Role of the regulator in compliance and enforcement

There are many tools available to the regulator under the model Work Health and Safety (WHS) Act in regards to enforcement and compliance, including notices, enforceable undertakings and prosecutions.

What power will the regulator have?

- Under the model WHS Act the regulator has the following functions and powers:
  - advising and making recommendations to the relevant Minister and reporting on the operation and effectiveness of the model WHS Act
  - monitoring and enforcing compliance with the model WHS Act, including through enforceable undertakings, legal proceedings and prosecutions
  - providing advice and information on work health and safety to duty holders and the community
  - collecting, analysing and publishing statistics
  - fostering a cooperative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives
  - promoting and supporting education and training
  - administering internal reviews
  - engaging in, promoting and coordinating the sharing of information to achieve the objectives of the model WHS Act, including sharing information with other regulators, and
  - any other function conferred by the model WHS Act.

- The regulator also has all of the powers and functions that are conferred on an inspector under the model WHS Act.

Role of the regulator in prosecutions

- Prosecutions for offences against the model WHS Act may only be brought by the regulator, an inspector authorised in writing by the regulator or the Department of Public Prosecutions in the relevant jurisdiction.

- If a person believes that a Category 1 or 2 offence has been committed but the regulator has not prosecuted anyone for the alleged offence, the person may apply to the regulator to bring a prosecution. An application may be made within six and 12 months after the event that is alleged to constitute the offence.
  - The regulator must respond to the applicant within three months advising whether the investigation into the matter is complete and if so, whether a prosecution will be brought.
If the regulator advises that no prosecution will be brought, the applicant can request that the matter be referred to the Director of Public Prosecutions (DPP) for consideration. The regulator must comply with a request.

The applicant and the person against whom the accusation is made will be advised of whether the DPP recommends that a prosecution be brought. If the regulator declines to follow the advice of the DPP to bring proceedings, the regulator must advise both the applicant and alleged offender of its reasons.

Powers of regulator to obtain information

- The regulator has broad powers to obtain information from any person they have reasonable grounds to believe are capable of giving information, producing documents or giving evidence in relation to a possible contravention of the model WHS Act, or that will assist the regulator to monitor or enforce compliance with the model WHS Act.

- To request information, the regulator needs to issue a written notice requiring a person to produce documents, or provide information or evidence. This notice will set out the legality of the request, the person’s obligations under the model WHS Act concerning the production of information and will advise the person that they can seek legal representation.

- The model WHS Act provides that it is an offence to refuse, without reasonable excuse, to provide information, documents or evidence when requested. However, a person is not required to produce a document or provide information that is subject to legal professional privilege.

- Additionally, any information or documents provided by a person is not admissible as evidence against that person other than in proceedings arising out of the false or misleading nature of the information or document.

What are enforceable undertakings?

- An enforceable undertaking provides an alternative to prosecution for a breach or alleged breach of the model WHS Act. An enforceable undertaking is a legally binding agreement between the offender, or the alleged offender, and the regulator. It aims to create improvements to work health and safety in the workplace, industry and the broader community.

- The regulator may accept an enforceable undertaking requested by a person in connection with a contravention or alleged contravention under the model WHS Act. The regulator cannot accept an enforceable undertaking for a contravention of a Category 1 offence, as this involves a level of reckless conduct that exposes an individual to a risk of death or serious injury.
The regulator must give a person who is seeking to make an enforceable undertaking written notice of the decision to either accept or reject the enforceable undertaking and of the reasons for the decision. A decision to accept an enforceable undertaking must be published on the regulator’s website, detailing the reasons for the decision.

An enforceable undertaking becomes compulsory when the regulator’s decision to accept the enforceable undertaking is given to the person who made the enforceable undertaking, or at any later date specified by the regulator.

The person who made the enforceable undertaking may request to have the enforceable undertaking varied or withdrawn. However, the enforceable undertaking cannot be varied to change the nature of the contravention it is seeking to rectify. If the regulator agrees to vary an enforceable undertaking it must publish the decision on the regulator’s website.

An enforceable undertaking is not an admission of guilt on the part of the person who made the enforceable undertaking.

It is an offence to contravene an enforceable undertaking while it is in effect. If this occurs the regulator may apply to a court to impose a fine, an order directing that the person comply with the enforceable undertaking or an order discharging the enforceable undertaking. The court may make any other orders it considers appropriate, including directing the person to pay the cost of the proceedings and the cost of compliance to the regulator.

The model WHS Act prevents a person from being prosecuted for a contravention or an alleged contravention of the model WHS Act if an enforceable undertaking is in effect or has not yet been completely discharged. If an enforceable undertaking is accepted and legal proceedings are already underway but not yet finalised, the regulator is required to discontinue the proceedings.