

FACT SHEET

Request the regulator to commence a prosecution under the WHS Act 2011 in relation to a mine or petroleum site

March 2016

Introduction

This fact sheet is provided to help people who are considering making a request to the regulator (i.e. the NSW Department of Industry under section 231 of the *Work Health and Safety Act 2011* to commence a prosecution in relation to a workplace that is a mine or petroleum site.

This fact sheet relates to a situation where a person reasonably believes a category 1 or 2 offence under the WHS Act has occurred and the department has not commenced a prosecution between 6 and 12 months of the event occurring.

For information or to raise an issue about an investigation being undertaken by the department, please contact the Mine Safety Compliance Officer on 02 4924 4024.

Request for a prosecution

Section 231(1) of the WHS Act allows a person who reasonably considers that a category 1 or 2 offence has been committed, if no prosecution has been brought, to make a written request to the department to bring a prosecution. The request can only be made between 6 and 12 months after the event occurred.

Request about any offence under the WHS Act

The procedure under section 231 of the WHS Act only applies to category 1 or 2 offences. These offences are provided for under sections 31 and 32 of the WHS Act respectively.

A category 1 (section 31) offence occurs if:

- a) the person has a health and safety duty and
- b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness and
- c) the person is reckless as to the risk to an individual of death or serious injury or illness.

A category 2 (section 32) offence occurs where a person has a health and safety duty and fails to comply with that duty, and the failure exposes an individual to a risk of death or serious injury or illness.

There is a further category of offence, which is a category 3 (section 33) offence. However, a request for prosecution cannot be made for a category 3 offence.

Providing information with the request

Your written request should state that it is made under section 231 of the WHS Act.

You should set out the facts of the event (including the date, place and names of the people concerned) and how you believe the event constitutes a category 1 or 2 offence. The request should identify the individual or company you believe committed the offence.

The request should also include your contact details so that the department can contact you to obtain further information. In some cases, the department may ask you to provide a statement or other information in support of your request.

How to make the request for prosecution

The request must be in writing.

We prefer that request be submitted via email to the address below. Alternatively, you may mail or fax your request. Please only submit your request via one method. The request must only be sent to the addresses below.

Email: compliance.minesafety@industry.nsw.gov.au

Mail: Prosecution request

NSW Department of Industry, Skills and Regional Development
Mine Safety Compliance Officer
PO Box 344
Hunter Region Mail Centre NSW 2310

Fax: (02) 4914 0089

You should use the *Request the regulator to commence a prosecution in relation to a mine or petroleum site form* to request that a prosecution be brought. Proper completion and submission of the form will allow for a timely assessment of the request by the department.

Confidentiality

The department will maintain confidentiality over your details to the extent required and permissible by law. Section 271 of the WHS Act sets out the department's confidentiality obligations when it exercises its powers under the WHS Act.

To properly investigate some matters, it may be necessary to disclose some of the details of the information you have provided, which may allow your identity to be revealed.

Within three months of receiving the request, the department must advise the person who you believe committed an offence of the application, whether the investigation is complete, and if it is complete, whether a prosecution will be brought.

Response time

Within three months of receiving the request, the department must advise you in writing whether the investigation is complete, and if it is complete, whether a prosecution will be brought.

If the decision has been made not to bring a prosecution, the department must tell you the reasons for that decision.

The department must advise you in writing within three months whether the investigation is complete. If it is not complete, the department's policy is to advise you when the investigation has been completed, and whether a prosecution will be brought.

Enforceable undertakings

The department will not enter into any proposed enforceable undertaking until the request under section 231 of the WHS Act has been determined.

If the department has accepted an enforceable undertaking in relation to an alleged breach of the Act, a prosecution for the same breach can be commenced, but only if the enforceable undertaking is contravened and under certain circumstances.

When the department decides not to prosecute

If the department decides not to prosecute, the department must advise that you may ask for the matter to be referred to the Director of Public Prosecutions (DPP) for consideration. The DPP is the independent state prosecution authority.

If you make a written request to the department to refer the matter to the DPP, the department must refer the matter to the DPP within one month of your request.

Referring matters to the Director of Public Prosecutions

The request must be in writing. The department will send you a form to complete in order to request that the matter be referred to the DPP.

We prefer that request be submitted via email to the address below. Alternatively, you may mail or fax your request. Please only submit your request via one method.

Prosecution Request
NSW Department of Industry, Skills and Regional Development
Mine Safety Compliance Officer
PO Box 343
Hunter Region Mail Centre NSW 2310
Fax: (02) 4914 0089
Email: compliance.minesafety@industry.nsw.gov.au

What the Director of Public Prosecutions will do

The DPP will consider the matter and within one month advise (in writing) the department as to whether the DPP considers that a prosecution should be brought. The department must ensure that a copy of the DPP's advice is given to you and to the person you believe committed the offence.

If the Director of Public Prosecution advises that a prosecution should be brought, does the department have to prosecute?

No. If the department declines to follow the DPP's advice to prosecute, the department must give written reasons for the decision. The reasons must be given to you and the person who you believe committed the offence.

Can anyone else prosecute?

Yes. The DPP has a general power to bring proceedings for any offence against the WHS Act and the WHS (Mines and Petroleum Sites) Act. Section 230(5) of the WHS Act provides that nothing in that section affects the DPP's ability to bring proceedings.

Further information

For further information, contact the Mine Safety Compliance Officer by one of the following methods:

Email: compliance.minesafety@industry.nsw.gov.au

Telephone: 02 4924 4024

Fax: 02 4914 0089

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Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (April 2016). However, because of advances in knowledge, users are reminded of the need to ensure that information upon which they rely is up to date and to check currency of the information with the appropriate officer of the NSW Department of Industry, Skills and Regional Development or the user's independent advisor.

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