

# Overview of how inspectors deal with specific issues



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## **1. Overview of how inspectors deal with entry to a workplace, premise or site under the OHS legislation**

Inspectors generally enter a workplace, premise or site (to be collectively referred to as a workplace throughout this procedure) as part of planned (project) work or as response work (following an incident, a request for attendance detailed in a service request or having observed an OHS issue requiring attention). Once at the workplace, inspectors may:

- assess whether the dutyholder is complying with OHS legislation;
- enforce compliance with OHS legislation;
- determine certain OHS matters which are unresolved or may be in dispute;
- provide advice and guidance to workplace parties on how to comply with their obligations;
- promote and discuss systematic management of OHS issues; and
- promote and discuss representative arrangements in the workplace.

Section 98 the *Occupational Health and Safety Act 2004* (the OHS Act), empowers an inspector to enter a place that the inspector reasonably believes is a workplace at any time during working hours to inspect, examine and make enquiries as necessary. However an inspector may enter any place at any time if the inspector reasonably believes that there is an immediate risk to the health and safety of a person arising from the conduct on an undertaking at the place.

There are similar provisions relating to entry to a place under s.13 of the *Dangerous Goods Act 1985* (the DG Act) and entry to an equipment site under s.14 of the *Equipment (Public Safety) Act 1994* (the EPS Act).

**Note:** the power of entry under the OHS legislation cannot be exercised in respect to a place that is used exclusively for residential purposes without the consent of the occupier or under the authority of a search warrant.

**Also note:** there are limitations on inspectors' power to enter workplaces covered by the Commonwealth Occupational Health and Safety Act 1991 – see *Overview of how inspectors deal with Victorian OHS legislation at Commonwealth workplaces*.

Inspectors are not required to pre-notify or make an appointment to enter a workplace, premises or site, but they may do so.

Section 102 of the OHS Act requires an inspector, to take all reasonable steps to, immediately on entry, notify the occupier and if members of any designated work group (DWG) are affected in any way by the entry, a health and safety representative (HSR) for the DWG.

Section 102(2) of the OHS Act provides that an inspector is not required to notify these persons or produce their inspector identification card if:

- (a) to do so would defeat the purpose for which the place was entered or cause unreasonable delay; or
- (b) the person is already aware that the inspector has entered the place or was notified in advance of the entry. Note: It is WorkSafe Victoria policy that when entering under s.102(2)(b), inspectors will show their inspector identification card.

There are similar provisions in s.14(2) of the DG Act, and s.15(2) of the EPS Act.

Inspectors should record in their inspector notebook the reasons for conducting an inspection without notifying the occupier and relevant HSR(s) or producing their inspector identification card.

It is WorkSafe policy that inspectors make notes of conversations, observations and draw diagrams when they have entered a workplace, premises or site.

Inspectors will generally focus their inspection activity on matters relevant to the purpose of their entry to the place concerned. Inspectors will advise relevant HSRs (if any) of their rights (under s.69 of the OHS Act) to accompany the inspector during the inspection and be present at any interview between the inspector and any member of their designated work group (if that person consents to the HSR being present).

In addition to the inspector dealing with the specific issue(s) triggering their attendance at the workplace, premises or site, it is WorkSafe Victoria policy that inspectors also address the following matters:

#### *Representative arrangements*

When an inspector is attending a workplace for the first time (except in circumstances where it is not practical to do so (such as when attending an emergency response), and at 12 monthly intervals if inspections continue at that workplace, inspectors are expected to promote and encourage employee representation. This can be done by:

- inquiring into the presence of HSRs and health and safety committees and how well they are operating; and
- if there are no such arrangements in place, advising the employer and employees on the role of HSRs and health and safety committees and how they can be established.

#### *Section 71 of the OHS Act*

Where there are duly elected HSRs / deputy HSRs, s.71 of the OHS Act requires employers to keep a current written list of HSRs and deputy HSRs and to display this list in the workplace or be otherwise readily accessible.

It is WorkSafe Victoria policy that, at each visit to a workplace that has DWGs (other than in emergency response situations), inspectors will request that the employer show them the written list of HSRs and deputy HSRs for each DWG and confirm that the list is displayed or made readily accessible as required by s.71 of the OHS Act.

Checking this list ensures that the inspector is able to speak with the relevant and duly-elected representatives, and is consistent with the published WorkSafe Victoria policy position on support for HSRs available on the website.

Unless the required list is available, up-to-date and displayed or otherwise accessible to all employees at the workplace, or it becomes so while the inspector is present through *voluntary compliance*, it is WorkSafe Victoria policy that inspectors will issue an improvement notice to remedy the observed contravention.

### *Consultation*

Inspectors are expected to routinely promote and encourage the establishment of suitable arrangements in workplaces to assist employers to meet their duty to consult with employees and HSRs (if any) in accordance with Part 4 of the OHS Act.

### *Other persons attending with inspectors*

Where two or more inspectors visit a site together, one of the inspectors will act as the lead inspector and the other as assisting that inspector. In this situation, one Entry Report will be issued by the lead inspector which should acknowledge any use of powers by both inspectors as is relevant.

Section 122 of the OHS Act provides an inspector with the power to seek the assistance of any person in the exercise of their powers. An inspector may seek help from any person at the workplace or site they attend or they may seek to bring in a person to assist them, for example an interpreter or a technical expert (who may themselves also be appointed as an inspector but would not be acting in that capacity in these circumstances). There are similar provisions under s.19 of the DG Act and s.21 of and EPS Act. The occupier of the place or employer with management and control of the workplace must allow the person assisting the inspector access.

If an inspector is planning to take a person to a place for any other purpose (for example for their education or to do research), prior consent from the occupier of the place must be sought. If consent is not given, the person will not be taken to the place.

### *Maintaining contact with workplaces*

Inspectors are encouraged, where appropriate, to obtain email addresses for the dutyholder or their representative and any HSRs that they deal with at a workplace. WorkSafe Victoria will keep a record of these email addresses for the purposes of forwarding information and guidance material considered to be relevant to those persons.

## **2. Overview of requirements for inspectors when issuing Entry Reports and/or notices following entry to a workplace, premise or site**

Once an inspector has exercised their power of entry under the OHS legislation they are required to provide an Entry Report to the occupier or apparent occupier. The *Occupational Health and Safety Act 2004* (the OHS Act) further requires where there are members of a Designated Workgroup (DWG) a copy of the Entry Report is provided to the Health and Safety Representative (HSR) when or as soon as practicable after the inspector leaves the workplace, premise or site (to be collectively referred to as a workplace throughout this procedure). Section 103 of the OHS Act requires that a report about the entry is provided in writing and details what must be included:

- Time of entry and departure; and
- the purpose of the entry; and
- a description of things done while at the place, (eg the powers exercised); and
- a summary of the inspector's observations while at the place; and
- the procedure for contacting WorkSafe Victoria and the inspector for further details of the entry; and
- the procedure for seeking review of any decision made by the inspector during the entry (note this information is provided in the Entry Report template); and
- if any photographs, sketches or recordings were taken, a statement that advises that such have been taken and where they are or will be available for inspection.

There are similar provisions under s.14A of the *Dangerous Goods Act 1985* (the DG Act) and entry to an equipment site under s.15A of the *Equipment (Public Safety) Act 1994* (the EPS Act).

In accordance with WorkSafe Victoria policy the following should also be included in an Entry Report as is appropriate:

- Summary of the representative arrangements including the arrangements in place, if any, and how well they are working.
- Promotion of consultation in accordance with Part 4 of the OHS Act.
- Verification that the list of DWGs, in accordance with s.71 of the OHS Act was current and displayed or otherwise readily accessible.
- Inspector Identification card was shown.

One Entry Report will be prepared for each visit, regardless of the number of reasons for the visit (unless the inspector exercises powers in relation to more than one dutyholder at the place - such as a principal contractor and sub contractors on a construction site – in which case separate Entry Reports will be prepared for each dutyholder.

**Note:** Meetings with parties at a location other than their workplace (such as a WorkSafe Victoria Office) are not recorded in Entry Reports.

The inspector's Entry Report will generally be provided to the relevant parties at the conclusion of the inspection; that is, when the inspector is leaving the workplace. If it is not possible or appropriate to do so at that time, the Entry Report will be prepared off site and then provided to the parties by the end of the next business day (unless exceptional circumstances apply).

If it is not possible to prepare the detailed Entry Report before leaving the workplace and the inspector forms an opinion that any notices need to be issued, these will be issued in hand-written form (not accompanied by an Entry Report) at that time. A computer-generated copy of the notice may be sent with the subsequently prepared Entry Report.

#### *Service of Notices and Entry Reports*

Section 115 of the OHS Act (and s.17G of the DG Act and s.19E of the EPS Act) details the options for inspectors when serving non-disturbance, improvement and prohibition notices.

Section 64 of the OHS Act includes the same options of service for a Provisional Improvement Notice (PIN) Enquiry Outcome Notice to a person, following a determination as a result of a disputed PIN.

It is WorkSafe Victoria policy that Entry Reports are served by the same method as any accompanying notice.

The service options are:

- (a) deliver it personally to the person or send it by post or fax to the person's usual or last known place of residence or business
- (b) leave it for the person at the person's usual or last known place of residence or business with a person who is apparently over 16 years and who apparently resides or works there, and
- (c) leaving it for the person at the workplace to which the notice relates with a person who is apparently over 16 years and who apparently is the occupier for the time being of the workplace (or site).

Inspectors will generally serve the Entry Report and/or notices *personally* (if dealing with a natural person who is either the dutyholder named in the report/notice or an officer of the dutyholder where the duty holder is a body corporate) or *left for a person*, commonly a management representative (if the dutyholder is a body corporate).

#### *Review of inspectors' decisions*

Section 127 of the OHS Act details which inspectors' decisions are reviewable, listing the provision of the Act that is reviewable and the *eligible persons* who can seek a review (Similar provisions are in s.20 of the DG Act and s.24 of the EPS Act).

It is WorkSafe Victoria policy that inspectors inform persons provided with an Entry Report and/or notices of this right, and, if requested to do so, provide a copy of the WorkSafe-approved form for such application to the person(s).

### **3. Overview of how inspectors deal with Victorian OHS legislation at Commonwealth workplaces**

Prior to 15th March 2007, the *Occupational Health and Safety (Commonwealth Employment) Act 1991* covered only the Commonwealth Government and Commonwealth Authorities and their employees in matters pertaining to OH&S, with Comcare as the regulator.

From 15 March 2007 the name of that Act changed to the *Occupational Health and Safety Act 1991* (the Commonwealth OHS Act) and that Act provides that all non-Commonwealth corporations who are licensed self-insurers under the Commonwealth Compensation Act (referred to as "non-commonwealth licensees") are also covered by the Commonwealth OHS Act. State and Territory Occupational Health and Safety laws are excluded from applying to employers and employees covered by the Commonwealth Act (unless an exception applies).

However, any contract employer or self-employed person that is engaged by the Commonwealth, a Commonwealth Authority, or a "non-commonwealth licensee" to work on their premises remains covered by the Victorian OHS Act (unless the contracted party is also one of those three types of entities). Any employees of the contracted party and any other party sub-contracted by the contractor also remain covered by the Victorian OHS Act.

**Note:** jurisdiction under the Victorian *Dangerous Goods Act 1985* and the *Equipment (Public Safety) Act 1994* is not affected by the changes to the Commonwealth OHS Act in any way.

Before entering the premises of the Commonwealth, a Commonwealth Authority or "non-commonwealth licensee", a Victorian inspector must be of the reasonable belief that the matter for which they are requiring entry relates to a person(s) covered by the Victorian OHS Act. The inspector is able to use their entry powers under the Victorian OHS Act to enter a workplace covered by the Commonwealth OHS Act as long as it is to monitor and enforce compliance with the Victorian OHS Act and regulations by persons who are covered by the Victorian OHS Act, or perform a function that an inspector has under the Victorian OHS Act or regulations at the workplace, for example determining unresolved particulars of a designated workgroup. That is, in relation to persons covered by the Victorian OHS Act, inspectors can exercise any of their powers in the normal way.

On occasions, inspectors may need to obtain information from persons covered by the Commonwealth OHS Act in relation to the issue they are dealing with which involves a person covered by the Victorian OHS Act. In these circumstances, inspectors are able to exercise the following powers under the Victorian OHS Act to deal with the person:

- s.99 – general powers on entry including powers to inspect, examine and make enquiries; inspect and examine anything (including a document); bring in any required equipment or materials; seize anything (including a document) that may afford evidence of an offence against the Victorian OHS Act or regulations; seize anything for examination or testing that cannot reasonably be done on site; and take photographs or measurements or make sketches or recordings;
- s.100 – powers to require production of documents or answers to questions;

s.110 – power to issue a non-disturbance notice; and

s.119 - power to require persons to state their name and address if the inspector reasonably believes the person may be able to assist investigation into an indictable offence under the Victorian OHS Act or the person has committed or is about to commit any offence under the Victorian OHS Act or regulations.

For example:

An inspector is onsite at a Commonwealth, Commonwealth Authority or “non-commonwealth licensee” premises dealing with how a Victorian labour hire company conducts hot work activities. The Victorian employer states that they are using the hot work permit required by the Commonwealth, Commonwealth Authority or “non-commonwealth licensee”. The inspector will make enquiries with the Commonwealth, Commonwealth Authority or “non-commonwealth licensee” using s.99(b) or s.100(1) powers to require the Commonwealth, Commonwealth Authority or “non-commonwealth licensee” to produce the hot work permit work method statement the labour hire employees are required to follow and induction training records relating to that work method statement. The inspector may also make enquiries associated with these documents as part of determining compliance by the labour hire company with their duties under the Victorian OHS Act.

When an inspector exercises any of these powers to obtain information from persons covered by the Commonwealth OHS Act, they will issue an Entry Report to the Commonwealth, Commonwealth Authority or “non-commonwealth licensee” (as relevant) detailing the powers exercised and the purpose of the exercise of the powers (eg to follow the example above, the purpose would be to monitor and/or enforce compliance by the labour hire company with their duties under the Victorian OHS Act).

The Commonwealth, a Commonwealth Authority, or a “non-commonwealth licensee” will commit an offence under the Victorian OHS Act if an inspector is hindered or obstructed in the exercise of their powers, including their power to enter the premises of the Commonwealth, a Commonwealth Authority, or a “non-commonwealth licensee” that is also the premises where a person covered by the Victorian OHS Act works. See *Overview of offences against inspectors*.

#### *OHS Issue under control of the Commonwealth, a Commonwealth Authority or a “non-commonwealth licensee”*

If as part of the visit the inspector reasonably believes that an OHS issue exists that is within the control of the commonwealth entity (and not a person covered by the Victorian OHS Act), it is WorkSafe Victoria Policy that the inspector – although not having power to deal with the commonwealth entity – seek to have the issue addressed (to reduce the likelihood of a person(s) exposure to risk consistent with the principles of health and safety protection) by one of the following means:

- Raise the issue with the commonwealth entity, recommending they deal with the issue (giving appropriate guidance);
- If relevant, use inspector powers in relation to the contractor(s) (who may then put pressure on the principal);
- Raise the issue with a Comcare inspector if they are also at the site at the time of the inspector’s visit; or

- Raise the issue with their line manager to consider whether to refer the matter to the Comcare office in Victoria for them to take any further action they deem appropriate.

#### **4. Overview of processes inspectors are required to follow when exercising the power to collect samples**

When WorkSafe Victoria prosecutes a criminal charge it must prove the case to the criminal standard of "beyond reasonable doubt". In meeting this standard WorkSafe Victoria is required to prove beyond reasonable doubt all the elements of the alleged offence. This can include proving beyond reasonable doubt that the plant or substance which is alleged to have been unsafe to work with is the plant or substance identified, or consists of or has certain properties. WorkSafe Victoria must also be able to prove that the plant or substance produced as evidence in court is the same plant or substance referred to in the evidence.

As a regulatory body WorkSafe Victoria has been given a range of coercive powers under the legislation it administers to ensure that all admissible evidence of criminal conduct be produced to the Court. Inspectors appointed under the Acts administered by WorkSafe Victoria are able to exercise the coercive powers as part of their duties to ensure compliance with the law. In certain instances other employees may be delegated by WorkSafe Victoria to exercise specific powers of the Inspector under the legislation.

The legislation confers upon an inspector/ delegated officer the right to enter a place or workplace to exercise such powers and duties as may be necessary under the Acts or the Regulations made under them. The following Acts include the power to take samples;

- Sections 99(e) and 101 of the *Occupational Health and Safety Act 2004* (OHS Act)
- Sections 13(1)(f) of the *Equipment (Public Safety) Act 1994* (EPS Act)
- Sections 13B and 13D of the *Dangerous Goods Act 1985* (DG Act)
- Sections 18(7) and 20(5) of the *Road Transport Reform (Dangerous Goods) Act 1995*

Sections 13B (1) (e) of the DG Act gives power to seize any thing at that place for further examination or testing. Section 13D of that Act gives specific power to take samples.

Section 101 (1) of the OHS Act empowers an inspector who enters a workplace to take (without payment) samples of any thing at the place that may be required for analysis.

The power to take samples is based upon a potential for analysis. Samples should be taken where there is a need to establish the identity and or composition of a substance. For example there may be occasions when an inspector may need to have a sample analysed in order to assist the inspector form a 'reasonable belief' basis for issuing an improvement or prohibition notice. It may also be necessary to take a sample to potentially be analysed at a later stage to prove the identity or composition of a substance when a matter is the subject of any relevant proceedings under the OHS Act.

Sub-sections 101(2), (3) and (4) of the OHS Act and sub-sections 13 D (3) and (4) of the DG Act, place similar obligations upon inspectors when exercising the power to take samples:

- to notify his or her intention to take a sample to both the occupier (or apparent occupier) for the time being and a health and safety representative for members of an affected Designated Work Group

and, unless it is unsafe to do so, to:

- divide the sample taken into as many parts as are necessary and mark or seal or fasten up each part in a way that the nature of the sample allows
- give one part to each of the persons specified above if they require so
- keep one part for future comparison, and
- to submit another part to an analyst if it is determined that the sample is to be analysed.

## **5. Overview of how inspectors deal with allegations that an employer has failed to consult on OHS matters as required by s.35 and s.36 of the Occupational Health and Safety Act 2004 (OHS Act)**

One of the key objects of the OHS Act is to promote greater involvement and cooperation between employers and employees on workplace health and safety issues.

WorkSafe Victoria believes that consultation is a key element in an effective health and safety management system. Section 4 of the OHS Act details the principles of health and safety that should be taken into account when administering the OHS Act. Section 4(5) recognises the benefits of employee participation in OHS matters:

*Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.*

Giving effect to this principle, the OHS Act and r.2.1.5, *How to involve health and safety representatives in consultation* provide a clear framework for workplace consultation.

Section 35(1) of the OHS Act requires employers to consult, so far as is reasonably practicable, with employees who are, or are likely to be, directly affected by the related matter described in s.35(1)(a)-(g). This duty extends to independent contractors and their employees in relation to matters over which the employer has control or should have control.

### *Meaning of “reasonably practicable”*

WorkSafe interprets ‘reasonably practicable’ in Part 4 of the Act to mean ‘*that which can be done within the limits of reason*’ i.e. that employers must consult with employees to the extent that is reasonable in all the circumstances.

**Note:** The elements of “reasonably practicable” listed in s.20(2) apply only to Part 3 of the OHS Act and the Regulations, not to Part 4.

Employers are not expected to do the impossible but are required to take a proactive and sensible approach to consultation. For example it may not be reasonably practicable to consult with employees who are on extended leave. However it would be appropriate to ensure that these employees are kept informed about any matters that will directly affect or are likely to directly affect their health and safety when they return to work.

### *Who must be consulted?*

The Act requires employers to consult, so far as is reasonably practicable, with

- employees
- health and safety representatives [s.36(2)]
- independent contractors and employees of labour hire companies [s.35(2)]

**Note:** As volunteers are not employees or independent contractors, the duty to consult does not apply. However, the employer must ensure, so far as reasonably practicable, that volunteers are not exposed to risks to their health and safety (s.23). Consultation with volunteers may therefore be valuable in assisting the employer to meet this duty.

### *What does consultation involve?*

Consultation does not mean telling employees about a decision or action on a health and safety matter after it has been taken. Consultation means giving employees an opportunity to shape that decision or action.

Section 36(1) provides that an employer must consult employees by:

- sharing information with employees about the matter
- giving employees a reasonable opportunity to express views about the matter, and
- taking those views into account.

Regulation 2.1.5 provides that an employer must involve a HSR in consultation by:

- providing HSRs with all relevant information. If it is reasonably practicable, the information must be provided to the HSRs a reasonable time before it is provided to the employees
- inviting the HSRs to meet with the employer to consult on the matter or meet with the HSRs at their request, and
- giving the HSRs a reasonable opportunity to express their views on the matter and taking those views into account

### *Ways to consult*

Additional mechanisms for consultation include:

- Health and safety committees (HSCs)
- Consultation procedures as agreed in the workplace
- Face-to-face discussions
- Regularly scheduled meetings such as tool box talks, production meetings, team meetings and DWG meetings.

These additional consultation mechanisms do not replace the requirement to consult with HSRs - HSRs must always be involved in any consultation that affects or is likely to affect the members of their DWG.

### *Agreed procedures for consulting about health and safety*

Section 36(3) provides that although agreed procedures for consultation are not required by the Act, if procedures for consultation have been agreed, they must be followed.

Many workplaces will already have ways to consult on health and safety that suit their needs. Existing health and safety consultation procedures should be reviewed in consultation with employees and HSRs to ensure they are consistent with the OHS Act and r.2.1.5.

Agreed procedures for consultation must:

- be consistent with the OHS Act (i.e. must enable the employer to meet their consultation obligations and cannot remove the powers of a HSR or functions of a HSC)
- be the subject of consultation with employees before they are implemented (if there are HSRs, they must be involved in this consultation)
- be agreed. This means that it is consensual and there has been genuine consultation and agreement between the employer, the HSRs and employees. The procedure must not be imposed by one party or the other or

arise out of a flawed process for reaching agreement. A flawed process for reaching agreement may be one:

- where only a select group of employees participated and agreed with the employer, or
- where agreement is reached through an unrepresentative process eg not all HSRs or all HSC members or all relevant employee representatives, as the case may be, were able to participate in the agreement process.

Where a consultation procedure is consistent with the OHS Act, has been the subject of consultation with employees, is the result of genuine agreement, is being followed by the employer and the employer has not otherwise breached the OHS legislation, then WorkSafe will consider the employer to be compliant with the consultation provisions of the OHS Act.

When an inspector enters a workplace to deal with an allegation that an employer has failed to consult on OHS matters, the inspector will enquire into the matter with the person raising the allegation, relevant HSR(s)/deputy HSR(s) and the employer/employer's representative to obtain their views on what has occurred.

The inspector will also enquire into the matter with other persons if the views of the above-mentioned persons differ and seek documentary evidence of the various views.

The inspector may determine as follows:

1. Consultation did occur - the parties will be advised of this;
2. Consultation did not occur and was not reasonably practicable in the circumstances - the parties will be advised of this, a recommendation made to look into practicability for the future, and benefits of a consultation procedure promoted;
3. Consultation did not occur, was reasonably practicable in the circumstances, and the change is not yet implemented – the parties will be advised of the offence, guidance and advice will be provided on future compliance, and an improvement notice will be issued requiring consultation to now occur;
4. Consultation did not occur, was reasonably practicable in the circumstances, the change is already fully implemented, and there is no evident risk to persons' health and safety - the parties will be advised of the offence, guidance and advice will be provided on future compliance, the inspector will determine if it is reasonably practicable to re-open the matter and if so issue an improvement notice requiring consultation to now occur or otherwise will promote benefits of a consultation procedure;
5. Consultation did not occur, was reasonably practicable in the circumstances, the change is already fully implemented, and there is evident risk to health and safety of employees as a result of the change – the parties will be advised of the offence, guidance and advice will be provided on future compliance, benefits of a consultation procedure will be promoted, and the evident risk issues will be separately dealt with by the inspector including issuing notices where appropriate
6. A valid agreed procedure was in place, but not followed by the employer - the parties will be advised of the offence, guidance and advice will be provided on future compliance, an improvement notice will be issued requiring consultation to now occur in accordance with the agreed

procedure, and if there are other substantive breaches of the Act or regulations evident these will be separately dealt with;

7. A purported agreed procedure is not valid – the parties will be advised that the procedure cannot be used for the purposes of consultation, and guidance will be provided on what a new agreed procedure should include for it to be valid.

In relation to offences identified in scenarios 3, 4, 5 and 6, inspectors may also consult with their Group Leader and consider referring the failure to consult as required by the OHS Act for further investigation and enforcement action where exacerbating factors of recklessness, recalcitrance or recidivism apply.

**Note:** The five indicia for what constitutes an agreed procedure are:

- The procedure must have been the subject of consultation with any HSR and employees directly affected or likely to be affected [see s.35(1)(d)(ii)]
- The procedure must have been agreed, that is being subject of consent and genuine agreement between the employer and relevant employees, not imposed by one party or the other or arising out of a flawed process for reaching agreement (a flawed process for reaching agreement may be one where only a select group of employees participated and agreed with the employer, or - where agreement is intended to be reached through a representative process – not all HSRs or all OHS Committee members or all relevant unions, as the case may be were able to participate in the agreement process):
- The “agreed procedure” must consist of a procedure that is a process or steps for resolving issues (not, for example, something that sets out what the outcome would be in specified circumstances);
- The “agreed procedure” must be consistent with Part 4 of the Act [for example, it must not exclude the right of HSRs to be consulted as specified in s.36(2)] ;and
- The “agreed procedure” must relate specifically to how consultation will occur on matters set out in s.35(1)(a)-(g) (not, for example, be a procedure which exists solely for other purposes such as a grievance or complaint procedure, unless such a procedure is agreed to be utilised for health and safety issues).

## **6. Overview of how inspectors deal with requests to determine unresolved particulars in designated work group negotiations**

A Designated Work Group (DWG) is a grouping of employees who share similar workplace health and safety concerns and conditions.

Division 1 of Part 7 of the *Occupational Health and Safety Act 2004* (OHS Act) sets out how DWGs may be established or varied for a single employer. Section 43 and Section 44 provide that:

- An employee or an employer may initiate negotiations
- An employer must do everything reasonable to ensure negotiations start within 14 days of the request
- A DWG can only be negotiated between the employer and the employees
- An employee may be represented in the negotiations by anyone authorised by them eg trade union official (note: in multi-union workplaces there could be a number of representatives for employees)
- An employer may be represented in the negotiations by anyone authorised by them

Section 44(1) of the OHS Act provides that the negotiation must be directed only at:

- how best to group employees at one or more workplaces so that the employees' OHS interests are represented and secured;
- how best to group employees at one or more workplaces so that the HSR will be accessible to each member of the group;
- the number of HSRs (must be at least one) for each DWG;
- the number of deputy HSRs (if any) for each DWG;
- the term of office (not exceeding three years) of each HSR and deputy HSR; and
- whether the HSRs are to be authorised to also represent independent contractors and their employees (although it may be agreed that the HSR will represent (sub)contractors, they cannot be part of the negotiation for DWGs in relation to the workplace at which they are working as (sub)contractors).

Section 46 of the OHS Act sets out the matters to be taken into account when grouping employees into DWGs

These matters are:

- the number of employees at the workplace(s);
- the nature of each type of work;
- the number and grouping of employees who perform the same or similar types of work eg same type of tasks or who work under the same or similar arrangements eg same shift arrangements, same breaks, working under the same contract or certified agreement, same job grade, being part-time, casual or seasonal;
- the areas at the workplace(s) where each type of work is performed;
- the nature of any hazards;
- any overtime or shift working arrangements; and
- whether other languages are spoken by the employees.

Negotiation has been defined as "a discussion intended to produce an agreement or the activity or business of negotiating an agreement". This means that a position put to one party to elicit comment or feedback would not be a 'negotiation' within the meaning of the OHS Act.

Section 44(2) provides that when the DWG(s) are agreed, the employer must establish the DWG by communicating to all employees in writing as soon as possible. This means the employer must provide a formal statement in writing setting out all the particulars that have been agreed (or determined by an inspector) in relation to DWGs at the workplace(s) of the employer. This statement can be provided to all employees either by letter and/or, if available, email. Merely posting the document on a noticeboard is not considered to be sufficient.

Section 44(3) provides that the parties to an agreement may negotiate a variation of that agreement at any time. Section 44(4) provides that if a variation is agreed, the employer must vary the agreement by communicating the change to all employees in writing as soon as possible, in the manner described above.

#### *Determination by inspector of unresolved particulars*

Section 45 sets out where agreement is not reached within a reasonable time any party to the negotiation may ask WorkSafe Victoria to arrange for an inspector to determine the particulars that are unresolved and the inspector must take into account the matters identified in s.46.

An inspector will make enquiries of all relevant parties to obtain an understanding of their positions and why the particular(s) remain unresolved. The inspector will meet first with the party making the request, and will obtain confirmation from employee(s) that any representative is authorised by them.

If the request for an inspector's determination relates to DWG negotiations for multiple employers, inspectors do not have power to determine unresolved particulars and will provide guidance for negotiating multiple employer DWGs and arrange for the issue to be referred (through the Advisory Service) as a service request to WorkSafe Victoria's Workplace Support and Education Division for support and assistance.

If particulars are resolved during discussions with the parties, the inspector will ask the requesting party to withdraw their request for a determination. Otherwise, the inspector will provide a Notice of Determination of DWG Unresolved Particulars (either at that time or in due course if further consideration is required). It is WorkSafe Victoria Policy that inspectors inform the relevant workplace parties of their right to seek review of the inspector's determination and provide a copy of the Authority-approved form for such application to the person(s) if requested to do so.

#### *Coercion*

Section 53 of the OHS Act prohibits coercion of workplace parties when they are attempting to establish or negotiate DWGs, vary DWG agreements and in relation to representation in negotiations. It is an offence to:

- pressure someone not to make, or to withdraw, a request for a DWG under s.43,
- intimidate someone into not being represented in the negotiations, or
- intimidate someone into being represented by a particular person.

An inspector will make preliminary enquiries into such an allegation and – if it appears the allegation is substantiated – will consider referral for comprehensive investigation.

## **7. Overview of how inspectors deal with requests to conduct an election of HSRs and/or deputy HSRs**

Section 54(4) of the *Occupational Health and Safety Act 2004* (OHS Act) provides that members of a Designated Work Group (DWG) can determine how an election for a HSR is to be conducted. The employer has no role in determining how an election is to be conducted except where an employer who is a natural person is part of the relevant DWG.

Section 54(4) of the OHS Act also provides that if members of a DWG, whether of a single employer or multiple employers, cannot reach agreement within a reasonable time on how to elect their HSR or deputy HSR, any member of the DWG may ask WorkSafe Victoria to arrange for an inspector to conduct the election. The only other role under the OHS Act for inspectors is provision of guidance or advice on election matters.

The election process is identical for both the election of HSR and deputy HSR. However, if an election is required of both roles and an inspector is requested to assist, the inspector will run two parallel but separate elections. A person may wish to nominate for a deputy HSR, if they are not elected as HSR. This would involve two elections, one following the other.

The relevant inspector (with endorsement of their Industry Program Director) may appoint the Victorian Electoral Commission (VEC) or another person to conduct the election(s) on WorkSafe's behalf. A decision made by an inspector to appoint a person to conduct an election of a HSR is a reviewable decision. It is WorkSafe Victoria Policy that inspectors inform the relevant workplace parties of this right and provide a copy of the Authority-approved form for such application to the person(s) if requested to do so.

Section 54(5) of the OHS Act provides that an election must be conducted in accordance with the procedures (if any) prescribed by the regulations. There are currently no such regulations.

The inspector, having determined the request was made by a DWG member, will meet first with the DWG member making the request and then separately with other relevant members of the DWG to obtain views about the disagreement. The inspector will provide advice on conduct of elections. If the DWG members reach agreement during discussions, the inspector will ask the requesting party to withdraw their request for an inspector to conduct the election(s). Otherwise, the inspector will proceed to conduct the election(s) or have the VEC or other person appointed to conduct the election(s).

In either case, the election timing and venue will be determined, the roll of DWG members confirmed, and a letter will be issued to all DWG members calling for nominations. If only one nomination is received for the position(s), the nominated DWG member will be declared elected. If there is more than one nomination for the position(s), the candidates' positions on the ballot paper will be determined by draw in the presence of an employee representative, voting will occur, and the votes will be counted using the preferential voting system (with candidates present if they wish to be). The successful candidate(s) will be declared elected and the inspector (or VEC or other appointed person as relevant) will advise all relevant parties.

## **8. Overview of how inspectors deal with requests to attend workplaces to deal with matters relating to issue resolution processes**

Section 73 (1) of the *Occupational Health and Safety Act 2004* (OHS Act) states that if any health and safety issue arises in the workplace or from the conduct of the undertaking of an employer, the employer or its representative, and the employees affected by the issue or the HSR must attempt to resolve the issue in accordance with the relevant agreed procedure or, if there is no such agreed procedure, in accordance with the prescribed procedure set out in Part 2.2 of the *Occupational Health and Safety Regulations 2007* (the Regulations), *Issue Resolution Procedures*.

### *Agreed Procedures*

Inspectors do not have power to require that agreed procedures be developed. There is no obligation that workplace parties establish agreed procedures.

If there are no agreed procedures for issue resolution at the workplace, then Part 2.2 of the Regulations, *Issue Resolution Procedures* must be followed.

### *Consultation in relation to agreed procedures*

Section 35 (1)(d)(i) of the OHS Act requires employers to consult when making decisions about procedures for issue resolution at the workplace.

If after following this process agreement on a procedure for issue resolution cannot be achieved, then the procedure prescribed in Part 2.2 of the Regulations, *Issue Resolution Procedures* must be followed.

### *Employer Representative*

If the employer appoints a representative for the purposes of s.73, the employer must ensure that the person is not an HSR, and must ensure that the person has an appropriate level of seniority and is sufficiently competent to act as the employer's representative.

### *Inspector may be required to attend the workplace*

Section 75 (1) provides that if the issue is not resolved within a reasonable time any one of the parties attempting to resolve it may ask the Authority to arrange for an inspector to attend the workplace to enquire into the issue.

Section 75 (2) provides that an inspector will attend the workplace as soon as possible after the request is made and take such action the inspector considers necessary [section 75(3)].

Possible issues relating to these provisions which may be raised for inspectors to deal with are:

1. Guidance sought on what should be included in agreed procedures – the inspector will provide this guidance (consistent with WorkSafe Victoria's published guidance);
2. Disputes over whether there should be workplace based agreed procedures or whether Part 2.2 *Issue Resolution Procedures* should apply - the inspector will advise that agreed procedures must be followed if they exist and if there are no agreed procedures the procedures in the Regulations automatically apply; inspectors do not have power to require that agreed procedures be developed but will advise on the benefits of agreed procedures;
3. The agreed procedures are valid agreed procedures as envisaged by the Act - if the inspector determines the purported agreed procedures are not valid the parties will be advised that the procedure cannot be used for the

purposes of issue resolution and guidance will be provided on what a new agreed procedure should include for it to be valid.

4. Allegation that the relevant issue resolution procedure has not been followed – the inspector will advise parties to follow the relevant agreed or prescribed procedure in future and consider referring the matter for comprehensive investigation.
5. That although there has been an attempt at resolution, the issue has not been resolved - the inspector will make enquiries of relevant persons obtaining views on how the matter should be resolved, obtain any other relevant information, and either advise the parties on how the matter ought to be resolved or issue relevant notice(s) if a contravention or immediate risk is evident.
6. That one party is purporting to follow a procedure that is not agreed – the inspector will establish from enquiries what procedure is being followed and whether it is an agreed procedure, and if not, will advise the parties that the steps in the Issue resolution Regulations must be followed unless or until an agreed procedure is formulated; or
7. Allegations (or inspector's observation) that the employer's representative (if any) for the purposes of subsection 73(1)(a) is not appropriately senior or sufficiently competent – if the inspector establishes the employer's representative is not suitably senior and/or competent (consistent with WorkSafe's published guidance), the parties will be advised, an Improvement Notice may be issued requiring the employer to ensure their representative for the purposes of s.73 is suitably senior and competent, and consideration given to referring the matter for comprehensive investigation.

**Note:** The five indicia for what constitutes a valid agreed procedure are:

- The procedure must have been the subject of consultation with any HSR and employees directly affected or likely to be affected [see s.35(1)(d)(ii)]
- The procedure must have been agreed, that is being subject of consent and genuine agreement between the employer and relevant employees, not imposed by one party or the other or arising out of a flawed process for reaching agreement (a flawed process for reaching agreement may be one where only a select group of employees participated and agreed with the employer, or - where agreement is intended to be reached through a representative process – not all HSRs or all OHS Committee members or all relevant unions, as the case may be were able to participate in the agreement process):
- The “agreed procedure” must consist of a procedure that is a process or steps for resolving issues (not, for example, something that sets out what the outcome would be in specified circumstances);
- The “agreed procedure” must be consistent with Part 4 of the Act [for example, it must not exclude the right of HSRs to be consulted as specified in s.36(2)] ;and
- The “agreed procedure” must relate specifically to how consultation will occur on matters set out in s.35(1)(a)-(g) (not, for example, be a procedure which exists solely for other purposes such as a grievance or complaint procedure, unless such a procedure is agreed to be utilised for health and safety issues).

The inspector will consider whether the procedure has been agreed between the employer and the HSRs or majority of employees, endorsed by the Health and Safety Committee (if any), or has been agreed between the employer and relevant union(s) having coverage.

## **9. Overview of how inspectors deal with work cessations under s.74 of the Occupational Health and Safety Act 2004 (OHS Act)**

Section 73 of the OHS Act sets out the mechanisms for dealing with health and safety issues by the parties in the workplace. Section 73(1) provides that if any issue concerning health and safety arises at a workplace the employer or its representative and the Health and Safety Representative (HSR) or deputy HSR as relevant for the Designated Work Group (DWG) or employees affected by the issue shall attempt to resolve the issue, through an agreed procedure, or if there is no relevant agreed procedure, to follow the process prescribed under Part 2.2—Issue Resolution Procedures in the *Occupational Health and Safety Regulations 2007*.

Section 74(1) of the OHS Act provides that the employer and/or the HSR or the deputy HSR as relevant may, after consultation, direct that work shall cease when an issue concerns work which involves an immediate threat to the health and safety of any person and, given the nature of the threat and degree of risk, it is not appropriate to adopt general issue resolution processes.

WorkSafe considers that consultation will have occurred, initiated by either the HSR or deputy HSR as relevant or the employer representative, prior to directing that work shall cease if:

- information about the issue in question has been shared with the other party;
- the other party has been given the opportunity to immediately express their views on the matter; and
- the views if any, have been taken into account before proceeding to act.

Agreement does not necessarily have to be reached, in order to determine that consultation has occurred.

Section 74 (2) entitles the employer to assign affected employee(s) to suitable alternative work when their usual work has ceased by direction. Inspectors cannot advise on exactly what is suitable alternative work, but will advise the employer to take account of the employees' knowledge, skill, training and experience and recommend that any dispute about what is suitable alternative work be dealt with through relevant workplace grievance or dispute resolution processes or – if the alternative work raises a health and safety issue – through issue resolution processes under s.73 of the OHS Act.

Section 75 (1) provides that any of the parties attempting to resolve the issue may ask the Authority to arrange for an inspector to attend the workplace when there has been a direction that work shall cease in accordance with section 74(1). Section 75 (2) provides that an inspector will attend as soon as possible after the request is made in section 75 (1) and take such action as the inspector considers necessary.

Unless all parties agree to meet jointly, the inspector will meet first with the person who directed that work cease to obtain details of the history of the issue, including consultation about the work cessation. (If the person who directed that work cease is not a party attempting to resolve the issue under s.73(1), the inspector will deal with the substantive issue rather than treat the matter as a valid work cessation under OHS Act.) The inspector will then meet with the person making the request for the inspector's attendance to obtain details of why the work cessation is disputed,

including their view about whether consultation about the work cessation occurred. The inspector will seek any other relevant information.

The inspector will first determine if consultation, as required by s.74(1) occurred. If not, the inspector will deal with the substantive issue rather than treat the matter as a valid work cessation under OHS Act.

For a valid work cessation, the inspector will determine if there is in the circumstances an immediate risk and – if controls are not implemented – issue a Prohibition Notice.

If the inspector does not believe there is immediate risk, or it has been remedied in their presence, the inspector will determine whether the employees had reasonable cause for concern for their health and safety and deal with any identified contravention by issuing an Improvement Notice unless the matter is remedied in their presence.

WorkSafe considers there was reasonable cause for concern for employees health and safety when employees had justifiable reasons to believe there was an immediate exposure to a risk to their health (eg from exposure to a hazardous substance) or safety (eg from exposure to unprotected work at heights) whether or not this was, in fact, the case.

The inspector's reason(s) for why a prohibition notice has or has not been issued or why there has or has not been a determination that the employees had reasonable cause for concern for their health or safety will be recorded in the relevant Entry Report.

Section 75 (4) sets out the circumstances when affected employees are entitled to be paid under the OHS Act for not working during a cessation period when the inspector has either issued a prohibition notice in relation to the matter giving rise to the work cessation or determined in writing that there was reasonable cause for employees to be concerned for their health or safety in relation to the matter. (However, as a result of amendments to the federal Workplace Relations Act, an inspector can not specifically advise whether employees have an entitlement to be paid in the event of a cessation of work as this is now a question of federal law, despite provisions in s75 of the OHS Act. Parties will be advised to seek their own advice on the application of the Workplace Relations Act.)

A decision made by an inspector in relation to a work cessation to either issue (or fail to issue) a prohibition notice or determine (or fail to determine) there was reasonable cause for employees to be concerned for their health or safety is a reviewable decision. It is WorkSafe Victoria Policy that inspectors inform the relevant workplace parties of this right and provide a copy of the Authority-approved form for such application to the person(s) if requested to do so.

## **10. Overview of how inspectors deal with requests to attend a disputed Provisional Improvement Notice (PIN)**

Section 60 of the *Occupational Health and Safety Act 2004* (OHS Act) empowers a health and safety representative (HSR), or deputy HSR as relevant, to issue a PIN, where he/she believes on reasonable grounds that a contravention of the OHS Act or Regulations has occurred or is likely to occur in circumstances that make it likely that the contravention will continue or be repeated.

### *Issuing a valid PIN*

- A PIN may be issued to any person on whom duties are imposed by the OHS Act.
- A PIN can only be issued by a HSR/deputy HSR elected under the OHS Act.
- A PIN must be issued to the correct or relevant dutyholder.
- Section 60(2) provides that the HSR (or deputy) may only issue the PIN after consulting with the person about remedying the contravention or likely contravention or matters/activities causing the contravention.
- The PIN must, in accordance with s.60(3):
  - state the HSR/deputy HSR's belief on which the issue of the PIN is based and the grounds for that belief;
  - specify the provision of the OHS Act or Regulations that the HSR/deputy HSR considers has been or is likely to be contravened; and
  - specify a day (at least 8 days after the day on which the PIN is issued) **before** which the duty holder is required to remedy the contravention or likely contravention or the matters or activities causing it.
- The PIN must be given by the HSR to the dutyholder (or their nominated or most senior available management representative if the dutyholder is a corporation) using one of the service methods set out in s.64 of the Act:
  - by delivering it personally, or sending it by post or fax to the dutyholder's usual or last known home or business;
  - leaving it for the duty holder at the usual or last-known home or business address with a person who is apparently over 16 years and who apparently resides or works there;
  - or leaving it for the duty holder at the workplace to which the PIN relates with a person who is apparently over 16 years and who is apparently the occupier for the time being of the workplace.

A PIN must meet all the above-listed dot points to be valid. However, a PIN will not be invalid merely because of:

- a formal defect or irregularity (eg the information in the PIN is inaccurate or incomplete in some way) unless the defect or irregularity causes or is likely to cause substantial injustice; or
- a failure to use the correct name of the person as long as the notice sufficiently identifies the person and it was given to that person by one of the service methods set out in s.64.

### *Obligations of a person issued with a PIN*

When issued with a PIN, s.60(4) of the OHS Act requires the duty holder to do the following:

- (a) if the person is an employee, bring the PIN to the attention of his or her employer; or
- (b) Employers who are given a PIN by an employee as per paragraph (a) or any other persons who were issued with a PIN (eg a manufacturer, designer, partner in a business) must:

- (i) bring the notice to the attention of each person whose work is affected by the notice; and
- (ii) display a copy of the notice in a prominent place at or near the workplace, or part of the workplace, at which work is being performed that is affected by the notice. WorkSafe considers that “prominent display” means open display in a place where the notice will be seen without prior knowledge that it is there and where the relevant people will come across it in the normal course of events and be able to examine it.

It is the expectation that the PIN be displayed within a reasonable timeframe, such as by close of business on the date of issue [or next morning if issued late in the day]. Where the duty holder requests the attendance of an inspector to enquire into a disputed PIN, the PIN should be displayed until the inspector attends to make enquiries into the matter.

It is an indictable offence for the duty holder to fail to comply with a PIN that has not been the subject of a request for an inspector to attend the workplace or a PIN affirmed by an inspector.

#### *Inspector can be required to determine a disputed PIN*

A person to whom a PIN has been issued (or their employer if the person is an employee) may, within seven days after the notice is issued, require an inspector to attend the workplace.

Note: if such a request is made outside 7 days, an Inspector has no power to affirm, modify or cancel the PIN and the PIN remains in play. The role of an inspector in these circumstances is to provide guidance to the duty holder on their obligations and/or deal with an allegation that the PIN has not been complied with if satisfied there was/is a contravention as cited in the PIN.

When requested, an inspector must attend the workplace as soon as possible but before the day specified in the PIN being the day by which the notice must be complied with [s.63(2)]. The inspector must enquire into the circumstances relating to the PIN as soon as possible [s.63(3)(a)].

If an inspector does not attend the workplace before the compliance date, there is no power for an inspector to affirm, modify or cancel the PIN.

The inspector will notify both the HSR and the recipient of the PIN that he or she will be attending the workplace before the compliance date specified in the PIN. When attending the workplace, unless the parties agree to meet jointly, the inspector will meet first with the HSR to obtain history and details of the issue leading to the PIN and then with the person to whom the PIN was issued to obtain details of why the PIN is disputed. Information will be sought from other relevant persons if necessary.

If during discussions, the PIN is no longer disputed or the HSR no longer supports their PIN, the inspector will seek withdrawal of the dispute or the PIN (as relevant). If the PIN remains in dispute, the inspector will determine its validity (in itself, or by application of s.65 of the OHS Act).

If the PIN is determined to be invalid, the inspector will deal with the substantive issue raised in the PIN.

If the PIN is determined to be valid, the inspector will either affirm the PIN, affirm the PIN with modifications, or cancel the PIN.

An inspector is not required to affirm or cancel the PIN prior to the compliance date if they are unable to form their opinion on the matter during the initial attendance at the workplace.

The inspector is required under s.63(3)(b) of the Act to give written notice of his or her decision to affirm (with or without modifications) or cancel the PIN. It is WorkSafe Victoria Policy that a PIN Enquiry Outcome Notice will be also be issued if an inspector determines that the PIN is not valid. A PIN Enquiry Outcome Notice will be given to both the HSR who issued the PIN and the duty holder to whom the PIN was issued. The PIN Enquiry Outcome Notice will, in accordance with s.63(5) set out:

- (a) the basis for the inspector's decision to affirm or cancel the PIN; and
- (b) if the PIN is affirmed, the penalty for contravening the PIN; and
- (c) how the review of the inspector's decision may be sought.

The PIN Enquiry Outcome Notice and associated Entry Report will be given to the relevant HSR and duty holder by one of the service methods set out in s.64 of the OHS Act.

A decision made by an inspector to affirm or cancel a PIN is a reviewable decision. It is WorkSafe Victoria policy that inspectors inform such a person and any relevant HSR or deputy HSR of this right, and provide a copy of the Authority-approved form for such application to the person(s) if requested to do so.

**Note on requirement for HSR to consult prior to issuing a PIN:**

WorkSafe considers that consultation will have occurred, initiated by the HSR (or deputy HSR as relevant), prior to issuing a PIN if:

- the HSR has - verbally or in writing - provided information to the dutyholder (or management representative if the dutyholder is an employer) about remedying the contravention or likely contravention or the matters or activities causing the contravention or likely contravention;  
(Note: it is sufficient for consultation purposes that the HSR raises the activities, matters or things which they believe cause a contravention of the Act or Regulations without having to specify a particular provision of the Act or Regulation at this time, though they may do so. The HSR must have indicated that the contravention or matters or activities causing it needs to be remedied. For the purposes of consultation the HSR does not have to specify the remedy but may suggest option(s) for remedying the believed contravention or matters or activities causing it.)
- the HSR has allowed the person an opportunity to express their views and to contribute in a timely fashion to remedy the alleged contravention or resolve the matters or activities causing the alleged contravention;  
(Note: the person may express their view immediately – in which case the HSR can immediately move to the next step; alternatively, the person may need to take reasonable time to consider the HSR's view, for example to obtain authorisation from a more senior manager or to seek expert advice on the matter – in which case, the HSR needs to allow for a reasonable time to pass for the person to either action the matter if they agree with the HSR or respond otherwise to the HSR before the HSR moves to the next step. "Reasonable time" will vary dependent on circumstances, the issue in the workplace and/or the immediacy of risk, but should not normally be longer than a period of one week for relatively minor matters and two to three weeks for more complex concerns.)
- the HSR has taken into account the views of the person before issuing the PIN.

Consultation can still be said to have occurred even if:

- the dutyholder does not respond to the HSR in a reasonable time or at all. In this case, the HSR can take the failure to respond into account before deciding to issue

the PIN. There does not have to be a two-way exchange - only the opportunity for this to occur;

- there is no agreement between the HSR and the duty holder. The duty holder does not have to agree that there is or is likely to be a contravention or agree with the HSR about how to remedy the matter. The time period for consultation or degree of consultation required is not specified in the Act - it will depend on the circumstances and must be reasonable for the relevant circumstances (see above); or
- the HSR has pre-prepared the PIN which is subsequently issued to the dutyholder (or their representative) after the conclusion of the consultation process. A pre-prepared PIN, or a modified pre-prepared PIN, may be issued if –after the consultation process is complete – the HSR is at that stage not satisfied with the outcome.

Consultation does not require the HSR to have specifically stated they will issue a PIN if they are not satisfied with the outcome of the consultation process (though they can state this). Nor does the consultation process require that the HSR state the penalty implications of issuing a PIN and the dutyholder not complying with it (though they can state this also if they wish.)

**Note on when a PIN is considered invalid:**

A PIN is not valid when any *one or more* of the following is evident:

- The PIN has not been issued by a HSR/deputy HSR elected under the Act
- The PIN has not been issued to the correct or relevant dutyholder (eg to a manager instead of the employer if the contravention that is cited is an employer's duty; or to the wrong employer where multiple employers are involved at the workplace)
- The PIN has not stated the HSR/deputy HSR's belief on which the issue of the PIN is based and grounds for that belief
- The PIN has not specified the provision of the Act or regulations that is likely to be contravened
- The PIN has not specified a day (at least 8 days after the day on which the PIN is issued) before which the dutyholder is required to remedy the contravention
- The PIN does not contain all the matters specified in s.60(3)
- The PIN is capable of misleading the person to whom it is issued
- The PIN was not given by the HSR to the dutyholder using one of the service methods set out in s.64
- The subject matter does not affect the members of the HSR's DWG or independent contractors and their employees that the HSR is authorised to represent
- No consultation with dutyholder:- The HSR has not shared information about the relevant OHS issue with the dutyholder, has not given the dutyholder an opportunity to express their views , or has not taken into account the views of the dutyholder before proceeding to act
- The identified defects are not "formal defects or irregularities" and cannot be corrected by the application of s.65, for example, no compliance date.

## **11. Overview of how inspectors deal with allegations of Provisional Improvement Notice (PIN) non-compliance**

Non-compliance with a PIN issued by an HSR is an indictable offence under s.62 of the *Occupational Health and Safety Act 2004* (the OHS Act). Section 60(4) imposes obligations on the person to whom the PIN is issued relating to raising attention to, and display of the PIN.

WorkSafe Victoria will arrange for an inspector to follow up any service request which alleges non-compliance with a PIN issued by a HSR, including a PIN which has been affirmed (with or without modifications) by an inspector. The inspector will first determine whether the PIN was valid.

Where the inspector determines the PIN as invalid, the inspector will consider and deal with the substantive issue, and provide guidance to the relevant HSR about the requirements for a valid PIN.

It is WorkSafe Victoria Policy that when an inspector observes a valid non-complied PIN and they have formed the belief that the matter that gave rise to the PIN continues to be a contravention, or likely to be repeated, an inspector is to issue an improvement notice directing the duty holder to remedy the contravention (unless “voluntary compliance” is achieved while the inspector is on site).

If a valid PIN has not been complied with, the inspector in conjunction with their Group Leader may refer the matter for comprehensive investigation by WorkSafe Victoria with a view to possible prosecution, letter of caution or enforceable undertaking.

It is WorkSafe Victoria Policy that when a valid PIN has not been complied with and has not been referred for comprehensive investigation a warning letter will be issued to the duty holder (whether or not an Improvement Notice was also issued).

PIN's are not required to be followed up by an inspector unless a service request is received alleging non-compliance.

An invalid PIN cannot be considered for non-compliance for the purposes of a WorkSafe Victoria comprehensive investigation with a view to possible prosecution.

## **12. Overview of how inspectors deal with allegations of discrimination for OHS reasons**

Section 76 of the *Occupational Health and Safety Act 2004* (OHS Act) prohibits conduct by an employer that is listed in s.76(1) if the dominant reason for engaging in that conduct is one of the reasons listed in s.76(2).

Alleged discrimination under s.76 of the OHS Act is one of WorkSafe Victoria's strategic priorities for commencing comprehensive investigations with a view to potential prosecution or enforceable undertaking. It is WorkSafe Victoria Policy that:

- allegations of discrimination against HSRs are dealt with promptly and thoroughly. (Refer to WorkSafe Victoria's policy *Support for Health and Safety Representatives*.)
- allegations of discrimination under s.76 against HSRs or other employees and prospective employees of the Act are directly referred by the Advisory Service to the relevant Group Leader as a service request.
- a service standard applies when dealing with such service requests. First contact by an inspector with the person alleging discrimination is to be made within one day and the first interview with that person or workplace visit (as appropriate to the circumstances) within 3 working days of the service request being received.
- in dealing with alleged discrimination, the inspector's role is to make enquiries and exercise other relevant powers to obtain information so as to form a preliminary view as to whether s.76 has been breached.

WorkSafe Victoria cannot act on anonymous allegations that s.76 has been contravened. However, the initial contact with WorkSafe Victoria may be made on behalf of the person(s) making the allegation by another person such as an HSR, union representative, family member or friend. The person who has allegedly been discriminated against must also be directly spoken with by an inspector/investigator (as relevant) in order for first-hand information (and not "hearsay") to be obtained. The person may have a support person in attendance at any time when speaking with an inspector/investigator.

Preliminary enquiries and evidence gathering by one or more inspectors is aimed at establishing whether or not a reasonable belief can be formed that:

The person who has allegedly been discriminated against is/was an employee or prospective employee who fits one of the descriptors in s.76(2):

- Is/was a HSR
- Is/was a member of a HSC
- Is exercising/has exercised a power as a HSR or member of a HSC
- Is assisting/has assisted or is giving/has given information to an inspector, a HSR, or a member of a HSC; or
- Is raising/has raised an issue or concern about health and safety to an inspector, a HSR, or a member of a HSC, or an employee of the employer.

The person who has allegedly been discriminated against was subject to at least one of the actions listed in s.76(1):

- Dismissal (or threat of same)
- Injury in employment (or threat of same)

- Altering the employee's position to the employee's detriment (or threat of same)
- Refusing/failing to offer employment to a prospective employee, or
- Less favourable treatment to a prospective employee in offering terms of employment

The dominant reason for the conduct listed in s.76(1) was any of the circumstances set out in s.76(2); and

The person engaging in the conduct listed in s.76(1) is the employer or a prospective employer of the person who has allegedly been discriminated against (and not, for example, a third party such as a principal contractor or host employer if the person's direct employer is a contractor or labour hire firm).

**Note:** An alleged s.76 discrimination matter may also be dealt with by the affected employee and employer or their representatives in an industrial relations context. This does not preclude WorkSafe Victoria dealing with the matter in parallel under the Act.

If a disputed Provisional Improvement Notice issued by a HSR raises alleged discrimination under s.76, the inspector should follow the procedure Disputed PIN, but also make enquiries into the matter in accordance with this procedure in order to establish whether there is a contravention of s.76 that can be supported by an inspector.

Once preliminary enquiries and evidence gathering is completed, a case conference will be held involving the relevant inspector, Group Leader and Industry Program Director, together with representation from the Operations Support Division, Legal Services Investigations Division and any other relevant area (for example, where a HSR has allegedly been discriminated against, the Workplace Support and Education Division).

The case conference will determine, on a case by case basis, whether there is sufficient information to form an opinion that discrimination has occurred and, if so, develop an individual case strategy for dealing with the particular matter. More than one case conference may be required for any matter, at different stages of the intervention. Outcomes of the case conference process may include one or more of the following:

- The inspector advises the employer there has been a contravention of s.76(2) and what compliance looks like, and seeks voluntary compliance
- The Authority or an inspector issues an Improvement notice citing s.76(2) as the contravention and directing the contravention to be remedied
- The inspector advises the employer to develop an anti-OHS discrimination policy and raise awareness amongst all management and other employees about the employer's legal obligation to ensure that prohibited action under s.76 does not occur
- The inspector recommends the employer to arrange for counselling and/or mediation by a suitably qualified/experienced person to be offered to relevant individuals involved in the matter
- A prioritised comprehensive investigation is commenced with a view to potential prosecution or enforceable undertaking

- A strategy for managing the intervention post case conference is determined
- If the allegation is not deemed to be a matter involving discrimination, consideration is given to what further actions should be taken, if any.

Where a reasonable opinion is formed that there has been discrimination it is WorkSafe Victoria's aim to preserve or restore the status quo for the person who has allegedly been discriminated against.

### **13. Overview of how WorkSafe deals with allegations of workplace bullying**

All allegations of workplace bullying are to be directed to the Advisory Service in the first instance.

#### *Role of Advisory Service*

Consistent with WorkSafe's approach to other reported hazards, the Advisory Service will first encourage the person alleging bullying to raise the matter in the workplace, either directly or with the assistance of their HSR (if any) through:

- agreed OHS issue resolution procedures or, if there are no such agreed procedures, the prescribed procedures for OHS issue resolution in Chapter 2 of the OHS Regulations 2007 (refer s.73 of the OHS Act); or
- the workplace's own "no bullying" procedure (if any); or
- any other workplace grievance procedure.

If there appears no reasonable prospect of the matter being resolved through such processes, or the matter has been raised through such processes and the person alleging bullying is not satisfied with the outcome, the Advisory Service will:

- Obtain full contact details for the person alleging bullying
- Gather details of the allegation of workplace bullying
- Consider whether the circumstances described fit within the definition of bullying
- Enquire into the persons expectations / expected outcome
- Advise the person that the inspector's role is to:
  - Contact the person and clarify the details of the allegations
  - Make enquiries at the workplace in relation to the existence and adequacy of procedures at the workplace to manage workplace bullying issues
  - Make enquiries at the workplace about the specific circumstances described by the person
  - Determine if there is or has been any contravention(s) of the OHS Act in relation to the matter raised and, if appropriate, take enforcement action.
- Advise that it is not the inspector's role to mediate or conciliate between workplace parties or otherwise directly resolve the matter at the workplace (although inspectors can recommend employers use third party providers for dispute resolution or counselling services as relevant)
- Generate Service Requests and refer them to the Group Leader, Workplace Bullying Intervention Unit
- Send out an Information Pack to the person for each Service Request generated.

#### **Note:**

1. If a person alleging bullying is not willing to reveal their identity to WorkSafe, the Advisory Service will advise the person that WorkSafe cannot intervene in the matter, but will refer the person to the WorkSafe website where guidance on workplace bullying is available.

2. If the person alleging bullying identifies themselves to WorkSafe but is not willing to have their identity revealed to the employer at the relevant workplace, the Advisory Service will advise that inspectors cannot make enquiries into the specific allegations of bullying but may still make enquiries at the relevant workplace regarding the existence and adequacy of procedures for managing workplace bullying issues.

3. If the person alleging bullying is a third party on behalf of another person, the Advisory Service will advise that the inspector will also need to contact the affected person to confirm the nature of the allegations and explain what WorkSafe can do and cannot do in responding to the allegation.

4. If the matter does not fall within the definition of workplace bullying, the person will be referred to an appropriate alternative agency (such as Victoria Police or the Equal Opportunity Commission) if relevant.

#### *Role of inspectors*

When a Service Request for alleged workplace bullying is generated by the Advisory Service, an inspector(s) will:

- Contact the person alleging bullying (and – if that party is a third party – the affected person) to obtain and clarify details of the allegation, including what (if anything) occurred at the workplace in response to the allegation and names and contact details of any witnesses and what they believe each witness can provide to support the allegation;
- Make enquiries at the relevant workplace about the allegations, including steps (if any) taken by the employer in response to the allegations and the outcome of these steps;
- Make enquiries with relevant witnesses;
- Make enquiries as to the existence and adequacy of procedures at the workplace to manage workplace bullying issues; and
- Obtain relevant documentary or other evidence.

**Note:** If the person alleging bullying is no longer an employee at the relevant workplace, the Workplace Bullying Intervention Unit Group Leader will determine what action is to be taken on a case-by-case basis.

The inspector(s) assess all information obtained and will determine if s.21 or s.25 of the OHS Act appears to have been contravened by the employer or any employee respectively and – where appropriate – take enforcement action (including issuing Improvement Notices and/or considering referral of the matter for comprehensive investigation).

The inspector will provide guidance and advice to the employer on effectively managing workplace bullying issues by:

- Referring to or providing a copy of WorkSafe's published guidance material
- Promoting the importance of prevention strategies in workplaces including policies and training of all managers and staff, processes for reporting bullying issues, and processes for responding to allegations of bullying.

The inspector(s), in conjunction with the Workplace Bullying Intervention Unit Group Leader, will consider whether to convene a Case Conference to review information obtained and develop an individual case strategy. Such case conferences will enable involvement and input from psychological risk subject matter experts and relevant WorkSafe officers in Operations Support and Legal Services and Investigations.

The inspector or Group Leader, as relevant, will notify the person alleging bullying regarding next steps and the outcome of the intervention.

## **14. Overview of target timeframe for inspectors' responding to service requests or notifiable incidents**

WorkSafe Victoria's Advisory Service is notified of incidents and receives service requests from workplace parties and others to address health and safety issues. Where appropriate, these are referred to the relevant team leader to arrange for an inspector to deal with the matter.

WorkSafe Victoria has adopted a series of operational service standards to set the maximum target time for inspectors (or the relevant team leader) to make first contact when dealing with the referred matter – either through first attendance at the workplace or through a telephone call with the person notifying the incident or requesting the service.

Note: these service standards are target timeframes not guaranteed timeframes; whilst they are what we aim to meet, resource availability and prioritisation of all commitments may result in target timeframes not always being met. It is not expected that inspectors imperil their own health and safety to achieve these service standards, eg by driving in a manner unsafe for traffic or weather conditions or because they have been inadvertently delayed dealing with a previous matter.

- Notifiable incident
  - emergency response 1 hour metro, 2 hours country
  - serious incident/injury 1 day
- Immediate risk 1 hour metro, 2 hours country
- Alleged non compliance
  - Construction 3 working days
  - All other industry sectors 10 working days
- Allegations of OHS discrimination 1 working day (first contact);  
3 working days (for interview/workplace visit)
- Requests for assistance (general) 10 working days
- Work cessation 2 hours metro, 4 hours country
- Disputed PIN compliance date As soon as practicable before
- HSR elections
  - Construction 3 working days
  - All other industry sectors 10 working days
- DWG issues 10 working days
- ARREO issues 15 minutes (for 'phone contact)  
2 hours metro, 4 hours country
- Trenching notification On day of trenching (if attending)
- Asbestos removal notification On day of removal (if deemed high risk)

- Explosives

As deemed appropriate to  
circumstances

## **15. Overview of how inspectors issue and follow up on notices**

Inspectors are empowered to issue Improvement Notices, prohibition Notices, Non-Disturbance Notices.

Improvement Notices are issued to a person to require them to remedy a contravention or likely contravention of a provision of the Act / regulations, where an inspector has formed a reasonable belief that the person is contravening the provision or has contravened the provision in circumstances that make it likely that the contravention will continue or be repeated.

Prohibition notices are issued to prohibit an activity or the carrying on of the activity in a specified way where an inspector reasonably believes that there is occurring, or may occur, an activity at a workplace, which involves or will involve an immediate risk to the health and safety of any person. The activity or carrying on of the activity in a specified way is prohibited until an inspector certifies in writing that the matters that give or will give rise to the immediate risk have been remedied. A prohibition notice must be issued to the person who has or appears to have control over the activity to be prohibited.

A Non-Disturbance Notice is issued to the occupier (or apparent occupier) of a place to require them to stop the use or movement of, or interference with, a specific item of plant, substance or any other thing at the place, and prevent disturbance of that specified plant, substance or thing or the specific area where it is located. These notices may only be issued where the inspector has formed a reasonable belief that it is necessary to do so in order to facilitate the inspector performing their functions or exercising their powers in relation to the place or any plant, substance or other thing at the place.

It is WorkSafe Victoria policy that inspectors will issue an Improvement or Prohibition Notice in all cases where they reasonably believe there is a contravention or likely contravention, or an activity is occurring at a workplace that involves or will involve an immediate risk to the health or safety of a person or an activity may occur at a workplace that, if it occurs, will involve an immediate risk to the health or safety of a person, unless the matter is addressed at the time of its detection and in the presence of the inspector (i.e. unless “voluntary compliance” is achieved).

It is WorkSafe Victoria policy that inspectors will provide guidance and advice on how the matters that give or will give rise to the contravention or likely contravention identified in any Improvement Notice or on how the matters that give or will give rise to the immediate risk identified in a Prohibition Notice can be remedied by identifying at least one example of “what compliance looks like” (indicating there are options or a choice of ways for achieving compliance for performance based duties) or what can be done to remedy the immediate risk, and by referring to any relevant approved Compliance Code or other relevant published guidance material.

Inspectors' decisions to issue an Improvement Notice, Prohibition Notice or Non-Disturbance Notice are reviewable decisions. It is WorkSafe Victoria policy that inspectors inform persons issued with an Improvement Notice and any relevant HSR or deputy HSR of this right, and if requested to do so, provide a copy of the Authority-approved form for such application to the person(s).

It is an offence for a person issued a notice to not to comply with the notice.

It is WorkSafe Victoria policy that a follow-up visit to the relevant workplace or site is to be conducted by an inspector to determine the compliance status of any notice that has been issued. The timeframe for a follow-up visit is as follows:

#### Improvement Notice

- Immediately after the date / time specified for compliance or within a maximum of 5 working days from that date.

#### Prohibition Notice

- When a duty holder requests that the prohibition notice be certified as risk-remedied;
- At the discretion of the issuing inspector, exercising appropriate judgement relevant to the circumstances and parties involved; and
- For any notice that “remains in force”; at 6-monthly intervals from the date of issue.

#### Non-Disturbance Notice

- Within the 7 (or lesser) days as stated on the notice (to complete the work the NDN was issued to facilitate)

When following up a notice, an inspector may determine – as appropriate to the circumstances – that the notice has been complied with or risk remedied (as the case may be) or not complied with.

Non-compliance may result in referral for investigation or the issuing of a warning letter.

An inspector’s decision relating to certification that matters that are the subject of a cease activity direction in an improvement notice (if included) or a prohibition notice have been remedied (i.e. determined as complied with / risk remedied) are reviewable decisions. It is WorkSafe Victoria policy that inspectors inform the person to whom an improvement notice with a cease activity direction or a prohibition notice was issued and any relevant HSR or deputy HSR of this right at the time they communicate their belief on the compliance status and, if requested, provide a copy of the WorkSafe approved form for application for Internal Review to the person(s).

An inspector may request that WorkSafe apply to the Supreme Court for an injunction compelling the person to whom the notice was issued to comply or be restrained from contravening the Notice.

## **16. Overview of offences against inspectors**

Inspectors have power to enter a workplace, premise or site and to exercise a range of other powers as provided by OHS legislation. The inspector has the right to take such persons as is deemed necessary into the workplace for the purpose of assisting them in their duties.

It is an offence for an occupier or apparent occupier for the time being in charge of the workplace, the employer who has the management and control of the workplace, or an employee to refuse or fail, without reasonable excuse, to provide such assistance as the inspector may reasonably require for the performance of his or her functions or exercise of his or her powers under the OHS Act or regulations.

There are a range of other offences against an inspector:

- A person must not intentionally hinder or obstruct an inspector in the performance of his or her functions or exercise of his or her power under the OHS Act or regulations, or induce or attempt to induce any other person;
- A person must not intentionally conceal from an inspector the location or existence of any other person or any plant, substance or other thing;
- A person must not intentionally prevent or attempt to prevent another person from assisting an inspector; and
- A person must not assault, directly or indirectly intimidate or threaten, or attempt to intimidate or threaten an inspector or a person assisting an inspector.

Offences against inspectors will be referred for investigation with a view to possible prosecution or other legal action as appropriate.



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## WorkSafe Victoria

### Advisory Service

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Phone.....03 9641 1444

Toll-free.....1800 136 089

Email.....[info@worksafe.vic.gov.au](mailto:info@worksafe.vic.gov.au)

### Head Office

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Melbourne 3000

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Website.....[worksafe.vic.gov.au](http://worksafe.vic.gov.au)

### Local Offices

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Bendigo.....03 5443 8866

Dandenong.....03 8792 9000

Geelong.....03 5226 1200

Melbourne

(628 Bourke Street).....03 9941 0558

Mildura.....03 5021 4001

Mulgrave.....03 9565 9444

Preston.....03 9485 4555

Shepparton.....03 5831 8260

Traralgon.....03 5174 8900

Wangaratta.....03 5721 8588

Warrnambool.....03 5564 3200

