VICTORIA

4.1 Summary of the Victorian Act

The Victorian Act expressly states a number of 'key principles' which employers, employees and the Authority should apply. They include:

- All people should be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- Any person who manages, owns or controls workplaces is responsible for eliminating or reducing those risks so far as practicable.
- Employers and self employed persons should be proactive[1] and take reasonably practicable measures to ensure health and safety.
- Employers and employees should exchange information and ideas about risks to health and safety and the measures that can be taken to eliminate or reduce those risks.
- Employees are entitled and should be encouraged to be represented on health and safety issues.

The Acts main *duties* and *responsibilities* can be summarized as the following:

- The Act makes it clear that the duty to ensure health and safety requires all reasonably practicable steps to be taken to eliminate risks or, if they cannot be eliminated, to reduce them.
- The duty to safeguard the health of employees expressly covers psychological as well as physical health.
- Compliance with a relevant compliance Code will conclusively demonstrate that the Act has been complied with. This is different to the way in which Codes are used in other jurisdictions.
- Designers of buildings or structures for use as or for a workplace have a duty to ensure that the buildings or structures are designed to be safe and without risks to health.
- Owners of a workplace, who have management or control, have a duty to ensure the workplace is safe.
- Specific workplace incidents resulting in death or serious injury or the threat of such incidents must be reported to the Authority, with the site being preserved until there is a direction made by an Inspector. This follows the inclusion of reporting requirements previously contained in regulations.
- The meaning of 'officer' of a corporation, association or partnership is clearly defined. Liability of officers is not confined to offences in which they consented or connived or which occurred because of their willful act of neglect. An officer will be liable if an OHS contravention arose from their failure to take reasonable care having regard to the officer's knowledge, role and other matters. Volunteers are excluded from this provision.

The act of any employee, agent or officer acting within the actual or apparent scope of their employment or authority will be the act of the corporation for the purposes of liability under the Act.

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[1] See, for instance *Holmes v R E Spence and Co Pty Ltd* (1992) 5 VIR 119 at 123. Here the judge said; 'An employer's responsibility is to be discharged by an "active and imaginative" and flexible approach to potential dangers in the knowledge that human frailty is an ever present reality.' Foll. in *Awwad v Amcor Packaging (Australia) Pty Ltd* [2008] SAIRC 8.

CHAPTER 4 – Victoria

4.2 The aim and intent of the Act

The Victorian Act lists its objects as:

- To secure the health, safety and welfare of employees and other persons at work;
- To eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work;
- To ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
- To provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards.[1]

Having regard to the principles of health and safety protection which are set out in section 4.

The Act gives a narrative account of why safety at work is important, setting out a number of *principles*:

1. The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
2. Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
3. Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
4. 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.
5. Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.[2]

Then, further on, the Act relates in even more detail the 'concept' of ensuring health and safety as including the following requirements:

1. To avoid doubt, a duty imposed on a person to ensure, so far as is reasonably practicable, health and safety requires the person –
   (a) to eliminate risks to health and safety so far as is reasonably practicable; and
   (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.[3]
2. To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety
   (a) The *likelihood* of the hazard or risk concerned eventuating;
   (b) The *degree* of harm that would result if the hazard or risk eventuated;
   (c) What the person concerned *knows*, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
   (d) The availability and suitability of ways to *eliminate* or reduce the hazard or risk;
   (e) The *cost* of eliminating or reducing the hazard or risk.

Employers are required to examine the particular circumstances of their own workplaces and craft the best way to minimise those hazards they determine exist. The above 'concepts' provide a framework and approach to engage in that hazard identification and management process.

[1] *WHS Act* s 2.
[2] *WHS Act* s 4.
[3] *WHS Act* ss 20.

4.3 Employers' duties

The Act states the major duty of an employer to their employees as to, so far as is reasonably practicable[1], provide and maintain for employees of the employer a working environment that is safe and without risks to health.[2]

The Act goes on to expand (but not limit it) the general duty to a number of more specific duties:

1. To provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health[3].
2. To make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances.
3. To maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health.[4]
4. To provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer.
5. To provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.[5]

In undertaking these duties, independent contractors engaged by an employer and anyone employed by that independent contractor are taken to be employees – so identical duties are owed with regard to their safety as are owed to employees.[6]

4.3.1 Duty to monitor health

One of the ways that the Act requires employers to undertake their duty to ensure that employees' health is protected is to monitor the health of those employees.[7]

An employer must, so far as is reasonably practicable monitor the health of employees of the employer, monitor conditions at any workplace under the employer's management and control and provide information to employees of the employer (in such other languages as appropriate) concerning health and safety at the workplace, including the names of persons to whom an employee may make an enquiry or complaint about health and safety.

In order to fulfil this duty to monitor an employer must, so far as is reasonably practicable keep information and records relating to the health and safety of employees of the employer and employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees of the employer.

4.3.2 Duty to others

An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.[8]

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[1] See the next section on what is reasonably practicable.

[2] *OHS Act* s 21(1). See *Chugg v Pacific Dunlop Ltd* [1988] VR 411 esp. at 414-416; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; *Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181.

[3] For a discussion of the meaning of the phrase 'safe and without risks to health' see *TTS Pty Ltd v Griffiths (1991) 105 FLR 255 at 267*.

[4] See also *OHS Reg* 2.1.1.

[5] *OHS Act* s 21(2).

[6] *OHS Act* s 21(3). The duty owed to independent contractors is only in relation to matters over which the employer has control. The section does not allow, for the purposes of OHS liability, for the employer to agree to transfer responsibility for those issues to the contractor. See *Stratton v Van Driel Ltd* (1998) 87 IR 151; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187.

[7] *OHS Act* s 22. See also *OHS Reg* 2.1.3.

[8] *OHS Act* s 23.

4.4 Meaning of reasonably practicable

The Act specifically defines what is meant by 'reasonably practicable' in section 20. It states:

'To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety –

(a) the likelihood of the hazard or risk concerned eventuating;

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

(e) the cost of eliminating or reducing the hazard or risk.'[1]

Reference should also be made to the first part of section 20(1) of the Act. This section states:

'To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person –

(a) to eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.'

One of the leading cases to examine the issue in Victoria is the case of *Chugg v Pacific Dunlop Ltd*[2]. Justice of Appeal Ormiston stated that the process a duty holder had to engage in was to obtain knowledge of industry practice in relation to a particular potential hazard:

> The question then arises of taking that knowledge into account together with the other factors in the definition, namely the severity of the particular hazard or risk, any ways of removing or mitigating the hazard or risk, and finally the cost of its removal or mitigation. All of those factors will have to be weighed objectively by the Magistrate or jury in determining whether, so far as was

practicable, the employer provided or maintained a safe working environment and one that was safe and without risks to health.[3]

[1] *OHS Act* s 20(2). See Chapter 3 for a discussion of 'reasonably practicable' in the context of the harmonised Act. But a typical example of judicial consideration of this phrase is found in the English case of *Edwards v National Coal Board* [1949] 1 KB 704 where Lord Justice Asquith said: 'A computation must be made by the [duty holder] in which the quantum of risk is placed on one scale and the sacrifice involved in the measure necessary for averting the risk (whether in money, time, or trouble) is placed in the other; and if it be shown that there is a gross disproportion between them – the risks' insignificant to the sacrifice – the defendants discharge the onus on them.'

[2] [1999] 3 VR 934. The judgment in this case was upheld by the High Court in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

[3] [1999] 3 VR 934 at 965.

4.5 Other persons who have duties under the Act

In addition to the duties imposed on employers, there are a number of others under the Act who have duties in relation to OHS – most of which are not covered in detail in this chapter. They include

- Self employed people – OHS Act s 24;
- Employees – OHS Act s 25[1];
- People who manage or control workplaces – OHS Act s26;
- Designers of Plant – OHS Act s 27;
- Designers of buildings and structures – OHS Act s 28;
- Manufacturers of plant and substances – OHS Act s 29;
- Suppliers of plant and substances – OHS Act s 30[2];
- Installers, erectors and commissioners of plant – OHS Act s 31.

In addition, there are a number of other 'general' duties imposed on all people. For instance, the Act states that a person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence[3].

[1] See *R v Reynolds*, (unreported), Victorian County Court, Judge McInerney, 24 February 2004.

[2] See for instance *WorkCover Authority of NSW v Arbor Products International (Australia) Pty Ltd* (2001) 105 IR 81 for a prosecution in NSW in relation to this duty.

[3] *OHS Act* s32.

4.6 Consultation – minimum requirements

One of the major duties under the Victorian Act is the duty to consult[1]. Worksafe Victoria provides important guidance to business about the minimum consultation requirements. Consultation is a philosophy underpinning occupational health and safety in Australia – health and safety systems will be more effective if workers (and other stakeholders) are involved in 'their own' safety, rather than systems being 'imposed' from the top down.

Consultation is also important because, having effective consultation processes in place is looked at favourably by courts during the sentencing phase of any court proceeding after a successful prosecution.

Below outlines what employers need to do as a minimum to achieve compliance with the duty to consult. It should supplement guidance provided in Victorian WorkSafe's publication *Consultation on health and safety – A handbook for workplaces*, WorkSafe's *HSR Policy* in relation to consultation and *An overview of how inspectors deal with specific issues* containing information on enforcement of the employer duty to consult.

Employers must consult with employees on the matters listed below so far as is reasonably practicable[2]. This means that employers must consult with employees where that is reasonable in the circumstances – depending on factors such as the size and structure of the business, the nature of the work that is carried out and other relevant factors.

Employers also must involve Health and Safety Representatives (HSRs) (if they exist in the workplace) in consultations on matters affecting, or likely to affect, the health and safety of their work group members[3] – regardless of whether with or without the direct involvement of the Designated Work Group (DWG). This can be achieved either by:

- Consulting directly with employees and HSRs together;
- Consulting directly with employees and HSRs separately; or
- Consulting with employees via HSRs without the involvement of employees directly, provided this has been agreed in a procedure for consultation in the workplace.

Where there is no HSR, consultation must be undertaken directly with employees.

Employers must consult with independent contractors and their employees where the principal employer has control, or would have control if not for an agreement to the contrary, over work, or premises or other aspects of a workplace.[4] A person cannot 'contract out' of their OHS duties – an important principle found in every State and Territory. However, the independent contractor, sub-contractor or labour hire firm, as direct employers, still have a duty to consult with their employees.

4.6.1 Volunteers

Because volunteers are not employees or independent contractors, the duty to consult does not apply. However, the employer must ensure so far as is reasonably practicable that volunteers are not exposed to risks to their health and safety. Consultation with volunteers is therefore still prudent and can assist the employer to meet their duties.

4.6.2 The consultation process

Consultation *must* involve:

- Sharing information with employees about the matter;
- Giving employees a reasonable opportunity to express views about the matter, and;
- Taking those views into account.

When employees are represented by an HSR, the consultation must involve the HSR and they must be provided with all relevant information about the matter and, if reasonably practicable, a reasonable time before it is provided to employees. Consultation must proceed with the employer:

- Inviting the HSR to meet or meeting with the HSR at their request, and;
- Giving the HSR a reasonable opportunity to express their views on the matter and taking those views into account.

Employers must provide the opportunity and adequate facilities (eg providing a meeting room and time) for affected employees and their HSR(s) to come together to consider the information that has been provided, to discuss the issues and form their views.

WorkSafe makes it clear that consultation must occur at certain specified times. These include:

- When identifying or assessing hazards or risks;
- When making decisions on how to control risks;
- When making decisions about the adequacy of facilities for employee welfare;

- When making decisions about procedures to:
  - resolve health and safety issues
  - consult with employees on health and safety
  - monitor employees' health and workplace conditions
  - provide information and training
  - determining the membership of any Health and Safety Committee (HSC) in the organisation
- When proposing changes that may affect employees' health or safety to any of the following:
  - The workplace;
  - Plant, substances or other things used in the workplace, or;
  - The work performed at the workplace.
- When doing any other thing prescribed by the *Occupational Health and Safety Regulations 2007*.

While employers, HSRs and employees should aim to reach agreement as a result of consultation, agreement is not a required outcome of the *Occupational Health and Safety Act 2004* (OHS Act). An employer is still ultimately responsible for making decisions about health and safety, and controlling risk so far as is reasonably practicable.

4.6.3 Mechanisms for consulting with affected employees – and resolving issues

The Act sets out the general requirement that employers must consult with employees. The Regulation requires that HSRs must be included in consultation if there are HSRs in the workplace.

According to Victorian WorkCover, procedures for consultation should be agreed upon with a majority of employees and then followed. Agreed procedures must:

- Be genuinely agreed ie there has to be genuine consultation and agreement about the procedures between the employer, the HSRs and employees, and it has not been imposed by one party or the other, or arisen out of a flawed process for reaching agreement, such as reaching agreement through an unrepresentative process;
- Be consistent with the OHS Act (see below);
- Be the subject of consultation with employees (and HSRs, if elected) before they are implemented.

Again, WorkCover suggests that 'agreed consultation procedures' should include:

- The matter an employer must consult about;
- Who will be consulted;
- The ways consultation will occur eg through HSRs, the HSC, regular meetings, tool box talks;
- How information will be shared with employees and HSRs;
- What opportunities will be provided for employees and HSRs to give their views on proposed matters, as well as how feedback will be given to HSRs and employees;
- How consultation will occur with any employees who have special language and literacy needs[5]; and
- Timelines for reviewing the procedure.

The Act states[6] that if an issue concerning health or safety arises at a workplace or from the conduct of the undertaking of an employer, then both the employer or its representative and the employees affected

by the issue or, if there is a designated work group in relation to which the issue has arisen, the health and safety representative for that group must attempt to resolve the issue in accordance with the relevant agreed procedure or, if there is no such procedure, the relevant procedure prescribed by the regulations.[7]

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[1] The main duty to consult is found in s 35 of the Act.

[2] For a discussion of what this phrase means, see above at [2.4].

[3] *OHS Act* s 36(2).

[4] See *R v ACR Roofing Pty Ltd* (2004) 11 VR 187.

[5] See the Victorian *Compliance Code – Communicating occupational health and safety across languages*.

[6] *OHS Act* s 73.

[7] The default procedure is found in Part 2.2 of the Regulations.

4.7 Designated workgroups

An employee may ask his or her employer to establish designated work groups of employees of the employer at one or more workplaces[1] – and if the employee does so ask, the employer must establish such a group or groups.

The particulars of the designated work groups are to be determined by negotiation between the employer and employees. The employer must do everything reasonable to ensure that negotiations start within 14 days after the request.

The negotiations between employer and employees regarding workgroups need to include discussions regarding the manner of grouping, into one or more designated work groups, employees at one or more workplaces that best and most conveniently enables the interests of those employees relating to occupational health and safety to be represented and safeguarded, and best takes account of the need for a health and safety representative for the designated work group or groups to be accessible to each member of the group and the number (which must be at least one) of health and safety representatives for each designated work group.[2]

The negotiations must also address the number of deputy health and safety representatives (if any) for each designated work group, the term of office (not exceeding 3 years) of each health and safety representative and deputy health and safety representative (if any), and whether the health and safety representative or representatives for the designated work group or groups are authorised also to represent independent contractors, or a class of independent contractors, engaged by the employer, and any employees of such independent contractors, who work at a workplace at which members of the designated work group or groups work.

The Act requires that if the negotiations result in agreement on the above mentioned items an employer must establish the designated work group or groups (as agreed) by giving written notice to the employees.[3]

The parties to an agreement concerning a designated work group or groups may, at any time, negotiate a variation of the agreement. The Act allows employees to be represented by a person of their choosing in these negotiations. If no agreement can be reached between an employer and employees (or their representatives) an inspector can be called upon (by either party) to determine the outcome.[4]

There are a number of things that the Act says must be 'taken into account' in the negotiations (or by an inspector, if he or she is called in). They include:

1. The number of employees at the workplace or workplaces;
2. The nature of each type of work performed at the workplace or workplaces;
3. The number and grouping of employees who perform the same or similar types of work or who work under the same or similar arrangements;

4. The areas at the workplace or workplaces where each type of work is performed;
5. The nature of any hazards at the workplace or workplaces;
6. Any overtime or shift working arrangements at the workplace or workplaces;
7. Whether other languages are spoken by the employees[5].

The Act also allows for the grouping of employees from different employers into the same workgroup. This would be appropriate if a number of employees employed by different employers worked at the one workplace.[6]

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[1] *OHS Act* s 43.

[2] *OHS Act* s 44.

[3] *OHS Act* s 45.

[4] *OHS Act* s 46.

[5] See Victorian *Compliance Code – Communicating occupational health and safety across languages.*

[6] *OHS Act* s 47-51.

4.8 Health and Safety representatives

The Act requires that a health and safety representative for a designated work group is to be elected by the members of the designated work group.[1] A person is only eligible to be a representative if that person is a member of the workgroup and is not disqualified after an employer application for disqualification is successful (see s56 of the Act). All employees in the workgroup are eligible to vote for the representative. Members of the workgroup determine how an election is to be held, and if they cannot reach agreement they can ask an inspector to determine a procedure. Generally representatives are elected for three years – or less if the work group determines a lesser period.

The rules in relation to deputy OHS representatives are the same.

4.8.1 Powers of representatives

The Act sets out the power of representatives as including:

1. Inspect any part of a workplace at which a member of the designated work group works both at any time after giving reasonable notice to the employer concerned or its representative, and immediately in the event of an incident or any situation involving an immediate risk to the health or safety of any person;
2. Accompany an inspector during an inspection of a workplace at which a member of the designated work group works;
3. Require the establishment of a health and safety committee;
4. If a member of the designated work group consents, be present at an interview concerning occupational health and safety between the member and an inspector or the member and the employer concerned or its representative;
5. If the health and safety representative is authorised to represent an independent contractor engaged by the employer and that person consents, be present at an interview concerning occupational health and safety between the person and an inspector or the person and the employer concerned or its representative;
6. Whenever necessary, seek the assistance of any person.[2]

The instances where the representative may exercise these powers are set out in s58(2) of the Act (although they are relatively comprehensive). The circumstances are when the representative is:

1. Representing the members of the designated work group, or independent contractors engaged by the employer whom the representative is authorised to represent, concerning health or safety;
2. Monitoring the measures taken by the employer or employers in compliance with this Act or the regulations;
3. Enquiring into anything that poses, or may pose, a risk to the health or safety of members of the designated work group, or independent contractors whom the representative is authorised to represent, at the workplace or workplaces or arising from the conduct of the undertaking of the employer or undertakings of the employers; or
4. Attempting to resolve with the employer concerned or its representative any issues concerning the health or safety of members of the designated work group.

In the last instance – where an employee is attempting to resolve an issue between the employer concerning the health and safety of the workgroup, the representative must follow the procedure set out in the Act.

4.8.2 Procedure for resolving disputes

If an issue concerning health or safety arises at a workplace or from the conduct of the undertaking of an employer the employer or its representative the employees affected by the issue or, if there is a designated work group in relation to which the issue has arisen, the health and safety representative for that group must attempt to resolve the issue in accordance with the *relevant agreed procedure* or, if there is no such procedure, the relevant procedure prescribed by the regulations. An employer must ensure that its representative (if any) for the purposes of that negotiation is not a health and safety representative and has an appropriate level of seniority, and is sufficiently competent, to act as the employer's representative.[3]

4.8.3 Provisional improvement notices

Representatives may issue provisional improvement notices in order to attempt to resolve OHS issues in the workplace.[4] If a health and safety representative believes on reasonable grounds that a person is contravening a provision of this Act or the regulations or *has* contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated the health and safety representative may issue to the person a provisional improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention. However, the health and safety representative may only do so after consulting with the person about remedying the contravention or likely contravention or the matters or activities causing the contravention or likely contravention.

The Act sets out what must be included in such a notice. The notice can include directions that the person must take to rectify the breach.

If a person receives such a notice, and that person is not the employer, the person must bring it to the attention of the employer, and bring it to the attention (or the employer must bring it to the attention) of anyone affected by it, as well as displaying it in a prominent place.[5]

If either party wishes, they may request the attendance of an inspector at a workplace within seven days after the issuance of such a notice: A representative may wish an inspector to attend because they

believe the compliance notice has not resulted in the issue being dealt with, or the employer may wish an inspector to attend because they dispute the need for the order and do not wish to comply.[6]

[1] *OHS Act* s 54.

[2] *OHS Act* s 58.

[3] *OHS Act* s 73. Reference must also be made to Part 2.2 of the *Occupational Health and Safety Regulations 2007* titled 'Issue Resolution Procedures'. Regulations 2.2.3 and 2.2.4 set out the process for the reporting of OHS issues to the employer.

[4] *OHS Act* s 60. See *The Australian Workers' Union v Victorian Workcover Authority (Occupational and Business Regulation)* [2011] VCAT 1385; *Cutler v Victorian Workcover Authority (Occupational and Business Regulation)* [2010] VCAT 1841; *Pham v Victorian Workcover Authority (Occupational and Business Regulation)* [2012] VCAT 1767.

[5] *OHS Act* s 60(3).

[6] *OHS Act* s 60(4).

4.8.4 Employers duties to representatives

An employer must, if requested by a health and safety representative for a designated work group of which employees of the employer are members, allow the representative to attend an initial course of training in occupational health and safety after being elected and a refresher course at least once in each year, after completing the initial course of training, that he or she holds office.[1]

The Act requires that the request to attend the course be made at least 14 days before it begins and allows that the representative shall be kept on full pay for the duration of the course.

A health and safety representative has a right to have access to information that the employer has relating to actual or potential hazards arising from the conduct of the undertaking of the employer or the plant or substances used for the purposes of that undertaking and the health and safety of the members of the designated work group, or independent contractors whom the health and safety representative is authorised to represent.[2]

If a member of the designated work group consents, an employer must allow a health and safety representative for that group to be present at an interview concerning occupational health and safety between the member and an inspector and the member and the employer or its representative.

If the health and safety representative is authorised to represent an independent contractor and that person consents, the employer must allow the representative to be present at an interview concerning occupational health and safety between the person and an inspector or the person and the employer or its representative.

An employer must also allow a health and safety representative for the designated work group to take such time off work with pay as is necessary or prescribed by the regulations for exercising his or her powers under the Act as well as to take part in any course of training relating to occupational health and safety that is approved or conducted by the Authority and of which the employer is given at least 14 days' notice. Employers must also provide such other facilities and assistance to a health and safety representative for the designated work group as are necessary or prescribed by the regulations to enable the representative to exercise his or her powers under this Part. This latter requirement may require the employer to provide the representative with storage space (for records) or an area in which to conduct meetings or interviews with members of his or her workgroup.

In providing records to the representative, no records must be provided that identify the private health details of any employee unless the employee has authorized the provision, or unless the records are in such a manner that does not allow the identification of any employee.

An employer, any of whose employees are members of a designated work group must allow a person assisting a health and safety representative access to the workplace unless the employer considers that

the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety.

[1] *OHS Act* s 67.

[2] This duty does not require the employer to acquire or produce information they do not already have. See *Nelson Brothers Funerals Pty Ltd v Victorian WorkCover Authority* (2000) 101 IR 303.

4.9 OHS Committees

An employer must establish a health and safety committee within 3 months after being requested to do so by a health and safety representative.[1] At least half of the members of a health and safety committee must be employees (and, so far as practicable, health and safety representatives or deputy health and safety representatives) of the employer.

4.9.1 Functions of committees

The functions of OHS committees are:

1. To facilitate co-operation between the employer and employees in instigating, developing and carrying out measures designed to ensure the health and safety at work of the employees;
2. To formulate, review and disseminate (in other languages if appropriate) to the employees the standards, rules and procedures relating to health and safety that are to be carried out or complied with at the workplace; and
3. Such other functions as are prescribed by the regulations or agreed between the employer and the committee.[2]

A health and safety committee must meet at least once every 3 months at any other time of its choosing if at least half of its members require a meeting.

[1] *OHS Act* s 72.

[2] *OHS Act* s 72(3).

4.10 Stopping work

If an issue concerning health or safety arises at a workplace or from the conduct of the undertaking of an employer and the issue concerns work which involves an immediate threat to the health or safety of any person and given the nature of the threat and degree of risk, it is not appropriate to adopt the processes set out in the Act regarding consultation the employer or the health and safety representative for the designated work group in relation to which the issue has arisen may, after consultation between them, direct that the work is to cease.[1]

During any period for which work has ceased in accordance with such a direction, the employer may assign any employees whose work is affected to suitable alternative work.

[1] *OHS Act* s 74. See *Esso Australia Pty Ltd v Victorian Workcover Authority (Occupational and Business Regulation)* [2006] VCAT 1557; *Gilbertson-Greenham v AMIEU* (1990) 5 VIR 189.

4.11 Inspectors

If an issue cannot be resolved in a workplace pursuant to the procedures set out above, an inspector may be called to resolve that issue.[1]

4.11.1 Inspectors' powers

An inspector may enter a place that the inspector reasonably believes is a workplace at any time during working hours. However, an inspector may enter any place at any time if the inspector reasonably believes that there is an immediate risk to the health or safety of a person arising from the conduct of an undertaking at the place. There is a procedure in the Act that an inspector must follow once he or she has entered a workplace.[2]

Once an inspector has entered a place he has the following powers: [3]

1. Inspect, examine and make enquiries at the place;
2. Inspect and examine anything (including a document) at the place;
3. Bring any equipment or materials to the place that may be required;
4. Seize any thing (including a document) at the place that may afford evidence of the commission of an offence against the Act or the Regulations;
5. Seize any thing at the place for further examination or testing but only if the inspector reasonably believes that the examination or testing is reasonably necessary and cannot be reasonably conducted on site;
6. Take photographs or measurements or make sketches or recordings;
7. Exercise any other power conferred on the inspector by the Act or the Regulations;
8. Do any other thing that is reasonably necessary for the purpose of the inspector performing his or her functions or exercising his or her powers under this Act or the Regulations;
9. Require a person to produce a document or part of a document located at the place that is in the person's possession or control and examine that document or part and require a person at the place to answer any questions put by the inspector. A person must not, without reasonable excuse, refuse or fail to comply with a requirement to answer a question or produce a document. However, it is a reasonable excuse to refuse to answer a question or produce a document if answering the question or producing the document would tend to incriminate him or her;[4]
10. Take (without payment) samples of anything at the place that may be required for analysis. If this occurs, the inspector must inform the employer of the intention to do so and provide the employer with a portion of the sample that has been taken.[5]

Once an inspector has completed an inspection he must give the occupier a report of his or her findings, in writing, as soon as is practicable after leaving.[6]

An inspector may apply to a magistrate for the issue of a search warrant in relation to a particular place if the inspector believes on reasonable grounds that there is, or may be within the next 72 hours, a particular thing (including a document) at the place that may afford evidence of the commission of an offence against the Act or the Regulations.[7]

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1 *OHS Act* s 75.
2 *OHS Act* s 98.
3 *OHS Act* s 99.
4 *OHS Act* s 100.
5 *OHS Act* s 101.
6 *OHS Act* s 103.
7 *OHS Act* s 104.

4.12 Notices an inspector may issue

4.12.1 Non-disturbance notice

An inspector who has entered a place may issue a non-disturbance notice to a person who is or appears to be the occupier for the time being of the place requiring the person to stop the use or movement of, or interference with, any specified plant, substance or other thing at the place and prevent the disturbance of the specified plant, substance or other thing or a specified area of the place where the plant, substance or other thing is located if the inspector reasonably believes that it is necessary to do so to facilitate the performance of his or her functions or exercise of his or her powers under the Act.[1]

4.12.2 Improvement notice

If an inspector reasonably believes that a person is contravening a provision of the Act or the regulations or has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention. An improvement notice may include directions concerning the measures to be taken to remedy the contravention as well as interim directions, or interim conditions on the carrying on of any activities to which the notice relates, that the inspector considers necessary to minimise risks to the health or safety of a person.[2]

4.12.3 Prohibition notice

If an inspector reasonably believes that 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 the inspector may issue to a person who has or appears to have control over the activity a prohibition notice prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector has certified in writing that the matters that give or will give rise to the risk have been remedied.[3]

There are a number of rules found within the Act that relate to the contents of the above notices.

4.12.4 Other powers

An inspector may ask a person to state his or her name and address if the inspector reasonably believes that the person may be able to assist in the investigation of an indictable offence under this Act that has been committed or is suspected of having been committed or has committed or is about to commit an offence (whether indictable or summary) under the Act or the regulations.[4]

An inspector may give a direction (either orally or in writing) to a person at a workplace if the inspector reasonably believes that it is necessary to do so because of an immediate risk to the health or safety of any person. A person must not, without reasonable excuse, refuse or fail to comply with a direction given to the person.[5]

Inspectors may also be accompanied by other persons (such as experts in a particular area) to assist them in their work, and employers are to treat such experts as having the same rights and powers as the inspectors themselves.[6]

Employers are required to assist inspectors in the fulfilling of their duties (except in the instance outlined above in relation to a right to silence).[7]

4.12.5 Employers' obligations in relation to inspectors

Employers must not intentionally hinder or obstruct an inspector in the performance of his or her functions or exercise of his or her powers under the Act or the Regulations, or induce or attempt to induce any other person to do so or intentionally conceal from an inspector the location or existence of any other person or any plant, substance or other thing or intentionally prevent or attempt to prevent any other person from assisting an inspector. Similarly, employers must not assault, directly or indirectly intimidate or threaten, or attempt to intimidate or threaten, an inspector or a person assisting an inspector.[8]

4.12.6 Review of decisions of inspectors

Part 10 of the Act[9] provide mechanisms for reviewing decisions of inspectors – including internal review by WorkCover through to review by VCAT.[10]

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1 *OHS Act* s 110.

2 *OHS Act* s 111. See *AB Oxford Cold Storage Company Pty Ltd v VWA* [2006] VCAT 1365.

3 *OHS Act* s 112. See *ANI Engineering v Bolton* (1987) 3 VIR 76.

4 *OHS Act* s 119.

5 *OHS Act* s 120.

6 *OHS Act* s 122.

7 *OHS Act* s 121.

8 *OHS Act* s 125.

9 *OHS Act* sections 127-129.

10 See for instance *Gray Bruni Constructions v Victorian WorkCover Authority (Occupational and Business Regulation)* [2006] VCAT 1969; *Kavanagh v Victorian WorkCover Authority (Occupational and Business Regulation)* [2010] VCAT 639; *Warrnambool CC v Victorian WorkCover Authority (Occupational and Business Regulation)* [2012] VCAT 947; *Phil Fehring Engineering Pty Ltd v Victorian Workcover Authority (Occupational and Business Regulation)* [2006] VCAT 1863; *Kone Elevators Pty Ltd v Victorian WorkCover Authority (Occupational and Business Regulation)* [2011] VCAT 2272.

4.13 Union rights in relation to OHS

The Act allows authorised union representatives certain rights to enter premises to investigate suspected OHS breaches.[1] A person may only hold an entry permit as an authorised union representative of a registered employee organisation if he or she is a permanent employee or officer of the organisation, whether engaged on a full-time or part-time basis and has satisfactorily completed a course of training approved (in writing) by the Authority.

4.13.1 Right of entry – circumstances

If an authorised union representative reasonably suspects that a contravention of this Act or the Regulations has occurred or is occurring at a place that is a workplace *and* any of the following apply, then the authorized representative may enter the workplace:

1. The suspected contravention relates to or affects work that is being carried out by one or more members of the registered employee organisation or relates to or affects any of those members;
2. The suspected contravention relates to or affects work that is being carried out by one or more persons whose employment is subject to a certified agreement, or relates to or affects any of those persons, and the registered employee organisation is bound by that certified agreement;
3. The suspected contravention relates to or affects work that is being carried out by one or more persons who are eligible to be members of the registered employee organization, and whose employment is not subject to a certified agreement by which any registered employee organisation is bound, or relates to or affects any of those persons.[2]

The union representative may only enter the workplace during working hours, for the purpose only of enquiring into the suspected contravention. Immediately after entering the workplace the union representative should identify themselves to both the employer or his or her representative, as well as any OHS representative for the workgroup concerned with the breach or suspected breach.[3]

4.13.2 Rights after entry

An authorised representative of a registered employee organisation who enters a workplace may do any of the following but only to the extent that it is reasonable for the purpose of enquiring into the suspected contravention:

1. Inspect any plant, substance or other thing at the place;
2. Observe work carried on at the place;
3. Consult with one or more employees (with their consent) at the place who are members or are eligible to be members of the registered employee organisation;
4. Consult with any employer at the place about anything relevant to the matter into which the representative is enquiring.[4]

An authorised representative of a registered employee organisation is *not* entitled to exercise a power in respect of a place, except with the consent of the employer who has, or a person who on behalf of the employer has, the management and control of the work, if the exercise of that power would cause any work at the place to cease, but an authorised representative is permitted to consult with an employee during his or her meal-time or other breaks.

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1 *OHS Act* s 81.
2 *OHS Act* s 87.
3 *OHS Act* s 88.
4 *OHS Act* s 89.

4.14 Notification of incidents

The Act lists a large number of incidents that must be reported. Generally notification must occur immediately (or as soon as possible) after the incident, and must be followed by a written report within 48 hours of the incident.[1] Employers must keep a copy of the report for at least 5 years. The list of reportable incidents includes:

- The death of a person;
- An incident that results in a person requiring medical treatment within 48 hours of exposure to a substance;
- An incident that results in a person requiring immediate treatment as an in-patient in a hospital;
- An incident that results in a person requiring immediate medical treatment for the amputation of any part of his or her body;
- A serious head injury or a serious eye injury;
- The separation of his or her skin from an underlying tissue (such as de-gloving or scalping); or
- An incident that results in a person receiving an electric shock or a spinal injury or the loss of a bodily function or serious lacerations.[2]

The notification duty also applies to incidents that 'expose a person in the immediate vicinity to an immediate health or safety risk'. Immediate risk is where that likelihood is present at the time of the

incident occurring. It includes any situation which seriously endangers or threatens the health or safety of a person.

Specific instances of immediate risks are listed as where someone is likely to be injured through:

- The collapse, overturning, failure or malfunction of, or damage to, any plant that the Regulations prescribe must not be used unless the plant is licensed or registered;
- An incident that results in the collapse or failure of an excavation or of any shoring supporting an excavation;
- An incident that results in the collapse or partial collapse of all or part of a building or structure;
- An incident that results in an implosion, explosion or fire;
- An incident that results in the escape, spillage or leakage of any substance including dangerous goods (within the meaning of the *Dangerous Goods Act 1985*);
- An incident that results in the fall or release from a height of any plant, substance or object;
- In relation to a mine the overturning or collapse of any plant; or
- The inrush of water, mud or gas; or
- The interruption of the main system of ventilation.

Note that this duty applies even where there may have been no injury at all to anyone – there simply needs to have been the possibility that, because of the incident, someone might have been injured.

4.14.1 Duty to preserve incident site

An employer or self-employed person who is required to notify the Authority of a reportable incident that has occurred at a workplace must ensure that the site where it occurred is not disturbed until either an inspector arrives at the site or such other time as an inspector directs when the Authority is notified of the incident. The Act allows that a site *may* be disturbed for the purpose of protecting the health or safety of a person or aiding an injured person involved in an incident; or taking essential action to make the site safe or to prevent a further occurrence of an incident.

[1] *OHS Act* s 37.

[2] *OHS Act* s 38.

4.15 Licenses

Employers must not conduct an undertaking at a workplace if the Regulations require the workplace, or class of workplace, to be licensed or registered. Similarly a person must not use plant at a workplace if the Regulations require the plant or its design to be licensed or registered and the plant or its design is not licensed or registered in accordance with the Regulations. There are certain skilled types of work where the worker also needs to be licensed.[1]

[1] See especially Part 3.6 of the OHS Regulation that deals with high-risk work licensing.

4.16 Prohibited actions for employers

The Act states that no person (including an employer) must coerce or attempt to coerce another person not to make, or to withdraw, a request under section 43 (to form a workgroup), or in relation to the conduct of

negotiations concerning a designated work group or groups (including negotiations for a variation of an agreement) or in relation to the other person being represented in such negotiations.[1]

The Act also states that an employer or prospective employer is guilty of an indictable offence if the employer or prospective employer engaged in that conduct because the employee or prospective employee is or has been a health and safety representative or a member of a health and safety committee or exercises or has exercised a power as a health and safety representative or as a member of a health and safety committee or assists or has assisted, or gives or has given any information to, an inspector, a health and safety representative or a member of a health and safety committee; or raises or has raised an issue or concern about health or safety to the employer, an inspector, a health and safety representative, a member of a health and safety committee or an employee of the employer.[2]

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[1] *OHS Act* s 53. See *Boylan Distribution Services Pty Ltd* (unreported) Sunshine Magistrates' Court, 29 July 2003.

[2] *OHS Act* s 76.

4.17 Compliance Codes

The Act allows the Minister to produce 'Compliance Codes' to provide practical guidance to persons with duties or obligations under the Act or the Regulations.

WorkSafe will use these Compliance Codes to communicate compliance information where there are known and effective means of achieving compliance. In other cases, WorkSafe will use other non-statutory guidance material.

Each Compliance Code identifies:

- The specific provision of the Act or Regulations for which the Compliance Code deems compliance;
- Which duty holder or duty holder may rely on compliance with the Compliance Code to deem compliance; and
- The extent to which reliance on the Compliance Code will discharge the duty holder's duties under the Regulations or the Act.

As guidance documents, rather than mandatory Regulations, Compliance Codes will use the phrase 'needs to' as advisory language, unless they are directly referencing a mandatory duty in the Act or regulation. The general OHS duty applies – a person with OHS duties must take all reasonable steps to minimise harm arising from OHS risks – and if a better means of minimising harm exists than the measures in a compliance code – those measures should be preferred over the compliance code.

Compliance Codes may include background, contextual information and general advice as well as specific guidance on how to comply with specific duties. They should be flexible enough to describe a range of practical measures for guiding the compliance effort - what is understandable and practical for one person or business may not be so for another.

Some Codes will have specific information about compliance solutions, while others will include processes that can be followed so that appropriate decisions about how to comply can be made. Where appropriate, Compliance Codes may incorporate or adopt documents produced by reputable standards setting bodies.

Failing to comply with a Compliance Code does not give rise to any liability – civil or criminal. However, following a Compliance Code in relation to a possible OHS issue is generally taken to demonstrate compliance with the Act. Section 152 of the Act states:

Effect of compliance with regulations or compliance codes

If –

(a) the regulations or a compliance code make provision for or with respect to a duty or obligation imposed by this Act or the Regulations; and

(a) a person complies with the regulations or compliance code to the extent that it makes that provision –

the person is, for the purposes of this Act and the Regulations, taken to have complied with this Act or the Regulations in relation to that duty or obligation.[1]

At January 2013 there were 8 Compliance Codes in Victoria:

- Communicating occupational health and safety across languages
- Workplace amenities and work environment
- Confined spaces
- First aid in the workplace
- Prevention of falls in general construction
- Foundries
- Managing asbestos in workplaces
- Removing asbestos in workplaces

[1] *OHS Act* s 152.

CHAPTER 4 – Victoria