Why regulators can’t “just do something”

SLED Director Cameron Smith breaks down the legalities around why SLED can’t take action on matters outside of NSW security legislation.

One of the most common criticisms directed at regulators is, “if you know it's happening, why don't you just do something about it?”

In the security industry, this question is often raised in relation to allegations of cash payments, wage underpayments, taxation avoidance, payroll tax issues, workers compensation concerns and other forms of misconduct that may give non-compliant businesses an unfair commercial advantage over those trying to do the right thing.

The frustration behind the question is understandable. Compliant operators can feel as though they are competing on an uneven playing field. Workers may feel that their legal entitlements are not being respected. Industry participants may see patterns of conduct that appear obvious to them and wonder why a regulator is not taking direct action.

The assumption behind the question is that if misconduct appears obvious, any regulator that becomes aware of it should be able to investigate and take action. However, the reality is more complicated. Regulators do not get to choose which laws they enforce. They do not get to decide which offences they investigate simply because they consider the conduct unacceptable. They exercise the powers Parliament has given them, for the purposes for which those powers were conferred, and within the limits set by legislation.

This is sometimes described as regulators needing to “stay in their lane”. That phrase can sound defensive, but it reflects an important rule of law principle. In a lawful regulatory system, agencies do not act because they are frustrated, suspicious or morally certain that misconduct is occurring. They act because legislation gives them authority to investigate, obtain evidence, make decisions and take enforcement action.

Different regulators have different responsibilities

Governments allocate regulatory responsibility between agencies for a reason. Each regulator has its own legislation, powers, expertise, procedures, evidence-gathering tools, enforcement options and review mechanisms.

- Industrial relations matters are primarily regulated by the Fair Work Ombudsman.
- Taxation matters are primarily regulated by the Australian Taxation Office.
- Payroll tax matters are primarily regulated by Revenue NSW.
- Work health and safety matters are primarily regulated by SafeWork.
- NSW security industry licensing matters are primarily regulated by SLED.

Those boundaries are not always neat in practice. A single business model may involve security licensing issues, employment issues, taxation issues, workers compensation issues and workplace safety issues. However, the fact that a business operates within the security industry does not automatically make all misconduct a security industry offence, nor does it automatically give SLED the power to investigate every aspect of that conduct.

Where information received by SLED suggests possible breaches of legislation administered by another agency, the appropriate response is usually to refer that information to the agency with responsibility for that issue. That is not a refusal to act. It is recognition that the right regulator must use the right powers for the right purpose.

A simple analogy

The principle becomes easier to understand when applied to a different type of misconduct.

If a security business was caught dumping chemical waste into a river, few people would argue that SLED should investigate environmental offences. Most would expect the matter to be referred to the NSW Environment Protection Authority because that agency has the expertise, legislative powers and statutory responsibility to investigate environmental harm.

The same principle applies when concerns arise about industrial relations, taxation, payroll tax, workers compensation or workplace safety matters.

The issue is not whether the conduct is serious. The issue is which regulator Parliament has authorised to investigate the conduct, gather evidence and take enforcement action. While SLED is the primary regulator of the NSW security industry, that does not mean that SLED is the regulator of every legal obligation that may apply to a security business.

Knowing something is happening is not enough

A common theme of industry discussions about non-compliance is that “everybody knows it's happening”. In many cases, that may well be true in a practical sense. A regulator may receive repeated complaints, industry participants may provide examples, workers may describe what they have experienced, and competitors may point to pricing that appears inconsistent with lawful business practices. Those matters may create legitimate concern.

However, there is an important distinction between suspicion, intelligence and evidence.

Regulators do not make legally sustainable decisions based on rumour, industry gossip, frustration or general industry knowledge. They need evidence. More importantly, they need evidence that has been lawfully obtained, is relevant to the legislation being administered and can be relied upon in the relevant decision-making process.

This is where regulatory boundaries become important. If a regulator does not have authority to investigate a particular category of misconduct, it will usually lack the legal powers needed to obtain the evidence required to prove that misconduct. It may not be able to enter premises for that purpose, inspect particular documents, compel the production of records, or require answers to questions.

If the regulator oversteps its powers to obtain that material, it risks undermining its own case. Evidence obtained unlawfully may be inadmissible, or given little or no weight, in Tribunal or Court proceedings. Even where the evidence is not automatically excluded, the lawfulness of the regulator's conduct may become a central issue. That can damage the case, undermine public confidence and expose the agency to legitimate criticism.

The issue is therefore not simply whether a regulator believes misconduct is occurring. The question is whether the regulator has lawful authority to investigate the conduct, obtain admissible evidence and rely upon that evidence to support a decision that the legislation empowers it to make.

SLED's enforcement powers are not general investigative powers

Part 3B of the *Security Industry Act 1997* (the Act) gives SLED enforcement officers significant powers, including powers to enter certain premises without a warrant. However, those powers are not unlimited. The legislation provides that they may only be exercised for determining whether there has been compliance with, or a contravention of, the Act or regulations, or generally for administering the Act.

That limitation matters. It means SLED's enforcement powers are not general investigative powers. They are intended to facilitate the administration and enforcement of the security industry legislation. They cannot be used whenever an enforcement officer encounters conduct that appears concerning.

If a regulator seeks to use powers granted for one purpose to investigate matters that Parliament has assigned to another regulator, it risks acting beyond its authority. Any evidence obtained may be challenged. The decision-making process itself may become vulnerable to challenge.

Staying within jurisdiction is not merely a technical legal requirement. It is fundamental to ensuring that regulatory action is lawful, evidence-based and capable of withstanding scrutiny before a Tribunal or Court.

Findings by other regulators can still matter

None of this means that conduct identified by other regulators is irrelevant to security industry licensing decisions.

The security industry legislation recognises that offences and penalties imposed under other legislation may, in certain circumstances, affect a person's ability to obtain or retain a licence.

However, the legislation also establishes specific thresholds before those consequences arise.

The Security Industry Regulation illustrates this by providing that certain penalties imposed under the Industrial Relations Act, Australian Consumer Law or Fair Work Act may be taken into account only in relation to applications for, renewals of, or decisions to revoke Master licences, and only where at least five relevant penalties have been imposed within a two-year period.

The legislation therefore recognises that misconduct established by other regulators may have licensing consequences, but it also sets clear limits regarding when those consequences arise.

Whether those thresholds are too high, too low or appropriate is ultimately a matter of public policy.

Reasonable people may hold different views. Some may argue that licensing consequences should occur earlier, while others may regard significant licensing action as appropriate only where there is evidence of repeated or systemic non-compliance.

Whatever view is taken, regulators are required to apply the law as it exists. They do not have authority to substitute their own policy preferences for those reflected in legislation.

Avoiding multiple punishments for the same conduct

The existence of legislative thresholds also reflects a broader policy consideration. Where another regulator has investigated misconduct, obtained evidence and secured penalties under its own legislation, questions can arise about the circumstances in which a second regulator should impose an additional and more severe consequence for the same conduct.

Licensing schemes serve an important protective function by regulating who may participate in a particular industry. However, the distinction between punishment and protective regulation can become blurred where licensing consequences are severe. The revocation of a Master licence results in a business ceasing to be able to conduct security activities in NSW, with significant impact on that business's employees and customers.

Governments often establish clear thresholds for when misconduct dealt with by another regulator can be relied upon in licensing decisions. Those thresholds help prevent multiple regulators from punishing the same conduct in an uncoordinated or disproportionate way, while providing regulated businesses with greater certainty about the consequences of non-compliance.

The limits of "fit and proper"

Some people argue that a regulator should simply rely on broader concepts such as whether a person is "fit and proper" or whether holding a licence would be contrary to the public interest.

Those concepts are important, but they are not blank cheques. Where legislation specifically addresses a particular category of conduct and establishes thresholds for when that conduct becomes relevant, considerable care is required before relying on broader discretionary provisions in a way that would effectively bypass those thresholds.

It is also important to understand that "fit and proper" and "public interest" determinations are not simply matters of personal opinion. While they involve the exercise of judgement, that judgement must still be based on evidence and relevant facts. A regulator cannot simply conclude that a person is not fit and proper, or that licensing action is in the public interest, because it dislikes particular conduct or has concerns that cannot be substantiated. Any decision must be capable of being justified by reference to the evidence available and the legislation being administered.

Again, the issue is not whether the conduct is acceptable, it's whether the regulator has lawful authority to take the proposed action on the evidence available.

Why staying in the lane matters

The "stay in your lane" principle is sometimes dismissed as regulators looking for reasons not to become involved. In reality, it is a safeguard.

It helps ensure that regulators exercise only those powers Parliament has chosen to confer upon them. It helps ensure that evidence is obtained lawfully and for a proper purpose. It helps protect the integrity of enforcement outcomes by reducing the likelihood that decisions will be successfully challenged. It also helps ensure that businesses and individuals are not subjected to investigations or sanctions that exceed the authority intended by Parliament.

None of this means the current framework is necessarily perfect. There will always be debate about whether regulatory boundaries, legislative thresholds, agency powers and information-sharing arrangements strike the appropriate balance. Those are legitimate policy discussions but are matters for Government and Parliament to decide.

Regulatory boundaries do not mean inaction

None of this should be read as suggesting that SLED is passive in its approach to non-compliance within the security industry.

Over many years, SLED has taken significant enforcement action against security businesses and operatives who have breached the security industry legislation. Those actions have included licence revocations, prosecutions, penalty infringement notices and other enforcement outcomes against businesses and individuals involved in unlicensed security activities, unauthorised subcontracting, misleading information, failures to comply with lawful requirements, undisclosed close associates and other serious breaches of the legislation.

Some of those outcomes are published on the NSW Police Force website as **Significant Enforcement Actions**. They provide practical examples of what can happen when evidence establishes non-compliance with the security industry legislation and SLED is able to act within the powers Parliament has given it.

The growth of the licensed security industry also provides important context. In April 2011, around the time SLED was established, there were 3,905 Master licensees and 39,953 licensed security operatives in NSW. Today, there are over 6,600 Master licensees and more than 62,000 licensed security operatives.

Many factors will have contributed to that growth. However, I believe SLED's sustained focus on identifying and addressing unlicensed security businesses and operatives has played a role in ensuring people and businesses operating in the security industry become appropriately licensed.

The issue is therefore not whether SLED is willing to use its powers. The issue is that those powers must be used for the purposes for which Parliament granted them.

In summary

When people ask why SLED does not simply take action against every instance of alleged misconduct that comes to its attention, they are usually focusing on whether the conduct appears to have occurred. From a regulatory perspective, however, that is only the starting point.

The more relevant questions are whether SLED has jurisdiction to investigate the conduct, whether it has lawful authority to obtain the evidence required to prove it, whether that evidence can be relied upon in Court or Tribunal proceedings, and whether the proposed regulatory response is consistent with the legislation being administered. Those questions are not bureaucratic obstacles. They are fundamental safeguards within a system governed by the rule of law.

This can sometimes be frustrating for industry participants who see misconduct occurring and want immediate intervention. However, the answer is not for regulators to act beyond their authority. Regulators should be judged not by whether they attempt to solve every problem that arises within an industry, but by whether they exercise the powers Parliament has conferred upon them lawfully, fairly and effectively. Sometimes that will involve direct enforcement action, sometimes it will involve referring information to another agency, and sometimes it will involve relying on findings made by another regulator where legislation permits those findings to be taken into account. In every case, however, a regulator's obligation is to act within the framework established by Parliament, not outside it.