

WORKCOVER AUTHORITY OF NEW SOUTH WALES

Compliance Policy and Prosecution Guidelines

February 2004

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WORKCOVER AUTHORITY OF NEW SOUTH WALES

COMPLIANCE POLICY AND PROSECUTION GUIDELINES

SECTION A - GENERAL

1. INTRODUCTION

ROLE OF WORKCOVER

- 1.1 The WorkCover Authority of New South Wales (WorkCover) is a statutory corporation constituted pursuant to section 14 of the *Workplace Injury Management and Workers Compensation Act 1998*. WorkCover exercises various powers and authorities and has duties and functions under the legislative framework for occupational health and safety and workers compensation in NSW.
- 1.2 The legislative framework includes the following enactments:
- *Occupational Health and Safety Act 2000* and the regulations and codes of practice made under the Act;
 - *Dangerous Goods Act 1975* and its regulations;
 - *Workers Compensation Act 1987*, the *Workplace Injury Management and Workers Compensation Act 1998*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* and the regulations, instruments and guidelines made under the authority of those acts; and
 - *Sporting Injuries Insurance Act 1978* and its regulations.
- 1.3 The functions of Workcover include:
- ensuring compliance with the workers compensation legislation and the occupational health and safety legislation;
 - responsibility for the day to day operational matters relating to the schemes to which any such legislation relates;
 - investigating workplace incidents; and
 - assisting in the provision of measures to deter and detect fraudulent workers compensation claims.

1.4 In exercising its functions, WorkCover is required to:

- promote the development of healthy and safe places of work;
- promote the prompt, efficient and effective management of injuries to persons at work;
- ensure the efficient operation of workers' compensation insurance arrangements; and
- ensure the appropriate co-ordination of arrangements for the administration of the schemes to which the workers compensation legislation and the occupational health and safety legislation relates.

WORKCOVER'S APPROACH

1.5 WorkCover's Corporate Plan has the following focus:

Vision: we aspire to safe and secure workplaces.

Mission: we aim to work in partnership with the New South Wales community to achieve safe workplaces, effective recovery and return to work and security for inured workers.

Objectives: we will foster injury and illness prevention and improve the viability of the workers compensation scheme.

1.6 In the exercise of its obligations to ensure compliance with workplace laws, WorkCover may take a number of different approaches (education, information, incentives and enforcement) depending on the nature of the issue that has arisen. The approach to be adopted in any particular matter will depend on an assessment of the circumstances of the workplace issue as well as consideration of a range of factors as detailed in Section B below.

1.7 Regardless of the reasons for its interaction with a workplace, WorkCover applies the general principles of transparency, proportionality, consistency and accountability in undertaking its compliance and prosecution roles.

Transparency

WorkCover will make all attempts to ensure that parties understand what is expected of them and of WorkCover in relation to the workplace interaction, the reasons for the workplace visit, without breaches of confidentiality, any actions which have to be undertaken in the workplace and the reasons why, and any arrangements for follow up activities.

Proportionality

The approach taken by WorkCover during workplace interaction will be proportionate to the identified risk to health and safety, the seriousness of any perceived breach, or the level of non-compliance with legislative requirements. Any decision to proceed to prosecution will be weighed in the light of the public interest to be protected.

Consistency

Workplaces with similar risks, comparable levels of non-compliance or extent of seriousness of breach can generally expect a uniform approach from WorkCover.

Accountability

As a public sector agency WorkCover is accountable to the Government, statutory investigatory bodies such as the Ombudsman and ICAC, and to the broader community for the actions undertaken by it in the course of performing its legislative roles.

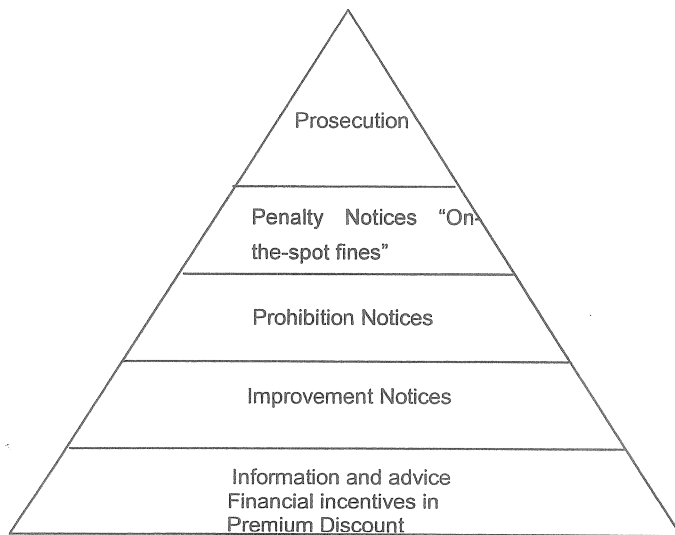
SECTION B

2. POLICY CONSIDERATIONS – COMPLIANCE

COMPLIANCE GENERALLY

- 2.1 WorkCover's role is not limited to monitoring compliance with the legislation it administers. It also provides a range of services to assist those with obligations under the legislation to meet those obligations. For example, WorkCover:
- provides information, advice and assistance through a range of services including its web site at www.workcover.nsw.gov.au and the WorkCover Assistance Service on 131 050.
 - issues permits and licences for a wide range of activities including storage of dangerous goods, the importation, manufacture, selling and use of explosives, and the use of prescribed plant that affects public safety;
 - provides technical advice in areas ranging from hazardous substances to lifts, manual handling to safety management systems;
 - administers the Premium Discount Scheme which gives financial incentives to employers achieving safer workplaces and better return-to-work outcomes for injured workers; and
 - conducts various information and education programs.
- 2.2 To achieve compliance, WorkCover uses a variety of strategies to reinforce workplace health and safety. These include strategic compliance programs and prosecutions in targeted industries, not limited to circumstances where workers are killed or injured, but where a risk to health and safety is evident.
- 2.3 WorkCover encourages a systematic approach to managing workplace risks, where workplace hazards are identified, associated risks are assessed and action is taken to eliminate those risks. Where the risks cannot be eliminated, they must be controlled. Risk management principals are an integral part of WorkCover's information products, training packages and major programs.
- 2.4 WorkCover also seeks to ensure compliance with the statutory obligation to take out appropriate workers compensation insurance and to deter fraudulent claims.
- 2.5 WorkCover is also responsible for ensuring compliance with the restrictions on advertising workers compensation services that apply to lawyers and their agents.
- 2.6 To support compliance strategies WorkCover has a range of compliance options available for use. The options include the provision of information ; the issue of improvement notices, prohibition notices; penalty notices (on-the-spot fines); or the taking of prosecution action in appropriate matters. The type of

option used will depend on the circumstances and the level of risk to life or injury or to the circumstances involved in the workers compensation non-compliance.



This pyramid reflects the increasing severity of the compliance options at WorkCover's disposal, but is not meant to imply a staged response. WorkCover will choose one or more options based on the individual circumstances of the matter.

- 2.7 Consideration may be given to commencing a prosecution instead of or in addition to applying alternative compliance actions (such as the issuing of improvement or prohibition notices), where the issue of notices is not considered sufficient for ensuring compliance with the relevant legislation.
- 2.8 WorkCover inspectors are directly involved with compliance activities in the workplace. A workplace interaction can be undertaken for a number of reasons including:
- in response to an incident or complaint regarding occupational health and safety (OHS), workers compensation or injury management;
 - as part of a planned audit program;
 - under a targeted intervention program in response to identified hazards, high-risk industries, poor-performing employers or non-compliant employers.
- 2.9 WorkCover has a discretion to determine the appropriate method of achieving compliance. Compliance and enforcement decision-making is structured and involves consideration of the factors outlined in this policy. The decision to take court action is often not the compliance action of first choice, rather it is made after a careful consideration of a range of factors, including whether advice or a penalty notice is the most effective way of achieving compliance.
- 2.10 The following sections deal more specifically with the practical application of WorkCover's compliance policy under the OHS legislation and under the

workers compensation legislation including guidelines in relation to prosecutions.

SECTION C

3. COMPLIANCE – OCCUPATIONAL HEALTH & SAFETY

MAKING WORKPLACES SAFER

- 3.1 WorkCover and industry have a shared objective to make workplaces safe as well as ensuring the care, support and return-to-work of injured workers. While WorkCover works co-operatively with industry to help achieve safe and healthy workplaces, employers and workers have the primary responsibility for workplace safety.
- 3.2 WorkCover promotes a systematic risk management approach where hazards are identified, associated risks are assessed and action is taken to eliminate those risks. Where the risks cannot be eliminated, they must be controlled. Risk management principles are an integral part of WorkCover's information products, training packages and major programs.

THE OCCUPATIONAL HEALTH AND SAFETY ACT 2000 AND THE OCCUPATIONAL HEALTH AND SAFETY REGULATION 2001

- 3.3 From 1 September 2001 important new workplace safety laws came into effect in New South Wales. The NSW Government has introduced the *Occupational Health and Safety Act 2000* (the OH&S Act 2000) and the *Occupational Health and Safety Regulation 2001* (the OH&S Regulation 2001) (the OH&S legislation) to update and simplify laws relating to health and safety in all NSW workplaces. The new laws have been written in plain English and contain new provisions that require employers to consult with employees on health and safety matters.
- 3.4 The objects of the OH&S Act 2000 are to:
- secure and promote the health, safety and welfare of people at work
 - protect people at a place of work against risks to health or safety arising out of the activities of persons at work
 - promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs
 - provide for consultation and co-operation between employers and employees in achieving the objects of this Act
 - ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled
 - develop and promote community awareness of occupational health and safety issues

- provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices
- protect people against risks to health and safety arising from the workplace and the use of prescribed plant that affects public safety.
(see section. 3 of the OH&S Act 2000).

SCOPE OF OH&S LEGISLATION

- 3.5 The primary focus of the OH&S legislation is workplace safety. Protection of people against risks to health and safety arising from the use of plant that affects public safety is also an objective of the OH& S Act.
- 3.6 The major duties under the OH&S Act are set out in sections 8, 9, 10, 11, 20 and 26 of the OH&S Act. Section 8(1) requires an employer to ensure the health, safety and welfare at work of all the employees of the employer. Section 8 (2) creates an obligation on an employer to ensure that people (other than employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.
- 3.7 Section 9 creates an obligation on a self-employed person to ensure that people, other than the employees of the person, are not exposed to risks to their health or safety rising from the conduct of the person's undertaking at the person's place of work.
- 3.8 Section 10 imposes a duty on persons who have to any extent, control of non-residential premises used as a place of work (or control of any plant or substance provided for use of persons at work) to ensure that the premises, plant or substance is safe and without risks to health.
- 3.9 Under section 11, a person who designs, manufactures or supplies any plant or substance for use by people at work must:
- (a) ensure that the plant or substance is safe and without risks to health when properly used, and
 - (b) provide, or arrange for the provision of, adequate information about the plant or substance to the persons to whom it is supplied to ensure its safe use.
- 3.10 A duty is placed on employees by s20, while at work, to take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.
- 3.11 Under section 26, if a corporation contravenes, whether by act or omission, any provision of the Act or regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

3.12 A place of work is defined in the OH&S Act as 'premises' where persons work. 'Premises' is in turn defined to include: "any place, and in particular includes:

- (a) any land, building or part of any building, or
- (b) any vehicle, vessel or aircraft, or
- (c) any installation on land, on the bed of any waters or floating on any waters, or
- (d) any tent or movable structure.

3.13 Section 135 of the Act extends certain provisions of the Act (but not sections 8, 9, 10 or 20) to plant affecting public safety. This plant includes boilers and pressure vessels, escalators, lifts, moving walks and scaffolding. The OH&S Regulation 2001 imposes duties in relation to plant.

LIMITS OF OH&S JURISDICTION

3.14 Not every incident or risk to health and safety is within the scope of the OH&S legislation, although those that arise at premises comprising places of work will normally be so. For instance, incidents or risks on public roads or associated with recreational or leisure activities taking place in open areas would not normally be within the scope of the OH&S legislation. Issues of public safety in these places and involving these activities are usually the responsibility of other agencies such as the Roads and Traffic Authority, the Environment Protection Authority, Police, the Department of Health or the Department of Sport and Recreation. WorkCover has a number of agreements in place with other State agencies to prevent duplication in areas where there is potential for a number of legislative provisions to be called into action

OH&S REGULATION

3.15 The OH&S Regulation 2001 supports the OH&S Act 2000. It sets out requirements for workplaces for putting into place systems to identify, assess, control and/or eliminate health or safety risks. It also details how the duty to consult with employees about health and safety can be met. The Regulation provides broad coverage for all workplaces along with specified control measures for particular hazards and industry activities. These include:

- work premises and working environments generally with particular reference to fall prevention, control of asbestos, working spaces, noise management, atmosphere, working at heights, electricity in the workplace, working in confined places and manual handling;
- controls in relation to the design, manufacture, importation and sale of certain plant;
- control of hazardous process and substances; and
- safety in construction work.

- 3.16 Employers, directors, managers, supervisors and others who are in a position to influence health and safety in the workplace need to understand and comply with the duties set out in the OH&S legislation. One way to achieve compliance is to exercise *due diligence*. This requires individuals to take every precaution reasonable in the circumstances relating to the particular case.
- 3.17 People who design, manufacture and supply plant and substances also have obligations under the OH&S legislation and associated legislation such as the *Dangerous Goods Act 1975*.
- 3.18 NSW Government authorities must also comply with the OH&S legislation and are subject to the same sanctions as the rest of the community.
- 3.19 Workers, too, have a responsibility to co-operate with their employer's reasonable requirements imposed in the interests of health, safety and welfare.

APPROVED CODES OF PRACTICE

- 3.20 An approved code of practice gives practical guidance on how the required standards of health, safety and welfare can be met in a specific area of work. Failing to observe a relevant approved code of practice can be used as evidence that a person or company has failed to comply with the OH&S legislation.
- 3.21 Copies of the OH&S Act 2000, the OH&S Regulation 2001, and approved codes of practice are available from the WorkCover web site at www.workcover.nsw.gov.au. As well, there is a range of material that provides information and advice on occupational health and safety issues.

COMPLIANCE STRATEGIES

- 3.22 Inspectors visit places of work for many reasons. These reasons may be for example as part of a specific targeted compliance program or in response to a workplace safety complaint. Targeted programs are a strategic and focused way of improving workplace health and safety in NSW. Priority areas, including industries and workplaces are identified by using statistical information on specific areas of concern occurring in particular areas and industries.
- 3.23 Inspectors investigate workplace accidents involving serious injury or death as a matter of course. They also visit workplaces when serious health and safety issues or risks are brought to their attention. Regardless of the reason for their visit to the workplace, inspectors evaluate the situation at the workplace and choose what action, if any, to take or recommend. The evaluation takes into account a number of factors, including:
- the nature of the workplace issue and how serious it is;
 - commitment in the workplace to implementing systems that will ensure a lasting improvement to occupational health and safety;
 - the time the workplace may need to address the issue.

- 3.24 The inspector will often accompany workers or supervisors, or both, around the work site, talk to a range of people and gather as much information as possible about the workplace. They may ask to see proof of a current workers compensation policy, the register of injuries and check WorkCover records for previous incidents and workers' compensation claims.
- 3.25 Based on the information gathered and the reason for the visit, the inspector will choose or recommend the most effective option for ensuring safety is improved in a lasting way at that place of work. These options include improvement and prohibition Notices, workers compensation notices penalty notices (on-the-spot fines), and recommendations for prosecution.

COMPLIANCE OPTIONS

IMPROVEMENT NOTICES: ss 91,92 OH&S ACT 2000

- 3.26 Improvement notices require a particular hazard or potential risk to health and safety to be rectified within a specified time frame. Improvement notices state the reasons for the notice and specify the nature of the hazard or the risk to health and safety.
- 3.27 The notice details the measures to be taken on how to rectify the situation and may provide guidance, or references to relevant Australian Standards, approved codes of practice and relevant publications. The notice will usually include contact details so that the issues can be discussed before the inspector visits the workplace again to check that the notice has been complied with.
- 3.28 At present, the maximum possible penalty for non-compliance with an Improvement Notice is \$82,500 for a corporation; \$41,250 for a non employee; and \$2,475 for an employee.
- 3.29 The notice provides information as to how the notice can be reviewed if you question the decision to issue it – see also sections 95 to 103 of the OH&S Act.

PROHIBITION NOTICES: ss 93,94 OH&S ACT 2000

- 3.30 Prohibition notices are issued when an inspector is of the opinion that a situation is of immediate risk to the health and safety of people. These notices require the cessation of work or activity until the situation is made safe. At present, the maximum possible penalty for non-compliance with a Prohibition Notice is \$165,000 for a corporation; \$82,500 for a non employee; and \$4,950 for an employee. The notice provides information as to how the notice can be reviewed if you question the decision to issue it.

PENALTY NOTICES (ON-THE-SPOT FINES): s 108 OH&S ACT 2000

3.31 In order to highlight the seriousness of health and safety in the workplace, an inspector may issue a penalty notice, also known as an infringement notice or on-the-spot fine. The offences in respect of which notices can be issued and the amounts that can be imposed by way of fine are set out in Schedule 2 to the OH&S Regulation 2001. A person served with a penalty notice may elect not to pay the penalty and to have the matter dealt with by the court. The procedure for making an election is set out on the back of the penalty notice.

3.32 An inspector may also issue one or more improvement notices at the same time as issuing a penalty notice. This is not for punitive reasons but to ensure any identified health and safety issues are addressed.

SECTION D

4. COMPLIANCE - WORKERS' COMPENSATION AND INJURY MANAGEMENT

4.1 There are two major pieces of legislation that guide the administration of workers' compensation and injury management in New South Wales. These are the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* and the regulations made under these Acts, collectively termed the workers compensation legislation. The workers compensation legislation establishes the WorkCover Scheme. This section outlines the obligations under the WorkCover Scheme and the compliance policy and strategies of WorkCover under the workers compensation legislation.

THE WORKCOVER SCHEME

- 4.2 The main objectives of the WorkCover Scheme are to:
- assist in securing the health, safety and welfare of workers and prevent work-related injuries;
 - in order to assist injured workers and promote their return to work as soon as possible, provide:
 - prompt treatment of injuries,
 - effective and proactive management of injuries, and
 - necessary medical and vocational rehabilitation following injury
 - provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses;
 - be fair, affordable, and financially viable,
 - ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
 - deliver the above objectives efficiently and effectively.

- 4.3 The WorkCover Scheme is funded from the premiums paid by employers. Under the Scheme all employers are assigned to a Workcover Industry Classification (WIC) code, based on the claims history of employers in that industry. As an incentive for safe work practices the basic “rate” for an employer may be adjusted according to the employer's claims experience.
- 4.4 Early return to work is a key element in injury management. Research shows that the earlier a worker returns to work or begins a rehabilitation program, the greater the likelihood of recovery from injury. This in turn reduces the amount of time a worker remains on financial benefits and enhances the viability of the Scheme. The premium structure, penalties for non-compliance and the benefits available to workers are all designed to ensure that an injured worker receives early and effective treatment. Returning the worker to maximum productivity is the shared responsibility of the treating doctor and the employer in co-operation with the worker. The insurer is responsible for overseeing the development of injury management plans.
- 4.5 WorkCover also administers the Uninsured Liability Indemnity Scheme (ULIS). This is also funded from workers' compensation premiums. The scheme ensures that workers who are injured at work, whose employers do not hold a workers' compensation insurance policy, are still entitled to the same assistance as those workers whose employer holds insurance. WorkCover will take action against uninsured employers to recover any monies paid to injured workers from the scheme.
- 4.6 As the financial viability of the Scheme is based on all employers sharing the costs of workplace injury equitably, failure to comply with the legislation, especially to pay workers' compensation premiums, is viewed very seriously. Non-insurance places an unfair burden on those employers who do comply, as it increases their premiums and places them at a competitive disadvantage.

OBLIGATIONS UNDER THE WORKCOVER SCHEME

- 4.7 The workers compensation legislation imposes general obligations on employers, employees and others.
- 4.8 Some key obligations for employers are to:
- hold a valid workers' compensation insurance policy;
 - comply with the obligations imposed by the insurer's injury management program;
 - keep a record of wages paid for at least the last seven years;
 - notify the insurer within 48 hours after becoming aware that a worker has been significantly injured and is likely to be off work for seven days or more;
 - not dismiss a person wholly or mainly because of a work-related injury within six months after the worker first became unfit for work;

- notify the insurer if unable to provide suitable employment (either at all or immediately) when requested by a partially incapacitated worker;
- have a Register of Injuries book in which workers should write work-related injury details.

4.9 Workers must:

- notify their employer of an injury as soon as possible;
- not provide false or misleading statements in a notice of injury to an employer, or in a claim for workers' compensation payments, or in medical certificates or other documents;
- comply with the injury management program and plan;
- return to work as soon as possible; and
- notify the payer of workers' compensation payments of any changes in employment that affect the worker's earnings.

4.10 The workers compensation legislation should be consulted for full details of all obligations. As from 1 July 2003, there are obligations on principal contractors to ensure that subcontractors who engage employees have in place workers compensation policies.

COMPLIANCE STRATEGIES

4.11 WorkCover provides a range of information and advice through the WorkCover Assistance Service. Workers' Compensation insurers also provide advice on managing workplace safety risks, as well as insurance requirements, managing compensation claims and injury management issues.

4.12 WorkCover uses information derived from a variety of sources including from its inspectors and authorized officers and from data and research to identify areas of possible non-compliance with the workers compensation legislation.

4.13 As with OH&S, WorkCover uses a range of compliance measures depending on the particular characteristics of the alleged non-compliance. For some breaches of the workers compensation legislation, an inspector may provide advice on how to comply with the legislation or may direct an employer to rectify a problem. Where the inspector is of the opinion that it is not sufficient merely to provide advice or direction about workers' compensation obligations, a Penalty Notice will be issued. More serious offences may warrant prosecution before either the Chief Industrial Magistrate or the Local Court.

4.14 WorkCover has a discretion in determining the appropriate method of achieving compliance. Decision-making in terms of compliance is, however, structured and involves consideration of the factors outlined in this policy. The decision to take court action is often not the compliance action of first choice-rather it is made after a careful consideration of a range of factors, including whether advice or some other form of compliance option is more appropriate.

COMPLIANCE OPTIONS

ORDERS: S 174 WORKERS COMPENSATION ACT 1987

- 4.15 Section 174 of the *Workers Compensation Act 1987* provides inspectors and authorized officers with powers to issue orders to employers in relation to the supply of information and the keeping of records. Orders under this section are usually issued as part of an investigation into compliance with obligations under the workers compensation legislation.

PENALTY NOTICES (ON-THE-SPOT FINES): S 246, WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998

- 4.16 Penalty notices are used as an effective and efficient method of dealing with less serious breaches of the legislation. If the fine attached to the penalty notice is paid then no further action will be taken by WorkCover in relation to that offence. The offences in respect of which notices can be issued and the amounts that can be imposed by way of fine are set out in Schedule 5 to the *Workers Compensation (General) Regulation 2003*. A person served with a penalty notice may elect not to pay the penalty and to have the matter dealt with by the court. The procedure for making an election is set out on the back of the penalty notice.
- 4.17 The factors a WorkCover inspector considers when determining whether to issue a penalty notice include:
- whether the breach is a minor one;
 - in the case of a failure to insure, the number of employees and the length of time the employer was uninsured;
 - whether the breach can be remedied quickly;
 - whether the issuing of a penalty notice is likely to have the desired deterrent effect; and
 - if the breach is a one-off situation or part of an ongoing pattern of non-compliance.

DEBT RECOVERY AND REIMBURSEMENT

- 4.18 Where there has been a failure to insure under the workers compensation legislation, WorkCover may take action to recover as a debt up to double the amount of the avoided premium. WorkCover may also seek reimbursement of any compensation paid to a worker under the Uninsured Liability and Indemnity Scheme. These actions are in addition to the issue of a penalty notice or taking action to prosecute an offence.

PROSECUTION

- 4.19 The fact that a penalty notice can be issued for an offence does not mean that only this action can be taken. WorkCover has discretion to undertake a prosecution for an offence and it has discretion to waive prosecution in circumstances where the offender pays a sum equal to double the amount of avoided premium. Where a penalty notice is considered under the

circumstances to be inappropriate, prosecution action may be initiated.

- 4.20 Specific offences for which WorkCover may prosecute include non-insurance, under-insurance and fraud.

NON-INSURANCE

- 4.21 Section 155 of the *Workers Compensation Act, 1987* requires all NSW employers to obtain and maintain workers compensation insurance. Employers who fail to obtain a workers compensation policy place an unfair burden on those employers who do comply, as this increases their premiums and places them at a competitive disadvantage.

UNDER-INSURANCE

- 4.22 Under-insurance constitutes the primary financial risk to the WorkCover Scheme. Under-insurance may involve direct under-declaration of wages, auto-renewing a policy in order to reduce premium, provision of misleading information to obtain an incorrect WIC code and therefore "rate" or avoidance of claims experience to deliberately reduce premium.
- 4.23 The level of non-compliance varies across industry sectors. WorkCover pursues a number of different compliance strategies to ensure equity is maintained among employers in bearing the Scheme's financial burden and meeting obligations through the premiums paid.

FRAUD

- 4.24 There are various types of fraud, means of committing fraud and parties that commit fraud within the Workers Compensation Scheme. In general, fraud is the attainment of a benefit or advantage by means of deception. Specifically, it is when employers, service providers, employees or others receive payments from the Scheme due to deceptive means. WorkCover views fraud offences very seriously and will actively pursue these cases.
- 4.25 Making a false or misleading statement while claiming for workers' compensation is a serious offence. A false or misleading statement can include making a claim for workers' compensation where there was no injury, or a claim falsifying the degree of injury suffered. The WorkCover fraud investigation unit investigates allegations of fraud and prosecutes in accordance with this policy. More serious breaches of fraud are referred to the Director of Public Prosecutions for prosecution under the *Crimes Act 1900*.

SECTION E

5. PROSECUTION GUIDELINES

THE DECISION TO PROSECUTE

- 5.1 As indicated in earlier sections of this document, prosecution in a court for an offence under the OH&S legislation or the workers compensation legislation is one of several options available to WorkCover.
- 5.2 Prosecution is a discretionary action. Not every breach of the laws passed by Parliament is automatically prosecuted.
- 5.3 The dominant factor in the exercise of the discretion to prosecute or not to prosecute is the public interest.
- 5.4 WorkCover, by commencing a prosecution, aims to both punish the offender and deter future offenders. Prosecution in appropriate circumstances sends a message to the community that failures of legislative responsibilities will be enforced through the Courts. The decision to prosecute is made on the basis of the applicable law at the time and public interest considerations.
- 5.5 WorkCover is committed to a policy of prosecuting whenever significant breaches of OH&S legislation take place. Prosecution of significant cases include cases involving fatalities and incidents of serious injury where potential risks to health and safety are high. Breaches of workers compensation legislation involving fraudulent conduct, whether by an employer or worker or service provider, and non-insurance and under-insurance by employers, will also be prosecuted.

FACTORS TAKEN INTO ACCOUNT

- 5.6 The general public interest is the paramount concern to be taken into account in the decision to prosecute. As provided for in the Prosecution Guidelines of the Office of the Director of Public (the ODPP Guidelines), the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:
 - whether or not the admissible evidence available is capable of establishing each element of the offence, ie a prima facie case;
 - whether or not it can be said that there is no reasonable prospect of conviction; and if not
 - whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

PRIMA FACIE CASE

- 5.7 Before any prosecution is considered, there must be enough evidence to establish a prima facie case.

REASONABLE PROSPECT OF CONVICTION

- 5.8 As noted by in the ODPP Guidelines, this consideration requires an exercise of judgment which 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.

PUBLIC INTEREST

- 5.9 In considering the public interest, the main criteria for consideration will be similar to that adopted by the ODPP Guidelines and will include:
- a) the seriousness or triviality of the offence and/or whether the breach is of a technical nature only; - WorkCover tends to prosecute when a death has occurred, when there has been a serious injury, or when there has been a risk of fatal or serious injury;
 - b) any mitigating or aggravating circumstances;
 - c) the length of time since the alleged offence;
 - d) the degree of culpability of the alleged offender in relation to the offence;
 - e) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
 - f) the prevalence of the alleged offence and the need for deterrence both specific and general;
 - g) any prior breaches of or convictions under the OH&S or workers compensation insurance laws;
 - h) whether the alleged offence is of considerable public concern;
 - i) any precedent which may be set by not instituting proceedings;
 - j) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
 - k) the length and expense of a Court hearing;
 - l) whether proceedings are to be instituted against others arising out of the same incident;
 - m) community expectations that proceedings will be instituted;
 - n) the availability and efficacy of any alternatives to prosecution.
- 5.10 The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case.
- 5.11 The resources available to WorkCover to conduct prosecutions are finite. They will therefore not be expended in pursuing inappropriate cases.

IRRELEVANT CONSIDERATIONS

5.12 WorkCover adopts the principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- any elements of discrimination against the person eg. race, nationality, political associations;
- personal empathy or antipathy towards the offender; or
- the political or other affiliations of those responsible for the prosecution decision.

5.13 WorkCover prosecution policy involves giving priority to prosecuting offences relevant to:

- a) target industries and or hazards;
- b) injury types and workplace fatalities;
- c) alleged failure to comply with a prohibition notice;
- d) offences against inspectors or authorised officers which prevent them from exercising their powers;
- e) offences relating to impersonating an inspector;
- f) employer, worker or service provider fraud;
- g) non-insurance or under insurance by employers.

5.14 When considering the exercise of prosecutorial discretion in prosecutions under the workers compensation legislation, WorkCover considers:

- how long the person has been uninsured;
- the particular circumstances of the breach;
- the conduct of the person since the offence. For example, whether any liability to the ULIS has been repaid, or how soon after the breach was detected was insurance taken out;
- the efficacy of such prosecution, for example whether the offender is an invalid pensioner, a liquidated company where there are no assets or where the offender is a bankrupt;
- the need to actively deter employer, worker or service provider fraud of the workers compensation scheme;
- the need to ensure that employers meet their workers compensation premium responsibilities; and
- any other factor peculiar to the circumstances.

WHO MAY PROSECUTE

5.15 For offences under the *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001*, proceedings may only be instituted:

- (a) with the written consent of the Minister, or
- (b) with the written consent of an officer prescribed by the regulations, or
- (c) by an inspector appointed under Division 1 of Part 5 of the Act, or

- (d) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.

(See section 106 of the OHS Act 2000)

- 5.16 For offences under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* proceedings are commenced in accordance with the provision of section 245 of the 1998 Act.

SELECTING DEFENDANTS

GENERAL PRINCIPLES

- 5.17 Employers, including corporations and the managers and directors of corporations, persons in control of premises/plant/substances made available to non-employees for work, manufacturers, suppliers and designers of plant/substances and employees can be defendants. This may mean that a number of people commit an offence arising out of the same incident.
- 5.18 In addition to the factors set out at 5.9 above, further general considerations that may be taken into account in choosing the appropriate defendant in a particular case are:
- a) 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 or the material circumstances leading to the alleged offence or who formed any relevant intention;
 - b) in relation to (a) above, what was the culpability of the proposed defendant;
 - c) the effectiveness of any Court order that might be made against the proposed defendant.

CORPORATE AND DIRECTOR/MANAGER LIABILITY

- 5.19 WorkCover 's policy is to actively pursue both corporations and those concerned in the management of those corporations for breaches of the OHS and workers compensation legislation.

PUBLIC AUTHORITIES

- 5.20 The legislation administered by WorkCover binds the Crown and Government authorities. The law applies with equal force to both the private and public sectors. It is generally in the OHS area that a public authority is likely to be prosecuted by WorkCover.
- 5.21 WorkCover recognises that the issue of deciding in what circumstances public authorities should be prosecuted for breaches of the OHS legislation is a specific instance of determining whether prosecution is in the public interest and acknowledges that there are two competing public interests in relation to the prosecution of public authorities. These are:

- (a) the public has an interest in Government authorities abiding by the law;
and
 - (b) it is the taxpayer that bears the cost of any prosecution of public authorities. Such expenditure needs to be justified as being in the public interest.
- 5.22 Public authorities are usually under the control and direction of a Minister who can direct compliance with the OHS legislation. However, this position does not always achieve the requisite compliance. In the interests of general deterrence there will be instances where it is important that compliance not only be achieved but be seen to be achieved.
- 5.23 In prosecuting Government authorities however, the current Premier's Memorandum No. 97-26: "*Guidelines for litigation involving or between Government departments and authorities*", applies to the parties to proceedings. This procedure is designed to minimise the factual issues between the parties and provide an opportunity for open and frank discussion. The consultation envisaged by the guidelines operates as an adjunct and not necessarily an alternative to prosecution. This level of consultation can be applied to the private sector.

CHARGES

GENERAL PRINCIPLE

- 5.24 Once a decision is made to deal with an incident by way of prosecution, it is in the public interest for that prosecution to proceed. It is WorkCover's responsibility to select charges where there is a reasonable prospect of conviction. The charges must clearly reflect the seriousness of the alleged criminal conduct. The charge laid and any statement of facts must reflect adequately 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

- 5.25 WorkCover has a duty to refine its case to avoid laying either duplicitous or multiple charges. There will be instances where the same act will be prohibited under two separate pieces of legislation and involve an offence under each. Where there is another prosecuting authority involved as well as WorkCover, WorkCover will liaise with the other organisation to ensure the most appropriate charge(s) are laid.

DEATH AT WORK

- 5.26 Where there has been a breach of the law leading to a work-related death, the Police and WorkCover need to consider whether the circumstances of the case might justify a charge of manslaughter under the *Crimes Act 1900*. In

accordance with the *Protocol For The Investigation And Provision Of Advice In Relation To Workplace Deaths And Incidents Of Serious Injury And Prosecutions Arising Therefrom*, the Police and WorkCover have agreed on certain investigative principles the aims of which are to maximise the expertise and resources of each agency to ensure that the most appropriate charges are laid in the circumstances. The decision as to which agency will lead an investigation is to be made at the commencement of the process and where the facts support a charge of manslaughter the Police may seek the opinion of the ODPP. Both agencies on completion of their respective investigations will provide the Coroner with a brief of evidence to assist the Coroner in his or her deliberation of whether an inquest is to be held. WorkCover will not generally commence a prosecution under the OHS legislation until the Coronial process is complete. If the ODPP decide not to pursue a manslaughter case, WorkCover may still bring a prosecution under OHS legislation.

CHARGE –BARGAINING

- 5.27 Charge-bargaining involves negotiations between the defence and the prosecution in relation to the charges which will proceed to hearing with a view to the defence entering a plea of guilty to fewer than all the charges initially laid or to a lesser charge in return for the prosecution withdrawing the remaining charges. However, if appropriate charges are laid initially there is little scope for charge-bargaining and hence there will be only limited circumstances where bargaining will be considered.
- 5.28 A charge-bargaining proposal will not be considered by WorkCover unless:
- (a) the remaining charges adequately reflect the nature of the criminal conduct of the defendant and the plea provides adequate scope for sentencing; and/or
 - (b) the evidence available to support the prosecution case is weak in any material respect; and/or
 - (c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial.

MODE OF TRIAL

- 5.29 All trials are conducted summarily. Prosecutions for workplace fatalities and incidents of serious injury under the occupational health & safety legislation will be instituted in the Industrial Relations Commission of New South Wales in Court Session and in all other matters before the Chief Industrial Magistrate's Court and Local Courts.
- 5.30 Prosecutions for breaches of workers compensation legislation will generally be instituted before the Chief Industrial Magistrate's Court and Local Courts. Where an investigation or review of a workers' compensation prosecution matter reveals a breach of the provisions of the *Crimes Act 1900*, the matter may be referred to the ODPP for appropriate action. It is then a matter for the ODPP as to whether the prosecution is brought before the Local Court or District Court.

5.31 Unless there are good reasons to the contrary, all charges arising out of the same incident will normally be instituted in the same jurisdiction (and preferably at the same time) so the Court has the option to hear them together.

VICTIMS IMPACT STATEMENTS

WHAT IS A VICTIM?

5.32 A victim can be either a primary victim or a family victim.

PRIMARY VICTIM

5.33 A primary victim is:

- a person against whom the offence was committed, or
- a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned.

In order to be a primary victim, a person must have suffered personal harm as a direct result of an offence.

Personal harm can include actual physical bodily harm, mental illness or nervous shock.

FAMILY VICTIM

5.34 Where a primary victim has died as a direct result of an offence, a family victim is a person who was, at the time when the offence was committed, a member of the primary victim's immediate family.

A person can be a family victim whether or not the person has suffered personal harm as a direct result of the offence.

The following are considered to be members of the primary victim's immediate family:

- the victim's spouse
- the victim's de facto spouse or same sex-partner if that person has cohabited with the victim for at least 2 years
- a parent, guardian or step-parent of the victim
- a child or step-child of the victim or a child for whom the victim is the guardian
- a brother, sister, step-brother or step-sister of the victim.

WHAT IS A VICTIMS IMPACT STATEMENT

5.35 A victim impact statement is a written statement prepared by a victim. In the case of a primary victim, a victim impact statement contains information about any personal harm suffered by the victim as a direct result of the offence. In the case of a family victim, a victim impact statement contains information about the impact of the death of the primary victim on the members of the immediate family of the primary victim.

WHEN CAN A VICTIM IMPACT STATEMENT BE GIVEN ABOUT AN OCCUPATIONAL HEALTH AND SAFETY OFFENCE

5.36 The *Crimes (Sentencing Procedure) Act 1999* allows a victim impact statement to be received and considered in the Industrial Relations Commission in relation to an offence against Division 1 of Part 2 of the *Occupational Health and Safety Act 2000* where the offence results in the death of, or actual physical bodily harm to, any person. Division 1 contains the duties relating to health, safety and welfare at workplaces on employers, self-employed persons, controllers of work premises, plant or substances and on designers, manufacturers and suppliers of plant and substances for use at work.

A victim impact statement may also be received and considered in the Local Court in relation to an offence that involves the death of any person.

WHO CAN MAKE A VICTIM IMPACT STATEMENT ?

5.37 The following people can make a victim impact statement:

1. A primary victim.
2. A family victim.

A VICTIM IMPACT STATEMENT IS VOLUNTARY

5.38 A victim does not have to make a statement if they do not want to – the decision is his or hers. No one may make a statement on behalf of a victim if the victim objects to the statement being made. If the primary victim is incapable of objecting to the statement, a member of the primary victim's immediate family or other representative may object to a victim impact statement about the personal harm suffered by the victim.

The court cannot infer that because there is no victim impact statement that there was little or no impact on a victim.

A VICTIM IMPACT STATEMENT CAN ONLY RELATE TO THE OFFENCE(S) FOR WHICH THE OFFENDER HAS BEEN CONVICTED

5.39 The victim impact statement describes the direct effects of the offence on the victim. The court will only consider the effect of offences for which the offender is convicted.

If the victim statement refers to other offences for which the offender was not convicted by the court, those parts cannot be admitted into evidence. It is best to speak to WorkCover before preparing the statement if it is unclear as to the offences for which the offender was convicted.

WHAT INFORMATION SHOULD BE CONTAINED IN A VICTIM IMPACT STATEMENT?

- 5.40 There must be accurate detail about any personal harm suffered – that is any physical injury, short or long term and any psychological/emotional harm, short or long term. If the victim is preparing his or her own statement, he or she may attach any relevant medical reports that support the statement.

The defence is entitled to cross-examine the victim or the author of the report about the contents of the statement. This may happen because the offender does not agree with parts of the statement.

The victim impact statement must not contain anything that is offensive, threatening, intimidating or harassing towards the offender. The victim impact statement is about the impact on the victim. It gives the victim an opportunity to participate in the justice process by fully informing the court about the effects of the offence upon the victim.

PROFESSIONAL REPORTS

- 5.41 In some circumstances the victim may attach a professional report such as a medico-legal report or a social work/psychological assessment. The emphasis of this report must be on the impact of the offence and the resultant personal harm on the victim.

WHO CAN PREPARE A VICTIM IMPACT STATEMENT?

- 5.42 A victim impact statement may be prepared by:
1. Any qualified person chosen by the victim, or a victim's representative, or the prosecutor in the proceedings to which the statement relates. A qualified person is either:
 - a. A counsellor who is authorised to provide approved counselling services under section 21 of the Victims Compensation Act 1996, or
 - B Any other person who is qualified by training, study or experience to provide the particulars required for inclusion in a victim impact statement.
 2. The victim.
 3. A victim's representative.

REPRESENTATIVES OF THE PRIMARY VICTIM

- 5.43 Where a primary victim is incapable of providing information for a victim impact statement, a member of the primary victim's immediate family or other representative eg counsellor, psychologist, social worker, medical specialist, may act on behalf of the victim.

Similarly, a member of the primary victim's immediate family or other representative may object to a victim impact statement about the personal

harm suffered by the victim if the primary victim is incapable of objecting to the statement.

WHEN SHOULD A VICTIM IMPACT STATEMENT BE PREPARED?

- 5.44 A victim impact statement should be prepared after the offender has been convicted, but before sentencing. WorkCover will liaise with a victim to advise and assist if necessary with the preparation of a victim impact statement

WHEN MAY A VICTIM IMPACT STATEMENT BE RECEIVED AND CONSIDERED BY A COURT?

- 5.45 If the court considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after a person has been convicted, but before the person is sentenced.

Only the prosecutor in the proceedings may actually tender the victim impact statement to the court.

If the primary victim has died as a direct result of the offence, the court must receive a victim impact statement given by a family victim and acknowledge its receipt. A court may make any comment on the statement that the court considers appropriate.

However, the court must not consider a victim impact statement unless it has been given by or on behalf of the victim to whom it relates, or by or on behalf of the prosecutor.

Also, the court must not consider a victim impact statement given by a family victim in connection with the determination of punishment for the offence, unless it considers that it is appropriate to do so.

AMENDING A VICTIM IMPACT STATEMENT

- 5.46 A victim impact statement can be amended by WorkCover's prosecutor in consultation with the person who wrote the statement before it is handed up to the court.

ATTENDANCE AT COURT

- 5.47 WorkCover's prosecutor will give the victim impact statement to the court and will inform the victim if he or she is required at the court. If the victim is not required to attend by the court, the victim may still attend if she or he wishes.

READING OUT A VICTIM IMPACT STATEMENT IN COURT

- 5.48 If a victim impact statement has been given to a court, the victim or a member of the immediate family of the victim, or other representative of the victim, is entitled to read out the whole or any part of the statement to the court.

The statement can be read out when the court decides it is appropriate. This will be at some point after the offender has been convicted but before the offender is sentenced.

WHO CAN SEE THE VICTIM IMPACT STATEMENT?

5.49 When a victim impact statement is received by the court, the court may make the statement available to the prosecutor, the offender or to any other person as it considers appropriate. If the court gives the offender access to the victim impact statement, it must do so on the basis that the offender will not keep copies of the statement.

FORMAL REQUIREMENTS FOR A VICTIM IMPACT STATEMENT

5.50 A court may only receive or consider a victim impact statement if it complies with the following requirements:

- is in writing
- identifies the victim or victims.
- includes the full name of the person who prepared the statement and be signed and dated by that person.
- does not contain anything that is offensive, threatening, intimidating or harassing.
- is legible,
- is on A4 size paper
- is no longer than 20 pages in length (including medical reports or other annexures), except with the leave (or consent) of the court.

A victim impact statement may be either typed or hand-written.

If the statement has been prepared by a person who is not a victim or a victim's representative, the victim impact statement must state that the victim does not object to the statement being given to the court. The victim, or the victim's representative, must sign the statement to verify that they do not object.

IF THE VICTIM IMPACT STATEMENT CONCERNS A FAMILY VICTIM –

5.51 The victim impact statement must identify the primary victim and state the nature and duration of the relationship between the primary victim and the family victim. However, it is not necessary to state the duration of the relationship between the primary and family victim if the family victim is a relative by blood or marriage.

IF A VICTIM'S REPRESENTATIVE ACTS ON BEHALF OF A PRIMARY VICTIM TO PROVIDE INFORMATION FOR A VICTIM IMPACT STATEMENT –

5.52 The victim impact statement must indicate the name of the victim's representative and the nature and duration of the relationship between the primary victim and the victim's representative. However, it is not necessary

to state the duration of the relationship between the primary victim and their representative if the representative is a relative by blood or marriage.

Please note, only one victim impact statement can be given in respect of each victim.

SOME POINTS TO NOTE

- 5.53 Victim impact statements are tendered by WorkCover's prosecutor and become exhibits in the case. It is possible for the person who makes the statement to be cross-examined.

A copy of the victim impact statement must be supplied by the prosecutor to the offender.

It is not possible for a victim impact statement to be treated confidentially or to prevent publication.

APPEALS

- 5.54 WorkCover may appeal a decision of the Industrial Relations Commission in Court Session constituted by a single member, or the Chief Industrial Magistrate or other Magistrate, to the Full Bench of the Commission in Court Session. In deciding whether to appeal a sentence/conviction, WorkCover will be guided by the principles set out in the ODPP Guidelines. The key factors to be taken into account are:

- (a) appeals should only be brought to establish and maintain adequate standards of punishment for offences under the OHS legislation or to correct sentences that are so disproportionate to the seriousness of the offence as to lead to a loss of confidence in the administration of criminal justice; and
- (b) appellate courts will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

- 5.55 In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal should be brought promptly.

CONCLUSION

These Guidelines do not attempt to cover all questions that can arise in the prosecution process for breaches of the legislation administered by WorkCover. It addresses those issues which WorkCover considers are of immediate concern and in respect of which clarification is desirable. It will be reviewed regularly, and any changes will be made public.
