

Victorian Government Response to: *A report on the Occupational Health and Safety Act 2004 – Administrative Review*

June 2008

Background

When the *Occupational Health and Safety Act 2004* (the Act) was introduced, the Government committed to a review of the Act's administration within 12 months of all provisions of the Act coming into operation.

In August 2007 the Minister for Finance, WorkCover and the Transport Accident Commission appointed Mr Bob Stensholt MP to conduct the Review, with the support of a Victorian WorkCover Authority (VWA) Secretariat.

The Review involved extensive consultation with trade unions, employer associations and other Victorian organisations, and found overwhelming agreement that the new laws were “essentially sound” and “working as intended”. The review also found that stakeholders generally view the VWA as a “more constructive and transparent regulator” than previously.

Mr Stensholt's Report contains 36 recommendations, the overwhelming majority of which are supported by the Government in their entirety.

A significant number of these recommendations relate to VWA operational matters and propose changes to processes, guidance and support for workplace parties. Many of these recommendations are consistent with operational changes the VWA is already implementing or planning to implement.

The Government fully supports recommendations relating to:

- greater protection of employees who raise OHS issues by establishing an individual right of action;
- improved resolution of safety issues in the workplace;
- revised guidance for workplace consultation;
- greater flexibility and support for workplace representation; and
- providing improved certainty around what compliance ‘looks like’.

Mr Stensholt also proposed amending the scope of the duty of designers of buildings or structures to include the construction phase of the building or structure. In responding to this recommendation, the Government has requested the VWA to undertake in depth policy analysis and wide stakeholder engagement in developing appropriate proposed amendments.

Mr Stensholt made a number of recommendations about the operation of the tripartite Occupational Health and Safety Advisory Committee and the stakeholder bodies that support it. The Government considers these matters relate to the internal governance of the VWA and hence are for the VWA Board and management to consider.

Mr Stensholt's final two recommendations relate to issues of Government leadership in OHS, which is the subject of separate consideration by the Government of its strategy for enhancing public sector OHS leadership. In recent years, Departments have shown a strong commitment to improving OHS outcomes. In accepting the intent of Mr Stensholt's recommendations in this area, the Government acknowledges that there remains an important role for it in displaying OHS leadership.

The Government welcomes the overall outcomes of the Review. Its response to each recommendation is set out in detail in the attached table.

Report Rec. No. (page)	Recommendation	Government response	Comments
Duties of designers of buildings or structures			
1 (p.33)	I believe that there is a <i>prima facie</i> case for amending the scope of the duty of designers of buildings or structures to cover in the Act the construction phase of the building or structure. I therefore recommend that the VWA consults with affected parties on the scope of such an amendment and reports back to the Minister with specific recommendations.	Accepted	The Government is not convinced that the case for change in this area has been adequately made. However, the Government supports the VWA undertaking policy analysis as well as stakeholder engagement to provide advice to the Minister for Finance, WorkCover and the Transport Accident Commission on the nature of such a legislative amendment. This analysis and stakeholder engagement will be deferred until the Construction Part of the <i>Occupational Health and Safety Regulations 2007</i> has been in operation for 12 months, and will therefore occur in 2009/10.
Duty of employers to consult with employees			
2 (p.39)	That the VWA develops guidance on what an employer needs to do to achieve compliance with the consultation duty and ensures that the guidance: <ul style="list-style-type: none"> • clearly articulates what employers need to do as a minimum to achieve compliance with the duty; and • covers compliance both in those workplaces that have elected health and safety representatives (HSRs) and those that don't. Such guidance might include the use of a statutory instrument by way of a WorkSafe Position (under section 12).	Accepted	The VWA intends to develop guidance in 2008/09 on what an employer needs to do to achieve compliance with the consultation duty. The guidance will cover compliance both in those workplaces that have elected Health and Safety Representatives (HSRs) and those that don't. The VWA will give consideration to the suitability of a WorkSafe Position (that is, a guideline made under section 12 of the OHS Act) as the appropriate instrument in which to provide this guidance. If a WorkSafe Position is to be prepared, its delivery is not likely to take place before late in 2008/09, due to the formal making process required.
3 (p. 39)	Once there is clear guidance for Inspectors and workplaces on this matter, the VWA should take measures to address non-compliance with the Part 4 provisions, by: <ul style="list-style-type: none"> • running compliance projects, conducting investigations and prosecuting breaches where appropriate; and • implementing some targeted program activity by Inspectors in high risk industries where active consultation can make a significant contribution to health and safety. 	Accepted	The VWA intends implementing measures suggested by Mr Stensholt to address non-compliance with Part 4 (Duty of Employers to Consult) over a two year period, commencing after the guidance material is completed (expected 2008/09).

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Incident notification			
4 (p. 42)	<p>To enhance the processes related to phone calls on incident notification, that the VWA should:</p> <ul style="list-style-type: none"> • log all calls related to incident notification and allocate reference numbers to all callers; • review its quality assurance process regarding how such calls to its Advisory Service are processed; and • regularly train Advisory Staff and Emergency Response Controllers on any changes. 	Accepted	In 2008/09 the VWA intends to review its quality assurance process regarding the way phone calls on incident notification are processed by its Advisory Service and develop a system that ensures all such calls are logged and a reference number allocated to all callers. It will ensure that its Advisory Service Staff and Emergency Response Controllers continue to be regularly trained or briefed as necessary.
Risks to psychological health			
5 (p. 44)	That the VWA continues its staged approach to reducing stress related risks to psychological health and as part of that approach the VWA develops strategies in consultation with stakeholders that can be applied to stress in the private sector with a view to piloting those strategies in 2008-09 at the latest.	Accepted	The VWA intends to develop strategies in consultation with stakeholders that can be applied to stress in the private sector with a view to piloting those strategies in 2008/09.
Control and multiple duty holders			
6 (p. 48)	That the VWA issues a WorkSafe Position under section 12 of the Act on the way in which shared and overlapping duties and the issue of control apply to labour hire agencies and host employers.	Accepted	The VWA intends to develop a WorkSafe Position on the way in which shared and overlapping duties and the issue of control apply to labour hire agencies and host employers. It anticipates this WorkSafe Position will be delivered late in 2008/09.
7 (p. 48)	That the VWA completes its evaluation of the current guidance as soon as possible and continues to work with the labour hire industry, and those who work in it, to provide clear practical advice to the industry.	Accepted	During 2008/09 the VWA intends to complete its evaluation of the current guidance and continue to work with the labour hire industry, and those who work in it, to provide clear practical advice to the industry.

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Workplace representation – DWGS and HSRs			
8 (p. 52)	That the VWA is more proactive in promoting the benefits of the new options for representation and continues to facilitate and support the creation of multi-employer Designated Work Groups (DWGs) where appropriate, including the preparation of additional guidance material on multi-employer DWGs.	Accepted	The pilot project referred to in recommendation 9 should be undertaken first as it will inform the development of the guidance.
9 (p.52)	That the VWA sponsors a pilot project on multi-employer DWGs with a view to facilitating a better understanding of the issues which may arise in their establishment, and to inform whether or not legislative amendment is required to improve uptake.	Accepted	In 2008/09, the VWA intends to deliver a pilot project on multi-employer DWGs to facilitate a better understanding of the issues which may arise in their establishment and to identify whether legislative amendment is required to improve uptake.
10 (p. 52)	That the VWA considers developing a system which allows the VWA to maintain a record of all workplaces where HSRs exist (without identifying HSRs individually).	Accepted	The VWA aims to undertake policy analysis to consider the viability of the proposed system in 2008/09.
Workplace representation – issue resolution			
11 (p. 57)	That the VWA issues a WorkSafe Position setting out its views on ‘sufficiently competent’ and the recommended learning outcomes for training courses.	Accepted	A WorkSafe Position, setting out the VWA’s view of the meaning of ‘sufficiently competent’ and the recommended learning outcomes for training courses, is expected to be delivered in 2008/09.
12 (p. 57)	That the VWA develops an assessment tool for inspectors to determine the OHS competency of employer representatives.	Accepted	The VWA is looking to develop an assessment tool for inspectors to determine the OHS competency of employer representatives in 2008/09.
Protecting employees who raise OHS issues			
13 (p. 64)	That the Victorian Government fulfils its policy commitment to legislate to provide greater protection for workers who raise safety issues by considering this explicitly in the forthcoming policy review of accident compensation with a view to harmonisation between Acts.	Noted	While this recommendation is beyond the scope of the review, the Government will move to implement the necessary legislative amendments to give practical effect to the commitment given to the VTHC.
14 (p. 64)	That the VWA immediately supports current policy on section 76 discrimination by making a WorkSafe Position that sets out the way in which section 76 would apply to various scenarios. This Position should, among other things, define ‘detriment’ and ‘injury’ to employment as well as fleshing out the ‘dominant reason’ test. The Position would necessarily include references to how the courts have interpreted the terms in OHS, anti-discrimination and industrial relations contexts.	Accepted	The VWA views initiatives in this area as a priority.

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15 (p. 64)	That the VWA should adopt a more strongly focused compliance and deterrence approach to the issue including additional targeted prosecutions.	Accepted	The VWA will adopt a more strongly focussed compliance and deterrence approach to protecting employees who raise OHS issues, including additional targeted prosecutions. This is addressed in the planning discussed under recommendation 29 below.
16 (p. 64)	That the VWA continues to raise awareness and understanding among duty-holders on what does and does not constitute 'injury' or 'detriment' under section 76, as well as strategies for prevention. The VWA protocol, once approved, should be widely disseminated and publicised.	Accepted	The VWA will continue to raise awareness and understanding among duty-holders on what does and does not constitute 'injury' or 'detriment' under section 76, as well as strategies for prevention. This will flow on from the actions coming out of recommendation 14 (above) and will occur in 2008/09. The VWA protocol, once approved, will be placed on the VWA's website for downloading and will be widely disseminated and publicised.
17 (p. 64)	That the VWA increases training and support of the Inspectorate in properly identifying cases of discrimination under section 76 by: <ul style="list-style-type: none"> • providing inspectors with case studies to illustrate what section 76 discrimination 'looks like'; and • running training sessions for the Inspectorate and Investigators, or a dedicated group of Inspectors and Investigators, on how to properly manage allegations of section 76 discrimination 	Accepted	The VWA is already implementing this recommendation. Training for Inspectors and Investigators on section 76 and the new VWA protocol is under development. Delivery of that training to all Inspectors and Investigators is scheduled for March to May 2008 and is therefore expected to be completed in 2007/08. The training will include case studies.
18 (p. 64)	That consideration of possible legislative changes and the ongoing operation of section 76 be added to the agenda of OHSAC.	Referred	The Government refers recommendation 18 to the VWA Board of Management for consideration. See also recommendation 23.
19 (p. 64)	That the VWA continues to monitor the issue of discrimination against workers other than employees (such as contractors) carefully and advise the Government upon obtaining empirical evidence of a problem requiring legislative amendment. In that case, the Government should give serious consideration to introducing into both Acts a provision which would allow a workplace party which exercises its coercive power to induce a breach of either of the above 'discrimination' provisions to be treated as if it had committed the act of direct discrimination against a worker itself.	Accepted	The VWA will continue to monitor the issue of discrimination against workers other than employees (such as contractors) carefully. The VWA will advise the Government upon obtaining empirical evidence of a problem requiring legislative amendment.
Right of entry for authorised representatives of registered employee organisations			

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20 (p. 69)	That the VWA reviews the form of the 'Notice of Suspected Contravention' to simplify and amend it to ensure no worker who has made a complaint can be identified.	Accepted	The VWA plans to review the form of the 'Notice of Suspected Contravention' in 2008/09 to ensure no worker who has made a complaint can be identified.
21 (p. 69)	That the VWA reviews and revises its procedures and relevant guidance material on ARREOs and widely publicises them.	Accepted	The VWA intends to review and revise its procedures and relevant guidance material on ARREOs and publicise them widely by late 2008/09.
22 (p. 69)	That the VWA amends its Field Operations Manual to confirm for the Inspectorate that an improvement notice, citing section 93, can be imposed if an ARREO is being denied entry to a workplace.	Accepted	<p>The Government notes that Division 5 of Part 15 of the Commonwealth <i>Workplace Relations Act 1996</i> (WR Act) adds an overlay of Federal regulation to ARREO rights of entry under the OHS Act in respect of premises occupied or controlled by constitutional corporations (WR Act ss.755). The Government further notes that there is still much debate as to which employers Part 15 applies to, as not all employers are covered by the WR Act.</p> <p>The VWA has recently been advised that the Commonwealth will be promulgating a regulation which is intended to clarify the application of 'right of entry provisions' in State OHS laws, in circumstances where right of entry to a Commonwealth workplace is being sought. The implications of this regulation would have to be taken into account by an Inspector in determining whether, in particular circumstances, an ARREO had a right to enter premises under the OHS Act and whether a person had breached section 93 of the OHS Act by denying entry.</p> <p>Accordingly the VWA has advised that it will wait until the new Commonwealth regulation is enacted before amending the Field Operations Manual.</p> <p>Training is to be provided to the Inspectorate in 2008/09, which will include the impact of the WR Act on the operation of the OHS Act.</p>
Occupational Health and Safety Advisory Committee (OHSAC)			
23 (p. 72)	That the Board reviews its protocols around engagement with OHSAC with a view to improving its involvement on strategic OHS policy issues and the operation and administration of the Act.	Accepted	<p>The Government supports the VWA's continued efforts to improve stakeholder engagement and accepts this recommendation that the VWA Board of Management review arrangements relating to OHSAC.</p> <p>It is anticipated that the VWA Board will consider its protocols around engagement with OHSAC with a view to improving its involvement on strategic OHS policy issues and the operation and administration of the Act in 2008/09.</p>

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24 (p. 73)	That the Terms of Reference for both OHSAC and the Stakeholder Reference Groups (SRGs) be revised to create a formal 'link' between OHSAC and the SRGs, which allows for operational OHS issues to be referred by OHSAC to the SRGs for consideration and feedback.	Referred	This recommendation is referred to the VWA Board of Management for consideration. The VWA will aim to revise the Terms of Reference for both OHSAC and the Stakeholder Reference Groups (SRGs) to create a formal 'link' between them, allowing for referral of issues and feedback in 2008/09.
25 (p. 73)	That the VWA explores all avenues for the engagement of stakeholders to promote healthy and safe working environments, and to ensure that key stakeholders are engaged in the development of the VWA's strategic and operational OHS policies. This could include convening ad hoc meetings (or sub-committees) of OHSAC as strategic OHS issues arise, engaging with OHSAC on the development of its forward plan, and proactively seeking OHSAC's input into the development of the VWA's business plans and strategic OHS issues which may arise in the rollout of Strategy 2012.	Accepted	The Government accepts this recommendation that the VWA Board of Management review its stakeholder engagement arrangements. The VWA is already seeking to improve engagement with its stakeholders. For example, members of the SRGs and OHSAC have been involved in the current round of business planning for the Health and Safety Business Unit.
Providing certainty about compliance			
26 (p. 79)	That the VWA focuses on the appropriate and concerted use of statutory guidance— <ul style="list-style-type: none"> • WorkSafe Positions to reflect the VWA's policies and the exercise of its discretions under the Act; and • compliance codes to provide certainty about compliance. To do this, the VWA must: <ul style="list-style-type: none"> • finalise its overarching policies and strategy in developing statutory instruments and non-statutory information as a matter of urgency; • review the feedback from the first two WorkSafe Positions, and evaluate its internal policy and processes for developing future Positions; and • provide adequate resources to meet the current commitment to compliance codes to ensure no further slippage in their delivery. 	Accepted	In focussing on the appropriate and concerted use of statutory guidance by 2008/09, the VWA has: <ul style="list-style-type: none"> • finalised its overarching policy and strategy for developing WorkSafe Positions and compliance codes in the Compliance Framework Handbook and Business Rules; • considered the resources needed to meet the current commitment to compliance codes and is including them in the current business planning process; and will <ul style="list-style-type: none"> • finalise its overarching policies and strategy in developing other statutory instruments and non-statutory information as a matter of urgency; and • review the feedback from the first two WorkSafe Positions, and evaluate its internal policy and processes for developing future Positions.

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27 (p. 79)	That the VWA continues to actively engage its stakeholders in the development of OHS guidance, mindful of the importance of ensuring that this guidance is capable of being harmonised with that of other jurisdictions wherever possible.	Accepted	The VWA is actively engaging its stakeholders on an on-going basis in the development of OHS guidance, with harmonisation an important consideration.
28 (p. 79)	That the VWA adopts alternative nomenclature for what are currently called 'WorkSafe Positions', e.g. 'Section 12 Rulings', 'Section 12 Interpretations', 'Section 12 Determinations', 'OHS Rulings', 'OHS Interpretations' or similar wording.	Not accepted	The term 'WorkSafe Position' has been accepted by key stakeholders and adopted to avoid creating confusion amongst duty holders regarding the place of this statutory instrument within the OHS Compliance Framework.
Enforcement, prosecution and penalties			
29 (p. 87)	That the VWA increases the level of resources of its prosecution and investigations branch to increase its effectiveness and build capacity to more effectively undertake strategically targeted prosecutions in the public interest.	Accepted	The VWA has commenced business planning for a staged approach over 3 years – 2008/09 to 2010/11 – to increase the level of resources to undertake more strategically targeted investigations and prosecutions.
30 (p. 87)	In relation to sections 32 and 144, that the VWA: <ul style="list-style-type: none"> • monitors the interpretations of the courts on the outcomes of prosecutions under sections 32 and 144 and updates its policy advice and procedures accordingly; and • provides further training and instruction to the Inspectorate, other relevant operational areas and externally on the operation of these sections. 	Accepted	The VWA already monitors the interpretations of the courts on the outcomes of prosecutions on an on-going basis and updates its policy advice and procedures accordingly. This includes sections 32 and 144 and, when required, further training and instruction will be given to the Inspectorate, other relevant operational areas and externally on these sections.
31 (p. 87)	That the VWA increases its use of the suite of alternatives to prosecution, such as enforceable undertakings, with a view to maximising strategic outcomes.	Accepted	As noted for recommendation 29 above, business planning also covers this recommendation. A framework for an Enforceable Undertakings project has been developed.
32 (p. 87)	That the VWA issues a WorkSafe Position on its interpretation of section 100(1)(c) and provides further training and instruction to the inspectorate to ensure they have a clear understanding of the intent of this section with regards to being able to compel the answering of questions.	Accepted	Much of the work around section 100 has already been done. The VWA's policy on section 100(1)(c) is explicit in its operational procedures and inspectors were reminded of the extent of their powers under section 100(1)(c) in the <i>Inspect e-newsletter</i> of January 2008. The VWA intends to develop a WorkSafe Position on its interpretation of section 100(1)(c) for delivery in late 2008/09.
Review of decisions			

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33 (p. 91)	That the current policies around Internal Review continue to operate as they have done to date.	Accepted	N/A
34 (p. 91)	That the Internal Review Unit's staffing levels and compliance with timeframes for the completion of reviews are proactively monitored, and contingency is built in to ensure adequate resources are available to meet timeframes in the light of fluctuations in caseload and demand.	Accepted	Monitoring of staff/resource requirements is on-going and a contingency plan is currently being put in place.
Government leadership in OHS			
35 (p. 94)	<p>That public sector Departmental Secretaries, heads of agencies, and senior management do more to assume a leadership role in securing better OHS outcomes in the public sector, including:</p> <ul style="list-style-type: none"> • having a clear, well-publicised and actively promoted OHS policy, endorsed by the Departmental Secretary or equivalent, which outlines OHS responsibilities for all; • specifying OHS activities in the performance agreements of senior management, and regularly reviewing management performance in relation to these activities; • fostering an open, consultative environment that encourages staff to raise OHS concerns, and making the necessary arrangements to ensure that these concerns are genuinely considered and resolved; and • having OHS as a standard agenda item for meetings of the executive and other senior management. 	Accepted with variation	<p>Consistent with the intent of this recommendation, the Secretary of DTF will write to all departmental secretaries and the Chief Commissioner of Victoria Police:</p> <ul style="list-style-type: none"> - reminding them of the Government's commitment to improve OHS outcomes in the public sector; - asking them to identify managers in their organisation with responsibility for OHS performance and introducing OHS performance indicators into their performance plans; and - asking that they introduce and actively monitor key performance indicators for OHS within their organisation.
36 (p. 94)	That the VWA should assess and evaluate the success of the OHS Roundtable in terms of its role in engaging senior public sector stakeholders and producing improved OHS outcomes in the public sector generally, and not just in the 'inner budget' sector.	Accepted	The Government accepts this recommendation that the VWA assess and evaluate the success of the OHS Roundtable.