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VICTORIAN WORKCOVER AUTHORITY

GENERAL PROSECUTION GUIDELINES

SPECIAL

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VWA GENERAL PROSECUTION GUIDELINES

1. Nature of General Prosecution Guidelines

The General Prosecution Guidelines set out the Victorian WorkCover Authority's criteria for, and approach to, prosecution decisions. They guide the Authority in the exercise of its prosecutorial discretion.¹

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

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

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

2. Legislation under which Prosecution May Occur

2.1 Occupational Health and Safety Prosecutions

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

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

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

2.1.1 Referral to Director of Public Prosecutions

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

2.2 Accident Compensation Prosecutions

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

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

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

3. Publication of General Prosecution Guidelines

The General Prosecution Guidelines are published in the Government Gazette in conformity with the requirements of s 130(4) of the **Occupational Health and Safety Act 2004**; s 40(3) of the **Dangerous Goods Act 1985**; s 28(6) of the **Equipment (Public Safety) Act 1994**; and s 252(6) of the **Accident Compensation Act 1985**.

The Guidelines are also:

- published on the Authority's website (www.workcover.vic.gov.au); and

¹ For further information in relation to the status of these Guidelines see Part 5 "Non-Adherence to Guidelines Does Not Affect Prosecution".

- incorporated into the WorkSafe Compliance and Enforcement Policy. (The broader Policy document places the Guidelines in context, as part of the Authority's overall compliance and enforcement functions.)

4. Supplementary Enforcement and Prosecution Policies

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

The purpose of Supplementary Enforcement and Prosecution Policies is to:

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

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

Supplementary Enforcement and Prosecution Policies:

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

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

5. Non-Adherence to Guidelines Does Not Affect Prosecutions

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

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

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

6. Key Aim of Prosecutions

6.1 Key Aim of OHS Prosecutions

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

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

6.1.1 Constructive Compliance

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

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

6.1.2 Objectives

The objectives of an OHS prosecution are to:

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

6.1.3 Operational Context and Processes

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

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

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

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

6.2 Accident Compensation Prosecutions

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

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

7. Principles of Prosecution

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

7.1 OHS Prosecutions

In accordance with the principles that underpin WorkSafe's approach to all its activities, all OHS prosecution-related activities should be transparent, accountable, constructive, and effective.

In addition, all OHS prosecution-related activities should be targeted, proportionate, consistent, and fair, and conducted in accordance with these General Prosecution Guidelines. (For details, see topic 9 of the WorkSafe Compliance and Enforcement Policy).

7.2 'Accident Compensation' Prosecutions

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

8. Limitation Periods for Prosecutions

8.1 OHS Prosecutions

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

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

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

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

8.1.1 Other OHS Laws

Various limitation periods apply for the prosecution of indictable offences under other OHS laws.² For summary offences, proceedings must be brought within 12 months of the alleged offence, except where otherwise provided in the relevant OHS law (see s 26(4) of the **Magistrates' Court Act 1989**).³

8.2 Accident Compensation Prosecutions

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

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

9. Who May be Subject to Prosecution?

9.1 OHS Prosecutions

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

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

² i.e. under the **Dangerous Goods Act 1985**; **Equipment (Public Safety) Act 1994**; **Road Transport (Dangerous Goods) Act 1995** (and its Commonwealth equivalent).

³ Careful consideration of the relevant legislation should be undertaken by any person who considers they may be affected.

- suppliers of plant or substances (s 30); and
- persons who install, erect or commission plant (s 31).

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

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

9.2 Accident Compensation Prosecutions

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

10. OHS Infringement Notices

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

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

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

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

11. Investigation of Alleged Offences

11.1 OHS Comprehensive Investigations

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

11.1.1 Purpose of Comprehensive Investigations

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

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

11.1.2 Referrals for Consideration

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

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

11.1.3 Criteria for Commencing Comprehensive Investigations

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

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

a) Work-related Fatalities

b) Other 'Notifiable Incidents'

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

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

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

c) Focus Areas for Prevention

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

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

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

d) Non-compliance with a Notice or Direction

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

- (i) still exists at the workplace; or
- (ii) was 'passed on' without adequate warning (for example, sold or otherwise supplied for potential use at another worksite without adequate warning – e.g. see ss 23, 24 and 30); or

(iii) was remedied substantially after the date specified in the notice/direction.

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

e) *Offence against a WorkSafe Inspector*

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

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

Refusal by an employer to:

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

g) *Offence against or by an Authorised Representative*

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

h) *Discrimination*

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

i) *Coercion*

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

j) *Incident Notification and Site Preservation*

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

k) *Dangerous Goods Offences*

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

l) *Equipment (Public Safety) Offences*

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

m) *Other Target Areas*

- (i) where appropriate, failure to pay the penalty imposed in an infringement notice within the specified time or prosecution upon withdrawal of an infringement notice (s 142);

- (ii) a comprehensive investigation will be conducted where, in accordance with s 131 of the **Occupational Health and Safety Act 2004**, a person requests that a prosecution be brought (and where subsequently the matter may be referred to the Director of Public Prosecutions for advice).

11.2 'Accident Compensation' Investigations

Areas of investigation in relation to Accident Compensation offences include:

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

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

12. Prosecution Criteria

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

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

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

13. Sufficient Evidence

As the initial step in determining whether to undertake prosecution proceedings (or an alternative form of punitive action) against an alleged offender, the Authority endorses and adopts the considerations, as set out from time-to-time, in the Australian Prosecutorial Guidelines ('APG')⁴, in particular:

13.1 Reasonable Prospect of Conviction

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

13.2 Matters to be taken into Account

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

- the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact...;

4 The full text of the Australian Prosecutorial Guidelines is available at www.workcover.vic.gov.au

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

13.3 Evaluation of the Evidence

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

13.3.1 Grounds for Exclusion of Evidence

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

13.3.2 Admissions

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

13.3.3 Reliability and Credibility of Witnesses

“(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?”

“(d) Has a witness a motive for telling less than the whole truth?”

“(e) Are there matters that might properly be put to a witness by the defence to attack his or her credibility?”

“(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability that is likely to affect his or her credibility?”

“(g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?”

“(h) If there is a lack of conflict between eyewitnesses, is there anything that causes suspicion that a false story may have been concocted?”

13.3.4 Availability of Witnesses

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

13.3.5 Child Witnesses

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

13.3.6 Identification Issues

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

13.3.7 Multiple Defendants

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

14. Public Interest

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

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

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

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

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

14.2 Public Interest Considerations: Alleged OHS Offences

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

14.2.1 Nature and Circumstances of the Alleged Offence

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

14.2.2 Characteristics of the Duty Holder

- the degree of culpability of the alleged offender in connection with the offence, for example:
 - the degree to which the dutyholder acted in accordance with any advice given by the Authority pursuant to s 18 of the Occupational Health and Safety Act 2004 in relation to complying with a duty or obligation under that Act;

- the relevant compliance history of the alleged offender (including the alleged offender's response to WorkSafe's previous enforcement and prevention activities); and
- the attitude of the alleged offender (including any relevant proactive measures taken to comply with Victoria's OHS laws).
- relevant history and other relevant characteristics of the alleged offender (e.g. age, intelligence, physical health, mental health, special infirmity, etc.);
- subject to any rights or privileges (such as the privilege against self incrimination), whether the alleged offender is willing to co-operate in the investigation or prosecution of the matter, including the investigation and prosecution of others, or the extent to which the alleged offender has done so.

14.2.3 Level of Public Concern

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

14.2.4 Impact of Offence

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

14.2.5 Deterrence

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

14.2.6 Effect of Prosecution

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

14.2.7 Administrative Considerations

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

14.3 Public Interest Considerations: Alleged Accident Compensation Offences

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

15. Determination of Appropriate Prosecution-related Option

15.1 Alleged OHS Offences

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

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

15.1.1 Prosecution Proceedings

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

15.1.2 Enforceable Undertaking

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

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

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

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

15.1.3 Letter of Caution

Where it is in the public interest, then, in limited circumstances for relatively minor⁵ offences, a Letter of Caution may be issued as an alternative to prosecution.

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

15.1.4 No Further Action

No further action will be taken, where:

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

15.1.5 Notification of Decision to Interested Persons

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

- the alleged offender;

⁵ In this context, having regard to all the relevant circumstances, whether a matter is a 'relatively minor' or 'more serious' offence will be determined by application of these General Prosecution Guidelines, in particular, the criteria for comprehensive investigation and the prosecution criteria – e.g. factors such as the actual or potential consequences of the breach are taken into consideration. It reflects the culpability involved in the offence.

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

15.2 Alleged ‘Accident Compensation’ Offence

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

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

16. Conduct of Investigations and Prosecutions

Details of the processes by which the Authority conducts its investigations⁶ and its other prosecution-related activities in accordance with these General Prosecution Guidelines are set out, from time-to-time, in Supplementary Enforcement and Prosecution Policies. Examples include:

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

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

17. Review by DPP of Decision not to Prosecute (OHS)

17.1 Request to Commence Prosecution

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

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

17.2 Referral for Advice by DPP

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

⁶ i.e. ‘OHS comprehensive’ investigations and ‘accident compensation’ investigations.

17.3 Final Determination by Authority

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

17.4 Review Statistics

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

18. Sentencing Options

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

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

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

19. Ancillary Orders and Submissions

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

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

19.1 Provision of Information to Persons Affected by OHS Offences

Where appropriate, the Authority will provide information in relation to ancillary orders (e.g. compensation orders) and submissions (e.g. Victim Impact Statements) to relevant persons.⁷

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

20. Notification of Outcome of Prosecution

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

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

⁷

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

21. Publishing Prosecution Outcomes and other Enforcement Data and Information

21.1 Publishing and Utilising the Outcome of OHS Prosecutions

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

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

For example, the Authority will:

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

For details see the Supplementary Enforcement and Prosecution Policy ' <i>Publishing Prosecution Outcomes and other Enforcement Information & Data</i> ' at www.worksafe.vic.gov.au
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21.2 Publishing the Outcome of Accident Compensation Prosecutions

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

Explanation of Terms (OHS)

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

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

More serious breach	Having regard to all the relevant circumstances, whether an offence is a relatively minor or more serious offence is determined by application of the VWA General Prosecution Guidelines, in particular, the criteria for commencing comprehensive investigation and the prosecution criteria – e.g. factors such as the actual or potential consequences of the breach are taken into consideration. It reflects the culpability involved in the offence.
Non-compliance	Contravention (i.e. breach) of Victoria’s OHS laws.
OHS	Occupational health and safety
Prosecution-related activities	The Authority’s decision-making processes and other activities when: <ul style="list-style-type: none"> – it is considering whether to commence prosecution proceedings, accept an enforceable undertaking, issue a letter of caution or take no further action in relation to an alleged breach of Victoria’s OHS laws; and – when undertaking the conduct such matters.
Punitive measure	A recommendation that: <ul style="list-style-type: none"> – an infringement notice be issued; or – a comprehensive investigation occur in accordance with the VWA General Prosecution Guidelines. See topic 17 of the WorkSafe Compliance and Enforcement Policy
RCBU	Rehabilitation and Compensation Business Unit, which manages the Authority’s functions in relation to assisting and compensating injured workers and providing Victoria’s workplace insurance scheme.
Relatively minor breach	See definition of ‘More serious breach’.
Remedial measure	A measure taken by WorkSafe to enforce compliance with Victoria’s OHS laws (e.g. the issuing of an improvement notice or prohibition notice). See topic 15 of the WorkSafe Compliance and Enforcement Policy
Serious injury	As described by s 37 of the Occupational Health and Safety Act 2004
Statute	An Act of parliament
Supplementary Enforcement and Prosecution Policy	Policies that support the practical implementation of the General Prosecution Guidelines. See part 4 of the VWA General Prosecution Guidelines.
The Act	Occupational Health and Safety Act 2004
Victoria’s OHS laws – “the Act” – “Victoria’s other OHS laws”	The following Acts and their associated regulations: <ul style="list-style-type: none"> ● Occupational Health and Safety Act 2004 (“the Act”) ● Dangerous Goods Act 1985; Equipment (Public Safety) Act 1994; Road Transport (Dangerous Goods) Act 1995; Road Transport (Dangerous Goods) Act 1995 (and its Commonwealth equivalent) (“Victoria’s other OHS laws”)

Victoria's Other OHS laws	See Victoria's OHS laws.
VWA ("the Authority")	Victorian WorkCover Authority, the manager and regulator of Victoria's workplace safety system.
VWA General Prosecution Guidelines	The guidelines which apply to all VWA prosecutions and which are gazetted in accordance with legislative requirements.
Workplace parties	Employers, employees and other workers, health and safety representatives, and other dutyholders.
WorkSafe	VWA's occupational health and safety arm, which manages its regulatory functions in relation to preventing workplace and work-related deaths, injuries, and disease and in enforcing Victoria's OHS laws.
WorkSafe Compliance and Enforcement Policy	The policy which provides an overview of the legislative framework within which WorkSafe operates and sets out how WorkSafe's 'Constructive Compliance Strategy' is applied to its enforcement and prosecution activities.

Details of Policy Development: Last Update

- The VWA General Prosecution Guidelines were gazetted on: 1 July 2005.
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