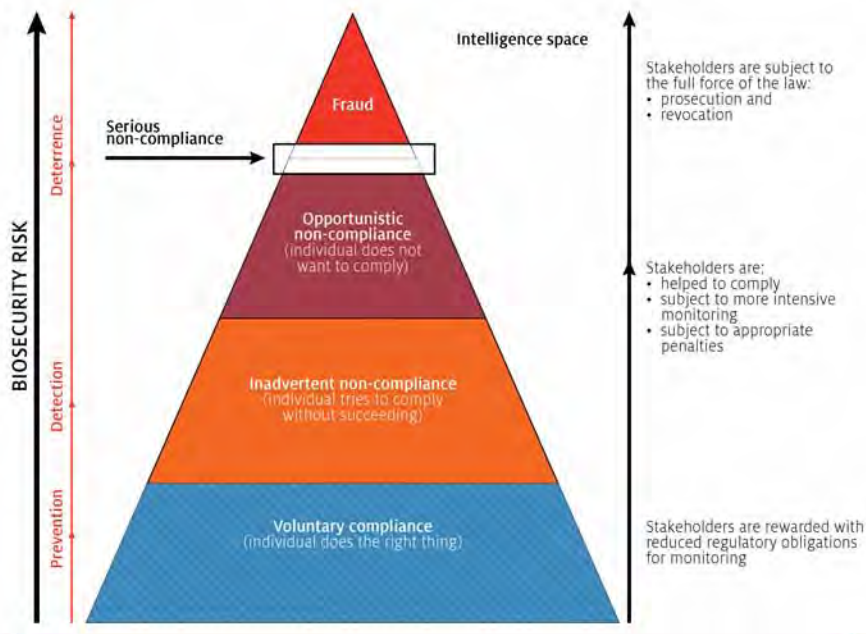


FIGURE 9(A): DAFF's Responsive regulatory model for biosecurity enforcement.

Source: Department of Agriculture, Fisheries and Forestry (Biosecurity) 2012 *Biosecurity Compliance Strategy*



FIGURE 9(B): DAFF's Compliance model for biosecurity.

Source: Department of Agriculture, Fisheries and Forestry (Biosecurity) 2012 *Biosecurity Compliance Strategy*

FOR MORE INFORMATION:

Department of Agriculture, Biosecurity Compliance Plan:

<http://www.daff.gov.au/biosecurity/about/biosecurity-compliance-strategy>

Department of Agriculture, Fisheries and Forestry (Biosecurity) (2012) *Biosecurity Compliance Strategy: A plan for managing compliance and enforcement in Australia:*

<http://www.agriculture.gov.au/SiteCollectionDocuments/aqis/about/media-releases/2010/biosecurity-compliance-strat.pdf>

2.1.5.2. Australian Pesticides And Veterinary Medicines Authority

The Australian Pesticides And Veterinary Medicines Authority (APVMA) is an independent statutory authority delivering regulatory activities to protect the health and safety of people, animals and crops, the environment, and trade. It describes its regulatory approach on its website as follows:

When an investigation is completed, the APVMA has discretion to respond using a graduated range of compliance and enforcement tools. We choose a response or combination of responses that will deliver the best outcome to achieve operational and legislative objectives. This can include choosing to:

- *not pursue the matter further;*
- *support and encourage voluntary compliance (by providing advice, raising awareness and engaging stakeholder groups);*
- *take administrative action to control risk;*
- *implement a mid-range compliance response, such as a formal warning or compulsory recall; or*
- *pursue a sanction such as an infringement notice, civil penalty order, cancellation of authorisation or prosecution.*

FOR MORE INFORMATION:

Australian Pesticides and Veterinary Medicines Authority, Responsive compliance and enforcement:

<http://apvma.gov.au/node/127>

Australian Pesticides and Veterinary Medicines Authority (2012) *Corporate Plan 2012-15*:

http://archive.apvma.gov.au/about/corporate/docs/corporate_plan_2012_15.pdf

2.1.6. Department Of Primary Industry And Fisheries: Enforcement Of Animal Biosecurity (Northern Territory)

The role of Animal Biosecurity is to protect and facilitate market access for Northern Territory livestock and livestock products to domestic and international markets. This includes disease surveillance and control, livestock identification, meat industries, livestock welfare, veterinary laboratory services and legislative compliance. The approach for compliance and enforcement of animal biosecurity adopted by the Department is represented below. The policy stresses that (a) industry consultation occurs with significant legislative changes, (b) education about new legislation is always done prior to compliance and enforcement action, and (c) assistance for new technologies is often provided to assist the producer. Increasing severity of enforcement actions when compliance is not forthcoming is another feature of the policy from verbal warnings to prosecution. These elements are all in keeping with a responsive regulatory model.



FIGURE 10: Approach adopted by animal biosecurity staff for compliance and enforcement.

Source: Northern Territory Government, Enforcement of Animal Biosecurity Legislation for the Livestock Industries NT Fact Sheet 01/01/2013

FOR MORE INFORMATION:

Northern Territory Government, Enforcement of Animal Biosecurity Legislation for the Livestock Industries NT Fact Sheet 01/01/2013:

http://www.nt.gov.au/d/Primary_Industry/Content/File/biosecurity/LivestockIdMovement/FS_EnforcementofABLegislationfortheLivestockIndustries.pdf#search=%22enforcement%22

2.1.7. Office Of The Gene Technology Regulator (Australia)

The Office of the Gene Technology Regulator undertakes monitoring, audits, inspections and investigations under the auspices of the Gene Technology Act 2000. The Office's web page for monitoring and compliance protocols states their objective as:

To protect the health and safety of people, and to protect the environment, by identifying risks posed by or as a result of gene technology, and by managing those risks through regulating certain dealings with GMOs.

In its 2007 Monitoring and Compliance Framework, the OGTR includes a Compliance Pyramid featuring a hierarchy of compliance enforcement strategies, which escalate in severity and aim to give "accredited organisations every opportunity to comply".

It is the OGTR's goal to maintain the majority of its regulatory activity at the base of the pyramid. As such, their compliance model is accompanied by efforts to foster, in accredited organisations, a corporate culture of risk

management and an enabling environment, underpinned by effective education, which reduces the potential for non-compliance.

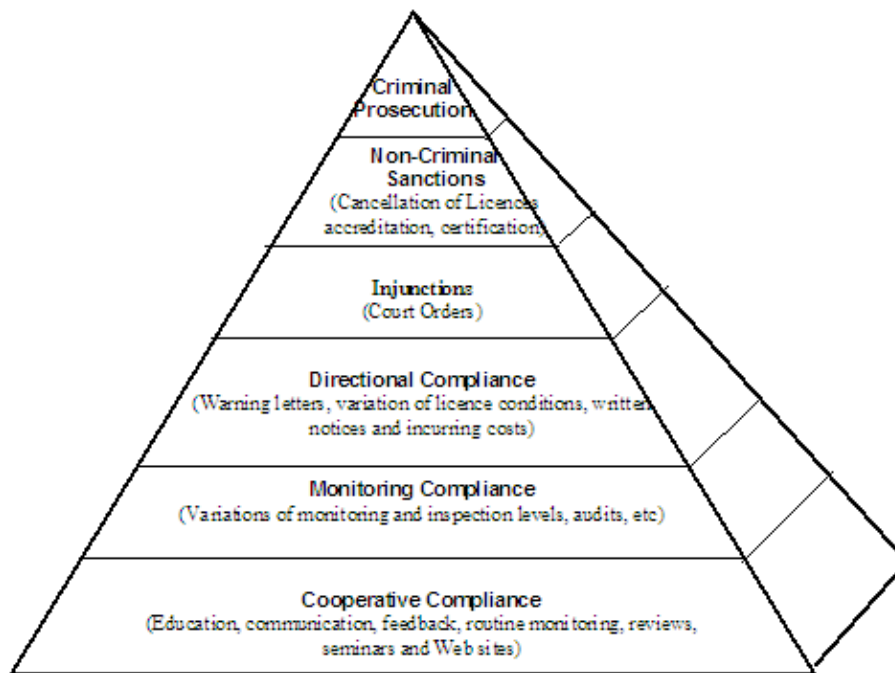


FIGURE 11: OGTR's monitoring and compliance model.
Source: OGTR 2007 Monitoring and Compliance Framework

FOR MORE INFORMATION:

Office of the Gene Technology Regulator (2007) Monitoring and Compliance Protocols - Monitoring and Compliance Framework in accordance with the Gene Technology Act 2000:

<http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/M&CFrameworkJuly07-htm>

2.2. Workplace

2.2.1. Safe Work (Australia)

Safe Work Australia is an Australian Government statutory agency established in 2009 by the Safe Work Australia Act 2008. The agency's primary responsibility is to improve work health and safety and workers' compensation arrangements across Australia.

The harmonised work health and safety laws, which came into effect in 2012, are complemented by a national approach to compliance and enforcement. Safe Work Australia ensures this national approach is applied to compliance and enforcement under the model WHS Act and Regulations. To this end the agency developed a *National Compliance and Enforcement Policy* (2011). The approach described in this policy document is based on a responsive regulatory model:

The lowest level of the pyramid involves an approach which is employed most frequently, often in combination with other tools, to assist duty holders achieve compliance. Sanctions (such as criminal penalties) are at the top of the pyramid and are applied less frequently. (6)

In their Compliance and Enforcement Policy document, Safe Work Australia notes there is:

the ability to escalate if an initial intervention does not achieve the desired outcome (6),

while adding the proviso that:

This does not mean that regulators will always commence with provision of information and advice, and only use other tools in an escalated manner. (6)

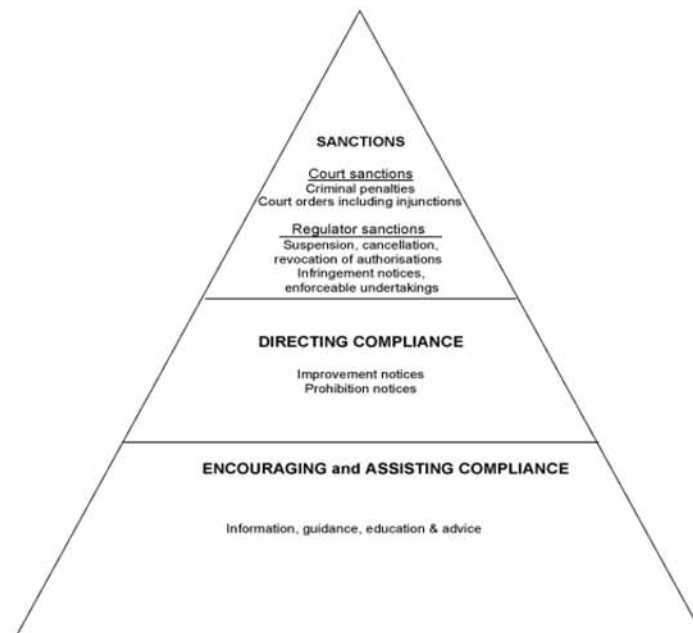


FIGURE 12: SWA's approach to using compliance and enforcement tools.
Source: Safe Work Australia 2011 National Compliance and Enforcement Policy

FOR MORE INFORMATION:

Safe Work Australia (2011) *National Compliance and Enforcement Policy*, Australian Government:
[http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/618/National Compliance and Enforcement Policy.pdf](http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/618/National%20Compliance%20and%20Enforcement%20Policy.pdf)

Safe Work Australia *Australian Work Health and Safety Strategy 2012-22: Healthy safe and productive working lives*:
<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/719/Australian-WHS-Strategy-2012-2022.pdf>

2.2.2. Comcare (Australia)

Comcare administers the Work Health and Safety Act 2011 (WHS Act) and Work Health and Safety Regulations 2011 in the Commonwealth jurisdiction. Comcare’s regulatory activities include:

- managing compliance and enforcement activities under the WHS Act;
- promoting prevention as the primary means of reducing the human and financial costs of injury and disease, as well as identifying and targeting priorities and evaluating results; and
- developing and administering safety policy aimed at improving the regulatory framework to ensure that it provides strong accountability, reflects risks and is outcome based.

Comcare’s Regulation Policy describes their regulatory approach to enhancing the health, safety and welfare of workers through education, assurance and enforcement. Comcare’s regulatory framework consists of:

- the WHS Act and WHS regulations;
- approved Codes of Practices; and
- Comcare Guidance and Other Guidance.

This framework leads to a regulatory compliance model as shown below. This model displays the overall aims and responsive approach of Comcare as a regulator.



FIGURE 13: Comcare’s regulatory compliance model.
 Source: Comcare 2013 *Regulatory Policy*

FOR MORE INFORMATION:

Comcare (2013) Schedule 1- Comcare's regulation framework:

http://www.comcare.gov.au/Forms_and_Publications/publications/corporate_publications/comcare_regulation_policy/schedule_1_comcares_regulation_framework

Comcare (2013) *Regulatory Policy*:

http://www.comcare.gov.au/_data/assets/pdf_file/0018/123192/Comcare_regulation_policy_schedule_1_PDF,_75.8_KB.pdf

2.2.3. Work Health and Safety in the Mining Industry (Australia)

Work health and safety in the mining industry is regulated by states and territories. New South Wales, Queensland and Western Australia have separate mining work health and safety regulations. In the other jurisdictions with smaller mining industries, regulations for mining are covered under the general work health and safety regulations.²¹

The next three cases illustrate aspects of responsive regulation found among Australia's mining regulators. According to Gunningham (2007), mining regulators have found it difficult to achieve a workable balance between the bottom layer of advise and persuade and the harder-edged top layer of prosecution in the pyramid of sanctions. Jurisdictions differ in the layer at which regulatory activity is concentrated. Some efforts to improve integration have been made through the National Mine Safety Framework (see next entry).

FOR MORE INFORMATION:

Gunningham, N. (2007) "Prosecution for OHS Offences: Deterrent or Disincentive?", *Sydney Law Review* 29(3): 359-390: http://sydney.edu.au/law/slr/slr29_3/Gunningham.pdf

Gunningham, N. and D. Sinclair (2007) "Responsive OHS Regulation in the Mining Sector", *National Research Centre for OHS Regulation Working Paper 56*, Regulatory Institutions Network, Australian National University: http://regnet.anu.edu.au/sites/default/files/WorkingPaper_56.pdf

2.2.3.1. National Mine Safety Framework

The National Mine Safety Framework (NMSF) aims to achieve a nationally consistent occupational health and safety regime in the Australian mining industry. The implementation of the NMSF aims to improve the safety of workers through greater consistency and efficiency of occupational health and safety regulation.

The National Mine Safety Framework Implementation Report (2009) provides a figure of an enforcement pyramid (see below). Enforcing authorities in each jurisdiction may choose to utilise any or all of the tools contained within.

²¹ <http://www.safeworkaustralia.gov.au/sites/swa/whs-information/mining/pages/mining>

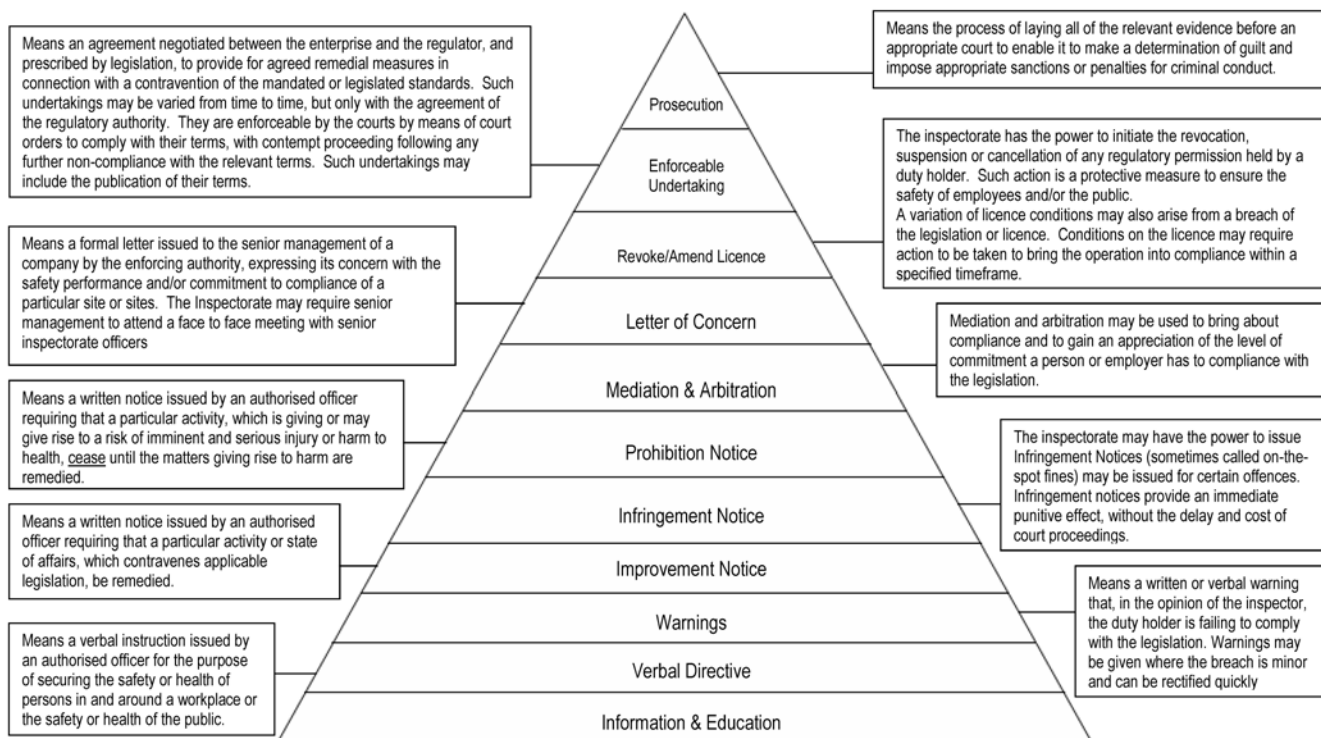


FIGURE 14: A regulatory pyramid used to illustrate principle based enforcement and the development of competences among regulators.

Source: National Mine Safety Framework 2009 *Implementation Report* p 40

FOR MORE INFORMATION:

Department of Industry and Science, National Mine Safety Framework:

<http://www.industry.gov.au/resource/Mining/NationalMineSafetyFramework/Pages/default.aspx>

National Mine Safety Framework (2009) *National Mine Safety Framework Implementation Report*:

<http://www.industry.gov.au/resource/Documents/Mining/NMSF-Implementation-Report-June2009.pdf>

2.2.3.2. Queensland Mines Inspectorate: Compliance Policy Implementation Guide

The Queensland Mines Inspectorate Compliance Policy – Implementation Guide (2010) explains the compliance promotion and enforcement strategies are available to Inspectors to reduce the incidence of work related injury and disease. The Enforcement Pyramid below is described by Cliff and Johnstone (2010) in a review of the effectiveness of enforcement actions as follows:

The guides depict the current enforcement tools in an enforcement hierarchy ranging through five levels of administrative response, from level one advising the obligation holder of opportunities for improvement or advising obligation holders failing to comply with their obligations to control a low to medium risk; level two advise the obligation holder where they are failing to comply with their obligations – usually an unacceptable level of risk which routinely includes issuing a directive; level 3 conduct a site management accountability meeting in the regional office; level four conduct a senior company management accountability meeting in Brisbane with the Commissioner for Mine Safety and Health and chief inspectors; to level five recommend prosecution.

Sitting below these five levels are the educate, advise and mentor functions as well as the mine record book entry recommendations. The emphasis ... is on achieving an acceptable level of risk, and a risk assessment process is outlined ... which defines the level of the enforcement response as being based upon the severity of the risk. (25-6)

Cliff and Johnstone proceed to emphasize the importance of and need for:

a substantive and objective education process to promote uniform application of the enforcement tools.(26)

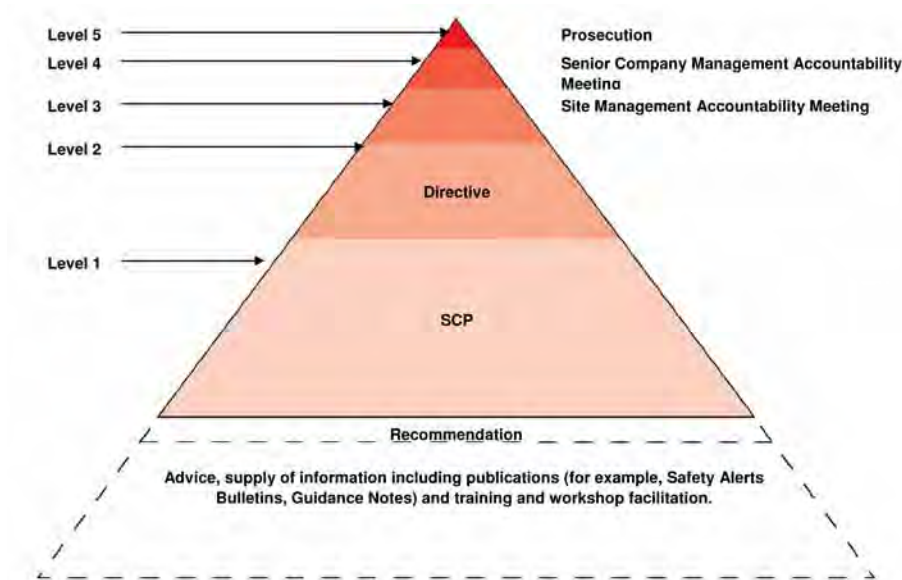


FIGURE 15: Enforcement Pyramid with a range of “compliance promotion and enforcement strategies.”

Source: Department of Employment, Economic Development and Innovation 2010 *Mines Inspectorate Compliance Policy: Implementation guide* p. 5

FOR MORE INFORMATION:

Department of Employment, Economic Development and Innovation (2010) *Mines Inspectorate Compliance Policy: Implementation guide*, Queensland State Government:

https://mines.industry.qld.gov.au/assets/mines-safety-health/mining_compliance_policy_implementation_guide_march_2010.pdf

Cliff, D. and R. Johnstone (2010) *Final report on the provision of evaluation and research services on the effectiveness of compliance action in improving mine safety*, Queensland Mines Inspectorate, Department of Employment, Economic Development and Innovation:

<https://mines.industry.qld.gov.au/assets/inspectorate/effectiveness-of-enforcement-report-final-2010.pdf>

Department of Natural Resources and Mines (2013) *Operational Policy: Administrative Compliance Tools*, Policy number 01/2013:

<http://mines.industry.qld.gov.au/assets/legislation-pdf/operational-policy.pdf>

2.2.3.3. Queensland Petroleum and Gas Inspectorate: Regulatory Enforcement Policy

In the Foreword to the Regulatory Enforcement Policy, the Commissioner for Mine Safety and Health outlines the vision of the Petroleum and Gas Inspectorate in Queensland as follows:

The Inspectorate's vision is for safe, secure and healthy individuals in our industries and our community in regard to all regulated petroleum and gas-related activities (iii)

To help the Inspectorate achieve this vision, the legislation enables the Inspectorate to use a range of compliance and enforcement actions, from simple advice and guidance through to statutory notices and directions, and ultimately prosecution. It is important that these actions are fair and appropriate for the circumstances involved. (iii)

The Regulatory Enforcement Policy Pyramid (below) is the foundation for the Petroleum and Gas Inspectorate's enforcement policy. The tools range from informal non-statutory-based advice and discussion, to statutory-based directives and notices, to prosecution. According to their website, while generally a staged approach may be used, the Inspectorate will use legislative powers as needed in response to wilful or negligent situations, dangerous situations where imminent risk is detected or may potentially occur, and where serious injury, death or substantial damage has occurred.

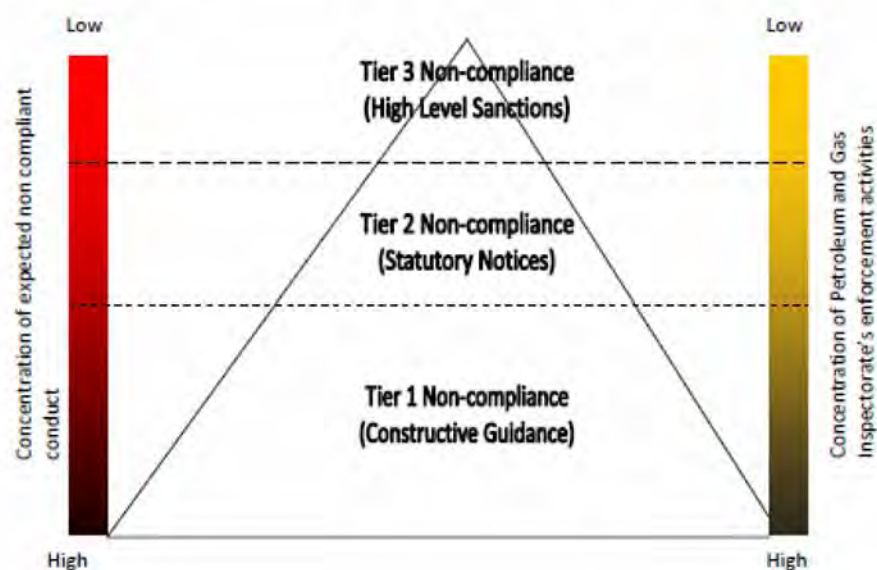


FIGURE 16: Regulatory Enforcement Policy Pyramid.

Source: Department of Employment, Economic Development and Innovation 2011 *Regulatory Enforcement Policy: Petroleum and Gas Inspectorate* p. 11

FOR MORE INFORMATION:

Department of Employment, Economic Development and Innovation (2011) *Regulatory Enforcement Policy: Petroleum and Gas Inspectorate*, Queensland State Government:

<https://mines.industry.qld.gov.au/assets/safety-and-health/PG-enforcement-policy.pdf>

Department of Natural Resources and Mines (2013) *Operational Policy: Administrative Compliance Tools*, Policy number 01/2013, Queensland State Government:

<http://mines.industry.qld.gov.au/assets/legislation-pdf/operational-policy.pdf>

2.2.4. Department of Mineral Resources (South Africa)

Efforts have been made to move towards a more responsive regulatory approach in relation to mining health and safety. In 2005, Department of Mineral Resources (Republic of South Africa) provided a Guideline for Enforcement of the Mine Health and Safety Act by the Mine Health and Safety Inspectorate. The guideline in the Forward was:

intended to assist the Inspectorate in achieving a clear and consistent approach to the enforcement of the Mine Health and Safety Act of 1996 (3)

The Guideline recommended that:

...a graduated series of options [be] adopted with consultation and verbal directions as the starting point, progressing through statutory instructions to order compliance, or to an order to halt or suspend operations at a mine or an affected area of a mine; and finally, the recommendation of an administrative fine or prosecution for failure to comply. (6-7)

This graduated series of options is generally referred to as the Enforcement Pyramid. The pyramid refers to the series of escalating alternatives, corresponding to successively more serious circumstances (7)

This approach is a simplified version of a responsive regulatory pyramid, as illustrated below:

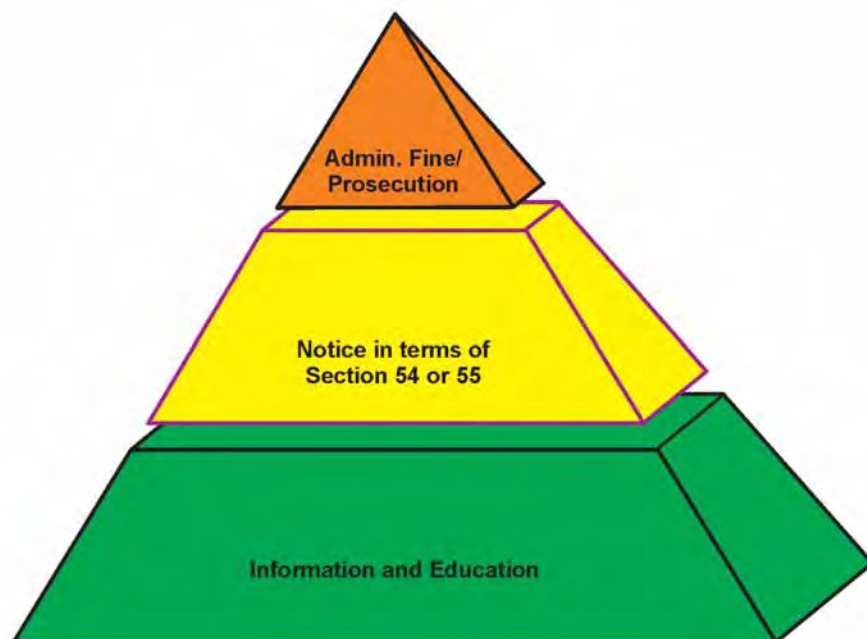


FIGURE 17: The Enforcement Pyramid.

Source: Mine Health and Safety Inspectorate 2005 Guideline for Enforcement of the Mine Health and Safety Act p. 7

FOR MORE INFORMATION:

Mine Health and Safety Inspectorate (2005) *Guideline for Enforcement of the Mine Health and Safety Act*, Department of Minerals and Energy, Republic of South Africa:

<http://www.dmr.gov.za/legislation/summary/30-mine-health-and-safety/528-guideline-for-enforcement-of-the-mhs-act.html>

2.2.5. Worksafe (New Zealand)

WorkSafe New Zealand is New Zealand's workplace health and safety regulator. According to the regulator, New Zealand has high rates of workplace fatalities, serious harm injuries and work-related disease and illness. WorkSafe aims to achieve a 25 percent reduction by 2020 of the workplace death and injury toll.

New Zealand's WorkSafe *Statement of Intent 2014-2018* maps out how WorkSafe New Zealand aims to achieve a reduction in workplace deaths, occupational diseases and injuries. WorkSafe New Zealand is working toward a new intervention approach that is risk-based. The purpose of reform is to provide a greater focus on high-risk workplaces and on occupational health, more worker participation in health and safety, and better co-ordination between government agencies, all to embed and promote good workplace health and safety practices.

WorkSafe NZ sees itself as working closely with employers, employees and others to:

- educate them about their workplace health and safety responsibilities;
- engage them in making changes that reduce the chances of harm; and
- enforce workplace health and safety legislation.

According to the Statement of Intent 2014-2018, regulatory reform will enable Worksafe NZ to be:

*an intelligent regulator. Risk will be targeted and addressed in a proportionate manner. Regulation and enforcement alone are blunt instruments unless matched with engagement and education. WorkSafe NZ will **help those willing to comply, and hold to account those who break the law.** (2)*

*This operating model will be underpinned by a set of principles and supported by frameworks to guide decision-making, which will include information about enforcement actions. The decision-making frameworks will include some mandatory standards **but also allow discretion to take account of particular circumstances and contexts.** Our approach will make **considered use of a wide range of possible interventions and actions**, chosen to be proportionate to the risk or severity of harm. ... Our intervention approach will include, where appropriate, prosecutions to deter non-compliance with New Zealand's health and safety laws. (28)*

The reform process is being progressed through developing new legislation and regulations.

FOR MORE INFORMATION:

Worksafe New Zealand *Statement of Intent 2014-2018*, New Zealand Government:
<http://www.business.govt.nz/worksafe/about/publications/documents/statement-of-intent-2014-pdf>

2.2.6. Ministry of Labour: Healthy and Safe Workplaces (Ontario, Canada)

According to their website, the Ministry of Labour (MOL) was established in 1919 to develop and enforce labour legislation. MOL's mission is to advance safe, fair and harmonious workplace practices that are essential to the social and economic well-being of the people of Ontario. Through the Ministry's key areas of occupational health and safety, employment rights and responsibilities, and labour relations, the Ministry's mandate is to set, communicate and enforce workplace standards while encouraging greater workplace self-reliance. The Ministry also develops, coordinates and implements strategies to prevent workplace injuries and illnesses and can set standards for health and safety training. A range of specialized associations, agencies, boards and commissions assist the Ministry in its work.

The Ontario Regulator's Code of Practice (see Section 1.4) guides the activities of Ontario's regulatory Ministries and organizations that are involved in regulatory compliance, including the Ministry of Labour. A major partner organization in Ontario's Health and Safety System is the Workplace Safety and Insurance Board (see Section 2.2.6) that also adopts a responsive compliance model (see diagram in Section 2.2.6).

The Ontario Strategy Framework (p. 8) frames regulatory activity and emphasizes the importance of each workplace having a well-functioning Internal Responsibility System. The Strategy Framework acknowledges differences in commitment to this goal. Some workplaces adopt a 'watch me' approach. They have high standards and serve as occupational health and safety champions for other workplaces. Some workplaces take the 'show me' approach. They are unaware of their occupational health and safety responsibilities, but are willing to learn and comply. And some workplaces adopt a 'make me' approach. They are willfully non-compliant. The Strategy Framework concludes:

Stakeholders agree that strong enforcement is essential in dealing with workplaces that are willfully non-compliant with the law. (14)

The following figure from the Strategic Framework sets out the tools available to help the Ministry achieve its vision, goals and priorities. The range of responses includes education and training through to enforcement.

Strategy Framework

The strategy framework is designed to guide all parties who influence health and safety in Ontario workplaces and help us maximize the investments made by all parts of the system.



FIGURE 18: Strategy Framework.

Source: Ministry of Labour 2013 *Healthy and Safe Ontario Workplaces* p. 12

FOR MORE INFORMATION:

Ministry of Labour (2013) *Healthy and Safe Ontario Workplaces: A Strategy for Transforming Occupational Health and Safety*:

<http://www.labour.gov.on.ca/english/hs/pdf/strategy.pdf>

2.2.7. Workplace Safety and Insurance Board (Ontario, Canada)

Ontario's Workplace Safety and Insurance Board (WSIB) administers public no-fault workplace insurance for employers and their workers. WSIB provides disability benefits, monitors the quality of healthcare, and assists in early and safe return to work for workers who are injured on the job or contract an occupational disease.

The key components of WSIB's compliance framework (2012) are:

education and communication, excellent customer service, a culture of compliance, a responsive compliance model based on identified behaviours, an approach to compliance as a set of mutual obligations, and a risk-based process targeting of problems which can be fixed. (3)

The Responsive Compliance model is presented below.

When you:	The WSIB will:
<i>Are willing to do the right thing</i>	<i>Make it straightforward for you to comply.</i>
<i>Try to comply but don't always succeed</i>	<i>Support you to comply.</i>
<i>Do not want to comply</i>	<i>Deter by detection and administrative action.</i>
<i>Decide not to comply</i>	<i>Use the full force of the law.</i>

Responsive Compliance Model



FIGURE 19: From Commitment to Action: Responsive Compliance Model.
 Source: Workplace Safety and Insurance Board 2012 *From Commitment to Action*

FOR MORE INFORMATION:

Workplace Safety and Insurance Board (2012) *From Commitment to Action: The Framework for Compliance at the WSIB*:

<http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdey/~edisp/wsib012804.pdf>

2.2.8. Health and Safety Commission: Enforcement Policy Statement (UK)

The Health and Safety Executive’s (HSE) aims are to protect the health, safety and welfare of people at work, and to safeguard others, mainly members of the public, who may be exposed to risks from the way work is carried out. This Enforcement Policy follows the Regulators’ Compliance Code (see Section 1.8) and sets out the general principles and approaches which health and safety enforcing authorities are expected to follow. Enforcing authorities have a range of tools they are able to use to secure compliance and respond proportionately to criminal offences. Inspectors may offer duty holders information and advice, both face to face and in writing. This may include warning, improvement and prohibition notices, withdraw approvals, vary licence conditions or exemptions, issue cautions and prosecution.

FOR MORE INFORMATION:

Health and Safety Executive's Enforcement Policy Statement:

<http://www.hse.gov.uk/pubns/hse41.pdf>

<http://www.hse.gov.uk/enforce/enforcepolicy.htm>

2.3. Patient Safety

2.3.1. Therapeutic Goods Administration (Australia)

The Therapeutic Goods Administration (TGA) is responsible for regulating medicines and medical devices. The TGA is part of the Australian Government's Department of Health and Aging. TGA's *Regulatory Compliance Framework* (2013) outlines how the TGA aims to manage its compliance function under its legislation.

The TGA describes its approach to compliance as:

a staged risk-management approach that attempts to identify entities at risk of unintentional or deliberate non-compliance and enable the development of appropriate strategies to prevent non-compliance. (7)

Risks that can arise in relation to therapeutic goods vary: the product itself may inherently pose a risk once on the market, or risk may lie in the product not meeting specified compliance standards, or the risk may lie in the product being unlawful or unauthorised.

The TGA communicates compliance expectations and standards to market-entry applicants and can deny access to applicants who cannot demonstrate compliance. The TGA emphasises the importance of its monitoring of the market for signals of non-compliance.

Underpinning all forms of monitoring is the legislated requirement for sponsors to monitor the performance of their products in the marketplace and, where higher risk products or serious health issues are involved, to report problems to the TGA in a timely manner. (6)

TGA notes that it uses a range of tools when taking action on compliance matters, including:

- Encouragement/guidance
- Restrictions/warnings
- Suspensions/sanctions
- Cancellation/prosecution

TGA's overall approach to compliance recognizes different attitudes to compliance among those they are regulating and the need to be responsive to these differences. TGA's compliance approach is summarised in the figure below.

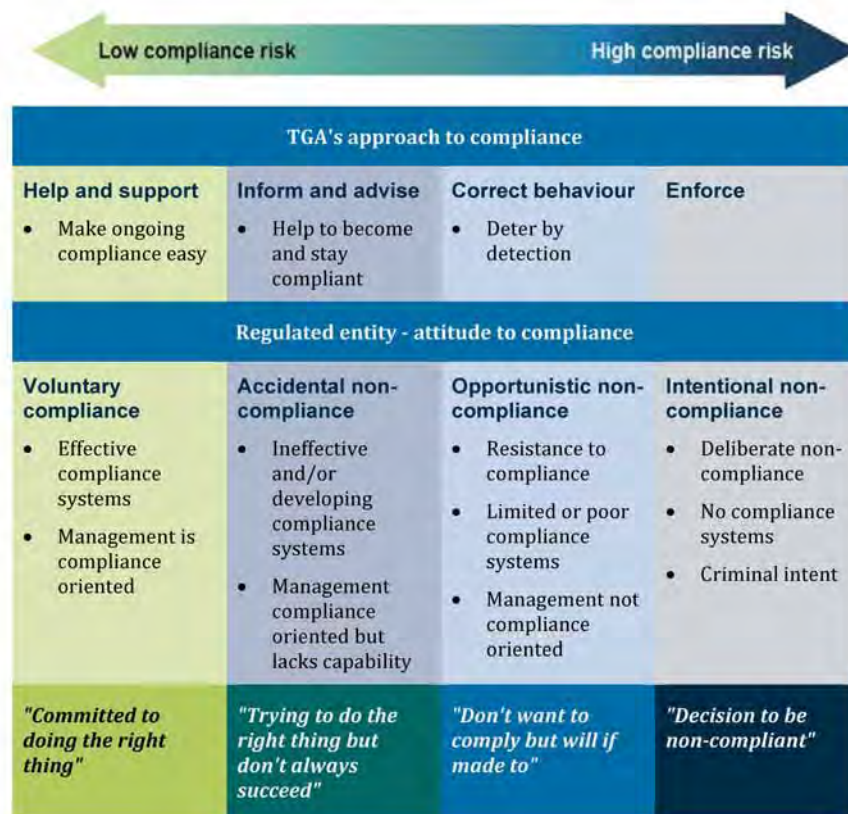


FIGURE 20: Summary of TGA's compliance framework showing its risk assessment, compliance approaches and regulatees' approaches to compliance.

Source: Therapeutic Goods Association 2013 *Regulatory Compliance Framework* p. 8

FOR MORE INFORMATION:

Therapeutic Goods Association (2013) *Regulatory Compliance Framework*, Department of Health and Aging, Australian Government:

<https://www.tga.gov.au/regulatory-compliance-framework>

2.3.2. Patient Safety Commission (Oregon, USA)

The Oregon Patient Safety Commission is a semi-independent state agency charged by the Oregon Legislature with reducing the risk of serious adverse events occurring in Oregon's healthcare system and encouraging a culture of patient safety. The approach of the Commission is responsive in so far as it is using a voluntary, educative approach and mediation to improve outcomes for those who have experienced serious harm and to prevent future serious harm. It is an example of a cooperative approach in response to high risk. Facilities also have an incentive to participate in problem solving.

The Oregon Patient Safety Commission focuses on the education arm of regulatory activity. The Commission has an adverse event-reporting program and analyses these data to provide feedback to help participants learn about how they can improve their practices. The Commission sponsors workshops and is actively engaged in learning collaborations for quality improvement. The Commission offers an early discussion and resolution service for patients or service providers who have encountered a case of serious injury or death.

The Commission’s adverse event reporting program was intentionally designed to be voluntary; facilities may choose whether they wish to report adverse events. If facilities choose to participate, the reports they submit are confidential and non-discoverable according to statute. By combining voluntary reporting with protected information, the Commission creates the “safe table” needed to examine, understand and correct root causes of medical mistakes.

FOR MORE INFORMATION:

Oregon Patient Safety Commission, home page, helping make health care safer for all Oregonians:
<http://oregonpatientsafety.org>

Oregon Patient Safety Commission, Patient Safety Reporting Program:
<http://oregonpatientsafety.org/reporting-programs/>

2.4. Other Health and Safety Applications

2.4.1. Private Health Insurance Administration Council (Australia)

The Private Health Insurance Administration Council (PHIAC) is an independent Statutory Authority that regulates the private health insurance industry. Private health insurance policy is set down by the Australian Government Department of Health. PHIAC collects and disseminates information about private health insurance to allow consumers to make informed choices about the product. PHIAC protects consumers of private health insurance by ensuring an industry that is competitive, efficient and financially sound. The Council’s enforcement actions are governed by the following six principles:

- **No surprises:** the Council prides itself on fostering a close and positive working relationship with insurers. The concept of ‘no surprises’ works both ways, with the Council expecting insurers to disclose potential compliance issues in a clear and timely manner. By the same token, the Council commits to giving insurers fair warning of proposed regulatory interventions.
- **Transparency:** where appropriate the Council’s decision-making takes place within a rigorous corporate governance framework. This ensures that the Council acts consistently, proportionately and within the principles of procedural fairness. Its actions are able to be reviewed by a range of bodies, including the Administrative Appeals Tribunal (AAT) and the Federal Court.
- **Confidentiality:** in general, PHIAC’s investigations of insurers are conducted confidentially and the Council does not generally comment publicly on matters it may or may not be investigating.
- **Timeliness:** the investigative process and the resolution of enforcement matters will be conducted as efficiently as possible to avoid costly delays and insurer uncertainty.
- **Fairness:** the Council aspires to strike a balance between voluntary compliance and enforcement. The Council will generally give an insurer the opportunity to be heard and to rectify potential regulatory issues. However, where necessary, the Council will not hesitate to act to protect consumers of private health insurance should their interests be at risk.
- **Responsibility:** all insurers are responsible for their compliance with the legislation and for establishing processes and protocols to ensure compliance.
- **Accuracy:** the Council expects insurers to provide timely and accurate information to support its oversight of the industry. Inaccuracies or delays in providing information to the Council may undermine the Council’s ability to properly assess an insurer’s prudential position, respond to emerging issues and advise stakeholders on the state of the industry.

PHAC's regulatory framework assists the Council in determining an appropriate regulatory response. The Council has a broad range of discretionary response options from ongoing routine dialogue through to employing the full range of formal powers in the Act. The level of regulatory intervention is informed by the nature and impact of the identified matter, the urgency, the likelihood the issue may further escalate and the insurer's ability to resolve the issue in-house.

A graduated and flexible range of discretionary enforcement response options allows the Council to escalate an action, or reward an insurer for improved performance, by reducing the level of oversight.

The Council's enforcement framework showing graduated levels of regulatory oversight of private health insurers is below.



FIGURE 21: Private Health Insurance Administration Council enforcement framework.
Source: Private Health Insurance Administration Council (url below)

FOR MORE INFORMATION:

Private Health Insurance Administration Council, regulatory framework:
<http://phiac.gov.au/industry/regulatory-framework/>

Private Health Insurance Administration Council, enforcement framework:
<http://phiac.gov.au/industry/regulatory-framework/enforcement/>

2.4.2. Competition and Consumer Commission (Australia)

The Australian Competition and Consumer Commission (ACCC) is an independent statutory government authority and is Australia's peak consumer protection and competition agency. Most of the ACCC's enforcement work is conducted under the provisions of the Competition and Consumer Act 2010 (the Act).

The purpose of the Act is to enhance the welfare of Australians by:

- promoting competition among business;
- promoting fair trading by business; and
- providing for the protection of consumers in their dealings with business.

The ACCC was an early adopter of responsive regulation and compliance pyramids. It continues to use a range of compliance and enforcement tools, supporting voluntary codes and self-regulation, while being willing to use the combination of tools that will provide *the best possible outcome for the community* (3)

The ACCC uses a risk-based approach with elements of responsive regulatory thinking in their verbal description of their compliance activities and enforcement options:

- education and information for consumers;
- liaising and cooperating with other agencies;
- promoting effective use of compliance systems by business including voluntary self-regulatory codes and schemes;
- offering administrative resolutions to non-compliance where appropriate;
- infringement notices if a stronger sanction is required; then:
- escalating to legal proceedings through issuing court-based enforceable undertakings; and
- seeking court-based outcomes in the face of serious or persistent non-compliance.

FOR MORE INFORMATION:

Australian Competition and Consumer Commission 2014 *Compliance and Enforcement Policy*:

<https://www.accc.gov.au/publications/compliance-and-enforcement-policy>

Australian Competition and Consumer Commission 2002 *Cooperation Policy for Enforcement Matters*:

<https://www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters>

Australian Competition and Consumer Commission 2014 *ACCC Immunity and Cooperation Policy for Cartel Conduct*:

<http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct>

Grant, R. (2005) "The ACCC's regulatory strategy", in Australia's corporate regulators – the ACCC, ASIC and APRA, Research Brief no. 16 2004-05, online at the Parliamentary Library of Australia:

<http://aphnew.aph.gov.au/binaries/library/pubs/rb/2004-05/05rb16.pdf>

Parker, C. (2004) "Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings", *The Modern Law Review* 67(2): 209-246.

Parker, C, Braithwaite, J and N. Stepanenko (2004) ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education & Liaison Strategies, Regulatory Institutions Network:

<http://www.anu.edu.au/fellows/jbraithwaite/documents/Reports/ComplianceReportParkerBraithwaiteandStepanenko1.pdf>

2.4.2.1. Product Safety

Product Safety Australia seeks to ensure consumer products are safe and that businesses make, import and sell safe products. Various compliance and enforcement options on their website include infringement notices, public warnings, civil pecuniary penalties, disqualification orders, substantiation power to check claims. Product Safety Australia makes reference to three levels of intervention: (a) voluntary industry self-regulation; (b) administrative resolution; and (c) court cases, suggesting some elements of a responsive regulatory approach in their thinking.

FOR MORE INFORMATION:

Product Safety Australia, home page, site administered by ACCC on behalf of all state and territory consumer product safety regulators:

<http://www.productsafety.gov.au/content/index.phtml/itemId/970225>

Product Safety Australia, Penalties & consequences:

<http://www.productsafety.gov.au/content/index.phtml/itemId/970499#toc7>

2.4.2.2. Consumer Law

The Australian Consumer Law (ACL) commenced On 1 January 2011 and includes:

- a national unfair contract terms law covering standard form consumer contracts;
- a national law guaranteeing consumer rights when buying goods and services;
- a national product safety law and enforcement system;
- a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales;
- simple national rules for lay-by agreements; and
- new penalties, enforcement powers and consumer redress options.

The ACL applies nationally and in all states and territories, and to all Australian businesses. For transactions that occurred prior to 1 January 2011, the previous national, State and Territory consumer laws continue to apply. The ACL is administered and enforced jointly by the ACCC (see 2.4.2 above) and the State and Territory consumer protection agencies, with the involvement of ASIC on relevant matters. ACL regulators are guided in their compliance and enforcement efforts by the model below.

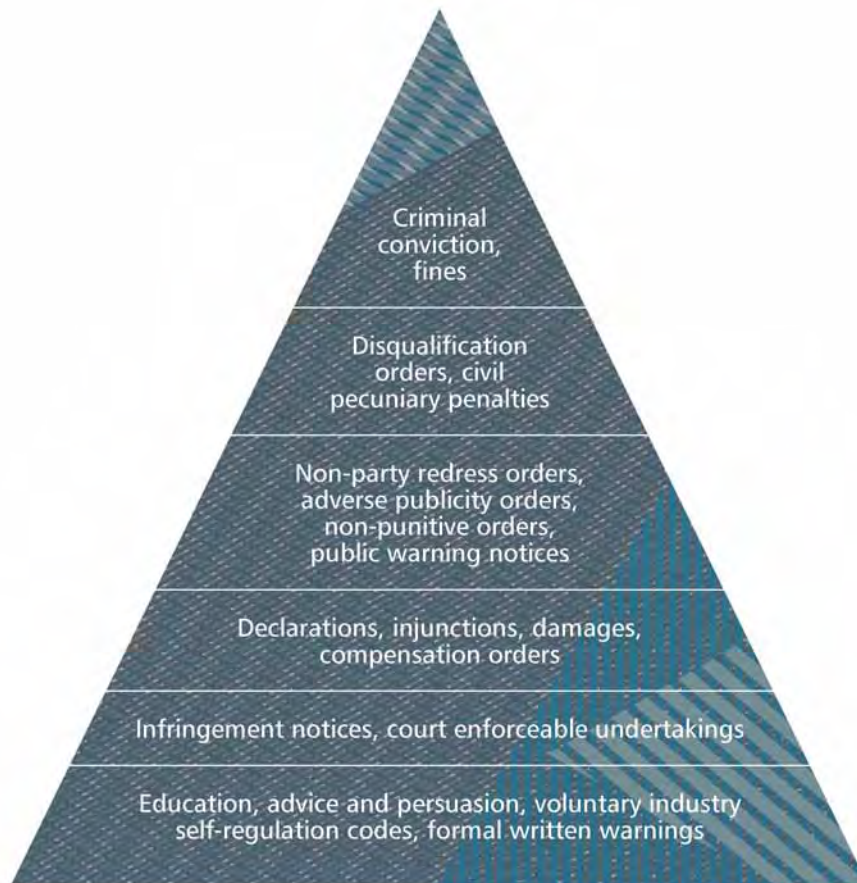


FIGURE 22: Compliance and enforcement options and regulatory actions for ACL regulators.

Source: Australian Consumer Law 2010 Compliance and enforcement: How regulators enforce the Australian Consumer Law p. 11

FOR MORE INFORMATION:

Australian Consumer Law (2010) Compliance and enforcement: How regulators enforce the Australian Consumer Law:

http://www.consumerlaw.gov.au/content/the_acl/downloads/compliance_enforcement_guide.pdf

2.4.3. Department of Internal Affairs (New Zealand)

The New Zealand Department of Internal Affairs has a historically broad range of responsibilities and functions, including regulation in the following sectors: gambling, censorship, electronic messaging (spam), private security personnel and private investigators, and anti-money laundering and countering financing of terrorism. The Department also oversees a register of charities, government records of births, deaths, marriages and passports, public records, archival materials, record keeping of government and regulatory impact statements.

With its various functions, the Department of Internal Affairs has developed a paper to describe its approach to compliance and enforcement. The title of the paper bears their philosophy, “Minimizing Harm – Maximizing Benefit” (2012).

The paper commits to identifying and focusing regulatory efforts on removing barriers to full and sustained compliance. The approach taken to compliant individuals and organizations will differ from the solutions chosen for those who are deliberately non-compliant. Model 1 below captures the responsive regulatory features of the approach of the Department, including the objective of encouraging individuals and organizations to assume responsibility beyond compliance with the law. Model 2 shows the different model for intelligence gathering, risk assessment and problem definition. Through these two models, the Department of Internal Affairs is able to separate the steps of assessing risk and then implementing a compliance enforcement plan to manage a particular risk.



FIGURE 23(A): Compliance and enforcement approach.

Source: The Department of Internal Affairs (2012) Minimising harm – Maximising Benefit: The Department of Internal Affairs' Approach to Compliance and Enforcement (Section: Our compliance and prioritisation models)

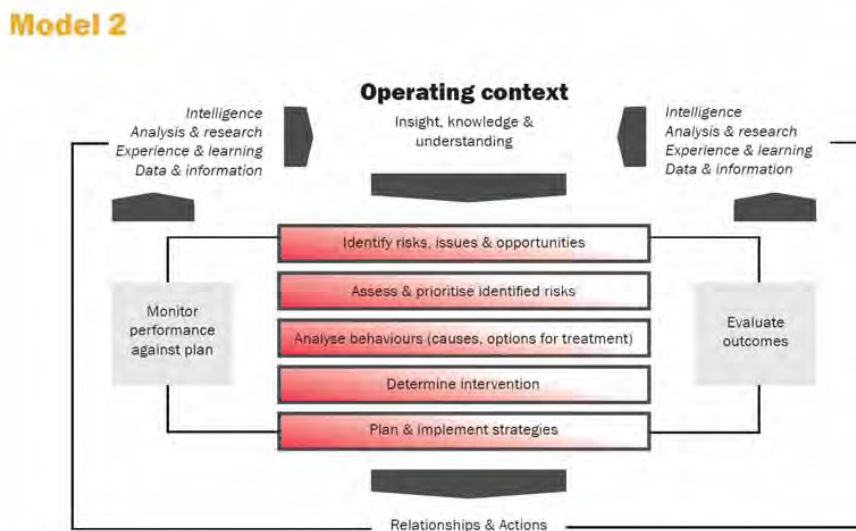


FIGURE 23(B): Prioritisation approach for compliance activity.

Source: The Department of Internal Affairs (2012) Minimising harm – Maximising Benefit: The Department of Internal Affairs' Approach to Compliance and Enforcement (Section: Our compliance and prioritisation models)

FOR MORE INFORMATION:

The Department of Internal Affairs (2012) Minimising harm – Maximising Benefit: The Department of Internal Affairs' Approach to Compliance and Enforcement:

<http://www.dia.govt.nz/Minimising-Harm-Maximising-Benefit>

Department of Internal Affairs Achieving Compliance – A Guide for Compliance Agencies in New Zealand
http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Information-We-Provide-Achieving-Compliance-A-Guide-for-Compliance-Agencies-in-New-Zealand

The Department of Internal Affairs (2013) Statement of Intent 2013-16:
[http://www.dia.govt.nz/pubforms.nsf/URL/DIA-SOI-2013-16.pdf/\\$file/DIA-SOI-2013-16.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/DIA-SOI-2013-16.pdf/$file/DIA-SOI-2013-16.pdf)

The Department of Internal Affairs, References and reading material guiding compliance strategy generally:
http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Information-We-Provide-References

2.4.4. Commerce Commission (New Zealand)

The Commerce Commission is an independent authority and New Zealand's primary competition regulatory agency, enforcing legislation that promotes competition in New Zealand markets and prohibiting misleading and deceptive conduct by traders. The Commission also enforces a number of pieces of legislation that use regulation to provide the benefits of competition in markets where effective competition does not exist. This includes in the telecommunications, dairy, electricity, gas pipelines and airport sectors (website 'about us', url below).

The Commerce Commission screens complaints and cases to prioritise their workload and allocate limited resources. Cases that receive the Commission's attention are dealt with in a context-responsive way described as follows in the *Enforcement Response Guidelines* (2013):

when determining the most appropriate enforcement response to a particular situation, we do not apply a rigid formula. Rather, we weigh all competing considerations and exercise our judgement. Much will depend on the circumstances of the case and the attitude and responsiveness of the parties involved. Not every breach requires litigation; nor can we accept every offer of settlement. (5)

The Enforcement Response Guidelines were produced to increase transparency over the activities of the Commerce Commission. Currently the Guidelines cover consumer law enforcement and competition enforcement.

The Guidelines emphasise that the Commission uses a wide range of tools, including education and advocacy, to achieve good public understanding of the law and compliance by people and businesses. Where the Commission considers that a person or business may have breached the law, the Commission will take into account the extent of the harm, the seriousness of the conduct and the public interest when determining the most efficient use of taxpayer resources.

If the Commission decides to take enforcement action, it will select a response aimed at stopping the unlawful conduct, deterring future breaches and remedying the harm. Enforcement options are broadly grouped as low-level and high-level responses.

Low-level responses include the issuing of compliance advice letters or warnings to businesses and people to remind them of their obligations. These options may be suitable where the harm is minimal, the conduct is accidental or the result of a limited understanding of the law, there is a willingness to comply, or the public interest does not favour a more severe response.

Higher-level responses include court injunctions to immediately change behaviour, and the commencement of civil or criminal court proceedings. The Guidelines include (as an attachment) the new Criminal Prosecution Guidelines, which provide additional guidance on the circumstances in which the Commission will initiate a criminal prosecution, and the principles and practices applicable to each criminal prosecution.

The Guidelines also emphasise that the Commission is willing in many cases to attempt to resolve disputes through negotiated settlement, and will consider any proposal that is well-developed, principled and realistic. A typical settlement will require the person or business to cease the unlawful conduct, take some action to remedy the breach (in most cases, by compensating parties who have been harmed by the conduct), make some admission of liability, and, where appropriate, pay a penalty set by the court.

The approach to enforcement is captured in the figure below:

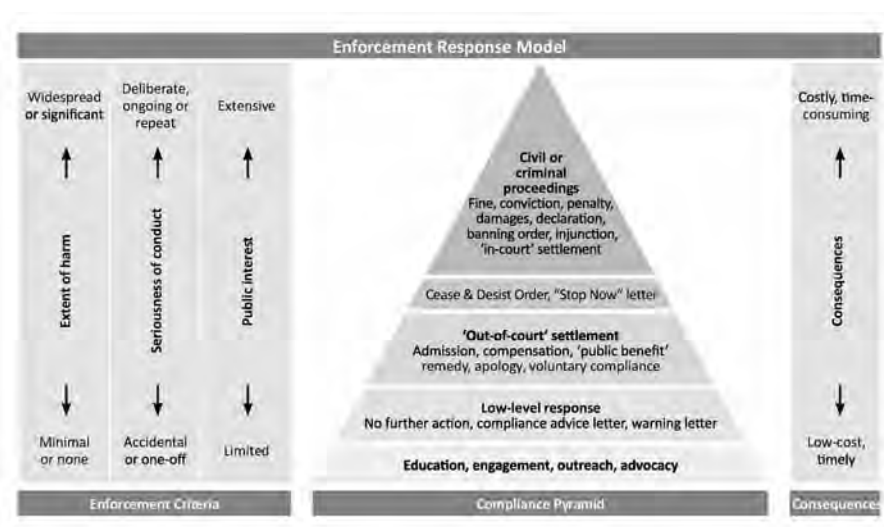


FIGURE 24: Enforcement Response Model.

Source: Commerce Commission New Zealand 2013 *Enforcement Response Guidelines* p.5

MORE INFORMATION:

Commerce Commission New Zealand, about us:

<http://www.comcom.govt.nz/the-commission/about-us/>

Commerce Commission New Zealand (2013) *Enforcement Response Guidelines*:

<http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

2.4.5. Ministry of Consumer Affairs (New Zealand)

The New Zealand Ministry of Consumer Affairs seeks to deliver trusted, competitive and well-regulated markets through creating an environment in which the interests of consumers are protected, businesses compete effectively and consumers and businesses participate confidently.

Consumer Affairs is within the Ministry of Business, Innovation and Employment. The Ministry considered responsive regulation in its 2005 discussion paper and its international review of enforcement practices. Most recently it has put forward a Prosecution Policy (2013) to guide its compliance and enforcement activity. The Ministry describes having a number of response options to criminal conduct, but regard prosecution as “a

significant enforcement measure that should be used in a deliberate and targeted manner” and that should be executed following “a structured approach” (3).

FOR MORE INFORMATION:

Ministry of Business, Innovation and Employment (2013) *Prosecution Policy*:

<http://www.mbie.govt.nz/about-us/compliance-and-enforcement/prosecution-policy.pdf>

Ministry of Consumer Affairs (2006) *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper*, New Zealand Ministry of Economic Development:

<http://www.consumeraffairs.govt.nz/pdf-library/publications/Review-of-the-Redress-and-Enforcement-Provisions-of-Consumer-Protection-Law-International-Comparison-Discussion-Paper.pdf>

Ministry of Consumer Affairs (2005) *Review of Industry-Led Regulation - Discussion Paper*, New Zealand Ministry of Economic Development:

<http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/discussion-papers/review-of-industry-led-regulation-discussion-paper>

2.4.6. Police Framework for Preventing & Reducing Alcohol-Related Offending & Victimization (New Zealand)

New Zealand Police enforce alcohol-related legislation, using enforcement activities to target issues such as drink driving, drinking in public and compliance with liquor licensing legislation. The aim and outcome of New Zealand Police’s enforcement model is to reduce alcohol-related harm. The model below indicates the range of actions police will take to enforce compliance.

The Graduated Response Model (GRM) operates with recognition that the Police are required to prioritise their monitoring and enforcement of licensed premises, due to the sheer numbers of such premises and data showing that a significant proportion of harm occurs from a small minority of licensed premises.

The Graduated Response Model also recognises that compliance with liquor legislation can be achieved through dialogue with licensed premises, as well as through enforcement action when breaches occur. Reassurance and support form the basis of the framework. Police will work in partnership with:

- communities to identify alcohol issues and appropriate solutions. This will include appropriate alcohol-related initiatives designed for and by members of specific population groups; and
- both local and national partners to prevent and reduce alcohol-related harm.

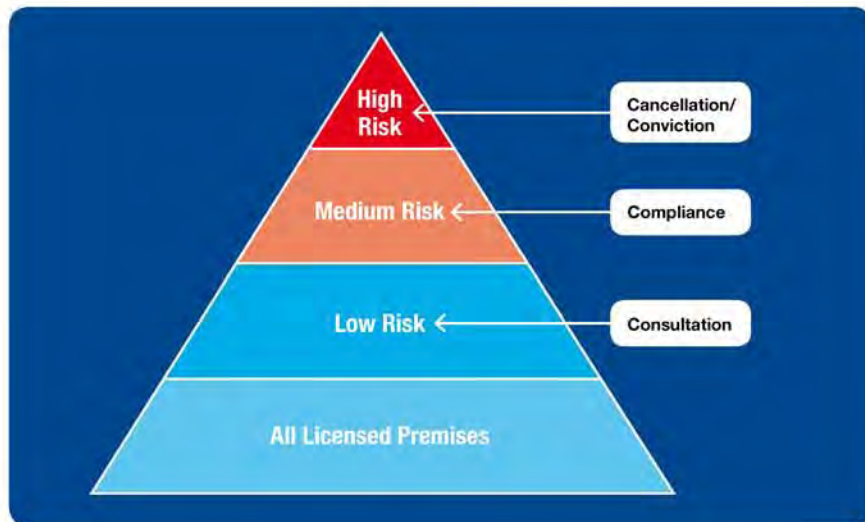


FIGURE 25: The Graduated Response Model (GRM): the operating framework for Police’s liquor licensing work.

Source: New Zealand Police 2010 Framework for Preventing and Reducing Alcohol-related Offending and Victimization 2010-2014 p. 5

FOR MORE INFORMATION:

New Zealand Police (2010) Framework for Preventing and Reducing Alcohol-related Offending and Victimization 2010-2014:

<http://www.police.govt.nz/sites/default/files/resources/alcohol-safety-strategy.pdf>

3. SOCIAL SERVICES AND WELFARE

3.1. Charities and Not-For-Profits Commission (Australia)

The Australian Charities and Not-for-profits Commission (ACNC) is the independent national regulator of charities. The ACNC mission is to promote public trust and confidence in charities, support the innovation and health of the sector, and reduce unnecessary regulatory obligations. The ACNC is responsible for registering organizations as charities, keeping a searchable public register of registered charities, assisting the not-for-profit sector meet compliance obligations through providing information and advice, helping the public understand the work of the not-for-profit sector, and working with other governments and agencies, including those at state/ territory levels, to develop a 'report once, use-often' reporting framework for charities.

The regulatory role of the ACNC involves ensuring that organizations claiming charitable status and the benefits it offers are in fact charities in so far as they benefit the public and contribute to society in vital ways. In addition, the ACNC monitors registered charities, and if they are not meeting their obligations, seeks more information, provides guidance and support or takes compliance action.

The regulatory approach adopted by the Commission is currently under review. When the approach was adopted in 2013 after an extensive period of consultation, the ACNC represented their philosophy through the regulatory pyramid below. The ACNC describes its regulatory approach on its website as follows:

The ACNC's approach begins with an emphasis on providing education and advice to support charities to meet their regulatory obligations. Some charities may need more assistance. For a smaller number, we will need to use our formal powers under the ACNC Act.

Our proportionate approach means that we will take the minimum action required to address the issue. If a lesser option does not resolve the issue at first, we will take progressively stronger action until the issue is resolved. We will usually give those involved a chance to explain and consider any explanation seriously before we use our formal powers.



FIGURE 24: Regulatory Pyramid – Approach to regulation.

Source: ACNC 2013 Commissioner’s Policy Statement: regulatory approach (under review, see url below)

FOR MORE INFORMATION:

ACNC and its role:

http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC/Edu/ACNC_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe

ACNC and regulating charities:

http://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09

ACNC (2013) Commissioner’s Policy Statement: regulatory approach:

http://acnc.gov.au/ACNC/About_ACNC/Regulatory_app/RegApp_St2013/ACNC/Publications/Reg_App/RegAppr_Powers.aspx

Braithwaite, V. (2012) A Discussion Paper for Developing a Regulatory Framework for Not-For-Profits, Regulatory Institutions Network Occasional Paper 19, Australian National University. Paper written for the Charities and Not-for-Profits Task Force, Treasury and the Australian Taxation Office:

<https://docs.google.com/file/d/OBxGINTrvTRpRa0J2dVlycjVzY28/edit>

3.2. Department of Human Services (Australia)

The Department of Human Services delivers Medicare, Centrelink, Child Support and CRS Australia payments and services. The department describes its main priority as working with people to help them comply with their payment requirements and other obligations.

The regulatory approach is largely risk-based. In line with this philosophy, the priority of the department is education and early intervention to ensure that as many people as possible find it easy to do the right thing, receive accurate payments, meet their obligations and avoid debts. Changes to the department's service delivery model have been undertaken to make it easier for people to engage with the department, for the department to more quickly identify people who need to update details or correct overpayments, and to focus fraud investigative capacity on the more serious cases.

The figure below shows how the department has differential responses for low and high levels of compliance in accord with responsive regulatory thinking.



FIGURE 25: Compliance Model.

Source: Department of Human Services *Compliance Program 2013-15* p. 7

FOR MORE INFORMATION:

Department of Human Services and its role:

<http://www.humanservices.gov.au/corporate/about-us/>

Department of Human Services *Compliance Program 2013-15*, Australian Government:

<http://www.humanservices.gov.au/spw/corporate/publications-and-resources/resources/9648-compliance-program/compliance-program-2013-15.pdf>

3.3. National Regulatory System for Community Housing (Australia)

The National Regulatory System for Community Housing (NRSCH) is designed to contribute to a well governed and managed community housing sector and provide a platform for the ongoing development and viability of the community housing sector across Australia. The key objectives of the NRSCH are to:

- provide a consistent regulatory environment to support the growth and development of the community housing sector;
- pave the way for future housing product development;
- reduce the regulatory burden on housing providers working across jurisdictions; and
- provide a level playing field for providers seeking to enter new jurisdictions.

Registrars have enforcement powers to ensure that tenants and community housing property are protected in the event that a provider does not comply with the Community Housing Providers National Law or Regulatory Code. The enforcement approach is based on a spirit of encouraging providers to remedy non-compliance, prior to taking enforcement action.

Where there are issues of non-compliance, the National Law gives Registrars a range of enforcement powers based on the following principles:

- **Proportionate:** enforcement powers will be used only when necessary and in a way that is appropriate to the assessed level of risk
- **Accountable:** able to justify regulatory assessments and be subject to scrutiny
- **Consistent:** enforcement will be consistent regardless of the jurisdiction in which the provider operates
- **Transparent:** there will be clear and open communication with providers about enforcement processes and decisions
- **Flexible:** enforcement will avoid unnecessary rules about how providers organise their business and demonstrate compliance
- **Targeted:** enforcement will be focused on the core purposes of improving tenant outcomes and protecting vulnerable tenants, protecting government funding and equity, and ensuring investor and partner confidence.

Enforcement Guidelines for Registrars (2014) notes that the regulatory approach is risk-based with a suite of options for enforcing compliance. The approach is described as “responsive, proportionate and consistently applied” (4).

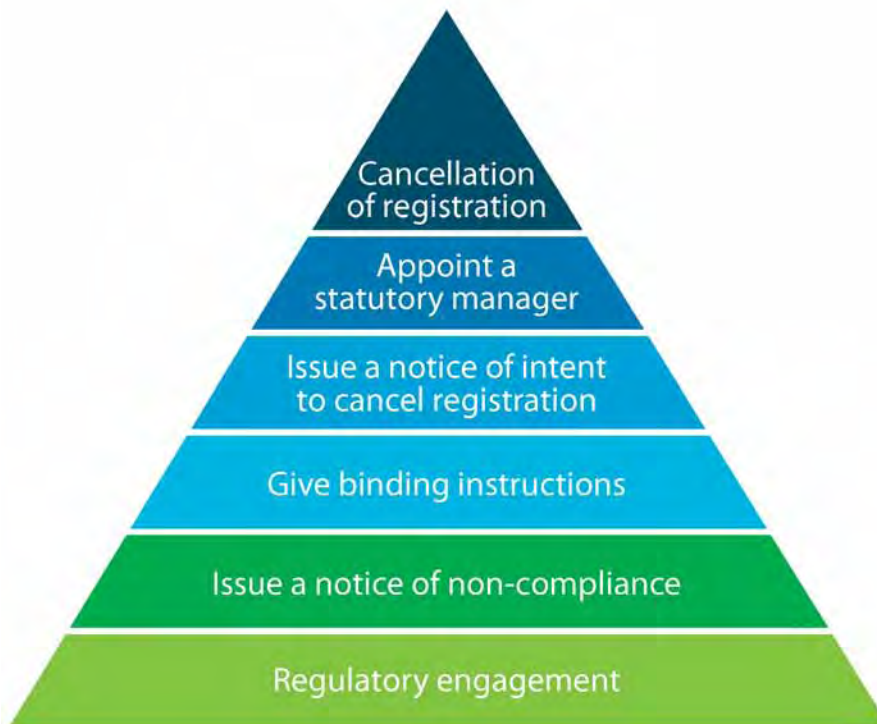


FIGURE 26: Escalating approach to non-compliance.

Source: National Regulatory System for Community Housing Directorate 2014 *Enforcement Guidelines for Registrars* p. 5

FOR MORE INFORMATION:

National Regulatory System for Community Housing Directorate (2014) *Enforcement Guidelines for Registrars*: http://www.nrsch.gov.au/_data/assets/file/0020/284033/1_Enforcement_Guidelines.pdf

3.4. National Economic and Social Council: Quality And Standards in Human Services Project (Ireland)

The National Economic and Social Council (NESc) of Ireland advises the Taoiseach (Prime Minister) on strategic issues for Ireland’s economic and social development. The members of the Council are appointed by the Taoiseach, for a three year term. These members are representatives of business and employers’ organisations, trade unions, agricultural and farming organisations, community and voluntary organisations, and environmental organisations; as well as heads of Government departments and independent experts. The make-up of the NESc Council means that it plays an important and unique role in bringing different perspectives from civil society together with Government. This helps NESc to analyse the challenges facing Irish society and to develop a shared understanding among its members of how to tackle these challenges.

NESC has a history of producing reports with strategic, long-term analyses of key economic and social development issues affecting Ireland. From 1986 to 2006 NESc regularly produced strategy reports which were the basis for negotiating the social partnership agreements, as well as contributing to development of overall Government policy.

The Quality and Standards in Human Services in Ireland Project was concerned with how regulation and standards could best contribute to good quality, continuous improvement in human services. A public service

reform program (Transforming Public Services), along with the challenge of providing quality services with reduced resources in the current economic climate, brought an increasing interest in standards, performance and accountability.

The project draws on theory and international evidence, along with an overview of developments in Ireland, to set out the different routes to quality across service sectors. The analysis sought to explore the balance between encouraging self-monitoring and regulation and a more formal system of inspection and oversight, identified the role of different parties (central government, regulators, service providers, service users), and outlined the merits of adopting a problem-solving approach whilst sharing the learning of what worked. A series of detailed reports, which review the role of standards and quality improvement initiatives in a number of human services areas have been published separately (see url below).

NESC's approach to the work on standards and quality in human services and the key themes which informed the work drew largely on Braithwaite's work on responsive regulation and the concept of the regulatory pyramid, with self regulation and voluntary approaches at the broad base and command and control approaches, with sanctions, at the narrow apex. In the middle of the pyramid is meta-regulation, which is the regulation of self-regulation. This approach also sought to integrate supports with sanctions.

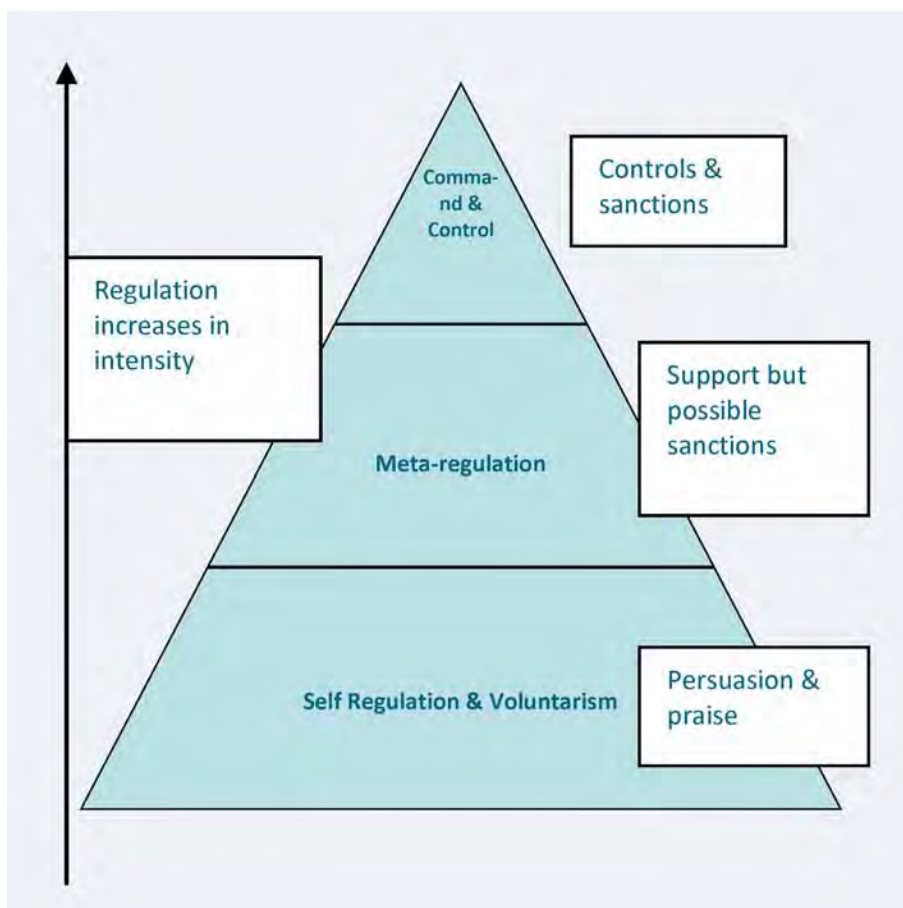


FIGURE 27: The NESC (Ireland) regulatory pyramid.

Source: National Economic and Social Council (2012) Quality Standards in Human Services Conference Highlights p. 3

FOR MORE INFORMATION:

National Economic and Social Council, Ireland:

<http://www.nesc.ie/en/our-organisation/about-nesc/>

National Economic and Social Council (2012) Quality Standards in Human Services Conference Highlights, *Overview of Achieving Quality in Ireland's Human Services: a synthesis report*:

http://files.nesc.ie/nesc_reports/en/NESC_133_conference_highlights_quality_and_standards_in_human_services.pdf

National Economic and Social Council (2011) *Quality and Standards in Human Services in Ireland: Overview of concepts and practice*, National Economic and Social Development Office:

<http://www.nesc.ie/en/publications/publications/nesc-reports/124/>

http://files.nesc.ie/nesc_reports/en/NESC_124_2011.pdf

National Economic and Social Council (2011) Summary: *Quality and Standards in Human Services in Ireland: Overview of concepts and practice*, National Economic and Social Development Office:

http://files.nesc.ie/nesc_reports/en/NESC_133_Synthesis_Report_Exec_Summary.pdf

National Economic and Social Council (2011) *Quality and Standards in Human Services in Ireland*, access to other reports:

<http://www.nesc.ie/en/publications/publications/nesc-reports/>

3.5. The Protection of Children

Responsive regulation is not often talked about in the context of child protection. More commonly restorative justice and family group conferencing are the ideas that are implemented to provide children and their families with voice when there are concerns for the wellbeing of a child. In many respects, child protection services operate with a default responsive regulatory model in mind, but concerns about the risk to children create unease in child protection authorities arguably because responsive regulatory thinking empowers communities and challenges the decision making of authorities and professionals. The application of responsive regulation to child protection has been an area of concentrated scholarship in the Regulatory Institutions Network and a site of activism for change.

FOR MORE INFORMATION:

Bromfield, L. and P. Holzer (2008) *A National Approach for Child Protection: Project Report*, National Child Protection Clearinghouse, Australian Institute of Family Studies.

Harris, N. (2011) "Does responsive regulation offer an alternative? Questioning the role of formalistic assessment in child protection investigations." *British Journal of Social Work* 41: 1383-1403.

Harris, N. (2008) "Family group conferencing in Australia 15 years on", *Child Abuse Prevention Issues (Series)*, 27, 1-20

Braithwaite, V., Harris, N. and M. Ivec (2009) Seeking to clarify child protection's regulatory principles. *Communities, Children and Families Australia* 4(1): 5-21.

Harris, N., Braithwaite, V. and M. Ivec (2009) Rejoinder: A responsive approach to child protection. *Communities, Children and Families Australia* 4(1): 69-75.

Hamilton, S. and V. Braithwaite (2014) Complex lives, complex needs, complex service systems, Regulatory Institutions Network Occasional Paper 21, Australian National University.

Ivec, M. (2013) "A necessary engagement: Parent and family involvement in child protection. A review of parent and family engagement activities and programs in Australia and overseas. Anglicare, Tasmania.

<https://www.anglicare-tas.org.au/research-library/report/necessary-engagement>

3.5.1. Child, Youth and Family Service, Ministry of Social Development (New Zealand)

This entry provides insight into how child protection authorities are introducing ideas of responsive regulation without explicitly connecting with the regulation literature.

According to the New Zealand Child, Youth and Family (CYF) service web site:

When families become known to us, our role is to:

work out what's going on and assess the level of needs, including risk or harm to the child and work with the family and others to find the best solution for the child.

In the majority of cases, families don't require our involvement. They just need advice or to be connected to the right support services. When the family has needs, but there are no safety or wellbeing issues for the child, we put them in touch with appropriate community services if they are not already connected.

For others, we carry out a fuller assessment to find out more about what's happening for the family, their needs and risks (which includes safety) and the right way to help. Depending on what we find, we will: (a) link the family with the right community based support services to help meet their needs in a coordinated, wrap-around way; and (b) for the more complex cases, we'll hold a family group conference where the family and other key people agree on a plan to support the child, and work with the family to help them care safely for their children. If the child or young person is in serious danger and needs to be protected, they will be taken into care while we are working with the family.

The website goes on to explain how decisions are made when further intervention is required and emphasises how important family group conferences are for decision making. CYF describe the process of 'removing children' in the following way:

What's best for children is to be safe and cared for in their own families, so we work with families to help them provide a safe and loving home for them.

When it's not safe for a child or young person to be cared for at home, we find other family members or caregivers for them to live with. Many of these children will return home once things are sorted out, while others will stay permanently with their caregivers or extended family if the Family Court decides this is in the best interests of the child.

FOR MORE INFORMATION:

Child Youth and Family Service, New Zealand Ministry of Social Development and its role:

<http://www.cyf.govt.nz/about-us/key-statistics/#OurRole3>

3.5.2. Office for Children, Youth And Family Support: Children’s Policy and Regulation Unit (Australian Capital Territory)

The Children’s Policy and Regulation Unit (CPRU) is a section of the Office for Children, Youth and Family Support and administers the legislation covering licensed children’s services. Their regulatory role is to ensure that services are compliant with standards and the legislation, to provide professional advice in setting up new services, to be a source of information for families, the community and other children’s services, and to provide support in terms of training and assistance for children and families in need.

CPRU also does quality assessments under the National Quality Framework, a set of national standards for child care developed by the Australian government in consultation with states and stakeholders.

According to CPRU’s *Compliance Strategy* (2009 pp. 4 - 6), the CPRU ensures compliance is achieved “through the practice of responsive regulation.” The responsive approach of CPRU means taking note of context, giving preference to the least intrusive strategy to elicit compliance, and ensuring there are opportunities for discussion about why the regulation is necessary. This means that, in the first instance, the Office supports the service to develop their own effective responses rather than stipulating what they must do. However, if this fails, the CPRU may immediately escalate its enforcement by utilising statutory tools, for example, issuing a Compliance Notice, Suspension, or Safety Suspension.

The CPRU describes its regulatory approach as: “collaborative, strengths-based and child centred.” It seeks to “ensure services feel empowered to meet their minimum requirements and understand the need for the requirements to exist,” noting that “highly developed relationships enable regulators to work proactively to achieve compliance” (*Compliance Strategy* p. 4). Their monitoring work involves announced and unannounced visits, data collection and review, targeted monitoring campaigns, and email and phone contact with services, and response to complaints.

According to the CPRU *Compliance Strategy*, Children’s Services Advisers utilise Braithwaite and Ayres’ Responsive Regulation Model along with their own adapted version of this pyramid, called the CPRU Practice Model when they are dealing with non-compliance:

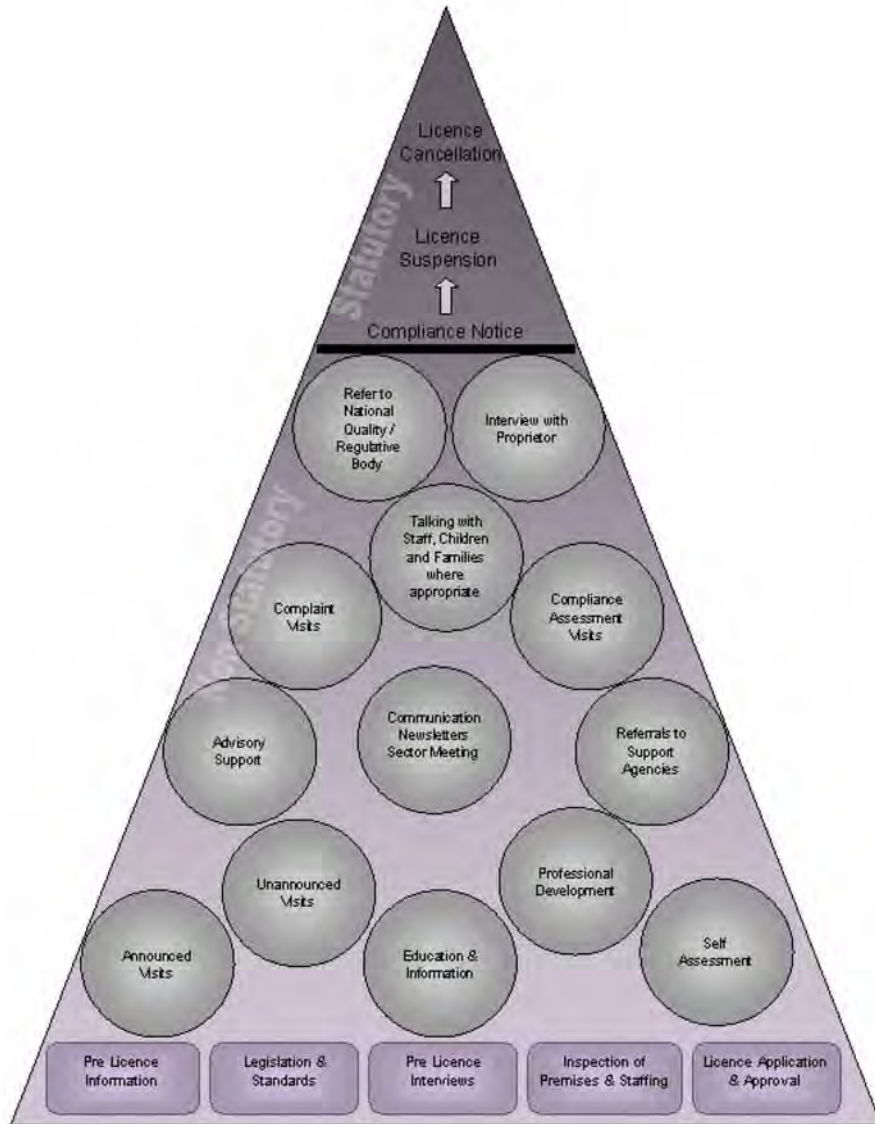


FIGURE 28: The CPRU Practice Model.

Source: ACT Children's Policy and Regulation Unit 2009 *Compliance Strategy* p. 6

FOR MORE INFORMATION:

ACT Children's Policy and Regulation Unit, Office for Children, Youth and Family Support (2009) *Compliance Strategy*, Department of Disability, Housing and Community Services:

http://www.dhcs.act.gov.au/_data/assets/pdf_file/0003/49827/CPRU_Compliance_Strategy_-_January_2009.pdf

ACT Government Education and Training Directorate and Regulatory Authority (CPRU)

http://www.det.act.gov.au/childrens_policy_and_regulation/legislation

4. ENVIRONMENT

4.1. Department of the Environment (Australia)

The Department of the Environment designs and implements the Australian Government's policies and programs to protect and conserve the environment, water and heritage and promote climate action. The environmental framework is being delivered under four pillars: clean air, clean land, clean water and national heritage.

The Australian Government embarked on a de-regulation agenda in 2013 to cut red-tape and boost productivity. Within this new initiative, 'steering of the flow of events' (which is the broader understanding of regulation in the academic literature) appears through incentive schemes and risk management by the department. Some of the documents and frameworks referred to below pre-date 2013, others are post-2013. The four applications below illustrate elements of responsive regulatory thinking in the environment portfolio.

4.1.1. National Framework for Compliance & Enforcement Systems for Water Resource Management

The National Framework for Compliance and Enforcement Systems for Water Resource Management (2012) aims to provide a national approach by strengthening water resource management compliance and enforcement within each State and Territory.

The framework is considered by the department to (a) bring greater consistency to enforcement, (b) a risk-based approach, (c) best practice in compliance and enforcement practices, and (d) appropriate levels of monitoring and public reporting.

A Compliance Pyramid captures strategies used to pursue compliance:

The pyramid is designed with most compliance action at the base involving processes for encouraging and assisting compliance. Further up the pyramid actions are more concerned with directing compliance through verbal directions, advisory notices and warning notices. The top, where generally there is the least activity, involves administrative remedies and criminal proceedings. (1)

For the pyramid to work effectively, jurisdictions require each of the elements to be effective and operate efficiently, to allow for the strategy's overall success. While these pyramids concentrate most resources to the bottom of the pyramid (for example, in education) the National Framework ensures that the tools and processes at all levels of the pyramid are equally robust. If any of the elements are not robust it allows a weakness or gap in the framework that can be exploited by those seeking to take advantage, which could potentially cause the failure of the whole approach. (1)

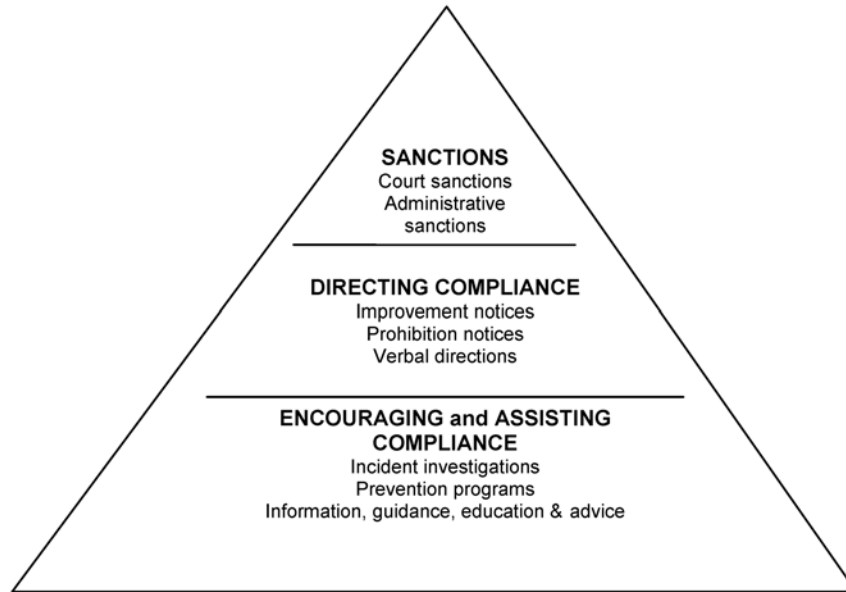


FIGURE 29: Compliance Pyramid.

Source: National Framework for Compliance and Enforcement Systems for Water Resource Management 2009

FOR MORE INFORMATION:

Department of the Environment, National Framework for Compliance and Enforcement Systems for Water Resource Management:

<http://www.environment.gov.au/resource/national-framework-compliance-and-enforcement-systems-water-resource-management>

<http://www.environment.gov.au/system/files/resources/d4367a3b-28a9-430d-a869-2effbda8a447/files/ris-water-compliance-enforcement.pdf>

4.1.2. Clean Energy Regulator

The Clean Energy Regulator is an independent regulator responsible for administering a number of climate change laws. The purpose of these laws is to encourage clean energy use and the generation of electricity from renewable resources, to provide for projects to remove carbon dioxide from the atmosphere and avoid emissions of green house gases, to provide for reporting and dissemination of green house gas emissions information and energy consumption and production, and to establish a Registry to monitor emissions units.

The Clean Energy Regulator combines the functions of previous regulators including the Greenhouse Energy Data Officer. The Greenhouse Energy Data Officer used a responsive regulatory approach (Carter and Baker 2011). While the Clean Energy Regulator does not describe its compliance and enforcement approach in responsive regulatory terms, it adopts a range of strategies, including provision for education and support, work to promote voluntary compliance, and a range of enforcement options when faced with persistent non-compliance that poses risk. The Clean Energy Regulator’s policy statement sets out the following nine principles to guide its compliance and enforcement work:

- assist participants to understand their rights and obligations through education and training programs;
- support those who want to do the right thing and, where appropriate, incorporating feedback into enhancement of systems and processes;
- use intelligence analysis where possible to inform regulatory response decisions;
- ensure that procedural fairness is consistently applied to all participants so the system is seen as equitable and fair ;
- ensure that decision-making takes place within rigorous corporate governance processes and is able to be reviewed internally and externally;
- actively pursue those who opportunistically or deliberately contravene the law;
- ensure that regulatory responses are proportionate to the risks posed by any non-compliance and take into account the conduct of scheme participants, including their compliance history;
- conduct investigations professionally; and
- ensure that the investigative process and the resolution of enforcement matters is conducted as efficiently as possible

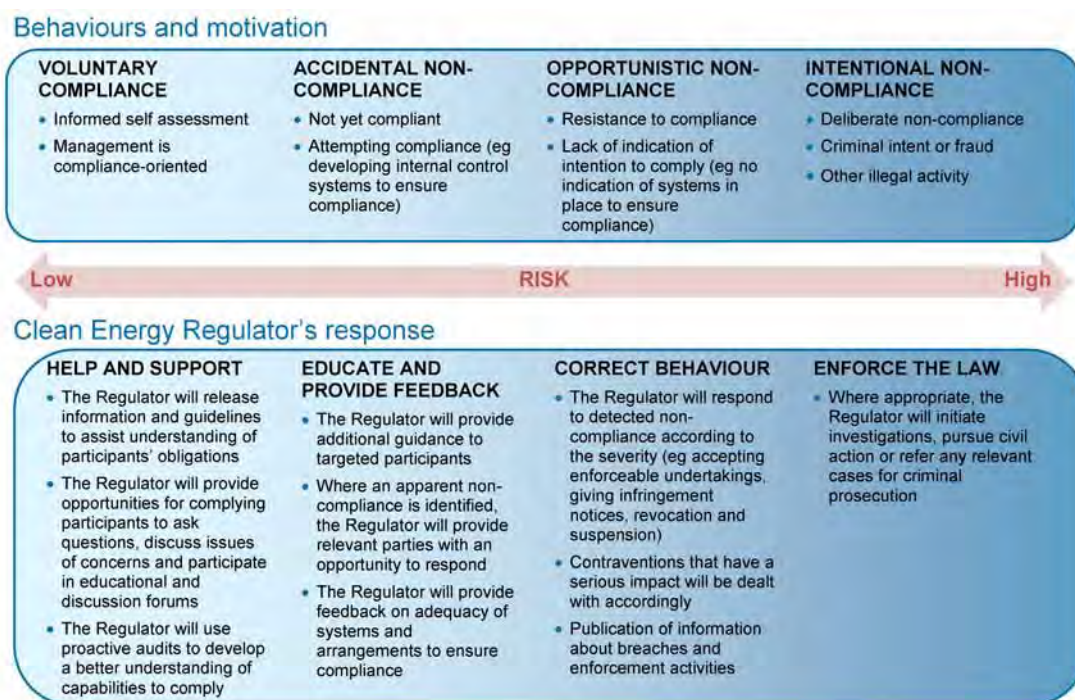


FIGURE 30: Behaviours and Motivation and Clean Energy Regulator's Response.

Source: Clean Energy Regulator 2012 Compliance, Education and Enforcement Policy p. 4

FOR MORE INFORMATION:

Clean Energy Regulator (2012) Compliance, Education and Enforcement Policy:

<http://www.cleanenergyregulator.gov.au/About-us/Corporate-policies/Documents/CER-Compliance-Education-and-Enforcement-policy.pdf>

Carter, R. and C. Baker (2011) Australia's National Greenhouse and Energy Report ACT 2007, Ninth International Conference on Environmental Compliance and Enforcement:

http://inece.org/conference/9/proceedings/33_CarterBaker.pdf

4.1.3. Emissions Reduction Fund

The Emissions Reduction Fund is included as an example of a new regulatory form where government rewards entities that can demonstrate performance that meets their standards. The better the performance the higher the reward. The regulatory challenge is to set clear standards, measure performance reliably and validly, and assess performance against the standards.

The Emissions Reduction Fund provides an incentive for businesses, state and local governments, community organizations and individuals to undertake approved emissions reduction projects and to compete for payment from the Government for those projects.

The Emissions Reduction Fund is administered by the Clean Energy Regulator (see 4.1.2).

The Clean Energy Regulator will issue Australian Carbon Credit Units for emissions reductions generated using approved methods, as set out in their Methodology Determination Guidelines. These credits can then be purchased through the Emissions Reduction Fund or used under voluntary carbon off-setting programs.

The Emissions Reduction Fund is still in the planning stages, but has the potential, in theory, to be responsive to quality performance.

FOR MORE INFORMATION:

Department of the Environment, Emissions Reduction Fund:

<http://www.environment.gov.au/climate-change/emissions-reduction-fund>

Department of the Environment, Emissions Reduction Fund Methods:

<http://www.environment.gov.au/climate-change/emissions-reduction-fund/methods>

Clean Energy Regulator (2015) *Emissions Reduction Fund: Methodology Determination Guidelines*:

<http://www.cleanenergyregulator.gov.au/About-us/Corporate-policies/Documents/CER-Compliance-Education-and-Enforcement-policy.pdf>

4.1.4. Murray-Darling Basin Authority

The Murray-Darling Basin Authority (MDBA) was established under the *Water Act (2007)* as an independent, expertise-based statutory agency. The MDBA undertakes activities that support the sustainable and integrated management of the water resources of the Murray-Darling Basin.

The MDBA works in collaboration with other governments at local and state level, other Australian government agencies, regional bodies, industry bodies, landholders, environmental organizations, scientists and communities.

The MDBA is the enforcement agency for contraventions of the Management of Basin Water Resources and for information gathering provisions under the Act.

The MDBA describes its approach to compliance as follows:

In undertaking our compliance functions we have an emphasis on engagement, education, awareness raising and support, and transparency and reporting. The compliance program is based on an assessment of risk, including both the likelihood and consequence of non-compliance with the various obligations, enabling us to focus on material risks and cost-effective solutions.

We will work in good faith with all parties and use our enforcement powers only when needed. (8)

Our approach to compliance and the various tools we will use depend on the attitude to compliance of the entity with whom we are dealing. Where entities are engaged and seeking to comply, we will focus on working with them to achieve compliance. However, where an entity is unengaged and demonstrates a lack of willingness to comply, we will rely on the more formal enforcement approaches including mediation and enforceable undertakings, enforcement notices and injunctions. (9)

The approach and tools are represented in the following figure:

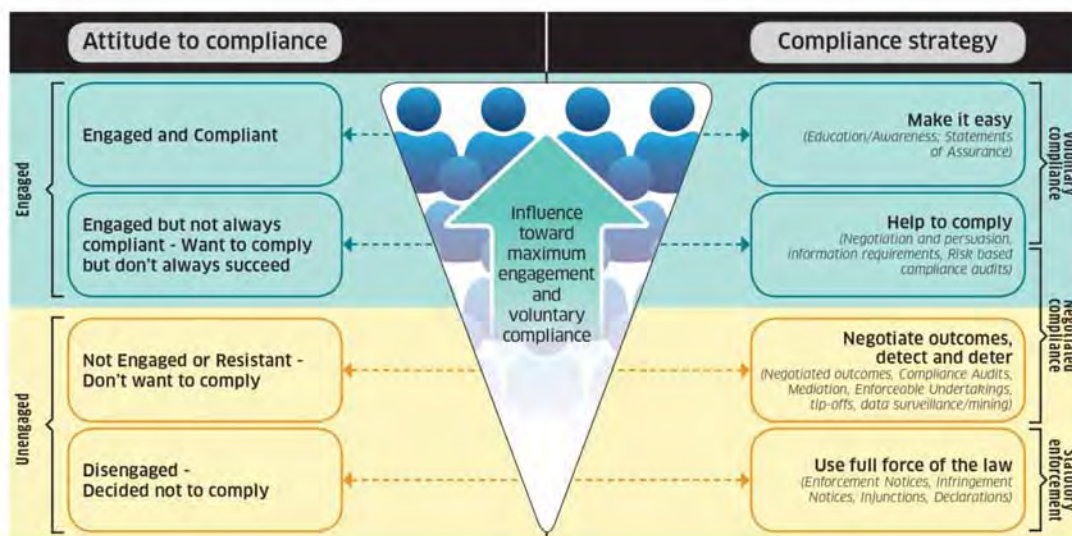


FIGURE 31: Compliance approach and tools.

Source: Murray-Darling Basin Authority 2014 *Compliance Strategy* p. 9

FOR MORE INFORMATION:

Murray-Darling Basin Authority and its role:

<http://www.mdba.gov.au/about-mdba>

Murray-Darling Basin Authority and its strategic plan 2012-2015:

<http://www.mdba.gov.au/sites/default/files/MDBA-Strategic-Plan-20120501.pdf>

Murray-Darling Basin Authority (2014) *Compliance Strategy*:

<http://www.mdba.gov.au/sites/default/files/MDBA-Compliance-Strategy-Nov-2014.pdf>

4.1.5. Environment Protection and Biodiversity Conservation Act (1999)

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is the Australian Government's central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places — defined in the EPBC Act as matters of national environmental significance.

The EPBC Act Compliance and Enforcement Policy describes the Department's approach to, and the principles that guide, compliance and enforcement activities under the EPBC Act. The policy is intended to promote a consistent, transparent and fair approach to EPBC Act compliance and enforcement activities, and provide guidance for stakeholders and the wider community about how the Department addresses potential contraventions of the EPBC Act.

The Department recognises that a range of compliance and enforcement mechanisms are necessary to provide an effective and flexible regulatory system. The compliance and enforcement measures used by the Department can be both proactive and reactive. The measures range from education, outreach, advice or warnings, to deterrent sanctions such as injunctions, remediation orders, seizure of goods, civil penalties, infringement notices and criminal prosecution. The Department commits to applying mechanisms in a consistent and transparent manner to provide fairness and certainty for the regulated community.

In the first instance, the Department supports responsible self-regulation by encouraging the community to act in accordance with the EPBC Act. To do this, measures such as targeted communication and education activities are used to engage with the regulated community at the earliest possible stage and providing timely information and advice. This helps to:

- raise awareness of the benefits of complying with the EPBC Act, and the various measures that will be taken to address non-compliance;
- remove barriers to compliance (e.g. lack of awareness about EPBC Act obligations, confusion with other regulators, or how to comply with the Act);
- promote the objects of the legislation;
- overcome factors that encourage non-compliance (e.g. lack of public support for, or misunderstanding of, the objects of the EPBC Act); and
- reduce the risk that people will inadvertently take an action that breaches the EPBC Act.

In most instances, targeted communication and education activities are sufficient to ensure the regulated community meets its obligations under the EPBC Act. Where these compliance approaches fail, enforcement measures may be used.

FOR MORE INFORMATION:

Department of the Environment (2013) Compliance and Enforcement Policy: Environment Protection and Biodiversity Conservation Act 1999, Australian Government:

http://www.environment.gov.au/system/files/resources/2caa19c8-4393-4ffa-be0c-ed246f93f604/files/epbc-act-compliance-enforcement-policy_1.pdf

4.2. National Offshore Petroleum Titles Administrator (Australia)

National Offshore Petroleum Titles Administrator (NOPTA) is part of the Commonwealth Department of Industry and Science, established in 2012. Apart from its analysis and advisory functions to government, NOPTA (a) manages the collection, management and release of data, titles administration, approval and registration of transfers and dealings and (b) oversees the keeping of the registers of petroleum and greenhouse gas storage titles.

As part of its role, NOPTA monitors titleholder's compliance with their legislative obligations. Its Compliance and Enforcement Policy aims to assist titleholders and other persons to understand NOPTA's approach to non-compliance. The policy considers the principles of best practice regulatory administration:

NOPTA's compliance and enforcement strategy is to encourage compliance and provide assurance, to all stakeholders, that the agreed title conditions are being met within the agreed timeframes. It will be implemented using a graduated, risk based approach which recognizes the finite amount of resources available. (3)

Communication is central in the strategy and early engagement is openly encouraged. Available compliance and enforcement options fall into four categories.

The bottom two tiers include mostly informal compliance options such as education and awareness, monitoring titleholders' progress through reporting requests and conducting audits. The legislation also provides a number of formal enforcement options such as directions, additional title conditions, cancellation of titles and prosecution, which is illustrated by the top two tiers. ... It is possible for an issue to be addressed at any level of the compliance pyramid and be escalated or de-escalated at any time depending on the nature and seriousness of the breach. (3)



FIGURE 32: NOPTA Compliance Pyramid.

Source: National Offshore Petroleum Titles Administrator (2011) *Compliance and Enforcement*, p. 3

FOR MORE INFORMATION:

National Offshore Petroleum Titles Administrator and its role: <http://www.nopta.gov.au/about/index.html>

National Offshore Petroleum Titles Administrator (2011) *Compliance and Enforcement*:
http://www.nopta.gov.au/_documents/nopta-compliance-enforcement-policy.pdf

National Offshore Petroleum Titles Administrator and *Annual Compliance Program*:
http://www.nopta.gov.au/_documents/nopta-annual-compliance-program.pdf

4.3. National Industrial Chemicals Notification and Assessment Scheme (Australia)

The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) assesses the risk of industrial chemicals and provides information to promote their safe use. NICNAS is a statutory scheme located within the Australian Government Health portfolio, and is responsible for:

- assessing new industrial chemicals for human health and/or environmental impacts through the statutory notification and assessment scheme;
- reviewing existing industrial chemicals of concern either as priority existing chemicals, secondary notifications (reassessment of a chemical) or targeted assessments addressing specific health and environmental concerns;
- providing information on the human health and environmental impacts of industrial chemicals and making recommendations on their safe use;
- maintaining the Australian Inventory of Chemical Substances (AICS);
- registering introducers of industrial chemicals;
- collating and analysing information, auditing against obligations under the Act, and undertaking relevant investigative, compliance and enforcement action; and
- ensuring Australia meets its obligations under international agreements relating to industrial chemicals.

NICNAS work closely together with the states and territories to help ensure that there is an effective interface of responsibilities.

The figure below features NICNAS's hierarchical enforcement strategy, starting with a persuasive approach, which employs no sanctions, and gradually progressing to more severe sanctions.

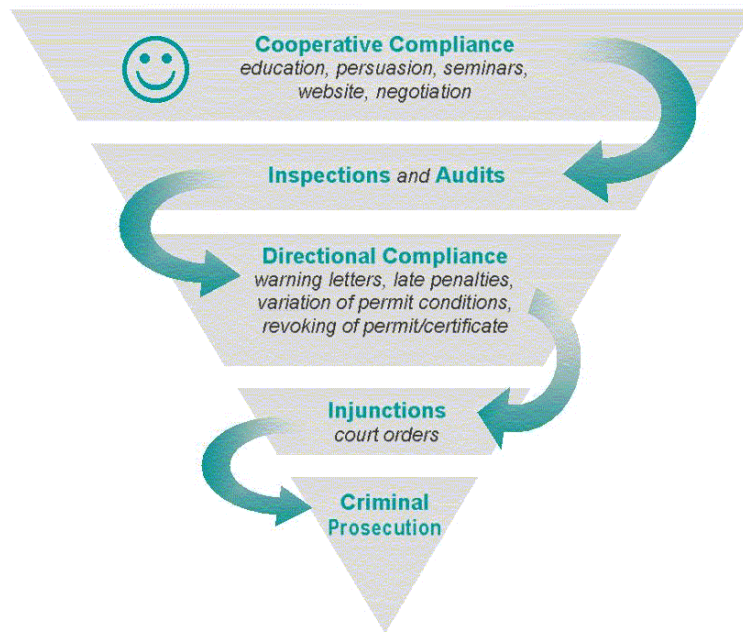


FIGURE 33: NICNAS's hierarchical enforcement strategy.

Source: NICNAS (2013) Compliance Style (url below)

FOR MORE INFORMATION:

National Industrial Chemicals Notification and Assessment Scheme, Regulation and Compliance, Compliance Style: <http://www.nicnas.gov.au/regulation-and-compliance/our-compliance-style>

4.4. Radiation Protection and Nuclear Safety Agency (Australia)

The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) is an Australian Government agency charged with responsibility for protecting the health and safety of people, and the environment, from the harmful effects of radiation. ARPANSA is part of the Health Portfolio.

ARPANSA adopts a graded and risk-based approach to compliance and enforcement. A range of regulatory responses is available to ARPANSA to address non-compliance. The figure below describes ARPANSA's regulatory approach. When non-compliance is identified, the regulatory response will be commensurate with its severity or the risk that it poses. History and context are taken into account. The initial regulatory response will most often be at a lower level, but will be escalated if the licence holder fails to respond. ARPANSA uses the minimum response necessary to achieve the desired result, which, in most cases, will be a return to compliance.

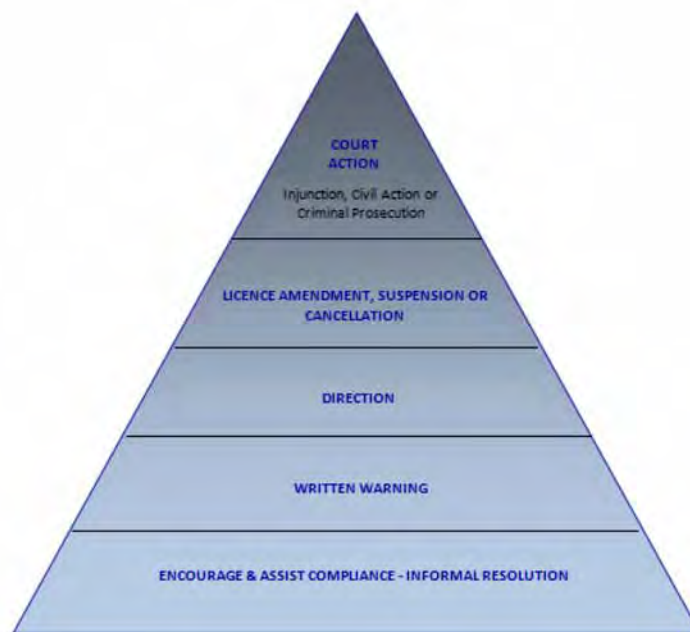


FIGURE 34: ARPANSA's graded response to non-compliance.

Source: ARPANSA (2012) *Regulatory Guide*, p. 5

FOR MORE INFORMATION:

Australian Radiation Protection and Nuclear Safety Agency (2012) *Regulatory Guide: Graded Response to Non-compliance v1*:

<http://www.arpansa.gov.au/pubs/regulatory/guides/OS-COM-SUP-270J.pdf>

Australian Radiation Protection and Nuclear Safety Agency:

<http://www.arpansa.gov.au>

Jim Scott (2010) ARPANSA Compliance Monitoring Programme 2010/11, paper presented at ARPANSA License Holder Forum AFP College, Canberra:

<http://www.arpansa.gov.au/pubs/regulatory/licenceholders/Forum2010/ComplianceMonitoring2010-2011.pdf>

4.5. South Australian Environmental Protection Agency

The South Australian Environmental Protection Agency (EPA) has set out its compliance approach on its website and in its 2014-2015 Annual Compliance Plan:

We recognise that the majority of individuals and companies are willing to comply. We tailor our regulatory actions across the full spectrum of circumstances, in particular to support and recognise those who demonstrate a commitment to good compliance and go beyond compliance to achieve outcomes such as greater sustainability, resource efficiency and best practice business processes. At the other end of the spectrum, we will seek to be robust in tackling failure to comply. For those that deliberately or negligently fail to comply, the EPA considers expiation, orders or prosecution. (4)

The EPA uses a risk-based approach, attending to the seriousness of the actual or potential environmental harm, and the attitude and history of the offender. The model featured below is particularly innovative in so far as it merges mechanisms that would be expected in pyramids of support and sanctions. A suite of compliance and enforcement tools is available and ranges from cautionary advice and formal warnings, to court action which may result in a significant fine. While not utilizing the familiar enforcement pyramid, the EPA employs responsive regulatory principles.

The EPA's compliance and enforcement approach is described as being based on the foundation of firm but fair regulation, guided by the following five core principles of being:

- proportional
- consistent
- transparent
- targeted
- timely

Dispute resolution processes are set out for those circumstances where concern about or dispute with an EPA compliance and enforcement decision, action or order arises.



FIGURE 35: EPA's compliance and enforcement approach.

Source: South Australian Environmental Protection Authority *Annual Compliance Plan 2014-15* p. 4

FOR MORE INFORMATION:

South Australian Environmental Protection Authority and its role:

http://www.epa.sa.gov.au/what_we_do/compliance_and_enforcement

South Australian Environmental Protection Authority *Annual Compliance Plan 2014-15*:

http://www.epa.sa.gov.au/what_we_do/compliance_and_enforcement

South Australian Environmental Protection Authority (2009) *Compliance and Enforcement: Regulatory Options and Tools*:

http://www.epa.sa.gov.au/xstd_files/Licensing/Guideline/cem.pdf

4.6. Ministry for Primary Industries (New Zealand)

The Ministry for Primary Industries spans agriculture, horticulture, aquaculture, fisheries, forestry, and food industries, animal welfare, and the protection of New Zealand's primary industries from biological risk.

The Ministry's vision is to grow and protect New Zealand. It does this by improving the productivity and environmental performance of primary industries, increasing sustainable resource use, enhancing access to international markets, managing risk to New Zealand's biological foundations, and providing assurances about the integrity of food and other products. The Ministry is New Zealand's largest regulator.

The Ministry for Primary Industries 2012/13 Annual Report states:

to ensure New Zealand's natural resources remain sustainable in the long term, MPI mitigates the potentially adverse impacts of industry activities through its compliance programmes. MPI's approach to compliance emphasises using a range of interventions across the voluntary, assisted, directed and enforced (VADE) compliance spectrum. (20)

We work with industry to manage resources such as New Zealand's fisheries, where our strategy is to promote high levels of voluntary compliance with fisheries laws, thereby creating an effective deterrent against illegal activity through rigorous monitoring and enforcement. Our contacts with recreational fishers and online guidelines on take and size limits are tools to support sustainable use of fisheries. (20)

A formal review of the Ministry of Primary Industries published in March 2013 identified the need to develop 'value' regulation; to look at ways to use regulatory and non-regulatory interventions to add greater value and to encourage greater voluntary compliance with standards.

This requires a very different way of thinking about the potential value added from regulation, one that is far bigger in scope than simply the efficient setting and policing of minimum standards agreed to protect community interests or comply with international conventions. The standards consumers value need to be given far more weight and the Ministry needs to rethink the way it works with industry ... More thought also needs to be given to the impact of government intervention ... That implies a better understanding, for example, of where competition can help and where collaboration is needed to capture value and build collective brand attributes. (10)

The Annual report of the Ministry for Primary Industries 2012/13 provides examples of working with communities to improve regulatory success (particularly indigenous communities, respecting their customary regulatory practices around fishing p. 20). The Annual Report of 2013/14 signalled legislative changes and consolidation of MPI's layered approach through the VADE system, announcing close working relationships with industry associations and stakeholders, along with partnerships for auditing transitional facilities around biosecurity (this includes effectively using unannounced audits). The Ministry for Primary Industries' Statement of Intent 2014-2018 illustrates New Zealand's prioritising of an enabling regulatory regime to help achieve economic goals.

FOR MORE INFORMATION:

New Zealand Ministry for Primary Industries *Annual Report 2012/13* New Zealand Government:

<http://www.mpi.govt.nz/document-vault/103>

State Services Commission, the Treasury, and the Department of Prime Minister and Cabinet (2013) *Performance Improvement Framework: Formal Review of Ministry of Primary Industries*, New Zealand Government:

<http://www.ssc.govt.nz/sites/all/files/pif-mpi-review-march2013.pdf>

New Zealand Ministry for Primary Industries *Annual Report 2013/14* New Zealand Government:

<https://mpi.govt.nz/document-vault/3343>

New Zealand Ministry for Primary Industries *Statement of Intent 2014-18*:

<http://www.mfat.govt.nz/Media-and-publications/Publications/SOI-2014/3-Strategic-Direction.php>

4.6.1. Biosecurity New Zealand: Slowing Pest Spread Report (2010)

The New Zealand Ministry for Primary Industries aims to control and eradicate identified pests and prevent unwanted marine or freshwater species from gaining a foothold in New Zealand rivers, lakes or coastal waters.

A range of opportunities exist to slow pest spread. Particular attention is paid to understanding the different pathways for the spread of pests and assessing risk in different contexts. Strategies which inform participants of the potential consequences of their actions and arm them with practical means for reducing that risk are prioritised. National communication initiatives have been developed. A range of voluntary measures and regulatory tools are used to encourage and enforce compliance, as evidenced by the responsive regulatory pyramid below:

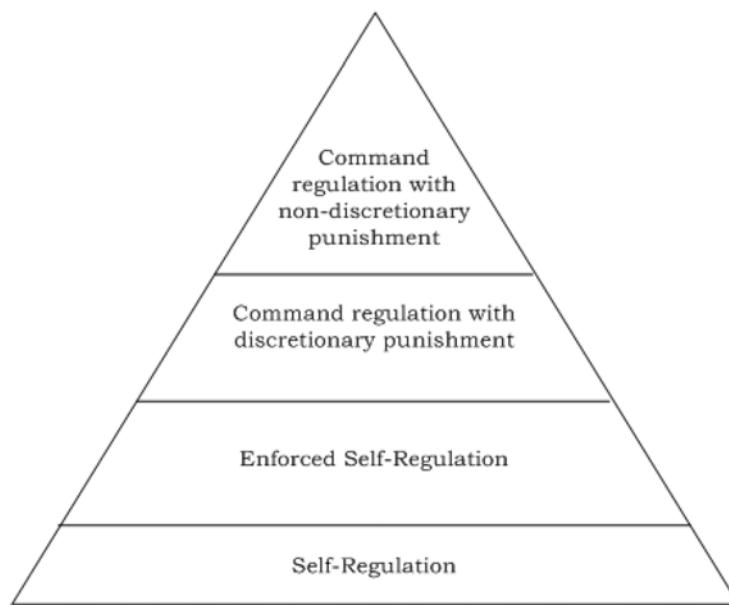


FIGURE 36: Enforcement pyramid from J. Braithwaite (2000).
 Source: Biosecurity New Zealand (2010) *Slowing Pest Spread* p. 20

FOR MORE INFORMATION:

Biosecurity New Zealand (2010) *Slowing Pest Spread: Domestic Pathways of Human Mediated Pest Spread and Opportunities for their Management* Technical Paper No: 2010/22:

<http://www.biosecurity.govt.nz/files/pests/salt-freshwater/2010-22-slowing-pest-spread.pdf>

Ministry for Primary Industries, Pest Management: <http://www.biosecurity.govt.nz/pests/surv-mgmt/mgmt>

Braithwaite, J. (2000) *Convergence in Models of Regulatory Strategy Regulation, Crime, Freedom: Collected Essays in Law* Dartmouth: Ashgate (pp. 99-105)

4.7. Ministry for the Environment (New Zealand)

The Environment Act 1986, under which the Ministry for the Environment was established, describes functions that include collecting and disseminating information, providing advice, resolving conflict, and providing an environmental perspective on government proposals. The Ministry advises the Government on the institutions, laws, regulations, policies and economic incentives that set the framework for environment management. These laws, regulations and policies are implemented and enforced mainly through others, especially the Environmental Protection Authority (EPA) and local government.

Ministry work on air quality and the effects of air pollution is one area where a graduated response to compliance has been utilized. Another is waste minimisation (see sections below).

FOR MORE INFORMATION:

Ministry for the Environment, New Zealand Government:

<http://www.mfe.govt.nz/index.html>

4.7.1. National Air Quality

The Clean Healthy Air for all New Zealanders: The National Air Quality Compliance Strategy to Meet the PM10 Standard is described as a tool to support the achievement of the targets in the Resource Management (National Environmental Standards for Air Quality) Regulations 2004.

The Ministry for the Environment is promoting a toolkit of “compliance activities” to assist regional councils ... [and their communities to achieve air quality targets.] This Compliance Strategy adopts a graduated approach, with activities ranging from education, assisted compliance, advice, reporting and review through to action. (20)

A graduated approach recognises that barriers to compliance may be different in different regions due to local variations in physical, social, political and economic factors. The Minister for the Environment has stated that compliance with the Regulations will best be met by developing effective “local solutions for local problems”. However, in keeping with the government’s commitment to “better Regulation, less Regulation”, some of the ‘solution mechanisms’ required may be more efficiently handled through central government legislation rather than local government regulation, e.g., regional planning documents. (20)



FIGURE 37: The Compliance Toolkit and its Response Categories.

Source: Ministry for the Environment 2011 *Clean Healthy Air for All New Zealanders* p. 22

FOR MORE INFORMATION:

Ministry for the Environment (2011) *Clean Healthy Air for All New Zealanders: The National Air Quality Compliance Strategy to Meet the PM10 Standard* New Zealand Government:

<http://www.mfe.govt.nz/publications/air/clean-healthy-air-all-new-zealanders-national-air-quality-compliance-strategy-meet>

4.7.2. Waste Minimisation

The *Waste Minimization Act Regulatory Enforcement Guideline* sets out a high level regulatory compliance and enforcement model.

The Guideline describes the regulatory purpose as follows:

The purpose of the Waste Minimization Act is to encourage waste minimization and decrease waste disposal to protect the environment from harm and provide environmental, social, economic and cultural benefits. The Act establishes processes for accrediting and monitoring product stewardship schemes. The purpose of product stewardship is to encourage, and in certain circumstances require, people and organizations involved in the life of a product to share responsibility for (a) ensuring there is effective reduction, reuse, recycling, and (b) managing environmental harm arising from the product when it becomes waste. (3)

The Compliance Model is presented in the diagram below. The model is:

- risk-based;
- has a suite of non-legal, contractual and statutory tools;
- is responsive to the conduct of the regulated sector;
- allows for evaluation, learning, and adaptation of the regulatory approach adopted;
- enables consistency of decision making while allowing discretion for the regulator to be responsive to individual circumstance; and
- is flexible and agile to allow managers to respond to new priorities and policies.

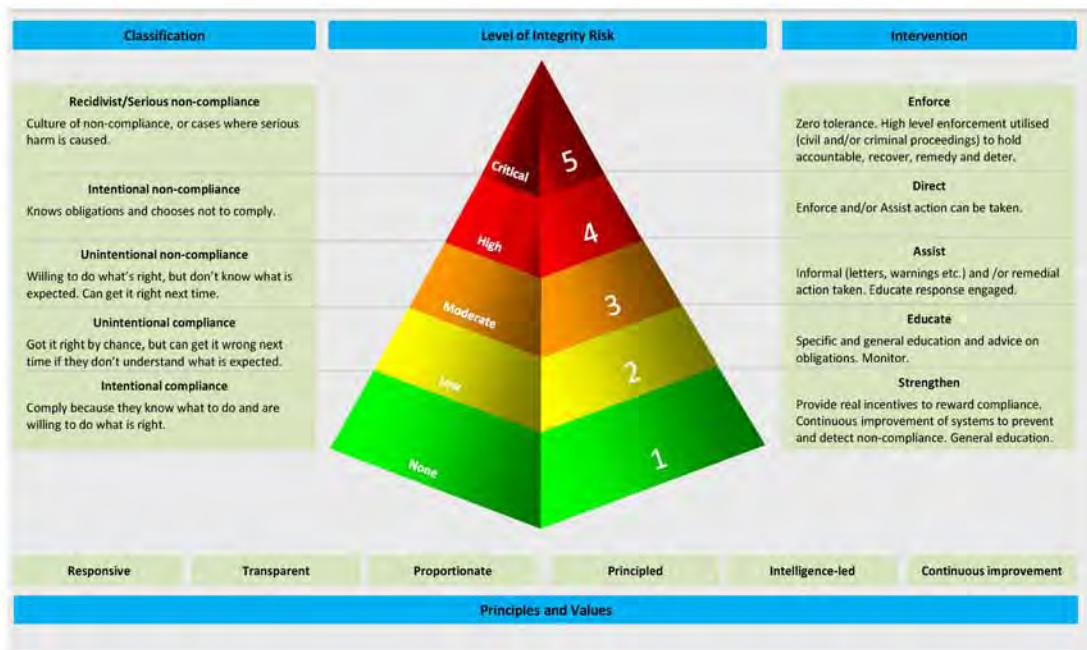


FIGURE 38: Compliance Model.

Source: Ministry for the Environment Waste Minimization Act Regulatory Enforcement Guideline p. 5

FOR MORE INFORMATION:

Ministry for the Environment, Waste Minimization Act Regulatory Enforcement Guideline New Zealand Government:

<http://www.mfe.govt.nz/sites/default/files/regulatory-enforcement-guidelines.pdf>

4.8. Registration, Evaluation, Authorisation And Restriction Of Chemicals (The European Union)

Registration, Evaluation, Authorisation And Restriction Of Chemicals (REACH) is a European Union regulation concerning the Registration, Evaluation, Authorisation & restriction of Chemicals that entered into force on 1 June 2007.

REACH aims to: (a) improve the protection of human health and the environment through the better and earlier identification of the intrinsic properties of chemical substances; (b) enhance innovation and competitiveness of the EU chemicals industry; and (c) promote alternative methods for the hazard assessment of substances in order to reduce the number of tests on animals.

In principle, REACH applies to all chemical substances; not only those used in industrial processes but also those used in day-to-day life, for example in cleaning products and paints as well as in articles such as clothes, furniture and electrical appliances. Therefore, the regulation has an impact on most companies across the EU.

REACH places the burden of proof on companies. To comply with the regulation, companies must identify and manage the risks linked to the substances they manufacture and market in the EU. They have to demonstrate to the European Chemical Agency (ECHA) how the substance can be safely used, and they must communicate the risk management measures to the users.

If the risks cannot be managed, authorities can restrict the use of substances in different ways. In the long run, the most hazardous substances should be substituted with less dangerous ones.

REACH's core requirement is that manufacturers or importers of chemicals sold in the European Union register them with a central European Chemicals Agency.

Fuhr and Bizer (2007) regard REACH as a paradigm shift in the regulatory approach of the EU towards self-responsibility of agents and responsive regulation. They see it as responsive because it adopts a 'carrots and sticks' approach to the regulation of chemicals. They argue, however, that there is a need for greater incentives to support the self-responsibility regulative approach, should the initiative wish to achieve widespread participation and compliance.

Fleurke and Somsen (2011) also see benefits in the approach:

We argue that the precautionary approach embodied in REACH has triggered a radical departure from past regulatory efforts that failed effectively to engage with contemporary regulatory challenges of scale, uncertainty, complexity and innovation. In effect, REACH is shaping a promising EU regime of responsive co-regulation that is without precedent in the forty-year history of EU environmental law. We believe that the success of this regime will not only determine the effectiveness of EU chemicals regulation, but more generally will come to determine the way in which EU regulation is

likely to respond to a host of new technologies that shape our technological modernity.
(357)

For a further discussion of benefits as well as shortcomings in current design and implementation, see Rigolle et al (2013) reference below.

FOR MORE INFORMATION:

European Commission, Internal Market, Industry, Entrepreneurship and SMEs:
http://ec.europa.eu/growth/index_en.htm

European Commission, Environment, REACH:
http://ec.europa.eu/environment/chemicals/reach/reach_en.htm

European Chemicals Agency, understanding REACH:
<http://echa.europa.eu/web/guest/regulations/reach/understanding-reach>

Fuhr, M. and K. Bizer (2007) "REACH as a paradigm shift in chemical policy – responsive regulation and behavioural models", *Journal of Cleaner Production* 15(4): 327-334.

Rigolle C. W. Rommel, H. Neefs, and H. Verhaegen (2013) "How effective is the European legislation regarding cancer-related chemical agents?" *Journal of Epidemiology and Community Health* 67(7): 539-541.

Fleurke, F. and H. Somsen (2011) "Precautionary regulation of chemical risk: How REACH confronts the regulatory challenges of scale, uncertainty, complexity and innovation" *Common Market Law Review* 48(2): 357–393.

4.9. United Nations Environment Program: Multilateral Environmental Agreements

The United Nations Environmental Programme (UNEP), described as the voice for the environment within the United Nations system, was established in 1972. UNEP acts as a catalyst, advocate, educator and facilitator to promote the wise use and sustainable development of the global environment. UNEP's mandate is to be the leading global environmental authority.

UNEP work encompasses:

- Assessing global, regional and national environmental conditions and trends;
- Developing international and national environmental instruments; and
- Strengthening institutions for the wise management of the environment.

The term "Multilateral Environmental Agreement" (MEA) is a broad term that relates to any of a number of legally binding international instruments through which national Governments commit to achieving specific environmental goals. MEAs (as with other international agreements) usually bind only those States who have agreed to be bound by the MEA. Non-Parties, however, can be affected, for example, by prohibiting or restricting trade by Parties with non-Parties. MEAs can follow a variety of models, including command and control, responsive regulation, and advisory.

UNEP's Manual on MEA compliance and enforcement promotes responsive regulation and the Ayres and Braithwaite pyramid as one model that states may wish to adopt.

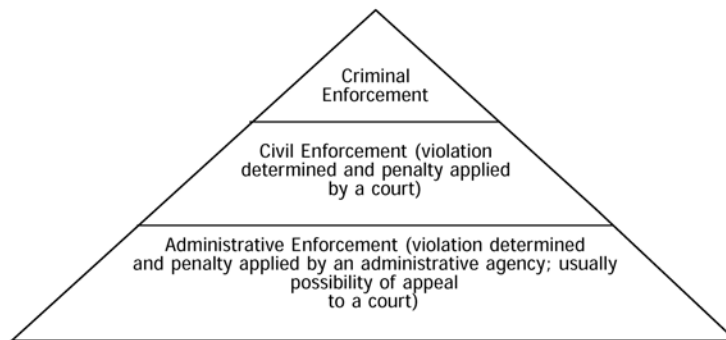


FIGURE 39: Enforcement Pyramid.

Source: UNEP 2006 Manual on Compliance with and Enforcement of Multilateral Environmental Agreements p. 311

FOR MORE INFORMATION:

United Nations Environment Programme, Division of Environmental Policy Implementation (2004) Draft Manual on Compliance with and Enforcement of Multilateral Environmental Agreements:

https://www.ipcc.int/sites/default/files/documents//1182346786718_meas_draft_manual_nov24_fullversion.pdf

United Nations Environment Programme, Division of Environmental Policy Implementation (2006) Manual on Compliance with and Enforcement of Multilateral Environmental Agreements:

http://www.unep.org/delc/Portals/119/UNEP_Manual.pdf

9th International Conference on Environmental Compliance and Enforcement (2011), Conference Proceedings, Whistler, British Columbia, Canada:

<http://inece.org/conference/9/proceedings/Proceedings9thINECEConference.pdf>

5. COMMUNICATIONS AND MEDIA

5.1. The Office of Communications (UK)

The UK Office of Communications (Ofcom) is the communications regulator that regulates the TV and radio sectors, fixed line telecoms, mobiles, postal services, plus the airwaves used by wireless devices.

Ofcom states in the Executive Summary of *Identifying appropriate regulatory solutions* (2008 p. 2) that it aims to be “as transparent and objective as possible” when selecting the most appropriate regulatory approach. Regulation may range from “no regulation at all, through industry self-regulation (where industry administers solution without formal oversight), co- regulation (where a form of statutory control is present), to full statutory intervention.”

Ofcom started with the reasonable assumption that no one form of regulation could successfully regulate all the various types of behaviour and activities going on within the communications sector.

It is their preference to “work in partnership with stakeholders to develop regulation,” recognising that “self- and co-regulation can, in the right circumstances, provide an effective means to address citizens’ and consumers’ interests.” They also highlight that: “the fast moving and technologically complex nature of the communications markets can ... under some circumstances, make statutory regulation insufficiently flexible.” (2)

At the same time, Ofcom acknowledged that they needed a set of principles to decide when it was appropriate to permit self-regulation or co-regulation or statutory intervention. They use the following principles to guide their decision-making:

Self-regulation is most likely to work where the following conditions are present: industry collectively has an interest in solving the issue; industry is able to establish clear objectives for a potential scheme; and the likely industry solution matches the legitimate needs of citizens and consumers. (2)

It is unlikely to be appropriate where the following conditions are found: there are incentives for individual companies not to participate; or there are incentives for participating companies not to comply with agreed codes. Where we determine that self-regulation is unlikely to succeed, co-regulation may be used to ensure that incentives are effectively aligned. (2-3)

Where neither self- or co-regulation are appropriate but regulation is necessary, a statutory solution will be required. (3)

When supporting the establishment of new self- and co- regulatory schemes, we will refer to criteria identified following our review of best practice. These are: public awareness transparency, significant industry participation, adequate resources, clarity of processes, ability to enforce codes, audits of performance, system of redress in place, involvement of independent members, regular review of objectives, and non-collusive behaviour. (3)

In applying their regulatory principles, Ofcom seeks to “adopt a pragmatic and flexible approach...and take additional factors into account as appropriate to a specific case” (p. 3) Finally, it is their policy to “consult publicly on any proposals for changes in regulation ... and ... include impact assessments of different options in [their] consultations” (p. 3), all of which, when applied, are elements of regulatory responsiveness.

FOR MORE INFORMATION:

Office of Communications, Stakeholder and Enforcement Actions:

<http://stakeholders.ofcom.org.uk/enforcement/>

Office of Communications (2008) *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation: Executive Summary:*

<http://stakeholders.ofcom.org.uk/consultations/coregulation/statement/>

6. TRANSPORT

6.1. Civil Aviation Safety Authority (Australia)

The Civil Aviation Safety Authority (CASA) is an independent statutory authority responsible for the safety regulation of civil air operations in Australia and the operation of Australia-registered aircraft overseas. CASA aims to enhance and promote aviation safety through effective safety regulation and by encouraging industry to deliver high standards of safety.

CASA has adopted a responsive approach in distinguishing compliance related action from enforcement related action, as illustrated by the explanation below from CASA's Enforcement Manual (pp. 2-3 to 2-4):

It is common ground that compliance with aviation safety requirements is normally achieved by the entirely self-motivated conduct of participants in aviation-related activities who comply with the rules because they know or believe it is the 'right thing' to do, as a matter of law and in the interests of safety alike.

Beyond such self-motivated compliance (in the reinforcement of which CASA is playing a greater and more constructive role) there are four other ways in which CASA is actively and directly involved in bringing about compliance, each of which is reflected in specified CASA functions under section 9 of the Civil Aviation Act. These are:

- *Assisting the industry to comply, generally and on an individual basis*
- *Encouraging or exhorting compliance*
- *Compelling compliance*
- *Penalising and deterring non-compliance.*

CASA endeavours to bring about compliance with legislative requirements and optimal safety outcomes by assisting the industry through general and more specifically targeted safety promotion and educational activities, and through the advice CASA provides on operational and technical matters to individual pilots, engineers and operators. CASA also acts to encourage or exhort authorisation holders to comply and to conduct their activities at a high level of safety through the counselling process and by recommending remedial training.

CASA's safety-orientated actions of the kind described in the last paragraph may be described as compliance-related action, as opposed to enforcement action, since no enforcement of any kind is actually involved.

CASA may also act to compel authorisation holders to comply with safety standards, or to prevent them from continuing to breach those standards, through processes involving the suspension or cancellation of authorisations, the variation of authorisations, which may include the imposition of conditions, and by entering into, and where necessary, enforcing voluntary undertakings.

In addition, CASA has the power to initiate action with a view to penalising persons for contravening regulatory requirements, although the pursuit of such action is in the hands of the Commonwealth Director of Public Prosecutions. From CASA's perspective, the implementation of such punitive action as may be necessary and appropriate is meant to deter those persons (specific deterrence) and others (general deterrence), from contravening the safety standards specified in the legislation in the future, by encouraging them to reflect on the consequences of their conduct.

In many cases, it may also cause them to reassess the safety-related implications of their past misconduct, and to alter their behaviour on that basis (rehabilitation). It is, of course, only a court, not CASA or the Commonwealth Director of Public Prosecutions, which has the authority to impose a penalty for a breach of the Act or the Regulations.

FOR MORE INFORMATION:

Civil Aviation Safety Authority Regulations and Policy

http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_90900

Civil Aviation Safety Authority (2013) Enforcement Manual:

<http://www.casa.gov.au/wcmswr/assets/main/manuals/regulate/enf/009rful.pdf>

6.2. Maritime Safety Authority (Australia)

The Australian Maritime Safety Authority (AMSA) is the national agency responsible for maritime safety, protection of the marine environment, and maritime and aviation search and rescue.

AMSA's Compliance and Enforcement Policy (2012) assists AMSA, industry stakeholders and other parties with duties, obligations and responsibilities under maritime safety legislation understand the suite of tools available to AMSA to ensure legislative requirements are met.

AMSA, as the national regulator of maritime safety legislation, makes the best use of its regulatory resources by adopting a graduated approach to compliance and enforcement (p. 8). AMSA recognises that both compliance mechanisms and enforcement mechanisms are necessary to provide an effective and flexible regulatory system. The compliance and enforcement options are represented in the diagram below.

AMSA maintains it is committed to having systems and processes in place to support the following principles:

Accountability: AMSA’s inspectors must be conscious at all times of their role and their accountability for promoting the highest level of statutory compliance.

Consistency: Like situations will be treated in a like manner. Duty holders need to have full confidence that AMSA’s decision-making and actions will be equitable and that comparable situations will have comparable outcomes.

Transparency: Duty holders must be in no doubt as to the criteria used by AMSA in coming to a decision. Decisions and their reasons must be communicated clearly to relevant stakeholders.

Impartiality: Decisions made by AMSA must both be impartial and be seen to be impartial. Any potential conflict of interest that might influence a decision must be disclosed. The decision to take action must not be influenced by:

- the personal views of an inspector concerning the non compliant person or corporation;
- possible political or commercial advantage or disadvantage to the Government or any entity; or
- public, industry or political criticism, or the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Proportionality: Decisions made by AMSA will be proportionate to the identified risk to safety or the marine environment, the seriousness of any perceived breach and the level of non compliance with legislative requirements.

Fairness: AMSA will seek to strike the right balance between assisting voluntary compliance and undertaking enforcement actions, while responding to the competing interests of stakeholders, government and the public.



FIGURE 40: Compliance and enforcement principles.

Source: Australian Maritime Safety Authority 2012 *Compliance and Enforcement Policy* p. 8

FOR MORE INFORMATION:

Australian Maritime Safety Authority (2012) *Compliance and Enforcement Policy*:

<http://www.amsa.gov.au/forms-and-publications/Publications/AMSA314-CEP-policy.pdf>

6.3. Transport Safety Victoria (Australia)

Transport Safety Victoria (TSV) is an independent statutory authority, responsible for transport safety regulation for bus, maritime and rail transport.

TSV regards itself as a risk-based regulator and emphasizes the responsive regulatory approach of enforced self-regulation:

[Our Policy] should be understood in the ‘co-regulatory’ context under which transport safety regulation operates. Co-regulation places a shared responsibility for safety on all relevant stakeholders, including a primary responsibility on duty-holders to demonstrate how they ensure safety through risk management. (1)

TSV’s regulatory approach states that:

regulators consistently exercise discretion, from setting strategic visions, regulatory scope, work prioritisation and resource allocation (‘what to work on’), to regulatory strategies (‘how to work on it’) and enforcement discretion (‘when and what tools to use at what time’). TSV’s regulatory approach guides this discretion by setting out:

- *Outcomes TSV seeks in transport safety regulation,*
- *Principles which TSV binds itself to when striving for these outcomes,*
- *Strategies for achieving these outcomes,*
- *Factors to take into account, including under regulatory strategies, and*
- *Processes, policies and procedures to ensure this policy is effectively implemented. (3)*

TSV takes a graduated and integrated approach as illustrated in the diagram below. This means TSV generally uses the least interventionist tool in the first instance (information/guidance/education), thereby minimising regulatory burden while maximising public value for regulatory resources. TSV states it will consider the full range of options available and take a balanced approach in each case. However, when safety requires, TSV will not hesitate with enforcement.

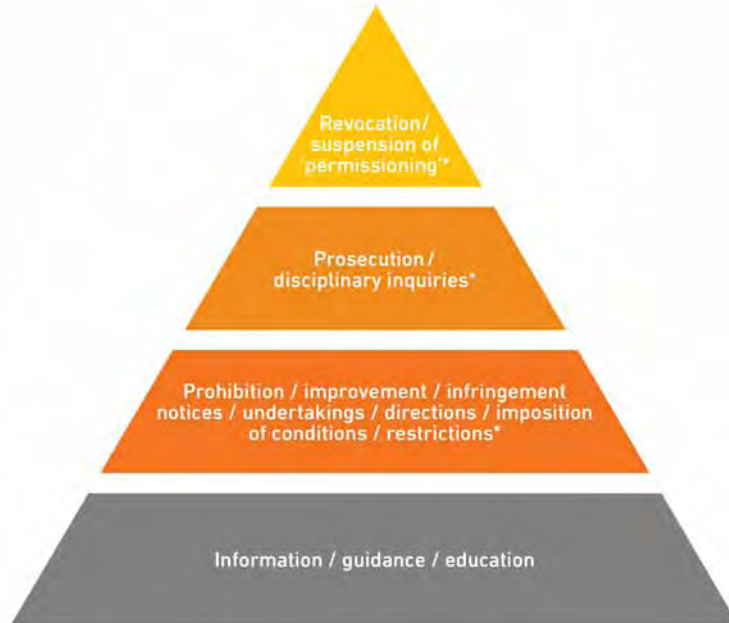


FIGURE 41: Enforcement Pyramid.

Source: Transport Safety Victoria Regulatory Approach Policy p.7

FOR MORE INFORMATION:

Transport Safety Victoria Regulatory Approach Policy:

http://www.transportsafety.vic.gov.au/_data/assets/pdf_file/0004/46975/TSV_REGULATORY_APPROACH_POLICY_web.pdf

6.4. Motor Accidents Authority (Australia)

The Motor Accidents Authority (MAA) of New South Wales has developed a regulatory and enforcement policy for dealing with minor and major non-compliances by Compulsory Third Party insurers.

The MAA regulates insurers, monitors insurance performance, supports injury prevention and road safety initiatives, and provides an independent dispute resolution service. According to the website, the MAA’s regulatory and enforcement policy ensures the MAA is fair and consistent in its response to insurers who fail to comply with their obligations:

The policy adopted by the MAA is based on a hierarchy of penalties that range in seriousness from education to licence suspension which are matched to the seriousness of the non-compliance. The policy outlines how the MAA assesses the noncompliance and determines a penalty.

FOR MORE INFORMATION:

Motor Accident Authority ‘Regulation and Enforcement’:

<http://www.maa.nsw.gov.au/for-professionals/for-insurers/regulation-and-enforcement#798>

7. CORPORATIONS AND FINANCE

7.1. Taxation Office (Australia)

The Australian Taxation Office describes its business model as reflecting the need to establish an environment that supports both self-assessment and high levels of voluntary compliance. The model focuses on using a mix of help, education, verification and enforcement strategies to assist taxpayers to understand and comply with their obligations. Detecting non-compliance, encouraging taxpayers to do the right thing, deterring those who do not comply, and using the full force of the law when people decide not to meet their tax obligations are all part of the mix of strategies the Tax Office uses to optimize voluntary compliance (see figure below).



FIGURE 42(A): The ATO'S attitude to compliance and response strategy approach.

Source: Australian Taxation Office, attitude to compliance and compliance strategy website (url below)

The precursor to this thinking is an approach to compliance that was guided by the principles in the *Taxpayers' Charter* and the *ATO Compliance model* (see figure below). The Charter is the ATO's commitment to taxpayers that they will be treated with procedural justice, regardless of whether they are compliant or non-compliant. The Compliance Model helps the Tax Office understand different attitudes and behaviours to compliance among taxpayers and their advisers. It summarises the different sorts of support and intervention that may be needed to ensure the right amount of tax is collected from each taxpayer.

Factors that influence taxpayer attitudes to these obligations include business, industry, sociological, economic and psychological. These are represented in the figure below on the left as the BISEP, which is used to analyse the taxpayer's reasons for behaving in a particular way. Understanding reasons for compliance enables the ATO to enforce the law while being responsive to the drivers of a taxpayer's non-compliance. By understanding drivers of non-compliance, the ATO is better positioned to manage non-compliance and tailor their regulatory intervention accordingly.

The usefulness of this Compliance Model is evident in its popularity among other tax institutions, including New Zealand Inland Revenue (discussed later) and the OECD in its tax guidance and review documents (see references below).

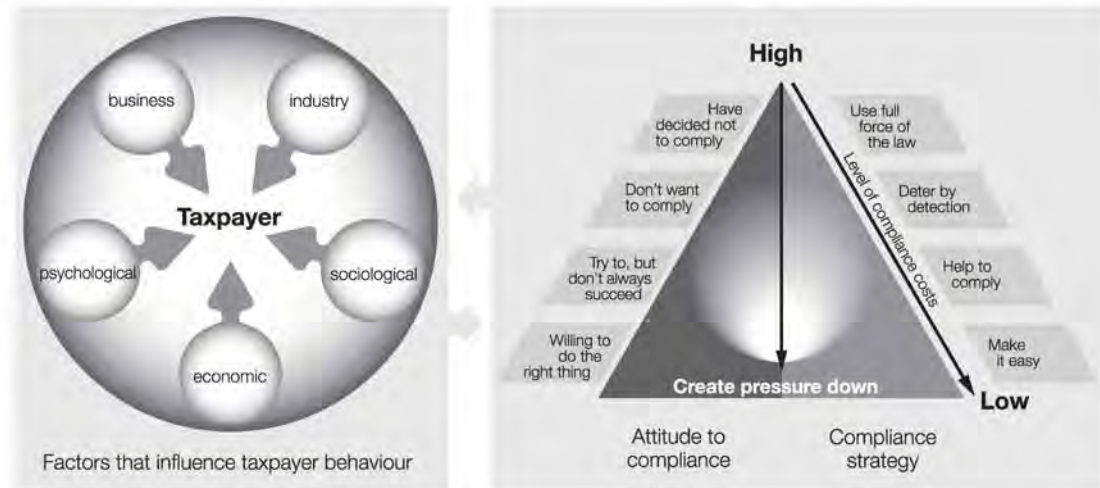


FIGURE 42(B): The BISEP (Business, Industry, Sociological, Economic, Psychological) and the ATO Compliance Model.
 Source: Australian Taxation Office 2009 *Developing Effective Compliance Strategies* p.5

FOR MORE INFORMATION:

Australian Taxation Office (2009) *Developing Effective Compliance Strategies*, Australian Government:
<https://www.ato.gov.au/Print-publications/Developing-effective-compliance-strategies/>

Australian Taxation Office, attitude to compliance and compliance strategies:
https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-statistics/Compliance-in-focus-2013-14/?anchor=Our_compliance_strategies#Our_compliance_strategies

Australian Taxation Office, How we check compliance, our approach to compliance:
<http://www.ato.gov.au/General/How-we-check-compliance/Our-approach-to-compliance/>

Australian Taxation Office, Compliance in Focus 2013-14:
<http://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-statistics/Compliance-in-focus-2013-14/?anchor=Foreword#Foreword>

Braithwaite, V. and J. Job (2003) The theoretical base for the ATO compliance model, Centre for Tax System Integrity Research Note:
<https://digitalcollections.anu.edu.au/bitstream/1885/42101/2/researchnote5.pdf>

Organisation for Economic Co-operation and Development (2004) Guidance Note. Compliance Risk Management: Managing and Improving Tax Compliance. Committee on Fiscal Affairs (p. 41):
<http://www.oecd.org/tax/administration/33818656.pdf>

Organisation for Economic Co-operation and Development (2011) Tax Administration in OECD and Selected Non-OECD countries Comparative Information Series (2010) (p. 89-90):
<http://www.oecd.org/ctp/administration/CIS-2010.pdf>

The Centre for Tax System Integrity Website (reviews of Compliance Model):
<http://ctsi.host.sk/>

7.2. Securities Commission (Ontario, Canada)

The Ontario Securities Commission (OSC) is an independent Crown corporation that is responsible for regulating Ontario's capital markets. A member of the Canadian Securities Administrators, the OSC works with other Canadian securities regulators to improve, co-ordinate and harmonize the regulation of Canada's capital markets. The 2012-2015 Strategic Plan for the OSC, *A 21st Century Securities Regulator*, describes its statutory mandate:

to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. (2)

This mandate would be achieved through the primary organizational goal of delivering responsive regulation.

Recent analysis of the Commission's enforcement activity suggests that it conforms closely to the 'enforcement pyramid' model (Marquis 2009). Severe sanctions are used only very occasionally while intermediate sanctions occupy a larger scope of OSC's activity. According to OSC Chair David Wilson, the majority of the OSC's activity is concentrated at the pyramid's base, that is, it focuses on persuasion and "softer" means of securing compliance.

The Commission has a wide range of enforcement tools (including license revocation, officer bans, cease trading orders, onerous reporting requirements and various civil and criminal sanctions) at its disposal. However, it has been criticized for not using its capacity to responsively escalate sanctions in the event of non-compliance.

As Marquis (2009) puts it:

It has been observed, in a number of cases, that the OSC has failed to successfully apply serious sanctions to big (and very public) offenders. We can safely assume that the regulated players within the Commission's jurisdiction understand this history, including the particular political and legal dynamics the regulator operates in. (19)

Marquis (2009) draws on OSC data to model operations as follows:

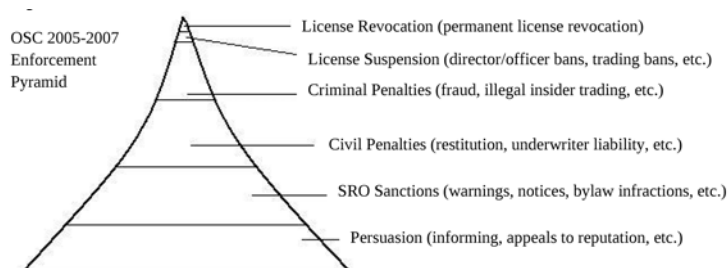


FIGURE 43: OSC 2005-2007 Enforcement Pyramid.

Source K. Marquis 2009 Responsive Securities Regulation p. 16

FOR MORE INFORMATION:

Ontario Securities Commission *The OSC: A 21st Century Securities Regulator* 2012-2015 Strategic Plan:
www.osc.gov.on.ca/documents/en/Publications/pub_20120228_osc-2012-2015-strategic-plan.pdf

Marquis, K. (2009) "Responsive Securities Regulation: An Assessment of the Enforcement Practices of the Ontario Securities Commission", Regulatory Governance Initiative Working Paper, Ottawa, ON: Carleton University:: http://www.regulatorygovernance.ca/publication/regulation-paper-responsive-securities-regulation/wppa_open/
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532366

Lo, D. (2012) A Call for Sentencing Enforcement Reform in Ontario Securities Regulation: Restorative Justice, Pyramids and Ladders. Masters Thesis, Faculty of Law, University of Toronto:
https://tspace.library.utoronto.ca/bitstream/1807/33295/3/Lo_Daniel_201211_LLM_thesis.pdf

7.3. European Commission: Directorate-General Taxation And Customs Union (European Union)

The compliance pyramid model is used by the European Commission as part of their Compliance Risk Management Guide for tax administrations for member states. The compliance model below illustrates a two-dimensional pyramid, which displays risk reduction strategies on the compliance continuum side and compliance behaviour on the taxpayer population side.

The Guide provides background information, best practices and a framework for the implementation of modern compliance risk management principles for tax administrations. Compared to the original Guide, the up-date focuses more on influencing behaviour of taxpayers, to stimulate compliance and curb non-compliance.



FIGURE 44: The Compliance Spectrum.

Source: European Commission 2010 Compliance Risk Management Guide for Tax Administrators p. 38

FOR MORE INFORMATION:

European Commission Compliance Risk Management Guide for Tax Administrators:
http://ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/taxation/risk_management_guide_en.pdf

7.4. The Tax and Customs Administration (The Netherlands)

The Dutch Tax and Customs Administration is part of the Ministry of Finance responsible for a wide range of activities, but are best known for levying and collecting taxes and national insurance contributions. The Tax and Customs Administration not only collects, but also pays out. For example, the Tax and Customs Administration pays out provisional refunds and benefits that are available to households towards the costs of childcare, rent or health care. It also investigates fraud and the supervision of the import, export and transit of goods.

In their corporate publication *The Dutch Tax and Customs Administration* (2014), the organization describes itself as: service provider, as spider in the web of collaboration, as monitor and law enforcer, as fraud fighter, as a partner for entrepreneurs and as an ICT (information technology) organization. The compliance approach is one of making it easy and helping people to comply with their tax obligations while at the same time taking a strict approach when fraud is detected:

We want to serve you in a way that fits today's world. A world in which we do more and more of our work digitally, because you do too. But we are precise in making sure that everyone fulfils their obligations, provides us with correct details. So the Tax and Customs Administration provides service whenever possible, but is strict whenever necessary. (6)

Effective collaboration with other 'intermediaries' is also stressed as an important feature. Tax returns can be partially filled in, making it easier for taxpayers. Working with intermediaries also is part of the organization's approach to inspections, monitoring and enforcement. The Fiscal Information and Investigation Service (FIOD) supervised by the Public Prosecution Service is the investigations body which deals with fraud.

Gribnau (2007) describes the Dutch tax administration in this way:

[a] shift away from the traditional deterrence law approach to a compliance strategy with a focus on more responsive and cooperative regulation. ... Important values and principles are procedural justice, mutual trust, reciprocity and good communication. Institutional checks and balances and accountability, transparency, and publicity should guarantee impartial administrative regulation and enforcement and prevent the granting of privileges and abuse of power. (abstract)

FOR MORE INFORMATION:

Gribnau, H. (2007) *Soft Law and Taxation: The Case of the Netherlands* *Legisprudence* 1(3):

<http://ssrn.com/abstract=2445032>

The Dutch Tax and Customs Administration 2014

http://download.belastingdienst.nl/belastingdienst/docs/dutch_tax_customs_admin.pdf

7.5. Administrative Review Council (Australia)

The Administrative Review Council's (ARC) produced a 2008, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, in 2008. The report details a pyramid of business rules in which a case is made for the appropriate application of 'black letter' versus 'soft' law. Although the report makes no mention of responsive regulation, the emphasis on 'soft' law reflects the same model of favouring, at least initially, an enabling rather than punitive approach to enforcement. The Council uses a pyramid (see below) to show the way in which they might include soft law and self-regulation and co-regulation into their regulatory approach.

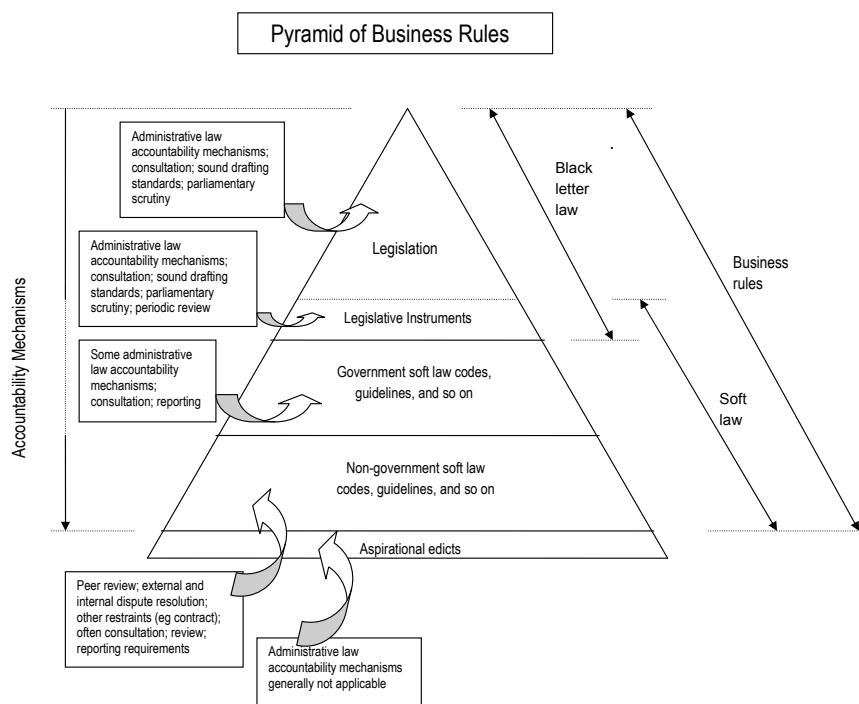


FIGURE 45: ARC Pyramid of Business Rules

Source: Administrative Review Council (2008) Administrative Accountability in Business Areas Subject to Complex and Specific Regulation, Canberra: Commonwealth of Australia, p.x

FOR MORE INFORMATION:

Administrative Review Council (2008) Administrative Accountability in Business Areas Subject to Complex and Specific Regulation, Canberra: Commonwealth of Australia, p.x:

<http://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo49.aspx>

7.6. Prudential Regulatory Authority (Australia)

The Australian Prudential Regulatory Authority (APRA) is the prudential regulator of the Australian financial services industry. APRA oversees banks, credit unions, building societies, general insurance and re-insurance companies, life insurance, friendly societies and most members of the superannuation industry. APRA is funded largely by the industries it supervises.

Enforcement is of central importance for APRA as set out in the introduction of the Enforcement Manual:

Enforcement involves specific intervention and the pursuit of remedial actions where the Australian Prudential Regulation Authority (APRA) does not believe that an institution has the ability or willingness to rectify serious identified weaknesses that threaten financial viability or safety. Enforcement activities are critical to ensuring financial promises to beneficiaries continue to be met and form an important component of APRA’s Framework for Prudential Supervision. (3)

APRA employs a sophisticated risk management model and has case managers assigned to monitor and advise when issues arise.

Under the section on Enforcement Action Policy, the Manual states:

The Enforcement team will have regard to the following principles, which are considered 'good practice' in the implementation of enforcement strategies. Enforcement seeks to:

- *minimise losses to current and prospective beneficiaries by intervening actively and promptly in troubled entities;*
- *adopt a 'no surprises' policy, by liaising and corresponding with regulated entities to convey prudential concerns and rectify matters at an early stage;*
- *favour prevention over punishment by adopting pro-active measures to remedy;*
- *weaknesses and forestall problems;*
- *encourage voluntary cooperation and compliance by providing sufficient scope for troubled entities to rectify internal weaknesses or make an orderly exit from the industry;*
- *make well-informed decisions by conducting comprehensive investigations;*
- *commissioning experts' reports and taking other steps to gather relevant facts and establish objective findings;*
- *quarantine troubled entities by closing them to new business in cases where full and prompt rectification of problem areas seems unlikely to prevent prospective beneficiaries becoming exposed to the danger already faced by existing beneficiaries; and*
- *promote the orderly exit of entities without a long-term future (10)*

These principles, combined with the monitoring and assistance provided to businesses through risk management and case management, are consistent with a responsive regulatory approach.

FOR MORE INFORMATION:

Australian Prudential Regulatory Authority Enforcement Manual

<http://www.apra.gov.au/CrossIndustry/Documents/APRA-Enforcement-Manual.pdf>

7.7. Department of Commerce (Western Australia)

The purpose of the Department of Commerce is to create a modern diversified economy, providing for growth, safety and protection of the community by promoting innovation and science, enhancing capacity and with a world-class regulatory environment. The latter objective has been pursued through adopting a compliance strategy model that guides the Department to assist people to comply with the law through responsive and effective regulatory programs. The department strives to enforce compliance effectively, efficiently and equitably in laws governing consumer protection, labour relations, occupational safety and health, energy safety and building.

The Department of Commerce's compliance strategy and associated enforcement policies enable consumers and traders and employees and employers to understand the department's approach to achieving compliance with consumer and employment laws.

The model assumes most individuals and organisations will comply, or try to comply, with their obligations. The department acknowledges that it is not appropriate to respond to all compliance issues in the same way. The department also acknowledges the need for traditional enforcement techniques to deal with non-compliance where serious breaches of the law occur.

The Department of Commerce recognises the way in which it responds can influence the behaviour of individuals and organisations. The department's aim is to encourage compliance. (1)



FIGURE 46: Compliance Strategy Model.

Source: Western Australia Department of Commerce *Compliance Strategy* p. 2

FOR MORE INFORMATION:

Western Australia Department of Commerce *Compliance Strategy* Government of Western Australia:

https://www.commerce.wa.gov.au/sites/default/files/atoms/files/compliance_strategy.pdf

PART 3 RELATED REGULATORY LITERATURE
AND CONCEPTS

Regulation shapes much of our daily activities and occurs through many different avenues – through consumer markets, labour markets, insurance companies, financial institutions, standard setting and reviewing bodies, and professional associations, as well as old style government regulators. For example, the food we eat is subject to an array of regulatory forces that govern how the food is sourced, grown and harvested, how it is transported and stored, how it is processed, packaged, again transported and marketed, where and how it is sold, how it is priced and where it is consumed. Regulatory scholarship has contributed a vast literature on this activity of ‘regulation’ in its many different forms, producing a number of concepts that add depth and breadth to the responsive regulatory approach. Some key concepts are:

Markets: The market has been embraced as a regulatory mechanism to ensure that goods and services offered to citizens are of quality and will not produce harms. Markets can fail, however, when competition is unfair, quality is not transparent or when a market in virtue is crowded out by a market in vice. Many different markets can be in play simultaneously. For example, tertiary institutions may compete in a fraudulent market of credentialism (offering qualifications for the lowest cost) when the public and the government expect them to be competing in the virtuous market of educational quality. With market failures has come recognition for new forms of regulation to ensure fair competition and transparency. Regulatory activity is undertaken by special purpose agencies both in the private and public sector, as well as by industry groups and organizations. David Levi-Faur and Jacinta Jordana (2005) refer to this explosion in regulatory activity as ‘regulatory capitalism’.²²

Networked governance: With regulatory capitalism, various nodes of power with their associated networks of support and influence amass informal and formal enforcement capability. These different nodes and networks may cooperate or they may compete for regulatory influence. For example, human rights of Bangladeshi factory workers may not have much of an audience with those who have the power to influence working conditions in that country. But when over 1,000 Bangladeshi factory workers die as a result of a poorly constructed work environment, other global networks and western consumers start to take notice of the poor working conditions of Bangladeshi factory workers. Pressure is placed on western retailers to pay attention to and address unsafe working conditions and cheap labour of factory workers in developing countries. Governments in those developing countries may then fear the withdrawal of western retailers which will then affect exports from the developing country – this chain of events may then influence the government and local industry to ‘lift their game’ in terms of working conditions for local women and men. Change has come about through coordinating different networks with different support bases and different capacities to affect regulatory outcomes.

Co-production: Regulators not only need to network with each other but they need the cooperation of the public to ensure their interventions are effective. Desk auditing depends on those being regulated collecting and submitting data in the form regulators require; police need the cooperation of the public to inform them of crimes and help them solve crimes; child protection authorities rely on community organizations, professionals, and families to keep children safe. When we focus on a problem, regulatory co-production is a reminder to look at the whole complex system, and to prioritise consultation and negotiation to ensure that any regulatory interventions into this system are both desirable and practicable.²³ Such processes can safeguard against unintended consequences.²⁴

²² Levi-Faur, D. and J. Jordana. 2005. The Rise of Regulatory Capitalism: The Global Diffusion of a New Order, *The Annals of the American Academy of Political and Social Sciences* 598 (1).

²³ John Alford (2009) provides analyses of co-production relevant to the Australian context in *Engaging Public Sector Clients: From Service-Delivery to Co-production*, Palgrave Macmillan.

²⁴ Grabosky, P.N. 1996. “Unintended Consequences of Crime Prevention.” In R. Homel & R. V. Clarke (eds), *Crime Prevention Studies*, 5: 25-56.

Third party regulators: Other bodies outside government take on regulatory responsibilities.²⁵ Government is not at the centre of all regulation and third parties can bring necessary expertise to the regulatory task which governments may lack. Third parties may do compliance auditing on financial probity or food preparation safety as part of meeting requirements of a government regulator. The heavy vehicle regulator may rely on other transport experts to determine if it is safe for a particularly large and heavy load to follow a certain route to its destination. Insurance companies may rely on third parties to use their expertise to investigate reasons behind a claim, be it personal injury or property loss. In all these cases, third parties are meeting a regulatory function.

Smart regulation is a suite of interventions that are complementary or that reinforce each other to deal with a regulatory problem.²⁶ The approach recognizes that there are many ways to achieve a certain outcome, and a smart regulator will have all of these means at their disposal to combine in an effective way.

Meta regulation is a term used to describe regulating the regulators. Regulators have always relied to some extent on third parties to help them do their jobs. A classic example is the way in which tax agents assist individuals in filing their tax returns, and in so doing, become gatekeepers to ensure that certain tax rules are followed (this is not to suggest that all tax agents do what tax authorities want). Internationally, tax authorities regulate tax practitioners to greater or lesser degrees, knowing that through focusing attention on the taxpayer's agent they can regulate the taxpayer, at least to some extent. The meta regulation phenomenon has grown in complexity in recent decades with the growth of 'regulatory capitalism'.

Risk: Some regulators have merged risk models with responsive regulation. To regulate responsively means being aware of the risk of harm and factoring this into decisions about regulatory intervention. But risk is not the only consideration. Within a responsive regulatory framework, high risk does not mean a highly interventionist response is necessarily required. For example, some of the greatest risks to humanity are best dealt with at the base of the pyramid because the solution is complex and requires cooperation from everyone. Preventing war, or the spread of a deadly virus such as ebola, or the melt down of a nuclear reactor are such examples. Entering into adversarial positioning may not be helpful when adversaries have to work together to find a solution.

It is worth noting at this point a distinction between assessing risk and a regulatory intervention. In order to contain regulatory costs, it is not unusual for a regulator to opt for community wide education and training for self-regulation and to be satisfied with this minimal intervention for all except those identified as high risk groups. Responsive regulation then becomes an approach that is developed for those high-risk groups that may require a full regulatory pyramid to elicit compliance. The regulator still starts by listening, however. Being classified as part of a high-risk segment does not justify stigmatization from the regulator. The regulatee may be more than willing to cooperate if they just knew how to meet compliance demands. One might suppose that the thinking of those who have mapped risk onto responsive regulatory pyramids is to signal to their own staff how far they will go in their efforts to elicit compliance. Unless risk is high, they are not prepared to sequence interventions all the way up the regulatory pyramid. Often regulatees know this as well unfortunately. Their take-home message is that "my misdemeanour is not significant enough for the regulator to worry about me – nothing more will happen, I am safe continuing with my non-compliance for the moment." This way of thinking is likely to be particularly common in fields where risk assessment is a driving methodology.

²⁵ Grabosky, P.N. 1995. "Using Non-governmental Resources to Foster Regulatory Compliance," *Governance* 8(4): 527-50.

Grabosky, P.N. 1997. "Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems," *International Journal of the Sociology of Law* 25(3): 195-201.

²⁶ Gunningham, N. and P. Grabosky. 1998. *Smart Regulation: Designing Environmental Policy*. Oxford: Oxford Clarendon Press.

Summary

When our attention turns away from what a government regulator does and focuses instead on harm and the many actors who have a part to play in preventing that harm, the regulatory landscape changes. Refocusing on the problem is consistent with Malcolm Sparrow's call to "pick important problems and fix them".²⁷ This is at the heart of responsive regulation. If there is no problem, there is no need for regulators to make their presence felt in anything other than a light touch way. If there is a problem, then the sources of the problem need to be systematically analysed and the best people for fixing the problem need to be brought together to develop a plan of action. Listening, educating and persuading on the merits of new ways of doing things and deterring from old non-compliant pathways involve everyone in a learning exercise. This step legitimizes the regulatory enterprise for the regulatory community.

The increasing regulatory complexity around things that matter most to us is why responsive regulation and its development is still important as new applications emerge during its third decade. It requires strong, clear sighted and high integrity leadership from the top to ensure that regulatory activity focuses on things that matter such as saving lives, safeguarding health and well-being, promoting prosperity, and caring for the environment. Otherwise why intervene? While leaders are required to show wisdom in choosing when to regulate, the conversation as to how to regulate needs to be far more expansive, from the bottom up and sideways, if regulation is to work effectively and elicit responsible co-production within the community.

²⁷ Sparrow, M. 2000. *The Regulatory Craft: Controlling Risks, Managing Problems and Managing Compliance*. Washington DC: The Brookings Institution

