



POLICY

Compliance and enforcement

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1 Introduction

Under the *Work Health and Safety Act 2020* (WHS Act), the WorkSafe Commissioner is the regulator and is responsible to the Minister for the administration of the WHS Act and any other law relating to work health and safety.

The regulator is supported by the Department of Mines, Industry Regulation and Safety (DMIRS) and its officers. The regulator appoints DMIRS' officers as WorkSafe inspectors who are authorised to effect the investigative powers provided to them under the WHS Act¹. The regulator may also delegate their powers to any other person under the WHS Act².

The policy is modelled on Safe Work Australia's National Compliance and Enforcement Policy, which is available on the Safe Work Australia website. The policy is further supported by the regulator's *Prosecution policy*.

2 Purpose of this policy

This policy provides a balanced and nationally consistent framework to meet the main objective of the WHS Act to attain a safe working environment for workers and other persons at workplaces. Therefore, compliance and enforcement actions undertaken pursuant to the WHS Act must contribute to that goal.

The regulator operates as a risk-based safety regulator and therefore requires the flexibility to make decisions based on priorities to effectively achieve the object of the WHS Act using available resources. The policy:

- facilitates transparency and accountability in the compliance with and enforcement of the WHS Act
- supports the harmonisation of work health and safety across Australian jurisdictions, which is a central object of the WHS Act
- ensures that decisions relating to compliance and enforcement under the WHS Act are based on appropriate criteria, which are capable of being applied fairly and consistently across a broad range of circumstances to which the WHS Act applies.

¹ *Inspectors are appointed pursuant to s. 156 and their powers are provided at s. 160*

² *s. 154*

3 Aims of compliance and enforcement

The regulator is committed to the prevention of workplace deaths, injuries and illness. In realising this objective, work health and safety laws provide the regulator 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 cooperative, consultative relationships between duty holders and the persons to whom they owe duties and their representatives
- sharing information with other regulators
- conducting and defending proceedings under work health and safety laws.

4 Compliance and enforcement principles

Principles	How the principles underpin and guide the regulator's approach
Consistency	The regulator takes a consistent approach to similar fact situations/ circumstances, to achieve greater protection and certainty in workplace and industry.
Transparency	The regulator demonstrates impartiality, balance and integrity in undertaking all compliance and enforcement activities.
Accountability and proportionality	Compliance and enforcement decision-making is made in accordance with the regulator's published policies and guidelines. The decisions will be justifiable and there will be available avenues of complaint or appeal. Compliance and enforcement measures are proportionate to the seriousness of the non-compliance.
Responsiveness	Compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace.
Risk-based	The regulator focusses activities on the areas of assessed highest risk and upon strategic enforcement priorities relating to work health and safety.
Compassionate	The regulator shows empathy and strives to understand circumstances of stakeholders in undertaking compliance and enforcement activities.

5 Strategic enforcement priorities

The regulator sets strategic priorities for the compliance and enforcement activities. To ensure consistency, responsiveness and the efficient use of resources, the regulator works collaboratively with regulators from other jurisdictions. 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 locally.

Through sharing intelligence and participation in national campaigns, the regulator seeks to:

- ensure a nationally consistent approach to compliance and enforcement
- ensure that emerging national issues are dealt with appropriately
- address the compliance and regulatory burdens for persons conducting businesses or undertakings (PCBUs) across more than one jurisdiction
- identify industries or sectors that require specific or multifaceted and coordinated enforcement responses to address identified ongoing issues.

To assist in meeting the obligations of the regulator and to deliver specific functions, organisational or structural changes may be undertaken in order to ensure the most appropriate use of resources. This may include the creation of positions, along with relevant training and development, or the movement of positions across WorkSafe directorates.

6 Monitoring and compliance

The regulator monitors compliance with work health and safety laws in various ways, which includes the use of inspection powers, carrying out of proactive or reactive enforcement activities, licence holder and assessor compliance assessments, and investigations.

The regulator shares information with regulators from other jurisdictions to target particular industries, workplaces or workplace parties for proactive compliance reviews. Proactive activities are conducted in line with the activities assessed as highest risk and the strategic enforcement priorities.

The regulator may also receive incident notifications and requests to respond to work health and safety issues. All incidents or notifications reported to the regulator are assessed through a triage process to determine an appropriate regulatory response. This process follows procedures and criteria to ensure that the regulator provides a consistent and accountable service that can be measured and evaluated fairly.

The regulator undertakes inquiries to determine whether a breach has occurred and to gather, analyse and document information that may assist in preventing future breaches.

WorkSafe inspectors, appointed by the regulator, may conduct site visits to workplaces in response to an incident, complaint or as part of a targeted proactive or reactive compliance program. The aim of inspections and investigations is to assess the extent of compliance by duty holders with work health and safety laws, and to support compliance.

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

- requiring a person to produce documents and give answers to questions
- seizing items for use as evidence of an offence
- issuing of improvement and prohibition notices.

7 Investigations

Consistent with the principles of proportionality and responsiveness, resources available for investigation of incidents are devoted to the most serious cases.

WorkSafe investigations are undertaken for a range of reasons, which include:

- determining the causes of an incident
- assessing compliance with WHS laws
- determining what action may be appropriate to enforce compliance with WHS laws.

The scope and scale of an investigation varies depending upon the nature of the issue and the compliance tools being used or considered. Investigations will generally involve:

- collection, recording and examination of all relevant evidence from the incident scene
- where appropriate seizure of evidence held by external agencies, for example, WAPOL
- where appropriate engagement of expert evidence
- collection and examination of documentary evidence, including electronic records
- interview of witnesses with evidence relevant to the incident
- interview of relevant PCBUs or their representatives.

7.1 Matters for investigation

In line with the regulator's role and functions, WorkSafe investigates incidents when information suggests a potential breach of the WHS Act may have occurred and:

- a person receives a serious injury or illness at (or from) a workplace³
- a person receives fatal injury at a workplace
- the regulator, in contemplation of the circumstances of an incident, may consider prosecution of a potential duty holder is warranted in response to the occurrence of a 'dangerous incident'.

The primary purpose of these investigations is to identify:

- whether evidence establishes a prima facie case and that the public interest may be served by initiating enforcement action
- causal variables of the incident which may be used to inform and/or assist industry avoid repetition or reoccurrence of incidents causing, or potentially causing, serious injury, illness or death.

³ Workplace as defined under s. 3

It is not possible for the regulator to investigate all issues of non-compliance with the WHS laws that are uncovered in the course of an inspection or in response to a complaint.

Priority matters for investigations include:

- 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
- serious psychosocial incidents
- sexual harassment and assault
- failure to notify occurrence of incidents
- where an incident or matter is a serious risk to a person's health or safety.

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

- the severity and scale of potential or actual harm
- the seriousness of any potential breach of WHS legislation
- 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
- the wider relevance of the event, including matters of significant community concern.

7.2 Serious injury or illness incidents

Worksafe will investigate incidents occurring at a workplace⁴, involving serious injury or illness⁵ to a worker⁶ which occurs as a result of exposure to a hazard.

Decisions as to whether investigation into a serious injury or illness event will be conducted is determined by assessment of the WorkSafe triage criteria of:

- the degree of the immediate injury or illness
- the anticipated injury/illness outcome and potential degree of any impairment
- variables that increased the injured worker's vulnerability, such as age or experience
- the work health and safety antecedents of the relevant PCBU.

⁴ Workplace as defined under s. 8

⁵ Serious injury or illness as defined under s. 36

⁶ Worker as defined under s. 7

7.3 Fatality incidents

WorkSafe will investigate notifications of fatality incidents when they occur to a person:

- at a workplace, whether or not the deceased person is a person working at the time
- as a consequence of a work activity, whether or not exposure to a hazard occurred on a workplace
- as a consequence of a motor vehicle crash involving a person who at that time was working.

7.4 Suicide events

Generally, WorkSafe will not investigate the specific circumstance of a suicide event on the basis that the Coroner of Western Australian investigates such matters. In some circumstances WorkSafe may conduct investigations into a workplace's management of psychosocial hazards following notification of a suicide event which may have connection to that workplace.

7.5 Investigation of multiple and or concurrent PCBUs

Where multiple or concurrent PCBUs with duties are identified, WorkSafe will reach separate and individual outcomes in relation to the respective PCBU based on the evidence and facts established in relation to their respective legislative duties. Accordingly, there will be circumstances where WorkSafe reaches different investigative outcomes in relation to PCBUs with duties relevant to a singular incident.

7.6 Instances where WorkSafe may not investigate

WorkSafe may not investigate the following:

- motor vehicle crashes resulting in the injury or death of a worker while travelling to work
- the death of a worker during the course of medical treatment at a medical facility
- the death of a worker that is outside WorkSafe's legislative or territorial jurisdiction.

In some instances, an incident may fall under multiple jurisdictions. As such, WorkSafe may decide not to investigate a matter that is under investigation by another agency, such as WAPOL.

WorkSafe may defer investigative action when an external regulator has criminal proceedings relating to an incident which is before an appropriate court.

8 Compliance and enforcement tools

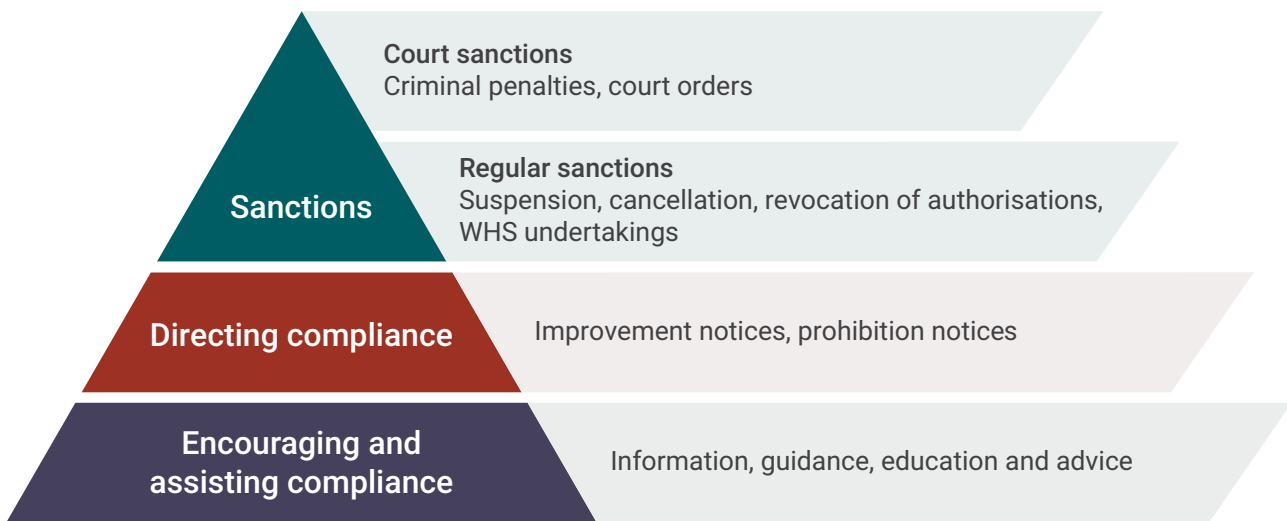
Where an inspection or investigation reveals evidence of an alleged breach, the regulator will consider what enforcement action, if any, should be taken. Health and safety risks can emerge over time and the regulator may develop new approaches to respond to those risks.

A number of measures are available to the regulator 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 regulator determines the most appropriate approach and enforcement tool to be used depending on all the circumstances of a breach.

The tools that are available to the work health and safety regulator 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
- accepting a WHS undertaking
- commencing a criminal prosecution
- revoking, suspending or cancelling authorisations
- 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 the regulator will always commence with provision of information and advice, and only use other tools in an escalated manner.

The regulator 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.

8.1 Provision of codes of practice, guidance and information

Under the WHS Act, the Minister may approve a code of practice after consulting with relevant unions and employer organisations. A code of practice may be admissible in proceedings as evidence as to whether a duty or obligation under the WHS Act was complied with. A court may have regard to a code of practice as evidence of what was known about a hazard or risk, and in determining what was reasonably practicable.

The regulator may also provide guidance and information to workplace parties with the aim of raising awareness of their rights and obligations under the WHS laws. The purpose of this is to help duty holders comply with the WHS laws, and build their capability to address WHS issues and achieve compliance.

However, information provided by the regulator, other than an approved code of practice, generally does not provide the duty holder with any additional rights or defences in relation to an alleged contravention.

8.2 Verbal directions and other informal directions

An inspector may issue a verbal direction to a duty holder about the need to correct a health and safety issue. The direction outlines required changes that must be made while the inspector is at the workplace and these changes will be reviewed by the inspector prior to their leaving the workplace. Inspectors who identify minor defects at a workplace may record the defect and require confirmation at a later time that the defect has been rectified.

Verbal directions and other informal directions are not expressly provided for in the WHS Act. If they are not complied with, then other compliance tools may need to be considered. It should be noted that a verbal direction is different to a prohibition notice (see section 8.4), which may be given orally but must be confirmed in writing.

8.3 Improvement notices

Inspectors may issue an improvement notice if they form a reasonable belief that a person is contravening a provision in the WHS Act, or a contravention has occurred and it is likely that it will continue or be repeated.

Generally, an improvement notice will be issued where non-compliance is detected that does not involve an immediate risk to health and safety. The improvement notice is issued to a person who is a WHS duty holder, for example a PCBU, worker or importer.

The workplace can usually continue to operate while the improvement notice is being actioned; however, the improvement notice will require the issue to be remedied within the period specified in the notice.

If the person does not comply with the improvement notice in the period specified, it is open to the regulator to commence a prosecution against them for failure to comply with the improvement notice.

8.4 Prohibition notices

Prohibition notices are intended to stop a workplace activity that involves a serious risk to a person's health or safety emanating from an immediate or imminent exposure to a hazard. The prohibition notice is there to prohibit the 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.

If the person does not comply with the prohibition notice, it is open to the regulator to commence a prosecution against them for failure to comply with the prohibition notice⁷. The regulator may also take any remedial action that the regulator believes is reasonable to make the workplace safe after giving written notice to the person to whom the prohibition notice was issued, and recover costs of taking the remedial action.

8.5 Revoking, suspending or cancelling authorisations

The regulator issues licences, registrations and other regulatory permissions. The regulator may decide to revoke, 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.

The regulator may also impose any condition they consider appropriate on licences issued and held under the WHS (General) Regulations 2022. 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 reprimanded.

As these decisions can have serious consequences for the relevant duty holder (and flow on effects for employees), the regulator must balance these considerations with the need to protect the health and safety of employees and/or the public. In making a decision whether or not to issue or renew an authorisation, the regulator will consider the person's history of compliance.

⁷ s. 197

8.6 Requiring production of independent report

The regulator may require a PCBU to procure, and provide to the regulator, a report that relates to work health and safety at any workplace of the business or undertaking, generally or in relation to WHS matters including a particular accident or other occurrence at any workplace of the business or undertaking⁸.

The report must be prepared by a suitably qualified person who is independent of the PCBU and who is approved by the regulator; and include any contents required by the regulator. The report must be submitted within the time frame specified by the regulator.

This authority requiring an independent report will generally be used by the regulator when matters are particularly complex and require specialist expertise.

8.7 WHS undertakings

A WHS undertaking is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for contravention of a WHS provision. It is a written commitment by a person who has committed (or may have committed) an offence to do certain things in an agreed period.

Such undertakings are voluntary, and a person cannot be compelled to make an undertaking. The regulator has the discretion whether or not to accept the undertaking. Typically, the activities in connection with an undertaking are substantial and must aim to deliver tangible benefits to the workplace, industry or broader community.

A WHS undertaking cannot be accepted for an alleged contravention that is industrial manslaughter, or a Category 1 offence⁹ and will generally not be accepted by the regulator where the offence relates to reckless conduct.

In determining whether or not to accept a WHS undertaking, the regulator is guided by the regulator's [WHS undertakings policy](#).

8.8 Prosecution

Where there is sufficient admissible evidence of a contravention of the WHS laws and prosecution would be in the public interest, the regulator may bring a prosecution. All prosecutions are conducted in accordance with the Director of Public Prosecutions (DPP) [Statement of Prosecution Policy and Guidelines 2022](#) and the [WorkSafe Prosecution Policy](#).

In determining whether or not to prosecute, the following criteria needs to be met:

- the existence of a prima facie case – whether the evidence is sufficient to justify the institution of proceedings.
- a reasonable prospect of conviction – an evaluation of the likely strength of the case when it is presented in court. This takes into account such matters as the availability, competence, and credibility of witnesses, the admissibility of evidence, and any defences available to the accused
- a public interest test – this 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
 - any mitigating or aggravating circumstances

⁸ s. 155B

⁹ A Category 1 offence is defined under s. 31

- the characteristics of the duty holder – 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.

8.9 Categories of offences

Industrial manslaughter is the most serious offence under the WHS Act¹⁰. While the regulator will investigate allegations of this offence, any prosecutions will be commenced by the DPP.

In addition to industrial manslaughter, there are three categories of offences under the WHS Act for a breach of a health and safety duty:

- Category 1 offences relate to where a duty holder's failure to comply with a health and safety duty causes death or serious harm to an individual¹¹.
- Category 2 and 3 offences involve less culpability than Category 1 offences, as there is no fault element.

In each offence if a person has a health and safety duty, and they fail to comply with that duty they commit an offence. Category 2 offences have a third element which provides that the failure to comply with the WHS duty exposed an individual to a risk of death, injury or harm.

8.10 Time limit for commencing a prosecution

A prosecution for a criminal offence under the WHS Act must be brought within the latest of the following¹²:

- within two years after the offence first came 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 a WHS undertaking
- in relation to a Category 1 offence, the WHS Act enables proceedings to be brought after the end of the applicable limitation period if fresh evidence is discovered, and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

There is no limitation period for bringing proceedings for industrial manslaughter. Where the DPP has decided not to bring proceedings for industrial manslaughter, the WHS Act provides for another offence to be brought within six months of the DPP's decision¹³. This ensures that proceedings may be commenced where the limitation period might otherwise have expired.

¹⁰ s. 30A

¹¹ *Serious harm is defined under s. 31(3)*

¹² s. 232

¹³ s. 232(4)(c)

8.11 Procedure if prosecution is not brought

If an individual considers that industrial manslaughter, a Category 1 offence or a Category 2 offence has occurred, but no prosecution has been brought in the period six to twelve months after the alleged offence, they can make a written request to the regulator to bring a prosecution¹⁴.

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. The regulator must also notify the alleged offender of these matters.

9 Enforcement criteria

In making a decision whether or not to take enforcement action, and what type of enforcement action is appropriate in the circumstances, the regulator is guided by the following considerations:

- the initial level of investigation required as assessed during the triage process
- 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
- whether the duty holder was authorised to undertake certain types of work
- impact of enforcement on encouragement or deterrence
- the characteristics of the duty holder, such as any special infirmities, age, engagement and attitude to investigation prior compliance history and background
- if it is a repeat offence, or there is a likelihood of the offence being repeated
- 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
- whether the health and safety issue can be rectified in the presence of an inspector, or the inspector is satisfied, based on evidence provided, with a plan to remedy the breach.

The WHS laws impose duties on all workplace parties and these responsibilities coexist and overlap. When determining whether to take action and against whom to take such action, the regulator will consider all relevant duty holders and whether they have discharged their obligations.

¹⁴ s. 231

10 Publishing enforcement actions and outcomes

The regulator may publish information about enforcement action and outcomes in order to raise awareness of WHS laws and the consequences of non-compliance, with the aim of deterring people from engaging in similar conduct and promoting better practices.

The regulator may publicise this information through a variety of methods including, but not limited to:

- website
- media statements and interviews
- conferences and public forums
- publications
- research.

In the case of WHS undertakings, the regulator is required to publish a notice of a decision to accept an undertaking and the reasons for that decision¹⁵.

In relation to a prosecution, the court may also make an adverse publicity order, which requires the offender to publish the offence, its consequence and the penalty¹⁶.

The regulator will endeavour to ensure that all published information is accurate, impartial and balanced, and encourages compliance with WHS laws.

11 Notification of enforcement decisions

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

- the alleged offender¹⁷
- the person who raised the matter with the regulator or their representative
- the person who was injured or exposed to risk
- 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.

¹⁵ s. 217(2)

¹⁶ s. 236

¹⁷ *If a prosecution is commenced, the prosecution notice will be issued*

12 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 regulator. The range of decisions for which a review can be sought are listed in the 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.