

Commonwealth Senate Education and Employment Committee Inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia

Melbourne Public Hearing – 28 August 2018

Victorian Government's response to questions on notice

Request for copies of documents

The Committee has requested copies of the following documents:

- The Victorian Government's opening address to the Committee
- The Family Liaison Officer Fatalities Services Model
- The WorkSafe Compliance and Enforcement Policy (2005) (Compliance and Enforcement Policy).

Copies of these documents are attached.

The Compliance and Enforcement Policy has recently been reviewed and updated. The new Compliance and Enforcement Policy will soon be published on the WorkSafe website.

The review and update of the Compliance and Enforcement Policy was undertaken in response to recommendations made by the Independent Review of Occupational Health and Safety (OHS) Compliance and Enforcement (Independent Review). The Independent Review examined the appropriateness and effectiveness of OHS compliance and enforcement in Victoria. The Independent Review made its final report public on 19 December 2017 and made 22 recommendations. The Victorian Government responded to the Independent Review, supporting 19 recommendations in full, two recommendations in part and one recommendation in principle. WorkSafe has committed to implementing all 22 recommendations in line with the Government's response.

The recommendations focused on improving and enhancing the existing Victorian compliance and enforcement framework. Specific recommendations were made to refresh the Compliance and Enforcement Policy in consultation with the OHS Advisory Committee. In line with the Government's Response to the Independent Review, the readability of the Compliance and Enforcement Policy has been improved by using clear, accessible language, simplifying some sections, removing unnecessary diagrams and improving the narrative by altering the structure and flow of the document.

Request for information that indicates the policy direction or the policy formulation of the proposed offence of industrial manslaughter in Victoria

The Victorian Government has announced that should it be re-elected, it will legislate a new criminal offence of 'workplace manslaughter' in the *Occupational Health and Safety Act 2004* (OHS Act).

The offence would cover the situation where an employee dies, or is injured and later dies, as a result of negligent conduct of an employer. In addition to employees, the offence will also cover the

situation where negligence causes the death of someone other than an employee (such as a member of the public).

Employers that are convicted of the offence would face maximum fines of almost \$16 million (100,000 penalty units) and individuals who are responsible for negligently causing death will face a maximum penalty of 20 years imprisonment.

This penalty is more than five times the current penalty for an employer who recklessly engages in conduct that places another person at a workplace in danger of serious injury under the OHS Act. This sends a strong message that putting people's lives at risk in the workplace will not be tolerated.

WorkSafe will be responsible for prosecuting employers who do the wrong thing and will be given the powers and resources needed to do this.

The government will establish an Implementation Taskforce, including business and unions, to consult on the details of the proposed laws.

Request for data on the number of quad bike fatalities since the introduction of the new Compliance Code on Plant, and whether any of those fatalities involved quad bikes that were compliant with the new Code.

In March 2018, Victoria published the Plant Compliance Code (Code) which provides practical guidance for those who have duties or obligations in relation to plant, including quad bikes, under the OHS Act and Occupational Health and Safety Regulations 2017 (OHS Regulations).

There have been no quad bike fatalities in Victoria since the introduction of the Code.

The Code provides information about how to identify hazards and control risks associated with plant used in a workplace, including quad bikes.

The Code identifies key sources of risk for the operation of quad bikes, such as roll over and collisions. The Code also outlines associated control measures that may reduce these risks such as the use of warning devices and operator protective devices. While the Code outlines measures to identify and reduce risks, quad bike fatalities can be the result of a complex range of plant, environmental and behavioural factors (such as operator error or negligence). It is not possible for this Code to deal with every risk associated with the use of plant in the workplace that a duty holder might encounter. The guidance in this Code needs to therefore be considered with regard to the particular characteristics and circumstances of the workplace.

While the guidance provided in the Code is not mandatory, a duty holder who complies with the Code will – to the extent it deals with their duties or obligations under the OHS Act and OHS Regulations – be taken to have complied with those duties or obligations.

Victoria also has a comprehensive guide on the safe use of quad bikes titled *Quad bikes on farms: A handbook for workplaces 2018*. The handbook provides detailed information for users of quad bikes, including a risk assessment tool and identification of a wide range of risk factors and how they may be controlled. Risk controls include the use of helmets, operator protective devices, training, quad bike maintenance, appropriately managing loads and attachments, and considering the most

appropriate vehicle for the working environment. WorkSafe is also continuing its awareness and education campaign in this area.

Request for data on the number of workplace visits made by WorkSafe that are made in response to calls from unions

When reporting health and safety concerns or requesting WorkSafe inspections, callers are not required to identify themselves or whether they are a union representative or affiliate. It is therefore not possible for WorkSafe to definitively state the number of workplace visits by WorkSafe inspectors that are the result of service requests made by unions.

In 2017-2018, there were 10,705 service requests made to WorkSafe. Of these service requests, 6,463 resulted in a workplace visit by WorkSafe inspectors.

WorkSafe data indicates that 1,435 of these requests were from people that identified as being from a union. Of these service requests, 916 resulted in a workplace visit by WorkSafe inspectors. As noted above, this figure may not be representative of the proportion of service requests that are made by unions, because callers are not required to identify themselves or whether they are a union representative or affiliate.

Request for data on the number of workplace deaths over the last 5 years that have resulted in prosecution?

An employer or self-employed person has a duty to notify WorkSafe of a death that has occurred at a workplace that is under their management or control (sections 37 and 38 of the OHS Act). This includes the death of an employee or a person present at the workplace (such as a visitor or member of the public). WorkSafe reports annually on the number of fatalities that are determined to be “work related”. This includes suicides and traffic accidents that are determined to be work related.

However, it does not include:

- deaths that do not occur in a workplace and do not arise from the conduct of work (or a work process);
- deaths determined strictly to be of natural causes or suicide that are not work related;
- police, security guards, bank staff and shop staff that are killed in the traditional course of crime (e.g. armed robbery); and
- deaths of employees, self-employed persons or other persons covered by legislation not administered by WorkSafe Victoria (e.g. Comcare, ships subject to the *Occupational Health and Safety [Maritime] Act 1994* [Cth]).

The table below provides the numbers of successful and unsuccessful prosecutions relating to each notifiable death over the past five calendar years. Some notifiable fatalities resulted in the prosecution of more than one legal entity.

Year	No. of notified fatalities	No. of notified fatalities that resulted in prosecutions	No. of legal entities prosecuted	No. of successful prosecutions	No. of unsuccessful prosecutions	No. of prosecutions on foot
2013	21	7	13	11	2	-
2014	23	13	13	8	1	4
2015	19	8	9	6	-	3
2016	26	10	12	3	-	9
2017	27	7	7	1	-	6
Total	116	45	54	29	3	22

Request for confirmation on whether all families of victims of workplace fatalities in Victoria for the past two years have been contacted by the Family Liaison Officer

WorkSafe does not capture data on whether all the families of victims of workplace fatalities are contacted by the Family Liaison Officer (FLO).

The FLO was established within WorkSafe at the start of 2018. When WorkSafe is notified of a fatality, WorkSafe investigators obtain the contact details of family members where possible and refer these contact details to the FLO to make initial contact. The FLO's intention is to have ongoing contact with all families that have current investigation or prosecution matters on foot. In some circumstances, it is not appropriate for the FLO to have direct or ongoing contact with family members; for example, in fatalities where the family is being investigated as the employer. In those circumstances, the family may be referred to external support service providers (for example GriefWorks). In some instances, the family or next of kin may not want to have contact with the FLO.

Request for information on the scope of services provided by the WorkSafe Victoria's Family Liaison Officer

The attached FLO Fatalities Service Model provides a comprehensive description of the support provided by the FLO prior, during and after a prosecution. The Fatalities Service Model also discusses the FLO's role in supporting the family through decisions not to prosecute, and the drafting of victim impact statements. Finally, the Fatalities Service Model outlines the approach to disengaging with the family after the court processes have concluded.

The support offered by the FLO does not extend to coronial inquests. In circumstances where a coroner is conducting an inquiry, the family will be referred to the Family Liaison Officers at the Coroners' Court.

Request for information on the penalty in the *Occupational Health and Safety Act 2004 (Vic)* for the offence of failing to notify WorkSafe of a workplace fatality or serious injury

Section 38(1) of the OHS Act requires employers to notify WorkSafe of certain types of workplace incidents. The types of incidents that must be reported to WorkSafe are:

- where a person has died;
- where a person requires medical treatment within 48 hours of exposure to a substance;
- where a person has incurred a serious injury that requires immediate medical treatment or treatment as an in-patient in a hospital; or
- where an incident has exposed a person in the immediate vicinity to an immediate risk to the person's health or safety.

The importance of these obligations was recognised in 2017, when the penalties for breach almost doubled. A breach of these provisions is an indictable offence (although may be heard summarily) and carries significant penalties of 240 penalty units (currently \$38,686) for individuals and 1,200 penalty units (currently \$193,428) for body corporates.

Request for information on the operating budget for WorkSafe Victoria's enforcement and prosecution activities

WorkSafe Enforcement Group's total operating budget for 2018/2019 financial year is \$13,728,199. The Enforcement Group is responsible for investigating and prosecuting breaches of health and safety and workplace compensation legislation. The Enforcement Group currently consists of 52 investigators, 18 lawyers, and is assisted by analysts and support personnel.

Request for data on the number of notices not to disturb a worksite have been issued in the last five years, in response to a workplace death

Where a fatality or serious incident occurs, section 39(1) of the OHS Act imposes a duty on employers to preserve the incident site until otherwise directed by a WorkSafe inspector. Breaching this section is an indictable offence, which carries significant penalties of up to 240 penalty units (currently \$38,686) for an individual and 1200 penalty units (currently \$193,428) for a body corporate.

Section 39(2) provides that a site may be disturbed for the purpose of protecting the health or safety of a person, aiding an injured person involved in an incident or taking essential action to make the site safe or to prevent a further occurrence of an incident.

Under section 110 of the OHS Act, WorkSafe inspectors have the power to issue a non-disturbance notice to a person requiring that person to stop the use or movement of, or interference with any specified plant, substance or other thing, and to prevent the disturbance of the specified plant, substance or other thing or a specified area of the plan where the plant, substance or other thing is located. Such a notice can be for up to seven days, although multiple notices may be issued.

Since 1 January 2013, WorkSafe has issued 32 non-disturbance notices in response to a workplace fatality.

Request for data on the number of WorkSafe Victoria's investigations in the last five years that have resulted in prosecution

WorkSafe records the number of investigations completed each financial year as well as the number of prosecutions commenced. WorkSafe aims to complete its investigations within six months and to commence its prosecutions within 12 months of the investigation commencing. Given not all investigations are completed and prosecuted within the same year, it is not possible for WorkSafe to accurately represent correlative data representing the number of investigations in the last five years that have resulted in prosecutions.

The data below highlights the number of investigations completed, the number of prosecutions commenced, and the prosecution success rate, to give the Inquiry an understanding of the scope of WorkSafe's enforcement activity.

Compliance measure	2013/2014	2014/2015	2015/2016	2016/2017	2017/2018
Investigations completed	251	275	300	299	286
Prosecutions commenced	107	114	119	138	148
Prosecution success rate	88%	93%	94%	90%	91%

Request for data on the number of prosecutions involving workplace fatality that have been conducted by the Victorian Director of Public Prosecutions over the past five years

WorkSafe is responsible for prosecuting matters under the OHS Act that are heard summarily. For indictable matters, the matter remains under the care and conduct of WorkSafe's Enforcement Group until the offender is committed to stand trial. Where an accused is committed to stand trial by a Court, the *Criminal Procedure Act 2009* (Vic) mandates that the Director of Prosecutions conducts the matter. WorkSafe does not keep statistical data on matters that are run by the Director of Public Prosecutions.

Request for information on how WorkSafe determines whether or not to prosecute a case

WorkSafe has published its General Prosecution Guidelines that provides comprehensive guidance on how WorkSafe determines whether or not to prosecute a matter or to issue a letter of caution.

WorkSafe is guided by two paramount considerations when deciding the most appropriate enforcement action to take:

- whether there is sufficient evidence to support enforcement action; and
- whether enforcement action is in the public interest.

In deciding whether there is sufficient evidence, prosecutors must be satisfied that there is a reasonable prospect of conviction. Factors that a prosecutor may consider when making this assessment include possible defences and the integrity, reliability and credibility of the available evidence.

Once satisfied that there is a reasonable prospect of a conviction, prosecutors must consider whether a prosecution is in the public's interest. Factors that a prosecutor will take into account when deciding if a prosecution is in the public interest include:

- the nature and circumstances of the offending;
- the characteristics of the offender;
- the impact of the alleged offending on other persons and the regulatory scheme;
- the need for general and specific deterrence;
- when the alleged offending took place; and
- the length and cost of taking enforcement action.

WorkSafe's prosecution policy draws on the principles contained within the Victorian Director of Public Prosecution's prosecution policy. To assist the Inquiry, that policy has also been provided.

My name is Paul Fowler. I am the Acting Executive Director of Health and Safety at WorkSafe Victoria.

Thank you for your invitation to appear today to discuss Victoria's submission and to assist the inquiry.

In this day and age, no life should be lost at work, and no one should be at risk of losing their life at work.

While workplace fatalities have continued to occur in Victoria, there has been a downward trend over the past three decades. Unfortunately, a total of 27 people lost their lives as a result of an incident at a Victorian workplace last year and there have been 13 deaths to date this year.

Even one death is one too many – every Victorian deserves to come home from work safely every day. Behind these figures are family and friends suffering an unimaginable loss. I would like to take this opportunity to express my condolences to Mr and Mrs Brownlee and Dr Lana Cormie who are here today, and bravely shared their story to this inquiry.

Victoria's response to a workplace fatality comprises of clear notification requirements, collaboration between multiple agencies, support for the families and those affected, and a strong compliance and enforcement framework. It is also imperative that the penalty system in any OHS framework is a strong enough deterrent to make sure employers take workplace safety seriously.

About WorkSafe Victoria

As Victoria's occupational health and safety regulator and manager of Victoria's workers compensation scheme, WorkSafe plays a critical role in the lives of Victorian employers and workers.

It is WorkSafe's vision to ensure that Victorian workers return home safely every day. WorkSafe works with the Victorian community to actively prevent workplace injuries and illness from occurring. This prevention led approach is embedded through the Victorian Occupational Health and Safety or OHS legislative framework and is also a key focus of WorkSafe's corporate strategy, WorkSafe 2030.

This means that WorkSafe invests in proactive initiatives to prevent incidents of workplace injury and illness. Preventative strategies include a combination of awareness, education, partnerships and enforcement.

Victoria's written submission outlines some of WorkSafe's current programs aimed towards reducing injury and fatality in Victoria's three highest risk industries, those of construction, major hazards facilities and mines, and agriculture. The programs, whilst tailored to each industry, all seek to emphasise a proactive, educative and preventative approach to workplace safety, and to embed a culture of safety in these industries.

For example, in March 2018, WorkSafe commenced a targeted initiative on quad bike safety in the agriculture industry. Between 2011 and 2017, there were 25 deaths as a result of quad

bike roll over. Preventing further death and injury is a key priority for WorkSafe. Since March 2018, WorkSafe has inspected over 500 workplaces and issued more than 200 notices relating to inadequate risk controls associated with quad bikes, including roll over, helmets and vehicle maintenance.

To incentivise farmers to improve quad bike safety, in 2016, Victoria introduced a rebate scheme for eligible farmers to receive up to \$1200 for the fitment of operator protector devices, or the purchase of an alternative vehicle.

Earlier this year, Victoria published a Compliance Code on plant which provides specific guidance to employers and duty holders in respect to quad bikes. The Code identifies key sources of risk such as roll over and associated controls such as the fitment of operator protective devices. Duty holders who follow this Compliance Code are deemed to have complied with their duties or obligations under the OHS Act and OHS Regulations with regard to plant.

Victoria also has a comprehensive guide on the safe use of quad bikes titled *Quad bikes on farms: A handbook for workplaces 2018*. The handbook provides further detailed information for users of quad bikes, including a risk assessment tool and identification of a wide range of risk factors and how they may be controlled. Risk controls include the use of helmets, operator protective devices, training, quad bike maintenance, appropriately managing loads and attachments, and considering the most appropriate vehicle for the working environment. WorkSafe is continuing its awareness and education campaign in this area.

Vulnerable workers

Another key focus area for Victoria is the risks faced by Victoria's most vulnerable workers. As highlighted in Victoria's written submission, labour hire workers are among those disproportionately affected by hazardous employment.

In June 2018, the Victorian Parliament passed legislation establishing a labour hire licensing scheme. The scheme will be regulated and administered by a new Labour Hire Commissioner and is expected to commence in early 2019. The scheme seeks to protect labour hire workers from being underpaid and exploited by labour hire businesses and hosts who use labour hire workers.

Whilst several other States have also introduced similar schemes, the Victorian Government strongly supports an appropriately designed national licensing scheme as the most effective way to achieving the benefits of such a scheme. The Victorian Government reiterates its request for the Federal Government to take action in this area by establishing a national labour hire licensing scheme.

Victoria is committed to developing programs for the labour hire industry that enhance awareness and knowledge of workplace safety for both employers and labour hire employees.

The Victorian OHS Framework - Incident notification and initial investigations

WorkSafe is notified of workplace fatalities either by the responding emergency services personnel or from employers through mandatory notification provisions in the OHS Act.

Notifications must be made regardless of whether the incident involves an employee or a member of the public.

The initial notification is usually made by phone and the OHS Act requires the employer or self-employer to provide a written report within 48 hours. The employer or self-employer must also preserve the site until an inspector arrives or such other time that an inspector directs.

Upon receiving notification of a death, WorkSafe will attend the site as soon as possible. Victoria Police and Ambulance Victoria are generally the first responders to a workplace fatality. Upon the arrival of a WorkSafe investigator, the scene is under WorkSafe's jurisdiction.

Where there are questions as to whether an offence has also been committed under the *Crimes Act*, WorkSafe and Victoria Police work closely together, and may progress joint investigations and prosecutions. Victoria Police, on behalf of the Coroner, will also conduct a concurrent investigation. The relationship between Victoria Police, the Coroner's office and WorkSafe is one of collaboration and cooperation.

The role of the family liaison officer

Whilst it is Victoria Police or the employer who generally notifies the person's next of kin or family, WorkSafe has a key role to play in supporting families through the investigation and prosecution process.

Where there has been a workplace fatality, WorkSafe's Family Liaison Officer, or FLO, provides support and information to family members. The FLO is a trained social worker and will make contact with the next of kin after referral from the WorkSafe investigator. Ongoing contact between the family and the FLO is guided by the needs and wishes of the family.

Victoria acknowledges that workplace deaths represent an overwhelming challenge to bereaved family members as they are particularly unexpected and traumatic. An important part of the FLO role is to assist families to understand the role of the WorkSafe prosecution, and to integrate it into a narrative where the criminal prosecution is only one part of the process.

Victoria is also exploring options for restorative justice practices to be implemented during the enforcement and claims process. Restorative justice principles are a way of reconciling the actions of an offender with the expectations of victims and the wider community. WorkSafe has commissioned RMIT to undertake this project, and is currently engaging with key stakeholders, to ensure that any model proposed can meet the needs of all parties involved in or affected by workplace fatalities or injuries.

Enforcement

Whilst Victoria directs considerable resources into its prevention programs, enforcement is an important response to any workplace injury or fatality. A vital element of WorkSafe's enforcement activities is undertaking investigations and prosecutions whether or not a breach of the OHS Act or Regulations has resulted in death, injury or disease. This allows WorkSafe to also investigate near misses and provides opportunities to prevent serious

injury or death from occurring at a later stage should appropriate control measures not be implemented.

An Independent Review was established in 2016 to examine the appropriateness and effectiveness of OHS compliance and enforcement in Victoria. The Independent Review made its final report public on 19 December 2017 and made 22 recommendations. Victoria has accepted all recommendations either in full, in part or in principle.

The recommendations focused on improving and enhancing the existing Victorian compliance and enforcement framework, specifically through refreshing WorkSafe's OHS Compliance and Enforcement Policy, enhancing the existing regulatory toolkit, and improving existing WorkSafe information, support and training.

Offences

In respect to offences, currently, the offence of reckless endangerment is the most serious offence under the OHS Act, carrying a term of imprisonment not exceeding 5 years and/or a maximum fine of approximately \$285,000 for a natural person or \$3.1 million in the case of a company.

The fine for a company was more than doubled in 2016 to reinforce the seriousness and additional culpability associated with reckless endangerment.

Industrial manslaughter

The Victorian Government will not tolerate fatalities at work and recognises that while prevention is a high priority, the penalty system needs to be a strong enough deterrent to make sure employers take workplace safety seriously.

The Victorian Government has committed, if re-elected, to create a new criminal offence of workplace manslaughter in the OHS Act. Under this proposed law, employers will face fines of up to \$16 million and individuals responsible for negligently causing death will be held to account and face up to 20 years in gaol. This penalty is more than five times the current penalty for the reckless endangerment offence. This sends a strong message that putting people's lives at risk in the workplace will not be tolerated.

The detail of the new offence will be informed by an Implementation Taskforce which will include businesses and unions. The new laws will help make sure that all Victorians come home from work safely.

Closing remarks

The prevention of industrial deaths is complex and requires a combination of targeted awareness, education and enforcement activities. Whilst strong penalties act as a deterrent, the key to eliminating industrial fatalities is through prevention, building a culture of workplace safety and ensuring workplace risks are eliminated or controlled from the very outset.

Victoria looks forward to the Inquiry's insights.

Service Model – Family Liaison Officer - Fatalities

Introduction

As an investigatory and prosecuting agency, WorkSafe has a responsibility under the *Victims Charter Act 2006* to provide information and support to victims of crime throughout the investigation and legal process. Enforcement Group has a policy for 'Victims and Persons Adversely Affected by Crime' which states that victims and witnesses will be treated with courtesy, respect and dignity and provided with timely information, assistance and support.

Where there has been a workplace fatality, the Family Liaison Officer (FLO) provides support and information to the next of kin (NOK) and other family members of the deceased.

Evidence Base

WorkSafe investigates approximately 15-20 work related fatalities each year and the Enforcement Group (EG) currently has 30 active prosecutions in various stages. Each of these cases involves a family who is concurrently working through grief and the uncertainties of a prosecution. Victims of Crime (VOC) report feeling excluded from the investigation and prosecution process, frustrated that the cases WorkSafe prosecutes are often run on narrow technical points and that the penalties courts impose are financial and feel out of proportion to the loss the family has suffered.

The traditional model of grief is Kubler – Ross' stage theory where bereaved people proceed through denial to anger, bargaining, depression and then possible acceptance. There is an implication that grief is made up of a series of tasks and stages and at the end of it you get over the loss and recover. Contemporary theories of grief are focused on meaning making. They understand grief as idiosyncratic and inextricable from our sense of who we are, and that we grieve each loss differently. For example expected deaths of an elderly relative are experienced and processed differently than a shocking death of a young person which generally foundationally affects the ways people understand the world and their role in it.

Workplace deaths represent a particular challenge to bereaved family members world as they are unexpected and traumatic. The deaths WorkSafe investigate happen in work environments regulated by safety legislation, where there is an expectation that workers are safe. Unlike family responses to suicide, which are characterized by reactions of shame, stigma, and self-blame, family responses to work related deaths are characterized by anger and injustice (Matthews, 2016). Support provided throughout the legal process needs to acknowledge and normalise these feelings, and assist the families to begin to integrate make meaning from their loss. An important part of the FLO role is to assist families to understand the role of the WorkSafe prosecution, and to integrate it into a narrative where the criminal prosecution is one part of the legal process, and not the sole source of justice for the family member.

Research out of the University of Sydney found that following a workplace death families frequently feel isolated and 'out of the loop' from institutional responses. The study found that the provision of counselling was often inadequate and poorly timed. Further complicating the grief of these families is the time frames associated with formal investigations and court processes (Matthews, et al 2017). People who have had a family member die as the result of a workplace incident are significantly more likely to report symptoms of prolonged grief disorder, 45% of respondents, compared to those who have experienced a homicide, 22% of respondents (Matthews, Et al, 2016). This highlights the need for a flexible provision of support.

A significant proportion of respondents reported that the time to hold and complete the formal processes (e.g. investigation and court processes) following the death impacted:

- The intensity of their grief reactions (71%),
- The duration of their grief reactions (75%), and
- Their ability to begin to adapt to life without their loved one (70%) (Matthews, 2017)

Families' reported needs following a workplace fatality include:

- Clear and consistent communication from WorkSafe throughout the investigation and legal process.
- Clear explanations and reasons for decisions.
- Opportunities to have their 'voice' heard and participate in the decision making process.
- Timely completion of the formal processes.
- Interactions that display fairness, respect, trust, friendliness and openness.
- Adequate emotional support.

The Model

Engagement

Sudden and traumatic deaths are particularly bewildering for families and force them to make a series of difficult decisions and interact with a number of government services at a time when they are in the initial stages of grief. Following referral from the allocated investigator the Information Officer (FLO) makes initial contact with the identified next of kin (NOK) of the deceased by phone and sends a letter with her contact details. If the NOK identifies an alternate contact person the FLO will provide updates to them. The FLO follows up again in the weeks following the initial call to check in again and set up a scheduling for contact throughout the investigation and legal review.

The NOK can choose to have regular monthly contact with the FLO or to be contacted only when there is an update on the case. The option of a monthly check ins allows families to feel like they remain engaged with WorkSafe, even when there is very limited new information that can be provided, and allows them to build a relationship with the FLO. The investigation and legal process is often opaque to anyone outside of WorkSafe, and it can be difficult for families to sit with uncertainty about exactly what happened to their family member. Regular contact initiated by WorkSafe in cases where the time frames in the legal process are extensive ensures the NOK don't feel like the matter has been "forgotten about".

The FLO is able to be contacted via email, desk phone or on her mobile. The FLO works 9-5 and is not able to provide a crisis support. If a family member is in crisis the FLO will arrange for a referral to an appropriate service.

During the engagement process the FLO discusses the parameters of her role with the NOK including:

- The FLO is unable to give advice or discuss any insurance claims or civil proceedings, except in the most general terms.
- Any information provided to the FLO will not be shared with other business units outside of WorkSafe's Enforcement Group.
- The FLO will not share information with an external provider without written consent, unless the FLO is concerned that the NOK is likely to harm themselves or someone else.

Support prior to court

Following initial contact the FLO:

- Explains the investigation process and expected time lines.

- Discusses the other agencies likely to become involved, for example the coroner and the insurer.
- Listens to the NOK story and develops an understanding of the family circle and circumstances.
- Undertakes an assessment to determine if referral to a clinical mental health support is required, or if there are other outstanding support needs.

Prior to a decision about prosecution monthly check ins occur during investigation and legal review.

In particularly traumatic, complex or high profile incidents a home visit may occur at this stage.

Home Visits

Home visits play an important role in the support the FLO provides to families, meeting the family in a setting they are comfortable with builds rapport and the NOK often feels able to ask questions they wouldn't in a phone call or meeting in a legal office. Home visits are also an opportunity for the FLO to have more in-depth conversations with the NOK and begin to assist them to build a narrative around the prosecution, their expectations and grief.

Home visits can occur at any time in the process, but are most likely to occur:

- At the commencement of a prosecution.
- Prior to the commencement of a trial.
- To support the completion of a Victim Impact Statement (VIS).

Prior to any home visit the FLO will assess the NOK and home situation to ensure that any OH&S risks are identified and managed.

Decision not to prosecute

If the result of legal review is a recommendation not to prosecute the FLO will communicate this to the family. This can be difficult for the NOK to hear, and depending on how they are travelling and the outcome they were looking for from WorkSafe there are options they can explore:

- Discussion of the section 131 process to review the decision not to prosecute.
- A meeting or phone call with the lawyer to understand why the decision was made.
- If the NOK has factual questions about what happened to their family member, or questions about the incident and immediate emergency response a meeting or phone call with the investigator or lawyer.
- Referral to the Family Liaison Officer at the coroner's court.

Prior to closing with the NOK the FLO will undertake an assessment to determine if referral for ongoing or clinical support is required.

Beginning of the court process

Once charges are filed the FLO makes contact with all the identified family members and determines the best way to provide initial information about the court process to the family. This can be via phone, home visit, or family meeting at the WorkSafe office. Families have the option to have the WorkSafe lawyer present for this meeting.

If the lawyer will be present the FLO will work with the family prior to the meeting to identify any questions they have about the process.

Through the early administrative court dates the FLO will keep in touch with the family through the monthly check ins and will provide updates following court dates.

Court Support

Unless a family member is a witness in prosecution the NOK is able to attend any court date.

Prior to attending court the FLO meets with the family to discuss:

- What to expect in court and court etiquette.
- The context of the court date and how it fits in the broader prosecution.
- If there is any material, for example CCTV footage likely to be shown in court that may be distressing
- The possible outcomes of the court date.
- Strategies to minimise contact between NOK / victim and accused in court building.

The FLO will arrange and attend a conference with the lawyers and counsel if the family wishes to speak with them prior to the court date.

Sometimes the material brought up in court can be difficult for families / NOK to hear. Prior to court the FLO discusses this with the family, explores strategies to manage anger and anxiety in the courtroom, and talks through specifics of the case that are likely to cause distress.

The FLO will debrief with the family at the conclusion of the court date, and check in with them in the week following the date if required.

Being a witness

In some cases a family member may also be a witness in the prosecution. The FLO will arrange and attend a conference with counsel and the solicitor prior to the court date to allow the family member to meet the lawyers, ask any questions they have about the process, raise any concerns and discuss what to expect from cross examination.

If there is a mental health worker already involved with the family member the FLO will work with them to develop strategies to ensure the family member is safe throughout the court proceedings.

If the family member is not engaged with a mental health worker the FLO will meet with them to discuss:

- Strategies to manage anxiety in the witness box.
- Any specific concerns about being a witness.
- A practice reading of the witness statement if required.
- Referral for mental health assistance if required.

Victim Impact Statements

The VIS is the family's opportunity to directly tell the court about their experience of the loss. It is important to discuss with the family that a VIS will be served on the defence and read by their lawyers and representatives from the company. It will also be read by the judge or magistrate and quotes from it can form part of his or her sentencing remarks which are publically available.

Sometimes the process of writing the VIS can lead the family member to re-experience their grief and trauma. The FLO will be mindful of this when discussing the VIS and provide support throughout the process. If there are mental health professionals involved with the family the FLO can coordinate with them when communicating about the VIS.

To support the completion of a VIS the FLO can:

- Undertake a home visit to discuss the VIS/be present as a support while the VIS is written.
- Provide guidance on formatting a VIS and general information about what can and cannot be included.
- Arrange for translation if required.

If there are likely to be issues with admissibility of the VIS the FLO will arrange a conference with the family and the legal team prior to the plea hearing to discuss the issues likely to be raised.

If a family member wishes to read their statement in court the FLO will:

- Help develop strategies to manage emotion in the court room
- Arrange a visit to view the court room, where they would be standing, etc.
- Support the family member to practice reading the statement out loud.

Plea and sentence

The conclusion of the formal process can be particularly difficult for families. Even with advanced preparation, hearing a magistrate or judge impose a financial penalty on a company can be upsetting, and often the penalties available to the court don't feel like justice to the family.

There is an extent to which anger and disappointment is inevitable in these circumstances, but the FLO works intensely with families prior to a plea and sentence to ensure as much as is possible the family is prepared for the outcome.

Disengagement

The FLO undertakes a slow disengagement with families following the conclusion of the court process. Families are provided with intensive support to integrate and process the sentence in the initial weeks following the outcome.

In most cases the FLO will have fully disengaged in the three months after the matter is finalised. The FLO will only remain involved past that time if there is a clear plan for the next steps for the family.

Prior to closing the FLO will:

- Discuss if there are any outstanding questions about the incident or prosecution.
- Arrange and facilitate a final meeting with the lawyer or investigator if the family wishes
- Undertake a comprehensive assessment of the family circumstances to identify if any ongoing support is required and make appropriate referrals
- Ensure the family have updated contact details if there are questions or concerns in the future.

Supervision

The FLO is a trained social worker and receives monthly external supervision with a focus on

- Critical reflection on practice.
- Case discussion.
- Professional development.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

1ST EDITION

JULY 2005



Incorporating the VWA General Prosecution Guidelines

*** NEW Dangerous Goods (Storage and Handling) Regulations 2012**

On 1 December 2012, the Dangerous Goods (Storage and Handling) Regulations 2012 (**DG (S&H) Regulations 2012**) replaced the Dangerous Goods (Storage and Handling) Interim Regulations 2011 (**Interim Regulations**) which expired on this date. The DG (S&H) Regulations 2012 have retained most of the legal requirements contained in the Interim Regulations. There are only a small number of changes. This document has not yet been updated to reflect the changes introduced by the DG (S&H) Regulations 2012. More information on the key changes introduced by these new regulations can be found in the guidance titled *Information about: Key changes to dangerous goods storage and handling requirements* available at worksafe.vic.gov.au/dgkeychanges and *More information about: Incident reporting* available at worksafe.vic.gov.au/incidentreporting



OUR VISION

Workplaces free from injury and disease.

OUR MISSION

To work with all Victorians to progressively reduce the incidence, severity, and cost to the community of work-related injury and disease.

PRINCIPLES OF REGULATION

The following principles underpin WorkSafe’s approach to all its activities:

- **constructive:** WorkSafe will provide constructive advice to dutyholders and other stakeholders about compliance issues and its decision-making processes;
- **accountable:** Decision-making must be in accordance with the Authority’s policies, justifiable, and subject to public scrutiny;
- **transparent:** All decision-making will be transparent (i.e. clear processes and decisions with clear reasons provided), so that dutyholders can understand what is expected of them, and what they can expect in their dealings with the Authority;
- **effective:** WorkSafe staff will act in accordance with the duties, responsibilities, rights, and limitations of power specified in the legislation that WorkSafe administers, to a high professional standard. All compliance and enforcement activity will be aimed at deterring non-compliance with Victoria’s occupational health and safety laws.

LETTER FROM THE CHIEF EXECUTIVE OF THE VICTORIAN WORKCOVER AUTHORITY

WorkSafe Victoria, as part of the Victorian WorkCover Authority, is the state's workplace safety regulator. Its vision is for all Victorian workplaces to be free from work-related injury and disease.

Our vision is achievable. But it will only be attained through widespread compliance with Victoria's occupational health and safety laws. For this to occur, we must first achieve:

- widespread community support for the fundamental right to a healthy and safe workplace;
- workplaces moving beyond minimum compliance towards continuous improvement and effective occupational health and safety management; and
- participation of all workplace parties in occupational health and safety improvements in the workplace.

Only then can we progressively reduce the incidence, severity, and cost to the community of work-related injury and disease, and move towards the achievement of our final goal of a risk-free workplace for all Victorians.

The *Occupational Health and Safety Act 2004* is a significant step towards the goal of a safe working environment for all Victorians. To support the new legislation, WorkSafe is transforming its operations to become a more constructive, transparent, accountable, and effective regulator. As a more transparent regulator, WorkSafe's approach to its enforcement and prosecution activities must be appropriately targeted, proportionate, consistent, and fair.

As part of its transformation, WorkSafe has updated both the *WorkSafe Compliance and Enforcement Policy* and the Authority's *General Prosecution Guidelines*. We have also developed a series of Supplementary Enforcement and Prosecution Policies to support the consistent and transparent application of the *General Prosecution Guidelines* and to clarify specific aspects of our prosecution decision-making processes.

Updating the *WorkSafe Compliance and Enforcement Policy*, the *General Prosecution Guidelines* and developing Supplementary Enforcement and Prosecution Policies involved significant engagement with stakeholders, and I thank them for their valuable suggestions and feedback.

I am confident that these policies and guidelines will provide a strong foundation for healthier and safer Victorian workplaces.



Greg Tweedly
Chief Executive
Victorian WorkCover Authority
July 2005

CONTENTS

WorkSafe Compliance and Enforcement Policy

1. Scope of WorkSafe Compliance and Enforcement Policy.....	4
2. Role of WorkSafe (as part of the VWA).....	4
3. Victoria's Occupational Health and Safety Legislation.....	5
4. Occupational Health and Safety Act 2004	5
5. Constructive Compliance Strategy.....	6
5.1 Encouraging Workplace Health and Safety	6
5.2 Deterring Poor Workplace Performance	8
6. Integrated Approach.....	8
7. Prevention is Key Aim of Inspection and Enforcement	9
7.1 Nature of Compliance	9
7.2 Key Aim	9
8. Who is Subject to Inspection and Enforcement?	9
9. Principles of Inspection and Enforcement.....	10
10. Strategic Enforcement Priorities (TARGET AREAS)	10
11. Role of WorkSafe Inspectors.....	11
11.1 Powers of Inspectors	11
11.2 Monitoring and Review of Inspector's Decisions	12

12. When will an Inspection Occur?

12.1 Notifiable Incident	13
12.2 VWA Programs of Inspection	13
12.3 Attendance in Response to Requests under the OHS Act	13
12.4 Attendance in Response to Other Requests. ...	14

13. Provision of Advice and Information

13.1 Information and Education	14
13.2 Advice from WorkSafe Inspectors	15

14. Enforcement Criteria.....

14.1 Nature and Circumstances of the Alleged Breach	15
14.2 Characteristics of the Dutyholder.....	16
14.3 Deterrence.....	16
14.4 WorkSafe's Strategic Enforcement Priorities. ...	16

15. Enforcement Measures: Remedial

15.1 Voluntary Compliance	16
15.2 Improvement Notice	16
15.3 Prohibition Notice	17
15.4 Power to Give Directions	18
15.5 Review of a Provisional Improvement Notice (PIN)	18
15.6 Review of a Direction to Cease Work.....	18
15.7 Non-disturbance Notice	18

WorkSafe Victoria is a division of the Victorian WorkCover Authority.

The information presented in this guidance material is intended for general use only. It should not be viewed as a definitive guide to the law, and should be read in conjunction with the *Occupational Health and Safety Act 2004* and the *Accident Compensation Act 1985*.

The information contained in this publication is protected by copyright. The Victorian WorkCover Authority hereby grants a non-exclusive licence in this publication to the recipient of this publication on the condition that it is not disseminated for profit. The Victorian WorkCover Authority encourages the free transfer, copying and printing of the information in this publication if such activities support the purposes and intent for which the publication was developed.

16. Enforcement Measures: Revocation, Suspension, Cancellation of Licenses etc.	19
17. Enforcement Measures: Punitive	19
17.1 Infringement Notice	19
17.2 Recommendation for a Comprehensive Investigation	20
18. Prosecution and Other Results of a Comprehensive Investigation	20
18.1 Prosecution Proceedings	20
18.2 Enforceable Undertaking	20
18.3 Letter of Caution	21
18.4 No Further Action	21
19. Prosecution-related Activities.....	21

Victorian WorkCover Authority General Prosecution Guidelines

1. Nature of General Prosecution Guidelines	22
2. Legislation under which Prosecution May Occur.....	22
2.1 Occupational Health and Safety Prosecutions. . .	22
2.2 Accident Compensation Prosecutions.....	23
3. Publication of General Prosecution Guidelines	23
4. Supplementary Enforcement and Prosecution Policies	23
5. Non-Adherence to Guidelines Does Not Affect Prosecutions	24
6. Key Aim of Prosecutions	24
6.1 Key Aim of OHS Prosecutions.....	24
6.2 Accident Compensation Prosecutions.....	25
7. Principles of Prosecution	25
7.1 OHS Prosecutions.....	25
7.2 'Accident Compensation' Prosecutions.....	25
8. Limitation Periods for Prosecutions.....	26
8.1 OHS Prosecutions.....	26
8.2 Accident Compensation Prosecutions.....	26
9. Who May be Subject to Prosecution?.....	26
9.1 OHS Prosecutions.....	26
9.2 Accident Compensation Prosecutions.....	27
10. OHS Infringement Notices	27

11. Investigation of Alleged Offences	27
11.1 OHS Comprehensive Investigations	27
11.2 'Accident Compensation' Investigations	30
12. Prosecution Criteria	30
13. Sufficient Evidence.....	30
13.1 Reasonable Prospect of Conviction	30
13.2 Matters to be taken into Account	30
13.3 Evaluation of the Evidence	31
14. Public Interest	32
14.1 Effect on Decision to Prosecute (or take Alternative Punitive Action).....	32
14.2 Public Interest Considerations: Alleged OHS Offences	32
14.3 Public Interest Considerations: Alleged Accident Compensation Offences	34
15. Determination of Appropriate Prosecution-related Option	34
15.1 Alleged OHS Offences	34
15.2 Alleged 'Accident Compensation' Offence	35
16. Conduct of Investigations and Prosecutions... ..	35
17. Review by DPP of Decision not to Prosecute (OHS).....	36
17.1 Request to Commence Prosecution	36
17.2 Referral for Advice by DPP.....	36
17.3 Final Determination by Authority	36
17.4 Review Statistics.....	36
18. Sentencing Options.....	36
19. Ancillary Orders and Submissions.....	36
19.1 Provision of Information to Persons Affected by OHS Offences	37
20. Notification of Outcome of Prosecution	37
21. Publishing Prosecution Outcomes and other Enforcement Data and Information	37
21.1 Publishing and Utilising the Outcome of OHS Prosecutions	37
21.2 Publishing the Outcome of Accident Compensation Prosecutions.....	37
Explanation of Terms (OHS)	38
Details of Policy Development: Last Update	40

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

1. SCOPE OF WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

The *WorkSafe Compliance and Enforcement Policy* provides an overview of the legislative framework within which WorkSafe operates and sets out how WorkSafe's 'Constructive Compliance Strategy' is applied to its enforcement and prosecution activities.

This Policy document also incorporates the *VWA General Prosecution Guidelines*, as published in the *Victorian Government Gazette*.

2. ROLE OF WORKSAFE (AS PART OF THE VWA)

The Victorian WorkCover Authority (VWA) is the manager and regulator of Victoria's workplace safety system. The Authority's overall responsibilities include:

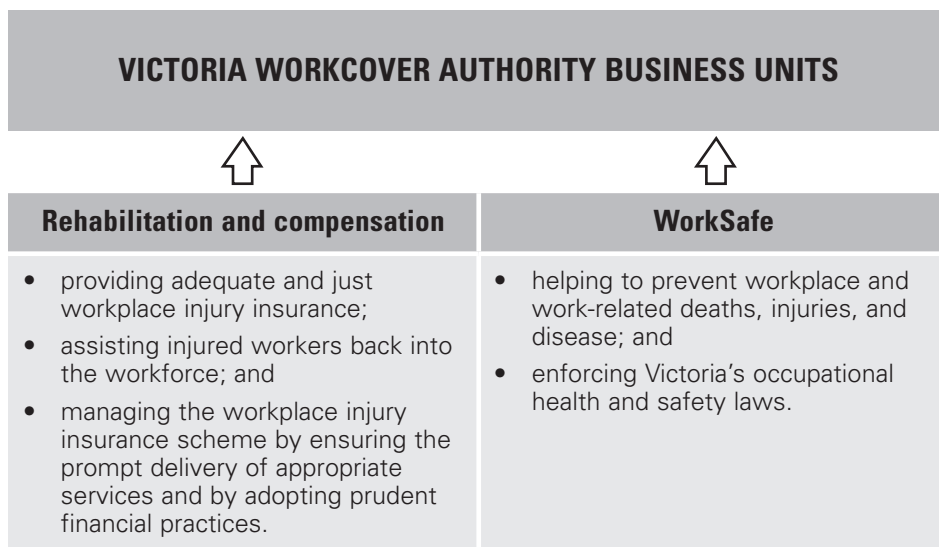
- enforcing Victoria's occupational health and safety laws;
- helping to prevent workplace and work-related deaths, injuries, and disease;
- providing adequate and just workplace injury insurance;
- assisting injured workers back into the workforce; and
- managing the workplace injury insurance scheme by ensuring the prompt delivery of appropriate services and by adopting prudent financial practices.

The Authority's functions in relation to assisting and compensating injured workers and providing Victoria's workplace insurance scheme are undertaken by VWA's Rehabilitation and Compensation Business Unit.¹

The Authority's regulatory functions in relation to preventing workplace and work-related deaths, injuries and disease and enforcing Victoria's occupational health and safety laws are undertaken by VWA's occupational health and safety arm, WorkSafe Victoria.

*Note 1: The RCBU's functions are performed in accordance with the **Accident Compensation Act 1985** and **Accident Compensation (WorkCover Insurance) Act 1993**.*

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY



3. VICTORIA'S OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

WorkSafe administers Victoria's occupational health and safety ("OHS") laws, including the following Acts and associated regulations:

- *Occupational Health and Safety Act 2004* ("the Act"); and
 - *Dangerous Goods Act 1985*;
 - *Equipment (Public Safety) Act 1994*;
 - *Road Transport (Dangerous Goods) Act 1995*; and
 - *Road Transport (Dangerous Goods) Act 1995* and its Commonwealth equivalent.
- ("Victoria's other OHS laws")

4. OCCUPATIONAL HEALTH AND SAFETY ACT 2004

The principal Act under which WorkSafe conducts its activities is the *Occupational Health and Safety Act 2004*. The objectives of the Act (which are set out in s 2) are, in summary:

to achieve, through the active involvement of all workplace parties, a safe and healthy workplace for all Victorians, whereby risks to the health, safety, and welfare of employees, other persons at work, and the public are eliminated.²

*Note 2: Under s 2 of the **Occupational Health and Safety Act 2004**, the objects of the Act are to:*

- (a) secure the health, safety, and welfare of employees and other persons at work;*
- (b) eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work;*
- (c) ensure the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and*
- (d) provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety, and welfare standards.*

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

When performing its functions, WorkSafe has regard to these objectives and to the principles of health and safety protection set out in s 4 of the Act, which are as follows:

- (1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in all the circumstances.
- (2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- (3) Employers and self-employed persons should be proactive, and take all reasonable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- (4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
- (5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

The functions of WorkSafe include both activities that encourage the development of risk-free workplaces (e.g. providing advice to dutyholders) and activities that are designed to deter poor OHS performance (e.g. prosecutions).

5. CONSTRUCTIVE COMPLIANCE STRATEGY

In performing its functions, WorkSafe applies a strategy of 'constructive compliance' – a balanced combination of positive motivators and deterrents – to improve workplace health and safety.

Integral to WorkSafe's *Constructive Compliance Strategy* is the recognition that real and sustainable improvement in workplace health and safety is achieved primarily by the active involvement of employers and employees in hazard identification, management, and elimination.

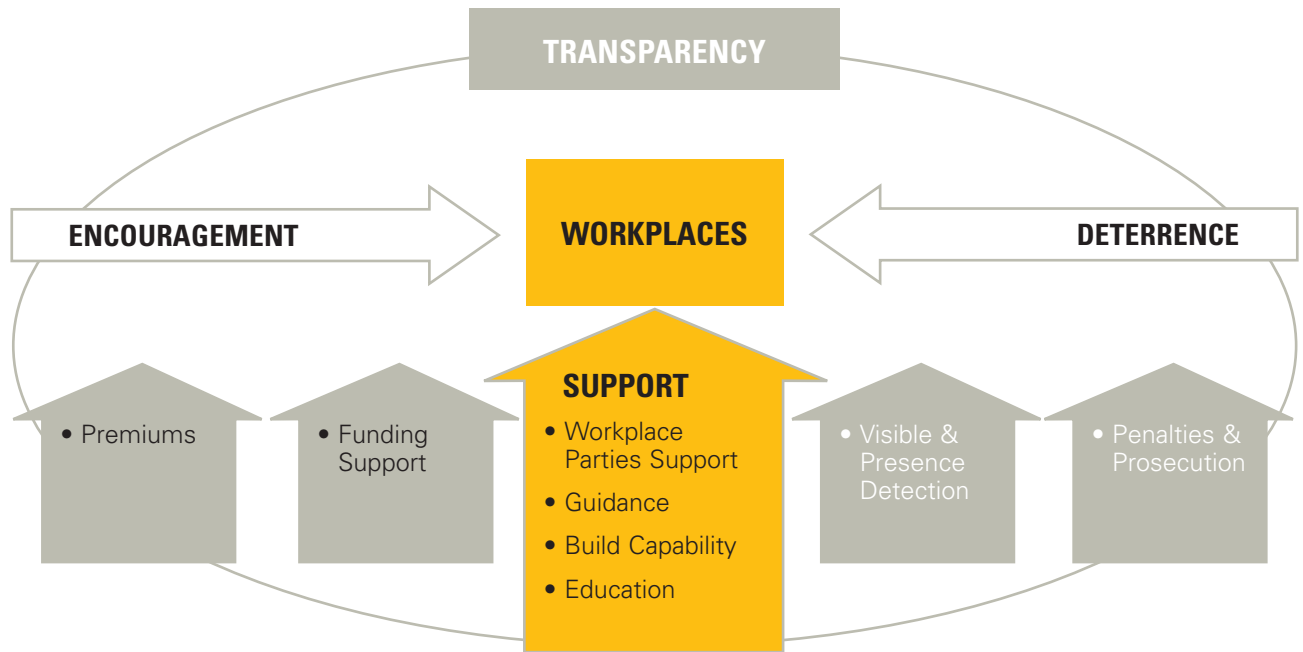
'Constructive Compliance' is the strategy within which the *WorkSafe Compliance and Enforcement Policy* has been developed and operates.

5.1 Encouraging Workplace Health and Safety

The key levers for encouraging workplace health and safety are:

- effective communication and engagement with stakeholders;
- the provision of practical and constructive advice and information to workplace parties (e.g. employers, employees, health and safety representatives) and other stakeholders about rights, duties, and responsibilities under Victoria's OHS laws, and what is required to comply with these;
- fostering co-operative, consultative relationships between workplace parties (e.g. employees and employers) to achieve health and safety solutions that 'work for everyone';
- supporting and involving stakeholders in the provision and promotion of education and training in occupational health and safety; and
- financial incentives to workplace parties and their representatives for improved OHS performance (e.g. the Safety Development Fund, the Small Business Innovation Fund, Information and Education Fund, and incentives under the Workplace Injury Insurance Premium system – for details see www.workcover.vic.gov.au).

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY



<ul style="list-style-type: none"> • Workplace Injury Insurance system. 	<ul style="list-style-type: none"> • Funding support including: Safety Development Fund, Small Business Innovation Fund, and Information and Education Fund. • High involvement from industry associations and unions for targeting and delivery of funding. 	<ul style="list-style-type: none"> • Provide advice and information to workplace parties on how to comply. • Engage and communicate with stakeholders. • Foster consultative relationships between employers and employees. • Support and involve stakeholders in education and training. • Internal review of decisions. 	<ul style="list-style-type: none"> • Maintain regulator role and inspection activities. • Inspectors provide advice on compliance. • Maintain credible risk of prosecution or alternative punitive action. • Enforce remedial action by dutyholders to remedy alleged breaches. 	<ul style="list-style-type: none"> • Prosecute more serious breaches. • Implement alternative penalties for relatively minor breaches (where appropriate). • Seek appropriate sentencing options. • Publish/utilise enforcement information and data to leverage the outcome of prosecution-related activity (e.g. to enhance deterrence; inform dutyholders in same and similar industries; inform future inspection activity).
--	--	--	---	--

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

5.2 Deterring Poor Workplace Performance

The key levers for deterring poor workplace performance and addressing non-compliance are:

- the discharge of WorkSafe's inspection responsibilities;
- the enforcement of remedial measures whereby dutyholders must remedy breaches of Victoria's OHS laws;
- the imposition by WorkSafe of alternative penalties (e.g. infringement notices, enforceable undertakings, letters of caution) for relatively minor breaches³ of Victoria's OHS laws or where otherwise appropriate;
- prosecution of more serious breaches⁴ of Victoria's OHS laws, whether or not a resulting in death, injury, or disease;
- seeking appropriate sentencing options; and
- publishing and/or utilising enforcement data and information to leverage the outcome of inspection and enforcement activity, including prosecution-related activity, for example:
 - publishing enforcement data/information in relation to the nature and outcome of prosecutions (and, where appropriate, the imposition of alternative penalties such as infringement notices, enforceable undertakings, and letters of caution) to enhance specific and general deterrence;
 - informing dutyholders in the same and similar industries of the nature and outcome of prosecutions (and, where appropriate, the imposition of alternative penalties) and providing advice in relation to how to prevent similar breaches; and
 - utilising enforcement data/information resulting from inspection activity, comprehensive investigations, the imposition of alternative penalties, and the outcome of prosecutions to inform future inspection activity on:
- a systemic level; and,
- where appropriate, in relation to individual dutyholders.

6. INTEGRATED APPROACH

Often, the most appropriate response to a breach of Victoria's OHS laws is to apply an integrated strategy that combines the use of one or more enforcement measures with the provision of advice and guidance material.

Examples:

- an inspector issuing an improvement or prohibition notice will also provide advice and guidance material on what changes will enable a dutyholder to comply with the relevant Act or regulation;
- following a work-related fatality an inspector will usually place a prohibition notice on the equipment involved to deal with the immediate risk. A comprehensive investigation will also commence.

*Note 3: In this context, having regard to all the relevant circumstances, whether a matter is a 'relatively minor' or 'more serious' offence will be determined by application of the **VWA General Prosecution Guidelines**, in particular, the criteria for comprehensive investigation and the prosecution criteria – e.g. factors such as the actual or potential consequences of the breach are taken into consideration. It reflects the culpability involved in the offence.*

Note 4: Ibid

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

7. PREVENTION IS KEY AIM OF INSPECTION AND ENFORCEMENT

Under the *Occupational Health and Safety Act 2004*, WorkSafe has a responsibility to “monitor and enforce compliance” with the Act and its associated regulations.

7.1 Nature of Compliance

Compliance with Victoria’s OHS laws is a continuous process which involves the development, improvement and maintenance of a healthy and safe working environment and systems of work. This on-going process must be sufficient to fulfil the dutyholder’s obligations and duties under OHS laws before compliance is achieved.

7.2 Key Aim

The key aim of WorkSafe’s inspection and other enforcement activities (i.e. remedial and punitive measures, including prosecution) is to deter non-compliance with Victoria’s OHS laws and thereby prevent workplace and work-related deaths, injuries, and disease. (For this reason, enforcement action may be taken whether or not a breach of Victoria’s OHS laws has resulted in death, injury, or disease.)

Related aims include the promotion of good OHS values and practices and, where relevant, organisational rehabilitation.

8. WHO IS SUBJECT TO INSPECTION AND ENFORCEMENT?

Occupational health and safety duties apply to dutyholders, i.e. all persons associated with the operation of workplaces and other undertakings, including:

- employers, including contractors with employees and labour hire companies (ss 21 to 24);
- employees (s 25) and other workers (ss 23-24);
- officers (ss 144-145);
- other persons who manage or control a workplace (s 26);
- designers of plant, buildings, and structures (ss 27-28);
- manufacturers of plant or substances (s 29);
- suppliers of plant or substances (s 30); and
- persons who install, erect or commission plant (s 31).

All such dutyholders are subject to inspection by WorkSafe and, where appropriate, the use of enforcement measures (including prosecution in accordance with the *General Prosecution Guidelines*).⁵

Victoria’s other OHS laws contain similar provisions in relation to dutyholders.

Note 5: For further details see the Supplementary Enforcement and Prosecution Policy Liability of organisations, officers, employees, and other dutyholders.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

9. PRINCIPLES OF INSPECTION AND ENFORCEMENT

In addition to the principles that underpin all WorkSafe's activities (i.e. that all activities should be constructive, transparent, accountable, and effective⁶), the following principles also apply to WorkSafe's inspection and enforcement activities, including its prosecution-related activities:

- **targeted:** WorkSafe should target its activities to the areas of most need and effect (e.g. high-hazard and high-risk situations and industries);
- **proportionate:** All enforcement action should be proportionate to the seriousness of the non-compliance;
- **consistent:** A consistent approach should be taken in similar fact situations/circumstances, to achieve consistent outcomes;
- **fair:** All compliance and enforcement activities (including decision-making) must be fair – i.e. undertaken with impartiality, balance, and integrity. In addition, all prosecution-related activities must be undertaken in accordance with the *VWA General Prosecution Guidelines*.

WorkSafe strives to ensure that all its inspection and enforcement activities (including its prosecution-related activities) are undertaken according to the highest standards of ethics and work practice.

10. STRATEGIC ENFORCEMENT PRIORITIES (TARGET AREAS)

WorkSafe has a clear strategic focus for its inspection and other enforcement activities, which target the following priorities:

a) Incident and Emergency Response Notifications

Incident and Emergency Response Notifications, including workplace fatalities.

b) Focus Areas for Prevention

Focus areas of prevention, as determined by WorkSafe in its multi-year strategies and other business plans, for example:

- (i) high-hazard and high-risk industries and occupations (e.g. construction, farming, transport);
- (ii) the causes of common injury types (e.g. manual handling injuries).

From time-to-time, WorkSafe targets additional focus areas of prevention and publishes this information on its website (www.worksafe.vic.gov.au) and/or in the media.

Where WorkSafe targets a new focus area of prevention or hazard, an initial three-phase period of systems development and education will usually precede the increase in inspection and enforcement activity.

Depending on the level to which safe systems of work have already been developed for the targeted focus area of prevention or hazard, the initial three-phase period will, to varying extents, involve WorkSafe engaging with dutyholders to:

Phase 1: raise awareness (via public forums, the media, publications, etc.) that:

- WorkSafe will be consulting with stakeholders to explore key issues and to build-up and consolidate knowledge in relation to what systems of work will constitute compliance for a targeted hazard or focus area of prevention; and
- when the three-phase period of systems development and education is complete it will usually be followed by an increase in inspection and enforcement activity.

*Note 6: For details, see the 'Principles of Regulation' on the inside front cover of this **WorkSafe Compliance and Enforcement Policy**.*

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

Phase 2: build up knowledge, through the trialling of techniques and approaches to managing and controlling risk, as to what systems of work will constitute compliance (e.g. WorkSafe and dutyholders jointly conduct and evaluate workplace-based trial approaches to risk control);

Phase 3: consolidate knowledge and understanding as to what systems of work will constitute compliance and be considered “reasonably practicable” risk management and control for the targeted hazard or focus area of prevention, for example:

- increase dutyholders’ understanding of systemic compliance requirements via public forums, consultations, publications, web information, media;
- provide training to WorkSafe inspectorate prior to increased inspection and enforcement activity.

Following completion of the initial three-phase period, an increase in inspection and enforcement activity will usually occur.

11. ROLE OF WORKSAFE INSPECTORS

The health and safety (“OHS”) responsibilities and powers of WorkSafe inspectors are set out in the Act – primarily in Part 9 – and in Victoria’s other OHS laws, under which they may also be appointed.

Subject to the Authority’s directions, WorkSafe inspectors:

- inspect workplaces for compliance with Victoria’s OHS laws;
- provide practical, constructive advice and information to dutyholders about how to comply with their OHS duties and obligations (and provide advice and information to health and safety representatives); and
- enforce Victoria’s OHS laws by:
 - compelling dutyholders to undertake remedial action to rectify health and safety breaches; and/or
 - recommending punitive action, i.e.:
 - (i) the issuing of an infringement notice; or
 - (ii) a comprehensive investigation to determine whether a breach of the OHS laws has occurred that may warrant prosecution or other punitive action (and to gather data that can be used to assist in preventing future OHS breaches).

11.1 Powers of Inspectors

The Act gives inspectors extensive powers of entry, enquiry and investigation. In most circumstances, it is an offence not to provide “reasonable assistance” to an inspector without “reasonable excuse”.

WorkSafe, itself, has all the powers of an inspector (s 8).

11.1.1 Inspector’s Power of Entry

Under s 98 of the Act, a WorkSafe inspector may enter a place that the inspector reasonably believes is a workplace at any time during working hours. The inspector may also enter any place (including a car, truck, ship, boat, airplane or any other vehicle) at any time if the inspector reasonably believes that there is an immediate risk to the occupational health or safety of a person.

Inspectors have a range of obligations relating to entry of premises, including notification of their presence (s 102) and the provision of a written report (s 103). Their powers of entry do not extend to premises which are only used for residential purposes (s 107).

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

11.1.2 Inspectors' Powers of Investigation

Inspectors have extensive powers of investigation, including:

- general powers of inspection and seizure (s 99); and the power to:
- compel the production of documents and answering of questions (this power does not, however, infringe on a person's right to avoid self incrimination: s 100);
- take samples of substances for analysis (s 101);
- apply to a magistrate, in certain circumstances, for a search warrant (s 104);
- require a person to provide their name and address (s 119); and
- give directions to a person at a workplace where the inspector reasonably believes that it is necessary to do so because of an immediate risk to the health and safety of any person (s 120).

The process by which WorkSafe inspectors apply for search warrants is set out in the Supplementary Enforcement and Prosecution Policy Search Warrants, which is available from WorkSafe and at www.workcover.vic.gov.au.

11.1.3 Assistance to be provided to WorkSafe Inspector

It is an offence for workplace occupiers, employers and employees to refuse or fail, without reasonable excuse, to provide reasonable assistance to a WorkSafe inspector in the performance of their duties under the Act or regulations (s 121).

11.1.4 Information to be provided by WorkSafe Inspectors

Under s 100(3) of the Act, before requiring a person to produce a document or answer questions, an inspector must:

- produce their identity card;
- warn the person that "a refusal or failure to comply with the requirement, without reasonable excuse, is an offence"; and
- inform the person that "he or she may refuse or fail to answer any question if answering the question would tend to incriminate him or her".

Similar protection against self-incrimination exists in relation to notices issued by the Authority under s 9 of the Act requiring the giving of information or production of documents for the purpose of ascertaining whether the Act/regulations have been complied with or the investigation of a suspected contravention.

For further information in relation to dutyholders' rights and obligations during a WorkSafe inspection see WorkSafe Victoria Inspectors, which is available from WorkSafe and at www.worksafe.vic.gov.au.

11.2 Monitoring and Review of Inspector's Decisions

A range of internal and external quality-monitoring systems exist to ensure that inspectors exercise their powers under OHS laws appropriately, in accordance with WorkSafe policies and guidelines.

11.2.1 Qualifications and Training

WorkSafe inspectors have technical or professional qualifications and/or backgrounds in occupational health and safety. They are expected to develop and maintain the competencies to perform their functions and exercise their powers through a range of competency-based training and assessment programs, which are conducted by, or on behalf of, WorkSafe – e.g. the Diploma of Government (Workplace Inspection).

11.2.2 Regular Systemic Auditing of Inspectors' Decisions

WorkSafe regularly audits inspector reports and notices/directions issued in relation to workplace or other site interventions to assess whether appropriate enforcement action is being taken by inspectors. This includes the auditing of matters that have not been referred for comprehensive investigation.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

11.2.3 Internal and External Review of Inspectors' Decisions

Certain decisions made by inspectors under the *Occupational Health and Safety Act 2004* are 'reviewable decisions' (s 127). Upon application by an 'eligible person', such decisions are subject to internal review by the Authority (s 128).

Subsequently, the eligible person can apply to the Victorian Civil and Administrative Tribunal for external review of the Authority's decision (s 129).

For further information see www.workcover.vic.gov.au.

12. WHEN WILL AN INSPECTION OCCUR?

A WorkSafe inspector will inspect a workplace for compliance with Victoria's OHS laws in the following circumstances.

12.1 Notifiable Incident

Under s 38 of the *Occupational Health and Safety Act 2004*, an employer or self-employed person has a duty to notify the Authority where, at a workplace under their management and control, a 'notifiable incident' has occurred.

An inspector will attend a workplace where a workplace death occurs. Where another form of notifiable incident occurs, being:

- a serious injury (as described by s 37); or
- exposure of a person to an immediate risk (as described by s 37)

an inspector may attend the workplace, depending on the nature and circumstances of the incident.

For guidance on what constitutes a 'notifiable incident' under s 37 of the Act see www.worksafe.vic.gov.au

12.2 VWA Programs of Inspection

The majority of inspections occur as part of WorkSafe's on-going programs of inspection, in particular, as part of programs that target focus areas for prevention (i.e. areas of activity identified by WorkSafe as strategic priorities for its enforcement activities – see topic 10 for details).

12.2.1 Inspector-initiated Inspections

In addition to conducting planned inspections under WorkSafe's programs of inspection, from time-to-time WorkSafe inspectors initiate inspections in response to observations made or information received by the inspector (e.g. if an inspector is passing a construction site and observes a workplace activity that may pose an immediate risk, the inspector will initiate an inspection).

12.3 Attendance in Response to Requests under the OHS Act

In accordance with the *Occupational Health and Safety Act 2004*, WorkSafe must attend a workplace in response to:

- a request from a person issued with a Provisional Improvement Notice (PIN), or their employer, that a WorkSafe inspector enquire into the issuing of the PIN and either affirm (with or without modification) or cancel the PIN (s 63);
- a request from a party to an unresolved OHS issue or Direction to Cease Work that a WorkSafe inspector enquire into the issue and perform any function and/or exercise any power under the Act that the inspector considers to be reasonably necessary in all the circumstances, including the issuing of a prohibition notice (s 75);
- a request from a party to an unresolved issue between an Authorised Representative of a Registered Employee Organisation who enters a workplace to enquire into a suspected contravention of the Act and the employer at the premises that a WorkSafe inspector attend to resolve the issue (s 89);
- a request from a party to unresolved negotiations relating to a Designated Work Group that a WorkSafe inspector attend to resolve the matter (s 45).

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

Whilst attending a workplace upon such a request, in addition to taking whatever action is necessary to resolve the original issue, the inspector has the right to make an unrelated inspection of the premises (e.g. where an inspector observes an immediate risk that is unrelated to the original purpose of the visit).

12.4 Attendance in Response to Other Requests

A member of the public or person in a workplace (e.g. an OHS representative, union representative, employee or other worker) can request that WorkSafe send an inspector to the workplace to enquire into alleged non-compliance with Victoria's OHS laws, for example, a reported breach of the duty to consult under the consultative provisions of the Act (s 35).

Where such a request is received, WorkSafe may send an inspector, depending on the nature and circumstances of the request (e.g. whether the alleged breach relates to a focus area for prevention).⁷

Whilst attending a workplace upon such a request, the inspector has the right to make an unrelated inspection of the premises (e.g. where an inspector observes an immediate risk that is unrelated to the original purpose of the visit).

13. PROVISION OF ADVICE AND INFORMATION

WorkSafe provides guidance material and advice to dutyholders both on a proactive basis, to encourage compliance, and as a remedial measure, to assist dutyholders to remedy a breach of Victoria's OHS laws.

13.1 Information and Education

An important way in which WorkSafe assists workplace change is by providing practical, accessible, and customised guidance material on a large range of topics relating to compliance with standards. Guidance material is developed with the involvement of stakeholders on topics such as:

- guidelines and compliance codes (which set out how duties may be complied with);
- effective OHS management;
- hazard identification, risk assessment, and risk control processes; and
- avenues for further assistance.

WorkSafe's information and education activities assist all parties involved in workplace health and safety, including: employers, employees and other workers, health and safety representatives, contractors, designers, manufacturers, and suppliers. Its information and education activities promote effective workplace health and safety management that emphasises:

- a planned and proactive approach;
- commitment and involvement of managers at all levels;
- the meaningful and effective involvement of employees and other workers;
- the identification and assessment of all risks and the control of hazards at their source;
- the development of a workplace culture that stresses occupational health and safety as a paramount priority;
- appropriate provision of training, information, and supervision; and
- systematic management of health and safety issues.

WorkSafe promotes the establishment of designated work groups and health and safety committees, and the overall development of effective workplace consultation and issue resolution – all of which are vital to improving health and safety in the workplace. WorkSafe also actively supports the election of health and safety representatives and the development of their skills.

Note 7: Where a person contacts WorkSafe in relation to a health and safety issue in the workplace, and the issue has not yet been through the relevant agreed or prescribed resolution procedures, WorkSafe may refer the matter back to the workplace parties for resolution in accordance with s 73 of the Act.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

For further information visit the WorkSafe website (www.worksafe.vic.gov.au) or phone the VWA Publications Line (9641 1333) or the WorkSafe Advisory Service (1800 136 089) or email to info@workcover.vic.gov.au

13.2 Advice from WorkSafe Inspectors

One of the key functions of WorkSafe is to provide advice to dutyholders. Section 18 of the *Occupational Health and Safety Act 2004* states that WorkSafe may “give advice to a person who has a duty or obligation under this Act or the regulations about complying with that duty or obligation”.

WorkSafe inspectors will provide practical and constructive advice to dutyholders in relation to how to comply with Victoria’s OHS laws, and, where a breach is detected, how to remedy the breach. This advice includes referring dutyholders to applicable guidelines and compliance codes, and to other relevant information to assist with compliance.

Advice given under s 18 does not provide the dutyholder with any additional rights or defence under the Act in relation to an alleged breach. However, in accordance with the *VWA General Prosecution Guidelines*, the degree to which the dutyholder acted in accordance with such advice will be taken into account in assessing their level of culpability when deciding whether to prosecute.

14. ENFORCEMENT CRITERIA

A WorkSafe inspector who detects a breach of an OHS Act or regulation during an inspection must decide:

- what advice/information should be given to the dutyholder;
- what enforcement measures should be applied by WorkSafe to ensure that remedial action is taken by the dutyholder to remedy the breach; and
- whether the circumstances are such that the inspector should recommend that:
 - the Authority issue an infringement notice as a punitive measure⁸; or
 - a comprehensive investigation be undertaken to determine whether a breach has occurred that may warrant prosecution (or other punitive action).

Where an inspector detects a breach of Victoria’s OHS laws, the inspector will take action to ensure that the breach is remedied by the dutyholder.

Prior to determining what enforcement action to take, the inspector will make enquiries – to the extent that is appropriate – with the dutyholder (or their nominated representative), relevant health and safety representatives, and other relevant parties.

In determining the most appropriate action to be taken, the inspector will take into account all of the following criteria:

14.1 Nature and Circumstances of the Alleged Breach

The nature and circumstances of the alleged breach, in particular:

- the seriousness of the alleged breach;
- the extent of the risk;
- the actual or potential consequence of the alleged breach (e.g. extent of injury caused to a person);
- the prevalence of the alleged offence; and
- any other relevant circumstances.

Note 8: Infringement notices can only be issued in the circumstances/manner prescribed in the relevant Act and/or regulations and are only available for non-indictable offences.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

14.2 Characteristics of the Dutyholder

The characteristics of the dutyholder will be taken into account in assessing the dutyholder's level of culpability for the breach, in particular:

- the degree to which the dutyholder acted in accordance with any advice given by the Authority pursuant to s 18 of the *Occupational Health and Safety Act 2004* in relation to complying with a duty or obligation under that Act;
- the relevant compliance history of the dutyholder (including the dutyholder's response to WorkSafe's previous enforcement and prevention activities); and
- the attitude of the dutyholder (including any relevant proactive measures taken to comply with Victoria's OHS laws).

For information in relation to compliance for particular hazards and industries see www.worksafe.vic.gov.au

14.3 Deterrence

The impact of enforcement action on:

- general deterrence (i.e. reducing the likelihood that other dutyholders will commit similar offences or otherwise breach OHS laws); and
- specific deterrence (i.e. reducing the likelihood that the offender will commit a further breach of OHS laws).

14.4 WorkSafe's Strategic Enforcement Priorities

The Authority's strategic enforcement priorities – i.e. target areas (see topic 10 for details).

15. ENFORCEMENT MEASURES: REMEDIAL

Where non-compliance with Victoria's OHS laws is detected, or where there is an immediate risk, the inspector will issue a notice or direction to compel the dutyholder to control the risk, unless the matter is addressed by the dutyholder at the time of its detection and in the presence of the inspector.

After consideration of the Enforcement Criteria, the following enforcement measures are available to an inspector to compel a dutyholder to take remedial action to rectify an alleged breach:

- voluntary compliance;
- improvement notice;
- prohibition notice;
- power to give directions;
- review of a PIN;
- review of a direction to cease work.

A non-disturbance notice may also be issued, where appropriate.

15.1 Voluntary Compliance

If the alleged breach is addressed by the dutyholder at the time of its detection by the inspector (i.e. immediate and satisfactory remedial action is taken) then – dependent upon consideration of the Enforcement Criteria – the inspector may decide to take no other enforcement action.

15.2 Improvement Notice

An inspector may issue an improvement notice if he/she reasonably believes that a breach of the Act or regulations is being committed, or has been committed and is likely to be committed again (s 111).

An improvement notice will generally be issued where non-compliance is detected which does not involve an immediate risk to health and safety and which is not corrected immediately.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

The purpose of the improvement notice is to focus the dutyholder on the tasks to be carried out to remedy the alleged breach. The improvement notice will require the breach to be remedied by a certain date and may include directions on what remedial measures must be taken. Under s 113, an inspector can include a direction/condition that refers to a compliance code and offers a choice of ways to remedy the breach.

Because improvement notices do not require the breach activity to cease whilst the breach is being remedied, the notice may also contain directions/conditions on how the activity should be carried on in the interim (i.e. staged compliance), to minimise risks to health and safety. It can also state that if the breach is not remedied by a specified date, the breach activity must cease altogether.

If the dutyholder does not comply with the improvement notice by the specified date a comprehensive investigation may be commenced that may lead to prosecution for:

- failure to comply with the improvement notice; and/or
- the alleged breach of the Act or regulation for which the improvement notice was originally issued.

The Authority also has the power to apply to the Supreme Court for an order compelling a person to comply with an improvement notice (s 118).

A decision by an inspector to issue an improvement notice is subject to review upon application by an 'eligible person' (see topic 11.2.3 for details).

Similar provisions exist in other OHS legislation: s 22 of the *Equipment (Public Safety) Act 1994*; ss 17-17B of the *Dangerous Goods Act 1985*; ss 28-29 of the *Road Transport Reform (Dangerous Goods) Act 1996* (Cwlth).

15.2.1 Risk Control Plan

Where numerous hazards are identified at a workplace (or across multiple workplaces controlled by the dutyholder) that do not involve an immediate risk an inspector may, as an alternative to issuing numerous improvement notices, and after discussion with the dutyholder:

- issue individual improvement notices in relation to the highest priority hazards; and
- in addition, agree on a date by which the dutyholder will develop a risk control plan in respect to the systemic management of workplace hazards.

A risk control plan is a staged plan which can be used by a dutyholder to ensure that where numerous hazards are present at a workplace that do not involve an immediate risk they are addressed in a planned manner in order of priority.

When a satisfactory risk control plan has been developed by the dutyholder, its implementation may be monitored by WorkSafe. If the dutyholder fails to implement the risk control plan, further enforcement action may be taken by WorkSafe against the dutyholder.

15.3 Prohibition Notice

An inspector may issue a prohibition notice if he/she reasonably believes that there is an immediate risk to the health or safety of a person from an activity that is occurring or may occur in the workplace (s 112).

A prohibition notice requires that the risk activity cease (or cease to occur in the specified way) until the risk has been remedied. It can include directions on what measures must be taken to remedy the risk. Under s 113, an inspector can include in the notice a direction/condition that refers to a compliance code and offers a choice of ways to remedy the risk.

The purpose of a prohibition notice is to ensure that any activity which presents an immediate risk to workplace health and safety ceases at once and does not resume until the dutyholder has remedied the risk in accordance with the notice.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

If the prohibition notice is not complied with, a comprehensive investigation will usually commence with a view to prosecution for:

- failure to comply with the prohibition notice; and/or
- where relevant, any alleged breach of OHS laws that resulted in the immediate risk.

The Authority also has the power to apply to the Supreme Court for an order compelling a person to comply with a prohibition notice (s 118).

A decision by an inspector to issue a prohibition notice is subject to review upon application by an 'eligible person' (see topic 11.2.3 for details).

Similar provisions exist in other OHS legislation: s 23 of the *Equipment (Public Safety) Act 1994*; ss 17-17B of the *Dangerous Goods Act 1985*; ss 28-29 of the *Road Transport Reform (Dangerous Goods) Act 1996* (Cwlth).

15.4 Power to Give Directions

In addition to the power to issue improvement notices and prohibition notices, an inspector may give directions (either orally or in writing) to a person at a workplace if the inspector reasonably believes that it is necessary to do so because of an immediate risk to the health or safety of any person. It is an offence to refuse or fail to comply, without reasonable excuse, with such directions (s 120).

15.5 Review of a Provisional Improvement Notice (PIN)

A person issued with a provisional improvement notice ("PIN") by a workplace health and safety representative, or the employer of the person issued with the notice, can request that a WorkSafe inspector "enquire into the circumstances which are the subject of the PIN". After making appropriate enquiries, the inspector will either affirm (with or without modification) or cancel the PIN (s 63).

A health and safety representative who issues a PIN may also request that a WorkSafe inspector enquire into issues relating to the PIN.

Alleged non-compliance with a PIN will be investigated by WorkSafe in the same manner as non-compliance with a notice issued by a WorkSafe inspector.

A decision by an inspector to affirm or cancel a PIN is subject to review upon application by an 'eligible person' (see topic 11.2.3 for details).

Similar provisions exist in other OHS legislation: Provisional Directions may be issued by Authorised Delegates under s 17A of the *Dangerous Goods Act 1985*.

15.6 Review of a Direction to Cease Work

Where a health and safety issue (s 73) or an issue relating to a Direction to Cease Work (s 74) is not resolved within a reasonable time, a party thereto can request that a WorkSafe inspector "enquire into the issue". After making appropriate enquiries, the inspector will perform any function or exercise any power under the Act that he/she considers to be reasonably necessary in all the circumstances, including the issuing of a prohibition notice (s 75).

A decision by an inspector, pursuant to s 75(4)(b), in relation to whether reasonable cause existed for employees to be concerned for their health and safety is subject to review upon application by an 'eligible person' (see topic 11.2.3 for details).

15.7 Non-disturbance Notice

An inspector may issue a non-disturbance notice to an occupier of premises. This notice requires the occupier to stop the use of, and prevent disturbance to, specified plant, substances, etc. (s 110).

The purpose of a non-disturbance notice is to assist the inspector to perform his/her duties. The inspector will issue a notice when he/she believes that it is necessary to do so to "facilitate the performance of his or her functions or exercise of his or her rights under the Act or the regulations".

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

e.g. a non-disturbance notice might be issued where a serious injury has occurred and the inspector is of the opinion that further inspection is necessary to determine whether a prohibition notice should be issued and/or that a comprehensive investigation should be undertaken to determine whether a breach has occurred that may warrant prosecution.

The Authority has the power to apply to the Supreme Court for an order compelling a person to comply with the non-disturbance notice (s 118).

A decision by an inspector to issue a non-disturbance notice is subject to review upon application by an 'eligible person' (see topic 11.2.3 for details).

16. ENFORCEMENT MEASURES: REVOCATION, SUSPENSION, CANCELLATION OF LICENSES ETC.

WorkSafe issues licenses, permits, certificates, registrations, notifications, and other regulatory permissions. In performing its enforcement activities, WorkSafe has the power to initiate the revocation, suspension or cancellation of any regulatory permission held by a dutyholder. Such action is a protective measure to ensure the safety of employees and/or the public. It may be undertaken even where a remedial measure (e.g. a prohibition notice) has been complied with by the dutyholder (ss 40-42).

In making a decision whether or not to issue or renew a regulatory permission WorkSafe will consider the person's history of compliance.

The revocation, suspension, or cancellation of a regulatory permission may have serious consequences for the permission holder and may also have serious, adverse 'flow on' effects (e.g. for employees, dependent businesses, etc.). WorkSafe acknowledges this potential, which must be balanced against the paramount need to protect the health and safety of employees and/or the public.

In certain circumstances, non-compliance may also be reported to other regulatory agencies or statutory registration boards for consideration under their legislation.

In carrying out inspections and comprehensive investigations (in accordance with the *VWA General Prosecution Guidelines*) WorkSafe will consider whether a person has acted in accordance with any regulatory permissions.

17. ENFORCEMENT MEASURES: PUNITIVE

At times, after applying the Enforcement Criteria, WorkSafe will be of the opinion that – even if remedial action has occurred (e.g. a notice or direction has been issued) – punitive action may be warranted.

In such circumstances, the following options exist:

- infringement notice;
- recommendation for a comprehensive investigation.

17.1 Infringement Notice

An Infringement Notice may be issued by WorkSafe as an alternative to prosecution – s 139 of the *Occupational Health and Safety Act 2004*; s 45B of the *Dangerous Goods Act 1985*; s 38 of the *Commonwealth Road Transport Reform (Dangerous Goods) Act 1996*; s 27 of the *Equipment (Public Safety) Act 1994*.

Infringement Notices can only be issued in the circumstances/manner prescribed in the relevant Act and/or regulations and are only available for non-indictable offences.

Infringement Notices provide an immediate punitive effect, without the delay and cost of court proceedings. However, they can only impose a penalty of 10 units⁹ or one fifth of the maximum penalty that could be imposed by a court for the offence (s 139).

*Note 9: As at July 2005, this equates to \$1,048.10 (subject to change from time to time, as published in the **Government Gazette**).*

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

An infringement notice is a punitive measure. It will not be withdrawn on the basis that an improvement notice or prohibition notice (i.e. a remedial measure) that was previously issued in relation to the breach has been complied with.

A person to whom an infringement notice is issued is entitled to reject the notice and to instead face prosecution proceedings in court.

Infringement notices can only be issued in the circumstances/manner prescribed in the relevant Act and/or regulations. For details see the Supplementary Enforcement and Prosecution Policy Infringement Notices at www.workcover.vic.gov.au

17.2 Recommendation for a Comprehensive Investigation

An inspector will recommend that a comprehensive investigation be undertaken by WorkSafe to determine whether a breach of the legislation has occurred that may warrant prosecution (or alternative punitive action) where:

- a work-related fatality has occurred (s 37); or
- the inspector is otherwise of the opinion that it is appropriate, taking into account the Criteria for Commencing a Comprehensive Investigation set out in part 11.1.3 of the *VWA General Prosecution Guidelines*.

18. PROSECUTION AND OTHER RESULTS OF A COMPREHENSIVE INVESTIGATION

Where a comprehensive investigation is conducted by WorkSafe then, after consideration of the prosecution criteria set out in part 12 of the *VWA General Prosecution Guidelines*, it will result in either:

- commencement of prosecution proceedings;
- an enforceable undertaking;
- a letter of caution; or
- no further action.

18.1 Prosecution Proceedings

Where sufficient admissible evidence exists of a breach of OHS laws and prosecution would be in the public interest, the Authority will commence proceedings under the relevant Act/regulations and conduct the prosecution in accordance with the *VWA General Prosecution Guidelines*.¹⁰

Where prosecution results in a finding of guilt, a range of sentencing options are available to the court. Depending on the nature of the offence, these may include, for example: monetary fines, imprisonment, adverse publicity orders (s 135); orders to undertake improvement projects (s 136), health and safety undertakings (s 137).

18.2 Enforceable Undertaking

Where it is in the public interest, a written undertaking may be accepted by the Authority in lieu of proceedings for an offence against the Act or regulations (s 16). As part of the undertaking, the dutyholder must remedy the alleged contravention in the manner specified, and take any other actions agreed to in the undertaking.

An enforceable undertaking is an alternative to prosecution. Its purpose is to focus the dutyholder on the tasks to be carried out to remedy the alleged breach and/or prevent a similar contravention of OHS laws in the future.

If an enforceable undertaking is not complied with, the Authority may apply to the Magistrates' Court for an order enforcing the undertaking (s 17).

For details see the Supplementary Enforcement and Prosecution Policy Enforceable Undertakings at www.workcover.vic.gov.au

Note 10: In certain circumstances, matters may be referred to the Director of Public Prosecutions.

WORKSAFE COMPLIANCE AND ENFORCEMENT POLICY

18.3 Letter of Caution

Where it is in the public interest, then, in limited circumstances for relatively minor offences, a Letter of Caution may be issued as an alternative to prosecution.

For details see the Supplementary Enforcement and Prosecution Policy Letters of Caution at www.workcover.vic.gov.au

18.4 No Further Action

No further action, where no breach is established OR there is insufficient admissible evidence of the breach OR it is not in the public interest to commence prosecution proceedings, accept an enforceable undertaking, or issue a Letter of Caution.

19. PROSECUTION-RELATED ACTIVITIES

All OHS prosecution-related activities are conducted in accordance with the *VWA General Prosecution Guidelines*. A range of Supplementary Enforcement and Prosecution Policies exist which provide details of the implementation of the principles set out in the *General Prosecution Guidelines*.

The *VWA General Prosecution Guidelines* and all Supplementary Enforcement and Prosecution Policies are available on request from the Authority, as well as being published on the WorkCover website (www.workcover.vic.gov.au).

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

1. NATURE OF GENERAL PROSECUTION GUIDELINES

The *General Prosecution Guidelines* set out the Victorian WorkCover Authority's criteria for, and approach to, prosecution decisions. They guide the Authority in the exercise of its prosecutorial discretion.¹¹

The *General Prosecution Guidelines* apply to all prosecution-related decisions made by the Authority under Victoria's occupational health and safety ("OHS") laws.

They also apply to all prosecution-related decisions made by the Authority under Victoria's accident compensation laws.

The *General Prosecution Guidelines* replace any and all prosecution guidelines previously issued by the Authority.

2. LEGISLATION UNDER WHICH PROSECUTION MAY OCCUR

2.1 Occupational Health and Safety Prosecutions

Prosecutions for OHS offences are commenced/undertaken by WorkSafe as the regulatory arm of the Authority. Prosecutions relate to breaches of Victoria's OHS laws, including breaches of the following Acts and associated regulations:

- *Occupational Health and Safety Act 2004*;
- *Dangerous Goods Act 1985*;
- *Equipment (Public Safety) Act 1994*;
- *Road Transport (Dangerous Goods) Act 1995* (and its Commonwealth equivalent).

The power to issue and conduct OHS prosecutions is delegated to the Chief Executive of the Victorian WorkCover Authority and the Executive Director, WorkSafe Victoria.

2.1.1 Referral to Director of Public Prosecutions

In appropriate circumstances, the Authority will refer matters to the Director of Public Prosecutions ("DPP") for prosecution (e.g. under the *Crimes Act 1958*) and may, in certain circumstances, commence proceedings in consultation with the DPP.

Note 11: For further information in relation to the status of these Guidelines see Part 5 "Non-Adherence to Guidelines Does Not Affect Prosecution".

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

2.2 Accident Compensation Prosecutions

Prosecutions for offences against Victoria's accident compensation laws are commenced/undertaken by the Authority's Rehabilitation and Compensation Business Unit, including prosecutions under the following Acts and associated regulations:

- *Accident Compensation Act 1985*;
- *Accident Compensation (WorkCover Insurance) Act 1993*; and
- *Crimes Act 1958*.

The power to issue and conduct accident compensation prosecutions is delegated to the Chief Executive of the Victorian WorkCover Authority and the Executive Director, Rehabilitation and Compensation Business Unit or, for limited offences, the Director, Business Support Division.

3. PUBLICATION OF GENERAL PROSECUTION GUIDELINES

The *General Prosecution Guidelines* are published in the *Government Gazette* in conformity with the requirements of s 130(4) of the *Occupational Health and Safety Act 2004*; s 40(3) of the *Dangerous Goods Act*; s 28(6) of the *Equipment (Public Safety) Act*; and s 252(6) of the *Accident Compensation Act 1985*.

The *Guidelines* are also:

- published on the Authority's website (www.workcover.vic.gov.au); and
- incorporated into the *WorkSafe Compliance and Enforcement Policy*. (The broader Policy document places the *Guidelines* in context, as part of the Authority's overall compliance and enforcement functions.)

4. SUPPLEMENTARY ENFORCEMENT AND PROSECUTION POLICIES

From time-to-time the Authority will develop Supplementary Enforcement and Prosecution Policies, which provide details of the implementation of the principles set out in the *General Prosecution Guidelines*.

The purpose of Supplementary Enforcement and Prosecution Policies is to:

- increase the consistent and transparent application of the *General Prosecution Guidelines*; and
- clarify aspects of the Authority's decision-making processes.

Whereas the *Guidelines* apply to all prosecution-related decisions made by the Authority, Supplementary Enforcement and Prosecution Policies provide details of particular aspects of the prosecution process (e.g. the Supplementary Enforcement and Prosecution Policy 'Enforceable Undertakings' indicates the nature of OHS offences which will be considered for such undertakings).

Supplementary Enforcement and Prosecution Policies:

- are consistent with, and support, the implementation of the *General Prosecution Guidelines*;
- in no way replace or add to any of the principles set out in the *General Prosecution Guidelines*;
- should be read in the context of, and subject to, the *General Prosecution Guidelines*; and
- will be kept under regular review in relation to their effectiveness and relevance and may be modified by the Authority at any time.

An up-to-date list of all Supplementary Enforcement and Prosecution Policies and copies of all Supplementary Enforcement and Prosecution Policies are available at www.workcover.vic.gov.au

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

5. NON-ADHERENCE TO GUIDELINES DOES NOT AFFECT PROSECUTIONS

Although the Authority is required by statute to publish these *General Prosecution Guidelines* in the *Government Gazette*, the *Guidelines* themselves do not have the force of statute. They guide the Authority in the exercise of its prosecutorial discretion.

Any failure by the Authority to act in accordance with these *Guidelines* (or the Supplementary Enforcement and Prosecution Policies which support them) in no way affects the validity of a prosecution by the Authority.

Non-adherence to the *Guidelines* by the Authority also in no way affects the prosecutorial rights of the Director of Public Prosecutions (see, for example, s 130(5) of the *Occupational Health and Safety Act 2004*).

6. KEY AIM OF PROSECUTIONS

6.1 Key Aim of OHS Prosecutions

The key aim of the Authority's prosecution activities in relation to occupational health and safety is to deter non-compliance with Victoria's OHS laws and thereby prevent workplace and work-related deaths, injuries, and disease. (For this reason, prosecution action may be taken whether or not a breach has resulted in death, injury, or disease.)

Related aims include the promotion of good OHS values and practices and, where relevant, organisational rehabilitation.

6.1.1 Constructive Compliance

WorkSafe's prosecution activities are part of the Authority's strategy of 'constructive compliance', whereby a balanced combination of positive motivators and deterrents is applied to improve workplace health and safety – for details, see topic 5 of the *WorkSafe Compliance and Enforcement Policy*.

In accordance with this strategy, WorkSafe offers advice, information, and education to encourage compliance with Victoria's OHS laws. Where compliance is not obtained through such motivators, enforcement measures (e.g. improvement notices and prohibition notices) are used to secure compliance. In some circumstances, prosecution will also be considered a necessary response to the offence and/or the most appropriate means of dealing with the offender and deterring other prospective offenders from contravening the legislation.

6.1.2 Objectives

The objectives of an OHS prosecution are to:

- prosecute dutyholders, in accordance with these *General Prosecution Guidelines*, for alleged breaches of Victoria's OHS laws; and
- publish, in accordance with these *Guidelines*, information in relation to the nature and outcome of prosecutions, for deterrence (general and specific) and educative purposes.

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

6.1.3 Operational Context and Processes

The Authority recognises that when it files a charge or conducts a prosecution it is not enforcing the legislation it administers in isolation, but is functioning as a prosecution agency within the criminal justice system. As with all prosecution agencies, the Authority will take action when it is required in the public interest.

From time-to-time the Authority will enter into Memorandums of Understanding with other agencies in the criminal justice system to establish inter-agency protocols (e.g. to avoid procedural and technical duplication of tasks where cross-jurisdictional responsibilities exist). Memorandums of Understanding:

- will be consistent with, and support, the implementation of the *General Prosecution Guidelines*;
- in no way replace or add to any of the principles set out in the *General Prosecution Guidelines*;
- should be read in the context of, and subject to, the *General Prosecution Guidelines*; and
- will be kept under regular review in relation to their effectiveness and relevance and may be modified by the Authority at any time.

Memorandums of Understanding will be available from the Authority upon request and at www.workcover.vic.gov.au.

6.2 Accident Compensation Prosecutions

The key aim of the Authority's prosecution activities in relation to Victoria's accident compensation laws is to encourage compliance and to maintain the integrity of the Accident Compensation scheme.

The prosecution objectives parallel those for OHS prosecutions (i.e. prosecute in accordance with these *Guidelines*; publish information about prosecutions; and function as a prosecution agency in a multi-agency criminal justice system – for details see 6.1).

7. PRINCIPLES OF PROSECUTION

The Authority will institute and conduct all prosecution-related activities to the highest standards of prosecutorial ethics and practice.

7.1 OHS Prosecutions

In accordance with the principles that underpin WorkSafe's approach to all its activities, all OHS prosecution-related activities should be transparent, accountable, constructive, and effective. In addition, all OHS prosecution-related activities should be targeted, proportionate, consistent, and fair, and conducted in accordance with these *General Prosecution Guidelines*. (For details, see topic 9 of the *WorkSafe Compliance and Enforcement Policy*.)

7.2 'Accident Compensation' Prosecutions

All 'accident compensation' prosecution-related activities should be transparent, accountable, consistent, and fair, and conducted in accordance with these *General Prosecution Guidelines*.

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

8. LIMITATION PERIODS FOR PROSECUTIONS

8.1 OHS Prosecutions

Under s 132 of the *Occupational Health and Safety Act 2004*, prosecution for an indictable offence must be brought within two years of:

- the offence being committed; or
- the Authority becoming aware that an offence has been committed

except that a prosecution may be brought after this time with the written authorisation of the Director of Public Prosecutions.

Prosecutions for summary offences under the Act must be brought within 12 months of the alleged offence, except where otherwise provided in the Act (see s 26(4) of the *Magistrates Court Act 1989*).

8.1.1 Other OHS Laws

Various limitation periods apply for the prosecution of indictable offences under other OHS laws.¹² For summary offences, proceedings must be brought within 12 months of the alleged offence, except where otherwise provided in the relevant OHS law (see s 26(4) of the *Magistrates Court Act 1989*).¹³

8.2 Accident Compensation Prosecutions

Various limitation periods apply for the prosecution of offences under Victoria's accident compensation laws. For certain offences under the *Accident Compensation Act 1985* and the *Accident Compensation (WorkCover Insurance) Act 1993* the limitation period is three years from the date of the alleged offence (e.g. s 252(4) of the *Accident Compensation Act 1985*). However, limitation periods may vary for individual offences.

Prosecutions may also be commenced for alleged offences under the *Crimes Act 1958* which occur in connection with a claim for compensation. These offences are generally indictable offences and are not subject to statutory time limitations.

9. WHO MAY BE SUBJECT TO PROSECUTION?

9.1 OHS Prosecutions

All dutyholders have an on-going role to play in ensuring a safe and healthy working environment. Any dutyholder who breaches Victoria's OHS laws may be subject to prosecution in accordance with these *General Prosecution Guidelines* – for example, dutyholders specified in the *Occupational Health and Safety Act 2004*, including:

- employers, including contractors with employees and labour hire companies (ss 21 to 24);
- employees (s 25) and other workers (ss 23-24);
- officers (ss 144-145);
- other persons who manage or control a workplace (s 26);
- designers of plant, buildings, and structures (ss 27-28);
- manufacturers of plant or substances (s 29);
- suppliers of plant or substances (s 30); and
- persons who install, erect or commission plant (s 31).

WorkSafe will consider the role of all dutyholders in assessing whether they have complied with their respective duties under Victoria's OHS laws.

For details see the Supplementary Enforcement and Prosecution Policy *Liability of organisations, officers, employees, and other dutyholders* at www.workcover.vic.gov.au

*Note 12: i.e. under the **Dangerous Goods Act 1985; Equipment (Public Safety) Act 1994; Road Transport (Dangerous Goods) Act 1995** (and its Commonwealth equivalent).*

Note 13: Careful consideration of the relevant legislation should be undertaken by any person who considers they may be affected.

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

9.2 Accident Compensation Prosecutions

All dutyholders have a role to play in the maintenance of an efficient and fair compensation and rehabilitation scheme. Any dutyholder who fails to comply with their legislative obligations may be subject to prosecution.

10. OHS INFRINGEMENT NOTICES

In certain circumstances, the Authority has the power to issue an infringement notice as an alternative to prosecution under OHS laws (see s 139 of the *Occupational Health and Safety Act 2004*; s 45B of the *Dangerous Goods Act 1985*; s 38 of the *Commonwealth Road Transport Reform (Dangerous Goods) Act 1996*; s 27 of the *Equipment (Public Safety) Act 1994*).

Infringement Notices can only be issued in the circumstances/manner prescribed in the relevant Act and/or regulations and are only available for non-indictable offences.

A person to whom an infringement notice is issued is entitled to reject the notice and to instead face prosecution proceedings in court.

For details see the Supplementary Enforcement and Prosecution Policy *Infringement Notices* at www.workcover.vic.gov.au

11. INVESTIGATION OF ALLEGED OFFENCES

11.1 OHS Comprehensive Investigations

Prior to determining whether to prosecute (or take alternative punitive action) against an alleged offender, WorkSafe will undertake a comprehensive investigation.

11.1.1 Purpose of Comprehensive Investigations

The purpose of a comprehensive investigation is to determine whether a breach of Victoria's OHS laws has occurred that may **warrant** prosecution (or alternative punitive action).

A further aim of comprehensive investigations is to gather information that can be applied to assist in preventing future OHS breaches (i.e. gather information that can be used to improve future systems of hazard identification, risk assessment, and risk control).

11.1.2 Referrals for Consideration

WorkSafe receives referrals for consideration of whether to conduct a comprehensive investigation from a range of sources, including:

- WorkSafe inspectors (for details see topic 17 of the *WorkSafe Compliance and Enforcement Policy*);
- fire brigades (e.g. the Melbourne Fire and Emergency Services Board or the Country Fire Authority);
- the Environment Protection Authority
- the Victoria Police and the Australia Federal Police;
- a notification by the coroner;
- a complaint by a member of the public (including unions, employees, and health and safety representatives).

11.1.3 Criteria for Commencing Comprehensive Investigations

WorkSafe has clear strategic priorities (i.e. target areas) for its comprehensive investigations. Comprehensive investigations will usually occur in relation to the following target areas, with the decision in individual cases taking into account the need to balance the necessity to maintain public confidence in the administration of the law with consideration of whether a comprehensive investigation would place a disproportionate burden on WorkSafe's enforcement capabilities (and any other relevant considerations).

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

Strategic priorities for commencing comprehensive investigations in relation to OHS offences include:

a) *Work-related Fatalities*

b) *Other 'Notifiable Incidents'*

Other notifiable incidents (i.e. serious injury or an immediate risk to health or safety, as described in s 37) where there is a high degree of culpability such as:

- Reckless conduct: conduct that recklessly endangers, or may recklessly endanger, persons at work (s 32);
- Recalcitrance: failure to control risks despite previous notices, directions, warnings, incidents, advice or information (whether from the Authority or any other source – in particular, employees of the dutyholder or health and safety representatives);
- Recidivism: relevant repeat offences or breaches by dutyholders or prior findings of guilt and/or convictions under OHS laws and/or under any other relevant legislation;
- Duration of Breach: failure to identify and/or control the risk over a sustained period of time;
- Systems of Work: significant departure from widely-known/accepted safe systems of work resulting in:
 - (i) an increase in risk (e.g. the introduction of a system of work or risk control measure that does not meet accepted safety standards); or
 - (ii) failure to control risks arising from known hazards.

The degree to which the dutyholder has taken suitable measures to comply with OHS laws will be taken into account in assessing the level of culpability for the breach.

c) *Focus Areas for Prevention*

Alleged offences in focus areas of prevention, as determined by WorkSafe in its multi-year strategies and other business plans, for example:

- (i) high-hazard and high-risk industries and occupations (e.g. construction, farming, transport);
- (ii) offences relating to the causes of common injury types (e.g. manual handling injuries).

From time-to-time, WorkSafe targets additional focus areas of prevention and publishes this information on its website (www.worksafe.vic.gov.au) and/or in the media – for details, see topic 10 of the *WorkSafe Compliance and Enforcement Policy*.

d) *Non-compliance with a Notice or Direction*

Failure to comply with a notice or direction issued by a WorkSafe inspector (e.g. an improvement or prohibition notice) or a health and safety representative (e.g. a provisional improvement notice), in particular, where the risk that was the subject of the notice/direction:

- (i) still exists at the workplace; or
- (ii) was 'passed on' without adequate warning (for example, sold or otherwise supplied for potential use at another worksite without adequate warning – e.g. see ss 23, 24 and 30); or
- (iii) was remedied substantially after the date specified in the notice/direction.

Whilst failure to comply with a notice or direction is a strategic priority, the comprehensive investigation may also examine the original breach to which the notice/direction related – in particular, in circumstances (i) to (iii).

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

e) Offence against a WorkSafe Inspector

- hindering, obstructing, concealing evidence from, etc. a WorkSafe inspector or preventing a person from assisting a WorkSafe inspector (s 125);
- assaulting, intimidating, threatening, etc. a WorkSafe inspector or a person assisting a WorkSafe inspector (s 125);
- impersonating a WorkSafe inspector (s 126).

f) Offence against a Health and Safety Representative (or Committee)

Refusal by an employer to:

- allow OHS training as specified in a determination of the Authority (s 67);
- meet the obligations to health and safety representatives (e.g. access to information, interviews, time, and facilities) as specified in the Act (s 69);
- establish a health and safety committee (s 72).

g) Offence against or by an Authorised Representative

- offences by Authorised Representatives of Registered Employee Organisations (ss 91-92);
- hindering, obstructing, intimidating, etc. an Authorised Representative (s 93);
- impersonating an Authorised Representative (s 94).

h) Discrimination

Discrimination, or threats of discrimination, against an employee or prospective employee for any action in relation to occupational health and safety – for example, for being a health and safety representative (s 76).

i) Coercion

Coercion relating to the establishment of, or negotiations concerning, Designated Work Groups (s 53).

j) Incident Notification and Site Preservation

- failure to notify WorkSafe of a “notifiable incident” (s 37);
- failure to preserve an incident site (s 39).

k) Dangerous Goods Offences

- offences involving a failure to comply with the *Dangerous Goods Act 1985* that result in substantial damage to property;
- breaches involving high consequence dangerous goods; and
- breaches of Governor-in-Council Orders under s 55 of the *Dangerous Goods Act 1985* that impose an absolute prohibition in relation to dangerous goods.

l) Equipment (Public Safety) Offences

- breaches of Governor-in-Council Orders under s 37 of the *Equipment (Public Safety) Act 1994* that impose an absolute prohibition in relation to prescribed equipment.

m) Other Target Areas

- (i) where appropriate, failure to pay the penalty imposed in an infringement notice within the specified time or prosecution upon withdrawal of an infringement notice (s 142);
- (ii) a comprehensive investigation will be conducted where, in accordance with s 131 of the *Occupational Health and Safety Act 2004*, a person requests that a prosecution be brought (and where subsequently the matter may be referred to the Director of Public Prosecutions for advice).

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

11.2 'Accident Compensation' Investigations

Areas of investigation in relation to Accident Compensation offences include:

- theft or fraud-related offences by a service provider, employer or worker;
- offences by an employer that may prejudice the WorkCover rights of an injured worker or compromise the efficient and effective operation and management of the accident compensation scheme;
- offences against persons exercising powers under the legislation.

The Authority will assess and, where appropriate, investigate allegations of non-compliance by dutyholders. In addition, from time-to-time the Authority may determine additional areas of strategic importance that require focused investigation due to the risk they present to the integrity of the accident compensation scheme (e.g. because of their prevalence) and/or for reasons of general deterrence.

12. PROSECUTION CRITERIA

Where an OHS comprehensive investigation or an Accident Compensation investigation reveals evidence of a breach, the Authority will consider whether a prosecution (or alternative punitive action) should commence.

In determining the most appropriate prosecution-related action to take following an OHS comprehensive investigation (i.e. prosecution, enforceable undertaking, letter of caution, no further action) or an Accident Compensation investigation (i.e. prosecution, letter of caution, letter of advice, administrative penalties, or no further action), the Authority assesses the information obtained during the investigation by considering and applying the following prosecution criteria:

- Sufficient Evidence: whether there is sufficient evidence to support a reasonable prospect of conviction; and
- Public Interest: the Authority's Public Interest Criteria.

13. SUFFICIENT EVIDENCE

As the initial step in determining whether to undertake prosecution proceedings (or an alternative form of punitive action) against an alleged offender, the Authority endorses and adopts the considerations, as set out from time-to-time, in the *Australian Prosecutorial Guidelines* ('APG')¹⁴, in particular:

13.1 Reasonable Prospect of Conviction

- (i) "The initial consideration... is whether the evidence is sufficient to justify the institution or continuation of a prosecution." (APG 2).
- (ii) "A prosecution should not be instituted or continued unless there is admissible, substantial, and reliable evidence that a criminal offence known to law has been committed by the alleged offender.....a bare prima facie case is not enough." (APG 2-3).
- (iii) "Once it is established that there is a prima facie case, it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured." (APG 3)

13.2 Matters to be taken into Account

"The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as:

- the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact...;
- the admissibility of any alleged confession or other evidence...;

*Note 14: The full text of the **Australian Prosecutorial Guidelines** is available at www.workcover.vic.gov.au*

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

- any lines of defence which are plainly open to, or have been indicated by, the alleged offender; and
- any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction." (APG 4)

13.3 Evaluation of the Evidence

When evaluating the evidence regard should be given to the following matters (APG 6):

13.3.1 Grounds for Exclusion of Evidence

- "(a) Are there grounds for believing the evidence may be excluded, bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confessional evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution."

13.3.2 Admissions

- "(b) If the case depends in part on admissions by the alleged offender, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the alleged offender?"

13.3.3 Reliability and Credibility of Witnesses

- "(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?"
- "(d) Has a witness a motive for telling less than the whole truth?"
- "(e) Are there matters that might properly be put to a witness by the defence to attack his or her credibility?"
- "(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability that is likely to affect his or her credibility?"
- "(g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?"
- "(h) If there is a lack of conflict between eyewitnesses, is there anything that causes suspicion that a false story may have been concocted?"

13.3.4 Availability of Witnesses

- "(i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad? Is any witness likely to obtain an exemption from giving evidence pursuant to s 400 *Crimes Act 1958*?"

13.3.5 Child Witnesses

- "(j) Where child witnesses are involved, are they likely to be able to give sworn evidence or, if not, is there corroboration in some material particular by some other evidence implicating the alleged offender?"

13.3.6 Identification Issues

- "(k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender?"

13.3.7 Multiple Defendants

- "(l) Where two or more alleged offenders are charged together, is there a realistic prospect of the proceedings being severed? If so, is the admissible evidence sufficient to prove the case against each alleged offender should separate trials be ordered."

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

14. PUBLIC INTEREST

Where it is determined that sufficient evidence exists to support a prosecution (or alternative punitive action) against the alleged offender, consideration will then be given as to whether it is, in fact, appropriate for the Authority to undertake such action.

The Public Interest Criteria which WorkSafe takes into consideration when deciding whether prosecution or other punitive action (i.e. enforceable undertaking or letter of caution) is appropriate, and if so which, include the following:

14.1 Effect on Decision to Prosecute (or take Alternative Punitive Action)

WorkSafe endorses and adopts the comments, as set out from time-to-time, in the *Australian Prosecutorial Guidelines* ('APG') and the importance of public interest considerations, in particular:

- (i) "It has never been the rule....that suspected criminal offences must automatically be subject to prosecution.....(Prosecution should occur) 'whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration." (APG 1)
- (ii) "The decision whether or not to prosecute is the most important step in the prosecution process. In every case, great care must be taken in the interests of the victim, the suspected offender, and the community at large to ensure that the right decision is made. A wrong decision to prosecute, or conversely, wrong decisions not to prosecute, both tend to undermine the confidence of the community in the criminal justice system." (APG 2)
- (iii) "Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted." (APG 7)
- (iv) "...Generally speaking the more serious the offence, the less likely it will be that the public interest will not require that a prosecution be pursued." (APG 8)
- (v) "Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the court in mitigation at sentence. Nevertheless, where the offence is not so serious as plainly to require prosecution the prosecutor should also apply his or her mind to whether the public interest requires a prosecution to be pursued." (APG 10)

14.2 Public Interest Considerations: Alleged OHS Offences

The Public Interest Criteria which WorkSafe takes into consideration when deciding whether prosecution or other punitive action is appropriate, and if so, of what kind include the following:

14.2.1 Nature and Circumstances of the Alleged Offence

- the seriousness of the alleged offence;
- the extent of the risk;
- the actual or potential consequence of the alleged offence (e.g. extent of injury caused to a person);
- the prevalence of the alleged offence;
- mitigating or aggravating circumstances; and
- any other relevant circumstances.

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

14.2.2 Characteristics of the Duty Holder

- the degree of culpability of the alleged offender in connection with the offence, for example:
 - the degree to which the dutyholder acted in accordance with any advice given by the Authority pursuant to s 18 of the *Occupational Health and Safety Act 2004* in relation to complying with a duty or obligation under that Act;
 - the relevant compliance history of the alleged offender (including the alleged offender's response to WorkSafe's previous enforcement and prevention activities); and
 - the attitude of the alleged offender (including any relevant proactive measures taken to comply with Victoria's OHS laws).
- relevant history and other relevant characteristics of the alleged offender (e.g. age, intelligence, physical health, mental health, special infirmity, etc.);
- subject to any rights or privileges (such as the privilege against self incrimination), whether the alleged offender is willing to co-operate in the investigation or prosecution of the matter, including the investigation and prosecution of others, or the extent to which the alleged offender has done so.

14.2.3 Level of Public Concern

- whether the nature of the alleged offence is of considerable public concern.

14.2.4 Impact of Offence

- the attitude to prosecution proceedings which is held by:
 - the person who was injured or exposed to an immediate risk;
 - the family of a person who died as a result of the alleged offence;
- the impact of the alleged offence on such persons;
- the impact of the alleged offence on any other relevant persons (e.g. witnesses); and
- any other relevant impact of the offence.

14.2.5 Deterrence

- the impact of prosecution-related action on:
 - general deterrence (i.e. reducing the likelihood that other dutyholders will commit similar offences or otherwise breach OHS laws); and
 - specific deterrence (i.e. reducing the likelihood that the offender will commit a further breach of OHS laws).

14.2.6 Effect of Prosecution

- the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;
- the availability and efficacy of any alternatives to prosecution;
- whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- any entitlement of the State, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken.

14.2.7 Administrative Considerations

- the necessity to maintain public confidence in the administration of the law;
- the likely length and expense of prosecution proceedings and/or a trial;
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute; and
- the staleness of the alleged offence.

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

14.3 Public Interest Considerations: Alleged Accident Compensation Offences

The public interest considerations which will be taken into account when determining whether to commence/continue prosecution proceedings for an alleged offence against Victoria's accident compensation laws are parallel to those taken into account for alleged OHS offences (except for those factors which are specific OHS considerations).

15. DETERMINATION OF APPROPRIATE PROSECUTION-RELATED OPTION

15.1 Alleged OHS Offences

After consideration of all the relevant prosecution criteria (i.e. sufficient evidence and public interest), an OHS comprehensive investigation will result in either:

- commencement of prosecution proceedings;
- Enforceable Undertaking;
- Letter of Caution; or
- no further action.

15.1.1 Prosecution Proceedings

Where sufficient admissible evidence exists of a breach of OHS laws and prosecution would be in the public interest the Authority will commence proceedings under the relevant OHS Act/regulations and conduct the prosecution in accordance with the *VWA General Prosecution Guidelines*.

15.1.2 Enforceable Undertaking

Where it is in the public interest, a written undertaking may be accepted by the Authority in lieu of proceedings for an offence against the Act or regulations (s 16).

As part of the undertaking, the dutyholder must remedy the alleged contravention in the manner specified, and take any other actions agreed to in the undertaking.

An enforceable undertaking is an alternative to prosecution. (Its purpose is to focus the dutyholder on the tasks to be carried out to remedy the alleged breach and/or prevent a similar contravention of OHS laws in the future.) However, if the undertaking is not complied with, the Authority may apply to the Magistrates' Court for an order enforcing the undertaking (s 17).

For details see the Supplementary Enforcement and Prosecution Policy '*Enforceable Undertakings*' at www.workcover.vic.gov.au

15.1.3 Letter of Caution

Where it is in the public interest, then, in limited circumstances for relatively minor¹⁵ offences, a Letter of Caution may be issued as an alternative to prosecution.

For details see the Supplementary Enforcement and Prosecution Policy *Letters of Caution* at www.workcover.vic.gov.au

15.1.4 No Further Action

No further action will be taken, where:

- no breach of OHS laws is established by the comprehensive investigation; or
- taking into account the prosecution criteria of these *General Prosecution Guidelines*:
 - there is insufficient admissible evidence of the breach; or
 - it is not in the public interest to prosecute the breach, accept an enforceable undertaking, or issue a Letter of Caution.

*Note 15: In this context, having regard to all the relevant circumstances, whether a matter is a 'relatively minor' or 'more serious' offence will be determined by application of these **General Prosecution Guidelines**, in particular, the criteria for comprehensive investigation and the prosecution criteria – e.g. factors such as the actual or potential consequences of the breach are taken into consideration. It reflects the culpability involved in the offence.*

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

15.1.5 Notification of Decision to Interested Persons

When a decision is made by the Authority as to what, if any, action will be taken by the Authority following a comprehensive investigation (i.e. prosecution proceedings, enforceable undertaking, letter of caution, no further action) the following persons will be notified forthwith in writing of the decision:

- the alleged offender;
- the person who was injured or exposed to an immediate risk;
- the family of a person who died as a result of the alleged breach;
- witnesses who have provided formal statements to a comprehensive investigation; and
- any other interested parties whom it is appropriate to notify.

15.2 Alleged 'Accident Compensation' Offence

After consideration of all the relevant prosecution criteria (i.e. sufficient evidence and public interest), an 'accident compensation' investigation will result in either:

- a) prosecution proceedings being commenced under the appropriate Act and/or regulations in accordance with these *General Prosecution Guidelines*;
- b) letter of caution, in limited circumstances for relatively minor offences, as an alternative to prosecution;
- c) letter of advice, in limited circumstances, where there is prima facie evidence of a relatively minor or technical breach, as an alternative to prosecution;
- d) administrative penalties, in limited circumstances, for offences under s 108(4A) of the *Accident Compensation Act 1985* in relation to the late lodgement of claims by employers; or
- e) no further action where no breach is established or there is insufficient admissible evidence of a breach or it is not in the public interest to commence prosecution proceedings.

16. CONDUCT OF INVESTIGATIONS AND PROSECUTIONS

Details of the processes by which the Authority conducts its investigations¹⁶ and its other prosecution-related activities in accordance with these *General Prosecution Guidelines* are set out, from time-to-time, in Supplementary Enforcement and Prosecution Policies. Examples include:

- *Mode of Trial*: in relation to when the Authority will seek to have an indictable offence which is triable summarily heard in the Magistrates' Court;
- *Liability of organisations, officers, employees, and other dutyholders*: in relation to when it may be appropriate to prosecute various types of dutyholders (e.g. employees, companies, officers etc);
- *Prosecution of an Offence under an Act and/or a Regulation*; and
- *Search Warrants*.

An up-to-date list of all Supplementary Enforcement and Prosecution Policies and copies of all Supplementary Enforcement and Prosecution Policies are available at www.workcover.vic.gov.au

Note 16: i.e. 'OHS comprehensive' investigations and 'accident compensation' investigations.

VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

17. REVIEW BY DPP OF DECISION NOT TO PROSECUTE (OHS)

17.1 Request to Commence Prosecution

Under s 131 of the *Occupational Health and Safety Act 2004*, if the Authority has not brought prosecution proceedings within six months of an alleged offence, any person may request that WorkSafe commence prosecution.

Upon receipt of such a request, WorkSafe will conduct a comprehensive investigation of the alleged offence and, within three months of the request being made, must advise the person in writing whether prosecution proceedings will be brought. If WorkSafe does not intend to prosecute, it must provide written reasons for its decision.

17.2 Referral for Advice by DPP

If requested to do so by a person to whom it has provided written reasons why prosecution proceedings will not be brought, the Authority must refer the matter to the Director of Public Prosecutions for advice as to whether the DPP considers that a prosecution should be brought.

17.3 Final Determination by Authority

After consideration of the DPP's advice, the Authority will make its final determination whether or not to commence prosecution proceedings, and will advise the person who made the original request for prosecution forthwith in writing. A copy of the DPP's advice must be sent to the person. If the Authority declines to follow the advice given by the DPP, it must also provide written reasons to the person.

17.4 Review Statistics

The Authority must provide statistics relating to reviews by the DPP in its annual report and on the WorkCover website (www.workcover.vic.gov.au).

18. SENTENCING OPTIONS

Where prosecution results in a finding of guilt, a range of sentencing options are available to the court. Depending on the nature of the offence, these may include, for example: monetary fines, imprisonment, and/or the OHS-specific dispositions set out in the *Occupational Health and Safety Act 2004*, such as adverse publicity orders (s 135); orders to undertake improvement projects (s 136), and health and safety undertakings (s 137).

Where appropriate, the Authority will seek sentencing dispositions that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant sentencing considerations.

For details see the Supplementary Enforcement and Prosecution Policy *Sentencing Submissions* at www.workcover.vic.gov.au

19. ANCILLARY ORDERS AND SUBMISSIONS

Where appropriate, in the course of its role as a prosecutorial agency, the Authority will:

- apply for ancillary orders (e.g. restraining orders);
- make ancillary submissions;
- in accordance with s 95F of the Sentencing Act 1991, upon request by or on behalf of a 'victim', read aloud in open court during the sentencing hearing any admissible parts of a victim impact statement that are appropriate and relevant to sentencing; or
- refer the initiation of such applications and submissions to the Director of Public Prosecutions and other relevant prosecutorial agencies.

VICTORIAN WORKCOVER AUTHORITY GENERAL PROSECUTION GUIDELINES

19.1 Provision of Information to Persons Affected by OHS Offences

Where appropriate, the Authority will provide information in relation to ancillary orders (e.g. compensation orders) and submissions (e.g. Victim Impact Statements) to relevant persons.¹⁷

For details see the Supplementary Enforcement and Prosecution Policy *Ancillary Orders and Submissions* at www.workcover.vic.gov.au

20. NOTIFICATION OF OUTCOME OF PROSECUTION

The following persons will be notified in writing by the Authority of the outcome of prosecution proceedings commenced by the Authority:

- the alleged offender;
- the person who was injured or exposed to an immediate risk;
- the family of a person who died as a result of the alleged breach;
- witnesses who have provided formal statements to a comprehensive investigation; and
- any other interested parties whom it is appropriate to notify.

21. PUBLISHING PROSECUTION OUTCOMES AND OTHER ENFORCEMENT DATA AND INFORMATION

21.1 Publishing and Utilising the Outcome of OHS Prosecutions

Publishing the nature and outcome of prosecution-related activity draws attention to the consequences of health and safety violations and the need for real and sustainable improvement in workplaces. It is a valuable tool both for educating dutyholders and deterring non-compliance.

The Authority will publish and/or utilise enforcement data and information to leverage the outcome of inspection and enforcement activity, including prosecution-related activity.

For example, the Authority will:

- publish enforcement data/information in relation to the nature and outcome of prosecutions (and, where appropriate, the imposition of alternative penalties such as infringement notices, enforceable undertakings, and letters of caution) to enhance specific and general deterrence;
- inform dutyholders in the same and similar industries of the nature and outcome of prosecutions (and, where appropriate, the imposition of alternative penalties) and provide advice in relation to how to prevent similar breaches; and
- utilise enforcement data/information resulting from inspection activity, comprehensive investigations, the imposition of alternative penalties, and the outcome of prosecutions to inform future inspection activity on:
 - a systemic level; and
 - where appropriate, in relation to individual dutyholders.

For details see the Supplementary Enforcement and Prosecution Policy *Publishing Prosecution Outcomes and other Enforcement Information & Data* at www.worksafe.vic.gov.au

21.2 Publishing the Outcome of Accident Compensation Prosecutions

In the case of accident compensation prosecutions, publishing the nature and outcome of prosecutions may also be undertaken as a deterrent and educative tool.

Note 17: Relevant persons to whom it may be appropriate to provide information include: (i) the person who was injured or exposed to an immediate risk; (ii) the family of a person who died as a result of the alleged breach; (iii) other relevant persons (e.g. other persons who have suffered injury and/or property loss as a direct result of the alleged offence).

EXPLANATION OF TERMS (OHS)

This Explanation of Terms applies to terms used in the *VWA General Prosecution Guidelines* and the *WorkSafe Compliance and Enforcement Policy*. It is provided to facilitate understanding and in no way qualifies or defines the meaning of the terms used in those documents.

Accident Compensation laws	<i>Accident Compensation Act 1985, Accident Compensation (WorkCover Insurance) Act 1993</i> (and, where applicable, the <i>Crimes Act 1958</i>).
Breach	A contravention of (i.e. non-compliance with) Victoria's OHS laws.
Compliance	The continuous process of fulfilling obligations and duties imposed by legislation (e.g. by Victoria's OHS laws). See topic 7 of the <i>WorkSafe Compliance and Enforcement Policy</i> .
Comprehensive Investigation (OHS)	A detailed investigation carried out to determine whether a breach of Victoria's OHS laws has occurred that may warrant prosecution (or alternative punitive action) and to gather information that can be applied to assist in preventing future OHS breaches.
Constructive Compliance	The strategy applied by WorkSafe to all its enforcement and prosecution activities – a balance of positive motivators and deterrents to improve workplace health and safety.
Dutyholder	A person upon whom a duty is imposed by Victoria's OHS laws, e.g. employers (including contractors with employees and labour hire companies); employees and other workers; officers; other persons who manage or control a workplace; designers of plant, buildings, and structures; manufacturers of plant or substances; suppliers of plant or substances; and persons who install, erect or commission plant.
Enforcement activities	WorkSafe activities that aim to reduce work-related and workplace death, injuries and disease by deterring non-compliance with Victoria's OHS laws – including inspection activities and the use of remedial measures (such as improvement notices and prohibition notices) and punitive measures (such as infringement notices).
Focus area of prevention	Some of the areas identified by WorkSafe as strategic priorities for its enforcement and prosecution activities. See topic 10 of the <i>WorkSafe Compliance and Enforcement Policy</i> .

EXPLANATION OF TERMS (OHS)

Government Gazette	An official publication of the government that contains proclamations bringing legislation into operation, notifications of government decisions and subordinate legislation, etc.
Memorandum of Understanding	Agreement entered into by the Authority with other prosecutorial agencies to avoid procedural and technical duplication of tasks.
More serious breach	Having regard to all the relevant circumstances, whether an offence is a relatively minor or more serious offence is determined by application of the <i>VWA General Prosecution Guidelines</i> , in particular, the criteria for commencing comprehensive investigation and the prosecution criteria – e.g. factors such as the actual or potential consequences of the breach are taken into consideration. It reflects the culpability involved in the offence.
Non-compliance	Contravention (i.e. breach) of Victoria's OHS laws.
OHS	Occupational health and safety
Prosecution-related activities	The Authority's decision-making processes and other activities when: <ul style="list-style-type: none"> – it is considering whether to commence prosecution proceedings, accept an enforceable undertaking, issue a letter of caution or take no further action in relation to an alleged breach of Victoria's OHS laws; and – when undertaking the conduct such matters.
Punitive measure	A recommendation that: <ul style="list-style-type: none"> – an infringement notice be issued or – a comprehensive investigation occur in accordance with the <i>VWA General Prosecution Guidelines</i>. See topic 17 of the <i>WorkSafe Compliance and Enforcement Policy</i> .
RCBU	Rehabilitation and Compensation Business Unit, which manages the Authority's functions in relation to assisting and compensating injured workers and providing Victoria's workplace insurance scheme.
Relatively minor breach	See definition of 'More serious breach'.
Remedial measure	A measure taken by WorkSafe to enforce compliance with Victoria's OHS laws (e.g. the issuing of an improvement notice or prohibition notice). See topic 15 of the <i>WorkSafe Compliance and Enforcement Policy</i> .
Serious injury	As described by s 37 of the <i>Occupational Health and Safety Act 2004</i> .
Statute	An Act of parliament.
Supplementary Enforcement and Prosecution Policy	Policies that support the practical implementation of the <i>General Prosecution Guidelines</i> . See part 4 of the <i>VWA General Prosecution Guidelines</i> .

EXPLANATION OF TERMS (OHS)

Victoria's OHS laws – “the Act” – “Victoria's other OHS laws”	The following Acts and their associated regulations: <ul style="list-style-type: none"> • <i>Occupational Health and Safety Act 2004</i> (“the Act”) • <i>Dangerous Goods Act 1985; Equipment (Public Safety) Act 1994; Road Transport (Dangerous Goods) Act 1995; Road Transport (Dangerous Goods) Act 1995</i> (and its Commonwealth equivalent) (“Victoria's other OHS laws”).
Victoria's Other OHS laws	See Victoria's OHS laws.
VWA (“the Authority”)	Victorian WorkCover Authority, the manager and regulator of Victoria's workplace safety system.
VWA General Prosecution Guidelines	The guidelines which apply to all VWA prosecutions and which are gazetted in accordance with legislative requirements.
Workplace parties	Employers, employees and other workers, health and safety representatives, and other dutyholders.
WorkSafe	VWA's occupational health and safety arm, which manages its regulatory functions in relation to preventing workplace and work-related deaths, injuries, and disease and in enforcing Victoria's OHS laws.
WorkSafe Compliance and Enforcement Policy	The policy which provides an overview of the legislative framework within which WorkSafe operates and sets out how WorkSafe's 'Constructive Compliance Strategy' is applied to its enforcement and prosecution activities.

DETAILS OF POLICY DEVELOPMENT: LAST UPDATE

- The *WorkSafe Compliance and Enforcement Policy* was last updated on: 1 June 2005.
- The *VWA General Prosecution Guidelines* was gazetted on: 1 July 2005.

The first part of the paper discusses the importance of the research and the objectives of the study. It then presents a literature review of the existing research on the topic. The second part of the paper describes the methodology used in the study, including the data collection and analysis techniques. The third part of the paper presents the results of the study, and the fourth part discusses the implications of the findings.

The study was conducted using a quantitative research design. Data was collected from a sample of 100 participants using a survey questionnaire. The data was then analyzed using statistical software to determine the relationships between the variables.

The results of the study show that there is a significant positive relationship between the variables. This finding is consistent with the previous research in the field. The implications of the findings suggest that the research has practical applications in the field.

In conclusion, the study has shown that there is a significant positive relationship between the variables. This finding is consistent with the previous research in the field. The implications of the findings suggest that the research has practical applications in the field.

WORKSAFE VICTORIA

Advisory Service

222 Exhibition Street
Melbourne 3000

Phone 03 9641 1444

Toll-free 1800 136 089

Email info@workcover.vic.gov.au

Head Office

222 Exhibition Street
Melbourne 3000

Phone 03 9641 1555

Toll-free 1800 136 089

Website . . . www.workcover.vic.gov.au

Local Offices

Ballarat 03 5338 4444

Bendigo 03 5443 8866

Dandenong 03 8792 9000

Geelong 03 5226 1200

Melbourne

(628 Bourke Street) . . . 03 9941 0558

Mildura 03 5021 4001

Mulgrave 03 9565 9444

Preston 03 9485 4555

Shepparton 03 5831 8260

Traralgon 03 5174 8900

Wangaratta 03 5721 8588

Warrnambool 03 5564 3200

WorkSafe Victoria's General Prosecution Guidelines

March 2017

WorkSafe Victoria (WorkSafe) issues the following general guidelines in relation to the prosecution of offences under Victoria's occupational health and safety and workers compensation laws.

WorkSafe's constructive compliance strategy

Constructive compliance recognises the importance of providing all participants with comprehensive information and education about their duties and responsibilities. This approach combines encouraging good practices with deterring unacceptable performance.

WorkSafe balances the use of positive motivators and deterrence measures to improve workplace health and safety and return to work, and to prevent abuse of the workers compensation scheme.

WorkSafe provides advice, information, education and financial and other incentives to encourage compliance with Victoria's health and safety and compensation laws.

Where compliance is not achieved, enforcement tools may be used to assist in securing compliance. Where WorkSafe considers it appropriate a prosecution will be initiated to deal with a breach.

WorkSafe has a range of enforcement tools it may use depending on the circumstances of the non-compliance. For example:

- seeking voluntary compliance;
- issuing a letter of caution;
- accepting an enforceable undertaking; or
- referring matters to professional, registration or disciplinary bodies or other agencies.

Further details about the range of enforcement tools used by WorkSafe can be found in WorkSafe's Compliance and Enforcement Policy (a broader policy document that places these guidelines in context, as part of WorkSafe's overall compliance and enforcement functions).

Consistent with WorkSafe's organisational values, its compliance and enforcement activities should be

constructive, accountable, transparent and effective, and its enforcement actions should be targeted, proportionate, consistent and fair.

Victoria's occupational health and safety and workers compensation laws

Victoria's occupational health and safety and workers compensation laws include the following Acts of Parliament and the Regulations made under those Acts:

- Occupational Health and Safety Act 1985 (the old OHS Act)
- Occupational Health and Safety Act 2004 (the OHS Act)
- Dangerous Goods Act 1985 (the DG Act)
- Road Transport (Dangerous Goods) Act 1995 (the RT Act)
- Equipment (Public Safety) Act 1994 (the EPS Act)

In these guidelines, the above Acts are collectively referred to as Victoria's 'health and safety' laws.

- Accident Compensation Act 1985 (the AC Act)
- Workplace Injury Rehabilitation and Compensation Act 2013 (the WIRC Act)
- Accident Compensation (WorkCover Insurance) Act 1993 (the ACWI Act)

In these guidelines, the above Acts are collectively referred to as Victoria's 'compensation' laws.

These guidelines are intended to guide WorkSafe in the exercise of its prosecutorial discretion. Failure by WorkSafe to act in accordance with these guidelines does not affect the validity of any action taken or decision made by WorkSafe.

These guidelines are published in the Victorian Government Gazette in accordance with the requirements of Victoria's health and safety and compensation laws. They are also published on WorkSafe's website, worksafe.vic.gov.au, and incorporated in WorkSafe's Compliance and Enforcement Policy.

Key aim of prosecutions

The key aim of WorkSafe's health and safety prosecutions is to deter non-compliance with Victoria's health and safety laws and to prevent workplace and work-related deaths, injuries and disease. A prosecution may be brought regardless of whether a breach resulted in death, injury or disease.

Health and safety prosecutions also aim to promote good occupational health and safety (OHS) values and practices.

The key aim of WorkSafe's workers compensation prosecutions is to deter non-compliance and to maintain the integrity of the workers compensation scheme.

Strategic enforcement priorities – target areas

Prior to determining whether to prosecute (or take any other form of enforcement action), WorkSafe will undertake inquiries to determine whether a breach has occurred and to gather information that may assist in preventing future breaches.

In the case of compensation matters, inquiries may also be aimed at determining WorkSafe's liability to pay compensation.

An inquiry or investigation may be triggered by a range of sources, including complaints, referrals from other agencies and WorkSafe's proactive activities, for example, education campaigns and workplace inspections.

WorkSafe sets strategic priorities for its compliance and enforcement activities. Key priorities for inquiries or investigations and associated enforcement actions usually occur in the following target areas:

Target areas for prosecutions under health and safety laws

1. Work-related fatalities
2. Incidents involving serious injury or an immediate risk to health and safety where there appears to be a high degree of culpability; for example, cases involving:
 - reckless conduct that endangers or may endanger persons at work
 - failure to control risks despite previous warnings or knowledge

- repeat offending
 - significant departures from widely known or accepted safe systems of work.
3. WorkSafe's focus areas for prevention, as determined by WorkSafe in its published strategies and business plans; for example:
 - high-hazard and high-risk industries and occupations (e.g. construction, farming and transport)
 - common injury types (e.g. musculoskeletal injuries).
 4. Failure to comply with a notice or direction given by an inspector or WorkSafe, especially where the risk that was the subject of the notice or direction:
 - still exists at the workplace
 - was 'passed on' to others without adequate warning (e.g. supplied to another worksite without adequate warning), or
 - was not remedied until a significant time after the date specified in the notice or direction.
 5. Offences against inspectors:
 - hindering, obstructing, concealing evidence from an inspector or preventing a person from assisting an inspector
 - assaulting, intimidating, threatening an inspector or a person assisting an inspector
 - impersonating an inspector.
 6. Offences against Health and Safety representatives (or committees), including refusals by employers to:
 - allow OHS training as specified in a WorkSafe determination
 - meet the obligations to health and safety representatives (e.g. access to information, interviews, time and facilities)
 - establish a health and safety committee.
 7. Offences against, or by, authorised representatives of registered employee organisations such as hindering, obstructing, intimidating or impersonating an authorised representative.
 8. Discrimination or threats to discriminate against employees or potential employees for any action in relation to occupational health and safety; for example, being a health and safety representative.
 9. Coercion in negotiations relating to the establishment of designated workgroups of workers
 10. Failure to notify WorkSafe of 'notifiable incidents' and failing to preserve incident sites when required to do so
 11. DG Act offences that involve:
 - substantial damage to property

WorkSafe Victoria's General Prosecution Guidelines

- high consequence dangerous goods
 - breaches of Governor-in-Council orders that impose an absolute prohibition in relation to dangerous goods
12. EPS Act offences, especially breaches of Governor-in-Council orders that impose an absolute prohibition in relation to prescribed equipment
 13. Other target areas as published from time to time by WorkSafe.

Target areas for prosecutions under workers compensation laws:

1. Offences involving dishonesty by workers, employers and those who provide services to injured workers (eg health professionals)
2. Failures by employers to comply with the return to work obligations set out in Part VIIB of the AC Act and Part 4 of the WIRC Act, e.g. to plan a worker's return to work, to consult about a worker's return to work and to provide employment to injured workers to the extent that it is reasonable to do so
3. Offences by employers that unduly delay or complicate a worker's access to entitlements or appropriate treatment, e.g. failing to make weekly payments
4. Discrimination or threats to discriminate against workers for making or pursuing claims for compensation or giving notice of injury
5. Offences against return to work inspectors and other persons authorised to exercise powers for WorkSafe
6. Breaches by self-insurers
7. Premium evasion.

Compensation and health and safety laws impose a range of obligations on a range of people. In considering whether the legislation has been complied with, WorkSafe considers the conduct of all duty holders.

Enforcement criteria

The time for WorkSafe to bring charges against a person for an offence is generally limited depending on the offence; for example:

- WorkSafe is required to bring charges for indictable offences against the OHS Act within two years of the offence being committed or WorkSafe becoming aware that an offence has been committed, unless

the Director of Public Prosecutions (DPP) authorises an extension of time

- WorkSafe is required to bring charges for certain offences under the WIRC Act and the AC Act within three years from the date of the alleged offence
- Prosecutions for summary offences must be brought within 12 months of the alleged offence, except where otherwise provided by law.

Where a WorkSafe investigation reveals evidence of a breach, WorkSafe will consider whether a prosecution should be commenced or another form of enforcement action should be taken.

WorkSafe may decide to seek advice from, or consult with, the DPP when considering what, if any, enforcement action should be taken. When appropriate, WorkSafe can also refer matters to the DPP for a decision whether or not to prosecute.

In deciding on the most appropriate enforcement action to take, WorkSafe is guided by the following two paramount considerations:

- whether there is sufficient evidence to support enforcement action, and
- the public interest.

Sufficient evidence

When considering whether there is sufficient evidence to support a prosecution (as opposed to other enforcement action), WorkSafe adopts the guidelines of the Victorian Director of Public Prosecutions (DPP) – in particular, Policy 2: Prosecutorial Discretion ('DPP Prosecutorial Discretion Policy'), available at www.opp.vic.gov.au.

Reasonable prospect of conviction

'Prosecutors must be satisfied that there is a reasonable prospect of a conviction' (DPP Prosecutorial Discretion Policy at 3).

There are a number of factors to consider in determining whether there is a reasonable prospect of conviction. After considering these factors a prosecution should not be commenced if the prosecutor is not satisfied that there is a reasonable prospect of conviction.

WorkSafe Victoria's General Prosecution Guidelines

Factors to consider

'Factors to which regard should be had in assessing this include:

- the possibility of evidence being excluded
- any possible line of defence
- whether the prosecution witnesses are available, competent and compellable
- the credibility and reliability of the prosecution witnesses
- how the witnesses are likely to stand up to giving evidence in court
- whether any witnesses have a motive for telling less than the whole truth
- any conflict between eye-witnesses
- whether there is any reason to suspect that a false story may have been concocted
- the reliability of any admissions
- the existence and reliability of any forensic or medical evidence
- the reliability of any identification evidence
- in the case of a child witness, whether the child will give sworn evidence, and if not, whether there is any evidence which corroborates the child's evidence
- any other matter relevant to whether a jury would find the person guilty'.

When considering whether there is sufficient evidence to support other forms of enforcement action, WorkSafe is guided by its legal advisers on a case by case basis.

Public interest

Where WorkSafe believes there is sufficient evidence to support enforcement action being taken, consideration will then be given to whether it is in the public interest for WorkSafe to take such action.

WorkSafe adopts the considerations as published in the DPP Prosecutorial Discretion Policy:

- 'Once satisfied that there is a reasonable prospect of a conviction, prosecutors must consider whether a prosecution is required in the public interest. This is the dominant consideration'. (DPP Prosecutorial Discretion Policy at 4)
- 'If the prosecutor is satisfied that there is a reasonable prospect of a conviction, the prosecution should proceed unless there are public interest factors tending against prosecution which outweigh those tending in favour'. (DPP Prosecutorial Discretion Policy at 5)

WorkSafe takes into account the following when deciding whether enforcement action is appropriate and in the public interest:

1. The nature and circumstances of the alleged offending, including:
 - the seriousness of the alleged offence and the level of public concern about the alleged offence
 - the extent of the risk posed by the alleged offence to workers, employers or the scheme generally
 - the actual or potential consequences of the alleged offence (e.g. in the case of a health and safety offence, the extent of any injury caused to a person)
 - the prevalence of the alleged offence
 - any mitigating or aggravating features of the alleged offending.
2. The characteristics of the alleged offender, including:
 - the extent to which the alleged offender has acted in accordance with any advice given by WorkSafe in relation to its obligations
 - the alleged offender's compliance history (including the alleged offender's response to any previous WorkSafe enforcement and prevention activities)
 - the attitude of the alleged offender(s) (including any proactive steps taken to comply or efforts to make restitution for any loss caused by the offence)
 - the alleged offender's age, intelligence, health and any special infirmity
 - whether the alleged offender co-operated in the investigation or prosecution of the case, including the investigation or prosecution of others or is prepared to do so.
3. The impact of the alleged offence on others; for example:
 - any person who has been injured or exposed to risk
 - the family of any person who has died as a result of the alleged offence
 - any witnesses.
4. The impact of the alleged offence on the scheme, e.g. the extent of any financial losses suffered by the scheme as a result of the alleged offence.
5. The need for general deterrence – reducing the likelihood that others will commit similar offences.

6. The need for specific deterrence – reducing the likelihood that the alleged offender will commit further breaches.
7. The effect of prosecution, including:
 - the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
 - the availability and efficacy of alternatives to prosecution
 - whether the consequences of any resulting finding of guilt would be unduly harsh or oppressive
 - any entitlement to criminal compensation, reparation or forfeiture if prosecution action is taken.
8. The need to maintain public confidence in the administration of the law and the scheme, including considering whether enforcement action could be perceived as counter-productive, eg by bringing the law into disrepute.
9. The likely length and cost of taking enforcement action.
10. When the alleged offence occurred.

Notification of WorkSafe's enforcement decisions

When WorkSafe makes a decision as to what, if any, enforcement action will be taken following an investigation, WorkSafe will generally notify the following parties of the decision:

- the alleged offender
- the complainant
- the person who was injured or exposed to an immediate risk (health and safety)
- the family of a person who died as a result of the alleged breach (health and safety).

If a prosecution is brought, WorkSafe will also notify these parties of the outcome.

Sentencing options

Where a prosecution results in a finding of guilt, a range of sentencing options are available to the court. Depending on the nature of the offence, these may include fines, imprisonment, adverse publicity orders and orders to undertake improvement projects. WorkSafe will seek sentencing dispositions that balance its aims of general and specific deterrence with the circumstances of each individual case.

Where appropriate, WorkSafe will also:

- apply for other orders – eg restitution orders, compensation orders, forfeiture/disposal and costs orders
- upon request by or on behalf of a victim, read aloud in open court during the sentencing hearing any admissible parts of a victim impact statement that are relevant to sentencing.

Where appropriate, WorkSafe will provide information in relation to these ancillary orders and submissions to affected parties.

Requesting WorkSafe bring a prosecution

If WorkSafe has not brought a prosecution within six months of an alleged health and safety, return to work or discrimination offence, any person may request that WorkSafe bring a prosecution. Following a request to bring a prosecution, WorkSafe must – within three months – investigate the matter and advise whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought.

If WorkSafe advises that a prosecution will not be brought, WorkSafe must refer the matter to the DPP if the person requests in writing that WorkSafe do so.

The DPP must consider the matter and advise in writing whether or not the Director considers that a prosecution should be brought. WorkSafe must send a copy of the Director's advice to the person who requested the DPP's review. If WorkSafe declines to follow the advice of the DPP to bring a prosecution, WorkSafe must give reasons for its decision.

Publication of enforcement actions and outcomes

Publishing the nature and outcome of enforcement actions draws attention to the consequences of violating the law.

It is a valuable tool for both educating duty holders and deterring non-compliance.

WorkSafe will publish and use enforcement data and information to maximise the outcome of its inspection, investigation and enforcement activity.

For example, WorkSafe:

- publishes information as to the nature and outcome of prosecutions (and where appropriate, other enforcement actions such as enforceable

WorkSafe Victoria's General Prosecution Guidelines

undertakings) to support specific and general deterrence

- informs duty holders in the same or similar industries of the nature and outcome of prosecutions (and, where appropriate, other enforcement actions) and provides advice as to how to prevent similar breaches
- uses information resulting from inspections, investigations and enforcement actions to inform its targeting.

More information about compliance and enforcement

Further information

Visit: worksafe.vic.gov.au

Contact WorkSafe Advisory Service on

1800 136 089 or info@worksafe.vic.gov.au

In addition to these guidelines, WorkSafe publishes further details about its approach to compliance and enforcement through its Compliance & Enforcement Policy, which can be found at worksafe.vic.gov.au.

From time to time, WorkSafe may publish supplementary compliance and enforcement policies, which provide further information about particular aspects of WorkSafe's compliance and enforcement activities. An up-to-date list of all supplementary compliance and enforcement policies is available at worksafe.vic.gov.au.

Note: *The information contained in this document is based on the provisions of the Workplace Injury Rehabilitation and Compensation Act 2013, and is intended for general use only. Whilst every effort has been made to ensure the accuracy and completeness of this document, WorkSafe Victoria does not accept any liability for any loss or damage which may be incurred by any person acting in reliance on this document. For a definitive statement of the law, you should read the Workplace Injury Rehabilitation and Compensation Act 2013 or seek your own legal advice about it.*

© Victorian WorkCover Authority 2017