

## **Working Paper 23**

# **The Use of Infringement Notices in OHS Law Enforcement**

**Liz Bluff**

Researcher, National Research Centre for Occupational Health and Safety  
Regulation, Regulatory Institutions Network, Research School of Social Sciences,  
Australian National University

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### Address for correspondence:

National Research Centre for Occupational Health and Safety Regulation  
Regulatory Institutions Network (RegNet)  
1st Floor Garden Wing, University House  
The Australian National University  
Canberra ACT 0200  
Ph (02) 6125 1514 Fax (02) 6125 1507  
Email [nrcohsr@anu.edu.au](mailto:nrcohsr@anu.edu.au)  
Web <http://ohs.anu.edu.au>

## **Introduction**

In the occupational health and safety (OHS) field increasing use is being made of infringement notices (also known as penalty notices or on-the-spot fines), to enforce OHS legislation. An infringement notice is an administrative notice, authorised by statute, which sets out the particulars of an offence and gives the alleged offender the option of either paying a penalty to expiate the offence or electing to have the matter dealt with by a court.<sup>1</sup> Such notices are part of the OHS law enforcement regime in five of the Australian jurisdictions and there are plans to introduce them in others. Legislation enabling their use was recently enacted in New Zealand, and various forms of administrative penalty are also used in OHS law enforcement including the United States, some Canadian provinces and some European countries.

The rationale for using infringement notices under Australian law is that they enable enforcement of offences in a quick, easy and inexpensive process without costly court action or the need to prove the elements of an offence.<sup>2,3,4</sup> Hence it is more likely that enforcement action occurs, and that offences are officially 'noticed' and penalised. The action which creates the alleged offence and the infringement notice are also linked in time, which may increase the preventive effect. Infringement notices may also provide a less harsh and less discriminatory way of dealing with minor offences, particularly those committed by people who may not understand the legal system and may not be aware that they have committed an offence.<sup>5</sup> Thus, there are some important legal and administrative arguments which provide a rationale for using infringement notices. Nonetheless, their role and place in OHS law enforcement is uncertain and there is a need for evidence of their impact.

In the only Australian empirical study of OHS infringement notices, Gunningham, Sinclair and Burritt undertook approximately 100 interviews with policy makers, inspectors, industry partners and recipients of infringement notices about their experience with notices issued under OHS and other legislation.<sup>6</sup> The majority of industry respondents believed that infringement notices were an effective mechanism for preventing work-related injury and disease, although their impact may be predominantly short-term in nature. Some signals of this positive impact were the perception that a notice was an effective means of 'getting the safety message across', that it was treated as a significant 'blot on the record' which spurred preventive activities, and that it was an indicator for judging the safety performance of managers.

On-the-spot fines have also led to improvements in performance in other areas of Australian law enforcement.<sup>7</sup> These improvements are more likely to be sustained if resources are provided for continuing enforcement. Reasons given by inspectors and policy makers for the perceived success of infringement notices were a firm's concern that public knowledge of the fine will have an impact upon their reputation, the effect of drawing attention to inspectors' powers and presence, leading to improved behaviour, an immediate impact on the offender due to the swift method for warning and fining offenders, and the combination of advice of non-compliance and imposition of a fine.

The strongest empirical evidence of the impact of administrative penalties on OHS performance is provided by studies of the US Occupational Safety and Health Administration's (OSHA, US) citation and penalty system, in operation since the 1970s. Citations identify the regulations and standards alleged to have been violated

and the proposed length of time for their abatement<sup>8,9</sup> Although studies of fatality, injury or disease trends on an industry wide basis have generally failed to find a preventive impact from inspection and citation activities,<sup>10,11,12,13</sup> studies focusing specifically on the impact on firms where enforcement activity has occurred, found that even relatively small fines can achieve higher levels of compliance. A study of 6,842 manufacturing plants actually inspected, cited and issued penalties by OSHA (between 1979 and 1985) found a 15-22% reduction in injuries and a 20% reduction in lost work days in the three years following inspections. In contrast, brief inspections that did not result in penalties had no injury reducing effects, possibly due to their failure to attract senior management's attention.<sup>14,15</sup> Compliance with OSHA standards was also enhanced by citation and penalties in specific industries (custom wood-working manufacturing and construction).<sup>16,17</sup> A similar positive impact was found for reduction of injury rates for falls, which decreased significantly for firms inspected and cited for non-compliance with the Washington state fall protection standard, as compared to firms not inspected and penalised.<sup>18</sup>

However, a more recent study of the OSHA citation system reveals that the average impact of OSHA inspections on injury rates declined from 15 percent in the early 1980s, to 8 percent in the late 1980s and to one percent in the 1990s.<sup>19</sup> This declining impact has not been fully explained but possible contributors are that over time the OSHA standards cited may have become less relevant to the principal causes of injury (and hence had less impact on injury rates), and that changes to the method of OSHA inspections may have adversely impacted on the OSHA citation system. From the mid-1990s OSHA inspections placed more emphasis on problem solving and encouraging firms to reduce workplace hazards rather than detailed inspections identifying specific violations. This suggests that the approach to inspection and type of offences for which administrative penalties are used may influence their impact on injury rates.

There are some broader lessons to be learnt from the US OSHA experience. On the one hand there is some evidence that inspection, coupled with an administrative penalty, may have a positive effect on compliance behaviour and consequently on injury levels, even in circumstances where the costs of complying are likely to exceed the economic benefits of compliance.<sup>20</sup> On the other hand, wider policy and contextual issues such as approaches to inspection, how administrative penalties are applied and for what offences, may influence the impact of these penalties. In any jurisdiction applying administrative penalties it will be important to clarify these wider issues in order to design and implement arrangements with the 'right mix' of characteristics to optimise preventive action in response to notices.

These matters are now discussed in the context of infringement notice schemes in Australia and New Zealand. Infringement notices have been used in OHS law enforcement, for a number of years, in Queensland, New South Wales and the Northern Territory.<sup>21</sup> They are provided for, but have not yet been used in Tasmania and the ACT, and they were also recently introduced in New Zealand.<sup>22</sup> Their introduction is under consideration in South Australia,<sup>23</sup> Victoria<sup>24</sup> and Western Australia.<sup>25</sup> Comparison of the different schemes reveals key differences in the legislative basis for serving infringement notices, the types of offences for which they may be issued, the monetary amount of penalties, the criteria for serving such notices, the form and method of serving infringement notices, the required response to a notice

and the effect of payment. The design and implementation of infringement notice schemes, with regard to these characteristics, are crucial to determining the effectiveness of this type of penalty for stimulating action to advance occupational health and safety. The following discussion outlines these different characteristics, summarises how they are dealt with in each jurisdiction, and discusses legal and practical considerations for OHS regulators.

### **Legislative basis for serving infringement notices**

In the jurisdictions with existing arrangements, the legal basis for serving infringement notices is often established under OHS legislation.<sup>26</sup> However in some jurisdictions infringement notices are established under statewide infringement notice schemes. For example, in Queensland the *State Penalties Enforcement Act 1999* and regulations (SPER) identify the offences for which infringement notices may be issued and the arrangements for administration.<sup>27</sup> In New South Wales such a statewide scheme also plays a part in collecting and processing fines through the Self-enforcing Infringement Notice System (SEIN), although OHS offences, penalties and administrative arrangements are established under the OHS statute and regulations. In the event that infringement notices are introduced in the states of Victoria and South Australia, statewide infringement (or expiation) arrangements will play a part in collection and processing fines.<sup>28</sup>

Thus there are differences in whether the identification of infringement offences and penalties, and the infrastructure for collecting, processing, reviewing and appealing fines, are established under OHS legislation, under legislation dealing with the use of infringement notices more widely, or a mix of the two. This makes for different arrangements between jurisdictions and potentially has implications for both the design of infringement notice arrangements and their implementation. For example, statewide schemes have the benefit of an established infrastructure for administration of fines and may draw more widely on experience in using infringement notices in law enforcement. However, they may be less attuned to considerations about the most strategic design and use of infringement notices in OHS law enforcement. On the other hand infringement notices and arrangements designed by OHS regulators may take less account of wider legal issues. These different frames of reference are evident in some of the variation between the different Australian and New Zealand infringement schemes.

### **Type of offences for which infringement notices may be issued**

An infringement notice does not involve a binding determination of liability, as is the case if an alleged offence is prosecuted. For this reason the Australian Law Reform Commission (ALRC) considers that such notices should be reserved for clear cut offences of a less serious nature, that is offences that are relatively minor, victimless and involve strict or absolute liability.<sup>29</sup> Australian enforcement officers also suggest, from experience, that unless the offences selected are unambiguous, substantial time and trouble may be required by inspectors to investigate and justify a notice, in the event that a review or appeal is requested, thus negating the rationale for their use, that is, that they are and easy to use.<sup>30,31</sup> Thus reasons of enforceability suggest that infringement notices should be reserved for non-complex offences where the breach is clearly defined in law, the facts are easily verified and the evidence is non-controversial.

This approach has been followed under the Queensland and Northern Territory OHS regimes where infringement offences are of a more clear cut or administrative nature, for example breaches of requirements for certification and training for prescribed occupations, incident notification and recording, use of safety signs, provision of first aid, amenities, and so on. While offences for which infringement notices may be used under New South Wales OHS law include some clear cut and administrative offences, they also include much broader offences such as breaches of the general duties of care or non-compliance with risk management processes. Infringement notices may also be applied to such broader offences under Australian Capital Territory and New Zealand OHS law. Non-compliance with inspectors' notices, and non-compliance with workplace arrangements obligations are also an offence for which an infringement notice may be served in several jurisdictions. Table 1 summarises the types of offences for which infringement notices might be served in the various Australian and New Zealand jurisdictions.

**Table 1: Type of offences for which infringement notices are used**

Type of offence	Jurisdictions							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
Strict or absolute liability	√	√	√	√	√	<i>Not yet pre-scribed</i>	√	<i>Not yet introduced</i>
Administrative		√	√	√				
Other less serious or clear cut		√	√	√				
Broad duties	√		√		√			
Non-compliance with inspector notices	√		√		√		√	
Workplace arrangements	√		√		√			

While the key offences under the Australian OHS statutes are strict or absolute liability in nature, one of the ALRC's characteristics for infringement offences, this does not necessarily mean that they are suitable for infringement notices. They are often qualified by ('reasonably) practicable' (or taking 'reasonable precautions' and exercising 'proper diligence' in Queensland). Alternatively, they may require decisions about the adequacy of risk management processes. Thus, such offences are not clear-cut and there are practical as well as legal reasons for OHS regulators to be cautious about using infringement notices for broader offences of this type.

Nonetheless, it is still important to optimise the preventive value of infringement notices. Using them exclusively for administrative matters runs the risk of criticisms of 'revenue raising' or 'technical breaches'.<sup>32</sup> There is merit in including in the list of expiable OHS offences some matters that are clear cut and unambiguous, but also have a direct effect on risk control. For example, exposure to noise or hazardous substances above exposure standards, or failure to protect portable electrical equipment with RCDs are offences that involve a clear breach of required risk control measures. Such offences should be carefully considered and defined to enhance the potential preventive influence of infringement notices.

Finally, there is also concern about the appropriateness of infringement notices, which are intended to be a penalty for a particular episode of non-compliance, for dealing with continuing offences. The general duties under the OHS statutes and risk management standards in OHS regulations impose continuing obligations upon duty holders. In principle, once an infringement notice is paid a person's liability for the offence is taken to be discharged and further proceedings cannot be taken for the offence. This strongly suggests that if infringement notices are applied to these types of obligations, OHS regulators' enforcement strategies need to specify 'trigger points' so that inspectors have several opportunities to issue infringement notices in order to penalise continuing failure to comply.<sup>33</sup>

### Amount of penalty

Under Australian OHS law, the maximum penalties are low: \$1,500 (NSW and Qld), \$1,000 (ACT), \$315 (SA proposed) and \$250 (NT) (as summarised in Table 2 below). In New Zealand, the maximum penalty is higher, set at \$4,000 for breaches of systematic hazard identification requirements, and \$3,000 for all other breaches of the OHS statute.

**Table 2: Maximum penalty for infringement notices**

Maximum penalty	Jurisdictions							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
\$4,000	√					<i>Not yet prescribed</i>		
\$1,500		√	√					
\$1,000					√			√ <sup>1</sup>
< \$500				√				√

In contrast, administrative penalties in Canada are set at a higher level. In British Columbia the maximum penalty is \$500,000 (Can), although the actual penalty is set according to organisational size (by payroll) and the nature of the violation.<sup>34</sup> In the province of Yukon administrative penalties are \$5,000 (Can) for a first offence and \$10,000 (Can) for a subsequent offence,<sup>35</sup> while in Manitoba the maximum penalty is \$5,000.<sup>36</sup> However, 'ticketing offences' which are on-the-spot fines applied to workers in the Ontario construction industry attract a penalty of \$100-200.<sup>37</sup> In the United States, administrative penalties are also higher, ranging from \$7,000 to \$70,000 according to the type of violation.<sup>38</sup>

There is some difference of opinion about the optimal penalty for an infringement notice. In New Zealand, a review of administrative penalties argued that if penalties are set too low there is little condemnatory force associated with them and they may actually reduce the deterrent force of law,<sup>39</sup> compared, for example, to the penalty that might be imposed in the event of prosecution by a court. However, there is some empirical evidence that notwithstanding the small level of infringement fines in Australian usage, an infringement notice is perceived to be a significant financial deterrent, especially by individuals and smaller firms for whom the shock impact is quite high.<sup>40</sup> A more general deterrent effect may even be possible as regulators in the Australian study of infringement notices observed that once one firm in an area or

<sup>1</sup> Although infringement notices are not yet enacted under Victorian OHS legislation, the Victorian Procedure for Enforcement and Registration of Infringement Notices (PERIN) sets a limit of 10 penalty units for infringement notices under any Victorian law where such notices are used.

trade had received an on-the-spot fine, the ‘word got around’ and other firms were influenced to reassess their OHS performance, and adopt preventive measures.

The US OSHA studies suggest a specific deterrent effect whereby increased compliance and/or reduced injury rates are achieved in firms cited and fined. Although it was technically possible to impose higher penalties, in practice the penalties were quite small. Strict deterrence models predict that to create a credible deterrent, the penalty should outweigh the costs of compliance. However, there is some evidence that the cost of compliance may substantially outweigh the penalty imposed but nonetheless a marked increase in compliance can be achieved with a small administrative penalty.<sup>41</sup> There are several possible explanations. Duty holders may perceive the risks and costs of non-compliance to be higher than they are; the penalty process may bring into focus other costs that can arise from non-compliance such as workers compensation claims; or the action may focus attention on OHS problems previously overlooked or ignored.<sup>42,43</sup>

In summary, research on the US OSHA system as well as in Australia suggests that a small fine can provide an incentive for prevention. Nonetheless, the US and Canadian systems, and the recently enacted New Zealand system, carry the threat of a higher penalty than those in Australia. There is scope to keep the level of penalty for infringement notices under review, to ensure that a sufficient level of deterrence is provided. One option is a tiered system of on-the-spot fines in which the most serious offences merit a more substantial penalty. However, care is needed in designing this to ensure that different levels are matched with criteria for their application, to minimise discretion by those serving notices. Increased penalties might also be imposed for repeat offences of the same type within a given period. Another strategy is to use fines in conjunction with publicity to escalate the response, especially for larger recipients for whom the stigma of the fine, rather than the amount, is a primary motivating factor.<sup>44</sup> All of this might be achieved within the ALRC’s recommendation that the level of penalty should not exceed 20% of the maximum penalty that could be imposed by a court for the particular offence.<sup>45</sup>

### **Criteria for serving infringement notices**

In the Australian jurisdictions, responsibility for deciding whether to serve an infringement notice in particular circumstances rests with an OHS inspector. In contrast, New Zealand inspectors require authorisation by a Service Manager before an infringement notice is served. Those serving notices may be guided by criteria for determining when it is appropriate to serve an infringement notice. In particular, inspectors in the Australian Capital Territory must have ‘reasonable grounds’ to believe that an offence has been committed, which is consistent with ALRC’s<sup>46</sup> recommendations. Inspectors in Tasmania must be ‘of the opinion’ that an offence has been committed and in NSW OHS inspectors may issue such a notice ‘if it appears to the officer’ that an offence has been committed. Some of these procedural matters and differences in approach between jurisdictions are summarised in Table 3 below.

For example, some jurisdictions limit the number of offences identified on each infringement notice. In South Australia and Tasmania infringement notices must be limited to three offences per notice, although the ALRC<sup>47</sup> suggests there should be an infringement notice for each offence. There is a time limit for serving an



infringement notice in South Australia (within 6 months of the alleged offence) and New Zealand (within 14 days of an inspector becoming aware of an offence), while the ALRC<sup>48</sup> suggests a 12 month time limit after alleged offence within which to issue an infringement notice. Most jurisdictions allow for withdrawal of an infringement notice, but there is variation in the time limit within which this might be done, and whether or not withdrawal must take place before the notice is paid.

Thus there is considerable variation in procedural matters and plenty of scope for inspectors to exercise discretion (and inconsistency) in serving infringement notices. Perceived lack of consistency by inspectors or a ‘one size fits all’ approach that fails to consider particular circumstances may have a negative impact, creating perceptions amongst recipients of unfairness or that infringement notices are simply revenue raising.<sup>49</sup> Recipients who respond in this way are unlikely to change their behaviour in the interests of OHS. Enforcement policy and procedure is one way to attempt to manage discretion,<sup>50,51,52</sup> as it makes explicit the criteria for serving an infringement notice as well as any targeting strategies. The existing enforcement policies of OHS regulators,<sup>53</sup> provide inspectors with minimal guidance about the use of infringement notices. More detailed guidelines and training about the circumstances in which infringement notices can be most appropriately used is essential to support implementation and ensure that procedures for their use are clear and transparent, for inspectors and for recipients of notices. In particular, the decision to issue an infringement notice should be based on the type of offence, genuine risk and the potential preventive value of serving such a notice. On no account should there be, in policy or in practice, a ‘quota’ system.

**Table 3: Criteria and procedure in using infringement notices**

Criteria & policy issues	Jurisdictions							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
Authorisation from manager in regulator	√							
Reasonable grounds or inspector’s opinion that offence committed			√		√	√		
Limit on offences per IN						√	√	
Warning before IN	√			√				
Use with prohibition/improvement notice	√	√					√	
Time limit to issue IN	√						√	
Possible to withdraw IN	√			√	√	√	√	√

### Responsive enforcement

As well as legal and practical concerns in serving infringement notices, there are also strategic questions about their use and, in particular, how infringement notices are applied in the context of the broader debate about responsive enforcement.<sup>54</sup>

Traditionally, approaches to regulatory enforcement have been divided between a ‘deterrence’ or ‘punishment’ approach on the one hand and a ‘compliance’ or ‘persuasion’ approach on the other. Deterrence theory argues that if offenders are detected with sufficient frequency and punished with sufficient severity then they will perceive that the costs of violation outweigh the perceived benefits.<sup>55</sup> General deterrence holds that a population of firms can be persuaded from violating a law if they believe that non-compliance will be detected and punishment severe and swift. Specific deterrence holds that if a particular firm is punished for violating a law, it will be less likely to repeat the violation.<sup>56</sup> In contrast a persuasion approach emphasises cooperation, conciliation and negotiation between regulator and regulatee.<sup>57,58</sup>

Increasingly, regulators are recognising that the most credible and optimal enforcement strategy is achieved by a judicious mix of deterrence and persuasive approaches applying a regulatory enforcement pyramid.<sup>59,60,61</sup> Under this model the regulator assumes that a duty holder will be compliant, and begins enforcement activity at the bottom of the pyramid, providing advice (oral or written) and attempting to persuade the regulatee to comply voluntarily. If compliance is not forthcoming, the regulator escalates the response up the pyramid, through a range of sanctions or forms of punishment. These measures typically include inspectors’ improvement and prohibition notices, withdrawal of licenses and prosecution. Improvement notices are issued for breaches of OHS law that do not give rise to an immediate threat while prohibition notices are used to direct that specific activity or work ceases where there is an immediate threat to health and safety. In a strategy of responsive enforcement, infringement notices, together with improvement and prohibition notices, are an intermediate level response between advice and persuasion on the one hand and a higher level deterrent such as prosecution or withdrawal of a license on the other hand.<sup>62</sup>

There is currently no single approach to the use of infringement notices by OHS regulators. For example, in the Northern Territory inspectors are required to provide a warning before serving an infringement notice, and in New Zealand, infringement notices are to be reserved for situations that the person responsible has already been warned about, by written warning, improvement or prohibition notice, previous infringement notice, previous conviction, hazard notice or compliance order. Thus infringement notices are used to ‘escalate’ the regulator’s response to non-compliance. However, they are not to be used in place of prosecution in circumstances where multiple breaches have occurred. In such cases prosecution must be considered rather than serving multiple infringement notices. A different approach is applied in Queensland where OHS inspectors usually issue infringement notices together with an improvement or prohibition notice in order to require that a contravention is remedied.<sup>63</sup> Likewise in New South Wales an inspector may issue one or more improvement notices in conjunction with an infringement notice to ensure that identified health and safety issues are addressed.<sup>64</sup> In South Australia it is proposed that infringement notices would only be used if an infringement notice has previously been issued on a matter and it has not been complied with.<sup>65</sup>

There is scope to consider a more strategic approach to the use of infringement notices in the context of responsive enforcement. In particular, in view of the current low level of infringement fines, there is concern that an infringement notices may

signal to a corporation that offences are ‘purchasable commodities’ rather than acts and omissions considered by the state to be intolerable.<sup>66</sup> Moreover, infringement notices, by circumventing criminal processes in the courts, remove a significant deterrent effect of the scrutiny and social stigma of a court hearing. Added to this, OHS offences have historically been regarded as ‘not really criminal’, which has reduced the impact of OHS prosecutions.<sup>67</sup> A final concern is that infringement notices, on their own, do not require duty holders to review their management of OHS to ensure that there is not a repetition of the offence.

In determining the most strategic use of infringement notices a guiding rule is to ensure that there is proportionality between the seriousness of the offence, the enforcement measure(s) used and the penalty imposed. As such, infringement notices should not become a substitute for prosecution in serious or repeat cases of offending. However, inspectors might issue a number of notices simultaneously for different, less serious, offences where there are multiple breaches of legislation, particularly in view of the low level of fines. In addition, a mechanism is needed to require duty holders to review their management of the OHS problem giving rise to a breach, as once an infringement notice is paid, liability for the offence that is the subject of the notice is taken to be discharged. The current practice of some jurisdictions of using infringement notices in conjunction with improvement or prohibition notices provides such a mechanism for requiring preventive action.

### **Method and form of serving infringement notices**

In general, infringement notices may be served in person or by post using a standard form. There is some concern that the antagonism of recipients may be raised if a notice is sent in the post without advice at the time of inspection that a notice will be served.<sup>68</sup> Such a negative response can be substantially avoided by an inspector explaining, at the time of an inspection, that an infringement notice will be issued and why. It is the combination of warnings and education about an offence, combined with the actual fine, that make the infringement notice effective.<sup>69</sup>

A further consideration is to ensure that senior management's attention is drawn to the OHS problem. Serving notices principally to those with the central responsibility, resources and capacity to take preventive action is the most effective means to ensure that senior management are aware of the fine. In turn, this has greater potential to impact positively on organisational OHS policy. Follow-up procedures are also critical to check that performance has improved and to maximise preventive action.<sup>70,71</sup>

In addition to issues of ‘acceptance’ of infringement notices there are additional concerns about the legal rights of recipients. It may be expedient to serve an infringement notice but the lack of court appraisal and associated court procedure may undermine principles of due process and fairness. There is a risk that innocent people may pay infringement notices to avoid the inconvenience and cost of contesting proceedings. Accordingly the ALRC insists that the rights of an alleged offender must be set out clearly in the infringement notice including the right to contest the notice in court and the right to seek review or withdrawal of the notice by demonstrating to the issuing authority that the factual basis on which the notice was issued was erroneous. Recipients of notices should also be clear about the effect of payment of the notice on

the alleged offender and the consequences if the notice is not withdrawn or varied and the infringement notice is not paid.

Table 4 summarises the items prescribed for inclusion in OHS infringement notices in Australia and New Zealand. The items most commonly included are details of the alleged offence, the amount payable, how to pay, and the date, time and place of offence. Advising recipients of their rights in regard to contesting a notice in court is prescribed in five jurisdictions but advising of a right to request review of a notice by the relevant regulator is only prescribed in two jurisdictions. Nonetheless, other jurisdictions may allow for review of a notice. For example, in New South Wales the right to request review is not prescribed but is policy of the WorkCover Authority.<sup>72</sup> The effect of payment is prescribed in one jurisdiction (Northern Territory) and the consequences of not paying in only three jurisdictions (Tasmania, South Australia and New Zealand).

**Table 4: Items included on infringement notices**

Items	Jurisdictions							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
Details of offender			√	√	√			√
Date & time of offence	√	√	√	√	√			√
Date notice issued				√	√			
Place of offence	√		√	√	√			√
Regulation code			√					
Details of offence	√	√	√	√	√	√	√	√
Amount payable	√	√	√	√	√	√	√	√
How to pay	√	√	√	√	√	√	√	√
Request review		√		√				
Contest in court	√		√		√		√	√
Advise no further action if pay				√				
Consequences if disregard notice	√					√	√	
Inspector's details			√				√	

In summary, there is scope to improve both the acceptance of and response to infringement notices by considering how and to whom they are served. There is also scope to improve the protection of the rights of recipients by ensuring that opportunities to review or contest notices, and the consequences of non-payment, are clearly set out in infringement notices. These issues are only partially addressed under current procedures and forms for serving infringement notices.

### **Response to a notice and effect of payment**

The ALRC<sup>73</sup> recommends that the key actions that should be required of an alleged offender, to whom an infringement notice is issued, are to pay the infringement notice or to seek withdrawal of the notice by demonstrating that the factual basis on which

the notice was issued was erroneous. If the recipient of the notice does not pay the fine or appeal the notice, then they should be prosecuted for the alleged offence.

In only three of the jurisdictions, summarised in Table 5, are all three of these elements features of the system. Payment of the fine is a requirement in all of the regimes, usually to the OHS regulator but in some cases to the police or other government authority processing infringement notices. The usual period for paying the fine is 28 days (or 21 days in two jurisdictions). The opportunity to request a review of the notice by the OHS regulator is provided in only five of the jurisdictions. Prosecution for non-payment of the fine is a feature of five of the OHS infringement regimes but in South Australia, the statewide arrangements for expiation of offences provide that an alleged offender who does not pay the fine, or request a review by the regulator or a court hearing, will be convicted without a hearing. An additional element in four jurisdictions is the serving of a reminder notice.

**Table 5: Action required by alleged offender**

Action	Jurisdictions							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
Pay fine within set time	28 days	28 days	21 days	28 days	28 days	21 days	28 days	<i>Not yet introduced</i>
Payment to	Crown	OHS regulator or	Police	OHS regulator or	OHS regulator or	OHS regulator or	Police	
Request OHS regulator review	√	√	√	√			√	
Request court hearing	√	√	√	√	√		√	
Serving of reminder notice	√			√	√		√	
Prosecution of unpaid fine		√	√	√	√	√	Convict without hearing if reminder notice unpaid	

The ALRC<sup>74</sup> also recommends that proceedings should not be brought if a person accepts and pays an infringement notice and this is generally the case in the Australian and New Zealand regimes. However, there are some qualifications to this. In particular, in New Zealand, even if an infringement notice is paid, if the offending to which the notice relates is not fixed, that is the non-conformance is ongoing after the payment of the fine, then proceedings may still be taken. In at least two Australian jurisdictions (South Australia and Northern Territory), if an infringement notice is withdrawn, proceedings may also still be taken against an alleged offender. Furthermore, some jurisdictions, as discussed above, use infringement notices in conjunction with improvement or prohibition notices and further proceedings may be taken in relation to these if they are not complied with.

The ALRC<sup>75</sup> also recommends that acceptance of an infringement notice should not be an admission of liability in any civil proceedings, as the offence has not been tested in court. However, only some jurisdictions clearly establish this protection (see Table 6 below). Further to this, the ALRC considers that the fact that an infringement notice has been served or withdrawn should not be admissible in proceedings for an offence

to which the notice relates. This is the case in the Tasmanian regime but not in others. In South Australia an infringement notice cannot be taken into account in sentencing under other proceedings, but in New Zealand it can. Payment of an infringement notice cannot be recorded as a conviction in five of the eight jurisdictions considered.

**Table 6: Effect of payment of infringement notice**

Effect	Jurisdiction							
	NZ	Qld	NSW	NT	ACT	Tas	SA	Vic
No further proceedings		√	√	√ <i>unless IN withdrawn</i>	√	√	√ <i>unless IN withdrawn</i>	√
Payment not admission of civil liability			√			√	√	
Notice not admissible in proceedings						√		
No conviction recorded	√	√	√		√			√
Consideration of INs in sentencing	Yes						No	

In summary, there is scope to refine arrangements regarding response to infringement notices and effect of payment so that, in principle, a recipient who pays an infringement notice will not be subject to further proceedings, payment will not be regarded as admission of civil liability, and the serving of an infringement may not be admissible in subsequent proceedings. On the other hand, unless an infringement notice is reviewed and withdrawn, if it is not paid, the offence will be prosecuted.

However, there is a need to qualify this approach in the context of ongoing poor OHS performance in an organisation. In such circumstances the frequent issue of notices, by an officer who ‘has a reasonable belief’ that an alleged offence has been committed, does suggest a pattern of non-compliance, even if those notices are routinely paid and thus untested in court. Therefore, this information might form part of the compliance history of an organisation. For example, while an infringement notice should not be regarded as a previous conviction, a history of infringement notices might indicate the need to escalate the enforcement strategy with a firm. It is also relevant, in mitigation of penalty in OHS prosecutions, to rebut claims by organisations that they have a good attitude to OHS or a good OHS record.<sup>76</sup> In turn, maintenance of comprehensive records of infringement notices and follow up action, by the regulator, are important both to document the compliance history of an organisation, and also as the basis of assessment of the effectiveness of infringement notice schemes. Data to be collected are written warnings issued and either acted upon or ignored and repeat offences so that the enforcement response can be escalated, in accordance with a policy of responsive enforcement.<sup>77</sup>

## Conclusion

Infringement notices are now part of OHS law enforcement in several Australian states and territories, as well as in New Zealand. In principle these notices have the potential to favourably influence OHS performance. However, it is difficult to draw

firm conclusions about effectiveness in view of limited empirical evidence as well as the considerable diversity in existing schemes. This paper raises some important legal and practical concerns which may qualify the effectiveness of infringement notices, and have implications for policy makers designing and implementing infringement notice schemes, to be applied in OHS law enforcement.

The indications are that infringement notices are more suited to non-complex offences where the breach is clearly defined in law and the facts are easily verified. There is a challenge to define expiable OHS offences which are clear-cut and ambiguous but which also clearly have preventive value by virtue of a direct link to OHS risk control. There are reasons for regulators to be more cautious about applying infringement notices to offences involving decisions about '(reasonable) practicability' or the adequacy of risk management processes. There is also reason to keep the level of penalty for infringement notices under review. Current fines in Australia are low by international standards and as the principal role of infringement notices is to deter non-compliance, they need to be set at a level that does deter. This could involve a tiered system of fines where more serious and repeat breaches warrant a higher penalty.

There is a series of considerations relating to consistency and transparency in decision making, and procedure for, issuing infringement notices, both to ensure fairness for recipients of notices and effectiveness of infringement notice arrangements. There is a case for OHS regulators to develop and promulgate procedural guidelines addressing key considerations including: the *grounds* or criteria for issuing an infringement notice, the *number of offences* identified on a notice (one offence per notice), the *time limit* within which a notice may be served, arrangements and basis for *review and withdrawal* of a notice, how infringement notices are used in the context of *responsive enforcement* and a hierarchy of enforcement measures, and especially their relationship to improvement and prohibition notices, the *person to whom* notices are served (drawing senior manager's attention to OHS problems), and how *records* of infringement notices are used as part of the compliance history of an organisation.

To protect the legal rights of recipients, infringement notice formats should clearly set out the right to seek review of a notice or contest it in court, the effect of payment and consequences of non-payment. They should also provide details of the offence and practical arrangements about payment of the fine. There should be a consistent approach whereby infringement notices, that are paid and not subject to a court hearing are not taken into account in subsequent proceedings or civil action.

Finally, there is a need for further empirical studies of the use of infringement notices in Australian (and New Zealand) OHS law enforcement in order to determine more clearly the characteristics of infringement notice schemes that are most effective in deterring non-compliance with OHS law. Ultimately, the success of infringement notices depends on their ability to change the behaviour of recipients so that future injury, disease and death are prevented, and this is how they should be judged.

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