

Fact sheet

Request the NSW Resources Regulator to commence a prosecution under the *Work Health and Safety Act 2011* in relation to a mine or petroleum site

December 2023

Introduction

Section 231(1) of the *Work Health and Safety Act 2011* allows a person who reasonably considers that a category 1 or 2 offence at a mine or petroleum site has been committed, and, if no prosecution has been brought, to make a written request to the Regulator to bring a prosecution. The request can only be made between 6 and 18 months after the event occurred.

Request about any offence under the WHS Act

The procedure only applies to category 1 or 2 offences, which 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 engages in the conduct with gross negligence or 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) a person has a health and safety duty; and
- b) fails to comply with that duty; and
- c) 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.

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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 the Regulator can contact you to obtain further information. In some cases, the Regulator may ask you to provide a statement or other information supporting your request.

How to make the request for prosecution

The request must be in writing.

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

Email the form to cau@regional.nsw.gov.au

Mail: Central Assessment Unit,
NSW Resources Regulator,
PO Box 344, HRMC, 2310.

You should use the form [Request the Regulator to commence a prosecution in relation to a mine or petroleum site](#) 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 Regulator.

Confidentiality

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

To thoroughly 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.

Response time

Within 3 months of receiving the request, the Regulator 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 Regulator must tell you the reasons for that decision.

If the investigation is not complete within 3 months of receiving the request, the Regulator's policy is to advise you when the investigation has been completed, and whether a prosecution will be brought and to keep you informed at least every 3 months during the investigation process.

Enforceable undertakings

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

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If the Regulator 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 Regulator decides not to prosecute

If the Regulator decides not to prosecute, the Regulator 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 Regulator to refer the matter to the DPP, the Regulator 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 Regulator will send you a form to complete in order to request that the matter be referred to the DPP.

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

Prosecution Request

NSW Resources Regulator of the Department of Regional NSW

Mail: Central Assessment Unit,
NSW Resources Regulator,
PO Box 344, HRMC, 2310.

Email: cau@regional.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 Regulator as to whether the DPP considers a prosecution should be brought. The Regulator 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 DPP advises that a prosecution should be brought, does the Regulator have to prosecute?

No. However, if the Regulator declines to follow DPP advice to prosecute, the Regulator 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 preserves the DPP's ability to bring proceedings.

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Further information

For further information, contact the CAU by one of the following methods:

Email: cau@regional.nsw.gov.au

Telephone: 1300 814 609 Option 2 then 4

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