4 Approach to benchmarking OHS regulation

Key points

- The Commission's approach to this benchmarking study has been informed by the rationale for the broader benchmarking program as well as the lessons from the Commission's previous regulation benchmarking studies and international studies.
- The methodology used has been to:
  - identify differences in either the regulation itself or its enforcement
  - devise indicators which are likely to show which requirements impose higher costs on business
  - seek evidence as to whether or not the higher costs could be associated with better outcomes.
- Participants to this study suggested regulatory differences across the jurisdictions resulted in different compliance costs in relation to:
  - regulator characteristics and enforcement practices
  - the accountability of regulators
  - regulations aimed at influencing the culture of compliance
  - the regulation of particular hazards or processes
  - mining regulation in New South Wales, Queensland and Western Australia.
- Concern was also raised about duplication between regulatory regimes in relation to:
  - Comcare and state and territory regimes
  - industry-specific and general OHS regimes.
- Those areas chosen for benchmarking were selected on the basis that they were likely to provide useful information to policy makers seeking reforms aimed at reducing the compliance cost of OHS regulation.

As detailed in earlier chapters of this report, occupational health and safety (OHS) regulation plays an important role in securing safety outcomes for Australian workers. That said, while most businesses agree that this regulation is both necessary and beneficial, many have suggested that the sheer volume of regulation and inconsistencies that exist between jurisdictions have imposed significant compliance burdens. This chapter sets out what benchmarking is and details some

insights gained from international attempts to benchmark compliance burdens on business. It then describes most of the concerns raised by participants to this study and explains the reasoning behind the issues selected for further examination and benchmarking in this report.

4.1 What is benchmarking?

Benchmarking is the process of comparing an area of interest using one or more indicators resulting in a standard, or point of reference, against which that area of interest can be 'compared, assessed, measured or judged' (OECD 2006). Benchmarking depends upon having a standardised method for collecting and reporting the data underpinning the indicators on which the comparisons will be based.

Benchmarking helps an organisation understand how it is performing relative to either its peers or against some standard (such as a best practice standard). Organisations may compare themselves to their peers in order to diagnose problems in their performance, identify their strengths and weaknesses (relative to their peers) and/or to determine best practice (Vlăsceanu, Grünberg and Pârlea 2004). The organisations being compared usually share some features, for example, they may compete in the same market or regulate similar areas of business activity.

In general, benchmarking is best used as a tool to inform decision making rather than to simply establish some hierarchy of performance amongst a peer group. In using benchmarking to inform decision making, the benchmarking outcomes need to be considered in light of the circumstances of the organisation(s) being compared. For example, it would be reasonable to expect that in order for a regulator in a geographically larger state (such as Western Australia) to achieve the same level of regulatory coverage as a smaller state (such as Tasmania), the larger state regulator will need to have a greater number of regional offices, or have their staff spending more time travelling. If both states recover the full cost of regulation from business, then the geography of the larger states will contribute to a potentially higher cost of regulation for businesses in those states.

Why benchmark Australian business regulation?

The Regulation Taskforce (2006) provided the impetus for a program of benchmarking business regulation when it concluded that benchmarking across jurisdictions would assist in improving regulatory regimes. This view was endorsed by the Australian Bankers' Association in their submission to the Commission's 2008 benchmarking study (ABA 2008) wherein it noted that benchmarking could

lead to a number of benefits, including: improving the efficiency and effectiveness of regulation; ensuring the consistency of regulation across jurisdictions; improving the transparency of decision making and accountability of regulators; and ensuring regulation delivers ‘net benefits’.

The use of benchmarking to identify improvements in regulatory regimes has precedent in international studies. The OECD (1997) observed that many international studies focused on benchmarking of regulatory regimes shared common objectives, including to:

1. create sustained pressure for improvement in the public sector
2. expose areas where improvement is needed and reveal underlying problems of an organisation (or group of organisations)
3. identify superior processes which can be adopted and provide insights as to what constitutes best practice
4. focus on the links between processes and performance
5. assess performance objectively
6. test whether the implementation of improvement plans and strategies resulting from benchmarking have been successful.

The majority of these objectives are also relevant to this study.

The simple public reporting of benchmarking indicators on regulatory burdens, even without any accompanying analysis, can also be beneficial. Benchmarking can provide useful information to policy makers and stakeholders by:

- highlighting potentially unnecessary burdens on businesses, where differences in regulatory burden across jurisdictions are not attributable to differences in regulatory objectives or outcomes
- highlighting the regulatory approaches, for comparable objectives, that generate lower burdens on business
- increasing government accountability for the cost-effective delivery of regulation, through the increased transparency afforded by benchmarking.

The benchmarking of regulatory burdens over time may assist in identifying the jurisdictions that have been the most successful in reducing the burdens on business. Benchmarking could also strengthen the accountability of regulators to business and the community by requiring them to demonstrate the benefits of regulation where those benefits are said to more than offset the costs of the regulation (PC 2007).

4.2 Insights from international benchmarking studies

Outside of Australia there are a number of examples of benchmarking studies in which attempts have been made to compare regulatory regimes at a point in time or regulatory burdens over time (box 4.1).

Box 4.1 International studies of regulatory burden

Comparisons across countries

The World Bank's *'Doing Business'* report presents a range of quantitative indicators on business regulations and the protection of property rights across 181 countries. This annual exercise can be used to compare aspects of regulatory regimes across countries. For example, in the 2009 report, Australia was ranked ninth in terms of ease of doing business and third in terms of ease of starting a business.

The OECD's report*, Cutting Red Tape: Comparing Administrative Burdens across Countries,* considers the administrative burdens faced by transport businesses in 11 countries undertaking two activities: 'hiring a worker' and 'operating a vehicle'. This report produced a number of insights into how the regulatory regimes could be simplified or made more efficient.

Comparisons within countries (or jurisdictions)

Most benchmarking studies of a country or jurisdiction are undertaken as part of a broader government program of 'red tape reduction'. The studies are typically undertaken to establish a baseline regulatory burden and then to track progress against a stated goal of reducing that regulatory burden. As a result, these studies typically make comparisons over time, rather than a comparison at a point in time (which is the primary purpose of the Commission's benchmarking program).

The Canadian province of *British Columbia* measured regulatory burdens by using a count of regulatory requirements to quantify the burden. A regulatory requirement was defined as 'a compulsion, obligation, demand or prohibition placed on an individual, entity or activity by or under the authority of a provincial Act, regulation or related policy'. This approach has the advantage of being readily measured and providing a consistent basis for measurement over time, but the disadvantage of giving equal weight to each requirement, regardless of its nature.

Other studies

Reducing the risk of policy failure: challenges for regulatory compliance (Parker) considers the emerging issues for regulatory compliance and the possible explanations for differing compliance levels. A number of 'smart principles' for promoting regulatory compliance can be gleaned from the report (box 4.2).

Sources: HSE (2009); Ministry of Small Business and Revenue — Government of British Columbia (2008); World Bank (2008); OECD (2007); Jones et al. (2005); Parker (2000).

Box 4.2 **'Smart' principles for promoting regulatory compliance**

- Maximise the potential for voluntary compliance:
  - avoid unnecessarily complex regulation
  - ensure regulation is effectively communicated
  - minimise the costs of compliance (in terms of time, money and effort)
  - ensure regulation fits well with existing market incentives and is supported by cultural norms and civic institutions
  - consider providing rewards and incentives for high/voluntary compliance, for example, by reducing the burden of routine inspections and granting penalty discounts when minor lapses occur
  - nurture compliance capacity in business, for example, by providing technical advice to help businesses, especially small and medium sized enterprises, to comply with regulation.
- Maintain an ongoing dialogue between government and the business community, to ensure that regulators have a good understanding of the types of businesses they are targeting.
- Adequately resource regulatory agencies.
- Use risk analysis to identify targets of possible low compliance.
- Develop a range of enforcement instruments so regulators can respond to different types of non-compliance.
- Monitor compliance trends in order to gauge the effectiveness and efficiency of enforcement activities.

Source: Based on Parker (2000).

The international studies provide valuable insights that have been applied in this study, including:

- planning the study so that it is not heavily reliant on representative data from business
- establishing comparable measures of regulatory burden through an analysis of the actual requirements on business and, where appropriate, using simplifying assumptions (such as assumed time frames for certain business processes)
- using the smart principles for promoting regulatory compliance (box 4.2) as the best practice indicators against which to assess and compare regulators and their administration and enforcement of OHS regulation
- narrowing the scope of the study, wherever possible, to specific aspects of regulation (or business activity)
- linking the benchmarking indicators to specific regulatory requirements.

Collectively, the international studies suggest a range of alternative measures for quantifying regulatory burdens. The studies also suggest that reliance on a single measure (such as a count of regulatory requirements) or on a single aspect of the regulatory burden (such as the administrative burden) may result in a failure to identify the major source(s) of regulatory burden on businesses.

4.3 What can be benchmarked?

Regulatory benchmarking can either construct and compare indicators of current compliance costs across jurisdictions, without reference to any specific best practice, or compare indicators against best practice standards or policy targets (PC 2007). In essence, the former pinpoints areas where current regulations could be delivered more cost-effectively by identifying agencies or jurisdictions regulating at a higher cost than others. The latter focuses less on how agencies or jurisdictions compare to each other and more on how they measure up against best practice and thus highlights areas where improvements can be made.

This report focuses predominantly on the benchmarking of current regulation and is separate from, but cognisant of, the development of model national OHS regulation that is taking place following the recent review (Stewart-Crompton, Mayman and Sherriff 2008, 2009 — see chapter 1). Some of the information provided by this benchmarking exercise will be useful for policy makers to assess proposed changes in regulatory regimes. Benchmarking also allows some measurement of any perverse incentives created by regulations, even those which are considered 'best practice'. Further, a comparison of practical enforcement practices can provide useful insights under any regulatory regime. This section presents some general perspectives on how OHS regulation can impose compliance burdens on businesses, and for these burdens, how benchmarking can aid policy makers in delivering better regulation.

Compliance burdens and regulation

As discussed in chapter 1, all regulations that address market or other failures attempt to induce changes in behaviour. It is through such changes in behaviour that compliance costs can be imposed on individuals and businesses where they have to adopt new practices (which in some cases can represent changes in the level or type of production) or complete additional tasks to those that they would have otherwise undertaken. However, regulation does not necessarily impose costs on all individuals or businesses. For example, for many areas of regulation, individuals and businesses would otherwise meet or exceed the requirement of the regulation in

order to meet consumer demands or because it represents sound business practice to do so. In these instances the regulations impose no compliance costs.

Governments also incur administrative costs in implementing and enforcing regulations. Governments, usually through regulators, need to inform individuals and businesses of their responsibilities under regulation, monitor the actions of those covered by the regulations, and enforce the duties for those who are not compliant. These activities can feed into business costs when regulators charge fees for inspection services or use financial penalties for non-compliance.

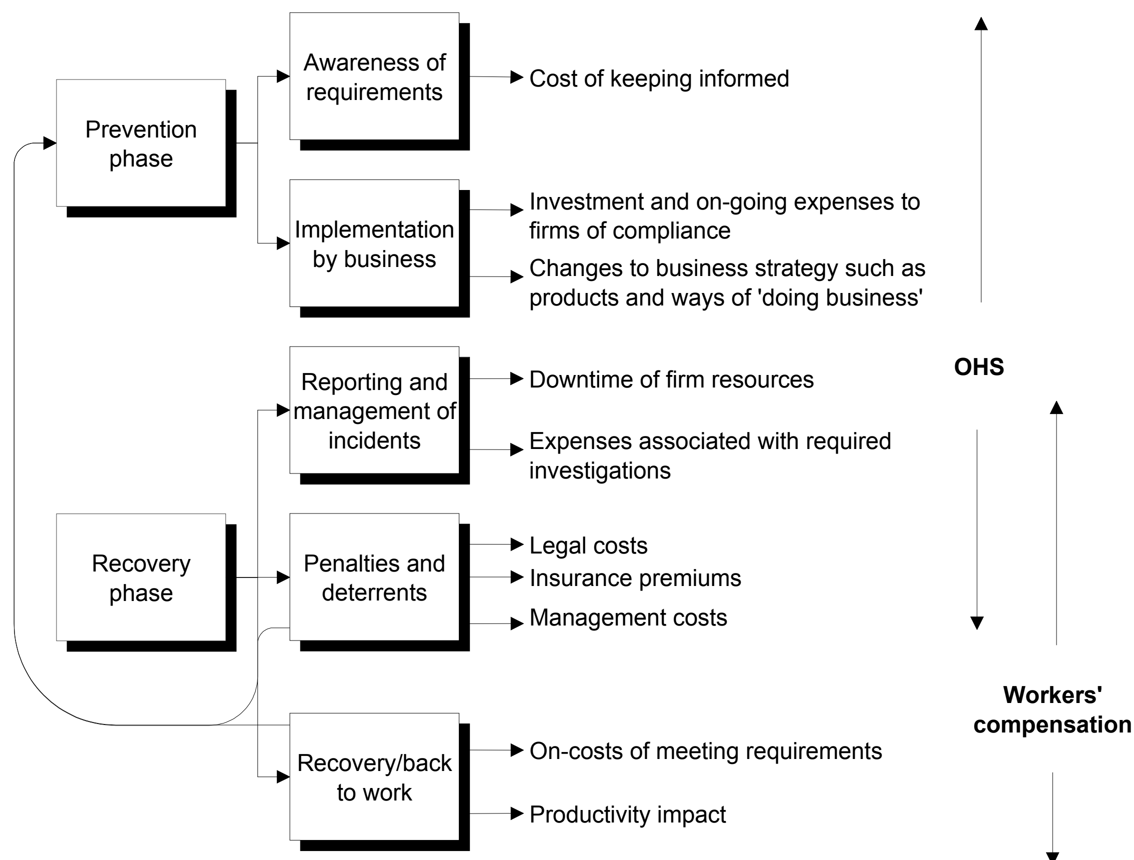
For OHS, these costs occur at different regulatory phases. Broadly, business compliance with OHS (and workers' compensation) regulation can be thought to occur in two phases — the prevention and recovery phase. The prevention phase occurs prior to any workplace incident, and includes all the activities undertaken in becoming aware of, and implementing, various regulatory requirements. The recovery phase comprises all the required activities post an incident such as reporting and complying with any penalties imposed.

The regulations and regulators target desired outcomes through a variety of methods and instruments during both phases. For example, in the prevention phase, to limit the risks of certain hazards, regulations may prohibit businesses from exposing those in the workplace to certain situations. Codes of practice are often developed to inform businesses of ways in which they can achieve this. Then, to ensure compliance, regulators will inspect workplaces, provide education about risks and issue penalties when businesses are in breach of their duties. Then, after an accident (recovery phase), regulators will require incident reports, conduct further inspections and investigations and issue penalties. For OHS, regulators generally target the prevention phase.

Notwithstanding the benefits created by OHS regulation, costs are imposed on businesses during both the prevention and recovery phases (figure 4.1).

The indicators of costs depicted in figure 4.1 capture the costs of not only OHS regulations, but also workers' compensation regulations. Although not under reference, workers' compensation regulations affect incentives for employers to take preventative action against workplace injury and disease. While, overall, policy makers are interested in all cost aspects when assessing the effectiveness of any regime aimed at preventing injury and then reducing harm after it has occurred, for the purpose of this study the focus is mainly on the costs and incentives associated with the prevention phase: awareness of requirements, implementation of measures by business and reporting and management of incidents (which are the focus of most OHS regulations).

Figure 4.1 **Compliance costs associated with OHS regulation**



Another complicating aspect of attempts to measure the compliance burden of OHS regulation is the use of general duties that confer responsibilities on those individuals who can influence health and safety outcomes. These broad duties impose responsibilities that can create significant burdens irrespective of any specific requirements.

Given these broad duties, the addition of specific requirements in subordinate legislation may not materially add to the compliance burden created by the more general duty. In some cases, it may even reduce it by making the requirements implied by the general duty more transparent. However, in other cases, if the requirements are overly prescriptive they may add to compliance costs through reducing the flexibility businesses have in complying with their general duty of care.

4.4 Main complaints raised

Through submissions and stakeholder consultations, the Commission was made aware of various areas of OHS regulation which imposed significant burdens on businesses and also where differences existed between jurisdictions in their regulatory approach to OHS. Further to this, through a survey of 1802 small and medium sized enterprises (SMEs) conducted by Sensis Pty Ltd (see appendix B), the Commission asked respondents what were the three elements of OHS regulation that concerned them the most in terms of compliance costs. While 60 per cent said no individual elements concerned them, or that they did not know, the remainder identified a number of areas (table 4.1). Not all responses related to specific aspects of OHS regulation, with ongoing training costs, the costs associated with compliance with the regulatory regime overall, and the cost of purchasing and maintaining safety equipment the most significant cost items raised.

Table 4.1 **Areas of high compliance costs to SMEs associated with OHS regulation**

12 months to May 2009

Area	*Responses*	*Responses*
	no.	%
Ongoing training	277	17
Compliance with legislation	277	17
Purchasing/maintaining safety equipment	217	14
Time costs	108	7
Paperwork	78	5
Changes to equipment	64	4
Record keeping and reporting	59	4
Maintaining safety	56	3
Modifications/maintenance of business premises	47	3
Additional staff/wages	38	2
Dealing with regulators	35	2
Hazard/risk control	34	2
Need for consultants/specialists	32	2
Licensing/staff qualifications	20	1
Monitoring/managing staff	19	1
Cost/time involved maintaining health and safety committee	16	1
Other	237	15

Source: Sensis Survey of SMEs (2009 unpublished).

Differences by firm size

During consultations, the Commission was informed by many large businesses that they adopted more stringent OHS requirements than those imposed by regulation as they valued achieving good OHS outcomes. Further, many large businesses also maintain strong standards in order to achieve self-insurance accreditation under various workers' compensation arrangements.

Despite this, larger businesses are likely to face a number of costs associated with reporting requirements and maintaining an understanding of their regulatory requirements irrespective of their self-imposed standards. A leading Australian retailer, for example, put forward a number of cost estimates associated with OHS regulation. They estimated that keeping on top of their OHS legal requirements cost them around $25 000 in annual subscriptions to information providers alone. Other costs included those related to understanding the powers of inspectors ($11 000); understanding the various fire certification requirements ($10 000); forklift training ($100 000); and other legal training for executives ($15 000).

Also, OHS regulation appears to be a significant component of total regulatory compliance activities for larger businesses. In a survey of over 500 businesses, the Australian Industry Group found that for large businesses (defined as those with more than 100 employees), OHS compliance activities dominated the total resources used in regulatory compliance — more than 70 per cent stated that most of their resources used in regulatory compliance were directed to OHS activities compared to under 50 per cent for medium, small and micro firms (those with less than 100 employees) surveyed (AIG 2009).

The Sensis survey provides a more detailed picture of the OHS compliance costs faced by 1800 SMEs.[1] The costs of complying with individual components of OHS regulation were generally viewed as trivial compared to their overall costs (table 4.2). The costs identified were spread across a number of areas and were predominantly trivial with the exception of those associated with employing an additional person with specific skills; purchasing training externally; engaging OHS consultants; providing protective clothing; and those relating to replacing plant and equipment earlier than otherwise.

[1] The Australian Federation of Employers and Industries submission (AFEI sub. DR26, table 1) provides a comparison of the SME data with a survey of 400 its members. A direct comparison of the Sensis and AFEI data may not be appropriate as the AFEI considers its membership to have a 'heightened awareness of their [OHS] obligations' (sub. DR26, p. 10).

Table 4.2 **Costs to SMEs associated with complying with OHS regulation**[a]

12 months to May 2009

Action	*SMEs*	*Trivial*	*Moderate*	*Substantial*
	%	%	%	%
Employed an additional employee with specific skills	10	38	39	23
Engaged an external consultant	25	54	34	12
Tasked existing staff to implement OHS	56	65	28	7
Developed an health and safety committee and/or appointed an health and safety representative	30	71	24	5
Conducted hazard identification and risk control	61	75	20	6
Provided protective clothing	53	59	32	8
Kept records	58	76	20	5
Purchased information from external sources	33	68	25	6
Purchased staff training externally	35	53	37	10
Undertook staff training internally	53	67	27	6
Modified existing plant and equipment	34	55	29	16
Replaced plant and equipment earlier than otherwise	19	45	32	23
Changed what is produced	3	53	32	15
Changed production processes	12	67	21	11
Changed inputs or materials	7	64	22	14
Other	1	nc	nc	nc
None of these	16	na	na	na

na not applicable. **nc** not collected. [a] Sum of columns exceed 100 due to multiple responses. Proportions expressed as a percentage of responses.

Source: Sensis Survey of SMEs (2009 unpublished).

Overall, the main reason cited by SMEs for undertaking actions was to ensure compliance with OHS regulation — accounting for 49 per cent of the actions taken (table 4.3). The activities of regulators were also important, accounting for 9 per cent of the reasons for why businesses undertook compliance activities. Compliance with other policies such as workers' compensation only accounted for 2 per cent of the actions taken.

Interestingly, the significance of motivations of SMEs not related to complying with OHS regulations (such as to create a safe working environment, common sense/good business practice and to retain staff which account for 28 per cent of reasons given for the actions taken) suggest that the actual burden created by OHS regulatory regimes for this group is less than the costs put forward because many businesses are likely to have undertaken these activities in the absence of OHS regulation.

Table 4.3 **Reasons for SME compliance activities**

12 months to May 2009

Reason for action	*Responses*	*Responses*
	no.	%
Part of compliance with regulations	1 064	49
Safe working environment	380	18
Common sense/good business practice	130	6
Information from regulator	112	5
Retain staff	93	4
Actions of regulator[a]	77	4
Other policy[b]	47	2
Other	307	12

[a] Actions of regulators refer to inspections, audits and prosecutions. [b] Includes workers' compensation and environmental policy.

Source: Sensis Survey of SMEs (2009 unpublished).

The issues raised by SMEs in the survey, along with other differences between jurisdictions identified by participants to this study and those identified by the Commission can be classified into two broad groups:

- differences across the jurisdictions in:
  - regulator characteristics and enforcement practices
  - the accountability of regulators
  - regulations aimed at influencing the culture of compliance
  - the regulation of particular hazards or processes
  - mining-specific regulations in New South Wales, Queensland and Western Australia.
- duplication between regulatory regimes in relation to:
  - Comcare and state and territory regimes
  - industry-specific and general OHS regimes.

Differences across the jurisdictions

Regulator characteristics and enforcement practices

Regulators represent the most significant, and often the only, interface between government regulations and business. Thus the characteristics of, and approach taken by, regulators can significantly influence the burden created by OHS regulations.

A number of participants have suggested that the enforcement approach of regulators varies significantly. For example, as put by the Australian Chamber of Commerce and Industry (ACCI):

> Enforcement through a judicious mix of education, training and — only where necessary — prosecution and penalty requires balance and judgement, and this aspect of a regulator's role has been inconsistent both within and across jurisdictions. Such inconsistency is confusing for businesses and is counter-productive relative to the goal of achieving safer workplaces. Employers require additional and better quality guidance material that does not generate additional burdens. (sub. 6, p. 19)

Further, ACCI suggested that inspection activity also varies and with it compliance costs:

> Frequency, thoroughness and efficiency of OHS inspections vary within and across jurisdictions.
>
> OHS inspections impose a significant burden on those businesses who are inspected as well as on tax payers who fund regulator activity, and therefore regulators should aim to conduct the minimum number of inspections required to achieve broad OHS outcomes in their jurisdiction. (sub. 6, p. 24)

One participant also suggested that regulators need to work with, not against, businesses to achieve good safety outcomes:

> Despite New South Wales having more prosecutions and imposing more fines than all other jurisdictions safety performance resources will have little impact if they are not supported by an appropriate organisational philosophy and culture. If, as has been the suspicion of employers in New South Wales, the regulator views those who it regulates as, prima face, wrong … simply because they are the subject to regulation then it is unlikely a cooperative relationship which focus on the intended result, safer workplaces, will emerge. (NSW Business Chamber, sub. 11, p. 4)

Following these concerns, there are a number of possible areas which can be benchmarked to provide insight into the practices of regulators and the subsequent burden placed on business:

- regulators' characteristics — such as their size and resourcing
- allocation of resources to enforcement activities — regulators may have different approaches to allocating their resources to ensure the greatest level of compliance
- information provision — the different approaches regulators take to informing businesses of their compliance requirements
- the mutual recognition of compliance activities required by other regulations and self regulatory instruments — whether these can be used to demonstrate compliance under specific state or territory regimes

- available enforcement and compliance instruments and their use — regulators differ both in the education and enforcement tools legally available to them to use and the extent to which each instrument is actually used to achieve compliance
- levels of penalties — penalties vary between jurisdictions.

Accountability of regulators

The accountability and transparency of regulators are important features of a good regulatory system. Businesses that interact with regulators, and face penalties for breaches in compliance, should be aware of the reasons behind regulator decisions and know how they can appeal them. This point was highlighted by the NSW Business Chamber:

> Clearly regulators need to be held to account for their performance, however, we do need to find ways to encourage them to focus on "getting it right" rather than "not being wrong". (sub. 11, p. 4)

Further, to ensure the general public is fully aware of the resources used to enforce these policies (so that decisions about cost effectiveness can be made), regulators should have transparent reporting processes.

In the area of regulator accountability, several characteristics of regulators can provide useful areas to benchmark, including:

- the appeal processes available to contest decisions made (including licensing) and penalties imposed
- the transparency of regulators' decision making and reporting
- the feedback provided to, and obtained by, regulators.

Regulations aimed at influencing the culture of compliance

Interventions to encourage compliance through increasing knowledge and awareness of OHS issues, such as training requirements and worker consultation and representation, have been increasingly used within OHS regulations. Differences, however, exist between jurisdictions in these interventions.

Business SA suggested that for such regulatory interventions to be successful:

> … governments and regulators … [should] focus on what is reasonable, practical and achievable, and to make the right interventions if and when they are needed. This means a framework that facilitates high level OHS awareness and culture in workplaces, and not the micro-management of OHS in workplaces. For the framework

> to be effective, it must be consistent with the realities of operating businesses in the modern economy and mobile labour force. (sub. 2, p. 4)

However, Business SA suggested that instead of this, governments have made it impossible to comply or be fully aware of regulations due to the sheer quantity of regulation. As a result they suggest that rates of non-compliance are high:

> A comprehensive detailed legislative compliance audit … of any organisation (or indeed government department) will reveal areas of non-compliance. While these non-compliances may not be associated with 'high risk' activities they indicate that it has become almost impossible to fully comply with South Australia's OHS&W [occupational health, safety and welfare] legislation. (sub. 2, p. 9)

The views put forward by Business SA suggest that the success of intervention aimed at engendering a culture of compliance with OHS legislation will be influenced by a businesses' awareness of their requirements.

Hazard identification, risk control and record keeping

All OHS regulation requires businesses to identify hazards, control risks and keep records. Some say these processes have led to adverse outcomes by shifting the focus of regulation from prevention to record keeping. As put by Business SA:

> The majority of South Australia's OHS&W [occupational health, safety and welfare] regulations and Codes of Practice contain requirements to maintain records. The production of these records is now perceived by SafeWork SA inspectors and the Industrial Court as the only system to prove compliance with any OHS&W regulation or standard.
>
> The unfortunate outcome of this emphasis on record keeping is to create the perception that the focus of OHS&W in South Australia has shifted from prevention to that of record keeping. (sub. 2, p. 9)

This sentiment was also expressed by National Disability Services, who expressed concern that reporting requirements drew resources unnecessarily away from their core activities:

> In order to provide services outside a standard segregated facility, disability service providers are required to undertake detailed risk assessments of the premises at which work is to be undertaken (eg. client's home, local café), and to document those assessments. Whilst consideration of risk is important to ensure the safety of the worker and the person with a disability, in the current funding environment, the need to document this process in order to meet legislative obligations reduces the time available for the client to participate in their chosen activity. (sub. 14, p. 3)

Further, it was suggested that differences in reporting requirements also placed unnecessary costs on interstate businesses when they move staff between jurisdictions. As put by Boral Limited:

> Transfers of staff have cost implications when they take place across State boundaries, including retraining where requirements differ e.g. incident notification timeframes, preservation of incident site, documentation, Codes of Practice, etc. This is particularly important for OH&S personnel and for supervisors and managers especially where working environments may be industrially sensitive. (sub. 3, p. 3)

Given hazard identification and risk control (and the resulting reporting requirements) are a central feature of OHS regulation, they can significantly alter business compliance costs.

Workplace consultation and representation requirements

As discussed in chapter 2, OHS regulation requires businesses to consult with staff over health and safety issues. These measures are aimed at improving safety outcomes through both creating a holistic approach to OHS and by allowing the early identification of workplace risks. However, some argue that the extensive employee consultation requirements impose costs without improving safety outcomes:

> … some employers report that legislative requirements for formal consultation systems which identify specific structures and mechanisms (such as OHS Committees for organisations of a certain size) impose a burden which does not demonstrate an outcome of reduced risk of injury or illness. (National Disability Services, sub. 14, p. 4)

It has also been suggested that differences between jurisdictions in these consultation requirements, which extend to training requirements, create unnecessary costs for interstate businesses:

> … there are differences in costs between States associated with in house activities e.g. OH&S Representatives selection, training including refresher training, and range of responsibilities which impact on time on the job, etc. (Boral Limited, sub. 3, p. 3)

Differences in attempts to encourage a union presence in the workplace have also been highlighted as an area where businesses believe unnecessary costs could evolve. Concern was raised over the extent of union access rights into worksites with the Master Builders Australia suggesting that, to avoid unnecessary disruption and potential duplication in compliance activities, union officials should be accompanied by government inspectors during visits (sub. 1, attachment 1).

Specific duty of care provisions

Duty of care provisions help ensure employers and others to continue to identify and manage workplace risks. Some participants suggested, that for some groups, these provisions have gone 'too far' and created unnecessary compliance burdens, and that the differences that exist between jurisdictions add to compliance costs and uncertainty. As put by the Association of Construction Engineers Australia (ACEA):

> The ACEA believes consulting engineering firms, especially those that operate in multiple jurisdictions, are unnecessarily burdened by inconsistent designer specific duties of care that are in effect in each jurisdiction.
>
> This is because the role and responsibility of a designer of buildings or structures has started to increase beyond the design process in the last decade. In some jurisdictions a designer now has a duty of care to ensure persons who construct the design project are not unduly exposed to hazards or risks, whereas others jurisdictions don't. (sub. 5, p. 4)

In a similar vein, the Australian Finance Conference suggested that the duties imposed on suppliers have had some unintended consequences. In particular, they raised concerns that financiers of plant and equipment could be captured by supplier duties where exemptions for passive financiers did not exist:

> We recently consulted our members about their concerns about the compliance burden created for financiers by inconsistencies in current OHS laws and the risks placed on financiers of plant and equipment in jurisdictions which do not have "passive financier" provisions. Members have confirmed that this remains a concern and would be a factor in making a decision about providing finance in some jurisdictions and about the cost of finance. In some cases, the financier may not provide finance at all, such as for high risk transportation vehicles used to transport dangerous or explosive substances, waste management and health services equipment. (sub. 15, pp. 1–2)

A central issue in these duty of care provisions is whether or not they extend past a point where an individual or business is in a position to retain control of the workplace.

Personal liability provisions

The regulatory regimes of state and territory governments have adopted different approaches to the extent to which individuals within companies are personally liable for OHS breaches. The Safety Institute of Australia suggested that personal liability provisions of individuals within businesses went too far and should be limited:

> Liability should be assigned to Corporations, and only to individuals in the event of deliberate, negligent and/or reckless practice. (sub. 13, attachment 1, p. 8)

As with duty of care, these provisions intend to create an incentive for those who can influence OHS outcomes in a positive way to do so.

Onus of proof

Differences in who holds the onus of proof in each state and territory were identified by participants as sources of high compliance costs. For example, Master Builders Australia suggested that the approach in New South Wales has not led to improvements in safety outcomes:

> The NSW system which is highly regulated and with its absolute duty of care does not deliver the best safety outcome when compared with other state jurisdictions where safety has not been compromised. (sub. 1, attachment 1, p. 4)

Similarly, the ACEA suggested that the reversal of onus of proof increased the compliance burden placed on business:

> The ACEA believes the reverse onus of proof provisions imposed in OHS laws in NSW and Qld inflict an additional regulatory burden on consulting firms that operate in those jurisdictions.
>
> This is because reverse onus of proof provisions mean an employer in NSW and Qld has an absolute duty of care to provide a safe working environment for its employees, and that when an accident occurs in the workplace the onus is then upon the employer to prove that is was not 'reasonably practicable' for them to eliminate or reduce the hazard and risk. This strict liability approach is onerous for consulting engineering firms to control and manage. (sub. 5, p. 7)

This issue was addressed in the recent review into model OHS laws (Stewart-Crompton, Mayman and Sherriff 2008, 2009 — see chapter 1) and is not examined further in this report.

Possible areas to benchmark

Regarding the regulations aimed at influencing the culture of compliance, participants raised the following differences as areas of greatest concern:

- awareness of regulatory requirements — businesses report different levels of awareness of what they are required to do under OHS regulations
- hazard identification and risk control documentation and requirements
- record keeping and requirements to report incidents
- the extent and coverage of specific duties of care
- personal liability provisions
- training requirements for staff and required resourcing

- models for employee safety representatives and committees
- union access rights.

The regulation of particular hazards or processes

The identification, management and control requirements for particular hazards within the regulations of different jurisdictions can differ. Such requirements and the resulting differences have the potential to impose compliance burdens on some businesses. For example, as put by the Northern Territory Horticultural Association:

> Occupational health and safety (OHS) standards vary between states and territories, sometimes making requirements complicated or hard to ascertain. For example, farm machinery may meet the Australian manufacturer's safety standards but not meet local OHS standards. Furthermore some standards are relevant to one use but impractical for other purposes. For example, elevated work platform requirements are designed for the construction industry and unsafe in the context of the horticultural industry. (sub. 12, p. 2)

Further, as these requirements are a significant component of all OHS regulations, they can impose significant compliance costs on businesses.

Areas where participants raised concerns about the burdens imposed from differences between jurisdictions included the regulation of the following hazards:

- falls from heights
- working in confined spaces
- workplace stress, bullying and harassment
- exposure to noise
- manual handling in the workplace
- transportation of hazardous materials
- working with hazardous substances
- driver fatigue
- licences required for high risk work.

Duplication between OHS regulatory regimes

Comcare and state and territory regimes

The OHS regulatory landscape is populated by eight state and territory schemes, a Commonwealth scheme which operates in all states and territories — the Comcare

scheme — along with a maritime regime to cover offshore OHS issues and other OHS related legislation contained within industry-specific Acts.

ACCI suggested that the existence of multiple regimes across the states and territories creates significant costs for the economy:

> While multi-state businesses comprise less than 1 percent of all businesses they are typically larger firms and account for almost 30 percent of Australia's employment.
>
> Such businesses are required to understand, keep up to date with and comply with the voluminous and complex array of legislation and regulation for each jurisdiction within which they operate.
>
> This invariably reduces workplace productivity due to increased regulatory compliance costs, while delivering no additional safety benefits.
>
> Increased costs for employers operating in multiple OHS jurisdictions include keeping abreast of regulatory changes in multiple jurisdictions, greater administrative costs (e.g. record keeping), employing additional staff, higher OHS training costs, and difficulties implementing company wide OHS policies and procedures where the regulatory requirements differ by jurisdiction. (sub. 6, p. 20)

The issue of potential overlap between OHS regulations of the Commonwealth and state and territory regulatory regimes was also raised by several participants during consultations (see chapter 2 and chapter 13 for details of the regulatory regimes). It was suggested that different operators on the one worksite may be subject to differing OHS laws, one set developed by the Commonwealth and the other by a state or territory. It was suggested that this situation, while not only representing duplication in regulatory effort, also created confusion for businesses. These sentiments were captured in the Victorian Government's submission to the review of Comcare by the Department of Employment, Education and Workplace Relations in 2008:

> Rather than being provided with less red tape, businesses who swap schemes are now subject to two sets of safety regulation at their worksites - where there was previously only one - as contractors and others on those sites remain subject to State safety laws. The reluctance to remedy this runs counter to the shift toward less and simpler regulation recommended by the Banks Report, Reducing the Regulatory Burden on Business, and which is central to the COAG National Reform Agenda. (Victorian Government 2008, p. 1)

During consultations, the Commission heard similar views from others to those put forward by Victoria.

A number of areas relating to duplication between core OHS regimes provide possible areas to benchmark:

- the additional burden imposed by differences in OHS regulation between jurisdictions — for those businesses that operate across borders, knowledge of

the requirements of multiple OHS systems, and their reporting, was suggested to create additional burdens

- the differences in costs for national businesses in complying with the Commonwealth's scheme compared with those which must comply with eight (each state and territory) OHS regimes
- the potential for overlap, inconsistency, duplication and uncertainty created by the Comcare scheme — for example, issues of who holds the duty of care on a site for which the main work is conducted by a Comcare insured company, but which also employs a number of subcontractors regulated under individual state and territory legislation.

Industry-specific and general OHS regulations

The NSW Minerals Council said that industry-specific OHS regulations could create duplication and increase the costs faced by some businesses:

> … there are two main areas that impede/burden the NSW mining industry in the area of OHS:
>
> - the overlapping and sometimes conflicting obligations imposed on the NSW mining industry by the:
>   - Occupational Health and Safety Act 2000 and its regulation
>   - Coal Mine Health and Safety Act 2002 and its regulation
>   - Mine Health and Safety Act 2004 and its regulation.
> - the inconsistencies between the two governing regulators — NSW Department of Primary Industries and NSW Workcover, and the subsequent impediments to safe, innovative and efficient operations. (sub. 9, p. 1)

Similar concerns were also raised by mining companies in Queensland and Western Australia during consultations.

Master Builders Australia (sub. 20) also suggested that the requirements imposed by the Federal Safety Commissioner imposed significant additional burdens to those imposed by state, territory and Commonwealth OHS regulatory regimes. The scheme, however, is not compulsory for all businesses and is entered into when seeking to engage in a commercial relationship with the Commonwealth Government. Given its voluntary and contractual nature, it is not assessed in this report.

A number of areas relating to duplication between industry-specific and general OHS regimes provide possible areas to benchmark:

- the potential for overlap, inconsistency, duplication and uncertainty created by the boundaries that exist between generic OHS regulation and that of industry-specific regulation within the one jurisdiction — for example, how construction activities undertaken on a mine site are dealt with
- differences between the general OHS and the mining-specific OHS regulations in those states where they exist (New South Wales, Queensland and Western Australia).

4.5 Criteria for selecting areas to benchmark

In order to identify the most useful areas to benchmark and to avoid potentially erroneous comparisons, the Commission has developed criteria for selecting regulations (and administration and enforcement practices) raised by stakeholders as being of concern as well as those areas identified by the Commission to benchmark. Areas to benchmark were selected where:

1. there are differences in either the regulation itself or in the administration and enforcement of that regulation
2. the benchmarking analysis of the regulation or its enforcement/administration should contribute to either current or proposed reforms
3. there appears to be a difference between jurisdictions in the cost the regulation or its enforcement/administration imposes on business
4. where there are differences in the costs imposed by regulations, those differences do not appear to be matched by a difference in the effectiveness of those regulations
5. it appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data.

The reference date chosen for benchmarking OHS regulation and its burden on business is the 2008-09 financial year. However, as the Commission has made use of existing data wherever possible, some indicators make use of data collected in earlier or later periods.

Areas of OHS regulation selected for benchmarking

To select the areas which will be benchmarked, the criteria developed above were used to filter the proposed areas detailed in section 4.4. How these areas ranked against the criteria is given in table 4.4. Areas that will be investigated and benchmark indicators will be developed were those which satisfied all the criteria.

Table 4.4 Selecting areas to benchmark

	Criterion				
	1	2	3	4	5
Regulator characteristics and enforcement practices – chapter 5					
Regulator structure and resources	✓	✓	✓	✓	✓
Information provision by regulators	✓	✓	✓	✓	✓
Mutual recognition	✓	✓	✓	✓	✓
Available instruments, their use and the level of penalties	✓	✓	✓	✓	✓
Educative and punitive approaches	✓	✓	✓	✓	✓
Allocation of resources according to risk	✓	✓	✓	✓	✓
Accountability of regulators – chapter 6					
Appeal provisions	✓	✓	✓	✓	✓
Transparency	✓	✓	✓	✓	✓
Feedback	✓	✓	✓	✓	✓
Regulations aimed at influencing the culture of compliance					
Risk, duty of care and advice – chapter 7					
Awareness of regulatory requirements	✓	✓	✓	✓	✓
Risk management	✓	✓	✓	✓	✓
Record keeping and reporting requirements	✓	✓	✓	✓	✓
Duty of care	✓	✓	✓	✓	✓
Personal liability provisions in OHS regulatory regimes	✓	✓	✓	✓	✓
OHS training requirements – chapter 8					
Training requirements for staff and required resourcing	✓	✓	✓	✓	✓
Worker consultation, participation and representation – chapter 9					
Health and safety representatives and committees	✓	✓	✓	✓	✓
Union access rights in OHS regulatory regimes	✓	✓	✓	✓	✓
Particular hazards					
Confined spaces	×	×	✓	✓	✓
Noise	×	×	✓	✓	✓
Transportation of hazardous materials	✓	×	✓	✓	✓
Driver fatigue	✓	×	✓	✓	✓
Regulating hazardous substances – chapter 10					
Asbestos and other hazardous substances	✓	✓	✓	✓	✓
Psychosocial hazards – chapter 11					
Stress, bullying and harassment	✓	✓	✓	✓	✓
Other hazards and activities – chapter 12					
Falls from heights	✓	✓	✓	✓	✓
Manual handling	✓	✓	✓	✓	✓
Licences for high risk work	✓	✓	✓	✓	✓
Duplication – chapter 13					
The costs of inconsistencies for businesses that operate across borders	✓	✓	✓	✓	✓
Comcare and state and territory OHS regimes	✓	✓	✓	✓	✓
General versus mining-specific OHS regulatory regimes	✓	✓	✓	✓	✓
Differences in mining-specific OHS regulatory regimes	✓	✓	✓	✓	✓

Those which did not satisfy all the criteria, such as confined spaces and noise were not investigated further (and were also not raised as significant concerns by participants to this study). In the case of confined spaces and noise, the regulatory approach taken in each jurisdiction is similar, and thus developing benchmark indicators that highlighted potential differences in compliance burdens would not provide useful information for policy makers.[2] Items relating to transportation of hazardous materials and driver fatigue were also excluded from the analysis as they lay primarily outside OHS regulation.

For the remaining areas put forward by participants or those identified by the Commission, the investigation and development of indicators to benchmark jurisdictions was believed to provide useful information for policy markers. In particular, many of these areas are the subject of proposed reforms, making comparisons of the current regulations particularly useful so that changes can be evaluated post the reform process — for example, those relating to differences in the legislative approach by various jurisdictions. Further, issues relating to interactions between the Comcare scheme and those that exist in each state and territory have the potential to remain after the development and adoption of a nationally consistent model OHS Act, and thus provide a useful area to benchmark irrespective of regulatory changes (the Commonwealth will look into Comcare's OHS responsibilities after the implementation of the model OHS Act). In the following chapters of this report, these areas are explored in more detail, indicators are developed and benchmarks presented.

Selecting benchmarking indicators

Wherever possible, indicators should shed light on the size and nature of the differences in compliance burdens. These indicators will either be quantitative (statistical or empirical) or qualitative (descriptive) depending on information available and characteristic to be compared.

While quantitative indicators provide a direct basis for the benchmarking comparisons, there is normally only a narrow range of indicators suitable for direct quantitative measurement. Also, the range of such indicators is further limited by the need to ensure comparability of the results. In contrast, while qualitative indicators are usually less precise and require close attention to ensure consistent application and analysis, they can capture more broadly-based sources of costs, such as the costs imposed by the approach of regulators to the administration and

[2] A national standard for working in confined spaces (AS2865) exists has been adopted by all jurisdictions except Victoria as a code of practice. However, the national standard was originally modelled on Victoria's approach so that any differences are limited.

enforcement of regulation. Accordingly, a mix of quantitative and qualitative indicators is required in order to provide a reasonable balance of precision and coverage in the study.

In selecting the indicators used in this study, the Commission was mindful of the following principles:

- *relevance* — the indicators should illuminate an important aspect of the burden of regulation on business and also be relevant to the possible policy responses for reducing unnecessary burdens
- *ease of interpretation* — wherever possible, the indicators should be easy to interpret and it should be apparent what they are being used to measure
- *ease of data collection* — the data required for an indicator should be obtainable at a reasonable cost or already be available. Where gaps or limitations in the data exist, they should not materially undermine the usefulness of the indicator(s) reliant on that data
- *timeliness* — the indicators should be based on a reference period as close to the present as possible
- *comparability* — the indicators should facilitate meaningful comparisons between jurisdictions
- *robustness* — the indicators should be conducive to producing comparable benchmarking results over time.

The indicators used in this study were tailored to the specific aspects of the regulatory burden being benchmarked. Further, the indicators have been developed in light of the feedback received from stakeholders through their submissions and the Commission's consultation process.

Sourcing the data

A number of previous studies (such as PC 2008b, KPMG 2007, Allen Consulting Group 2007b and PC 2004) experienced difficulty in obtaining data on the compliance costs incurred by business. In the context of OHS regulation, Allen Consulting Group (2007b) noted that businesses:

> … were not able to disaggregate costs that were incurred or attributable to the Regulations from those that are general business costs, or those due to the general duties of the Act. (p. 60)

In addition to these challenges, the Commission was also mindful that this study should minimise the burden on those businesses and regulators supplying data — especially given the considerable resources they have expended in the supply of

information to a number of other studies into OHS in recent times. In order to minimise the burden on businesses and regulators, the Commission sought to obtain the data used in this study from publicly available sources wherever possible. For those instances where public data were not available, and direct indicators of the burden on business were required, the Commission:

- worked with organisations that had expressed an interest in providing data to the benchmarking study
- participated in an ongoing private sector survey of SMEs in order to obtain data on the impact of various aspects of OHS regulation
- sought information from governments on their administration and enforcement practices through a survey of national, state and territory regulators.

Appendix B contains further details of the Commission's approach to collecting data.

This approach reflects the lessons from the 'cost of business registrations' report (PC 2008b), namely:

- using a wide round of stakeholder consultation to help ensure surveys and other information gathering activities are well constructed and appropriately targeted
- data should be sought from the source best placed to provide it. For example, businesses complying with particular requirements would be best placed to know the costs of complying with those requirements. Similarly, regulators should have the best knowledge of the regulations they enforce and administer, and how they undertake their responsibilities
- the importance of working closely with those supplying data in order to achieve an acceptable response rate and quality of data.

Interpreting the benchmarking results

Even though the Commission has been careful to design its data requirements and benchmarking indicators to minimise the limitations of previous benchmarking studies, not all of the challenges referred to above can be completely overcome. This results in data sets that are subject to caveats and qualifications. Further, the indicators initially selected may not illustrate the regulatory burden as well as was first thought. The 'Cutting Red Tape' report (OECD 2007) provides an example of the difficulties that can be experienced in this regard — out of an original 17 indicators, only eight were deemed appropriate for comparative analysis.

The Commission has sought to minimise the significance of these challenges, by:

- basing its data specifications and approach to data collection on a thorough understanding of the underlying regulatory requirements
- consulting with regulators to clarify any aspects of the regulations and requirements on business that may affect the data collected
- not reporting data or using indicators where their comparability has been substantially compromised
- providing suitably detailed caveats to the benchmarking indicators where appropriate.