

# Responsive sentencing: Non-monetary orders in work health and safety

---

Guide for regulators in the use of non-monetary orders  
June 2020

Centre  
for WHS

The following tables (Table 1 – 6) list the relevant considerations for each non-monetary order. The tables also include the legal text from the *Model Work Health and Safety Act 2010* and links to example cases where the order has been given in the past. This includes cases across all Australian work health and safety jurisdictions.



This report and the work it describes were funded through the Workers Compensation Operational Fund. Its contents, including any opinions and/or conclusions expressed, are those of the authors alone and does not necessarily reflect SafeWork NSW policy.

© Crown Copyright 2020

Copyright of all the material in this report, including the NSW Government Waratah and other logos, is vested in the Crown in the right of the State of New South Wales, subject to the Copyright Act 1968. The use of the logos contained within this report is strictly prohibited.

The report may be downloaded, displayed, printed and reproduced without amendment for personal, in-house or non-commercial use.

Any other use of the material, including alteration, transmission or reproduction for commercial use is not permitted without the written permission of Department of Customer Service (DCS). To request use of DCS's information for non-personal use, or in amended form, please submit your request via email to [contact@centreforwhs.nsw.gov.au](mailto:contact@centreforwhs.nsw.gov.au)

Table 1: Summary of considerations before proposing an Adverse Publicity Order to the court, including legal citation and example case law.

Adverse Publicity Order <i>Work Health and Safety Act 2010 s 236</i>		
Citation	Considerations	Case law
<p>(1) The court may make an order (an <b>adverse publicity order</b>) in relation to the offender requiring the offender:</p> <p>(a) to take either or both of the following actions within the period specified in the order:</p> <p>(i) to publicise, in the way specified in the order, the offence, its consequences, the penalty imposed and any other related matter,</p> <p>(ii) to notify a specified person or specified class of persons, in the way specified in the order, of the offence, its consequences, the penalty imposed and any other related matter, and</p> <p>(b) to give the regulator, within 7 days after the end of the period specified in the order, evidence that the action or actions were taken by the offender in accordance with the order.</p> <p>(2) The court may make an adverse publicity order on its own initiative or on the application of the person prosecuting the offence.</p> <p>(3) If the offender fails to give evidence to the regulator in accordance with subsection (1) (b), the regulator, or a person authorised in writing by the regulator, may take the action or actions specified in the order.</p> <p>(4) However, if:</p> <p>(a) the offender gives evidence to the regulator in accordance with subsection (1)(b); and</p> <p>(b) despite that evidence, the regulator is not satisfied that the offender has taken the action or actions specified in the order in accordance with the order, the regulator may apply to the [designated court] for an order authorising the regulator, or a person authorised in writing by the regulator, to take the action or actions.</p> <p>(5) If the regulator or a person authorised in writing by the regulator takes an action or actions in accordance with subsection (3) or an order under subsection (4), the regulator is entitled to recover from the offender, by action in a court of competent jurisdiction, an amount in relation to the reasonable expenses of taking the action or actions as a debt due to the regulator.</p>	<p>(1) the nature of the offence</p> <p>(2) the prevalence of the offence in the industry</p> <p>(3) the level of compliance achieved since the offence was committed</p> <p>(4) how the offender views:</p> <ul style="list-style-type: none"> <li>importance of reputation</li> <li>likelihood of publicity reaching important people</li> <li>likelihood these groups will disapprove</li> <li>extent of latent impacts of this disapproval</li> </ul> <p>(5) the environment in which the notice will be released</p> <p>(6) the language and wording</p> <ul style="list-style-type: none"> <li>Noticeable</li> <li>Accessible</li> <li>Relevant</li> <li>Implementable</li> </ul> <p>(7) the characteristics of the intended audience;</p> <ul style="list-style-type: none"> <li>Who needs to be informed, warned or deterred? (for example, public, industry, investors, shareholders, creditors, contractors, collaborators, distributors, providers, customers, employees)</li> <li>Will they disprove?</li> <li>Is it relevant?</li> <li>Will they learn?</li> </ul> <p>(8) how and when they are best reached</p> <ul style="list-style-type: none"> <li>Delivery method (for example, media releases, tv, radio, printed and online newspapers, industry magazines, websites, social media, displaying physical notices, direct contact through email or post)</li> <li>Duration</li> <li>Size</li> <li>Proportional cost and attention</li> </ul>	<p><a href="#">SafeWork NSW v Investa Asset Management Pty Ltd [2019] NSWDC 472</a></p> <p><a href="#">SafeWork NSW v KD &amp; JT Westbrook Pty Ltd (No 2) [2019] NSWDC 15</a></p> <p><a href="#">Perry v Bellard Pty Ltd [2014] SAIRC 23</a> (Order appealed)</p> <p><a href="#">Badge Constructions (SA) Pty Ltd v Perry [2014] SAIRC 25</a> (Order appealed)</p> <p><a href="#">Perry v Kahlon Estate's Wines Pty Ltd [2013] SAIRC 27</a></p> <p><a href="#">Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor [2013] SAIRC 22</a></p> <p><a href="#">Hillman v Prospect Building Services Pty Ltd &amp; Anor [2013] SAIRC 21</a></p> <p><a href="#">Perry v Conroy's Smallgoods Pty Ltd [2013] SAIRC 20</a></p> <p><a href="#">Hillman v Amcor Packaging (Aust.) Pty Ltd [2012] SAIRC 59</a></p> <p><a href="#">Neale v BJ Jarrad Pty Ltd [2012] SAIRC 57</a></p> <p><a href="#">Russell v SA Dept of Further Education, Employment, Science and Technology [2012] SAIRC 39</a></p> <p><a href="#">Farrell v B &amp; A Fisheries Pty Ltd [2012] SAIRC 27</a></p> <p><a href="#">Farrell v AlSCO Pty Ltd [2012] SAIRC 23</a></p> <p><a href="#">Farrell v Goodchild Nominees Pty Ltd [2011] SAIRC 69</a></p> <p><a href="#">Hook v Weatherford Drilling International (Aust) Pty Ltd (2010) SAIRC 49</a></p> <p><a href="#">Hillman v MSP Group Pty Ltd [2010] SAIRC 34</a></p> <p><a href="#">Ireland v Lucas Earthmovers Pty Ltd [2010] SAIRC 16</a></p>

Table 2: Summary of considerations before proposing a Restoration Order to the court, including legal citation and example case law.

Orders for Restoration <i>Work Health and Safety Act 2010 s 237</i>		
Citation	Considerations	Case law
<p>(1) The court may order the offender to take such steps as are specified in the order, within the period so specified, to remedy any matter caused by the commission of the offence that appears to the court to be within the offender's power to remedy.</p> <p>(2) The period in which an order under this section must be complied with may be extended, or further extended, by order of the court but only if an application for the extension is made before the end of that period.</p>	<p>(1) the nature of the offence</p> <p>(2) the harm caused by the offence has not been addressed. For example,</p> <ul style="list-style-type: none"> <li>unaddressed matters</li> <li>financial or other material losses</li> <li>harm to the community</li> </ul> <p><b>Note:</b> Consider workers compensation arrangements, public liability insurance and common law remedies</p> <p>(3) can it be included in other non-monetary orders? For example,</p> <ul style="list-style-type: none"> <li>Injunctions</li> <li>Project Orders,</li> <li>WHS Undertakings</li> </ul> <p>(4) the characteristics of victims and others indicating losses have not been fully compensated and low likelihood of seeking compensation through other means. For example,</p> <ul style="list-style-type: none"> <li>young age</li> <li>low financial capacity</li> <li>weak employment conditions</li> </ul> <p>(5) the characteristics of the offender indicating ability to comply. For example,</p> <ul style="list-style-type: none"> <li>financial capacity</li> </ul> <p>(6) conferencing or engagement to incorporate the voice of those involved and identify opportunities for restoration activities incl. compensation, donation or project-style activities. For example,</p> <ul style="list-style-type: none"> <li>victims</li> <li>industry associations</li> <li>community groups</li> <li>charities</li> <li>public organisations</li> <li>trusts</li> </ul>	<p><a href="#">SafeWork NSW v MGK Constructions Pty Ltd [2019] NSWDC 518</a> (Order rejected)</p> <p><a href="#">Boland v Kentucky Fried Chicken Pty Ltd [2017] SAIRC 16</a> (Order rejected)</p> <p><a href="#">R v Garth Paterson [2016] Local Courts of NSW (unpublished)</a></p>

Table 3: Summary of considerations before proposing a Project Order to the court, including legal citation and example case law.

WHS Project Orders <i>Work Health and Safety Act 2010 s 238</i>		
Citation	Considerations	Case law
<p>(1) The court may make an order requiring the offender to undertake a specified project for the general improvement of work health and safety within the period specified in the order.</p> <p>(2) The order may specify conditions that must be complied with in undertaking the specified project.</p>	<p>(1) the nature of the offence and the offender's behaviour since the offence</p> <p>(For example, not deliberate, taking responsibility and collaborating during investigation suggests willingness and likelihood to complete a successful project)</p> <p>(2) the causes of the offence</p> <ul style="list-style-type: none"> <li>policy, procedures, practices</li> <li>insufficient implementation of knowledge or capability</li> <li>remaining risk or potential for harm in the organisation or industry</li> <li>unknown</li> </ul> <p>(3) combine with other non-monetary orders</p> <ul style="list-style-type: none"> <li>Training Order</li> <li>Restoration Order</li> <li>Adverse Publicity Order</li> </ul> <p>(4) the offender's capacity and ability to comply</p> <p>(For example, financial capacity, appointment of experts or consultants to support)</p> <p>(5) the scope of the project</p> <ul style="list-style-type: none"> <li>internal or community focussed</li> <li>related to the offence</li> </ul> <p>(6) outcomes</p> <ul style="list-style-type: none"> <li>concrete, tangible, and measurable</li> <li>short term and longer term</li> <li>How will the offender demonstrate compliance to the Court?</li> <li>What role will the regulator play in verifying compliance?</li> </ul> <p>(7) conferencing or engagement to incorporate the voice of those involved and identify opportunities for project activities</p>	<p><a href="#">SafeWork NSW v Samuels [2019] NSWDC 111</a></p> <p><a href="#">Hillman v Barossa Enterprises Incorporated [2011] SAIRC 26</a></p> <p><a href="#">WorkSafe Victoria v dairy farm in Milawa</a> (28/09/2018, undertaking)</p> <p><a href="#">WorkSafe Victoria v Mertikas Holdings Pty Ltd</a> (20/04/2015, undertaking)</p> <p>Cases involved in Victoria's 2014-2015 Diversion Program (<a href="#">1/07/2015</a>, <a href="#">28/05/2015</a>, <a href="#">21/04/2015</a>, <a href="#">9/04/2015</a>, <a href="#">2/10/2014</a>, <a href="#">4/09/2014</a>)</p>

Table 4: Summary of considerations before proposing a WHS Undertaking to the court, including legal citation and example case law.

Release on the giving of a court-ordered WHS Undertaking <i>Work Health and Safety Act 2010 s 239</i>		
Citation	Considerations	Case law
<p>(1) The court may (with or without recording a conviction) adjourn the proceeding for a period of up to 2 years and make an order for the release of the offender on the offender giving an undertaking with specified conditions (a <b><i>court-ordered WHS undertaking</i></b>).</p> <p>(2) A court-ordered WHS undertaking must specify the following conditions:</p> <p>(a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned;</p> <p>(b) that the offender does not commit, during the period of the adjournment, any offence against this Act;</p> <p>(c) that the offender observes any special conditions imposed by the court.</p> <p>(3) An offender who has given a court-ordered WHS undertaking under this section may be called on to appear before the court by order of the court.</p> <p>(4) An order under subsection (3) must be served on the offender not less than 4 days before the time specified in it for the appearance.</p> <p>(5) If the court is satisfied at the time to which a further hearing of a proceeding is adjourned that the offender has observed the conditions of the court-ordered WHS undertaking, it must discharge the offender without any further hearing of the proceeding.</p>	<p>(1) the nature of the offence and the offender's behaviour since the offence (For example, not deliberate, taking responsibility and collaborating during investigation suggests willingness and likelihood to complete additional activities)</p> <p>(2) the aim of the order</p> <ul style="list-style-type: none"> <li>▪ supervision</li> <li>▪ deterrence</li> <li>▪ punishment</li> <li>▪ incapacitation</li> <li>▪ rehabilitation</li> </ul> <p>(3) the offender's needs and the causes of the offence that require addressing</p> <ul style="list-style-type: none"> <li>▪ Training Order</li> <li>▪ Restoration Order</li> <li>▪ Project Order</li> </ul> <p>(4) the duration (For example, 6 months for a training course, 12 months without special conditions, up to two years if required)</p>	<p><a href="#">SafeWork NSW v Samuels [2019] NSWDC 111</a></p> <p><a href="#">SafeWork NSW v E G Knight &amp; Sons Pty Ltd [2019] NSWDC 336</a> (order rejected)</p> <p><a href="#">SafeWork NSW v Yan Huai Wu and Zenger (Aust) Pty Ltd [2018] NSWDC 211</a></p> <p><a href="#">R v Salvation Army NSW Property Trust [2015] NSWDC</a></p> <p><a href="#">WHSQvE236520</a> (19/03/2019)</p> <p><a href="#">WHSQvE246589</a> (13/12/2018)</p> <p><a href="#">WHSQvE241701</a> (08/10/2018)</p> <p><a href="#">WHSQvE238161</a> (6/07/2018)</p> <p><a href="#">WorkSafe Victoria v Bellevue Orchard Pty Ltd</a> (20/12/2018)</p> <p><a href="#">WorkSafe Victoria v Mills Plumbing and Airconditioning Pty Ltd</a> (15/08/2018)</p> <p><a href="#">WorkSafe Victoria v Extension Builders Australia Pty Ltd</a> (14/08/2018)</p> <p><a href="#">WorkSafe Victoria v Dept of Health and Human Services</a> (19/06/2018)</p>

Table 5: Summary of considerations before proposing a Training Order to the court, including legal citation and example case law.

Training Order <i>Work Health and Safety Act 2010</i> s 241		
Citation	Considerations	Case law
The court may make an order requiring the person to undertake or arrange for 1 or more workers to undertake a specified course of training.	<p>(1) the nature of the offence</p> <p>(2) the lack of willingness, capability or competence was a significant contributor to the offence</p> <p>(3) address general or specific training needs, for example,</p> <ul style="list-style-type: none"> <li>▪ Due diligence training</li> <li>▪ Risk management training</li> <li>▪ Supervisor/management training</li> <li>▪ General WHS training</li> <li>▪ Specific areas related to the offence, (For example, falls from heights, forklift operation, machine operation)</li> </ul> <p>(4) duration</p> <ul style="list-style-type: none"> <li>▪ one-off training course/s</li> <li>▪ ongoing training program</li> </ul> <p>(5) combine with other non-monetary orders</p> <ul style="list-style-type: none"> <li>▪ Project Order</li> <li>▪ WHS Undertaking</li> <li>▪ Restoration Order</li> <li>▪ Adverse Publicity Order</li> </ul> <p>(6) who would most benefit from adequate knowledge and skills to ensure future compliance</p> <p>(7) ensure the course selected is appropriate to the characteristics of the learners, that is,</p> <ul style="list-style-type: none"> <li>▪ Tailored</li> <li>▪ Engaging</li> <li>▪ Relevant</li> <li>▪ Problem solving</li> <li>▪ Timely</li> <li>▪ Implementable</li> </ul>	<p><a href="#">SafeWork NSW v Bilal Hamdan [2020] NSWDC 65</a></p> <p><a href="#">SafeWork NSW v Samuels [2019] NSWDC 111</a></p> <p><a href="#">SafeWork NSW v E G Knight &amp; Sons Pty Ltd [2019] NSWDC 336</a> (order rejected)</p> <p><a href="#">SafeWork NSW v Cleo Antoniou [2018] NSWDC 392</a> (order rejected)</p> <p><a href="#">SafeWork NSW v Yan Huai Wu and Zenger (Aust) Pty Ltd [2018] NSWDC 211</a></p> <p><a href="#">WorkCover NSW v Desmond Long</a> (July 2014)</p> <p><a href="#">Perry v Carter [2014] SAIRC 2</a></p> <p><a href="#">Perry v Kahlon Estate Wines Pty Ltd [2013] SAIRC 27</a></p> <p><a href="#">WHSQvE194862</a> (05/02/2016)</p> <p><a href="#">WHSQvE190028</a> (22/06/2016)</p>