

Work health and safety in Queensland – a regulatory revival?

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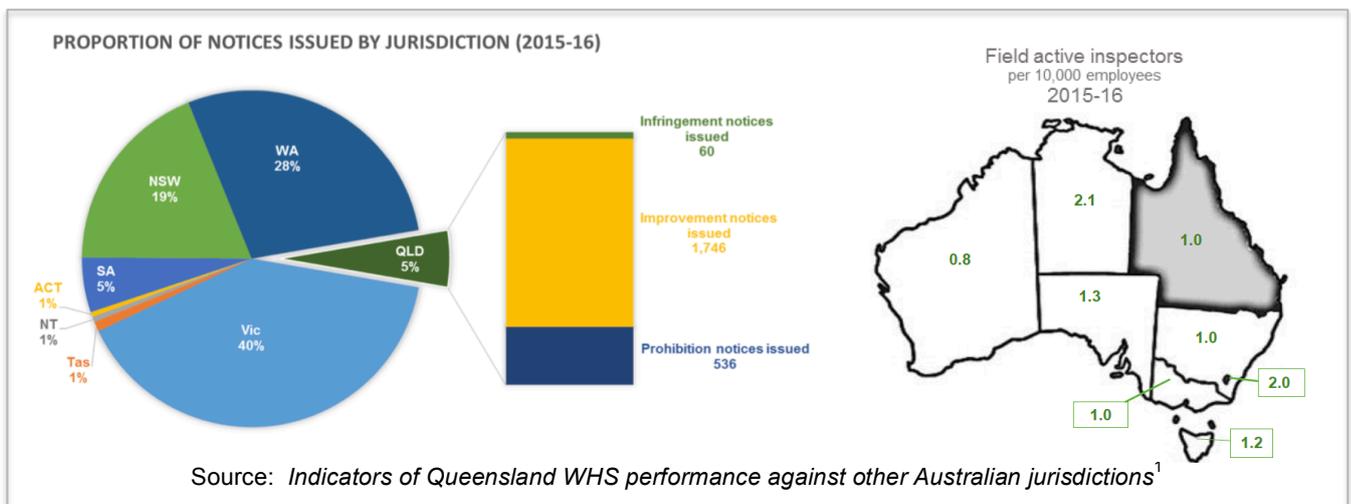
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The softly, softly approach

The traditional approach of the Queensland safety regulator, Workplace Health and Safety Queensland, has been to work collaboratively with businesses about their WHS obligations through education and engagement, and issue of the occasional statutory notice. Legal action has usually been a last resort, or at least an option that was reserved for the most serious of offences.



The latest available data shows that in 2015-16, Queensland inspectors issued only 5% of all statutory WHS notices in Australia (compared to Victoria's 40%, Western Australia's 28% and New South Wales' 19%)¹, despite having a ratio of inspectors to employees of 1:10,000 which is either equal to or greater than most other states. Similarly, at 20% Queensland lags in third place behind Victoria (40%) and NSW (24%) for all successful WHS legal proceedings in Australia for the period 2015 – 2017.²

Recent significant incidents

But it appears this is changing, following some very high profile and/or fatal workplace incidents in Queensland. These include the Dreamworld and Eagle Farm incidents in October 2016 that cumulatively resulted in the deaths of six people in the space of three weeks; more than [30 rollovers](#) on Toowoomba Second Range Crossing between 2016 - 2018 which lead to part of that project being [shut down](#) for almost a month³; the death of a 20 year-old electrician who was electrocuted when he came into contact with a live switchboard at a construction site in Claremont in 2012; and the death of a worker in 2014, after falling from the roof of a factory at Cooroy on the Sunshine Coast.

¹ Queensland Office of Industrial Relations. *Indicators of Queensland WHS performance against other Australian jurisdictions (Based on: Safe Work Australia Annual Comparative Performance Monitoring Report 19th Edition (CPM19-Part 2) for 2015-16 (November 2017). 2018*

² Safe Work Australia. *Comparative Performance Monitoring Report – 20th Edition*. December 2018.

³ Queensland Government. *Estimates (Transport and Public Works) Committee – Transport and Main Roads*. 27 July 2018.

In relation to the [Dreamworld](#) matter, while no charges have yet been laid, a [coronial inquest](#) has concluded and the findings are due in the next few months. It is anticipated the coroner will refer matters to the Director of Public Prosecutions for further legal action; this could include charges against a range of duty holders under the *WHS Act/Regulation 2011*, and/or *Criminal Code*.

With respect to [Eagle Farm](#), the Principal Contractor (PC) was [charged and fined \\$405,000](#) for two Category 2 offences under the *WHS Act 2011*, the PC's site manager was charged under *WHS Act 2011* (matter still to be finalised), and the individual subcontractor in control of the work at the time of the fatalities was charged with manslaughter under the *Criminal Code* (matter still to be finalised).

At least [107 statutory notices](#) have been issued to the Principal Contractor on the [Toowoomba Second Range Crossing](#), and Workplace Health and Safety Queensland took the extraordinary step of establishing a [special team of inspectors](#) dedicated purely to this project. Given the frequent and serious nature of the incidents, it is likely further legal action will follow, however no charges have yet been laid.

In March 2018, the electrical contractor responsible for the [electrician's death](#) in Claremont was sentenced to [seven years' jail](#) (minimum two years) for manslaughter and perjury under the *Criminal Code*.

In February 2019, the director of [Multi-Run Roofing](#) was sentenced to a year in prison (suspended after 4 months) and his company fined \$1 million for the worker's fatal fall, in Queensland's [first Category 1 prosecution](#) under the *WHS Act 2011*.

This is a range of sentencing and fines that have rarely been seen in Queensland before, and certainly not within such a short timeframe.

The “Best Practice Review”

The Queensland Government commissioned the [Best Practice Review](#) following the Eagle Farm and Dreamworld fatalities. It considered in detail the effectiveness of WHS Qld as a regulator, and made some pointed findings about their performance, including:

- a need to “re-focus operations on the core functions of WHS Qld as a labour inspectorate”;
- that a “very large and inappropriate drop off in enforcement activity” had occurred;
- that an overuse of engagement, educative and capacity building strategies had resulted in “insufficient emphasis on hard compliance and enforcement”;
- a perceived lack of independence and transparency of WHS Qld's role in prosecutions, investigations, inspectorate functions and workplace engagement activities; and
- that Queensland's decision to relinquish or modify some of its previous WHS laws as a result of national harmonisation in 2011 had not been positive (eg. the reverse onus of proof, removal of WHSO's, legal standing of Codes of Practice etc).

A total of 58 recommendations were made, and a number have already been (or will be) introduced as a consequence of the [Work Health and Safety and Other Legislation Amendment Bill 2017](#). These include:

- introduction of the offence of Industrial Manslaughter, with a maximum penalty of 20 years imprisonment or \$10 million (complete – *WHS Act 2011*, Part 2A);
- the establishment of a new WHS Prosecutor's Officer and the appointment of a [WHS Prosecutor](#) (*WHS Amendment Bill 2017*, Part 4 - imminent). It is anticipated that once this independent office is established, investigations and prosecutions will occur far more swiftly than has previously been experienced;
- an increased use of [priority infringement notice offences](#) (on-the-spot-fines), which range from \$720 – \$3,600 for a business (*SPER Reg 2014*, Schedule 1). These have always been available but have previously been used sparingly;

- re-introducing the role of the WHSO (complete – *WHS Act 2011*, Part 5A). While not mandatory, this will be able to be used as some evidence of due diligence in the event of legal proceedings);
- re-instating the status of Codes of Practice as admissible in legal proceedings (complete – *WHS Act 2011*, s275); and
- restoration of the reverse onus of proof (ie. a PCBU charged with an offence is guilty unless a successful defence is established). This has not yet been restored, but is expected to follow.

In addition to these recommendations, the Office of Industrial Relations (of which WHS Qld is a department) is also to formally appoint a permanent replacement for the Deputy-Director General, who departed from the role in December 2018.

Whilst the prosecutions and resultant jail terms discussed in this article concern matters that occurred prior to the [2017 Best Practice Review](#), its recommendations may well be starting to gain momentum. The regulator appears to be pursuing its functions with a renewed vigour and a willingness to exercise the complete suite of options open to them under existing laws. And if they don't, then it's clear that the police and Department of Public Prosecutions will (as in the cases of Eagle Farm and the Claremont fatalities, where charges were laid under the *Criminal Code*).

What about harmonisation?

On the national front, Safe Work Australia published its [Review of the Model Work Health and Safety Laws](#) in December 2018. Following the introduction of harmonised WHS laws in Queensland and NSW in 2012, the number of successful prosecutions almost halved within two years in those states.⁴ While the review does not specifically address this, it does make recommendations with respect to national adoption of industrial manslaughter laws, and consistency of sentencing through the development of sentencing guidelines. It also recommends a further increase in WHS penalties. Up until July 2017, the highest fine in Queensland for a breach of the *WHS Act 2011* had been \$200,000 (with the majority of fines less than \$100,000).^{5 6} The fines associated with the Eagle Farm and Multi-Run Roofing fatalities (\$405,000 and \$1 million respectively) have upped the ante, and it is likely Queensland will see significantly higher fines handed down for WHS offences from this point on.

Given the degree of change to the Queensland WHS Act and Regulations since the Best Practice Review, strict harmonisation appears all but dead in Queensland. However, recent jail sentences, increases in fines handed down by courts, an increased focus in use of on-the-spot fines, a new Deputy-Directory General and a dedicated WHS Prosecutor suggest that the Queensland WHS regulator may just be coming back to life.

Shelley Dale is a respected WHS professional with over 20 years of experience. Her consulting practice, [Shelley Dale OHS Services](#), has been helping clients in the transport, construction, civil, critical infrastructure, manufacturing, food, health, education, waste management, mining and local government sectors manage their health and safety obligations since 2008. She is a Queensland Government accredited Self-Insurance Auditor, with a special interest in developing and implementing WHS management systems.

In her spare time, Shelley represents the interests of employers through her ministerial appointment to the Workplace Health and Safety Queensland Board's Industry Sector Standing Committee (Transport and Storage), ponders the merits of being the oldest in her classes at first year law school, and enjoys horse racing and champagne (in no particular order).

⁴ Safe Work Australia. *Comparative Performance Monitoring Report 2013-14, 17th Edition*. October 2015.

⁵ Regan, Laura. [Queensland set for WHS crackdown](#). 6 July 2017.

⁶ [Allscaff Systems](#) was fined \$700K under the *WHS Act 1995* for the deaths of two workers who fell from a swing stage on the Gold Coast in June 2008.