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
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
- 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.
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
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

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.

Further information
Visit: worksafe.vic.gov.au
Contact WorkSafe Advisory Service on
1800 136 089 or info@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.

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