13 Duplication

Key points

- Large national companies are much more affected by differences in occupational health and safety (OHS) regulatory regimes than small and medium sized enterprises.
- National businesses facing a number of state and territory OHS regulatory regimes are likely to face additional costs in complying with the regulations compared to those that operate under the national Comcare scheme:
  - firms operating Australia-wide face 282 codes of practice at the state and territory level compared with 21 for Comcare insured firms
  - there are 30 different licence classes potentially required by a Comcare insured firm compared with 90 for one that operates in all states and territories (even after mutual recognition is taken into account).
- The potential for regulatory overlap exists in all jurisdictions due to OHS coverage by the Commonwealth through the Comcare scheme.
- Industry specific regulations can duplicate general OHS regulatory requirements such as with mining regulation in Queensland and Western Australia. In the case of New South Wales, duplication does not strictly occur, rather its mining legislation is meant to complement and further clarify the general OHS legislation.
  - In New South Wales, mining regulation does not exempt businesses from provisions under the general OHS Act and regulations, but all OHS regulatory activities are conducted by the mining regulator.
- It is likely that large mining companies find the Western Australian system imposes higher regulatory burdens than those in New South Wales and Queensland, as the Western Australian regulatory system is less reliant on performance and process based regulation.
- While personal liability provisions may increase the effectiveness of OHS regulation, business managers consider that those jurisdictions with stricter provisions such as New South Wales, Queensland, Tasmania and the ACT constrain their decision making.

The OHS regulatory landscape is complicated by the existence of eight state and territory regimes, a national scheme that operates in all states and territories — the Comcare scheme — and OHS related legislation contained within industry-specific

Acts such as those related to mining. In submissions and through consultations, the Commission was informed that these complications placed a number of burdens on particular businesses. This chapter examines some of these issues and provides benchmarks to indicate potential areas where regulatory burdens are likely to be high and possibly unnecessary.

This chapter focuses on duplication that is related to jurisdictional legal differences between OHS regulation and regulators. However, when a safety related incident occurs, there is potentially a range of other government interests beyond those related to OHS (for example, police when a work-related death occurs) which may be required to be on the same worksite, interview the same people and obtain the same or similar records to ensure the regulations they enforce have been correctly applied. As such, the overall costs imposed on businesses as a result of dealing with all government requirements after a safety related incident is likely to be greater than depicted here.

13.1 The costs associated with differences in OHS regulations

The costs associated with differing OHS regulatory regimes are generally borne by businesses which have a presence in multiple jurisdictions. In 1998, a greater proportion of larger businesses operated in multiple jurisdictions compared with small to medium sized businesses — 42 per cent of all larger business (more than 200 employees) operated in multiple jurisdictions, compared with 0.8 per cent of small and medium businesses (table 13.1). Further, for employees of large businesses, 57 per cent work for firms with operations in more than one jurisdiction, compared with 6 per cent for SMEs.

Table 13.1 **Single and multi-state businesses**

Number and employment 1998

Size of business (employee number)	*Single state*		*Multi-state*		*Multi-state*	
	Number of businesses	*Number of employees*	*Number of businesses*	*Number of employees*	*Share of businesses*	*Share of employees*
	No.	No.	No.	No.	%	%
< 200	886 147	3 868 395	6 725	245 842	0.8	6.0
200 +	1 782	1 356 925	1 314	1 833 561	42.4	57.5
All	887 929	5 225 320	8 039	2 079 403	0.9	28.5

Source: PC (2004) using unpublished ABS data.

Small and medium enterprises that operate solely within a given jurisdiction may still be affected by differences in OHS regulations directly through purchasing or selling goods and services from interstate, or indirectly through competing with businesses located in other jurisdictions which may face higher or lower compliance burdens associated with OHS regulation.

Given the small proportion of SMEs operating in more than one jurisdiction, it is not surprising that in the survey of them, only 5 per cent (or 97 out of 1802 surveyed) reported that they had incurred any costs associated with dealing with differences in OHS regulations in other states. Nor is it surprising that for those who did report they incurred some costs, only 13 per cent suggested they were substantial (table 13.2).

Table 13.2 **Costs of differences in OHS regulation — SMEs**
12 months to May 2009

Type of cost and significance	*Responses*[a]	*Responses*
	no.	%
Cost type		
Obtaining information	51	53
Training costs	46	47
Additional inspections/audits	31	31
Recruiting costs	31	32
Machinery and equipment transfer and purchase	19	20
Buying more equipment/bring up to standard	3	3
Administrative costs	7	7
How to comply with requirements	3	3
Levies on dangerous goods that are freighted	3	3
Different licensing obligations for each state	2	2
Insurance/liability	2	2
Don't know	2	2
Significance		
Small	44	45
Moderate	37	38
Substantial	13	13
Other	3	3

a Sum exceeds the number of businesses who reported facing costs associated with differences (97) as they reported multiple costs.

Source: Sensis Survey of SMEs (2009 unpublished).

Similar to the small effect of differences in regulatory regimes on the compliance costs incurred by SMEs, only a small proportion suggested that inter-jurisdiction differences had any impact on their business — 9 per cent. (Despite this, it is likely that a disproportionate number of SMEs which operate close to state and territory

borders could have their compliance costs affected by differences in OHS regulations.) Of these, 28 per cent suggested differences had a positive impact, with 72 per cent suggesting the impact was negative. Respondents provided further details on the incidence of various impacts (table 13.3). The most common impact was that differences made costs higher for their business compared to those in other jurisdictions — claimed by 55 businesses.

These observations contrast with the extensive compliance burdens that result from jurisdictional differences reported by large national companies. For example, in a small survey of six large national businesses, the Institute of Actuaries of Australia found that all ranked the compliance burden associated with eight separate state and territory OHS regimes as either the second or third most important reason considered in determining their interest in joining the Comcare scheme (Watson, McInnes and Hurst 2007).

Table 13.3 **Ways in which differences in jurisdictions' OHS laws impact upon businesses — SMEs**

12 months to May 2009

Impact	*Number*	*Per cent*[a]
Makes our costs higher than businesses in other states and territories	55	35
Rules not set for each state	24	15
Makes it harder to compete with businesses undertaking similar activities interstate	19	12
Time consuming	13	8
Results in cheaper prices for products and services from other states and territories	12	7
Financial impact	10	6
Training	7	5
Makes it a safer place to work	7	5
Hard work to keep up to standard/hard to implement changes	7	5
Need to keep up to date	4	3
Transport requirements	4	3
Transferring information between states/companies	3	2
Increased paperwork/admin	3	2
Additional policies in place	2	1
Increase in red tape	2	1
Creates a more effective/productive environment	2	1
We already do everything that is required/work to the highest standard	2	1
It affects pricing	1	1

[a] Sum exceeds 100 as respondents had multiple answers. Expressed as a percentage of total responses.

Source: Sensis Survey of SMEs (2009 unpublished).

Other large multi-state firms have also suggested that the additional costs created by dealing with different OHS regimes in each state and territory are significant and

manifest in terms of increased complexity and confusion over OHS responsibilities. For example, in their submission to the *National Review into Model OHS Laws* the Business Council of Australia suggested that:

> … One of the major difficulties facing employers who operate nationally is the myriad of different legislative and regulatory requirements existing in the different jurisdictions. Having one set of requirements will not only improve efficiency for both businesses and regulators, but also promote a better understanding of the requirements of the system. (BCA 2008a, p. 1)

A similar sentiment was expressed by Abigroup which suggested that differences were a source of frustration for large businesses:

> … there is a great deal of frustration at the differences in obligations between jurisdictions and the confusion which can result on specific issues while attempting to fulfil the OHS obligations. (Abigroup 2008, p. 7)

Telstra also suggested that differences in OHS regulatory regimes imposed costs on those businesses that operated under the national Comcare scheme through interactions with contractors:

> Telstra itself operates under a single, national OHS regime (the Federal Comcare system), but in its business dealings with contractors, service providers and various State government authorities, it is subjected to the morass and complexity of differing OHS regulation throughout Australia. (Telstra 2008, p. 4)

The Australian Industry Group also found, in a survey of over 500 companies (including large businesses), that OHS regulation was an area where most businesses would like to see further simplification (AIG 2009). The preference for simplification was most commonly expressed by larger businesses (those with more than 100 employees) and potentially could be linked to the additional complexity faced by these firms when operating in multiple jurisdictions.

These views, amongst others, suggest that unlike for SMEs, the costs incurred due to differences in OHS regulation between jurisdictions for large businesses are significant.

13.2 Comcare and state and territory OHS regimes

The Commonwealth OHS regulatory regime, administered and enforced by Comcare (box 13.1), offers some businesses the opportunity to have their operations covered by a single piece of OHS regulation instead of up to eight. As an example of a national scheme, this can lead to significant reductions in the compliance burden placed on businesses that operate nationally. For example, Boral Limited, which has to deal with all state and territory regimes, states:

By virtue of operating in all States and Territories of Australia, Boral is impacted by more than 450 regulatory and advisory instruments including 8 principal OH&S Acts, 25 principal Regulations, 45 other relevant Acts, 49 other relevant Regulations, 144 Codes of Practice/Advisory Standards, and more than 200 other guidelines. These cover all areas including general OH&S, mining, dangerous goods, electrical safety, explosives, maritime, radiation, petroleum, rail safety, transport, workers compensation, gas, etc. (sub. 3, p. 1)

As a result of this, Boral Limited considered that:

… the plethora of current Regulation and guidance which applies to it [Boral] because of the various State and Territory jurisdictions as being unhelpful, costly and unnecessary. (sub. 3, p. 4)

This highlights the potential complexity and number of different compliance activities that firms operating interstate have to deal with.

While not direct cost comparisons, a number of indicators can be used to highlight the potential for compliance cost differences which exist between those firms regulated by Comcare and those that have to deal with individual state and territory regimes. These include comparisons between requirements of the Commonwealth regime and the cumulative total of all states and territories in:

- pages of legislation, regulation and number codes of practice that businesses need to be aware of
- the number of regulators they need to interact with
- the number of licences/certificates required for staff that operate/conduct:
  - high risk work (as defined in the national standard — ASCC 2006c) activities
  - load-shifting equipment
  - other high risk work activities set out in regulation
  - work with hazardous materials
  - formwork and explosive-powered tools
  - other plant or equipment or undertake tasks that require a licence, certificate or permit
- the number of compliance reporting processes that need to be established
- the number of different employee-based OHS consultative requirements (such as OHS committees, representatives or officers).

Comparisons on the indicators above are detailed in table 13.4 and show the differences between a business that operates nationally and is regulated by Comcare, compared to another national business that is regulated separately in each

state and territory. It should be noted that the differences depicted are only due to requirements in the general OHS Acts and do not include the further complication of the other 70 or more OHS related statutes that exist across Australia.

Box 13.1 The Comcare scheme

Comcare is the regulator for the Commonwealth's OHS, rehabilitation and workers' compensation arrangements. These arrangements, known as the Comcare scheme, cover all Commonwealth public sector agencies along with some eligible corporations which have been granted a self-insurance licence. From March 2007, eligible corporations also came under the jurisdiction of the Commonwealth's Occupational Health and Safety Act 1991 and thus were removed from state-based OHS regulation.

An 'eligible corporation' for the Comcare scheme, under section 100 of the Safety, Rehabilitation and Compensation Act 1988, applies to employees of a corporation that:

- is, but is about to cease to be, a Commonwealth authority; or
- was previously a Commonwealth authority; or
- is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.

National companies such as Optus (the first non-Commonwealth employer in the scheme), Linfox and John Holland are among the current 29 covered by the Comcare scheme.

Entry of further eligible corporations to the scheme halted in December 2007, when a moratorium on granting further self-insurance licences under the Comcare scheme was put in place. This remains. Along with the moratorium, the scheme was reviewed in order to examine whether it provided workers with adequate workplace safety and compensation arrangements. The review was to have been completed by the end of July 2008 but the report was not released until September 2009. At that time, the Commonwealth Government decided to maintain the moratorium until after 2011 when it is expected uniform OHS laws will have been implemented in all jurisdictions.

Businesses covered by the Comcare scheme have to be aware of 621 pages of regulation — 147 from the primary legislation and 474 from formal regulations. This contrasts to 3392 pages that a business that operates in all jurisdictions needs to be aware of and compliant with — 1068 from the primary legislation and 2324 from formal regulations.

In other areas the contrast is not as great. Licences for high risk work, for example, do not include any overlap due to the existence of a national standard (ASCC 2006c) and mutual recognition amongst all jurisdictions (see chapter 12). Further, in the case of these licences, Comcare recognises those issued by individual states and territories and does not issue licences of its own. Thus, for these licences, Comcare

places the same burden on a business as those faced by any business that operates in all Australian jurisdictions.

Table 13.4 Selected comparisons of regulatory compliance between Comcare and state and territory regimes

Regulations in force 2008-09

Indicator	*Under Comcare*	*Under all jurisdictions other than Comcare*
Pages of primary legislation[a]	147	1 068
Pages of formal regulations[a]	474	2 324
Codes of practice	25	276
Regulators	1	8
Licensing		
High risk work licences/certificates[b]	29	29
Load-shifting licences/certificates[b]	0	9
Other high risk work licences/certificates[b]	0	4
Hazardous materials licences/certificates[c]	0	9
Formwork and explosive-powered tools	0	2
Other licences/certificates/permits[d]	1	37
Compliance reporting processes required	1	8
Regulated employee based OHS consultative committees	1	7

[a] Page numbers for legislation and regulations based on PDF format versions where available, and if not Word or text format versions. [b] See chapter 12 for details on licences/certificates for high risk work, load-shifting and other high risk work activities. [c] Licences for hazardous materials include those for asbestos removal (except the Northern Territory as it is defined under high risk work). [d] Other licences/certificates/permits related to any other licensing and range from general construction to dangerous goods.

Source: PC estimates.

As noted in chapter 2, all states and territories, with the exception of Western Australia, require businesses to establish OHS committees. While broadly similar, differences exist in when they are required, the extent of their responsibilities and the regulation they are helping to implement. Thus, a non-Comcare firm must be aware of at least seven different OHS committee requirements, compared to just one for a firm insuring with Comcare.

Having a number of different reporting requirements within each state and territory can also impose additional costs on large businesses not operating in the Comcare scheme. A leading Australian retailer not covered by the Comcare scheme, for example, reported that the cost of developing and implementing an incident reporting system, taking into account the differences in each state and territory, cost

them $50 000 (see appendix D for details of the different reporting requirements complied by the national retailer).

The overall costs of the additional requirements imposed on businesses through having to deal with multiple OHS regimes can be significant. Indeed, as suggested by Woolworths, the gains from the Comcare scheme are due to it offering a nationally consistent regime:

> Woolworths view is that the appeal of the Comcare scheme for those organisations that have applied and those that may be considering it, is that it does not necessarily represent a better scheme but rather offers national consistency. (Woolworths Limited 2008, p. 3)

These sentiments have also been expressed by a number of other large national businesses (see for example, Linfox Australia Pty Ltd 2008, Rio Tinto 2008 and National Australia Bank 2008 among others). The benefits from this include factors such as being able to develop an nationally consistent OHS regime within firms amongst others. The Commission was unable to identify any estimates of the aggregate cost of complying with one versus eight separate OHS regimes.

However, some studies can provide an insight into the costs imposed by differences in particular regulatory requirements. An insight into the costs of additional licensing requirements due to operating in multiple states, for example, can be gained by examining the costs imposed by single state licensing requirements. In reviewing the need for the licences for formwork and for explosive-powered tool operators, for example, WorkCover NSW (2009a) found that certification of individuals imposes combined costs over five years of $17.5 million on New South Wales businesses. Further to this, the existence of the two licence classes would impose an additional $26.1 million in enforcement and administration costs on WorkCover NSW over the five year period.

Rozen (2007) identifies sources of lower burdens for businesses which operate under the Comcare scheme rather than the regimes of the state and territory governments, including:

- offences such as breaches of general duty provisions are summary and not indictable
- there are no provisions for direct personal liability for individuals within companies (see section 7.5)
- maximum penalties under state and territory law are considerably higher — under the Victorian Act, for example, the maximum penalty exceeds $900 000 (s. 21(4)) whereas the highest fine that may be imposed in the event of a criminal prosecution under the Commonwealth Act is less than half of that (s. 2(21))

- criminal prosecutions under the Commonwealth Act are only available in circumstances where death or serious bodily harm results from the breach and there is evidence of negligence or recklessness (s.2(18))
- in the case of other breaches, the only sanction is a 'civil penalty' of up to $240 000 (s. 2(4,23)).

Another source of lower burden would also include not needing staff to liaise with multiple regulators.

An issue with these lower burdens is the extent to which they may reduce incentives for companies to take due care in managing OHS.

Interactions between Comcare and state and territory regulators

Issues can arise over which regulator has jurisdiction when worksites contain a mix of Comcare and state/territory-based businesses. (For sites where only either state/territory-based businesses or Comcare-covered businesses operate, no jurisdictional overlap exists.) Such issues can also potentially arise due to the interaction of industry-specific OHS regulators and core regulators — the case of mining-specific and general OHS regulations and regulators are explored in the following section.

Several high profile cases, such as deaths in BHP's remote Western Australian operations (see, for example, Freed 2009), have highlighted the potential for regulatory overlap. Further, these have raised concerns over OHS practices and brought into question which jurisdiction is ultimately responsible for safety outcomes. As put by the Queensland Government in its submission to the review of Comcare in 2008 in relation to the coverage of firms self-insured under the Comcare scheme by Commonwealth OHS regulation:

> … OHS changes introduced by the Commonwealth have resulted in two separate systems of regulation potentially applying to a single workplace. If a national self-insurer engages contractors who are covered by State/Territory safety laws the national self-insurer would have obligations under the Commonwealth's safety laws, while the contractor would have obligations under State/Territory OHS legislation. This complexity would also apply where the national self-insurer is a contractor working in workplaces covered by State and Territory OHS laws. (Queensland Government 2008a, p. 2)

The overlap in responsibilities has the potential to increase the compliance burden faced by businesses and create confusion over OHS responsibilities. Such confusion can hinder businesses achieving OHS outcomes. As stated by the Queensland

Government, the existence of Commonwealth OHS regulation covering firms self-insured under the Comcare scheme has:

> … increased costs for employers and national self-insurers, due to increased duplication and overlap in OHS laws, while also being problematic for the different agencies enforcing the different legislation. (Queensland Government 2008a, p. 2)

Given that two regulatory systems can apply to the one site, the issue of 'who is responsible' for a workplace incident becomes a source of uncertainty and hence a potential burden on business. The extent of the duty of care placed on a business in control of the site, and of contractors and subcontractors and their employees, is a particularly important source of this confusion as it defines where responsibilities start and finish for both employers and regulators. These responsibilities are determined by the duties held by employers, the definition of a worker and the provision relating to those in control of a worksite.

Potential overlaps due to duty of care provisions

As noted in chapter 2, each state has adopted different ranges of duties of care. The Commonwealth, Victoria, South Australia and Western Australia expressly cover contractors in an employer's duty of care provisions. In Victoria, South Australia and Western Australia these provisions are very similar, with the duty limited to aspects over which the employer has control.

In other jurisdictions, the extent to which an employer owes a duty of care to contractors and the contractor's employees relates to both the definition of an employee or worker and the duties imposed on those who control a site. For these jurisdictions, whether contractors or subcontractors are specifically covered by an employer's duty of care through the definition of an employee/worker varies:

- only in the Northern Territory are contractors and subcontractors expressly covered by an employer's duty of care
- Queensland is the only state to expressly rule out coverage of an employer's duty of care to contractors and subcontractors through the definition of an employee/worker
- in New South Wales and the ACT (along with all other states and territories), an employer's duty of care conferred by the definition of a worker relates to their direct employees only.

In terms of provisions relating to those in control of a worksite, the Commonwealth is the only jurisdiction not to detail specific duties for those in control of a workplace (however, duties are imposed on employers in relation to third parties

which have similar provisions to those imposed on persons in control of a worksite). However, for the remainder, the duties imposed vary:

- New South Wales has a very general duty that states a person in control of a workplace must make it safe and without risk to health
- Victoria, Queensland, Western Australia, Tasmania and the Northern Territory have narrower duties which apply to the person in control of the workplace if they supply equipment/plant, and in relation to access and egress from the workplace
- South Australia and the ACT have fairly general duties for those in control of the workplace that cover both access and egress to the workplace and the workplace itself. However, South Australia specifically excludes those engaged by the employer/controller of the workplace from duties imposed on those in control of the workplace.

The combination of general duties of care placed on employers, the definition of an employee/worker, and those duties placed on a person in control of a workplace appears to imply that an employer owes a duty of care to a contractor and the contractor's employees over aspects of the work and worksite for which the employer has control in all jurisdictions. In some jurisdictions (New South Wales, Queensland, Tasmania and the ACT) this is limited to access to, and egress from, the worksite and any provided plant or equipment. For the Commonwealth, Victoria, South Australia and Western Australia it is potentially broader and relies on an interpretation on what an employer has control over either on a site or in terms of the activities of a contractor. In the Northern Territory, it is explicit — an employer owes a duty of care to a contractor and the contractor's employees.

Overlap in regulator responsibilities?

Given the differences in OHS coverage of particular regimes, the potential for regulator overlap exists — that is, both the state or territory regulator and Comcare have the authority to investigate a particular incident. This can represent an area of confusion for business and a need to comply with multiple regimes and regulators, and thus create additional compliance and administration costs. To highlight these issues, the potential coverage of different OHS regimes, and thus regulators, for two hypothetical sites was analysed. The two hypothetical sites involved:

- a Comcare covered company using state-based contractors and subcontractors
- a State-based company using a Comcare covered contractor or subcontractor.

Two scenarios are used as examples. For scenario 1, regulator overlap is measured based on an incident occurring with an employee of the contractor/subcontractor

through an activity to which the employer/person in control of a site has no direct control. For scenario 2, regulator overlap is measured based on an incident occurring with an employee of the contractor/subcontractor through an activity to which the employer/person in control of a site may have some control, or at least where some ambiguity exists. For scenario 2, it is assumed that the incident is unrelated to access or egress to the site or to any use of plant and equipment provided by the employer/person in control of the site. The results are given in table 13.5. It should be noted, however, that irrespective of whether there is overlap in the responsibilities of regulators, where both Comcare and state or territory based businesses operate on the one site, both regulators have powers to enter the site and inspect the operations of the business within their jurisdiction (see, for example for Queensland, WHSQ 2007).

Under scenario 1, only in the Northern Territory do both Comcare and NT WorkSafe have jurisdiction when the site is controlled by a state-based firm. This is due to the broad definition of a worker in the Northern Territory's Act.

Under scenario 2, the potential for regulator overlap is significantly greater. For all Comcare company controlled sites there is a potential for both Comcare and the relevant state/territory-based regulator to be involved if an incident occurs. Only in Tasmania and Queensland where duties are more explicit and narrower is it likely that regulator overlap will not occur for sites controlled by state-based businesses.

The overlap created by the duty of care provisions of various jurisdictions can be overcome by regulators through the use of memorandums of understanding (MoUs). Through MoUs, regulators have the potential to set out the instances where inspections or investigations can be carried out by any given regulator (or both), and thus can avoid businesses having to deal with multiple regulators which are all attempting to achieve the same safety outcomes.

To date, however, no state or territory regulator has developed an MoU with Comcare. Despite this, Comcare informed the Commission that they had frequent contact with state and territory OHS regulators to minimise any potential overlap which included conducting joint investigations and sharing information. Further, the review of Comcare proposed that MoUs should be used in order to manage interactions with state and territory regulators over OHS incidents (DEEWR 2009).

A further issue exacerbating the potential for duplication in regulator effort are laws surrounding the sharing of information. For example, New South Wales OHS law precludes the sharing of OHS information. Further, at the Commonwealth level, the core OHS Act does not include information sharing provisions. Instead, requests for information must be processed under the Freedom of Information provisions.

Table 13.5 **Regulator access to selected worksites**

Regulations in force during 2008-09

	Scenario 1			Scenario 2		
Site-type	*Comcare*	*State OHS regulator*[a]	*No.*	*Comcare*	*State OHS regulator*[a]	*No.*
New South Wales						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Victoria						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Queensland						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	×	1
South Australia						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Western Australia						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Tasmania						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	×	1
Northern Territory						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	✓	2	✓	✓	2
ACT						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2

[a] State OHS regulator refers to the relevant state or territory general OHS regulator.

Source: PC estimates.

It should also be noted that, with moves to harmonisation, issues of regulator overlap will remain as long as both Commonwealth and state and territory OHS regimes exist (issues also arise with industry-specific regulation — see following section for more detail). Even if all jurisdictions are implementing the same regulation, as long as the duty of care of any given employer is sufficiently broad, as proposed for the model OHS laws[1], it will remain possible that both Comcare and state or territory regulators will have overlapping jurisdictions for any given site where both Comcare covered and state-based businesses operate.

In this light, it should be noted that the Workplace Relations Ministerial Council has decided to investigate the Commonwealth's OHS regulation applying to Comcare self-insurers (WRMC 2009a) (this review is separate to the recent review conducted by the Department of Education, Employment and Workplace Relations — see box 13.1). Further, the Commonwealth Government has also announced its intention to transfer OHS coverage of self-insurers to the states and territories after the uniform OHS laws have been adopted:

> The Deputy Prime Minister briefed Ministers on the Commonwealth's intent, following the implementation of uniform OHS laws, to support OHS coverage of Comcare self-insured licensees being transferred to state and territory jurisdiction. Ministers agreed to Commonwealth officials working with state and territory officials in giving further consideration to the issues raised by this proposal, including whether all or only some licensees would be transferred to state/territory coverage. (WRMC 2009c, p. 2)

While imposing additional costs on those firms affected, this would reduce the scope for regulator overlap.

13.3 Interactions between general OHS and industry specific OHS Acts: mining

Each state and territory has a number of other pieces of primary legislation apart from the general OHS Acts which also cover OHS issues (see chapter 2). These Acts relate to specific industries or hazards. The number of additional Acts varies significantly, from 3 in Western Australia to 9 in the Commonwealth. In total there are around 70 additional Acts relating to OHS.

With the existence of other Acts that deal with OHS issues, there is the potential for overlap and inconsistencies to occur which may have a detrimental impact on safety

[1] The *National Review into Model OHS Laws* (Stewart-Crompton, Mayman and Sherriff 2008) proposed the definition of an employee/worker to be sufficiently broad and extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.

outcomes. Further, multiple Acts can create confusion for both businesses and regulators in determining which Act applies and to what extent various safety procedures need to be implemented. Confusion may also exist over who can inspect businesses undertaking various activities. This confusion can increase both the administration and compliance costs placed on regulators and businesses for any given level of safety outcomes.

Inconsistencies and overlap between general OHS and mining specific OHS regulation was a particular concern raised by participants in this study. For example, the NSW Minerals Council suggested that regulatory overlap and inconsistency was created by both general and mining-specific OHS regulation applying to mine sites (sub. 9, p. 1).

Along with New South Wales, Queensland and Western Australia both have separate mining-related OHS regulation in conjunction with their general OHS statues. (While Victoria and South Australia also have separate mining Acts that contain references to workplace health and safety, OHS for mining activities and mine sites remain the responsibility of the general OHS regulator.)

The approach to mining OHS regulation differs between the three jurisdictions. In Western Australia and Queensland, the general OHS legislation specifically excludes mines from its coverage. In these two states, mines and mining activities are covered exclusively by the mining statutes. In New South Wales, however, the general OHS Act also covers mines, with the mining specific statutes complementing the general OHS Act (Gunningham 2007b). Further, in the event of any inconsistency between the mining specific and general OHS Act, the general OHS Act prevails. To avoid regulator overlap, the Minister for Finance administers the general OHS Act for all workplaces except mines, which are the responsibility of the Minister for Mineral Resources who oversees the mining specific regulation.

Given the nature of the New South Wales regulatory regime, compliance with the mining specific statutes on mine sites alone will not provide a defence against a prosecution under the duties imposed by the general OHS Act (Gunningham 2007b). Thus in New South Wales, mining businesses effectively need to ensure they comply with two regulatory regimes, despite formally having to deal with only one regulator.

The legal setup up of the mining and general OHS Acts in each of the three jurisdictions should, in theory, prevent any potential for inconsistent regulation to apply to any given mine site. Despite this, the existence of separate Acts and regulations that are purported to achieve the same outcomes (albeit for different worksites and activities) may create some confusion ‘on the ground’ for businesses.

Further, these systems contrast with the approach adopted by Victoria which has the one overarching OHS Act, specifically dealing with mining in formal regulation under this Act.

One measure of duplication in legislation is the degree to which mining and general OHS Acts cover the same areas at a broad level (table 13.6), that is, whether provisions directed at the same outcome are represented in both Acts. In Queensland and Western Australia, both the mining and general OHS Acts cover a range of similar matters. It is likely that the administrative burden on government of OHS regulation is greater in these three states than those that have unified provisions. Further, it has been suggested that '… the maintenance of separate mine-specific legislation serves to perpetuate the view that the industry is so inherently and intractably dangerous as to merit special treatment' (Gunningham 2007b, p. 43) although its improved safety performance might in part to attributed to the special attention this sector has been receiving (chapter 3).

It should be noted, however, that for New South Wales, there is no explicit duplication in legislation. Matters in the mining-specific OHS legislation are additional to those in the core OHS Act and the general and mining Acts complement each other. That is, the Acts deal with different requirements even if they serve the same outcome. Despite this, the dual structure is likely to place greater administrative burdens on the NSW Government compared to a combined structure, albeit to a lesser extent than in Queensland or Western Australia.

Table 13.6 **Areas of mutual coverage**

Mining and general OHS Acts in force during 2008-09

	Qld[a]			*WA*	
Provision	*General*	*Coal*	*Minerals*	*General*	*Mining*
General duties	✓	✓	✓	✓	✓
Regulator powers	✓	✓	✓	✓	✓
Employee consultation	✓	✓	✓	✓	✓
Notification/reporting	×	✓	✓	✓	✓
Competency standards/licensing	✓	✓	✓	✓	✓
Safety management plans	×	✓	✓	×	×
Major hazards	×	×	×	×	×

[a] Queensland confers health and safety obligations instead of duties.

Source: Relevant mining and general OHS Acts.

Regulator overlap?

Despite the legal separation of the mining specific and general OHS Acts in Western Australia and Queensland, during consultations the Commission was advised that for particular sites or particular activities on mining sites, there has been some duplication in enforcement by regulators due to a blurring of the demarcation lines. In particular, it was suggested that the general OHS regulators had responsibility for construction activities on worksites, with the mines inspectorate having responsibility for the 'mining' activities.

In Queensland, any issue of regulator overlap should be overcome through the application of the Act. The *Coal Mining Safety and Health Act 1999* (Qld) applies to coal mines and mining operations which are defined to include construction activities as part of on-site activities (Division 4, Section 10). Similarly, Queensland's *Mining and Quarrying Safety and Health Act 1999* (Qld) uses the same definitions but excludes coal mines to apply to other mining and quarrying operations. Further, the mining-specific and core OHS regulators established a MoU in 2006 to overcome any issues of inconsistency, overlap and also to establish the sharing of information and expertise. This includes sharing specialist resources, such as inspectors with particular skills.

There is less clarity over the application of the Western Australian *Mines and Safety Inspection Act 1994* (WA). Unlike Queensland, the Act does not set out explicitly where it applies and instead, the Act states that it is:

> An Act to consolidate and amend the law relating to the safety of mines and mining operations and the inspection and regulation of mines, mining operations and plant and substances supplied to or used at mines; to promote and improve the safety and health of persons at mines and for connected purposes. (*Mines and Safety Inspection Act 1994*, p. 1)

This suggests that the Act solely applies to mines and mining operations. However, as with Queensland, mining operations are also defined to include any developmental and construction work associated with the mine (*Mines and Safety Inspection Act 1994* (WA), s. 4).

Thus, within both Queensland's and Western Australia's mining legislation, mining sites and mining operations are defined to also include any construction work deemed to be part of the mine, thereby potentially limiting overlap.[2] However, it is

[2] Despite regulator overlap in Queensland and Western Australia being limited by the application of the Acts, there is still potential for overlap to occur when a Comcare insured company operates on a mine site (see previous section).

possible that for Western Australia, given the application of the Act is not as clearly defined, potential for overlap between the mining and general OHS statutes exists.

13.4 Other differences in mining OHS regulatory regimes

There are a number of other differences in the mining specific OHS regulatory regimes operating in New South Wales, Queensland and Western Australia. For example, in a recent review of the Western Australian mining OHS Act, the Kenner Report (Kenner 2009), it was found that there was 1 mines inspector for every 1795 people working in the Western Australian resources sector compared with a ratio of about 1 to every 880 mining employees in Queensland, and 1 to every 550 mining employees in New South Wales. The Report stated that the low number of mining inspectors in Western Australia creates a 'disconnect' between what the mining industry expects of its regulators and what it can deliver.

Other notable differences between regulatory regimes which are likely to impact differentially on business costs have also been identified. For example, the three jurisdictions reportedly differ on the extent to which prescription, outcomes and process/systems based regulations are used. Western Australia's regulations are still based on a prescription (*Mine Safety and Inspection Regulations 1995*) while Queensland, and to a lesser degree New South Wales, have moved to generic risk based standards and performance standards (such as specifying outcomes in terms of gas and dust levels).

While prescriptive standards may provide greater certainty and information to businesses, which is usually especially valued by small and medium sized enterprises, they also: limit flexibility; lead to regulatory overload; increase apathy and a minimum compliance mentality of both management and workers (Bardach and Kagan 1982); and impose costs on companies without commensurate improvements in safety (PC 1998, pp. 255–60).

In order to gauge the different regulatory approaches adopted by each jurisdiction, comparisons were made between similar parts of mining specific formal OHS regulations. In each jurisdiction, regulations pertaining to general safety (such as duties and other general safety requirements) and those relating to the management of mines were classified into four main types of standards aimed at influencing behaviour as described by Gunningham (2006):

- prescriptive standards: regulations which specify precisely what measures to take

- general duties: set out principles which duty holders must follow
- performance-based standards: specify the outcome of the OHS improvement or desired level of performance
- systematic process-based standards: identify a process, or series of steps, to be followed in pursuit of safety.

Given the strong similarities between the coal and minerals legislation and regulation in both New South Wales and Queensland, only the coal regulation was used as the basis of comparison. The results are shown in table 13.7.

As seen from table 13.7, the regulatory approach adopted by the three states with mining-specific OHS regulations differs slightly. While for matters pertaining to general safety and the management of all mines in Western Australia and that of coal mines in New South Wales and Queensland, there is a heavy reliance on prescriptive regulation, Queensland and to a lesser extent New South Wales place a greater reliance on performance and process based regulations compared to those adopted in Western Australia. It should be noted, however, that as only a small proportion of the total regulations in Queensland and Western Australia were examined, it is possible that overall, the aggregate results in table 13.7 do not accurately reflect the differences in the regulatory approach adopted by the three states.

Table 13.7 **Approaches to mining-specific OHS regulation**[a]

Regulations in force during 2008-09

Type of standard	*NSW*		*Qld*		*WA*	
	no.	%	no.	%	no.	%
Prescriptive standards	75	56	57	46	57	61
General duties	4	3	2	2	0	0
Performance-based standards	29	22	39	31	24	26
Systematic process-based standards	14	10	15	12	1	<1
Definition or regulation administration	12	9	11	9	12	13
Total number of regulations	134	100	124	100	94	100
Pages of regulation examined	44[b]	63	68	27	47	12

[a] Regulations within Part 2 (duties relating to health and welfare at coal operations) and Part 4 (safety at coal operations) of the *Coal Mine Health and Safety Regulation* 2006 (NSW); Chapter 2 (all coal mines) of the *Coal Mining Safety and Health Regulation* 2001 (Qld); and Part 3 (management of mines) and Part 4 (general safety requirements) of the *Mines Safety and Inspection Regulations* 1995 (WA) were used as the basis for comparison. It should be noted, that as only a small proportion of the total regulations in Queensland and Western Australia were examined, it is possible that overall, the aggregate results do not accurately reflect the differences in the regulatory approach adopted by the three states. [b] Regulation published in word document form without contents so page length not directly comparable to the PDF versions including contents published by the other jurisdictions — total pages of regulation were: New South Wales 70; Queensland 253; and Western Australia 406.

Source: PC estimates.

Hazard management plans and systems in mining OHS regulation

Differences between the states also exist in regards to more specific and detailed risk-based requirements in mine safety legislation. Due to the nature of the mining industry, some process-based standards are considered by some to be necessary in accounting for the inherent risks and hazards in the sector. This has led to the enactment of requirements for major hazard management plans and the more encompassing health and safety management systems within the New South Wales and Queensland mine safety legislation.

Major hazard management plans map out the process or processes for the identification, assessment and control of major hazards in the workplace. In coal and other mining, these major hazards could include underground transport, fire and explosions and airborne dust. According to the NSW Minerals Council, the intention with major hazard management plans is to '… ensure that certain controls, which, through experience, are known to be critical for the management of major hazards, are put into place' (NSWMC 2002, p. 28). These controls could include defined issues such as specified ventilation quantities or gas levels, standard operating procedures and other measures to control risk.

The other additional requirement, the health and safety management systems, include elements such as major hazard management plans, but are more holistic in addressing health and safety in the workplace. These legislated provisions require mining companies to develop health and safety systems that include elements such as risk management, training, inspection programs and information arrangements. Once these systems have been developed, they are required to be submitted to the relevant regulator and, subsequently, are continuously reviewed.

While the New South Wales and Queensland mining legislation prescribes the use of both major hazard management plans and health and safety management systems before mining can begin, Western Australia's mining legislation does not have such prerequisites or legislative requirements (Gunningham 2007b).

There has been debate about the necessity of process-based standards. On one hand, proponents of such requirements cite the inherent risks and hazards that mining poses on employees — necessitating a systematic approach to risk and hazards. On the other hand, some policy-makers have argued that, rather than being prescribed by regulations, such plans and systems should be at the discretion of the employer to consider and implement (Gunningham 2007b). Therefore, it is not possible to assess whether the additional requirements in New South Wales and Queensland are a source of unnecessary burden, or if it leads to better safety outcomes compared with mining in Western Australia.