

## **NATIONAL COMPLIANCE AND ENFORCEMENT POLICY**

### **1. Introduction**

The Commonwealth, state and territory governments have agreed to harmonised work health and safety laws to improve work health and safety, provide consistent protection for Australian workers and reduce the regulatory burden.

To fully realise the benefits of harmonised work health and safety laws, the governments have recognised the need for harmonised work health and safety laws to be complemented by a nationally consistent approach to compliance and enforcement<sup>1</sup>.

This policy sets out the principles endorsed by the Workplace Relations Ministers' Council that underpin the approach work health and safety regulators (the regulators) will take to monitoring and enforcing compliance with the Work Health and Safety Act and Regulations. It operates alongside other nationally agreed policies and procedures governing the use of specific regulatory tools, or policies that may be specific to each regulator where they relate to the regulator's interface with the criminal justice system in their jurisdiction. This policy is available on the website of each work health and safety regulator and Safe Work Australia.

Safe Work Australia is an Australian Government statutory agency with responsibility for improving work health and safety and workers' compensation arrangements across Australia. The Agency is jointly funded by the Commonwealth, state and territory governments facilitated through an Intergovernmental Agreement signed in July 2008. The Agency is not a regulator and does not administer the work health and safety laws for any Australian jurisdiction.

Safe Work Australia's role includes developing policy dealing with compliance and enforcement of the model work health and safety laws and to ensure that a nationally consistent approach is taken by work health and safety regulators in each jurisdiction.

### **2. Aims of Compliance and Enforcement**

All Australian jurisdictions are committed to the prevention of workplace deaths, injuries and illness.

In realising this objective, work health and safety laws provide regulators with a range of functions including:

- providing advice and information to duty holders and the community
- monitoring and enforcing compliance with work health and safety laws
- fostering co-operative, consultative relationships between duty holders and the persons to whom they owe duties and their representatives
- sharing information with other regulators, and
- conducting and defending proceedings under work health and safety laws.

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<sup>1</sup> Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety made on 3 July 2008.

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The regulators seek to use an effective mix of positive motivators, compliance monitoring and deterrents to encourage and secure the highest possible levels of compliance with work health and safety laws. In doing so, there is a need to balance a number of considerations, including:

- the community's expectation that businesses and undertakings will be monitored and held accountable if they fail to comply with work health and safety laws
- the need to support workplace parties and stakeholder bodies to build capability to achieve compliance with work health and safety laws, and
- the need to work with industry, workplace parties and stakeholders to continue to promote innovation and continuous improvements in health and safety standards.

The positive motivators employed by the regulators include:

- communicating with, engaging and supporting stakeholders
- providing practical and constructive advice, information, and education about rights, duties and responsibilities
- fostering cooperative and consultative relationships between persons conducting businesses or undertakings, their workers, health and safety representatives, unions and employer organisations
- supporting and involving workplace parties in the provision and promotion of education and training, and
- providing support to health and safety representatives and entry permit holders to assist them in performing their functions and exercise their legislative powers.

Compliance monitoring activities may include inspections, audits and other verification activities with the aim of enhancing work health and safety management practices and achieving sustainable compliance with work health and safety laws. The regulators will address any identified deficiencies by using compliance and enforcement tools outlined in this policy, as considered appropriate to the circumstances.

There are a number of ways in which non-compliance is deterred by the regulators. These include:

- detecting and dealing with alleged breaches of the work health and safety laws
- undertaking inspections, audits and investigations of alleged breaches of work health and safety laws
- taking appropriate enforcement action in response to breaches
- seeking appropriate sentencing outcomes in prosecutions, and
- publishing information regarding the nature and outcome of compliance and enforcement activities.

### 3. Key Principles

The following principles underpin all work health and safety compliance and enforcement activities:

|                         |   |
|-------------------------|---|
| <i>Consistency</i>      | Regulators endeavour to ensure that similar circumstances at workplaces lead to similar approaches being taken, providing greater protection and certainty in workplace and industry. |
| <i>Constructiveness</i> | Regulators provide support, advice and guidance to assist compliance with work health and safety laws and build capability.   |
| <i>Transparency</i>     | Regulators demonstrate impartiality, balance and integrity.   |
| <i>Accountability</i>   | Regulators are willing to explain their decisions and make available avenues of complaint or appeal.  |
| <i>Proportionality</i>  | Compliance and enforcement responses are proportionate to the seriousness of the conduct.   |
| <i>Responsiveness</i>   | Compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace.   |
| <i>Targeted</i>         | Activities are focussed on the areas of assessed highest risk or the work health and safety regulators' strategic enforcement priorities.   |

### 4. Strategic enforcement priorities

The regulators set strategic priorities for their compliance and enforcement activities which are determined both nationally and locally.

To ensure consistency, responsiveness and the efficient use of resources, the regulators work collaboratively. This includes the sharing of information and intelligence, sharing tools and strategic initiatives and working together to develop and implement national campaigns. Campaigns may be implemented by collaborative efforts, for example through a coordinated national effort, or may be implemented by each jurisdiction locally.

Through sharing intelligence and participation in national campaigns, the regulators seek to:

- ensure that regulators maintain a nationally consistent approach to compliance and enforcement
- ensure that emerging national issues are dealt with appropriately, and
- address the compliance and regulatory burdens for persons conducting businesses or undertakings across more than one jurisdiction.

### 5. Monitoring and compliance

The regulators monitor compliance with work health and safety laws in a number of ways, such as through the use of inspection powers and carrying out of audits.

The regulators also receive incident notifications and requests to respond to work health and safety issues. These notifications and requests are triaged to determine an appropriate regulatory response.

The regulators also share information with each other and gather/use data and other information to target particular industries, workplaces or workplace parties for proactive compliance reviews. These proactive activities are conducted in line with the activities of assessed highest risk and the strategic enforcement priorities (see above).

Prior to determining whether to take any action in relation to a possible breach, regulators undertake inquiries to determine whether a breach has occurred and gather information that may assist in preventing future breaches.

Inspectors appointed by the regulators attend workplaces and other sites to conduct inspections and audits.

The aim of inspections and audits is to assess the extent of compliance by duty holders with work health and safety laws, and to support compliance. Inspections and audits are a feature of both planned (targeted) and response work.

Inspectors have significant powers under work health and safety laws including:

- requiring answers to questions
- requiring production of documents
- seizing items for use as evidence of an offence
- issuing of improvement and prohibition notices

Investigations are undertaken for a range of reasons, such as to determine the causes of an incident, to assess compliance with work health and safety laws, to determine what action may be needed to prevent a further occurrence, and to determine what action may be appropriate to enforce compliance with work health and safety laws. Lessons learnt from investigations also inform development of work health and safety guidance and policy, and may inform future changes to work health and safety laws.

Consistent with the principles of proportionality and responsiveness, resources available for investigation of incidents are devoted to the most serious cases. It is not possible for work health and safety regulators to investigate all issues of non-compliance with the law which are uncovered in the course of an inspection, or in response to a complaint.

The regulators will generally carry out a full investigation of a work-related death, unless there are compelling reasons for not doing so.

In determining which complaints or reports of incidents, injury or disease to investigate and in deciding the level of resources to be deployed, the regulators take account of the following factors:

- the severity and scale of potential or actual harm
- the seriousness of any potential breach of the law

- the duty holder's compliance history, including such matters as prior convictions and notices issued
- whether the duty holder was licensed or authorised to undertake certain types work
- strategic enforcement priorities
- the practicality of achieving results, and
- the wider relevance of the event, including matters of significant community concern.

The following circumstances or allegations are priority areas for investigations:

- work-related fatalities and serious injuries or where there is a risk of such outcomes
- non-compliance with inspectors' notices or directions
- offences against inspectors
- offences against health and safety representatives and matters relating to entry permit holders
- discrimination against workers on the basis of their work health and safety activities, and
- failure to notify incidents.

The regulators may conduct investigations in conjunction with other relevant agencies (e.g. police, environmental protection agencies and electrical safety agencies). In such cases, a regulator may be a lead or support agency.

## **6. Compliance and enforcement tools**

Where an inspection or investigation reveals evidence of an alleged breach, the regulators will consider what enforcement action, if any, should be taken. Health and safety risks can emerge over time and the regulators may develop new tools to respond to those risks.

A number of measures are available to regulators to compel a duty holder to remedy any identified contravention and to sanction a contravening duty holder. These measures may be used alone or in combination.

The regulators determine the most appropriate tool to be used depending on all the circumstances of a breach.

The tools that are available to the work health and safety regulators include:

- giving advice on compliance and seeking voluntary compliance
- resolving or assisting parties resolve certain work health and safety disputes
- issuing a prohibition notice
- issuing an improvement notice
- seeking an injunction

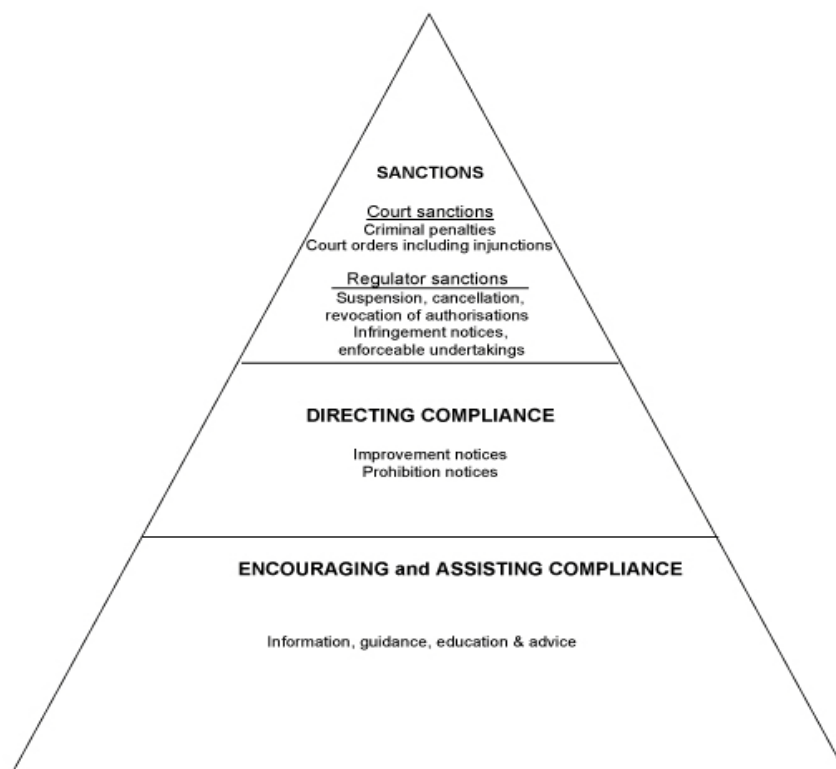
- issuing an infringement notice
- accepting an enforceable undertaking
- commencing a civil or criminal prosecution
- revoking, suspending or cancelling authorisations, and
- publishing enforcement actions and outcomes.

The following diagram represents, in the general sense, the relative volume or proportionate use of these tools and the ability to escalate if an initial intervention does not achieve the desired outcome.

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.

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

Regulators will commence their intervention using the tools that are most appropriate in the particular circumstances. Some tools, as indicated in this policy, are alternatives while others may be used in combination. Using a range of tools in the lower levels of the pyramid may often achieve compliance without needing to escalate to the more serious levels of sanctions.



## **7. Criteria which guide enforcement decision-making**

In deciding on the most appropriate action to take, the regulators are guided by the following considerations:

- the adverse effect, that is the extent of the risk, the seriousness of the breach and the actual or potential consequences
- the culpability of the duty holder, that is, how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk
- the compliance history and attitude of the duty holder
- if it is a repeat offence or there is a likelihood of the offence being repeated
- whether the duty holder was authorised to undertake certain types of work;
- impact of enforcement on encouragement or deterrence
- any mitigating or aggravating circumstances, including efforts undertaken by the duty holder to control risks
- whether the risk to health and safety is imminent or immediate, and
- whether the safety issue can be rectified in the presence of an inspector or the inspector is satisfied with a plan to remedy the breach.

Work health and safety laws impose duties on all workplace parties and these responsibilities co-exist and overlap. When determining whether to take action and against whom to take such action, the regulators consider all relevant duty holders and whether they have discharged their obligations.

In addition to these general criteria which guide decision-making, the remainder of this policy elaborates on the specific criteria which guide regulators in the use of each compliance tool.

## **8. Advice or guidance**

Advice and guidance aims to raise workplace parties' awareness of their rights and obligations and help duty holders know how to comply with work health and safety laws and build their capability to address work health and safety issues and achieve compliance.

Having provided the duty holder with advice or guidance as to how compliance may be achieved, if satisfied that a person has taken timely and satisfactory steps to remedy a breach at the time of detection or through agreed action, the regulator may decide to take no further action.

Advice and guidance can also be provided to support the use of other compliance and enforcement tools, such as improvement and prohibition notices.

## **9. Improvement or prohibition notices**

Inspectors have the power to issue improvement and prohibition notices. The aim of issuing improvement and prohibition notices is to ensure that non-compliance with work health and safety laws and serious risks is remedied.

Inspectors may issue an improvement notice in any circumstance where they form a reasonable belief regarding a contravention unless some other appropriate action is considered by the inspector to achieve the desired outcome.

Where there is a serious risk which emanates from an immediate or imminent exposure to a hazard, an inspector will issue a prohibition notice, which is a direction to prohibit an activity until the inspector is satisfied that the risk has been remedied. The direction may be given orally, but must be confirmed by written notice.

Where there is a failure to comply with an inspector's notice, the regulator may prosecute or, if there is a serious risk to health and safety, may also seek an injunction against the person to whom the notice was directed.

Improvement and prohibition notices are 'remedial' enforcement measures, not 'punitive' measures (i.e. they are not punishment). This means that in cases where punishment is warranted, other measures such as an infringement notice or prosecution may also be taken in addition to notices issued by an inspector.

## **10. Injunctions**

Injunctions may be sought by regulators to compel a person to comply with an inspector's improvement, prohibition or non disturbance notice. Injunctions are used when there is a serious risk to health and safety which has not been remedied by the person to whom the notice has been issued and other mechanisms available to the regulator have not resulted in compliance being secured.

Injunctions are likely to be sought when there are exceptional, pressing or urgent circumstances (for example, where the breach involves a significant risk to public safety).

## **11. Infringement notices**

Infringement notices are a mechanism for regulators and inspectors to impose an immediate form of punishment for certain types of breaches, sending a clear and timely message that there are consequences for non-compliance.

Infringement notices will generally be issued where there is some punishment warranted for the breach but the nature of the breach is not serious enough to warrant prosecution.

Infringement notices are only available for certain types of offences where:

- the offence involves a contravention of a more minor nature
- a prosecution of the offence would not give rise to a right to trial by jury, and
- there is prima facie evidence that an offence has been committed.

Factors which are considered relevant to the exercise of discretion to issue an infringement notice are:

- the seriousness of the risk
- the extent of any injury
- the frequency of similar conduct by the duty holder
- the prevalence of the offence in the jurisdiction and industry impact
- the duty holder's safety and compliance history

- the duty holder's co-operation and willingness to address the issue
- whether the subject matter of the offence is part of a priority intervention or campaign
- the attempts by the person to control the risk associated with the alleged contravention
- prior notice of the risk (e.g. direct to the duty holder or through educational material, safety alerts, guidance sheets etc)
- whether the circumstances warrant the application of a sanction at a lesser scale than an enforceable undertaking or prosecution (possibly in addition to remedial action in the form of an improvement or prohibition notice), and
- any mitigating or aggravating circumstances.

When exercising discretion to issue an infringement notice to a worker, the regulator or inspector will always consider whether the person conducting the business or undertaking's obligations to the worker and others have been met.

A failure to make a payment that is required under an infringement notice may result in proceedings being brought.

## **12. Civil proceedings – breaches of right of entry powers**

Civil proceedings may be brought by a regulator in relation to conduct breaching provisions relating to work health and safety entry permit holders – whether by entry permit holders or by those who owe duties to them. Although not constituting a criminal offence, a regulator may seek a monetary penalty against a permit holder or other person who fails to act in accordance with the law.

## **13. Enforceable undertakings**

An enforceable undertaking is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for a contravention of the Act. An enforceable undertaking provides an opportunity for significant work health and safety reform to be undertaken.

Typically, the activities associated with an undertaking are substantial and must aim to deliver tangible benefits to the workplace, industry or the broader community.

The availability of an enforceable undertaking in connection with a contravention will involve consideration of a number of factors, including:

- the nature and extent of the contravention
- the quality of the remedial action proposed and the extent to which it achieves measurable improvements in workplace safety
- the likelihood that the enforceable undertaking will deliver real benefits to the workplace, industry or community beyond that which would normally be expected of a duty holder.

An enforceable undertaking will generally not be accepted where the offence relates to reckless conduct or where an infringement notice has been issued for the contravention.

## **14. Prosecutions**

Prosecutions may be brought in relation to alleged breaches of offence provisions in work health and safety laws.

The question of whether to bring a prosecution for a breach of work health and safety laws is a significant one as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable. The regulators operate within a broader prosecutorial framework as part of the criminal justice system that requires the highest standard of integrity to be applied to prosecutorial decision making.

Each regulator applies the Director of Public Prosecution (DPP) guidelines specific to its jurisdiction. However the Australian DPPs have agreed upon a common set of principles to be used in determining the question as to whether or not a prosecution should be commenced or, if commenced, should be permitted to proceed. Although in some jurisdictions these criteria are expressed in different language, they do not differ in substance.

In determining whether or not to prosecute, three criteria common to all jurisdictions in the DPP guidelines need to be met. They are as follows:

- the existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings
- a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant)
- a public interest test which may include the following considerations:
  - a) the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
  - b) any mitigating or aggravating circumstances
  - c) the characteristics of the duty holder—any special infirmities, prior compliance history and background
  - d) the age of the alleged offence
  - e) the degree of culpability of the alleged offender
  - f) whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
  - g) the efficacy of any alternatives to prosecution
  - h) the prevalence of the alleged offence and the need for deterrence, both specific and general, and
  - i) whether the alleged offence is of considerable public concern.

In relation to work health and safety offences, the time for the regulator to bring charges against a person is limited. Proceedings for a criminal offence under work health and safety laws may be brought within the latest of the following:

- within two years after the offence first comes to the regulator's attention

- within one year after a coronial report was made or a coronial inquiry or inquest ended, if it appeared from the report or the proceedings at the inquiry or inquest that an offence had been committed against this Act
- within six months of a contravention of an enforceable undertaking, or
- if an offence relates to reckless conduct that creates a risk of death or serious injury/illness, at any time thereafter if fresh evidence is discovered.

Proceedings for a contravention of a civil penalty provision<sup>2</sup> may be brought within two years after the regulator first becomes aware of the contravention.

### **15. Revoking, suspending or cancelling authorisations**

The regulators authorise certain people to undertake certain types of work and organisations to conduct certain types of undertakings. For example, work involving the removal of dangerous substances such as asbestos and to operate major hazard facilities.

Regulators may decide to revoke, suspend or cancel a person's authorisation given in order to deal with inappropriate conduct or practices identified during inspection work or as a result of information received. Such action is a protective measure and may be undertaken even where steps have been taken to remedy a contravention or where an offender has otherwise been punished (ie. fined).

The regulators recognise that the revocation, suspension or cancellation of authorisations may have serious consequences for a person. When making decisions about authorisations, the regulators balance these considerations with the paramount need to protect the health and safety of workers and other persons. In making a decision whether or not to issue or renew an authorisation, the regulators will consider the person's history of compliance.

### **16. Publishing enforcement actions and outcomes**

Regulators publicise information about their enforcement actions in order to raise awareness of work health and safety laws and the consequences of non-compliance, thereby deterring people from engaging in similar conduct and promoting better practices.

Examples of the ways regulators may publicise information about enforcement actions are:

- summarising cases on their websites
- speaking to the media and sending press releases about a case
- using a case as a teaching tool at seminars, conferences and in materials distributed to various groups
- using information about a case in the regulators' publications, and
- using information from a case to gather and publish data and statistics.

At any stage of an inspection, audit, investigation or prosecution, regulators may disclose information about a case for the purposes of preventing similar offences from occurring.

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<sup>2</sup> Under work health and safety laws, civil penalties only apply to a failure to comply with obligations towards and of work health and safety entry permit holders.

The regulators may also disclose information about a case to the public at any time where they consider that it is necessary to quell speculation or to correct or forestall inaccurate media reports.

In the case of enforceable undertakings, regulators are required to publish a notice of a decision to accept an undertaking and the reasons for that decision.

At all times, regulators aim to be accurate, impartial, balanced and fair in the way in which they communicate about investigations, inspections, audits and enforcement actions.

### **17. Notification of enforcement decisions**

When a regulator makes a decision regarding whether to initiate a prosecution or enforceable undertaking following an investigation, the regulator may notify the following parties of the decision:

- the alleged offender
- the person who raised the matter with the regulator or their representative
- the person who was injured or exposed to risk, and
- the family members of a person who has died as a result of an alleged breach.

Inspectors may also provide information about their workplace inspections and any actions taken to relevant workplace parties.

### **18. Challenging decisions**

Work health and safety laws provide that certain persons can seek internal and/or external review of certain types of decisions that are made by inspectors and the regulators. The range of decisions for which a review can be sought are listed in the model WHS Act and regulations.

In relation to prosecutions, if a regulator has not brought a prosecution within six months of the date of an alleged Category 1 or 2 offence (but not later than 12 months after the date of the alleged offence), a person can request that the regulator bring a prosecution. Following a request to bring a prosecution the regulator must (within three months) advise whether the investigation has been completed, and if so, whether or not a prosecution will be brought or give reasons why a prosecution will not be brought.

### **19. Other persons who can exercise work health and safety powers**

It is also important to note that elected health and safety representatives have functions and powers under work health and safety laws, including powers to take certain actions.

Union officials who hold work health and safety entry permits have powers of entry into workplaces and other powers in relation to suspected work health and safety breaches. The authorising authority that issues the work health and safety entry permits also has certain powers to resolve a dispute about right of entry and to revoke entry permits.

### **20. More information about compliance and enforcement**

In addition to this policy, regulators each publish further details about their compliance and enforcement programs, which can be found at each regulator's website.

### **21. Periodic review**

The implementation of this policy will be reviewed by Safe Work Australia following the first anniversary of the commencement of model work health and safety laws.

This policy will also be reviewed together with the five year review of the content and operation of the work health and safety legislation.

**Australian work health and safety regulators:**

Comcare

Safework SA

WorkCover NSW

Workplace Health and Safety Queensland

WorkSafe ACT

WorkSafe Victoria

NT WorkSafe

WorkSafe Western Australia

Workplace Standards Tasmania