
7 Risk, duty of care and advice

Key points

- Surveyed small and medium-sized enterprises (SMEs) report differing levels of awareness of their OHS regulatory requirements — those very aware of their requirements ranged between 54 per cent in New South Wales to 34 per cent in Western Australia.
- General risk management processes are required to be undertaken in all jurisdictions except Victoria and the ACT.
 - Despite this, general duties imposed on employers imply a risk management process in all jurisdictions.
 - Across all jurisdictions, surveyed SMEs reported similar actual and relative costs (in terms of their total cost base) for hazard identification and risk control.
- All jurisdictions impose a number of record keeping arrangements in relation to workplace safety.
 - Victoria requires records to be kept for 30 years only where work-related diseases have a long latency period.
 - Surveyed SMEs located in Victoria, Northern Territory and the ACT all reported higher costs due to record keeping activities than those in other jurisdictions.
- Duty of care provisions placed on the designers of structures exist in all jurisdictions except the Commonwealth, New South Wales and the ACT. Given all are covered by general duty of care provisions, it is not possible to establish which jurisdictions impose the higher costs.
 - The differences in approaches are likely to have increased confusion for businesses operating across borders within Australia.
- Duty of care provisions placed on suppliers can potentially create unnecessary burdens for financiers of plant and equipment unless they are qualified by passive financier provisions.
 - Queensland, Western Australia and Tasmania do not have these provisions and are likely to place greater burdens on financiers and their customers than the other jurisdictions.
- Duty to obtain advice provisions appear to be more onerous in Queensland than in other jurisdictions and do not appear to have improved medium-sized (30 or more employees) businesses' awareness of OHS provisions in that state.

Occupational health and safety (OHS) laws operating in each jurisdiction require employers to undertake a number of processes related to improving awareness of OHS issues with a view to increasing the commitment to compliance within the workplace. These include risk management of hazards and record keeping, along with specific duties imposed on particular groups such as designers and suppliers and personal liability imposed on individuals. These vary in the level of detail prescribed in the regulation, and the qualifications used to limit their scope and application. In this chapter these differences are discussed and benchmarks of potential differences in compliance burdens presented.

Other aspects of OHS regulation are also directed towards improving compliance by changing knowledge and attitudes such as OHS training and workplace consultation and representation — these are explored in chapters 8 and 9, respectively.

7.1 Awareness of regulatory requirements

One measure of the overall performance of any jurisdiction's OHS regulatory regime is whether or not businesses are aware of their requirements. The awareness businesses have of the OHS requirements embodied in various regulatory regimes will also impact significantly on the actual compliance burden that is created. If businesses are unaware of their OHS requirements, OHS regulation is unlikely to create any additional compliance costs because what businesses are doing is unaffected by OHS regulation and thus compliance costs will be minimal. Alternatively, if businesses are aware of OHS regulatory requirements, and are compliant with them, their costs in reducing workplace injury and disease should be more reflective of the costs created by the regulatory regime.

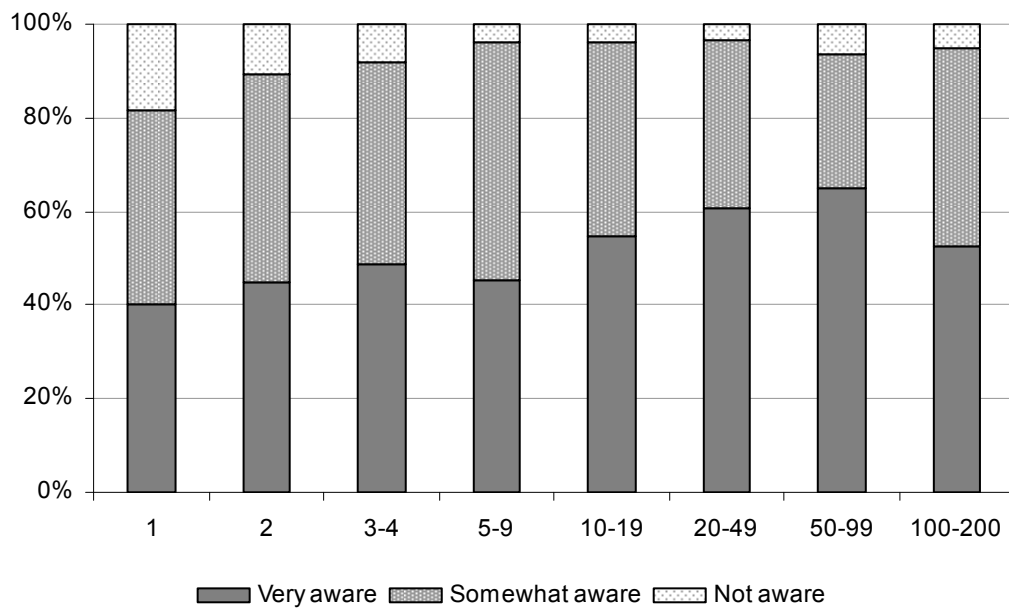
Responses to the survey of small and medium sized businesses reveal a number of differences in reported awareness of OHS regulatory requirements.¹ Overall, the largest proportion of SMEs reported that they were very aware of their regulatory requirements — 46 per cent — with 43 and 10 per cent stating they were somewhat or not aware respectively (the remainder did not know).² As evident in figure 7.1,

¹ Reported figures in jurisdiction comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

² As part of its submission to this study, the Australian Federation of Employers and Industries (AFEI) completed a survey of 400 of its SME members which showed 65 per cent of respondents were 'very aware' of their OHS obligations and 35 per cent were 'somewhat aware' (sub. DR26, p. 10). While the two results may not be different once standard errors are taken into account, a direct comparison of the Sensis and AFEI data may also not be appropriate as the AFEI considers its membership to have a 'heightened awareness of their [OHS] obligations' (sub. DR26, p. 10).

reported overall awareness of OHS regulatory requirements increased with business size.

Figure 7.1 SMEs' awareness of requirements by firm employee size^{a,b}
12 months to May 2009

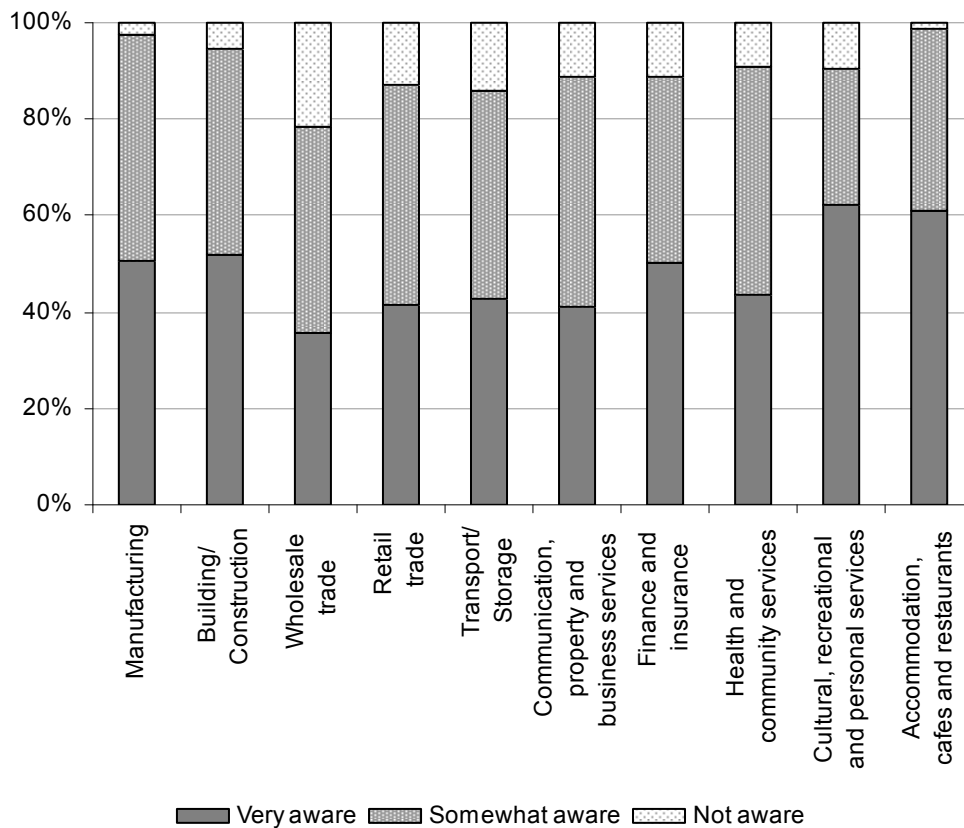


^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. ^b The result for businesses with 100 to 200 employees should be treated with caution due to the relatively small sample size.

Data source: Sensis Survey of SMEs (2009 unpublished).

The awareness of regulatory requirements also varied by industry. Those businesses that operated in the wholesale trade and retail trade sectors reported the lowest proportion of businesses that were very aware of their OHS regulatory requirements (figure 7.2). This may be partly due to the lower and less specific nature of the hazards they face or to a higher concentration of smaller businesses. At the other end, businesses in Accommodation, cafes and restaurants; Cultural, recreational and personal services; and Building and construction were more likely to be very aware of their OHS regulatory requirements.

Figure 7.2 SMEs' awareness of requirements by industry^a
12 months to May 2009

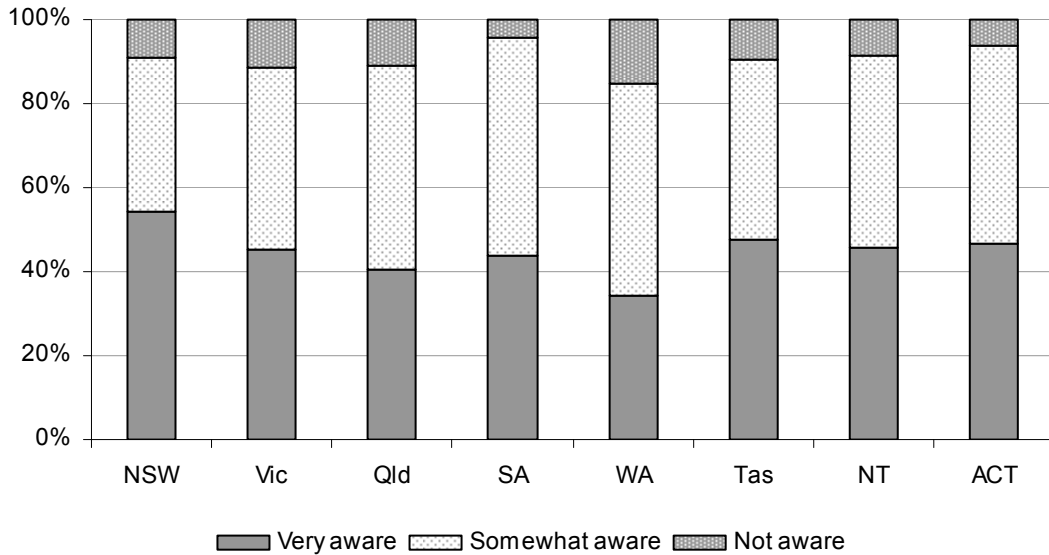


^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.
Data source: Sensis Survey of SMEs (2009 unpublished).

Awareness of regulatory requirements varied by jurisdiction. While the significant majority of businesses reported that they were either very or somewhat aware, the proportion which were very aware varied from 54 per cent for businesses located in New South Wales to 34 per cent for those located in Western Australia (figure 7.3). After New South Wales, Tasmania was the next best performing jurisdiction in terms of business awareness of OHS regulatory requirements.

Despite the overall differences in awareness between jurisdictions, firm size and industry, 93 per cent of businesses surveyed considered that their OHS practices were satisfactory.

Figure 7.3 SMEs' awareness of requirements by jurisdiction^a
12 months to May 2009

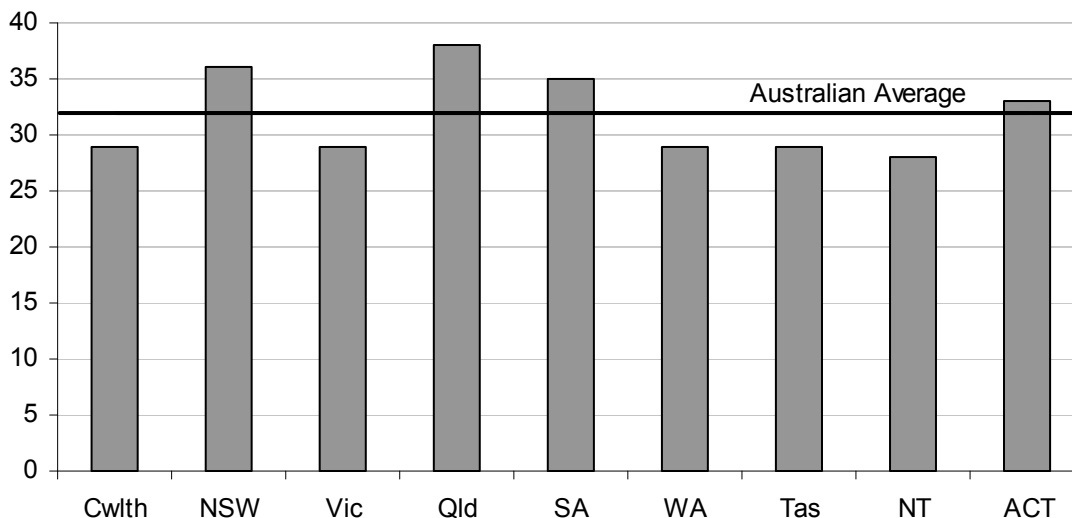


^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.
Data source: Sensis Survey of SMEs (2009 unpublished).

An indirect measure of businesses' and employees' awareness of OHS is the incidence of OHS provisions within employment contracts. It could be argued that in jurisdictions where both employers and employees are more aware of OHS responsibilities and rights, it is more likely that OHS provisions will be included within employment contracts. It should be noted, however, that for those agreements where OHS provisions are not included, these do not necessarily represent a lack of OHS regulatory coverage of employers and employees.

Examining all collective agreements as at 31 March 2009, for all businesses sizes, shows that the incidence of OHS provisions within collective agreements varies. Victoria and the ACT have the greatest number of collective agreements that embody OHS provisions, 96 per cent and 94 per cent respectively, compared with Western Australia and Tasmania which have the least — 82 per cent and 77 per cent respectively (figure 7.4).

Figure 7.4 Collective agreements with OHS provisions by jurisdiction
Per cent of all collective agreements as at 31 March 2009



Data source: DEEWR (2009 unpublished).

7.2 Risk management and record keeping

OHS regulation requires all employers to identify and minimise workplace hazards and other risks to workplace safety. In this section, the particular approaches adopted by various jurisdictions are outlined, along with businesses' views on the resulting compliance costs.

Risk management

Risk management is defined by the *National Review into Model OHS Laws* (hereafter the national review) as:

... a systematic process involving the identification of hazards, assessment of risks and the implementation of control measures to eliminate or minimise risks. (Stewart-Crompton, Mayman, and Sherriff 2009, p. 168)

Under the general duties imposed in all jurisdictions, risk management processes are effectively imposed on employers in the sense that they are required to '... engage in systematic OHS management' (Stewart-Crompton, Mayman and Sherriff 2009, p. 168). Despite this, the level of detail provided about the risk management process, and whether it is specifically mandated, varies between jurisdictions. In particular, some jurisdictions have set out a generally required risk

management process in their Acts or regulations, while others have left the specific details to particular hazards identified in regulations or codes of practice where applicable.

There is some contention, however, over where to detail generic risk management processes; that is, whether risk management processes should be specifically detailed in OHS legislation. On one side, Bluff (2009) suggests that including the process in legislation can provide further clarity and ensure consistency with current interpretation by the courts. On the other side, given that a risk management approach is implied under the general duties, and that it may not be required in every instance to satisfy the duty, the national review suggested that the specific inclusion of a risk management approach was unnecessary (Stewart-Crompton, Mayman, and Sherriff 2009).

As a result, the panel suggested that:

As a process, requirements for risk management should be placed in the model regulations rather than the model Act. Duty holders may not need to carry out the risk assessment step of the process where suitable control measures are immediately identifiable. (Stewart-Crompton, Mayman, and Sherriff 2009, p. 171)

Table 7.1 Enactments of risk management/assessment processes
Acts and regulations in force 2008-09

	<i>In primary legislation</i>	<i>In formal regulation</i>
Cwth ^a	x	✓ Regulation 1.05
NSW	x	✓ Regulations 9 to 12
Vic ^b	x	✓ Used in relation to particular hazards and not set out generally
Qld ^c	✓	✓ Used in relation to particular hazards
SA	x	✓ Regulation 1.3.2
WA	x	✓ Regulation 3.1
Tas	x	✓ Regulations 18 and 19
NT	✓	✓ Regulations 38 to 42
ACT ^d	x	✓ Used in regulations pertaining to confined spaces and not set out generally

^a Regulation 1.05 in the *Occupational Health and Safety (Safety Standards) Regulations 1994* (Commonwealth). ^b Victoria requires hazard identification, the control of risk and the review of control measures for manual handling, falls, confined spaces and plant. ^c Queensland requires a risk assessment to be completed and records kept in some instances for activities relating to underwater diving, hazardous substances, lead and construction. ^d Under the new *Work Safety Act 2008* (ACT) which came into effect on 1 October 2009 the ACT now requires a general risk management process.

Source: OHS Acts and regulations.

Irrespective of the debate over whether or not risk management processes should be specifically detailed in legislation, the approaches taken by each jurisdiction differ

and are detailed in table 7.1. In essence, while all employers may have to undertake risk management processes and keep documentation to satisfy their general duties, only in those jurisdictions where it is included in the Act or regulation is this a necessary requirement irrespective of ensuring compliance with the general duty.

Only Queensland and the Northern Territory have included provisions for risk management processes in both primary legislation and formal regulation. All other jurisdictions instead detail the required risk management/assessment processes in their regulations to some degree. Only Victoria and the ACT do not have generic risk management processes set out in their regulations, although these jurisdictions have detailed processes for particular hazards which are similar to the general processes set out in other jurisdictions' regulations.

Monitoring health and safety

All OHS regulatory regimes require employers to monitor the health and safety of their workers. In Victoria, South Australia, Tasmania, the Northern Territory, the ACT and the Commonwealth, provisions are set out in primary legislation under the general duties provisions (table 7.2). In the remaining jurisdictions, provisions are detailed in regulations.

Monitoring health and safety in the workplace is one means of early identification of emerging issues which can facilitate a duty holder to take preventative action; these are important aspects of hazard identification and risk management (Stewart-Crompton, Mayman, and Sherriff 2009). Nevertheless, for businesses, these specific monitoring requirements are likely to add to the compliance costs associated with the hazard identification and risk management processes set out in OHS regulation.

Table 7.2 Requirements to monitor worker health and safety

Details in primary legislation in effect in 2008-09

<i>Requirement to monitor health and safety</i>	
Cwth	s.16(5) Without limiting the generality of [the primary duty of care] insofar as that section applies in relation to an employer's employees, the employer breaches that subsection if the employer fails to take all reasonably practicable steps: (a) to take appropriate action to monitor the employees' health and safety at work, and the conditions of the workplaces under the employer's control
NSW	In regulations relating to individual hazards
Vic	s.22(1) An employer must, so far as is reasonably practicable— (a) monitor the health of employees of the employer; and (b) monitor conditions at any workplace under the employer's management and control
Qld	In regulations relating to individual hazards
SA	s.19(3) Without derogating from the operation of [the primary duty of care], an employer must so far as is reasonably practicable— (a) monitor the health and welfare of the employer's employees in their employment with the employer, insofar as that monitoring is relevant to the prevention of work-related injuries; (h) monitor working conditions at any workplace that is under the management and control of the employer
WA	In regulations relating to individual hazards
Tas	s.9(2) Without limiting [the primary duty of care], an employer must so far as is reasonably practicable – (a) if hazards exist and have been identified to the employer, in writing, by the Director, monitor the health of employees in their employment with the employer to ensure the prevention of work-related injuries and illnesses; and (h) monitor working conditions at any workplace that is under the control or management of the employer
NT	s.60(1) An employer must, if so required by the regulations: (a) monitor the health of the employer's workers or a particular class of workers; and (b) monitor conditions relevant to the health and safety of workers at a workplace under the employer's control
ACT ^a	s.21(3) Without limiting [the primary duty of care], the person's duty includes— (f) monitoring the work safety of people at the business or undertaking, and the conditions of the workplace, to ensure that work-related illness and injury are prevented

^a These provisions have changed with the introduction of the *Work Safety Act 2008* (ACT) on 1 October 2009.

Source: Stewart-Crompton, Mayman, and Sherriff (2009).

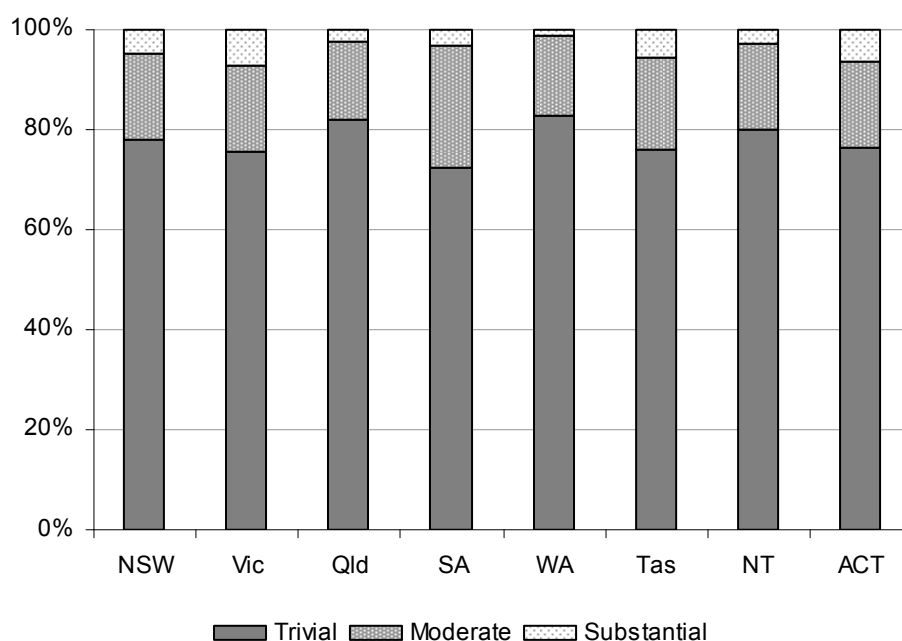
The costs of hazard identification and risk control

The costs imposed on businesses through requirements for hazard identification and risk control are likely to be in the form of: time taken to conduct reviews of the workplace and workplace activities; the resulting modifications to processes and procedures to control for risks; and, in conducting the paperwork associated with the requirements (including providing auditable documented evidence).

In a survey of SMEs conducted by Sensis Pty Ltd (see appendix B for details of the conduct of the survey), of those businesses which reported they had incurred costs

from conducting hazard identification and risk control (53 per cent), most reported that the cost was trivial — 78 per cent.³ This result only varied a little by jurisdiction, with the significance of the costs imposed reported to be greatest in South Australia, followed by those in Victoria and Tasmania and least in Queensland and Western Australia (figure 7.5). Given the nature of the provisions, the similarity in results is not surprising as even though some jurisdictions do not explicitly set out a risk management process in their regulations, it is implied under the general duties and thus in most cases is still required to be completed.

Figure 7.5 Cost to SMEs of conducting hazard identification and risk control by jurisdiction^a
12 months to May 2009



^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

Data source: Sensis Survey of SMEs (2009 unpublished).

On a reported actual cost basis, however, there were greater differences between states and territories. The average costs⁴ reported by SMEs of conducting hazard

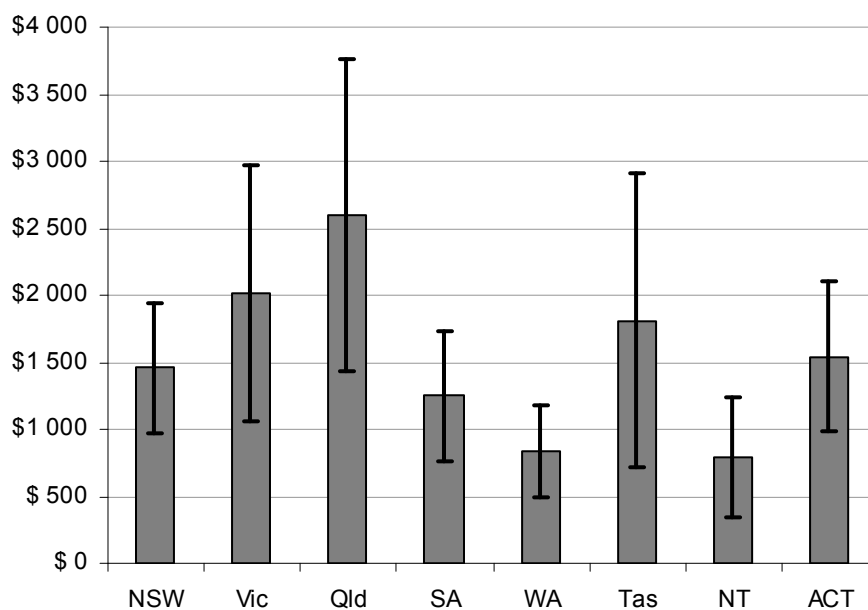
³ Reported figures were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

⁴ Reported costs were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

identification and risk control are shown on figure 7.6 along with the standard errors⁵ — plus and minus one standard error is indicated by the black lines. Despite the differences in average costs, most estimates had large standard errors meaning that the costs for all jurisdictions were not statistically different.

Figure 7.6 Reported average costs incurred by SMEs due to conducting hazard identification and risk control by jurisdiction^a

12 months to May 2009



^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. The black lines indicate the range plus and minus one standard error for the estimated average cost for each jurisdiction.

Data source: Sensis Survey of SMEs (2009 unpublished).

The difference between the proportion of medium (those with between 20 and 200 employees) and small (those with less than 20 employees) businesses reporting moderate or substantial costs was only small. On an actual cost basis, however, medium sized businesses reported average costs associated with hazard identification and risk control over the past 12 months of close to \$9500, compared with small sized businesses which reported average costs of close to \$1100.

⁵ Standard errors are one measure of sampling error, which result from surveying a sample of SMEs as distinct from conducting a census of the whole population. Standard errors indicate the degree to which an estimate may vary from the value which would have been obtained from a full enumeration or the 'true value'. There are about two chances in three that a sample estimate differs from the true value by less than one standard error.

Reported costs by industry were more diverse, reflecting the variable nature and prevalence of workplace risks and hazards between industries. For example, SMEs in higher risk industries such as Manufacturing and Building and construction reported more significant costs associated with hazard identification and risk control than those SMEs in other sectors which all reported similar significance levels (the exception to this is Retail trade) — 27 per cent and 26 per cent respectively reported moderate or substantial costs compared with an average of 16 per cent for other industries.

The corresponding actual reported costs by industry also followed this pattern with SMEs in Manufacturing and Building and construction recording the highest average costs — an average of \$3666 and \$3418 over the past 12 months respectively, compared with an average for other industries of \$1100. SMEs in the Accommodation, café and restaurants and Health and community services sectors reported the lowest average costs (\$770).

Record keeping

Record keeping for matters relating to the control of risks, such as keeping records of when and at what level employees have been exposed to hazardous substances, exist in all jurisdictions' OHS regulations (table 7.3). Record keeping requirements are used to aid employers to discharge their OHS responsibilities. The record keeping requirements differ significantly between jurisdictions, with some such as the ACT only detailing two specific requirements, compared to more numerous requirements imposed in New South Wales and Victoria.

Despite this, given that most jurisdictions either imply or specifically set out risk management processes that would also require records to be kept, it is not possible to say whether or not the greater prescription in some regulation has any real impact on cost. Further, it may even be the case that the greater level of detail in some regulations makes it easier and therefore less costly for businesses to comply with the requirements of the regulation.

Table 7.3 Record keeping requirements^aSummary of requirements in regulations 2008-09

<i>Matters for which records must be kept</i>	
Cwth	Plant, hazardous substances, confined spaces, dangerous goods, major hazard facilities, electricity, driver fatigue, construction, working at heights.
NSW	Asbestos, health monitoring, electricity, confined spaces, long distance truck driver fatigue, plant, carcinogenic substances, hazardous substances, dangerous goods, major hazard facilities, lead, construction.
Vic	Noise (risk control and determinations), confined spaces, working at heights, plant, hazardous substances, carcinogenic substances, asbestos, lead, construction, major hazard facilities, mining.
Qld	Asbestos, underwater diving, hazardous substances, lead, health monitoring, confined spaces, construction.
SA	Plant, hazardous substances, mining, health monitoring, amusement structures, hazardous substances, asbestos, demolition work, excavation work, petroleum work, mining, health monitoring.
WA	Electricity, driving commercial vehicles, plant, hazardous substances, carcinogenic substances, lead, health monitoring, atmosphere and respiratory plant, construction.
Tas	Health monitoring, plant, noise, asbestos, hazardous substances.
NT	Hazardous substances, plant, health monitoring, work areas, lifts, escalators and moving walks, amusement structures, asbestos.
ACT ^b	Confined spaces, health monitoring.

^a Excludes records associated with training and high risk work licensing. ^b Under the new *Work Safety Act 2008* (ACT) which came into effect on 1 October 2009 the ACT now requires records to be kept for a greater number of matters.

Source: General OHS regulations.

However, the approach taken by some jurisdictions to require record keeping associated with hazard identification and risk management varies. In Victoria, it was found that while 89 per cent of workplaces had adequate risk controls in place for plant hazards, only 49 per cent had documented risk assessments (WorkSafe Victoria 2007). Given this, the approach taken by WorkSafe Victoria was to focus on the outcomes (the observed risk controls) rather than the documented evidence (what was done prior to risk control) in assessing compliance with the regulation. Further, for specific hazards, record keeping requirements in Victoria have been rationalised so that lengthy periods (such as 30 years) are only mandated when work-related injury or disease has a long latency period (WorkSafe Victoria 2007).

Along with the record keeping requirements shown above, and those that are derived from hazard identification and risk control under OHS regulation, businesses are required to notify regulators of any incidents that occur at their workplace and keep records pertaining to these incidents. The requirements imposed by different jurisdictions in terms of incident notification and subsequent record keeping vary (table 7.4).

Table 7.4 Written incident notification and subsequent record keeping

Requirements in 2008-09

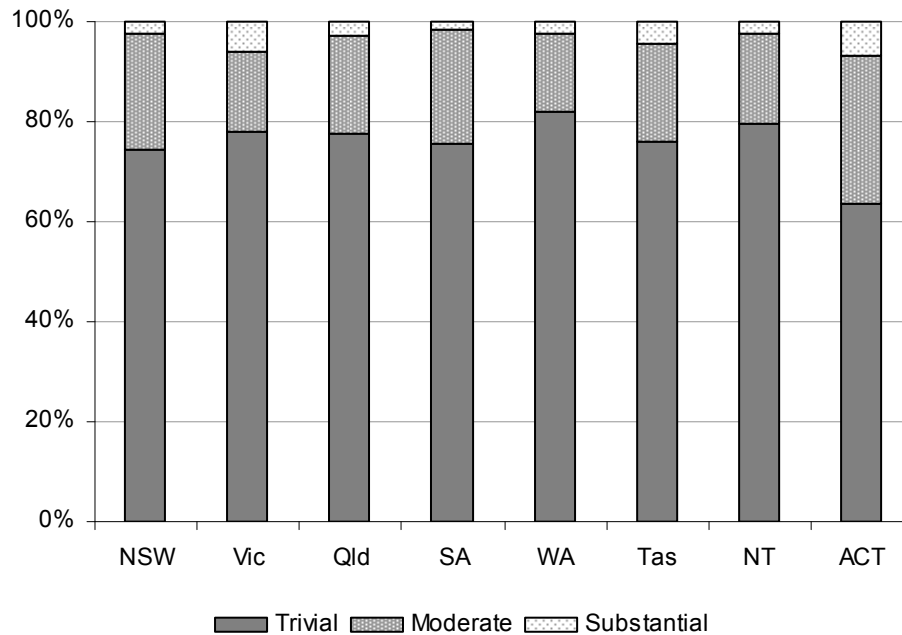
	<i>Reporting requirement</i>	<i>Record keeping requirement</i>	<i>Notification method</i>					
			<i>Phone</i>	<i>In person</i>	<i>Fax</i>	<i>Mail</i>	<i>Email</i>	<i>Online</i>
Cwlth	Report within 24 hours (2 hours for death).	30 years	✓	✗	✓	✗	✗	✓
NSW	For workers, report immediately (via phone) to insurer if workers' compensation payable (they pass on to WorkCover) unless death or serious injury/incident (immediate). For non-workers' compensation issue report immediately for death or serious injury/incidents, or within 7 days for others.	5 years	✓	✗	✗	✗	✗	✓
Vic	Notify immediately (via phone), written report within 48 hours.	5 years	✓	✗	✓	✓	✗	✓
Qld	Notify immediately if death (via phone) written report within 24 hours.	1 year	✓	✗	✓	✗	✗	✓
SA	Notify as soon as practicable (via phone), written report within 24 hours.	3 years	✓	✗	✓	✓	✗	✗
WA	Report within 5 days		✓	✓	✓	✓	✓	✗
Tas	Notify immediately (via phone), written report within 48 hours.		✓	✗	✓	✓	✓	✗
NT	Notify as soon as practicable (via phone), report within 48 hours.	5 years	✓	✗	✓	✗	✓	✗
ACT	Report as soon as practicable, but no later than 7 days.	5 years	✓	✗	✓	✓	✗	✗

Source: Regulator websites.

At one extreme, the Commonwealth requires businesses within its jurisdiction to keep records relating to OHS incidents for at least 30 years. At the other extreme, Queensland only requires records to be kept for at least one year. For Western Australia and Tasmania, no formal record keeping requirements exist in relation to OHS incidents.

Results from the survey of SMEs indicate that businesses in the survey reported similar cost burdens associated with record keeping across the jurisdictions, with the exception of the ACT (figure 7.7).

Figure 7.7 Costs incurred by SMEs to keep records by jurisdiction^a
12 months to May 2009



^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

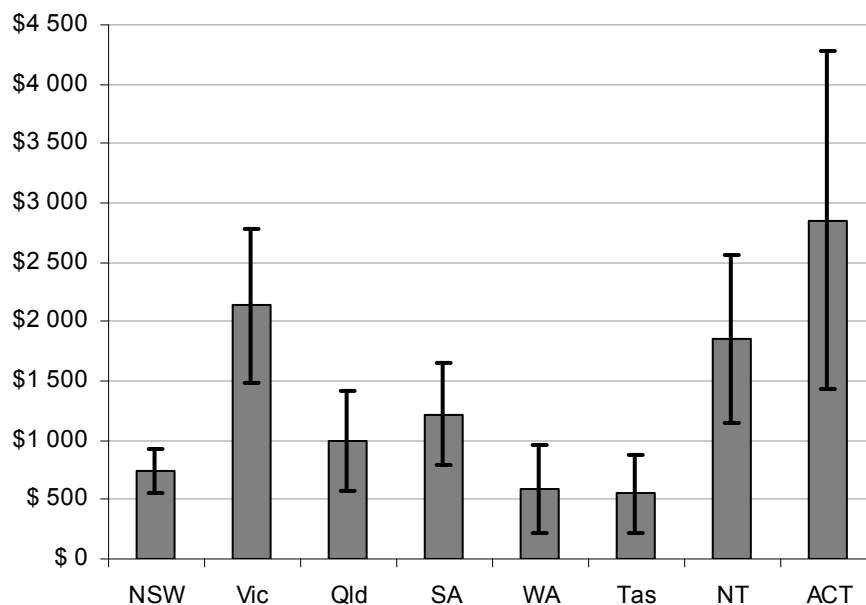
Data source: Sensis Survey of SMEs (2009 unpublished).

Overall, 58 per cent (1051) of all SMEs surveyed reported that they faced some costs associated with keeping OHS records. Of these 75 per cent reported the costs were trivial, with 20 and 5 per cent reporting moderate and substantial costs respectively. Across the jurisdictions, a larger proportion of SMEs in the ACT reported that they faced moderate or substantial costs associated with record keeping — 36 per cent — compared with other jurisdictions. The remaining jurisdictions all reported similar distributions of trivial, moderate and substantial costs.

The reported actual costs of record keeping do, however, reveal differences between the jurisdictions (figure 7.8). SMEs in the ACT, Victoria and the Northern Territory all reported higher costs due to record keeping activities relating to OHS over the past 12 months. These three jurisdictions have significantly higher average costs than for SMEs in New South Wales, Western Australia and Tasmania. However, given the similarities in the hazard identification and risk control requirements and

their associated record keeping, along with similarities in other record keeping requirements (with the exception of the ACT), it is unclear if these differences are driven by the regulations themselves. Instead, differences are possibly driven by the approach of the regulators, which may place a greater focus on record keeping in contrast to observed outcomes. Alternatively, differences may be driven by what businesses in these jurisdictions perceive is required in order to comply with OHS regulations.

Figure 7.8 Reported average costs incurred by SMEs due to record keeping by jurisdiction^a
12 months to May 2009



^a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. The black lines indicate the range plus and minus one standard error for the estimated average cost for each jurisdiction.
Data source: Sensis Survey of SMEs (2009 unpublished).

As with other reported costs, medium sized businesses reported higher average costs associated with record keeping (approximately \$4200) than small sized businesses (approximately \$900), possibly reflecting the increased complexity of their operations as well as needing to keep records for a larger number of people.

Reported significance of costs also varied by industry. As expected, those SMEs which operate in Manufacturing, Building and construction; and Cultural, recreational and personal services had a relatively high proportion of SMEs claiming that the costs of keeping records were moderate or substantial —

27 per cent, 37 per cent and 40 per cent respectively, compared to an average for other industries of 17 per cent. For Manufacturing and Building and construction, this is in line with the greater number of potential workplace hazards associated with these industries, and thus much greater record keeping requirements. However, for Cultural, recreational and personal services it is unclear what drives these higher costs.

Despite the differences in reported significance of record keeping costs, on an actual cost basis, only SMEs in the manufacturing sector reported statistically significant higher costs for record keeping — \$2937 in the 12 months to May 2009 compared with an average for other industries of \$930.

7.3 Duty of care

As discussed in chapter 2, duties of care are imposed on a range of groups, from employers to suppliers of plant and material and to individuals within companies. The purpose of having a range of duties is to ensure that all who can influence health and safety outcomes through their actions have a specific responsibility to do so. This sentiment has been expressed in the national review:

4.14 The model Act should clearly state the basis for imposing duties of care. These are that the duty holder provides, makes a specified contribution to or involvement in, or manages, at least one of the elements that go to work being undertaken, being:

- the activity;
- the place of work;
- the systems or arrangements under which the work is undertaken;
- the things used in undertaking work (plant, substances, structures or components);
or
- the capability (training and information), instruction and supervision and welfare of those undertaking the work.

4.15 Duties must apply to the design, manufacture or supply of any of these elements. (Stewart-Crompton, Mayman, and Sherriff 2008, p. 20)

In having a wide range of duties, OHS regulation can also be sufficiently flexible to cover changes over time in the nature of business relationships and production systems (Stewart-Crompton, Mayman, and Sherriff 2008).

Despite the valid reasons for imposing a range of duties, participants to this study and others have expressed concern that these provisions have gone ‘too far’ in some jurisdictions by imposing unnecessary burdens on businesses, and that the variation between jurisdictions has created confusion. The Commission has not benchmarked

duty of care in its entirety but has instead narrowed the focus to three aspects that were raised by participants — duties of care for designers, financiers and the coverage of contractors by an employer's duty of care.

The Association of Construction Engineers Australia (ACEA) believes that the duties imposed on designers vary across jurisdictions and are overly onerous:

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. (sub. 5, p. 4)

The Australian Finance Conference suggests that the different approaches to duties imposed on suppliers has created uncertainty, and in some cases has limited the availability of finance for businesses wishing to invest in new plant and equipment:

... for equipment financiers, the various duties of owners and suppliers under OHS laws, regulations and codes of practice are difficult to interpret and apply ... The result for our Members and their clients is uncertainty in regard to their OHS duties and obligations in respect of financed assets. This uncertainty can lead to a reluctance by financiers to provide certain types of funding and/or increased funding costs for customers. (sub. 15, attachment 1, pp. 3–4)

The extent of coverage an employer's duty has over a contractor and their employees was also raised as an issue. These three issues are assessed in this section.

Duties of designers

Each jurisdiction has approached the way in which it imposes duties on designers in slightly different ways (table 7.5). For example, at one end no specific duties are imposed on designers within the Commonwealth's legislation, while at the other extreme designers have duties in relation to plant, substances and structures in the Northern Territory.

Further, in specifying these additional duties, there has been some confusion about whether or not these have extended the coverage of the OHS Acts. For example, the national review points out that Victoria's provisions did not add anything new, but rather helped make the current duties more explicit:

The introduction in Victoria (Vic) of duties of care for designers of buildings or structures resulted in mistaken concern being expressed that architects, engineers, draftspersons and others had a new duty of care that they did not previously have. The duties of care for designers of buildings or structures, however, may go no further than

the ‘conduct of the undertaking’ duties in the Vic Act. A benefit from the inclusion of a specific duty on a particular class of persons is to make clear that such a duty exists, while also providing clarity on its application. (Stewart-Crompton, Mayman, and Sherriff 2008, p. 25)

Table 7.5 Duties on designers
Primary legislation in effect in 2008-09

	<i>Duties on designers of:</i>		
	<i>Plant</i>	<i>Substances</i>	<i>Structures</i>
Cwth	x	x	x
NSW	✓	✓	x
Vic	✓	x	✓
Qld	✓	x	✓
SA	✓	x	✓
WAA ^a	✓	x	✓
Tas ^a	✓	x	✓
NT	✓	✓	✓
ACT ^{a,b}	x	x	x

^a Duties for designers of substances in Western Australia, Tasmania and the ACT are imposed in dangerous goods legislation. ^b In the ACT duties in relation to design for plant and structures have been imposed under the *Work Safety Act 2008* (ACT) which came into effect 1 October 2009.

Source: Adapted from Stewart-Crompton, Mayman, and Sherriff (2008).

It is difficult to assess whether the duties imposed on designers of structures have gone ‘too far’. Essentially, the argument put forward by groups such as the ACEA is that the duties imposed on them generate greater costs than benefits and extend beyond what they could conceivably control.

Safe design has the potential to improve the product that is being developed and thus improve the safety outcomes generated and potentially the demand for the product. For example, the importance of design in workplace accidents has been highlighted by various studies. Over the period 1989 to 1992, it was estimated that in 52 per cent of the accidents relating to plant and equipment that led to fatalities, design problems were a contributing factor (NOHSC 2000). To the extent the designer provisions reduce workplace injury and disease, benefits will be created for employers, employees and the broader community.

Whether or not these interventions provide *net* benefits is more difficult to assess, particularly in the absence of reliable data on both the costs imposed on businesses (something which was not put forward in submissions to this study) and the benefits created (that is, what has the effect of these provisions been on workplace safety outcomes). This difficulty is highlighted in the differing outcomes of previous reviews into whether duties should be imposed on the designers of buildings

intended to be used as workplaces. For example, reviews of OHS regulation such as Victoria’s Maxwell Review (Maxwell 2004), the Northern Territory’s review (Shaw et al. 2007) and the review conducted by the ACT (ACT Occupational Health and Safety Council 2005) all supported the imposition of duties on the designers of buildings, while the 2006 review in New South Wales did not (WorkCover NSW 2006).

Despite this, a critical issue in determining whether these provisions can potentially create unnecessary costs relates to whether or not the provisions are limited to the extent to which a designer might be reasonably expected to have control over the outcome.

On this, the approach taken in the jurisdictions which impose specific duties on designers varies (table 7.6). Only in Queensland is the issue of control specifically addressed in the duty of care, with all other jurisdictions adopting the reasonably practicable qualification. The Northern Territory has a variant on this and instead uses a qualifier based on what is appropriate, while Western Australia and Tasmania include proper use in their qualifications.

Table 7.6 Limitations on duties of designers of structures

Summary of qualifiers on duties 2008-09

<i>Limitations on duties</i>	
Cwlth	na
NSW	na
Vic	Duty is qualified by reasonably practicable (section 28(1))
Qld	Duty is qualified so that a designer only holds a duty of care to the extent the content of the design of the structure falls under the control of the designer (section 30B(4))
SA	Duty is qualified by reasonably practicable (section 23A(1))
WA	Duty is qualified by as far as is practicable and that the building is properly constructed, used and maintained (section 23(3a))
Tas	Duty is qualified by as far as is practicable and that the building is properly constructed, used and maintained (section 14(1))
NT	Duty is qualified by reasonably practicable and specifically for designers ‘to the extent that may be appropriate in the circumstances’ (section 57(2))
ACT	na

na not applicable.

Source: General OHS Acts.

For the jurisdictions without specific duties, it is likely that the general duties imposed in OHS legislation, qualified by reasonably practicable, cover designers.

As all duties are qualified to some degree, it is not possible to determine whether these impose unnecessary costs on businesses. However, given the differences in

the approaches taken, there is likely to be some degree of confusion over the extent of the duty of care imposed on designers. For example, it could be assumed that the reasonably practicable qualification would take into account the issue of control, but it would remain open to court interpretation. Thus it is possible that given the level of uncertainty, the compliance burden placed on businesses (through changed production processes or increased costs in obtaining advice about their regulatory requirements) could be greater in those jurisdictions with duties that are not qualified by ‘control’ — all jurisdictions except Queensland.

On balance, taking account of the discussion above, the Commission does not consider it possible to clearly identify a ranking of the least to the most burdensome requirements placed on designers across jurisdictions.

Duties of financiers

Financiers of plant and equipment can have duties imposed on them through the provisions in all OHS Acts that impose duties on suppliers of plant and equipment. Duties are imposed due to the nature of leasing and hire purchase arrangements, as contractually financiers own the plant and equipment and ‘supply’ it to a business or individual under a commercial arrangement. The Australian Finance Conference suggests that as a result:

... a financier may have obligations under OHS laws as an owner or supplier of a financed asset, even though it is unlikely to have any control over the selection, use or maintenance of the asset. The finance or lease agreement will generally require the customer to take responsibility for the use and maintenance of the asset in accordance with all applicable laws and regulations. Given that the financier does not have possession or control of the asset, realistically it is not in a position to discharge any owner or supplier duties under OHS laws. (sub. 15, attachment, p. 3)

In the case where financiers are caught up in the duties imposed on suppliers, it is possible that financiers will not provide finance to businesses seeking new plant or equipment as they cannot discharge this liability to those who have control over the work activities concerned (primarily the real supplier/manufacturer). Alternatively, financiers may alter the type of finance provided which may impose additional costs for both financiers and business. This unintended outcome potentially imposes an unnecessary burden on businesses within these jurisdictions in the form of limited finance, or finance that is supplied but at a higher cost in order to account for the transfer of liability or changed financing arrangements. Further, given differing arrangements between jurisdictions, a compliance burden is placed on financiers in determining whether or not they are caught under the duty of care provisions.

However, as recommended by Stewart-Crompton, Mayman, and Sherriff (2008) during the national review, the intention of these provisions is to capture those who can influence health and safety outcomes and exclude those who cannot. In recognition of this, and of the particular circumstances of financiers, some jurisdictions currently have provisions for ‘passive financiers’ in their OHS Acts.

Passive financier provisions have been enacted within OHS legislation in recognition of the potential limited control financiers have over OHS outcomes. These provisions exclude financiers who only own plant, structures or substances for the purpose of financing its acquisition. Where these provisions exist, it is unlikely that the duty of care provisions impose any unnecessary burdens on businesses.

Given this, an indirect indicator of the potential unnecessary compliance burden for financiers created by duty of care provisions placed on suppliers is whether or not various general OHS Acts have passive financier exemptions (table 7.7).

Only the Commonwealth, New South Wales, Victoria and the ACT have explicit exemptions relating to passive financiers. Of the remainder, South Australia and the Northern Territory have limited provisions, with all other jurisdictions having none. For those states and territories with limited or no provisions, it is possible that businesses face higher burdens associated with the availability, type and cost of finance for plant and equipment. However, it should be noted that in Queensland a defence to any breaches of the duty imposed on financiers includes whether or not they have control over the situation which led to a breach, potentially limiting this compliance burden. But it is unclear whether the additional defence of control would lower burdens beyond the defence of reasonably practicable as it would be expected that reasonably practicable would also include elements of control.

It should also be noted that the national review recommended that passive financier exclusions be included in the model Act — recommendation 36 (Stewart-Crompton, Mayman, and Sherriff 2008). This recommendation has subsequently been accepted by the Workplace Relations Ministerial Council (WRMC 2009a).

Table 7.7 Duties of suppliers and passive financier provisions

Summary of duties 2008-09

	<i>Duties (summary)</i>	<i>Passive financier provisions</i>
Cwth	Section 19: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use at time of supply; have carried out research and testing to minimise risk; and provide adequate information about intended usage and conditions to persons supplied.	✓ section 19(2)
NSW	Section 11: Supplies of plant or substances must ensure that it is safe for its intended use and provide adequate information to persons supplied.	✓ section 11(2)f
Vic	Section 30: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use and provide adequate information about intended usage and conditions to persons supplied.	✓ section 30(2)
Qld	Section 32B and 34A: Supplies of plant or substances must ensure (by examining and testing) that it is safe for its intended use and provide adequate information to about the way it must be used to ensure health and safety to persons supplied.	✗
SA	Section 24: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use and foreseeable misuse, and provide adequate information about intended usage and conditions to persons supplied.	Possible — regulation 3.2.7
WA	Section 23: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use at time of supply; have carried out research and testing to minimise risk; and provide adequate information about intended usage and conditions to persons supplied.	✗
Tas	Section 14: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use and provide adequate information about intended usage and conditions to persons supplied.	✗
NT	Regulation 11: Suppliers of plant or substances must ensure that its safe, has been tested and provide information to persons supplied.	Possible — regulation 11(3)
ACT	Section 43: Supplies of plant or substances must ensure as far as reasonably practicable that it is safe for its intended use at time of supply; have carried out research and testing to minimise risk; and provide adequate information about intended usage and conditions to persons supplied.	✓ section 43(2)

Source: General OHS Acts and regulation.

Duties imposed on employers with respect to contractors

A number of participants to this study suggested that there was some ambiguity over who was responsible when an accident occurred on a worksite involving a contractor's or sub-contractor's employee — employers, contractors, sub-

contractors or all. Further, it was also suggested that where the responsibilities were better known, making an employer responsible for the actions of a contractor's or sub-contractor's employees imposed unnecessary burdens as the employer did not have any control over such an individual. This sections examines both these issues.

Who holds a duty of care?

Whether or not an employer holds a duty of care to a contractor or sub-contractor and their employees depends on a combination of the duty of care imposed on an employer, the definition of a worker/employee and the duty of care imposed on those in control of a worksite. Irrespective, an employee of a contractor is owed a duty of care by their employer (the contractor) as per the general duty of care imposed on employers (see chapter 2).

As discussed in chapter 13, these provisions vary and are shown in table 7.8.

Table 7.8 Elements of duty of care coverage — employer/contractor relationship
2008-09

	<i>Duty owed to contractor by an employer (expressly stated)</i>	<i>Contractor defined as employee/worker</i>	<i>Contractor covered in controllers duty – access, egress and supplied equipment/plant only</i>	<i>Contractor covered in controllers duty – access, egress and worksite more generally</i>
Cw/ith NSW	✓			✓
Vic	✓		✓	
Qld			✓	
SA	✓			
WA	✓		✓	
Tas			✓	
NT		✓	✓	✓
ACT ^a				

^a Under the new *Work Safety Act 2008* (ACT) which came into effect on 1 October 2009 the ACT now includes independent contractors and outworkers under an employer's duty.

Source: General OHS Acts.

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 of 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.

Further, as Johnstone, Quinlan and Walters (2004) note, there are some differences in the ‘geographic’ spread of these duties. In Victoria and Queensland, the coverage extended by the use of business or undertaking within the Acts means an employer’s duty extends beyond the employer’s worksite. In Commonwealth, New South Wales, and the ACT, coverage is limited to the workplace, while for South Australia and Western Australia, Johnstone, Quinlan and Walters (2004) suggest coverage is also not as extensive compared to Victoria and Queensland.

Do duties on employers in relation to contractors impose unnecessary burdens?

Applying a broad duty of care on an employer provides government with a flexible tool to achieve OHS outcomes as it can apply to a number of diverse business relationships. Further, a broad duty also limits the potential for perverse incentives to arise, such as those which induce businesses to change the nature of their contractual relationships in order to avoid liability. For example, restricting a duty of care to an employer’s employees may create an incentive for an employer to use contractors for work with significant OHS risks. If these contractors are not better placed to manage these risks, then it is likely worse OHS outcomes will result, or at least, OHS outcomes will be achieved at higher cost than otherwise possible.

However, if the duties imposed on businesses extend past what they could reasonably be expected to manage and influence, then they are likely to impose some unnecessary costs. Given this, of importance in examining whether or not unnecessary costs have the potential to arise is to examine whether or not the duties imposed are qualified to some extent.

As discussed earlier, whether or not an employer holds a duty of care to a contractor’s or sub-contractor’s employees depends on the duty of care imposed on employers, and the duty of care imposed on those in control of a worksite.

Table 7.9 shows the qualifications that exist to the duty of care imposed on employers and those in control of a workplace. All duties except those in New South Wales and Queensland are qualified by at least reasonably practicable. For Victoria, South Australia and Western Australia, an employer’s duty of care to a contractor is further qualified by aspects over which an employer can control. In

New South Wales and Queensland, however, given the reverse onus of proof, reasonably practicable and control defences are possible.

Table 7.9 Qualification of duties
2008-09

	<i>Qualification on employer's duty</i>	<i>Qualification on controller's duty</i>
Cwth NSW	Reasonably practicable na	None — reasonably practicable and control defences exist
Vic	Limited to aspects over which an employer can control	
Qld	na	None — reasonably practicable and control defences exist
SA	Limited to aspects over which an employer can control	
WA	Limited to aspects over which an employer can control	
Tas	na	Reasonably practicable
NT	Reasonably practicable	
ACT	na	Reasonably practicable

na not applicable.

Source: OHS Acts.

Despite the differences in the qualifications used, like the duties imposed on designers, it is unclear whether these constitute real differences in terms of compliance burdens.

7.4 Duty to be informed on OHS matters

OHS regulation imposes requirements on employers to be informed on OHS matters — specifically, in some jurisdictions employers have a duty to obtain appropriate information on OHS matters, and/or an employer has to employ a person to perform certain OHS functions (such as an OHS adviser). Part of the rationale for these requirements is to address potential knowledge and experience gaps of the OHS duty holders in order to allow them to adequately fulfil their broader OHS obligations (Stewart-Crompton, Mayman and Sherriff 2009).

The requirements for employers to be informed on OHS matters were considered in the national review (Stewart-Crompton, Mayman and Sherriff 2009), with the recommendations of that review being rejected by the Workplace Relations Ministerial Council (box 7.1).

Box 7.1 National Review into Model Occupational Health and Safety Laws**Recommendation (no. 139) of the *National Review into Model Occupational Health and Safety Laws*:**

The model Act should provide that persons conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters.

The qualifications of persons providing such advice should be addressed in the regulations.

Provision should be made along the lines of the Queensland Act for the appointment by persons conducting a business or undertaking of [Workplace Health and Safety Officers (WHSOs)] and further consideration should be given to how that requirement can be extended to non-traditional work arrangements that normally involve thirty or more workers. (Stewart-Crompton, Mayman and Sherriff 2009, p. 180)

Workplace Relations Ministerial Council response:

In relation to the first and second paragraphs, such provisions should not be included in the model Act, as an unintended consequence could be that persons conducting a business or undertaking would be encouraged to delegate their responsibilities. The creation of WHSOs, as per the third paragraph, is also opposed. (WRMC 2009a, p. 36)

The requirements for employers to be informed on OHS matters are separate and distinct from the information and advisory services provided by regulators (box 7.2) and, in some instances, cannot be met by those services or the advisory services provided by business groups. They are also separate and distinct from the guidance some regulators provide on selecting and using OHS consultants.

The legislative provisions in this area have been described as ‘rather basic and piecemeal’, subject to being easily ‘overlooked by the uninitiated’, ‘vague’ and ‘oriented to larger organisations’ (Bluff 2005). The differing approaches of the jurisdictions reflect this description:

- New South Wales, Victoria, Queensland and the Northern Territory all take different approaches to the requirement for employers to be informed on OHS matters (table 7.10)
- Tasmania and South Australia both require an employer to appoint officers to be responsible for OHS matters, but not necessarily to inform the employer on OHS matters (box 7.3)
- Western Australia and the ACT do not have a specific requirement ‘to be informed’ beyond that which could be imputed from the employer’s broader duty of care under the OHS statute.

Box 7.2 Information and advisory services provided by regulators and business groups

Information and advisory services provided by regulators

All Australian OHS regulators provide information on the OHS requirements of their respective jurisdictions through publicly available material and publications — many of which are available from their websites. Many regulators also offer some form of OHS advisory service, for example:

- WorkSafe Victoria, through the ‘Small Business Health and Safety Assistance Program’, offers up to three hours free consultancy to firms with less than 50 employees
- WorkSafe WA, through the ‘Thinksafe Small Business Assistance Program’, provides three hours free consultancy to firms in certain industries with less than 20 employees
- SafeWork SA provides ‘Safe Business is Good Business’ information sessions. These two hour sessions are aimed at small business and cover topics such as the development and implementation of safety management systems.

Information and advisory services provided by business groups

Business groups, such as the Queensland Chamber of Commerce and Industry and Chamber of Commerce and Industry (WA), provide OHS information and advice to their members and, in some instances, to non-members. The groups also provide others services, such as being advocates for their members in respect to OHS issues and providing OHS training courses. Businesses typically pay for these services via their membership fees and/or on a fee-for-service basis.

Some of these business groups receive government funding through programs such as Workplace Health and Safety Queensland’s (WHSQ) Small Business Grants Scheme which funds industry groups ‘that assist employers to better manage and improve workplace health and safety’.

Sources: Bluff (2005); SafeWork SA (2009); WA DoC (2009); WHSQ (2009b); WorkSafe Victoria (2009b).

Outside of legislative provisions, Western Australia, along with Queensland and South Australia, have codes of practice that extend the role of the employer’s first aid arrangements to include ‘some form of [OHS] centre or service, organised either in-house or through an external agency that provides specialised advice or services’ (Bluff 2009). This OHS service provides further OHS functions to the employer, such as OHS advice and training, risk assessments, health assessments, health surveillance, ergonomics or occupational hygiene assessments, and vocational rehabilitation.⁶ As these requirements are not legislative provisions, only apply in

⁶ These provisions typically apply to larger organisations or organisations undertaking high risk work.

certain circumstances, and primarily relate to securing competent first aid and/or health services (rather than obtaining information and advice to aid in satisfying OHS duties of care), they are not considered further in this chapter.

Table 7.10 Requirements to be informed on OHS matters

New South Wales, Victoria, Queensland and the Northern Territory 2008-09

<i>Duty</i>	
NSW	An employer must obtain 'reasonably available information from an authoritative source' where necessary to enable them to fulfil their OHS responsibilities
Vic	The employer is to employ or engage suitably qualified persons to provide advice to the employer concerning the health and safety of its employees
Qld	Employers in prescribed industries must appoint a qualified workplace health and safety officer. One function of this officer is to inform on OHS matters
NT	Health surveillance is to be provided, at the employer's expense, by a competent person trained to test and examine persons exposed to the hazards

Box 7.3 Responsible officer requirements of South Australia and Tasmania

South Australia

Companies operating in South Australia are obligated to appoint a 'responsible officer' (or officers) to be responsible for taking reasonable steps to ensure the company complies with its OHS duty of care. The responsible officer must be a member of the board, the chief executive officer or senior executive of the company. Within three months of being appointed, the responsible officer must undertake an approved OHS training course.

The company's senior executive and board will be collectively deemed to be 'responsible officers' if the company fails to appoint at least one responsible officer.

Tasmania

All employers are required to appoint a 'responsible officer' for each of their workplaces. The responsible officer is accountable for the fulfilment of the employer's OHS duties and obligations. The 'responsible officer provisions' operate so as to make the employer and responsible officer equally responsible, and liable for breaches, of the OHS duty of care.

Compared to the requirements applying in New South Wales, Victoria and the Northern Territory (table 7.10), the requirements applying to Queensland employers are more detailed and comprehensive. Queensland employers in prescribed

industries⁷ must appoint an officer (referred to as a workplace health and safety officer (WHSO)) for each of its workplaces with 30 or more employees.⁸ A Queensland employer may, with the prior approval of the regulator, arrange for a WHSO to be responsible for more than one workplace.

Unlike responsible officers in South Australia and Tasmania (box 7.3), Queensland WHSOs do not take on the obligations of the employer and, unlike Health and Safety Representatives (who are elected by employees to represent them on OHS matters and in OHS consultations — chapter 9), a WHSO is an appointment and employee of the employer (Stewart-Crompton, Mayman and Sherriff 2009).

The *Workplace Health and Safety Act 1995* (Qld) prescribes the following functions of a WHSO in a workplace:

- to advise the employer on the overall state of health and safety
- to conduct inspections at the workplace to identify any hazards and unsafe (or unsatisfactory) conditions and/or practices
- to report in writing to the employer (or principal contractor) any hazard or unsafe (or unsatisfactory) workplace practices identified during inspections
- to establish appropriate OHS educational programs
- to investigate, or assist in the investigation of, all workplace incidents
- to help inspectors in the performance of the inspectors' duties
- to report OHS incidents or risks to the employer (or principal contractor).

In order to become qualified to operate as a WHSO a person must either:

- have been assessed by a registered training organisation (RTO) as being competent to perform the duties of a WHSO
- have qualifications or experience that demonstrate the ability to satisfactorily perform the duties of a WHSO — such qualifications include the satisfactory completion of an approved workplace health and safety officer course (box 7.4).

⁷ Prescribed industries as at August 2009 include Building and construction; Community services; Electricity, gas and water; Financial, property and business services; Manufacturing; Public administration; Recreational services, personal services and other services; Retail and wholesale trade; and Transport and storage.

⁸ The employer must have 30 or more workers at the workplace for a total of any 40 days during the year. A similar requirement is placed on principal contractors, but the threshold for appointment is different to that of employers. A principal contractor must appoint a WHSO where the principal contractor has, or is likely to have, 30 or more persons working at a workplace in any 24 hour period.

Box 7.4 WHSO training — courses and costs

The initial WHSO training courses comprise two stages:

- the first stage covers matters such as the core elements of OHS legislation, risk assessment, incident investigation and consultative arrangements
- the second stage includes industry specific training.

The first stage of the WHSO training takes five days and, based on a limited sample of training providers, costs between \$770 and \$900. Reaccreditation training costs typically take 2 days and cost between \$415 and \$475.

Sources: Queensland Government (2008b); ASLS (2009a); Safe Work Queensland (2009).

Once a person has demonstrated they are qualified to be a WHSO, the regulator will issue a certificate of authority to operate as a WHSO. The certificate is valid for the a maximum period of five years, after which the person needs to apply for the certificate to be renewed. In order to renew the certificate, a person must demonstrate that they remain qualified to act as a WHSO, either by being reassessed by a RTO, or satisfactorily completing a WHSO ‘refresher’ course.

In the 2001 review of the *Workplace Health and Safety Act 1995* (Qld) it was noted:

... [the WHSO] provision has gone some of the way towards improving the knowledge and understanding of health and safety issues within the workplace... (Crittall 2001, p. 14)

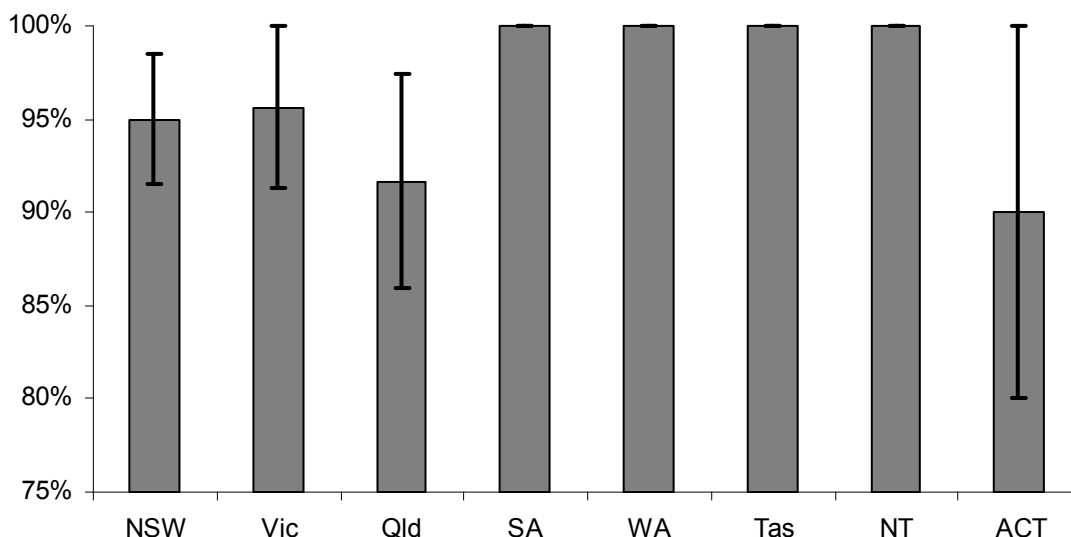
However, the more stringent requirement to employ a WHSO in Queensland does not appear to have translated into greater awareness of OHS regulations. Results from a survey of SMEs indicate that Queensland businesses with over 50 employees reported no better levels of awareness of OHS requirements than similar sized businesses in other jurisdictions (figure 7.9).

Of the regulatory requirements related to an employer’s duty to be informed on OHS matters, the comprehensive nature of the Queensland requirement for a WHSO would seem likely to create the greatest burden on business, especially compared to the comparatively simple requirements of New South Wales, Victoria and Northern Territory.

Based on a number of WHSO vacancies advertised in Queensland during July 2009, the before tax salary of a WHSO lies between \$49 535–66 658 per annum. This is consistent with ABS data which shows the majority of Occupational and Environmental Health Professionals earn over \$52 000 per annum before tax (table 7.11).

Figure 7.9 Awareness of OHS requirements by medium-sized businesses^a

12 months to May 2009 for businesses with 50 or more employees



^a Reported figures in comparisons were weighted to ensure the sample reflected the actual medium business population distribution in each state. See Sensis (2009) for further details on the weights. The black lines indicate the range plus and minus one standard error for the estimated average cost for each jurisdiction.

Data source: Sensis Survey of SMEs (2009 unpublished).

Table 7.11 Salaries of Occupational and Environmental Health Professionals — 2008^a

	Gross annual income		
	Less than \$52 000	\$52 000–\$72 800	Over \$72 800
	%	%	%
Queensland — share of Occupational and Environmental Health Professionals	26	34	40
Victoria — share of Occupational and Environmental Health Professionals	45	55	0
All other states and territories — share of Occupational and Environmental Health Professionals	31	24	45

^a The annual income distributions are based on estimates with high relative standard errors and so should only be considered to be broadly indicative of the actual annual income distributions.

Source: ABS (*Employee Earnings, Benefits and Trade Union Membership, Australia* Cat. no. 6310.0).

These salaries provide some indication as to the average annual burden of the WHSO on those Queensland businesses required to employ a WHSO, while the training costs in box 7.4 are, potentially, another cost to business of WHSOs (albeit

a cost that may only arise every five years). Further, as illustrated in figure 7.9, it does not appear that the Queensland WHSO requirements are producing better outcomes (compared to other jurisdictions) in terms of employers in medium sized businesses being informed (or considering themselves informed) on OHS matters.

7.5 Direct liability

Direct personal liability for individuals within companies has been used in regulations to achieve greater compliance and also provide an alternative option to prosecuting companies. The deterrence effect, and thus how much the prosecution of companies for breaches of OHS laws contributes to regulatory compliance, is open to debate. Gunningham (2007) suggests that studies have found that the prosecution of companies has a number of positives in terms of improved regulator effectiveness through:

- imposing a social sanction on a firm and thus jeopardising its corporate image
- providing additional measures to deal with recalcitrant offenders and those who believe that it is not in their self interest to comply voluntarily.

Despite this, given a range of reasons for non-compliance (from deliberate to accidental) and a range of firm sizes, it is unlikely that the deterrence effect from company prosecution provisions will be uniform. For example, setting fines such that sufficient incentive exists for all firms to avoid them can be difficult as levels that would be sufficient to deter large firms can send small businesses into bankruptcy (a result which is rarely viewed as in the public interest) — this is termed the ‘deterrence trap’ (Coffee 1981) and is discussed further in chapter 5. Further, prosecuting firms that have not deliberately breached their requirements can create an adversarial relationship between regulators and their clients, which does not improve OHS outcomes.

Given these difficulties, additional measures such as imposing personal liability on company directors have been suggested to complement business liability (Braithwaite 2002, Gunningham 2007b, Foster 2009). In essence, it is argued that individual liability provisions complement other deterrence measures and can be an effective component of the pyramid of enforcement measures used by regulators (see chapter 5 for details of an enforcement pyramid).

Currently, each jurisdiction with the exception of the Commonwealth has adopted differing levels of personal liability within their OHS regulatory regimes. Most jurisdictions extend the liability to ‘officers’ for breaches of the OHS Act made by the company. Officers are those who are involved in the decision-making processes

and are defined by Victoria, South Australia and the Northern Territory using the definition of an officer under the *Corporations Act 2000* (Cwlth). In other jurisdictions the definition varies to include:

- executive officers in Queensland
- directors in New South Wales, Western Australia, Tasmania and the ACT
- persons concerned in the management of the company or decisions that affect the whole or substantial part of the corporation in New South Wales
- the company secretary in Western Australia
- members of an organisation in Western Australia if the entity is controlled by members (Stewart-Crompton, Mayman and Sherriff 2008).

The way in which liability is conferred on individuals also varies between the jurisdictions (Stewart-Crompton, Mayman and Sherriff 2008).

- In New South Wales, Queensland and Tasmania, company officers are automatically liable for established company breaches providing that an officer has committed the same offence as the company and cannot prove a relevant defence (for example, that they have exercised due diligence or do not have influence).
- In Victoria, South Australia, Western Australia and the Northern Territory, an officer has breached the OHS Act where the offence by the company is attributable to an act or omission of the officer. In Western Australia, it must be proved that the act or omission by the officer was due to wilful neglect, consent or connivance. In the other jurisdictions, it must be proved that the officer failed to exercise reasonable care.
- In the ACT, an officer is liable for a breach of duty by a company if that officer was reckless, and in a position to influence the conduct of the corporation and failed to take reasonable steps to do so.

It should also be noted that the ACT is the only jurisdiction to have an industrial manslaughter offence under the *Crimes Act 1900* (ACT). While not a provision in OHS regulation (and thus will not be affected by moves towards harmonisation), it is likely that this influences the compliance of businesses with OHS regulations and probably increases the costs faced by businesses in the ACT.

Despite direct liability provisions being advocated due to their link with improved compliance, they do have some unintended consequences through overly altering business decision making. In 2008, Treasury surveyed 102 ASX-200 directors on a range of issues including the effects of personal liability provisions (Treasury 2008). Just under two-thirds of company directors reported that by

placing personal liability on them, they were likely to occasionally make overly cautious decisions (decisions that imposed additional costs for no improvement in OHS outcomes or reduced workplace risks) to hedge against personal prosecution, imposing unnecessary costs on the firm. Of the remainder, 13 per cent reported that overly cautious decisions were made frequently, with 15 per cent and 7 per cent stating such decisions were rarely or never made respectively.

Table 7.12 Laws which caused overly cautious decision making

Degree to which laws were responsible (0 to 6) — 2008

	<i>None</i> <i>Low</i> <i>Medium</i> <i>High</i>							<i>Rating</i>	<i>Response</i>
	<i>0</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>		
	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>%</i>	<i>Av.</i>	<i>Count</i>
i) The duty to act in good faith in the best interests of the company in section 181 of the Corporations Act 2001.	31	5	22	14	16	7	4	2	94
ii) The duty to act with reasonable care and diligence in section 180 of the Corporations Act 2001.	16	9	27	18	13	11	7	3	94
iii) The duty to prevent insolvent trading in section 588G of the Corporations Act 2001.	17	7	19	12	12	21	12	3	94
iv) The continuous disclosure laws (section 674 of the Corporations Act 2001).	1	5	11	12	31	29	12	4	94
v) Derivative liability laws, under which you may be found liable for the misconduct of your company because you are a director (e.g. some occupational health and safety laws, environmental laws and/or building laws).	3	4	4	11	19	23	35	5	94
vi) Another law or other laws.	45	13	6	7	9	10	11	2	94

Source: Treasury (2008).

Of the different laws surveyed, personal liability laws such as those in OHS regulation, were found to have the greatest impact on cautious decision making (table 7.12). Close to 58 per cent of respondents reported that these laws had a high impact on overly cautious decision making (ratings of 5 and 6). Further, only 10 per cent of respondents perceived that there were reasonable defences under these laws, with 67 per cent believing that there were not — 23 per cent responded

as not knowing (Treasury 2008). This suggests that the perception that adequate defences to personal prosecution do not exist are likely to be the cause of the overly cautious decision making.

While this survey did not contrast the approaches taken by each jurisdiction, it does suggest that for businesses in those jurisdictions with a greater degree of personal liability (New South Wales, Queensland, Tasmania and the ACT), the costs of the these unintended changes in decision making behaviour are likely to be the greatest.