



Department
of Industry



NSW DEPARTMENT OF INDUSTRY

Prosecution guidelines

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1. Introduction

1.1 Purpose

This guideline explains the approach that the NSW Department of Industry will take in response to breaches of legislative obligations under the regulatory frameworks that it administers. The Department'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.

The overall goal of any prosecution undertaken by the Department is to achieve regulatory compliance and to seek to build and maintain community confidence in the regulatory oversight provided by the Department. This is explained in more detail in our Regulatory Policy.

A decision to begin proceedings for a breach of legislation is a serious decision, with potential operational, financial and reputational impacts for both the Department 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 Department will make a decision to prosecute
- the factors the Department will take into account in deciding which person is the appropriate defendant
- how the Department will make a decision regarding the specific charges it lays

This Guideline is not legally binding on the Department or on any other organisation. It is however intended to form part of the Department's policy on compliance and enforcement, and to provide guidance on the decision making process the Department utilises 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 Department when assessing whether to proceed with prosecution action.

1.2 The Department's regulators

The Department of Industry leads the NSW Government's contribution to economic growth through managing our natural resources sustainably and encouraging investment and competition in NSW. Through the execution of its regulatory functions, the Department is responsible for ensuring the sustainable use of, and access to, natural resources. The Department's regulators also work to mitigate and manage risks to the community and the environment. They also help to build and maintain community and industry understanding and confidence in the regulatory systems across the Department. The Department exercises regulatory functions across a wide range of industries, managed by the following units that sit within the Department of Industry cluster:

- Water
- Fisheries
- Biosecurity and Food Safety (including the NSW Food Authority)
- Game (hunting)
- Plantations and Natural Resources
- Crown Lands
- Liquor and Gaming
- Local Land Services
- Sport

Each respective area has a number of pieces of legislation that it administers, and there are a number of regulatory response options available to address breaches of the legislation.

2. Principles of prosecution

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

- The key aim of the enforcement action the Department chooses is to achieve compliance with legislative obligations. Prosecution is a strategic response the Department may choose based on the circumstances and supporting evidence. The Department considers all responses to non-compliance such as the issuing of written warnings, statutory notices, penalty notices, enforceable undertakings, as well as prosecution, recognising that prosecution may not always be the most effective means of promoting compliance. Not all alternatives to prosecution are available to all regulators within the Department of Industry.
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Releasing information about enforcement supports transparency and draws attention to the consequences of breaking the law. When the Department releases information regarding prosecutions, this is done to help educate others and achieve compliance.

The Department's Regulatory Policy requires that a graduated and proportionate response to non-compliance be employed by Department regulators. It requires that Department's regulators respond to non-compliance according to the severity of the non-compliance and the regulated entity's culpability and approach to non-compliance.

3. Making a decision to prosecute

3.1 Who may prosecute?

The Department exercises regulatory functions conferred on it under legislation that it administers.

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

The Department has established internal systems to define which officer (or group of officers) will develop proposals to commence proceedings and which officer (or group of officers) will make the decision to prosecute (or not).

3.2 When may prosecution occur?

The Department 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 achieve compliance. In appropriate circumstances, prosecution sends a message to industry and the community that a failure to comply with the law may be dealt with by the courts.

However, there are finite resources available to pursue 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 Department will

consider taking prosecution action for serious breaches of the legislation, or in situations where other enforcement actions have proven ineffective or the regulated entity has demonstrated a clear intention not to comply.

4. Factors relevant to undertaking prosecutions

The decision to prosecute an offence requires consideration as to whether prosecution is in the public interest. In determining this issue the Department will consider whether:

- there are reasonable prospects of conviction; and
- discretionary factors are such that the matter should be prosecuted¹.

4.1 Reasonable prospect of conviction

A prosecution may only be commenced if legal advice indicates there are reasonable 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.²

4.2 Discretionary factors

Consideration must be given to discretionary factors such as but not limited to:

- the seriousness or triviality of the offence and/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 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
- 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 prosecution.
- Whether another Government agency has taken a prosecution in respect to the same facts and circumstances

¹ NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007, <http://www.odpp.nsw.gov.au/prosecution-guideline>

² *ibid*

The applicability of and weight to be given to these and other factors will vary, depending on the particular circumstances of each case.³

4.3 Irrelevant considerations

The Department 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.⁴

4.4 Alternatives to prosecution

Some of the laws administered by the Department 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 frequently 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 Department will consider undertaking this action.

5. Who may be prosecuted?

5.1 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 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 Department 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.

5.2 Corporate and director/manager liability

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and

³ *ibid*

⁴ *ibid*

volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation.⁵

In addition managers and directors / officers may attract personal liability for offences under the legislation as a result of their actions or inactions. The relevant legislation will generally specify the offences for which director/managerial liability can arise and the circumstances in which this may occur. Generally this will require 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.

5.3 Employee / worker liability

Proceedings may be brought by the Department against an employee, agent or worker 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.

The guiding principle in deciding whether to charge an employee is the degree of culpability involved. Factors relevant to assessing the degree of culpability include:

- (a) whether the employee knew or should have known that the activity in question was illegal
- (b) the seniority of the employee and the scope of the employee's employment duties, and
- (c) whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice.⁶

6. 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 Department 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.

6.1 Similar charges for the same offence

The Department 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.

6.2 Continuing offences

The Department 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 which gave rise to the offence; and

⁵ NSW Environmental Protection Authority - Prosecution Guidelines March 2013, page 7
<http://www.epa.nsw.gov.au/legislation/20130141EPAProsGuide.htm>

⁶ Ibid., 7-8.

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- whether the consequences of the act or omission continued over a period of time.

The Department 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.

6.3 Evaluation of prosecution proposals

The process of evaluating proposals relating to prosecutions and requests to have penalty notices decided in court can be very complex. In light of this complexity, each of the Department's regulators document and implement a process for reviewing prosecution proposals and requests to have penalty notices decided in court with advice from persons with appropriate skills and expertise in relation to the matter. The matter will be reviewed against the Department's Prosecution Guidelines, assessing whether:

- there are reasonable prospects of conviction and
- there are any discretionary factors relating to the matter that would suggest the matter should proceed.

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

7. Commencing proceedings

Prior to commencing prosecution proceedings, the Department engages appropriate legal advice as to whether there are reasonable prospects of conviction for the alleged offence.

Where possible and appropriate the Department will seek to recoup both its investigation and legal costs in respect to a successful prosecution.

8. Appeals against sentences

Decisions to appeal a sentence following a prosecution judgement in a Local Court 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 Department considers:

- whether there was a material error of law in the initial proceedings;
- how likely the appeal is to succeed; and
- whether the sentence was manifestly inadequate.

Where a sentence is imposed by the Local Court, with respect to an environmental offence, an appeal as to sentence will also require leave to be granted by the Court.

The Department does not commence appeals as to sentence in jurisdictions other than the Local Court. Appeals as to sentence in all these jurisdictions must be commenced by the Attorney-General or Director of Public Prosecutions.

9. Releasing information about prosecutions

The need for deterrence is a significant consideration in the decision to prosecute. This will only be successful if the regulated community is informed of the potential implications of breaching the law. Unless there are extenuating circumstances, the Department will generally issue a media release or otherwise publicise successful prosecutions. In doing so care must be taken to ensure that the offence and resulting penalty is accurately described.

10. Decisions to not prosecute

It is critical that there is integrity surrounding decisions to not prosecute. If the investigating officer has recommended prosecution and legal advice indicates that there are reasonable prospects of a conviction any decision to not prosecute must be supported by written reasons by the decision maker. The decision maker must also advise the Secretary of his or her decision, and the reasons for it, in writing within 5 days.