

Occupational health and safety compliance and enforcement policy

Edition 2

September 2018

Contents

WorkSafe's role	3
Victoria's OHS laws	3
WorkSafe values and principles of compliance and enforcement	4
WorkSafe's regulatory model	5
Who is subject to inspection and enforcement?	6
Role of inspectors	7
When will an inspection occur?	8
Provision of information and guidance	9
Enforcement criteria	10
Enforcement measures: Remedial	11
Enforcement measures: Permissions	13
When will an investigation occur?	14
Enforcement measures: Punitive	16
Glossary	18

WorkSafe Victoria is a trading name of the Victorian WorkCover Authority.

© WorkSafe Victoria

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

WorkSafe occupational health and safety compliance and enforcement policy

WorkSafe's role

WorkSafe Victoria (WorkSafe) is the regulator of Victoria's occupational health and safety (OHS) laws and administrator of Victoria's workers' compensation scheme. WorkSafe's overall responsibilities include:

- monitoring and enforcing Victoria's OHS laws
- helping to prevent work-related deaths, injuries and disease
- providing adequate and just workplace injury insurance
- assisting injured workers back into the workforce
- managing Victoria's workers' compensation scheme.

Victoria's OHS laws

WorkSafe administers Victoria's OHS laws, which include the following Acts and the corresponding regulations:

- *Occupational Health and Safety Act 2004* (OHS Act)
- *Equipment (Public Safety) Act 1994* (EPS Act)
- *Dangerous Goods Act 1985* (DG Act).

The principal Act under which WorkSafe conducts its OHS activities is the OHS Act. The objectives of the OHS Act 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.

When performing its functions, WorkSafe has regard to these objectives and to the principles of health and safety protection set out in the OHS Act:

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;

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;

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;

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;

Employees are entitled and should be encouraged to be represented in relation to health and safety issues.

The main purpose of the **EPS Act** is to provide for public safety in relation to prescribed equipment and equipment sites. The main purpose of the **DG Act** is to promote the safety of persons and property in relation to the manufacture, storage, transfer, transport, sale, purchase and use of dangerous goods and the import of explosives.

Scope of WorkSafe compliance and enforcement policy

The WorkSafe OHS compliance and enforcement policy (policy) provides an overview of the legislative framework within which WorkSafe operates and sets out how WorkSafe and inspectors will approach their compliance and enforcement activities.

WorkSafe occupational health and safety compliance and enforcement policy

Inspectors hold a range of powers resulting from their appointment under the OHS laws. Inspectors must exercise those powers in accordance with the requirements of the OHS laws. Generally speaking this requires inspectors to form opinions and exercise discretion as to the appropriate manner of exercise of their powers. In exercising their discretion, inspectors should apply the criteria and use the considerations outlined in this policy to determine the appropriate course of action.

The policy applies to Victoria's OHS laws. Whereas the focus of this policy is compliance and enforcement under the terms of the OHS Act, it is also to be read as having general applicability to WorkSafe's compliance and enforcement activities under the EPS Act and DG Act.

A separate compensation compliance and enforcement policy applies to workers' compensation and rehabilitation activities undertaken by WorkSafe.

WorkSafe values and principles of compliance and enforcement

WorkSafe's vision

Victorian workers returning home safe every day.

WorkSafe's mission

Actively working with the community to deliver outstanding workplace safety and return to work, together with insurance protection.

WorkSafe's values

WorkSafe's values underpin and guide its approach to all of its activities. They apply to WorkSafe's compliance and enforcement activities in the following ways:

Values	How WorkSafe's values underpin and guide the approach to compliance and enforcement activities
Constructive in the way we provide information, advice and service.	WorkSafe will provide practical constructive and timely information and guidance about compliance issues to all duty holders and other stakeholders.
Accountable for what we do and what we say; we live up to our promises.	Compliance and enforcement decision making will be made in accordance with WorkSafe's published policies. These decisions will also be justifiable and subject to public scrutiny.
Transparent in the way we work, our environment is open and honest.	All compliance and enforcement decisions will be made following clear processes. Clear reasons will be provided for decisions.
Effective by working collaboratively to deliver high quality services.	WorkSafe's compliance and enforcement activities will seek to eliminate risk to workers, prevent harm and maximise the effect of deterrence activities.
Caring by showing empathy in our dealings with everyone we work with.	In undertaking compliance and enforcement activities, WorkSafe will strive to understand and respect the position of duty holders and other stakeholders.

WorkSafe occupational health and safety compliance and enforcement policy

Principles of OHS compliance and enforcement

WorkSafe also applies the following principles to its OHS compliance and enforcement activities:

Principles	How the principles underpin and guide WorkSafe's approach
Targeted	WorkSafe will target its activities to the areas of most need and effect.
Proportionate	All enforcement action will be proportionate to the nature of the non-compliance.
Consistent	A consistent approach will be taken in similar fact situations/circumstances, to achieve consistent outcomes.
Fair	All compliance and enforcement activities (including decision making) must be fair – ie undertaken with impartiality, balance and integrity. In addition, all prosecution-related activities must be undertaken in accordance with the WorkSafe general prosecution guidelines.
Collaboration and information sharing	WorkSafe will engage and work with OHS stakeholders. WorkSafe will collaborate and lawfully share information with co-regulators and other agencies.

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

WorkSafe's regulatory model

Prevention is the key aim of WorkSafe's compliance and enforcement activities

The key aim of WorkSafe's compliance and enforcement activities is to achieve compliance with Victoria's OHS laws and thereby prevent workplace and work-related deaths, injuries and disease and achieve the highest levels of safety available under the law.

Constructive compliance strategy

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 OHS is primarily achieved by the active involvement of employers and employees in hazard identification, management and elimination of risk.

WorkSafe encourages OHS by:

- communicating and engaging with employers, employees, health and safety representatives, other stakeholders and members of the public
- providing practical and constructive information and guidance to employers, employees, health and safety representatives and other stakeholders about their rights, duties, and responsibilities under Victoria's OHS laws, and how to comply
- encouraging cooperative and consultative relationships between employers, employees, health and safety representatives supporting and involving stakeholders in the provision and promotion of education and training in OHS
- providing financial incentives to encourage OHS performance (eg incentives under the WorkCover premium model).

WorkSafe occupational health and safety compliance and enforcement policy

WorkSafe deters poor OHS performance and addresses non-compliance by:

- undertaking workplace inspections
- enforcing remedial measures (eg improvement notices, prohibition notices)
- requiring duty holders to remedy contraventions
- imposing alternative punitive measures (eg enforceable undertakings, letters of caution)
- undertaking prosecutions in accordance with the general prosecution guidelines, whether or not the contravention has resulted in death, injury or illness
- seeking appropriate sentencing outcomes
- publishing the outcomes of prosecutions and details of enforceable undertakings
- informing duty holders (in the same or similar industries) of the nature and outcome of enforcement actions and providing information on compliance (including how to prevent similar contraventions)
- using enforcement data and information to improve the outcome of inspection and enforcement activity, including prosecution-related activity.

Integrated approach

Often the most appropriate response to a contravention 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 information and guidance.

For example, an inspector issuing an improvement or prohibition notice will provide information and guidance regarding the changes a duty holder can make to comply with the relevant Act or regulation.

Risk-based model

As part of its compliance and enforcement activities, WorkSafe adopts a risk-based planning approach. Risk of non-compliance is identified with reference to both the likelihood of non-compliance and the severity of the potential consequence of the non-compliance.

WorkSafe allocates resources and prioritises its compliance monitoring and inspection efforts towards those risks. WorkSafe responds to risk through both day-to-day inspections and detailed programs and projects.

Operational approaches are developed to establish specific tools and interventions that may be used in particular areas.

Risk-based business planning processes identify strategic enforcement priorities which may give rise to specific activities and, where non-compliance is identified, may give rise to specific enforcement responses.

Enforcement response

In responding to non-compliance, WorkSafe will use remedial measures to achieve compliance, and consider whether it is appropriate to implement punitive measures.

Enforcement action may be taken whether or not a contravention of Victoria's OHS laws has resulted in death, injury or disease. In determining the appropriate response, WorkSafe will have regard to the risk of harm that has arisen as a result of the non-compliance, as well as the characteristics of the duty holder. For further details refer to **Enforcement criteria**.

Who is subject to inspection and enforcement?

OHS duties apply to a variety of duty holders including:

- employers, including contractors with employees and labour hire companies
- employees and other workers
- company 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
- persons who install, erect or commission plant.

WorkSafe occupational health and safety compliance and enforcement policy

All duty holders are subject to inspection by WorkSafe and its inspectors, and where appropriate, the use of enforcement measures.

Role of inspectors

Subject to the WorkSafe's directions, inspectors will:

- conduct inspections for compliance with Victoria's OHS laws
- provide practical, constructive information and guidance to duty holders about how to comply with their duties and obligations (and provide information and guidance to health and safety representatives) and
- enforce Victoria's OHS laws by:
 - compelling duty holders to undertake remedial action to rectify health and safety contraventions
 - recommending comprehensive investigations to determine whether a contravention 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 contraventions).

Inspectors' power of entry

Under the OHS Act, an inspector may enter a place (including a car, truck, ship, boat, airplane or any other vehicle) that the inspector reasonably believes is a workplace at any time during working hours. The inspector may also enter any place 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 and the provision of a written report. These powers of entry do not extend to premises which are only used for residential purposes.

Inspectors' powers of investigation

Inspectors have extensive powers of investigation, including:

- general powers of inspection and seizure
- 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)
 - take samples of substances for analysis
 - apply to a magistrate, in certain circumstances, for a search warrant
 - require a person to provide their name and address
 - give directions to a person at a workplace, where the inspector reasonably believes it is necessary to do so, because of an immediate risk to the health or safety of any person.

Assistance to be provided to inspectors

It is an offence for a duty holder to refuse or fail, without reasonable excuse, to provide reasonable assistance to an inspector in the performance of their duties under the OHS Act or regulations.

Information to be provided by inspectors

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'
- 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'.

Supporting, monitoring and review of inspectors' decisions

There is a range of internal and external systems in place to ensure that inspectors exercise their powers under OHS laws appropriately and in accordance with WorkSafe's policies and guidelines.

WorkSafe occupational health and safety compliance and enforcement policy

Qualifications and training

Inspectors have technical or professional qualifications and/or backgrounds in OHS. They are expected to develop and maintain these competencies to perform their role. This is mainly achieved through a range of competency-based training and assessment programs, which are conducted by, or on behalf of, WorkSafe.

Regular systemic auditing of inspectors' decisions

WorkSafe regularly audits inspector reports, notices and directions to assess whether inspectors are taking appropriate enforcement action. This includes the auditing of matters that have not been referred for comprehensive investigation.

Internal and external review of inspectors' decisions

Certain decisions made by inspectors under the OHS laws are 'reviewable decisions'. Upon application by an 'eligible person', such decisions are subject to internal review by WorkSafe. An eligible person can also seek review of the decision in the Victorian Civil and Administrative Tribunal.

WorkSafe maintains a number of internal review guidance principles. These guidance principles set out decision-making processes used by WorkSafe in relation to applications for internal review of decisions and provide guidance for Internal Review Unit officers when considering and deciding on applications for review and associated matters.

When will an inspection occur?

An inspector will inspect a workplace for compliance with Victoria's OHS laws in the circumstances set out below.

Notifiable incident

An employer or self-employed person has a duty to notify WorkSafe where a 'notifiable incident' occurs at a workplace under their management and control.

An inspector will attend a workplace where a workplace death occurs.

An inspector may also attend a workplace where another form of notifiable incident occurs, depending on the nature and circumstances of the incident, including:

- a serious injury
- the exposure of a person to an immediate risk.

Programs of inspection

Inspections can occur as part of WorkSafe's ongoing programs of inspection. For example, inspections may occur as part of programs that target areas of strategic focus for prevention as determined by WorkSafe from time to time.

Inspector-initiated inspections

Inspectors may initiate inspections in response to observations made or information received by the inspector (eg if an inspector is passing a construction site and observes a workplace activity that may pose an immediate risk).

Attendance in response to requests under the OHS Act

Under the OHS Act, WorkSafe must send an inspector to attend a workplace in response to:

- a request from a person in relation to a provisional improvement notice (PIN), that requires an inspector to review the PIN and either affirm (with or without modification) or cancel the PIN
- a request from a party to an unresolved OHS issue or direction to cease work that requires an inspector to enquire into the issue and perform any function and/or exercise any power under the OHS Act that the inspector considers to be reasonably necessary in all the circumstances, including the issuing of a prohibition notice
- a request from a party to an unresolved issue between an authorised representative of a registered employee organisation (ARREO), who enters a workplace to enquire into a suspected contravention of the OHS Act, and the employer at the premises that an inspector attend to resolve the issue

WorkSafe occupational health and safety compliance and enforcement policy

- a request from a party to unresolved negotiations relating to a designated work group that an inspector attends to resolve the matter.

During these attendances the inspector has the right to make an unrelated inspection of the premises (eg where an inspector observes an immediate risk that is unrelated to the original purpose of the visit).

Attendance in response to other requests

A member of the public or employee in a workplace can request that WorkSafe send an inspector to attend the workplace to enquire into alleged non-compliance with Victoria's OHS laws (eg a reported contravention of the duty to consult under the consultative provisions of the OHS Act).

Where such a request is received, an inspector may attend the workplace, depending on the nature and circumstances of the request.

Where an inspector does attend a workplace in response to a request, the inspector can inspect any part of the premises.

Provision of information and guidance

WorkSafe provides information and guidance to duty holders, both to encourage compliance and as a remedial measure and to assist duty holders to remedy a contravention of Victoria's OHS laws.

WorkSafe provides practical, accessible, and customised guidance on how to comply with standards across a range of topics. Guidance material is developed with stakeholders on topics such as:

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

WorkSafe's information and guidance aims to assist all parties involved in OHS, including: employers, employees and other workers, health and safety representatives, contractors, designers,

manufacturers, and suppliers. This information and guidance aims to promote effective OHS management that emphasises:

- a planned and proactive approach
- commitment and involvement of managers and officers at all levels
- meaningful and effective involvement of employees and other workers
- identification and control of hazards at their source
- the development of a workplace culture that recognises the paramount nature of OHS
- appropriate provision of instruction, training, information and supervision
- systematic management of health and safety issues.

WorkSafe promotes the establishment of designated work groups and health and safety committees, and the development of effective workplace consultation and issue resolution measures – 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.

Information and guidance from inspectors

One of WorkSafe's key functions is to provide information and guidance to duty holders. Inspectors will provide practical and constructive information and guidance to duty holders about how to comply with Victoria's OHS laws, and, where a contravention is detected, how to remedy the contravention. This information and guidance includes referring duty holders to applicable guidelines and compliance codes, and other relevant information to assist with compliance.

Information and guidance given by WorkSafe and inspectors does not provide the duty holder with any additional rights or defences in relation to an alleged contravention. The degree to which the duty holder followed such advice may be taken into account when deciding whether to prosecute.

WorkSafe occupational health and safety compliance and enforcement policy

Enforcement criteria

An inspector who detects a contravention of OHS laws during an inspection will decide:

- what information and guidance should be given to the duty holder
- what compliance and enforcement actions should be taken by WorkSafe to ensure the duty holder complies with the law (remedial actions)
- whether the circumstances indicate that punitive enforcement action is warranted (punitive actions).

Where an inspector detects a contravention of OHS laws, the inspector will take action to ensure that the contravention is remedied by the duty holder.

Before deciding what enforcement action to take, the inspector will make enquiries with the duty holder (or their nominated representative), relevant health and safety representatives, and other relevant parties.

The inspector should also enquire into the duty holder's overarching systems of work and consider whether the identified contravention arose due to a failure of these systems. The inspector should take appropriate compliance and enforcement actions to address any identified deficiencies in the duty holder's systems of work.

WorkSafe and inspectors will take an escalating approach, both in using remedial tools to ensure that compliance is achieved, and in determining to punish non-compliance. In determining the most appropriate action to be taken, WorkSafe and inspectors will have regard to WorkSafe's regulatory model and consider the following factors:

- the nature and circumstances of the alleged contravention
- the characteristics of the duty holder
- other relevant criteria.

The nature and circumstances of the alleged contravention

In determining the appropriate enforcement response, WorkSafe and inspectors will take into account the nature and circumstances of the alleged contravention, including consideration of factors such as:

- the seriousness of the alleged contravention
- the extent of the risk of harm presented by the contravention (as opposed to whether any actual harmful outcome has eventuated)
- the prevalence of the alleged offence
- any other relevant circumstances.

The characteristics of the duty holder

The characteristics of the duty holder will be taken into account in assessing the duty holder's level of culpability for the contravention, in particular:

- whether the duty holder followed any WorkSafe information and guidance in relation to compliance with a duty or obligation
- the duty holder's compliance history (including the duty holder's response to WorkSafe's previous enforcement and prevention activities)
- how long the incident or non-compliance continued
- whether or not the harm is still occurring or has been reduced
- whether the risk was foreseeable
- whether the act or omission was intentional
- reckless conduct
- recalcitrance; failure to control risks despite previous notices, directions, warnings, incidents, advice or information (whether from WorkSafe or any other source – in particular, employees of the duty holder or health and safety representatives)
- recidivism; relevant repeat offences or contraventions by duty holders or prior findings of guilt and/or convictions under OHS laws and/or under any other relevant legislation
- duration of contravention; failure to identify and/or control the risk over a sustained period of time
- systems of work; significant departure from widely known or accepted safe systems of work.

WorkSafe occupational health and safety compliance and enforcement policy

Other criteria

WorkSafe and inspectors may also consider other criteria in deciding the appropriate enforcement response, such as:

- the deterrence impact of enforcement;
 - the impact of enforcement action in regards to deterring the offender as well as other duty holders from committing similar offences will be taken into account.
- WorkSafe's strategic enforcement priorities;
 - WorkSafe from time to time sets areas of strategic enforcement priority (ie target areas). An inspector may also have regard to these strategic enforcement priorities in determining what compliance and enforcement action to take.

Enforcement measures: Remedial

Where non-compliance with OHS laws is detected the inspector will generally issue a notice or direction to compel the duty holder to address the non-compliance, unless the contravention is remedied by the duty holder at the time of its detection and in the presence of the inspector. Where the contravention is remedied in this way, an inspector may decide that enforcement measures are not required.

After considering the enforcement criteria, the following enforcement measures are available to an inspector to rectify an alleged contravention:

- improvement notice
- prohibition notice
- directions
- affirmation of a PIN or a direction to cease work.

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

Contravention remedied at the time of inspection

Where non-compliance with OHS laws is detected, an inspector may decide that no compliance or enforcement action will be taken if:

- the contravention has already been addressed or is addressed by the duty holder at the time of its detection and in the presence of the inspector and
- the observed non-compliance is;
 - not a work activity that is occurring or that involves or will involve an immediate risk to the health and safety of a person or
 - an activity that might occur at a workplace that, if it occurs, will involve an immediate risk to health and safety of a person and
- the inspector forms the view that the contravention is not likely to be continued or repeated.

Before deciding whether or not compliance and enforcement action will be taken, an inspector should have regard to the enforcement criteria outlined in this policy.

Where an inspector decides that no further compliance or enforcement action will be taken, the inspector will make a record of the detected non-compliance.

As examples, it will generally not be appropriate for an inspector to decide not to use enforcement measures in the following circumstances:

- Where an inspector has identified and addressed the same contravention with the same duty holder on a previous occasion, and identifies a recurrence of the contravention. In these circumstances an inspector should generally consider issuing an improvement or prohibition notice (as appropriate) to ensure that the non-compliance is rectified, and consider whether further enforcement action is necessary in accordance with the enforcement criteria.
- Where the duty holder's attitude to the contravention indicates that there may be future contraventions unless a notice or direction is issued.

Inspectors will make a record of the remedied contravention in the entry report and will provide advice to a duty holder that if the same contravention is identified, it could lead to stronger enforcement action.

WorkSafe occupational health and safety compliance and enforcement policy

Notices and directions

Inspectors have the power to issue a variety of notices and directions to address health or safety issues in the workplace. Commonly inspectors will make a decision between issuing an improvement notice or a prohibition notice. A prohibition notice will generally be appropriate if an inspector forms a reasonable belief that there is an immediate risk to health or safety. In contrast an improvement notice will generally be appropriate where an inspector considers that an activity does not involve an immediate risk but requires some remedial steps to achieve compliance with OHS law. Both notices carry the same penalty for non-compliance.

Improvement notice

An improvement notice is intended to direct a duty holder regarding ways to remedy the alleged contravention. Generally, an improvement notice will be issued where non-compliance, which does not involve an immediate risk to health and safety, is detected.

An inspector should generally issue an improvement notice if the inspector reasonably believes that a person is contravening the OHS Act or regulations or has previously contravened and the contravention is likely to be repeated.

An improvement notice:

- will specify the date by which the contravention must be remedied and will include directions on remedial measures to be taken
- can include a direction/condition that refers to a compliance code and can detail alternative methods to remedy the contravention
- may specify directions or conditions regarding how the activity should be carried on in the interim (eg staged compliance) to minimise risks to OHS
- may also state that if the contravention is not remedied by a specified date, the activity must cease altogether.

If the duty holder does not comply with the improvement notice by the specified date, a comprehensive investigation can be commenced that

may lead to prosecution for failure to comply and/or the alleged contravention for which the improvement notice was originally issued.

WorkSafe also has the power to apply to the Supreme Court for an order compelling a person to comply with an improvement notice.

A decision by an inspector to issue an improvement notice is subject to review.

Examples of when an inspector might issue an improvement notice include: observed incomplete scaffold where no work has commenced or observed insufficient policies to address bullying in the workplace.

Prohibition notice

The purpose of a prohibition notice is to ensure that any activity which presents an immediate risk to OHS ceases at once and does not resume until the duty holder has remedied the risk.

An inspector should generally issue a prohibition notice if the inspector reasonably believes that there is an immediate risk to the health or safety of a person arising from an activity that is occurring or may occur in the workplace.

A prohibition notice requires that the activity cease (or cease occurring in the specified way) until the risk has been remedied. It may include directions regarding actions to take in order to remedy the risk. An inspector can include in the notice a direction or condition that refers to a compliance code and offers options to remedy the risk.

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 any alleged contravention of OHS laws that resulted in the immediate risk.

WorkSafe also has the power to apply to the Supreme Court for an order compelling a person to comply with a prohibition notice.

A decision by an inspector to issue a prohibition notice is subject to review.

WorkSafe occupational health and safety compliance and enforcement policy

Example of when an inspector may issue a prohibition notice include the conduct of unsafe work at height, or the use of an unguarded power press.

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 because of an immediate risk to the health or safety of any person. It is an offence to refuse or fail to comply with these directions without having a reasonable excuse. If a direction is not complied with, a comprehensive investigation will usually commence with a view to prosecution for failure to comply with the direction.

As stated above, WorkSafe also has the power to apply to the Supreme Court for an order compelling a person to comply with a prohibition notice.

Affirm, modify or cancel a provisional improvement notice (PIN)

A person issued with a PIN by a workplace health and safety representative, or the employer of the person issued with the notice, can request that an inspector 'enquire into the circumstances which are the subject of the PIN'. A health and safety representative who issues a PIN may also request that an inspector enquire into issues relating to the PIN.

After making appropriate enquiries, the inspector will either affirm (with or without modification) or cancel the PIN. Prior to determining the appropriate action, an inspector should endeavour to discuss a PIN with the health and safety representative who issued it.

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

Non-disturbance notice

An inspector may issue a non-disturbance notice to an occupier of a workplace. This notice requires the occupier to stop the use or movement of, and prevent interference with, specified plant, substances or other things.

The purpose of a non-disturbance notice is to assist the inspector to perform their duties. The inspector will generally issue a non-disturbance notice when the inspector believes that issuing the notice is necessary to facilitate the performance of their functions or the exercise of their powers.

For example, a non-disturbance notice might be issued where a serious injury has occurred. An inspector may decide 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 contravention that may warrant prosecution has occurred.

WorkSafe has the power to apply to the Supreme Court for an order compelling a person to comply with the non-disturbance notice.

Enforcement measures: Permissions

Licences, permits, certificates and other regulatory permissions

WorkSafe issues licences, registrations, notifications and other regulatory permissions. WorkSafe also has the power to initiate the revocation, suspension or cancellation of any regulatory permission issued to a duty holder. These actions may be taken as protective measures to ensure the safety of employees and/or the public. They may be undertaken even where a remedial measure (eg a prohibition notice) has been complied with by the duty holder. This action may also be taken by WorkSafe as a punitive measure.

In determining whether or not to take action in respect of a regulatory permission, WorkSafe will consider any relevant compliance history.

The revocation, suspension or cancellation of a regulatory permission may have serious consequences for the relevant duty holder and may also have serious, adverse flow on effects (eg for employees, dependent businesses).

This potential must be balanced against the paramount need to protect the health and safety of employees and/or the public.

WorkSafe occupational health and safety compliance and enforcement policy

In certain circumstances, non-compliance may also be reported to other regulatory agencies or statutory registration boards for consideration under their legislation, where the sharing of this information is lawful.

When will an investigation occur?

Referrals for investigations

Prior to determining whether to prosecute against an alleged offender, WorkSafe will undertake a comprehensive investigation to determine whether a contravention of Victoria's OHS laws has occurred that may warrant prosecution or an alternative punitive action.

WorkSafe considers whether to conduct a comprehensive investigation following receipt of information through a range of avenues. Those avenues include:

- investigations referred from the inspectorate, usually arising from planned inspection programs and project activity - some referrals also arise from incident response and inspector responses to service requests (see **inspector referrals** below)
- fatalities, serious injuries and incidents reported via WorkSafe's emergency response service
- applications made under section 131 of the OHS Act (see **request under s131 OHS Act** below)
- referrals and requests from external agencies including the Environment Protection Authority, fire-fighting agencies, the Victoria Police and the Australia Federal Police, and notifications from the State Coroner.

Inspector referrals

An inspector may recommend to WorkSafe that a comprehensive investigation be undertaken to determine whether a contravention of the legislation has occurred that may warrant prosecution (or alternative punitive action).

An inspector will generally do this where the inspector is of the opinion that it is appropriate to do so, taking into account the following:

- a referral should generally be made when other avenues for achieving compliance have failed or are insufficient to ensure compliance
- in some cases merely achieving compliance is an insufficient response and punitive measures may be appropriate, by reference to WorkSafe's enforcement criteria and WorkSafe's criteria for comprehensive investigation.

Criteria for comprehensive investigation

When considering whether to commence a comprehensive investigation, WorkSafe must have regard to this policy, general prosecution guidelines and strategic enforcement priorities (as published from time to time).

WorkSafe will prioritise comprehensive investigations to ensure the most effective use of its resources. In accordance with the enforcement criteria outlined in this policy, WorkSafe will generally consider the following factors to determine whether to undertake a comprehensive investigation:

- the strategic value of taking punitive action
- the risk of harm associated with the non-compliance
- the culpability of the offender (refer to 'characteristics of the duty holder' below).

Specific examples of areas where comprehensive investigations may occur

Work-related fatalities resulting from a contravention of the OHS Act will always be referred for potential comprehensive investigation.

Comprehensive investigations will also usually occur in relation to the following:

- a) **Other 'notifiable incidents'** under the OHS Act or EPS Act (ie serious injury or an immediate risk to health or safety) where there is a high degree of culpability such as:
 - reckless conduct
 - recalcitrance; failure to control risks despite previous notices, directions, warnings, incidents, advice or information (whether from WorkSafe or any other source – in particular, employees of the duty holder or health and safety representatives)

WorkSafe occupational health and safety compliance and enforcement policy

- recidivism; relevant repeat offences or contraventions by duty holders or prior findings of guilt and/or convictions under OHS laws and/or under any other relevant legislation
 - duration of contravention; failure to identify and/or control the risk over a sustained period of time
 - systems of work; significant departure from widely-known or accepted safe systems of work.
- b) **Focus areas for prevention** and strategic enforcement priorities, as determined by WorkSafe in its multi-year strategies and other business plans, and in particular where those strategies and plans indicate that WorkSafe proposes to manage risks in these areas through enhanced enforcement actions.
- c) **Non-compliance with a notice or direction** issued by an inspector (eg an improvement or prohibition notice) or a health and safety representative (eg a PIN). The comprehensive investigation may also examine the original contravention to which the notice or direction related. In particular, comprehensive investigation should be considered where the risk that was the subject of the notice or direction:
- still exists at the workplace
 - was 'passed on' without adequate warning (for example, sold or otherwise supplied for potential use at another worksite without adequate warning - see sections 23, 24 and 30)
 - was remedied substantially after the date specified in the notice/direction.
- d) **Offence against an inspector** such as:
- 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.
- e) **Offence against a health and safety representative** (or committee) such as:
- refusal by an employer to allow OHS training as specified in a WorkSafe determination
 - refusal to meet the obligations to health and safety representatives (eg access to information, interviews, time and facilities) as specified in the OHS Act
 - refusal to establish a health and safety committee.
- f) **Offence against or by an authorised representative of registered employee organisations (ARREO)** under the OHS Act such as:
- hindering, obstructing, intimidating an ARREO (or similar)
 - impersonating an ARREO.
- g) **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.
- h) **Coercion** relating to the establishment of, or negotiations concerning, designated work groups.
- i) **Incident notification and site preservation** offences such as:
- failure to notify WorkSafe of a 'notifiable incident'
 - failure to preserve an incident site.
- j) **Offences under the DG Act** such as:
- offences that result in substantial damage to property
 - contraventions involving high consequence dangerous goods
 - contraventions of Governor-in-Council orders under s55 of the DG Act that impose an absolute prohibition in relation to dangerous goods.
- k) **Offences under the EPS Act** such as:
- contraventions of Governor-in-Council orders under s37 of the EPS Act that impose an absolute prohibition in relation to prescribed equipment.

WorkSafe occupational health and safety compliance and enforcement policy

Requests under section 131 OHS Act

Any person may request that WorkSafe commence a prosecution if they consider that an offence under the OHS Act has occurred and WorkSafe has not commenced a prosecution within six months of the alleged offence. Within three months of receiving a valid request, WorkSafe will investigate the matter (if an investigation has not already been conducted).

For more information, refer to *Information about – Enforcement Group: Requests for prosecution under section 131 of the Occupational Health and Safety Act 2004*.

Enforcement measures: Punitive

Sometimes, after applying the enforcement criteria, WorkSafe may decide that – even if remedial action has occurred (eg a notice or direction has been issued) and permissions have been reviewed or are under review – punitive measures may be warranted.

Prosecution and alternative outcomes of comprehensive investigation

After WorkSafe conducts a comprehensive investigation and considers the general prosecution guidelines, WorkSafe may:

- initiate prosecution proceedings
- take no further action
- issue a letter of warning
- issue a letter of caution
- accept an offer to enter an enforceable undertaking
- accept an offer to undertake the criminal justice diversion program.

Prosecution proceedings

Where there is sufficient admissible evidence of a contravention of OHS laws and prosecution would be in the public interest, WorkSafe may commence proceedings and conduct a prosecution in accordance with the general prosecution guidelines.

If 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, for example: monetary fines, imprisonment, adverse publicity orders, orders to undertake improvement projects or health and safety undertakings.

All OHS prosecution-related activities are conducted in accordance with the general prosecution guidelines. WorkSafe also observe the model litigant guidelines, the Victorian Charter of Human Rights and the victims charter pursuant to the *Victims Charter Act 2006*.

The general prosecution guidelines and all supplementary enforcement and prosecution policies are available on request from WorkSafe, as well as being published on the WorkSafe website worksafe.vic.gov.au.

No further action

In spite of the circumstances warranting a comprehensive investigation there are times when a decision may be made not to prosecute or undertake other enforcement action.

There are limited situations where this can occur. For example:

- The detection of a contravention can fall outside the statutory timeframes for commencing a prosecution. In such cases, unless the Director of Public Prosecutions extends the time for commencement of a legal proceeding, WorkSafe is prohibited from laying charges.
- There are instances where the case unfolds and it becomes evident that to pursue the contravention would not be in the public interest or otherwise fails to meet the criteria for commencing legal proceedings contained in the general prosecution guidelines.

In these and similar circumstances it may be appropriate to take no further action. When this occurs, WorkSafe will write to the duty holder and inform them of its decision.

WorkSafe occupational health and safety compliance and enforcement policy

Letters of warning

Letters of warning are used to inform a duty holder that their act or omission is considered to amount to a contravention of an OHS law. Letters of warning are informal in nature and are used to remind the duty holder of their legal obligations.

A letter of warning is used where it is apparent that a contravention may have occurred but an investigation to establish the contravention is not considered necessary or appropriate in the circumstances.

For further information, refer to *Health and safety policy on letters of warning*.

Letters of caution

Letters of caution are used where WorkSafe has investigated an incident and established that a contravention of OHS law has occurred. A letter of caution may be issued as an alternative to prosecution.

WorkSafe may issue a letter of caution where the contravention may be viewed as relatively minor taking into account the enforcement criteria outlined in this policy.

To issue a letter of caution, WorkSafe must be satisfied that:

- a contravention of OHS law has occurred
- having regard to all the available evidence, there is a reasonable prospect of obtaining a conviction
- it is not in the public interest to commence a prosecution against the duty holder, having regard to the considerations set out in WorkSafe's general prosecution guidelines.

For further information, refer to *Enforcement group policy on letters of caution*.

Enforceable undertaking

Subsequent to its investigation, WorkSafe may accept an enforceable undertaking as an alternative to continuing with prosecuting the offence. As part of the enforceable undertaking, the duty holder will be required to remedy the alleged contravention in the manner specified, and take any other actions agreed to.

An enforceable undertaking is a written undertaking which contains commitments to do certain things within a particular timeframe. A person may offer an enforceable undertaking prior to any charges being laid.

WorkSafe will consider and evaluate offers of enforceable undertakings in accordance with the *Enforcement group policy on enforceable undertakings pursuant to section 16 of the OHS Act*.

Criminal justice diversion program (diversion program)

The intention of the diversion program is to enable those acknowledging responsibility for their offending at an early stage (usually first time and low-risk offenders) to avoid the formal court process and comply with conditions that benefit the offender, victim and community as a whole. The diversion program is governed by section 59 of the *Criminal Procedure Act 2009*.

Both WorkSafe and the court must support an accused's proposal for diversion. If WorkSafe supports the proposal, charges are adjourned and, upon successful completion of the diversion program, dismissed.

Relevant factors WorkSafe will take into account in assessing whether diversion is appropriate are outlined in the *Enforcement group policy on the criminal justice diversion program*.

WorkSafe occupational health and safety compliance and enforcement policy

Glossary

The explanation of terms applies to terms used in the general prosecution guidelines and the OHS 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.

Contravention	A contravention of (ie non-compliance with) Victoria's OHS laws.
Compliance	The continuous process of fulfilling obligations and duties imposed by legislation (eg by Victoria's OHS laws).
Comprehensive investigation	A detailed investigation carried out to determine whether a contravention 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 contraventions.
Constructive compliance	The strategy applied by WorkSafe to all its enforcement and prosecution activities – a balance of positive motivators and deterrents to improve OHS.
Duty holder	A person upon whom a duty is imposed by Victoria's OHS laws, eg 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 (eg enforceable undertaking).
Inspector	A person holding the powers of an inspector under OHS law.
Non-compliance	Contravention of Victoria's OHS laws.
Prosecution-related activities	WorkSafe's decision-making processes and other activities when: 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 contravention of Victoria's OHS laws; and when undertaking the conduct in such matters.
Remedial measure	A measure taken by WorkSafe to enforce compliance with Victoria's OHS laws (eg the issuing of an improvement notice or prohibition notice).
Serious injury	As described by section 37 of the OHS Act.
Stakeholders	Employers, employees, other interested parties and members of the public.
Supplementary enforcement and prosecution policy	Policies that support the practical implementation of the general prosecution guidelines.
General prosecution guidelines	The guidelines which apply to all prosecutions and which are gazetted in accordance with legislative requirements.



WorkSafe Agents

Agent contact details are all available at worksafe.vic.gov.au/agents

Advisory service

Toll-free 1800 136 089
Email info@worksafe.vic.gov.au
Website worksafe.vic.gov.au

For information about WorkSafe in your own language, call our interpreter service

Mandarin	1300 559 141
African	1300 650 535
Greek	1300 661 494
Italiano	1300 660 210
Japanese	1300 662 373
Russian	1300 722 595
Spanish	1300 724 101
Turkish	1300 725 445
Vietnamese	1300 781 868
Arabic	1300 554 987
English	1300 782 442
Other	1300 782 343