

## Article Information

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## The Risks of Injury, Death and Substantial Financial Penalties: SafeWork NSW Prosecutions for WHS Breaches

***SafeWork NSW can (and do) bring prosecutions for breaches of the Work Health and Safety Act 2011 (NSW) (WHS Act) regardless of whether an injury or death has occurred on-site. The financial exposure is considerable. Knowing what to ask for (and expect), being aware of the various competing interests and experienced professional support with evidence and submissions will likely have a huge impact on the outcome.***

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### SafeWork's Power to Enter Site and Issue Notices

It is SafeWork NSW's aim to reduce work related fatalities, serious injuries and illnesses. SafeWork employs inspectors who have powers under the WHS Act to enter workplaces, including construction sites, and issue notices when there is a contravention of the WHS Act and other WHS laws.

Improvement notices are issued when a SafeWork Inspector believes a safety issue requires fixing. The notice will specify a compliance deadline and construction can generally continue in the interim. Examples of improvement notices include, requiring compliance with Australian Standards, the installation of handrails on stairs and barriers around open lifts shafts.

Prohibition notices are issued when a SafeWork Inspector believes that an activity poses a serious risk to health or safety. The notice requires work in the specified area to cease immediately. The notice will specify what work is to stop and the safety measures to be put in place before work can re-commence. An example of a prohibition notice includes a prohibition on work proceeding on an elevated slab of a building until solid construction hand-rails or scaffolding is installed on the live edge, thereby aiming to prevent the risk of a fall from heights.

### Non-compliance with Improvement and Prohibition Notices

In some circumstances, a penalty notice may be issued, rather than prosecuting through the courts. Penalty notices do not involve court proceedings (unless they are contested by the offender), and hence are a quicker option for dealing with WHS offences. The maximum amount of a penalty notice is 20% of the maximum amount of penalty that could be imposed for the offence by a court.<sup>[1]</sup>

However, SafeWork is quite likely to instead commence court action as the maximum penalty that may be issued by a court is much higher than the maximum under a penalty notice.

### Court Attendance Notice and Negotiations with the Prosecutor

Following issue of improvement or prohibition notices, SafeWork will likely re-inspect the site to ensure compliance. If they believe there has been a non-compliance, they may proceed to prosecute the offender.

This may result in the issue of a Court Attendance Notice (CAN). The actual court will depend on the nature of the offence and the jurisdictional limits of the court, but the Local Court is by far the most frequent venue in the absence of injury or death. SafeWork will likely be represented by a solicitor from the Department of Customer Service, which is the same department as NSW Fair Trading.

The CAN will contain details of the court date, and a short summary of the facts of the alleged offence. The short summary will likely form the basis of the Statement of Facts, which are later put before the Court when determining sentencing. For that reason it is imperative that only known facts are contained within the Statement of Facts.

Breaches of WHS laws are considered a crime, and in the Local Court are dealt with in the Crimes List. Prior to entering a pleading, the offender may seek to negotiate with the Prosecutor, in an attempt to narrow the issues in dispute and come to an agreed resolution of the offences.

At the mention (the first Court date) the offender should notify or file with the Court a 'Written Notice of Pleading' detailing whether they seek to plead guilty or not guilty to the offence. If pleading guilty, the offender may attach to the 'Written Notice of Pleading' submissions regarding mitigating factors, which it asks the court to consider when sentencing. If the offender pleads guilty to the offence, a discount (can be 25%) is often applied to the sentence, as it is seen as a benefit to the court in avoiding unnecessary time and expense in securing the conviction.

## **The Court Hearing**

If successful in the prosecution, as well as seeking a conviction of the WHS offence (which is recorded on the SafeWork NSW Prior Convictions Database), Safework will likely seek substantial penalties and its costs in the prosecution.

The penalties alone are significant, under the WHS Act, the maximum monetary penalty that may be imposed on a corporation:

- for breach of a Prohibition Notice is \$594,021.50;[\[2\]](#) and
- for breach of Improvement Notice is \$297,010.75.[\[3\]](#)

However, the maximum monetary penalty that may be imposed by the Local Court in proceedings for a summary offence under the WHS Act is \$71,500.[\[4\]](#) Prosecutions may be brought in respect of multiple CANs, which exposes the offender to the maximum penalty in relation to each offence.

In determining the sentence for the WHS offence, the Court must consider the sentencing considerations in the *Crimes (Sentencing Procedure) Act 1999* (NSW), including:

- whether the offender has plead guilty;
- making the offender accountable;
- preventing similar offences;
- mitigating and aggravating factors; and
- general and specific deterrence.

It is likely that SafeWork, if successful, will seek an order for moiety, meaning that the Court order that part of the penalty (i.e. 50%), be paid to the prosecutor. Given that, it is in SafeWork's interest for non compliance to be dealt with through the courts and for it to advocate substantial fines. Specialist support from those familiar with the prosecution process is therefore a good investment.

Knowing what to ask for (and expect), being aware of the various competing interests together with well prepared evidence and submissions has a significant impact on outcome of these prosecutions. This is relevant to verdict, penalty and the prosecutions claim for Safework's legal costs. Going it alone or with a lawyer with little specific experience are not great options. Professional support by those experienced in SafeWork prosecutions, such as that provided by Piper Alderman, will give you access to the best available outcome.

*This article has been written for general educational purposes only, and is not to be taken as legal advice.*

[\[1\]](#) See 243(4) of the *WHS Act*.

[\[2\]](#) See 197 and s 242B of the *WHS Act*.

[\[3\]](#) See 193 and s 242B of the *WHS Act*.

[\[4\]](#) See 229B(4) *WHS Act* and s17 *Crimes (Sentencing Procedure) Act 1999* (NSW).