

Queensland Workplace Health and Safety, Electrical Safety and Dangerous Goods Safety Management

Compliance and Enforcement Policy 2009



Contents

1.	Preamble	1
2.	Purpose	1
3.	Scope	2
4.	Aims / purpose of compliance and enforcement	2
5.	Key principles	2
6.	Compliance and enforcement strategy	3
7.	Compliance and enforcement measures	4
8.	Enforcement criteria	5
9.	Criteria for escalation of investigation	7
10.	Prosecution criteria	9
	Appendix A – Compliance pyramid	12



1. Preamble

The Queensland Government is committed to ensuring healthier and safer workplaces and communities throughout the state. To achieve this aim the Department of Justice and Attorney-General (hereafter referred to as ‘the Department’) administers three significant pieces of legislation in relation to workplace health and safety, electrical safety and dangerous goods safety. Throughout this document the abbreviation used to reference the three pieces of legislation will be ‘OHS legislation’.

This policy applies to all enforcement and compliance activities undertaken in both the public and private sectors of industry. It also applies to enforcement and compliance activities relating to community electrical safety.

This policy is modelled on the national compliance and enforcement policy but customises it to Queensland’s OHS legislation. The national policy is available on the Workplace Health and Safety Queensland (WHSQ) website.

A broadly similar approach to workplace health and safety regulation is taken by all other Australian workplace health and safety, electrical safety and dangerous goods safety jurisdictions. It comprises a principal act which codifies common law duties of care, complemented by detailed regulations and codes of practice, and incorporates a system of education, inspection, advice, enforcement and, where warranted, prosecution.

This policy is supported by a suite of documents that give greater detail on how the policy is applied by the Department.

2. Purpose

This policy operates to support the achievement of the national targets established in the *National OHS Strategy 2002-2012*; the *Queensland Workplace Health and Safety Strategy 2004 - 12* and the *Electrical Safety Plan for Queensland 2009 - 2014*. In this regard the Department targets compliance and enforcement strategies to address the priorities of:

- reducing high incidence/severity risks
- improving the capacity of business operators and workers to manage OHS effectively
- preventing occupational disease more effectively
- eliminating hazards at the design stage
- strengthening the capacity of government to influence OHS outcomes
- protecting the community and workforce from incidents at major hazard facilities
- protecting the community and workforce from dangerous goods risks, and
- protecting the community and workforce from electrical risk.

3. Scope

This policy is a principles-based document that applies to the Department in its administration of the:

- *Workplace Health and Safety Act 1995*
- *Electrical Safety Act 2002*, and
- *Dangerous Goods Safety Management Act 2001*.

4. Aims / purpose of compliance and enforcement

Queensland's occupational health and safety (OHS) authorities implement compliance and enforcement strategies in order to:

- ensure obligation holders have access to information about OHS legislation and how to comply
- ensure obligation holders comply with OHS legislation or if they fail to comply ensure they are held to account
- ensure obligation holders eliminate or properly control risks
- take action to deal immediately with serious risks
- promote and achieve sustained compliance with the law, and
- deter non-compliance and prevent workplace injury.

5. Key principles

The key principles of regulation underpinning compliance and enforcement activities of the Department are that they be:

Consistent - endeavour to ensure that similar circumstances lead to similar enforcement outcomes, thus providing greater protection and certainty at the workplace

Constructive - provide support, advice and guidance to help people comply with OHS legislation

Transparent - demonstrate impartiality, balance and integrity

Accountable - willing to explain enforcement decision-making and provide avenues of complaint or appeal

Proportionate - compliance and enforcement responses are proportionate to the seriousness of the non-compliance

Targeted - to areas of highest risk or strategic enforcement (e.g. to protect vulnerable workers)



6. Compliance and enforcement strategy

How does the Department go about ensuring compliance?

As a modern occupational health and safety authority, the Department uses a wide selection of compliance strategies ranging from information, advice, persuasion, co-operation, inspection, verification and compulsion through to deterrence activities. The primary emphasis is on assisting industry to comply with occupational health and safety obligations through the provision of programs that build industry capability to properly manage workplace risks.

The Department has adopted a strategy that uses an effective mix of positive motivators and strong deterrents to achieve compliance with the law and improved health and safety. This strategy seeks to encourage obligation holders to comply while ensuring that there are fair and swift consequences for those who do not. A wide range of measures are available from advice, education and information to the issue of compliance notices and directives, prosecution and/or removal of licences or other authorisations or permissions. The provision of information, advice, education and assistance are important elements in achieving compliance.

Queensland's compliance and enforcement strategy is two pronged:

a. Risk based compliance and enforcement

Firstly, this policy aims to target compliance and enforcement actions to areas of greatest risk to health and safety. Risk-based compliance and enforcement seeks to target the available resources to areas of greatest need and where they are most likely to have the greatest impact on improving working and community environments.

b. Responsive compliance and enforcement

Secondly, in order to ensure that regulatory response leads to sustained compliance, compliance and enforcement measures also seek to respond to the particular circumstances of the relevant obligation holder or workplace.

Responsive regulation seeks to use the most effective and appropriate enforcement measures to achieve compliance.

Responsive sanctioning complements responsive compliance and enforcement. The principles governing such sanctioning aim to:

- change the behaviour of the obligation holder
- eliminate any financial incentive of non-compliance
- be proportionate to the nature of the offence and the harm caused
- reduce the harm caused by non-compliance, where appropriate
- deter future non-compliance, and
- be responsive and consider what is appropriate for the particular obligation holder.

7. Compliance and enforcement measures

What tools are available to the Department when non-compliance is detected?

The Department has a number of measures available, both formal and informal, to compel an obligation holder to remedy any identified breach of OHS legislation and to sanction the obligation holder. Measures might be invoked or implemented alone or in combination.

Measures available under the *Workplace Health and Safety Act 1995* include:

- improvement notices requiring compliance by a certain date
- infringement notices
- orders from the Industrial Magistrates Court to secure compliance
- seizure of plant, equipment and substances
- prosecutions
- enforceable undertakings
- prohibition notices that prohibit a practice or use of plant or equipment until it can be undertaken or used safely
- provisional improvement notices issued by workplace health and safety representatives
- boards of inquiry
- suspension or cancellation of a licence or other approval such as accreditation.

Measures available under the *Electrical Safety Act 2002* include:

- improvement notices requiring compliance by a certain date
- infringement notices
- orders from the Industrial Magistrates Court to secure compliance
- seizure of plant, equipment and substances
- prosecutions
- enforceable undertakings
- directions to make unsafe electrical work electrically safe



- electrical safety protection notices to rectify immediate electrical risks
- unsafe equipment notices
- suspension or cancellation of a licence by the Electrical Licensing Committee, or other disciplinary action against electrical licence holders and former electrical contractor licence holders
- electrical safety notifications relating to the supply or use of electrical equipment.

Measures available under the *Dangerous Goods Safety Management Act 2001* include:

- directives to obligation holders to remedy specific contraventions of the Act, including directives to review systems, reduce risk or suspend operations
- infringement notices
- seizure of plant, equipment and substances
- prosecutions.

In addition there are a range of informal measures that may be adopted:

- oral directions
- advice and information
- letter of obligation or warning
- risk control plans.

8. Enforcement criteria

What criteria are applied when enforcing the OHS legislation?

Most enforcement activity is undertaken by inspectors or authorised officers who adopt a flexible and responsive approach with the provision of advice, education and assistance being recognised as important elements in achieving compliance.

In making a decision whether or not to take enforcement action, and what type of enforcement action is appropriate in the circumstances, relevant considerations are:

- adverse effect, that is, the extent of the risk, the seriousness of the breach and the actual or potential consequences
- culpability of the obligation holder, that is, not necessarily the consequence of the lack of compliance, but rather how far below acceptable standards the conduct has fallen
- compliance history and attitude of the obligation holder, and the likelihood of the offence being repeated
- whether the obligation holder has a licence or permission to undertake any activity
- impact of enforcement on encouragement or deterrence
- any mitigating or aggravating circumstances, including the extent of effort an obligation holder has expended in controlling risks
- whether the risk to health and safety is imminent or immediate, and
- whether the safety issue can be rectified in the presence of an inspector or authorised officer.

An inspector or authorised officer will consider all the obligation holders relating to a compliance matter and determine if each has discharged their obligations under the legislation. Obligation holders under each act are listed below.

Workplace Health and Safety Act 1995

- persons who conduct a business or undertaking, whether as employers, self-employed persons or otherwise
- persons in control of workplaces or relevant workplace areas
- designers of plant, or structures including buildings
- principal contractors
- project managers
- manufacturers of plant or substances
- suppliers of plant or substances, storage or handling systems, and persons who install, erect or commission plant
- workers.

Electrical Safety Act 2002

- electricity entities
- employers and self-employed persons
- designers, installers and repairers of electrical equipment and installations
- manufacturers, suppliers and importers of electrical equipment
- persons in control of electrical equipment
- workers and other persons at places where electrical equipment is located

Dangerous Goods Safety Management Act 2001

- everyone involved with the storage or handling of hazardous materials or with storage or handling systems at any place who may affect the safety of persons or may harm property at any place or the environment
- the occupier of a major hazard facility or dangerous goods location
- an employee or other person at a major hazard facility or dangerous goods location
- a manufacturer, importer or supplier of dangerous goods
- a designer, manufacturer, importer or supplier of storage or handling systems for use at a major hazard facility or dangerous goods location
- an installer of storage or handling systems at a major hazard facility or dangerous goods location.



What can an obligation holder do if not satisfied with the application of the criteria?

Queensland's OHS legislation has provisions that give obligation holders, whose interests are affected by a decision made by an inspector or an authorised officer such as a decision to issue an enforcement notice, the right to seek a review of that decision. The review process is explained on the reverse side of all enforcement notices.

Under the OHS legislation, an application for review of an inspector's or authorised officer's decision to issue an enforcement notice may be made to the Department and must be submitted on the approved form within 14 days after the day the person receives the decision. The application must be provided with enough information on the application form to enable a decision to be made (approved forms are available from all of the Department's offices and the Department's web site).

The Department must give written notice of the results of the review decision to the applicant.

9. Criteria for escalation of investigation

The compliance strategy consists of a graduated approach as illustrated in the Compliance Pyramid.¹ Information, advice and assistance are the preferred elements of interaction with obligation holders and the foundation of the Compliance Pyramid. Compliance strategies may need to escalate if an advisory approach does not achieve the desired outcome, or is otherwise not appropriate given the circumstance. Escalation of an investigation and the enforcement response chosen is dependent on an assessment of the findings against the enforcement criteria. Enforcement action generally graduates from warnings, enforcement notices and infringement notices through to suspension of operation or suspension or removal of a licence and prosecution where it is considered a licence holder or an obligation holder is demonstrating a wilful disregard for their obligations.

The pyramid illustrates the increasing severity of the compliance options at the Department's disposal, any of which may be utilised in isolation or combination depending on the severity of the matter in question.

The Department exercises discretion in deciding whether incidents, cases of ill health, or complaints should be investigated. The importance of maintaining a proportionate response, and particular factors to be taken into account in deciding the level and type of response to be used/taken, is recognised. In order to ensure consistency in responses to similar incidents or breaches, transparent criteria are adopted for escalation to an investigation which can potentially lead to prosecution.

¹ Refer to Appendix A

Investigations are undertaken in order to determine:

- compliance with the legislation
- causes
- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the legislation
- lessons to be learnt and to influence the legislation and policy, and
- what response is appropriate to an alleged breach of the legislation.

To maintain a proportionate response, most resources available for investigation of incidents will be devoted to the more serious circumstances. It is neither possible nor necessary to investigate all issues of non-compliance with the law which are uncovered in the course of preventive inspection, or in the investigation of reported events.

The Department will generally carry out an investigation of a reportable death; unless there are specific reasons for not doing so, in which case those reasons will be recorded, such as when the incident is outside the authority's jurisdiction.

In selecting which complaints or reports of incidents, injury or occupational ill health to investigate and in deciding the level of resources to be used, the Department will generally take account of the following factors:

- the severity and scale of potential or actual harm
- the seriousness of any potential breach of the law
- the obligation holder's compliance history, including such matters as prior convictions and notices issued
- the enforcement priorities
- the practicality of achieving results
- the wider relevance of the event, including matters of significant community concern or emerging issues.

The Department, in determining whether or not a matter should be further investigated, will have regard to the following priority areas for investigation:

- fatalities and serious injuries or where there is a risk of such consequences
- damage to property or the environment caused by electricity or hazardous materials
- non-compliance with notices or directions
- offences against Department inspectors
- offences against persons exercising OHS responsibilities at the workplace (e.g. health and safety representatives, union officers or other persons authorised under the legislation)
- discrimination against employees on the basis of their OHS activities
- failure to notify incidents.

Where an investigation reveals non-compliance the Department will consider whether or not a prosecution should be commenced, or another sanction applied, or other appropriate action taken.

10. Prosecution criteria

Prosecution in court for an OHS offence is one of several options available to the Department. Prosecution is a discretionary action. Not every breach of OHS legislation is automatically prosecuted.

Who may be prosecuted?

OHS legislation imposes obligations on certain categories of persons. A person may owe obligations in more than one capacity. Those who are alleged to have breached OHS legislation may be subject to a range of enforcement measures, including prosecution. When determining whether or not to prosecute, the Department will consider all relevant obligation holders' contributions and whether they have discharged their legal duties. When making such a decision the Department will consider the role, involvement, and circumstances of each obligation holder. Consequently the Department may choose to prosecute some but not all obligation holders.

When and why will a decision to prosecute be made?

The decision on whether to bring a prosecution for a breach of OHS legislation is one of the most significant as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable. The Department operates within a broader prosecutorial framework as part of the criminal justice system that requires the highest standard of integrity to be applied to prosecutorial decision-making.

The Department will apply the Queensland Director of Public Prosecutions (DPP) guidelines in determining the question as to whether or not a prosecution should be commenced or, if commenced, should proceed.

In determining whether or not to prosecute, three criteria in the DPP guidelines need to be met. They are as follows:

- the existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings.
- a reasonable prospect of conviction, that is, an evaluation of how strong the case is likely to be when presented in court. This takes into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, and the admissibility of any confession or other evidence, and any lines of defence available to the defendant.
- the public interest which may include (but is not limited to) the following considerations:
 - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature



- any mitigating or aggravating circumstances
- the characteristics of the obligation holder – any special infirmities, prior compliance history and background
- the age of the alleged offence
- the degree of culpability of the alleged offender
- whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
- the availability and efficacy of any alternatives to prosecution
- the prevalence of the alleged offence and the need for deterrence, both specific and general, and
- whether the alleged offence is of considerable public concern.

Within what timeframe must a prosecution be brought?

A proceeding for an offence must start:

- within 1 year after the commission of the offence, or
- within 6 months after the offence comes to our knowledge; but for electrical and dangerous goods matters, within 3 years after the commission of the offence, or
- for workplace health and safety and electrical safety matters, if the offence involves a breach of an obligation causing death and the death is investigated by a coroner under the *Coroners Act 2003*—within 2 years after the coroner makes a finding in relation to the death.

What avenues of appeal are available?

The *Workplace Health and Safety Act 1995* and *Electrical Safety Act 2002* prescribe that prosecutions for breaches of provisions of these Acts are to be conducted in the Industrial Magistrates Court. Accordingly, if a party to the proceeding, a person bound by the decision or an inspector who started the proceeding, is dissatisfied with the decision, any of these parties may appeal to the Industrial Court to review the decision.

Prosecutions for breaches of the *Dangerous Goods Safety Management Act 2001* are conducted in the Magistrates Court or District Court. There are no specific provisions in this Act detailing the appeal processes. Therefore appeals from convictions or sentences imposed by the Magistrates Court or District Court are governed by the general rules relating to appeals from these courts.



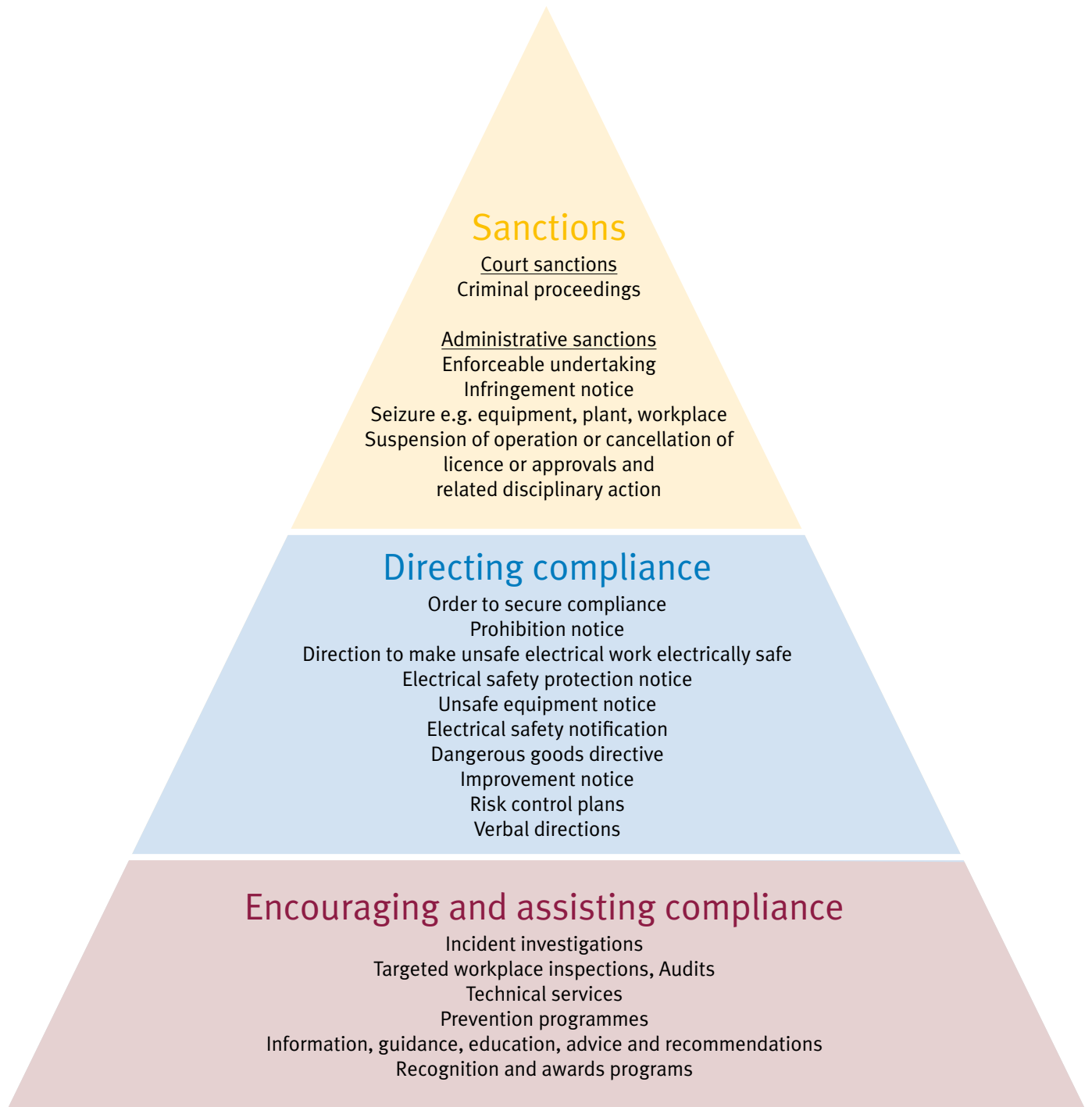
How will a decision be communicated?

It benefits all parties to have the outcomes of investigations communicated. The Department has processes to deal with the communication of such outcomes. Similarly it is considered that the publication of prosecution results is an effective tool for maximising the deterrent value of prosecutions and educating obligation holders.

The Department publicises its prosecution-related information by a variety of methods including:

- Website
- Media statements: the Department issues media releases and responds to media enquiries, including on occasions granting media interviews to newspapers, radio, television and online media outlets.
- Conferences and public forums: Departmental representatives participating in public forums, such as safety conferences, disseminate appropriate information and statistics on prosecutions and enforceable undertakings.
- Publications: the Department publishes a wide variety of printed publications or printable versions of online publications which contain relevant information on prosecutions and enforceable undertakings, including brochures, newsletters and the Annual Report.
- Research: the Department collects and publishes data and statistics on fines imposed, successful prosecutions and accepted enforceable undertakings.

Appendix A – Compliance pyramid





Further information

Workplace Health and Safety Queensland and Electrical Safety Office

Websites: www.worksafe.qld.gov.au (Workplace health and safety)
www.deir.qld.gov.au (Electrical safety)

Telephone: 1300 369 915 (Workplace health and safety and dangerous goods safety management)
1300 650 662 (Electrical safety)

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