

Russell Kennedy Government CPD

Session 6. Enforcement Notices 101

4 March 2022

Kylie Walsh, Principal

Natalie Marchesani, Senior Associate



Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Introduction

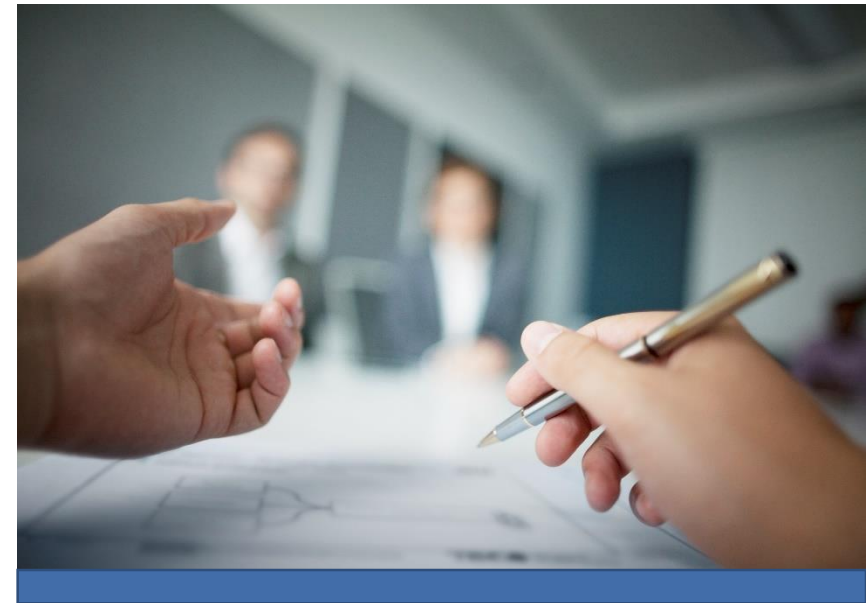


Enforcement notices

- Enforcement notices, compliance notices, improvement notices, prohibition notices
- Intended to achieve compliance, not punish
- Low cost enforcement tool
- Decision making process is more complex than other enforcement tools

Key take-aways

- Check delegations and authorisations
- There is always a threshold test that must be met
- Issue notices quickly
- Actively monitor compliance with the notice
- Administrative law principles apply
- Keep good records
- Afford procedural fairness



Enforcement Notices - Types

I. Prohibition Notices

II. Improvement/ Compliance Notices



Enforcement Notices (Prohibition Notice) – General requirements

Key features

- The person with power to issue the notice
- Level of satisfaction required before issuing the notice
- Prohibiting an activity that is in contravention of the Act

Example:

Occupational Health and Safety Act 2004 under s 112

112 Power to issue prohibition notice

(1) If an **inspector reasonably believes** that—

(a) an **activity is occurring at a workplace** that involves or will involve an **immediate risk** to the health or safety of a person; or

(b) an **activity may occur at a workplace** that, if it occurs, will involve an **immediate risk** to the health or safety of a person—

the inspector may issue to a person who has or appears to have control over the activity a prohibition notice prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector has certified writing that the matters that give or will give rise to the risk have been remedied.

Enforcement Notices (Improvement Notice) – General Requirements cont'd

Key features

- The person with power to issue the notice
- Level of satisfaction required before issuing the notice
- Improving or remedying a contravention of the Act

Example:

Supported Residential Services (Private Proprietors) Act 2010 under s160

160 Secretary may issue compliance notice

(1) **The Secretary** may issue a compliance notice to a **proprietor** requiring the proprietor to remedy a matter specified in the compliance notice if the Secretary **believes on reasonable grounds** that the proprietor **has contravened or is contravening a provision of this Act** or the regulations.

Who can issue the notice?

- Delegation or instrument of appointment
- Check the requirements regularly
- Has there been a change to the legislation?

Updated National Victoria Victoria Police

Administrative bungle leaves 1000 Victorian police officers wrongly sworn in

News > Law Order

Hundreds of fines issued by Protective Services Officers to be withdrawn

UPDATE: POLICE will withdraw hundreds of fines handed out by PSOs - largely for driving breaches - because they had no authority to issue them.

ASHLEY ARGOON

News > Victoria

35,000 parking fines to be withdrawn after City of Melbourne admits 'administrative error'

UPDATE: SOME \$3m in parking fines set to be repaid to Melbourne motorists was set aside for the Queen Victoria Market upgrade, the Lord Mayor has revealed.

Level of satisfaction – threshold test

➤ What is ‘reasonable belief’?

- Reasonable belief is a precondition to the exercise of the person’s discretion to issue either an improvement or prohibition notice.
- In *DPP v Farmer*, Bell J stated a ‘belief is something more than suspicion but does not need to approach anything like certainty but it requires more than a possibility’.
- The person issuing the notice must:
 - genuinely hold the relevant state of mind, and
 - there must be in existence facts that are ‘sufficient to induce the state of mind in a reasonable person’ *George v Rockett (1990)* 170 CLR 104
- Objective test which precludes the arbitrary exercise of power of the person to issue a notice

Level of satisfaction – cont'd

Let's look at the *Work, Health and Safety Act 2011* as an example:

195 Power to issue prohibition notice

- (1) *This section applies if an inspector reasonably believes that:*
- (a) *an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or*
 - (b) *an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.*
- *Growthbuilt Pty Ltd v SafeWork NSW [2018] NSWIRComm 1002;*
 - *Australian Postal Corporation v Comcare [2014] FWC 3228 (15 May 2014)*

Dictation

Acting under dictation occurs not only when a person responsible to exercise a discretionary function is directed to do so in a certain way but it also occurs where the decision maker felt obliged to decide the matter in a certain way because of another person's concluded views even if instructions were not given.

- NSW Ombudsman – Investigation into actions taken by Safework NSW Inspectors in relation to Blue Mountains City Council Workplaces – A special report to Parliament under sections 26 and 31 of the *Ombudsman Act 1974* – 21 August 2020
- https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0019/109009/Investigation-into-actions-taken-by-SafeWork-NSW-Inspectors.pdf



Timing and Compliance

➤ Timing

- The enforcement notice must be issued soon after the level of satisfaction has been reached that a contravention of the act has occurred, is occurring or may occur.

➤ Compliance

- What does compliance look like?
- Proportionate to the risk - *Nilufar v Secretary, Department of Education [2020] NSWCATAD 37*
- Ensure that enforcement notices issued are monitored and complied with
- *Pyrenees Shire v Day [1998] HCA 3*

Tips and Traps

➤ DO

- Make sure to check the delegations and appointments
- Make sure the person issuing the notice has reached the level of satisfaction prescribed by the legislation
- Consider relevant contextual factors '*facts which are sufficient to induce the state of mind in a reasonable person*'
- Make sure there are contemporaneous notes – ensure that the person has documented their observations in full to support their belief
- Make sure the contents of the notice meets the statutory requirements and that it is clear
- Make sure that the duty holder can actually comply with the notice – think about what evidence you'd need to assess whether they have complied
- Make the person issuing the notice has the power to do so

➤ DON'T

- Dictate
- Issuing a notice too late
- Forget to monitor compliance with the enforcement notice

Enforcement notice = Administrative Decision

The decision to issue an enforcement notice is an administrative decision.

This means that the principles of administrative law apply to the decision making process.

For example:

- Bias
- Procedural fairness
- Relevant considerations
- Taking into account irrelevant considerations
- Unreasonableness
- Improper purpose

Challenges to enforcement notices

➤ **Judicial review**

- Will scrutinise the decision maker's state of mind
- Looking for errors in decision making process

➤ **Merits review – VCAT (or sometimes an appeal to Magistrates' Court)**

- Not concerned with errors in decision making
- Stands in shoes of original decision maker and makes a fresh decision

Other

The enforcement notice can also be challenged during a prosecution or some other kind of enforcement proceeding relating to the breach of the notice



Challenges to enforcement notices – con't

➤ Timing of assessment of evidence – merits review

- VCAT will stand in the shoes of the original decision maker
- Are the facts and law to be considered at the time of hearing or is it at the time of the decision?
- Starting point in all merits review matters is that VCAT assesses the evidence at the time of the hearing.

- Dependable Care Pty Ltd v Department of Families, Fairness and Housing (Review and Regulation) [2021] VCAT 617

Challenges to enforcement notices – con't

Test – what is the statutory question to be answered?

Frugtneit v Australian Securities and Investments Commission [2019] HCA 16

The High Court has recently had occasion to revisit the question of what evidence a tribunal should consider in reviewing a governmental decision.

The primary decision, and the statutory question it answers, marks the boundaries of the Aat's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision.

Challenges to enforcement notices – con't

➤ Statutory question in this case

Supported Residential Services (Private Proprietors) Act 2010 under s160

160 Secretary may issue compliance notice

(1) **The Secretary** may issue a compliance notice to a **proprietor** requiring the proprietor to remedy a matter specified in the compliance notice if the Secretary **believes on reasonable grounds** that the proprietor **has contravened or is contravening a provision of this Act** or the regulations.

VCAT held:

Present (is contravening) and present perfect tense (has contravened)

Therefore, it is not a pre-condition that the to the issue of the compliance notice that the contraventions of the SRS Act are still happening at the time that the Secretary seeks to issue it (or the Tribunal, acting in the Secretary's place, reviews it).

It follows that restructuring at hub does not obviate the contravention.

Keep good records

➤ Records should be kept at the time of making the decision:

- Date of decision
- Decision maker and under what authority
- Decision that was made
- Legislative provisions
- Matters taken into account (bearing in mind the relevant threshold test)
- Evidence before the decision maker at time of making decision
- Reasons for decision

➤ Why?

- If challenged – will either need to defend decision making process or will need to produce evidence to persuade VCAT it was the correct and preferable decision

Procedural Fairness

1. Starting point – procedural fairness must be afforded

2. Check the statute
 - Procedural fairness can only be excluded if there is a clear legislative intention to do so
 - Is there a show cause process in the legislation

3. Once a right to procedural fairness has been established, what that right entails depends on the particulars circumstances and the balancing of competing interests

4. Full content of procedural fairness
 - Letter/show cause letter – outlining evidence and allegations
 - Provide the person with all of the evidence against them (including any policies that might be considered)
 - Give them a reasonable time to respond – oral and in writing

Procedural Fairness – con't

➤ What about urgent circumstances?

1. Court's are reluctant to find that urgent circumstances excludes the right to natural justice (*State of South Australia v Honourable Peter Slipper MP* [2004] FCAFC 164)
2. Urgency is more likely to reduce its content
3. Reduced procedural fairness might include:
 - Reduced time to be heard
 - Or perhaps officers informing the person during the inspection that an enforcement notice might be issued

Key take-aways

- **Check delegations and authorisations**
- **There is always a threshold test that must be met**
- **Issue notices quickly**
- **Actively monitor compliance with the notice**
- **Administrative law principles apply**
- **Keep good records**
- **Afford procedural fairness**



Q&A – Your Russell Kennedy Contacts



Sarah Manly
Principal and facilitator

P: +61 3 9609 1691
E: smanly@rk.com.au



Natalie Marchesani
Senior Associate

P: + 61 3 8640 2307
E: NMarchesani@rk.com.au



Kylie Walsh
Principal

P: +61 3 9609 1551
E: KWalsh@rk.com.au



Feedback

Scan this QR code to provide instant feedback on the session.



Russell Kennedy Pty Ltd
info@rk.com.au
russellkennedy.com.au

Melbourne

Level 12, 469 La Trobe Street
Melbourne VIC 3000
PO Box 5146
Melbourne VIC 3001 DX 494 Melbourne
T +61 3 9609 1555 **F** +61 3 9609 1600

Sydney

Level 6, 75 Elizabeth Street
Sydney NSW 2000
Postal GPO Box 1520
Sydney NSW 2001
T +61 2 8987 0000 **F** +61 2 8987 0077

Liability limited by a scheme approved under Professional Standards Legislation.

An international member of



russellkennedy.com.au