

NATIONAL OCCUPATIONAL HEALTH & SAFETY (OHS) COMPLIANCE AND ENFORCEMENT POLICY

1. Preamble

A broadly similar approach to workplace health and safety regulation is taken by the Australian jurisdictions. It comprises a principal occupational health and safety act which codifies common law duties of care, complemented by detailed regulations and codes of practice, and incorporates a system of education, inspection, advice, enforcement and, where warranted, prosecution. The importance of harmonisation of these occupational health and safety (“OHS”) laws is reflected by the Commonwealth’s current national review into model occupational health and safety laws.

2. Purpose of the National OHS Compliance and Enforcement Policy

The purpose of the National OHS Compliance and Enforcement Policy is to assist workplace health and safety authorities¹ to adopt a consistent enforcement effort that is effective (in terms of reducing the incidence of work related injury and disease) and efficient in achieving compliance while also maintaining community confidence that the laws are being administered fairly and consistently.²

This policy operates to support the achievement of the national targets established in the *National OHS Strategy 2002-2012*. In this regard the HWSA³ jurisdictions may target compliance and enforcement strategies to address the national priorities of:

- reducing high incidence/severity risks;
- improving the capacity of business operators and workers to manage OHS effectively;
- preventing occupational disease more effectively;
- eliminating hazards at the design stage; and
- strengthening the capacity of government to influence OHS outcomes.

To promote transparency and consistency, this policy will be available on the website of each workplace health and safety authority.

2. Scope

This national policy is a principles-based document endorsed by each HWSA jurisdiction. It is interim in nature, pending the development and jurisdictional implementation of model national OHS laws. It is intended to ensure consistency in outcomes and that common approaches are taken by workplace health and safety

¹ See Appendix B

² Workplace health and safety authorities strive to ensure compliance with the OHS laws that they administer. Achieving safer and more productive workplaces through compliance with the law is the desired end result or outcome. Enforcement activities are but one of a range of tools used by workplace safety authorities to secure this outcome. Strategies that do not involve enforcement, but are designed to achieve the compliance outcome, are referred to in this document as compliance strategies.

³ Heads of Workplace Safety Authorities at www.hwsa.org.au

authorities to the laws they administer. Each workplace health and safety authority will customise its policies to reflect its particular legislative and administrative framework and the national policy.

3. Aims/Purpose of Compliance and Enforcement

Workplace health and safety authorities implement compliance and enforcement strategies in order to:

- ensure dutyholders have access to information about OHS laws and how to comply;
- ensure dutyholders comply with OHS laws or if they fail to comply ensure they are held to account;
- ensure duty holders eliminate or properly control risks;
- take action to deal immediately with serious risks;
- promote and achieve sustained compliance with the law; and
- deter non-compliance and prevent workplace injury.

4. Key Principles

The key principles of regulation underpinning compliance and enforcement activities of the workplace health and safety authorities are that they be:

Consistent regulators will endeavour to ensure that similar circumstances at workplaces lead to similar enforcement outcomes, thus providing greater protection and certainty at the workplace

Constructive regulators provide support, advice and guidance to help people comply with OHS laws

Transparent regulators demonstrate impartiality, balance and integrity

Accountable regulators are willing to explain their enforcement decision making and uphold avenues of complaint or appeal

Proportionate compliance and enforcement responses are proportionate to the seriousness of the non-compliance

Targeted to areas of highest risk or strategic enforcement (eg to protect vulnerable workers)

5. Compliance and Enforcement strategy

How do workplace health and safety authorities go about ensuring compliance?

The modern workplace health and safety authority uses a wide selection of compliance strategies ranging from information, advice, persuasion, co-operation, inspection, verification and compulsion through to deterrence activities. The primary emphasis is on assisting industry to comply with occupational health and safety

obligations through the provision of programs that build industry capability to properly manage workplace risks.

Workplace health and safety authorities have adopted a strategy to use an effective mix of positive motivators and strong deterrents to achieve compliance with the law and improved health and safety. This strategy seeks to encourage dutyholders to comply while ensuring that there are fair and swift consequences for those who do not. A wide range of measures are available to authorities ranging from advice, education and information to the issue of compliance notices and prosecution and/or removal of licence or other authorisation or permission. The provision of information, advice, education and assistance are important elements in achieving compliance.

6. The compliance and enforcement strategy is two pronged:

Risk based compliance and enforcement

Firstly, the policy aims to apply resources and target compliance and enforcement actions to areas of greatest risk to health and safety. Risk-based compliance and enforcement seeks to target the resources available to each workplace health and safety authority to areas of greatest need and where they are most likely to have the greatest impact on improved working environments.

Responsive compliance and enforcement

Secondly, in order to ensure that regulatory response is effective at leading to sustained compliance at the workplace, compliance and enforcement measures also seek to be responsive to the particular circumstances of the dutyholder or workplace that is the subject of attention.

Responsive regulation seeks to use the most effective and appropriate enforcement measures to achieve compliance.

Responsive sanctioning complements responsive compliance and enforcement. The principles governing such sanctioning aim to:

- change the behaviour of the dutyholder;
- eliminate any financial incentive of non-compliance ;
- be proportionate to the nature of the offence and the harm caused;
- reduce the harm caused by regulatory non-compliance, where appropriate;
- deter future non-compliance; and
- be responsive and consider what is appropriate for the particular dutyholder.

7. Compliance and Enforcement Measures

What are the workplace health and safety authority's tools when non-compliance is detected?

A mixture of measures both formal and informal are available to workplace health and safety authorities to require a dutyholder to remedy any identified breach of OHS laws however not all have the same enforcement tools.

The following measures are common to all jurisdictions and might be invoked or implemented alone or in combination:

- immediate compliance by the dutyholder;
- issue of an improvement notice requiring compliance by a certain date;
- issue of a prohibition notice that prohibits a practice or use of plant or equipment until it can be undertaken or used safely;
- oral or written directions ;
- prosecution.

Measures available to some workplace safety authorities include:

- enforceable undertakings;
- non-disturbance notices;
- cease work or other directions by health and safety representatives;
- infringement notices, expiation notices;
- injunctions;
- civil remedies; and
- loss of licence.

In addition there are a range of informal measures that may be adopted which might include conferencing with the identified dutyholder and warnings issued to such dutyholders.

The availability of administrative challenges to inspectors' decisions is supported by all workplace safety authorities.

8. Enforcement Criteria

What criteria are applied when enforcing the OHS legislation?

Most enforcement activity is undertaken by inspectors who adopt a flexible and responsive approach with the provision of advice, education and assistance being recognised as important elements in achieving compliance.

In making a decision whether or not to take enforcement action, and what type of enforcement action is appropriate in the circumstances, relevant considerations are:

- adverse effect, that is, the extent of the risk, the seriousness of the breach and the actual or potential consequences;

- culpability of the dutyholder, that is, not necessarily the consequence of the lack of compliance, but rather how far below acceptable standards the conduct has fallen;
- compliance history and attitude of the dutyholder; and the likelihood of the offence being repeated;
- whether the dutyholder has a licence or permission to undertake any activity;
- impact of enforcement on encouragement or deterrence;
- any mitigating or aggravating circumstances, including the extent of effort a dutyholder has expended in controlling 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.

An inspector will consider the dutyholders in the workplace and determine if each has discharged his or her duties under the Act. Such dutyholders might include:

- employers, including contractors and labour hire companies;
- employees and other workers;
- officers and/or directors of corporations;
- persons who control or manage workplaces;
- designers of plant, buildings and structures;
- manufacturers of plant and substances;
- suppliers of plant or substances and persons, who install, erect or commission plant.

9. Criteria for investigation

The compliance strategy consists of a graduated approach as illustrated in the “compliance pyramid”.⁴ Information, advice and assistance are the preferred elements of interaction with a workplace and the foundation of the compliance pyramid. Compliance strategies may need to escalate if an advisory approach does not achieve the desired outcome, or is otherwise not appropriate given the circumstance. Escalation strategies graduate from inspectors’ notices, warnings, suspension or removal of a licence through to prosecution where, for example, a duty holder is demonstrating wilful disregard for health and safety obligations.

The pyramid illustrates the increasing severity of the compliance options at the workplace health and safety authority’s disposal, any of which may be utilised in isolation or combination depending on the severity of the matter in question.

Workplace health and safety authorities exercise discretion in deciding whether incidents, cases of ill health, or complaints should be investigated. The importance of maintaining a proportionate response, and particular factors to be taken into account in deciding the level and type of response to be used/taken, is recognised. In order to ensure consistency in responses to similar incidents or breaches, transparent criteria are adopted for escalation to an investigation which can potentially lead to prosecution.

⁴ See Appendix A

Investigations are undertaken in order to determine:

- compliance with the legislation;
- causes;
- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law;
- lessons to be learnt and to influence the law and guidance;
- what response is appropriate to an alleged breach of the law.

To maintain a proportionate response, most resources available for investigation of incidents will be devoted to the more serious circumstances. It is neither possible nor necessary to investigate all issues of non-compliance with the law which are uncovered in the course of preventive inspection, or in the investigation of reported events.

The workplace health and safety authority will generally carry out an investigation of a reportable work-related death, unless there are specific reasons for not doing so, in which case those reasons should be recorded, such as when the incident appears not to be work-related or is outside the authority's jurisdiction.

In selecting which complaints or reports of incidents, injury or occupational ill health to investigate and in deciding the level of resources to be used, the workplace health and safety authority will generally 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 dutyholder's compliance history, including such matters as prior convictions and notices issued;
- the enforcement priorities;
- the practicality of achieving results;
- the wider relevance of the event, including matters of significant community concern or emerging issues

The workplace health and safety authority, in determining whether or not a matter should be further investigated, will have regard to the following priority areas for investigation:

- work-related fatalities and serious injuries or where there is a risk of such consequences;
- non-compliance with notices or directions;
- offences against inspectors;
- offences against persons exercising OHS responsibilities at the workplace (e.g. health and safety representatives, workplace health and safety officers, union officers or other persons authorised under the legislation);
- discrimination against employees on the basis of their OHS activities;
- failure to notify incidents.

Where an investigation reveals non-compliance the workplace health and safety authority will consider whether or not a prosecution should be commenced, or another sanction applied, or other appropriate action taken.

10. Prosecution

Prosecution in court for an OHS offence is one of several options available to the workplace health and safety authority. Prosecution is a discretionary action. Not every breach of the OHS laws is automatically prosecuted.

Who may be prosecuted?

The OHS legislation in the Commonwealth, States and Territories imposes duties on a number of persons, although their precise statutory definitions may vary⁵, and these duties co-exist and overlap. When determining liability, and whether or not to prosecute, the workplace health and safety authorities will consider all relevant dutyholders and whether they have discharged their legal duties. Those who are alleged to have breached OHS laws may be subject to a range of enforcement measures, including prosecution. When making such a decision the workplace health and safety authority will consider the role, involvement, and circumstances of each dutyholder. Consequently the authority may choose to prosecute some but not all dutyholders.

When and why will a decision to prosecute be made?

The decision on whether to bring a prosecution for a breach of OHS laws is one of the most significant as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable. Workplace health and safety authorities 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 authority adopts and will apply the Director of Public Prosecution (DPP) guidelines specific to that HWSA 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.⁶

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.
- There needs to be a reasonable prospect of conviction, that is, an evaluation of how strong is the case likely to be when presented in court. This takes 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, and the admissibility of any confession or other evidence, and any lines of defence available to the defendant.
- The public interest which may include (but is not limited to) the following considerations:
 - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature;

⁵ See list of dutyholders under heading “Enforcement Criteria”

⁶ See “Prosecutorial Guidelines” agreed by the Australian Directors of Public Prosecutions, as first articulated in 30 June 1993.

- any mitigating or aggravating circumstances;
- the characteristics of the dutyholder – any special infirmities, prior compliance history and background;
- the age of the alleged offence;
- the degree of culpability of the alleged offender;
- whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence, both specific and general;
- whether the alleged offence is of considerable public concern.

Within what timeframe must a prosecution be brought?

Various jurisdictional time limits will apply to prosecutions under the OHS legislation of each workplace health and safety authority.

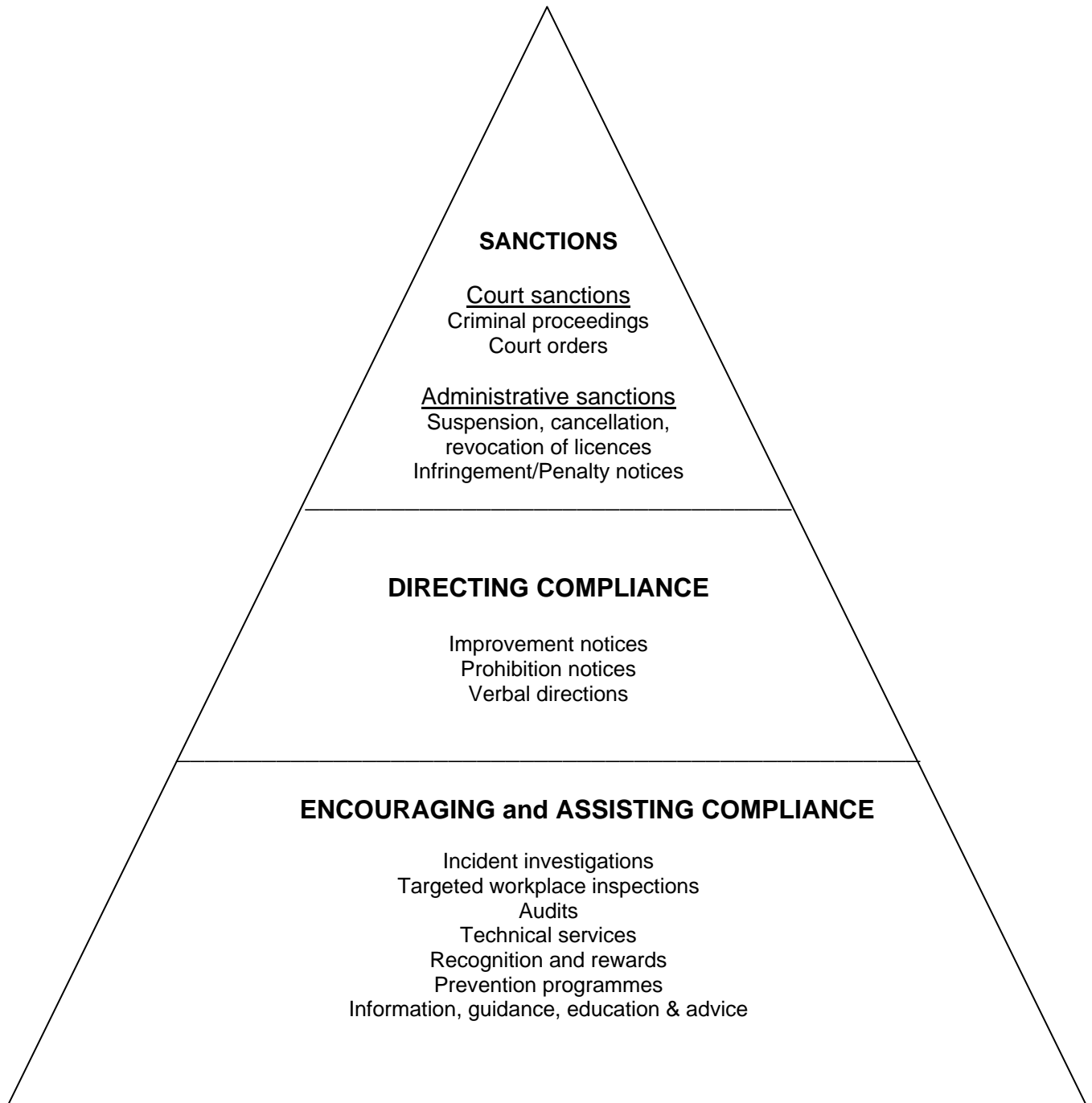
What avenues of appeal are available?

In relation to appeals from prosecutions, the various workplace health and safety authorities will be guided by the principles set out in the applicable legislation and DPP guidelines.

How will a decision be communicated?

It benefits all parties to have the outcomes of investigations communicated and each jurisdiction has processes to deal with the communication of such outcomes. Similarly it is considered that the publication of prosecution results is an effective tool for maximising the deterrent value of prosecutions and educating dutyholders.

Appendix A



Appendix B

Australian Workplace Safety Authorities

ACT WorkCover

Comcare

SafeWork SA

WorkCover NSW

Workplace Health and Safety Queensland

WorkSafe VIC

WorkSafe NT

WorkSafe Western Australia

Workplace Standards Tasmania

Appendix C

Schedule of Principal Acts

Occupational Health and Safety Act 1991 (Cth)

Occupational Health and Safety Act 1989 (ACT)

Occupational Health and Safety Act 2000 (NSW)

Workplace Health and Safety Act 2007 (NT)

Workplace Health and Safety Act 1995 (Qld)

Occupational Health, Safety and Welfare Act 1986 (SA)

Workplace Health and Safety Act 1995 (Tas)

Occupational Health and Safety Act 2004 (Vic)

Occupational Safety and Health Act 1984 (WA)

Signatories

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