



**NSW
Resources
Regulator**

PROSECUTION GUIDELINES



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Introduction

Purpose

This guideline explains the approach that the NSW Resources Regulator will take when considering prosecution action in response to breaches of legislative obligations under the regulatory frameworks that it administers. The Regulator's capacity to prosecute the entities it regulates is an important discretionary power and regulatory tool, and in appropriate circumstances prosecution action will be taken.

This guideline is published in accordance with section 230(4)(a) of the *Work Health and Safety Act 2011*. This guideline should be read in conjunction with the Regulator's [Compliance and Enforcement Approach](#), which outlines the aims of compliance and enforcement as well as the tools available to the Regulator.

The overall goal of any prosecution undertaken by the Regulator is to promote regulatory compliance and to assist in building and maintaining community confidence in the regulatory oversight provided by the Regulator.

A decision to begin proceedings for a breach of legislation is a serious decision, with potential operational, financial and reputational impacts for both the Regulator and the affected business/individual. A clear and consistent governance framework regarding the decision-making process for prosecutions is crucial to ensure that proportionate and appropriate compliance action is taken in response to breaches.

This guideline has been published to help explain:

- the basis on which the Regulator will make a decision to prosecute
- the factors the Regulator will take into account in deciding which person is the appropriate defendant
- how the Regulator will make a decision regarding the specific charges it lays.

This guideline is not legally binding on the Regulator or on any other organisation. It is however intended to form part of the Regulator's policy on compliance and enforcement, and to provide guidance on the decision-making process the Regulator uses when considering appropriate compliance action. The guideline is also a key tool in educating the community and regulated entities on the processes undertaken and factors considered by the Regulator when assessing whether to proceed with prosecution action.

Who we are

The NSW Resources Regulator, within the NSW Department of Planning, Industry and Environment, is responsible for compliance and enforcement functions across the mining and energy sectors. This includes undertaking a range of activities to ensure duty holders maximise compliance with resources and safety legislation and taking enforcement action where appropriate.

Principles of prosecution

Prosecution is one tool within the Regulator's overall compliance and enforcement strategy. There are a range of other compliance and enforcement tools that can be used depending on the nature and type of breach being dealt with. The Regulator applies the following principles in relation to prosecutions:

- The key aim of the enforcement action the Regulator chooses is to encourage compliance with legislative obligations. Prosecution is a strategic response the Regulator may choose based on the circumstances and supporting evidence. The Regulator recognises that prosecution may not always be the most effective means of promoting compliance and considers all alternatives to achieving compliance such as the issuing of warning letters, statutory notices, penalty infringement notices, enforceable undertakings, and other compliance tools.
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Releasing information about enforcement actions draws attention to the consequences of breaking the law. When the Regulator releases information regarding prosecutions¹, this is done to help educate others and encourage compliance.

Making a decision to prosecute

Who may prosecute

The regulatory functions exercised by the Regulator are made possible under legislation that creates an authority to regulate, and there are multiple legislative instruments administered by the Regulator.

¹ The Regulator has a Public Comment Policy which explains when we comment publicly on our activities, our general approach to public comment and limitations on informing the public of our regulatory activities which is available on our website.

Where prosecution action is available as an enforcement tool under the legislation, authority to pursue prosecution is either directly vested in the Regulator or established by virtue of section 14 of the NSW *Criminal Procedure Act 1986*.

When prosecution may occur

The Regulator treats prosecution as one of its strongest regulatory responses to a breach of the legislation, along with other serious compliance actions such as licence or authorisation suspension/cancellation. As with all enforcement actions, the primary aim of prosecution is to encourage compliance. In appropriate circumstances, prosecution acts as a deterrent and sends a message to the industry and community that a failure to comply with the law may be dealt with by the courts.

However, there are finite resources available to pursue expensive enforcement actions like prosecutions, so informed decisions must be made on when this is the most effective response. This decision is made on a case-by-case basis with regard to the circumstances of the matter being dealt with. Generally, the Regulator will consider taking prosecution action for serious breaches of the legislation, or in situations where other enforcement actions have proven ineffective and the regulated entity has demonstrated a clear intention not to comply.

Factors relevant to undertaking prosecutions

The NSW Director of Public Prosecutions (DPP) is the independent prosecutorial body for NSW and has developed *Prosecution Guidelines* for all NSW government bodies. Under these guidelines, the public interest is the paramount consideration in determining whether the Regulator will prosecute a matter or not. The guidelines dictate that whether the public interest requires a matter be prosecuted is in turn based on:

- whether there is a prima facie case
- whether there are reasonable prospects of conviction, and
- whether discretionary factors are such that the matter should not be prosecuted.²

² See NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007, <<http://www.odpp.nsw.gov.au/prosecution-guideline>>.

Establishing a prima facie case

Before any prosecution is considered, there must be sufficient admissible evidence available and capable of establishing each element of the offence (a prima facie case).

Reasonable prospect of conviction

Secondly, consideration must be given to the prospects of a conviction. This requires an exercise of judgment that will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. A relevant consideration in the evaluation of the strength of a prosecution case will be the existence or otherwise of evidence to support any defence that may be raised by the defendant.

Discretionary factors

Thirdly, consideration must be given to discretionary factors such as but not limited to:

- the seriousness or triviality of the offence or whether the breach is of a technical nature only
- any mitigating or aggravating circumstances
- the length of time since the alleged offence
- the degree of culpability of the alleged offender in relation to the offence
- whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute
- the prevalence of the alleged offence and the need for both specific and general deterrence
- any prior breaches of, or convictions under the legislation
- whether or not the alleged offence is of considerable public concern
- any precedent which may be set by not instituting proceedings
- the age, physical or mental health, or special infirmity of the alleged offender or witnesses or a victim
- the length and expense of a court hearing

- whether proceedings are to be instituted against others arising out of the same incident
- community expectations that proceedings will be instituted
- the availability and efficacy of any alternatives to prosecution³
- whether another government agency has taken a prosecution in respect to the same facts and circumstances.

The applicability of and weight to be given to these and other factors will vary, depending on the particular circumstances of each case.

Irrelevant considerations

The Regulator has established policies and governance frameworks to ensure that its exercise of prosecutorial discretion is not influenced by any inappropriate considerations, such as:

- any elements of discrimination against the person, that is the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved
- personal empathy or antipathy towards the alleged offender or victim
- the political or other affiliations of those responsible for the prosecution decision
- possible political advantage or disadvantage to the government or any political party, group or individual.

Alternatives to prosecution

Some of the laws administered by the Regulator provide options to exercise strong regulatory responses that may be considered alternatives to prosecution. For example, enforceable undertakings are able to be accepted following breaches of some legislation. Enforceable undertakings are often able to achieve a greater benefit for the community than could be gained through prosecution alone.

Where there is an alternative but comparably strong regulatory response available under the relevant legislation, the Regulator will consider undertaking this action.

³ Ibid

Who may be prosecuted?

Selecting defendants

Liability under the relevant legislation is imposed on a wide range of entities who may have participated in or contributed to an offence. This can mean that multiple regulated entities (either individuals or organisations) may have committed an offence arising out of a single incident. It is not always appropriate to prosecute every entity who may be liable for an offence.

The Regulator will, when selecting appropriate defendants, assess:

- who is primarily responsible for the alleged offence, that is:
 - who was primarily responsible for the acts or omissions giving rise to the alleged offence
 - who was primarily responsible for the material circumstances leading to the alleged offence
 - who formed any relevant intention.
- the potential effectiveness of any court orders that might be made against the proposed defendant.

Corporate and officer/executive liability

Corporations and officers (such as directors and managers) may attract liability for offences under the legislation as a result of their actions or inactions. The legislation makes provision for:

- the limited offences for which director/managerial liability can be attributed to an individual under the Acts, and
- the legal test set out under the Acts in relation to director/officer/managerial liability for corporate liability offences.

The test, as set out in the various legislative instruments, requires the relevant person to be a director of the corporation, or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence.

Worker/individual liability

Proceedings may be brought by the Regulator against a worker, contractor or subcontractor, agent or person where an offence has occurred, regardless of whether that person has embarked on a venture of their own making and volition, or one that is outside the scope of their employment/engagement and without the explicit approval of their employer.

Determining charges

Once a decision is made to deal with an alleged contravention of the legislation by way of prosecution, it is in the public interest for that prosecution to succeed. The Regulator is responsible for selecting charges that are consistent with the seriousness of the offence and that it can prosecute successfully.

Any charges laid must reflect the nature and extent of the conduct disclosed by the evidence, with the aim of providing a basis for the court to impose an appropriate penalty.

Similar charges for the same offence

The Regulator has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence. There will be occasions where an act or omission will be prohibited under two separate statutes and involve an offence under each. Laying duplicate or multiple charges will be avoided unless considered appropriate in the circumstances.

Continuing offences

The Regulator will assess whether to lay a charge for a continuing offence or separate charges depending on the act or omission. The main consideration when making this determination is:

- whether there was a single act or omission that gave rise to the offence, and
- whether the consequences of the act or omission continued over a period of time.

The Regulator will usually lay a charge for a continuing offence if a single act or omission has continuing consequences. Similarly, where there has been continuing or multiple acts or omissions, it would be appropriate to lay a charge for a continuing offence.

Evaluation of prosecution proposals

The process of evaluating proposals relating to prosecutions and court-elected matters can be very complex. In light of this complexity, the Regulator convenes for each of these matters a review panel of senior officers, with appropriate skills and expertise to review the matter. The panel will review the matter in a timely manner and in alignment with the ODPP guidelines, assessing whether:

- there is admissible evidence available capable of establishing each element of the offence (a prima facie case)
- there are reasonable prospects of conviction, and
- whether there are any discretionary factors relating to the matter that would suggest the matter should not proceed.

A recommendation is then provided to the relevant decision-maker about whether or not prosecution action should be pursued.

Note: Proceedings where an entity has chosen to have a penalty notice determined by a court are not subject to the above governance arrangements.

Commencing proceedings

Prosecution proceedings will not be commenced without the concurrence the Secretary of the department (or delegate).

Seeking legal advice

Before commencing prosecution proceedings, the Regulator engages appropriate legal advice either internally or externally on the matter.

Appeals

Decisions to appeal a sentence following a prosecution judgement are treated in a similar way to the initial decision to prosecute. These decisions are made on a case-by-case basis with regard to all of the circumstances of the matter. In particular, the Regulator considers:

- whether there was a material error of fact or law in the initial proceedings
- how likely the prosecution is to succeed, and
- whether the sentence was manifestly inadequate.

Decisions to appeal will only be commenced with the concurrence of the Secretary of the department (or delegate).

Costs

The Regulator will seek to recover its investigation, legal and administrative costs in respect to any successful prosecution.