

NSW Work Health & Safety Act

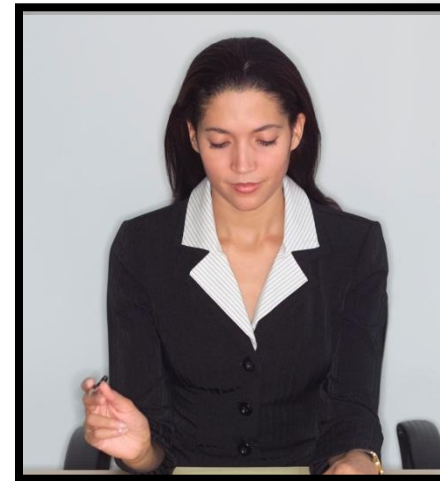
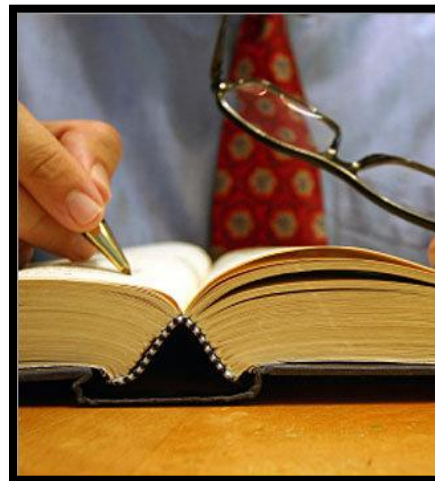


Module: Enforcement

What is different in WHS Act about Enforcement and Penalties



The WHS Act retains and builds on the enforcement framework found in the current legislation



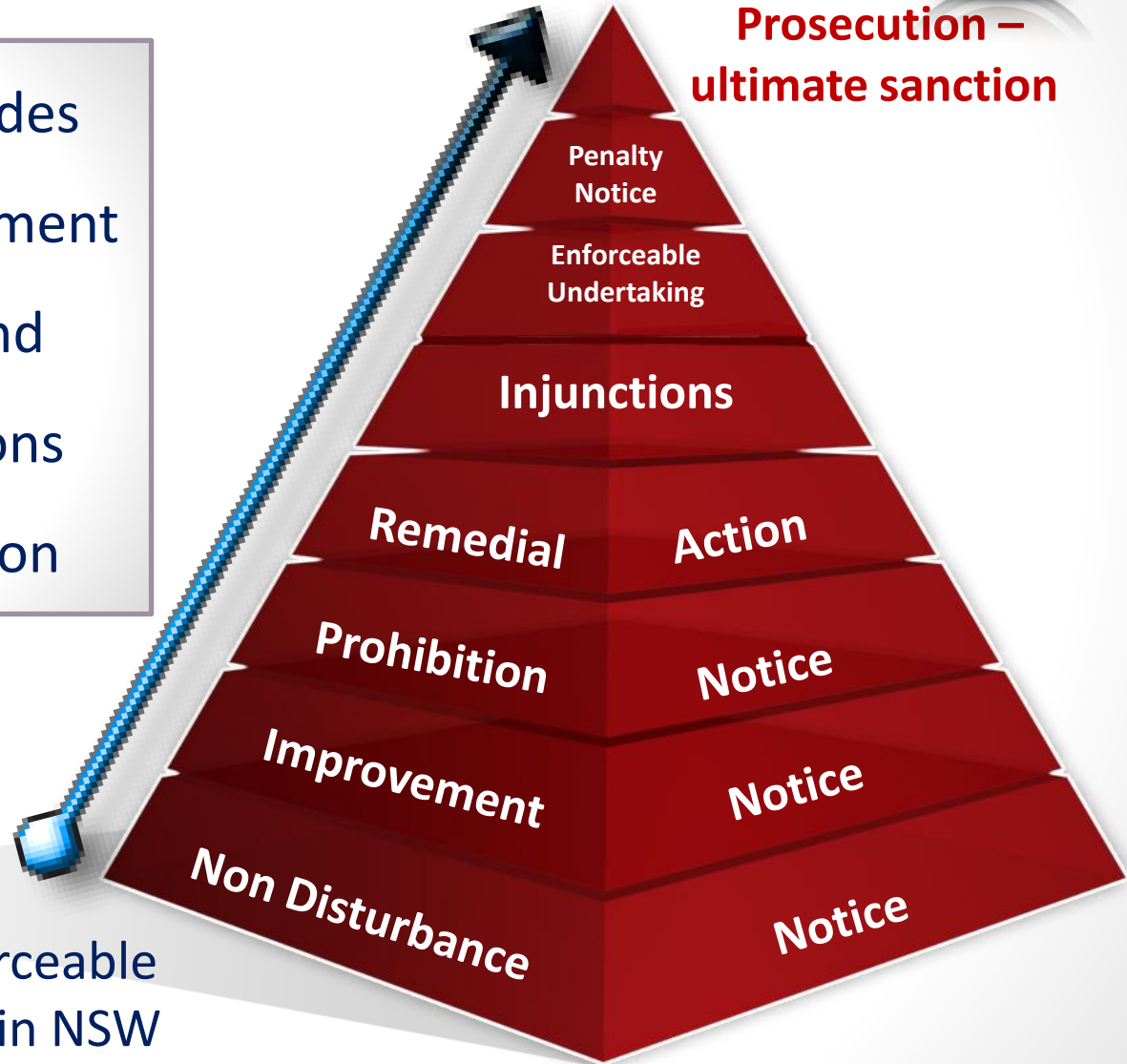
A greater range of sanctions, higher penalties, restrictions on a Trade Unions right to prosecute and abolition of the reverse onus of proof are new to the NSW enforcement framework

Enforcement Measures



The WHS Act provides graduated enforcement regime with civil and criminal prosecutions the ultimate sanction

Prosecution – ultimate sanction



Injunctions, and enforceable undertaking are new in NSW



Enforceable Undertakings

WorkCover may accept a **WHS undertaking** in connection with the matter giving rise to a contravention or an alleged contravention as an **alternative to a prosecution**



\$\$ to focus on positive prevention action



NOT Available for Category 1 Offences

Enforceable Undertakings:



- Once accepted **no proceedings can be brought** in relation to the contravention
- Giving an undertaking is **not an admission of guilt**
- Decision must be given **in writing** & notice of decision **published on WorkCover's website**
- Undertaking is enforceable **when the decision** to accept the undertaking is **given**
- It is an **offence to contravene** – and can result in proceedings and/or an order to carry out

The Right to Prosecute

The right to bring a prosecution under the WHS Act rests with WorkCover in NSW



A Trade Union can bring a prosecution under the WHS Act in NSW **only if:**

- 1.the offence concerned is a **Category 3**
- 2.the offence concerned is a **Category 1 or a Category 2 offence**
and

WorkCover has (after referral of the matter to the Director of Public Prosecutions) **declined to follow the advice of the DPP to bring the proceedings**



Power of HSR to issue PIN



Can only act
if

- Completed **initial training**
- **Consulted** with the person to whom the notice is issued

Then only
if

- the representative reasonably believes that a person is **contravening** a provision of the Act, has contravened a provision of the Act in circumstances that make it likely that the contravention will continue or be repeated

And

- Must be in **writing** and may recommend measures to remedy issue
- PCBU can seek **review** within 7 days. Inspector may cancel, confirm or confirm with modification



PENALTY STRUCTURE

Category 1 Reckless Conduct

- Corporations: \$3m
- Individuals as a PCBU or Officers of a PCBU: \$600k / 5 years jail
- Other Individuals : \$300k / 5 years jail



Category 2 Breach High Risk

- Corporations: \$1.5m
- Individuals as a PCBU or Officers of a PCBU: \$300k
- Other Individuals : \$150k



Category 3 Duty Breach

- Corporations: \$500k
- Individuals as a PCBU or Officers of a PCBU: \$100k
- Other Individuals : \$50k





Reverse onus of proof removed

The burden of proof (beyond reasonable doubt) **rests entirely upon the prosecution** in matters relating to non-compliance with duties imposed by the Act

Except for civil actions relation to discriminatory conduct and WHS entry permit holders





What should you do?



- **Understand your obligations** and what steps you need to take to **ensure compliance** with the WHS Act



- Understand what you have to do to prove **due diligence**



- Keep evidence that you have done everything **reasonably practicable** to prevent a contravention