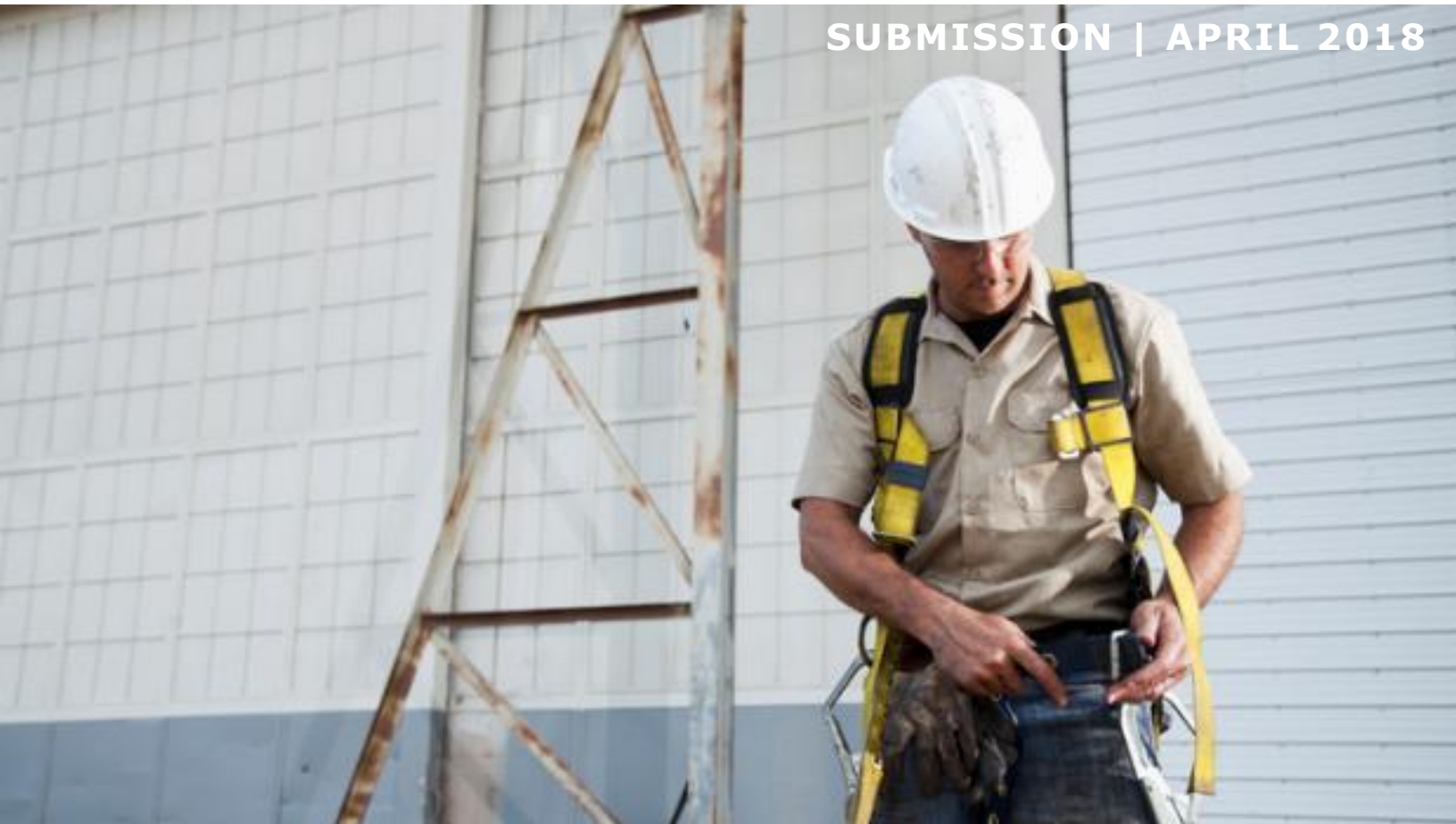


Submission to the 2018 Review of the model Work Health and Safety laws

SUBMISSION | APRIL 2018



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APPENDIX A8

Overview

The NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Market Practice and Premium Guidelines ("MPPGs") Consultation.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

The Chamber is a leading business solutions provider and advocacy group with strengths in workplace management, work health and safety, industrial relations, human resources, international trade and business performance consulting.

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Note

The New South Wales Business Chamber ('the Chamber') notes advice from the Independent Reviewer that the focus of this national review is on recommending changes where there is a strong evidence base.

The Chamber has participated in the development of the Australian Chamber of Commerce and Industry's submission and wishes to convey its support for the propositions contained therein.

The Chamber does, however, also wishes to specifically address recommendations 37 and 49 from the *Best Practice Review of Workplace Health and Safety Queensland* that was released on 3 July 2017 ('the Queensland recommendations'). The Chamber maintains these recommendations, if implemented, would have significant negative implications for businesses in New South Wales.

Introduction

Together, the two Queensland recommendations are multi-faceted but each includes a recommendation that particular matters be considered in this review.

A full excerpt of both recommendations are contained in [Appendix A](#) to this submission. In essence, these recommendations propose that the enforceable undertaking regime for workplace incidents involving a fatality be removed and replaced with new sentencing guidelines with 'suggested penalties' to apply in all jurisdictions.

The Chamber submits that neither of those recommendations are appropriate for New South Wales, for the following reasons and should be rejected.

1. A failure to follow Better Regulation Principles

The Chamber notes that these recommendations are not accompanied by a Regulatory Impact Statement.

Given the differences between each State and Territory's criminal jurisdiction, any attempt by the Queensland government to impose their own laws onto those other jurisdictions without adhering to Better Regulation Principles should be disregarded until due process has been followed.

2. The context of the Queensland review

The Queensland recommendations are the result of an inquiry that was precipitated by "*the recent tragic fatalities at Dreamworld and an Eagle Farm worksite in 2016*"¹.

While both of these incidents were undoubtedly tragic, when considering them in the context of longer term safety trends, neither justifies the significant departure in policy put forward in the Queensland recommendations to the current framework of enforceable undertakings.

The Queensland recommendations appear to be divorced from safety data which indicates (see figures below) the current regime is contributing to the significant downward trend in workplace fatalities since 2005 (both in NSW and nationally). It is arguable that the Queensland recommendations are an example of 'penal populism'.

¹ Page 17, Best Practice Review of Workplace Health and Safety Queensland, https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0016/143521/best-practice-review-of-whsq-final-report.pdf, downloaded 11 April 2018.

In its most basic form, penal populism is a form of political opportunism “which ‘buys’ electoral popularity by cynically increasing levels of penal severity because it is thought that there is public support for this, irrespective of crime trends . . . The consequences of penal populism are thus much more far reaching than politicians simply ‘tapping’ into the public mood as and when it suits them. It is not something they can turn off at will.”²

As was observed by Norrish QC DCJ in **R v Alex Cittadini** [2009] NSWDC 179 @ [25], “the bitterness over the search for justice as it is described by the family of the victims is understandable. This extends to blaming the prisoner for consequences for which he is not responsible . . . but there must be, in any context, some limits to the extent of criminal liability which will fall within the limits of liability for damages, or liability under relevant Occupational Health and Safety legislation”.

The Queensland recommendations appear to adopt a form of penal populism and, as such, do not form a solid evidence base or foundation for changing the current work health & safety policy landscape in New South Wales, especially as the trend of workplace fatalities has been and continues to fall (as will be illustrated further in this submission).

3. The success of the enforceable undertaking regime in New South Wales.

An enforceable undertaking regime for workplace fatalities currently exists in New South Wales and has been an important contributor towards the downward trend¹ of workplace-related fatalities in NSW since 2005, as shown by Figure 1.

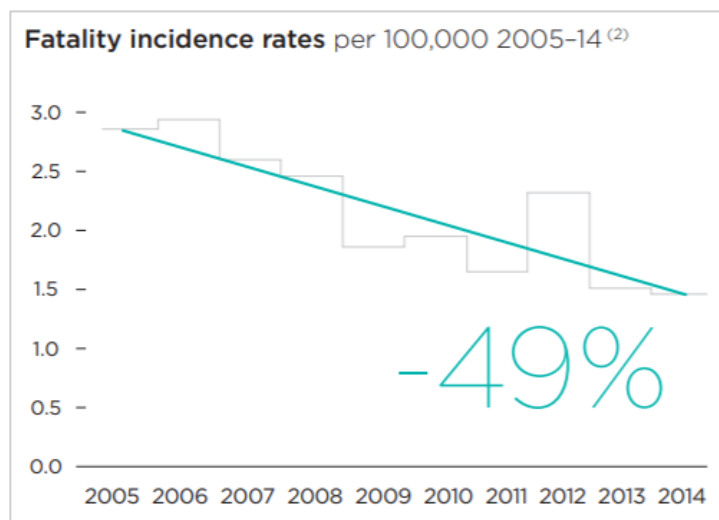


Figure 1 (source: SafeWork NSW)

² J Pratt, Penal Populism (2007) 3-4,, 172-174 excerpts reproduced in ‘Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales’ by Brown, Farrier, McNamara, Steel, Grewcock, Quilter and Schwartz, 6th edition, the Federation Press © 2015.

This is consistent with the national trend³ (refer to Figure 2, below)

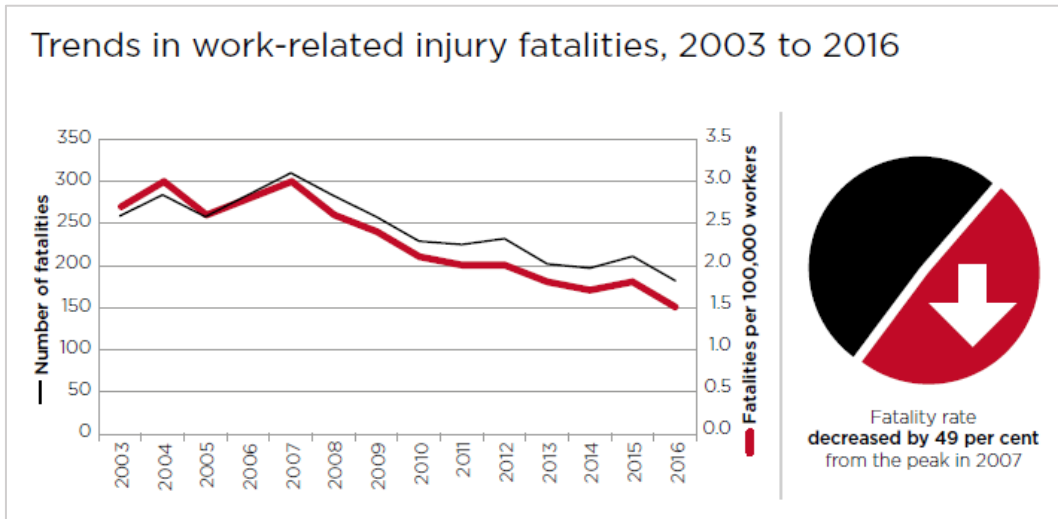


Figure 2 (source: Safe Work Australia)

As can be seen from Figure 3, at 1.4 per 100,000 workers, New South Wales' workplace-related fatality rate is below the national average of 1.5 per 100,000 and well below that of some of the other jurisdictions.

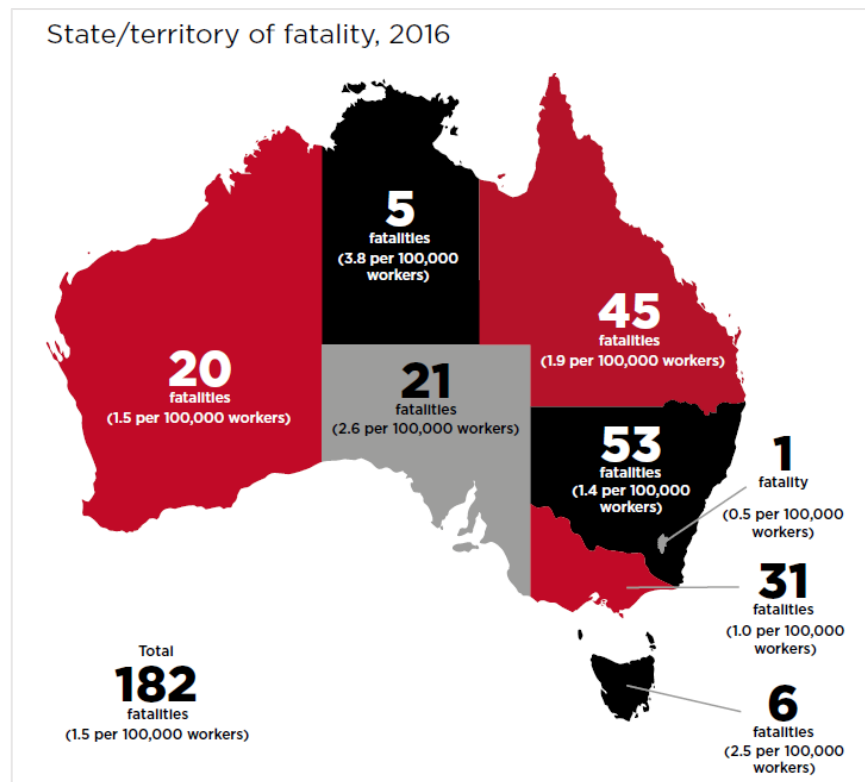


Figure 3 (source: Safe Work Australia)

³ 'Key Work Health and Safety Statistics Australia 2017 work-related injury fatalities', downloaded on 12 April 2018 from https://www.safeworkaustralia.gov.au/system/files/documents/1709/em17-0212_swa_key_statistics_overview_0.pdf.

To provide more context, the statistics produced by Safe Work Australia⁴ indicate that the rate of workplace-related fatalities are higher for particular **occupations** (Figure 4), **industries** (Figure 5) and workers who fall within a **particular age bracket** (Figure 6).

Occupations	Number of fatalities	Fatality rate (fatalities per 100,000 workers)
Machinery Operators and Drivers	62	8.2
Labourers	40	3.4
Technicians and Trades Workers	26	1.5
Managers	24	1.6
Professionals	14	0.5
Community and Personal Service Workers	3	0.2
Sales Workers	3	0.3
Clerical and Administrative Workers	1	0.1
Total	182	1.5

The total includes unknown occupations. This means the sum of fatalities may not equal the total.

Figure 4 (source: Safe Work Australia)



Figure 5 (source: Safe Work Australia)

⁴ ibid

Age group, 2016

Age group (years)	Number of fatalities	Fatality rate (fatalities per 100,000 workers)
less than 25	14	0.8
25-34	33	1.2
35-44	24	0.9
45-54	41	1.6
55-64	46	2.6
65 and over	24	5.3
Total	182	1.5

Figure 6 (source: Safe Work Australia)

The Chamber submits a more targeted regulatory approach is preferable than removing the current enforceable undertaking regime.

There is no evidence to support a change to the work health and safety laws as they currently exist in New South Wales as suggested in the Queensland recommendations.

4. The nature of the criminal law system and sentencing regime in NSW

Consideration also needs to be given to the fact that Queensland's criminal laws have been codified, as opposed to New South Wales, which applies the common law in workplace fatalities.

Therefore, any proposed changes to the Queensland criminal law system to confine workplace fatality crimes to a particular statutory regime would be far simpler to implement in Queensland than in other jurisdictions, especially New South Wales.

In addition, in New South Wales, criminal proceedings⁵ attracting custodial sentences for workplace fatalities already can be (and have been⁶) brought under the common law.

⁵ For manslaughter by criminal negligence

⁶ For example, **R v Lavender** [2004] NSWCCA 120.

There is a specific sentencing regime for the crime of manslaughter which is unique to New South Wales, using principles enunciated by Spigelman CJ in ***R v Forbes*** [2005] NSWCCA 377 at [133] – [135] and [141] which incorporate the factors listed under section 21A of the *Crimes (Sentencing Procedure) Act 1999*.

This regime is implemented throughout the entire criminal law system in New South Wales, regardless of the circumstances in which the manslaughter arose.

Introducing new sentencing principles for workplace-related fatalities would therefore create inequity within the NSW system and should not be applied in a broader setting.

APPENDIX A

On 5 April 2017, the Honourable Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, announced that a best practice review of Workplace Health and Safety Queensland (WHSQ) should be undertaken in response to the tragic fatalities at Dreamworld and an Eagle Farm worksite in 2016.

The review also considered specific issues such as whether an offence of 'gross negligence causing death' should be introduced and whether current penalty levels under the work health and safety laws act as a sufficient deterrent to non-compliance.

On 3 July 2017, the Final Report to this review was released.

Recommendations 37 and 49 of that report were that:

Enforceable undertakings

37. *In relation to the enforceable undertakings framework:*
- a. *The Work Health Safety Act 2011 be amended to expressly prohibit enforceable undertakings being accepted for contraventions or alleged contraventions of the WHS Act 2011 that relate to circumstances involving a fatality.*
 - b. *The Guidelines for the acceptance of an enforceable undertaking be amended to provide a general exception (unless exceptional circumstances exist) where the applicant has a recent prior conviction connected to a work-related fatality; the applicant has more than two prior convictions arising from separate investigations, or the application relates to an incident involving a very serious injury.*
 - c. *For consistency, 'very serious injury' should be defined as stated in the WorkCover New South Wales Enforceable undertakings: Guidelines for proposing an enforceable undertaking.*
 - d. *The Queensland Government consider making similar amendments to the enforceable undertaking requirements under the Electrical Safety Act 2002 and the Safety in Recreational Water Activities Act 2011.*
 - e. *The Queensland Government consider recommending similar amendments be made to the national model Work Health and Safety Act as part of the 2018 review.*

Penalties for work-related fatalities and injuries

49. *In view of inter-state differentials, the Queensland Government seek to include in the 2018 review of the national model work health and safety laws consideration of the development of sentencing guidelines that outline 'suggested penalties' to apply in all jurisdictions. The UK Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline could be used as a starting point for development of such guidelines.*