

**Colin
Biggers
& Paisley**

What happens when the prosecutor comes knocking?

Cormack Dunn
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Summary

- Overview of regulatory bodies:
 1. **WHS:** Safe Work Australia, SafeWork NSW under the *Model WHS Act*.
 2. **Consumer Law:** ACCC under the *Competition and Consumer Act 2010* and *Australian Consumer Law*
 3. **Environmental Law:** EPA under the *Protection of the Environment Operations Act 1997 (NSW)*.
 - EPA investigations pollution, waste, and environmental harm and enforces compliance.



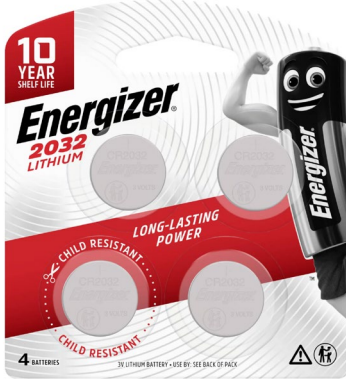
Summary (cont.)

High degree of similarity in stages:

1. Event
2. Notification of potential breach
3. Written letter
4. Formal notice
5. Interviews
6. Procedural fairness
7. Summons
8. Brief
9. Court appearance
10. Determination



1. Event

Work Health and Safety	Consumer Law	Environmental Law
Workplace Accident	Harmful Product	Chemical Spill
		

2. Notification of potential breach

WHS	Consumer Law	Environmental Law
Triggered by workplace incidents (injury, death), complaints, or inspector observations.	Initiated by consumer complaints, whistleblowers, media reports, or referrals. ACCC may elect not to notify at this stage to prevent evidence tampering.	Based on pollution reports, community concerns, or internal monitoring. EPA officers may make contact by telephone or simply attend at the site.
Notifiable under s 38 WHS Act.	Investigations initiated under Part XIB of the CCA.	Pursuant to Chapter 7 of the POEO Act.

1. Express willingness to cooperate and assist, where appropriate (establish rapport).
2. Conduct an internal investigation (get ahead of the investigator, ensure investigation is covered under LPP)
3. Notify your insurer.

3. Written letter

WHS	Consumer Law	Environmental Law
Inspectors may send informal written requests for documents or interviews or simply attend site.	ACCC may issue informal "initial inquiry letters" outlining concerns and inviting a response.	EPA may send a "show cause" letter or a letter outlining alleged breaches and requesting a response or explanation.
No statutory protections against self-incrimination where information is voluntarily produced.	Require voluntary cooperation.	Require voluntary compliance.

1. Establish a main point of contact for communicating with the regulator.
2. Make sure employees are not giving rogue interviews.
3. Consider requesting that the inspector issue a formal notice compelling production.

4. Formal notice

WHS	Consumer Law	Environmental Law
Inspectors can issue written notices requiring production of documents or information under ss 155 of the WHS Act. Statutory protections against self-incrimination.	ACCC uses s 155 CCA, to compel the production of documents, provision of information or attendance to given evidence.	EPA can issue a "Notice to Provide Information and Records" under s 191 POEO Act. May also issue a Prevention Notice or Clean-Up Notices under ss 91 and 93 to compel certain environmental actions.

1. Consider what information or material is within the scope of the notice.
2. Request extensions, where necessary - failure to comply is an offence.
3. Keep copies of all materials provided to investigator.

5. Interviews

WHS	Consumer Law	Environmental Law
Conducted by inspectors under s 171; legal representation allowed; may be in private. Statutory protections against self-incrimination.	ACCC may compel interviews under s 155(1)(c) CCA; failure to comply is an offence; legal rights apply. Statutory protections against self-incrimination.	EPA officers may interview under Chapter 7 POEO Act. Interviewees have the right to silence and legal representation.

1. Prepare (but don't coach) employees for interviews.
2. Obtain copies of interview recordings.
3. Opportunity to develop rapport with Inspector.
4. Maintain control over site, including timing and areas that are subject to investigation.

6. Procedural fairness

WHS	Consumer Law	Environmental Law
Before enforcement, regulators may issue a letter inviting response to allegations (natural justice)	Before referring a matter for enforcement, the ACCC may send a "draft case theory" outlining proposed allegations and providing an opportunity for response.	EPA may issue Show Cause Notices or draft decisions for comment.

1. Opportunity to address any unconscious bias.
2. Strategic consideration: how much of your argument do you want to give away prior to proceedings?

7. Summons

WHS	Consumer Law	Environmental Law
Issued if prosecution is pursued under criminal procedure rules. Prosecutor must file the summons (along with Practice Note 16) within 7 days of filing application. Compels the defendant to appear in court for alleged breaches.	ACCC initiates proceedings under Part VI of the Competition and Consumer Act 2010 (CCA). ACCC files a statement of claim or application, court issues a summons or court attendance notice.	EPA or DPP makes application, summons issued by the court. Defendant notified to appear.

8. Brief

WHS	Consumer Law	Environmental Law
Evidence compiled into a brief for legal review and decision on prosecution. Served within 28 days of Notice of Appearance. Includes written statements, documents to be tendered, notices, transcripts of interviews, expert reports etc.	ACCC prepares enforcement brief; may lead to litigation or settlement. Includes evidence gathered under s 155 CCA, internal investigation reports, expert economic or consumer behaviour analysis, witness statements and business records.	Brief prepared for administrative or criminal enforcement. Includes site inspection reports, sampling and lab analysis, expert environmental assessments, witness statements, relevant licences or breach notices.

9. Court appearance

WHS	Consumer Law	Environmental Law
Matters heard formerly heard in District Court, now Industrial Relations Court. First mention 8 weeks after summons.	Federal or state courts. Case management under Federal Court Rules. More serious criminal prosecutions are prosecuted by the CDPP.	Land and Environment Court or Local Court. Civil or criminal proceedings.

10. Determination

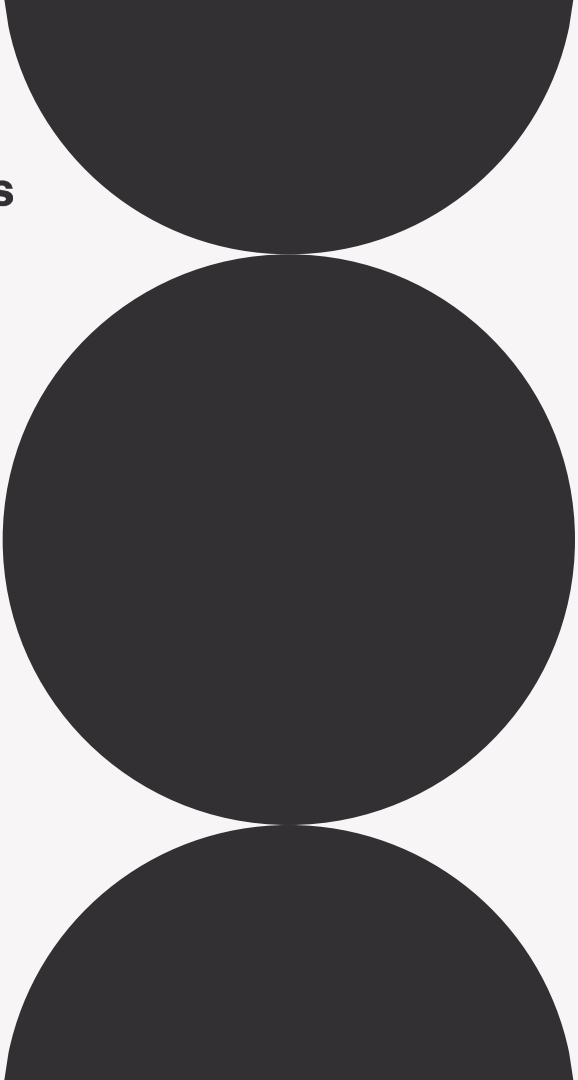
WHS	Consumer Law	Environmental Law
Outcomes may include conviction or acquittal, enforceable undertakings, or orders for training, compliance or monitoring. Penalties up to \$3 million for corporations. Sentencing considerations including nature of breach, degree of harm and prior compliance history.	Outcomes may include declarations of contravention, injunctions, disqualification of directors, compensation to affected consumers and compliance program orders. Penalties up to \$50 million.	Outcomes may include conviction or dismissal, remediation orders and licence suspension or cancellation. Sentencing considerations include degree of environmental harm, intent and negligence.

Conclusion

Key takeaways:

1. Understand process.
2. Be aware of regulator powers and processes.
3. Respond promptly and respectfully.
4. Engage legal counsel early.
5. Remember that preparedness and cooperation can mitigate risks and improve outcomes.





**Colin
Biggers
& Paisley**

Questions

Presenter



Cormack Dunn

Partner | Employment & Safety

Colin Biggers & Paisley

Cormack.dunn@cbp.com.au

**Colin
Biggers
& Paisley**

Thank you.

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