

Australian Industry Group

Independent Review of
Occupational Health and Safety
Compliance and Enforcement in
Victoria – Discussion Paper
June 2016

Submission to
Independent Review Panel
State Government of Victoria

AUGUST 2016

Ai
GROUP

INDEPENDENT REVIEW OF OCCUPATIONAL HEALTH AND SAFETY COMPLIANCE AND ENFORCEMENT IN VICTORIA

SUBMISSION IN RESPONSE TO DISCUSSION PAPER

Contributing to the review

The review panel is keen to receive your feedback. All interested individuals and organisations are invited to share their views by providing comment and responses to the questions in the [discussion paper](#).

Submissions can address any or all of the questions and can include any evidence, examples or case studies that you think may be relevant. All submissions accepted by the review are public documents which will be posted on the review's website. Individuals and organisations can request that their submissions remain confidential.

The review panel will assess all public submissions received.

The closing date for submissions is 1 August 2016.

Submissions can be lodged by:

- completing an online submission form, available at www.ohsreview.vic.gov.au
- downloading and completing this comment template and forwarding to independentreview@ohsreview.vic.gov.au or
- mailing your completed comment template response to:
Independent OHS Review
GPO Box 4579
Melbourne VIC 3001

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Introduction

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group's Victorian Branch Director, Timothy Piper, holds a ministerial appointment to the Occupational Health and Safety Advisory Committee (OHSAC), established under section 19 of the Occupational Health and Safety Act 2004. Ai Group representatives also participate in the Stakeholder Reference Group (SRG), and various other stakeholder consultation forums, convened by WorkSafe Victoria.

Ai Group played a major role in the Maxwell review that culminated in the making of the Victorian Occupational Health and Safety Act 2004, and the Occupational Health and Safety Regulations 2007. Ai Group is also a member of Safe Work Australia that oversaw the development of the Model Work Health and Safety (WHS) laws that were adopted by most Australian jurisdictions effective 1 January 2012 or 1 January 2013. Western Australia is currently progressing adoption of the Model WHS laws, and New Zealand also adopted a set of laws based largely on the Model from April 2016.

Ai Group continues to be disappointed that Victoria has not adopted these laws which would provide WorkSafe Victoria with extra levers that could be used to promote improvements in workplace health and safety. These include: the concept of a *person conducting a business or undertaking* (rather than duties that are seen to rely on the employer/employee relationship); positive due diligence obligations that appear in the main body of the Act, rather than the officer liabilities that sit at section 144 of the Victorian OHS Act; and obligations for duty holders to consult, cooperate and coordinate with other duty holders to ensure health and safety.

Ai Group is aware that the issue of whether Victoria should adopt the Model WHS Laws is outside the terms of reference for this review, although we note the related issue of Victoria's relationship to the national compliance and enforcement strategy is specifically referenced.

Informing our Views for this Submission

We engage with employers through our membership services, consulting services and training delivery, receiving constant feedback about the issues they encounter when managing occupational health and safety, and about their interactions with WorkSafe Victoria.

In addition to drawing on this information, and our direct engagement with WorkSafe Victoria over many years, we have engaged with members during this review process to seek their views about the issues and questions posed by the discussion paper. Our responses to the questions are based on this extensive knowledge base.

Previous stakeholder consultation

Ai Group appreciated the opportunity to participate in the tripartite workshops that were organised at the start of this review. However, the various views of stakeholders that were aired during those discussions do not appear to have informed the discussion paper. We are keen to understand how the various inputs will be considered in the development of the final report to the Minister.

Discussion paper comment section

General feedback: Do you have any general comments for the review to consider?

Comment:

The overwhelming feedback we have received in relation to this review, and in unrelated discussions with our members about occupational health and safety, is that WorkSafe Inspectors have a valuable role in assisting workplaces to understand their obligations and to help them to identify and implement practical solutions in the workplace.

Many years ago, inspectors attended a site and issued notices that identified breaches, without giving advice about how that breach could be remedied. Whilst some of those employers had access to consultants or employer organisations that could provide some assistance, many do not. Even where employers do have access to that support, it is not possible for a third party to adequately ascertain what was in the mind of the inspector when they issued the notice.

A major issue raised by Ai Group at that time was that if an inspector could identify a breach, they must also be able to identify at least one solution that they believed was reasonably practicable. If so, then it was in the best interests of health and safety for that information to be shared.

We are pleased that inspectors now provide a much more advisory role and we wish to reinforce the importance of this continuing.

Section 3 – OHS Compliance and Enforcement Framework

This review will examine the policies in the C&E framework and their implementation to establish whether they are relevant, appropriate and support the improvement of OHS in Victoria.

Question 1: How appropriate and relevant is the C&E policy in guiding WorkSafe’s approach to ensuring Victorian OHS laws are complied with, enforced and communicated?

Comment:

The current Victorian C&E (Compliance and Enforcement) policy has been in place since July 2005, building on previous versions, in response to the Maxwell review which recommended greater transparency. Within the Executive Summary, Maxwell stated:

Making the legislative scheme work better means ensuring that the scheme operates effectively, accountably, transparently and fairly. This in turn means making clear the principles which drive OHS legislation and enforcement, and at the same time attending to the details of enforcement mechanisms and processes.

It has been the experience of Ai Group that much of the activities of WorkSafe Victoria have been developed in line with the intentions of the policy. It provides a good model for a constructive regulator, and is a good reference point against which WorkSafe strategies, priorities and activities can be measured.

A major advantage of the C&E policy, as compared to the NC&E (National Compliance & Enforcement) policy, is the level of detail that can be provided when the policy is referring to a specific piece of legislation and a specific regulator.

In addition to referencing the legislative tools available to inspectors, the C&E policy also refers to risk control plans (section 15.2.1); it is stated that a risk control plan can be used “where numerous hazards are identified at a workplace ... as an alternative to issuing numerous improvement notices”.

It is Ai Group’s view that risk control plans can also provide a good compliance option when difficult issues, that require long term solutions, are identified by inspectors during workplace interactions; such issues might involve significant capital expenditure or development of solutions with third parties. Risk control plans can provide a tool that allows for longer term solutions to be agreed to, and monitored over time, and may be a more appropriate approach to achieving compliance than improvement notices with short timeframes for compliance.

In recent discussions with WorkSafe’s stakeholder working groups and the Stakeholder Reference Group (SRG) Ai Group has not been made aware of any significant use of risk control plans.

It is our view that risk control plans should be considered as part of WorkSafe’s strategic enforcement approach.

Question 2: How can the C&E policy be improved?

Comment:

The current C&E policy was established shortly after the making of the 2004 Act; at that time it was envisaged that regulations would be made to establish an infringement notice regime, as facilitated by section 139 of the Act:

- (1) The regulations may provide that a person may be serviced with an infringement notice as an alternative to a prosecution for an offence (other than an indictable offence) against this Act or the regulations that is prescribed by the regulations for the purpose of this section.

Subsequently, throughout the C&E policy there is reference to infringement notices as a punitive tool available to the regulator. As the Act has now been in place for 14 years and regulations have not been made to introduce infringement notices, it would seem to be appropriate to remove all reference to infringement notices from the C&E policy.

The C&E policy could be enhanced by including a paragraph, similar to that in the last paragraph of section 9 in the NC&E, specifically stating that "Improvement and prohibition notices are 'remedial' enforcement measures, not punitive measures (i.e. they are not punishment). This means that in cases where punishment is warranted, other measures such as an infringement notice or prosecution may also be taken in addition to notices issued by inspectors". This would assist organisations to better understand the role that is played by notices, and make them more willing to engage with inspectors over issues that may result in notices being issued.

The review panel would like to know your views on the NC&E policy. The review will examine consistency between the state and national policies, and consider whether greater alignment would improve WorkSafe's compliance and enforcement policy and activities.

Comment:

Victoria's C&E policy was used as the model for developing the NC&E. In order to address the broad requirements of all jurisdictions the detail included in the Victorian C&E was removed, and a high level document was agreed. In addition to outlining how the laws will be enforced, the NC&E policy addresses how the jurisdictional regulators will work together in the development of combined strategies and the sharing of information. This is not a feature of the C&E policy.

Question 3: How consistent is Victoria's C&E policy with the NC&E policy?

Comment:

The NC&E policy was developed with a different purpose in mind than Victoria's C&E policy. During the National OHS Review, Ai Group stated: "... national consistency of regulator behaviour is considered to be as important as national consistency of legislation. For this reason, a nationally agreed enforcement and prosecution policy should be developed and be endorsed by WRMC and COAG. Regulators should be required to adopt the protocol and to demonstrate that they have fully implemented the protocol". (Submission in Response to Issues Paper, July 2008, p.56).

The NC&E policy was developed with the express purpose of outlining how regulators would approach the implementation and enforcement of harmonised laws in a similar manner. The aim was consistency, not detail. Accordingly, the NC&E policy is a document with a high level focus, as distinct from the more detailed approach taken in Victoria.

Accordingly, the two documents cannot be directly compared.

Question 4: Does the Victorian policy need to be more consistent with the national policy?

Comment:

If Victoria did not have a C&E policy the NC&E policy would be an appropriate policy to adopt within Victoria. However, given the level of detail that is currently contained in the Victorian C&E policy it would not be appropriate to remove the detail provided in order to achieve consistency.

In addition to the issues outlined in response to question 1 the Victorian C&E policy could be further enhanced by including information about how Victoria will work with other jurisdictions to ensure ongoing consistency in application of laws, in spite of Victoria having not adopted the Model WHS laws. It could also refer to how WorkSafe Victoria will work with other Victorian regulators to enhance occupational health and safety.

Section 4 – OHS compliance and enforcement activities

The review intends to examine and review WorkSafe’s compliance and enforcement approach against the markers of modern regulatory best practice, as well as against WorkSafe’s view of what a modern regulator is.

Question 5: How effectively is WorkSafe operating as a modern regulator?

Comment:

It is Ai Group’s view that, on the whole, WorkSafe is applying the principles of a modern regulator. In an organisation with the size and diversity that WorkSafe has there will always be individual circumstances where stakeholders believe things could have, and should have, been done differently. Our members provide us with such examples, as do union members to them.

Ai Group is called upon to assist members to deal with difficult issues involving inspectors, and have experienced situations where some inspectors have appeared to be partisan with a union approach, for whatever reason. In some circumstances this appears to be particularly blatant. When specific issues have been raised within the WorkSafe hierarchy, this approach is generally dealt with and a more productive interaction is achieved. However, employers can be fearful that a complaint about the behaviour of an inspector’s response may lead to negative consequence, either from the inspector or from the union.

Employers also provide us with examples of good outcomes in workplaces, where employers feel that the inspector has been “firm but fair” and provided the necessary information and advice to enable them to comply with the requirements of the laws and move forward to further enhance health and safety in the workplace.

Some employers indicated that they had experience of both “types” of inspectors; those that take an educative role and those that are more dictatorial in nature. Without exception these employers advised that there were better outcomes in the workplace when the educative approach was taken.

Information provided to us at the June 2016 SRG outlines WorkSafe’s direct interaction with workplaces. In excess of 40,000 visits per annum, during which in excess of 20,000 notices are issued. As a result of these 20,000+ notices, there are approximately 1,100 applications for internal review each year (5.5%). Of these internal review applications, in 2015/16, 88.2% of applications related only to a change of compliance date. The remaining 12% of internal review applications, relating to substantive issues, equate to 132 (0.66%).

This indicates to us that employers generally accept that the notices issued are valid, albeit that more time could be allowed for compliance. It would seem that a more detailed discussion about how long it will take an employer to achieve the outcomes of the notice could be beneficial, before notices are issued.

Question 6: Are there areas in which WorkSafe could improve its approach as a modern regulator?

Comment:

Generally, WorkSafe operates within the approach of a modern regulator (as outlined on page 19 of the discussion paper). However, there are some key areas that we would like to focus on.

The use of data to develop strategies

Although not a specific dot-point in the description of the modern regulator, the use of data is implied across many of the dot-points, in particular “evidence-based enforcement”.

Whilst some more sophisticated approaches to developing targeted areas of focus have been applied in recent years, there continues to be a strong focus on the use of claims data. Claims data is flawed in determining where risks exist: significant risks may not manifest themselves in injuries, due to luck or a range of intervening mitigating factors; injuries that occur may not result in a worker lodging a claim with their employer; a claim lodged with an employer may not find its way into the system; good return to work may result in a significant injury not becoming a “4 week” statistic.

In addition to the above, in recent times a range of reports by the Victorian Auditor General’s Office (VAGO) have resulted in WorkSafe being required to divert resources to the public sector areas of Health and Education in response to the recommendations outlined in the reports. This may, or may not, be an appropriate response, but it would appear that WorkSafe may not have the level of independence to make a risk-based decision of their own; nor, it would seem, have they had the ability to say that these large public sector employers should have the resources to deal with their own issues.

WorkSafe Victoria is an organisation with limited resources, funded by employer workers’ compensation premiums, that needs to effectively allocate those resources across the full range of encouragement and deterrence activities. WorkSafe needs to utilise all available knowledge and intelligence to drive the best possible outcomes in occupational health and safety in workplaces

It may be useful to seek information from employers, via a survey, that identifies the risks that most concern workplaces, rather than those that lead to claims entering the system.

It is our understanding that the World Health Organisation asks Google to get intelligence on emerging issues through people Googling their symptoms; it may be worth considering whether Google or other big data could assist to indicate trends.

A strong consultative approach with stakeholders

WorkSafe has established a range of mechanisms that aim to facilitate consultation with stakeholders. Ai Group participates in many of these forums: Ministerial appointment to OHSAC (Occupational Health and Safety Advisory Committee); Stakeholder Reference Group (SRG); and various stakeholder working groups. The level of consultation within those forums varies significantly – from true consultation, and even collaboration, through to nothing more than the provision of information.

In 2014 work was undertaken to establish an “engagement framework” as part of the Stakeholder Charter for operations of the SRG, and much input was provided by stakeholders in order to develop this document. The intention was for the document to form the basis of clearly communicating the level of engagement that WorkSafe intended for each stakeholder interaction; this would facilitate the establishment of clear expectations and enable stakeholders to understand the level of commitment they would need to bring to that process. The completed document, which has rarely been referred to, is attached as Appendix A. It is Ai Group’s views that this document should be resurrected and become the guiding document to inform WorkSafe’s approach to stakeholder engagement.

It is recognised that WorkSafe has a legislative responsibility to participate in tripartite arrangements, as established by section 2 of the Act where it is stated that an objective of the Act is: “(d) to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards”.

Ai Group also recognises the importance of WorkSafe undertaking additional direct engagement with organisations or individuals that can constructively influence their compliance and enforcement strategies. We encourage that approach, with the understanding that WorkSafe will share the learnings from those engagements with the tripartite stakeholders.

Question 7: Are there other regulatory approaches that the review should consider?

Comment:

Many of the risks currently being considered by WorkSafe will require multi-pronged resolutions in workplaces, such as systemic manual handling risks or complex psychological health issues. As outlined in response to question 1, improvement notices may not be the best tool to achieve the long term solutions that are needed. WorkSafe should consider how risk control plans could be used, with appropriate ongoing monitoring, to achieve better regulatory outcomes.

The review would like to know your views on WorkSafe’s approach to its constructive compliance strategy.

Question 8: How effective is WorkSafe in applying the levers to ensure OHS laws are complied with, enforced and communicated?

Comment:

Generally, WorkSafe is effective at applying the various levers to ensure OHS laws are complied with and enforced within individual workplaces.

Some will argue that there should be a greater emphasis on the issuing of notices and the initiation of prosecutions. However, the ratio of WorkSafe inspectors to the number of Victorian workplaces will always mean that broader initiatives such as guidance material and the communication of expectations will continue to be important levers.

Marketing

In relation to advertising type campaigns, WorkSafe will always tread a difficult line between:

- Encouraging workplaces to welcome inspectors into their workplace to provide assistance, or reinforcing the message that ultimately an inspector has enforcement powers and should be feared;
- Delivering a message that employers have obligations to provide healthy and safe workplaces, or delivering an image that employers disregard the health and safety of their employees; and
- Encouraging employees to stand up for their rights; or making it look like workers are responsible for injuries if they occur.

In recent times, WorkSafe has returned to a very consultative approach on marketing campaigns. It is Ai Group’s view that, whilst we may not fully support the messages presented in the advertising, this increased engagement has improved the quality of the messages that are being delivered as the views of key tripartite stakeholders are being taken into account.

We note that one of our members commented that the advertisements that showed an employer “fearing” the arrival of an inspector did not assist to build the view that WorkSafe inspectors should be encouraged to assist workplaces to achieve better outcomes, merely portraying them as a policing role that should be avoided.

Communicating workplace failures and prosecutions

Over the years, WorkSafe has had a varying approach to the level of general communication they have around workplace failures. It is Ai Group’s views that it is important to publicise prosecutions to ensure that employers do understand that a prosecution may be the final outcome of a workplace failure. However, many of the prosecutions highlighted are at the “extreme” end, allowing many readers to assess the situation and think “that is outrageous and was rightly prosecuted, but it wouldn’t happen in my workplace”. Recent bullying cases are a clear example of this response.

Another approach may be to get better publicity for the occurrence of serious incidents. At the start of 2016 there were two tragic incidents that attracted strong media coverage, with news articles appearing in the early pages of the Herald Sun. As occurs with reporting of road fatalities, the articles (based on WorkSafe Victoria press releases) did not try to determine who was at fault – all they tried to achieve was highlight the impact of a workplace death and seek to identify that this could happen in your workplace. This focus appears to have waned in more recent time.

Safety Alerts issued by Workplace Health and Safety Queensland could be a good model for WorkSafe to adopt to ensure that the “day to day” incidents get higher recognition. An example of a recent alert, distributed to subscribers via email, is shown below.

Workplace Health and Safety Queensland is investigating a fatal incident that happened on Thursday 4 February 2016 in Maleny.

A worker later died in hospital of a chest injury he sustained when a disc shattered while he was using a nine inch grinder.

Could this happen anywhere your employees are working?

This alert is a reminder for you and your organisation to consider the effectiveness of your safety management systems in preventing an incident like this from occurring at your workplace.

For information on workplace health and safety visit www.worksafe.qld.gov.au or call 1300 362 128.

Please note: Workplace Health and Safety Queensland cannot comment on the progress of individual investigations. Each workplace incident is different, so the time taken to complete a thorough investigation will vary depending on the circumstances. More complex incidents may take many months to complete.

Question 9: Are there other approaches and/or levers that the review should consider?

Comment:

Employers advise us that they want access to information that is more targeted to practical solutions within their own industries. WorkSafe has undertaken a lot of work on this type of guidance over the last ten years. However, guidance documents have focused on the areas that WorkSafe has identified as high risk (predominantly driven by claim number and severity data). Hence there are many gaps in the information provided.

In instances where WorkSafe has identified an area for focus, the resultant “field knowledge” has not always been gathered and/or disseminated as well as it could be. An example of this is field work associated with the packing and unpacking of shipping containers. It is believed that the requirements of third parties (suppliers or customers) can make it difficult to implement solutions, and this was the reason for the intervention. Advice to the relevant stakeholder working group was that, in many cases, inspectors were finding that appropriate controls had been put in place and therefore did not issue notices associated with manual handling. However, this was not accompanied by any information about how these organisations had managed to influence the third parties that are often seen as barriers to implementation.

A discussion about these outcomes indicated that the difficulties associated with this type of work are that the key role of inspectors is to identify non-compliance.

If projects are established that want inspectors to identify compliance and bring back important information to inform duty holders, the focus of these projects may need to be different. A greater focus on how organisations achieved good performance is necessary, especially where it involved behaviour change and/or supply chain interactions.

4.1 Use of data and information to drive compliance and enforcement activities

The review would like to know your views on whether WorkSafe’s activities are consistent with identified strategic priorities.

Question 10: How effective is WorkSafe at using data and information to target its compliance and enforcement activities to the areas of most need and effect?

Comment:

See answer to question 6.

Question 11: Are there other sources of data and information WorkSafe could use to inform its activities?

Comment:

See answer to question 6.

4.2 Effective communication and engagement with stakeholders

The review is interested in your views on WorkSafe’s effectiveness in engaging with stakeholders to develop, implement and evaluate its compliance and enforcement activities.

Question 12: How effectively does WorkSafe engage and involve stakeholders such as OHSAC?

Comment:

Worksafe has varied effectiveness in engaging with OHSAC and WAC. At times it has done very well and at other times, quite poorly. Currently it is adequate. The unwieldy nature and diverse opinions and support bases for the people sitting on the Ministerially appointed committees is an issue which makes it harder for the executive to effectively engage. While the unions and senior employer groups usually have common issues, others who sit on the committees are often dealing with quite different matters and have different interests. The greatest value for participants would be to ensure there is commonality of interests (not views!), which would also help ensure engagement at the most senior levels.

People sitting on those Committees should also be educated around the aims of Worksafe. The greater the collegiality of the committee, the more likely it is to function well and provide advice – perhaps even being at one at times – with its comments to Worksafe. There is a recognition amongst senior people within the unions and employer associations that there will always be compromise and matters can often be worked through. However the greater the diversity of interests, the less likely that is to occur and the less value the meeting is.

In addition, see answer to question 6.

Question 13: How can WorkSafe improve engagement with and involvement of stakeholders to drive compliance and enforcement activities?

Comment:

See answer to question 6.

In addition, WorkSafe could consider a more active approach to partnering with employer organisations to collectively deliver a message to duty holders. A successful example of this was a member seminar, initiated by Ai Group and delivered in December 2015, that addressed the issues of bullying – what WorkSafe expect when they visit a workplace, and how they will respond to a bullying complaint.

4.3 Practical and constructive advice and information

A key term of reference for this review is to look at Worksafe’s functions in relation to delivering compliance information and promoting OHS awareness education and training. The review will examine WorkSafe’s approach to providing advice to duty holders, and examine how its current approach to information, education and campaign activities aligns with its C&E policy.

Question 14: How effectively does WorkSafe provide advice and information to duty holders, consistent with the C&E policy?

Comment:

Inspectors

We have received feedback from members that, on the whole, WorkSafe inspectors provide useful information to employers to assist them to achieve compliance in areas identified as needing attention. One employer provided an example of an inspector offering to return to the site with another inspector who had more specialised knowledge to assist in identifying solutions.

However, some of the areas for improvement included:

- A need for inspectors to have a more practical approach to workplace issues and to understand the context within which issues arise;
- The importance of inspectors doing further investigation about what has occurred in the workplace to date in relation to a specific issue before issuing a notice, e.g. referring to committee minutes or inspection records to see what has been done to date; and
- An ability to leave the workplace with principles of safe thinking and behaviour that will equip them to make appropriate decisions in new or novel situations, not just reoccurrences of previously examined situations.

Advisory Services

We have also received feedback that some employers have received inconsistent advice when contacting the Advisory Service, on different days with the same question. One member also advised that whilst they find the verbal advice from the Advisory Service to be helpful, responses to written questions are often vague.

Codes and Guidance Material

Members have advised us that they see a need for more Compliance Codes (which should be satisfied by work currently underway within WorkSafe) and for simple, practical guidance.

WorkSafe Week

We received some feedback that information provided at WorkSafe Week can be too vague, too basic and not engaging enough. In particular, some people who attended regularly found the presentations to be repetitive of passed topics and information. It was suggested that it may be beneficial to “grade” presentations according to the presumed knowledge of attendees, allowing some more advanced information to be delivered without the need to cover the basic information at the start of a session which is of limited duration.

Another issue related to WorkSafe Week is that the HSR Conference is approved under s69(d) of the Act, which results in elected HSRs having the right to attend the Conference. In this context, WorkSafe Week is resented by many employers. They feel it removes staff from their workplace that they can ill afford, that the training is mediocre at best and that they have no control over the activities of the employee or the training undertaken, despite the fact they are training during working hours.

Question 15: How can WorkSafe improve the way it conveys advice and information to duty holders?

Comment:

The major difficulty about conveying advice and information about occupational health and safety is that duty holders, especially small to medium businesses, generally look for information about a specific issue and want a simple straightforward answer – quickly. They do not want to work through a detailed document that tells them about the legal obligations and the meaning of reasonably practicable. For example, if they want to know how to store chemicals, they want a document that answers that question. One member gave an example of wanting information from WorkSafe about LPG bulk storage; a search on the WorkSafe website resulted in them locating a document on the risks to public safety of temporary gas storage during the 1998 gas crisis in Victoria (with a publication date of 2005) - <http://www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/lpg-incorrect-bulk-storage-is-a-public-risk>. The employer was unable to find any useful material.

WorkSafe Victoria cannot expect to be the providers of all relevant information to every duty holder covering every risk. In relation to some risks it may be appropriate to partner with relevant organisations to provide information on the WorkSafe website, or to provide links to useful information available from other locations.

Question 16: How effectively does WorkSafe promote OHS awareness?

Comment:

See our answer to question 6.

Question 17: Are there more effective approaches that should be considered?

Comment:

Ai Group does not have anything further to add.

4.4 Fostering cooperative, consultative relationships

The review will examine WorkSafe’s current approach to supporting workplace parties.

Question 18: How effectively does WorkSafe provide support to workplace parties?

Comment:

Consultation within Workplaces

In relation to this issue, the focus of the discussion paper appears to be on the role of WorkSafe in engaging with HSRs when they attend a workplace. There is no consideration as to how an inspector can foster cooperative, consultative arrangements between the HSR and the employer during that visit. Nor does it consider how these cooperative, consultative arrangements can be fostered within workplaces where HSRs do not exist.

The importance of genuine consultation with workers should be a part of every inspector visit; the focus should be on the benefits that can be derived by drawing on the knowledge of workers. It has been our experience that some inspectors tend to use “OHS shorthand” when asking employers if they have “health and safety representatives”, often leading to an employer thinking it is a legal requirement to have them, and not understanding that it is an elected role that may be utilised to facilitate consultation.

A more investigative discussion about “how do you consult with workers on health and safety” may provide better insight and overcome the confusion caused by the use of jargon that OHS professionals and inspectors understand, but the average employer does not.

General support for workplace parties

It is our understanding that WorkSafe Victoria funds the website and newsletter for elected Health and Safety Representatives run by Victorian Trades Hall Council (VTHC). There is no similar support for the employer side of the equation.

It is acknowledged that WorkSafe Victoria does provide some funding for authorised consultants, including some employer organisations, to provide either 3 hours or 6 hours of free OHS consulting for small and medium businesses. However, this can only have a limited reach and may benefit from being supplemented by targeted training and information for managers and supervisors about their general obligations and practical information about how to foster good consultative arrangements and prevention activities in their workplaces.

Union right of entry

This is one area where we receive significant feedback from members about the lack of support they receive when inspectors are asked to intervene in relation to what is seen by the employer as vexatious attempts, without strong grounds, by union organisers to utilise their OHS right of entry powers to access workplaces, especially during difficult EBA negotiations. Complaints by members generally include a concern about the lack of detail provided in the description of the *suspected contravention*.

The response of inspectors appears to be at facilitating entry by confirming that a notice has been provided and the organiser holds the appropriate permits; these enquiries are often addressed over the phone. However, employers rightly expect that the inspector will consider the content of the notice which generally provides scant information in relation to the alleged breach. Given that the law requires that the permit holder form a view that there has been a contravention, it would seem reasonable that the permit holder is able to articulate that information within their notice. Without this level of detail, an employer is justifiable in their belief that the entry is nothing more than a “fishing expedition” or a tool to avoid the normal notice and other requirements of the Fair Work Act.

Ai Group believes it would be valuable to revisit the protocols that apply in these circumstances to ensure that the integrity of right of entry provisions is enhanced; this should include a requirement that the inspector consider the robustness of the information provided about the suspected contravention.

This area needs to be more proactively managed and licence given to inspectors to look more objectively at obvious recidivists. At present, it is an area that gives Worksafe Victoria, the Victorian industrial relations environment and the Victorian economy a poor reputation and impacts on investment in the community. Where OHS powers are being used as IR tools, this should be recognised by the regulator and effective remedies provided.

Interaction between union right of entry and the power of an HSR to seek the assistance of any person.

Ai Group acknowledges that the power to seek assistance, granted to HSRs by s58(f) is a broad ranging power which has no specific restraints within the legislation.

However, it has been our experience that when union right of entry activities are appropriately controlled, some union organisers then approach the HSRs to get them to “seek the assistance” of the organiser; hence, curtailing the right of entry provisions under the Act. It has always been Ai Group’s view that the power provided under s58(f) became unnecessary when union right of entry provisions were legislated.

This approach is not conducive to developing trusting and workable consultative arrangements in the workplace. When the union organiser walks away the HSR is required to continue to have an ongoing relationship with the employer.

It is Ai Group’s view that it would be helpful if WorkSafe provided some form of guidance to assist HSRs to understand the rationale for this power and how they can get the best benefit to themselves and their workplaces when exercising that power.

Question 19: How can WorkSafe improve the way it provides support to workplace parties?

Comment:

See answer to question 18

4.5 Inspectorate activity

The review will examine how effective WorkSafe’s inspectorate activities are in ensuring that OHS laws are complied with, enforced and communicated. It will also examine how WorkSafe adopts and applies learnings from reviews of inspector decisions.

Question 20: Is WorkSafe’s inspectorate effective in detecting breaches of OHS laws and ensuring compliance with those laws?

Comment:

Some risks appear to be easier to deal with than others, in terms of regulatory attention and response. There needs to be a flexible range of options to raise awareness and adopt an innovative response to the more hidden, complex and fluid risks such as manual handling.

Question 21: How can WorkSafe’s approach to inspections be improved?

Comment:

See our answers to question 1 (in relation to risk control plans) and question 18 (in relation to support for workplace parties)

Question 22: Are there other approaches to enforcement that the review should consider?

Comment:

As outlined in question 1, the broader use of risk control plans could provide an additional enforcement tool; it could be utilised in such a way as to facilitate workplace consultation to achieve outcomes, rather than relying on compliance with an inspector’s notice.

4.6 Enforcement measures

The review will examine how WorkSafe applies its enforcement measures to ensure OHS laws are complied with, enforced and communicated.

Question 23: How effective is WorkSafe in applying enforcement measures to deter non-compliance with Victoria’s OHS laws?

Comment:

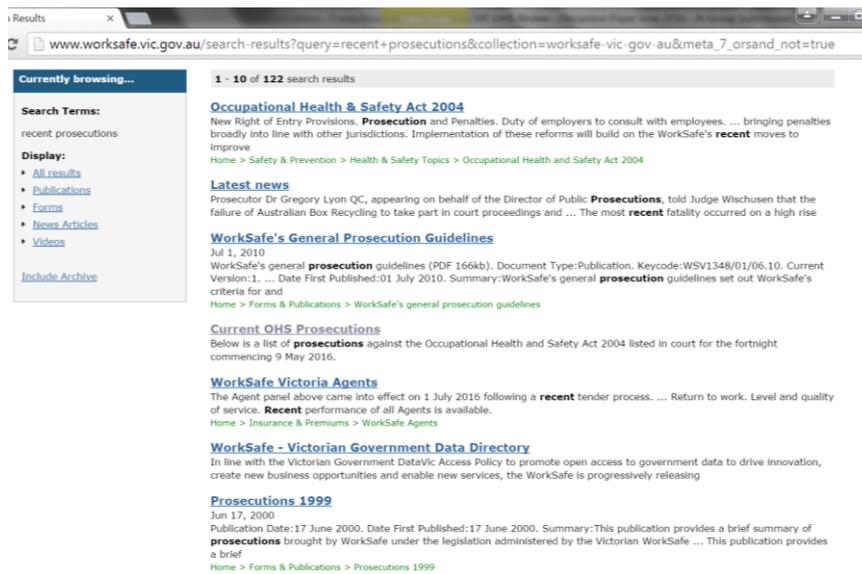
It is Ai Groups view that WorkSafe effectively applies the range of enforcement measures available to them.
See also our answer to question 20.

Question 24: How effective is WorkSafe at promoting its enforcement outcomes for prevention purposes?

Comment:

It is Ai Group’s view that the promotion of enforcement outcomes, and compliance outcomes, is an important part of sharing the message about the importance of health and safety and the key risks and failures that can lead to significant injuries or fatalities. Ai Group regularly utilises case outcomes, in a range of jurisdictions, within our training and communications with employers – to highlight how they should be addressing issues.

The prosecution outcomes published on the WorkSafe website are a useful reference point for those who know that the information exists, and how to find it. The search result below illustrates the difficulty associated with getting to recent prosecutions; with trial and error, clicking on *current prosecutions* (for the fortnight commencing 9 May – although accessed on 28 July) does get you to a page that enables you to access recent prosecutions.



We understand the difficulties associated with getting media coverage of prosecution outcomes, unless the penalty is extremely high, or the breach involves extreme behaviour (such as recent bullying prosecutions). However, it is our view that these prosecutions provide useful information for duty holders and should be more broadly disseminated.

Further, fines that are perceived as being “relatively small” can create an unintended consequence in some people’s minds that OHS breaches are insignificant. However, many of these carry with them a conviction which can have significant impacts on individuals; whilst the descriptions do state whether there was a conviction or not, the dot point outcomes do not address that. It may be beneficial to create more emphasis on the conviction. See example below, with Ai Group’s suggested addition in red:

Court:	Geelong Magistrates’ Court
Coram:	HH Magistrate Mellas
Fine:	\$20,000.00 with conviction
Costs:	\$3,975.00
Published:	08/07/2016
Category:	Failure to provide information, instruction, training or supervision

It may be useful to have the prosecution information that is on the website in a more accessible location, e.g. a link on the home page. It would also be valuable to utilise prosecution outcomes in an informative fact sheet. We note for example that one of the most recent prosecutions is for failing to notify the regulator of a notifiable incident. A case study that highlights these prosecutions and refers to the obligations to notify could form the basis of “prosecution learnings” that could also be included in the prosecution outcomes.

Enforceable undertakings (EUs) have been an alternative to prosecutions since 2004. EUs provide an opportunity for money and other resources that would otherwise be expended on defending a prosecution and paying a fine, being utilised on activities that are directed at improving health and safety; these EUs must include a contribution that is outside the organisation’s direct activities.

Ai Group has always supported the concept of EUs as a way to get good outcomes from unfortunate circumstances.

The WorkSafe website indicates that there have been 43 enforceable undertakings accepted by WorkSafe Victoria since 2007. Averaging at a rate 4.3 per year, this does not seem to be a high level of EUs, and may indicate a lack of willingness either by duty holders to offer EUs or for WorkSafe to accept them. It is not possible for us to consider this, but it would be worth the Review Panel pursuing this question.

It is also our view that there would be benefit in analysing the content of the EUs and the final outcomes they delivered, in order to assess and enhance the effectiveness of EUs as part of WorkSafe’s strategic approach to enforcement.

In addition, it is Ai Group’s view that the learnings from detailed investigations, as part of determining whether or not to prosecute, can provide an invaluable insight into **why** breaches occur. This should include not only the proximate causes of any physical failure, but also the prior thinking that may have contributed to the incident. It would be helpful if these learnings could be distilled, without identifying specific employers or individuals, into information that can be utilised by stakeholders to improve health and safety in their workplaces. For example, if the breach relates to “a lack of guarding”, what was the reason for there being no guarding – “it didn’t come with a guard”; “it slowed the machine down”; nobody thought the guard was useful”.

Question 25: How can WorkSafe’s strategic approach to enforcement measures be improved?

Comment:

We have nothing further to add.

Question 26: Are there any impediments to WorkSafe applying its enforcement measures?

Comment:

Ai Group is not aware of any impediments.

4.7 Working with other agencies

The review panel will look into how WorkSafe works with other agencies to improve OHS standards.

Question 27: How can WorkSafe’s approach to working with other agencies be improved?

Comment:

There has previously been some discussion about combining all the Government regulatory agencies into one organisation. It has been suggested this could create consistency and reduce costs.

AiGroup believes that Worksafe should remain a ‘standalone’ entity and should retain the mandate for both insurance and OHS. Worksafe has managed, across many years and differing Governments, to maintain a strong focus on OHS and reducing premiums, both of which should be important to both employers and employees. This combined emphasis, with a skill based Board in place, has generally been appropriate.

A change to that structure might create an imbalance that would not benefit any party. The Victorian system is considered well throughout the world and is positively viewed within Australia. Whilst there may be value in working in conjunction with other agencies, it must also be at arm's length to them.

The relationship within Worksafe of OHS and insurance must also be maintained. The leverage it provides to Government, Worksafe and the community is envied by other OHS organisations around the world, and has proven to be helpful in Victoria. It must be maintained.

Section 5 – Current and future challenges

The review is interested in compliance and enforcement into the future, as our economy, society and environment are affected by a transforming world.

Question 28: Are there other future challenges that will affect WorkSafe's ability to ensure that OHS laws are complied with, enforced and communicated?

Comment:

A current challenge for many employers is how to deliver a workplace that is, so far as reasonably practicable, safe and without risks to health and safety, for workers who are of advancing years. Whilst the concern is often about potential workers' compensation liability for degenerative conditions, it is a major area of consideration for work into the future.

Another key challenge is the management of health and safety risks when technology is allowing more and more workers to telecommute; this is sometimes driven by employer needs, but often driven by employee requests. Employers, and employees, need to understand what each party should be expected to do in these circumstances, especially when the flexibility associated by these arrangements is sought by the employee.

WorkSafe Victoria Health & Safety Business Unit - Stakeholder Charter & Principles

1. Purpose and application

Stakeholder engagement is critical to WorkSafe Victoria's (WorkSafe) success as a regulator. One of the objectives of the *Occupational Health and Safety Act 2004 (Vic)* is:

- to provide for the involvement of employees, employers and organisations representing these persons, in the formulation and implementation of health, safety and welfare standards

We recognise that working effectively with our stakeholders can deliver a better service to Victorian workplaces and achieve superior health and safety outcomes.

The intent is that this Charter will formalise how WorkSafe's **Health and Safety Business Unit (HSBU)** will engage with **Stakeholder Reference Group (SRG) members** on projects, programs, strategies, initiatives and interventions.

HSBU includes Health & Safety Operations (H&S Ops) and Prevention Strategy Division (PSD). SRG members represent Victorian employers and employees and are a subcommittee of the Occupational Health and Safety Advisory Committee (OHSAC). SRG assist OHSAC in discharging its functions. References to '**stakeholders**' in this document refers to SRG members.

It is recognised that Enforcement Group (EG) and Legislation, Policy & Information Services Division (LPIS) also engage with the Stakeholder Reference Group and have existing consultative mechanisms and legal parameters to work within that are separate to this stakeholder charter.

The purpose of formalising how HSBU engages with SRG members is to improve the effectiveness of engagement with the SRG group, which has a wealth of valuable high-level strategy and operational knowledge. We recognise that this stakeholder engagement is critical to achieving WorkSafe Victoria's vision and mission, including our Strategy 2017 targets.

2. What does successful implementation of the Charter & Principles look like?

Successful implementation of this stakeholder charter means that:

- engagement is actively pursued with relevant stakeholders at the appropriate time;
- the shared principles for stakeholder engagement are enacted;
- stakeholders have a greater understanding of WorkSafe's regulatory processes;
- stakeholders understand the scope and limitations of WorkSafe's role as a regulator;
- opportunities to raise issues early and often throughout decision-making processes are facilitated;
- engagement includes conversation and meaningful regular discussion;
- there is clarity, integrity and trust in the stakeholder engagement process; and
- there is clarity of roles and responsibilities of the regulator and stakeholder forums and groups

WorkSafe's HSBU and SRG members will partner in monitoring whether the Charter & Principles are being successfully implemented.

WorkSafe Victoria Health & Safety Business Unit - Stakeholder Charter & Principles

3. Organisational Context

WorkSafe's 'modern regulator' and constructive compliance approach seeks the right balance of encouragement for effective workplace safety and deterrence for poor performance. This involves prioritising risks, working with industry, stakeholders and the community, and providing people at work with clear advice on how to comply with the law before taking enforcement action.

Our vision - Victorian workers returning home safe every day.

Our mission - Working with the community to deliver outstanding workplace safety, together with quality care and insurance protection to workers and employers.

Legislative mandate - To administer legislation that improves workplace health and safety, public safety, and delivers insurance protection and workers' compensation services for Victorian employers and workers.

Our values -

- **Constructive** - We are constructive in the way we provide information, advice and service.
- **Accountable** - We are accountable for what we do and what we say. We live up to our promises.
- **Transparent** - We work in a transparent way in an environment which is open and honest.
- **Effective** - We are effective by working collaboratively to deliver high quality services.
- **Caring** - We demonstrate care by showing empathy in our dealings with everyone we work with

4. Working together

The aim of WorkSafe's HSBU and key external stakeholders working together is to collaborate in achieving our common goal of contributing to improvements in health and safety in the Victorian community.

We recognise that successful stakeholder engagement involves time, resources and commitment from all parties. If done successfully, we expect stakeholder engagement to have the following impacts:

- Better informed decision-making
- Increased buy-in and ownership
- Achieving superior health and safety outcomes

WorkSafe's HSBU commits to the items in the Stakeholder Charter. To supplement this, we expect our key stakeholders to play an active role in achieving the common goal of superior health and safety outcomes.

SRG members can do this by:

- Participating in working groups / sub-committees etc.
- Providing us with any relevant information that can help our decision making
- Keeping us informed of any relevant changes in industry or hazards

The principles of stakeholder engagement listed below are intended to guide how we work together in a constructive, accountable, transparent, effective and caring manner. Consultation is intended to be consistent with the spirit of legislation surrounding consultation in the Occupational Health and Safety Act 2004, although there is no employee/employer relationship.

WorkSafe Victoria Health & Safety Business Unit - Stakeholder Charter & Principles

5. Legal and Policy Parameters

It is important for WorkSafe to clarify how this engagement process fits into relevant decision making systems, particularly as the Stakeholder Charter is designed to be for the whole Health and Safety Business Unit, but also needs to recognise that the delivery of certain regulatory functions will sometimes mean that WorkSafe will be unable to have discretion as to how we engage with key external stakeholders. As stated above, this Charter does not apply to Legal Policy & Information Services and Enforcement Group.

Role of the regulator

It is particularly important to emphasise that this commitment will not apply to those administering health and safety legislation (eg. inspectors appointed under the OHS Act, those authorised to perform a function or exercise powers on behalf of WorkSafe). In many cases, delivering regulatory functions requires WorkSafe to withhold confidential and classified information, which may only be discussed with relevant parties and not a broader stakeholder group.

Similarly, WorkSafe is unable to consult on regulatory functions such as investigations, prosecutions and other matters subject to legal privilege, Freedom of Information exemptions or privacy legislation. Certain matters may fall into the 'inform' column when they are no longer confidential (eg. completed prosecutions), which can then be provided to a broader stakeholder group. WorkSafe will consider requests for information on discretionary matters.

The Victorian Occupational Health and Safety Compliance Framework Handbook ('the Handbook')

WorkSafe's Legislation Policy & Information Services Division (LPIS) engages with stakeholders on various matters including legislation, Regulations, Compliance Codes, WorkSafe Positions and non-statutory guidance. The Handbook provides a comprehensive explanation of how WorkSafe engages with its stakeholders for these business activities. In this context, whilst the Stakeholder Charter is intended to complement the Handbook – the Handbook will remain the primary document outlining how LPIS will conduct its stakeholder engagement activities.

WorkSafe Victoria Health & Safety Business Unit - Stakeholder Charter & Principles

ENGAGEMENT LEVEL



INFORM	CONSULT	INVOLVE	COLLABORATE
Goal:	Goal:	Goal:	Goal:
To provide stakeholders with balanced and objective information to assist them in understanding the problems, alternatives, opportunities and/or solutions	To obtain stakeholder feedback on analysis, alternatives and/or decisions	To work directly with stakeholders throughout the process to ensure that stakeholder concerns and views are consistently understood and considered	To partner with stakeholders in each aspect of the decision including the development of alternatives and the identification of the preferred solution
Commitment to stakeholders:	Commitment to stakeholders:	Commitment to stakeholders:	Commitment to stakeholders:
We will keep you informed	We will keep you informed, listen to and acknowledge concerns and provide feedback on how stakeholder input influenced the decision	We will work with you to ensure that your concerns and aspirations are taken into account in the alternatives developed and provide feedback on how stakeholder input influenced the decision	We will look to you for direct advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible
Examples to consider:	Examples to consider:	Examples to consider:	Examples to consider:
<ul style="list-style-type: none"> • Changes in operational structure • Operational policy 	<ul style="list-style-type: none"> • Operational strategy • Strategic projects • Guidance material 	<ul style="list-style-type: none"> • Proactive projects and programs 	<ul style="list-style-type: none"> • Prevention fund projects • Stakeholder-led initiatives such as alerts and guidance specific to industry that may be co-branded
Possible process:	Possible process:	Possible process:	Possible process:
<ul style="list-style-type: none"> • Website • Email contact list • Marketing • Seminars 	<ul style="list-style-type: none"> • Broad call for comments or submissions • Direct approach for advice 	<ul style="list-style-type: none"> • Stakeholder workshops and meetings • Forums • One-to-one discussions 	<ul style="list-style-type: none"> • Working groups/project committees • Technical advisory groups • Innovation projects

WorkSafe Victoria Health & Safety Business Unit - Stakeholder Charter & Principles

OVERRIDING PRINCIPLE - WorkSafe Victoria's stakeholder engagement is undertaken with the intention of helping to scope, inform and implement constructive action in delivering WorkSafe's vision and mission. This engagement will be undertaken in a manner that promotes success (informative, consultative, involving and collaborative), consistent with the spirit of our corporate values and within our legislative mandate.

- 1. CONSTRUCTIVE PURPOSE** – We support stakeholder engagement as a process to make better decisions that incorporate the interests and concerns of all affected stakeholders. Engagement should also meet the needs of WorkSafe to take constructive action towards delivering WorkSafe's vision and mission.
- 2. RIGHTS & RESPECT** – We recognise the rights of workplace parties and their representatives to access information, provide feedback, be consulted and actively participate in decision making
- 3. TRUST** – We will undertake and encourage actions that build trust and credibility for the process amongst all the participants
- 4. TRANSPARENCY** – We will encourage the disclosure of all information relevant to the stakeholder's understanding and evaluation of a decision. We will give feedback on how engagement informs decision making.
- 5. INCLUSIVE & BALANCED** – We will ensure that all stakeholders have fair and equal access to engagement processes and the opportunity to impact decision making where possible
- 6. RESPONSIVE & TIMELY** – Stakeholder engagement will be undertaken as early in the process as possible to permit consideration and constructive debate, allowing a greater range of solutions to emerge and to raise the chances of successful implementation
- 7. COMMITMENT & ACCOUNTABILITY** – We ensure that all commitments made to stakeholders are made in good faith and accept that we are accountable for decisions, actions and omissions that we make in relation to WorkSafe stakeholder activities.
- 8. EFFECTIVENESS** – We will create mechanisms and measurements to ensure the effectiveness of stakeholder engagement and ensure we are outcome-focused in our interactions