



Supplementary Enforcement and Prosecution Policy

Subject: Liability of organisations, officers, employees, and other dutyholders

1.0 SCOPE

Liability of organisations, officers, employees, and other dutyholders details the Authority's approach to **prosecuting various types of dutyholders** (e.g. corporations, partnerships, unincorporated associations and other bodies, officers, employees, etc.).

It is a Supplementary Enforcement and Prosecution Policy and should be read in the context of, and subject to, the *VWA General Prosecution Guidelines*.

2.0 BACKGROUND

2.1 Status

Liability of organisations, officers, employees, and other dutyholders is one of a range of Supplementary Enforcement and Prosecution Policies which the Authority develops, from time-to-time, to provide **details of the implementation of the principles** set out in the *VWA General Prosecution Guidelines*. As with all Supplementary Enforcement and Prosecution Policies, it:

- **is consistent with, and supports**, the implementation of the *Guidelines*;
- **in no way replaces or adds to** any of the principles set out in the *Guidelines*;
- should be read **in the context of, and subject to**, the *Guidelines*; and
- will be kept **under regular review** in relation to its effectiveness and relevance and may be modified by the Authority at any time.

2.2 VWA General Prosecution Guidelines

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

All occupational health and safety ("OHS") prosecution-related activities are conducted by the Authority's OHS arm, WorkSafe, in accordance with these *Guidelines*.

Where a comprehensive investigation reveals evidence of a breach of Victoria's OHS laws, WorkSafe will apply the **prosecution criteria** of 'sufficient evidence' and 'public interest' to determine what punitive action, if any, should occur (i.e. prosecution proceedings, enforceable undertaking, letter of caution, or no further action).

3.0 POLICY

3.1 Dutyholders

Part 9 of the *VWA General Prosecution Guidelines* sets out who may be subject to prosecution (or alternative punitive action) for a breach of Victoria's OHS laws as follows:—

"All dutyholders have an on-going role to play in ensuring a safe and healthy work 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."

3.2 Liability of Dutyholders

Offences under Victoria's OHS laws relate to breaches of the legal obligations owed by the different types of dutyholders (see above list). Dutyholders can be **individuals or organisations** such as corporations, partnerships, unincorporated bodies or associations.

WorkSafe recognises that under Victoria's OHS laws a number of dutyholders can have **co-existing duties** at a workplace. When determining liability, WorkSafe will consider whether each dutyholder has discharged their legal duties in relation to **actions, omissions, and/or decisions** that affect their own health safety and welfare and that of other persons in the workplace and the public.

All dutyholders who breach Victoria's OHS laws may be subject to the range of enforcement measures available under the relevant Act or regulation (e.g. improvement notices, prohibition notices) and/or to prosecution-related action.

When deciding which dutyholder(s) are responsible for a breach and whether or not to prosecute, WorkSafe will apply the *VWA General Prosecution Guidelines* to the **role, involvement, and circumstances of each dutyholder**.

The *Guidelines* make clear that not all offences should be prosecuted. As a consequence, WorkSafe may decide to prosecute some dutyholders but not others.

3.3 Employers

The general duties in Victoria's OHS laws require dutyholders to ensure safety and the absence of risks to various degrees. This amounts to **an obligation to control risks** to the extent required by the relevant legislation.

e.g. the *Occupational Health and Safety Act 2004* ("the Act") requires that employers, '**as far as reasonably practicable**', provide and maintain a **working environment** that is safe and without risks to health (s 21).

The duty of employers under s 21 of the Act to provide and maintain a safe and healthy working environment includes, but is not limited to, the duty, **as far as is reasonably practicable**, to provide and maintain:

- **safe systems of work;**
- safe plant;
- safe use, handling, storage, and transport of plant and substances;
- safe workplaces;
- adequate welfare facilities, and
- appropriate information, instruction, training and supervision for employees.

The law requires that the working environment (e.g. systems of work), so far as is reasonably practicable, take account of human factors in eliminating or reducing risk.

In a working environment, the employer will generally have the **greater control of risk** than will an employee. An employer can **control and manage risk**, and is much more likely to be **able to effect change** in the workplace than is an individual employee.

For these reasons, where both an employer and an employee are involved in the same workplace incident, **the employer is more likely to be prosecuted** for an offence.

3.4 Employees

WorkSafe will apply the prosecution criteria in the *VWA General Prosecution Guidelines* to determine whether an employee has breached Victoria's OHS laws and, if so, whether he/she will be subject to prosecution or other enforcement action.

When determining whether an employee has **failed to take reasonable care** of their own safety or that of other persons affected by the employee's acts, omissions, and/or decisions, particular regard will be had to:

- the systems of work in place at the workplace;
- the training, information, instruction, and supervision provided to the employee;
- whether the employee was acting within their stated role;
- whether any other employee was placed at risk; and
- whether the employee intentionally or recklessly interfered with or misused anything provided in the workplace in the interests of health, safety, or welfare.

Complementary Duty

An employee has a duty to act in good faith. However, an employee's duty of reasonable care does not stand alone. It is complementary to the employer's duty of reasonable care, including the duty to provide the employee with the **appropriate training, information, instruction, and supervision** required to properly fulfil the employee's duty (see 3.3).

Usual Components of 'Duty to Take Reasonable Care'

An employee's duty to take reasonable care would usually include, for example, the duty to:

- **participate in OHS training** provided by or through the employer;
- **follow the employer's health and safety instructions**;
- use the **personal protective clothing and equipment** provided by the employer (this duty is dependent upon the employer providing proper instruction in its care, use, and storage);
- take good **care of equipment** (in particular, the employee must not deliberately misuse or damage the equipment);
- **report hazards** of which the employee becomes aware;
- **report work-related injuries or harm to health** of which the employee becomes aware; and
- **co-operate** with employers so that the employer is able to carry out their designated duties.

Levels of Responsibility

Different levels of employee responsibility may exist at different levels of an organisation, for example:

a supervisor who has received the appropriate level of training and instruction should follow the agreed procedure for fixing a hazard that is reported to him/her or referring the matter to the nominated person in the agreed chain of reporting.

Enforcement Action

An employee who fails in their duty to take reasonable care may be subject to the enforcement tools that WorkSafe can apply to all dutyholders (e.g. improvement notices, prohibition notices) and/or to prosecution-related action.

3.5 Organisations and Officers

3.5.1 Corporations

When applying the prosecution criteria to determine whether a body corporate (i.e. a corporation or the Crown) will be prosecuted for a breach of Victoria's OHS laws, regard will be had to whether the organisation had in place **a healthy and safe working environment, in particular, safe systems of work**.

If the corporation failed to provide a healthy and safe work environment with safe systems of work (e.g. a system of work was deficient in safety or non-existent) it may be prosecuted.

A corporation is responsible for the acts and omissions of all its employees, agents and officers who acted within the actual or apparent scope or authority of their employment — s 143 of the *Occupational Health and Safety Act 2004* (“the Act”).

Where a corporation fails to provide a healthy and safe working environment with safe systems of work WorkSafe **will also consider whether individual officer(s)** of the corporation **were responsible** for ensuring that these were in place.

If a corporation officer was responsible for ensuring that a healthy and safe working environment with safe systems of work was in existence and **failed to take reasonable care** in doing so, the officer **may also be prosecuted** for the offence (ss 143-144). See 3.6 for details.

3.5.2 Partnerships, Unincorporated Bodies and Associations

Similarly, if a partnership or an unincorporated body or association **fails to take reasonable care** to ensure that a healthy and safe working environment with safe systems of work is in place, the individual officer(s) of the organisation will be liable for the breach and may be prosecuted accordingly (s 145). See 3.6 for details.

3.6 Definition of ‘Officer’

Section 5 of the *Occupational Health and Safety Act 2004* states that “Officer” of a body corporate, unincorporated body or association or partnership has the meaning (other than in Part 8) given by section 9 of the *Corporations Act*¹.

This means that only persons who have the **capacity to make decisions** — or to **participate** in making decisions — that have a **real or direct influence** on an organisation’s policy and planning or financial standing will be considered ‘officers’. A person who only has responsibility for **implementing** those decisions is **not** an officer.

Under this definition, ‘officer’ includes all:

- directors of a corporation;
- members of boards of management of public authorities;
- partners in a partnership; and
- office holders of unincorporated bodies and associations.
- Chief Executive Officers are also officers.

The following classes of people are also considered officers for the purposes of the Act:

- those who operate divisions of a corporation who, with the CEO, are part of the executive management committee that makes decisions that directly influence the organisation’s policy and planning or financial standing;
- those who operate a division of a corporation that represents a substantial part of the corporation and who have the authority to make decisions about policy and planning or financial standing of that division;

¹ “Officer” within the meaning of section 9 of the Corporations Act means:

- (a) a director or secretary of the corporation; or
- (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation’s financial standing; or (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

“Officer of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person who:
 - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
 - (ii) has the capacity to affect significantly the entity’s financial standing.”

- those who significantly affect the corporation's financial or business standing but are not directly appointed (e.g. members of a holding corporation who help shape the operation of a subsidiary); and
- Shadow directors or defacto directors (in some circumstances, a person may be a "shadow director" who effectively acts as an officer, even though they are not a named office holder. A corporation cannot be appointed a director but may come within the scope of the provision as a shadow director).²

3.6.1 Persons Not Included as Officers

Only persons who can affect a **substantial part** of a business or **significantly affect** its financial standing will be considered to be 'officers'.

This means that only persons at the **most senior levels** of organisations that are **genuinely in a position to prevent breaches of Victoria's OHS laws** will be liable for prosecution as an 'officer'.³

The following classes of people are **not** considered 'officers' for the purposes of the Act:

- those who manage branch offices but do not make, or participate in making, decisions that directly influence the organisation's policy and planning or financial standing (i.e. persons who only implement the decisions of others are not 'officers');
- school principals, in either their role as managers of schools or as the executive officers of school councils;
- middle level managers who report to, and implement decisions of, officers (e.g. area managers of retailers);
- forepersons or managers in small businesses who implement decisions made by directors of the organisation.

Volunteer Officers

If an officer is acting on a voluntary basis (irrespective of whether he/she receives out-of-pocket expenses) then he/she is not liable to be prosecuted under these provisions.

i.e. volunteer officers are not liable to be prosecuted.

3.7 Officer Liability

Sections 144 and 145 of the Act set out the liability of officers of corporations, the Crown, partnerships and unincorporated bodies and associations. The basis of an offence by an officer is **failure to take reasonable care** to prevent the organisation from breaching the Act or regulations.

i.e. an 'officer' who is responsible for ensuring that a **healthy and safe working environment with safe systems of work** is in existence and fails to take reasonable care to do so may be prosecuted.

The officer will be liable to a fine not exceeding the maximum fine that a natural person would receive for the breach committed by the corporation.

3.7.1 Relevant Factors

In making a decision whether to take **punitive action** against an officer (i.e. whether to **prosecute**, accept an enforceable undertaking, issue a letter of caution, or take no further action), WorkSafe will apply the prosecution criteria of 'sufficient evidence' and 'public interest' set out in the *VWA General Prosecution Guidelines*.

As part of this process, WorkSafe will consider the same factors that a court will consider under ss 144 and 145 of the *Occupational Health and Safety Act 2004*.

i.e. in determining whether an officer **failed to take reasonable care** it will take into consideration:

- the officer's degree of knowledge;
- the officer's capacity for decision making;
- the actions or inactions of others; and
- other relevant matters.

² Note that 'officers' may also have duties under Part 3 of the *Occupational Health and Safety Act 2004* as employees or persons.

³ As stated by Minister Hulls to the Legislative Assembly in his second reading speech of the Occupational Health and Safety Act 2004.

In particular, WorkSafe will consider the following factors in determining the officer's **level of culpability**:

- Did the measures which might reasonably have been taken to avoid the incident fall properly and reasonably within the duties, responsibilities, and scope of the officer's functions, for example:
 - making arrangements for facilitating ongoing training and supervision; and
 - creating, monitoring, and maintaining systems for identifying, assessing, and controlling hazards and risks to health and safety?
- Did the officer fail to take obvious steps to prevent the incident?
- What was the degree of culpability involved in the officer's behaviour?
- Has the officer had previous advice or warnings regarding matters leading to the incident, or should the officer have reasonably known about the advice or warnings?
- Did the officer knowingly compromise safety for personal gain, or for commercial gain of the organisation, without undue pressure from the organisation to do so?
- Was the contravention attributable to another person, and if so, to what extent?
- What could reasonably be expected of the officer, bearing in mind all the relevant circumstances including:
 - the officer's role and knowledge; and
 - the nature and context of the relevant activity being conducted by the organisation?

3.8 What is 'Reasonable Care'?

Dutyholders — including organisations, their officers, and employees — have a duty to take 'reasonable care'. 'Reasonable care' is the level of judgment, prudence, and activity that a person would reasonably be expected to exercise in particular circumstances.

'Reasonable care' is determined objectively.

e.g. the standard of care for an officer of a corporation is no different to what an officer, in the course of his/her duties, is required to do in order to comply with other legislative obligations and for the proper management of risks associated with the corporation's operations.

Each case is considered on its own facts and circumstances and any prosecution action will reflect the principles of the *VWA General Prosecution Guidelines*.

The duty to take reasonable care extends to the **actions, omissions, and/or decisions** of the dutyholder.

3.9 Person Who Manages or Controls a Workplace

Under s 26 of the Act, a person who has, to any extent, the management or control of a workplace, must ensure, so far as is reasonably practicable, that the workplace, and the means of entering and leaving it, are safe and without risks to health. **This duty relates primarily to occupiers of workplace premises** (whether or not the occupier is the owner of the premises).

3.10 Designers, Manufacturers, Suppliers, etc.

Designers of plant, buildings, or structures who **know, or ought reasonably have known**, that it will be used in or as a workplace must ensure, **as far as is reasonably practicable**, that it is designed to be without risks to the health of any person using it for the purpose it was designed (ss 28-29).

Manufacturers and suppliers of plant and substances have similar duties (ss 29-30), as do persons who install, erect, or commission plant (s 31).

All such dutyholders who breach their obligations under Victoria's OHS laws may be subject to prosecution.

Dutyholders should make sure that they are aware of their obligations under Victoria's OHS laws, particularly those relating to hazard identification, risk assessment, and risk control, and the provision of information concerning the reduction of risk.

3.11 Case Example: Who could be Prosecuted?

3.11.1 Nature of Workplace Incident

A machine operator removes a guard from a machine and is injured by the unguarded machine.

Liability in Situation A

In this case:

- prior to removing the guard, the employee was given inadequate training and/or information and/or instruction and/or supervision; and/or
- removal of guards from machines and their continuing use was a generally accepted and condoned practice in the workplace; and/or
- there was a failure by the employer to adequately provide and maintain a system for the correct and continuous usage of guards.

In such circumstances:

- the **employee** may be considered to have taken reasonable care and will not be liable;
- the **employer** may be liable for failing to take reasonable care to, as far as practicable:
 - provide and maintain a safe system of work and safe plant; and/or
 - provide appropriate information, instruction, training and supervision for employees;
- where the employer is a corporation, its **officers** may also be liable for failing to take reasonable care in certain circumstances;
- if the guarding was inadequately designed, the **manufacturer** and/or **designer** of the machinery, as well as the **supplier** of the guarding, may also be liable;
- the employer's duty as **occupier** of the workplace (i.e. the person who manages and controls the workplace, whether or not the owner) would not be in issue, as the workplace incident related to the inadequate plant, systems of work, training, supervision etc., rather than to the building and its entries and exits.

Liability in Situation 'B'

In this case:

- prior to removing the guard, the employee received proper training, information, instruction, and supervision; and
- the guard in question was sufficient; and
- the removal of guards was neither accepted nor condoned in the workplace; and
- the employer had in place a system for monitoring the correct and continuous usage of guards.

In such circumstances:

- the **employee** who removed the guard may be liable for failure to take reasonable care;
- the **employer**, and, where relevant, its **officers**, have taken reasonable care and will not be liable. (Nor would the employer, in their role of **occupier** of the premises, be liable.)
- unless the machine cannot properly be operated with the guard in place, the **designer**, **manufacturer**, and **supplier** of the machine will also not be liable.

3.11.2 Possible Outcome of Workplace Incident

WorkSafe will consider the responsibility and potential liability of each dutyholder.

The full range of enforcement action available under the Act (including improvement and prohibition notices) will be considered, as appropriate.

Subject to the existence of 'sufficient evidence' and consideration of the public interest criteria in the *VWA General Prosecution Guidelines*, the dutyholder(s) who are responsible for the breach may also be subject to prosecution or other punitive action (e.g. enforceable undertaking or letter of caution).

4.0 Related Policies

For copies of the *WorkSafe Compliance and Enforcement Policy* and the *VWA General Prosecution Guidelines* see www.worksafe.vic.gov.au.

5.0 Legal Advice Should Be Sought

The information contained in this supplementary enforcement and prosecution policy is not intended to constitute legal advice. Readers should **seek legal advice** in relation to the nature and content of relevant Victorian law and the contents of this policy.

6.0 Last Modified

This supplementary enforcement and prosecution policy was last modified on 20 June 2005.