

# A SUMMARY OF COMPLIANCE, ENFORCEMENT AND PROSECUTION POLICY

**1ST EDITION**

JUNE 2005

WorkSafe Victoria, as the occupational health and safety arm of the Victorian WorkCover Authority, manages the regulatory functions in relation to preventing workplace and work-related deaths, injuries and disease and enforces Victoria's occupational health and safety laws.

WorkSafe uses a Constructive Compliance Strategy in its compliance and enforcement activities, which balances a combination of positive motivators and deterrents to improve workplace health and safety (see Figure 1 overleaf).

By using an integrated approach to enforce Victoria's OHS laws, WorkSafe combines the use of one or more enforcement measures (for example, issuing an improvement or prohibition notice) with the provision of advice and guidance material.

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.

## **WHAT IS COMPLIANCE?**

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

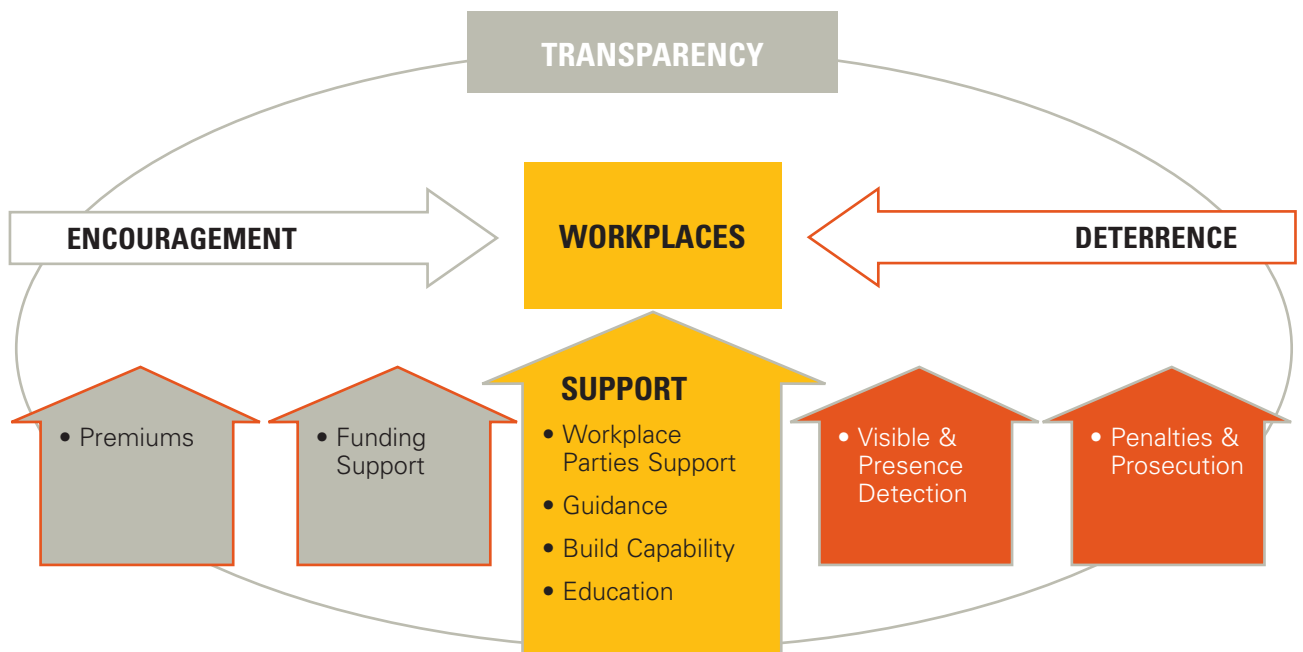
## **PRINCIPLES OF REGULATION AND ENFORCEMENT**

The principles of regulation which underpin all WorkSafe activities apply to its compliance, enforcement and prosecution-related activities: all activities should be constructive, transparent, accountable, and effective. The following principles also apply to WorkSafe's inspection and enforcement activities:

- targeted – WorkSafe targets its activities to areas of most need and effect (e.g. high hazard and high risk situations and industries);
- proportionate – all enforcement action is proportionate to the seriousness of non-compliance;
- consistent – a consistent approach is undertaken in similar situations/circumstances to achieve consistent outcomes; and
- fair – all compliance and enforcement activities are undertaken with impartiality, balance and integrity.

In addition, all prosecution-related activity is undertaken in accordance with the *VWA General Prosecution Guidelines*.

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<ul style="list-style-type: none"> <li>• Workplace Injury Insurance system.</li> </ul>	<ul style="list-style-type: none"> <li>• Funding support including: Safety Development Fund, Small Business Innovation Fund, and Information and Education Fund.</li> <li>• High involvement from industry associations and unions for targeting and delivery of funding.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide advice and information to workplace parties on how to comply.</li> <li>• Engage and communicate with stakeholders.</li> <li>• Foster consultative relationships between employers and employees.</li> <li>• Support and involve stakeholders in education and training.</li> <li>• Internal review of decisions.</li> </ul>	<ul style="list-style-type: none"> <li>• Maintain regulator role and inspection activities.</li> <li>• Inspectors provide advice on compliance.</li> <li>• Maintain credible risk of prosecution or alternative punitive action.</li> <li>• Enforce remedial action by dutyholders to remedy alleged breaches.</li> </ul>	<ul style="list-style-type: none"> <li>• Prosecute more serious breaches.</li> <li>• Implement alternative penalties for relatively minor breaches (where appropriate).</li> <li>• Seek appropriate sentencing options.</li> <li>• 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).</li> </ul>
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Figure 1: WorkSafe's Constructive Compliance Strategy.

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## DUTYHOLDERS

All dutyholders (i.e. all persons associated with the operation of workplaces and other undertakings) may be subject to WorkSafe's enforcement activities, including prosecution. Dutyholders under the *Occupational Health and Safety Act 2004* ('the Act') are:

- employers, including contractors with employees and labour hire companies;
- employees and other workers;
- officers;
- other persons who manage and control workplaces;
- designers of plant, buildings and structures;
- manufacturers of plant or substances;
- suppliers of plant or substances; and
- persons who install, erect or commission plant.

## KEY AIM OF ENFORCEMENT ACTIVITIES

The key aim of WorkSafe's inspection and other enforcement activities 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 non-compliance results in death, injury or disease. Enforcement activities can provide a further opportunity to promote good OHS values within an organisation.

## STRATEGIC PRIORITIES

WorkSafe's strategic priorities (i.e. target areas) for inspection and other enforcement activities include:

- incident and emergency response notifications; and
- focus areas of prevention (including high hazard and high risk industries and occupations and the causes of common injuries).

The focus areas of prevention may alter from time-to-time, according to WorkSafe's multi-year strategies and business plans.

A three-phase program of systems development and education will usually occur prior to an increase in enforcement activity in focus areas. Depending on the level to which safe systems of work have already developed for a focus area, the initial three-phase period will involve WorkSafe engaging with dutyholders to:

- raise awareness;
- build up knowledge; and
- consolidate knowledge and understanding.

Details of new focus areas are published on WorkSafe's website.

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## ROLE OF WORKSAFE INSPECTORS

The role of WorkSafe inspectors includes:

- inspecting workplaces;
- providing advice and information;
- using enforcement measures such as improvement and prohibition notices to compel dutyholders to rectify breaches of OHS laws; and
- where appropriate, initiating punitive measures (i.e. infringement notice, comprehensive investigation).

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

- requirements in relation to qualifications and training;
- regular audits of inspector reports, notices or directions issued in relation to workplace or other site interventions. This includes the auditing of matters that have not been referred for comprehensive investigation; and
- upon application by eligible persons, an internal review by the Victorian WorkCover Authority of certain decisions made by inspectors and, subsequently, external review of the Authority's decision by the Victorian Civil and Administrative Tribunal.

## WORKPLACE INSPECTIONS

The circumstances in which a WorkSafe inspection will occur include:

- in response to a notifiable incident (e.g. where a death, serious injury, or exposure of a person to an immediate risk occurs);
- during WorkSafe programs of inspection;
- in response to a request made under the Act (pursuant to ss 63, 75, 89, 45); and
- in certain circumstances, in response to other requests from members of the public or a person in a workplace.

## SUPPORT AND GUIDANCE

WorkSafe 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 by inspectors does not provide dutyholders with any additional rights or defence under the Act in relation to an alleged breach. However, 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.

## DETERRENCE MEASURES

When a WorkSafe inspector detects a breach of an OHS Act or regulation the inspector will take action to ensure that the breach is remedied by the dutyholder. Where a breach of OHS laws is detected, or where there is an immediate risk, a WorkSafe inspector will issue a notice or direction to compel the dutyholder to control the risk, unless the matter is addressed at the time of its detection and in the presence of the inspector.

The **enforcement criteria** applied by an inspector in determining the most appropriate enforcement action to take includes:

- the nature and circumstances of the alleged breach;
- the characteristics of the dutyholder;
- deterrence (general and specific); and
- WorkSafe's strategic enforcement priorities (i.e. target areas).

Inspectors will make their decision after undertaking enquiries, as appropriate, with the dutyholder, health and safety representatives, and other relevant parties.

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After consideration of the enforcement criteria, the following measures are available to an inspector to compel a dutyholder to rectify the alleged breach:

- no further action in response to immediate **voluntary compliance**;
- **improvement notices** requiring the breach to be remedied by a certain date. An improvement notice is only available where there is no immediate risk;
- **prohibition notices** where there is an immediate risk and activity must cease until the risk is remedied;
- **power to give directions**, either orally or in writing, where an immediate risk exists;
- **review of a PIN** (i.e. provisional improvement notice) issued by a health and safety representative, to affirm, modify, or cancel the PIN; and
- **review of a decision to cease work**, which may include the issuing of a prohibition notice.

A non-disturbance notice may be issued where appropriate (e.g. to prevent disturbance to an incident scene).

WorkSafe has the power to revoke, suspend or cancel a regulatory permission (e.g. a license or permit) as a protective measure to ensure the safety of employees and/or the public.

## WHEN IS FURTHER ACTION REQUIRED?

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:

- the issuing of an **infringement notice** by WorkSafe as an alternative to prosecution, as prescribed in the relevant Act and/or regulation (only available for non-indictable offences); or
- a **comprehensive investigation** to determine whether a breach of OHS laws has occurred that may warrant prosecution or other punitive action. A further purpose of a comprehensive investigation is to gather data that can be used to assist in preventing future OHS breaches.

An inspector may recommend a matter for comprehensive investigation where a work-related fatality has occurred or where the inspector is of the opinion that it is otherwise warranted, taking into account the Criteria for Commencing a Comprehensive Investigation set out in the *VWA General Prosecution Guidelines*.

## INVESTIGATIONS

In each instance, the decision whether to conduct a comprehensive investigation will take into account the need to balance the necessity to maintain public confidence in the administration of the law with other relevant considerations, in particular, whether the investigation would place a disproportionate burden on WorkSafe's enforcement capabilities. Priority areas for investigation include:

- work-related fatalities;
- notifiable incidents (i.e. serious injury or immediate risk to health and safety) where there is a high degree of culpability such as reckless conduct, recalcitrance, relevant repeat offences or prior findings of guilt, sustained duration of breach, or significant departure from widely known/accepted safe systems of work;
- a breach in a focus area of prevention (e.g. high-hazard or high-risk industry or occupation);
- non-compliance with a notice or direction;
- an offence against a WorkSafe inspector;
- an offence against a health and safety representative (or committee);
- an offence by, or against, an Authorised Representative of a Registered Employee Organisation;
- discrimination, or threats of discrimination, against a (potential) employee on the basis of their OHS activities;
- coercion relating to the establishment of, or negotiations concerning, designated work groups;
- failure to notify WorkSafe of a notifiable incident or failure to preserve an incident site;
- certain dangerous goods offences;
- certain equipment (public safety) offences;
- failure to pay an infringement notice (or prosecution where a notice is withdrawn); and
- requests to prosecute received under s 131.

Where a comprehensive investigation reveals evidence of a breach, WorkSafe will consider whether a prosecution (or alternative punitive action) should commence.

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## PROSECUTIONS

In determining the most appropriate prosecution-related action to take following a comprehensive investigation WorkSafe 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 Victorian WorkCover Authority's public interest criteria.

The initial consideration is whether there is a reasonable prospect of a conviction being secured, taking into account whether there is admissible, substantial, and reliable evidence that a criminal offence has been committed by the alleged offender. A prosecution will not proceed if there is no reasonable prospect of a conviction being secured.

Where WorkSafe determines that sufficient evidence exists to support a prosecution (or alternative punitive action) against the alleged offender, consideration is then given to the public interest criteria to determine whether, in fact, it is appropriate for WorkSafe to undertake such action.

The public interest criteria relate to considerations such as: the nature and circumstances of the offence; the characteristics of the dutyholder; the level of public concern in relation to the alleged offence; the impact of the alleged offence; the need for special and general deterrence; the likely effect of prosecution and alternatives to prosecution; and administrative considerations such as the necessity to maintain public confidence in the administration of the law.

The possible outcomes of applying the prosecution criteria of sufficient evidence and public interest following a comprehensive investigation are:

- the commencement of **prosecution proceedings** (which may result in a finding of guilt, with a range of sentencing options available to the court, depending on the nature of the offence, including monetary fines, imprisonment, adverse publicity orders, orders to undertake improvement projects, health and safety undertakings);
- the acceptance of an **enforceable undertaking** in lieu of prosecution;
- in certain circumstances, for relatively minor offences, the issuing of a **letter of caution** as an alternative to prosecution; or
- **no further action**, where no breach is established, or there is insufficient admissible evidence, or it is not in the public interest to prosecute.

## FURTHER INFORMATION

All prosecution-related activities are conducted by WorkSafe in accordance with the *VWA General Prosecution Guidelines*. Supplementary enforcement and prosecution policies exist which provide details of the implementation of the principles set out in the *VWA General Prosecution Guidelines*.

The *WorkSafe Compliance and Enforcement Policy*, the *VWA General Prosecution Guidelines*, and the supplementary enforcement and prosecution policies are available from [www.workcover.vic.gov.au](http://www.workcover.vic.gov.au).

For further information please contact WorkSafe Victoria on 1800 136 089.

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## WORKSAFE VICTORIA

### Advisory Service

222 Exhibition Street  
Melbourne 3000

Phone . . . . . 03 9641 1444

Toll-free . . . . . 1800 136 089

Email . . . . . [info@workcover.vic.gov.au](mailto:info@workcover.vic.gov.au)

Web . . . . . [www.workcover.vic.gov.au](http://www.workcover.vic.gov.au)

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