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## 6 Occupational health and safety

### Key points

- Governments regulate chemicals in the workplace for a number of reasons:
  - Exposure to chemicals in workplaces can cause injury, illness and death.
  - Workplace chemicals can pose complex risks to people, property and the environment. Because the hazards and risks are not easy to observe, adequate safety precautions may not be taken.
  - Common law liability for negligence or breach of contract may not ensure appropriate levels of workplace safety.
- Overall, the system for regulating chemicals and plastics in the workplace appears to be effective in that it contributes to a reduction in the incidence of workplace injury, illness and death. The total costs of the regulatory system to businesses and governments are not known. Elements of the system could be delivered more efficiently by reducing costs, improving occupational health and safety (OHS) outcomes, or both.
- In some areas of workplace chemicals regulation — including classification, labelling and material safety data sheets (MSDS) — regulatory requirements are nationally consistent. In other areas, such as major hazard facilities and the storage and handling of workplace dangerous goods, regulations are less consistent across jurisdictions.
- National consistency and overall effectiveness and efficiency in chemicals and plastics OHS regulation would be enhanced by an intergovernmental agreement between the Commonwealth, state and territory governments to implement national standards and codes of practice without variation.
- Replacing the existing parallel systems of regulation for hazardous substances and dangerous goods with a single system of regulations for all workplace hazardous chemicals would potentially reduce some of the costs faced by firms, and could increase compliance. Moving to a new system would also involve significant costs. Under current circumstances, the costs of implementing a new system would likely exceed the benefits.
- Australia should continue to monitor the implementation of the United Nations' Globally Harmonised System of Classification and Labelling of Chemicals overseas, and consider implementing the system for workplace chemicals if, at some time in the future, it is found to deliver a net benefit.

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## 6.1 The case for regulating workplace chemicals

Work-related injuries, illnesses and fatalities impose significant costs on individuals, their families, businesses, the community and the economy as a whole. There are financial costs such as compensation, medical treatment and time off work, and non-financial costs such as the pain and suffering of people injured at work and their families. In 2004-05, there were 140 655 compensation claims made for work-related injuries or illnesses that involved one week or more absence from work. Compensated fatalities accounted for 214 of these claims (ASCC 2007a).

Contact with chemicals and plastics is one cause of work-related injury, illness and fatalities in Australia. In 2004-05, there were 29 compensated fatalities that were caused by long-term contact with chemicals or substances (ASCC 2007a), and many more people die each year from past exposure to workplace hazardous substances (ASCC 2005).

In addition, in 2004-05 there were 1675 claims for compensation for injuries caused by chemicals and other substances (this was down from 1890 compensated injuries in 1997-98). The median loss of working time from injuries caused by chemicals and other substances was 1.8 weeks and the median compensation payout was \$3400 (ASCC nd2).

Workplace chemicals can present complex risks to people, property and the environment. The physical properties of some chemicals — such as flammability and toxicity — are hazardous. These hazards and the risk of exposure to, and adverse impacts on, people, property and the environment, are not necessarily obvious. This potential information failure could lead to inadequate safety precautions in the workplace.

Employers can benefit from exercising a duty of care for their employees — workplace safety increases worker satisfaction and productivity, and can enhance a firm's reputation. However, the desire to exercise a duty of care is unlikely to be sufficient in all cases to ensure levels of workplace safety that meet community expectations.

One approach to managing the risks posed by workplace chemicals would be to rely on the common law system to supplement employers' own interests. Under common law, people who are injured at work can claim compensation from their employer for negligence or breach of contract. While the potential for such claims gives employers an added incentive to prevent workplace injuries, there are some weaknesses in the common law system:

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- Employers may underestimate the risk of workplace injury, leading them to not take adequate safety precautions or insurance.
  - Claims can involve high legal ‘transaction costs’.
  - Compensation that is awarded by courts may not be delivered if firms are not adequately insured.
  - The adversarial nature of common law actions does not necessarily encourage early return to work.

As a consequence, governments directly regulate some workplace practices, including the use of hazardous chemicals, to reduce the risks of injury, illness and death. This chapter assesses the effectiveness and efficiency of the Australian system of chemicals and plastics occupational health and safety (OHS) regulation, and makes recommendations on reforms that could improve the system.

## **6.2 The regulatory framework**

Under the Australian Constitution, the power to legislate for OHS was not explicitly referred to the Commonwealth Government. Consequently, ten principal OHS statutes have been developed — six State, two Territory and two Commonwealth (one relating to Commonwealth Government workers and the other relating to the maritime industry). While maintaining responsibility for OHS regulations within their jurisdictions, the Commonwealth, state and territory governments have made some effort to enhance the consistency of OHS regulations across jurisdictions, and to harmonise Australian regulations with international standards.

This section describes the current regulatory framework, the role of the different levels of government and the mechanisms for national and international harmonisation.

### **State and territory legislation, regulations and codes of practice**

All states and territories have a principal OHS Act that codifies the duties of care under common law. The general duties of care are supported by more detailed requirements that are set out in regulations. Codes of practice describe ways in which the requirements that are set out in regulations can be met.

Compliance with regulations is mandatory, and non-compliance can lead to penalties. Compliance with codes of practice is not mandatory, but offers certainty to firms with regulatory obligations. Firms that choose to meet their regulatory

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obligations in other ways may have to prove that their chosen approach satisfies the required outcomes.

## **Basic elements of workplace chemicals regulation**

Regulations for workplace chemicals impose three broad obligations on employers:

1. *Hazard identification* — Employers must determine whether a chemical used in the workplace has hazardous properties (such as toxicity, flammability or corrosiveness).
2. *Information provision* — If a workplace chemical has hazardous properties, it must be labelled and employers must ensure that people likely to be exposed to it have access to a material safety data sheet (MSDS) that sets out the properties of the chemical and the measures that should be taken to reduce the risk of injury.
3. *Risk assessment and control* — Employers must assess the risks that workplace chemicals pose to workplace health and safety, and take actions to control and reduce the risks. This may include bans on using certain chemicals in any circumstances.

## **Hazardous substances and dangerous goods**

In Australia, workplace chemicals are regulated under different sets of regulations depending on the types of hazard they present. Substances that pose a hazard (either acute or chronic) to the health of people who are exposed to them, are regulated as ‘hazardous substances’. Goods that pose a physical hazard to people, property or the environment (for example, flammable, explosive or corrosive materials), are regulated as ‘dangerous goods’.

### *History of workplace hazardous substances regulations*

Until 1992 there were no overarching hazardous substances regulations in Australia. Some states and territories regulated specific substances (such as lead and asbestos) for their potential health effects, and set exposure standards for others. The National Occupational Health and Safety Commission (NOHSC) introduced national Approved Criteria for Classifying Hazardous Substances and National Model Regulations for the Control of Workplace Hazardous Substances. The Approved Criteria and Model Regulations were implemented reasonably consistently across the states and territories. Participants in this study have identified two factors that contributed to this outcome:

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- Because the states and territories did not have an existing set of overarching regulations for hazardous substances, it was relatively straightforward to overlay the national model regulations onto the existing state and territory regulations.
  - The states and territories committed to a timeframe for the implementation of the national model regulations.

### *History of workplace dangerous goods regulations*

The National Standard for the Storage and Handling of Workplace Dangerous Goods (declared by the NOHSC in 2001) has not been implemented as consistently as the workplace hazardous substances regulations (section 6.4). Before the declaration of the National Standard, the states and territories all had some regulations in place for workplace dangerous goods. Many of these regulations drew on the Australian Code for the Transport of Dangerous Goods by Road and Rail (the ADG Code).

State and territory regulations for workplace dangerous goods were administered by a range of departments and agencies, and not necessarily through OHS agencies. The regulators had historically made efforts to harmonise their regulations through annual meetings between the heads of the regulatory agencies. While the classification of dangerous goods and requirements for labels and MSDS are all relatively consistent, regulations for risk assessment and control are not. Factors that contributed to this outcome include:

- The National Standard is a performance-based regulation — it imposes a general duty of care on people who manage or control the storage and handling of dangerous goods. Regulated parties have flexibility to determine how to satisfy their duty of care. Before the declaration of the national standard, state and territory regulations had been more prescriptive, and many regulators were reluctant to move to a performance-based system.
- There was no commitment to a timetable for implementing the National Standard.

The existence of separate regulatory systems for hazardous substances and dangerous goods leads to duplication, regulatory overlaps and inefficiency in chemicals and plastics OHS regulation. Regulators have recognised that this is a significant problem, and are moving to a single system of regulation for all workplace hazardous chemicals. The Commission's assessment of the proposed system is set out in section 6.5.

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## Institutional arrangements

Responsibilities for chemicals and plastics OHS regulations are split between Commonwealth, state and territory governments.

### *The role of Commonwealth Government departments and agencies*

A number of Commonwealth Government departments and agencies have a role in chemicals and plastics OHS regulation. The two with the most direct role are the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) and the Australian Safety and Compensation Council (ASCC).

### *NICNAS*

NICNAS's primary role is to assess industrial chemicals. Formally, its role in OHS regulation is limited. When NICNAS assesses chemicals, it publishes reports on its findings, including recommendations on the contents of labels and MSDS. NICNAS recommendations that relate to OHS are reviewed by the Office of the ASCC (OASCC) and many of the listings on the Hazardous Substances Information System (HSIS) are based on information supplied by NICNAS. NICNAS stated:

To facilitate this process, NICNAS OHS recommendations are framed in accordance with nationally agreed frameworks, the National Model Regulations for the Control of Hazardous Substances in the Workplace and the National Dangerous Goods Framework. (sub. 36, p. 4)

The National Code of Practice for the Control of Workplace Hazardous Substances recommends that employers should make NICNAS summary reports available to employees and their representatives:

Where they exist and are applicable to the workplace, summary reports produced under the *Industrial Chemicals (Notification and Assessment) Act 1989* (Cwlth) should be made available on request to employees and employee representatives. (NOHSC 1994a, p. 41)

It should be noted that unless this provision is enforced under state or territory OHS legislation and regulations, it does not impose any obligations on employers to provide (or even be aware of) NICNAS summary reports.

### *The ASCC*

The ASCC is an advisory body that is established by administrative decision by the Australian Government Minister for Employment and Workplace Relations. The ASCC was first established in October 2005, when it succeeded the NOHSC. The

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ASCC is a tripartite council of 18 representatives from employer and employee organisations and Commonwealth, state and territory government OHS agencies. The ASCC provides a forum for those parties to consult and participate in the development of national standards and codes of practice for OHS and workers' compensation. The regulatory documents that are declared by the ASCC are intended to form the basis of a nationally-consistent system of OHS regulation.

The ASCC is supported by the OASCC, which is part of the Department of Education, Employment and Workplace Relations.

The ASCC is not a regulatory authority and does not make or enforce laws. The national standards and codes of practice that it declares and maintains have no legal authority unless they are adopted by a state or territory government. The states and territories are under no obligation to adopt any of the national model regulations, standards or codes of practice that the ASCC declares.

The ASCC has declared and maintains seven national standards and model regulations, and 11 national codes of practice (box 6.1). These have been implemented to varying degrees by the states and territories.

As well as declaring national standards and codes of practice, the ASCC maintains the HSIS, a database of:

... substances that have been classified in accordance with the Approved Criteria for Classifying Hazardous Substances 3rd Edition and/or have National Exposure Standards declared under the NOHSC Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment. (ASCC nd1)

The HSIS assists manufacturers, importers and suppliers of chemicals to identify chemicals with hazardous properties. It also includes advice on how chemicals should be labelled and on the maximum exposure limits that should not be exceeded in the workplace.

The data set that forms the basis of the HSIS is updated from time to time. The most recent update of the data set occurred in June 2008. Prior to that, the system had not been updated since March 2007. Delays in updating the information on the HSIS reduce its usefulness as a source of information. The Commission considers that it should be mandatory for the ASCC to update the HSIS whenever a new National Exposure Standard is declared under the NOHSC Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment.

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### *The ASCC has the power to ban workplace chemicals*

While the ASCC is not a regulatory authority, it can trigger a ban on workplace chemicals, or exclude them from certain uses, by adding them to schedule 2 of the National Model Regulations for the Control of Workplace Hazardous Substances (the National Model Regulations). Currently, there are only six substances listed on the schedule, all of them different types of asbestos. As with other national standards and codes of practice maintained by the ASCC, the bans or restrictions can only be enforced by the states and territories. Some jurisdictions (for example, the ACT) refer directly to the National Model Regulations in their OHS legislation. Other jurisdictions have to specifically adopt the changes to schedule 2 of the National Model Regulations into their own regulations. Jurisdictions can also ban or limit the use of substances that are not banned by the ASCC. For example, the Northern Territory bans the use of a number of substances for spray painting and abrasive blasting.

Some participants in the study wanted to see more use made of the ASCC's power to ban chemicals by adding them to schedule 2 of the National Model Regulations. There were concerns that the process of adding a substance to the schedule is excessively complex and time consuming.

For example, in 2004 the Australian Paint Manufacturers' Federation (APMF) sought government support for an industry ban on paint products containing lead. One avenue the APMF explored was adding lead-containing paint to schedule 2 of the National Model Regulations. The NOHSC stated to the APMF at the time that:

... attempting to restrict the use of lead based paint through provisions of the Model Regulations or its Schedules is both complex and slow from a legislative perspective. (APMF, sub. 8, p. 5)

Adding a substance to schedule 2 of the National Model Regulations would have required agreement from the NOHSC, which would have required consultation with:

... State and Territory jurisdictions, employer and employee representatives and the public, and endorsement by NOHSC's committees and Workplace Relations Ministers, prior to declaration by the National Commission. (APMF, sub. 8, p. 6)

The APMF subsequently approached the NSW WorkCover Authority with the proposal to ban lead-containing paint. The Authority recommended that the proposal should be pursued through the NOHSC (APMF, sub. 8).

As a result, the APMF has been unable to convince any regulatory agency to support the ban on lead in paint that was self-imposed by industry.

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Banning a chemical outright is a blunt instrument that should be the last resort in the management of chemical hazards and risks. Any ban should be subject to all the relevant COAG requirements, including a full regulation impact statement (RIS). While the fact that adding a substance to schedule 2 of the National Model Regulations is complex and slow may not indicate a failing system, it may indicate that the system is not capable of achieving a ban through adding substances to the schedule. Any proposal to reform the system that would make it easier for regulators to ban substances should be subject to a thorough analysis of benefits and costs to all sectors of the community.

**Box 6.1      ASCC model regulations, standards and codes of practice that apply to workplace chemicals and plastics**

**National model regulations and standards**

- National Standard for the Storage and Handling of Workplace Dangerous Goods
- National Model Regulations for the Control of Workplace Hazardous Substances
- National Model Regulations for the Control of Scheduled Carcinogenic Substances
- Approved Criteria for Classifying Hazardous Substances
- National Standard for Synthetic Mineral Fibres
- National Standard for the Control of Inorganic Lead at Work
- Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment

**National codes of practice**

- National Code of Practice for the Storage and Handling of Dangerous Goods
- National Code of Practice for the Control of Workplace Hazardous Substances
- National Code of Practice for the Control of Scheduled Carcinogenic Substances
- National Code of Practice for the Labelling of Workplace Substances
- National Code of Practice for the Preparation of Material Safety Data Sheets
- National Code of Practice for the Safe Use of Synthetic Mineral Fibres
- National Code of Practice for the Control and Safe Use of Inorganic Lead at Work
- Code of Practice for the Safe Removal of Asbestos
- Code of Practice for the Management and Control of Asbestos in the Workplace
- National Code of Practice for the Safe Handling of Timber Preservatives and Treated Timber
- National Code of Practice for the Safe Use of Vinyl Chloride

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### *Development of national standards and codes of practice*

Under the *Australian Workplace Safety Standards Act 2005* and the *Australian Workplace Safety Standards Regulations 2005*, the ASCC is obliged to invite representations on proposed national standards and codes of practice. The Workplace Relations Ministers' Council (WRMC) approves the ASCC's work program, but has no formal role in the declaration of national standards or codes of practice.

Development and declaration by the ASCC of a new national standard or code of practice can take a number of years. The ASCC has the power to establish 'technical groups' or 'reference groups' to examine specific issues (for example, to decide what information should be required on a hazardous chemicals label). These are tripartite groups of representatives from the jurisdictions, industry and employee organisations. They typically have around 12 to 15 members. Where necessary, the OASCC prepares 'issues papers' that are sent out to all ASCC members for their input.

One or more drafts of the national standard or code of practice are made publicly available for comment.

The final document is submitted by the OASCC to the ASCC for declaration. The ASCC's constitution encourages it to make decisions by consensus, but if this is not possible, standards and codes of practice can be declared by a two-thirds majority. That the WRMC has no formal role in the declaration of standards is a concern (section 6.6).

### *The role of the states and territories*

In most states and territories, an OHS agency administers regulations that cover workplace hazardous substances and dangerous goods, including the transport of dangerous goods.

In Queensland, the situation is more complicated. The Plastics and Chemicals Industries Association (PACIA) stated that, as well as four state government agencies, local governments also enforce elements of workplace chemicals regulation in that state:

- Major Hazard Facilities and Dangerous Goods legislation is under CHEM Services in the Department of Emergency Services
- Class 3 Dangerous Goods (Flammable Liquids) licensing is carried out by local government

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- Hazardous Substances are regulated by Workplace Health and Safety in the Department of Employment and Industrial Relations
  - Explosives and security sensitive ammonium nitrate are regulated by the Department of Natural Resources, Mines and Energy
  - Transport of Dangerous Goods is regulated through Queensland Transport. (sub. 33, pp. 4–5)

The greater the number of agencies involved in OHS regulation, the more complex the system is for businesses that use chemicals. The complexity increases the costs of compliance and can undermine the effectiveness of the regulations.

The Queensland Government acknowledged that the current framework in Queensland ‘is difficult for obligation holders to navigate and creates jurisdictional overlaps between agencies’ (Queensland Government sub. DR121, p. 3). The Queensland Government stated that ‘steps are currently being taken to correct this situation ... from a whole-of-government perspective’ (sub. DR121, p. 3).

## **International harmonisation**

Because the intrinsic properties of chemicals do not depend on their location, countries that have compatible hazard classification systems can benefit from sharing chemical assessment data. Systems of classification, labelling and MSDS that are compatible, can facilitate trade in chemicals and plastics.

Currently, the Australian system of classification for hazardous substances is aligned with the classification system used in the European Union (ASCC 2006f). For dangerous goods, Australia uses a classification system that is aligned with the United Nations Transport of Dangerous Goods Model Regulations.

### *The Globally Harmonised System of Classification and Labelling of Chemicals*

Australia is currently moving toward implementation of a system based on the United Nations’ Globally Harmonised System of Classification and Labelling of Chemicals (GHS). The GHS is a hazard-based system for classification and labelling of workplace chemicals. The GHS consists of:

- a set of criteria for determining whether a chemical has hazardous properties such as flammability, explosiveness or carcinogenicity
- requirements for the content of GHS-compliant labels and safety data sheets (SDS). (The GHS uses ‘SDS’ instead of the Australian term ‘MSDS’.)

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Many countries have indicated that they intend to implement GHS-based systems for workplace hazardous chemicals. However, to date, only New Zealand has implemented a GHS-based system. Full implementation in other countries is not expected for a number of years. Europe is planning to begin implementing a GHS-based system in 2008, and abandon its current system of hazard classification (which is also currently used in Australia) in 2015.

Implementation of the GHS could deliver benefits by internationally harmonising classification, labelling and SDS for workplace chemicals, but switching to a new system would involve costs to industry and governments. The Commission has assessed some of the costs and benefits of GHS implementation (section 6.5).

### **6.3 Effectiveness of workplace chemicals regulations**

The overriding objective of Commonwealth, state and territory government OHS legislation and regulations is to minimise the incidence of workplace injury, illness and death. The effectiveness of OHS regulations depends on how successful they are in meeting this objective.

#### **International comparisons**

Data from the International Occupational Safety and Health Information Centre suggest that rates of workplace injury and death in Australia compare favourably with many other developed countries (table 6.1). It should be noted, however, that international comparisons of workplace injury, illness and death are complicated by a lack of data and often — where data are available — by differences in definitions, systems of compensation and industry structure.

**Table 6.1 Rates of workplace injury and fatalities, international comparisons, 2004**

Country	Workplace fatalities	Workplace injuries
	(per 100 000 workers employed)	(per 100 000 workers employed)
Australia <sup>a</sup>	2.0	1 270
Austria <sup>b</sup>	5.0	3 890
Belgium <sup>a</sup>	4.4	3 797
Canada <sup>a</sup>	5.8	2 135
Denmark <sup>b, c</sup>	2.0	1 574
Finland <sup>a</sup>	2.1	2 715
France <sup>a</sup>	3.5	3 949
Germany <sup>a</sup>	2.6	2 948
Italy <sup>a</sup>	5.0	3 097
Sweden <sup>b</sup>	1.4	782
UK <sup>b</sup>	0.7	585
US <sup>a</sup>	4.0	<b>na</b>

<sup>a</sup> Data refer to compensated injuries and fatalities. <sup>b</sup> Data refer to reported injuries and fatalities. <sup>c</sup> Data are from 2001. **na** Not available.

Source: Adapted from International Occupational Safety and Health Information Centre (nd).

## Workers' compensation claims are falling over time

Between 1997-98 and 2005-06, overall rates of workers' compensation claims for workplace injuries and fatalities in Australia have fallen from 12.2 per million hours worked to 9.4 per million hours worked. Rates of claims for injuries and fatalities related to chemicals fell slightly, from 1.5 per million hours worked to 1.4 per million hours worked (table 6.2).

**Table 6.2 Rates of claims for workers' compensation, per million hours worked, Australia, 1997-98 to 2005-06**

Year	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
Total claims	12.2	11.6	11.2	11.2	10.9	10.6	10.5	10.1	9.4
Chemicals-related claims <sup>a</sup>	1.5	1.6	1.5	1.5	1.4	1.5	1.4	1.4	1.4

<sup>a</sup> Refers to claims where the mechanism of injury was a chemical or chemical product, a material or a substance.

Source: ASCC (nd2).

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## **Diseases of long latency are a significant problem**

Exposure to hazardous substances can have both acute and chronic effects on people's health. Acute reactions to substances include skin or eye irritation, respiratory problems and other effects that manifest within a short period after exposure. Chronic effects can include carcinogenicity, germ cell mutagenicity, reproductive toxicity and other long-term effects on specific organs or systems. These diseases can have long latency periods — that is, symptoms may not appear until many years after exposure.

Diseases of long latency are believed to cause a significant number of deaths and illnesses in Australia:

... it has been estimated that over 2000 people die per year from past occupational exposures to hazardous substances. (ASCC 2005, p. 1)

Another ASCC report (ASCC 2006g) estimated that occupational exposure to carcinogens is responsible for about 5000 cases of cancer per year. (It should be noted that this figure includes exposure to carcinogens that are not related to chemicals or plastics, such as solar radiation.)

Current Australian OHS regulations require employers to identify substances that have long-term health effects, and to ensure that people in workplaces are not exposed to harmful levels of hazardous substances. Employers may also be required to monitor the health of people who could be exposed to chemicals with adverse long-term effects. This can include periodic blood or urine tests and, for some substances, chest X-rays.

It is difficult to assess how effective OHS regulations are in reducing the incidence of diseases of long latency. However, actions such as the strict controls placed on asbestos demonstrate the seriousness of the concerns.

## **A simpler system would increase effectiveness**

Regulations that overlap or are unnecessarily complex have been identified as a barrier to compliance and to improved OHS outcomes.

For example, the ASCC (2006a) surveyed 91 small and medium enterprises (SMEs) to determine whether they had adequate measures in place to control hazardous substances. The ASCC focused on measures to control ten hazardous substances, including a number with carcinogenic properties and other long-term health effects. The report identified a number of factors that act as barriers to the implementation of controls for hazardous chemicals, including:

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- difficulty in understanding and applying the regulations
  - the technical complexity of controls
  - lack of appropriate information
  - lack of readily accessible expertise
  - lack of practical advice from the OHS Regulator (ASCC 2006a).

Measures to simplify the regulatory system could lead to increased compliance and reduced incidence of injury, illness and death.

### **‘Generic’ material safety data sheets undermine OHS regulations**

State and territory regulations require suppliers of hazardous substances and dangerous goods to provide current MSDS to all purchasers of the products. This provision is intended to ensure that employers have sufficient information to manage the risks posed by hazardous substances and dangerous goods. The provision of accurate MSDS contributes to effective OHS regulation.

The Commission is aware of a number of suppliers of documents that appear to be MSDS but are not prepared by the manufacturer, importer or supplier of the product. These documents are sold (often in databases) as ‘generic’ or ‘third-party’ MSDS. Under state and territory regulations, these documents may not be considered to be valid MSDS. For example, in a guidance note WorkSafe Victoria stated:

Generic or third party MSDS are not considered to be the manufacturer’s or importer’s MSDS. (WorkSafe Victoria 2005)

A similar guidance note issued by the Western Australia Commission for Occupational Safety and Health stated:

An MSDS produced by the manufacturer or importer of a hazardous substance must be obtained and used as the main source of information. “Third party MSDSs” which are produced by other parties and not the manufacturer or importer can be used as supplementary information, but should never be relied upon as the sole source of information. (Western Australia Commission for Occupational Safety and Health 2007, p. 6)

The use of ‘generic’ MSDS poses two problems:

- ‘Generic’ MSDS may not contain complete or up-to-date information about a hazardous substance or dangerous good. For example, the information in ‘generic’ MSDS may not be updated when product formulations change. This has the potential to undermine workplace safety.

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- Employers may, in good faith, be using ‘generic’ MSDS under the assumption that they are sufficient to meet their regulatory obligations. Use of these documents could expose employers to legal liability in the event of a workplace accident.

The Commission considers that the use of ‘generic’ or ‘third-party’ MSDS has the potential to undermine the effectiveness of chemicals and plastics OHS regulations. The Commission supports the approach taken by Worksafe Victoria and the Western Australian Commission for Occupational Safety and Health of warning users of these documents that they may not be meeting their obligations under OHS regulations if they use ‘generic’ MSDS.

## **6.4 Efficiency of workplace chemicals regulations**

Regulatory systems can be made more efficient by increasing the net benefits they deliver to the community. This section describes elements of the regulatory system that function relatively efficiently and others elements that could be made more efficient. Options for reform are considered below (sections 6.5 and 6.6).

### **The classification of workplace chemicals functions efficiently**

Classification of workplace chemicals with hazardous properties is a central element of chemicals and plastics OHS regulations. In all states and territories, the classification of hazardous substances is based on a system developed and maintained by the European Union. Dangerous goods are classified using the ADG Code, which is in turn based on the United Nations’ Transport of Dangerous Goods Model Regulations. This high level of consistency between jurisdictions within Australia and with overseas classification regimes reduces the costs to industry and increases the efficiency of the regulatory regimes.

### **Labelling and MSDS regulations are nationally consistent**

All states and territories require that workplace chemicals that have been classified as hazardous substances or dangerous goods (or both) must be labelled, and MSDS must be provided. State and territory regulations on labels and MSDS differ in their form and content. While the primary legislation and regulations may not appear nationally consistent, regulatory requirements in all jurisdictions can be satisfied by labels and MSDS that are prepared in accordance with the National Code of Practice for the Labelling of Workplace Substances and the National Code of Practice for the Preparation of Material Safety Data Sheets respectively.

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National consistency in the regulations for labels and MSDS has contributed to the efficiency of the OHS regulatory system.

### **Some dangerous goods regulations have not been implemented consistently**

Participants in this study have asserted that regulations for the storage and handling of workplace dangerous goods have not been implemented consistently by all states and territories. Some examples of the inconsistencies are set out below.

#### *South Australia still has prescriptive regulations*

The National Standard for the Storage and Handling of Workplace Dangerous Goods is a performance-based regulation. That is, it imposes a general duty of care on people who manage or control the storage and handling of dangerous goods, while permitting regulated parties to meet the general duties in the way that is most appropriate to their circumstances. The South Australian Dangerous Substances Regulations (2002) are not consistent with this approach. Instead, they prescribe certain actions that people must take to control dangerous goods. This approach excludes potentially more efficient or effective practices that may be developed and adopted by industry under the performance-based regulations in place in other jurisdictions.

#### *Class five substances are regulated under different systems*

Under the ADG Code, oxidizing substances or organic peroxides are classified as class five substances. For example, ammonium nitrate is classified as a class five substance. In most jurisdictions, class five substances are regulated as dangerous goods. In South Australia, some class five substances are regulated under the *Explosives Act 1936*, and are, therefore, subject to requirements that do not apply in other jurisdictions.

#### *Queensland regulates 'large dangerous goods locations'*

Under the Queensland Dangerous Goods Safety Management Regulation 2001, premises where dangerous goods are present are classified as either a 'minor storage workplace', a 'dangerous goods location', a 'large dangerous goods location' or a 'major hazard facility'. The classification depends on the quantity of dangerous goods on the premises. Other jurisdictions have specific regulations for major hazard facilities, but do not classify other premises in this way.

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## **Major hazard facilities regulations have not been implemented consistently**

Major hazard facilities (MHFs) are workplaces that store, handle or process large quantities of hazardous materials. Incidents at such facilities have the potential to cause serious injuries to people on the site and in surrounding areas, and damage to property and the environment, and are broadly described as ‘low probability–high cost’ (NOHSC 2002a, p. 2). Governments tend to impose stricter controls on MHFs than those applying to other facilities under general chemicals regulations, including OHS regulations.

The National Standard and Code of Practice for the Control of Major Hazard Facilities (the MHF Standard and Code) was declared by the NOHSC in 1996 and is maintained by the ASCC. As with other national standards and codes of practice, these documents have no legal authority unless they are adopted and enforced by state or territory regulators.

Currently, the Commonwealth, Victorian, Queensland, WA and NT Governments have introduced regulations for the control of MHFs based on the MHF Standard and Code. More than a decade after its declaration, the other jurisdictions — except for the ACT, which does not have any MHFs — have now drafted or are in the process of enacting MHF regulations.

Jurisdictions that have implemented the MHF Standard have not implemented it uniformly. Some jurisdictions have more effective and efficient systems of MHF regulation than others (appendix D).

The MHF Standard and Code are currently being reviewed by the ASCC. While the MHF Standard and Code apply both to chemicals and plastics facilities, and also to facilities that fall outside the scope of this study, the Commission considers that there are a number of generic issues that should be covered by the review, including best-practice policy making principles and alternative approaches to regulation.

### RECOMMENDATION 6.1

***As part of its review of the National Standard and Code of Practice for the Control of Major Hazard Facilities, the Australian Safety and Compensation Council should:***

- ***determine whether there is a case for regulation of Major Hazard Facilities beyond existing generic regulation in areas such as occupational health and safety, environmental protection, and planning, based on cost–benefit analysis***

*if such a case exists, identify strategies and opportunities for achieving greater consistency in the adoption and application of the Standard across jurisdictions, than has been achieved to date.*

## Differences in interpretation complicate the regulatory system

Even where national standards and codes of practice have been consistently implemented by state and territory governments, the practical experience of firms suggests that jurisdictions interpret them differently. For example, in all jurisdictions, an MSDS prepared in accordance with the National Code of Practice for the Preparation of Material Safety Data Sheets is sufficient to meet regulatory requirements for workplace hazardous substances and workplace dangerous goods. However, different jurisdictions have different practices relating to when MSDS have to be supplied.

In its submission to this study, 3M Australia stated that it has been attempting to ascertain the legal requirements to provide MSDS for obsolete products — products that have not been supplied for more than two years. 3M Australia asked the ASCC and each state and territory whether it had to supply an MSDS for obsolete products. Some jurisdictions advised that an MSDS was required. Others said it wasn't. Some jurisdictions were unsure and still others didn't respond at all (even after several months) (table 6.3). 3M Australia described the time and cost involved in dealing with multiple agencies as 'astronomical' (sub. 34, p. 7).

**Table 6.3 Responses to 3M Australia inquiries about MSDS for obsolete products**

<i>Agency or jurisdiction contacted</i>	<i>Time taken to get an answer</i>	<i>MSDS Required for obsolete products?</i>
ASCC	Less than one week	To comply with the regulations, technically yes
WorkCover NSW	More than 90 days	Still waiting for a reply
WorkCover Victoria	Less than one week	No
ACT	2 weeks	Unclear — referred to National Codes of Practice
Workplace Standards Tasmania	Less than 30 days	Yes
Workplace Health and Safety Queensland	1 week	No
Northern Territory	More than 60 days	Still waiting for a reply
WorkSafe Western Australia	More than 60 days	Still waiting for a reply
SafeWork South Australia	2 days	Unclear — referred to NICNAS

Source: 3M Australia, sub. 34, p. 7.

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## Reforms could improve effectiveness and efficiency

The Commission has considered a number of reforms that could improve the effectiveness and efficiency of the chemicals and plastics OHS regulatory system. These reforms are set out below (sections 6.5 and 6.6).

### 6.5 A single system for all workplace chemicals

In 2002, the NOHSC initiated a review of the hazardous substances regulatory framework (HSRF). The report, completed in July 2003, made 12 recommendations for changes to the regulatory framework, including:

That the duties, requirements, controls, and processes of the Hazardous Substances and Dangerous Goods Standards be integrated to achieve consistency. It is anticipated that integration of these Standards may result in simplification of the HSRF, assist in compliance, achieve better health and safety outcomes for workers, and reduce the costs of regulation. (ASCC 2006f, p. 119)

The ASCC has developed drafts of a consolidated system of national standards and codes of practice for ‘workplace hazardous chemicals’ to replace the existing national standards, model regulations and codes of practice for hazardous substances and dangerous goods. The proposed new systems of classification, labelling and SDS are based on the GHS. The new regulations would apply to all workplace hazardous chemicals, whether they exhibit health hazards, physical hazards or both.

Between September and December 2006, the ASCC published drafts of the national standards and codes of practice that would be the basis of the new system, as well as a draft RIS that included estimates of some of the costs and benefits of the proposed system. The draft RIS found that the benefits of the new system would exceed the costs of implementation. The ASCC invited public comment on the draft national standards and codes of practice and the draft RIS.

The proposal to move to a single system of regulation for all workplace hazardous chemicals has in-principle support from industry. However, industry has expressed reservations about some elements of the system proposed by the ASCC, and concerns about the costs and benefits as set out in the draft RIS. Industry concerns are assessed in the following sections.

## Implementing a new system will involve costs

Moving to a consolidated system of regulation for all workplace hazardous chemicals will impose costs on industry and on Commonwealth, state and territory governments. The sources of the costs include:

- developing the new national standards and codes of practice and incorporating them into state and territory law
- training regulators and people working in the industry to use the new system
- classifying workplace chemicals in accordance with the new system
- developing new labels and SDS for workplace chemicals.

According to ASCC estimates, implementation of the new system would cost the ASCC around \$230 000 over five years. All state and territory governments combined were estimated to face costs of less than \$1 million over five years. The costs to industry were estimated at over \$90 million per year over the five year implementation period (table 6.4).

**Table 6.4 ASCC estimates of the costs of implementing the new system**

<i>Cost driver</i>	<i>Cost over the five year implementation period</i>
<i>Costs to the ASCC</i>	
Establishing and implementing framework	No additional cost
Information dissemination and training	\$80 000
Establishing a list of GHS classifications	\$150 000
<b>Total cost to the ASCC</b>	<b>\$230 000</b>
<i>Costs to state and territory governments (total for all jurisdictions)</i>	
Establishing and implementing framework	\$630 000
Information dissemination and training	\$240 000
<b>Total cost to states and territories</b>	<b>\$870 000</b>
<i>Costs to industry</i>	
Information dissemination and training	\$149 million
Chemicals reclassification according to GHS	\$109.5 million
Relabelling of chemicals according to GHS	\$129 million
Revising SDS according to GHS	\$64.5 million
<b>Total cost to industry</b>	<b>\$452 million</b>

Source: ASCC (2006f).

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Industry has stated that the ASCC's estimates of the costs to industry were too low. For example, ACCORD Australasia, the Australian Industry Group and PACIA all included the following comment in their separate submissions to the ASCC:

... many of the average costs (e.g. reclassification, SDS preparation, labelling and others) used in the Draft RIS are considered to be low and will serve to distort the analysis. (ACCORD Australasia Ltd 2007, p. 23); (AIG 2007, p. 5); (PACIA 2007c, p. 22)

The Huntsman Chemical Company stated that the ASCC may have underestimated the costs of relabelling by 67 per cent (Huntsman Chemical Company 2007, p. 2). If accurate, this implies that relabelling of chemicals alone would cost industry over \$40 million per year over the first five years of the new system.

The ASCC stated that the costs of implementing the new system are likely to fall disproportionately on SMEs:

... the impact of business regulation can fall disproportionately on small firms which might not have the resources that large business have to comply with business regulatory requirements. These additional costs faced by SMEs can reduce their competitiveness in the market.

Similar to other industries, SMEs make up a large proportion of chemical manufacturers, importers, exporters and suppliers. Stakeholder consultations revealed that due to the relative complexity of the workplace chemicals regulatory framework, SMEs generally do not have the time or resources to stay informed of the changes and requirements of the legislation. (ASCC 2006f, p. 46)

Respondents to the ASCC, commenting on the draft RIS, also questioned the estimates of the costs to government of implementing the new system. For example, the ASCC estimated that the total cost of retraining inspectors and agency personnel in New South Wales would be \$15 900 (ASCC 2006f, p. 64). WorkCover NSW stated:

... the training of WorkCover NSW Inspectors appears to be significantly underestimated and therefore not properly costed eg currently there are approximately 300 inspectors and all would require training (including not only the technical aspects of the National Workplace Hazardous Chemical Framework but also the legal implications). (WorkCover NSW 2007, p. 5)

It is likely that retraining 300 personnel in the new system would cost significantly more than \$53 per person (the figure implied by the ASCC estimate).

The high costs of implementing a new system for workplace chemicals regulation serve to emphasise the importance of ensuring that the new system delivers net benefits to the community.

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## Benefits of a single system for workplace chemicals

A significant benefit of a single system of regulation for workplace chemicals would be the simplification of risk assessments for substances that are classified as both hazardous substances and dangerous goods. Replacing the existing systems of regulation of hazardous substances and dangerous goods with a single system of regulations for all workplace hazardous chemicals has the potential to reduce the time required to carry out risk assessments.

The ASCC's draft RIS estimated the benefits to industry of such time savings<sup>1</sup>. The estimate was based on a number of assumptions, such as the number of firms affected and the number of risk assessments each firm carries out per year. The ASCC concluded that if the new system were to reduce the time taken for risk assessments by 10 per cent, industry would reap savings of a net present value of over \$174 million.<sup>2</sup>

The Commission accepts that a unified system could simplify the process of risk assessment for workplace hazardous chemicals. The ASCC's estimate of a 10 per cent time saving may be a reasonable estimate of the benefits to industry.

## Benefits of a GHS-based system

A unified system of workplace chemicals regulation would require new or revised systems of classification, labelling and MSDS. The systems that are currently used for workplace hazardous substances and workplace dangerous goods could be consolidated into a single system. However, the consolidation of the new system provides an opportunity for governments to implement the United Nations' GHS in the workplace sector. This system has several advantages.

One advantage is that the GHS provides a single system for the classification, labelling and provision of SDS for all workplace chemicals with hazardous properties.

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<sup>1</sup> The draft RIS identified the savings as arising from 'avoidance of dual risk assessment requirements' (ASCC 2006f, p. 73). This was based on the assumption that if a chemical is classified as a hazardous substance and a dangerous good, state and territory regulations required employers to carry out two separate risk assessments. The Australasian Institute of Dangerous Goods Consultants (sub. DR76) noted that under New South Wales legislation there is no requirement to carry out two separate risk assessments for one chemical. The Commission has determined that this is the case in other jurisdictions as well. While the assumption in the draft RIS is not accurate, the way the ASCC modelled the benefits is a useful estimate of the benefits to industry if the new system reduces the time taken for risk assessments.

<sup>2</sup> This figure is the ASCC's estimate of the net present value of the savings calculated over a period of 30 years using a discount rate of 7 per cent.

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As well as meeting technical requirements, a GHS-based system could deliver other benefits to Australia. One is that countries that use the GHS as the basis of their hazard classification system would be able to share information on chemical assessments, thus reducing costs to firms and regulators.

GHS implementation could also reduce the costs incurred by importers and exporters of chemicals, thereby reducing barriers to trade in chemicals. The ASCC stated that implementing a GHS-based system would mean that exporters would not have to reclassify, relabel or prepare new SDS to comply with regulations in GHS-compliant export destinations (ASCC 2006f). Likewise, importers could avoid the need to reclassify, relabel or prepare new SDS to comply with Australian regulations. The ASCC estimated that the net present value of the costs avoided over the next 30 years would be approximately \$442 million (ASCC 2006f).

Industry has disputed the ASCC's estimate of the benefits of trade facilitation. The estimate was based on the assumption that all of Australia's major trading partners would implement GHS-based systems at the same time as Australia, and that the Australian system would be consistent with all of the overseas systems. Industry considers this an unrealistic assumption.

*Not all countries are intending to implement the GHS in the same way*

Although the GHS is intended to be a single global system for classification, labelling and SDS, the reality is that not all countries will implement all elements of the system in the same way or within the same time frames. In its submission to this study, ACCORD Australasia raised the issue of countries implementing 'brands' of the GHS that are not consistent with each other. For example:

... the European Commission has proposed that its scope of GHS Implementation will not include a number of GHS hazard categories but will include a number of hazards not currently included in the scope of the GHS.

The Environmental Risk Management Authority (ERMA) [the New Zealand regulator] has been attempting to implement an early 2003 version of the GHS. ERMA has made a number of changes and additions to hazard classifications and used codification not adopted up in the GHS official text or in proposals by any other country.

... there is no detailed information yet available on GHS implementation in North America. (sub. 42, pp. 32–33)

The Commission considers that some key assumptions underpinning the ASCC's estimate of the benefits of trade facilitation and information sharing are unlikely to materialise. In particular, the assumption that 'our major trading partners, accounting broadly for 50 per cent of the value of exports and imports, will adopt GHS' (ASCC 2006f, p. 77) within a similar timeframe to Australia is not realistic.

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Hence the Commission has concluded that some of the benefits of the new system have been significantly over-stated in the draft RIS, as set out below.

### **Costs and benefits of the proposed system**

The Commission's analysis of the costs and benefits of the proposed system of regulation of workplace hazardous chemicals is based on the draft RIS published by the ASCC and evidence provided by industry and government agencies on the proposed system. The Commission has assessed the assumptions and methodology used in the draft RIS, and the estimates of the benefits and costs of the proposed system. The Commission considers that:

- The estimated cost to industry of \$90 million per year over the proposed five year implementation period may be understated.
- The estimated costs to state and territory governments of \$870 000 over the five year implementation period are also understated.
- The benefits of simplified risk assessments may be of the order of \$174 million over 30 years in net present value terms, as estimated in the RIS.
- The benefits of trade facilitation and information sharing have been significantly overstated in the draft RIS.

The Commission therefore considers that at this stage the benefits to industry of simplified risk assessments are likely to be materially less than the costs of implementing the new system.

### **Under what conditions should Australia implement the GHS in the workplace sector?**

The decision to implement a GHS-based system for workplace hazardous chemicals should be based on a thorough assessment of all of the costs and benefits of the system. In light of this, it is worth noting that the final RIS for the ASCC's proposed system is forthcoming.

While the Commission does not intend to pre-empt the RIS process, based on the available evidence, the Commission has concluded that unless there are significant trade and information-sharing benefits from the new system, it will not deliver a net benefit at this stage. Such benefits will only arise if GHS-based systems are implemented in a number of Australia's major trading partners.

As noted above, New Zealand uses the GHS as the basis of its system of hazard classification. The EU is the only major trading bloc to have committed to

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implementing a GHS-based system (box 6.2). Aside from New Zealand, none of Australia's major trading partners in the Asia-Pacific region (such as the US, China and other APEC countries) have committed to implementing the GHS for workplace hazardous chemicals. The final RIS for the proposed system should reflect the stated intentions of Australia's major trading partners.

**Box 6.2 Implementation of the GHS in Europe**

The GHS will be implemented in Europe over a period of approximately seven years, commencing 2008, after a vote by the European Parliament. The process will proceed in two stages, starting with substances (single chemicals) and progressing to mixtures. From 30 November 2010:

- Substances
  - Must be classified and labelled according to the GHS
  - Safety data sheets will have classification data based on both the existing system and the GHS.
- Mixtures
  - Must comply with existing European regulations for classification, labelling and safety data sheets
  - Manufacturers have the option of also using GHS classification, labelling and safety data sheets

From 1 June 2015, all substances and mixtures must be classified, labelled and have safety data sheets prepared in line with the GHS. The existing European system will be repealed.

*Source:* United Nations Economic Commission for Europe (2008).

The Commission's analysis strongly suggests that if the final RIS accurately reflects the slow pace of GHS implementation among most of Australia's major trading partners, it would conclude that implementing the system would not deliver a net benefit under current conditions. If this is the case, implementation of the system should be delayed until more significant trade benefits can be realised.

If the proposed system is not supported under current conditions, the ASCC should continue to monitor developments in Australia's major trading partners. If other countries implement GHS-based systems of workplace chemicals classification, labelling and MSDS, the benefits of implementing a GHS-based system in Australia may exceed the costs.

RECOMMENDATION 6.2

***The Workplace Relations Ministers' Council should implement the Globally Harmonised System of Classification and Labelling of Chemicals in the***

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*workplace sector in Australia only when it can be shown that adoption of the new regime would produce net benefits.*

*The Australian Safety and Compensation Council should undertake a further regulatory impact assessment when some of Australia's key trading partners, such as China and the United States of America, have commenced implementation of systems of regulation for workplace chemicals that are based on the Globally Harmonised System of Classification and Labelling of Chemicals.*

## **Benefits of consistency with other labelling systems**

Current regulations for the control of workplace hazardous substances recognise some other labelling schemes as being sufficient to meet workplace requirements. Domestic products that are scheduled poisons and are labelled in accordance with the Standard for the Uniform Scheduling of Drugs and Poisons do not require separate hazardous substances labels for workplace use. Under the proposed new system for workplace hazardous chemicals, the exemption for appropriately labelled consumer products would continue, provided the chemicals:

... will only be used in the workplace for purposes incidental to the nature of the work and in quantities that are consistent with consumer household use. (ASCC 2006f, p. 39).

Likewise, agricultural and veterinary (agvet) chemical products labelled according to the Australian Pesticides and Veterinary Medicines Authority labelling code currently do not need separate workplace labels (ASCC 2006f). However, under the ASCC's proposed new system for workplace hazardous chemicals, all agvet chemical products, other than those supplied and used exclusively in the home, will have to carry both an approved agvet label and a workplace hazardous chemicals label.

Some participants raised concerns about the use of agvet labels in the workplace (ACTU, sub. 47, sub. DR88; Haztech Environmental sub. DR73). The main concern was that agvet labels do not include all of the hazard identification elements that are found on workplace chemicals labels (such as pictograms and hazard statements).

While approved agvet labels include extensive information on the appropriate precautions to take when using the products for registered uses, if they are used for purposes other than those for which they were registered ('off-label use'), the absence of pictograms and hazard statements on risk-based labels could lead to inadequate risk assessment and hence inadequate safety precautions being taken.

Other participants in this study and respondents to the ASCC's proposed regulatory framework were concerned that removing the recognition of approved agvet labels

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would lead to confusion, increase costs and potentially harm people and the environment. Nufarm Limited (2007, p. 2) expressed concerns that:

... agvet chemicals will be required to conform to two separate labelling regimes. Additionally, end users will be subjected to two separate, and potentially conflicting, regulatory regimes. This “dual-label” scenario will result in confusion as to the appropriate use of agvet chemicals and may lead to illegal off-label use as well as possible harm to health or the environment.

Croplife Australia agreed:

Adoption of GHS ... for pesticides would have no net benefits, and could potentially place additional regulatory and cost burdens on agricultural industries. (sub. 35, p. 16)

The Commission recognises that the DEEWR, the ACTU, Haztech Environmental and other participants in this study have legitimate concerns about the potential effects of recognising approved agvet labels as sufficient for workplace use. The Commission also notes that producers and users of agvet chemicals have valid concerns about the implications of the proposed changes.

Commonwealth, state and territory governments have agreed (through COAG) that regulatory processes should adhere to a number of principles. This includes establishing the case for any proposed change, assessing the costs and benefits of a range of alternatives (including non-regulatory and co-regulatory approaches) and choosing the option that delivers the greatest net benefit to the community. While the ASCC has published a draft RIS on the proposed workplace hazardous chemicals regulatory framework, it did not include any analysis of the costs and benefits of the proposal to overturn the current recognition of approved agvet labels in the workplace. Nor were any alternatives canvassed (such as changes to agvet labels).

The Commission considers that the proposed changes to the workplace labelling regime should be subject to the normal regulatory process, including a formal analysis of various reform options, and the costs and benefits of those options. This may include changes to agvet labels so that they meet the requirements of the workplace labelling regulations. Unless it can be demonstrated that the change would deliver a net benefit to the community, the current recognition of agvet labels in the workplace should remain in place.

#### RECOMMENDATION 6.3

***The Australian Safety and Compensation Council should conduct a regulatory impact assessment of the proposal to require agricultural and veterinary chemical products that are also workplace hazardous chemicals to carry workplace hazardous chemicals labels. The assessment should identify alternatives and the***

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*costs and benefits of the options. The Workplace Relations Ministers' Council should only adopt the proposal if it can be demonstrated that it would deliver a greater net benefit to the community than any alternative.*

*Until the regulatory impact assessment has been completed, recognition of agricultural and veterinary chemical product labels for occupational health and safety purposes should continue to apply.*

## **6.6 Reforms to the national OHS framework**

On 3 July 2008, the Prime Minister, Premiers and Chief Ministers signed an Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the OHS IGA). The agreement commits the signatories to the implementation by 2011 of a nationally uniform OHS legislative framework. The Commission is encouraged by many of the features of the OHS IGA, including:

- The agreement by all parties to uniformly adopt and implement national model OHS legislation, regulations and codes of practice.
- The agreement by all parties to 'take all necessary steps to enact or otherwise give effect to model OHS legislation ... within the timeframes agreed by WRMC' (COAG 2008c, p. 8).
- The agreement that the WRMC will be responsible for the final decision on the adoption of national model OHS legislation.
- The voting arrangements that enable the passage of a measure with a two-thirds majority of members of the WRMC, and count members that do not vote as having approved a proposal.
- The agreement by all parties to submit to the WRMC any amendments to legislation or new legislation that could 'materially affect the operation of model OHS legislation' (COAG 2008c, p. 11), and to not proceed with the amendment or new legislation unless it is endorsed by the WRMC. In addition, all parties agreed that if an amendment or new legislation is endorsed by the WRMC, all parties will 'undertake all necessary steps to introduce appropriate changes to their legislation with a view to ensuring that OHS legislation remains nationally consistent' (COAG 2008c, p. 11). This is a stronger mechanism than those found in some other IGAs (for example, transport (chapter 7)), though the Commission notes that the commitment to national uniformity is downgraded to a commitment to consistency.

One weakness in the IGA is that model OHS legislation, regulations and codes of practice can only be declared by a consensus decision of the WRMC. Requiring

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consensus could lead to undesirable trade-offs in the content of the model Act, regulations and codes of practice. The Commission's view is that the OHS IGA would be more likely to deliver national uniformity in a timely manner if decisions on model legislation, regulations and codes of practice were made by a two-thirds majority vote.

## Replacing the ASCC

Under the OHS IGA, the Commonwealth, state and territory governments have agreed to replace the ASCC with a new, independent body. The role of the new body will include to 'research, develop and recommend national OHS standards as appropriate' (COAG 2008c, p. 6)

The Commission considers that in some respects the new body will be an improvement on the ASCC:

- Rather than being established by administrative decision, the new body will be statutorily independent. This may increase the legitimacy of the new body in the eyes of stakeholders and enhance its power to drive reform.
- The power to declare national standards or codes of practice will rest with the WRMC, not the body that replaces the ASCC. This reflects principles of good governance.
- The new body will be funded jointly by the Commonwealth Government and the state and territory governments. This may lead to greater engagement with the policy-making process than if the body was solely funded by the Commonwealth.

While these measures mark an improvement on the current ASCC, the Commission considers that the proposed tripartite structure of the new body is not consistent with best practice principles of regulation. The new body is to consist of:

- an independent chair, nominated by the Commonwealth Minister
- a non-voting chief executive
- one member representing each state and territory government and the Commonwealth Government
- 2 members each from bodies that represent employees and employers.

In a previous report (box 6.3) and in the draft report on chemicals and plastics regulation the Commission has raised concerns about the tripartite structure of the ASCC (and its predecessor, the NOHSC) and the unwieldy size of those bodies. Those concerns apply equally to the new body, and are set out below.

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**Box 6.3 The Commission's 2004 report on national OHS frameworks**

In 2004 the Commission released an inquiry report on National Workers' Compensation and Occupational Health and Safety Frameworks (PC 2004a). That report included a detailed assessment of the NOHSC and recommendations for changes to its structure. While the NOHSC was replaced by the ASCC in 2005, many of the structural problems carried through to the ASCC, and will likely remain in the body that replaces it.

The ASCC is a tripartite body — it includes representatives of Commonwealth, state and territory governments, unions and employer groups. The NOHSC was also a tripartite body, as will be the body that replaces the ASCC. The Commission noted that the tripartite structure led to a number of problems, including:

- Membership of the board was determined by representation, not by expertise in developing and implementing best practice OHS regulations.
- Decisions could be influenced by the lobbying ability of board members.
- Some groups were not represented on the NOHSC board (for example, small business groups and the mining industry).
- The 18-member board was too large to be effective.

Supporters of the tripartite structure emphasised the importance of consultation in the development of OHS regulations. The Commission agreed that the involvement of stakeholders is essential, but stated:

... there is a significant difference between a consultation process, and a situation where those being regulated have direct control over the drafting of that regulation. Where stakeholder interests diverge significantly and where agreement or consensus becomes a major consideration, the chance that necessary change will be introduced in a timely fashion is put at risk. It also introduces the likelihood that compromise will result in something well short of best-practice. (PC 2004a, p. 91)

The Commission recommended that the NOHSC should have a board of between five and nine members appointed on the basis of their expertise and skills in OHS regulation. The members would be appointed by the Commonwealth Minister and their appointment would have to be approved by the WRMC. Membership would not be based on representation of any constituency.

The Commission recommended that the NOHSC should be given the power to establish advisory committees that would consist of representatives from unions, employer groups, Commonwealth, state and territory OHS agencies and experts in OHS policy implementation. These bodies would seek stakeholder input into the development of standards and codes of practice, but would not have any authority to make decisions on their content. Standards and codes of practice would have to be approved by the WRMC.

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### *The Commission's assessment of the body to replace the ASCC*

The body that replaces the ASCC will retain a tripartite structure, and will have an unwieldy 15 members. The Commission considers that setting national risk management standards for the use of chemicals in the workplace (and other OHS standards) is a task that is most effectively and efficiently undertaken by a national body of persons appointed for their knowledge and experience, and who would make decisions in the public interest (chapter 2). Membership of the body should not be based on representation of any jurisdiction or stakeholder group. The expert body should be small enough to effectively manage the development and implementation of nationally consistent OHS regulations. As the Commission has previously noted, the appropriate size of the new body is between five and nine members.

The Commission considers that stakeholders views can be sufficiently accommodated through advisory committees, and that stakeholder membership of standard-setting bodies is both unnecessary and inconsistent with best-practice regulation. Although under the OHS IGA the WRMC is responsible for making decisions on model legislation, regulations and codes of practice, the body that replaces the ASCC may retain some decision-making powers and is the body which makes recommendations to the WRMC.

The OHS IGA includes an agreement to review the operation of the body that replaces the ASCC 'no later than the sixth anniversary of the commencement of the Act establishing [ASCC replacement body] or as agreed by WRMC' (COAG 2008c, p. 11). This review should include an assessment of the effect of the tripartite structure of the new body on the quality of the advice it provides, and should consider replacing the body with a smaller body made up of people appointed for their knowledge and experience.

#### RECOMMENDATION 6.4

***The review of the operation of the body that replaces the Australian Safety and Compensation Council that is planned to commence within six years of its creation should assess its effectiveness and efficiency, including the impact of the tripartite structure of the body on the quality and nature of advice that it provides to the Workplace Relations Ministers' Council. The review should also consider the case for replacing the new body with a smaller, statutorily independent body comprised of experts in standard setting, rather than representatives of particular constituencies.***