

Work Health and Safety (Office of the Work Health and Safety Commissioner) Compliance and Enforcement Policy 2023*

Notifiable instrument NI2023-342

made under the

Work Health and Safety Act 2011, section 2.37 (Compliance and Enforcement Policy)

1. Name of instrument

This instrument is the *Work Health and Safety (Office of the Work Health and Safety Commissioner) Compliance and Enforcement Policy 2023*.

2. Commencement

This instrument commences on the day after notification.

3. Revocation

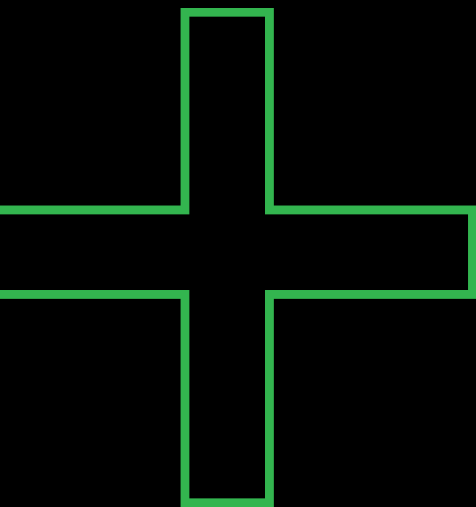
This instrument revokes the *Work Health and Safety (Office of the Work Health and Safety Commissioner) Compliance and Enforcement Policy 2020-2024* signed on 1 October 2020.

4. Notification

I make the Compliance and Enforcement Policy 2020-2024 as set out in Schedule 1.

Jacqueline Agius
Work Health and Safety Commissioner
27 June 2023

*Name amended under Legislation Act, s 60



COMPLIANCE AND ENFORCEMENT POLICY 2020-2024

Revised June 2023



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COMPLIANCE AND ENFORCEMENT POLICY

INTRODUCTION

The Work Health and Safety (WHS) Commissioner and the Office of the WHS Commissioner (WorkSafe ACT) are established under the [Work Health and Safety Act 2011](#).

The functions of the WHS Commissioner include making a Compliance and Enforcement Policy for WorkSafe ACT for every four-year period. Following consultation with the Minister and the WHS Council, the WHS Commissioner has prepared this Policy.

The Policy will be monitored and reviewed during each four-year period to ensure it continues to achieve the objectives of all stakeholders.

NATIONAL APPROACH

The Commonwealth, state and territory governments agreed to harmonised laws to improve WHS, provide consistent protection for Australian workers and reduce the regulatory burden on the person conducting the business or undertaking (PCBU).

To fully realise the benefits of harmonised WHS laws, governments recognised the need for the laws to be complemented by a nationally consistent enforcement approach achieved through the [National Compliance and Enforcement Policy](#).

In developing this Policy WorkSafe ACT has been guided by the National Compliance and Enforcement Policy with some amendments specific to the interface with the Territory's criminal justice system and to make it applicable to the ACT dangerous substances legislation. This Policy covers WorkSafe's administration and enforcement of the following legislation:

- [Work Health and Safety Act 2011](#) (WHS Act)
- [Work Health and Safety Regulation 2011](#) (WHS Regulation)
- [Dangerous Substances Act 2004](#) (DS Act), and
- [Dangerous Substances \(General\) Regulation 2004](#) (DS Regulation).

THE REGULATOR

Duty holders must comply with their obligations under the legislation to ensure workers and others are not exposed to preventable risks that may result in death, injury or illness. This Policy explains how the regulator (the WHS Commissioner) uses available enforcement tools to ensure duty holders are meeting these legislative obligations, and to create deterrents for failing to meet their duty of care.

The role of the regulator is to secure compliance through effective and appropriate monitoring and enforcement. The ACT's regulator is the WHS Commissioner. WorkSafe ACT inspectors are subject to the regulator's directions in the exercise of the inspector's compliance powers under section 162 of the WHS Act. The regulator directs WorkSafe ACT inspectors to exercise their compliance powers in accordance with this Policy.

AIM OF COMPLIANCE MONITORING AND ENFORCEMENT

The aim of WorkSafe ACT's compliance and enforcement activity is to prevent work-related deaths, injuries and diseases and to protect property and the environment from damage presented by hazards associated with dangerous substances by securing the highest possible level of compliance with the legislation.

OUR APPROACH TO COMPLIANCE MONITORING AND ENFORCEMENT

WorkSafe uses a range of tools to promote and secure compliance with the legislation by making sure:

- duty holders eliminate or minimise exposure to the risk of illness and injury
- duty holders who contravene WHS or dangerous substances requirements are held to account, and
- officers¹ of a PCBU exercise due diligence to ensure the PCBU is complying with any relevant duties.

Integral to WorkSafe's approach is the recognition that:

- duty holders in control of the work (WHS Act) or premises (DS Act) that creates the risk are in the best position to eliminate or minimise exposure to risks, and
- real and sustainable improvement in WHS or dangerous substances management and control is primarily achieved by the active involvement of all duty holders in hazard identification, management and elimination or minimisation of risk.

Our approach to compliance monitoring and enforcement includes the following key features:

- Obvious risks to the physical and psychological health and safety of workers and others are managed and any contraventions of the legislative requirements are quickly addressed.
- Targeting regulatory activity through intelligence and data analysis of risk of serious harm.
- Encouraging sustainable compliance through the provision of information and guidance that assists duty holders to take a systematic approach to WHS or dangerous substances management and to adopt effective controls to eliminate or minimise the risk of harm.
- Practicing proportionate, transparent and consistent enforcement that is responsive to the circumstances of the duty holder or workplace.
- Monitoring the effectiveness of our regulatory activities against our stated aim.

KEY PRINCIPLES

The regulator is guided by the seven nationally agreed principles when undertaking its compliance monitoring and enforcement role, exercising its regulatory responsibility and administering the legislation. These principles underpin the way WorkSafe ACT works in the following way:

<i>Consistency</i>	Compliance and enforcement decisions will be made in accordance with WorkSafe ACT's published policies. Outcomes from compliance monitoring and enforcement activities should be consistent and predictable.
<i>Constructiveness</i>	WorkSafe will provide guidance and support to help PCBUs comply with the relevant law and build capacity to identify and manage risks.
<i>Transparency</i>	WorkSafe will demonstrate impartiality and act with integrity. Those we regulate will know what to expect when dealing with us. Enforcement actions will be made public.

¹ Officers are persons who make, or participate in making decisions that affect the whole, or substantial part, of the business or undertaking of the Territory, Commonwealth or other State for the purpose of the legislation.

<i>Accountability</i>	WorkSafe is willing to explain decisions while protecting the integrity of investigations. We will balance confidentiality requirements with the need to provide information about regulatory actions.
<i>Proportionality</i>	WorkSafe will have regard for the current harm, the experience and past conduct of a PCBU when determining a regulatory response.
<i>Responsiveness</i>	WorkSafe will conduct its investigation, compliance activities and enforcement action as efficiently as possible. We will be adaptable to responding to new priorities, technologies and changing environments.
<i>Targeted</i>	WorkSafe's strategic enforcement priorities guide our actions. These are based on a range of considerations. WorkSafe targets its compliance monitoring and enforcement activities to prevent the most serious harm.

STRATEGIC ENFORCEMENT PRIORITIES

WorkSafe ACT uses data analysis; emerging trends; community, industry and union consultation; as well as *the Australian Work Health and Safety Strategy 2012-2022*. To ensure we work collaboratively WorkSafe ACT also engages with other WHS regulators. Industries, mechanisms and substances that present a significant risk of injury or illness to workers are prioritised.

The regulator's strategic enforcement priorities are outlined in the *WorkSafe ACT Strategic Plan 2020-2024*. Inspectors will have additional focus on these priorities, and if an inspector identifies a contravention in an area determined by the regulator to be a priority, the inspector will issue an infringement notice. The areas determined as a priority by the regulator will change periodically to reflect current and emerging risks.

The full list of infringement notice offences, including those indicated as priority areas for enforcement, is available on the WorkSafe website.

MONITORING COMPLIANCE

WorkSafe monitors compliance with the legislation in several ways, including using inspection powers as directed by the regulator, and carrying out audits.

WorkSafe ACT also receives incident notifications (WHS Act) or reports of dangerous occurrences (DS Act) and requests to respond to WHS or dangerous substances issues. These notifications and requests are triaged to determine an appropriate regulatory response.

Prior to determining what action to take in relation to a possible breach, WorkSafe ACT undertakes inquiries to determine whether a breach has occurred and gather information that may assist in preventing future breaches.

Inspectors 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 the legislation, and to ensure compliance. Inspections and audits are a feature of both planned (targeted) and response work.

Inspectors have significant powers under WHS and dangerous substances laws including:

- requiring answers to questions
- requiring production of documents
- seizing items for use as evidence of an offence, and
- issuing 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 the 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 the laws. Lessons learnt from investigations also inform development of WHS or dangerous substances guidance and policy and may inform future changes to the 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 regulators to investigate all issues of non-compliance with the law.

WorkSafe will carry out a full investigation of a work-related death, unless there is a valid reason for not doing so, for example, when another agency is taking the lead role in the investigation.

In determining which complaints or reports of incidents, injury or disease to investigate and in deciding the level of resources to be deployed, WorkSafe ACT takes 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 of work
- strategic enforcement priorities
- the practicality of achieving results, and
- the wider relevance of the event.

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
- substantial damage to property or the environment from the handling of or exposure to dangerous substances
- non-compliance with inspectors' notices or directions
- offences against inspectors
- offences against health and safety representatives (HSRs) and matters relating to entry permit holders
- discrimination against workers on the basis of their WHS activities, and
- failure to notify incidents (WHS Act) or failure to report dangerous occurrence (DS Act).

WorkSafe may conduct investigations in conjunction with other relevant agencies (e.g. the Australian Federal Police, the Environmental Protection Authority or Access Canberra). In such cases, WorkSafe may be a lead or support agency.

COMPLIANCE AND ENFORCEMENT TOOLS

Where an inspection or investigation reveals evidence of an alleged breach, WorkSafe will consider what enforcement action will be taken.

A number of measures are available to WorkSafe ACT 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.

WORKSAFEACT

The tools that are available to the regulator include:

- giving guidance on compliance and seeking voluntary compliance
- resolving or assisting parties resolve certain WHS disputes
- entering into a compliance agreement (DS Act)
- 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.

Where an inspection or investigation reveals evidence of an alleged breach, WorkSafe has a range of tools to use depending on the circumstances. WorkSafe is a strong regulator which will take immediate action when warranted.

When the inspector identifies a contravention, they are required to use their powers under the legislation to address the contravention. Sanctions are the appropriate starting point as opposed to guidance or remedial actions.

Aim	Compliance and Enforcement Tool
Voluntary compliance	Guidance
Deterring non-compliance	Remedial actions: Improvement notice Prohibition notice Punitive actions: Injunctions Infringement notice
Sanctions (penalising an offender)	Prosecution Revoking, cancelling or suspending authorisations
	Accept an enforceable undertaking ²

WorkSafe ACT determines the most appropriate tool to be used in accordance with the decision-making process which appears at the end of this Policy. These measures work as an effective incentive for compliant behaviour and as a deterrent to non-compliance.

² Enforceable undertakings are an alternative to legal proceedings in some cases. An EU is voluntary and is initiated by the PCBU. An EU cannot be accepted for Category 1 offences.

CRITERIA WHICH GUIDE ENFORCEMENT DECISION-MAKING

In deciding on the most appropriate action to take, WorkSafe ACT is 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 through the application of higher order controls as far as is reasonably practicable, and
- 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.

Whether there is a single issue, or multiple issues that result in several enforcement decisions, inspectors consider the overall enforcement approach, including whether it:

- deals with the most serious risks in order of priority
- takes account of the magnitude of the breaches and provides a proportionate response to the level of risk
- adequately addresses systemic problems with a focus on common causation factors
- secures sustained compliance, including system wide changes where multiple contraventions are apparent, and
- influences and deters other duty holders in the same industry.

WHS legislation imposes duties on all workplace parties and these responsibilities co-exist and overlap. Similarly, dangerous substances legislation places duties on everyone involved in handling dangerous substances. When determining what action to take and against whom to take such action, WorkSafe considers 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 prescribes how each compliance tool will be used by the regulator.

INFORMATION ABOUT COMPLIANCE

Where there isn't an apparent contravention or where the level of risk management does not meet the legal requirements for issuing a notice, an inspector may provide practical guidance and compliance support. In the circumstances where general information and advice is provided without a notice being issued, the inspector may follow this up by providing information in writing (e.g. email) with the regulator retaining a record of the information provided. For example, in a post workplace visit email, the inspector may provide links to, or copies of, any guidance or research discussed during the visit.

Guidance will raise parties' awareness of their rights and obligations and help duty holders know how to comply with the laws and how to address WHS or dangerous substances issues. An inspector may suggest resources to provide practical guidance and support to assist duty holders to voluntarily comply with the law from such

reputable sources as the WorkSafe ACT website, Codes of Practice, Safe Work Australia or other WHS regulator websites, and Australian/New Zealand Standards.

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

IMPROVEMENT NOTICES

Inspectors have the power to issue improvement notices to ensure that non-compliance with WHS or dangerous substance laws are remedied.

Improvement Notice: Issued to a duty holder to ensure non-compliance (a contravention) with WHS laws are remedied. It cautions the workplace about an unsafe practice, particular hazard or potential risk to health and safety. The notice requires corrective action to be taken within a specified timeframe. Separate notices are issued for identified hazards or alleged breach. Improvement notices can also be issued under the *Dangerous Substances Act 2004*.

Inspectors will issue an improvement notice in all cases where they reasonably believe that a person is contravening a provision of the legislation; or has contravened a provision and believes it is likely that it will continue or be repeated. The exception to this is where immediate rectification of a contravention occurs while the inspector is at the workplace. During workplace visits inspectors may identify contraventions that the duty holder can rectify in the presence of the inspector to achieve immediate compliance. Immediate rectification of contraventions will be recorded by the inspector. Contraventions that cannot be immediately rectified will result in a notice to remedy.

Where the contravention is evidence of a systematic management failure the inspector will issue an Improvement Notice that addresses the systematic management failure.

The purpose of an improvement notice is to focus the duty holder on the tasks to be carried out in order to remedy a contravention or any causal factors to achieve compliance with their duties under the legislation. For example, an inspector may issue a notice to remedy a contravention of risk management or hazard control provisions. The inspector may also issue a notice to address broader, or higher-level duties under the legislation.

The notice stipulates the contravention, the provision that is being contravened (or is likely to be contravened), and a time frame (a compliance period) by which the duty holder must comply with the notice. The notice may also contain directions for measures to be taken to remedy the contravention or prevent a recurrence, or likely recurrence of the contravention.

Where there is a failure to comply with an inspector's notice, the regulator may prosecute. Failure to comply with an improvement notice under the WHS Act may also result in a fine (infringement notice) being issued.

Improvement notices are 'remedial' enforcement measures (i.e. they require the person to remedy the contravention), not 'punitive' measures (i.e. they are not punishment).

An improvement notice may also be issued even when a prohibition notice or electrical safety protection notice has been issued. Unless the contravention is otherwise addressed by a prohibition notice, an improvement notice will be issued where the contravention cannot be immediately remedied while the inspector is at the workplace or onsite.

PROHIBITION NOTICES

Where there is a serious risk which emanates from an immediate or imminent exposure to a hazard, an inspector will issue a prohibition notice:

Prohibition Notice. Is a direction to stop an activity (immediately) until the inspector is satisfied the risk has been remedied. This direction can be given verbally and confirmed in writing. A prohibition notice will be issued in circumstances where there is a serious risk emanating from an immediate or imminent exposure to a hazard.

Prohibition notices will be issued by an inspector to stop an activity that is occurring or may occur at a workplace if they reasonably believe the activity involves, or would involve, a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard. For example: unguarded machinery or working at heights without any control measures.

Where the direction has been given orally, the direction must be confirmed by a written prohibition notice and given to the person that has control over the activity as soon as reasonably practicable. The notice will stipulate the matter that gives rise to the risk (or is likely to give rise to the risk) and, the provision in the legislation that is being, or is likely to be contravened. The prohibition notice may also contain recommendations such as measures that could be taken to remedy the contravention.

Improvement notices may also be issued at the same time to address any underlying failure, including systematic management provisions under the relevant legislation that led to the serious risk arising.

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. Prohibition notices are 'remedial' enforcement measures (i.e. they require the person to remedy the contravention), not 'punitive' measures (i.e. they are not punishment).

A prohibition notice may also be issued even when an improvement notice or electrical safety protection notice has been issued. Unless the contravention is otherwise addressed by an improvement notice or where the contravention cannot be immediately remedied while the inspector is at the workplace or onsite.

NON-DISTURBANCE NOTICES

An inspector may issue a non-disturbance notice if they reasonably believe it is necessary to do so to facilitate the exercise of their powers. For instance, a non-disturbance notice may be issued to preserve the site at which a notifiable event has occurred, or to stop any disturbance of a particular site (including plant, substance, structure or thing associated with the site), for a specified time that is reasonable in the circumstances (of no more than 7 days).

The non-disturbance notice must state the period of non-disturbance; the obligations of the person to whom the notice is issued; the measures to be taken to preserve the site; and the penalty for contravening the notice. A non-disturbance notice does not prevent any action, to assist an injured person, remove a deceased person, make the site safe to prevent further injury, that is associated with a police investigation, or for which an inspector has given permission. PCBUs, HSRs and right of entry holders will be given permission to enter a worksite according to the non-disturbance notice to carry out their duties under WHS legislation.

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.

WORKSAFEACT

The Dangerous Substances Act also allows for an injunction to be sought when a person has committed, is committing or is likely to commit an offence against this Act.

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

SANCTIONS

Sanctions, such as an infringement notice, licence suspension, enforceable undertaking (EU) or prosecution are penalties for non-compliance and act as a further incentive to comply with the legislation. Sanctions also act as a general deterrent for other duty holders who may consider contravening their duties.

INFRINGEMENT NOTICES

Infringement notices: (on the spot fines) 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 be issued where there is some punishment warranted for the breach, there is prima facie evidence that an offence has been committed but the nature of the breach is not serious enough to warrant prosecution.

Infringement notices are issued under the [Magistrates Court Act 1930](#). There are currently over 150 infringement notice offences for contraventions of the WHS legislation [Magistrates Court \(Work Health and Safety Infringement Notices\) Regulation 2011](#), and over 70 for contraventions of the dangerous substances legislation [Magistrates Court \(Dangerous Substances Infringement Notices\) Regulation 2004](#).

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

- the prevalence of the offence in the jurisdiction and industry impact
- whether the subject matter of the offence is part of a priority intervention or campaign
- the extent of any injury
- the seriousness of the risk
- the duty holder's safety and compliance history
- the duty holder's co-operation and willingness to address the issue
- 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 determining whether to issue an infringement notice to a worker, the regulator or inspector will always consider whether the PCBU'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 before the court.

An infringement notice may be revoked, and the matter referred for prosecution in circumstances where further investigation reveals that there is reason to pursue a higher order sanction. If the recipient of an infringement notice makes full and proper payment of the penalty, then the liability of the alleged offence is discharged, and no prosecution may be brought. However, where the fine has not been paid, or payment has commenced by instalment and not satisfied in full, the infringement notice may be withdrawn, the penalty amount already paid refunded, and prosecution commenced.

The recipient of an infringement notice has a right to dispute liability of the notice. They may elect to have the decision to issue the infringement notice internally reviewed by WorkSafe or they may also elect to have the matter heard in court so they can explain themselves to a magistrate.

CIVIL PROCEEDINGS – BREACHES OF RIGHT OF ENTRY POWERS (WHS ACT)

Civil proceedings may be brought by a regulator in relation to conduct breaching provisions relating to WHS entry permit holders – whether by entry permit holders or by those who owe duties to them.

ENFORCEABLE UNDERTAKINGS

The WHS Commissioner may accept an undertaking as an alternative to prosecuting a contravention of the WHS or dangerous substances laws.

An WHS undertaking cannot be accepted for a category one offence under the WHS Act (s.31).

Once an undertaking is accepted by the regulator it is enforceable. An enforceable undertaking is a legally binding agreement intended to improve not only WHS or the management of dangerous substances, but also deliver tangible benefits to the workplace, the relevant 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, and
- the likelihood that the enforceable undertaking will deliver real benefits to the workplace, industry or community beyond what would normally be expected of a duty holder.

The regulator's decisions about EUs are made in accordance with its *Enforceable Undertakings: General Guidelines* available on WorkSafe's website. WorkSafe also publishes enforceable undertakings the regulator has accepted under the WHS Act.

PROSECUTIONS

Prosecutions may be brought in relation to alleged breaches of offence provisions in WHS or dangerous substances laws. Prosecuting duty holders will provide a powerful deterrent to others and ensures that those who contravene the legislation are held to account. It draws attention to the consequences of contravening the legislation.

The question of whether to bring a prosecution for a breach of the 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. WorkSafe operates 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.

WORKSAFEACT

Where the regulator considers that a prosecution for WHS offences should be initiated, the WHS Commissioner may commence proceedings for an offence against the WHS Act. In commencing a proceeding under the WHS Act, s 230 provides two methods for doing so:

1. the WHS Commissioner can commence a proceeding in its own right pursuant to s 230(1) of the Act, or
2. the WHS Commissioner may refer a matter to the Director of Public Prosecutions (DPP) under s 230(2) for the DPP to consider commencing a proceeding on behalf of the WHS Commissioner. Information about the DPP, including its [Prosecution Policy](#), may be found at www.dpp.act.gov.au.

Where the WHS Commissioner decides to commence a proceeding in accordance with s 230(1) of the WHS Act, the WHS Commissioner will be required to follow the process for starting criminal proceedings within Ch 3 of the Magistrates Court Act 1930 (Magistrates Court Act). This includes laying information in accordance with Pt 3.3 of the Magistrates Court Act.

In determining whether to prosecute, three criteria need to be met:

- 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), and
- 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 availability and 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 WHS offences, the time for the regulator to bring charges against a person is limited. Proceedings for a criminal offence under WHS 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 the WHS 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 may be brought within two years after the regulator first becomes aware of the contravention.

REVOKING, SUSPENDING OR CANCELLING AUTHORISATIONS

The regulator authorises 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.

If necessary, the regulator will suspend or cancel a person's authorisation 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 (that is, fined).

WorkSafe recognises that the revocation, suspension or cancellation of authorisations may have serious consequences for a person. When making decisions about authorisations, WorkSafe ACT balances these considerations with the paramount need to protect the health and safety of workers and other persons. In deciding whether to issue or renew an authorisation, WorkSafe ACT will consider the person's history of compliance.

PUBLISHING ENFORCEMENT ACTIONS AND OUTCOMES

WorkSafe publicises information about its enforcement actions in order to raise awareness of WHS or dangerous substances laws and the consequences of non-compliance, thereby deterring others from engaging in similar conduct and promoting better practices.

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

In the case of enforceable undertakings under the WHS Act, WorkSafe is required to publish a notice of a decision to accept an undertaking and the reasons for that decision.

At all times, WorkSafe will act in a way that is accurate, impartial, balanced and fair in how it communicates about investigations, inspections, audits and enforcement actions.

Details of WHS prosecutions and accepted enforceable undertakings are available on WorkSafe's website.

NOTIFICATION OF ENFORCEMENT DECISIONS

When WorkSafe decides whether to initiate a prosecution or accept an enforceable undertaking following an investigation, WorkSafe ACT 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.

OTHER PERSONS WHO CAN EXERCISE WHS POWERS

It is also important to note that elected HSRs have functions and powers under WHS laws, including powers to take certain actions.

Union officials who hold WHS entry permits have powers of entry into workplaces and other powers in relation to suspected WHS breaches. WorkSafe, when issuing a WHS entry permit, also has certain powers to resolve a dispute about right of entry and to revoke entry permits.

CHALLENGING DECISIONS

There are a number of decisions made by WorkSafe that are reviewable. These are listed in the WHS Act (s. 223), WHS Regulation (reg. 676) and the DS Regulation (Schedule 5). An eligible person may apply to WorkSafe for an internal review of the decision.

If an internal review is sought, the dispute must be in writing and state the grounds for the review.

Formal reviews of decisions are undertaken by the ACT Civil and Administrative Tribunal (ACAT). There are time limits to seek a review of decisions and fees may apply. ACAT has various powers which include confirming the decision, varying the decision or setting aside the decision. For more information on ACAT or the appeals process, visit www.acat.act.gov.au.

In addition to ACAT, a person who has a complaint about a decision can complain to the ACT Ombudsman at www.ombudsman.act.gov.au.

PERIODIC REVIEW

This policy will be reviewed at least once every four years (or where legislative amendments require a revision) to:

- address any operational inefficiency with the policy
- ensure the policy is achieving its objective, and
- reflect new approaches to compliance and enforcement.



OVERVIEW OF THE WHS ENFORCEMENT DECISION-MAKING PROCESS

