

WORK, HEALTH AND SAFETY

AN INQUIRY INTO OCCUPATIONAL HEALTH AND SAFETY

Volume 1: Report



**INDUSTRY
COMMISSION**

**Report No. 47
11 September 1995**

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11 September 1995

The Honourable George Gear MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Minister

In accordance with Section 7 of the *Industry Commission ACT 1989*, we have pleasure in submitting to you the report on Work, Health and Safety in Australia.

Yours sincerely,

Jeffrey Rae
Presiding Commissioner

Michael Easson
Associate Commissioner

TERMS OF REFERENCE

I, GEORGE GEAR, Assistant Treasurer, under Part 2 of the Industry Commission Act 1989:

1. refer Australia's approach to occupational health and safety to the Industry Commission for inquiry and report within twelve months of receiving this reference;
2. specify that the Commission report on the broad strategies which should be undertaken or continue to achieve optimal outcomes in preventing occupational injury, illness and disease for the next decade;
3. without limiting the scope of this reference request that the Commission report on:
 - a) the levels, causes and costs of occupational injury, illness and disease in Australian industry, including the identification of differences relating to workforce characteristics (including gender and ethnicity) and workplace characteristics;
 - b) the extent and costs of prevention of occupational injury, illness and disease;
 - c) the costs and benefits of preventive strategies including complementary legislation and educational and promotional strategies;
 - d) the contribution that employers, employees and their representative organisations, occupational health and safety professionals and researchers can make to the prevention of occupational injury, illness and disease in the workplace;
 - e) the implications of incorporating occupational health and safety matters in enterprise agreements;
 - f) the appropriate legislative approaches and roles for National, Commonwealth and State/Territory agencies in promoting occupational health and safety;
 - g) the development and implementation (particularly the extent of acceptance in the workplace and State agencies) of national occupational health and safety standards;
 - h) export opportunities for Australian occupational health and safety services;and
 - i) identification of best practice approaches to occupational health and safety;
4. specify that the Commission report on any relevant implementation strategies;
5. specify that the Commission take into account recent substantive studies undertaken elsewhere; and
6. specify that the Commission have regard to the established economic, social, environmental and regulatory reform objectives of governments.

GEORGE GEAR

23 May 1994

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References

ABBREVIATIONS

Main abbreviations used in this report are listed below:

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACARP	Australian Coal Association Research Program
ACC	Accident Compensation Commission, New Zealand
ACCI	Australian Chamber of Commerce and Industry
ACIRRT	Australian Centre for Industrial Relations Research and Teaching
ACM	Australian Chamber of Manufactures
ACOM	Australian College of Occupational Medicine
ACRM	Australian College of Rehabilitation Medicine
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
ADAM	Agreements Data-Base and Monitoring
ADRAC	Adverse Drugs Reaction Reporting Scheme
AHMAC	Australian Health Ministers Advisory Council
AICS	Australian Inventory of Chemical Substances
AIOH	Australian Institute of Occupational Hygienists
AIRC	Australian Industrial Relations Commission
ALHMU	Australian Liquor Hospitality and Miscellaneous Workers' Union
AMA	Australian Medical Association
AMIC	Australian Mining Industry Council
AMIRA	Australian Mining Industry Research Association
AMSA	Australian Maritime Safety Authority
ARC	Administrative Review Council

ATAC	Australian Transport Advisory Council
AWE	Average Weekly Earnings
AWIRS	Australian Workplace Industrial Relations Survey
BCA	Business Council of Australia
BIE	Bureau of Industry Economics
CE	Commonwealth Employment
CEO	Chief Executive Officer
CEPA	Commonwealth Environment Protection Agency
CER	Common Essential Requirements
CERP	Closer Economic Relations Pact (with NZ)
CFMEU	Construction Forestry Mining and Energy Union
CIMAH	Control of Industrial Major Accidents Hazards
COAG	Council of Australian Governments
COSOP	Committee on Safety in the Offshore Petroleum Industry
CRS	Commonwealth Rehabilitation Service
CSB	Competency Standards Body
DBE	Department of Business and Employment
DEVETIR	Department of Employment, Vocational Education, Training and Industrial Relations
DIR	Department of Industrial Relations
DOHSWA	Department of Occupational Health, Safety and Welfare of Western Australia
DSS	Department of Social Security
DWHS	Department of Work Health and Safety
EEO	Equal Employment Opportunity
EIA	Economic Impact Assessment
EPA	Environment Protection Authority
EWG	Expert Working Group
GBE	Government Business Enterprise

GMA	Geoff McDonald and Associates
GPs	General Practitioners
HAGAW	Hunter Action Group Against WorkCover
HSE	Health and Safety Executive
HSO	Health and Safety Organisation
HSR	Health and Safety Representatives
HWCA	Heads of Workers' Compensation Authorities
IAC	Industries Assistance Commission
IC	Industry Commission
ICA	Insurance Council of Australia
ILAC	International Labour Affairs
ILO	International Labour Organisation
IRC	Industrial Relations Commission
ISC	Insurance and Superannuation Commission
JSRC	Joint Safety Review Committee
LTIFR	Lost Time Injury Frequency Rate
MAVIS	Medical and Vocational Intervention Strategies
MOLAC	Ministers Of Labour Advisory Committee
MSDS	Material Safety Data Sheet
MTIA	Metal Trades Industry Association
NBFI	Non-Bank Financial Institution
NDS	National Data Set for Compensation-Based Statistics
NESB	Non-English Speaking Background
NFA	National Food Authority
NFSC	National Food Standards Council
NHS	National Health Survey
NICNAS	National industrial Chemicals Notification and Assessment Scheme
NIOHS	National Institute of Occupational Health and Safety

NISU	National Injury Surveillance Unit
NOHSC	National Occupational Health and Safety Commission
NRA	National Registration Authority
NRTC	National Road Transport Commission
NSW	New South Wales
NT	Northern Territory
NTF	National Transport Federation Ltd
NWE	Normal Weekly Earnings
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational Health and Safety
OHSA	Occupational Health and Safety Authority
OHSW	Occupational Health & Safety Welfare
OOS	Occupational Overuse Syndrome
ORR	Office of Regulation Review
PACIA	Plastics and Chemicals Industries Association
PAYE	Pay As You Earn
PBS	Pharmaceutical Benefits Scheme
PCN	Preferred Care Networks
PEC	Priority Existing Chemical
PIAC	Public Interest Advocacy Centre
PIAWE	Pre-Injury Average Weekly Earnings
PIN	Provisional Improvement Notice
PMC	Premium Monitoring Committee
PRC	Premium Rates Committee
PRM	Premium Rates Committee
PSM	Population Survey Monitor
PTC	Public Transport Corporation (Victoria)
QALY	Quality Adjusted Life Years

QUT	Queensland University of Technology
R&D	Research and Development
RIS	Regulatory Impact Statement
RISE	Re-employment Incentive Scheme
RSC	Research Standing Committee
SABS	Safety Achiever Bonus Scheme
SAEF	South Australian Employers Federation
SCOA	Superannuated Commonwealth Officers Association
SDSC	Standards Development Standing Committee
SMS	Safety Management System
SPC	Special Premiers' Conference
SRC	Safety, Rehabilitation and Compensation
SRCA	Seafarers' Rehabilitation and Compensation Authority
SWORD	Surveillance of Work-related and Occupational Respiratory Diseases
TAC	Transport Accident Commission (Victoria)
TDA	Tasmanian Development Authority
TGA	Therapeutic Goods Administration
UK	United Kingdom
USA	United States of America
VACC	Victorian Accident Compensation Commission
VAFI	Victorian Association of Forest Industries
VARC	Victorian Accident Rehabilitation Commission
VBEF	Vehicle Builders Employers' Federation
VECCI	Victorian Employers' Chamber of Commerce and Industry
VIOSH	Victorian Institute of Occupational Safety and Health
WAFIC	Western Australian Fishing Industry Council
WAVE	Workers Average Weekly Earnings

WCRC	Workers Compensation Rehabilitation Commission of Western Australia
WCRI	Workers' Compensation Research Institution
WHS	Work, Health and Safety
WISE	Wage Incentive Scheme for Employers
WLPE	Workdays Lost Per Employee
WTFS	Work-related Traumatic Fatality Study

OVERVIEW

We believe that effective safety awareness in industry and commerce can only be developed by an accumulation of influences and pressures operating at many levels — that of the boardroom, the senior management, the supervisor, the trade unions, the worker on the shop floor — and operating in a variety of ways through education and training, through the provision of better information and advice, through practical, co-operative organisation and action, through legal sanctions where necessary, through research, publicity and so on. There is no single panacea and there are no simple short cuts (Robens 1972, p. 1).

There is considerable scope in Australia to reduce the human and economic loss associated with injury and disease at work. All in the community — employers and their associations, employees and their trade unions, as well as governments — can play an important part in achieving this goal.

Success will ultimately be determined *where* the current failures occur — in the workplace. For their part Australian Governments should provide the necessary leadership and support by reforming their policies on occupational health and safety (OHS). In essence they should:

- *streamline but strengthen regulation* with fewer, simpler rules;
- *allow greater flexibility* for workplaces to manage injury and disease;
- *beef up enforcement* of the key legal responsibilities;
- *strengthen financial incentives* for safer workplaces;
- *overhaul co-operation arrangements* between Australian governments;
- *provide greater contestability and transparency* in research funding; and
- *make OHS agencies* more accountable for their performance.

This Overview begins by setting out the Commission's findings on the *state of health and safety at work*. From there it canvasses the *case for reform* as a prelude to the *Commission's proposals*. The Overview then concludes with a discussion of the *benefits of reform* and of some issues in the *implementation of reform*.

STATE OF WORK, HEALTH AND SAFETY

Every year in Australia, over 500 workers suffer a traumatic death from work and up to 2200 die of occupational disease. Given that there are about 2000 road deaths, work may be a more important source of premature death than the roads.

In addition, injury and disease from work permanently disable workers. The Commission estimates that, at any one time, about 200 000 people cannot work at all due to an injury or disease sustained from work. Another 270 000 have been forced to change their jobs or permanently reduce their hours of work for the same reason.

Permanent disability imposes significant costs on injured workers and their families — pain and suffering, loss of earnings, reduced leisure and social opportunities, and loss of self-esteem. For example, the loss of income for those who become unemployed due to ill health from work is about \$22 000 a year.

Details of the incidence of injury and disease from work and some of its social consequences are set out in Box 1.

Cost of injury and disease

The Commission estimates that the total cost to injured employees, their employers and the rest of the community of work-related injury and disease is at least \$20 billion a year. This estimate is conservative as it does not include any allowance for pain, suffering and anguish.

The above total is the sum of the losses to all those adversely affected by work-related injury and disease. Their losses are often gains to others in the community — for example, the replacement workers, medical practitioners and those who provide services to injured workers. Only when these gains are taken into account can the loss to the economy as a whole be estimated. On this basis a 10 per cent reduction in injury and disease would see our national income (GDP) increase by about \$340 million. Workplace health and safety is therefore a significant economic issue.

Box 1 A tally of injury and disease from work

In each year, workplace injury and disease have a greater impact than many appreciate:

- around 500 die as a result of traumatic injury at work;
- between 650 and 2200 workers die as a result of occupational cancers — the majority from exposure to hazardous materials;
- up to 650 000 workers — or one in every twelve — suffer injury and illness from work and almost two-thirds will have to take time off work.

Men make up 57 per cent of the workforce but 94 per cent of the traumatic fatalities.

Workers with a non-English-speaking background have a risk of traumatic fatality which is four times that for the workforce as a whole.

The risk of traumatic fatality from work rises with age.

The industries with the highest risk of fatality are mining, transport, construction and agriculture.

At any time, the accumulated effects of work-related injury and ill health mean that:

- up to 140 000 workers cannot work at full capacity;
- over 270 000 workers have had to reduce permanently their hours at work, or change their jobs; and
- about 200 000 persons are prevented from working at all.

Of those who are unable to work at all:

- over 85 per cent have been unemployed for more than a year;
- almost 35 per cent have not worked for over five years; and
- their average income is \$9500 a year.

Work-related health problems also affect people in their retirement — up to 300 000 persons over the age of 65 are estimated to be suffering from them.

Around 30 per cent of the total cost has to be met by injured workers and their families. Employers bear about 40 per cent in workers' compensation costs, lost productivity and extra overtime. The community funds around 30 per cent, mostly in social security benefits and health subsidies. However, the community's share increases with the severity of the consequences — it is about 40 per cent for permanent disability compared with around 10 per cent for temporary disability.

Prevention of injury and disease at work

There is rarely, if ever, a single cause of injury or disease at work. Usually many factors are involved and the contribution of each to the outcome varies considerably. Only some factors are crucial but all interact in complex ways. They can begin to operate well before injury or disease occurs. The ability of individuals or firms to influence each of the factors also varies.

The key to controlling injury and disease at work is to be found in the design and control of the workplace and the activities conducted within it. Only very limited, if any, control is possible by focussing upon the behaviour of those who may be injured.

Design and operational control of the worksite buildings, plant, equipment, materials, work procedures and practices all shape the health and safety risks at the workplace. The quality of this design and operational control is ultimately determined by the workplace management.

Some employers have shown that injury and disease at work can be dramatically reduced by good management. They view injury and disease as waste to be eliminated. Their solution is comprehensive quality management to improve continuously the work environment and the activities conducted within it. As good risk management is usually an essential element of good management generally, improvements in health and safety go hand in glove with other gains in business performance.

Superior risk management requires cultural change at work. Senior management must be dedicated to a 'culture of care'. This commitment must be backed up by a willingness to invest resources in health and safety, and to hold line managers, supervisors and work teams responsible for outcomes in this regard. The full participation of an informed workforce is fundamental — employees usually know most about how to manage better the risks in their own work. The trade union movement has shown that its co-operation in this process can enhance OHS outcomes.

Unfortunately, there is no reliable basis for comparing Australia's OHS record, either over time or with that of other economies. However, many participants — including many government agencies — felt that our performance is not improving. Most believed that there is ample scope to do better. This is confirmed by the substantial differences in the health and safety performance achieved by employers of similar size in the same industry.

While the ultimate goal should be to ensure everyone is safe at work, prevention can come at a price. In some cases the risks are costly to abate, at least in the short to medium term, and it may be necessary to mandate minimum safety

levels to meet community needs. When doing so, however, the community has to make a choice about whether this represents the best use of the resources which would be required. Most, if not all, human endeavour entails some risk and this is tolerated by the community as an acceptable price for the achievement of its other goals.

CASE FOR REFORM

Those who are responsible for designing and managing the workplace and its activities do not bear all, or even most, of the costs of poor design or poor management — the gap is particularly pronounced in cases of death or permanent disability. These costs fall on those who become injured as well as the rest of the community who have to pay for the social security and other government services extended to the injured.

For these reasons, governments have sought to reduce the workplace risks to health and safety in a variety of ways. They have done so by regulating and enforcing health and safety at work. These activities have been complemented by programs to inform, educate and train people in workplace health and safety, as well as to provide financial incentives for better performance by workplaces.

Currently Australians are contributing \$140 million each year to these programs but receive limited information to show they are well conceived or properly executed. If the efficiency and effectiveness of these programs and their administration can be improved, lives and resources will be saved.

Regulation

The architecture of the regulation of health and safety at work is essentially the same in each Australian jurisdiction. It involves a single statute to cover health and safety in all, or nearly all, workplaces in the jurisdiction. Some jurisdictions have one or more statutes dealing with health and safety in specific industries — for example mining. Most also have statutes which address health and safety in specific areas — for example, the transport and handling of dangerous goods.

The principal OHS statute defines the rights and obligations of those involved with the workplace. The principal statute is supported by subordinate legislation and codes of practice. The subordinate legislation mandates the specific requirements to be achieved at the workplace. The codes of practice seek to advise some practical means for their achievement.

Box 2 The Robens Report

In May 1970, the UK Government appointed a Committee on Safety and Health at Work, chaired by Lord Robens. The Committee was asked to report on ‘the provision made for the safety and health of persons in the course of their employment’.

The Committee on Safety and Health at Work presented its report to the UK Government in June 1972. Its central conclusion was the following:

There are severe practical limits on the extent to which progressively better standards of health and safety at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system’ (Robens 1972, p. 12).

The Committee found the regulatory regime in the UK tended to encourage people to think and behave as if work-related health and safety were primarily a matter of detailed regulation by external agencies. The UK regime was an haphazard mass of intricate, detailed law that was difficult to comprehend, amend and keep up to date. Regulation paid insufficient regard to human and organisational factors, did not cover all workers or all hazards and its administration was fragmented.

The Committee identified four factors that contributed to ‘apathy’:

- the unco-ordinated proliferation of statutory standards;
- the excessive complexity of many of the standards;
- the failure to keep pace with technological, social and economic change; and
- the failure to formally and consistently involve employers and workers.

The Report proposed changes to policy to create a ‘more effectively self-regulating system’ at both the firm and industry level with greater involvement of workers and their trade unions. It proposed the creation of a single ‘enabling Act’ to:

- lay down the duties of employers, workers and suppliers of materials;
- establish basic rights for workers and their representatives;
- create new structures through which standards may be developed; and
- reform the administration and enforcement of the law by the creation of a single national authority.

This ‘enabling Act’ should be supported by regulations and industry codes of practice. objectives to be achieved.

Regulation can facilitate sound management of health and safety at the workplace. However, there are severe limits on the ability of governments to

cut injury and disease by specifying how risks to health and safety are to be managed — without a loss of efficiency at the workplace and in the economy as a whole. Governments have failed to recognise these limits in their regulatory reform, even though they have been known for some time (see Box 2).

Unclear legal rights and duties

Although fundamentally sound, the rights and obligations in the principal OHS statutes are not clearly and unambiguously defined. Moreover, there is redundant elaboration of their requirements. The incorporation of national OHS standards in subordinate legislation has exacerbated the over-elaboration — many merely restate, in other forms, the rights and duties in the principal OHS statutes. This has tended to add to the confusion about workplace health and safety in the community.

Too much legislation

In all, there are over 150 statutes which regulate health and safety at work across Australia.

There are nine Commonwealth and State OHS statutes, together with another six enactments with general OHS provisions. The latter include the *Factories, Shops and Industries Act* and *Construction Safety Act* in New South Wales, the *Labour and Industry Act* in Victoria, the *Factories and Shops Act* in Western Australia and *Machinery Act* in the Australian Capital Territory. These 15 statutes have 70 sets of regulations amounting to a further 1180 pages of law. There has been considerable progress in every jurisdiction in repealing the statutes and their regulations which were meant to be replaced by the OHS legislation — as proposed by the Robens Committee — but the process is incomplete.

There are another 129 statutes which contain provisions on specific workplace health and safety issues. These include State statutes dealing with dangerous goods and the mining industry in New South Wales, Queensland, Western Australia and the Northern Territory. The statutes dealing with the maritime and offshore petroleum industries are in the Commonwealth jurisdiction.

Inflexible regulation

Regulation should encourage prevention in all workplaces. To do so efficiently it must be sufficiently flexible. It needs to allow for the range of circumstances

in workplaces and for the management responses best suited to risk control in each.

The existing regimes do not adequately accommodate the different situations in individual workplaces. They do not allow for different capabilities of employers to develop their own safety management. Nor are they flexible enough to meet the desire of some employers for straight-forward, specified safety measures and certainty in compliance.

‘Best practice’ management not encouraged

‘Best practice’ management of the risks to health and safety at work has greater scope to improve health and safety outcomes than the enforcement of minimum standards. Apart from anything else, best practice is based on continuous improvement in performance. It is inherently difficult for minimum standards to deliver such dynamic improvements.

Despite this, existing regulation provides, at best, weak encouragement to the adoption of quality risk management approaches to health and safety. Many provisions discourage such systems; some are incompatible with them.

Inconsistency between jurisdictions

Jurisdictions place different obligations on employers, employees and suppliers. Some exposure limits — such as for noise and asbestos — differ as do some rules for hazardous plant, equipment and work processes. There are differences in enforcement. Such differences mean there are different levels of protection for workers doing the same job in the various jurisdictions — this is inequitable.

Employers with operations in more than one State have to work with multiple OHS regimes. This means additional costs whenever systems of work are changed or staff are moved; they also raise the cost of their internal monitoring of compliance.

Inefficient mandated standards

The present approach to mandating health and safety standards does not always produce efficient solutions. Some standards do not directly affect the risks to health and safety. Many standards are not expressed in terms of the desired outcomes but the way they are to be achieved. In doing so they ignore the fact that different solutions will be appropriate in different circumstances and at different times. Other standards are not expressed in measurable terms, thereby detracting from their enforceability.

Inadequate and unhelpful codes of practice

Governments have developed official codes of practice to provide guidance on how to comply with the law. Most focus on how to manage a particular hazard in all workplaces in all industries. Consequently, their advice is inadequate in extent and too general to be of practical help to most workplaces.

The focus on general, hazard-based codes of practice has probably inhibited timely responses to emerging health and safety issues in the workplace. The need for a practical response can vary considerably. If the need is not perceived as being acute everywhere, the recognition of a problem and the development of a code to deal with it in all workplaces can be too slow. A number of inquiry participants are concerned that this was the case with alcohol and drug use, and violence in the workplace. Such issues might be more appropriately addressed at an industry and workplace level.

Enforcement

Enforcement is not directed at preventing injury and disease by deterring non-compliance with OHS law. It tends to rely overly on persuasion — advice is usually the first response when a breach of OHS law is detected. Nor is enforcement targeted where it will have the greatest effect on prevention. Inspectorates tend to react to fatalities and serious injury, rather than to seek to prevent them occurring.

On average, workplaces face a 22 per cent chance of being visited by the OHS inspectorate in any year. If then found to be in *prima facie* breach of the OHS legislation, they have only a 6 per cent chance of being convicted and fined by the courts. The probability of being penalised is less than 1 per cent in the Australian Capital Territory.

As a consequence, the expected penalty for workplaces which fail to comply with OHS legislation is negligible. The Commission estimates that offenders face an expected penalty of less than \$33, averaged over all the jurisdictions.¹ Only two jurisdictions have expected penalties greater than \$33. See Table 1 for details.

Even in cases of fatal or other serious injuries, the courts impose low fines. The average fine imposed across the jurisdictions — on-the-spot fines and fines by the courts — is \$2480. The average fine for each jurisdiction ranges from

¹ The expected penalty takes into account the extent to which the penalties imposed are discounted by the risks of being detected and then prosecuted successfully by the OHS inspectorate.

\$1125 in New South Wales to just over \$8000 in Victoria. The level of the average fines reflects two factors — limits on the size of penalties in the OHS legislation and the preparedness of the courts to use the scope offered by these maxima.

Table 1 Expected penalty levels by State and Territory

<i>Jurisdiction</i>	<i>Probability of inspection^a</i> (per cent)	<i>Probability of a penalty^b</i> (per cent)	<i>Average penalty^c</i> (\$)	<i>Expected penalty^d</i> (\$)
NSW	20.8	12.8	1175	31
Vic	17.9	2.0	8004	29
Qld	25.0	21.8	2914	159
WA	17.9	1.7	3207	10
SA	18.5	12.3	5422	123
Tas	36.0	3.1	1207	14
ACT	22.7	0.7	3983	6
NT	35.7	4.7	1976	33
National average	22.0	6.1	2480	33

Note: See Table 7.2 for notes.

A low expected penalty means that enforcement has little or no deterrent effect. At best it will deter those who have been detected from committing another breach (and this may be questionable). However, it does not deter those yet to be found out because they know that they will be given a second chance.

If legal duties are not enforced, workplaces can face perverse competitive pressures — even well-intentioned employers could be reluctant to comply if it puts them at a disadvantage.

Nationally uniform standards

Nationally uniform OHS standards have been a goal since the creation of the National Occupational Health and Safety Commission (NOHSC) in 1984. However, NOHSC made little progress towards that goal until November 1991 when Heads of Government agreed to implement nationally uniform standards through NOHSC by the end of 1993.

Participants generally expressed the following concerns with the development of national standards by NOHSC and their implementation by the States.

- Jurisdictions have legislated ‘national standards’ in various ways with different effects. This is confusing and has reinforced perceptions that governments do not have a clear view of the appropriate approach.

- The content of the standards implemented can differ to a significant degree from those declared by NOHSC. Significant differences in content undermine the concept of uniform standards.
- Despite concerted effort by NOHSC since 1991, many criticised the progress in developing and implementing national standards. Not one of the priority standards has been fully implemented across the country.

In the Commission's view, the concerns expressed by participants are symptoms of fundamental problems with the national uniformity program. Governments have failed to agree on operational objectives or how they are to be achieved.

Lack of agreed objectives

Standards have been developed for the hazards associated with high workers' compensation pay-outs rather than those which impose the highest costs on the community. Fatality and permanent disability account for almost 60 per cent of total costs of injury or disease at work.

The program has not recognised that hazards can only be successfully managed at the workplace. Much effort has gone into developing national codes of practice but they provide little or no practical guidance to workplaces. As a result, some industries have moved away from the NOHSC codes. For example, the rural sector in Queensland developed its own codes for hazardous substances and plant with the support of and assistance from the Queensland OHS agency.

There has been no agreement on operational objectives because of the difficulty in developing standards applicable to all workplaces in all jurisdictions. Governments have been reluctant to agree to them and have reserved their right to modify declared standards to fit the needs of their jurisdiction.

Lack of agreement on implementation

In principle, uniform regulation implies uniform legislation. Governments have attempted to achieve greater regulatory consistency while maintaining flexibility by implementing the 'common essential requirements' in national standards as they see fit. As governments have been unable to agree on how to implement the national standards, significant differences in OHS law remain between the jurisdictions. Furthermore, there has been little co-ordination between implementation of national standards and reform of OHS regulation.

National institutions

NOHSC performs two roles. One is to manage the process of developing national programs in workplace health and safety. The other is to be a forum for consultation with State Governments, employers and trade unions on those programs. Worksafe Australia provides administrative and technical support to the National Commission in these roles. Of the programs conducted by NOHSC the most important has been the development of national standards.

The existing arrangements are illustrated in Figure 1.

It is generally agreed that, since its establishment, NOHSC has progressed the standing of OHS in the community. However, a large number of participants were critical of the time and resources required to achieve that change. In the Commission's view these are symptoms of fundamental problems with the national arrangements.

Unclear lines of responsibility

The Commonwealth Government funds Worksafe but cannot be held accountable for its performance. Many of the activities of Worksafe are controlled by NOHSC and on most others the National Commission exerts at least some influence.

NOHSC members are appointed as representatives of Governments, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU). Accordingly, it is unclear whether the Minister can hold NOHSC to account for its performance or its supervision of Worksafe. NOHSC members face a conflict between their loyalty to their institutions and their responsibility to manage Worksafe.

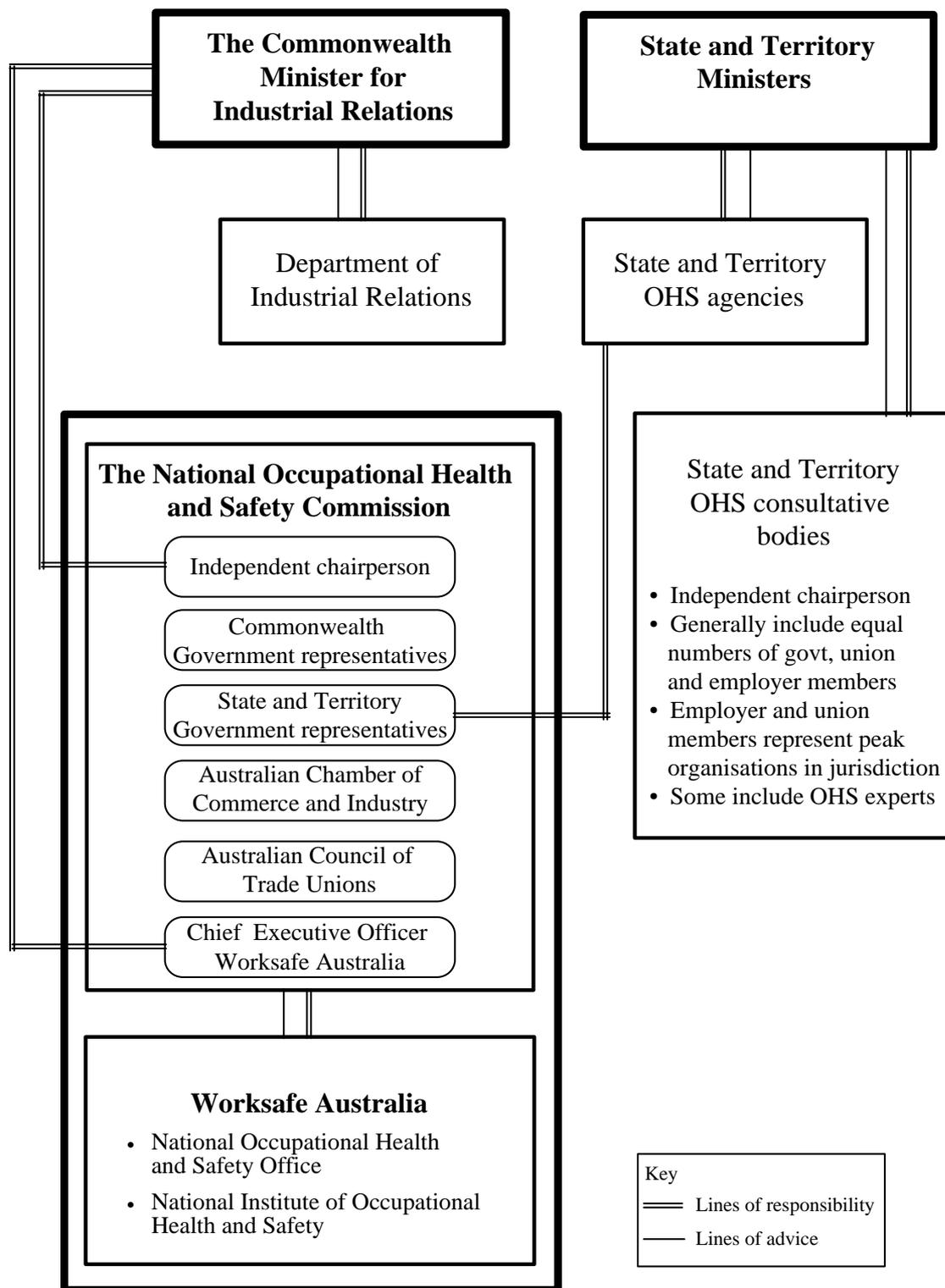
Worksafe's Chief Executive Officer (CEO) is responsible by law to the Commonwealth Minister for the funds provided to the agency. However, in practice, the CEO is responsible to NOHSC to some extent for Worksafe's use of its resources. This duplication and ambiguity of reporting lines do not provide for strong accountability.

An ineffective board of management

NOHSC has not been as successful as the board of management for Worksafe:

- with 18 members, it is too large to be an effective board of management;
- members are chosen primarily to represent the various interests — not for their ability to manage Worksafe; and
- the ambiguous and divided nature of its responsibility for Worksafe militates against it supervising Worksafe effectively.

Figure 1 Current national institutional arrangements



Members of NOHSC represent governments, employers and the trade unions. Accordingly, it is not clear that they can be accountable for their performance as a board of directors would be.

Only some parties are represented

NOHSC does not represent all who have a stake in health and safety at work. OHS professional societies are not included. The ACCI is the only employer association on NOHSC. There are other national employer groups that are not affiliated to the ACCI, such as the Australian Minerals Council and the National Farmers' Federation. While State Governments or their agencies are represented, other interested organisations at the State level are not.

Lack of engagement by the States

The apparent reluctance of the States to implement NOHSC decisions reflects the fact that NOHSC arrangements do not adequately engage all the interests in each State — nor do they recognise that the State Governments have the responsibility for, and are essential to, program delivery in OHS.

The State Governments have commitments to their own OHS consultative bodies and constituencies. Unless these interests are adequately accommodated by NOHSC, State Ministers face pressure to modify NOHSC decisions before their implementation. The need for States to revisit NOHSC decisions reduces the incentive for State Governments and State interest groups to participate fully in developing a consensus within NOHSC.

Research

Worksafe both undertakes research and funds others to carry out specific research projects. The internal research is carried out by the National Institute for Occupational Health and Safety (NIOHS) within Worksafe. The National Institute is the single largest contributor to OHS research in Australia. NIOHS also provides administrative support for the external research program.

The CEO of Worksafe is the Director of the National Institute. By law the Director is responsible to the Commonwealth Minister, but NOHSC exercises a significant degree of practical control. Such a division weakens and obscures the accountability of the National Institute for its performance.

NOHSC has attempted to make the National Institute more accountable by determining a research strategy and monitoring research performance. However, success depends on NOHSC's ability to act as the board of management for NIOHS — this is questionable for the reasons cited earlier.

The research effort of the National Institute was poorly regarded by many participants. There are problems with the relevance of its work to the needs of workplaces and industries. It has a bias in favour of epidemiological and medical research. Research into risk management seems to be given short shrift considering its importance in achieving superior health and safety outcomes.

Employer associations, OHS professional and scientific groups, and a number of State Governments expressed concern over a tripartite institution being responsible for deciding the research to be publicly funded. They feared that the research agenda can be compromised by the interests of the members.

Research has been poorly co-ordinated. This is recognised by NOHSC which has recently developed a strategy to provide a framework for co-ordination.

State OHS agencies

Outlays by State and Territory agencies on OHS programs were about \$117 million in 1993–94. This constituted about 80 per cent of the outlays on OHS programs by all jurisdictions. In addition to the development of OHS legislation, the outlays by the States are used for enforcement — the major part of all OHS outlays — as well as awareness, research, training and education programs. While annual outlays by each jurisdiction vary, outlays per employed person — about \$15 to \$17 per employed person — are roughly the same in most jurisdictions.

The States do not appear to require their OHS agencies to measure how their policies or their programs perform. The information published suggests that agencies do not have clearly defined and measurable objectives. Published OHS information also provides little indication of the effectiveness of agency programs.

The lack of adequate measurement of OHS performance and of the effectiveness of programs potentially compromise the progressive improvement of these programs. They also impede policy and strategy review. As a consequence, there can be no certainty that the current mix of preventive measures is the right one.

COMMISSION'S PROPOSALS

The Commission's charter requires it to take an economy-wide perspective in advising government on policy reforms. Accordingly, its recommendations are meant to serve the broad community interest, not just the interests of particular groups. The Commission's approach in this inquiry has been to identify those arrangements that should produce better workplace health and safety outcomes for workers, employers and the community.

In essence, the Commission's proposals are to:

- *streamline but strengthen regulation* using fewer legislative rules, in less detail, which focus on the minimum level of protection to be provided;
- *allow greater flexibility* for employers and their employees to determine the ways to make their workplace safer;
- *give greater emphasis to enforcement* by relying more on deterring breaches of the law and less on persuading people to comply;
- *provide stronger financial incentives* to encourage employers to make their workplaces safer;
- *overhaul Commonwealth-State arrangements* to enable the Governments to work together more effectively to improve health and safety at work for all Australians;
- *provide greater contestability and transparency* in research funding; and
- *make the OHS agencies* more accountable for their performance.

The proposals seek to recognise and accommodate the great diversity of safety problems, of appropriate management responses and of incentives for employers to ensure work is safe. Finally, they need to be flexible enough to be able to respond to changes in community expectations and as safety management possibilities in the workplace change.

In the Commission's view, all of its proposals are practical solutions to the problems identified in this report. In virtually all cases, each one has been successfully applied in at least one or more jurisdictions.

Moreover the spirit, if not the letter, of each proposal was put forward in the draft report and discussed with participants in the draft report hearings. There was board support for the proposals, although there were concerns among some participants about certain proposals.

Each of the proposed reforms is canvassed in detail below.

A better regulatory regime

The cornerstone of all OHS legislation is a codification of the common law *duty of care*. This requires the duty holder to do everything ‘reasonably practicable’ to protect the health and safety of others at the workplace. Jurisdictions place a duty of care on all employers, their employees and any others who influence the risks to health and safety at the workplace. The latter include contractors and those who design, manufacture, import, supply or install plant, equipment or materials used in the workplace.

The principal objective of regulation must be to reduce work-related injury and disease. However, superior outcomes cannot simply be mandated. Rather they are to be found in the application of comprehensive quality management principles by employers and their employees. OHS regulation has yet to fully reflect this and has thus failed to heed the central conclusion of the Robens Report (see Box 2).

The solution to achieving better OHS outcomes is to be found in a more faithful application of the principles for the regulation of health and safety enunciated in the Robens Report. These are:

- a single enabling statute to define clearly the rights and duties of all parties who influence the risks to health and safety at the workplace;
- subordinate legislation to mandate certain minimum health and safety standards, expressed in terms of outcomes as far as practicable; and
- a preference for voluntary standards and codes of practice to provide the practical means of implementing those legal requirements in the workplace.

Regulatory reform is needed to promote best practice. It should take the form of requiring those in the workplace to take greater responsibility for the management of the risks to health and safety, while enabling them to do so. This means changing the approach of much OHS legislation and the programs that support it. Regulation has to shift from imposing solutions towards enabling those at the workplace to make informed choices about best how to reduce the risks to life and limb at their workplace.

The Commission’s regulatory reforms are not aimed at deregulating health and safety at work. They are designed to make regulation work better — by getting rid of those rules that do not improve safety efficiently while improving those that do.

Duty of care

The codification of the common law *duty of care* should ensure that it is expressed in an efficient form and that its coverage is comprehensive.

The Commission considers that it is more efficient if it is the duty holders' responsibility to prove, to the satisfaction of courts if necessary, that the measures they took were reasonable and practicable. In New South Wales the adoption of 'reasonably practicable' as a defence has proved successful.

All those who influence the risks to health and safety at the workplace should have a duty of care for everyone at the workplace. The duties should be clearly elaborated to define the essential implications of the duty for each group — employers, employees, suppliers, and others — for the management of risks at the workplace.

For the employer, the elaboration should be confined to providing for the co-operative management of health and safety risks by an informed and trained workforce applying the principles of quality management.

Right to know and obligation to tell

Employees should have a *right to know* in relation to information held by their employer about hazards and their control. Employers should have an equivalent right in respect of information held by those who supply them with plant and equipment or materials for use at work. These rights should be complemented by *obligations to tell* on the part of those who hold the relevant information.

Employee participation and consultation

Employee involvement is crucial to successful solutions to OHS problems. Specific provisions are required for employees to elect workplace representatives to ensure that their interests are efficiently catered for in this process.

The forms of participation and consultation should be left to the employees in each workplace. In some cases, a health and safety committee may be most appropriate, in others a health and safety representative. Often, both could operate. Trade unions have played a significant role in identifying OHS problems in workplaces and in facilitating better outcomes. Therefore, elected representatives should have the right, but not the obligation, to work with trade unions.

The nature of appropriate powers and responsibilities of committees and employee representatives are controversial. Representatives and committees with quite different powers appear to work successfully in different

jurisdictions. That said, there should be uniform minimum rights for employee health and safety representatives in each jurisdiction.

Mandated requirements

Mandated safety requirements can be efficient ways to regulate health and safety at work. For example where there is uncertainty or where the community has to bear a significant part of the cost of injury or disease. To be efficient though, such requirements need to be enforceable and expressed in terms of broad outcomes. They should avoid prescribing how they are to be achieved or with what. A great many of the mandated requirements currently fail this test.

The present approach to mandating health and safety standards does not always produce efficient outcomes. This is often due to poor assessment and selection of the solution to be mandated. Mandated solutions must be assessed to ensure that they are likely to yield a net benefit to the community. Furthermore, such solutions should be designed and implemented to achieve their goal at least cost.

Voluntary standards

There should be greater emphasis on individual enterprises and industries developing their own *voluntary standards and codes of practice*. They are the best ways to promote best practice because they can accommodate well the circumstances of individual workplaces. To date, too much reliance has been placed upon government to lead the development of codes of practice.

There is a need for OHS legislation to encourage actively the development and application of enterprise safety management systems and industry-based codes of practice. They will enable employers and their employees to choose their own process and technical measures.

The reform of OHS legislation outlined in this report could take time to be completed in some jurisdictions. In the meantime, the OHS legislation should allow sponsors of enterprise management systems and codes of practice to adopt substitutes for mandated measures. This option should be available provided the sponsors can show that their choices offer equivalent or better protection. The flexibility provided by this option should promote more efficient outcomes. Moreover, the option should be retained wherever mandated requirements are not confined to those expressed in terms of outcomes.

Employers who choose neither to conform to an industry-based code of practice nor to develop an enterprise safety management system would still be subject to all the provisions of the OHS legislation. Such employers would be expected to be able to demonstrate that they had met their duty of care. Codes of practice developed by others in the same industry would help to define what would be

regarded by the courts as ‘reasonably practicable’, whether or not the employer acknowledged those codes.

Implications of proposals

Regulation that prescribes outcomes — rather than how they are to be achieved — is not only more efficient but also favoured by governments and employers. Other participants, including some trade unions, argued that there are limits to such regulation. The Labor Council of New South Wales supported the performance-based approach but expressed concern about the management of the change to that approach to regulation.

In the Commission’s view, the nature and degree of precision preferred by some is more appropriately provided in industry-based codes of practice. In a practical sense such codes would have the force of law. When the courts consider possible breaches of OHS legislation, they would turn to such codes as representing industry custom and practice.

Mandated safety requirements should generally prescribe outcomes. Nevertheless, there may still be a need for technical or process standards (such as with procedures for handling hazardous substances). Such needs would be best addressed by a combination of the employer’s duties in the OHS statute, and either industry-based codes of practice or enterprise safety management systems.

The proposed reforms address the problems associated with the present regulatory regimes. They will help to clarify the legal obligations of all who have a duty of care. Enterprises which need to develop their own methods for dealing with health and safety will be able to do so. They will cease to be constrained, as they currently are, by regulation.

The reforms will particularly benefit small to medium-sized enterprises (SMEs). They will no longer need to deal with a mass of legislation, but will be able to obtain guidance from a code of practice that is more relevant to their circumstances and more complete in dealing with their needs.

Due to the sheer volume, the Commission was unable to examine in depth every piece of legislation relating to health and safety at work. This is particularly true of the myriad of subordinate legislation. However, the direction that reform needs to take is quite clear. Each jurisdiction should *review all legislation* related to health and safety at work. The review should aim to ensure that all pre-Robens legislation is either repealed or, if worth retaining, incorporated into the subordinate legislation underpinning the principal OHS statutes. The review should also seek to streamline the mandated requirements in OHS legislation and express all of them in terms of outcomes.

Recommendations for better regulation

Recommendation 1

The Commission recommends that the principal OHS legislation in each jurisdiction place a duty of care on all those who influence the risks to health and safety associated with work. The duty should require the person responsible to do whatever is reasonably practicable to avert any risks under their influence. Such a duty should be placed upon:

- employers, including the self-employed;
- suppliers of plant, equipment and materials, including manufacturers, importers, installers and erectors;
- designers of plant, equipment and materials;
- owners and occupiers of workplaces;
- employees, including those employed by a contractor at other than their normal workplace; and
- visitors to a workplace.

Duties of care should be owed to all those who are exposed to any risks to their health and safety associated with work, including employees, contractors and their employees, visitors and those in the vicinity of the workplace.

Recommendation 2

The Commission recommends that the principal OHS legislation in each jurisdiction provide all those having a duty of care a specific defence against a *prima facie* breach of their duty of care. The defence should be that it was not reasonably practicable for them to have done more than they did to reduce risk.

Recommendation 3

The Commission recommends that the principal OHS legislation in each jurisdiction require all employers, as far as reasonably practicable, to:

- undertake ongoing identification, assessment and management of the risks to health and safety at their workplace, including keeping appropriate records and monitoring the health and safety of their employees;
- consult with their employees and their representatives in the identification, assessment and management of risks to health and safety at their workplace;
- inform employees and others in the workplace about the identification, assessment and management of risks to health and safety at their workplace;

- provide instruction and training for all those at the workplace to enable them to participate in the identification, assessment and management of risks to health and safety at their workplace; and
- ensure access to appropriate treatment for injuries sustained at their workplace.

Recommendation 4

The Commission recommends that the principal OHS legislation in each jurisdiction require all employees, as far as reasonably practicable, to co-operate with their employer in the management of risks to health and safety at their workplace.

Recommendation 5

The Commission recommends that the principal OHS legislation in each jurisdiction require all suppliers of plant, equipment, materials and services, as far as reasonably practicable, to inform purchasers and users about the identification, assessment and management of risks to health and safety associated with their products.

Recommendation 6

The Commission recommends that the principal OHS legislation in each jurisdiction grant a right to:

- employees and others at or in the vicinity of the workplace to be informed, as far as reasonably practicable, about the identification, assessment and management of the risks to health and safety at their workplace; and
- users of plant, equipment and materials, as far as reasonably practicable, to be informed about the identification, assessment and management of the risks to health and safety associated with their products.

Recommendation 7

The Commission recommends that the principal OHS legislation in each jurisdiction provide employees with a right to elect their health and safety representatives and any employee members of the health and safety committee at their workplace. Health and safety representatives and committee members should have a right to work in concert with trade unions in undertaking their roles. The minimum rights and responsibilities of health and safety representatives should be agreed amongst governments.

Recommendation 8

The Commission recommends that mandated safety requirements should, as far as possible:

- be economically warranted;
- prescribe measurable and enforceable outcomes; and

- avoid prescribing either the particular inputs into or processes to achieve the outcomes desired, unless it is more efficient to do so.

The principal OHS legislation should provide that particular requirements may be substitutable by alternative measures that can be demonstrated by the duty holder to provide equivalent protection to health and safety.

Recommendation 9

The Commission recommends that the legislation affecting occupational health and safety in each jurisdiction should be reviewed and amended with a view to:

- rationalising its structure by incorporating provisions under the principal OHS statute;
- removing redundant provisions;
- consolidating and rationalising industry-specific legislation under the principal OHS statute;
- harmonising OHS provisions with those for public health and safety, and environmental protection;
- ensuring mandated requirements are consistent with Recommendation 8; and
- expressing all provisions in plain English.

Recommendation 10

The Commission recommends that the principal OHS legislation in each jurisdiction explicitly recognise the use of safety management systems by individual enterprises to identify, assess and manage the risks to health and safety associated with the enterprise. The legislation should provide for the adoption of such systems to be granted *prima facie* evidence that care has been exercised. The criteria for enterprise safety systems to be granted evidentiary status should include that:

- there is adequate ongoing consultation between the employer and, as appropriate, their trade union representatives;
- all the risks to health and safety at the workplace in question are being adequately addressed; and
- relevant mandated requirements are being met or an equivalent level of protection to health and safety is achieved.

Recommendation 11

The Commission recommends that the principal OHS legislation in each jurisdiction provide for the use of advisory codes of practice to provide different ways for a group of enterprises in a particular industry to identify, assess and manage their risks to health and safety. The

OHS agency should be able to co-sponsor an advisory code of practice providing that:

- there is adequate consultation between employers and, as appropriate, their trade union representatives in the formulation of the code;
- nominated hazards are adequately addressed; and
- relevant mandated requirements are being met or an equivalent level of protection to health and safety is achieved.

Governments should agree on a mechanism for the mutual recognition of advisory codes of practice.

Greater deterrence in enforcement

The role of enforcement is to improve OHS outcomes by ensuring compliance with the relevant legislation. Enforcement is necessary where other incentives are insufficient to ensure compliance.

A better approach to enforcement would be to move in the direction of greater deterrence. Operationally, this involves adopting measures to increase the probabilities of detecting and penalising non-compliance with the duty of care, and to raise the penalties for non-compliance. There would be a continuing role for persuasion albeit a lesser, but better focussed, one.

Greater deterrence can increase the effectiveness of other OHS programs by enhancing the incentives for workplaces to assume greater responsibility for their own health and safety. The assumption of greater responsibility means that the demand for education and training, information and advice, and research will increase, possibly dramatically.

Enforcement objectives

The *objective of enforcement* should be to achieve compliance with the duty of care — the primary requirement in OHS legislation. By focussing on the duty of care, enforcement is directed at the objectives of the legislation, rather than at compliance as an end in itself. This enhances the credibility of an approach of greater deterrence in enforcement. Workplaces are more likely to accept — and even welcome — such an approach if it achieves a safer working environment.

In doing so, enforcement should encompass *all* who hold a duty of care. There is tendency for inspectorates to concentrate on employers and their employees. The other duty holders are often ignored because they are well separated from the discovery of a breach by time and geography.

OHS and the criminal justice system

Specialist panels of magistrates or judges should be set up in the court nominated to hear OHS cases. The intention is not to establish a new court. Specialist panels should enable more informed treatment of OHS cases. Panel members would become progressively better informed about health and safety and their practical management in the workplace.

Sentencing guidelines should be established in each jurisdiction to assist the courts when deciding penalties. They should be restricted to setting out the major factors — for example, the absence of a systematic approach to risk management — which are relevant when deciding the severity of penalties. By doing so they would help to ensure consistency in the sentencing process within and across jurisdictions. The intention is not to provide a table of penalties for a range of situations.

Penalties and sanctions

The *maximum penalties* should provide the courts with the ability to impose a credible deterrent, after allowing for the probabilities of detection and conviction. The Commission proposes that governments consider maximum fines of at least \$100 000 for individuals and \$500 000 for corporations.

In the longer run, the appropriate levels are likely to be much higher. These would be best determined after an evaluation of sufficient experience with the Commission's enforcement *and* regulatory reforms.

Inspectorates should make greater use of *on-the-spot fines*. Overseas evidence suggests that they can provide timely deterrence while minimising legal and administrative costs. On-the-spot fines should only be used for offences with a lower risk of harm or those that cause less harm. They must be complemented by an effective appeal system, thorough inspector training and a transparent enforcement policy setting out how they would be used.

Provision for *private actions* under OHS legislation would allow employees and other interested parties to prosecute breaches in their own right. This would facilitate the useful role played by trade unions in highlighting and maintaining minimum health and safety standards in workplaces.

Jurisdictions should consider a *wider range of sanctions* to make up for any limitations with monetary penalties. Possible penalties not currently in use are equity fines, publicity orders, internal discipline orders, preventive orders, corporate probation and community service orders.

Recommendations for more effective enforcement

Recommendation 12

The Commission recommends that inspectorates in each jurisdiction give a higher priority to deterrence in the enforcement of their OHS legislation.

Recommendation 13

The Commission recommends that enforcement in each jurisdiction focus on compliance with the duty of care.

Recommendation 14

The Commission recommends that specialist judges and/or magistrates be appointed within existing courts nominated to hear alleged breaches of OHS legislation.

Recommendation 15

The Commission recommends that governments develop sentencing guidelines for use by courts in determining appropriate penalties for breaches of OHS legislation. The guidelines should set out mitigating circumstances to which the courts should have regard in determining penalties.

Recommendation 16

The Commission recommends that all jurisdictions consider an immediate increase in the maximum penalties in their OHS legislation to the levels in Commonwealth Seafarer OHS legislation. Governments should also consider further increases in their maximum penalties over time.

Recommendation 17

The Commission recommends a system of on-the-spot fines for breaches of OHS legislation in all jurisdictions.

Recommendation 18

The Commission recommends that the right to bring private actions be provided in all OHS legislation.

Recommendation 19

The Commission recommends that governments consider the implementation of a wider range of corporate sanctions in each jurisdiction.

Administration of enforcement

Changes to the administration of enforcement must accompany more effective enforcement measures. A shift to greater deterrence requires that inspectorate resources be used to create credible deterrence without undermining voluntary compliance.

All jurisdictions should move to greater *transparency in enforcement* by publishing their enforcement policy in some detail. Transparency would contribute to a community debate on the issues, inform the public about how the government and the inspectorate intend to approach enforcement, and provide a basis for them to account for the outcomes. It would help to confirm the fairness of enforcement and the independence of the inspectorate.

Statutory inspections, and licensing and certification activities — such as registration of boilers and pressure vessels and the licensing of fork-lift drivers — place a heavy load on inspectorate resources. The performance of these tasks by others — other government agencies and the private sector — would free resources for pro-active enforcement.

Targeting of compliance inspections is usually based on data from workers' compensation claims. This is not very effective. All workplaces should, of course, be exposed to some risk of inspection and prosecution. Nevertheless, inspection would be better concentrated where enforcement can have the greatest impact on the risks to health and safety. This should be determined by an evaluation of the net gains to the community from increased compliance by different types of workplaces.

The *application of sanctions* by the inspectorate should give workplaces the strongest incentive to reduce the risks of injury and disease. To do so, the expected penalty to the duty holder of a breach must exceed the cost of immediate compliance to him or her. Prosecutions and on-the-spot fines deter all offenders before they are detected. Improvement notices only deter the individuals to whom they are directed, and then only when the breach is detected. For sanctions to provide credible deterrence, there should be an expectation that breaches will be prosecuted and the community informed of the outcome.

Specialised prosecution units within inspectorates — comprising inspectors, prosecutors and program administrators — should increase their ability to mount successful prosecutions. This has proved to be the case in New South Wales.

Greater deterrence in enforcement and a strong focus on the duty of care will place greater demands on the inspectorate. Inspectors will need to be properly trained, so that they can exercise their powers effectively and avoid costly,

unsuccessful prosecutions. Inspectorates will also need to establish clear operational policies and procedures to guide inspectors.

Recommendations for administration of enforcement

Recommendation 20

The Commission recommends that the OHS agencies publicise their enforcement policy and practice to make their approach to enforcement explicit.

Recommendation 21

The Commission recommends that governments consider having statutory inspections, licensing and certification activities provided externally to the inspectorate on a fee-for-service basis.

Recommendation 22

The Commission recommends that compliance inspections be prioritised by targeting areas of non-compliance where the net benefit in terms of injury and disease prevention is expected to be greatest. There should be regular evaluation of the effectiveness of the targeting strategy.

Recommendation 23

The Commission recommends that where general deterrence is required to provide an incentive to invest in safety, there should be an expectation that offences will be penalised, in addition to receiving compliance notices.

Recommendation 24

The Commission recommends the formation of prosecution units within OHS inspectorates.

Recommendation 25

The Commission recommends that details of occupational health and safety convictions, including a description of the offence and the penalties imposed, be publicised by the responsible agency.

Recommendation 26

The Commission recommends that inspectorates in all jurisdictions:

- assess the qualifications and skills required to enforce the duty of care under a more deterrence-oriented enforcement regime;
- review the current qualification and skill base of inspectors; and
- implement measures to redress deficiencies where necessary.

Consistency in health and safety protection

The Commission considers that greater *consistency between the jurisdictions* in OHS regulation should be achieved by a process of co-operative federalism.

Although there can be difficulties in achieving such agreement in a Federation, it is desirable to avoid a Commonwealth–State contest. Such a contest would have debilitating consequences for effective OHS measures at both the national and State levels. Co-operation is preferred as the States have responsibility for OHS and possess the administrative infrastructure and expertise.

Co-operative federalism has worked in other areas to remove regulatory inconsistency between the jurisdictions — for example, the adoption of national standards by the National Food Authority.

The Commission proposes a new approach to national consistency in OHS protection based upon:

- template legislation for the core elements of OHS legislation;
- national standards that are confined to exposure limits and other appropriately mandated requirements for OHS legislation;
- provision for industry-based codes of practice and enterprise safety management systems to be recognised in all jurisdictions; and
- consistency in enforcement across jurisdictions.

The core elements in the template legislation should include:

- the duty of care of employers, employees and third parties;
- the specific duties which elaborate each duty of care;
- any defences given to holders of a duty of care;
- provisions for employee workplace representation; and
- provisions to recognise codes of practice and safety management systems.

This approach would achieve the benefits of greater consistency at least cost to the community.

Employers operating in multiple jurisdictions would benefit from the reduced compliance costs of a single regime. Employees would have the advantage of more equitable protection. Use of the template would allow these benefits to be quickly realised and maintained as the legislation is subsequently amended.

On the other hand, employers who operate in the one jurisdiction should not be disadvantaged. Uniform rights and obligations in the template are unlikely to discourage the regulatory innovation by the jurisdictions which can reduce compliance costs and promote better health and safety outcomes. Most of the

scope to do so is likely to be found in the specific requirements in subordinate legislation rather than the general provisions in the principal legislation.

Consistent regulatory outcomes also require consistency in enforcement. Inconsistent approaches to enforcement detract from competitive neutrality among employers. It is also inequitable that some face higher and more frequently imposed penalties than others for a similar offence.

The reforms proposed for the principal OHS legislation should apply to any *industry-specific OHS legislation*. The preferred approach is to repeal industry-specific legislation and extend the principal OHS regime to all industries. Where strong demands for industry-specific arrangements exist, they could be accommodated in subordinate legislation and in codes of practice.

The *ratification of Convention No. 155* of the International Labour Organisation (ILO) would be a valuable demonstration of the commitment by the Governments to the reform of their OHS regulation. Most States and Territories have already signified their agreement to ratification — those that have not are expecting to do so in due course. Ratification does not have to, and should not, lead to the Commonwealth legislating unilaterally. The Commission strongly favours co-operative implementation of ILO Convention No. 155.

Commonwealth industrial relations legislation can lead to inconsistencies in the protection of health and safety. It does so by allowing enterprise agreements and awards to override State OHS legislation inadvertently or deliberately. Enterprise agreements and awards are not always the most appropriate vehicles for setting minimum OHS requirements. Furthermore, the creation of standards in awards that are not amenable to effective enforcement poses significant problems. Codes of practice and enterprise safety management systems are more appropriate for such issues.

In its ratification of an award or an agreement dealing with OHS, the Australian Industrial Relations Commission should therefore have regard to the possible undesirable, and sometimes unintended, consequences of such awards and agreements.

Recommendations for greater regulatory consistency

Recommendation 27

The Commission recommends the use of template legislation to achieve a nationally consistent regime for occupational health and safety. The template should be incorporated in

the principal OHS legislation in each jurisdiction and should cover:

- the general duty of care of employers, employees, suppliers and others;
- the specific duties of employers, employees, suppliers and others;
- any specific defences given to those having a duty of care;
- the ‘right to know’ of purchasers and users of plant, equipment and materials;
- provision for the recognition of enterprise specific safety management systems and codes of practice;
- the minimum rights and responsibilities of employee workplace health and safety representatives; and
- provision for nationally agreed mandated safety requirements.

Recommendation 28

The Commission recommends that governments adopt a nationally consistent approach to OHS enforcement.

Recommendation 29

The Commission recommends that the Commonwealth Government ratify International Labour Organisation Convention No. 155, but not proceed to legislate unilaterally.

Recommendation 30

The Commission recommends that the Commonwealth Government amend the *Industrial Relations Act 1988* so that State OHS legislation has priority under agreements and awards except where the Australian Industrial Relations Commission determines otherwise, having regard for the protection of employees and enforcement.

Financial incentives for prevention

Governments should make greater use of the scope offered by *workers’ compensation* to prevent work-related injury and disease. The link between the level of workers’ compensation premiums and workplace health and safety can be a strong one. US studies have revealed that ‘experience-rated’ premiums induce businesses to invest in health and safety to reduce their compensable injuries and therefore the size of the premium.²

² ‘Experience-rated’ premiums relate the extent of the insurance premium to the costs of recent workers’ compensation claims on the employer. The latter is a proxy for the risk of claims in the future.

The Commission completed a comprehensive review of workers' compensation in its 1994 report, *Workers' Compensation in Australia*. Accordingly it has confined itself to selected issues raised by participants in this inquiry.

Workers' compensation agencies provide little encouragement for small to medium-sized employers to reduce the health and safety risks at their workplaces. 'Experience-rating' is not statistically valid in these cases. Nevertheless, there may be scope to reward prevention in other ways.

The workers' compensation agencies should make insured employers more aware of the link between their claims costs and their premiums. They should also publish plain English guides explaining how premiums are determined.

The method of *public funding of agencies and programs* can nullify the prevention incentive from the experience-rating of workers' compensation premiums. This is because some funding arrangements fully reimburse workers' compensation premiums, regardless of how well or badly the agency or program beneficiary performs. They are not penalised for poor performance and consequently have little reason to invest in prevention.

Governments should develop *purchasing guidelines* for use by their agencies to ensure that tenderers have sound risk management systems and practices. This practice is common in the private sector and has recently been adopted by the New South Wales Government for major construction projects.

Greater *disclosure by companies* of their health and safety performance in their annual reports would raise awareness and help to encourage a more pro-active approach by business generally. Greater disclosure would require directors to acknowledge how their company performs against its policy goals and raise shareholder and public awareness of these issues.

Recommendations for greater use of financial incentives

Recommendation 31

The Commission recommends that governments encourage rebates on workers' compensation premiums for those employers whose premiums are not experience-rated where they follow codes of practice or apply enterprise safety management systems.

Recommendation 32

The Commission recommends that workers' compensation agencies ensure that insured employers are regularly informed of the link between their premiums and their claims experience.

Recommendation 33

The Commission recommends that government expenditure programs that include funding for workers' compensation premiums, do so on the basis of the average premium for the industry in question, rather than the actual premium charged to the individual recipient of the funding. This principle should also apply to the funding arrangements for all government agencies.

Recommendation 34

The Commission recommends that government agencies, in awarding major contracts, consider requiring contractors to warrant that their safety management would fully comply with relevant OHS legislation. This may be achieved by requiring the relevant information to be submitted during pre-qualification of tenderers or in tender documentation.

Recommendation 35

The Commission recommends that the Institute of Company Directors be invited to draft guidelines on the disclosure by companies of their health and safety records in their annual reports.

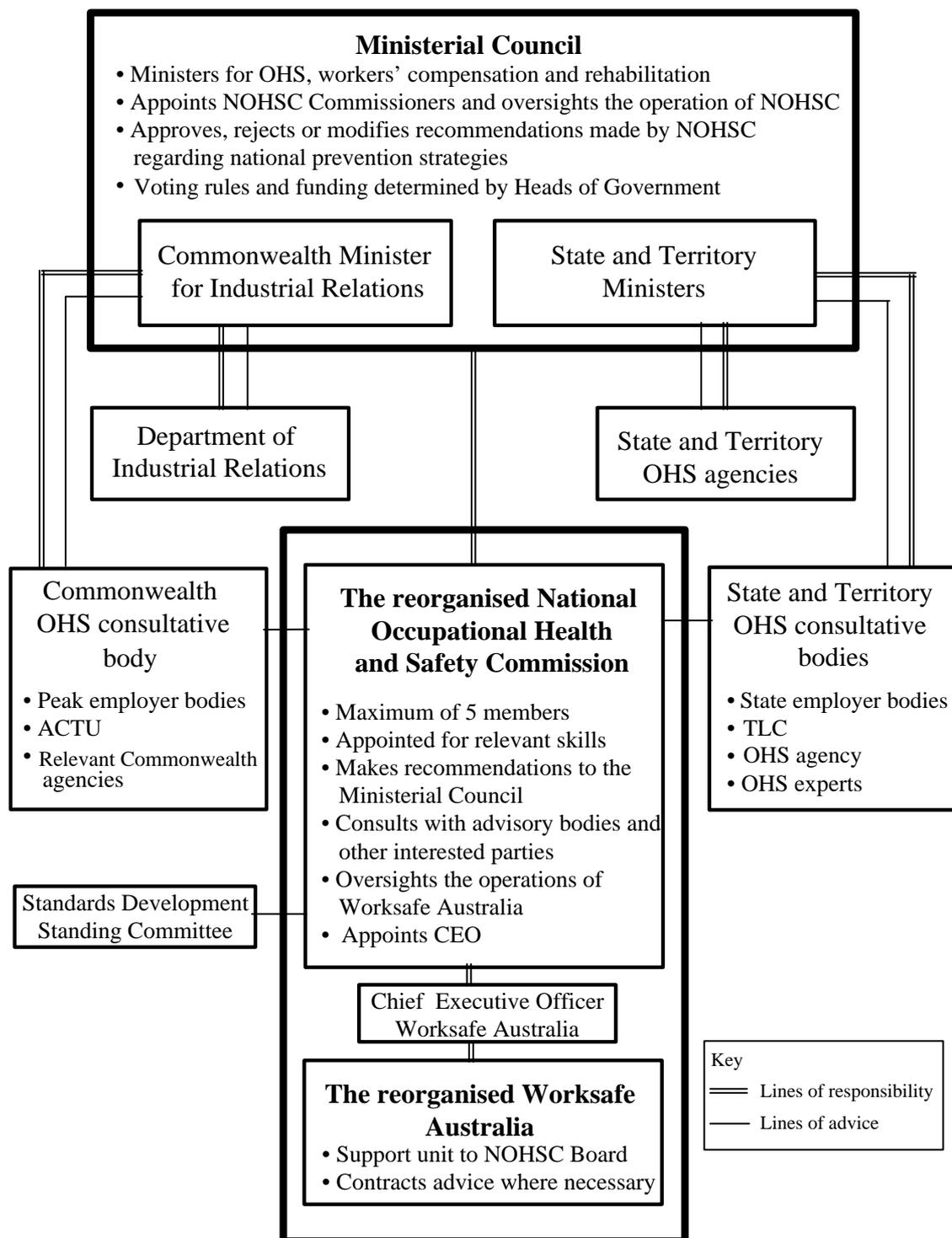
National institutions

National decisions should be made by those who have the authority to do so and who are politically accountable for implementing them. This implies that they should be made by the responsible Commonwealth and State Ministers.

The current structure of NOHSC involves an inherent dilemma. Each of its major roles implies a completely different kind of institution for that role to be performed effectively and efficiently. As shown previously, the present structure means that NOHSC is neither effective nor efficient as both a board of management and a consultative forum.

The Commission's solution to this dilemma is to create two institutions — each specifically designed for only one of the roles — and to structure each according to the needs of efficient execution of its role. The proposed arrangements are illustrated in Figure 2.

Figure 2 Proposed national institutional arrangements



A Ministerial Council

A Council of the responsible Commonwealth and State Ministers would increase the effectiveness and efficiency of the development and implementation processes. The Council should determine a genuinely national approach to workplace health and safety. Furthermore, it is desirable that the Council include the Ministers responsible for workers' compensation and rehabilitation. This would allow the Council to co-ordinate developments of OHS, workers' compensation and rehabilitation policy, where appropriate.

Establishment of a Ministerial Council would share responsibility for developing and implementing national OHS policy between all governments. Ownership by all is vital for worthwhile national programs.

The Ministerial Council's role should be to oversee policy development in areas where inter governmental co-operation would reduce duplication and facilitate better workplace outcomes nationally. It should provide a valuable forum for the development of OHS policy in a range of other areas:

- approving standards and determining priorities for proposed ones;
- overseeing the development of national programs — for example, research, statistics and awareness;
- determining performance benchmarks for Commonwealth, State and Territory programs;
- ensuring that programs are regularly evaluated; and
- ensuring national consistency in enforcement.

The Council's first major task should be to formulate the details of the template legislation agreed by the Council of Australian Governments (COAG).

The Ministerial Council may need to be complemented by administrative support to assist it in the development of its work priorities and timetables. This support could be provided by the heads of the relevant Commonwealth and State agencies.

A revamped NOHSC

The Ministerial Council should appoint a new NOHSC of no more than five members. Members should be selected on the basis of their expertise and skills. These should include practical experience of industry, the management of health and safety risks in the workplace, the development of government policy and programs, or the management of consultative processes. Members should cover the range of perspectives in the workplace.

The role of the revamped NOHSC should be to develop recommendations on legislation and prevention programs for the Ministerial Council to consider. Its activities should be in accordance with a corporate plan and work program agreed by the Ministerial Council.

The proposed arrangements would separate management of policy development from consultation with those with a stake in that development. This separation would provide for increased effectiveness and accountability for each function. The intention is not to diminish consultation, but to strengthen it through greater involvement of the various State advisory bodies. If necessary, this could be formalised by a requirement that NOHSC consult with these bodies.

There would be an advantage in all governments sharing the costs of the restructured NOHSC. It would enhance ownership of the national body and its activities by all governments. A typical arrangement for national bodies reporting to Ministerial Councils is for the Commonwealth to meet 50 per cent of the costs, with the States and Territories sharing the remainder on a per capita basis.

A new consultative forum

After its proposed restructuring, NOHSC could no longer perform the role of a consultative forum to advise the Commonwealth Minister for Industrial Relations. State members of the Ministerial Council would continue to have the benefit of their State's consultative body.

To fill this gap, a new consultative forum should be established to advise the Commonwealth Minister on matters to be considered by NOHSC and the Ministerial Council. The new forum should include representatives of the Commonwealth OHS agencies, the ACTU and national employer bodies, such as the ACCI and the National Farmers' Federation. It should also include representatives of Commonwealth agencies with a major interest in policy in areas related to OHS.

NOHSC should be responsible for managing the development of all national policies and programs, including national standards. Its work in standards development would be facilitated by retaining the Standards Development Standing Committee. The Standing Committee should advise NOHSC on priorities for standards development, and on the content of proposed standards.

The Standards Development Standing Committee should comprise equal numbers of nominated by the Ministerial Council, the ACTU and the peak employer organisations. People who are acknowledged for their expertise in the area under review but not directly affiliated to any of the tripartite partners should be able to be co-opted onto the Standing Committee.

Worksafe Australia

NOHSC should draw administrative support from a restructured Worksafe Australia. However, NOHSC should have the option to contract out development work to State OHS agencies and other appropriate organisations. The National Commission should appoint the CEO of Worksafe who should be responsible to NOHSC. The Ministerial Council should approve the corporate and operational plans of NOHSC and Worksafe.

Possible use of incorporation

The Commission suggests that governments consider the possibility of incorporating NOHSC and Worksafe under the *Corporations Act*. Incorporation could provide a legal structure which was consistent with the philosophy underlying the institutional reforms recommended by the Commission.

With incorporation, the agency would be a company to develop and manage OHS programs on behalf of its shareholders — the Commonwealth and State Governments. It would operate under a legal regime which would encourage and facilitate the members of NOHSC acting as the board of directors of the company. The day-to-day operation of the company would be the responsibility of the CEO and the staff of Worksafe. The Ministerial Council could be constituted as a meeting of the shareholders, called from time to time to approve the key decisions on the recommendation of the directors.

Recommendations for institutional arrangements

Recommendation 36

The Commission recommends that the Council of Australian Governments establish a Ministerial Council comprised of the Commonwealth, State and Territory ministers responsible for occupational health and safety, workers' compensation and rehabilitation in each jurisdiction. The core responsibilities of the Ministerial Council should be to:

- agree on OHS legislation;
- develop nationally mandated safety requirements;
- develop nationally consistent enforcement policies and practices; and
- benchmark the performance of OHS programs in each jurisdiction.

Recommendation 37

The Commission recommends that the National Occupational Health and Safety Commission be restructured. The National Commission should consist of no more than five persons. It should advise the Ministerial Council, undertake work directed by it, consult with governments and their consultative bodies, employer and employee representatives as necessary.

Commission members should be selected on the basis of their expertise and skills. Their expertise and skills should include practical experience of industry, the management of health and safety risks in the workplace, the development of government policy and programs or the management of consultative processes.

Recommendation 38

The Commission recommends that Commonwealth, State and Territory Governments contribute to funding the Ministerial Council, the new National Occupational Health and Safety Commission and its programs.

Recommendation 39

The Commission recommends that the Commonwealth Government establish an occupational health and safety advisory council with representatives from the peak employer organisations, the Australian Council of Trade Unions, the relevant Commonwealth agencies (including Comcare and the Department of Human Services and Health), and experts in occupational health and safety. The council should advise the Commonwealth Minister on matters before the Ministerial Council.

Recommendation 40

The Commission recommends that the Standards Development Standing Committee be retained to advise National Occupational Health and Safety Commission on the development of standards. The Standing Committee should comprise equal numbers of nominees of the Ministerial Council, the ACTU and the peak employer organisations. The Standing Committee should be able to co-opt OHS experts. Any dispute between the Standing Committee and the restructured National Occupational Health and Safety Commission should be advised to the Council of Ministers.

National research

Two principles should determine how the national research arrangements are reformed.

First, applied research should be specified by its users — those in workplaces and government — to ensure that it meets their needs. Those responsible for undertaking applied research should not be the sole source of advice on the

allocation of research funds. NOHSC does not have to conduct research — applied research to support national programs can and should be contracted out, possibly through State OHS agencies.

Second, research funding should be made contestable as far as practicable. In principle, funding should be open to all who could do the job, unless the costs of allocating funds this way outweigh its benefits. Contestability has numerous advantages — it promotes efficiency in the delivery of research, transparency in funding decisions and flexibility in the allocation of scarce research funds.

To provide for contestability, responsibility for funding research should be separated from the conduct of research. This is necessary to remove any conflict of interest in the decisions on the allocation of research funds.

Separation of National Institute from NOHSC

To ensure that the arrangements for the conduct and funding of research can meet the above requirements, the National Institute for Occupational Health and Safety should be separated from NOHSC. It should be set up as an autonomous research agency to undertake research on a fee-for-service basis.

Centres of excellence

Research centres should be invited to compete for block funding for a small number of centres of excellence in OHS research. Selection of the centres should be based on predetermined selection criteria and should not be confined to higher education institutions. The criteria should not discourage bids from new centres.

The National Institute should initially be best retained as a centre of excellence. In any event, it should have to compete with other researchers for all of its funding.

Research programs in other areas are delivered through research centres. The Australian Research Council (ARC) funds key centres in higher education institutions and the National Health and Medical Research Council (NHMRC) offers program and block grants to a range of medical research institutions.

Funding of national research

Commonwealth, State and Territory Governments have to decide whether they want a strong national program of OHS research and whether they are prepared to contribute towards its cost.

The choice of the most appropriate body to allocate any national funding for research depends upon the decisions reached on these two issues. Either the

ARC or the NHMRC would be capable of performing this function — they would have the advantage of applying an approach to the selection of OHS research consistent with what is done in other areas of research.

Under the proposed program for centres of excellence, research would tend to be carried out wherever it could be most efficiently conducted. As a consequence, a range of research institutions would tend to emerge. State Governments are more likely to contribute to a national approach to OHS research if the research effort is relevant to their jurisdictions.

Role of NOHSC

Until these issues on the funding of national research are resolved, the reorganised NOHSC should decide the allocation of block and project funding for OHS research. The research priorities should be determined by the Ministerial Council on advice from the NOHSC. The priorities should be set out in a published research plan. NOHSC should select the ‘centres of excellence’ and decide the external grants, consistent with the research plan.

The Research Standing Committee should be retained to advise NOHSC — and the Ministerial Council — on research priorities and proposals for funding. Involvement of the industrial parties on such a Standing Committee would help to ensure that funding decisions are relevant to the needs of the workplace. This should lead to greater adoption of research results by industry.

The new NOHSC should also be required to consult with State OHS agencies and State advisory bodies on research priorities and candidates for centres of excellence.

National information

The issue of measuring national performance in health and safety at work requires urgent attention by the Ministerial Council. Relevant, accurate and timely measures are essential for informed decisions on national OHS priorities and for the design of efficient prevention programs.

The National Data Set (NDS) for Compensation-based Statistics does not provide the information required. The NDS is out-of-date, inconsistent and substantially incomplete — data from workers’ compensation claims cannot give a reliable indication of work-related injury and disease.

Soundly based OHS statistics are a prerequisite for sound measures of the performance of OHS programs. There is insufficient information on the causes, levels and costs of work-related injury and disease to assess the effectiveness of prevention strategies and programs.

Recommendations on research

Recommendation 41

The Commission recommends that the National Institute of Occupational Health and Safety be established as an autonomous research organisation separate from the National Occupational Health and Safety Commission. The National Institute should be required to compete for funding and be allowed to undertake research on a fee-for-service basis.

Recommendation 42

The Commission recommends that block funding be provided to a small number of centres of excellence in occupational health and safety research.

Recommendation 43

The Commission recommends that the Ministerial Council decide the priorities for public funding of national occupational health and safety research on the advice of NOHSC. NOHSC should be responsible for allocating the funds for the centres of excellence and for research projects.

Recommendation 44

The Research Standing Committee should be retained to advise NOHSC on research priorities and funding. The Standing Committee should continue to be tripartite in character but have fewer members. Any dispute between the Standing Committee and NOHSC should be advised to the Ministerial Council.

Recommendation 45

The Commission recommends that the proposed Ministerial Council, as a matter of priority, agree on a strategy to improve knowledge of the state of occupational health and safety in Australia and to establish key measures of performance for OHS programs.

Chemical assessment

The Executive Officer for the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) reports to the responsible Commonwealth Minister through the CEO of Worksafe.

As NICNAS is a purely Commonwealth program, it would be inappropriate for the Scheme to be responsible to the proposed Ministerial Council. Therefore the administration of NICNAS should be separated from Worksafe.

NICNAS would be more effective if priority were to be given to assessments of those chemicals that pose the greatest risks. The Scheme would also be enhanced by more consistent assessment procedures. Selection should be based on estimates of the risk and the extent of the possible harm. Rather than automatically assessing all chemicals introduced to Australia since the Scheme's inception, a screening process should be used to determine when a full assessment is needed.

Consideration should be given to combining the independent scientific assessments of hazards which are conducted by various Commonwealth agencies. This should be done in such a way as to leave enforcement and administration of the relevant policy, which draws on these assessments, with the agencies in question.

Recommendation for chemical assessment

Recommendation 46

The Commission recommends that the National Industrial Chemicals Notification and Assessment Scheme be separated from Worksafe. The Commission recommends that the Commonwealth Government consider creating a single agency to provide scientific advice on hazardous materials.

Improving the OHS Agencies

Accountability of OHS agencies to government and their stakeholders is generally poor, although some perform better than others. There is limited assessment of the benefits and costs of individual programs. The reporting of performance measures in agency annual reports is not very systematic.

As closer ties are formed between the workers' compensation and OHS agencies in most jurisdictions, the funding of occupational health and safety from insurance premiums has risen proportionately.

There is a case for a mix of funding sources for OHS programs. Workers' compensation funds are appropriate when the beneficiaries of the OHS program are those who pay the premiums. Awareness and research programs can be targeted in this way. Even so, OHS agencies should regularly evaluate such funding to ensure that its benefits outweigh any costs. Consolidated revenue is to be preferred where the program has a wider impact than workers' compensation premiums — enforcement is such an activity.

Integration of OHS and workers' compensation

The Commission is unable to comment conclusively on whether integration of the agencies is the best arrangement in all circumstances. There are some potential advantages for the administration of OHS programs — for example, sharing information and access to funding. On the other hand, it would be undesirable if workers' compensation operations diffused the strong focus on prevention that should be part and parcel of OHS.

What is clear is the need to integrate policy development on occupational health and safety with that for workers' compensation. This would assist the prevention of injury and disease at work. For example, integration allows full realisation of the potential of workers' compensation to prevent such outcomes.

Mining inspectorates

There would be benefits from integrating *mining inspectorates* with the general OHS inspectorates. This would overcome concerns about the possibility of conflicting interests where an inspectorate is located in the department responsible for the development of the industry under inspection. With one larger inspectorate there would be a greater pool of skills and experience to be shared. The opportunities for inspectors to work in a variety of industries would also broaden their experience. However, mining inspection should be conducted by a specialised, discrete unit within the OHS inspectorate.

Integration should not mean a diminution or downgrading of inspection activities in the mining sector. Indeed, there would be administrative savings which could be used to increase the quantity and quality of the inspection.

Recommendations for improving the OHS agencies

Recommendation 47

The Commission recommends that OHS agencies be accountable for their performance. This means that their programs should:

- have clearly defined and measurable objectives;
- be adequately evaluated before implementation;
- have key performance measures; and
- be regularly monitored for their effectiveness and the results published.

Recommendation 48

The Commission recommends that the funding of OHS programs be from a mix of sources, including fee-for-service. Programs with broad community benefits should be largely funded by the taxpayer. Those that directly benefit employers with workers' compensation insurance should be largely funded by workers' compensation premiums.

Recommendation 49

The Commission recommends that governments integrate their occupational health and safety and workers' compensation policy making.

Recommendation 50

The Commission recommends that State and Territory Governments integrate mining inspectorates with the OHS inspectorate. However, a discrete and specialised mining inspection unit should be maintained within the OHS inspectorate.

Health, safety and the environment

There is scope to increase the consistency of policies dealing with OHS, public health and safety, and the environment. To this end, the new Ministerial Council could be responsible for facilitating the integration of OHS policy with Commonwealth and State policies in related areas.

More can be done to reduce the scope for administrative overlap, by clarifying and streamlining agency responsibilities. If it is not possible to combine relevant functions in a single agency, a lead agency should be appointed to supervise co-ordination.

Government agencies might also examine the scope to combine service functions. One possibility is joint compliance inspection of workplaces for OHS, public health and safety, and environmental regulation. Another is to combine some research and advisory functions.

The need for co-ordination would be reduced if legislation were rationalised to simplify administration and compliance. This would be facilitated by, wherever possible, the adoption of common regulatory principles, the harmonisation of legal rules and the consolidation of legislation dealing with OHS, public health and safety, and the environment.

In this regard, governments might consider extending the principle of the 'duty of care' to the management of the risks to public health and safety, and to the environment. The approach recommended for OHS in this report appears to have some merit in the regulation of these areas. The essence of this approach

would involve:

- defining a general duty of care for all who influence the risks to public health and safety or the environment;
- elaborating the general duty with specific duties appropriate to the these areas, including rights to know, obligations to tell and duties to identify, assess and control risks;
- providing for certain mandated requirements as measurable and enforceable performance outcomes, unless it is more efficient to prescribe inputs or processes; and
- providing for risk management at the enterprise level or industry-based codes of practice, based upon the principles underlying the Australian Standards for quality management (the AS 3900 series).

Information, training and education

Awareness about OHS — both at the workplace and in the community — is poor. The evidence indicates that many employers and employees are unaware of the causes of workplace injury and disease, or of the potential benefits of reducing them. Often employers are not even aware of their basic legal responsibilities, particularly small to medium-size employers. This is despite the considerable efforts by a number of organisations — notably OHS agencies and the trade unions — to raise awareness of these issues.

Governments can facilitate the achievement of better OHS outcomes by dispelling ignorance about OHS and the control of risks. This could involve information, training and education. Such assistance is most appropriate where employers and employees generally benefit from the particular program.

Information

Currently the effectiveness of information programs is assessed using fairly simple methods, such as audience recall and audience response surveys. These techniques are important components of program design and evaluation.

In some jurisdictions OHS agencies provide information and advice to workplaces that are highly specific to the circumstances of the particular workplace. For example, the Victorian Occupational Health and Safety Authority provides trained officers whose specific role is to provide information to individual workplaces.

Employers should be willing to pay for such advice. However, there may be a justification for governments to subsidise some services where employers are

not generally aware of their legal obligations or the benefits of workplace-specific advice. This is more likely in the case of small to medium-sized employers.

Training

The Commission's preference is for employers to have a *duty to train* their employees, as far as 'reasonably practicable'. This duty would not compel each employee to attend a training course. Employers would simply have to ensure that their employees had the required competences. For some, the amount of training needed may be quite modest.

Most jurisdictions require employers to send *employee representatives* or members of *health and safety committees* to an approved training course on full pay. Such regulation is inefficient — it concentrates on processes not outcomes. It is at odds with the reforms to the vocational education and training system to focus on attainment of specified competences. Moreover, since OHS training is not part of that system, it remains marginalised even though a lot of effort is put into it, particularly by the trade unions.

The specific OHS competences for employee representatives and committee members should be set out in national industry competency standards, along with the health and safety competences for others in the workforce.

In line with the changes to the vocational education and training system, State recognition authorities should have responsibility for accrediting OHS training programs and providers.

NOHSC should continue to provide *training grants* to the ACTU and ACCI for the time being, albeit in a modified form. These grants make the best use of existing infrastructure and expertise within the two organisations whilst minimising administration costs. However, the training should ultimately be conducted by the ACCI and ACTU on a bipartite basis. This will encourage joint training of managers and employee representatives where this is appropriate.

Education

There is little need for governments to be directly involved in the delivery of courses for OHS professionals. Although seed funding may have been justified in the past to develop OHS courses, the recent rapid growth in the number of courses suggests that funding is no longer necessary.

Recommendations for information, training and education

Recommendation 51

The Commission recommends that agencies evaluate the effectiveness of their existing awareness programs in terms of their effects on outcomes before determining the nature and scale of future funding of such programs.

Recommendation 52

The Commission recommends that OHS agencies encourage the provision of workplace-specific advice on occupational health and safety by third parties. Governments should inform employers about the potential role such advice can play and consider facilitating the establishment of a system of voluntary accreditation within the private sector.

Recommendation 53

The Commission recommends that national Competency Standards Bodies consider including OHS competences in all national industry competency standards.

Recommendation 54

The Commission recommends that, for the time being, the National Occupational Health and Safety Commission continues to provide grants to the Australian Council of Trade Unions and the Australian Chamber of Commerce and Industry for workplace training in occupational health and safety. However, these grants should be ultimately used to facilitate bipartite training administered jointly by these two organisations.

BENEFITS OF REFORM

The Commission expects that the proposed reforms will produce significant improvement to workplace health and safety in Australia. Many businesses have been able to make dramatic improvements in their records in preventing injury and disease. This is being achieved chiefly by ensuring that OHS is a key element of a quality management approach to running an organisation.

The Commission's proposed reforms should have most impact on fatalities and permanent disability — the very outcomes that cause the greatest economic and social disadvantage. These relatively infrequent, but economically damaging, outcomes are rather poorly dealt with by existing policy measures. They are more appropriately addressed by measures which are strongly focussed on the duty of care and which do more to encourage the adoption of quality management of health and safety risks by those in the workplace.

The average saving from preventing a workplace injury or disease is about \$27 000 a year (expressed in 1993–94 dollars). This estimate, however, needs to be adjusted for the cost of compliance and implementation and the benefits of reducing pain and suffering by injured workers and their families.

The expected improvements to health and safety at work will reduce social disadvantage and isolation. Many permanently incapacitated workers are forced to subsist on incomes at or below the poverty line. Prior to their injury, most enjoyed stable and remunerative employment. Diseases such as hearing loss, and injuries that reduce mobility such as back problems, contribute to social isolation, especially of the elderly.

Many Australians have to change jobs or permanently cut back their work hours because of workplace injury and disease. They lose income and often must abandon a career after many years of vocational training. Workers who retain their job after a workplace injury or disease often continue to suffer pain and have to cut down their leisure activities.

In the case of migrants, especially those from non-English-speaking backgrounds, injury and disease compounds problems they already experience in the community. Such workers have a significantly higher risk of workplace fatality.

Employers will benefit from the increased flexibility and reduced compliance costs inherent in the Commission's proposals. There will be fewer, simpler rules focussed on key health and safety objectives. They will be cast in a way

that allows workplaces, individually or collectively, to work out the best way to meet their legal objectives.

The benefits are not confined to the larger employers. Small to medium-sized enterprises (SMEs) should gain too. They will be able to develop their own codes of practice. Such codes will meet the needs of SMEs for more, and more practical, advice on meeting their legal obligations. Where it is justified, financial assistance should be provided by government to assist groups of SMEs in developing their codes of practice. Greater transparency in enforcement will be of particular benefit to SMEs given their limited exposure to the inspectorate and their need for more certainty in how enforcement will be conducted. The increased use of workers' compensation rebates to encourage better prevention will largely benefit SMEs, as experience-rated insurance premiums are not feasible for them.

Unions would be relieved of some of the burden of bringing about improvements to work health and safety. Furthermore, they would be able to play a more effective role in the development and application of workplace solutions to health and safety problems. With their involvement, industry-based codes of practice would establish safety practice benchmarks that are widely recognised and accepted. Beefed-up enforcement would reduce the number of recalcitrant employers with unsafe workplaces.

Better health and safety outcomes are generally linked to better public health and environmental outcomes. Incidents involving hazardous substances can harm workers, the adjacent community and the environment. To the extent that this is the case, improvements in OHS should be associated with improvements in the environment and in public health and safety.

IMPLEMENTATION OF REFORM

The way reform is implemented can have a profound bearing on the likelihood of its success. It affects the capacity of the regulatory regimes and the responsible institutions to accommodate the continual change which is necessary to realise the full benefits of the reforms.

The critical implementation tasks for the Commonwealth, State and Territory Governments are:

- to agree on the template legislation for OHS;
- to monitor progress on reforming OHS legislation in each jurisdiction;
- to establish the Ministerial Council; and
- to reorganise the NOHSC.

Achievement of these outcomes would represent a renewal of the commitment of all governments to improve health and safety at work in Australia. It would also represent a major achievement in advancing microeconomic reform and improving social justice.

Agreement on each of these major reform initiatives would most appropriately be reached in the COAG. This would reflect the national significance of these initiatives and would demonstrate the strength of the commitment of all governments to achieve better health and safety outcomes for every Australian workplace.

Endorsement by Heads of Government is required if the proposed reforms are to be implemented in a fashion which is both timely and commensurate with the importance of the reforms. In particular, it is critical that governments agree that industry-based codes of practice and enterprise safety management systems developed in any one jurisdiction can be recognised in all jurisdictions.

The economic and social cost to the nation of work-related injury and disease are such that the policy changes should be progressed as quickly as possible — without compromising the integrity of the proposed regulatory, administrative and institutional reforms.

1 THE INQUIRY

The level of health and safety at work has important consequences for all Australians. The costs of work-related injury and disease are high — injured workers face financial costs as well as pain and suffering, businesses incur workers' compensation premiums and losses in productivity, and the community pays through higher social security payments and subsidised medical services.

This inquiry is about finding better ways of *preventing* work-related injury and disease. A particular focus of the inquiry is how governments should intervene to ensure minimum levels of workplace safety and facilitate better outcomes.

The inquiry terms of reference are reproduced on page iv. In accordance with standard practice, all governments were consulted on the terms of reference of this inquiry.

The Assistant Treasurer announced the inquiry on 23 May 1994. The Commission was to submit its final report to the Commonwealth Government 12 months thereafter. The Assistant Treasurer subsequently extended the inquiry by two months to give interested parties more time to prepare their initial submissions. A further extension of six weeks was granted to allow sufficient time to consider the large public response to the draft report and the late submissions by some State governments.

This inquiry is preceded by the following reviews.

In the national arena:

- *Report of the Interim National Occupational Health and Safety Commission* (1984); and
- *Report by the Review Committee to the Minister for Industrial Relations* (1990).

At the State level:

- *Report of the Occupational Safety, Health and Welfare Steering Committee* — South Australia (1984);
- *OHS: Transforming Industrial Relations in Australia* — New South Wales (1989); and
- *Report of the Enquiry into the Operations of the Occupational Health, Safety and Welfare Act 1984* — Western Australia (1992).

The 1990 Ministers of Labour Advisory Committee (MOLAC) conference resolved that NOHSC standards should 'as far as practicable' be accepted as

minimum standards and implemented in the States and Territories. In August 1990 NOHSC agreed to develop an integrated National Standards Action plan to determine national priorities for standards development. At the October 1990 Special Premiers' Conference, heads of government agreed to pursue 'mutual recognition' in the context of regulatory reform initiatives. In November 1991 Labour Ministers agreed to achieve national uniformity of OHS standards by the end of 1993.

The Commission completed an inquiry into workers' compensation in Australia in 1994 (IC 1994a). As part of the inquiry, the Commission made recommendations affecting occupational health and safety. Governments are currently considering the implementation of the Commission's recommendations.

1.1 Inquiry scope

The Commission examined the occupational health and safety policies and programs of State, Territory and Commonwealth Governments. The links between occupational health and safety, public health and environmental policy and programs have also been examined in those areas where administrative and regulatory overlaps occur.

The inquiry encompasses the following areas:

- regulatory regimes;
- enforcement;
- national uniformity;
- institutional arrangements;
- research and information;
- financial incentives; and
- information, training and education.

All aspects of workplace health and safety were covered. However, particular attention was paid to hazardous chemicals and dangerous substances because of their role in occupational health and safety.

As directed by the terms of reference, the Commission has reported on the levels, costs and causes of occupational injury and disease. In doing so, particular attention was paid to ethnicity and gender issues.

The recommendations in the Commission's report on workers' compensation in Australia have not been re-examined unless they have implications for the reform of occupational health and safety that were not foreseen at the time that

report was finalised. The Commission believes that the recommendations of this inquiry can be implemented independently of any action by government on the recommendations contained in its workers' compensation report.

1.2 Inquiry procedures

The Commission distributed an issues paper in June 1994 to assist participants prepare their initial submissions to the inquiry.

Five consultancies were commissioned in the course of the inquiry. The subject of the consultancies were:

- the legal, institutional and industrial relations environment in other countries;
- regulatory compliance in Australia;
- Commonwealth Government power to legislate in respect of occupational health and safety;
- causes of occupational injury and disease: and
- the 'duty of care' and the concept of 'reasonably practicable' in OHS legislation.

A household survey was undertaken on behalf of the Commission by the Australian Bureau of Statistics over four two-week periods to measure the level of work-related health problems in Australia. Also, the Business Council of Australia assisted the Commission by surveying its members on the costs imposed by the lack of uniformity in OHS legislation across Australia (IC 1994d).

The Commission has a policy of consulting with a wide cross-section of the community. Informal discussions were held in all States and Territories with State, Territory and Commonwealth Governments, unions, industry associations, workers and managers, and health and safety professionals. In addition, the Commissioners and senior staff attended meetings and presented papers at conferences — particularly after the release of the Draft Report.

Workplace health and safety is largely in the hands of employers and their workers. The Commission, therefore, has placed great emphasis on discussing issues with people in their workplaces. Examples of workplaces visited include:

- petrochemical manufacturing and road construction sites in Victoria;
- automotive assembly and component manufacturing in South Australia;
- alumina refining in Western Australia; and
- aluminium smelting and coal mining in New South Wales.

Workers severely affected by work-related injury and disease were also approached so that the Commission could gain a better understanding of the consequences of inadequate workplace health and safety. For example, a visit to the Victorian Injured Workers' Centre took place in June 1994 shortly after the inquiry commenced.

Individuals and organisations who may not have the resources or access to the Commission's inquiry process, as many others do, were also contacted. For example, all State, Territory and national ethnic community councils were contacted. This was followed by a workshop presentation at the annual conference of the Federation of Ethnic Communities Councils of Australia in Hobart in December 1994.

Over 240 submissions were received prior to the draft report. Public hearings were held in all capital cities across Australia. There were 25 days of hearings at which 118 participants presented their submissions.

The Commission released a draft report on 12 April 1995. In response, the Commission received a further 176 submissions. Hearings were again held in all capital cities to provide an opportunity for those interested to present their comments on the draft findings and recommendations. There were 19 days of hearings at which 88 participants presented their submissions.

Further information on the conduct of the inquiry, including details of the consultancies, is contained in Appendix T.

1.3 Commission's approach

The Commission's charter requires it to take an economy-wide perspective and to formulate recommendations that serve the broad community interest, not just the interests of particular groups. Accordingly, the Commission's approach in this inquiry has been to identify arrangements that will produce better workplace health and safety outcomes for workers, employers and the community.

The Commission's starting point in developing policy principles was the 1972 Report of the United Kingdom Committee on Health and Safety at Work (the Robens Report). This report has had a profound influence on government policy and programs in both the United Kingdom and Australia. The Committee's philosophy on risk management and the role of government is widely accepted and adopted.

There is a dearth of information on the level, causes and costs of work-related injury and disease in Australia. In the Commission's view, this situation has arisen because research has been focussed on standards development to the

neglect of preventive strategies, policy studies and government programs. Furthermore, Commonwealth, State and Territory OHS agencies have not adequately evaluated or monitored the effectiveness of their OHS programs.

As a result, the Commission had to collect information in order to gain a broad understanding of the state of occupational health and safety in Australia. However, there is still insufficient information for the Commission to report as directed by the terms of reference, on the broad strategies that should be undertaken to achieve optimal outcomes in preventing occupational injury, illness and disease for the next decade.

In view of the paucity of information, the Commission's approach was to:

- develop a framework for efficient and equitable regulation that provides for national consistency;
- seek ways of clarifying the responsibility and increasing the accountability of institutions and agencies; and
- indicate how the effectiveness and efficiency of government programs would be improved.

The Commission's aim was to ensure prevention is effective by making those in the workplace responsible for their duty of care. This requires government involvement to be confined to the areas of its responsibility — defining legal responsibilities and rights, mandating safety requirements when it is efficient to do so, enforcing legislation and providing information and advice when this can be justified on 'public good' grounds.

The goal is to establish regulatory and institutional arrangements and incentive structures that will promote prevention by encouraging best practice in the workplace and efficient and effective government programs.

1.4 Structure of the report

This report is in two volumes. Volume 1 (this volume) contains the overview and the chapters of the report, which outline the Commission's key findings and recommendations.

In the next chapter, the levels, costs and causes of occupational injury and disease are discussed.

An analysis of the existing regulatory regime is presented in Chapter 3 along with the Commission's proposals for the overall approach to the reforms of regulation. This is followed by Chapters 4 to 6 outlining proposals for the principal OHS Acts, regulation in subordinate legislation and voluntary arrangements such as industry codes of practice and enterprise safety systems.

In Chapter 7, the Commission's proposed approach to enforcement is outlined. This is followed by Chapter 8 that proposes reforms to the way inspectorates operate.

In Chapter 9, proposals are put forward for achieving national consistency in workplace health and safety requirements.

The role that workers' compensation and other financial incentives can play in encouraging better management of workplace safety is discussed in Chapter 10.

The National Occupational Health and Safety Commission and other national institutional arrangements are discussed in Chapter 11. This is followed by Chapter 12 and Chapter 13 on arrangements for national research and chemical assessment respectively.

In Chapter 14, State and Territory government OHS agencies are analysed. In Chapter 15, the prospect of achieving greater co-ordination between occupational health and safety and other related policies (such as public safety and the environment) is discussed.

Training and education aimed at improving awareness of occupational health and safety are considered in Chapter 16. The economic, social and environmental gains stemming from a reduction in occupational injury and disease are outlined in Chapter 17.

Volume 2 of the report contains appendices, which present supporting material that describe and analyse existing arrangements and options for reform.

* * * * *

In most cases, where the Commission refers to work-related injury and disease, it should be taken to include fatalities and illnesses.

Wherever the Commission refers to the States it should be read as the States and Territories.

2 HEALTH AND SAFETY AT WORK

In this chapter the incidence of injury and disease at work and the costs they impose on injured workers, their employers and the rest of the community, are documented. This is followed by a discussion of the various factors that lead to occupational injury and disease and how they may best be controlled at the workplace.

An understanding of the level, causes and cost of workplace injury and disease is essential to the development of effective and efficient prevention programs by individual workplaces, industry and government.

Further information about the level and causes of injury and disease is provided in Appendix B. Additional information about the extent and incidence of the costs of injury and disease is provided in Appendix C.

2.1 Information sources

The most widely used source of statistical information on work-related injury and disease in Australia is to be found in the National Data Set for Compensation-based Statistics (NDS) compiled by Worksafe Australia. The NDS uses data from workers' compensation claims collected by the Commonwealth, State and Territory workers' compensation agencies. The NDS has information about the number of work days lost and the characteristics of people suffering from work-related injury and disease (for example, gender, industry and occupation).

Because it is based on workers' compensation claims, the NDS significantly under estimates the extent of work-related injury and disease:

- Injury or disease that results in an absence from work of less than five days are not recorded because most workers' compensation schemes in Australia do not pay compensation for such outcomes.¹
- Not all work-related injury and disease is eligible for workers' compensation. This is particularly true for long latency diseases.
- Not all types of employment are covered by workers' compensation. The most notable exclusion is the self-employed. Self-employment dominates

¹ This cut-off in the NDS is about to be raised to absences of ten days because of an equivalent change in the workers' compensation scheme in Victoria.

in fishing, agriculture, road transport and much of forestry and construction. These are among the most highly hazardous industries.

- Not all those who are eligible for workers' compensation claim for their injury or disease, or are able to have it correctly recognised.

These exclusions appear to be concentrated in injuries and diseases that are associated with fatality or permanent disability. For example, only 5 per cent of the known cases of mesothelioma are in the NDS (Worksafe Australia, sub. 50, p. 139).²

Consequently, less than half of all work-related injuries and diseases are covered by the NDS. In addition, recent changes to workers' compensation schemes mean that the NDS cannot be used to determine trends over time in the level of injury and disease.

In light of these limitations, the Commission had the Australian Bureau of Statistics (ABS) survey the incidence of work-related injury and disease in the Australian population. The survey was commissioned to provide an estimate of the overall level of injury and disease and its consequences for lost work time and opportunities.

The ABS surveyed a total of 9200 households in four separate quarterly surveys as part of its Population Survey Monitor (PSM). The survey sought to identify respondents who had suffered from a work-related health problem over the fortnight before the survey was conducted.

The sample size was chosen to produce broad estimates of the level of injury and disease. It is insufficient to undertake more detailed analyses. Population estimates of less than 25 000 persons are statistically unreliable (see Appendix B for further details).

The survey used two definitions of a work-related health problem. One is a health problem caused by an incident at work or which a doctor or the employer had said was work-related. These are *confirmed* work-related health problems. The other definition is of those who *perceived* that their health problem was work-related — that is, their employer or doctor had not indicated it to be a condition that had resulted from work, but the worker believed it to be so.

There are other sources of information on the state of occupational injury and disease that are statistically reliable but they only have limited coverage. The National Health Survey conducted in 1989–90 by the ABS was limited to health problems resulting from incidents at work. A New South Wales WorkCover survey of workplace injury and illness in 1993 covered only that State.

² Mesothelioma is a cancer caused by prolonged exposure to asbestos. Such exposures are overwhelmingly associated with work.

Worksafe Australia's Work-related Traumatic Fatality Study (WTFS) of coronial records was limited to deaths from traumatic accidents at work for the period 1982 to 1984. The study excluded deaths from disease, as these are not usually investigated by the coroner.

The Commission also used the data for Western Australia compiled by the Department of Occupational Health, Safety and Welfare of Western Australia (DOHSWA). As much of this data is derived from workers' compensation claims, this information has some of the limitations that are common to all workers' compensation statistics. However, the data have been subject to rigorous editing by DOHSWA, and data on fatalities are not solely based on workers' compensation claims but are supplemented from other sources.

As with all statistics, the information they provide should be interpreted with caution and adequately qualified. Some examples of the problems that can arise in interpretation are highlighted in Box 2.1.

2.2 Incidence of injury and disease

The Commission's household survey revealed that, in any two-week period, between 2.1 and 2.9 per cent of the working population suffer from a work-related health problem and, as a consequence, have had to take time off work (see Table 2.1).³

Between 1.3 and 1.8 per cent of the working population had to reduce their normal duties at work because of the effects of their work-related health problems. This is broadly consistent with the ABS's 1989–90 National Health Survey which revealed that one in 20 workers was suffering from a work-related injury or illness.

Results from the New South Wales WorkCover survey indicated that over 8 per cent of the working population in New South Wales had suffered a work-related injury or illness at some time within the 12 month period to October 1993. Assuming that New South Wales is representative of other States, about 650 000 workers each year suffer a work-related injury or illness — that is, one in every 12 workers in Australia. Almost two-thirds of these workers are expected to take some time off work.

Worksafe Australia's WTFS revealed that there were 1544 traumatic work-related deaths from 1982 to 1984, or about 500 deaths per year.

³ This excludes workers who may have a work-related health problem but have not had time off work in the two weeks prior to the survey being conducted.

Box 2.1 Interpreting OHS statistics

When interpreting trends in OHS statistics, it is important to ensure that the period chosen is long enough to abstract from unusually high or low values and to be sure that there are no underlying confounding factors or circumstances.

The Department of Occupational Health, Safety and Welfare in Western Australia (DOHSWA) has analysed the level of work-related fatalities in that State over the period 1982–83 to 1993–94. It concluded that:

While the average rate of work-related fatalities in Western Australia increased over the long-term, there has been a strong downward trend since the proclamation of the Occupational Health, Safety and Welfare Act in 1988. Over ... the period 1988–89 to 1993–94 the incidence of work-related fatalities fell by 37 per cent (sub. 222, p. 14).

The size of the decrease in fatalities is sensitive to the period of time over which it is measured and the base year that is chosen. The base financial year used here, 1988–89, was a year with a particularly high number of fatalities — more than 30 per cent higher than the next highest figure over the past 12 years.

The use of another base year would significantly alter the extent of the change. For example, the number of fatalities in 1989–90 was close to the average number of fatalities per year for the period chosen. If 1989–90 is used as the base year, the fall in fatalities is 10 per cent.

Another example of the difficulty in interpreting OHS statistics can be found in the use of injuries and fatalities statistics for the mining industry.

A number of inquiry participants, including the Chamber of Mines and Energy of Western Australia (sub. 31), have referred to statistics which show that the incidence of serious injury and fatality has fallen dramatically in the Western Australian mining industry since the 1960s.

In this period, there have been significant changes in the composition of the mining industry in Western Australia. In particular, between 1960 and 1980 there was a substantial shift from underground mining to the relatively less hazardous open-cut mining. In 1960, open-cut mining accounted for just under half of total mining employment. By 1980, this figure had risen to over 90 per cent (WA Mines Department Annual Reports).

Hence much of the improvement in the incidence of serious injuries and fatalities in the Western Australian mining industry is simply due to structural changes within the industry.

Doll and Peto (1981) estimated that between 2 and 8 per cent of all cancers are due to hazardous substances used in the workplace, which equates to between 650 and 2200 work-related cancer deaths each year.

Taken together, these two studies indicate that there are approximately 1150 to 2700 work-related deaths in Australia each year.

International comparisons of the extent of work-related injury and disease are extremely difficult to make. A whole range of factors, including differences in definitions, classifications and the accuracy of recording, serve to limit the usefulness of comparing the health and safety performance of different countries.

Table 2.1 Work-related health problems, PSM 1994–95

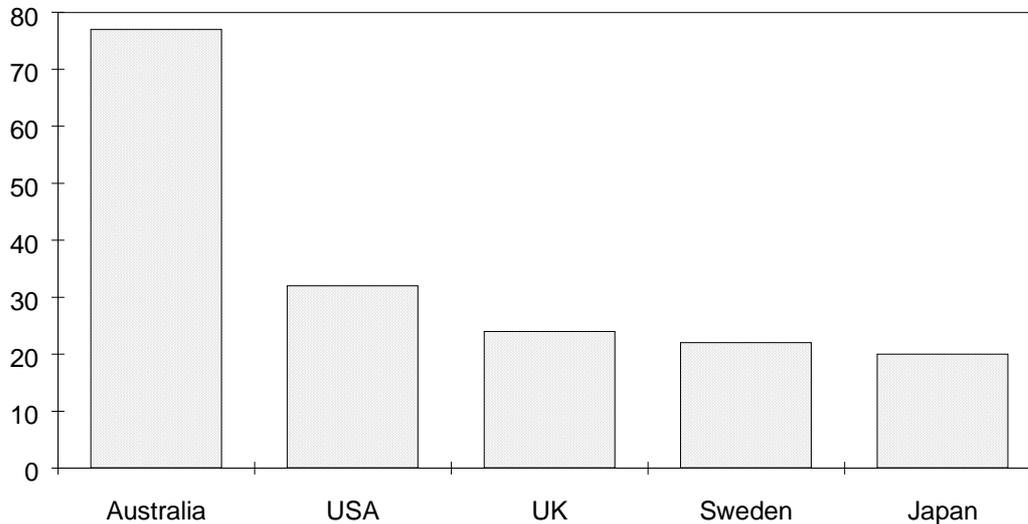
<i>Population group</i>	<i>Males</i>		<i>Females</i>		<i>Persons</i>	
	<i>('000)</i>	<i>(per cent)</i>	<i>('000)</i>	<i>(per cent)</i>	<i>('000)</i>	<i>(per cent)</i>
Those absent from work						
Confirmed	94.8	2.2	65.2	2.0	160.1	2.1
All	116.7	2.6	101.9	3.2	218.6	2.9
Those on reduced normal duties						
Confirmed	56.4	1.3	43.0	1.3	99.4	1.3
All	83.2	1.9	55.9	1.7	139.2	1.8
Those forced to take less paid work						
Confirmed	63.5	1.5	38.6	1.2	102.1	1.4
All	97.6	2.3	48.9	1.5	146.4	1.9
Those forced to change jobs						
Confirmed	57.5	1.3	43.3	1.3	100.8	1.3
All	75.1	1.7	50.5	1.6	125.6	1.7
Those unable to work						
Confirmed	117.3	..	53.6	..	170.9	..
All	137.2	..	63.6	..	200.8	..
Those over 65 years old						
Confirmed	90.7	..	22.3	..	113.0	..
All	143.8	..	43.7	..	300.5	..

.. Not applicable.

Source: Industry Commission.

Data published by the International Labour Organisation (ILO) for 1989 on fatality rates indicate that Australia performs poorly by comparison with other industrialised countries (see Figure 2.1).

Figure 2.1 Fatalities per million workers



Source: International Labour Organisation (1989).

Characteristics of workers at risk

Using information from the full range of available sources, the Commission has attempted to identify those factors that influence the likelihood of a person suffering a work-related injury or disease. These are discussed below.

Gender

Men are more at risk of workplace fatality and injury than women. Men constitute 57 per cent of the workforce but 94 per cent of the fatalities reported in Worksafe Australia's WTFS. Records of workers' compensation for fatalities in 1991–92 reveal a similar proportion.

In 1991–92, 3.9 per cent of male workers made a workers' compensation claim compared to 1.5 per cent of female workers. However, the PSM survey results reveal that a significant proportion of women suffer from health problems that they attribute to work-related causes.

In the four two-week survey periods, 3.2 per cent of female workers and 2.6 per cent of male workers took at least one day off work due to a confirmed or perceived work-related health problem.⁴ Over the same period, 2.0 per cent

⁴ This difference is statistically significant at the 90 per cent confidence interval.

of female workers and 2.2 per cent of male workers were absent from work due to a confirmed work-related health problem.⁵

There are many possible explanations for the different rate of both confirmed and unconfirmed absences for men and women — too many to analyse without a detailed study.

Non-English speaking backgrounds

New migrants, especially those with non-English speaking backgrounds (NESB), have higher work-related fatality rates than the average workforce. In their first year in Australia, NESB workers have almost four times the incidence of fatalities than their Australian-born counterparts.

Age and experience of workers

The NDS and WTFS both show that older workers have a higher incidence of workplace fatality (see Figure 2.2).⁶

The WTFS revealed that workers aged between 55 and 64 years had a significantly higher fatality rate of workers aged 15 to 19 years. The incidence of death by disease also increases sharply with age. The incidence of death among older workers may be even higher, as it is the older workers who die from long latency diseases that are poorly reported in workers' compensation and coroners' data bases.

The PSM survey revealed that younger workers (those aged 18 to 24) suffer a relatively high proportion of work-related health problems, compared to their proportion of the working population.⁷ The results also suggest that older workers (those aged 55 to 64) may suffer a relatively high proportion of work-related health problems.⁸

Furthermore, approximately 35 per cent of workers with work-related health problems had been in their job for less than a year before their health problem occurred.

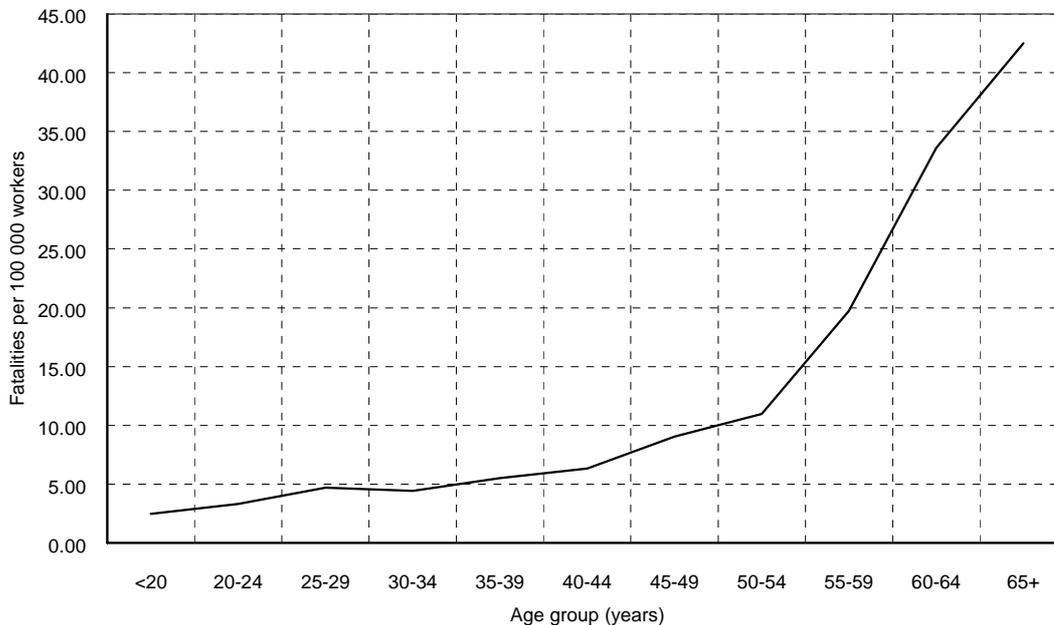
⁵ This difference is not statistically significant.

⁶ Data compiled by DOHNSWA on work-related fatalities presents a different picture. DOHNSWA found that workers aged 20 to 34 years were most at risk. The differences between data bases may reflect differences in the industry profile of Western Australia.

⁷ This result is statistically significant at the 95 per cent confidence interval.

⁸ This result is statistically significant at the 80 per cent confidence interval only.

Figure 2.2 Compensated workplace fatalities in Australia, incidence rate, 1991–92



Note: Fatalities incidence rate is the number of fatalities per 100 000 wage and salary earners.

Source: Worksafe Australia 1994 (p. 4) and unpublished national data.

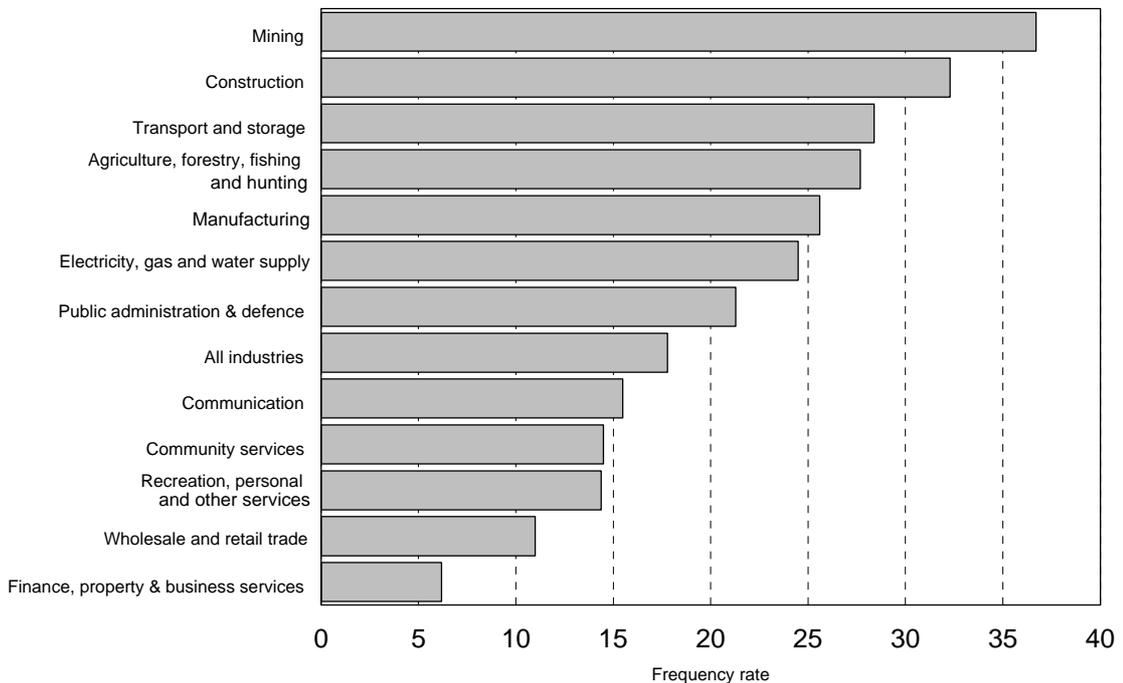
Industry of workplace

The industries with the highest fatality rates are the mining, transport, rural and construction industries. These industries also have the highest frequency rates (see Figure 2.3). Sales, communication, finance and business, community services and the recreation and personal services industries have lower than average injury or disease frequency rates.

Occupation

Those occupations with the most injury and disease are labourers, tradespersons and plant and machine operators. In a study by DOHNSWA, these three occupations accounted for 85 per cent of all fatalities, and had substantially higher lost-time injury rates (DOHNSWA 1994). Frequency rates recorded in the NDS show that incidents of non-fatal injury or disease are highest for these same groups of occupations (see Figure 2.4). Salespersons, managers, clerks and professionals have lower than average injury and disease frequency rates.

Figure 2.3 Compensated non-fatal injury and disease, frequency rate by industry, 1991–92



Note: Frequency rate is the number of claims per million hours worked by wage and salary earners.

Source: Worksafe Australia (unpublished National Data Set figures).

The PSM survey data reveal that there is little difference between the incomes of injured (pre-injury) and uninjured workers, whether they are male or female.

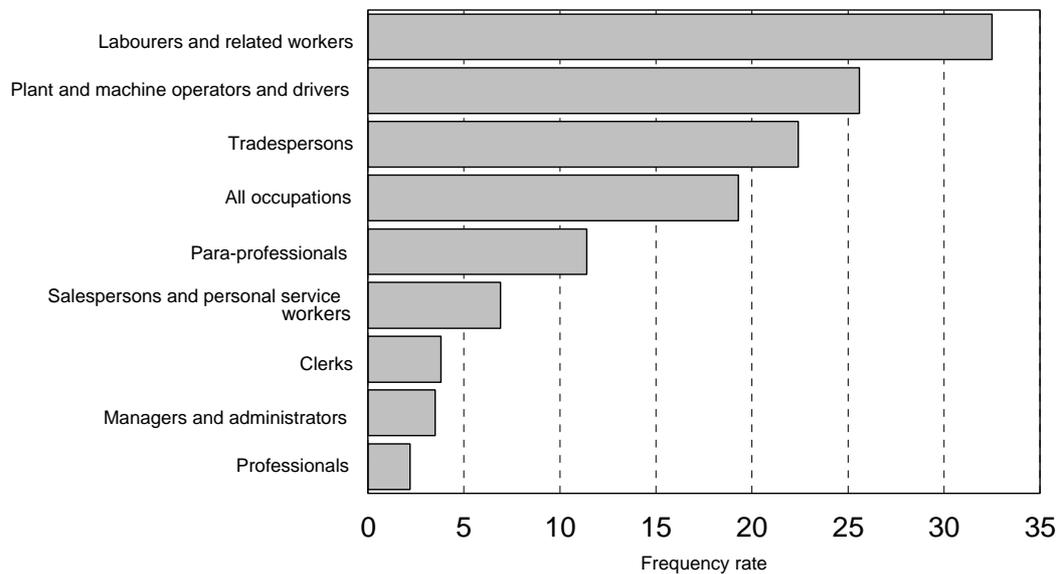
Size of workplace

PSM survey results reveal that, when the proportion of workers in different sized workplaces is taken into account, the workers most at risk may be those who work in workplaces employing less than five people (see Figure 2.5).

Although workplaces with less than five employees employ just 15 per cent of the workforce, over 21 per cent of all work-related health problems were attributed to them.⁹ Other workplaces experienced work-related health problems broadly in proportion to the number of workers employed.

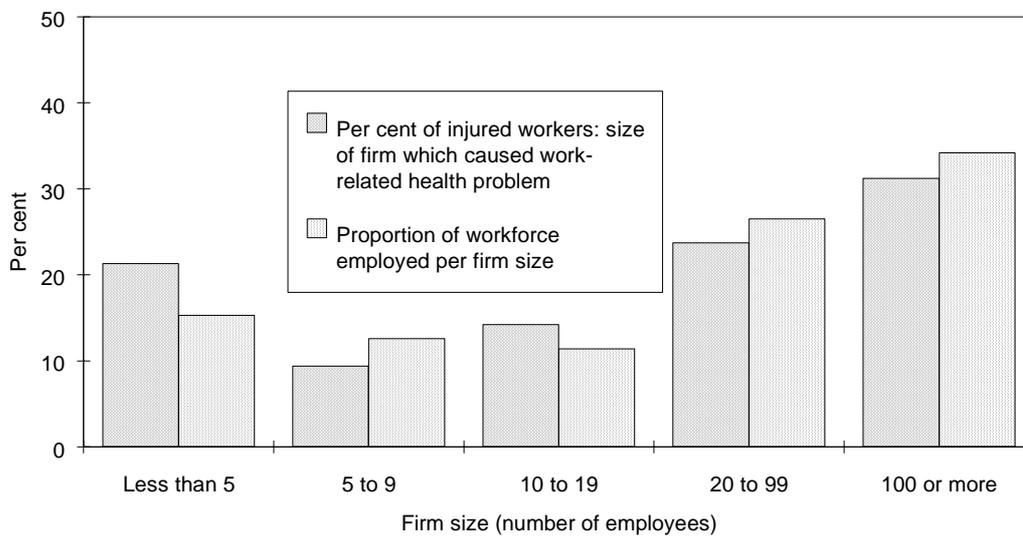
⁹ This result is statistically significant at the 80 per cent confidence interval only.

Figure 2.4 Compensated non-fatal injury and disease, frequency rate by occupation, 1991–92



Note: Frequency rate is the number of claims per million hours worked by wage and salary earners.
 Source: Worksafe Australia (unpublished National Data Set figures).

Figure 2.5 Employed labour force suffering a work-related health problem, by business size, 1994–95



Source: Industry Commission (based on the PSM survey).

2.3 Cost of injury and disease at work

Work-related injury and disease undermines Australia's economic performance, thereby reducing living standards.

The Commission estimated that between 20 and 23 million working days are lost each year because of work-related injury and disease — 1.2 per cent of all working days. In comparison, working days lost due to industrial disputes totalled 467 000 in 1994. The PSM survey results also indicate that in any two-week period, up to 1.8 per cent of the workforce will be performing their normal duties at less than full capacity because of work-related health problems.

The Commission estimated the economic cost of injury and disease for six categories of severity (see Tables 2.2 and 2.3). The severity categories range from short periods off work with full compensation, to permanent incapacity and fatality. The estimates are based on unit costs for each severity category obtained from the South Australian workers' compensation scheme in 1992–93. These have been extrapolated to the rest of the country. A full description of how the costs were calculated is contained in Appendix C.

The costs to employers, injured workers and the community were calculated and expressed as a share of total costs. Costs include the loss of business productivity, extra overtime, loss of income and future earnings, social welfare payments and medical costs. To avoid double counting, workers' compensation payments were deducted from all of these costs. The cost that an injury or disease imposes in future years was discounted to the present, to determine the total costs that would be imposed in current and future years by injuries and diseases occurring in any one year.

The costs of work-related injury and disease to injured workers, their employers and the rest of the community were estimated to be more than \$20 billion a year (see Table 2.2). The cost is significantly higher than the amounts covered by workers' compensation premiums.

The ratio of the direct cost — the workers' compensation payments — to the total cost to the employer, the employee and community in 1992–93 for each State is also presented in Table 2.2. Since 1992–93, the amount covered by workers' compensation has decreased in some States because of tightening eligibility requirements and reductions in compensation benefits.

The Commission's estimate of the average ratio of direct to indirect costs of approximately 3:1 accords with the results of other research. For example, Oxenburgh and Guldberg (1993) estimated that the indirect costs could be up to 3.5 times the workers' compensation costs.

Table 2.2 The cost of injury and disease at work, by location of workplace, 1992–93

<i>Location of workplace</i>	<i>Lower estimate (\$ million)</i>	<i>Upper estimate (\$ million)</i>	<i>Indirect : direct cost ratio^a</i>
New South Wales	6 300	6 693	3.4 : 1
Victoria	4 812	5 109	1.9 : 1
Queensland	3 323	3 531	7.4 : 1
Western Australia	1 832	1 946	5.1 : 1
South Australia	1 710	1 828	2.5 : 1
Tasmania	472	501	4.7 : 1
ACT	365	388	2.0 : 1
Northern Territory	188	200	3.5 : 1
All	19 000	20 200	~ 3 : 1

a The indirect to direct cost ratio is based on the upper estimate of direct and indirect costs.

Source: Industry Commission.

The Commission estimates that the unit cost of work-related injury and disease averages between \$27 000 and \$28 000. However, the unit cost varies significantly with the severity of the incident (see Table 2.3).

Table 2.3 Unit and total costs work injury and disease incidents by severity, 1992-23

	<i>< 5 days off work</i>	<i>5 or more days off work and return to work on:</i>			<i>Permanent incapacity</i>	<i>Fatality</i>	
		<i>Full duties</i>	<i>Reduced duties</i>	<i>Lower income</i>		<i>Traumatic</i>	<i>Long latency</i>
Unit cost(\$)	1 000	8 500	28 200	146 300	591 600	425 600	446 900
Total cost (\$m) ^b	140	1 060	2 420	4 560	11 540	300	na

na Not available.

- Zero or rounded to zero.

a Share of total incidents involving at least one day off work, rounded to the nearest 1 per cent.

b Upper estimate of total costs.

Source: Industry Commission.

Distribution of the costs

The total cost of work-related injury and disease is spread over employers, employees and the community. The Commission estimates that:

- employers bear about 40 per cent — costs include workers' compensation, loss of productivity, and overtime;

- injured workers bear about 30 per cent — costs include loss of income, pain and suffering, loss of future earnings, medical costs and travel costs; and
- the community bears about 30 per cent — costs include social welfare payments, medical and health costs, and loss of human capital.

The share of costs borne by injured workers rises sharply with the severity of the outcome while the share borne by their employers falls (see Table 2.4). Employers bear about 90 per cent of the cost of injury and illness resulting in less than five days off work. Where workers are permanently incapacitated, employers bear about 40 per cent of the cost, the community 40 per cent and the remaining 20 per cent by the individual. In cases of traumatic fatality, individuals and their family bear about 60 per cent of the cost, the community about 30 per cent, and employers 20 per cent.

Table 2.4 Distribution of cost of injury and illness by severity, 1992–93

	< 5 days off work	5 or more days off work and return to work on:			Permanent incapacity	Fatality	
		Full duties	Reduced duties	Lower income		Traumatic	Long latency
Employers (per cent)	90	90	90	40	40	20	30
Individuals (per cent)	-	-	10	50	20	60	50
Community (per cent)	10	10	10	10	40	30	20

- Zero or rounded to zero.

Note: Percentages may not add to 100 because of rounding to the nearest 10 per cent.

Source: Industry Commission.

Those workers who suffer the most severe outcomes bear the highest cost. Workers who are permanently incapacitated are estimated to incur an average cost of \$128 500. Those who suffer a minor injury (involving less than five days off work) face a cost of only \$10. The high cost borne by the permanently incapacitated is high because many workers' compensation schemes cut off, or substantially reduce, benefits for injured workers after a certain length of time.

The more severe outcomes account for the bulk of the total cost of work-related injury and disease. Outcomes involving permanent incapacity or death account for almost 60 per cent of total injury costs, despite their low incidence (see Table 2.5).

Although the incidence of permanent incapacity and fatality are low at 5 per cent of all injuries and illnesses, their unit costs are high at almost \$600 000 and \$430 000 respectively (see Table 2.3).¹⁰ Conversely, although the incidence of outcomes involving less than five days off work is high (about 35 per cent of all outcomes) the unit cost is relatively low (\$1000).

Table 2.5 Distribution of cost of injury and illness incidents and cost by severity, 1992–93

	< 5 days off work	5 or more days off work and return to work on:			Permanently incapacitated	Fatality
		Full duties	Reduced duties	Lower income		
Distribution of incidents (per cent) ^a	35	32	20	8	5	-
Share of total costs (per cent)	1	5	12	23	57	1

- Zero or rounded to zero.

a Share of total incidents involving at least one day off work, rounded to the nearest one per cent.

Source: Industry Commission.

Costs to government budgets

The Commission estimates that the cost to the Commonwealth budget of work-related injury and disease is approximately 3 billion, most of which falls on social security programs (see Table 2.6).

The cost to State and Territory budgets collectively is approximately \$600 million to, most of which falls on health programs.

Other studies have pointed to the cost of work-related injury and disease to the health system. Research by the National Injury Surveillance Unit (NISU) suggests that injury at industrial plants, mines and farms accounted for approximately 10 per cent of all hospital admissions for people aged 15 to 65 years in 1991–92 (NISU, unpublished). Data collected at some Australian hospital emergency departments indicate that around 20 per cent of injury attendances by persons aged 15 to 64 years are work-related (Harrison et. al. 1994, pp. 190–91).

¹⁰ The cost of a fatality does not include the value that the community or the individual places on his or her life.

Table 2.6 Government outlays due to injury and disease at work
(\$ million)

<i>Jurisdiction</i>	<i>Health and medical</i>	<i>Social security</i>	<i>Rehabilitation</i>	<i>Inspection and investigation</i>	<i>Travel</i>	<i>Total</i>
Commonwealth	680	1 950	860	0	0	3 500
States and Territories	410	0	0	110	180	710

Note: Based on the upper estimates of total injury costs. All estimates rounded to the nearest million dollars. Loss of human capital is the balancing community cost.

Source: Industry Commission

Costs to employers

The cost to employers of work-related injury and disease far exceeds workers' compensation payments. The Commission estimates that for every \$100 in workers' compensation payments by employers, there is an additional \$35 of extra costs incurred by employers as a result of workplace injury and disease (see Table 2.7).

The less severe an injury, the larger the share of indirect costs in the costs borne by employers. Employees are not compensated for many of the less serious outcomes. Such outcomes occur more frequently and cause costly disruptions to production, reducing productivity and inflating overtime costs. For example, for injuries where workers return to work on full duties, employers incur about \$230 in indirect costs for every \$100 in the cost of workers' compensation payments (see Table 2.7).

Costs to certain industries and enterprises

The cost of work-related injury and disease varies significantly between industries. The frequency of workers' compensation claims in the mining industry is six times greater than in the finance, property and business services industries, and twice as great as the all-industry average.¹¹ The frequency of claims in the construction, transport and storage and primary industries is also above the all-industry average (see Figure 2.3).

¹¹ The frequency rate is the number of claims expressed as a rate per million hours worked by wage and salary earners.

Table 2.7 Direct and indirect costs incurred by employers
(\$ million)

	<i>< 5 days off work</i>	<i>5 or more days off work and return to work on:</i>			<i>Permanent incapacity</i>	<i>Fatality</i>	<i>Overall cost</i>
		<i>Full duties</i>	<i>Reduced duties</i>	<i>Lower income</i>			
Direct cost	31	285	866	1 627	4 156	52	7 018
Indirect cost	91	667	1 174	293	223	11	2 458
Ratio of direct to indirect	1 : 2.9	1 : 2.3	1 : 1.3	1 : 0.2	1 : 0.1	1 : 0.2	1 : 0.35

Note: Based on the upper estimate of costs incurred by employers.

Source: Industry Commission.

There is evidence that the cost of workplace injury and disease varies significantly between enterprises in the same industry. A survey of lost-time injuries in the plastics and chemicals industries found significant variation in the lost-time injury frequency rate (LTIFR) of medium-sized enterprises (see Box 2.2).¹² A survey by the Australian Mining Industry Council found that LTIFR in the Tasmanian open-cut mineral sector was six times greater than the same sector in New South Wales. In the open cut coal sector, the LTIFR was over four times greater in Western Australia than in Victoria (AMIC 1994).

Government agencies spend around \$140 million on OHS programs, and employers spend significant amounts on measures to make the workplace safe. Although there are no overall estimates of the amount spent by employers, the Metal Trades Industry Association (1993) estimated the costs of complying with workplace health and safety requirements to be about 0.17 per cent of total sales. With total manufacturing turnover of about \$168 billion, this implies compliance costs of about \$285 million for manufacturing alone.

Impact on workers

Work-related injury and disease impose significant social costs on affected workers. Workers suffer pain, reduced earnings, reduced leisure and career opportunities, and loss of self-esteem. Families and others who provide support are also adversely affected. The loss is greatest for the families and friends of diseased workers.

¹² LTIFR measures the number of injuries involving an absence of at least one working day per million hours worked in each year.

Box 2.2 Workplace injury in the chemical and plastics industries

The Plastics and Chemical Industries Association (PACIA) conducts an annual survey of the occupational health and safety performance of its member chemical companies. The survey measures workdays lost per employee (WLPE) as well as lost time injuries of at least one day's duration per million working hours per annum (LTIFR).

In 1993, the results for the 26 companies with between 100 and 499 employees showed that there was significant variation in the safety performance of the individual companies:

<i>Company code</i>	<i>WLPE</i>	<i>LTIFR</i>	<i>Company code</i>	<i>WLPE</i>	<i>LTIFR</i>
022	0.192	2.4	034	0.078	2.8
023	0.098	17.1	054	0.195	9.6
033	0.000	0.0	041	0.214	1.6
001	0.265	9.5	062	0.590	25.7
065	0.584	20.8	059	0.530	33.0
025	0.950	49.5	056	0.000	3.4
048	0.005	1.3	047	0.830	73.3
068	0.531	3.1	005	0.384	34.0
029	0.392	6.6	061	2.845	128.7
037	0.054	4.3	066	0.578	27.1
074	0.184	12.4	044	1.377	144.3
016	0.305	8.9	083	0.110	3.8
076	0.000	0.0	080	0.128	8.8

For these companies, the average number of workdays lost per employee was 0.407. Some companies had not lost any workdays, although one company had an average WLPE of 2.845. While the average LTIFR for the group was 19.08, two companies had an LTIFR in excess of 100.

Source: PACIA (1994).

All of the injured workers that participated in this inquiry wanted to return to work. Since their injury, most had suffered a substantial deterioration in living standard, both financially and socially. In cases of serious incapacitation, the costs can be extreme. As one participant put it, 'The toll on human life cannot be taken too lightly either with its *sequelae* of suicide, mental disturbance,

marriage breakups, domestic violence and feelings of alienation, low self-image and failure' (sub. 113, p. 4).

The results of the PSM survey indicate that those who are permanently incapacitated suffer the most serious disadvantage. The survey revealed that there were an estimated 330 000 persons of working age who were suffering a confirmed work-related health problem. About half of them had been unable to work because of their condition.¹³

In the case of those unable to work at all, over 85 per cent had been unemployed for over a year and almost 35 per cent had not worked for over five years. The weighted-average income of these workers was \$9500. Close to 90 per cent had been working in the job which caused the injury or illness for over a year. The contrast between their stable employment experience prior to being injured, and their disadvantaged position after injury, illustrates the social cost of work-related health problems.

Over 270 000 workers have had to permanently reduce the amount of paid work they would like to do, or to change jobs because of the long-term effects of work-related injury or disease. Many of these workers would have suffered a substantial pay cut as a result.

Most of the workers who suffer a work-related injury not only have trouble performing their work activities, but their private lives are also affected. The worker suffering from hearing loss due to industrial noise has difficulty communicating in the workplace but, more importantly, is denied most of the social interaction everyone else takes for granted. This can result in the breakdown of their mental and social well-being.

Perhaps the most forgotten group are retirees. The PSM survey revealed that 6 per cent of retirees were suffering from a confirmed work-related health problem and a further 10 per cent believed that their health problem is work-related. Although injury may not always reduce retirees' incomes, it adversely affects their lifestyles.

2.4 Causes of injury and disease at work

Injury and disease in the workplace are the outcomes of complex chains of events. The processes leading to an injury or disease often involve a lengthy build-up over time of the many factors that contribute to the eventual outcome.

¹³ Based on persons who have had an absence from work during the two week survey period and those not working at all, due to a confirmed work-related health problem.

The factors involve the nature of both the work environment and the activities conducted within it, as well as the behaviour of employees in the workplace. It is therefore somewhat misleading to speak of ‘a cause’. As Quinlan and Bohle observed:

Injuries and disease are better understood as the culmination of a process of causation, which may include industrial, organisational, technical and human error components (1991, p. 110).

The Mining Division of the Construction, Forestry, Mining and Energy Union commented:

Inquiries into injuries and deaths in coal ... focus on finding a single fault or cause of the particular incident or injury, as do proceedings for damages The event is decontextualised — taken out of the industrial, organisational, technical and human context in which it occurred. This prevents a real understanding of causation and the role played by work organisation (sub. 153, p. 8).

The prevention of injury and disease at work requires the likely essential and contributing factors to the particular outcome to be identified and assessed. Only then can one determine those which are controllable and the degree of control that is feasible for each (see Box 2.3).

Box 2.3 Workplace injuries can be prevented

In 1993, two Worksafe Australia researchers, Feyer and Williamson, completed a study on traumatic deaths at work in Australia in the period 1982 to 1984. The researchers developed a coding system to describe the wider circumstances of the fatality including the main events leading up to the injury and any other factor which contributed to the fatality.

The results of the study showed that 97 per cent of fatalities could have been prevented. Analysis of the patterns of causation showed that most fatalities had multiple causes. Unsafe work practices and human errors occurred most frequently and were most influential in causing the fatalities. While factors relating to the work environment were relatively common, they were not as important when the various factors were ranked.

Analysis of the patterns of causation revealed that pre-existing unsafe work practices were the most common precursors of skill-based human errors immediately before the accident. The study said that ‘knowing that these unsafe work practices provided the circumstances for the later absent-minded errors to have their consequences suggests targets for prevention which are more likely to succeed than aiming to eliminate the errors themselves’.

Source: Worksafe (1993f).

From this perspective, successful control of the risks of occupational injury and disease relies on an approach involves the following steps:

- the identification of the hazards at the workplace;
- assessment of the factors which are essential or contribute to the greatest risks to health and safety;
- assessment of the risk associated with each hazard; and
- selection and implementation of the most appropriate control measures.

This approach is the most fruitful one to prevention. It considers all the factors associated with injury and disease and selects those that can be controlled such that the risks are reduced. This contrasts with an approach that only focuses on those factors which were in play at the time or were immediately linked to the injury or disease. As this latter approach tends to ignore the nature of the work environment and its activities, it tends to focus on worker behaviour as the cause of injury and disease.

McDonald and Associates state:

... historically too much reliance has been placed on behaviour control and too little on organising the work methods, environment and equipment to allow for the realities of human behaviour (1995, p. 121).

Similarly, Dr Wigglesworth supported a preventative approach based on workplace systems rather than human behaviour:

... one of the basic principles of the management of other public health problems is that passive countermeasures, which apply equally to all persons at risk without their active involvement, are more effective than those which are active, that is which require some component of human behaviour (sub. 132, p. 5).

McDonald and Associates found that the majority of factors contributing to work-related injury and disease are under the control of management, rather than individual workers. They argued that managers needed to improve their skills so that they can implement systems that effectively control workplace hazards.

Their findings are based on case studies of 3991 workplace injuries, diseases and fatalities in Queensland, which had been the subject of common law actions. McDonald and Associates found that in 87 per cent of cases the injury or fatality involve falls machines.

The control of gravitational, human and machine energy is a key part of prevention. For example, the hazard posed by gravitational energy can be controlled by minimising the amount of work that must be performed at heights, erecting guards or using harnesses to prevent people from falling. Similarly, the

hazard posed by fork lift trucks can be controlled by designing the factory so that fork lift trucks and workers move in separate corridors.

Worker behaviour always contributes to workplace injury and disease, but it is less easily controlled. In the above examples, it is difficult to ensure that roof builders will only move when they are perfectly balanced, or that factory workers will always carefully look out for fork lift trucks. These examples illustrate another conclusion by McDonald and Associates — that the workplace environment is one of the most controllable factors contributing to workplace injury.

The conclusions reached by McDonald and Associates are illustrated in Box 2.4 which contains the results of an accident investigation. It describes the factors leading to the roll-over of a road scraper at a mine, which seriously injured the driver. The re-organisation of the road work at the mine and correction of the design flaws with the scraper would be more likely to prevent such an injury recurring than trying to ensure that scraper drivers drove more carefully.

Further information on the causes of work-related injury and disease is provided in Appendix B.

McDonald and Associates has questioned the current priorities in government and industry programs directed at prevention and research. Dividing outcomes into permanent incapacity (Class One), temporary impact (Class Two) and inconvenience (Class Three), they contend that:

... occupational health and safety is fundamentally a Class 1 problem. Despite this, it is normal for governments and insurance companies not to report figures on permanent disabilities in a meaningful way. ... Class 1 damage will come from a relatively few occurrences and only the very largest organisations will have previous experience and history which gives them any understanding of these occurrences. Smaller organisations, looking at their history, are likely to learn nothing useful to help prediction of their future Class 1 damage (1995, p. 21).

The Commission agrees with this assessment. Indeed, the Commission's estimates suggest that the hazards that are the focus of national standards are not those that would yield the greatest saving in costs to the community, for a given reduction in their risks. The estimates also highlight the importance of drawing on 'best practice' from outside small to medium-sized enterprises because of the low frequency of workplace incidents that occur.

Box 2.4 Serious injury involving a mining vehicle

Scrapers were performing a benching operation on a strip mine. Two different sized scrapers were being used to remove 40 feet of overburden, predominantly clay — the smaller and slower scraper was the machine directly involved in this injury. The smaller scraper has an engine in front and little weight on the rear tyres when empty.

Both scrapers had conventional ply tyres and only the centres of the rear ones touched the ground. The tread on the tyres gave minimal cleaning action sideways but had a shoulder which could dig in after the tyre had deflected and/or the machine rolled to a certain stage.

Six types of clay were being removed. While all looked the same, three were extremely slippery when wet. The scrapers travel the same route many times so the road surface becomes heavily compacted. Dust and the road condition are controlled by regular watering by a truck fitted with a rear boom spray. The rate of application of the water can only be controlled by altering the speed of the truck. The maximum slipperiness develops five to ten minutes after watering.

As it was about time for the larger scraper to overtake, the operator of the smaller scraper angled his machine off the main scraper road. As the scraper left the road the driver shifted down gears and applied the brakes to the front wheels, which were on dry clay. The rear wheels were on wet clay. The speed of the scraper was about 30 kilometres per hour (Kph). The driver lost control and the scraper spun about 100 degrees by which time it had slid off the road onto drier, softer clay. The scraper then rolled over and the driver was injured.

McDonald identified 51 factors which contributed to the scraper rolling over and injuring the driver. These were classified as either human, machine or environmental factors.

A total of 13 *human factors* were identified. The driver did not detect change in conditions; he moved over to allow the faster machine to overtake; he was driving at 30 kph; and he had lifted his foot from the accelerator.

A further 25 *machine factors* were identified. These included the fact that the machine was capable of 56 kph, there was no side grip on the tyre, the machine was empty, and the small area of tyre contact.

The 12 *environmental factors* identified included the geometry of the road haul; that there was a larger scraper running the same spread; the type of clay on the road; and that there was wet and dry clay beside each other.

Source: Geoff McDonald and Associates (unpublished information).

2.5 Best practice in prevention

Good management is the key to the prevention of work-related injury and disease. For this reason, prevention strategies should ideally be tailored to each enterprise's circumstances, determined on a co-operative basis by management and workers.

Features of enterprises that are best practice in workplace health and safety are:

- commitment by management to improving safety performance;
- integration of safety into the responsibilities of line managers;
- joint management of safety by managers and workers; and
- a systems approach.

Management commitment sends a strong message to employees that workplace health and safety is an important issue, deserving their attention. It also ensures ongoing support for safety initiatives. The integration of workplace safety into the responsibilities of line managers ensures that policies are implemented, and that day-to-day decisions reflect safety considerations.

Joint management of workplace health and safety ensures that workers' insights into the hazards of work processes and their ideas on how to solve safety problems are taken into account. It also increases the commitment of workers to implement safety procedures, contributing to a safety culture within workplaces.

A common feature of Australian enterprises that are best practice in occupational health and safety is they adopt a systems approach to managing safety. Their systems include:

- policy and planning to determine OHS objectives and strategies;
- the allocation of responsibilities and accountability arrangements for meeting these objectives;
- the systematic identification, assessment and control of hazards;
- participation and consultation by managers and workers in determining ways to improve health and safety;
- education and training of managers and workers; and
- auditing to ensure that the system is implemented and performing against objectives.

To achieve continuous improvement in workplace health and safety, a number of Australian enterprises are managing safety in a 'quality context'. Quality is a management philosophy which seeks continuous improvement in the quality of performance of all the processes, products and services of an organisation. Best practice is discussed in more detail in Appendix F.

The Commission concurs with the Robens Committee which concluded:

The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them (1972, p. 7).

The Committee also argued:

There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulations by external agencies. We need a more effective self regulating system (1972, p. 12).

The Robens Committee recognised the importance of a systems approach to managing safety:

... the employer who wants to prevent injuries in the future, to reduce loss and damage, and to increase efficiency, must look systematically at the total pattern of accidental happenings — whether or not they caused injury or damage — and must plan a comprehensive system of prevention rather than rely on the ad hoc patching-up of deficiencies which injury [or] accidents have brought to light (1972, pp. 15–16).

These findings about the prevention of work-related injury and disease have important implications for government. First, it is not possible for governments to legislate for every possible sequence of events that could lead to workplace injury. This follows directly from the finding that a range of factors contribute to workplace injury, and these are specific to each enterprise's circumstances. As a result, there are limits to what governments can do to improve workplace safety, because prevention strategies must be tailored to workplace circumstances.

At best, broad preventative strategies can be developed at an industry level where work practices are similar. This suggests that it is more appropriate for government to enact legislation which establishes and enforces the responsibilities of employers and employees for workplace safety. It is also important that the regulatory regime encourages employers to adopt a systems approach to managing safety, and gives them the flexibility to adopt the approaches to prevention most suited to their circumstances.

Second, government cannot legislate for best practice. Only the actions of management and workers within enterprises can produce best practice. However, governments can elevate poorly performing workplaces to community standards, by enforcing the responsibilities of employers and employees.

3 HEALTH AND SAFETY REGULATION

Governments extensively regulate health and safety at work. They do so because employers and employees, left to themselves, would not achieve outcomes which were either equitable in their treatment of those at risk or inefficient in their use of the community's human and material resources.

Employers and their employees have insufficient incentive to prevent injury and disease at work, as the rest of the community has to meet a significant proportion of the cost of their consequences — through government programs and voluntary services. In any event, employers and employees are often unaware of the nature of the hazards at work or how to assess and manage the risks they present.

Regulation is based around a codification of the common law *duty of care*. This requires all those at work to take reasonable care to minimise injury to others. This general duty is accompanied by a set of specific rules which govern how it is to be fulfilled. Over the past decade the philosophy of regulation in this area has been undergoing fundamental change. Although a consistent regulatory philosophy has emerged, the changes have yet to produce a regime that achieves the most efficient and equitable outcomes.

3.1 Existing legislation

Prior to Federation, occupational health and safety legislation in each of the Australian colonies derived from the shops and factories legislation of that time in the United Kingdom. Since then health and safety at work has been a responsibility of the States and their regulatory approach continues to be much influenced by developments in the United Kingdom.

The Commonwealth plays two roles. It regulates occupational health and safety in those areas where it has constitutional responsibility — principally Commonwealth employment, as well as the maritime and offshore petroleum industries. More recently, the Commonwealth has sought to play a leadership role in developing uniform regulation of occupational health and safety through the establishment of the National Occupational Health and Safety Commission (NOHSC) (see Chapter 11).

Box 3.1 The Robens Report

In May 1970, the United Kingdom Government appointed a Committee on Safety and Health at Work, chaired by Lord Robens. The Committee was asked to report on ‘the provision made for the safety and health of persons in the course of their employment’.

The Committee on Safety and Health at Work presented its report to the United Kingdom Government in June 1972. Its central conclusion was the following:

The most fundamental conclusion to which our investigations have led is this. There are severe practical limits on the extent to which progressively better standards of health and safety at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system (Robens Committee 1972, p. 12).

The Committee found the regulatory regime in the United Kingdom tended to encourage people to think and behave as if work-related health and safety were primarily a matter of detailed regulation by external agencies. The United Kingdom regime was a haphazard mass of intricate, detailed law that was difficult to comprehend, amend and keep up to date. Regulation paid insufficient regard to human and organisational factors, did not cover all workers or all hazards and its administration was fragmented.

The Committee identified four factors that contributed to ‘apathy’:

- the unco-ordinated proliferation of statutory standards;
- the excessive complexity of many of the standards;
- failure to keep pace with technological, social and economic change; and
- failure to formally and consistently involve employers and workers.

The Report proposed changes to policy to create a ‘more effectively self-regulating system’ at both the firm and industry level with greater involvement of workers and their trade unions. A single ‘enabling Act’ should:

- lay down the duties of employers, workers and suppliers of materials;
- establish basic rights for workers and their representatives;
- create new structures through which standards may be developed; and
- reform the administration and enforcement of the law by a single national authority.

This ‘enabling Act’ should be supported by regulations and industry codes of practice. Regulations should be confined to ‘statements of broad requirements in terms of the objectives to be achieved’. Voluntary standards and codes of practice were to be used wherever possible instead of statutory regulations.

Architecture of OHS legislation

The architecture of OHS legislation in each Australian jurisdiction now involves a ‘principal’ Act which defines the rights and obligations of those involved with the workplace. The principal Act is supported by subordinate legislation (that is, regulations) and codes of practice. The subordinate legislation mandates safety requirements and the codes of practice advise some practical means for their achievement.

This architecture has been progressively introduced over the past 10 to 15 years, under the influence of the Robens Report in the United Kingdom (see Box 3.1). Both here and in the United Kingdom it was meant to unify and streamline the plethora of pre-existing Legislation which regulated specific hazards or types of workplace. Pre-existing legislation had evolved over the years in a piecemeal and *ad hoc* fashion. Much of it still remains. In addition, some States have specialised regimes for the mining industry, as does the Commonwealth for the offshore petroleum and maritime industries (see Appendix I).

Although there are differences in many of the details of the legislation enacted, they also share important common ingredients that reflect much of the philosophy of the Robens Report. The main features of the regimes currently operating in each jurisdiction are summarised in Table 3.1.

Principal OHS Acts

The principal OHS Act in each jurisdiction defines the general rights and obligations of all who have an influence on or face hazards in the workplace. Their central provision is a codification of the common law *duty of care*.

In jurisdictions other than New South Wales and Queensland, the statutory duty of care requires the duty holder to do everything ‘reasonably practicable’ to protect the health and safety of others at the workplace.¹ This duty is placed on all employers, their employees and any others who have an influence on the hazards in a workplace. The latter includes contractors and those who design, manufacture, import, supply or install plant, equipment or materials used in the workplace.

¹ ‘Reasonably practicable’ or words to that effect. NOHSC has adopted the term ‘workable’. Victoria, Western Australia and the Northern Territory use ‘practicable’, and New South Wales, Tasmania and South Australia refer to ‘reasonably practicable’. In Queensland, if there is neither a compliance nor advisory standard applicable to a situation, a person needs to ‘take reasonable precautions and exercise due diligence’ in order to discharge their obligations under the Act.

Table 3.1 Main provisions of the principal OHS Acts

	<i>Commonwealth</i>	<i>New South Wales</i>	<i>Victoria</i>	<i>Queensland</i>	<i>Western Australia</i>	<i>South Australia</i>	<i>Tasmania</i>	<i>Australian Capital Territory</i>	<i>Northern Territory</i>
Main Act	Occupational Health and Safety (Commonwealth Employment) Act 1991	Occupational Health and Safety Act 1983	Occupational Health and Safety Act 1985	Workplace Health and Safety Act 1995	Occupational Health, Safety and Welfare Act 1984	Occupational Health, Safety and Welfare Act 1986	Workplace Health and Safety Act 1995	Occupational Health and Safety Act 1989	Work Health Act 1986
Administration of Act	Comcare, on behalf of Safety, Rehabilitation and Compensation Commission	WorkCover Authority	Department of Business and Employment	Division of Workplace Health and Safety in the Department of Employment, Vocational Education, Training and Industrial Relations	Dept. of Occupational Health, Safety and Welfare assists the Minister for Labour Relations	WorkCover Corporation	Industry Safety and Mines Division of Tasmanian Development and Resources	OHS Office, which reports to the Deputy Chief Minister and the Minister for Industrial Relations	Work Health Authority
Persons to whom the duty is owed	employees, persons at or near a workplace, and contractors (under certain conditions)	all persons (including those who are not employees) at any workplace	employees including independent contractors and their employees	employees, and others affected by workplace undertakings	employees and other persons (including those who are not employees)	all persons	employees and other persons (including those who are not employees)	employees and third parties at or near the workplace	workers or any other persons working at the workplace, and the public in relation to work activities
Persons on whom the duty is placed	employers, employees, manufacturers, suppliers and installers	employers, manufacturers, suppliers, importers, designers, employees and the self-employed	employers, employees, self-employed persons, occupiers of workplaces, designers, manufacturers, importers and suppliers	employers, self-employed, persons in the control of workplaces, principal contractors, designers manufacturers, importers and suppliers, erectors and installers, owners of high risk plant	employers, occupiers, manufacturers, suppliers, importers, designers, employees and the self-employed	employees, self-employed, occupiers, building designers and owners	employers, principal contractors, occupiers, owners of premises, designers, importers, suppliers, manufacturers, installers and employees	employers, contractors, self-employed persons, manufacturers, erectors and installers and employees in the private sector	employers, self-employed, occupiers, manufacturers, designers, importers, suppliers and workers
Private right of action for damages	civil and criminal proceedings as per general legislation threshold limits under SRC Act may apply.	threshold requirements on claims for damages for both economic and non-economic loss	s.28 - expressly negates private action for breach of general duties	no limits	no reference - must look at the intention of the legislation	no limits	no limits	no limits	s.34 - expressly negates private right of action

Table 3.1 Main provisions of the principal OHS Acts (cont.)

	<i>Commonwealth</i>	<i>New South Wales</i>	<i>Victoria</i>	<i>Queensland</i>	<i>Western Australia</i>	<i>South Australia</i>	<i>Tasmania</i>	<i>Australian Capital Territory</i>	<i>Northern Territory</i>
Provision for OHS committees	workplaces with more than 50 employees, or where a HSR or union official requests it	where more than 20 employees and a majority requests it, or where directed by the OHSR Council	HSRs have the right to request committees	workers are entitled to elect one HSR (or more than one, if agreed by employer)	on request of HSRs if there are more than 10 employees	on request of HSRs, majority of employees or 5 of employees in workplaces with more than 20 workers	in workplaces with more than 20 employees where requested by the majority of employees	not required but are encompassed in the Act	in workplaces with more than 20 employees where requested by the majority of employees
Provision for health and safety representatives (HSRs)	may be selected for each designated work group	no provision	employee may request the establishment of designated work groups which may elect a HSR	if requested by employees, or directed by the Authority for particularly hazardous workplaces	employee may request it	each work group is entitled to a representative	workplaces with more than 10 employees	workplaces with 10 or more employees	no provision
Power of HSR to accompany inspectors	yes	na. - employees or union officials may accompany inspector if requested	After consultation with the employer's representative or representatives	no	only when requested	yes	yes	yes	no provision
Right of HSR to stop work	yes (in certain circumstances)	na.	yes	no	only inspectors	yes	workers themselves may refuse dangerous work	no	workers themselves may refuse dangerous work
Maximum Penalties						penalties are set out in divisions from: Division 1 up to \$100 000 Division 7 up to \$1000			
corporations	\$100 000 (GBEs only)	\$250 000	\$250 000	\$120 000	\$50 000		\$150 000	\$100 000	na
individuals	\$5000 (in GBEs only)	\$25 000	\$50 000 Up to 5 years gaol	\$24 000 Up to 6 months gaol	\$5000	Up to 5 years' gaol These apply to both corporations and individuals.	\$50 000	\$20 000 Up to 2 years' gaol	5000
On-the-spot fines	no	yes	provision in Act, but no regulations to give effect	yes	no	provision in Act, but no regulations to give effect	no	no	no (currently before Parliament)

na not applicable

Source: Industry Commission.

The ‘reasonably practicable’ qualification means that the requirements of the law vary with the circumstances of each case. The degree of risk in a particular activity or environment can be balanced against the time, trouble and cost of taking measures to control the risk.

This qualification allows those responsible to meet their duty of care at the lowest cost. In particular, it allows the duty holder to choose the most efficient means for controlling a particular risk from the range of feasible possibilities, the so-called ‘hierarchy of control’.² By doing so, it requires changes in technology and knowledge to be incorporated only as and when it is efficient to do so.

In New South Wales, the *Occupational Health and Safety Act 1983* provides for a *prima facie* breach to be successfully defended when the duty holder can show that it was not reasonably practicable to do more than what was done.

The duty of care in the Queensland *Workplace Health and Safety Act 1995* is an absolute one, but the Act provides duty holders with three defences against a *prima facie* breach. Two of these involve demonstrated adherence to either a ‘compliance standard’ (regulation) or an ‘advisory standard’ (code of practice). The remaining one requires the duty holder to show they took ‘reasonable precautions and exercised due diligence’.

In each jurisdiction, the principal OHS Act elaborates the duty of care for each duty holder with a number of *specific rights and duties*. These are considered to logically flow from the duty of care. For example, the Victorian *Occupational Health and Safety Act 1985* requires employers to:

- provide and maintain safe plant and systems of work;
- arrange safe systems of work in connection with plant and substances;
- provide a safe working environment and adequate welfare facilities;
- provide information on, and instruct, train and supervise employees in safe work;
- monitor the health of their employees and keep related records;
- employ qualified persons to provide health and safety advice;
- nominate a senior employer representative; and
- monitor conditions at any workplace under their control and management.

² The ‘hierarchy of control’ refers to the range of feasible options for managing the risk to health and safety. The hierarchy normally ranges over the following controls: *elimination* of the hazard; its *substitution* with a less harmful version; its *redesign*; *engineering controls*; *isolation* of the hazard from people at the workplace; *safe work practices*; *redesigning work systems*; and the use of *personal protective equipment* by people at the workplace.

These are representative of the employer's specific duties in the other jurisdictions.

All the principal Acts provide for *employee participation* in the management of health and safety at the workplace. Nevertheless, there are significant differences in the nature of that participation. Most provide for both employee health and safety representatives and health and safety committees. Others mandate one or the other (see Appendices I and Q).

All principal Acts have provisions governing the establishment, composition and functions of health and safety committees at workplaces. They generally provide for:

- a committee to be established when requested by a majority of employees or an employee health and safety representative;
- at least half of the committee members to be elected by the employees; and
- committees to facilitate consultation and co-operation on health and safety and recommend improvements to the employer.

The principal Acts, except New South Wales and the Northern Territory, currently mandate workplace health and safety representatives elected by the employees. In New South Wales and the Northern Territory, health and safety committees exercise some of the rights normally extended to employee representatives in other jurisdictions, such as the right to inspect the workplace.

There are differences between the jurisdictions in the selection procedures for health and safety committees and employee representatives, their powers, the resources to be made available to them, and their capacity to act in the event of immediate risk to the health and safety of workers.

Finally, the principal OHS Acts make provision for the *sanctions and penalties* that may be applied in the event of breaches of the legislation, and for the *administration of the legislation*. These issues are canvassed in Chapter 7 and Chapter 8 respectively.

Subordinate legislation

Subordinate legislation (or regulations) made under the principal OHS Act is used to mandate particular requirements or standards to be observed in the workplace. The requirements take the following forms:

- *Technical requirements* that specify the safety features of 'hardware' used in workplaces. They specify the design, selection and use of the physical protection to be provided against certain hazards or their consequences. Examples are first aid kits, certain plant and machinery (for example,

power presses, pressure vessels and boilers), and personal protective equipment.

- *Exposure limits* that specify the maximum acceptable level of exposure to certain measurable hazards. Such hazards include noise, radiation and atmospheric contamination of certain hazardous substances (for example, asbestos, synthetic mineral fibres and vinyl chloride).
- *Process requirements* that specify the processes to be followed in managing nominated hazards. They are used for hazards whose risks do not admit ready measurement — such as manual handling, industrial plant or safe work practices (for example, in confined spaces, at height, etc).
- *Documentation requirements* that specify what needs to be recorded and reported to the government authority. Examples include the requirements to document the maintenance of hazardous plant and equipment, or to report serious accidents and potentially serious incidents to the OHS agencies.

Many of these requirements, call upon Australian Standards developed by the Standards Association of Australia (Standards Australia).³ This is a longstanding practice and is extensively used in other areas of regulation (for example, the *Building Code*). A 1991 survey of occupational health and safety legislation in Australia revealed that over 200 Australian Standards were used in subordinate legislation or codes of practice (sub. 108, p. 1).

The Australian Standards used in this way cover: the storage, transport and handling of dangerous goods; the design, selection and use of personal protective equipment, safe work practices, the design of plant and equipment, occupational health and safety management and a range of other issues. The one exception is exposure limits which are regarded as the responsibility of government. This parallels the experience in other similar countries such as Canada, New Zealand and the United Kingdom.

There is potential for overlap between the standards development work of Standards Australia and Worksafe Australia. Accordingly, the two organisations have signed a Memorandum of Understanding to try to avoid duplication of effort (sub. 108, p. 1).

³ The Standards Association of Australia is a not-for-profit organisation incorporated by Royal Charter and independent of government. It is the Australian member of the International Standards Organisation.

Codes of practice

The flexibility allowed in complying with the duty of care involves a loss of certainty in knowing how to comply with it. To reduce this uncertainty all jurisdictions provide *codes of practice* for particular hazards have been developed.⁴ Codes of practice are not legally binding but provide one or more practical means of complying with the law.

When they are approved by governments, codes of practice have formal legal standing. The legal standing differs between jurisdictions. In New South Wales, a failure to follow the endorsed code is *evidence* of non-compliance. In Western Australia and the Australian Capital Territory, the legislation does not explicitly provide approved codes with evidentiary status. In other States, a failure to observe an approved code of practice is *proof* of a breach of the duty of care, unless the person responsible can prove that the measures taken did not constitute a breach of the duty.

Related legislation

In addition to its principal OHS legislation, there are other pieces of legislation that affect the management of health and safety at work.

For example, in New South Wales there are the *Factories, Shops and Industries Act 1962* and the *Construction Safety Act 1912*. Western Australia has the *Factories and Shops Act*. Most jurisdictions have legislation relating to dangerous goods. Generally these Acts have subordinate legislation.

There is also specific health and safety legislation for particular industries. The mining industry in New South Wales, Queensland, Western Australia and the Northern Territory have such regimes. In Queensland and New South Wales, there are separate regimes for coal and metalliferous mining. The maritime and offshore petroleum industries are the subject of Commonwealth industry-specific legislation.

3.2 Progress in streamlining regulation

All Australian governments have gone some way toward adopting the Robens reforms. In essence they involve replacing the many health and safety statutes by a principal Act, converting subordinate legislation to mandate the broad outcomes required rather than to prescribe how they are to be achieved, and

⁴ In Queensland, codes of practice are now called *advisory standards*.

using voluntary standards or codes of practice to legislation, wherever practicable. However, the process is not yet complete.

The Commission surveyed State and Territory Governments to identify the Acts and regulations affecting occupational health and safety that have been repealed and the new ones that have been introduced since the introduction of Robens legislation in their jurisdiction. The survey revealed that over 150 Acts and regulations (or parts thereof) have been repealed but more than 60 new Acts and regulations have been introduced (see Table 3.2). Much of this legislative activity reflects the implementation of national standards declared by NOHSC (see Chapter 9).⁵

Many governments have already repealed some of the related health and safety legislation by consolidating its provisions under the principal OHS Act. For example, Queensland repealed most of its pre-existing OHS legislation when it introduced the *Workplace Health and Safety Act 1989*. More recently, South Australia repealed the *Boilers and Pressure Vessels Act 1968* and *Lifts and Cranes Act 1985* when it introduced its consolidated OHS regulations in April 1995. Victoria repealed the *Boilers and Pressure Vessels Act 1970*, *Lifts and Cranes Act 1967* and *Scaffolding Act 1971* when it implemented the *National Standard for Plant* in July 1995.

Other governments are also moving in this direction. For example, Tasmania plans to repeal subordinate legislation relating to inspection of machinery and scaffolding (transcript, p. 3833).

Nevertheless many of the pre-Robens statutes, together with their subordinate legislation, remain on the statute books of some States. They include the New South Wales *Factories, Shops and Industries Act 1962*, the West Australian *Factories and Shop Act 1963*, the Victorian *Labour and Industry Act 1958*, and the Australian Capital Territory *Machinery Act 1949*, together with their various regulations.

The Australian Chamber of Commerce and Industry (ACCI) argued that:

While the principal Acts have been amended to incorporate the Robens-style approach, Australia is still largely operating under a prescriptive regime in the subordinate legislation (sub. 133, p. 28).

⁵ 'National standards' refer to the products developed by NOHSC to achieve greater uniformity. They consist of *common essential requirements* for inclusion in the appropriate legislation and *codes of practice* (see Chapter 9).

Table 3.2 Progress in streamlining legislation affecting OHS

<i>Jurisdiction</i>	<i>Number of Acts repealed^a</i>	<i>Number of regulations repealed^a</i>	<i>Number of Acts introduced</i>	<i>Number of regulations introduced^b</i>
NSW	1	10	1	16
Vic	3	74	1	15
Qld	6	3	1	1
WA	3	20	1	1
SA	3	28	1	17
Tas	2	1	1	5
ACT	0	0	1	2
NT	2	2	1	1

a Or parts thereof.

b Includes some which were subsequently repealed.

Source: Industry Commission.

3.3 Problems with regulation

There are major shortcomings in OHS legislation — the legal rights and responsibilities are unclear, the present regulatory framework is not conducive to best practice, there is too much legislation, too little practical guidance on what to do to meet it, and there are inconsistent legal requirements placed on workplaces.

Most of these problems were diagnosed more than 20 years ago by the Robens Report. Despite more than a decade of so-called Robens reforms, many problems remain.

Unclear legal rights and duties

Although fundamentally sound, the legal rights and obligations in the principal OHS Acts are not clearly and unambiguously defined. In the Commission's view this is exacerbating the unsatisfactory level of apathy and ignorance about work health and safety in the community.

In some jurisdictions, the simplicity and power of the employers' duty of care has been undermined by redundant elaboration. For example, under the Victorian *Occupational Health and Safety Act 1985*, employers have 11 specific duties, including such requirements as having to provide information in languages other than English, to nominate a management representative for occupational health and safety matters, and to employ or engage suitably qualified health and safety advisers.

The incorporation of national standards as regulations has further exacerbated the problem of over-elaboration as many of them restate the general and specific duties in the principal OHS Act.

The way in which the ‘reasonably practicable’ test is expressed in the legislation has led to persons with a duty of care under the OHS Act not having a clear view of their legal responsibilities. However, in jurisdictions other than New South Wales and Queensland, having the ‘reasonably practicable’ qualification to the general statement of a person’s duty of care has meant that too much onus has been placed on the prosecution to establish the facts of the case. In the Commission’s view, this is contrary to the intent of the common law obligations upon which the OHS Act is based.

Regulation and best practice

The principal objective of regulation must be to prevent injury and disease at work. Regulation can impose a minimum level of protection but superior performance in workplaces cannot be mandated. Best practice in the workplace can only be achieved by the unambiguous and strong commitment of the employers and employees to that goal (see Chapter 2).

Too many regulatory requirements (or standards) focus on highly detailed control of individual processes within workplaces or on the hardware and other inputs that they use (see Box 3.1). Such a focus is inefficient. Often it unnecessarily restricts the means by which protection is provided and the means it selects is unlikely to meet the needs of diverse workplaces. Box 3.2 provides some selected examples of the degree of prescription in some of the OHS legislation.

For this inquiry the Commission engaged Deloitte Touche Tohmatsu (Deloitte) to survey the attitudes of employers to compliance with OHS legislation in Victoria, New South Wales and Queensland. Many workplaces that participated in the survey — mainly in the construction industry and local councils that utilised mobile workplaces — said they had difficulty in meeting prescriptive requirements, due to changes in work conditions (Deloitte 1995, p. 8).

Box 3.2 Prescription of inputs and processes in OHS management

Reg. 7 of the NSW *Factories (Health and Safety) General Regulations*: every heating appliance in a factory must have a flue sufficient to carry off the products of combustion, and the flue must be 100 mm or more in diameter if it is circular in shape.

Reg. 10 of the NSW *Boiler and Pressure Vessel Regulations*: the mud legs of horizontal underfired boilers must be of steel, flanged and riveted to the bottom of the shell plate near the back end and shall not exceed 760 mm in length.

Reg. 7 of the *Occupational Health and Safety (First Aid) Regulations 1989* prescribes the precise content of the various first aid kits for every workplace in the jurisdiction, including the number of the plastic bags of each size to be used for amputated body parts.

Reg. 505(1) of the Western Australian *Occupational Health, Safety and Welfare Regulations 1988* requires boiler operators to attend, check, test and maintain boilers in accordance with prescribed procedures. For example, a water tube steam boiler must be attended at four hourly intervals by a certificated boiler attendant, and checked according to AS 2593.

Reg. 3.2.24(a) of the South Australian *Occupational Health, Safety and Welfare Regulations 1995*: an employer must ensure that pressure equipment, other than a gas cylinder, that is covered by AS 1200 SAA Boiler Code and that is in use, is inspected or tested in accordance with AS 3788 Boiler and Pressure Vessels – In-Service Inspection.

Reg. 5.6.2(3) of the South Australian *Occupational Health, Safety and Welfare Regulations 1995*: if a person at work at a foundry must carry molten metal by hand, unobstructed passageways or pouring aisles, that are at least 800 mm wide and allow the person to proceed safely about the foundry, must be provided.

s.100(a) of the Queensland *Workplace Health and Safety Regulation*: in the erection of a skeletal steel building or structure, permanent floors shall be installed so that there is not more than eight storeys or 24 m, whichever is the lesser, between the floor being erected and the uppermost permanent floor.

Reg. 25 of the Tasmanian *Industrial Safety, Health and Welfare (Fees) Regulations 1987*: unless there is an approved means of ingress and egress, every confined space shall be provided with a manhole not less than 450 mm long by 400 mm wide if rectangular, not less than 450 mm in diameter if circular, and the major and minor axis shall be 450 mm and 400 mm respectively, if elliptical.

Reg. 157 of the Northern Territory *Work Health (Occupational Health and Safety) Regulations 1992*: a worker engaged in abrasive blasting must be provided with an airline respirator of the hood or helmet type, complying with AS 1716, fitted with an inner bib and a shoulder cape, jacket or protective suit, and skin and foot protectors.

In best practice enterprises, the approach to risk management involves everyone at the workplace and is based upon the application of quality management principles to the continuous identification, assessment and control of the risks to life and limb. Eventually the combination of high level commitment and systematic management practice can produce a strong ‘safety culture’ in the enterprise which reinforces both commitment and practice in a virtuous circle (see Appendix F).

The South Australian Employers’ Chamber of Commerce and Industry observed that:

The key to reducing workplace injury and disease is good management which must include appropriate consultative mechanisms and systems so that a ‘safety culture’ is developed in each workplace. The specific systems and mechanisms must be tailored or developed by each enterprise to meet the unique character of its own operation and culture (sub. 272, p. 4).

Pioneer International agreed:

It is important that companies be allowed to design their organisations and systems to satisfy their own particular situation, rather than being forced to follow specific regulations (such as statutory positions) which are not appropriate to the organisation (sub. 15, p. 3).

The existing regimes do not sufficiently encourage development of quality management approaches to safety. Many provisions discourage such systems. Some are incompatible with them.

There is too much legislation

Across Australia there are 15 statutes that specifically cover work health and safety. These include the nine OHS statutes together with those which have major occupational health and safety provisions, such as the *Factories, Shops and Industries Act 1962* and *Construction Safety Act 1912* in New South Wales. These statutes have 70 sets of regulations amounting to a further 1180 pages of law (see Table 3.3).

These figures do not include the various codes of practice or the 200 Australian Standards referred to in OHS legislation or in the codes themselves. Moreover, as the Western Australian Chamber of Commerce and Industry noted, these Australian Standards also call up other documented standards, increasing the overall volume of text to which an employer needs to refer (sub. 379, p. 2).

Finally there are another 129 statutes — including those dealing with mining, petroleum and dangerous goods — which contain provisions on workplace health and safety.

Table 3.3 OHS and related legislation, June 1995

<i>Jurisdiction</i>	<i>Principal OHS Act</i>		<i>Acts with major OHS provisions^a</i>		<i>Other related Acts^a Number</i>
	<i>Number of regulations</i>	<i>Pages</i>	<i>Number of regulations</i>	<i>Pages</i>	
Commonwealth	1	25	1	5	10
NSW	13	50	30	400	23
Vic	6	70	2	4	21
Qld ^b	1	60	3	10	13
WA	1	100	1	3	17
SA	1	146	0	0	17
Tas	6	140	0	0	12
ACT	1	3	2	17	8
NT	1	45	0	0	8
All	31	639	39	439	129

a Includes provisions under other Acts that have an impact on OHS.

b Regulations currently under review.

Source: Industry Commission and CCH Australia Ltd.

Although not all of the legislation included in Table 3.3 applies to every employer (this depends on the nature of the business and the jurisdiction), many businesses are faced with an excessive burden. As an example, a hotel operator in Victoria would need to consider the legislation and codes of practice listed in Box 3.3 to ascertain whether it was in compliance with the law.

This volume of legislation increases the cost of compliance for employers, particularly for those in small to medium-sized business. They lack the resources to comprehend, let alone apply, the full array of legislative requirements. As Professor Cross noted:

The confusing mass of regulation ... means that employers often do not know what is required. They see safety regulations as more paper work required by government rather like all the complex tax law they have to work with. Safety at work is seen as not possible or practical. Employers cannot work out what level of hazard control is needed and sometimes cannot see how to comply with the letter of the law and continue to operate (sub. 303, p. 1).

Box 3.3 The hotel industry and workplace health and safety legislation

To ascertain whether they comply with OHS legislation, proprietors of most small to medium-sized hotels in Victoria have to consider the following 12 statutes (over 90 pages in total). In addition they may have to refer to six codes of practice (over 220 pages in total).

Statutes

- *Occupational Health and Safety Act 1985* (29 pages);
- *Equipment (Public Safety) Act 1994* (12 pages);
- *Dangerous Goods Act 1985* (could apply because most hotels have carbon and oxygen cylinders, flammable substances and highly alkaline chemicals) (28 pages);
- *Occupational Health and Safety (Plant Safety) Regulations 1995*;
- *Occupational Health and Safety (Issues Resolution) Regulations 1989* (2 pages);
- *Occupational Health and Safety (General Safety) Regulations 1989* (4 pages);
- *Occupational Health and Safety (Manual Handling) Regulations 1989*;
- *Occupational Health and Safety (Noise) Regulations 1989* (6 pages);
- *Occupational Health and Safety (Asbestos) Regulations 1989* (9 pages);
- *Dangerous Goods (Storage and Handling) Regulations 1989*;
- *Dangerous Goods (Prescribed List) Regulations 1986*; and
- *Dangerous Goods (Liquefied Gases Transfer) Regulations 1987*.

Codes of practice

- *First Aid Code of Practice* (12 pages);
- *Workplaces Code of Practice* (5 pages);
- *Manual Handling Code of Practice* (59 pages);
- *Manual Handling (Occupational Overuse Syndrome) Code of Practice* (48 pages);
- *Noise Code of Practice* (71 pages); and
- *Code of Practice on the provision of occupational health and safety information in languages other than English* (33 pages).

Source: Victorian Health and Safety Organisation and Industry Commission.

Western Mining Corporation considered that the burden of the legislation is too great for even the largest enterprises:

The sheer weight of legislation and regulations, together with Approved Codes of Practice, Worksafe Guidance Notes, Australian Standards (which, have in many cases, become referenced into codes or regulations) together with their implicit and explicit training and record keeping requirements, has become a burden which no company, not even the largest, most organised and best-resourced can be assured of complying with. We cannot keep up; we cannot develop fast enough measures that ensure the identification of all requirements, let alone provide reassurance of compliance with them. If this is so for a big corporation, how much more impossible is the task for the small? (sub. 47, p. 1).

Unnecessary duplication and inconsistency

There are too many specialised statutes covering health and safety in particular industries within each jurisdiction. In principle, they are redundant as the principal OHS legislation is capable of regulating all hazards. Many hazards addressed in industry-specific legislation are the same as those covered by the principal health and safety legislation.

There is also duplication within subordinate legislation. For example, Deloitte Touche Tohmatsu reported that:

The major criticisms [of OHS standards] were the tendency of the standards to be repetitive in their requirements for identification, assessment and control (Deloitte 1995, p. 36).

Hazardous substances and major hazardous facilities are subject to a range of different regulations to achieve environmental, public health and occupational health and safety objectives. Employers often have difficulties simultaneously meeting these requirements, especially where they prescribe processes rather than set performance requirements. The problem is complicated where regulations are administered by different government agencies. The Chamber of Manufactures of New South Wales noted:

Consistency and harmonisation across regulatory areas and government bodies is absolutely essential to ensure that regulations are practicable and clearly understood by all the parties. There is still a long way to go in this area where interdepartmental communication has been lacking ... in the area of chemicals regulation it has been necessary to ensure consistency in the development of manufacturing, storage, retailing, handling, transport, shipping and disposal requirements (sub. 90, p. 4).

Codes of practice are unhelpful

Governments have recognised that OHS legislation has to be supplemented by practical guidance for those responsible on how they can meet their obligations.

This guidance is meant to be provided by codes of practice. Codes have mostly been written for particular hazards, so that they may be applied in all workplaces. For example, NOHSC has developed national codes of practice for manual handling, noise, asbestos, hazardous substances and industrial plant.

Only certain types of hazard lend themselves to particular control measures that can be efficiently adopted in all workplaces. Hazard-based codes of practice are usually too general to provide practical assistance, and often are not relevant to the circumstances of individual industries or workplaces.

The ACCI argued:

At present Codes of Practice, and in particular those developed nationally, often do not provide the detailed guidance required to interpret the legislative requirements in regulations. They are often not written in user friendly terms and due to their generic nature it is often difficult for individual workplaces to translate this to their particular operations (sub. 133, p. 28).

Many small to medium-sized employers would, in fact, prefer more detailed guidance than is currently provided. The Deloitte survey found that:

Smaller employers tended to focus on the regulations which required specific actions to be taken, such as Testing of Electrical Equipment and the provision of First Aid facilities. Regulations and codes of practice which required the identification, assessment and control of hazards were not generally applied by these smaller employers (Deloitte 1995, p. 23).

This lack of practical advice is impeding the moves to re-define regulatory requirements in terms of performance. In small to medium-sized workplaces, this shortcoming fuels resistance to regulatory reform. The South Australian Chamber of Commerce and Industry observed:

There is some opposition to the development of fully performance-based regulations as some employers and employees favour the certainty of prescriptive-based regulations. This has resulted in regulations which can be a strange mixture of both performance and prescriptive elements (sub. 95, p. 10).

The rural sector in Queensland has developed its own specialised codes of practice for agricultural and veterinary chemicals and for rural plant because it considered that the relevant national codes were inappropriate to its circumstances. This is an inevitable consequence of developing codes to apply to all workplaces.

The Deloitte Touche Tohmatsu survey revealed that 20 of the 56 employers surveyed (or 36 per cent) considered the national code of practice on manual handling provided little assistance (Deloitte 1995, p. 28). In commenting upon the national standard and code of practice on manual handling, the Aged Care Association of Tasmania observed that:

we do not have ... inanimate objects in nursing homes, and it is very difficult to translate those standards and guidelines into actual day-to-day practice ... You can have principles in place, but ... that's going to be a huge challenge for whoever designs standards and legislation ... to develop universal standards (transcript, p. 1769).

3.4 Proposed reforms

The principal objective of regulation must be to prevent injury and disease at work. However, superior outcomes cannot simply be mandated at the workplace by regulation. Rather they are to be found in the application of comprehensive quality management principles by employers and their employees (see Chapter 2). OHS regulation has yet to fully reflect this and has thus failed to heed the central conclusion of the Robens Report (see Box 3.1).

The Commission considers that the solution is to be found in the more faithful application of the principles enunciated in the Robens Report. These are:

- a single, enabling statute to define clearly the rights and duties of all parties who influence the risks to health and safety at the workplace;
- subordinate legislation to mandate certain minimum health and safety standards, expressed in terms of outcomes as far as practicable; and
- voluntary standards and codes of practice to provide the practical means of implementing those legal requirements in the workplace.

The aims should be to promote best practice by encouraging those in the workplace to take greater responsibility for management of the risks to health and safety. This means changing the focus of legislation and the government programs that support them. They have to shift from direct imposition of the workplace solutions towards facilitating an informed choice by those at the workplace.

The Commission proposes that the codification of the common law *duty of care* should ensure that its coverage is comprehensive and that it is expressed in an efficient form.

All who influence the risks to health and safety at the workplace (employers, employees and third parties) should have a duty of care in respect of everyone at the workplace. Their duties should be clearly elaborated to define their essential implications for the management of the workplace. The Commission proposes that the elaboration should be confined to providing for the co-operative management of health and safety risks by an informed and trained workplace applying the principles of quality management.

The duty of care would remain the fundamental basis of OHS legislation. The Commission considers that it is more efficient if it is the duty holder's

responsibility to prove, to the satisfaction of courts if necessary, that the measures they took were reasonable and practicable.

Mandated safety requirements can be efficient ways of regulating work health and safety, particularly where there is uncertainty or where the community has to bear a significant part of the cost of injury or disease. To be efficient though, the Commission concludes that such requirements need to be enforceable and expressed in terms of broad outcomes. They should avoid prescribing how prevention is to be achieved or what workplaces must use to achieve them. A great many of the mandated requirements currently fail this test.

The Commission proposes that there should be greater emphasis on individual enterprises and industries developing their own *voluntary standards and codes of practice*. This is the route to best practice, as it better accommodates the circumstances of individual workplaces. To date, too much reliance has been placed upon government to lead the development of codes of practice.

OHS legislation should encourage the development and application of enterprise safety management systems and industry-based codes of practice. These would enable the best choice of process and technical standards for each workplace.

The Commission proposes that legislation should also allow employers to adopt substitutes for mandated health and safety measures as long as they can show they offer equivalent or better protection. This flexibility would lead to more efficient approaches to regulation and its enforcement.

Employers who choose neither to conform to an industry-based code of practice nor to develop an enterprise safety management system would still be subject to all the provisions of the OHS legislation. These include the duty of care and the other obligations in the principal OHS Act, as well as the full range of requirements in the subordinate legislation — exposure limits, process and technical requirements.

Such employers would be expected to be able to demonstrate that they had met their duty to do everything reasonably practicable to ensure health and safety at their workplaces. Codes of practice developed by others in the same industry would help to define what would be regarded by the courts as ‘reasonably practicable’, even though the particular employer did not use any of them in his or her workplace.

In the Commission’s view the degree of prescription preferred by some is more appropriately provided in industry-based codes of practice. In a *de facto* sense, it will have the force of law. When the courts consider whether the duty of care has been met, they will turn to such codes as representing industry custom and practice.

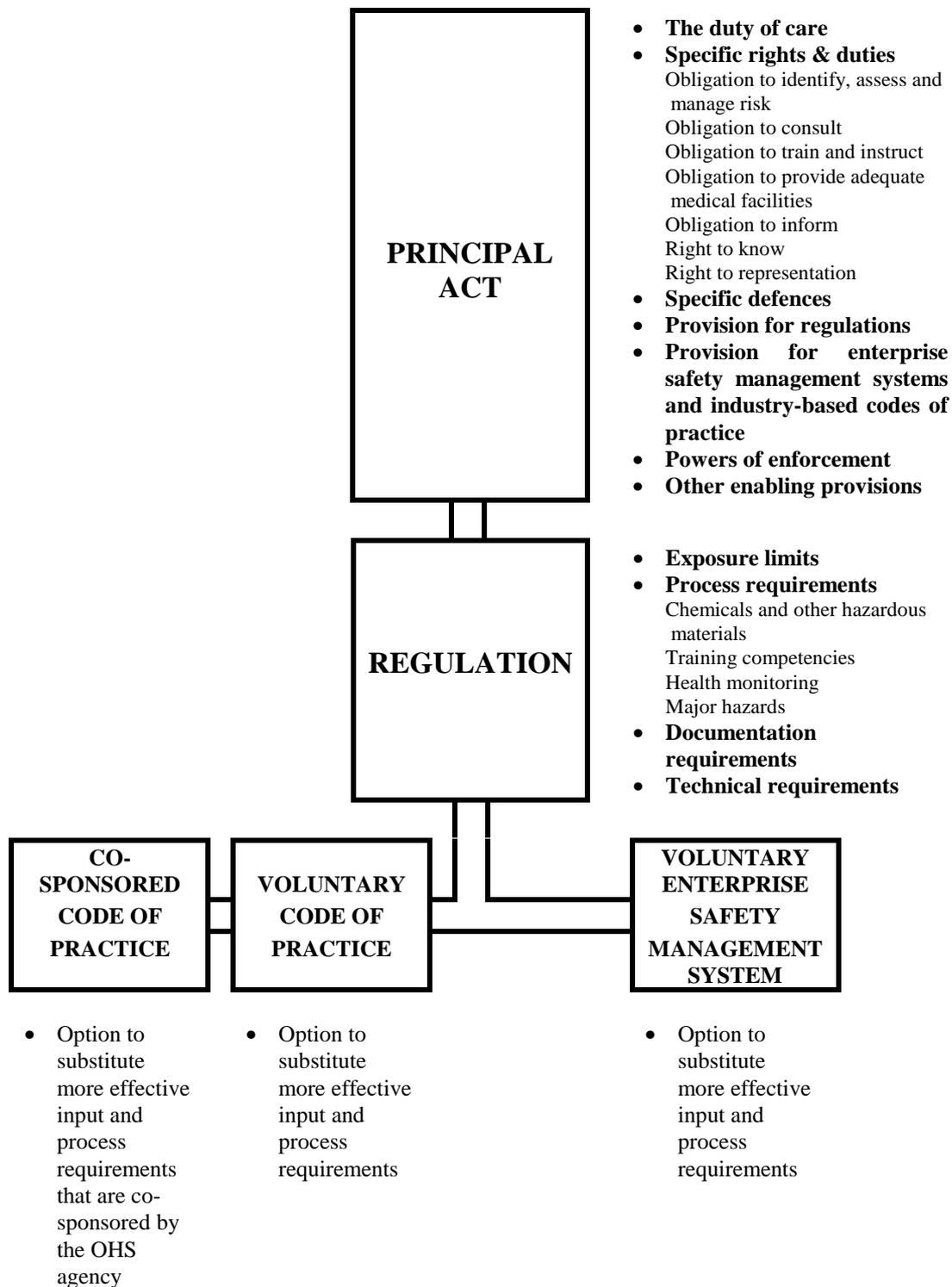
Mandated safety requirements should generally prescribe outcomes. Where there is a need for technical or process standards (such as with manual handling or working in confined spaces), risk management would be better addressed by a combination of the Commission's recommendations on the employer's specific duties in the legislation, and either industry-based codes of practice or enterprise safety management systems.

The Commission's proposed reforms address the main problems associated with the present regimes identified above. They will help to clarify the legal obligations of all persons having a duty of care. Enterprises which need to develop their own methods for dealing with workplace health and safety in order to achieve best practice will be able to do so, rather than being constrained by the legislation as is currently the case.

The reforms will particularly benefit small to medium-sized enterprises. There would no longer need to deal with a mass of legislation, but will be able to obtain guidance from a code of practice that is more relevant to their circumstances.

The key elements of the Commission's proposals are illustrated in Figure 3.1. Further discussion of each of the Commission's proposed regulatory reforms are in Chapters 4 to 6. The creation of a single, new enabling statute to govern work health and safety is discussed in Chapter 4. The role for mandated standards is canvassed in Chapter 5 and that for voluntary standards is in Chapter 6.

Figure 3.1 The Commission’s proposed regulatory regime for OHS



4 A NEW ENABLING STATUTE

The principal OHS legislation should set out, as clearly as possible, the set of principles which are to be consistently and comprehensively applied to the management of health and safety at the workplace. The legislation should provide the means for those in the workplace to be able to successfully manage the risks involved. These need to be set out in a manner that is as constructive as possible and minimises the resort to prescriptive controls.

The major means by which the legislation must give effect to these objectives is to define the legal rights and responsibilities of all those who influence the risks to health and safety at the workplace.

The most important of these rights and responsibilities is the *duty of care* owed by each person who has an influence over those risks. The duty should define what needs to be done on whose behalf. This needs to be supported by a series of *specific rights and obligations*. These are necessary to elaborate the essential features of the duty of care for each person concerned by it.

Finally, the legislation must also provide for a statement of the principles for the *co-operative management* of the risks to health and safety at workplaces by the employers and their employees. This requires definition of the appropriate rights, responsibilities and powers.

4.1 The duty of care

The duty of care is currently defined in the principal OHS Acts, but the wording differs between them. Most participants agreed that there is a need to ensure that the definition of each duty is comprehensive in its extent, that a duty is placed on everyone who has an influence on health and safety at the workplace, and that the duty is owed to all who may be in the vicinity of the workplace.

Some participants were concerned about the enforceability of the duty of care, especially given the shift to ‘performance-based’ regulation of occupational health and safety. For example, Mr Farr of the Queensland University of Technology commented:

The move by governments away from prescriptive to performance based regulation, while consistent with the concept of the duty of care, has produced some difficulties. Although the intent of this approach is to remove obstacles which would obscure the overall aim of achieving healthy and safe working environments, in practice it has proved difficult to enforce (sub. 78, p. 4).

The Department of Industrial Relations argued that OHS legislation is more easily enforced if it is more prescriptive and there is a tradition of effective enforcement:

The evidence for effective deterrence quoted by the Industry Commission comes from the United States. There are two relevant differences between the situation in the United States and the proposals for Australia. The regulatory regime in the US is quite prescriptive and the duty of care is not qualified to the same extent as in Australian jurisdictions by a 'reasonably practicable' clause. Additionally in the US there is a tradition of effective enforcement in most major areas of business regulation which contrasts with the tradition of generally weak enforcement in Australia (sub. 338, p. 6).

The Commission surveyed jurisdictions to find out if these concerns were valid. The survey found that, following the introduction of Robens-style legislation, prosecution activity has shifted toward breaches of the duty of care and away from breaches of particular regulations. In the period 1990–91 to 1993–94, 53 per cent of all prosecutions and 51 per cent of convictions were based solely on the duty of care. Nearly all jurisdictions commented that it is possible to successfully prosecute breaches of the duty of care, even in the absence of prescriptive legislation.

For example, the Victorian Government said:

... the HSO [Health and Safety Organisation] has a very high success rate for prosecution of duty of care offences and has had a low rate of appeals against compliance notices issued where duty of care provisions have been identified as the alleged contravention. In short, the HSO has not experienced any significant difficulty in enforcing the duty of care provisions expressed under the Victorian OHS Act (sub. 382, p. 6).

The Commission considers that the coverage of the duty of care should be comprehensive. All those who influence the risks to health and safety at the workplace should have a duty of care — employers, employees, suppliers of plant equipment and any others who influence those risks. The duty of care should be owed to all those who are exposed to the risks in question. This should include not only employees but any others at or near the workplace — contractors and their members, visitors and anyone who happens to be nearby.

Recommendation 1

The Commission recommends that the principal OHS legislation in each jurisdiction place a duty of care on all those who influence the risks to health and safety associated with work. The duty should require the person responsible to do whatever is reasonably practicable to avert any risks under their influence. Such a duty should be placed upon:

- employers, including the self-employed;
- suppliers of plant, equipment and materials, including manufacturers, importers, installers and erectors;
- designers of plant, equipment and materials;
- owners and occupiers of workplaces;
- employees, including those employed by a contractor at other than their normal workplace; and
- visitors to a workplace.

These duties of care should be owed to all those who are exposed to any risks to their health and safety associated with work, including employees, contractors and their employees, visitors and those in the vicinity of the workplace.

Reasonable practicability

The duty of care allows the person responsible to choose whatever prevention measures are *reasonably practicable*. This balances the benefit of reducing risk against the cost of doing so.

Legal expression

The Commission considers it is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.

The prosecutor would still have to first establish that a breach had occurred. Only then would the duty holder have to show that it was not reasonably practicable to have done more. In New South Wales the adoption of reasonably

practicable as a defence has increased the range and number of successful prosecutions (although there are other factors which contributed to this success).

In the Draft Report, the Commission proposed the adoption of the approach used in New South Wales. Unions agreed overwhelmingly with the proposal but most employer organisations opposed it. Employer organisations were concerned that this would constitute reversal of the onus of proof — alleging contravention of an important legal principle.

As already noted, this proposal does not alter the onus of proof in the first instance, namely that the duty of care had been breached. This point was emphasised by the Queensland Department of Employment, Vocational Education, Training and Industrial Relations (transcript, p. 2664).

Scope of reasonable practicability

In the Commission's view, the reasonably practicable qualification should apply to all mandated requirements in OHS legislation. There are both efficiency and equity grounds to support this position.

Safety requirements can only be established with typical workplace circumstances in mind. If the standard is established so that it is reasonably practicable to be met in most workplaces, the standard would be too low. It would also cost a great deal to collect the information and undertake the necessary analysis to be satisfied that all employers (and others) had met their duty of care. It is more efficient for government to set the standard at the preferred overall level and have employers and employees decide what is appropriate given the circumstances of their workplace.

The proposed approach is also more equitable than an absolute requirement. Under the proposed approach, employers that meet pre-existing, less stringent standards, would not be required to meet a new standard if the benefits of reducing the likelihood of injury and disease further did not justify the expenditure required.

Recommendation 2

The Commission recommends that the principal OHS legislation in each jurisdiction provide all those having a duty of care a specific defence against a *prima facie* breach of their duty of care. The defence should be that it was not reasonably practicable for them to have done more than they did to reduce risk.

4.2 Specific obligations of employers

The principal OHS Acts generally elaborate the various duties of care in too much detail. Fewer and more relevant provisions would be more effective. They would clarify the duties and reduce the extent of duplication in the legislation.

The Commission considers the following principles should determine the elaboration required.

- The specific obligations should constitute the minimum required to achieve the objective.
- They should concentrate on risk management processes that promote continuous improvement in health and safety.
- They should encourage and provide for employee participation in the management of health and safety at their workplace.
- Any specific obligation should not repeat what is already stated or clearly implied elsewhere in the legislation.

State Governments and trade unions generally agreed with the specific obligations proposed for employers in the Draft Report. The unions, however, did not wish to see other specific obligations deleted, as was also proposed. Having regard for these concerns, the Commission considers that the following would meet the above criteria:

- an obligation to train and instruct their employees, supervisors and managers, and others at the workplace, in health and safety;
- an obligation to consult with their employees on health and safety issues at the workplace;
- an obligation to tell their employees about health and safety issues at the workplace;

- an obligation to identify, assess and manage all risks to health and safety at the workplace; and
- an obligation to provide access to appropriate medical facilities for the treatment of injured workers.

The Department of Health, Safety and Welfare of Western Australia (sub. 268, p. 4) and the South Australian Government (sub. 275, p. 6) argued that employers should have an obligation to report workplace fatalities, injuries and diseases. The Commission does not support inclusion of such an obligation in the principal OHS Act as it is not essential to the protection of health and safety *at the workplace*. In certain circumstances, such a provision may be justified for the conduct of research in, or government administration of, occupational health and safety. In that case, the requirement might be incorporated in regulation.

In their responses to the Draft Report, most employer organisations agreed with the Commission's proposals on specific obligations of employers and suppliers.

A duty to train and instruct

This obligation would require employers to train employees, supervisors and managers so that they can develop and implement effective OHS management systems. Training also helps to increase commitment to health and safety. For these reasons, it is an essential element in the devolution of greater responsibility to those in the workplace. The obligation needs to be expressed in general terms, as training requirements will differ greatly between people and workplaces. Any detailed training requirements, such as that for employee health and safety representatives, should be in subordinate legislation.

The existing principal Acts place a duty on employers to provide adequate training for employees, although the wording of the Act varies slightly between jurisdictions.

A duty to consult

As recommended by the Robens Committee, employers should be required to consult with their workers. Employees bear the consequences of an employer's failure to meet his or her duty of care. Best practice enterprises have shown that employee participation is efficient because their employees are usually the best informed about the problems associated with their work activities (see Appendix F).

An obligation to consult should only be expressed in general terms so as not to constrain the form of consultation. This point is discussed further in Section 4.4. The duty to consult should also extend to those nominated by employees as their representatives.

A duty to consult is presently included in OHS legislation in only some jurisdictions.

A duty to identify, assess and manage risks

An obligation on employers to identify, assess and manage risks to health and safety would give legal expression to the comprehensive quality management principles that underpin the performance of best practice enterprises.

At present, such obligations are confined to subordinate legislation and in some jurisdictions apply only to some hazards, such as manual handling. Logically, the obligation should extend to all hazards. It would also be given greater force and prominence if included in the principal Act.

In some workplaces, this obligation would imply a need to monitor the health of employees and to keep appropriate records.

A duty to provide access to medical facilities

The duty of care logically extends to having to deal with the consequences of workplace incidents and an employer should have in place appropriate mechanisms for dealing with them. This requires that reasonable access to adequate medical treatment should be provided to injured workers.

This requirement is not currently specified in all OHS legislation.

4.3 Other rights and obligations

Apart from employers, there are also duties on employees and suppliers of hazardous materials and equipment.

A duty to co-operate

Employers cannot meet their duty of care without the co-operation of their employees.

Recommendation 3

The Commission recommends that the principal OHS legislation in each jurisdiction require all employers, as far as reasonably practicable, to:

- undertake ongoing identification, assessment and management of the risks to health and safety at their workplace, including keeping appropriate records and monitoring the health and safety of their employees;
- consult with their employees and their representatives in the identification, assessment and management of risks to health and safety at their workplace;
- inform employees and others in the workplace about the identification, assessment and management of risks to health and safety at their workplace;
- provide instruction and training for all those at the workplace to enable them to participate in the identification, assessment and management of risks to health and safety at their workplace; and
- ensure access to appropriate treatment for injuries sustained at their workplace.

Most principal OHS Acts already place an obligation on employees to co-operate. However, in some legislation there is unnecessary over-elaboration of the employee's obligations. Some require employees to use safety and personal protective equipment provided by the employer, even though this is implicit in the obligation to co-operate.

The Australian Chamber of Commerce and Industry (ACCI) (sub. 349, p. 7) and the Victorian Employers' Chamber of Commerce and Industry (VECCI) (sub. 313, p. 8) were concerned that information about health and safety which is provided to employees might be disseminated beyond the workplace.

The Commission considers it appropriate for employees to be required to co-operate in the management of the risks to health and safety. However, a specific obligation on employees to co-operate with their employer would, in most cases, imply that the employee would be under an obligation not to disclose commercially sensitive information.

Recommendation 4

The Commission recommends that the principal OHS legislation in each jurisdiction require all employees, as far as reasonably practicable, to cooperate with their employer in the management of risks to health and safety at their workplace.

An obligation to tell

Lack of information is one of the main rationales for regulation of workplace health and safety. Those in the workplace need to be well informed about hazards and their control if they are to manage them effectively. The devolution of responsibility for risk management to the workplace, as the Commission has proposed, requires that relevant information be made available.

The Commission considers that suppliers of plant, equipment and materials should face an obligation to provide information about their products and their safe use to purchasers and users. This is not currently the case in some legislation.

Similarly, employers should be required to inform employees and others in the workplace about health and safety risks and how they should be managed.

Evidence was submitted to the inquiry that suppliers and employers are not providing sufficient information to workers who are exposed to hazardous chemicals. The Commission supports a mandatory requirement (in regulations) on suppliers to provide a Material Safety Data Sheet for hazardous substances.¹

The supplier is in the best position to be aware of the safety implications of the transport, storage, handling and use of hazardous materials. As part of their obligation to inform their employees about the health and safety risks of their employment, employers would be expected to make Material Safety Data Sheets available to their employees.

BHP argued that the obligation to provide health and safety information should relate to hazards, rather than the risks associated with them, on the basis that what constitutes an acceptable level of risk is often dealt with through consultative processes (sub. 344, p. 1). In the Commission's view, there is

¹ The NOHSC model regulations for the Control of Workplace Hazardous Substances includes such a provision. Most governments have incorporated the model regulations in legislation, or are in the process of doing so.

scope for information to be provided on the level of risk involved in typical transport, handling, storage and use.

Recommendation 5

The Commission recommends that the principal OHS legislation in each jurisdiction require all suppliers of plant, equipment, materials and services, as far as reasonably practicable, to inform purchasers and users about the identification, assessment and management of risks to health and safety associated with their products.

A right to know

Employees should be able to demand information about hazards and their control from their employer. There should be an equivalent ‘right to know’ for employers, who should be able to demand from their suppliers information about the safe use of plant and equipment or substances supplied by them. These rights would complement the ‘obligations to tell’ proposed above.

The Commission considers that the right to know should be available to employees, but also others who are at or in the vicinity of the workplace. This would complement the duties of employers and suppliers to provide relevant information to all those whose health and safety might be affected by their actions.

None of the jurisdictions currently provide a right to request information from suppliers. However, in Western Australia such a requirement may be included in forthcoming legislation (sub. 269, p. 5).

Recommendation 6

The Commission recommends that the principal OHS legislation in each jurisdiction grant a right to:

- employees and others at or in the vicinity of the workplace to be informed, as far as reasonably practicable, about the identification, assessment and management of the risks to health and safety at their workplace; and
- users of plant, equipment and materials, as far as reasonably practicable, to be informed about the identification, assessment and management of the risks to health and safety associated with their products.

4.4 Employee participation in workplaces

Employee participation plays an important role in achieving workplace solutions to occupational health and safety problems.

The employees' role is critical to successful management of the risks to health and safety at work because:

- employees have a right to be involved in decisions affecting them, especially where their health or safety is at risk;
- employees are often best placed to know what needs to be done to address health and safety risks; and
- employee participation has other benefits, including improved industrial relations, higher morale and increased productivity.

Work by Biggins supports the claim that employee participation via elected representatives and committees contributes to improving workplace health and safety (1991, p. 138, p. 157). Biggins indicated that the majority of health and safety issues are resolved satisfactorily by representatives and committees (sub. 35, pp. 1–3).

Health and safety committees

Provisions governing the establishment, composition and functions of health and safety committees are included in all OHS legislation.

These provisions generally state that:

- employers must establish committees when requested to do so by a majority of employees or by a health and safety representative;
- at least half of the members of the committee must be employees elected by their peers; and
- the functions of committees include facilitating consultation and co-operation on health and safety matters and to make recommendations to the employer on improving workplace health and safety.

The Australian Council of Trade Unions (ACTU) identified several functions of OHS committees which it argued should be included in the principal OHS Act of every jurisdiction (see Appendix L).

The duty of care itself implies that consultative mechanisms have to be put in place. Furthermore, there is no guarantee that mandating a particular form of consultation (for example, committees) will necessarily lead to effective consultation. Indeed it is important that legislative provisions for health and safety committees do not inhibit other forms of consultation.

The Commission considers that if governments wish to continue mandating committees, this should be mandated as regulation in subordinate legislation.

Health and safety representatives

Except for New South Wales and the Northern Territory, existing legislation provides for worker-elected health and safety representatives. In New South Wales and the Northern Territory, committees exercise some of the rights normally extended to representatives in other jurisdictions, such as the right to inspect the workplace.

The ACTU contrasted the role of health and safety representatives with that of committees:

The OHS Committee has clearly defined responsibilities in the workplace which involve the broader issues, including integration of OHS into management systems, data and statistic gathering and review, developing and overseeing workplace programs and so on. The health and safety representative is much more closely involved with the day-to-day issues which arise in their 'designated work group', and in dealing with those issues on behalf of the workers who elected him/her (sub. 149, p. 9).

Several unions, including the ACTU (sub. 336, p. 8) and the Labor Council of NSW (transcript, p. 2869), called for legislative provisions providing for both representatives and committees.

Most employer groups, such as the ACCI (sub. 349, p. 8) and the Metal Trades Industry Association (MTIA) (sub. 278, p. 6) argued that the form of representation should be determined through consultation between employers and employees in each workplace.

The powers of employee representatives are controversial. Dr Johnstone argued:

... in order to ensure that the employer engages in an ongoing process of identifying, assessing, managing and monitoring hazards, employee elected health and safety representatives should be given the powers to (i) issue provisional improvement notices for contraventions of legislation (including the employer's general duty) and (ii) direct that work cease where there is an immediate threat to the health and safety of any person. Only workers can effectively enforce the employer's duty on an ongoing basis, and should be given powers to enable such enforcement (sub. 277, p. 3).

The ACTU proposed a number of powers and functions of health and safety representatives (see Appendix L).

The Commission supports all of these proposed powers — with the exception of the power to order workers to stop work, to initiate improvement notices and to call in consultants or advisers at the employer's expense. This view is supported by the Labor Council of NSW. The Council argued that employees have rights under common law to refuse dangerous work, and that a decision to shut a workplace is better taken through industrial action (transcript, pp. 2870-2871).

The Commission considers that maximising employee participation in management of health and safety at the workplace is the overriding objective when determining the appropriate roles and powers of employee representatives. The most appropriate form of employee representation will depend on the circumstances of each workplace. For example, in some workplaces, employees might be more willing to become representatives and to raise health and safety concerns if they could perform this role in a more collegiate forum such as a health and safety committee the Commission considers the ACTU's proposal concerning the functions of OHS Committees (see Appendix L) provide an appropriate guide.

Restricting the form of legally sanctioned participation to employee health and safety representatives would be counter-productive if it deterred active participation by other employees. Accordingly, the form of representation should be left to the employees in each workplace.

In some workplaces, a health and safety committee may be the most appropriate mechanism, while in others, elected representatives would be preferred. Some workplaces may have both committees and representatives where each perform

different but complementary roles. Although employers always have the option to establish committees, the Commission considers that the form of participation should be determined by their employees.

National consistency

There is a general trend towards greater consistency in the legislative provisions governing committees and representatives in the different jurisdictions. For example, both the Queensland *Workplace Health and Safety Act 1995* and the Tasmanian *Workplace Health and Safety Act 1995* have brought their provisions for health and safety representatives more in line with other jurisdictions.

Nevertheless, significant differences in the form of representation and the powers of representatives remain between jurisdictions (see Table 3.1 and Appendix Q). Examples of this are:

- There is provision for ‘designated work groups’ to be represented by a health and safety representative in Victoria, the Australian Capital Territory and the Commonwealth, but not in any other jurisdiction.
- In New South Wales, the Northern Territory and Tasmania, health and safety committees can be formed in workplaces with 20 or more employees. In Western Australia 10 or more employees are required, while in the Commonwealth jurisdiction, only workplaces with 50 or more employees can form committees.
- In Victoria and South Australia, a health and safety representative has the power to stop work where there is an immediate threat to the health and safety of an employee. In the Commonwealth and the Australian Capital Territory, they can only order work to stop in situations where the supervisor cannot be contacted immediately.

On equity grounds, all employees should have recourse to representation with the same minimum rights and responsibilities. Accordingly, the Commission proposed in the Draft Report that jurisdictions agree on uniform provisions for employee health and safety representatives, and health and safety committees. However, the employees at a workplace should be able to decide which of the three options (including none) will apply at their workplace.

Uniform provisions were supported by the ACTU but opposed by some Trades and Labor Councils. For example, the Victorian Trades Hall Council was not willing to support uniformity unless the uniform provisions were based on the rights in Victorian legislation (sub. 348, pp. 11–12). The Trades and Labour Council of the ACT supported uniform *minimum* requirements, which would give jurisdictions the scope to improve on these if they wished (sub. 295, p. 1).

The ACCI did not see a need for uniformity, arguing that ‘existing arrangements for representation appear to be working successfully in each jurisdiction’ and ‘the nature and powers and responsibilities of employee health and safety representation is controversial’ (sub. 349, p. 8).

The Commission believes that *uniform minimum rights* for employee health and safety representatives and health and safety committees would equitably provide employees with protection while accommodating the different needs and circumstances within individual jurisdictions. Uniform minimum rights would also provide a useful starting point from which to advance greater consistency in the future, in light of further experience and research on the participation arrangements most effective in improving work health and safety.

Recommendation 7

The Commission recommends that the principal OHS legislation in each jurisdiction provide employees with a right to elect their health and safety representatives and any employee members of the health and safety committee at their workplace. Health and safety representatives and committee members should have a right to work in concert with trade unions in undertaking their roles. The minimum rights and responsibilities of health and safety representatives should be agreed amongst governments.

Protection from discrimination

Some participants also raised the issue of *protection against discrimination* for employee health and safety representatives, members of health and safety committees, and individual employees who raise OHS issues with management.

In some jurisdictions, this protection is provided through specific provisions in their OHS legislation. Elsewhere, the protection is provided by common law or State industrial relations legislation. The Commonwealth *Industrial Relations Act 1988* provides protection against unfair dismissal, but does not protect against discrimination in the course of employment.

The Commission considers that adequate protection is currently available under common law and existing industrial relations legislation. However, if this protection proves to be partial, anti-discrimination provisions should be included in the uniform provisions for health and safety representation to be agreed by governments.

5 MANDATED SAFETY REQUIREMENTS

Governments mandate minimum standards for the management of risks to health and safety in workplaces. They do this to protect the health and safety of workers where:

- some of the costs of injury and disease are likely to be ignored when risk management decisions are taken because those costs are borne by the rest of the community;
- there is imperfect information at the workplace about workplace hazards and the management of the risks they pose to health and safety;
- uncertainty exists about the costs and benefits to the workplace, and to the rest of the community, from preventing injury and disease; and
- there are lower search costs in determining some preventative solutions just once for all workplaces (rather than by each workplace having to act on its own).

Employers and their employees may not voluntarily make those risk management decisions that are in the best interests of the community as a whole. Collectively, mandated decisions could achieve better outcomes, in at least some cases. Be that as it may, it does not follow that they necessarily will in practice.

It is for this reason that mandated solutions must be adequately assessed to ensure that they are likely to yield a net benefit to the community.¹ Furthermore, any such solutions should be implementable in a way that achieves the desired goal at least cost.²

The existing approach to mandating health and safety standards does not always produce efficient solutions. This is due to poor assessment and selection of the solutions. The Victorian Employers' Chamber of Commerce and Industry put it this way:

All too often governments see regulation as the only way to control a particular behaviour ... The plethora of ... OHS regulation by States and Territories has done little to improve OHS practices in the past. OHS regulatory bodies need to stop measuring their performance by the number of regulations they make and concentrate on practical ways of assisting business to improve OHS performance (sub. 97, pp. 1–2).

¹ The benefit of improving resource use less the cost of regulation and any distortions resulting from intervention.

² Thereby ensuring allocative efficiency by not restricting technical efficiency.

5.1 Principles for standard setting and regulation

On 11 April 1995, the Council of Australian Governments (COAG) endorsed a report by the Commonwealth–State Committee on Regulatory Reform which recommended a set of principles and guidelines for the development of national standards and regulations (see COAG 1995). The COAG endorsed these principles and guidelines for use by Ministerial Councils and regulatory bodies when developing proposed standards and regulations.

The COAG principles are summarised in Box 5.1. The text of the principles is reproduced in Appendix L.

Box 5.1 COAG Principles for National Standards and Regulatory Development

- Minimise the impact of regulation.
- Minimise the impact on competition.
- Predicability of outcomes.
- Compatibility with international standards and practices.
- Not restrict international trade.
- Regular review of regulation.
- Flexibility of standards and regulations.
- Standardise the exercise of bureaucratic discretion.

Source: COAG (1995).

These COAG principles have a number of implications in setting mandatory standards for occupational health and safety. First, assessment of the various impacts of proposed standards requires a comprehensive evaluation of their benefits and costs. Although there are limitations to its use, benefit–cost analysis is the best available approach for systematically illuminating the likely benefits and costs, and the different ways of achieving the objective behind the standard. Benefit–cost analysis is most valuable when conducted prior to the decision on a standard or regulation.

Second, standards and mandatory requirements are most likely to be efficient when directed at hazards, the natures of which are independent of the workplace or its activities. If the nature of a hazard varies between industries, it is probably better tackled by a combination of legal duties and codes of practice.

Third, there should be a direct link between the achievement of the standard at a workplace and a reduction in the risk of injury or disease at that workplace. The standard should therefore directly influence the design or management of the workplace, or of the activities which are associated with it.

Fourth, standards should be expressed in terms of broad outcomes. So-called ‘performance-based’ standards are preferred to those standards that prescribe processes, inputs or technical requirements. In most cases, the risks to health and safety are not likely to be sufficiently high to justify the use of the latter group as *mandatory* standards.³ The most likely exceptions to the presumption against such standards are those that address highly hazardous workplaces, such as petroleum refineries and nuclear reactors.

Fifth, measurable standards or requirements are more easily enforced. Those that are not enforceable (and hence not enforced) serve to discredit the health and safety regime, particularly if it is built around ‘performance-based’ standards. Measurable standards lend themselves better to periodic review and eliminate the need for discretion in their administration. They minimise the uncertainty, compliance costs and discrepancies in enforcement.

Finally, efficient setting of occupational health and safety standards requires that their requirements not be duplicated elsewhere in the mandating legislation. For example, no regulation should have the effect of repeating the general and specific duties set out in the principal OHS Acts.

The Commission considers that the rigorous application of the COAG principles should reduce the number of mandatory requirements currently in OHS legislation and alter the nature of many others. These issues are discussed below.

Governments and employers generally favoured approaches to regulation that prescribe outcomes rather than how those outcomes are to be achieved. The Australian Chamber of Commerce and Industry criticised the ‘traditional prescriptive legislative approach’ as:

- It was incapable of keeping pace with technological change and the changing work environment.
- It was inflexible, therefore potentially capable of creating dangerous or unsafe situations if its application was not appropriate. A specific regulation can sometimes not work and even put people at risk.
- Better preventative alternatives may exist which are rendered illegal by the legislation (sub. 133, p. 25).

³ This is not to suggest that there is no a role for the adoption of *voluntary* standards in these areas. This issue is discussed in Chapter 6.

Other participants, particularly most trade unions, argued there are limits to the use of performance-based requirements. The Tasmanian Trades and Labour Council stated:

The trade union movement would endorse the performance-based approach if it was convinced workplaces were equipped to deal with the issues. The fact that the basic minimum requirements of the Act are often not complied with makes us sceptical that things could improve if the prescriptive approach were abandoned (sub. 88, p. 2).

The Labor Council of New South Wales supported the performance-based approach. However, the Council expressed concern about the management of the change from technical to performance standards:

... the performance-based approach to OHS law, in NSW, has not been managed well. We have concerns that there is a continued push for more performance-based regulation when there is little evidence to show that the necessary cultural change required [to bring about improvements in health and safety] ... has emerged (sub. 145, p. 4).

The Commission agrees. It concludes that the shift towards performance-based regulation in OHS can only be successful if it is accompanied by a range of other measures. Steps must be taken to ensure that performance-based regulation is enforced and that breaches are prosecuted rigorously where necessary. The changes to regulation and its more effective enforcement must also be complemented by a range of other programs in the areas of OHS information, training and education to support the necessary cultural change in workplaces. These issues are taken up in later Chapters.

Exposure limits

Employers are meant to ensure that their employees are not exposed to hazards greater than the relevant exposure limit. There are different types of exposure limits, including time-weighted averages, peak and short-term exposure limits.

Exposure limits do not represent 'no effect' levels. Because individuals differ in their reactions to a given exposure, exposure limits do not guarantee everyone will be protected from harm. Accordingly, compliance with an exposure limit should not preclude further efforts by workplaces to further reduce exposure.

For these reasons, Shell Australia emphasised that *mandatory* exposure standards engender a 'cookbook' compliance mentality in both industry and the regulators and argued that exposure limits should not be mandated in legislation (sub. 308, p. 5).

In support of its position, Shell Australia quoted from the preamble to NOHSC's *Exposure Standards for Atmospheric Contaminants in the Occupational Environment*:

exposure standards are not fine dividing lines between satisfactory and unsatisfactory working conditions ... they are best used to assess the quality of the working environment and indicate where appropriate control measures are required (sub. 308, p. 5).

Exposure limits are good examples of 'performance-based' requirements in that they leave open the *means* of achieving the exposure level.

Although recognising the uncertainties surrounding the links between exposures and adverse health effects, the Commission considers that there can be benefits in mandating exposure limits to provide a minimum level of protection for all workers.

However, since mandated exposure limits do not guarantee that every worker will be protected, employers in some situations may need to reduce harmful exposures that are within the particular limit in order to meet their duty of care.

Process requirements

Process requirements have the potential to impose high compliance costs and to stifle innovation because they prescribe *how* a regulatory objective is to be met. A process requirement should only be mandated if it is more efficient to impose the same way of doing something on all workplaces.

Process requirements may be justified in terms of the COAG principles for standard setting. For example:

- a requirement for suppliers of hazardous substances to provide Material Safety Data Sheets to users (discussed in Chapter 4);
- health monitoring for highly hazardous substances; and
- the management of major hazardous facilities, such as petrochemical refineries and nuclear reactors.

The Commonwealth's *Safety Case* regime for offshore petroleum platforms is an example of a process requirement that is likely to meet the COAG principles because it is expressed in terms of an identifiable outcome. The regime requires the establishment of a *Safety Management System* for each petroleum lease or permit based upon the principles of the AS 3900 series of Australian Standards for quality management (see Box 5.2). This is demonstrated by the preparation of a Safety Case and its submission to the regulatory authority.

Box 5.2 The Safety Case regime for offshore petroleum platforms

Regulations under the *Petroleum (Submerged Lands) Act 1967* require operators to submit a *Safety Case*. The Safety Case regime is a form of co-regulation between government regulators and operators of petroleum leases or permits.

The Safety Case regime does not stipulate the methodology or standards to be applied to achieve the stated safety objectives. Operators have to demonstrate via a written Safety Case that they have a *Safety Management System* capable of continually and systematically identifying hazards, assessing their risks and consequences and, in so far as is reasonably practicable, eliminating or controlling the risks to personnel at the facility.

To be accepted by the regulator, a Safety Management System needs to include:

- policy and objectives;
- organisation and responsibility;
- risk assessment and risk management;
- employee involvement;
- employee selection, competency, and training;
- contractors and support services;
- design, construction and commissioning;
- safe operational procedures;
- maintenance, inspection, testing and modification;
- management of change;
- health system;
- emergency response;
- incident investigation and reporting; and
- performance audit and review.

The Safety Management System also needs to conform to the principles of quality management in the AS 3900 series of quality standards.

The *Guidelines for Preparation and Submission of Safety Cases* assist the operators and serve as a guideline for the Authority administering the Act by providing a semi-structured assessment methodology for assessing Safety Cases (see DPIE 1995). The written Safety Case is given an initial 'desk-top' or 'paper' audit and once formally accepted, the Safety Case becomes a set of recognised legal standards against which operators are assessed.

Part of the Safety Case is the provision for ongoing audit and review. The regulator conducts regular on-site audits against the Safety Case, to ensure the elements of the Safety Case are in place. The regulator also conducts in-depth 'compliance audits' into the system which closely examine the detailed implementation of selected aspects of the Safety Case (see Appendix L for further details).

A similar regime is being developed by NOHSC for major hazardous facilities generally.

The NOHSC *National Model Regulations for the Control of Workplace Hazardous Substances* includes a requirement for employers to monitor the health of workers who are exposed to highly hazardous substances (see Appendix N). This is another example of a process requirement that is likely to meet the COAG principles. The requirement for health monitoring is performance-based — it specifies which hazards need to be monitored but generally does not say how it is to be done.

Several of the national standards declared by NOHSC — for example, those for hazardous substances, manual handling and plant — require certain steps to be taken to identify, assess and control the particular hazard. In Chapter 4, the Commission proposed certain reforms to the employer's specific obligations in OHS legislation which would make such process requirements redundant. They would be covered by the addition of a specific obligation for the employer to identify, assess and control the risks to health and safety at the workplace.

Technical requirements

Many participants saw a role for technical requirements in relation to the design, selection, maintenance and use of plant, equipment and materials at the workplace. For example, the South Australian Government argued:

There are circumstances where a prescriptive approach may be needed, or the incorporation of prescriptive elements within a performance framework. These circumstances arise where there is a known high degree of risk and specific controls which are applicable to all circumstances where the risk occurs and essential to control the risk. Some aspects of the control of plant and dangerous goods meet these criteria. In these cases detailed standards are set out in Australian Standards which should be an integral, supporting element of performance-based regulations (sub. 147, p. 21).

The NOHSC *National Standard for Plant* incorporates many technical requirements. These broad requirements are supported by specific requirements for nominated types of plant. These specific requirements call up 36 Australian Standards (see Box 5.3).

The Commission agrees that, in some circumstances, mandatory technical requirements are appropriate. For example, it may be more efficient to have key safety elements included in the design of plant and equipment than to engineer them in subsequently. Hence there can be efficiencies in mandating such design criteria.

Box 5.3 Technical requirements in the National Standard for Plant

The *National Standard for Plant* is generally expressed in broad performance-based terms. However, it has some detailed requirements, such as requiring the design of various items of plant and equipment to be registered and registration of individual items of plant.

The Standard includes by reference a number of Australian Standards. These place quite detailed technical requirements on employers and ‘suppliers’ of plant and equipment — Schedule, three to the national standard lists a total of 36 Australian Standards.

For example, an employer has to ensure that certain pressure equipment in use is inspected in accordance with AS 3788 and that it is operated and maintained in accordance with either AS 3873 or, where applicable, AS 2593 or the *Australian Miniature Boiler Safety Committee Code*.

Clause 6(3) of the National Standard allows the administering agency to deem alternative standards acceptable for use in lieu of the referenced standard.

There is scope for reducing the considerable number of technical requirements currently found in OHS legislation. For example, in its *Work Health and Safety (Plant) Regulation*, Victoria has opted for a broader approach than the nationally agreed standard, and only refers to external standards for the purpose of defining plant and equipment to be registered. (Other requirements are largely process requirements relating to risk identification, assessment and management for various categories of plant and equipment.) This approach has enabled 11 sets of prescriptive technical requirements to be revoked.

Documentation requirements

Most OHS legislation include documentation requirements which require the administering agency to be informed about certain occurrences at the workplace within a given period. These generally relate to serious incidents, accidents and injuries.

Another type of documentation requirement in widespread use concerns the keeping of appropriate records at the workplace. They are usually required to be produced upon demand by the administering agency and are used for recording the maintenance and inspection of certain kinds of hazardous plant and equipment, such as pressure vessels, lifts and cranes, or internal audits of risks management systems or practices.

A third type of documentation requirement focuses upon health surveillance monitoring of those at or near the workplace. This seeks to record the changes in health status due to hazardous exposures. Such a requirement is included in the *National Standard on the Control of Workplace Hazardous Substances*.

Australian Standards

Australian Standards are referred to in many mandatory process, technical and documentation requirements of all jurisdictions for occupational health and safety. Some jurisdictions give Australian Standards the force of law while others only give them evidentiary status.

Under a memorandum of understanding with the Commonwealth Government, Standards Australia is recognised as the peak body for the development of most standards. The Commonwealth has undertaken to co-ordinate its responsibilities for regulation and mandatory standards with Standards Australia to the maximum extent possible.

For this reason, NOHSC and Standards Australia have a memorandum of understanding, defining their respective roles in setting standards related to occupational health and safety. NOHSC is responsible for exposure limits, model legislation and codes of practice related to safe work practices, the social acceptability of risk, statistics and record keeping. Standards Australia, for its part, develops technical design standards, related codes of practice and test methods, and standards not primarily directed at occupational health and safety.

Australian Standards are drafted to reflect *minimum* standards of performance in a particular area. They are meant to set out practical solutions that reflect the concerns of employees, the various commercial realities and related regulatory requirements. They reflect a consensus between all the major interests on a particular issue, including (but not confined to) governments, employers and trade unions.

Many Australian Standards are written for the express purpose of incorporation in legislation, for example, the electrical safety and building standards (transcript, p. 3143). Nevertheless, not all that have been incorporated in OHS legislation were originally drafted for that purpose. Moreover, not all are expressed in performance terms (transcript, p. 3147). These considerations suggest that the use of Australian Standards in OHS legislation does not always conform to the COAG principles for regulation.

Australian Standards would, however, provide valuable guidance material for those developing enterprise safety management systems or codes of practice. The relevant workplaces would be free to adopt Australian Standards as they

saw fit. Where appropriate, governments may also decide to endorse certain Australian Standards as approved codes of practice.

Standards Australia indicated that many Australian Standards could be regarded as codes of practice that provided guidance on ‘deemed to comply’ solutions (transcript, p. 3140). Several other participants, including the Queensland Division of Workplace Health and Safety (transcript, p. 604), the Western Australian Department of Occupational Health Safety and Welfare (transcript, p. 2160) and ACCI (sub. 349, p. 9), argued that Australian Standards would be more useful as reference documents and guidance materials and that they should not form part of legislation.

National standards

Many existing regulations, including those which are based on the nationally agreed standards developed by NOHSC, do not meet the principles agreed by COAG. A prominent example of this are regulations based on the *National Standard for Manual Handling* (see Box 5.4).

The Commission considers that only those parts of a national standard that conform to the COAG principles should be incorporated in regulation.

Incorporating a national standard in its entirety in legislation has the undesirable effect of signalling to the workplace parties that there is only one means of meeting their duty of care. Governments may decide that part or all of a particular national standard should have the status of an approved code of practice. Otherwise, it should be regarded as guidance material only.

The Department of Industrial Relations stated that national codes of practice are not mandatory and provide only one way in which mandatory requirements can be met (sub. 395, p. 4). It considered there is a misunderstanding of the role of national codes in each jurisdiction. The Department described several examples where the *National Standard for Manual Handling* and its code of practice were useful guidance to industry-specific approaches to manual handling risks (sub. 395, attachment 2). These included:

- the manual handling program developed by the Food Unions Health and Safety Centre, McCain’s, Kraft and Herbert Adams;
- the back injury prevention program developed by the Queensland Nurses’ Union and the Mater Misericordiae Public Hospitals;
- a manual handling project in the mining industry; and
- a project to address manual handling risks in the quarrying industry in South Australia.

Box 5.4 Efficient regulation and the National Standard for Manual Handling

The *National Standard for Manual Handling* consists of the *common essential requirements* for its legal implementation by each of the jurisdictions and a *National Code of Practice*.

The *common essential requirements* require employers to ‘take all workable steps’ to ensure that the design of ‘plant, equipment and containers’, ‘work practices’ and ‘the working environment’ are ‘safe and without risk to health’. The standard goes on to require the identification, assessment and control of manual handling risks to health and safety.

The associated *National Code of Practice* provides general principles and advice relating to the identification, assessment and control of manual handling hazards. This advice is designed to apply to all workplaces.

The main defect of this national standard is that it does not provide sufficient practical guidance to a workplace attempting to meet its regulatory requirements. It does little more than repeat the duty of care obligation of the employer, with particular reference to ‘manual handling’.

For example, Qantas Airways stated:

... in implementing the Manual Handling Regulation in NSW it gives little guidance for implementation. It advises [how] to assess the tasks without giving standards to work to (sub. 68, p. 1).

Deloitte (1995, p. 28) found that 22 of the 56 employers surveyed in Victoria, New South Wales and Queensland (or 40 per cent) considered the manual handling code of practice to provide inappropriate assistance to them. Another 34 per cent referred to the code for assistance on specific issues, and only 7 per cent actually followed the manual handling code of practice in a prescriptive way. The employers in the study operated in a wide range of industries, including trade, manufacturing, construction, utilities and community services.

The South Australian Government also noted the value of hazard-based national standards in providing direction for further development of industry-based approaches:

Hazard specific regulations and codes of practice do not preclude the establishment of industry codes of practice or enterprise safety systems but the latter would be on firmer foundations by applying the more detailed directions provided in the hazard specific regulations and codes. Thus hazard specific regulations and codes provide firm

foundations for managing risks in the workplace, whilst providing the flexibility for a management response which is appropriate to the workplace (sub. 275, p. 2).

The Commission recognises that some workplaces may see value in the national codes of practice and should be given the option of adopting them. Alternatively, workplaces should be able to develop their own, drawing on and modify the national standards developed by NOHSC.

Flexibility in mandated standards

The Commission recognises that it may take some time for all of its proposed regulatory reforms to be implemented. In the meantime, much of the unnecessary prescriptive legislation would remain. The Commission considers that employers should be given the option of substituting regulatory requirements with measures that can be demonstrated to produce an equivalent or better outcome for workplace health and safety.

Such a provision offers the possibility of reducing further the extent of any inflexibility in regulation, particularly in process and technical requirements. The Commission considers that best practice management approaches would be greatly encouraged by it.

Recommendation 8

The Commission recommends that mandated safety requirements should, as far as possible:

- be economically warranted;
- prescribe measurable and enforceable outcomes;
- avoid prescribing either the particular inputs into or processes to achieve the outcomes desired, unless it is more efficient to do so.

The principal OHS legislation should provide that particular requirements may be substitutable by alternative measures that can be demonstrated by the duty holder to provide equivalent protection to health and safety.

5.2 Review of legislation

Due to the sheer volume of legislation relating to health and safety at work in all jurisdictions, the Commission was not able to examine every piece of legislation in depth. This is particularly true of the myriad of subordinate legislation. However, the direction that reform needs to take is quite clear.

The Commission recommends that governments should review all their legislation related to health and safety at work. The reviews should aim to ensure that all pre-Robens legislation is either repealed or, where appropriate, incorporated into the relevant principal OHS legislation or its subordinate regulation. For each requirement that has to be retained, the review should assess the most efficient legislative form for it to achieve its objective.

The Commission expects that such reviews will identify the particular pieces of legislation that should be repealed and those that need to be amended. Exposure limits should be largely unaffected. The need for a number of process requirements would be largely, if not completely, eliminated by the Commission's proposals regarding the clarification of the obligations in the principal OHS statute. (The requirements in respect of manual handling and plant are good examples of redundant legislation.)

Many process and technical requirements should be able to be repealed. As far as possible, those that remain should be re-expressed in terms of *broad outcomes* as this is generally more efficient. As far as possible then, subordinate legislation should avoid prescribing *how* outcomes are to be achieved or *what* workplaces are to use to achieve them.

Recommendation 9

The Commission recommends that the legislation affecting occupational health and safety in each jurisdiction should be reviewed and amended with a view to:

- rationalising its structure by incorporating provisions under the principal OHS statute;
- removing redundant provisions;
- consolidating and rationalising industry-specific legislation under the principal OHS statute;
- harmonising OHS provisions with those for public health and safety, and environmental protection;
- ensuring mandated requirements are consistent with Recommendation 8; and
- expressing all provisions in plain English.

6 VOLUNTARY STANDARDS AND CODES OF PRACTICE

Superior health and safety outcomes at the workplace can only be achieved by individual employers and their employees. They cannot be imposed from without. For this reason, each of the jurisdictions needs to do more to facilitate and encourage individual workplaces to achieve ‘best practice’ standards of occupational health and safety.

Not all workplaces are willing or able to commit themselves to achieving such high levels of performance, at least in the short to medium run. However, they do need practical information on how they can manage health and safety at work in order to comply with the minimum standards set by law. At present this practical guidance is meant to be provided by codes of practice. However, existing codes of practice do not always fulfil this need (see Chapter 3).

In the Commission’s view, the solution to these problems is to be found in regulation giving greater responsibility to, and scope for, enterprises to devise and apply their own operational health and safety measures for their workplaces. These should be able to be implemented through safety management systems for individual enterprises or industry-based codes of practice for groups of enterprises. The design of such systems or codes should occur in close collaboration with employees and, where appropriate, their union representatives.

6.1 Enterprise safety management systems

The best occupational health and safety outcomes are delivered by employers who have *enterprise safety management systems*. These ‘best practice’ enterprises manage risks to health and safety as but one element in a comprehensive and systematic approach to running the organisation based upon the principles of *total quality management*.

An approach based on quality management principles has been adopted by best practice enterprises right across the industrial spectrum. This was highlighted by the range of enterprises that were the focus of a series of studies of best practice in occupational health and safety conducted by Worksafe Australia over the period 1992–94. They included Du Pont Australia, Henderson Automotive, Woodside Petroleum and Camberwell Coal (see Appendix F).

A quality management approach is, by no means, confined to the subjects of the Worksafe studies. Shell Australia, for example, has a typical approach with its Health, Safety and Environment Management System. The individual companies within the Shell Australia group have to develop health, safety and environmental policies, programs and practices. These have to be integrated into each establishment as essential elements of management.

Commitment from senior management within the enterprise, and requiring line management to have responsibility and accountability for occupational health and safety, are also critical to improving OHS performance (see Appendix F).

Regulation and safety management systems

The Safety Case regime for health and safety on offshore petroleum platforms stands in complete contrast to most OHS regulatory regimes. The Safety Case regime *requires* the development and application of an enterprise safety management system based upon the principles of the Australian Standards for quality management (the AS 3900 series).¹ Once endorsed by the Safety Case regulating agency, the particular management system becomes the basis for determining legal compliance with the Safety Case regime (see Box 5.2 in Chapter 5).

The volume, complexity and prescriptive detail in OHS legislation would make it difficult for most enterprises to commit themselves voluntarily to this sort of approach to safety management. The very considerable effort that they need to put into ensuring legal compliance detracts from their adopting a quality approach to management. Many enterprises balk at the commitment of the considerable *additional* effort required, given that they have little prospect of lightening their regulatory load.

The study by Deloitte Touche Tohmatsu (1995, p. 30) commissioned by this inquiry found that many of the larger enterprises prefer to follow an overall OHS risk management program, instead of following individual OHS standards such as manual handling.

In its Draft Report the Commission proposed that the OHS legislation in each jurisdiction should allow and encourage individual enterprises to develop and

¹ Currently neither Standards Australia nor the International Standards Organisation (ISO) has a quality management standard explicitly concerned with occupational health and safety risks in the AS 3900 or ISO 9000 series. Standards Australia is in the process of developing an interim quality management standard to fill this gap pending completion of an ISO standard, estimated to be in three to four years time (Standards Australia, sub. 249, p. 2).

apply an *enterprise safety management system* that incorporates health and safety into their overall management.

The Department of Industrial Relations noted that Worksafe's studies of best practice enterprises did not reveal any incompatibility between existing regulation and application of enterprise safety management systems (sub. 338, p. 4).

However, the Worksafe studies examined only the best enterprises. By definition these are the enterprises most likely to adopt a safety management system based on quality management principles in spite of restrictive legislative requirements. The Commission's concern is for those enterprises that are willing and able to adopt a quality management approach to workplace risks but are discouraged from doing so by regulatory burdens.

In the Northern Territory, the Work Health (Occupational Health and Safety) Regulations effectively require all employers to operate a safety management system (sub. 350, p. 3). The regulations outline requirements that make up a systematic approach to safety management — allocating responsibilities; consulting with employees; identifying and assessing risks; controlling risks; providing information, instruction and training; monitoring controls; and, keeping records. An employer can use an existing code of practice or develop their own procedures for meeting these requirements.²

In New South Wales, employers can follow an enterprise safety management system as one means of demonstrating their duty of care (sub. 397, p. 7).

In the Commission's view, current regulation in most jurisdictions — other than the Northern Territory and New South Wales — impedes the application of quality management systems by individual enterprises:

- Although regulation does not prohibit their use, the number, range and detailed nature of the mandatory requirements in regulation discourages them from doing so.
- An employer can still be prosecuted for not meeting any requirement mandated by regulation, even if the employer has adopted a superior *system* of management that has reduced the overall risks to health and safety to below the legal minima.
- Furthermore, particular requirements in regulation may conflict with more effective control measures generated by a quality management approach.

² Section 187A(4) of the Northern Territory *Work Health Act 1986* specifically provides for the development and approval of a workplace code of practice.

In their responses to the Draft Report, employer associations overwhelmingly agreed with the Commission's recommendations for enterprise safety management systems to be formally recognised in OHS legislation. The ACCI said it:

... strongly supports the recognition of enterprise safety management systems and the provision of incentives for employers who implement such systems in principal OHS Acts. The development and implementation of a comprehensive system to address health and safety hazards in the workplace and their integration into day to day operations, has long been recognised as the only truly effective way of controlling the risks and therefore minimising the inherent costs (sub. 349, p. 9).

The National Safety Council of Australia proposed that enterprise safety management systems should be capable of accommodating an enterprise's obligations under legislation which regulates risks to public health and safety, and to the environment (transcript, p. 2947).

Compliance and safety management systems

In the Draft Report, the Commission proposed that there should be provision for enterprise safety systems to be 'approved' by the regulatory authority as evidence of compliance with OHS legislation. The Commission had in mind a status similar to that of 'approved' codes of practice. In certain jurisdictions, the demonstrated application of such codes constitutes *prima facie* evidence of compliance with the relevant OHS legislation.³ Application of an approved code does not, therefore, constitute legal proof of compliance nor did the Commission intend that this be the case with approved enterprise safety management systems.

Conformity with all the elements of an endorsed enterprise safety management system would be evidence that care is being exercised but not necessarily that the duty is being met. An employer would have to demonstrate that the system used is relevant to the situation, and that health and safety risks had been addressed to the extent reasonably practicable.

The Commission proposed in its Draft Report that approval should be on condition that:

- sufficient consultation on the management system had taken place between the employer and employees;
- the management system address all health and safety risks at the workplace; and

³ In other words, the court could still find that the code itself was inadequate or that it had been inadequately applied by the employer, were there other more compelling evidence of either situation presented to it.

- the management system fulfils all the employer's legal obligations.

Although most trade unions acknowledged that enterprise safety management systems play an important role in addressing health and safety risks in the workplace, they do not agree with their being approved as evidence of compliance by the responsible government agency.

The Victorian Trades Hall Council (sub. 348, pp. 12–13) and the National Union of Workers (sub. 346, p. 13) considered that evidentiary status should be recognised on conditions different to those proposed by the Commission. They proposed that the management system should be agreed to by a tripartite committee (at least bipartite at a State level), it should be audited on-site by the inspectorate, and there should be consultation on and agreement to the system by the employees in question, their health and safety representatives and their unions.

Nearly all Governments objected to the approval of enterprise safety management systems. The main concerns related to adequacy of resources within inspectorates to approve and audit them, and the difficulty of ensuring that they continue to evolve to address changing health and safety conditions in the workplace.

The Northern Territory Government (sub. 350, p. 4) and Queensland Government (sub. 316, p. 9) expressed concern that approval implies some potential liability by the government agency for any subsequent failure by the management system. For example, the agency might be liable if an injury was shown to have been a consequence of an approved system not having adequately addressed risk factors.

In view of these concerns, the Commission decided to withdraw its proposal that provision be made for the approval of enterprise safety management systems by the regulating agency. However, it would be up to the court to decide whether an employer who follows an enterprise safety management system and who is defending a legal action under the OHS Act can admit it as evidence. This would depend on how relevant it is to the circumstances of a case.

Flexibility and enterprise safety systems

In the Draft Report, the Commission considered that it was essential for the sponsors of an enterprise safety management system to have the option to substitute particular requirements in OHS regulation with others that provide equivalent or better health and safety outcomes. However, sponsors would have

to demonstrate that the substitute measure provided equivalent protection to the requirement which was substituted.

The Commission recognises that it may take some time for all of its proposed regulatory reforms to be implemented. In the meantime, impediments to enterprise safety management systems would remain. Therefore, the Commission considers it essential that there be early implementation of the option for employers to substitute regulatory requirements with better measures. Greater flexibility would substantially increase the benefits of safety management systems. Compliance costs would be lower as employers would have greater freedom in the choice of ways to meet their duty of care.

This flexibility would not, and should not, be at the expense of health and safety. Sponsors of enterprise safety management systems who choose this option would still be required to provide protection which is equivalent to that available under the full range of legal obligations in the original legislation — exposure limits, process and technical requirements.

The Commission considers that sponsors should have the option of having their safety management systems audited for compliance purposes. This would give them greater certainty that the courts would recognise that they were taking care.

Incentives to develop enterprise safety systems

As with quality management systems generally, safety management based on such systems is more likely to appeal to the larger, better resourced workplaces.

The needs of most small to medium-sized workplaces may be better served by other approaches such as codes of practice. Nevertheless, International Safety Audit Systems (sub. 254) and Allara Risk Management Service (sub. 318), both of whom have experience with quality management systems for safety in such enterprises, considered that some types of quality management systems can be adapted for smaller businesses.

The Commission anticipates that many enterprises, especially those that are larger and have better resources, will want to adopt an enterprise safety management system. More effective enforcement of the duty of care (along the lines proposed in Chapter 7) would encourage employers generally to actively manage health and safety at their workplace.

There may be merit in governments providing other incentives for enterprises to develop and apply enterprise safety management systems. Possible incentives

could include:

- quality accreditation of enterprise safety management systems;
- rebates of workers' compensation premiums for enterprises with such systems in place; and
- exemption from some routine and random inspections for these enterprises (but not from inspection following a serious incident or accident).

The large number of enterprises that seek accreditation against the AS 3900 series of Australian Standards for quality management shows that many enterprises seek public recognition of best practice. In the same way there could be advantages in OHS legislation acknowledging enterprises with accredited health and safety management systems. It may be appropriate for such accreditation to be in terms of standards developed by a third party, such as the Australian Standard currently being developed by Standards Australia (sub. 249, p. 2).

There are, of course, dangers in providing accreditation, workers' compensation rebates or inspection benefits to employers without ensuring that the management systems in question are fully operational at the workplace. If such measures were implemented, there would be a need for the results of regular internal and external audits of these systems to be advised to the appropriate OHS agency.

Recommendation 10

The Commission recommends that the principal OHS legislation in each jurisdiction explicitly recognise the use of safety management systems by individual enterprises to identify, assess and manage the risks to health and safety associated with the enterprise. The legislation should provide for the adoption of such systems to be granted *prima facie* evidence that care has been exercised. The criteria for enterprise safety systems to be granted evidentiary status should include that:

- there is adequate ongoing consultation between the employer and their employees and, as appropriate, their trade union representatives;
- all the risks to health and safety at the workplace in question are being adequately addressed; and
- relevant mandated requirements are being met or an equivalent level of protection to health and safety is achieved.

6.2 Industry-based codes of practice

Enterprise specific safety management systems are not appropriate for all workplaces. They are likely to best suit large employers. For small to medium-sized employers the costs associated with developing and applying an individual system for every workplace may be prohibitive.

Employers, big and small, will continue to seek practical guidance on how to meet their legal obligations. Indeed, their need is likely to increase with the Commission's proposal that regulation be expressed in terms of outcomes. These needs will therefore involve an increasing challenge to policy since even the basic needs in this regard are not being fulfilled at the moment.

The South Australian Employers' Chamber of Commerce and Industry stated:

Different strategies are required for small employers who are unlikely to employ an OHS professional (essential for the amount of OHS legislation being implemented) and who are also unlikely to afford consulting fees in excess of \$1000.00 per day for advice. System safety should be seen as too complex for most small employers, certainly initially. Yet, authorities only seem to espouse this one pathway to success (sub. 95, p. 24).

The Australian Chamber of Commerce and Industry observed:

... performance-based standards provide the most appropriate legislative base for OHS, however these standards are likely to be ineffective if not backed by guidelines to assist especially small business and employees identifying problems (sub. 133, p. 27).

The Safety Institute of Australia was also concerned about small to medium-sized employers:

... this [performance-based] approach may leave the smaller employers without guidance or sufficient knowledge of risk management in their specific operations. This may lead to an ineffectiveness of the legislation to minimise risk in small business (sub. 133, p. 1).

... larger organisations ... may benefit from the flexibility offered by performance-based legislation as opposed to the traditional prescriptive style legislation (sub. 151, p. 2).

The Australian Mines and Metals Association (Inc) Tasmanian Branch, and the Tasmanian Chamber of Mines suggested a 'two tier system' of performance and prescriptive regulation:

The majority of our members have a preference for performance-based regulation ... There is a recognition that prescriptive regulation has a role where organisations lack the maturity, skills or resources to engage in an acceptable level of OHS commitment or activity without it ... There needs to be a range (or at least a choice) of measures and interventions due to the disparity in conduct, standards and performance between different enterprises.

This points to a two tiered approach, where beyond a minimum standard employers can either 'opt out' and apply their own management systems; or alternatively seek more detailed guidance from the relevant authorities (sub. 212, p. 6).

The need for industry-based guidance

Although official (or approved) codes of practice have long sought to provide the practical guidance that workplaces need to comply with the law, in the view of most inquiry participants, few have succeeded in doing this. The hazard-based codes of practice developed by NOHSC are inadequate in the extent of their advice and are too general to provide practical help to individual workplaces. This is despite general support for their development from employer associations, trade unions and government agencies.

The insistence on hazard-based codes of practice has probably inhibited timely responses by governments, employers and employees to emerging health and safety issues in the workplace. Although the need for a practical response can be acute in some industries, if it is not so everywhere the development of a code of practice can be frustratingly slow.

The Alcohol and Other Drugs Council of Australia suggested that the significant health and safety costs associated with the use of alcohol and other drugs in the workplace were not being confronted by governments, employers and employees (sub. 76). Mr Vaughan Bowie made a similar point about violence in the workplace (sub. 173).

The insistence on hazard-based codes of practice may be part of the reason for the relatively slow responses. This was certainly the view put forward by the Local Government Association of South Australia with regard to the development of a code of practice in South Australia to deal with workplace violence:

We have two situations in local government which could be addressed with [a code of practice on] violence in the workplace. We have nursing homes ... and cash transactions say in council offices. Let's deal specifically with those instead of saying that everybody has to look at violence in the workplace (transcript, p. 2404).

In the course of the inquiry, the Commission did, however, come across a number of voluntary codes of practice developed by industry associations that did not appear to suffer the shortcomings of the hazard-based codes (see Box 6.1). However, a number of industries are currently developing industry-based approaches to dealing with particular hazards such as manual handling using as guidance the hazard-based code of practice (sub. 396, Attachment 2).

To be useful, a code of practice must be relevant to the workplaces that are meant to use it. The development of guidance material by those close to the problems also stimulates awareness, ensures relevance and encourages innovation and commitment to occupational health and safety.

Box 6.1 Industry-based codes of practice

The inquiry found few examples of voluntary industry-based codes of practice. The following examples were those that came to the notice of the Commission. They differ considerably in terms of their coverage, level of detail and compliance incentives (see Appendix L).

- The Plastics and Chemicals Industries Association (PACIA) considers that health and safety is a very high priority for its member companies. Each has its own performance improvement program that are backed by PACIA's Responsible Care program. This program consists of eight codes of practice which define the performance practices for each company's operations and products.
- The Western Australian Fishing Industry Council, with the support and assistance of the Department of Occupational Health, Safety and Welfare, has developed a code of practice for the WA fishing industry.
- The Victorian Association of Forest Industries has produced a comprehensive risk control manual to assist members in meeting the anticipated national occupational health and safety standards.
- The Northern Territory Construction Association, with the support and assistance of the Northern Territory Work Health Authority, has developed a construction safety plan and a guide to safe work on roofs.

Accordingly, in the Draft Report the Commission supported the development of codes of practice by industry groups, such as employer associations, as a means of meeting the need for practical guidance. There are clearly efficiency gains to be made by small employers collectively developing guidance material, particularly where they face a limited range of control measures.

The Deloitte study (1995, p. 21) found that of the 56 employers surveyed, small employers were the least aware of their legal responsibilities, and of the distinctions between a regulation and a code of practice. This supports the view of many inquiry participants that small employers particularly are in need of guidance.

This approach is also advocated by the Australian Chamber of Commerce and Industry:

... enterprises will react positively to materials that are relevant to their own circumstances, but not to broadly couched general promotional material on OHS. For these reasons the development of strategic approaches to OHS which enable industry sectors to develop focused action to address the key OHS issues affecting them has received support from ACCI and its members (sub. 133, p. 44).

Industry-based codes of practice were also proposed by the Robens Committee:

Each individual industry ... has its own particular interests and problems. People within each industry look for a tailor-made approach to safety and health related to the industry's own circumstances (1972, p. 25).

Under current legislation, there are no legal impediments to developing industry-based codes of practice in any of the jurisdictions. In Queensland, several industry-based codes have been approved under the Workplace Health and Safety Act, including codes for Recreational Diving, and the Rural Plant and Hazardous Substances Codes (sub. 316, p. 10). However, several State governments including South Australia, the Northern Territory, Western Australia and Queensland, noted the practical difficulties of developing industry codes, including the demands on available resources, and apathy within industry.

Several participants argued that any group of persons — not just employers — should be able to propose a code for adoption. The AMWU cited the code of practice for the use of proteolytic enzymes as an example of a code that was initiated by unions (sub. 335, p. 6). The ACTU noted that the code of practice for synthetic mineral fibres was developed with significant union involvement (sub. 336, p. 11).

The Commission agrees that anyone should be able to *propose* a code for adoption but considers that its *selection* for adoption at a workplace should be voluntary.

Compliance and codes of practice

There should be no impediment in regulation to voluntary codes of practice being developed by industry associations or other groups of employers, employees and, as appropriate, unions.

The Robens Committee stated:

... we regard practical safety work undertaken on a voluntary basis at industry level as one of the most fruitful avenues for development in the future ... It is important that these self-generated and self-generating activities should not be inhibited by unnecessary State intervention (1972, p. 30).

In the Draft Report, the Commission concluded that sponsors of industry-based codes of practice should, nevertheless, have the option of having the code 'approved' by the relevant regulatory agency as evidence of compliance with the OHS legislation. The Commission had in mind the status currently accorded in certain jurisdictions whereby the demonstrated application of the code constitutes *prima facie* evidence (but not proof) of compliance with the relevant OHS legislation. Approval was intended to provide employers with greater certainty in meeting their legal obligations.

The Commission recognises that all jurisdictions currently recognise codes of practice in OHS legislation. Of these, all except Western Australia and the Australian Capital Territory specifically provide for codes approved by the relevant regulatory authority to have evidentiary status in the courts.

Most trade unions did not support the proposal in the Draft Report for the legislation to provide approved code of practice with evidentiary status. The ACTU expressed concern that legislation may be 'watered down' by the use of codes:

Where industry codes have been attempted nationally with significant industry involvement ... reworking them to ensure consistency with principal Acts and regulations has been significant. The ACTU's experience has been that employers have tended to take the opportunity to write down the legislation, rather than as a means to apply these with specific guidance for a particular industry (sub. 336, p. 11).

The Western Australian Department of Occupational Health, Safety and Welfare also did not support providing approved codes of practice with evidentiary status (sub. 269, p. 8).

In reviewing the issue, the Commission observes that it is not necessary for the regulatory authorities to approve codes of practice for them to be tendered in court as evidence of accepted industry practice.

Certainly, blanket guarantees about the adequacy of a code of practice cannot, and should not, be given by a regulatory authority. All the regulating agency can do is to assess the code and advise its sponsor as to whether it is capable of providing an adequate system of dealing with risk, given its underlying assumptions.

The agency is not in a position to confirm or deny the validity or presence of those assumptions. Rather than 'approving' a code of practice, it would be more appropriate to regard the agency as a 'co-sponsor' of the code. The overriding obligation of an employer is to meet their duty of care under OHS legislation, and a code of practice merely outlines one possible way of meeting that duty.

Role of hazard-based codes of practice

Some governments saw value in having hazard-based codes of practice, such as the national codes developed by NOHSC, continuing to be recognised in legislation. For example, the South Australian Government argued that hazard-based codes of practice provide a firm basis for developing industry-based approaches:

Hazard-specific regulations and codes of practice do not preclude the establishment of industry codes of practice or enterprise safety systems but the latter would be on firmer foundations by applying the more detailed direction provided in the hazard specific regulations and codes ...(sub. 275, pp. 2–3).

It also saw value in hazard-based codes providing guidance for those industries which choose not to develop an industry code (sub. 275, p. 3).

The Northern Territory Government considers that the national hazard-based codes of practice are ‘essential building blocks’ for industries to develop their own approaches to OHS management (sub. 350, p. 5). It said that:

Without the hazard-based codes in place several industry groups would end up researching and negotiating the same basic issues (sub. 350, p. 5).

The Commission considers that in most cases, codes have to be industry-based to be useful. That said, there is nothing to preclude a hazard-based code from being co-sponsored by a regulating agency, if that were found to be useful to managing OHS hazards in particular situations.

Where relevant, industry-based codes could incorporate parts of hazard-based codes. The resources which the NOHSC and state governments have committed to the development of hazard-based codes would not be wasted, as the codes would continue to provide general guidance. However, government efforts should now be directed to facilitating the development of industry-based codes of practice.

The approach to OHS regulation which the Commission has outlined in Chapters 3 to 5 requires that the OHS Act and subordinate legislation contain only those provisions which are essential for ensuring good health and safety outcomes at the workplace. All legislative provisions also need to conform to the principles for good regulation agreed to by the Council of Australian Governments. For the NOHSC standards which have already been incorporated as legislation, all jurisdictions will need to repeal those provisions which do not meet the COAG principles. This should be done as part of the review of current legislation recommended in Chapter 5.

Flexibility and codes of practice

The Commission proposes that the principal OHS Acts specifically allow codes to use alternative controls where these are superior to technical and process requirements. The process of substituting control measures does not mean that followers of codes are absolved from certain parts of the law, since the controls must provide the same or a better safety outcome than strictly following prescriptive requirements.

The OHS agencies should agree collectively on the process and criteria by which to recognise alternative measures in risk management. Consistency in approach would make it easier for one jurisdiction to decide whether a code recognised by another jurisdiction is acceptable.

Recommendation 11

The Commission recommends that the principal OHS legislation in each jurisdiction provide for the use of advisory codes of practice to provide different ways for a group of enterprises in a particular industry to identify, assess and manage their risks to health and safety. The OHS agency should be able to co-sponsor an advisory code of practice providing that:

- there is adequate consultation between employers and, as appropriate, their trade union representatives in the formulation of the code;
- nominated hazards are adequately addressed; and
- relevant mandated requirements are being met or an equivalent level of protection to health and safety is achieved.

Governments should agree on a mechanism for the mutual recognition of advisory codes of practice.

Incentives for industry-based codes of practice

In the Draft Report, the Commission noted the benefits in governments facilitating the development and use of industry-based codes of practice, at least initially and in certain priority areas. This may involve assistance to fund their development.

Several participants commented that the successful industry-based codes developed so far were those that had significant government involvement. The Department of Industrial Relations commented:

Worksafe Australia's experience with working with a number of industries to develop industry based codes of practice shows that Government support is generally required to develop an understanding of OHS problems within their industry and an appreciation of the types of strategies which might be effective in controlling workplace risks (sub. 338, p. 4).

Similarly, the South Australian Government (sub. 275, p. 15) and the Northern Territory Government (sub. 350, p. 4) commented that industry-based codes have required significant government involvement.

The South Australian Farmers' Association emphasised the importance of strong government commitment to the successful development of industry-based codes (transcript, p. 2372). The Ergonomics Society of Australia said that government support is particularly important for smaller businesses (sub. 266, p. 2).

The NSW OHS and Rehabilitation Council (sub. 306, p. 3) wanted to see tripartite, or at least bipartite, involvement in the development of industry-based codes of practice. Dr Johnstone (sub. 277, p. 4) and the Northern Territory Trades and Labor Council (sub. 358, p. 3) saw benefits in having codes of practice (and enterprise safety management systems) endorsed by a tripartite body.

There are a number of natural incentives for employers or industry groups to develop and apply industry-based codes of practice:

- an industry-based code should be more relevant to their circumstances;
- use of an approved code gives those responsible greater certainty that they are meeting the requirements of the law;
- use is likely to be seen in the community as evidence of responsible behaviour by the employer;
- better methods of management are not precluded at any time or place; and
- use of a code by those who developed it is likely to engender greater commitment to its provisions at the workplace.

The New South Wales Government considers that there are strong incentives for employers to comply closely with codes of practice because:

- if an employer follows an approved code, they are more likely to be regarded as having satisfied their duty of care in the event of prosecution;

- should an employer decide to put in place alternative measures to those in the code, they run the risk of OHS inspectors taking a different view about how adequately they have met their obligations; and
- it is difficult to demonstrate that following alternative measures lead to an equivalent level of safety as following a code of practice, since codes of practice generally do not quantify outcomes, and there are additional costs associated with collating expert advice (sub. 397, p. 2).

In the Commission's judgement, these incentives may not be adequate to ensure that industry-based codes of practice are widely developed and used to the extent that would be desirable in terms of the benefits to the community from reduced injury and diseases at work.

Financial assistance for the *development of industry-based codes of practice* may be necessary. Such assistance would recognise that governments currently fund the development of hazard-based codes of practice as there are 'public good' aspects to such guidance.⁴ Public funding of the development of codes by industry also overcomes the problem of 'free-riding' by some employers.⁵

These public good arguments are probably insufficient to justify public funding of all the development costs. However, the case for 'partial' or 'seed funding' of industry, in the nature of an incentive, is much stronger. Where the industry operates across the country, there is a case for both Commonwealth and State Governments providing support for this activity.

In addition it may also be necessary to provide additional encouragement for the *use of industry-based codes of practice*. This could take the form of rebates on workers' compensation premiums to those employers who provide appropriate evidence of use of such codes of practice. A rebate would recognise that adoption should, in time, reduce the workplace's compensable injuries and illnesses. However, the introduction of rebates needs to be approached cautiously, with due concern for the integrity of the compensation fund as well as due recognition of the financial incentives that premiums already provide for better health and safety.

⁴ 'Public goods' means goods which cannot be easily withheld from one individual without withholding them from everyone. Therefore they are often supplied communally.

⁵ 'Free-riding' refers to receiving a good without contributing to its costs.

7 ENFORCEMENT

Enforcement seeks to improve health and safety at work by ensuring compliance with OHS legislation. The immediate objective of enforcement — compliance — is subordinate to the ultimate goal of reducing workplace injury and disease. Therefore, the effectiveness of enforcement is determined by the extent to which compliance with OHS legislation prevents workplace injury and disease, and the degree to which enforcement induces compliance.

Enforcement is needed where other incentives are insufficient to obtain compliance.¹ The mere existence of OHS legislation implies that compliance is not always in the interests of those responsible. Non-compliance is *prima facie* evidence of this.

Enforcement has its limitations as it can only ensure that certain minimum levels of protection are observed at workplaces. It does little directly to encourage best practice approaches to health and safety. Despite these limitations, the Commission's analysis suggests that there is considerable scope to increase the effectiveness of enforcement. The Commission notes the significant role of unions in complementing and encouraging government's role in this area.

7.1 Existing approach

There are two approaches to enforcement in industrialised countries based on competing philosophies of regulation — deterrence and persuasion. As explained by Ayres and Braithwaite, the choice between them is contentious:

... there is a long history of barren disputation ... between those who think that corporations will comply with the law only when confronted with tough sanctions and those who believe that gentle persuasion works in securing business compliance with the law (1992, p. 20).

Advocates of *deterrence* argue that compliance is driven by the probability and severity of punishment — that is, the expected penalty. Tietenberg posits that there four elements are necessary to create both specific and general

¹ Other incentives to prevent injury and disease include natural incentives for both employers and workers to avoid injury (see Appendix K) and incentives from workers' compensation (see Chapter 10).

deterrence:²

... (i) a credible likelihood of detection of the violation; (ii) swift and sure enforcement response; (iii) appropriately severe sanction; and (iv) that each of these factors be perceived as real ... Deterrence is viewed in practice as creating a multiplier effect for each enforcement action, the magnitude of which depends on the strength of these factors (Tietenberg 1992, p. 23).

Those favouring *persuasion* believe co-operation is more likely to be successful as compliance depends upon non-economic values. Tietenberg explains:

The behavioural school of compliance theory argues that, at least for corporate compliance, individuals within a firm are motivated less by conscious decisions based on profit/loss than by motives of personal advancement, by fear of corporate sanction, or by social influence through an individual relationship with the regulator/inspector, peers, and or social norms ... One group presents the business firm or regulatee as a political citizen, postulating that enforcement is not cost effective because of high transactions costs and that it is really not necessary in most instances, given the inherent willingness to comply with the law (1992, p. 24).

Current thinking is that a mix of deterrence and persuasion is likely to be more effective than either one or the other (see Appendix M). Gunningham made this point:

Most contemporary specialists on regulatory strategy point to the severe limitations of both pure deterrence and pure compliance [persuasion] strategies, and argue, on the basis of considerable evidence from both Europe and the USA, that a judicious mix of compliance [persuasion] and deterrence is likely to be the optimal regulatory strategy (1994, p. 35).

Enforcement policy in Australia

In Australia, the following measures are available to the OHS inspectorates in each of the jurisdictions to secure compliance with their legislation:

- advice;
- formal direction;
- an improvement notice;³
- a prohibition notice;⁴

² Specific deterrence seeks to alter the behaviour of *an* individual. General deterrence aims to change behaviour of *all* individuals.

³ An improvement notice is a written direction requiring a person to remedy a breach of OHS legislation. It may be supported by reference to a specific regulation or duty of care provision. It sets a time limit within which the improvement must be carried out.

⁴ A prohibition notice is a written direction prohibiting the carrying on of an activity that the inspector believes involves an immediate risk to the health and safety of any person. The activity cannot be started again until the inspector certifies that the risk has been removed.

- an on-the-spot fine (in New South Wales only);
- a formal warning of prosecution; and
- a prosecution through the courts.

The OHS inspectorates generally draw on these measures in a two-stage process. For the majority of offences, persuasion in the form of advice and compliance notices is used when non-compliance is detected. Only when these fail do the inspectorates consider prosecution. Prosecution is typically only used as the first response in the case of a fatality or a serious injury.

A decade ago, Braithwaite and Grabosky observed that:

... seven of the eight general occupational health and safety inspectorates indicated in interview that education and persuasion were more important functions for them than law enforcement, and six of the eight thought they devoted more resources to education and persuasion than to law enforcement (1985, p. 25).

This is still the case. The policy of the Northern Territory Work Health Authority reflects an approach which is representative of most:

1. All workplace visits will be conducted in line with general principles outlined below, with the emphasis on involving employers in the process that staff undertake while at the workplace.
2. Compliance will be achieved, where possible, by obtaining commitment using an education and advisory approach which involves the employer (and workers where appropriate) in activities undertaken during a visit.
3. Where the advisory approach fails to gain compliance, a more formal approach will be used to obtain commitment to achieving compliance, such as written directions (Northern Territory Government 1994).

Maximum penalty levels vary considerably across jurisdictions. They range from \$5000 for individuals and \$50 000 for corporations in Western Australia and the Northern Territory, to \$100 000 for individuals and \$500 000 for corporations under the Commonwealth OHS legislation for seafarers (see Table 7.1).

In contrast, the maximum penalties under other economic regulation are much higher. For example, under the *Trade Practices Act 1974* the maximum penalty is \$10 million for a corporation and \$500 000 for individuals. The New South Wales *Environmental Offences and Penalties Act 1989* sets a maximum penalty of \$1 million for a corporation and \$250 000 for an individual.

Table 7.1 Penalty provisions by jurisdiction, 1 July 1995

<i>Jurisdiction</i>	<i>Provision for on-the-spot fines</i>	<i>Maximum penalty for individuals (\$)</i>	<i>Maximum penalty for corporations (\$)</i>
C'wealth ^a	no	5 000	100 000
Seafarers ^b	no	100 000	500 000
NSW ^c	yes	25 000	250 000
Vic ^{d e}	yes	50 000	250 000
Qld ^{f g}	yes	24 000	120 000
WA ^h	no	5 000	50 000
SA ⁱ	yes	100 000	100 000
Tas	no	50 000	150 000
ACT ^j	no	20 000	100 000
NT ^k	yes	5 000	50 000

a Only Government Trading Enterprises are liable to penalties (fines and imprisonment for up to six months).

b Individuals may be imprisoned for up to six months for serious offences.

c New South Wales is the only jurisdiction to have used on-the-spot fines.

d No regulations in place to give effect to the provision for on-the-spot fines.

e Individuals may be imprisoned for up to five years for serious offences.

f Individuals may be imprisoned for up to six months for serious offences.

g On-the-spot fine provisions not used to date.

h The *Occupational Health, Safety and Welfare (Amendments) Bill 1995* would increase maximum penalties for individuals to \$50 000 and for corporations to \$200 000.

i No regulations in place to give effect to the provision for on-the-spot fines. Individuals may be imprisoned for up to five years for serious offences.

j Individuals may be imprisoned for up to two years for serious offences.

k Northern Territory legislation providing for on-the-spot fines has been passed, and regulations are being drafted.

Source: Information provided by the OHS authorities in each jurisdiction.

7.2 Commission's assessment

In the Commission's view, the current approach to enforcement is not working. A survey by Deloitte Touche Tohmatsu on behalf of the Commission revealed significant non-compliance (Deloitte 1995). The survey found that only 28 per cent of workplaces had a high level of compliance (see Appendix M for further details).⁵ The level of non-compliance exists despite strong efforts by the trade unions to identify general problem areas and to bring particular cases to the attention of the OHS agencies and its inspectorate.

Although there is significant non-compliance, only a limited number and range of offences are being prosecuted. This is despite the actions taken by the trade

⁵ The Deloitte Touche Tohmatsu study categorised workplaces as having a high level of compliance if systems were in place to provide a workplace that is 'safe and without risks to health'.

union movements to draw attention to the areas in question. The Commission's analysis indicates that:

- prosecutions are less than 5 per cent of formal sanctions by inspectorates;
- where the right exists (New South Wales), only one private prosecution has ever been brought;
- very few prosecutions are brought under the various Crimes Acts;
- of the offences prosecuted, most involve death or serious harm;
- most prosecutions are against corporations (as opposed to individuals);
- 75 per cent of prosecutions are successful;
- the average fine imposed by the courts is \$3347;
- the highest fine ever imposed is \$120 000 in Victoria; and
- the maximum penalties — including imprisonment — have never been used in any jurisdiction.

A measure of deterrence

The Commission has estimated the expected penalty in each jurisdiction for workplaces which fail to comply with its OHS legislation.⁶ The results are presented in Table 7.2.

The expected penalties are negligible. The Commission estimates that offenders face an expected penalty of less than \$33, averaged over all the jurisdictions. They vary from \$159 in Queensland, to \$6 in the Australian Capital Territory. Only two jurisdictions have expected penalties greater than \$33.

On average, there is a 22 per cent chance of a workplace being visited by the OHS inspectorate in any year. If a *prima facie* breach of the OHS legislation is detected, there is only a 6 per cent chance of a conviction and fine by the courts. In the ACT the probability of being penalised is less than 1 per cent.

The average fine imposed across the jurisdictions — on-the-spot fines and fines imposed by the courts — is \$2480. The average for individual jurisdictions ranges from \$1175 in New South Wales to just over \$8000 in Victoria.⁷ The extent of the average fines reflects two factors — limits on the size of penalties

⁶ The expected penalty is the product of the probability of a workplace being inspected, the probability of it being penalised if in breach and the average penalty imposed in the jurisdiction. See Appendix M.

⁷ The average fine in New South Wales is a combined average of on-the-spot fines and court-imposed fines. The average court fine is \$2912.

in the OHS legislation (see Table 7.1) and the preparedness of the courts to use the scope offered by these maxima.

The low expected penalty for non-compliance implies that current enforcement policies have little or no deterrence effect. They are unlikely to discourage those who for reasons of ignorance, apathy or financial gain breach the law.

Table 7.2 Expected penalty levels by State and Territory

<i>Jurisdiction</i>	<i>Probability of inspection^a</i> (per cent)	<i>Probability of a penalty^b</i> (per cent)	<i>Average penalty^c</i> (\$)	<i>Expected penalty^d</i> (\$)
NSW	20.8	12.8	1175	31
Vic	17.9	2.0	8004	29
Qld	25.0	21.8	2914	159
WA	17.9	1.7	3207	10
SA	18.5	12.3	5422	123
Tas	36.0	3.1	1207	14
ACT	22.7	0.7	3983	6
NT	35.7	4.7	1976	33
National average	22.0	6.1	2480	33

a The number of inspections divided by the number workplaces.

b The number of convictions and on-the-spot fines divided by the number of sanctions imposed (improvement notices, prohibition notices and convictions).

c The total of on-the-spot and court-imposed fines, divided by the number of fines and convictions.

d The expected financial consequences facing a workplace which is in breach of OHS legislation.

Notes: The national average is the weighted average for all jurisdictions.

Data averages from 1990–91 to 1993–94 have been used (see Appendix M, Attachment M2).

Source: Industry Commission.

This is not surprising. A policy of first persuading individuals to rectify an unsafe situation, by giving advice or compliance notices, could be expected to do little to deter others. Everyone knows if they are found in breach of the law, they will generally be given an opportunity to comply without a penalty being imposed. At best this will deter those who have been detected from committing another breach (and that may be questionable). However, it does not deter those yet to be found out because they know that they will be given a second chance.

Empirical evidence of effectiveness

The potential impact of deterrence in Australia cannot be empirically assessed because the approach has never been firmly pursued here (see Braithwaite and Grabosky 1985). Given the low expected penalties estimated by the Commission, any empirical analysis is unlikely to reveal the potential impact of

deterrence on either compliance levels or health and safety outcomes (see Appendix M).

In the United States (US), the Occupational Safety and Health Administration (OSHA) has pursued a relatively strong policy on deterrence. The empirical evidence indicates that its approach has improved health and safety outcomes. The most compelling evidence was obtained by Scholz and Gray for 1979 to 1985:

We find evidence that OSHA enforcement has a significant impact on injuries in a substantial portion of the manufacturing sector. The number of lost work days and the number of lost work day injuries decrease significantly after increases in general enforcement and after specific contacts with enforcement agencies ... a 10 per cent increase in enforcement would reduce injuries by around 1 per cent for the large, frequently inspected firms represented in our sample (1990, p. 302).

After reviewing Scholz and Gray's results, Brown was led to conclude:

This study is more likely than the earlier studies to measure OSHA's true impact ... The greater precision of this employer-level study lends credence to its conclusion that penalties do prevent injuries (1992, p. 705).

Accordingly, it is clear that deterrence is essential to effective enforcement. On its own, persuasion cannot ensure a commitment to compliance where compliance is not in the economic interests of those concerned. Governments regulate occupational health and safety because the 'natural' incentives to reduce risks at the workplace are inadequate in many cases. Although some voluntarily comply, others need an incentive (or expected penalty) to do so.

Nevertheless, there are limits to the effectiveness of enforcement. Deterrence can destroy the scope for co-operation between the inspectorate and the workplace. As Gunningham observed:

While there are strong arguments for retaining effective penalties and for relying on deterrence as part of a broader regulatory strategy (Gunningham 1984, Ayres and Braithwaite 1993) there is also evidence that an over-reliance on deterrence can be counter-productive and produce a culture of regulatory resistance amongst employers (Bardach and Kagan 1982) (1994, p. 34).

Braithwaite and Grabosky refer to the research of Bowles, suggesting that compliance by the majority depends on deterring the recalcitrant minority:

Bowles suggested that about 20 per cent of all firms will comply unconditionally with any rule, about 5 per cent are always going to disobey, and about 75 per cent are also likely to comply, but only if the threat of punishing the incorrigible 5 per cent is convincing. It follows to the extent that these figures are even vaguely correct that voluntary compliance by the largest percentage of firms depends on deterring the incorrigible minority (1985, p. 81).

Others go further, and argue achieving compliance is likely to rely primarily on deterrence. As Brown explains:

There is good reason to believe that penalties enhance compliance in the short term by threatening would-be offenders with punishment, and in the long-term by changing attitudes about what is morally acceptable behaviour (1992, p. 703).

Competitive neutrality and enforcement

If legal responsibilities are not enforced, workplaces are more likely to face perverse competitive pressures. The Mining and Energy Division of the Construction, Forestry, Mining and Energy Union drew attention to this problem:

... businesses who comply with their duty as employers and with the OHS law are often disadvantaged when they have to compete with those who do not. The coal industry is a highly competitive industry, and the temptation must exist to sometimes cut OHS corners. Our members are killed and injured because those corners are cut. Compliance with OHS laws and maintaining a safe and healthy workplace should not be sacrificed in the interests of competitiveness. Prosecution for OHS offences is one way to maintain a 'level playing field' (sub. 153, p. 32).

The Health and Safety Commission of the United Kingdom has reported a private business survey which found that 59 per cent of the 4000 respondents wanted 'strict enforcement of uniform standards' to help ensure fair competition (Health and Safety Commission 1994, p. 88).

The work of Porter — referred to by a number of participants — suggests that vigorous enforcement of standards can enhance the competitive advantage of all workplaces. Porter stated:

National advantage is enhanced by stringent standards that are rapidly, efficiently, and consistently applied. These play the same role as a demanding buyer. Slow or uncertain application of standards, conversely, both wastes resources and undermines innovation (1990, p. 649).

Legislation should be enforced with equal vigour for private sector and public sector organisations. Government business enterprises in Australia already face the same enforcement measures as private enterprise. In principle, a vigorous approach to enforcement should apply to all government agencies, although most government departments and authorities cannot be prosecuted.

7.3 Proposed reforms

In the Commission's assessment, a better approach to enforcement would be to move in the direction of greater deterrence focussed on breaches of the duty of care. Operationally, this involves adopting measures to increase the

probabilities of detecting and penalising non-compliance with the duty of care, and to raise the penalties for such non-compliance. There would be a continuing role for persuasion, albeit a lesser one.

There is not sufficient empirical evidence to determine the optimal mix of persuasion and deterrence. All that can be done at this stage is to move in the 'right direction' and embark on a regular program of performance measurement and policy reassessment. This would allow the measures used for the enforcement strategy to evolve in a direction which progressively increases the effectiveness and efficiency of the strategy.

Any change for the better requires that deterrence and persuasion complement, rather than undermine, the role of each other in encouraging compliance. The achievement of better strategies also depends on identifying the appropriate role of persuasion. In some circumstances, the best enforcement response is advice or a compliance notice without a penalty — for example, in dealing with a minor breach in a workplace that otherwise has excellent systems. In this case, deterrence would detract from the effectiveness of enforcement.

The provision of advice by the inspectorate should be part of an overall policy on the provision of information. Inspectorates can assist individuals who want workplace-specific advice by helping them locate professional providers who can meet their needs (see Chapter 16). These services do not undermine deterrence because they are provided to all employers independently of inspections, regardless of whether employers are complying with their duties.

Greater deterrence has the potential to increase the effectiveness of other government programs directed at health and safety in workplaces, by enhancing the incentives for workplaces to assume full responsibility for managing their own health and safety. Assumption of greater responsibility will mean that the nature and the extent of these demands for information, advice, training and research will change, possibly dramatically.

As a consequence, governments will be able to redirect their programs and resources to those services which are of greatest value to prevention. For example, information on hazard management is more likely to be applied in the workplace if it has been actively sought.

Participants' views

Inquiry participants were divided about the proposal in the Draft Report to put greater reliance on deterrence in enforcement.

Many supported the proposal. The New South Wales Government considered that:

It is important that prosecution be strongly pursued where breaches of the duty of care can be demonstrated. Deterrence is integral to effective enforcement of occupational health and safety requirements (sub. 397, p. 11).

Comcare agreed:

The current system of prosecutions leading to fines and other penalties in Australia ... lacks sufficient force as an incentive for prevention. An effective enforcement and penalty system would act as a strong punitive and financial incentive for employers to comply with regulation (sub. 174, p. 13).

The Safety Institute of Australia said:

The major motivator for a corporation to introduce a prevention program would be cost reduction. This was indicated by chief executives who gave the maintenance of productivity and profits as the most important reason for taking accident prevention measures (Yann et al, 1990; and RMIT, 1992). Therefore, it could be argued that the best deterrence for dealing with corporate non-compliance is a credible penalty ... This cost to a corporation can be enhanced by the use and interaction of criminal stigma and adverse publicity (sub. 151, p. 21).

Others questioned the effectiveness of greater deterrence. The Australian Chamber of Commerce and Industry (ACCI) observed that:

In the past there has been an attempt to influence this behaviour [poor attitude to injury prevention] by the introduction of increased fines and penalties ... There does not appear however to be any factual or objective data which evidences that fines and penalties or threat of prosecution result in long term improved OHS performance (sub. 133, p. 37).

Although there is no reliable data for Australia in the occupational health and safety field, empirical evidence from the US experience with occupational health and safety regulation and evidence from other areas of regulatory enforcement in Australia indicate that deterrence can be effective.

The Northern Territory Government:

... does not agree with the Commission on this issue, and believes there is far more to be achieved by regulatory agencies working co-operatively with industry than playing a game of cat and mouse. Employers and others must be educated to accept and fully comply with their responsibilities at all times, not just on the one chance in a thousand that an inspector will catch them red handed in default (sub. 350, p. 7).

The New South Wales Department of Minerals argued that:

The mining industry has an effective enforcement culture involving persuasion, direction and prohibition processes and rarely needs to resort to time-consuming, resource-intensive, and generally, in the longer term at least, ineffective course of prosecuting a breach of legislation (sub. 257, p. 7).

An approach to enforcement based on persuasion may be appropriate in the mining industry in some States, where workplace inspection rates are very high. In the mining industry, workplaces are inspected more than twice a year on average across mining jurisdictions.⁸ General deterrence is not necessary where specific deterrence can be applied in all workplaces frequently.

Others supported a judicious mix, but cautioned against over-reliance on deterrence in the mix. For example, the Tasmanian Government stated:

There must be a balance between promotion/education, better legislation and enforcement to facilitate necessary cultural change.

An over-emphasis on a deterrence-oriented approach could be counter productive to bringing about cultural change (sub. 401, p. 4).

There is an explicit role for persuasion in enforcement where deterrence is counter productive. Advice and education — an important element of prevention — are not the primary role of enforcement and therefore government inspectorates.

Recommendation 12

The Commission recommends that inspectorates in each jurisdiction give a higher priority to deterrence in the enforcement of their OHS legislation.

The Commission has identified a package of policy measures to give effect to this recommendation of moving to greater deterrence in enforcement. These are canvassed in the following sections of this chapter. The implications of these recommendations for the administration of enforcement by the OHS inspectorates are canvassed in Chapter 8.

7.4 Goals of enforcement

The objective of enforcement should be to achieve compliance with the duty of care — the primary requirement in OHS legislation. By focussing on the duty of care, enforcement is directed at the objectives of the OHS legislation, rather than compliance as an end in itself. Only then can inspectorates ensure that the

⁸ This includes Queensland, Western Australia and the Northern Territory. The New South Wales Department of Minerals was not prepared to provide the requisite information (see Appendix M).

contribution of enforcement to the prevention of injury and disease at work has been maximised.

In doing so, enforcement should encompass *all* who hold a duty of care — employers, their employees, the suppliers of their materials and plant and equipment, and any others who influence the risks at the workplace. In the past, there has been a tendency for inspectorates to concentrate their attention upon the employer and his or her employees. The contribution of other duty holders to injury and disease has very often been ignored because they are rarely at the workplace and may be located in another jurisdiction.

Under this approach to enforcement, breaches of individual requirements in legislation are enforced to the extent that they breach the duty of care. For example, a breach of a technical regulation would not be enforced if a workplace had satisfied its duty of care through alternative (but equally effective) means. Where breaches of regulation amount to breach of the duty of care, enforcement of the duty of care will ensure compliance with regulation.

Enforcing compliance with the duty of care requires inspectorates to concentrate on failures in risk management systems — rather than individual breaches of regulations. This is a more effective approach to prevention, as the Victorian Government pointed out:

...a focus on duty of care obligations is more likely to ensure that the system failures which have led to a specific breach or breaches are addressed for future prevention. A focus on merely the obvious or immediate breach tends to mean that the root causes of the problem identified are not addressed. This is not an effective long-term prevention strategy (sub. 382, p. 6).

This focus also enhances the credibility of a vigorous approach to enforcement. Workplaces are more likely to accept — and even welcome — a vigorous approach to enforcement if the focus is on achieving a safe working environment, rather than compliance with regulation *per se*.

The gradual adoption of Robens-style legislation in most jurisdictions has necessitated a change in the focus of enforcement. Most inspectorates are more frequently prosecuting breaches of the duty of care and less frequently prosecuting breaches of technical requirements (see Table 7.3). However, some jurisdictions have coped with this change better than others. As stated by the National Safety Council:

Some inspectorates are more confused than others and not confident of clearly understanding their changed roles since the laws have changed in nature (sub. 89, p. 14).

Table 7.3 Prosecutions and convictions for breaches of the duty of care, 1990–91 to 1993–94

<i>Jurisdiction</i>	<i>Duty of care on its own (per cent of total)^a</i>		<i>Duty of care and regulation(s) (total number)</i>	
	<i>Prosecutions</i>	<i>Convictions</i>	<i>Prosecutions</i>	<i>Convictions</i>
NSW ^b	64	na	1689	1244
Vic ^c	66	63	327	279
Qld ^d	21	22	795	627
WA	32	28	329	238
SA	83	97	365	131
Tas	39	39	64	61
ACT	90	100	10	7
NT	100	100	9	9
National Average	53	51	3588	2596

a Prosecutions and convictions for breaches of the duty of care only, as a proportion of all prosecutions and convictions.

b From 1992–93 to 1993–94 only.

c The percentage of convictions for breaches of the duty of care on its own may be higher.

d The majority of prosecutions and convictions in Queensland were for failure to register a workplace.

na Not available.

Source: Information provided by OHS authorities.

Some participants felt that regulation based on the duty of care plus certain mandated requirements ('performance-based' regulations) cannot be enforced by deterrence. Mr Farr, senior lecturer at the Queensland University of Technology, commented:

The move by governments away from prescriptive to performance based regulation, while consistent with the concept of the duty of care, has produced some difficulties. Although the intent of this approach is to remove obstacles which would obscure the overall aim of achieving healthy and safe working environments, in practice it has proved difficult to enforce (sub. 78, p. 4).

The Department of Industrial Relations made a similar point:

The evidence for effective deterrence quoted by the Commission comes from the United States. ... The regulatory regime in the US is quite prescriptive and the duty of care is not qualified to the same extent as in Australian jurisdictions by a 'reasonably practicable' clause (sub. 338, p. 6).

The Commission notes that since the adoption of Robens-style legislation in Australia, a number of the jurisdictions have consciously refocussed their enforcement efforts on the duty of care. Their experience is that the duty of care can be successfully enforced in its own right (see Table 7.3). Enforcement does not need to resort to breaches of prescriptive regulation. As the Victorian Government has confirmed:

... the HSO [Health and Safety Organisation] has a very high success rate for prosecution of the duty of care offences and has had a low rate of appeals against compliance notices issued where duty of care provisions have been identified as the alleged contravention. In short, the HSO has not experienced any significant difficulty in enforcing the duty of care provisions expressed under the Victorian OHS Act (sub. 382, p. 6).

The State and Territory OHS agencies generally agree that enforcement should focus on the duty of care. For example, the Department of Occupational Health, Safety and Welfare of Western Australia stated:

The Department of Occupational Health, Safety and Welfare's enforcement activities are sharply focussed on ensuring compliance with the duties of care established in legislation. DOHSWA supports removal of all but a minimum of subsidiary legislation (regulations) to enhance the focus on the duty of care (sub. 269, p. 10).

The enforceability of the duty of care would be enhanced by the adoption of the Commission's proposed reforms to the legal definition which is outlined in Chapter 4. The development and adoption of industry-based codes of practice and enterprise safety systems proposed in Chapter 6 will establish what industry and the community regard as appropriate work health and safety practices.

Recommendation 13

The Commission recommends that enforcement in each jurisdiction focus on compliance with the duty of care.

7.5 Criminal justice system

Many inquiry participants were concerned at the way the criminal justice system handles alleged breaches of occupational health and safety legislation. Doubts were expressed about the adequacy of the understanding within magistrates court jurisdictions of health and safety and its management.

Some participants were critical that this lack of understanding led to low levels of fines being imposed by the courts in relation to the seriousness of the

offences. Comcare summed it up thus:

Judges and magistrates often do not appreciate the importance of imposing penalties that will have a significant deterrent effect not only on the offender but on others who have similar OHS responsibilities. Until this aspect of enforcement is successfully addressed, there is little likelihood that prescribed penalties will carry any real weight as a means of reducing occupational injury and disease (sub. 174, p. 13).

Education of the judiciary was often suggested to overcome the apparent reluctance of the courts to impose higher fines. One such proposal was by the Community and Public Sector Union:

As with recent moves to 'educate' judges about applying laws equally to men and women, so too the judiciary needs educating about the will of the parliament and the community when it comes to verdicts and sentencing for significant safety breaches at work (sub. 72, p. 7).

Specialist panels of judges and magistrates

In its Draft Report, the Commission proposed that a specialist panel of magistrates or judges — within the nominated court jurisdiction — should enable more informed treatment of OHS offences. Specialist panels would allow the members to become progressively better informed about health and safety and its practical management in the workplace. The intention was not to establish a new court jurisdiction.

Western Australia is in the process of implementing a specialist panel within its Magistrates Court. Some jurisdictions, such as South Australia, use their Industrial Magistrates Court which is specialised in industrial relations cases, including occupational health and safety.

The review of the OHS legal system in Victoria by Carson and Johnstone found that '410 occupational health and safety prosecutions over the past six years have been heard by approximately 80 Magistrates' (1990, p. 340). This means magistrates have very little opportunity to gain experience in OHS cases. Carson and Johnstone recommended the establishment of specialist panels to overcome this problem.

Several participants supported the establishment of specialist panels within existing court jurisdictions. For example, the South Australian Government concluded:

The arguments proposed by the Commission in reaction to the importance of developing expertise in relation to the judicial determination of OHS considerations is a powerful one, and it is believed that the Industrial Magistracy in SA has been particularly valuable in this regard (sub. 275, p. 24).

Some participants opposed the establishment of such panels. BHP argued that:

Each case has its own set of circumstances which must be judged primarily on the basis of evidence presented. There should not be a situation created where the judge's own views, or the views of a panel, may alter the impact of appropriate expert evidence...

Courts are dealing with rights of a person to be heard and be given a full, fair and just hearing on a criminal matter; not dealing with the social issues of improved safety in the workplace (sub. 344, p. 5).

Under the Commission's proposal, the specialist judges and magistrates would operate within existing court jurisdictions, and therefore be obliged to follow the same legal processes and procedures as other judges and magistrates.

ACT WorkCover stated that:

There may be difficulties in implementing this recommendation in a small jurisdiction such as the ACT (sub. 373, p. 7).

The Tasmanian Government stated:

In the Tasmanian legal system, OHS prosecutions are dealt with in the Magistrates' Court by a single Magistrate.

Magistrates in Tasmania are versed in all areas of the law and there would not be the need to appoint specialist judicial panels, nor would it be practical in such a small jurisdiction (sub. 401, p. 6).

The Commission recognises that in the smaller jurisdictions, there may be practical limitations to the establishment of specialist judicial panels.

Recommendation 14

The Commission recommends that specialist judges and/or magistrates be appointed within existing courts nominated to hear alleged breaches of OHS legislation.

Sentencing guidelines

Sentencing guidelines should be established in each jurisdiction to assist the courts when deciding penalties. They should explain the nature of factors which are relevant to the offence when deciding penalties. Sentencing guidelines help to ensure a degree of consistency in the sentencing process within and across jurisdictions.

In its Draft Report, the Commission called for comments from participants on the efficacy of imposing sentencing guidelines for occupational health and

safety offences. The Queensland Department of Employment, Vocational Education, Training and Industrial Relations stated:

In principle, sentencing guidelines would assist in providing the Magistracy with a greater understanding of which types of legal argument, in the context of presentation of mitigating circumstances and incidents, are more central to the spirit of the legislation.

Sentencing guidelines may well provide more accurate matching of the penalties to offences (sub. 316, p. 20).

Sentencing guidelines have a role in ensuring that the courts give effect to the intent and purpose of OHS legislation. As Dr Johnstone put it:

The key function of sentencing guidelines would be to ensure that during the sentencing process after convictions for OHS offences the court resist the pressures to decontextualise and individualise OHS offences. ... In short, in determining the appropriate penalty the court would be required to maintain a focus on the extent to which the employer's systems of work and OHS management processes fell short of the desired systems and processes (sub. 277, p. 8).

Sentencing guidelines can be used to discriminate between offenders who have genuinely attempted to comply with their duty of care and those who have only attempted to comply in a perfunctory way. As stated by Braithwaite — in regard to sentencing guidelines in the United States:

... it's said about the US sentencing guidelines that ... it has changed the prosecution policy of the US Justice Department to one where it's part of their prosecution guidelines that if they [workplaces] have a sophisticated and credible internal compliance system but one that has broken down in a particular case because a particular employee hasn't followed it, but the employee was properly trained and so on ... then that is a major factor in their prosecution guidelines as to why there won't be a prosecution (transcript, p. 2776).

Not all participants agreed with the idea of having such guidelines. Some doubted their practicality. The South Australian Employers' Chamber of Commerce and Industry considered that:

... the development of such guidelines may not be possible or feasible. The advantage is of course that greater consistency and rationality in sentencing would be obtained which is important if the deterrence model is to be accepted and enacted (sub. 272, p. 15).

The Commission recognises that it may be difficult to draft guidelines. However, the guidelines should not be intended to cover the very wide variety of circumstances surrounding breaches of the duty of care. The Commission does not propose that sentencing guidelines should provide a detailed matrix of the appropriate outcomes against each kind of offence and set of

circumstances. This would be impractical and should not be its purpose. The Victorian Government stated:

Issuing of sentencing principles which addressed the matters for general consideration, coupled with submissions by prosecutors on the specific issues relevant to the case at hand, would be an appropriate vehicle for consideration. This would avoid the need for detailed guidelines to address the wide variety of circumstances surrounding breaches of OHS legislation (sub. 382, p. 9).

Recommendation 15

The Commission recommends that governments develop sentencing guidelines for use by courts in determining appropriate penalties for breaches of OHS legislation. The guidelines should set out mitigating circumstances to which the court should have regard in determining penalties.

7.6 Sanctions in OHS law

Sanctions in OHS law usually involve a financial and non-financial component. The financial component of a sanction refers to the monetary cost of being sanctioned. The non-financial component of a sanction refers to the stigma of being detected and sanctioned.

Maximum penalties

The maximum penalties (including fines, imprisonment and licence revocation) should provide the courts with the ability to impose a penalty which is sufficient to act as a credible deterrent to others, after allowing for the probabilities of detection and conviction. Laing argued:

Unless penalties are significant some employers will view them as little more than an operating cost. In addition, fines should be sufficiently large to convince employers that a reasonable level of expenditure on safety and health is warranted (1992, p. 220).

Higher maxima are likely to lead to higher penalties. As explained by Laing:

Arguments in favour of increased penalties [include] ... an indication to the courts that Parliament and the community view the issues as significant and expect that fines should have a real deterrent value (1992, p. 220).

In its Draft Report, the Commission proposed that all jurisdictions consider maximum penalties at least equivalent to the levels in Commonwealth Seafarer OHS legislation. This would involve maximum penalty levels of at least

\$100 000 for individuals and \$500 000 for corporations. The levels in the Seafarer legislation are between two and five times the current maxima elsewhere.

Several participants supported an increase in the current maxima. For example, the Department of Employment, Vocational Education, Training and Industrial Relations of Queensland argued:

There can be little argument that major OHS offences should not be treated as seriously as economic and environmental offences ...

Courts seldom if ever award the maximum penalty in cases involving OHS offences and more often impose a small proportion of the maximum fine... Setting maximum fines at a higher level may tend to offset this discounting effect (sub. 316, p. 21).

Several participants argued for even greater maximum penalties. Professor Braithwaite commented that the proposal in the Draft Report had not:

... gone nearly far enough on the level of penalties. ... I'm talking about it being 20 times too low (transcript, p. 2769).

Others expressed concern about the Commission's proposal in the Draft Report. The Department of Health, Safety and Welfare in Western Australia argued that:

The selection of the penalties available under the Commonwealth Seafarer legislation as a benchmark is open to query. Whilst it may be the largest penalty available under any Australian OHS legislation, it is not necessarily appropriate (sub. 269, p. 14).

The South Australian Government recommended an:

... appropriately high level of maximum penalty but not necessarily that of the Seafarers OHS legislation, subject to any other recommendation of its OHS Advisory Committee (sub. 275, p. 25).

The Tasmanian Government argued that:

An increase in penalties certainly emphasises the seriousness of loss of life, injury and illness at work and such increases should be of such a magnitude that unfavourable comparisons with other non-OHS offences are not so easily made. However, it should be kept in mind that the penalties available under the Commonwealth Seafarers legislation are 'top of the range' and may not be appropriate in other OHS areas (sub. 401, p. 7).

The Commission agrees that the maximum penalties under Commonwealth Seafarer legislation may not be the most appropriate in the longer run. In the Commission's view the appropriate level is likely to be much higher. These would be best determined after an evaluation of sufficient experience with the Commission's proposed enforcement *and* regulatory reforms.

Recommendation 16

The Commission recommends that all jurisdictions consider an immediate increase in the maximum penalties in their OHS legislation to the levels in Commonwealth Seafarer OHS legislation. Governments should also consider further increases in their maximum penalties over time.

On-the-spot fines

On-the-spot fines are not part of the enforcement armoury of most Australian jurisdictions. Although only New South Wales uses them, the Australian Capital Territory, Victoria and the Northern Territory are considering their use.

Overseas evidence suggests that administrative penalties, such as on-the-spot fines, can create credible deterrence and do so quickly while minimising legal and administrative costs (see Appendix M). An administrative penalty system is used to enforce OHS legislation in the United States of America. It provides for penalties of up to US\$70 000 for wilful or repeat offences and US\$7000 for all others. These amounts are varied according to the circumstances surrounding the offence.

Maximum on-the-spot fines in New South Wales are \$500 for employers and \$50 for employees. In 1992–93, the number of on-the-spot fines in New South Wales was three times the number of convictions. The majority of on-the-spot fines were for offences where no harm had occurred. Around 10 per cent of fines were appealed, and around 20 per cent of appeals were upheld. Nearly 40 per cent of all on-the-spot fines were on employees, usually for failing to wear safety equipment.

In its Draft Report, the Commission proposed that all jurisdictions adopt on-the-spot fines.

Participants expressed a range of views. Some supported on-the-spot fines as a low cost and effective means of enforcing compliance. BHP stated:

BHP supports this recommendation. BHP believes that on-the-spot fines bring the event and the penalty into close proximity, maximising the deterrence effect in a cost effective manner. These fines can also help employers modify behaviour and enforce safety rules (sub. 344, p. 5).

Employer groups generally felt that on-the-spot fines were inappropriate and might be used as a revenue-raising device. The ACCI, for example, argued that:

... concern arises principally from the fact that in many of the issues that apply in workplaces, we are not necessarily dealing with issues of fact. ... It becomes, you know, one person's view as against another's as to what the risks may have been, and it really

doesn't lend itself to this form of remedy, so we would be quite concerned that the on-the-spot fines have the potential to be applied in a range of circumstances that are discretionary, that are dependent on the mood or the frame of mind or, you know, one inspector's perception of the issue as against another inspector's and that is not a sound basis for such a system.

Also, as we have mentioned, there is the potential for governments to try to run inspectorates on a cost recovery basis if they have access to on-the-spot fines and that they can simply become a source of revenue (transcript, pp. 3667-3668).

The South Australian Government responded to the Commission's proposal, stating that:

The appropriateness of issuing on-the-spot fines will be the subject of careful examination in the context of the new Consolidated Regulations and levels of compliance (sub. 275, p. 24).

The School of Public Health at Curtin University noted that misuse may be a problem:

Poor inspectorate training may result in unjustifiable on-the-spot fines, yet on-the-spot fines are probably too low to be worth contesting, unless an employer or employee is committed to principle (sub. 342, p. 9).

Clearly any system of on-the-spot fines must be accompanied by an effective appeal system, thorough inspector training, and a transparent enforcement policy. An appeal system ensures that defendants have recourse to the courts if they wish to dispute a fine imposed by the inspectorate. However, the New South Wales experience that only a small share of fines are successfully appealed suggests that wrong decisions by the inspectorate are probably not a significant problem.

Although trade unions supported on-the-spot fines in principle, they were concerned that they could be used against employees. The Victorian Trades Hall Council concluded:

Based on anecdotal evidence from New South Wales, we must oppose these as they have been abused in focusing on workers' breaches of such things as PPE [personal protective equipment] requirements and not on the general duty of employers (sub. 348, p. 18).

The Commission considers this is more a criticism of either the OHS legislation or the enforcement policy in the jurisdiction than of on-the-spot fines. If the community considers that employees' duties should encompass the wearing of appropriate safety equipment, then this requirement should be enforced. Alternatively, if the community considers that this is ineffective, then such a duty should be removed from the legislation.

Johnstone was one of a number of participants who are concerned that on-the-spot fines would trivialise offences:

While I can see the argument for on-the-spot-fines, I fear that use of such penalties will seriously undermine any move to enhance the use of criminal prosecution of OHS offences (sub. 277, p. 6).

This underlines the importance of ensuring that on-the-spot fines are only used for lower risk, lower harm offences. A clear set of guidelines — incorporated as part of inspectorates' enforcement policies — is essential to ensure the judicious use of on-the-spot fines. As stated by the Department of Employment, Vocational Education, Training and Industrial Relations of Queensland:

The application of on-the-spot fines can be a cost-effective means of sanctioning ... However it is first necessary to have in place clear guidance as to which offences and in which circumstances on-the-spot fines are appropriate (sub. 316, p. 19).

Recommendation 17

The Commission recommends a system of on-the-spot fines for breaches of OHS legislation in all jurisdictions.

The offence for manslaughter

There is no offence of manslaughter under OHS legislation in Australia. However, according to the Trades and Labour Council of the ACT, 'an emerging possibility' in Australia is the prosecution of employers under the Crimes Act for manslaughter in the event of a worker's death (sub. 75, p. 13). This applies to both individuals and corporations.

Although it can be used to do so, the Crimes Act in each jurisdiction is rarely used to prosecute work-related injury or death. Only one company has ever been convicted for manslaughter in Australia and that action was brought under the Crimes Act of the jurisdiction concerned.

Several participants called for greater use of the Crimes Act in relation to serious OHS offences. The Public Interest Advocacy Centre argued:

As well as prosecution under occupational health and safety legislation, employers who knowingly expose workers or the public to dangerous situations which result in death or injury should be subject to murder, manslaughter or assault charges. The fact that a death or injury occurs in the workplace should not mean that those responsible are immune from criminal charges (sub. 109, p. 14).

Convictions for manslaughter can deter others from committing similar offences. Hopkins cited Fisse and Braithwaite (1983) as follows:

... the purposes of prevention are well served: a corporate manslaughter conviction carries with it rather more stigma than is associated with a conviction for failure to maintain a safe workplace (1995, p. 111).

The Victorian Government amended their enforcement policy to provide for prosecutions under the *Crimes Act 1958*. The Victorian Government stated:

The possibility of such prosecutions and the completion of one such prosecution together with the awareness of several pending cases has, by a great deal of anecdotal evidence, provided a significant deterrent to employers (sub. 382, p. 9)

In cases of manslaughter, it is necessary to establish criminal negligence. This is generally more difficult, the larger the enterprise. In the case of corporations the culpability of individuals is more easily established where directors and managers have direct control over the workplace. For larger corporations, directors and managers are often far removed from operation of the workplace. As the Energy and Mining Division of the Construction, Forestry, Mining and Energy Union (CFMEU) noted:

Presently, in some jurisdictions, it is necessary to prove criminal negligence on the part of senior company officials who are the directing mind of the company to gain successful prosecution of a company. This is clearly easiest to do in respect of small companies ... In very large companies, as in coal, the directing minds may be thousands of kilometres away in a capital city or even in another country, and it is then almost impossible to prove that the company was criminally negligent (sub. 153, p. 27).

A much debated issue (especially in Victoria) has been whether manslaughter charges for OHS offences should be laid under the Crimes Act or the OHS legislation (see Carson and Johnstone 1991). Some commentators have called for an offence of industrial manslaughter to be created in OHS legislation. The Victorian Government stated:

... the issues of whether such prosecutions should be for manslaughter/Crimes Act offences or new specific offences incorporated into OHS legislation is one worthy of wider debate (sub. 382, p. 9).

The Commission concurs with the view of Carson and Johnstone that:

... technicalities aside, there are strong policy reasons for not using manslaughter provisions [in the Crimes Act] to prosecute employers responsible for industrial deaths. The use of such provisions would seriously undermine the criminality of the OHS Act ... because when a serious 'crime' is committed, involving gross negligence, it is prosecuted under the 'criminal law' rather than the OHSA (1990, p. 343).

Personal liability

Individuals who are responsible for the management of a corporation may be liable for OHS offences. In most jurisdictions, all individuals concerned with

the management of a corporation are potentially liable. Some jurisdictions even require a responsible officer to be nominated.

Despite these provisions, relatively few prosecutions have been initiated against directors and managers of corporations. For example, of those prosecuted in Victoria from 1983 to 1991, around 3 per cent were officers and managers of corporations (Johnstone 1994, p. 228).

Some participants referred to the deterrent power of personal liability. Mr Love from the Safety Institute of Australia observed:

I think the one fundamental thing that has made people sit up and look is criminal responsibility. One of the analogies I often use is that five years ago in the construction industry, no-one would wear helmets ... But as at today, you would have a hundred per cent compliance on Central Business District jobs.

The only difference between now and five years ago is that there is no law that says you have to wear it, but the real difference is that there's ... a personal liability that managers have woken up to and are concerned about (transcript, p. 319).

Personal liability has an important role to play in creating credible deterrence. Prosecution of directors, managers and others concerned in the management of a corporation deters others in positions of control. Hopkins found that:

... it is fear of personal liability which is by far the most important motivating factor ... It is quite widely known that individual directors have been prosecuted and even sent to gaol in the United States and this has had a profound effect on the thinking of some management boards (1995, p. 105).

In most jurisdictions, directors and managers have a defence against liability for the corporation's offences. To do so they have to show that the offence occurred without their knowledge or that they exercised 'due diligence'.

Queensland is the only State where it is mandatory for directors and management of a corporation to show that they had exercised 'due diligence' in order to avoid personal liability (Hopkins 1995). In other jurisdictions it is unclear upon whom the onus of proof rests (Brooks 1993).

Ignorance or lack of knowledge as a defence against personal liability is inconsistent with the duty of care. Those in the workplace are in the best position to identify, assess and control hazards. Senior managers have ultimate responsibility for ensuring that a corporation fulfils its duty of care.

The Commission considers that individuals responsible for the management of safety be required to show that they exercised due diligence in order to avoid liability. As Hopkins stated:

The response of senior company officers who are concerned to avoid personal liability is to set in place management systems which promote workplace health and safety and to audit these systems to ensure that they are working as well as possible. Directors

and managers who have set up such systems can be reasonably sure they have exercised 'due diligence' and that they could not be held personally liable in the event ... (1995, p. 10).

Private actions

In its Draft Report, the Commission invited comment on jurisdictions providing a right to bring private actions under OHS legislation. This right would provide individuals adversely affected by breaches of OHS legislation with an 'option of last resort' where inspectorates are unable or unwilling to take action.

The right to bring prosecutions under OHS legislation is generally limited to the OHS inspectorate. The exception is New South Wales, where the secretary of a union may also bring a prosecution. This provision has been used only once, to (successfully) prosecute a TAFE college. The New South Wales Government stated:

As a general principle, it is desirable that recourse in law is accessible to injured parties. However, this principle needs to be applied cautiously so that recourse to the court system does not result in unwarranted and unjustifiable litigation (sub. 397, p. 14).

Trade unions called for such a right in all jurisdictions. The ACTU proposed that employee health and safety representatives should have the right to:

... initiate prosecutions, through the union, in respect of breaches of regulations, where the government inspectorates fail to act (sub. 149, p. 7).

The Trades and Labour Council of the ACT agreed:

Currently no provision exists for unions to initiate prosecutions of employers for breach of the Act. This means that if the Crown decides not to prosecute, that is the end of the matter ...

Recent experience in NSW indicates that union initiated prosecutions on OHS grounds works very well. A provision in the Act is needed to allow similar action to be taken by a union in the ACT (sub. 75, p. 17).

The Trades and Labour Council of New South Wales felt that their experience of private actions raises the issue of how to make them work in practice:

One of the problems with the Act which of course no-one realised until we have taken this prosecution is that whilst the Act provides that a union secretary can initiate a prosecution, there are no provisions in the Act which actually enable a union to investigate a breach (transcript, p. 2877).

Other participants referred to the potential problems associated with private actions as an enforcement mechanism. Shell Australia argued that:

Irresponsible and nuisance prosecutions will result, which will undermine the reputation of the inspectorate and the regulatory authority. We believe prosecution should be limited to the inspectorate (sub. 308, p. 3).

The MMI Insurance Group also noted problems with private actions, arguing that:

... it allows inspectorates to shirk their responsibilities by throwing these matters back at employee representatives or families of victims in politically difficult circumstances. Victims and their families may, with unquestionable sincerity, act to a point of vexation in pursuing beliefs from an emotional perspective, irrespective of the particular facts (sub. 296, pp. 4–5).

The Commission considers that private actions do not negate the role of inspectorates but serve as a ‘safety valve’. Limited inspectorate resources are likely to mean that the inspectorate cannot proceed with all OHS offences which are worthy of prosecution. Private actions under OHS legislation would face the same costs and legal procedures as private legal actions in other areas of the law. As Dr Johnstone has shown, this limits the scope for abuse:

It is expensive to investigate, prepare and bring such prosecutions. This in itself, together with the burden of proof on the person bringing the prosecution and the other requirements of due process in the criminal law, will ensure that such a right of private action is not abused (sub. 277, p. 9).

Recommendation 18

The Commission recommends that the right to bring private actions be provided in all OHS legislation.

Other sanctions

Some participants called for a broader, more innovative range of sanctions to make up for the limitations of monetary penalties. The Mining and Energy Division of the CFMEU quoted the findings of the Law Reform Commission’s review of this issue (in relation to Trade Practices legislation):

- No matter how large, monetary penalties do not necessarily result in corporate offenders responding by taking internal disciplinary action against those responsible.
- Monetary penalties do not ensure that corporate offenders revise their internal controls where such revision is necessary to guard against repetition of the contravention.
- Monetary penalties tend to convey the impression that offences are purchasable commodities.
- Monetary penalties have a spillover effect on shareholders, workers, consumers and other bystanders.

- The level of monetary penalty required to reflect the gravity of the offence may exceed the capacity of the corporation to pay.
- Monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping (sub. 153, pp. 25–6).

Braithwaite and Grabosky (1985) identified a range of corporate sanctions not currently used. These include equity fines, publicity orders, internal discipline orders, preventive orders, corporate probation and community service orders. They argued that all these alternatives should be available to government.

Similarly, in a study on criminal law and occupational health and safety in Victoria, Dr Johnstone concluded that:

New penalties will need to be explored, so that the nature of the punishment or deterrence is more meaningful than the traditional fine. For example, penalties might include some sort of supervised probation; punitive injunctions requiring companies to remedy its internal controls; adverse publicity; or equity fines where the company is forced to create a parcel of share ownership which would be vested in a State agency crime compensation fund or the occupational health and safety authority itself (1994, p. 551).

The Commission notes that there was general support for the use of a wider range of sanctions in the responses to the Draft Report. For example, the Australian Manufacturing Workers' Union argued:

Improving health and safety performance can only occur if a range of sanctions are used against poor performers. Like other areas of legal sanctions, there needs to be a choice of sanctions dependant upon the circumstances and severity of the breach (sub. 335, p. 12).

The Department of Employment, Vocational Education, Training and Industrial Relations of Queensland stated:

The provision of a greater array of sanctions is an important consideration for all jurisdictions and perhaps a necessary step in the ongoing modernisation of regulation and enforcement practice.

Occupational Health and Safety legislation differs from general legislation and from general criminal statutes in that it offers a limited range of penalties. There is potential for a greater array of penalties aimed at encouraging or coercing corporations into changing their practices to succeed where less punitive measures have failed either in the particular case or because too much reliance has been placed on them in the past (sub. 316, p. 23).

The New South Wales Government stated that:

It is appropriate to consider a broader range of sanctions to further increase the effectiveness of prosecution activity. The imposition of a fine, for example, may be much less effective a penalty than publication of the poor occupational health and safety practices of a company. However the alternative penalty needs to be appropriate to the offence and should generate an occupational health and safety benefit. A penalty

of more extensive occupational health and safety audit requirements may be more effective in improving compliance in the longer term than, for example, a fine (sub. 397, p. 15).

Some participants did not see the need for a wider range of sanctions. For example, the Department of Occupational Health, Safety and Welfare of Western Australia considers:

... current avenues for the enforcement of occupational health and safety legislation are adequate (sub. 269, p. 15).

Recommendation 19

The Commission recommends that governments consider the implementation of a wider range of corporate sanctions in each jurisdiction.

8 ADMINISTRATION OF ENFORCEMENT

Enforcement practices must be consistent with efficient and effective enforcement of OHS legislation. A shift to greater deterrence, as proposed in Chapter 7, requires that inspectorate resources be used in such a way that credible general deterrence is established without undermining the voluntary compliance efforts of employers (and others) committed to the prevention of injury and disease in their workplaces.

Measures need to be developed and implemented in each of the following areas to operationalise the Commission's recommendations on the policy on enforcing OHS legislation:

- transparency in enforcement;
- the functions of the inspectorates;
- the targeting of their compliance inspections;
- their application of sanctions to identified breaches; and
- resourcing of the inspectorates.

Each of these issues is discussed in turn.

8.1 Transparency in enforcement

A formal and publicised enforcement policy exists only in some jurisdictions. Examples are Western Australia (see Box 8.1), the Northern Territory and Victoria.

A number of participants emphasised that there were benefits in having a transparent policy on enforcement of their OHS legislation. For example, the Department of Occupational Health, Safety and Welfare of Western Australia (DOHSWA) stated that:

Well, we believe it has served our system well. It was policy developed in, I think, around about 1991, and made very public thereafter. It's supported by explanatory material, in terms of how the department will administer that policy. We have distributed lots of copies of it and we believe that there is far less uncertainty about what the role of an inspector will be at a workplace now than there was in those days. So we support that. We believe that regulatory agencies should have an obligation upon them in the broad to have a public policy in terms of approach to enforcement — most definitely invaluable (transcript, p. 2180).

This does not mean that enforcement policies do not exist in any of the other jurisdictions — they do. However, they are only for internal use by the

inspectorate and as a consequence, are not transparent. As a result, many of those affected are unaware or unclear as to their obligations and the consequences of enforcement.

The Commission considers that all OHS agencies should make their approach to enforcement transparent by publishing a formal enforcement policy. The policy should, as a minimum, set out:

- enforcement objectives and plans;
- operating principles for targeting inspections;
- principles for dealing with safety breaches, including how ‘reasonably practicable’ will be interpreted by the inspectorate;
- the circumstances in which advice and particular sanctions will be applied;
- performance goals for the inspectorate; and
- procedures for the evaluation of enforcement.

A transparent policy would *inform* workplaces and the community of how the government and the inspectorate will approach the various issues in enforcement. It would contribute to a community debate on enforcement policy and practice. It would help to reassure all parties that the treatment of employers, employees and the community will be fair and that enforcement powers would not be abused. All concerned would be given notice of any changes in policy, thereby allowing some time for those responsible to adjust their behaviour. It would be unfair and unreasonable to implement significant changes while the majority of those affected remain ignorant of the implications.

Transparency would demonstrate and reinforce the *independence of the inspectorate*. Political interference in the enforcement process would be far more observable — and any perceptions of interference would be mitigated.

Accountability for enforcement depends largely on a transparent policy. The community has a right to know how governments intend enforcing OHS legislation — and to hold them accountable for the outcomes. An enforcement policy serves as a compact between government and the community.

The accountability of the inspectorate is also dependent on the transparency of the policy it is meant to enforce. A public and explicit policy is a precursor to the development of operational objectives and plans; without these, inspectorates cannot be held accountable for their performance.

Box 8.1 Western Australia's enforcement policy

1. All provisions of the Act have equal importance in regard to requirements for compliance and enforcement. Thus subject to established statutory interpretation, the same attention will be given to a breach whether it involves, for example, the general duty of care, discrimination, consultative provisions or regulations.
2. Non-compliance will be addressed by improvement notice, prohibition notice, prosecution action, and verbal direction. Verbal direction in the context of the enforcement policy only relates to situations where a breach can be immediately rectified and inspected prior to the inspector leaving the site.
3. Action taken by the inspector, including verbal directions, will be conveyed to the employer, health and safety representatives or health and safety committee or any other relevant party while the inspector is at the workplace.
4. Where an inspector obtains sufficient evidence to establish a *prima facie* case, and there is a reasonable prospect of a conviction, prosecution action will be initiated by the Department in circumstances including:
 - (i) where the issue of notices is not considered appropriate for ensuring compliance with the Act or Regulations;
 - (ii) where an alleged breach of the Act or Regulations has resulted, or could have resulted in a fatality or serious injury;
 - (iii) alleged failure to comply with an improvement or a prohibition notice;
 - (iv) where an inspector alleges a person has repeated the same offence;
 - (v) in cases of discrimination against an employee for any action in relation to occupational health and safety;
 - (vi) breaches of the consultative provisions of the Act; and
 - (vii) obstruction of an inspector.
5. Some targeted operations are initiated by compensation claims information of an individual workers' compensation policy holder or employer, provided by agreement with the Workers' Compensation and Rehabilitation Commission. Prosecution will not occur during operations based on this information. However improvement and prohibition notices will be issued where necessary as above. Prosecution action will occur if notices are not complied with.
6. Circumstances may arise in the process of investigating a serious injury or fatality whereby the Department forms the view the evidence is appropriate to take action under the criminal code, and the Police Department and/or the Coroner's Office will be briefed accordingly.

Source: DOHSWA (1992)

Most inspectorates were unable to provide the Commission with any formal *evaluation of performance* against the enforcement policy of the jurisdiction, let alone measurable indicators of performance. Only the Queensland Department of Employment, Vocational Education, Training and Industrial Relations has moved in this direction. The Department has developed a statistical basis for targeting inspection which also allows:

... changes in compliance to be estimated ... 'before and after' impacts of legislative or industry program changes. ... By providing measures of the impact of change it is possible to use estimates derived from the Compliance Audit Program results to also estimate the benefits of new standards, industry or compliance programs (correspondence, 18 May 1995).

Finally, transparency is critical to *credible deterrence*. Enforcement activity can only alter compliance behaviour if workplaces are aware of the consequences of non-compliance. An enforcement policy informs workplaces of the circumstances in which particular sanctions will be imposed.

Recommendation 20

The Commission recommends that the OHS agencies publicise their enforcement policy and practice to make their approach to enforcement explicit.

8.2 Functions of inspectorates

Inspectorates undertake a wide range of functions. These may be categorised as follows.

- *Technical activities:* These are certification and statutory inspections in respect of certain types of hazardous 'hardware', such as scaffolding, lifts, cranes, boilers and pressure vessels, as well as the licensing of operators of specific types of plant and equipment.
- *Reactive activities:* These consist of incident and accident investigations, follow-up visits to ensure compliance with improvement notices or that directions have been adhered to, and resolution of disputes (appeals) between employers and their employee health and safety representatives.
- *Proactive activities:* Random compliance inspections of target groups of workplaces and the enforcement action taken as a result of them (oral or written directions, improvement and prohibition notices, on-the-spot fines, prosecutions, and so on).

The jurisdictions were not able to estimate the resources they devote to these various activities, but they did provide the Commission with estimates of the share of workplace visits devoted to each (see Appendix M). In Table 8.1, enforcement expenditure is presented for each jurisdiction.

Table 8.1 Enforcement expenditure by jurisdiction, 1993–94

<i>Jurisdiction</i>	<i>Enforcement expenditure (\$millions)</i>	<i>Enforcement expenditure per employee^a (\$)</i>	<i>Total OHS expenditure (\$millions)</i>	<i>Enforcement expenditure as a percentage of total OHS expenditure</i>
Commonwealth ^b	0.4	1.1	3.9	10.3
NSW	17.8	9.7	38.0	46.8
Vic	15.8	10.1	22.0	72.0
Qld	15.3	17.2	24.4	71.8
Qld mining	na	na	1.3	na
WA ^c	9.2	16.3	12.1	76.0
WA mining	na	na	5.9	na
SA ^d	7.1	15.9	10.5	67.6
Tas	0.8	5.9	3.3	24.2
NT	1.5	28.2	1.7	88.2
NT mining	0.7	na	0.9	73.5

a Enforcement expenditure divided by the number of wage and salary earners in each jurisdiction (ABS, 1993d).

b Enforcement expenditure represents the estimated cost of contracting State and Territory inspectorates to conduct investigations for the Commonwealth in 1994–95. Total OHS expenditure includes the costs of enforcement activities conducted by Commonwealth investigators.

c Regulatory costs are included in enforcement and inspection costs.

d Figures are approximate.

na Not available.

Notes: The Australian Capital Territory was unable to provide this data. The New South Wales Department of Minerals did not provide these data.

The diversity of activities and administrative arrangements across jurisdictions makes the above table indicative at best.

Source: Information provided by OHS Authorities and Mining Departments.

The distribution of workplace visits across the three groups varies significantly among the jurisdictions. Proactive inspections make up at least half of all inspections by the Queensland, Northern Territory and Western Australian OHS inspectorates, and by the Western Australian mining inspectorate. They were less than a quarter of the visits by the Australian Capital Territory, Tasmanian and South Australian OHS inspectorates. For the Northern Territory mining inspectorate and the Australian Capital Territory and South Australian OHS inspectorates, technical inspections make up close to half or more of all inspections.

Technical activities

In its Draft Report, the Commission concluded that technical activities are a relatively low priority for the inspectorate compared to enforcing the duty of care. These activities are not as influential as enforcement for the prevention of injury and disease. Most can be performed by others.

Accordingly, the Commission proposed that the inspectorates should redirect resources from statutory inspections to proactive inspection. An increase in the number of proactive inspections would raise expected penalties (by increasing the probability of inspection) and therefore would enhance the deterrence value of enforcement. In this way, the number of proactive inspections could be potentially doubled in some jurisdictions and significantly increased in most others.

Statutory inspections could be provided on a fee-for-service basis by another agency or by accredited private sector providers. In most cases, statutory inspections are relatively straight forward but costly to perform. Provision of these services competitively would help to contain costs, although it does require some regulatory oversight to ensure that standards are maintained.

Some States have already contracted out statutory inspections to private assessors. Western Australia has done so for plant design and certificates of competency for plant operators. New South Wales has contracted out the safety audit of boilers. In the Northern Territory, 80 per cent of licence assessments are now carried out by external assessors.

Inquiry participants generally endorsed a system of accreditation for licensing and certification activities. The Victorian Farmers' Federation submitted that:

A proposal such as this could work on the basis that examiners would be licensed by the relevant State authority and an industry association which chose to apply for accreditation to issue Certificates of Competency would be required to use only licensed examiners. This would leave the relevant State authorities with control over the system but without the need to administer the system in its entirety. In addition to this, there would be price competition between examiners and also between accredited issuers of Certificates of Competency (sub. 129, p. 15).

The South Australian Government stated that the Commission's proposal is:

... supported and is consistent with the thrust of the new Consolidated Regulations (sub. 275, p. 22).

However, some Inquiry participants are not in favour of the use of the private sector to provide inspectorate activities. For example, the ACTU argued that:

We would have some doubt about whether, if those functions were transferred to private bodies, whether the resources that are currently expended would then be available for the other functions of the inspectorate. More likely they would be taken as a saving and public expenditure reduced accordingly. As you noted, our basic point is that we have more confidence in the independence and the integrity of the publicly run function than perhaps some of us would in the transfer of it to private bodies (transcript, p. 3401).

It is essential that any resources freed up as a result of contracting out technical activities, are re-directed to active workplace compliance inspection.

Advisory activities

The Robens Committee concluded that there was value in the inspectorate providing advice to workplaces on the management of health and safety risks. It advocated that:

... as a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activities of the unified inspectorate. We do not mean by this that the inspectorate should attempt to provide services which employers can and should provide for themselves. Nevertheless, we think that there is considerable scope, even within limited resources, for the development of high-quality advisory and consultancy services that would utilise and apply the great store of experience and expertise that has been built up within the inspectorates (Robens Committee 1972, p. 65).

The Commission considers that this advice should complement — and not detract from — the effectiveness of the overall enforcement effort and not divert resources from enforcement. As argued by the Safety Council of Australia:

Inspectors cannot be primarily consultants, educators, advisers. If they don't enforce the laws, no one else can! All their powers, resources and training should be directed towards being an evaluator of evidence of compliance provided by organisations being inspected (sub. 89, p. 14).

There can be a conflict when inspectors act as both advisers and prosecutors. Australia Post argued:

... there are disadvantages of inspectorates providing advice on preventative strategies to employers as well as detecting and prosecuting regulatory breaches ... By having two roles, an employer may be reluctant to seek advice from an inspectorate for fear that, in future the inspectorate may seek to prosecute the employer. It is expected that there would be a tendency for an inspector to be very cautious about giving advice because of the possibility that the advice may be relied upon by an employer in a subsequent prosecution (sub. 86, p. 8).

Finally, workplace inspections are not necessarily an effective vehicle for the provision of advice. Most workplaces will not see an inspector in a year. Those that do may lack the incentive to act on the advice. Independent and professionally qualified advice on the management of health and safety at work is available from the private sector. Those that really want advice should be able to obtain and pay for it themselves. The South Australian Government stated:

Inspectors do not have the capacity to provide detailed advice but are able to refer to appropriate bodies that can (sub. 275, p. 22).

Several participants argued that advisory activities should continue to be provided by the public sector, and not transferred to the private sector. The Northern Territory Government argued:

Given the limited private sector resources available to industry, it is simply not feasible to withdraw government advisory services (sub. 350, p. 8).

The United Trades and Labour Council of South Australia stated:

However, we would say that we very much favour the approach of maintaining that consultancy advisory function within the public sector for reasons of ensuring that there is no scope for corruption and so forth (transcript, p. 2535).

Recommendation 21

The Commission recommends that governments consider having statutory inspections, licensing and certification activities provided externally to the inspectorate on a fee-for-service basis

8.3 Targeting inspection

Statistically valid measures of the total costs of non-compliance with OHS legislation are not available. OHS agencies are also largely unaware of the extent to which non-compliance affects the incidence and severity of injury and disease at work.

The OHS inspectorates generally target their compliance inspections on the basis of data from workers' compensation claims. Workers' compensation claims do not adequately reflect the level or cost of injury and disease at work, nor do they measure the extent or costs of non-compliance (see Appendix M). For these reasons, data from workers' compensation claims are an inadequate and potentially misleading basis on which to target inspections. The Queensland Department of Employment, Vocational Education, Training and

Industrial Relations contended that:

Preventative agencies using workers' compensation data alone for targeting purposes are likely to find they are overlooking a great many workplace health and safety problem areas ... (sub. 79, p. 34).

The Commission recommends that compliance inspection should be targeted at those areas where enforcement can have the greatest preventive impact on health and safety. This is where the net gains from enforcement are greatest — the difference between the benefit from higher levels of compliance and the cost of its enforcement.

Benefit of greater compliance

The benefit of the greater compliance achieved by enforcement is the cost saving from less injury and disease at work. The costs should be measured both in terms of the economic and social consequences of increased prevention. Without some idea of the benefit of enforcement, the inspectorate will be unable to apply its resources effectively and efficiently.

Statistically valid surveys of compliance could be used to estimate levels of non-compliance. For example, on the basis of a study by McDonnell Phillips, the Queensland Department of Employment, Vocational Education, Training and Industrial Relations has:

... recently begun a new program to measure compliance with the Workplace Health and Safety Act and Regulation and to enable more effective targeting of field visits by inspectors ... Statistically valid samples will be used to predict likely compliance levels in an industry (sub. 79, p. 28).

There is a dearth of information on the effect of compliance with the duty of care on injury and disease at work. Compliance with mandated safety requirements should be better understood, otherwise the standard should not have been established in the first place. Better estimates of the effect of compliance on injury and disease are most likely to be obtained by studies within industries. There is likely to be a wide range of degrees of compliance from which to collect statistical data on the associated degree of prevention.

The benefit from increased compliance is likely to be highest for those injury and disease outcomes which impose the greatest cost on the rest of the community. These are likely to be the cases of non-compliance which increase the risk of death or permanent incapacity (see Chapter 2). While the Commission has estimated these cost 'spillovers' onto the rest of the community, further research in this area could provide inspectorates with more reliable measures.

Cost of enforcement

The costs of enforcement mainly involve the costs incurred in inspecting for and prosecuting breaches of the duty of care (see Appendix M). The costs of inspection vary according to many factors such as the geographical dispersion of workplaces, the nature and complexity of their technology and organisation, but mostly the size and number of workplaces in an industry.

The costs of enforcement are likely to be greater the larger the industry. The number of inspections required to achieve a given expected penalty for non-compliance will increase with the number of workplaces in the industry. For example, 10 workplaces would need to be inspected to create a 10 per cent probability of inspection in an industry of 100 workplaces, compared to 1000 workplaces in an industry of 10 000 workplaces.

Enforce all duties

Some participants expressed concern that enforcement has been focused on employers to the exclusion of others having responsibilities under OHS legislation (for example employees, manufacturers of plant and equipment or suppliers of hazardous chemicals). Mr Frith from the South Australian Employers' Chamber of Commerce and Industry stated:

... the emphasis or focus has still very much been on the employer's responsibility ... I'm not sure that the requirements on all parties have been fully considered and perhaps enacted through the regulations, responsibilities, and so on (transcript, p. 1433).

The obligations of all those who have a duty of care should be enforced. In its review of OHS legislation in the United Kingdom, the Health and Safety Commission stated:

... as far as possible those responsible in practice for creating risk should be held accountable for it. If that is the owner of the premises, or the supplier of the equipment, or the designer or client of the project, rather than the employer of workers exposed to risk, the enforcers should act accordingly (1994, p. 34).

Recommendation 22

The Commission recommends that compliance inspections be prioritised by targeting areas of non-compliance where the net benefit in terms of injury and disease prevention is expected to be greatest. There should be regular evaluation of the effectiveness of the targeting strategy.

8.4 Application of sanctions

Different types of sanctions perform different roles in enforcement, despite their common broader objective of increasing compliance and thereby preventing injury and disease. Prosecutions and on-the-spot fines are primarily general deterrence measures which impose an expected cost before the offender has been detected. Improvement notices and prohibition notices are specific deterrence measures which impose a cost once the offender has been detected.

Sanctions should be applied in ways that give workplaces the strongest incentive to invest in prevention. To provide a sufficient incentive to invest in prevention, the expected cost to the duty holder of breaching the duty of care over time, must exceed the actual cost of compliance in the present. Where this is the case, workplaces will be able to reduce their costs over time by investing in prevention.¹

The cost of compliance is the cost to workplaces of investing in safety systems and the control measures that those systems identify. Workplaces also have natural incentives (from increased productivity and savings in workers' compensation premiums) to make some investment in injury and disease prevention.

If sanctions are applied in such a way that the penalty is only equivalent to the cost of prevention, these natural incentives will be insufficient to ensure compliance with the duty of care. The sanction has to take account of the fact that not all breaches will be punished. Penalties have to be correspondingly higher to offset the effect of their being discounted by the probability of being penalised. This means that on their own, compliance notices will only deter the person who received the notice from breaching the law in the future.

¹ The expected cost of non-compliance in the future is greater than the cost of prevention in the present. This can be formalised as: $C_p < P(C_p + F)e^{-rt}$; where C_p equals the cost of prevention to the workplace; P equals the probability of being inspected and punished per unit of time; F equals the amount of the fine imposed; and e^{-rt} equals the discount factor.

Recommendation 23

The Commission recommends that where general deterrence is required to provide an incentive to invest in safety, there should be an expectation that offences will be penalised, in addition to receiving compliance notices.

Prosecutions

Under current arrangements, a limited number and range of offences are being prosecuted. The Commission's analysis indicates that prosecutions represent less than 5 per cent of all formal sanctions imposed.

At present, in most jurisdictions the prosecution of OHS offences is not handled by the OHS agency but by the Director of Public Prosecutions or the Crown Law Offices.

In New South Wales, prosecutions are conducted by a specialised, multidisciplinary unit within the WorkCover Authority. New South Wales has been able to prosecute (and convict) substantially more breaches than any other jurisdiction.

The Victorian Government stated that the Victorian Health and Safety Organisation's prosecutions unit:

... has been in place for some five years now and experience has shown both an improvement in the quality and comprehensiveness of investigations and prosecutions and a progressive expansion in the range of offence situations resulting in prosecution. The highest average penalty level across all jurisdictions can also, it is argued, be attributed in part to this approach (sub. 382, p. 8).

Dr Johnstone argues that Victoria has managed to prosecute more duty of care offences over a broader range of issues as a result of its prosecutions unit.

Dr Johnstone also argued that:

A specialist unit with a broad range of interdisciplinary skills is necessary to deal with the complex issues raised by workplace crime committed by business organisations (rather than the traditional defendants in the criminal law, individuals) and offences that are based on 'systems of work' (rather than the traditional criminal law's focus on incidents) (sub. 277, pp. 6–7).

In its Draft Report, the Commission called for views on the efficacy of forming a multidisciplinary prosecution unit within each inspectorate to increase the range and number of offences successfully prosecuted.

Mr Butler, an OHS inspector with the Victorian Health and Safety Organisation,

argued:

Prosecution teams [units] are the most effective way of increasing an agency's ability to mount successful prosecutions in relation to a range of offences (sub. 294, p. 1).

The ACTU argued:

... OHS authorities should establish specialist investigation/prosecution units which are equipped to concentrate solely on the investigation of fatalities, serious accidents and serious incidents. Most inspectorates have difficulty dealing with the demands of providing high quality legislative and technical advice to employers and health and safety representatives, and fulfilling their targeted workplace visits. Inspectors required to make judgements about prosecution activity must be appropriately trained and supported (sub. 336, p. 17).

The South Australian Employers' Chamber of Commerce and Industry — although generally in favour of prosecution units — highlighted a drawback:

... establishment of multidisciplinary prosecution units within the inspectorates would be costly and the ongoing running of such units would be resource intensive. Establishing units at such costs always runs the risk that they will generate or create work to justify their existence (sub. 272, p. 14).

The Commission appreciates that a specialised prosecution unit within the OHS inspectorate — devoted solely to the task of conducting prosecutions — may not be economical for all jurisdictions. Where they are, specialised units are likely to increase the willingness of inspectorates to prosecute breaches, as well as their ability to do so successfully. External prosecutors on the other hand, have a wider range of objectives than the enforcement of OHS law and often lack the non-legal expertise essential for successful prosecution of breaches of the duty of care.

Recommendation 24

The Commission recommends the formation of prosecution units within OHS inspectorates.

Sanctions and injury

The Commission considers that the decision to apply a sanction should be determined by the seriousness of the breach of the duty of care, and the costs of prevention. Whether an injury has occurred or not should be irrelevant to that

decision. As Brown stated:

If a particular violation gives rise to a chance of serious injury, mere luck determines which of the employers who commit this offence will injure a worker. The fortunate employer whose offence hurts no one is as much in need of deterrence as the unfortunate one whose employee is maimed (1992, pp. 724–5).

The duty of care requires that employers systematically identify, assess and manage risks. Incorporating the duty in statute ensures that it will be used for prevention, not just to provide damages in the case of injury. To realise this objective, it is important that enforcement agencies prosecute employers who fail to avert avoidable risks, even if these have not yet resulted in injury or disease. It is not appropriate that such offences only be sanctioned through on-the-spot fines. The Safety Institute of Australia argued that:

A belief by industry that a prosecution will only be instigated as a result of an accident may obviate the economic incentive to comply with the legislation. If an organisation decides that the chance of an accident is remote it will have very little incentive to comply. In the event of a visit by an inspector the worst outcome anticipated would be a notice to rectify the problem (sub. 151, p. 22).

To date, most enforcement agencies have focussed on prosecuting cases of serious injury to the exclusion of cases of serious risk. However, NSW WorkCover has demonstrated that it is possible to successfully prosecute cases of serious risk in the absence of serious injury. For example, a corporation in New South Wales was fined \$50 000 for a breach which, while resulting in only one lost day, had the potential for serious harm. The Industrial Court of New South Wales stated:

Whilst the degree of injury sustained (or lack of it) may impact in a peripheral way on the final determination by a court as to what is a relevant penalty to be imposed for a breach of the [OHS] Act, it is the fact that here is a risk of injury which is created and the potential consequences of that risk which are, in my opinion, of greater significance (unreported decision of Marks J., 30 November 1994).

Compliance notices and advice

Where inspectorates prosecute or impose on-the-spot fines on employers or suppliers they should also issue improvement notices (and prohibition notices where appropriate). This ensures that unsafe situations are rectified immediately, as well as incurring a financial penalty in order to deter future breaches by themselves and other employers.

Compliance notices and advice should not be used as a substitute for penalties in cases where employers are ignorant of their duties. As in other areas of the law, ignorance should not be a defence. Information and awareness programs and codes of practice should be used to raise awareness of responsibilities. A

lenient approach to ignorance reduces incentives for employers to find out their legal responsibilities, and fosters apathy.

It is only appropriate to give compliance notices and advice without penalties where the imposition of a penalty would be counter-productive. Where a workplace has made a genuine effort to comply, penalties for minor breaches may undermine their commitment in the future. In such a case, it is appropriate that the inspectorate recognise the commitment of the employer to meet their duty of care and remedy the situation through a notice rather than a penalty.

Inspectorates would need to distinguish between workplaces which have made a genuine effort to comply and those which have only attempted to comply in a perfunctory way (or not at all). The following are likely to be relevant in making this distinction:

- the adoption of an industry code of practice or enterprise safety management system;
- the quality of the workplace's risk management system relative to its industry peers; and
- the compliance record of a workplace.

Workplaces with poor compliance records and those which do not have credible systems in place, should receive on-the-spot fines in addition to notices and advice for minor breaches.

Compliance notices and advice should not be used as a substitute for penalties in the case of any serious breach. Serious offences are more than likely the result of a serious failure in the risk management system of a workplace (or lack of a system altogether). It should be for the court to decide whether it was reasonably practicable to have avoided the serious breach.

On the issue of whether inspectors should issue a notice or an oral direction, the Commission supports DOSHWA's policy that verbal direction should only be given where a breach can be immediately rectified and inspected prior to the inspector leaving the site.

Trivial breaches

In its Draft Report, the Commission proposed that penalties should be imposed for all significant offences, together with compliance notices where appropriate, but not for trivial breaches.

The over-riding objective of enforcement is to improve health and safety by increasing compliance. If compliance with a particular requirement does not improve safety, it is not sensible to enforce it. Enforcement of such breaches

wastes limited enforcement resources, undermines the employer's commitment to meeting their duties, and generally reduces the credibility of OHS law and its enforcement. Hopkins observed:

The prevailing wisdom among compliance researchers in the US is that enforcement agencies such as OSHA have been overly punitive and nit picky. This, it is suggested, antagonises the firms which are subject to these petty penalties and destroys the possibility of co-operation ... I have found such a view among company managers in Australia, too ... it was suggested to me that inspectors are imposing on-the-spot fines with little real justification (1995, p. 91).

Community acceptance of more vigorous enforcement depends on focusing on significant breaches. For example, the Victorian Employer's Chamber of Commerce and Industry (VECCI) stated that 'enforcement activity should be reserved only for significant offences and refrain from pursuing trivial breaches' (sub. 313, p. 15).

Many governments and trade unions questioned whether any breaches were trivial. They were concerned that such an approach would mean that technical requirements that had a significant effect on safety would not be enforced. For example, the ACTU (Queensland) expressed concern that:

... it's rather difficult to determine what's a trivial offence or trivial breach and quite often what may be seen as a trivial breach in particular circumstances could actually be life-threatening or threatening the health and safety of people (transcript, p. 2750).

Further to this, ACT WorkCover argued that:

The term 'trivial' is somewhat imprecise in meaning. What is trivial to one person may be significant to another (sub. 373, p. 7).

In Chapter 3, the Commission identified a number of technical requirements that are over-prescriptive (see Box 3.2). However this was not because these requirements are irrelevant to safety, but rather because they could preclude alternative ways of achieving an equivalent level of safety, and were already covered by the duty of care. Failing to maintain a boiler in a safe condition is a significant offence, whether or not this is prescribed in regulation. However, if a comprehensive approach to maintaining a boiler existed which was different from, but at least as safe as that prescribed in regulation, then safety would not be served by punishing the breach of boiler regulation.

Under the Commission's proposed regulatory approach the concept of a trivial breach will have less relevance because:

- most prescriptive technical regulation will be abolished;
- many workplaces will be developing and adopting their own enterprise safety management systems or industry codes of practice which are unlikely to include trivial requirements; and

- inspectorates will be focusing on the duty of care.

The respective circumstances in which offences should be prosecuted, fined, dealt with through improvement and prohibition notices and advice, or not acted on, should be clearly outlined in each jurisdiction's enforcement policy. This will ensure that inspectorates have clear operational guidelines, and that employers will know where they stand.

Publication of convictions

Most inspectorates do not widely publicise the details of the offences or the identity of the offenders. Most inspectorates only publicise such details in their annual reports, which only have a very limited circulation in industry. Some OHS authorities publicise details of prosecutions (convictions) outside of their annual reports, for example New South Wales in its *WorkCover News* and Victoria in its *Recent Prosecutions* circular.

Awareness of prosecutions is critical to credible deterrence. The threat of punishment is non-existent where employers and employees are unaware of the potential to be punished for offences. Many workplaces are largely unaware of their obligations under OHS legislation, let alone the consequences of failure to comply with OHS legislation.

If the community perceives OHS offences as largely unavoidable, workplaces are unlikely to face community pressure to improve occupational health and safety. Prosecutions signal to the community that OHS offences are culpable behaviour which could have been avoided.

Many participants endorsed the deterrence value of publicising convictions. For example, the Metal Trades Industry Association (MTIA) stated:

... the potential adverse publicity arising from prosecution proceedings against corporations ... would have an equal, if not greater, deterring effect than statutory sanctions (sub. 143, p. 4).

Publications with a high circulation must be used if publicising prosecutions is to be effective. As stated by the National Tertiary Education Union:

'Publicised' should be interpreted in its widest sense, with publicity not simply confined to circulation in limited edition OHS authority newsletters (sub. 321 p. 7).

The ACTU stated:

... the Victorian OHS authority produces a quarterly publication called *Recent Prosecutions - Occupational Health and Safety Legislation* ... it is reputed to have an effect on the public perception of the company in question, and therefore acts as an added incentive to improve their OHS performance (sub. 149, p. 8).

In addition to serving as a deterrent for workplaces, publicity would raise community recognition and understanding of OHS issues, increasing the impetus for improved OHS outcomes.

Recommendation 25

The Commission recommends that details of occupational health and safety convictions, including a description of the offence and the penalties imposed, be publicised by the responsible agency.

8.5 Resourcing the inspectorates

The Commission's recommendations for more vigorous enforcement, focussing on the duty of care, have significant implications for the training and skills of inspectors.

The focus on the duty of care necessitates that inspectors scrutinise the development and application of risk management systems, as well as the outputs of those systems, such as safe plant and equipment. The change in emphasis from compliance with prescriptive regulations to compliance with the duty of care, necessitates that inspectors exercise some judgement, in the absence of clear-cut rules.

Greater deterrence in enforcement places greater responsibility on inspectors. The exercise of this responsibility is likely, at least initially, to bring them into conflict with employers and other duty holders more often. Inspectors will need to be trained in the proper use of sanctions, so that they exercise their powers appropriately and avoid costly, unsuccessful prosecutions. Inspectorates will also need to establish clear operational policies and procedures to guide inspectors.

Participants attested to the importance of a well-trained inspectorate to the enforcement of the duty of care. On this point, the Department of Industrial Relations concluded that:

Inspectorates would need substantial re-orientation and re-training to make the proposed approach to deterrence work. This would include a solid understanding of the enforcement approach and the role of enterprise systems and industry codes within that approach. There would be a need for new strategies for enforcement operations and training of inspectors given that the proposed approach is at odds with the present general direction of inspectorate activities which emphasise the provision of advice (sub. 338, p. 7).

Most inspectorates are in the process of upgrading the qualification and skill base of their inspectors (see Table 8.2). However, some participants said there was scope for further improvement. One such was the Trades and Labour Council of Western Australia which commented that:

... people are still existing in the inspectorate and other than in-service courses a lot of them haven't really upgraded their qualifications. It's our view that they should be provided with further training and education (transcript, p. 2111).

Table 8.2 Employment characteristics of inspectors, 1993–94
(per cent)

<i>Employment characteristic</i>	<i>General</i>								<i>Mining</i>		
	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Qld (m)</i>	<i>WA (m)</i>	<i>NT (m)</i>
No formal training	0	24	0.9	6	0	5	0	0	0	8	0
Trade qualification ^a	80	45	68	31	80	35	40	60	0	26	10
Tertiary qualification ^b	79	22	54	52	30	4	80	80	100	66	40
OHS qualification ^c	75	14	44	32	25	10	70	70	0	16	0
In-house training ^d	100	100	100	100	100	100	100	100	100	95	10

a Proportion of inspectors holding a qualification in relevant trades, for example electrical trades.

b Proportion of inspectors holding a degree or diploma of any description (including those in progress).

c Proportion of inspectors holding a qualification specific to OHS (including those in progress).

d Proportion of inspectors having participated in work-based and internal training courses.

Notes: These figures include those appointed as inspectors.

The New South Wales Department of Minerals did not provide data.

Source: Information provided by the OHS Authorities and Mining Departments in each jurisdiction.

Recommendation 26

The Commission recommends that inspectorates in all jurisdictions:

- assess the qualifications and skills required to enforce the duty of care under a more deterrence-oriented enforcement regime;
- review the current qualification and skill base of inspectors; and
- implement measures to redress deficiencies where necessary.

9 CONSISTENCY IN HEALTH AND SAFETY PROTECTION

Currently, there are over 150 legal instruments in the nine jurisdictions (the Commonwealth, the six States and two Territories) which regulate health and safety at work. In addition, five jurisdictions have specific legislation for the mining industry. The Commonwealth has separate regimes for the offshore petroleum and maritime industries, and the States and Territories also have their own regimes for offshore petroleum.

There is inconsistency in regulation and its enforcement between, and even within States. Different obligations are placed on employers, employees and suppliers. Exposure limits for some hazards, such as noise and asbestos, differ. There are quite different rules for hazardous plant and equipment (for example, boilers, lifts and cranes, electrical equipment) and work processes (for example, demolition, working with compressed air). There are differences in the enforcement of OHS legislation (see Chapter 7). Finally, inconsistencies may be introduced by Federal industrial relations legislation over-riding State and Territory OHS law.

In recent years Australian governments have attempted to achieve greater consistency in OHS regulation so as to reduce the inequities and costs of inconsistency. These efforts have centred on the development and implementation of national standards by the National Occupational Health and Safety Commission (NOHSC). The inquiry revealed broad support for this initiative but concern about the approach currently being pursued and the rate of progress.

This chapter canvasses the issues in and options for achieving greater consistency in OHS regulation across all OHS jurisdictions. It concludes by looking at how to reduce inconsistency resulting from Federal industrial relations legislation.

9.1 Issues in greater consistency

Greater consistency in the level of regulatory protection of health and safety across the various jurisdictions has potentially significant implications for equity, economic efficiency and regulatory innovation. These are elaborated in turn below.

Equity

Differences in OHS law and its enforcement mean the health and safety of employees are not protected to the same degree, even where the risks of injury or illness at the workplace are the same.

It may be inequitable for workers who face essentially similar risks to their health and safety from work to be afforded different legal protection. This would be the case even if, as a result of the inconsistencies in the law, some workers are better off without any others being worse off.

For equity reasons, the trade union movement considered that Australian workers should have access to the same minimum level of protection from the law. The ACTU contended that:

Australian workers have a right to be protected from hazards that are not within their power to control, to the same level and extent, irrespective of the jurisdiction or industry in which they work (sub. 149, pp. 13–14).

Economic efficiency

National employers have to work within multiple OHS jurisdictions. Multiple regimes mean additional costs whenever systems of work are changed or staff are moved between regimes. They also raise the cost of internal monitoring of compliance by their operations.

BHP complained about the compliance costs imposed by non-uniformity between jurisdictions:

Regulators who suggest that there is no cost to industry in complying with a plethora of confusing and often contradictory cross-jurisdictional OHS requirements are simply wrong. The extent of those extra costs, large as they are, is irrelevant; the fact that there are extra costs at all is just adding a restrictive burden to industry without promoting safer performance (sub. 141, p. 8).

The problem of multiple jurisdictions is compounded by the plethora of legal instruments that national employers must have regard for when conducting their business. BHP identified 221 legislative instruments that it considers have implications for its management of health and safety (see Table 9.1).¹

¹ The Commission conservatively estimates that nationally there are at least 150 separate Acts and subordinate instruments that deal directly with OHS. The BHP figure also includes legislation, such as the Equal Opportunity Acts, that impact indirectly on OHS.

Table 9.1 OHS and related legislation applicable to BHP operations in Australia, June 1995

<i>Legislation</i>	<i>C'wealth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>All</i>
Acts	6	3	5	1	3	3	1	2	1	25
Regulations	19	36	26	26	23	25	14	15	12	196
All	25	39	31	27	26	28	15	17	13	221

Source: BHP (sub. 244, p. 1).

This volume of legislation impedes the efficient functioning of national markets, places even higher costs on those employers operating in multiple jurisdictions and detracts from competitive neutrality.

The Commission surveyed the members of the Business Council of Australia (BCA) who make up some of Australia's largest employers. Two-thirds of respondents (26 out of 42) considered that non-uniformity imposes costs on their operation but only three were able to quantify the costs (see Table 9.2).

Table 9.2 Business attitudes to national uniformity

<i>Principal industry of each business</i>	<i>Does a lack of uniformity impose costs?</i>		<i>Can you estimate the costs of non-uniformity?</i>		<i>Differences in the regulation and enforcement of manual handling?</i>		<i>Advantages from non-uniformity?</i>	
Manufacturing	6 Yes	6 No	2 Yes	10 No	1 Yes	8 No	3 Yes	6 No
Mining	5 Yes	5 No		12 No	4 Yes	3 No	1 Yes	9 No
Finance	3 Yes	1 No		4 No	1 Yes	1 No		3 No
Transport and communication	2 Yes			2 No		2 No		2 No
Sales and service	3 Yes	1 No		4 No	1 Yes	1 No		3 No
Construction	2 Yes			2 No		1 No		2 No
Government trading enterprises	5 Yes	3 No	1 yes	7 No	1 Yes	4 No		5 No
All	26 Yes	16 No	3 Yes	41 No	8 Yes	20 No	4 Yes	30 No

Note: Of the 86 members of the BCA, 37 responded to the survey, 2 responses from branches of the one business were consolidated. There were 8 respondents from the public sector.

Source: Industry Commission survey of the members of the Business Council of Australia. The survey was also distributed to Commonwealth Government Trading Enterprises by Comcare.

Businesses that operate under more than one OHS regime are usually the larger enterprises — such as those that make up the membership of the Business Council of Australia. For these enterprises, there would clearly be benefits from more consistent OHS regulation.

On the other hand, there are many employers who operate under only one OHS regime — predominantly small to medium-sized enterprises. Such enterprises are so numerous that they employ more people in total than large employers do. Moreover, their share of employment is growing. For them, there may be some benefit in having different regulatory regimes, if for example, one better suits their circumstances.

Accordingly, there may be a trade-off between the efficiency gains from the single regime which best accommodates employers operating in multiple jurisdictions and their employees, on the one hand, and that series of regimes which best fit small to medium-sized employers operating in the one jurisdiction, on the other.

Regulatory innovation

Innovation in the design and execution of regulatory instruments is a key element in improving the efficiency and effectiveness of regulatory regimes, such as that for occupational health and safety.

Some inconsistency in OHS regulation may allow greater innovation in the regulatory instruments that they use.

Moves to greater consistency therefore carry the risk of progressively eliminating the scope for regulatory innovation. The risk is greatest with uniformity. If regulatory experiments require the agreement of all or most governments, the scope for innovation is likely to be smaller than would otherwise be the case.

The risk of reduced regulatory innovation was one of the reasons many participants were opposed to the concept of a single regime to regulate health and safety in all workplaces in Australia.

9.2 Inconsistency between jurisdictions

Nationally uniform standards in occupational health and safety have been a goal of Australian Governments since the creation of the National Occupational Health and Safety Commission (NOHSC) for that purpose in 1984. However, NOHSC made little progress towards the goal of national uniformity until November 1991. At that time, Premiers and Chief Ministers agreed ‘to achieve nationally uniform standards in occupational health and safety and uniform standards in relation to dangerous goods by the end of 1993’ (Premiers and Chief Ministers, 1991).

In April 1992, Ministers of Labour endorsed a strategy to achieve national uniformity in respect of key hazards by the end of 1993 (Department of Industrial Relations, sub. 74, p. 7). This strategy identified seven priority areas for national standards: plant; manual handling; occupational noise; workplace hazardous substances; certification for users and operators of industrial equipment; major hazardous facilities; and dangerous substances. The strategy also identified several 'non-priority' areas (see Appendix H).

Since that time, five of the seven priority standards have been declared by NOHSC (see Table 9.3).

Initially, national standards were to consist of uniform legal text in the form of *model regulations* for adoption in each jurisdiction. This approach was unsuccessful due to inconsistencies in the principal OHS Acts of the jurisdictions, different approaches to their use of subordinate legislation and of codes of practice, and different styles of drafting legislation.

Table 9.3 Implementation of national standards

<i>Standard (Year declared)</i>	<i>C'wealth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
Manual Handling (1989)	P	A	A	A	A	A	A	A(1)	A
Noise (1992)	A	P	A	A	U	P	P	A(1)	A
Workplace Hazardous Substances (1993)	P	P	U	A	P	A	P	P	A
Plant (1994)	P	P	A	A(1)	P	A	P	A(1)	A
Certification for Users and Operators of Industrial Equipment (1992)	A	P	A	A	A	A	P	A(1)	A

Notes: A= adopted, P= adoption planned, U = under consideration.

1 Adopted as a code of practice.

Source: Department of Industrial Relations.

Subsequently, national uniformity was redefined as 'the consistent implementation of the *common essential requirements* (CER) of each nationally agreed standard'.² Most of the national standards declared by NOHSC comprise a set of CERs and one or more national codes of practice. CERs may

² This approach was endorsed by the Ministers of Labour Conference on 30 April 1993.

be implemented in a variety of ways. Jurisdictions have the freedom to use any legislative instrument, a code of practice, or any combination of these.

Participants views on problems with the current approach

Participants generally expressed concern with most aspects of the development and implementation of national standards by the jurisdictions.

There are concerns about the *manner of implementation* of national standards. Some jurisdictions have incorporated CERs into legislation, others have used approved codes of practice or guidance material. This means that the letter of a CER is mandatory in some jurisdictions but in others alternative ways of achieving the same result are permitted.

For example, the manual handling standard has been adopted as a code of practice in Queensland and Western Australia, but as regulations in some other jurisdictions (see Appendix H, Attachment H3). The workplace hazardous substances standard is being implemented as a code of practice in Queensland, but is being incorporated in the OHS Act or its regulations elsewhere. The results reinforce perceptions that governments do not have a clear view of the most appropriate approach.

Participants expressed concern that the *content of the standards* implemented can differ to a significant degree from the standards declared by NOHSC. Significant differences in content undermine the concept of uniform standards.

For example, the ACTU said:

Nationally uniform OHS standards, adopted in a consistent manner, is a priority objective of the ACTU and industry for reasons of both equity and efficiency. If the situation continues where States and Territories, having participated in the NOHSC processes, refuse to implement agreed national outcomes in a consistent manner, the value of the NOHSC will be seriously weakened (sub. 149, p. 4).

The Australian Liquor, Hospitality and Miscellaneous Workers' Union said:

... there are numerous examples of how uniform standards ... have been watered down by the States, and in some cases are not going to be picked up at all. That is a total waste of time and energy of all players involved in health and safety at all levels and it is our view that there is a need to tighten up the processes at the national level so that the States are either locked in voluntarily or overridden by Commonwealth intervention (transcript, p. 1293).

The Plastics and Chemical Industries Association (PACIA) observed:

It is of concern that despite the strenuous and co-operative efforts made to achieve endorsement of the regulations in NOHSC, it is our understanding some State authorities still feel the need to modify the regulations. This expression of State's rights leads to non-uniformity and is unhelpful to businesses operating across the nation (sub. 208, p. 5).

The Department of Industrial Relations cited the following as significant variations from the agreed national standards:

- there are variations from the noise standard in South Australia and Western Australia;
- the format of material safety data sheets is mandated in regulations in NSW, but referenced in codes of practice in the other jurisdictions;
- in NSW, Victoria and South Australia the plant standard will not apply to manually powered and held tools (sub. 395, Attachment 4).

Further details of these variations are in Appendix H.

The Western Australian Government revoked regulations made by the former government to adopt the manual handling and noise standard (sub. 74, p. 13).

The main argument used by State governments to justify variations at the time of implementation from the national standard developed by NOHSC, is that these variations are required in order to address local concerns. For example, the South Australian Government said:

The adoption of appropriate uniform national standards is not, however, an end in itself. The decision to adopt the standards, to adopt its content and the method of adoption are matters which should remain within the discretion of each State and its policy development framework. In this way local circumstances can be adequately addressed to ensure that the proposed uniform national standards are appropriately evaluated and unforeseen consequences minimised (sub. 147, p. 23).

Western Australia stated its position in the following terms:

Notwithstanding its commitment to national standards, Western Australia reserves the right to consider and assess each standard on a case by case basis within its tripartite Occupational Health, Safety and Welfare Commission. Where adoption of a particular standard is considered appropriate, implementation will be through whatever instrument or instruments best meet the needs of the State. While complete adoption and implementation of national standards in Western Australia cannot be guaranteed, it is highly likely close consistency with almost all national standards will be achieved (sub. 222, p. 40).

Many inquiry participants criticised the slowness in achieving national uniformity. For example, the MSB Hunter Port Authority said:

A particular concern is the time taken from the recognition for the need for a national standard and the adoption of that standard by the various States or Territories (sub. 87, p. 3).

Despite several years of concerted effort by NOHSC since 1991, many participants were critical of the *progress in development and implementation* of national standards (see Tables 9.3 and 9.4). Not one of the priority standards has been fully implemented across the country. Development of the national standard on hazardous substances began in November 1988. The standard was declared by NOHSC in December 1993 but has yet to be implemented by six governments.

Table 9.4 Timetable for development of selected national standards

<i>Standard</i>	<i>Decision to develop</i>	<i>Release for public comment</i>	<i>Review of public comment completed</i>	<i>Economic impact assessment noted</i>	<i>Declared</i>
Plant	July 92	December 92	September 93	June 94	June 94
Noise	July 86	September 89	June 90	August 91	March 92
Certified Operators	December 90	January 92	May 92	N/A	December 92
Hazardous Substances	November 88	March 90	December 90	December 93	December 93

Source: Information supplied by Worksafe Australia.

The Department of Industrial Relations emphasised the significant task involved in achieving national uniformity. It also argued that progress has been quicker in Australia than in other countries:

[criticism about the slow pace of reform] fails to take adequate account of the significant work required to 're-orient' the nature and development of national standards in light of the current shift to Robens-style legislative reform and the incorporation of economic impact assessments to satisfy State regulatory impact statement requirements ... the assessment also fails to acknowledge that the standard setting process has worked faster than in comparable developed countries such as the United Kingdom and the United States of America (sub. 74, p. 12).

Worksafe attributed the delays in achieving national uniformity to problems associated with earlier attempts to develop model regulations, the broad nature of the reforms being undertaken, the requirement for extensive public consultation in developing the standards, the need for some States to conduct regulatory impact assessments, and the difficulty of fitting national standards into the differing jurisdictional requirements in the States (sub. 50, p. 15).

The ACCI attributed the slow rate of progress to the extent of the change necessary and to the inherent difficulty of the task:

The achievements that have been made and the reform that has been enacted since this decision by the Premiers have been impressive. The reform required and the need to change long set behaviour was not insignificant. While reform may not have been achieved as quickly as some would have liked, this desire for more rapid change shows an ignorance of the disunity that was present and laborious and difficult process associated with standards development. There is no question that the parties directly involved in this process could not sustain more rapid development or change (sub. 133, p. 34).

In the Commission's view, the concerns expressed by participants about the current processes for achieving uniformity are symptoms of more fundamental problems with the national uniformity program. Governments have failed to agree on either its operational objectives or how they are to be achieved. These issues are discussed below.

Lack of agreed objectives

The program to achieve national uniformity does not appear to have clear and consistent operational objectives. Standards have been targeted at those hazards which are associated with high workers' compensation pay-outs rather than those which impose high costs on the community, that is give rise to fatalities and permanent disabilities. The Commission's estimates of the costs of work-related injury and disease show that outcomes involving permanent incapacity or death account for almost 60 per cent of total injury costs, despite their low incidence (see Appendix C).

The program has not given sufficient emphasis to the fact that hazards to health and safety can only be successfully managed at the workplace. Much of its effort has gone into developing a code of practice for each hazard. These generic codes are meant to be able to be used in any workplace in any industry. Although they are sound as statements of principle, the generic nature of these codes means they provide little or no practical guidance to those in the workplace who actually have to implement risk control measures. As a result, some industries have rejected the national codes of practice developed by NOHSC. For example, the rural sector in Queensland, with the assistance of the Queensland Government, developed separate codes of practice for hazardous substances and plant because the national codes were inappropriate for their sector.

Agreement on operational objectives has been difficult to achieve because of the difficulty of developing national standards that are applicable to all workplaces in all jurisdictions. Faced with the responsibility of implementing the standards declared by NOHSC, State and Territory Governments have been

reluctant to agree to proposed standards and have reserved their right to modify declared standards to fit the needs of workplaces in their jurisdiction.

Although occupational health and safety legislation has been reformed in certain respects, there has been no agreement on the architecture of the regulatory regimes. Many of the inconsistencies across jurisdictions reflect the different approaches to amending and repealing OHS legislation.

Lack of agreement on implementation

In principle, uniform regulation implies uniform text in legislation. However, governments have attempted to achieve consistent regulatory outcomes in occupational health and safety while maintaining flexibility by agreeing on the common essential requirements for the legislation instead. In support of this approach, the Department of Employment, Vocational Education, Training and Industrial Relations in Queensland, commented that:

CERs will overcome many perceived impediments to giving legislative effect to uniform standards as they provide jurisdictions with the necessary flexibility to implement the key requirements within State and Territory drafting requirements (sub. 79, p. 13).

The Australian Chamber of Commerce and Industry considered that this more flexible approach to national standards and their implementation will be responsible for national uniformity being achieved more quickly:

... as there should be no need to debate the detail of wording in common essential requirements as there was in model regulations (sub. 133, p. 33).

However, the Victorian Trades Hall Council argued a contrary view:

The decision of the Heads of Government to pursue a scheme to establish uniform occupational health and safety standards throughout Australia is in serious disarray. Much of this is due to ... the decision of the National Occupational Health and Safety Commission to dilute uniformity into something called common essential requirements.

Victorian Trades Hall Council would stress at this point that it is of the opinion that the decision to develop documented standards as Common Essential Requirements has been both genuinely misunderstood and deliberately misused (sub. 187, p. 10).

The disadvantage of the current approach to implementation is that it increases the risk of inconsistent application of the law. Although it generally supported an approach based on common essential requirements, the Department of Industrial Relations (DIR) recognised this risk:

From DIR's perspective it is the final outcome which is important ... The means by which national uniformity is achieved is of less importance. That said, we share concerns now being expressed that the common essential requirements approach may not yield the required degree of consistency and that significant differences may emerge between jurisdictions, particularly in areas of administration (sub. 74, p. 9).

The trade union movement expressed concern that the existing approach to implementation will lead to lower standards. The NSW Labor Council stated that common essential requirements have the effect of minimising OHS standards and pulling down the better performing States to the level of the lowest achiever (sub. 145, p. 11).

In the Commission's view, the existing approach to implementing national standards should be pursued only if the resultant differences in the law are clearly not substantive. The Chamber of Manufactures of NSW agreed:

The Chamber supports the concept of using common essential requirements where their use allows for a regulation to be promulgated in all States with differences limited to only minor detail. Where use of common essential requirements allows for a regulation within the State jurisdictions to differ in compliance detail, ie. essentially the basis for prosecution, then the Chamber opposes the concept (sub. 90, p. 7).

As governments have been unable to agree on how to implement national standards, significant differences in law between the jurisdictions remain. Furthermore, little consideration has been given to co-ordinating the implementation of national standards with the reform of OHS regulation generally.

These problems lead the Department of Industrial Relations to question the commitment of jurisdictions to national uniformity:

... when it comes to specific standards, commitment by jurisdictions to uniform implementation and adoption appears to be waning or at least qualified. For example, in the case of the national standards on *Manual Handling* and *Noise*, the Western Australian Government revoked regulations made by the former government to adopt the standard... [Furthermore] from time to time there have been suggestions that a particular NOHSC standard may not be adopted in a particular State or Territory, or not adopted in its totality (sub. 74, p. 13).

Options for greater national consistency

The reforms outlined in Chapters 3 to 6 will go a long way towards achieving greater national consistency in regulation. These reforms would result in greater consistency in the legislation as there would be fewer, simpler rules and they would be mostly expressed as outcomes. Responsibility for many of the provisions which previously prescribed process and technical requirements would be devolved to individual enterprises or groups of enterprises to fulfil through advisory codes of practice or enterprise safety management systems.

There would, nevertheless, be scope for significant inconsistencies to remain in regulation between the jurisdictions. In its Draft Report, the Commission identified three options for reducing the scope of such inconsistency. The options and participants' reactions to them are discussed below.

Template legislation

This option involves the required legislation being passed in full (the template) in one jurisdiction. Each of the other jurisdictions then adopts the template by passing a law which simply legislates the provisions of the template by reference. The template legislation is amended either independently by each jurisdiction or automatically once the originating jurisdiction has passed the necessary legislation. Template legislation has been used successfully to regulate non-bank financial institutions, the securities industry and road transport (see Appendix H).

The advantages of template legislation for occupational health and safety are that:

- regulatory uniformity, once achieved, can be maintained automatically;
- agreed changes are able to be more speedily implemented;
- it demonstrates that all governments are united in improving OHS;
- it achieves efficiencies in the design and drafting of legislation; and
- it could utilise the existing State OHS agencies to administer the legislation.

A disadvantage of template legislation is that all jurisdictions have to agree on the full text of the template. Moreover, the existing OHS legislation in each of the jurisdictions would probably have to be amended. The drafting of the relevant legislation would represent a major undertaking.

The progress in achieving national uniformity in the regulation of road transport has been slower than expected because of difficulties in obtaining a consensus on the relevant legislation through the National Road Transport Commission.

Template legislation could be implemented in a form which effectively overrides existing legislation (such as was done in the road transport area). Alternatively it could take the form of mutual recognition legislation which leaves existing State legislation intact and only operates in situations where the requirements of different jurisdictions directly conflict (Victorian Government, sub. 382, p. 4).

In its Draft Report the Commission recommended the use of template legislation to achieve greater uniformity. Many participants supported its use, in some cases with qualifications generally about the content of the template legislation.

Employer organisations and trade unions generally supported template legislation but wanted more information about its contents.

Some employer organisations, including VECCI (sub. 323, p. 12) and QCCI (sub. 300, p. 8) gave qualified support, on the condition that the template covers only common essential requirements.

BHP supports template legislation, but had doubts about whether it could be achieved:

... the nature and level of government commitment would need to radically change for this option to succeed. If we look at the process in the past of preparing and implementing model regulations and common essential requirements we would have to say that the record to date is not encouraging (sub. 344, p. 4).

Some State governments expressed positive sentiments about the use of template legislation but stopped short of committing themselves in advance of an indication as to its content. For example, the New South Wales Government said that:

The adoption of national template legislation warrants consideration by Governments as it would establish a more consistent legislative regime to develop and implement agreed national OHS standards. It would also facilitate legislative reform to establish best practice regulatory frameworks in each jurisdiction along the lines proposed by the Commission. (sub. 397, p. 10).

The Queensland Department of Employment, Vocational Education, Training and Industrial Relations commented:

Provided appropriate support and infrastructure were in place, including demonstrated Commonwealth commitment, this recommendation [on template legislation] could succeed and is supported in principle (sub. 316, p. 12).

The Department of Occupational Health, Safety and Welfare of Western Australia said it is not 'closed off to the notion' of the template, but it has concerns about the potential rigidities of having uniform legislation (transcript, p. 2171).

The use of template legislation was opposed by most other States. For example, the South Australian Government opposed it because it considers that additional resources would need to be diverted to developing template legislation:

The development of national template legislation would represent a diversion of resources to create a new system which cannot be justified in view of the considerable effort to date to negotiate nationally consistent standards for specific hazards and hazardous occupations. The products of 3-5 years of wide-ranging consultation and negotiation should not be passed over (sub. 275, p. 18).

The Tasmanian Government opposes template legislation on the grounds that it implies rigidity and does not allow for flexibility to reflect local conditions (sub. 401, p. 4).

The Northern Territory Government argued that template legislation is unnecessary, as it considers that the principal OHS legislation is already consistent across jurisdictions (sub. 350, p. 6).

Although some resources would need to be devoted to developing and implementing the template, there would be cost savings in the long run, due to States not having to draft and amend their own legislation in an inconsistent way.

Under the Commission's proposed approach to OHS regulation (outlined in Chapters 3 to 6), each jurisdiction would have the same core provisions in their principal OHS Acts. (These would be the subject of the template.) These elements are based on a codification of the common law, and should not have to vary amongst jurisdictions. The required flexibility would be provided through enterprise safety management systems and industry codes of practice.

As discussed in Chapter 4, in some areas such as the range of duties on employers, employees and suppliers, the principal OHS Act is currently *not consistent* between jurisdictions.

A national regime for national corporations

This option consists of Commonwealth legislation to create a single OHS regime for corporations that operate in multiple jurisdictions or engage in inter-state trade. The Commonwealth could enact such legislation while preserving the existing State OHS regimes for all other employers.

Section 51(xx) of the Constitution allows the Commonwealth to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The Attorney General's Department has advised the Commission that the Commonwealth has power to regulate the employment relationship between a corporation and its employees, including occupational health and safety (see Appendix H).

This option would provide the benefits of uniform regulation for those most affected by regulatory inconsistency. It may, however, introduce some new inconsistencies due to the creation of an additional OHS regime.

Such a regime would require an administering agency. The simplest solution would be for the Commonwealth to contract out this work to the State OHS authorities. The Commonwealth may have to accept some of the financial responsibility for this work. Comcare currently uses this type of arrangement to enforce OHS legislation for Commonwealth employees but not all jurisdictions have agreed to participate.

A variation of this approach is used in the United States. The Federal Government sets and enforces national minimum OHS standards through the Occupational Safety and Health Administration (OSHA). A State may choose to set and enforce its own standards but they must exceed those in the Federal legislation. The Federal Government pays approximately half the costs of administration in these 'State-plan' States. OSHA provides the inspection and enforcement in the other States and pays all the administrative costs involved. Between 1970 and 1995 slightly fewer than half the States have elected to be 'State-plan' States.

A national OHS regime

Under this option Commonwealth legislation would be used to establish a single OHS regime for all Australian employers.

Advice from the Attorney General's Department is that the Commonwealth could rely on several heads of constitutional power. These include:

- s.51(i) — Overseas and inter-State trade and commerce;
- s.51(xx) — Corporations;
- s.122 and s.52(i) — Territories and Commonwealth places; and
- s.51(xxix) — External affairs.

The High Court has established that the Commonwealth's power to make laws with respect to external affairs extends to legislation implementing Australia's international treaty obligations.³ The Commonwealth could therefore rely on the external affairs power of the Constitution to legislate a single OHS regime if it ratified International Labour Organisation (ILO) conventions relating to OHS, specifically Convention No. 155 (discussed below).

Although it may be constitutionally possible, the Commission doubts that it is either practical or desirable for the Commonwealth Government to unilaterally take over the administration and enforcement of OHS legislation. The Commonwealth lacks an administrative infrastructure and the relevant expertise. Some States, at least, could be expected to strongly contest any take-over and the uncertainty that would be created is likely to be counter-productive to improving health and safety at work. Most importantly it is doubtful that the unilateral assumption of responsibility would, at the end of the day, yield more than could be achieved through co-operative federalism.

³ The Tasmanian Dam case and cases such as *Richardson v Forestry Commission* (1987) 164 CLR 261 and *Queensland v The Commonwealth* (1989) 167 CLR 232. In the Teoh case, the High Court reinforced the view that the Commonwealth has the power to legislate to support Australia's fulfilment of international treaty obligations.

Some inquiry participants such as the Australian Services Union (sub. 159, p. 2) supported national OHS legislation. The National Safety Council said that most of its medium to large member enterprises who have operations in more than one State support singular-legislation, rather than a template or agreements on uniformity (transcript, p. 2950).

Commission's preferred approach

The Commission recognises the difficulties of achieving greater regulatory consistency across jurisdictions in a Federation. However, a Commonwealth–State contest on this issue would be undesirable and have debilitating consequences for occupational health and safety outcomes. Co-operative federalism is preferred as the States have responsibility for occupational health and safety and possess the only administrative infrastructure and expertise.

Co-operative federalism has worked in other areas to remove regulatory inconsistency between jurisdictions, for example, the adoption of national standards by the National Food Authority.

For these reasons, the Commission proposes that co-operative federalism be the process to develop and implement a new approach to national consistency based upon:

- template legislation for the core elements of OHS legislation;
- national standards that are confined to exposure limits and other appropriately mandated requirements;
- provision for industry codes of practice and enterprise safety systems to be recognised in all jurisdictions; and
- consistency in enforcement across jurisdictions. Each of these are discussed in turn.

Content of the template

The Commission proposes that the core elements in the template legislation should include:

- the duty of care of employers, employees and third parties;
- the specific duties which elaborate each duty of care;
- any defences available to holders of a duty of care;
- provisions for employee workplace representation; and
- provisions for enterprise safety management systems and codes of practice to be recognised by all jurisdictions.

The advantages of this approach are that it would achieve the benefits of greater consistency at least cost to the community.

Employers operating under multiple jurisdictions would benefit from the reduced compliance costs of a single regime. Employees would have the advantage of more equitable protection of their health and safety. The use of the template would ensure that these benefits are quickly realised and maintained as the legislation is subsequently amended.

On the other hand, employers operating under one OHS regime would not be disadvantaged. The differences between the jurisdictions in the duty of care, and the rights and obligations that accompany it are unlikely to be significant in terms of compliance costs. Equally, uniformity in these rights and obligations is unlikely to have adverse implications for regulatory innovation. Most of the compliance costs and inhibition of regulatory innovation are likely to be due to the mandated requirements in subordinate legislation rather than in the principles in the principal legislation.

The template should not contain so many provisions that agreement by all governments becomes a lengthy and highly difficult task, since the process of regulatory reform would be adversely affected. The Commission considers that a template which contains the core elements of the OHS legislation in each jurisdiction should be able to be agreed by governments.

Governments should continue to legislate those provisions that were outside the template. These would include the provisions relating to the enforcement and administration of the legislation.

In developing its preferred approach to achieving nationally consistent regulatory regimes, the Commission has taken into account the need to ensure that regulation in all jurisdictions contains consistent core provisions, while also providing sufficient flexibility to allow efficient workplace solutions. The aim is to facilitate national markets and achieve nationally consistent uniform health and safety protection — not to have one regulatory regime for all.

Recommendation 27

The Commission recommends the use of template legislation to achieve a nationally consistent regime for occupational health and safety. The template should be incorporated in the principal OHS legislation in each jurisdiction and should cover:

- the general duty of care of employers, employees, suppliers and others;

- the specific duties of employers, employees, suppliers and others;
- any specific defences given to those having a duty of care;
- the ‘right to know’ of purchasers and users of plant, equipment and materials;
- provision for the recognition of enterprise specific safety management systems and codes of practice;
- the minimum rights and responsibilities of employee workplace health and safety representatives; and
- provision for nationally agreed mandated safety requirements.

Consistency of legislation depends on regulatory review

Under the Commission’s approach, the template would apply only to the core elements of the principal OHS Act. It would not apply to the regulations in subordinate legislation, which currently vary significantly.

Therefore, in order to achieve consistency of regulatory outcomes, all governments will not only have to incorporate the template into the OHS Act, but be committed to undertaking a review of other legislation affecting OHS, as recommended in Chapter 5. The objective of the review should be to ensure that OHS legislation — including regulations in subordinate legislation — are reduced to the minimum necessary to achieve the stated objectives, and are consistent with the principles of good regulation agreed to by the Council of Australian Governments.

National recognition of codes of practice and enterprise safety systems

The Commission considers that there should be provision for codes of practice and enterprise safety systems developed in one jurisdiction to be recognised by all jurisdictions. This could be done through either:

- a process of mutual recognition — whereby recognition in one jurisdiction would grant automatic recognition in all jurisdictions;
- recognition to be granted by a body acting on behalf of all jurisdictions; or
- recognition by individual jurisdictions, with co-ordination by a national body.

Where sponsors of codes of practice or enterprise safety systems want to have them recognised by more than one OHS agency, the Commission believes that it would be more efficient for the evaluation to be conducted once and on behalf

of all governments. Regardless of which process is adopted, governments will need to agree collectively on the criteria for recognition.

The future of national standards

If template legislation is implemented by the jurisdictions along the lines proposed by the Commission, it will necessitate a change in approach to the setting of national standards in occupational health and safety.

The ACTU argued that national standards already declared by NOHSC should proceed to implementation:

... until the template legislation is finalised, all jurisdictions [should] remain committed to the current national standards development process and the consistent adoption and implementation of nationally agreed common essential requirements ...

and argued for:

the uniform adoption and implementation of the NOHSC priority standards ... in all jurisdictions (sub. 336, p. 12).

The Commission considers that, once the template legislation is in place, national standards developed by NOHSC should be confined to provisions to be incorporated into legislation, either in the template itself or the OHS legislation of the jurisdictions. This should greatly simplify the process of developing national standards.

Codes of practice will no longer need to be part of national standards. As proposed by the Commission in Chapter 4, codes of practice for practical hazard management will be the responsibility of industry.

It may be necessary for jurisdictions, individually or collectively, to continue to prepare generic guidance for industry on the management of particular hazards. The existing national codes of practice could be retained to perform this function.

Consistency in enforcement

Consistent regulatory outcomes require both consistent legislation and its consistent enforcement. Without a consistent approach to enforcement, regulatory outcomes will be different even when all the legislation is uniform. As stated by Worksafe Australia:

There is no doubt that different approaches to implementation and enforcement could result in different outcomes from the same standard. No evidence is available to enable a proper analysis of whether this has occurred (sub. 50, p. 17).

The Department of Industrial Relations stated:

Differences in the level of penalties, enforcement and prosecution strategies can lead to inconsistency in the environment in which OHS operates (sub. 74, p. 18).

The Commission considers that, to the extent possible, enforcement should be consistent across jurisdictions. Inconsistent approaches to enforcement detract from equity and competitive neutrality among employers. It is also inequitable that employers in some jurisdictions face higher and more frequently imposed penalties than employers in others for a similar offence.

Recommendation 28

The Commission recommends that governments adopt a nationally consistent approach to OHS enforcement.

9.3 Inconsistency within jurisdictions

In addition to their general OHS regulatory regime, some jurisdictions also have specific OHS legislation for particular industries. Mining in New South Wales, Queensland, Western Australia and the Northern Territory has such regimes. The maritime and offshore petroleum industries are subject to Commonwealth industry-specific OHS legislation. In addition, petroleum legislation in some States and the Northern Territory contain OHS provisions (which are similar to the Commonwealth legislation), applying to petroleum activities within State or Territory waters. Western Australia, Northern Territory and Victoria currently have offshore petroleum exploration and production.

The Commission notes that most industry-specific OHS regimes have recently been reformed, or are undergoing modernisation, to bring them more into line with the principles and approach of the general OHS legislation (see Appendix I):

- New South Wales and Queensland are each discussing the modernisation of their mining OHS legislation with the industry and the relevant unions;
- Western Australia has recently introduced new OHS legislation for mining;
- in July 1994 the Commonwealth made the OHS regime for the maritime industry consistent with that applying to Commonwealth employees ; and
- the Commonwealth adopted the Safety Case regime in 1992 for the offshore petroleum industry (see Chapter 4 and Appendix L).

Issues raised by industry-specific regimes

The main argument against industry-specific regimes is that they increase the risk of different regulatory approaches being applied to different industries. Having an industry-specific regime developed independently of the mainstream OHS regulation has led to many of the industry-specific regimes not keeping up with the reforms to the mainstream OHS legislation.

There are problems at the interface, where multiple regimes within the same workplace overlap. This leads to confusion on the part of both industry players and regulators. The MSB Hunter Ports Authority said that:

... a common occurrence is the duplication of regulation or legislation covering the same plant equipment or work practice. This does not provide for double the protection but provides for confusion on what is the applicable standard or work practice, often conflicting, that must be carried out and complied with in the workplace (sub. 87, p. 2).

BHP also criticised overlap between multiple regimes:

Problems arising from differing regulatory systems operating at the same time is instanced by the situation in the Australian Capital Territory (ACT) where the boundaries between the OHS (Commonwealth Employment) Act and the ACT OHS Act are blurred eg: a contractor working for the Commonwealth, in a Commonwealth building, is not covered effectively by the Commonwealth Act or the ACT Act safe workplace provisions. The effect of this is to negate any legal responsibility that the Commonwealth has to provide a safe workplace for a contractor ... Another example can be seen in the offshore petroleum industry where similar problems are caused by incompatibility between a variety of Acts (sub. 141, p. 7).

The main argument for maintaining specialised regimes is that they can be tailored to the needs of industries that are particularly hazardous and have unique hazards. However, it may be possible to address industry-specific concerns, without the need for a separate regime. The Commission notes that mining in Victoria, South Australia and Tasmania is covered by the general OHS Act, without the need for specific legislation.

Where industry-specific regimes exist, *most* in the relevant industries support their retention. For example, the Australian Mines and Metals Association (Tasmanian Branch), and the Tasmanian Chamber of Mines stated:

The majority of members consider that industry specific OHS regulations are necessary for the unique functions and risks associated with an underground mining environment. The Tasmanian industry also enjoys the specialist expert advice available to the industry through its State mines inspectorate.

Other than those areas peculiar to the industry, however, members consider that regulations should conform to National Standards (sub. 212, p. 8).

The Commission's proposals

The Commission's proposed reforms for the principal OHS legislation should also apply to industry-specific legislation. The preferred approach is to repeal industry-specific legislation and extend the principal OHS regime to cover all industries. Where strong demand for industry-specific arrangements exists, these could be accommodated in industry codes of practice.

Alternatively, the requirements in current industry-specific legislation that mandate requirements additional to those contained in the principal OHS regime, could be incorporated as industry-specific subordinate legislation under the principal OHS Act. This would maintain the industry-specific requirements, while preserving the integrity of the principal legislation.

This option is supported by the South Australian Government:

There is no obvious justification for separate Acts applying to workers in different industries ... However, under the umbrella of a single Act, there is scope for specific industry regulations or codes of practice to supplement generic, hazard-based standards. Such specific industry standards are warranted in high risk situations where specific controls are required which are unique to the industry. The single Act maintains administrative efficiency and consistent standards of enforcement (sub. 147, p. 28).

If industry-specific statutes are to be retained, they should be made consistent with the principal OHS legislation. Under the Commission's proposal for national uniformity, template legislation should apply to industry-specific regimes in the same way it applies to the principal OHS regimes.

If industry-specific regimes are retained, governments should give consideration to reducing any industry-specific occupational health and safety requirements to matters not covered by the principal OHS legislation, to reduce the total volume of legislation and to ensure that the two sets of legislation do not conflict.

9.4 International Labour Organisation Convention No. 155

Australia is considering ratifying a number of conventions of the International Labour Organisation (ILO) related to occupational health and safety. One of these — Convention No. 155 — is aimed at ensuring the health and safety of workers in all branches of economic activity. The principal features of the Convention are set out in Box 9.1 and the full text of the Convention is contained in Appendix H.

Most OHS legislation in Australia already conforms to the spirit, if not the letter, of ILO Convention No. 155. A number of jurisdictions (for example Tasmania) are in the process of amending their legislation in ways which would further increase the extent of conformity. The Commission's recommended

changes to Australian regulation of workplace health and safety are also consistent with it.

There is Commonwealth–State consultative machinery to deal with the ratification and implementation of ILO conventions. Unilateral ratification of a convention by the Commonwealth without observing these arrangements would only be justified in the most exceptional circumstances. Convention No. 155 is already close to ratification. All jurisdictions have formally agreed except for New South Wales, Tasmania and the Northern Territory and their agreement is expected shortly.

Although the principles of Convention No. 155 are supported by all Australian governments, many participants have reservations about its unilateral ratification by the Commonwealth. For example, the South Australian Government commented:

The unilateral ratification of international treaties by the Federal Government without the support of the States runs counter to the spirit of a Federal system of Government and is likely to inhibit effective policy making (sub. 147, p. 25).

Box 9.1 International Labor Organisation Convention No. 155

The main provisions of the Convention may be summarised as follows:

- the Convention applies ‘to all branches of economic activity’ (Article 1) but a ratifying state may exclude particular branches after consultation with the relevant employers and workers (Articles 1 and 2);
- each ratifying state must ‘in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment’ (Articles 4(1) and 7);
- the aim of that national policy shall be to prevent injury ‘by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment’ (Article 4(2));
- each ratifying state must ‘take such steps as may be necessary’ to implement the principles of the Convention, ‘in consultation with representative organisations of employers and workers’ (Article 8);
- there must be an ‘adequate and appropriate system of inspection’ and the enforcement system should ‘provide for adequate penalties for violations of the laws and regulations’ (Article 9(1) and (2));
- ‘measures shall be taken to provide guidance to employers and workers so as to help them to comply with legal obligations’ (Article 10);
- employers should be placed under a wide-ranging duty to ensure, so far as is reasonably practicable, the health and safety of their workforce (Article 16);
- workers who remove themselves from work situations where they had ‘reasonable justification to believe’ there was ‘an imminent and serious danger’ to life or health are to be protected against ‘undue consequences in accordance with national conditions and practice’ (Article 13);
- there are requirements for ‘appropriate’ training and consultation of worker representatives in relation to OHS (Article 19); and
- ‘co-operation between management and workers and or their representatives’ is essential (Article 20).

The full text of is reproduced in Appendix H, Attachment H2.

Most employer associations oppose unilateral ratification because of the potential use by the Commonwealth of the external affairs power to pass OHS legislation. The Retailers Council of Australia's comments were typical of those of most employers on this issue:

... we don't support the use of external affairs powers through ratification of ILO Convention 155, which would lead to a federally administered system, although we support the aims of ILO Convention 155 and we note that its principles have already been reflected in, for example, the New South Wales legislation. We believe that the industry is better served by a State-administered system which provides a more timely, efficient and cost-effective service than by a centralised national system (transcript, p. 1043).

The Metal Trades Industry Association, said they would support ratification only if agreed to by all State and Territory Governments (sub. 278, p. 7).

The Occupational Health, Safety and Rehabilitation Council of New South Wales believes the Commonwealth should not legislate on New South Wales' behalf:

Council argues that it would be unhelpful to ratify, in the current climate, ILO Conventions. The Commonwealth should not have the right to legislate, through the ILO Convention process, on New South Wales' behalf (sub. 105, p. 6).

Most unions support ratification of Convention No. 155. The ACTU considered that the Commonwealth should have the option of legislating unilaterally (sub. 336, p. 11). However, the NSW Labor Council expressed reservations:

... the Commonwealth Government should proceed with caution with regard to ratifying ILO convention NO. 155. ... State law and practice would currently comply with the Convention, and it is difficult to see the advantage in ratification merely as a sign of good faith (sub. 305, p. 12).

However, other submissions argued that ratification was more than a mere gesture. The Department of Industrial Relations (DIR) stated that in May 1994 the tripartite National Labour Consultative Council endorsed a proposal by its International Labour Affairs Committee (ILAC):

... that DIR and Worksafe convene a meeting of Commonwealth and State authorities to progress consideration of ratification prospects of the OHS conventions. ILAC considered that Australia complied with Convention 155, and possibly other OHS conventions, and noted that ratification was a useful way to show leadership on these matters in the Asia-Pacific region (sub. 74, p. 27).

Worksafe Australia saw demonstration benefits from ratification:

Benefits could be seen in enhancing our role in the region. Many regional countries are basing their approach on ILO standards. Where these ILO standards are adopted in Australia, our ability to export goods and services related to occupational health and safety is enhanced (sub. 50, p. 21).

The Commission believes ratification of Convention No. 155 would be a valuable demonstration of government commitment to reform and a signal to the international community of Australia's commitment to achieving high OHS standards. The Commission strongly favours co-operative implementation of Convention No. 155. Ratification does not have to, nor should it, lead to the Commonwealth legislating unilaterally and should not take place until all States and Territories agree to it.

Recommendation 29

The Commission recommends that the Commonwealth Government ratify International Labour Organisation Convention No. 155, but not proceed to legislate unilaterally.

9.5 Inconsistency due to industrial relations legislation

Enterprise agreements and industrial awards executed under Commonwealth industrial relations legislation can have implications for the consistency of the legal protection of health and safety at work.

When made under the Commonwealth law, such enterprise agreements and industrial awards have the effect of over-riding State and Territory OHS legislation. Section 152 of the *Industrial Relations Act 1988* makes it clear that:

Where a State law, or an order, award, decision or determination of a State industrial authority, is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.

In 1986 employers and unions in the passenger motor vehicle industry took advantage of this provision in relation to health and safety standards in their industry (see Box 9.2). This award raises the question as to whether industrial awards and enterprise agreements are likely to improve workplace health and safety, or to undermine the protection offered by State law.

Box 9.2 Vehicle Industry (OHS) Award 1986

An award decision in *AMI Toyota v Assoc of Drafting, Supervising and Technical Employees* in 1986 (reviewed and extended in 1989) raised the issue of the industrial relations mechanism regulating OHS.

Some employers believed the Victorian *Occupational Health and Safety Act 1985* made unacceptable intrusions into management prerogative by giving employee elected health and safety representatives powers that could be exploited as industrial relations weapons (Gunningham, 1990).

Section 109 of the Constitution allows Federal awards to prevail over State Acts and Regulations, and render the latter void 'to the extent of the inconsistency'. The Vehicle Builders Employees' Federation joined with six employers to seek a consent award to exclude the operation of State OHS legislation. An award, based on the Victorian OHS legislation, but with significant modifications, was granted in the terms sought.

It was argued that special features of the vehicle building industry (its national nature, and just-in-time production) made a national award appropriate. It was also argued that the emphasis of the Victorian legislation was to make OHS more of an industrial relations issue, and that as such, it was perfectly appropriate for it to be dealt with by the (then) Conciliation and Arbitration Commission.

Gunningham (1990) cites the following disadvantages of the award:

- the shortfall between the award provisions and the State legislation of Victoria (although the award provisions are superior to some other States' OHS provisions);
- at least three inspectorates now have enforcement responsibilities — State inspectors enforcing State laws which remain in force, the Arbitration Inspectorate under the Conciliation and Arbitration Act, and 'Inspectors' appointed under the award;
- the award provides much lower penalties for breach (maximum \$1000 fine compared to \$50 000 in Victorian OHS); and
- State inspectors can no longer issue improvement and prohibition notices (although they can be issued under the award).

Information compiled by the Department of Industrial Relations indicates that enterprise agreements are generally not used to address health and safety at work and where they are they do not address the issue in detail (see Appendix Q). Of the 3573 certified federal agreements in place as of 15 May 1995, 35 per cent contained health and safety provisions (sub. 396, p. 23).

The Department claims that, of those cases containing such provisions, 'the majority simply contain very general statements of commitment to improved standards' (sub. 74, p. 22). The Commission notes that such statements play an important role in raising the enterprise awareness of health and safety.

In March 1994, NOHSC agreed on guidelines for dealing with workplace health and safety in enterprise agreements. Subsequently, it published an information document containing advice about obtaining efficiency and productivity improvements through better management of workplace health and safety.

The main concern in dealing with workplace health and safety in enterprise agreements and awards is that it may entrench health and safety as an industrial relations issue, encouraging bargaining over health and safety protection. For example, Shell maintained:

It has been Shell's experience that where OH&S issues become mixed with industrial relations, the OHS performance of the organisation suffers. The credibility of OHS management is put in doubt if it becomes a bargaining chip (sub. 67, p. 6).

The Business Council of Australia stated:

... inclusion of occupational health and safety matters in formal enterprise agreements or awards is likely to increase the potential for allowing health and safety to be drawn into industrial conflict, and, if done at the Federal level, produces the jurisdictional problem of Federal industrial instruments conflicting with or effectively over-riding state or territory regulation of occupational health and safety (sub. 158, p. 6).

Comcare expressed concern that:

While there has been encouragement for OHS to be part of the enterprise bargaining process, there are concerns that this process may create inaccurate perceptions about the negotiability of OHS in workplace management and in particular, whether OHS is to be regarded as an industrial relations issue or a legislative issue (sub. 174, p. 12).

Governments were concerned that the use of agreements and awards could inadvertently undermine health and safety standards. The Department of Industrial Relations noted the opportunities presented by workplace bargaining, but stated:

... care should be taken to ensure that OHS standards cannot be negotiated away and that enterprise agreements preserve the operation of the regulatory framework established under OHS legislation (sub. 74, p. 1).

Similarly, the Northern Territory Government stated:

... existing occupational health and safety legislation should not be supplanted by occupational health and safety provisions in Enterprise Agreements as this would lead to inconsistencies with requirements in other industry sections and have serious repercussions for enforcement (sub. 43, p. 13).

Trade unions were also concerned at the risk of standards being undermined. The State School Teachers' Union of Western Australia expressed a common theme:

Enterprise agreements must not be able to undermine national minimum OHS standards. Any clauses pertaining to OHS should only strengthen the provisions for that workplace and incorporate particular industry requirements (sub. 25, p. 5).

Furthermore, research undertaken by the Australian Centre for Industrial Relations Research and Teaching (ACIRRT) in conjunction with Effective Change consultants suggests that enterprise agreements can have undesirable consequences for workplace health and safety even where it is not specifically addressed in the agreement. Effective Change stated:

Any agreement which changes work systems or working conditions has implications for OHS. The important point is whether these implications are considered or allowed for in the bargaining and implementation processes. Our research indicates that, by and large, this has not been the case (sub. 328, p. 5).

The Commission considers that enterprise bargaining may not always be the most appropriate vehicle for determining minimum occupational health and safety requirements at the workplace. The main reasons for this are:

- the negotiating parties may lack the capacity to deal with complex occupational health and safety issues;
- industrially weak workers, such as women or workers from non-English speaking backgrounds, may be disadvantaged by the process; and
- the agreements may complicate enforcement of health and safety at work.

The Commission's proposed codes of practice and enterprise safety management systems should be more appropriate than awards and enterprise bargaining for addressing workplace health and safety issues. They should ensure legislative protection and provide for negotiated workplace-based solutions that are not coloured by industrial relations bargaining.

At the same time, the Commission does not wish to rule out the use of awards and enterprise agreements to set workplace standards or processes that are superior to the requirements in State OHS law. The Commission also supports expressions of commitment to occupational health and safety in enterprise agreements.

However, the Commission considers that the Australian Industrial Relations Commission (AIRC) should have regard to the possible undesirable, and sometimes unintended, health and safety consequences of an award or an agreement dealing with occupational health and safety when the AIRC ratifies such awards and agreements. As the Department of Industrial Relations stated:

This would protect jurisdictions' legislation from being supplanted, while still allowing parties to negotiate OHS improvements over and above legislated minimum standards (sub. 74, p. 23).

Most participants supported the Commission's recommended approach to the use of agreements and awards. For example, the Metal Trades Industry Association of Australia (MTIA) believed agreements could be effective in raising the profile of health and safety at the workplace, but cautioned that:

MTIA recognises there are inherent dangers in attempting to regulate OHS through enterprise agreements and supports the view of the Commission that enterprise bargaining may not always be the most appropriate vehicle for establishing minimum occupational health and safety requirements and addressing the workplace health and safety issues. Furthermore, MTIA believes that enterprise agreements should not undermine minimum occupational health and safety standards (sub. 278, p 8).

Many inquiry participants stressed the importance of providing flexibility in any health and safety requirements.

The Victorian Employers' Chamber of Commerce and Industry stated that:

VECCI does not support the use of industrial awards to improve OHS. Awards by their very nature are complicated documents that are difficult to amend. It can become a rather inflexible document that hinders rather than encourages improvements in OHS (sub. 97, p. 17).

The South Australian Employers' Chamber of Commerce and Industry stated:

In our view, the emphasis should be on creating regulations and standards which are more simple and allow sufficient flexibility for their application at the workplace to be resolved without the need for awards or enterprise agreements to specifically over-ride such issues (sub. 95, p. 26).

The Commission considers that the proposed regulatory system (see Chapter 4) will provide such flexibility. Advisory codes of practice and enterprise safety management systems are more appropriate than awards and enterprise bargaining for addressing key workplace health and safety issues because they allow relevant, decentralised outcomes, ensure legislative and enforcement protection, and provide for negotiated workplace-based solutions that are a step removed from industrial relations bargaining.

Those who support the use of enterprise agreements to promote occupational health and safety claim that agreements enhance worker involvement in decisions affecting health and safety, and can be used to generate commitment to its improvement.

Australia Post regards enterprise bargaining as an opportunity:

... the Enterprise Agreement represents a means for Australia Post to take a major step forward in its efforts to entrench OHS improvement as an integral part of mainstream business initiatives (sub. 86, p. 5).

Pioneer International has successfully used enterprise agreements to promote OHS:

Pioneer has commenced including safety targets in some enterprise agreements with great success ... We believe that providing an occupational health and safety focus within our agreements has raised the profile of safety and the role of the employees in managing the problem (sub. 15, p. 6).

Recommendation 30

The Commission recommends that the Commonwealth Government amend the *Industrial Relations Act 1988* so that State OHS legislation has priority under agreements and awards except where the Australian Industrial Relations Commission determines otherwise, having regard for the protection of employees and enforcement.

10 FINANCIAL INCENTIVES FOR PREVENTION

Financial incentives play a powerful role in determining the level of workplace health and safety. A role for government is to ensure that such incentives help to promote efficient and equitable health and safety outcomes at work.

One instrument available to governments that can be used to influence financial incentives is workers' compensation. In its report on *Workers' Compensation in Australia*, the Commission made a number of recommendations to make this incentive more powerful (see IC 1994a). The implications of the Commission's recommendations for workplace health and safety are discussed in this Chapter.

In addition, opportunities to improve financial incentives in related areas such as government program funding, government purchasing and disclosure of company health and safety records are canvassed.

10.1 Workers' compensation

The cost of workers' compensation and the way insurance premiums for workers' compensation are set can influence the actions taken at the workplace to prevent injury and disease.

The cost of workers' compensation depends on the level of compensation benefits and the number of compensable injuries and diseases. In the long run, the risk to life and limb at work is one of the factors that determines the number and severity of such injuries and diseases.

Accordingly, the extent to which premiums reflect the claims experience of individual employers affects the employer's incentive to improve workplace health and safety. Employers can reduce their premiums by investing in prevention. The higher the premium, the greater the incentive to reduce it. A firm of consultant actuaries, Tillinghast, commented that:

In order to give such [health and safety] incentives, the premium rating structure must be reactive to changes in individual employer's, or groups of employers' experience, and be quick to apply those changes to the premium rate (sub. 267, p. 6).

For a given industry, the extent to which an individual employer's claims experience can be reflected in that employer's premium depends upon the size of their workforce. This is because the level of claims in any year is more likely to be a statistically reliable measure of the risk of compensable injury and disease for large employers than for small to medium-sized employers.

This implies that large employers can have their claims experience reflected in their premiums. On the other hand, smaller employers are more likely to have the cost of their claims spread across all employers and only reflected to a minor extent in their individual premiums.

Governments can improve the incentive to provide safe and healthy workplaces by ensuring that employers bear a substantial portion of the costs of workplace injury and disease. This promotes efficient use of resources and can be achieved by broad eligibility for compensation, and appropriate levels of compensation benefits.

However, full compensation for all outcomes may not be desirable or practicable. Higher compensation benefits and broader eligibility may increase the incentive for fraudulent claims and may also delay the injured employee's return to work. In addition, uncertainty surrounds the ability to diagnose whether and to what extent certain injuries and diseases are work-related, since many are subject to long latency periods. This makes it difficult to establish the liability of individual employers, or to make a claim where a patient has already left the workforce.

The size of the potential prevention incentive from workers' compensation premiums needs to be kept in perspective. Average premiums across the different jurisdictions in Australia range from approximately 1 to 3 per cent of total payroll costs. Only some premiums are determined by prior experience. For example, in Victoria about half of the workforce are employed by businesses who have less than 40 per cent of their premiums determined by their recent claims experience.

Empirical evidence of prevention

The evidence from the United States suggests that there is a strong link between the level of workers' compensation premiums and workplace health and safety. These studies also find that experience-rated premiums are a powerful inducement to businesses to invest in safety.

Butler analysed the link between workers' compensation and fatality rates in the United States during the period 1947–1990. After allowing for changes in industry mix, the business cycle, and the impact of workplace health and safety regulation, he concluded that workers' compensation costs may have played a significant role in reducing fatality rates:

I find that a 10 per cent increase in workers' compensation costs per payroll results in a 2 to 5 per cent decrease in the death rates (Butler 1994b, p. 18).

Moore and Viscusi agreed:

... workers' compensation is not a minor adjunct to the safety incentive process, but rather a driving force in reducing fatalities in the workplace. Our results indicate that in the absence of workers' compensation, fatality risks in American industries could rise by over 40 per cent (1990, p. 9).

Bruce and Aitkins (1993) found that the introduction of experience-rated premiums in two Canadian industries substantially reduced the number of fatalities. In particular, they concluded that experience-rated premiums permanently reduced fatalities by about 50 per cent and 9 per cent in the construction and forestry industries respectively.

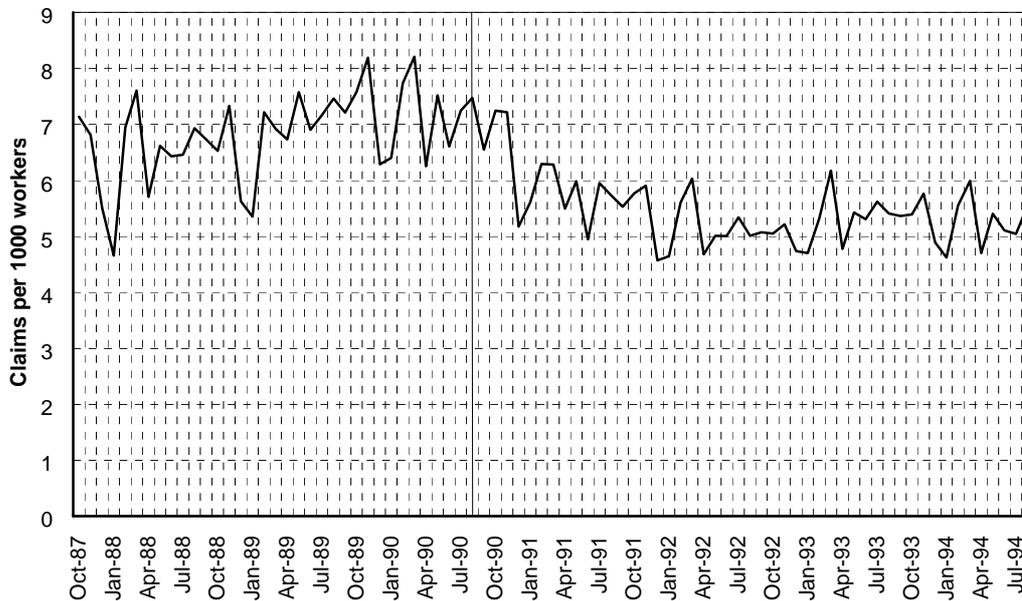
As all of these studies focus on fatalities, they constitute strong evidence of the level of workplace health and safety. Fatalities are not likely to be affected by claims management practices or fraudulent claims.¹ However, they do not have regard for all work-related fatalities because not all of them — particularly diseases — are identified as being work-related. This was recognised by the Queensland Department of Employment, Vocational Education, Training and Industrial Relations, who noted that 'almost all the occupational cancers are never compensated' (correspondence, May 1995).

Unfortunately, there is little Australian evidence on the effect of workers' compensation and experience-rated premiums on injury and disease at work. Few workers compensation agencies have a long enough series of consistent data on injuries or claims to analyse. Also, the changes to the schemes would complicate the analysis.

A significant decline in new claims in many Australian jurisdictions has followed the introduction of incentives for prevention, such as experience-rated premiums or bonus-penalty schemes. For example, in South Australia the rate of claims fell after the introduction of a bonus-penalty scheme (see Figure 10.1). The impact in other jurisdictions is discussed in Appendix J. However, it is difficult to determine whether this is indicative of improved safety, a tightening of claims management, changes in the definition of a compensable injury or employee concerns over job security during recessions.

¹ Claims management practices are activities that reduce the costs of workplace injury to employers, such as encouraging workers to return to work and discouraging injured workers from making claims once an injury has occurred.

Figure 10.1 South Australia, claims per 1000 workers



Note: South Australia implemented a bonus-penalty scheme in July 1990. Within nine months claims incurred per 1000 workers had fallen by about 20 per cent.

Source: SA WorkCover Corporation, unpublished data.

Participants' views

Inquiry participants expressed a wide range of views concerning the extent to which workers' compensation improves workplace health and safety. The diversity in views is fuelled by the lack of reliable Australian research.

Some participants felt that workers' compensation could have substantial positive effects. The Self-Insurers of South Australia argued:

The most effective incentive for an employer to improve OHS performance is [for the employer] to be required to bear the full cost of work-related injury, illness and disease arising out of the employer's workplace (sub. 41, p. 2).

Others thought that workers' compensation premiums merely encourage employers to manage the number and duration of claims, rather than improve health and safety. The Victorian Trades Hall Council expressed this as follows:

... premiums can be a very significant driver, but not necessarily a driver of good health and safety — they can be a driver of claims minimisation (transcript, p. 1139).

The Shop, Distributive and Allied Employees Association felt that compensation costs:

... cannot act as a generally effective safety incentive because of factors such as cost shifting, the widespread use of claims suppression and difficulties in quantifying indirect and social costs and making employers accountable for them (sub. 156, p. 4).

Inquiry participants disagreed on whether experience-rated premiums encourage prevention. The Community and Public Sector Union argued that they created:

... strong financial incentives for the employer to initiate effective preventative and rehabilitation strategies to minimise the incidence and severity of work accidents (sub. 72, p. 7).

Other participants felt that experience-rating had limited scope to prevent injury and disease. Hopkins contended:

From a policy point of view the important thing is to be aware of their [experience-rated premiums] limited ability to deliver safety effects and to explore ways in which this ability might be enhanced (1995, p. 31).

Incentives from existing schemes

In the Commission's view, governments have yet to take full advantage of the prevention incentives from workers' compensation. This conclusion is based on its analysis of premium setting, compensation benefits and the regulation of self-insurance among jurisdictions. These are discussed below.

Insurance premiums

New South Wales and Victoria are the only States insurers are required to set premiums for workers' compensation on the basis of previous claims experience. In Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory, insurers may use experience-rating but are not obliged to do so. Only South Australia and Queensland have a system of bonuses and penalties for those employees who are too small to be experience-rated. (For existing premium setting arrangements see Appendix J).

Most workers' compensation agencies constrain the amount of premium volatility that employers may experience. Victoria and New South Wales impose limits on the amounts that premiums can increase. Queensland and South Australia limit the size of bonuses and penalties. Western Australia limits the amount that private insurers can charge, potentially preventing insurers from fully penalising the most dangerous workplaces.

Some workers' compensation agencies limit the injuries that can be included in the experience-rating or bonus-penalty formulae. Where injuries and diseases are exempted, there is no incentive to invest in safety to prevent the exempted

injury or disease. Instead there may be an incentive to reclassify injuries to exploit the exemption. In its *Annual Report* for 1990–91, the Victorian WorkCover Authority (1991) noted a steady increase in the number of claims for exempted types of injuries such as second injuries.²

Compensation benefits

Some agencies have been limiting the duration, magnitude and eligibility for compensation, in part to encourage the early rehabilitation of injured workers. As these changes have flowed through to premiums, they have had the perverse effect of decreasing the incentive for employers to improve health and safety.

Benefits in Victoria are around half those in South Australia. Some jurisdictions stop benefits after two or three years. In others, severely injured employees can receive benefits for as long as their injuries limit their ability to return to work (Johns 1995). In Victoria benefits for partially incapacitated workers cease after two years. Robinson stated:

It was a policy that stood in stark contrast to the ... Government's broader ... commitment, on economic efficiency grounds, to user-pays. For what was involved was the deliberate transfer of compensation costs from employers, where they belonged, to the individual workers concerned and to the Commonwealth social security system (1994, p. 220).³

Policies that tighten eligibility requirements and reduce entitlements have clear benefits — for example, tightening eligibility requirements may reduce the extent of fraud and improve the financial position of schemes. However, they also have costs. Legitimate claims may be denied, some workers may be inadequately compensated and prevention incentives will be reduced (for the existing compensation and benefit arrangements see Appendix J). In addition, lowering compensation benefits is likely to lead to the costs of treating and supporting injured workers being shifted to the Commonwealth budget, resulting in Commonwealth taxpayers subsidising employers with unsafe workplaces.

Self-insurance

Self-insurance is where certain employers are exempted from insuring for workers' compensation. Instead they take full responsibility for compensating injured workers themselves. Self-insurers face stronger incentives to provide

² Second injuries refer to a subsequent injury. It can be either a new injury or an aggravation of a pre-existing injury.

³ Marc Robinson is Associate Professor, School of Economics and Public Policy, Queensland University of Technology. Between 1990 and 1993, Robinson was Director of the WorkCare Coordination Unit, Victoria.

safe places of work, since they bear more of the costs of their compensable injuries and diseases (for existing self-insurance arrangements see Appendix J).

Not all jurisdictions allow self-insurance. The Queensland Workers' Compensation Board and the Seafarers' scheme proscribe self-insurance.⁴

There is little consistency among licensing requirements for self-insurers. Several participants claimed that the lack of consistency imposes costs on national companies. Pioneer International Ltd argued:

... because of the wide variations in legislation between States, and Pioneer's particular business structure, it is extremely difficult for us to justify self-insurance in Australia, despite the fact that Pioneer is one of Australia's largest companies. Also, even if we were able to qualify for self-insurance in every State, current legislation is so different in each State that administering workers' compensation would be extraordinarily difficult and costly for us (sub. 230, p. 2).

The Victorian Government commented that the lack of consistent licensing requirements is a barrier to national companies being able to self-insure:

There is scope for greater consistency in the requirements that jurisdictions place on applicants for self-insurer status, so that enterprises which operate across Australia could obtain self-insurer status in all jurisdictions more easily (sub. 382, p. 10).

The lack of national consistency and the stringent licensing criteria in some jurisdictions may unduly limit the use of self-insurance.

The Commission's workers' compensation inquiry

In its report on workers' compensation, the Commission made a number of recommendations to strengthen the incentive on employers to invest in health and safety. These recommendations addressed the foregoing problems and, if implemented, would increase the incentives to improve health and safety at the workplace.

The Commission recommended that employers be strictly liable for work-related injury and disease on a no-fault basis, that premiums for large employers should be experience-rated and that small businesses should have access to a bonus-penalty scheme.

The Commission recommended the removal, where practicable, of premium increase caps. Capping constrains the amount of premium volatility that employers may experience and reduces the incentive to improve workplace health and safety. There are benefits from stable premiums — small businesses, in particular, may not be able to withstand large fluctuations. However, in its

⁴ The Queensland Workers' Compensation Board indicated that it saw some benefit in allowing self-insurance and that it is considering introducing it (transcript, p. 263).

inquiry on workers compensation, the Commission found that the scales had been tipped too far in favour of stability at the expense of the incentives for health and safety.

In relation to compensation benefits, the Commission recommended that:

- jurisdictions adopt common definitions of a worker, and of compensable injury and disease;
- jurisdictions adopt a common schedule of benefits;
- compensation payments be based on pre-injury average weekly earnings;
- access to common law remedies be removed, with compensation for non-pecuniary losses through a ‘table of injuries’; and
- all attributable expenses should be fully compensated.

The Commission supported self-insurance. It recommended uniform licensing criteria for self-insurers across jurisdictions and neutral prudential requirements compared to other insurers. The Commission proposed that a nationally available workers’ compensation scheme be established to operate in parallel with existing schemes. The scheme would be regulated by a National WorkCover Authority, which would also develop minimum requirements for all schemes.

The Commonwealth Government broadly supported the Commission’s recommendations but wanted further consideration of the need for a National WorkCover Authority and whether the roles and functions proposed for it could be met by other means. The Assistant Minister for Industrial Relations announced the following government goals.

- End regulatory inconsistency in workers’ compensation; and
- Provide access to a more consistent set of benefits and entitlements and to more competitive and portable insurance arrangements. Thereby:
 - bringing greater equity for injured employees, so that their treatment does not significantly vary according to where in Australia they are hurt;
 - bringing greater efficiency for employers. For example, removing any need to hold multiple insurance policies in relation to mobile employees and allowing national employers to hold one policy covering all their operations; and
 - creating a more nationally-oriented workers’ compensation insurance market, and so avoiding wasting resources in the duplication of administration and compliance activities (Johns 1995, p. 3).

The Commonwealth proposed that the Council of Australian Governments (COAG) establish a working group to develop a response to the Commission’s Report. The States and Territories did not agree. Instead, the States proposed

that the Heads of Workers' Compensation Agencies (HWCA) examine how to achieve greater national consistency.

Since the release of the Commission's Draft Report on *Work, Health and Safety*, the Labour Ministers' Council has considered a progress report from HWCA. The Council endorsed continuation of the project and the proposed schedule of progress reports from HWCA. A detailed set of recommendations for nationally consistent arrangements is to be presented to the Labour Ministers' Council in 1996.

Other issues raised in this Inquiry

Licensing requirements for self-insurance, compensation premium rebates for small businesses and awareness of premium determination were three other workers' compensation issues raised by participants.

Regulation of self-insurers

Self-insurers in South Australia were concerned about the injury prevention performance standards they have to meet. The Commission understands that the NSW WorkCover Authority proposes to introduce similar requirements.

In South Australia, self-insurers must conduct a workplace audit against the prevention standards. The audit is then scrutinised by the South Australian WorkCover Corporation. The Corporation sets progressive targets and scores employers on how successfully they achieve them. If employers reach their targets they do not have to be audited the following year. In recent years self-insurers have received progressively higher scores, indicating that they have achieved the targets set. The Corporation recently moved to reduce the documentation burden. Audits will only be required every three years, in conjunction with 'annual external assistance visits' (sub. 275, p. 53).

The Self-Insurers of South Australia argued that the injury prevention standards are unnecessary, irrelevant to improving health and safety, and costly:

In achieving these above mentioned improved scores there has been, arguably, significant costs that the exempt [self-insuring] employers have seen as necessary to be exempt but of no relevance to the improvement of OHS in the workplace. Conversely, exempt [self-insuring] employers have seen these non-beneficial, misdirected costs as detracting from the employer's financial ability to resource more important organisational OHS priorities that would beget actual outcome benefits — for the employees and employer (sub. 196, p. 2).

The Self-Insurers estimated that documenting compliance with the standards cost about \$120 000 for an employer with 1000 workers. The South Australian

Government disputed this figure, claiming that ‘there is no relationship between size of employer and cost of assessment’ (sub. 275, p. 52).

The Shell Company of Australia Ltd expressed a similar concern about performance criteria that self-insurers in Victoria previously had to meet:

... under the old WorkCare system in Victoria, in order to retain their licence, self-insurers had to satisfy a number of performance criteria, and were audited to ensure compliance with these criteria. Complying with these criteria and the accompanying audits and red tape became a significant cost, which threatened to erode the financial benefits of self-insurance (sub. 67, p. 12).

The South Australian WorkCover Corporation claims the injury prevention standards are necessary because prior to their introduction a large proportion of self-insurers failed to comply with legislative occupational health and safety requirements. The Corporation also does not accept that the standards are irrelevant to improving health and safety in the workplace and claims that the above estimates of the cost of compliance are biased upwards (sub. 236, p. 2).

If they are justified, such standards should be applicable to all employers. However, it is not clear that they are cost-effective in improving health and safety at work. They could increase costs and may deter employers from self-insuring — thereby reducing the number of employers subject to the superior safety incentives of self-insurance. The regulation of self-insurance should foster the option of self-insurance, while preserving prudential controls to ensure that self-insurers are able to meet all legitimate claims made on them.

In the light of these considerations, the Commission considers that South Australia should review its performance standards to ensure that they are a cost-effective means of improving health and safety at work.

Premium rebates and penalties

Several participants mentioned the need to give small to medium-sized employers stronger financial incentive to improve health and safety, as experience-rated insurance premiums are not feasible for this group. The Shell Company of Australia Ltd argued that:

Financial incentives ... must be considered. These could include more direct and immediate discounts in workers’ compensation premiums for good performance [and] discounts in workers’ compensation premiums to reward the installation of occupational health and safety management systems (sub. 67, p. 12).

South Australia offers premium rebates to employers under its Safety Achiever Bonus Scheme. These are available to those who establish workplace health and safety systems to prevent and effectively manage injuries. In its report on workers’ compensation, the Commission drew attention to the need for premium rebates for recognised reductions in risk by small business.

In the past it has been difficult for workers' compensation agencies to identify measures that clearly lead to reductions in risk. This should change under the Commission's proposal that OHS legislation recognise and encourage enterprise safety management systems and industry-based codes of practice (see Chapter 6).

Employers who adopt industry-based codes of practice or enterprise safety management systems should have better workplace health and safety outcomes. To encourage their adoption the Commission proposes that workers' compensation agencies should provide premium rebates to employers who do so.

Rebates should be made available only to those employers whose premiums are not experience-rated and should be subject to the financial integrity of the workers' compensation scheme being maintained.

The Victorian Automobile Chamber of Commerce was supportive of this proposal in the Draft Report:

We affirm the Industry Commission's proposal that workers' compensation insurance agencies provide incentives, including rebates, to clients and actively reward businesses that invest in safety and undertake safety management systems (sub. 314, p. 8).

Another option is to offer rebates for a proportion of the cost of safety management audits. This option is similar to that being considered by the Victorian WorkCover Authority. The audits could be undertaken on an annual basis. They would evaluate the employer's safety management system and recommend improvements in workplace safety. The rebates could be tailored so that employers pay for the safety management audit and receive the rebate when they implement the recommendations of the audit.

The Victorian Trades Hall Council expressed qualified support for such an initiative:

Whilst on one level this raises serious concerns — should organisations be 'paid' to comply with the law, what justification is there for distinguishing reimbursements on the basis of size of workforce, thus providing relief to some and not all employers — the idea is not without merit. It seems to be one of the very few ideas that has the possibility of getting small business to take occupational health and safety seriously (sub. 187, p. 16).

Recommendation 31

The Commission recommends that governments should encourage rebates on workers' compensation premiums for those employers whose premiums are not experience-rated where they follow codes of practice or apply enterprise safety management systems.

Awareness of premium determination

For the prevention incentive from workers' compensation to be effective, employers need to understand how their premiums are determined and how their claims history is related to their premium. Hopkins stated:

It is important not only that premiums reflect claims experience but that senior managers are aware of this and aware of just how much their claims are costing them (1994, ch. 13, p. 1).

QBE Workers' Compensation (NSW) Limited claimed that many employers are not aware that their claims history affects their premium (sub. 155).

In its report on workers' compensation, the Commission suggested that agencies should educate businesses regarding what causes premiums to fluctuate. One way of achieving this is to publish plain English guides on how premiums are determined. Victoria and South Australia currently do this.

In addition, premium notices or invoices could indicate how employers are performing compared both to previous years and to the average for their industry. At present, such information is often not provided. Premium notices in Victoria and New South Wales do not disclose the premium rate paid in previous years. The industry average premium rates are not shown on notices in Victoria.

Hopkins suggested that premium notices should encourage senior officers in corporations to take health and safety seriously:

... [premium notices] should be transacted with maximum publicity, with accompanying letters to chief executive officers, either congratulating them ... or chiding them ... [depending on their] performance. Compensation agencies could even have a program of making bonus payments in person to selected chief executive officers (1994, ch. 13, p. 1).

Recommendation 32

The Commission recommends that workers' compensation agencies ensure that insured employers are regularly informed of the link between their premiums and their claims experience.

10.2 Funding of government agencies and programs

Several inquiry participants mentioned that the way government programs are funded can nullify the prevention incentive from workers' compensation. In some cases, any recipients of program funding are automatically fully reimbursed for their workers' compensation premiums, regardless of how well or badly they perform. The unintended result is that the recipients have little reason to invest in prevention.

The Aged Services Association of New South Wales and the ACT (sub. 23) and the Labor Council of NSW (sub. 145) raised this issue in relation to the Commonwealth funding of nursing homes and hostels.⁵ Both participants cited the findings of a review into funding arrangements of nursing homes by Gregory who found:

... the funding arrangements of workers' compensation costs in nursing homes have been considered, and it seems clear that the existing cost reimbursement arrangements negate incentives to improve work practices. A system which funds workers' compensation at a fixed rate would produce a better outcome for taxpayers, nursing home staff and residents (1994, p. 82).

The Commission considers that where government programs are funded on the basis of their cost of production, the workers' compensation element should be at the average rate for the industry in question. The same approach should apply to the funding of government agencies.

With fixed funding for workers' compensation costs, proprietors of nursing homes and heads of government agencies would receive the same funding irrespective of their past claims experience. Proprietors and agencies that fail to invest in safety will not be funded for their higher than average claims cost. Those who do improve safety, and lower the cost of claims, will receive a financial benefit.

⁵ As highlighted by the Queensland Nurses' Union (sub. 104) this issue is particularly significant for nursing homes because of the high rate of injury and permanent incapacitation of nurses.

The Commission notes that some State Governments have already moved away from full cost reimbursement of workers' compensation costs for their agencies. This has encouraged the agencies concerned to improve workplace safety.

Recommendation 33

The Commission recommends that governments fund the cost of workers' compensation in their expenditure programs on the basis of the average workers' compensation premiums, do so on the basis of the average premium for the industry in question, rather than the actual premium charged to the individual recipient of the funding. This principle should also apply to the funding arrangements for all government agencies.

10.3 Government purchasing

Governments spend significant amounts on goods and services. Much of this expenditure is in hazardous industries such as the construction industry.

All governments have guidelines to help agencies evaluate prospective purchases and tenderers. Most take the following factors into account:

- value for money, including the quality of the goods and services on offer;
- the ability of the tenderer to work with the agency; and
- the dependability of the tenderer.

In the private sector, it is common for tenderers to have to meet the purchaser's risk management standards. These are often applied through a 'two-envelope' tender system. Under such a system purchasers require two bids (or envelopes) from each tenderer. One contains the tenderer's health and safety management system and performance, and the other their financial bid. The envelope containing details of the risk management system is opened first. If the tenderer's risk management system is found to be unsatisfactory, its tender is discarded. Tenderers are thus encouraged to improve their safety performance so as to increase their chance of being awarded contracts. Such an approach is used by companies such as Shell Australia and Woodside Petroleum.

Governments could adopt similar purchasing guidelines for their agencies to ensure tenderers have sound safety management systems. Worksafe Australia said:

Occupational health and safety considerations should be included in tender and contract specifications [for public sector organisations] (1995, p. 1).

Purchasing guidelines were introduced in New South Wales in March 1995. The guidelines require that tenders for major projects be accepted only from contractors who can guarantee that they have appropriate workplace health and safety systems in place. The Northern Territory Government's procurement policy also requires accredited contractors to have OHS systems in place and for their performance to be reviewed on an ongoing basis.

Many inquiry participants supported such provisions in the administration of government purchasing. The Department of Occupational Health, Safety and Welfare of Western Australia commented that:

There have been some outstanding examples in Western Australia where a major principal contractor has influenced occupational health and safety outcomes in their industry sector through attention to the occupational health and safety behaviour and performance of contractors (sub. 269, p. 15).

In the Commission's view, purchasing guidelines should be limited to requiring contractors to warrant that their health and safety management systems can guarantee compliance with relevant OHS legislation. Guidelines that imposed stricter requirements would impose additional costs on government budgets for little benefit.

Recommendation 34

The Commission recommends that government agencies, in awarding major contracts, consider requiring contractors to warrant that their safety management would fully comply with relevant OHS legislation. This may be achieved by requiring the relevant information to be submitted during pre-qualification of tenderers or in tender documentation.

10.4 Company reporting

Disclosure of a company's health and safety record in its annual report would raise awareness and help encourage a more proactive approach to health and safety. The information reported might include information on the company's health and safety policy, risk management systems and performance.

This form of disclosure would ensure attention to workplace health and safety at the highest level within the company. It would require directors to acknowledge how their company had performed and raise shareholder and public awareness of these issues. The commitment which is essential to best practice in health and safety must come from this level of a corporation.

The Robens Committee commented:

We can think of few things more likely to engage the attention of the chairperson and directors of a board than an obligation to furnish regular accounts about how the firm has catered for the health and safety of its employees, and with what results (1972, p. 24).

The Shell Company of Australia Ltd argued:

The annual reports of companies ... should include a section reporting [the company's] occupational health and safety performance (sub. 67, p. 12).

Many governments and other inquiry participants supported this initiative.⁶ The New South Wales Government stated that it:

... would encourage investors to consider the occupational health and safety record as one element of an investment decision. It constitutes a potentially useful information strategy that utilises market dynamics for public ends (sub. 397, p. 17).

The Commission supports voluntary disclosure by employers as a relatively costless incentive for business to improve health and safety at work.

The Commission notes that all Commonwealth agencies are required to report annually on their workplace health and safety performance under the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. Some State jurisdictions have similar reporting requirements. This mandatory reporting has not proven to be effective. For this reason, the Commission considers that such reporting should also be voluntary — undertaken by those who wish to promote their work safety performance.

Recommendation 35

The Commission recommends that the Institute of Company Directors be invited to draft guidelines on the disclosure by companies of their health and safety records in their annual reports.

⁶ For example, see the submissions from Mr Niven (sub. 101) and the Hunter Action Group Against WorkCover (sub. 332).

11 NATIONAL INSTITUTIONS

The National Occupational Health and Safety Commission (NOHSC) has been in operation for ten years. During that time it has conducted national programs in research, information, education, training and chemical assessments. More recently, it has concentrated its efforts on the development of national health and safety standards for implementation by the jurisdictions.

Many Inquiry participants said NOHSC had progressed the standing of occupational health and safety in the community since its establishment. However, a larger number of participants were critical of the time and resources required to achieve that change. Others questioned the value of its achievements.

In this chapter, the Commission proposes alternative institutional arrangements to address national issues in occupational health and safety. They are designed to encourage more effective co-operation between governments in the development of regulatory regimes and prevention programs.

11.1 Current national arrangements

NOHSC is an unincorporated statutory authority set up by the Commonwealth *National Occupational Health and Safety Commission Act 1985* (NOHSC Act). Its mission is to lead national efforts to provide healthy and safe working environments and to reduce the incidence and severity of occupational injury and disease.

NOHSC has two major roles to perform. One is to direct the development and conduct of national programs on workplace health and safety. In this regard the NOHSC Act sets out 28 functions for the Commission. They include formulating workplace health and safety strategies, recommending actions to facilitate co-operation between jurisdictions, acting as a means of liaison with other countries on occupational health and safety matters, publishing reports, assisting training, assisting research and encouraging the use of research results. In this role NOHSC has given priority to developing nationally consistent regulation of occupational health and safety through national standards — with each jurisdiction retaining responsibility for the implementation of national standards and their enforcement.

The other role NOHSC plays is to be a forum for consultation with employers, the trade unions and the States on the development and conduct of national

programs on health and safety at work. In the case of standards development, NOHSC has also been responsible for co-ordinating the process of public consultation on proposed national standards.

The Commission has 18 members:

- an independent Chairperson, the Chief Executive Officer (CEO) of Worksafe Australia and one representative nominated by the Commonwealth Minister for Industrial Relations;
- one representative nominated by the Commonwealth Minister for Human Services and Health;
- one representative nominated by each State and Territory Government;
- three representatives nominated by the Australian Chamber of Commerce and Industry (ACCI); and
- three representatives nominated by the Australian Council of Trade Unions (ACTU).

Members are appointed for up to three years and the CEO for up to five years.

NOHSC oversees the National Occupational Health and Safety Office — its operational arm — and the National Institute of Occupational Health and Safety — its research arm. In 1986, NOHSC adopted the title Worksafe Australia for the Office.

The Executive of NOHSC consists of the Chairperson, the CEO of Worksafe, the representative of the Department of Industrial Relations and three of the representatives nominated by the ACCI, ACTU, and State and Territory Governments, one from each group.¹ The Executive meets more frequently than NOHSC and has greater responsibility for the day-to-day operations of Worksafe, although there are guidelines which limit the Executive's powers.

The current national institutional arrangements are summarised in Figure 11.1.

At present Worksafe conducts programs in research and statistics, the development of national standards, promotion of enhanced workplace health and safety performance in industry, chemicals assessment as required under the *Industrial Chemicals (Notification and Assessment) Act 1989*, and participation in and the co-ordination of international activities.

Standing committees and working parties of NOHSC are tripartite in composition. At present there are three standing committees — the Standards Development Standing Committee (SDSC), the Research Standing Committee (RSC) and the Mining Industry Standing Committee.

¹ The State representative on the Executive rotates among those jurisdictions.

Working parties carry out the more technical work involved in standards development. People appointed to the working parties are nominated by the NOHSC representatives. Before declaring a proposed standard or code of practice, NOHSC must invite and consider public comment on it (see Box 11.1).

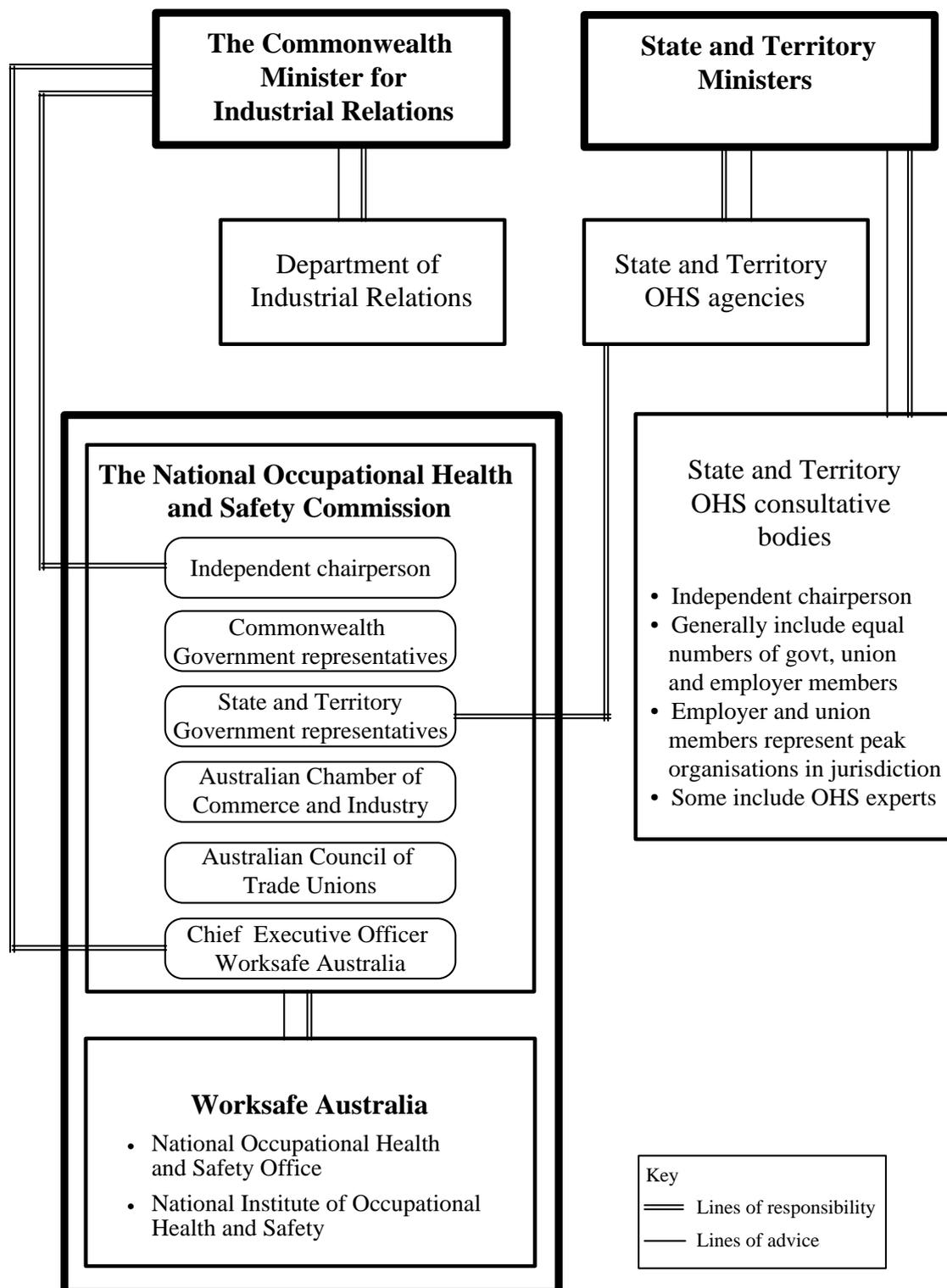
Box 11.1 The process for developing national standards

- NOHSC (through its Standards Development Standing Committee) identifies the need for a standard. This is usually at the suggestion of the States or Territories.
- An expert working group (EWG) or steering group is established to oversight development of a standard to meet the need. While such groups have tripartite membership, those nominated to them generally have expertise in a related field.
- A preliminary economic impact analysis is conducted in parallel with the development of the draft standard.
- After the EWG agrees on the draft standard, it is submitted to the Standing Committee. Once approved it is released for public comment for at least three months.
- Following public comment, an expert review committee is established to prepare the final standard.
- At this stage, NOHSC generally requires an economic impact assessment of the standard. The assessment is usually carried out by consultants on behalf of the Standing Committee.
- Once endorsed by NOHSC, jurisdictions work with their own Parliamentary Counsel to incorporate the common essential requirements into their legislation.

Source: Department of Industrial Relations (sub. 396, p. 6).

Declared national standards do not have any legal standing until they are legislated by the jurisdictions. Prior to implementation, most States undertake further consideration of the standard within their jurisdiction. This normally involves consideration by an advisory body and additional public consultation.

Figure 11.1 Current national institutional arrangements



In its ten years of operation, NOHSC has spent in excess of \$170 million on occupational health and safety activities. In 1993–94, NOHSC's total expenditure was \$26.8 million.² The Commonwealth Budget contributed \$22 million with the remainder coming from operating reserves (\$2.5 million) and independent sources, such as chemical assessments, research contracts and the sale of publications (\$2.3 million). Over 35 per cent of Worksafe's operating expenditure is on program support, corporate services and executive costs. Other major programs are research and statistics, and industry OHS development which includes industry training grants (see Table 11.1).

Table 11.1 Analysis of Worksafe Australia expenditure, 1993-94
(\$'000)

<i>Program</i>	<i>Salaries</i>	<i>Expenses</i>	<i>Overheads</i>	<i>Grants</i>	<i>Total</i>
National standards	1 486	660	1 215	17	3 378
Industry OHS Development	1 270	835	1 389	1 309	4 803
Research	2 776	1 016	3 038	764	7 594
Chemicals assessment	1 221	439	1 128	9	2 797
Professional education	316	146	347		809
National coordination	1 320	748	1 562	710	4 340
All	8 389	3 844	8 679	2 809	23 721

Note: Overheads include the cost of corporate services, program support and the executive. Staff numbers per program were used to weight the allocation of costs to each program.

Source: Worksafe Australia (1994e), Industry Commission.

Worksafe employed 236 staff as at 30 June 1994 — 231 staff were employed under the *Public Service Act 1922* and five staff under the *National Occupational Health and Safety Commission Act 1985*. Worksafe is located in Sydney.

11.2 Concerns with current arrangements

One of the major issues raised by participants in this inquiry was the structure and performance of the national institutions.

² The difference between the \$26.8 million reported in Worksafe's 1993–94 Annual Report and the \$23.7 million in Table 11.1 is due to differences in accounting methods. Provisions for depreciation and employee benefits in the Annual Report amounted to \$3.4 million.

Some participants considered that NOHSC was doing a satisfactory job and with some minor modifications its effectiveness could be enhanced. For example, the ACTU said that:

Worksafe Australia is a major contributor to Australia's occupational health and safety resources. Its effectiveness has improved over recent years and the ACTU believes it is performing well at the present time. However, there is room and there will always be room for further improvement (transcript, p. 1361).

Others were more critical. The Western Mining Corporation believes that NOHSC has not won the confidence of industry management or employees:

... it has tended to resist advice from industry and technical experts; it has approached standards development and standard setting in a manner which failed to demand consensus and capitulated to standard setting by vote; it has not exercised proper restraint over its own bureaucrats and experts, thus allowing them to develop their own agendas rather than act as the servants of the tripartite working groups (sub. 47, p. 1).

The Commission characterises the problems raised by inquiry participants about the national arrangements as follows:

- NOHSC programs have had limited impact at the workplace;
- NOHSC decision-making does not adequately engage the States and Territories who have the prime responsibility for program delivery;
- lines of responsibility and accountability in respect of NOHSC and Worksafe are unclear;
- NOHSC is too large to be an effective board of management; and
- membership of NOHSC is based upon representation of interested parties but not all are included.

Limited impact of outcomes

Some participants were critical of the outcomes of NOHSC programs and questioned their effectiveness in improving health and safety at the workplace. The Victorian Health and Safety Organisation (formerly the Occupational Health and Safety Authority) said:

In Australia's federal system, the States and Territories have the major responsibility for the administration of OHS. The outputs of many of the programs carried out by NOHSC and its support body Worksafe Australia have been unsuitable to meet the needs of the State and Territory jurisdictions. Few projects conducted by NOHSC or Worksafe Australia which are intended to assist workplaces to achieve lower rates of occupational injury and disease have been of use in Victorian workplaces (sub. 176, p. 33).

As discussed in Chapter 3, even where the national standards declared by NOHSC have been implemented by a jurisdiction, there are problems in

applying them at the workplace. The major part of the national standards of interest to the workplace are the national codes of practice. However, the national codes of practice have been strongly criticised by industry for their inadequate content and limited practical usefulness (see Chapter 3 and Appendix L).

Engagement of the States

The most common concern about the existing arrangements is that State and Territory Governments are not fully and promptly implementing decisions agreed at the national level. Given their primary role in delivering health and safety programs, lack of ownership by the States was seen as a critical failure.

Inquiry participants cited the example of the national standards declared by NOHSC which have not yet been adopted in all jurisdictions. Some standards have still not been implemented despite having been declared over three years ago (see Chapter 9). This reflects the fact that the NOHSC arrangements do not engage the States — as opposed to their OHS agencies — and fail to recognise that occupational health and safety is primarily a State responsibility. As the ACT Government said:

The ultimate decision to accept or reject NOHSC recommendations rests with individual Governments (sub. 373, p. 10).

State governments have commitments to consult with their own tripartite consultative bodies and their own citizens before implementing NOHSC standards. Where State interests diverge from the declared standard, State Ministers can face strong pressure to modify them.

The need to revisit NOHSC decisions at the State level reduces the incentive for the government and interest groups in a State to participate fully in the development of standards *within* NOHSC. State representatives on NOHSC do not necessarily represent the range of interests within their State — they usually confine themselves to representing their agency. The ACCI said:

State representatives at NOHSC have not necessarily represented the view of their State OHS Commission or consultative forum and have not always taken an approach which is consistent with the approach taken in their State forum (sub. 133, p. 20).

The inability of the interested parties within each State to participate fully in the NOHSC processes reduces the quality and representativeness of national decisions. This provides further justification for their modification at State level, undermining national consistency.

The tensions over the roles of groups represented on NOHSC discourage co-operation. The voting rules and the distribution of votes among the

governments (one vote each) and the industrial parties (three votes each) can mean that decisions can be carried even if some governments strongly oppose them. For example, Victoria and Western Australia have consistently opposed NOHSC's industry development programs. The WA Department of Occupational Health, Safety and Welfare argued that the programs:

... appear to be populist activities for the industry partners, not necessarily linked to priorities determined by the pattern of work-related injury and disease ... There has not been any industry plan developed under this program put before NOHSC for adoption since the inception of the program in 1991 (sub. 222, p. 35).

The decision-making role of NOHSC contrasts with what happens in each State where the tripartite body only *advises* the Minister, who makes the decision.

The Victorian Health and Safety Organisation argues that NOHSC has not focused on priorities identified by the States:

NOHSC needs to re-evaluate its role, to build upon strengths that it can bring within the federal system to the prevention of workplace injury and disease. This approach would see NOHSC taking a leading role in the following areas:

- identification of hazards and recommendation of appropriate forms of intervention;
- undertaking research on issues, particularly those identified by the States and Territories; and
- undertaking policy development on issues identified by the States and Territories (sub. 176, p. 33).

One reason the States do not have a strong stake in NOHSC outcomes is that they do not contribute to its funding. This reduces their interest in ensuring that the institution is effective and best use is made of the funds that it spends.

The failure to engage the States fully has undesirable consequences. First, the States are less willing to extend the scope of co-operation on occupational health and safety issues. Second, it undermines co-operation between Worksafe and State agencies, reducing the effectiveness of national initiatives.

Unclear responsibility and accountability

The lines of responsibility for NOHSC and Worksafe are not clearly delineated.

The Commonwealth Government funds Worksafe Australia, but the Minister cannot be held accountable for its performance as it is effectively under the control of NOHSC. Given that all members of NOHSC have been selected to represent the various industrial parties and governments, it is not clear that the Minister can hold NOHSC to account for its own performance or its supervision of Worksafe.

The representational nature of NOHSC means that members can be placed in the invidious position of having to reconcile loyalty to the institutions they represent with their responsibility to manage NOHSC's programs in the national interest. There is also a risk that purely industrial relations issues will intrude into NOHSC decision-making.

The CEO of Worksafe is nominated by the Commonwealth Government and is formally responsible to the Minister for the proper use of the Commonwealth funds provided to Worksafe. However, the CEO's responsibility is *de facto* to NOHSC for decisions on the use of resources by Worksafe. This duplication of reporting lines does not provide for strong accountability.

In the past at least, the weakened accountability of Worksafe has not encouraged the establishment of clear directions and priorities for Australia's national OHS agency. The Workcover Corporation of South Australia said:

NOHSC is not currently involved in preparation of the budget estimates, nor does NOHSC as a matter of course, prepare a strategic plan on which to base the budget. Recent consideration of strategic directions for the next ten years is a welcome exception to usual practice (correspondence, 13 June 1995).

NOHSC has an ineffective board of management

Although an effective tripartite forum, NOHSC has not been as successful in its role as the board of management for Worksafe and its programs.

Many members of NOHSC accepted this criticism. The ACCI said:

... NOHSC has not been a good platform for the management of Worksafe and for overlooking the activities of a body that has a very large staff and a significant budget of about \$20 million (transcript, p. 3676).

DOHSWA sees a need to improve the management of Worksafe:

The National Commission must give greater attention to its responsibilities under s.57 (1) of the National Occupational Health and Safety Commission Act [which requires NOHSC to prepare budget estimates]. The Commission had paid insufficient attention to the importance of its role in the estimate (budget) development process (sub. 269, p. 19).

The ACTU agreed on the need for a stronger supervision of Worksafe:

I think it would be appropriate for the [Industry] Commission to make some observations about the need for stronger levels of executive supervision of the administration of the national body (transcript, p. 3385).

Three features militate against NOHSC being an effective or efficient supervisor of Worksafe.

The first is the size of NOHSC. With 18 members, NOHSC is simply too large to be an effective board of management. NOHSC has attempted to overcome this by devolving some decisions to its Executive and by undertaking its more detailed work in standing committees. However, this strategy has only been partially successful. The Australian Paint Manufacturers' Federation said that the NOHSC process is too easily politicised:

... frequently the parties do not have the 'experts' to staff the relevant committees and accordingly nominate persons who have only a general knowledge of the subject. Because of this, the representatives are more likely to concern themselves with the 'political' aspect of the proposed regulations than the technical aspects (sub. 7, p. 2).

The second is that NOHSC members are chosen to represent the interests of governments, employers and trade unions — not necessarily for their ability to manage either the development of policy or the execution of programs.

The third feature is the ambiguous and divided nature of responsibility for Worksafe — discussed in the previous section — which militates against NOHSC being able to effectively supervise Worksafe.

Not all groups are represented on NOHSC

A number of participants felt that NOHSC did not represent all those parties that had a stake in health and safety at workplaces. OHS professional societies are not represented on NOHSC. The ACCI is the only employer association represented on the National Commission, even though there are many national employer groups that are not affiliated to it, such as the Australian Minerals Council and the National Farmers' Federation. Although State Governments or their agencies are represented, other interested parties at the State level are not.

OHS professional societies felt they should be represented on NOHSC. They argued that NOHSC programs would benefit from the independent input of people with specific expertise in health and safety at the workplace, particularly where technical issues are involved. The Safety Institute of Australia said:

... standards development work is confined to a narrow range of selected people who are invited to participate. These people have political positions as representatives of the tripartite partners, who arrive at the Worksafe arena to drive forward their own political perspectives, and without necessarily the values of the science of OHS at heart (sub. 151, p. 16).

The Australian Paint Manufacturers' Federation was concerned that relevant

industry parties are not directly represented on NOHSC's working parties:

One prime example of an unrepresentative committee is the Expert Working Group for Dangerous Goods which is drawing up the *Draft National Standard for the Storage and Handling of Dangerous Goods*. There is only one person on the committee who is not a public servant or union representative. Consequently, the paint industry, which is the second largest producer of dangerous goods (producing and transporting approximately 90 million litres of solvent based paint by road and rail each year), has no direct input into this committee and is not party to the drafting process (sub. 7, p. 3).

The ACCI's coverage of the business community was questioned by several employer associations. The National Farmers' Federation said that although the current representation is convenient, it is not effective because the ACCI does not represent the whole of industry (sub. 184, p. 7). The Shell Company of Australia supports the existence of a tripartite body but believes that the ACCI's monopoly over employer representation should be reassessed (sub. 67, p. 14).

11.3 Reform of the national institutions

In light of the problems outlined above, the Commission considers that national policy decisions should be made by those with the clear authority to make them, and the ability to implement them and to be fully accountable for the results. In its Draft Report the Commission proposed that this would be best achieved by the establishment of a Council of Commonwealth and State Ministers responsible for occupational health and safety.

The design of the institutional structure of NOHSC involves an inherent dilemma. Each of its two major roles implies a completely different kind of structure for that role to be performed effectively and efficiently. As the previous section has shown, the present structure of NOHSC means that it is not effective or efficient as both a board of management and a consultative forum.

The Commission's solution to this dilemma is to create two institutions — each specifically designed for only one of the roles — and to structure each according to the needs of the efficient execution of its role.

In its Draft Report the Commission proposed that NOHSC be reconstituted as a specialist board of management to oversight the development and conduct of national OHS programs on behalf of the proposed Ministerial Council. In addition, the Commission proposed that a new consultative forum be established to maintain the opportunity for the national representatives of the industry parties to advise government on national OHS issues.

Each of these proposals is canvassed in turn.

Creation of a Ministerial Council

A Ministerial Council would facilitate greater participation in the development of national policy and programs by all the jurisdictions. In this way a Ministerial Council would ensure ownership of the outcomes was shared between the Commonwealth, States and Territories. As recognised by the Commonwealth Department of Industrial Relations, full ownership of the national body is vital for the development of worthwhile national programs:

Greater joint ownership of a national strategy for OHS should lead to less duplication and greater coherence of national efforts; a more efficient OHS regulatory framework; and a more effective use of scarce OHS resources — in the interests of the overriding goal of improving OHS performance in Australian workplaces (sub. 74, p. 30).

Commitment by each of the jurisdictions is essential if national policy and programs are to be implemented. The establishment of a Ministerial Council would commit each jurisdiction to the implementation of the programs agreed to by the Ministers. This commitment would help to ensure that nationally agreed decisions are implemented in a consistent and timely fashion.

Australian governments have established Ministerial Councils to develop national regulatory approaches in various policy areas. For example, the Australian Transport Council, the National Food Standards Council and the Ministerial Council on the Australian National Training Authority are each developing a co-operative approach to reduce duplication and improve consistency in regulation between the jurisdictions (see Box 11.2).

A meeting of the Council of Australian Governments (COAG) would provide a good opportunity to establish the proposed Ministerial Council and for the Heads of Government to pledge their commitment to the new arrangements. COAG would also have to agree on the Council's role, functions and powers as well as the arrangements for its operation in areas such as funding and voting.

In parallel with settling these details, COAG should agree to the development of the template legislation and its key provisions — as proposed in Chapter 9. Taking this initial step would ensure that the Council begins its work with a clear and demonstrable commitment to more consistent regulation.

The mission of the Ministerial Council should be to oversee the further development of policy and programs where intergovernmental co-operation would overcome duplication of effort and facilitate better workplace safety outcomes.

Box 11.2 Ministerial councils and national regulation

There are 25 Commonwealth, State and Territory ministerial councils operating in Australia. This box includes a brief description of the structure of three of these councils.

National Food Standards Council

In 1991 all Australian Governments agreed to adopt the food standards agreed by the National Food Standards Council (NFSC). The NFSC comprises the Commonwealth Minister for Human Services and Health, and State and Territory Ministers responsible for food regulation. The Council can approve, amend or reject recommendations made by the National Food Authority (NFA).

The NFA consists of a full-time chairperson and four part-time members. Policy advice from the States and Territories is provided by the National Food Authority Advisory Committee. The Commonwealth fully funds the NFA.

Australian Transport Council

The Australian Transport Council (ATC) comprises Ministers for transport, roads, marine and ports. The ATC considers recommendations by the National Road Transport Commission (NRTC). The ATC requires a simple majority to approve most recommendations; those on user charges require a two-thirds majority.

The NRTC is developing a single set of standards and laws to serve as national law for road transport. In 1991, Heads of Government agreed that each Government would implement the approved national law which operates on 'template legislation'. The NRTC was given a fixed term of six years to complete the regulatory reforms. The NRTC has to consult with all governments, industry and other interested parties and has three advisory committees to assist it. The NRTC consists of three part-time commissioners. Its operating costs of about \$3.5 million a year are shared by all governments.

Ministerial Council on the Australian National Training Authority

The Ministerial Council comprises the Ministers responsible for vocational education and training. ANTA was established in 1992 by a Heads of Government meeting. ANTA is responsible for the development of training policy, the formulation of a national strategic plan and the provision of advice to the Ministerial Council on funding levels and distribution.

The ANTA Board consists of five part-time members appointed for their expertise by the Council. The Authority is jointly funded by all jurisdictions and employs about 100 staff. ANTA consults with 19 Industry Training Advisory Bodies.

The Council would also provide a valuable forum on occupational health and safety policy and programs in a range of areas:

- approving standards and determining priorities for proposed ones;
- overseeing the development of national prevention programs — for example, research, statistics and awareness;
- determining performance benchmarks for Commonwealth, State and Territory prevention programs;
- ensuring that prevention programs are regularly evaluated; and
- ensuring national consistency in enforcement.

A new or an existing Council

The Labour Ministers' Council could perform the role envisaged for the new Ministerial Council. This would obviate the need to establish a new one.

Many Governments or their agencies — in New South Wales, Western Australia, Queensland, Northern Territory, the Australian Capital Territory and Tasmania — argued that a separate council was not necessary and that COAG did not favour establishing new councils. For example, DOHNSWA said:

The present Labour Ministers' Council addresses occupational health and safety, and workers' compensation and rehabilitation matters ... The Labour Ministers' Council includes all Ministers responsible for occupational health and safety and workers' compensation and rehabilitation in Australia. The Labour Ministers' Council meets approximately twice a year and further meetings of the same Ministers on occupational health and safety, workers' compensation and rehabilitation agenda alone .. cannot be justified (sub. 269, p. 16).

The Commission favours a new council. There are good reasons for resisting the routine response to problems of the day that 'a Ministerial Council is the answer'. But work health and safety is an important area of microeconomic reform. Addressing occupational health and safety separately from industrial relations should help to foster more co-operation and less contention on issues where any underlying differences do not appear to be fundamental.

The proposed Ministerial Council would operate differently from the Labour Ministers' Council. First, it would be a decision-making body — not just a policy forum. Second, it would receive policy and administrative support from a revamped NOHSC — and not the Commonwealth Department of Industrial Relations, which provides the secretariat for the Labour Ministers' Council. Third, the Ministerial Council would bear ultimate responsibility for the operation of the new NOHSC. This contrasts with the Labour Ministers' Council which bears no responsibility for any of the national institutions.

The Northern Territory Government argued that a Ministerial Council was only necessary if governments agreed to proceed with template legislation (sub. 350, pp. 8–9). The Commission disagrees. A Ministerial Council would expedite development and implementation of nationally consistent policies in all areas where governments are looking for a national approach.

Scope of mandate

The Victorian Government was concerned that extension of the mandate of the proposed Ministerial Council to workers' compensation may provide the basis for the development of a national workers' compensation scheme (sub. 382, p. 11). This possibility was opposed by that Government on the basis that it might jeopardise its reforms of workers' compensation in Victoria.

The proposed Ministerial Council would be an instrument of the jurisdictions. They would determine the scope of collective action and could exclude areas where they preferred to take a separate approach. That said, there would be benefits in the Ministerial Council covering workers' compensation and rehabilitation issues. This would improve co-ordination between the national elements of occupational health and safety, workers' compensation and rehabilitation policy. In all jurisdictions except Victoria, the Minister responsible for occupational health and safety is also the Minister responsible for workers' compensation and rehabilitation.³

Linkages exist between these programs. Effective prevention of injury and disease reduces pressure on workers' compensation and rehabilitation programs. Appropriate workers' compensation premiums and return to work programs can also encourage better management of safety in the workplace (see Chapter 10).

Participants' views

There was strong support among the industrial parties for the establishment of a Ministerial Council. The MTIA said it:

... supports this recommendation and agrees that the establishment of a Ministerial Council will enhance the sharing of ownership for developing and implementing national OHS policy between Commonwealth, States and Territories which is essential if the goal of national uniformity is to be achieved (sub. 278, p. 11).

The Victorian Employers' Chamber of Commerce and Industry said:

A commitment from senior Ministers responsible for health and safety in each jurisdiction should improve the commitment to reform in this area (sub. 313, p. 21).

³ As with other ministerial councils, it would be possible for each jurisdiction to determine which minister attends a council meeting or allow both ministers to attend, but with only one minister participating at a time in the meeting, according to the topic being discussed.

The ACTU argued that the establishment of a Ministerial Council would address the weakness of ‘States not effectively implementing the outcome of the national body’ (transcript, p. 3390).

The New South Wales and Tasmanian Governments supported the establishment of a Ministerial Council. The New South Wales Government emphasised the benefits this would have for the development of national standards:

It is essential that there is Ministerial level consideration of draft national standards which are intended to be given legislative force by jurisdictions. ... National consistency would be better served if national standards were endorsed at a Ministerial level to ensure they had the support of Governments. This would also provide greater certainty for stakeholders (sub. 397, p. 16).

The Tasmanian Government said:

The concept of Commonwealth, State and Territory Ministers responsible for OHS and workers’ compensation playing a greater role in sharing ownership for developing and implementing national OHS policy is supported in principle (sub. 401, p. 8).

The Alcohol and Other Drugs Council of Australia argued that ministerial councils reduce public accountability, are not transparent in their processes, and are slow at making decisions (transcript, p. 2749).

The Commission considers that it is vital that the proposed Ministerial Council operates in an open and transparent way, particularly in light of the importance of consultation in OHS decision-making. Proposals should only be presented to the Ministerial Council for decision after they have been subject to extensive consultation by NOHSC.

The performance of the Ministerial Council would be reviewed by COAG and COAG would also set key objectives that the Council would be required to meet, such as the development of a nationally consistent regulatory regime.

Recommendation 36

The Commission recommends that the Council of Australian Governments establish a ministerial council comprised of the Commonwealth, State and Territory ministers responsible for occupational health and safety, workers' compensation and rehabilitation in each jurisdiction. The core responsibilities of the Ministerial Council should be to:

- agree on OHS legislation;
- develop nationally mandated safety requirements;
- develop nationally consistent enforcement policies and practices; and
- benchmark the performance of OHS programs in each jurisdiction.

Revamping the National Commission

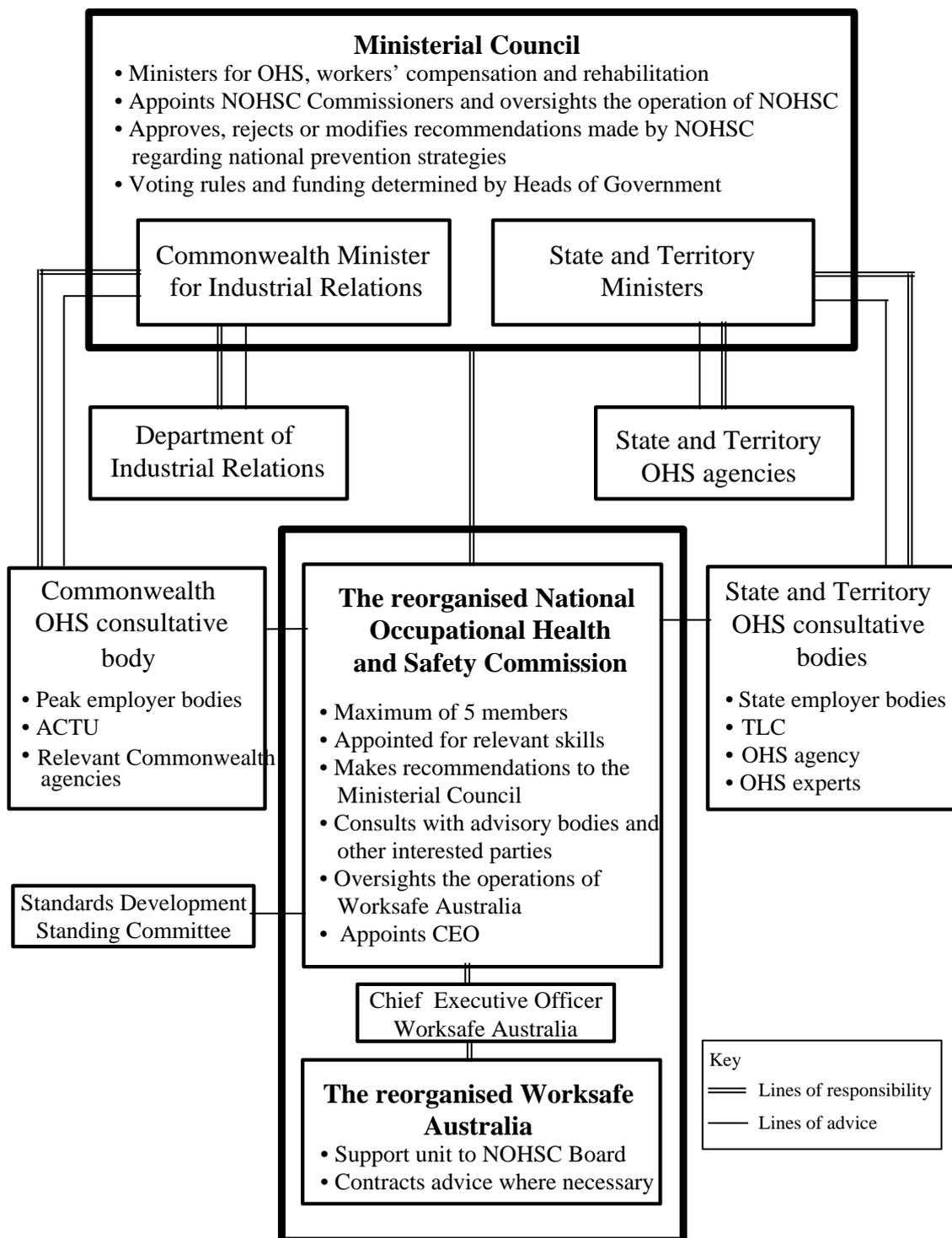
The proposed Ministerial Council would give political impetus to decisions on national policies and programs. However, there is a need for a body to assist the Council in its decisions and to be responsible for their administration. This would be the job of a reorganised NOHSC (see Figure 11.2).

The Ministerial Council should select and appoint a new NOHSC consisting of no more than five members. Members should be selected on the basis of their expertise and skills, which would include practical experience of industry, the management of health and safety risks in the workplace, the development of government policy and programs, and the management of consultative processes. Although they should not represent any group, those chosen should reflect the full range of workplace perspectives.

The role of the new NOHSC should be to develop recommendations on regulation and prevention programs for the Ministerial Council to consider. These recommendations should arise from work that fulfils a corporate plan and work plan agreed to by the Ministerial Council.

The new NOHSC should draw administrative support from a restructured Worksafe but have the ability to contract out work to State OHS agencies and others. Worksafe's CEO should be a non-voting member of NOHSC appointed by, and responsible to, NOHSC.

Figure 11.2 Proposed national institutional arrangements



Worksafe Australia should consist of a core of permanent staff. It should use secondments from industry, the trade unions and Commonwealth and State agencies to cope with variations in its workload and gain the expertise required for effective policy formulation and program design.

In the Commission's view, it is also important that Worksafe staff be encouraged to gain experience in State OHS agencies and in industry. Shell argued:

If Worksafe continues, its employees should also have had experience in working in and/or managing industries with serious hazards combined with good performance. It is not appropriate for people with no experience of such industry to effectively manage the policy and regulations of OHS in those industries (sub. 308, p. 3).

Concerns about diminished tripartism

Many participants were concerned that the proposed structure for NOHSC would diminish tripartite involvement in OHS policy making. For example, the South Australian Employers' Chamber of Commerce and Industry said:

The proposed structure has the potential to not provide adequate or appropriate representation from industry, both employers and employees. As the focus of OHS is at the workplace, those organisations representing employers and employees must be given a significant and substantial role in any new national structure (sub. 272, p. 20).

Such views reflect concerns that NOHSC would act without due consultation. However, NOHSC would and should have strong incentives to consult widely and to modify proposals in light of feedback to ensure that they find acceptance in the Ministerial Council. The Commission's intention is not to diminish consultation but strengthen it by involving all the advisory bodies and the interested parties. If necessary, this should be formalised by a requirement that NOHSC consult with advisory bodies and representative organisations of employers and employees in a State.

The structure proposed for NOHSC is in line with what exists now at the State level. There the industrial parties are consulted but final decisions rest with the responsible Minister. Although some State governments criticised the proposed structure, they did not see the need to propose reform of their own institutions.

The ACTU argued that the proposed arrangements would violate ILO Convention No. 155 and questioned the effectiveness of State advisory bodies (sub. 336, p. 22). The Commission believes its proposals are consistent with ILO Convention No. 155, particularly when account is taken of the consultative arrangements proposed in the next section of this Report. That Convention requires, *inter alia*, member countries to consult with the most representative organisations of employers and workers when formulating, reviewing and implementing a national OHS policy.

In addition to State advisory bodies, NOHSC should also consult with the organisations currently represented on NOHSC, such as the ACTU and ACCI, as well as those that are not, such as the National Farmers' Federation. Indeed the scope for consultation under the proposed arrangements should be wider than at present.

Lack of State ownership

The governments or agencies of South Australia, Western Australia, Northern Territory and the Australian Capital Territory were all concerned that the proposed restructuring of NOHSC would reduce the involvement of State government agencies in national policies. The South Australian Government said:

The proposed national institutional arrangements will result in the States having an ineffective pathway for their views to be fed into the Commission. The only formal channel for communication with, and involvement of, the State and Territory OHS agencies would be indirectly through the Ministerial Council at the broad public policy level.

The regulatory expertise and experience that exists at the State level in converting public policy directions into strategic plans would not be formally or efficiently utilised in the proposed arrangements (sub. 275, p. 33).

In the Commission's view, NOHSC would have strong incentives to consult with State OHS agencies to increase the likelihood of State Ministers supporting proposals. If necessary, this arrangement could be formalised by requiring NOHSC to consult with State agencies.

It is vital that the new NOHSC tap the regulatory expertise and experience of State agencies. This should be done by contracting policy development work to these agencies, or by establishing working groups with State representatives to advise Worksafe, as currently occurs.

ACT Workcover argued that State agencies need to participate in national negotiations to understand and accept the compromises:

Government officials will be less cognisant of the realities behind decisions and will have no sense of ownership of the compromises those decisions involve and consequently Ministers are less likely to be advised to accept decisions which are unpalatable (sub. 373, p. 10).

All those involved in developing and implementing national policy should be aware of the range of perspectives that shape them. The new NOHSC would do this by bringing interested parties together to discuss issues, by promoting consensus wherever possible and by ensuring that the Ministerial Council is fully informed about the views of all interested parties on an issue.

Alternative proposals

The Workcover Corporation of South Australia proposed two alternative structures to address the problems of NOHSC and Worksafe:

- Worksafe could be established as a Commonwealth department reporting directly to the Minister, with NOHSC as an advisory council to the Minister; or
- Worksafe could remain a statutory authority with NOHSC functioning as its board of management. The Chairperson of NOHSC and the Worksafe CEO would report directly to the Commonwealth Minister. NOHSC would establish a Finance and Budget Standing Committee which would meet regularly on financial matters and would report to NOHSC.

This second option is similar to proposals made by DOHSWA. They envisaged NOHSC developing a strategic plan for endorsement by the Labour Ministers' Council and playing a greater role in the financial management of Worksafe.

The first option would improve the accountability of Worksafe and clarify the respective roles of NOHSC and Worksafe. However, as it weakens the role of the States, it could lessen the States' ownership, and their preparedness to implement NOHSC decisions.

The second is similar to the current structure, and shares many of its deficiencies. It does not guarantee the States will implement NOHSC decisions. Responsibility for Worksafe would remain split between the Commonwealth Minister and NOHSC. NOHSC would not be accountable for its direction of Worksafe.

The Commission's proposed arrangements, on the other hand, would strengthen State ownership of the national policies and programs. NOHSC would only undertake work when it had the support of Commonwealth and State Ministers. This should encourage a more productive and co-operative relationship between Worksafe and the State agencies.

The States would be encouraged to take greater responsibility for ensuring Worksafe operates effectively. This would strengthen the States' confidence in Worksafe and their willingness to use it as a vehicle for national co-operation. The proposals provide clearer accountability for NOHSC and Worksafe. The smaller size of NOHSC would be more conducive to the effective management of Worksafe, and this should help to improve Worksafe's performance.

Recommendation 37

The Commission recommends that the National Occupational Health and Safety Commission be restructured. The National Commission should consist of no more than five persons. It should advise the Ministerial Council, undertake work directed by it, consult with governments and their consultative bodies, employer and employee representatives as necessary. Commission members should be selected on the basis of their expertise and skills. Their expertise and skills should include practical experience of industry, the management of health and safety risks in the workplace, the development of government policy and programs or the management of consultative processes.

There would be advantages in all governments sharing the operating costs of NOHSC. This would increase the ownership of NOHSC's activities by all governments. It would strengthen the incentives for NOHSC to design programs that reflect the needs and priorities of all governments.

A typical arrangement for national bodies reporting to ministerial councils is for the Commonwealth to contribute 50 per cent of the budget and the States and Territories to contribute the remaining 50 per cent on a per capita basis.

Recommendation 38

The Commission recommends that Commonwealth, State and Territory Governments contribute to funding the new National Occupational Health and Safety Commission and its programs.

New consultative arrangements

The proposed Ministerial Council would expect NOHSC to consult widely in the development of national policies, to ensure they had widespread acceptance. In particular, NOHSC would need to address the concerns of groups such as the ACTU, the ACCI, State tripartite consultative bodies, State OHS agencies, professional associations, and individual unions and employers.

State Ministers would be advised by their advisory body on matters put before the Council. The Commission envisages that the Commonwealth Minister would wish to be advised by the national organisations representing employers

and employees on such issues. However, with the restructuring of NOHSC the Commonwealth Minister would no longer be able to use the National Commission for this purpose. A specialist advisory body would need to be set up.

A Commonwealth consultative body should include representatives of the agencies that administer Commonwealth OHS legislation (Comcare and Seacare) and those which have a major interest in occupational health and safety. It should include the ACTU, the ACCI and other national employer bodies, such as the National Farmers' Federation.

Recommendation 39

The Commission recommends that the Commonwealth Government establish an occupational health and safety advisory council with representatives from the peak employer organisations, the Australian Council of Trade Unions, the relevant Commonwealth agencies (including Comcare and the Department of Human Services and Health), and experts in occupational health and safety. The Council should advise the Commonwealth Minister on matters before the Ministerial Council.

NOHSC would be responsible for managing the development of national policies and programs, including national standards. The Commission considers standards development would be facilitated by the retention of the Standards Development Standing Committee to advise NOHSC on priorities for standards development, and on the detail of proposed standards.

The Standing Committee should have equal numbers nominated by the Ministerial Council, the ACTU and the peak employer organisations. The Council should also consider including people who have specific expertise in the area under review but are not affiliated to any of the parties.

NOHSC should seek advice from the Standing Committee prior to and following development of a proposed standard in the light of the public consultation process. If one or more of the tripartite partners of the Standing Committee disagreed with the recommendation, NOHSC should advise the Ministerial Council accordingly.

The Standing Committee would help reveal the views and preferences of employers and employees. It would also help achieve consensus, particularly

where there are uncertainties about hazards, and where subjective judgements need to be made.

As the South Australian Government emphasised:

... risk is not an absolute quantity but varies according to its measurement, source information and different perspectives. Thus the tripartite system is designed to identify acceptable strategies to minimise risks from the standpoint of those affected by risks. There is also an understanding that greater ownership of outcomes will be achieved by their joint determination (sub. 147, p. 20).

The proposed arrangements seek to separate the management of standards development from consultation on their development. This is designed to improve the effectiveness and accountability of each function.

Consultation would be more effective because a wider range of parties would be consulted. This will address the concerns of those that are not represented at NOHSC. With 18 members on NOHSC, greater participation can only be accommodated by changing it from a representative to a management body and creating separate representative structures.

By tapping State advisory bodies and the proposed national advisory body, policy would be able to be developed with greater effective input from those with an interest in it. Problems of particular jurisdictions could be addressed earlier in the policy development stage than under current arrangements.

Separating the management of standards development from consultation should also help speed-up development. NOHSC would be directly accountable to the Ministerial Council, which could impose performance and timetable requirements. In turn, the Ministerial Council would be accountable to COAG for progressing reform.

Recommendation 40

The Commission recommends that the Standards Development Standing Committee be retained to advise the National Occupational Health and Safety Commission on the development of standards. The Standing Committee should comprise equal numbers of nominees of the Ministerial Council, the ACTU and the peak employer organisations. The Standing Committee should be able to co-opt OHS experts. Any dispute between the Standing Committee and the restructured National Occupational Health and Safety Commission should be advised to the Council of Ministers.

Use of incorporation

At present the legal status of NOHSC is an unincorporated statutory authority. The Shell Company of Australia suggested that incorporation was a superior legal structure for any reorganised NOHSC:

To consolidate commitment from the participants in the reorganised NOHSC, it should be incorporated along the lines of the National Training Board, with the participants bearing the responsibility for financing its activity, and ensuring its cost-effectiveness. (sub. 67, p. 14).

The Commission sees considerable merit in the proposal. Incorporation of NOHSC/Worksafe under the *Corporations Act* would provide it with a legal structure which was wholly consistent with the philosophy underlying the institutional reforms proposed in this Chapter.

With incorporation, the agency would be a company set up to develop and manage OHS programs on behalf of its shareholders — the Commonwealth, State and Territory Governments. It would operate under a legal regime which would encourage and facilitate the members of NOHSC acting as the board of directors of the company. The Ministerial Council would be a meeting of shareholders, called from time to time to approve the key decisions on the recommendation of the directors. Worksafe would be the executives and staff who are employed to manage the day-to-day conduct of the company.

The company's mission, objectives and functions, as well as the powers and responsibilities of the shareholders, directors and executives of the company could be laid down in the company's Articles of Association. The Articles could set them out in much the same way as they are specified in the NOHSC Act at present. The Articles would not, of course, replace the requirements of the Corporations Act but elaborate the additional needs of the shareholders.

There would be several advantages from the incorporation of NOHSC/Worksafe. In the first place it would obviate the need for any Commonwealth legislation.

This would be useful given the sensitivities of the States to any perceived take-over by the Commonwealth of service delivery in occupational health and safety. In addition, incorporation would:

- facilitate financial contributions from the States to the operating costs of NOHSC/Worksafe;
- reinforce and underline the role of Ministers in the conduct of the agency;
- remove the need for a ministerial council;
- apply commercial principles and accounting standards to NOHSC/Worksafe activities;

- require NOHSC members to act as a board of management for Worksafe; and
- apply the accountability disciplines of the *Corporations Act* to Worksafe and NOHSC.

For these reasons, the Commission suggests that the Council of Australian Governments consider the possibility of incorporating NOHSC/Worksafe when it decides how to implement the institutional reforms proposed in this Chapter.

12 NATIONAL RESEARCH

Research into occupational health and safety is important because it can inform employers and workers about the causes and consequences of work-related health problems — particularly occupational diseases — and how they might best be managed. It also provides crucial information to policy makers necessary for the formulation and execution of effective preventive programs by governments.

12.1 Existing arrangements for research

Some \$10 million is spent annually on applied research into occupational health and safety in Australia — almost all through government and semi-government agencies. The National Occupational Health and Safety Commission (NOHSC) is the major source of funds (\$4.2 million in 1993–94). Other significant contributions come from:

- *State OHS agencies:* The agencies in New South Wales, South Australia and Queensland fund individuals and institutions to undertake specific OHS research projects on their behalf. In 1993–94, this funding amounted to about \$2 million.
- *Workers' compensation agencies:* Comcare, the Victorian WorkCover Authority, the Western Australian Workers' Compensation and Rehabilitation Commission, the Queensland Workers' Compensation Board and the Tasmanian Workers' Compensation Board each have research programs that include OHS research projects.
- *Coal industry:* The Australian Coal Association spends in excess of \$2 million a year on health and safety research and the Joint Coal Board has a research grants program worth about \$1.5 million a year.

About 25 higher education institutions conduct occupational health and safety courses and carry out research into health and safety at work with some funding from the OHS agencies and industry organisations. There is no estimate of the overall level of funding of occupational health and safety research by these institutions.

In contrast, research generally by higher education institutions is funded by the Commonwealth through a dual system involving operating (block) grants to institutions and competitive grants for research programs and projects. Except for some medical research, the allocation of the competitive funding is decided by the Australian Research Council (ARC), which also plays an important role

in advising government on research policy. The National Health and Medical Research Medical Council (NHMRC) is responsible for allocating block funds to several medical research institutes and the rest of the competitive funding for medical research. The funding processes of the NHMRC are similar to the ARC.

No accurate information exists on the level of private sector expenditure on occupational health and safety research.

The *Occupational Health and Safety Research Survey* conducted by Worksafe Australia in 1994 identified a total of 260 OHS research projects being undertaken in that year. Industry, professional associations, unions and government business enterprises, funded 24 on their own and 37 jointly with government — which suggests that the majority of research projects are funded entirely by government.

The *Survey* listed 308 researchers working in occupational health and safety in 1994. Of these, 50 work in the National Institute of Occupational Health and Safety (NIOHS). Those surveyed were either involved in OHS research, or were soon to commence research in the field (many on a part-time basis).

Further information on the funding and administration of research and participants' views on their effectiveness is provided in Appendix S.

Operation of NIOHS

NOHSC both undertakes OHS research (intramural research) and funds others to carry out specific research projects (extramural research). The intramural research is carried out by NIOHS (also known as the Research, Scientific and Statistics Division of Worksafe Australia). NIOHS also provides administrative support for the extramural program. The National Institute is the single largest contributor to OHS research in Australia.

In 1993–94, \$4.2 million was spent by NOHSC on research (or \$7.5 million when all corporate support costs and overheads are included). Approximately 90 per cent of this went on intramural research. External grants awarded during 1993–94 totalled \$960 000 for 15 projects. Worksafe's external program allows for joint funding with other agencies.

NIOHS had 52 research projects in progress in 1993–94. Each was managed by one of its seven specialist units — Epidemiology and Surveillance, Ergonomics, Human Performance Analysis, Occupational Hygiene and Safety Engineering, Occupational Medicine, Statistics, and Toxicology.

The process for allocating research funds is described in Box 12.1.

Box 12.1 Administering NOHSC research

The strategic direction for Worksafe's research program is determined by the National Occupational Health and Safety Commission (NOHSC).

The Research Standing Committee (RSC) advises NOHSC on research priorities and on the annual research program for extramural and intramural research. The RSC is chaired by a member of NOHSC and has two nominees from each of the tripartite partners and five independent expert members. Members are appointed for a three-year term. The Chief Executive Officer (CEO) of Worksafe and the Executive Director of NIOHS are ex-officio members.

The main functions of the RSC are to:

- advise the CEO and NOHSC on research priorities and policies in the light of the current research needs of Australian industry;
- advise the CEO and NOHSC on the development of triennial and annual research programs for intramural research;
- review the annual intramural research program and monitor its progress;
- advise the CEO and NOHSC on topics for extramural research grants; and
- review the progress of extramural research.

Principal investigators develop specific research proposals for the intramural program, some of which will have been nominated by other parties (for example, industry associations and unions). The decision on whether a project proceeds is determined by the Institute Research Committee (IRC).

The IRC was established to review intramural research proposals for their scientific merit, to monitor on-going progress and to select referees for projects that require external review (projects worth more than \$80 000).

Membership of the IRC consists of Worksafe staff. There are four ex-officio members, including the Executive Director of NIOHS (who is also the Chair) and the CEO of Worksafe. Additionally, there are six or seven research members (at least five of whom are from within NIOHS), the remainder coming from other areas of Worksafe.

Management of NOHSC research is guided by the *Research Management Plan*. The Plan sets out various procedures for managing both the research plan for the National Institute as well as the external research program.

Source: Various sources by Worksafe Australia.

12.2 Problems with existing arrangements

Inquiry participants covering the spectrum of occupational health and safety interests expressed concerns about the current OHS research effort. Most comment was directed at the research conducted by NIOHS.

Weakened accountability

When established in 1984, the National Institute had a degree of independence from NOHSC. It was formed when the Research and Scientific Division of the former Commonwealth School of Public Health and Tropical Medicine was transferred from the University of Sydney to NOHSC.

The Director of the National Institute is a statutory officer appointed by the Governor-General and reports to the Commonwealth Minister for Industrial Relations. The CEO of Worksafe is currently the Director of the National Institute. Over recent years, NOHSC has assumed greater responsibility for the National Institute, primarily through its Research Standing Committee.

These arrangements blur lines of responsibility. This reduces accountability — both for those undertaking the research and those making decisions about research priorities and overseeing performance. Mr Mansfield of the ACTU, a former member of NOHSC, commented:

Research has always been an issue which has been grey in my experience. The research interests in the National Commission have always regarded themselves as having a degree of independence from the National Commission. They resisted right throughout the time that I was involved with NOHSC any significant oversight or supervision or direction from the National Commission to the research arm of the national body (transcript. p. 3386–3387).

Under the current arrangements, the responsibility for the National Institute rests with the Commonwealth Minister but NOHSC exercises *de facto* control. Such a division weakens and obscures the accountability of the National Institute to the public for its performance.

NOHSC has attempted to make the National Institute more accountable by determining a research strategy and monitoring performance against it. However, the success of this course of action depends on the ability of NOHSC to act as the board of management for NIOHS. This is questionable. NOHSC is too large to perform this role efficiently. Moreover, members of the Commission have not been chosen for their expertise in doing so nor are they required to put aside their loyalties to the institutions which they represent.

Ms Vallance of the Automotive, Food, Metals and Engineering Union, a member of NOHSC's Research Standing Committee, was supportive of the

efforts of the National Institute but agreed the intramural research program is not adequately managed. In addition, Ms Vallance said that the Research Standing Committee does not have the time or the information to properly manage this program.

The Research Standing Committee which I have recently joined at Worksafe, meant to do that but it's just physically impossible for a body like that to be able to also totally manage exactly ... real day-to-day stuff (transcript, p. 3449).

Lack of relevance

The most significant consequence of weakened accountability is the risk that the intramural research program will be determined by the interests of the researchers. These do not necessarily coincide with the public interest.

Some participants believed that this has been the case with the National Institute's research. There is a bias in favour of epidemiological and medical research. Research into risk management measures seems to be given short shrift considering the importance of risk management in health and safety outcomes. One outcome of this is that the research is neither useful, relevant nor timely. ACCI said that:

... it has been concerned for some time over the performance of the research functions within Worksafe. The perception that the research is esoteric and academic has hindered industry's willingness to participate in the activities that are undertaken. The lack of ability to respond quickly to identified areas of concern has reduced confidence in the program being able to deliver the preventive assistance and material required (sub. 349, p. 23).

The ACCI argued:

What tends to happen is that the process feeds on itself. ... people who have specialty in certain areas keep generating programs in their areas of specialty rather than the total research pool being able to be shifted around as needs in industry evidence themselves (transcript, p. 1410).

The Department of Industrial Relations commented that the research effort is more widely based than perhaps acknowledged. However, they indicated that continued broadening of the research is envisaged (sub. 338, p. 9).

The Australian Minerals Council was critical of the priorities for research into occupational health and safety. In its view:

... preventative research has the greatest potential to contribute towards the improvement of OHS standards for industry (sub. 63, p. 7).¹

¹ The submission by the Australian Minerals Council was submitted under its former title — the Australian Mining Industry Council.

Despite this need, the Council referred to the findings of a study of OHS research conducted by the Victorian Institute of Occupational Safety and Health (VIOOSH). It quoted the VIOOSH analysis of 1583 recent OHS research abstracts as finding that 56 per cent of OHS research was purely descriptive, 28 per cent was investigative and might lead to improved control measures, while only 16 per cent actually set out to research measures to control workplace risks (sub. 63, p. 7).

Inappropriate institutional arrangements

Employer associations, OHS professional and scientific groups, and a number of State governments, expressed concern over a tripartite institution deciding the research to be publicly funded. Their concern was that the research agenda would be compromised by the interests of the tripartite members.

The Victorian Institute of Occupational Safety and Health believes that it is inappropriate for a tripartite organisation to determine the distribution of government funding for OHS research:

Funding approvals are determined by commonly agreed research needs between the tripartite representatives: employer bodies, trade unions and government. Therefore, research priorities are largely restricted to the areas of current mutual interest, which limits the opportunities for useful and valid research undertakings outside of this 'tripartite consensus' framework (sub. 246, p. 19).

The WA Department of Occupational Health, Safety and Welfare raised one case where it felt that 'irrelevant industrial considerations have been used to prevent the funding of research judged to be scientifically valid and of considerable importance to a large number of workers' (sub. 222, p. 36). However, Professor Cross, an independent member of the Research Standing Committee, disputed whether one group could over-ride the decision process. She said:

The unions do not have the dominant vote on that committee in real or power terms and their view will not hold without support from industry, academics and government (sub. 303, p. 7).

The ACCI claimed that there are advantages from involving NOHSC in the research process because it can advise on areas of need and the best strategies for disseminating the research outcomes. However, the Chamber also said that the National Institute should be operationally independent from NOHSC because 'researchers and their results can get drawn into the political and industrial relations debate that surrounds the Commission' (sub. 133, p. 62).

The ACTU commented that tripartism improves the prospects that research will be appropriately targeted and implemented:

The NOHSC process encourages participation and consultation in the research process. The workplace is not a test tube. Social and behavioural research require consent, support and involvement. Action research is the type of research that has implications for the workforce (sub. 336, p. 24).

Hopkins argued that there is valid role for the industrial parties to determine research priorities:

... research is not value free, it is always value laden. This is not a criticism of the research because good scientific research which has scientific merit nevertheless is value laden. If this is the case, then it is appropriate, it seems to me, to have a tripartite forum to discuss the values involved in scientific research because the importance of this forum is that it enables all those values to be put on the table, debated and decisions made which explicitly take account of the values involved (transcript, p. 2820).

Worksafe believes that tripartism has an important advisory role:

... workplace based research requires the involvement and agreement of all parties, especially if there is to be a successful outcome and successful implementation of research findings. These tripartite review processes should serve an advisory and facilitatory function so that the independence and objectivity of the Institute is not compromised (sub. 50, p. 115).

The Commission considers that the existing institutional arrangements are inappropriate. The potential for conflicts of interest on NOHSC, its lack of relevant expertise and the weakened accountability for the performance of research by the National Institute, are not conducive to effective management. That said, the Commission recognises that advice from those with a direct interest in the research outcomes enhances the relevance of the research. Accordingly, the institutional arrangements should provide for tripartite advice on research priorities, but not tripartite management of research.

Poor co-ordination

Some participants said the research is poorly co-ordinated. This has led to duplication of effort. The Australian Coal Association suggested that:

There are numerous bodies (enterprises, industry groups, unions, State and Federal agencies) in Australia who oversee OHS research funding. This unco-ordinated research effort has created overlap and duplication of existing research. This situation is not unique to coal and could be improved through better co-ordination (sub. 112, p. 11).

Steps have been taken to improve co-ordination. In April 1993, NOHSC released its National Research Strategy to provide a framework for co-ordination of research. A national forum of agencies that fund OHS research

met for the first time in August 1994 to share information about current and on-going OHS research. Future meetings are planned on a six-monthly basis.

Worksafe Australia has completed and published the second annual survey of OHS research. The survey was conducted to 'assist those needing to find out about OHS research being done in Australia and the range of specialist facilities available' (1994i, p. 1).

The South Australian Government suggested that co-ordination could be improved by greater 'ownership' by the States of the national research strategy:

Worksafe and State agency contribution toward the national research strategy does require greater co-ordination through more structured liaison of research agencies. Mechanisms to encourage greater State input into the national research strategy would engender greater ownership and cross-agency liaison (sub. 147, p. 53).

The NSW Government said that national forums are an appropriate mechanism for co-ordination:

NSW recognises the need to ensure that there is a co-ordinated approach to OHS research to avoid duplication and wasted resources. The use of national forums is supported (sub. 397, p. 17)

The Commission agrees that a greater sense of ownership of national research priorities by the States would improve the co-ordination of the overall research effort. The institutional reforms proposed in Chapter 11 provide the basis for the necessary institutional changes.

Poor dissemination and application of research

Inquiry participants criticised the reporting of research findings and their translation into preventive solutions. This problem was identified by the Australian Coal Association in commenting on research for the mining industry (sub. 112).

Ms Armour, an OHS consultant, believes that OHS research results are not getting through to the people who need the information:

[Worksafe Australia is] not publishing research in relevant industry journals. It is very nice that the epidemiologists in the UK and the US know that the fishing industry in Australia has one of the highest fatality rates but it's a pity that the Australian fishing industry doesn't (sub. 29, p. 2).

The Australian Council of Trade Unions argued there is a need to improve the user friendliness of information resulting from Worksafe Australia research:

The majority of OHS research conducted is extremely useful, however, in most cases the format and language used to convey research findings to workplace parties means that the information is not read and therefore not applied in a practical sense (sub. 149, p. 37).

Worksafe commissioned a report on ways of improving the uptake of its research. The 1993 report — *Dissemination, Application, Implementation and Evaluation of Worksafe funded OHS research* — included 50 recommendations for improving the dissemination of research results at the workplace level, for applying research findings to the development of standards and codes of practice, and for evaluating the impact of Worksafe projects. The report found that Worksafe's intramural research had a positive impact on the workplace.

OHS consultants, Effective Change, argued that the practical usefulness of Worksafe research has improved (sub. 328, p. 7). However, there is a general view that there is scope for further improvement. Tasmanian Development and Resources stated:

As indicated at the government's submission to the inquiry in November of last year, it's considered there has been significant improvement in the performance of NOHSC and Worksafe Australia in recent years but the government accepts that further review and improvement is necessary (transcript, p. 3821).

The ACTU stated that:

... Worksafe Australia is a major contributor to Australia's occupational health and safety resources. Its effectiveness has improved over recent years and the ACTU believes it is performing well at the present time. However, there is room and there always will be room for further improvement (transcript, p. 1361).

Little private sector involvement in OHS research

According to Worksafe's OHS research survey (1994i), funding for OHS research by the private sector is limited. Of the few privately funded research projects, some are funded jointly with government agencies, such as the joint project between BHP and Worksafe Australia. The ACCI commented on the reasons for this lack of involvement:

Australian industry does not generally regard OHS research as an integral part of doing business. The types of enterprises in Australia that undertake their own research are generally large, national or international companies. The research is usually conducted in-house or overseas (sub. 133, p. 61).

Worksafe considered that Section 73B of the *Industry Research and Development Act 1986* may exclude health and safety research from the 150 per cent tax deduction for private sector research. In its view, occupational health and safety in industry would benefit by removal of such perceived

discouragement:

At a minimum, R&D into occupational health and safety matters should receive equivalent treatment to other industrially oriented R&D. This would mean specific inclusion of occupational health and safety in the Section 73B Research and Development provisions (that is, providing a 150 per cent tax deduction for occupational health and safety research). Allowance of a 100 per cent tax deduction for Research and Development which does not qualify for Section 73B allowances should be considered. (sub. 50, p. 119)

The South Australian Government stated that there is a need to encourage tertiary education institutions to apply their OHS research capabilities to the research needs of industry. It suggested that greater liaison between tertiary education institutions, government OHS agencies and industry was required (sub. 147).

Mr Farr of the Queensland University of Technology believes that current arrangements have stifled the incentives for industry to become involved in OHS research:

At present the occupational research and safety focus in Australia is centred in Sydney. While the benefits of having a strong national research centre are not questioned, there are also benefits in regional growth in occupational health and safety research. Not the least of these is the influence this will have on industry to participate in, and hopefully begin to fund, research in this area (sub. 78, p. 12).

The Commission understands that NOHSC is planning to introduce a program of research and education partnerships with a range of universities (see Box 12.2). One of the reasons for this program is to 'add to the funds available to the OHS area by successfully competing for funds from industry'.

12.3 Reform of research arrangements

In the Commission's view, there are three principles that should guide the determination of national research arrangements.

First, applied research should be demand-driven. It should be specified by the users. This maximises the likelihood that the choices will meet the needs of industry, government and the community. Supply-driven applied research is unlikely to do so.

Second, research funding should, as far as practicable, be made contestable. Funding should potentially be open to all researchers who could do the job to compete for the research task — unless the costs of administering a competitive tender system clearly outweigh the benefits from making research contestable. Competition helps to ensure that value for money is maximised.

Box 12.2 Research partnership between universities and NOHSC

At its December 1994 meeting, NOHSC agreed on a program of collaborative research partnerships between the National Institute of Occupational Health and Safety (NIOHS) and Australian universities. Worksafe's contributions will be mainly in-kind through the use of NIOHS facilities and staff secondments. The Extramural Research Fund could provide some support for collaborative research and some for co-ordination.

Partners are to be chosen on a competitive tender basis. Worksafe said that the criteria for selection is yet to be determined but could include the national character of the proposal (including geographic diversity of partnerships) and the coverage of the content areas of interest. Interactive development between universities may also be encouraged.

The partnerships will be expected to add to the funds available to the OHS area by successfully competing for funds from industry and sources which are presently untapped. The objective will be to improve the quantity and quality of OHS research through building a national network of researchers who fully use the capabilities and resources collectively available in the Institute and the Universities.

The proposed program is in its infancy. No formal program structure has been determined, although Worksafe hopes to have the program running by January 1996.

Source: Correspondence from Worksafe Australia, March 1995.

Third, it is necessary to separate the responsibility for funding research from the responsibility for its conduct to remove any conflict of interest in the decision-making. Such separation also improves transparency of the decision-making in both areas and facilitates flexibility in the allocation of the scarce funds for research.

The Commission concludes that the conduct of Worksafe's research programs are not consistent with these principles.

It is not essential for Worksafe to conduct research itself. Basic research is best undertaken by universities. Applied research to support the development of standards, policy and programs can and should be contracted out, possibly through State agencies. Certainly Worksafe should not be responsible for both dispersing the funds and conducting the bulk of the research.

The Commission supports the thrust of the recent NOHSC decision to promote research partnerships between the National Institute and universities (see Box 12.2). However, the proposal falls short of the contestability necessary.

The concentration of research effort in the National Institute reduces the ease with which resources can be shifted between changing priorities and detracts from transparency in the funding of individual projects. It has also discouraged the emergence of alternative institutions of research excellence. Professor Cross summarised the problems that universities experience under the current arrangements and how greater contestability would improve the overall quality and quantity of research outcomes (see Box 12.3).

Box 12.3 Difficulties faced by research institutions

At present the 120 researchers in universities work with only a tiny fraction of the total funding for OHS research. The system for obtaining this funding is highly inefficient and many good researchers in Universities spend nearly as much time writing proposals to keep contract staff in positions, as undertaking research work.

There is no core funding for the universities for OHS research. All must be sought combatively against priority areas of that year. The universities have no means of planning long term research program because there is no stable funding and rather arbitrary priorities appear each year.

Universities train many PhD students and young researchers who move out of health and safety research because funding is so difficult to obtain.

It is hard to make a good case for continuing research until a project is completed but it takes over a year from submission of a proposal to obtaining a grant. Lack of any core funding means that there is no money to pay for the relevant research worker to continue working in that year. They therefore leave and if the continuation of the project is accepted a new person must be employed with all the associated inefficiencies. A relatively small amount of core funding which is stable would make an enormous difference to efficiency of research in universities.

The cost of a project to the health and safety budget is much less in universities than in NIOHS (if only because of the DEET infrastructure). More effective research could therefore be done for less money.

Most university research groups in OHS are below critical mass in size because the budget available to University OHS research is too low. They have relatively poor equipment (particularly compared with the under-used equipment at Worksafe) again because there is no infrastructure funding. Redistribution would allow several top class Centres to operate with a better diversity of disciplines than exists in Worksafe (sub. 303).

Reactions to the Draft Report

In addressing these issues in its Draft Report, the Commission proposed that the National Institute not conduct research but should be responsible for:

- block funding a small number of ‘centres of excellence’ in OHS research, using the existing intramural research funds; and
- determining the allocation of the extramural research grants.

The Commission recommended that the National Institute no longer undertake research itself but that it be transformed into a small executive board of about five people with demonstrated ability to judge the merits of OHS research proposals.

Inquiry participants were divided over the proposals in the Draft Report.

The proposals were opposed by the Western Australian Department of Occupational Health, Safety and Welfare, a number of recipients of Worksafe research grants, OHS professional associations and most trade unions. All were convinced of the need to maintain a national body to conduct OHS research.

The Department of Industrial Relations expressed concern about the need to maintain ‘critical mass’:

While acknowledging the potential benefits of establishing centres of excellence, we believe it is necessary to look more closely at the critical mass of research talent required for the provision of timely and relevant research on one hand, and the creation of competitive research centres on the other (sub. 338, p. 9).

The Australian Council of Trade Unions (ACTU) felt that the necessary reforms to the intramural research arrangements had commenced and it:

... fails to see how centres of excellence would have more success than the current arrangements at targeting their research (sub. 336, p. 23).

It emphasised the importance of providing for the participation of the industrial parties, especially the trade unions, in the decision-making process.

A number of participants were concerned about the need to maintain an applied focus to research. For example, the Trade and Labour Council of Western Australia argued:

We believe very strongly that the research should have an applied focus and we believe that going to the centres of excellence model which I imagine would be universities or similar-type organisations may move us away from this applied research focus. We believe it’s essential that that be retained (transcript, pp. 2306–7).

The Victorian Trades Hall Council argued:

Taking research out of reach of any tripartite reference group will potentially decimate the focus on applied, relevant research (sub. 348, p. 21).

The Commission agrees, as its recommendation now makes clearer.

The proposals in the Draft Report were broadly supported by others, including the Labor Council of New South Wales, the Northern Territory Trade and Labor Council, the Northern Territory Government, the employer associations, and a number of large employers, such as Shell Australia and BHP. The South Australian Government supported block funding of centres of excellence but not the composition of the executive board of NIOSH.

The ACCI considered that the proposal would resolve its concerns about the current research arrangements. QCCI stated that:

... the new Institute should be made up of people who have a demonstrated ability to judge the merits of occupational health and safety research proposals. QCCI proposes that persons with workplace experience and knowledge also be included on the board. It is important that the board not be seen as purely academic and removed from the workplace (sub. 300, p. 17).

The Victorian Institute of Occupational Safety and Health applauded the proposals and recommended the ARC's Key Centres of Teaching and Research as an excellent model for the centres of excellence in OHS research.

A number of State governments and their agencies felt that the proposals required further examination. These included the New South Wales, Victorian and Tasmanian Governments, and the Queensland Department of Employment, Vocational Education, Training and Industrial Relations.

Reorganisation of the National Institute

In the Commission's view the National Institute could be retained in its current role of a centre of excellence in OHS research — thus overcoming concerns about the loss of expertise and research infrastructure.

Retention of this role, however, should not be at the expense of introducing greater contestability in all public funding of OHS research. The National Institute should therefore have to compete with other research providers and with other centres of excellence in OHS research for block funding.

Retention of the National Institute as a centre of excellence in research would, however, heighten the conflict of interest inherent in it being part of Worksafe and responsible to NOHSC — while NOHSC is responsible for administering and deciding the distribution of research funds through Worksafe. To remove this conflict, the Commission concludes that the National Institute should be separated from Worksafe. The separation of research funder from research provider would ensure that clear lines of accountability are established.

The National Institute should be created as an autonomous agency reporting directly to a Commonwealth Minister and be allowed to undertake research on a fee-for-service basis. Such competitive arrangements are common. Most rural research corporations use contract researchers to deliver the needs of their industry constituents. The ARC and the NHMRC seek proposals for research of the highest standard and only fund a small proportion of those they receive.

The National Institute should have the scope to manage its own block funding and to contract staff on a short-or long-term basis as required. At present, the majority of the National Institute's research staff are employed under public service conditions, which reduces the scope for rapid adjustment in research activities.

Recent studies have concluded that critical mass for a research centre would be achieved with between seven and ten researchers. A larger complement of researchers may be required if, as claimed by the Department of Industrial Relations, OHS research is likely to become increasingly multi-disciplinary in nature. Nevertheless, irrespective of the optimal size of a research centre of excellence, the proposed arrangement would ensure that a critical mass is maintained. Indeed, if there are economies of scale, the separated National Institute would have a competitive advantage.

The proposed arrangement overcomes other concerns raised by the Department of Industrial Relations (sub. 338, p. 11). It would ensure that established links with overseas research institutes are retained. It would also provide a platform for the Commonwealth to co-ordinate OHS research initiatives in the Asia-Pacific region.

Recommendation 41

The Commission recommends that the National Institute of Occupational Health and Safety be established as an autonomous research organisation separate from the National Occupational Health and Safety Commission. The National Institute should be required to compete for funding and be allowed to undertake research on a fee-for-service basis.

Centres of excellence in OHS research

A small number of centres of excellence in OHS research should receive block funding to carry out research. Selection of the centres for funding should be based on their satisfying predetermined selection criteria. Those criteria might include:

- the relevance of a centre's research program to national OHS research priorities;
- the scientific professionalism and experience of the research team involved;
- the centre's plans to communicate and apply the results of the research;
- the willingness of the institution or organisation supporting the centre to contribute resources to its research program;
- a demonstrated involvement from industry including commitments to contribute resources to the centre's research program; and
- a preparedness to have their performance regularly reviewed.

Some, but not all, centres of excellence are likely to be higher education institutions. If this is the case, it may also be appropriate for some of the research centres to also provide an OHS training and teaching program in a higher education institution. Criteria outlining requirements in this area would also have to be developed as a basis for assessing proposals for funding a centre proposing to provide these programs. Centres of excellence should be able to be established outside of the higher education sector, for example, by industry groups.

Research programs in other areas are delivered through selected research centres. For example, the Australian Research Council funds Special Research Centres and Key Centres in Teaching and Research (see Box 12.4). The National Health and Medical Research Council offers program and block grants to a range of medical research institutions.

The Commonwealth could get greater value for the funds it applies to OHS research by requiring centres of excellence to obtain some of their funding from industry. Greater involvement of industry should ensure that the research is better targeted to the needs of industry. The Commission's proposals regarding the development of codes of practice and stronger enforcement should increase the demand for research activity by industry and trade unions.

Box 12.4 Research Centres Program

The Commonwealth's Research Centres Program involves funding of around \$20 million a year and consists of the Special Research Centres and the Key Centres of Teaching and Research. Program funding is decided by the Australian Research Council and is available to higher education institutions.

There are over 20 Special Research Centres. They are established on the basis of research excellence and the potential to contribute to Australia's development. Funding is provided at a rate of between \$0.4 million and \$0.8 million a year for six years, with the possibility of a three-year extension subject to satisfactory review. Reviews of individual Centres are held every three years. Once a Centre's time has expired, its funding is made available to other higher education institutions on a competitive basis. A Centre may reapply for funding.

At present there are about 25 Key Centres of Teaching and Research. The goal of the Key Centres program is to provide a means by which education can respond to emerging national needs for the development of expertise in fields important to national development. The Centres receive block funding of between \$200 000 and \$500 000 per year for a period of six years with a review of progress after three years.

Apart from differences in research emphasis, both the Special Research Centres and the Key Centres have similar overall selection criteria:

- the adequacy of plans to nurture links with industry and other appropriate end-users;
- the potential for the Centre to create social, cultural or economic benefit; and
- the adequacy of host institution funding or provision of other resources.

Source: Department of Employment, Education and Training (1994).

Creation of funding for centres of excellence would ensure that the research effort was carried out wherever it could be best conducted and that a range of research institutions across the nation would be likely to emerge. State governments are more likely to contribute to a national approach to OHS research if the research effort is spread across the jurisdictions.

Recommendation 42

The Commission recommends that block funding be provided to a small number of centres of excellence in occupational health and safety research.

The role of the national institutions

Commonwealth, State and Territory governments should decide whether they want a strong national program in OHS research and whether they are all prepared to contribute towards its cost. The choice of the most appropriate body to allocate any national funding for research depends upon the decisions reached on these two issues.

The ARC and the NHMRC are responsible for allocating public funds for basic and applied research in other areas. Both have well developed systems for assessing and approving applicants against predetermined selection criteria. It may be possible to isolate a pool of funds for either the ARC or the NHMRC to allocate to OHS research.

Until these longer term issues are settled, the Commission considers that the reorganised NOHSC proposed in Chapter 11, should decide the allocation of the existing Commonwealth block and project funding for OHS research. The research priorities for this funding should be set by the Ministerial Council upon advice from the NOHSC.

This would involve NOHSC being responsible for selecting 'centres of excellence' in OHS research and for deciding the extramural grants program. As with the current arrangements, the criteria for allocating funding should be based on selecting proposals that best meet OHS priority areas and offer the greatest benefit to the community. All researchers and research institutions should be eligible to apply for extramural research funding.

Recommendation 43

The Commission recommends that the Ministerial Council decide the priorities for public funding of national occupational health and safety research on the advice of NOHSC. NOHSC should be responsible for allocating the funds for the centres of excellence and for research projects.

As NOHSC itself would not necessarily have specialist expertise in the area, it would benefit from advice from the range of interests — including peak employer organisations, the trade unions, State and Commonwealth OHS agencies, and the OHS professions.

Accordingly, the Commission proposes that a Research Standing Committee be established to advise the new NOHSC — and the Ministerial Council — on research priorities and proposals for funding. Involvement of the relevant

interests on such a Standing Committee would help to ensure that funding decisions are relevant to the needs of the workplace and thereby encourage uptake of research results.

The new NOHSC would also consult widely with the State and Territory OHS agencies and advisory bodies on appropriate research priorities as well as likely candidates for funding under the centres of excellence program. The views of the State and Territory organisations should be provided to the Research Standing Committee to assist it in its deliberations.

NOHSC research in support of its work would be provided on a contract basis by external providers. NOHSC should be responsible for selecting the most suitable researcher or research organisation — such as, a centre of excellence, State OHS agency or a private consultant.

Recommendation 44

The Research Standing Committee should be retained to advise NOHSC on research priorities and funding. The Standing Committee should continue to be tripartite in character but have fewer members. Any dispute between the Standing Committee and NOHSC should be advised to the Ministerial Council.

12.4 National information requirements

The Commission considers that there is one research issue that requires urgent attention by the Ministerial Council — the development of key measures of performance for occupational health and safety programs. The establishment of these performance measures would require the on-going collection of information on the level, causes and cost of work injury and disease.

Relevant and accurate measures are necessary so that the Council can make informed decisions on appropriate occupational health and safety priorities and to assist in the formulation of prevention strategies. The collection of work-related injury and disease statistics on an ongoing and uniform basis is a prerequisite for judging the effectiveness of government policies and programs.

The National Data Set (NDS) as a source of occupational health and safety information has a number of deficiencies. There is insufficient information on the levels, costs and causes of work injury and disease to adequately assess the effectiveness of prevention strategies and the programs to implement them (see Box 12.5).

Box 12.5 The National Data Set for Compensation-based Statistics

Establishment of the National Data Set for Compensation-based Statistics (NDS) required the agreement of the Commonwealth, States and Territories. Their role was to provide Worksafe on an on-going basis with workers' compensation claims data for them to compile, analyse and disseminate. According to Worksafe, the main reason workers' compensation data was chosen to measure national OHS performance was because of its scope and coverage, ease of collection and cost (sub. 50, p. 136).

The NDS is generally perceived by participants and many professionals as an inadequate source of information on the level and cause of workplace injury and disease in Australia. Many concerns relate to the inadequacies of workers' compensation data in general. These include:

- most self-employed and volunteer workers are not covered by workers' compensation;
- cases of workplace injury and disease where workers do not seek compensation or which do not result in successful claims are excluded; and
- occupational diseases, particularly those with a long latency period, are poorly covered.

However, there are additional concerns that relate specifically to the NDS, these include:

- the data set is not complete because some jurisdictions have not provided the data at all or have not fully adopted the NDS definitions and data could therefore not be included;
- the data are not available in a timely manner — the 1992–93 statistics were not available until February 1995;
- injury and disease resulting in less than five days off work is not included (less than 10 in Victoria);
- variations in compensable cases across schemes result in differences in coverage;
- a number of important variables are not included in the data set;
- the data set does not provide adequate information on the causes of fatality, injury, illness and disease; and
- changes in workers' compensation schemes means that the NDS cannot be used to determine trends over time in the levels of injuries and diseases.

Source: Worksafe Australia.

There are concerns about whether workers' compensation claims data should be used as the primary source of information to target prevention strategies. The Queensland Department of Employment, Vocational Education, Training and Industrial Relations argued that:

Workers' compensation data systems have been designed to support the administrative functions of compensation agencies. The resulting statistics do not give valid or reliable information on the status of workplace injury and disease and are therefore poor foundations for the targeting purposes of preventive agencies (sub. 79, p. 35).

Worksafe also warned against over reliance on the NDS statistics:

Data is required to augment the workers' compensation statistics as these statistics provide only a partial picture and can sometimes result in a distorted view if the statistics are not interpreted carefully (sub. 50, p. 141).

The Commission doubts that the cost of maintaining the NDS can be justified in view of its deficiencies and lack of use. Equally meaningful national estimates could be made by aggregating workers' compensation agency data — supplemented from other sources where needed.

The Commission notes that a review of the NDS is to take place some time during 1995–96. This review should be broadened to determine what OHS data is required to satisfy identified needs. This independent study could be contracted out through NOHSC research grant arrangements. If it is recommended that a central agency is required to collect and maintain OHS data, the selection of a suitable agency should be by competitive tender.

The review should look at the possibility of building a national data set based upon a suitable standard for industry to report injury and disease at work. This would involve a more cost-effective approach — the agencies would merely have to aggregate statistics collected by individual firms and industry for their own uses. The mining, petroleum, chemical and plastics industries do this at present using the *Workplace Injury and Disease Recording Standard* issued by Standards Australia. Although there is considerable scope to improve this Australian Standard, the review of the NDS should look at building on this practice, possibility in conjunction with a review of the relevant Australian Standard.

In the course of its investigations, the Commission identified a number of priority information sources. These are briefly outlined in Box 12.6. Further discussion is provided in Appendix S.

Box 12.6 Improving occupational health and safety statistics

Surveys

The Commission considers there is a need for reliable national time-series data on the level of occupational injury and disease. This data could be obtained through a survey, like the Population Survey Monitor which is conducted quarterly by the Australian Bureau of Statistics (see Appendix B). A survey of core questions can provide consistency over time, with the additional benefits of adding specific questions to address new and emerging issues when they arise.

A number of industry groups undertake their own surveys, including the mining, petroleum and chemical industries. Industry-specific surveys play an important role in focusing attention on industry-specific occupational health and safety issues. The Commission considers that greater use of these types of surveys would prove beneficial when addressing specific safety problems.

Cancer registries

Each State has a cancer registry, and requires doctors to report all cancer cases. However, there is no requirement at present to collect information on work history. To get a more accurate picture of the extent of work-related cancer, the Commission considers that all jurisdictions should include this type of information in cases reported to cancer registries.

Coroners' records

Coroners' records could contribute to a better understanding of traumatic workplace death in Australia. However, at present coroners' records tend to vary in the amount and quality of information collected across jurisdictions.

An investigation by the National Injury Surveillance Unit in South Australia (NISU) recommended, among other things, that standard investigation and recording protocols be designed to ensure that coroners records are consistent between jurisdictions. A meeting of representatives of coronial jurisdictions and major user groups endorsed this recommendation in late 1994.

The Commission supports the recommendation by the NISU that jurisdictions adopt the same reporting protocols for coroner's cases — and acknowledges the importance of coroners' reports including specific information on worker behaviour associated with traumatic death.

The following criteria should be used to determine what information should be collected nationally:

- identify what the data is required for, with some assessment of the value attached to having it (prioritising need);
- determine what could be feasibly collected and at what cost;
- identify the least-cost method of providing the data for the requirement(s) identified; and
- provide an overall assessment of cost-effectiveness.

Recommendation 45

The Commission recommends that the proposed Ministerial Council, as a matter of priority, agree on a strategy to improve the knowledge of the state of occupational health and safety in Australia and to establish key measures of performance for OHS programs.

13 CHEMICAL ASSESSMENT

The *Industrial Chemicals (Notification and Assessment) Act 1989* provides for a notification and assessment scheme to assess the risks to workplace health and safety, public health and the environment associated with the importation, manufacture or use of industrial chemicals. This scheme — the National Industrial Chemicals Notification and Assessment Scheme, or NICNAS — is administered by Worksafe Australia. Further information about the regulation of chemicals is contained in Appendix N.

In addition to NICNAS, the Commonwealth Government also administers other assessment and registration schemes for agricultural and veterinary chemicals, therapeutic goods, and food products.

During the inquiry, participants raised concerns about the assessment procedures for industrial chemicals, the dissemination of information about chemicals, the institutional arrangements for NICNAS, and the lack of consistency and co-ordination between chemical assessment schemes.

These issues are discussed in this chapter and options for reform are raised.

13.1 National Industrial Chemicals Notification and Assessment Scheme

NICNAS generates assessments of the risks of industrial chemicals to humans and the environment based on information collected from importers and manufacturers.¹ These assessments aid governments in deciding what controls, if any, are appropriate.

Worksafe assesses the toxicology and work-related risks, and the Commonwealth Environment Protection Agency (CEPA) and the Department of Human Services and Health provide advice on environmental and public health issues respectively.

NOHSC approves the total budget for the scheme. Day-to-day operation is under the control of the Director of NICNAS, a statutory office holder who is responsible to the Minister for Industrial Relations. A tripartite committee advises the Chief Executive of Worksafe on matters relevant to NICNAS.

¹ NICNAS defines an ‘industrial’ chemical as one which is not an agricultural or veterinary chemical, a therapeutic good, a food or food additive chemical or a radioactive substance. The scheme covers chemicals used in industry such as dyes, solvents and plastics, and some used in the home, such as paints, cleaning agents and cosmetics.

When NICNAS was introduced in July 1990, an inventory of about 38 500 industrial chemicals already in use was drawn up. Chemicals in the inventory were designated 'old' chemicals and exempted from the automatic assessment that applies to all 'new' chemicals.

'New' chemicals are assessed to determine whether they should be permitted to be imported or manufactured in Australia. Assessments are also used to generate information to enable government to determine what controls, if any, should apply to the use of a chemical. Some 'old' chemicals have been selected for assessment as Priority Existing Chemicals.

On 9 October 1994, the Assistant Minister for Industrial Relations announced a review of NICNAS by Dr Howard Gwynne, focusing on the implications of the move from 50 to 100 per cent cost recovery in 1996–97, foreshadowed by Cabinet. The final report of the Gwynne Review was released on 7 June 1995.

The Commission's proposals on how to make NICNAS more effective were developed independently of the Review. The Commission has investigated the role of NICNAS in promoting workplace health and safety in Australia. However, issues associated with its administration, including many of those addressed by the Gwynne Review, were not examined.

Assessment procedures

Currently NICNAS focuses on 'new' chemicals entering Australia, which are generally thought to be less hazardous than 'old' chemicals. There are a large number of chemicals in use that have never been assessed for their risks to workers and the environment.

The Plastics and Chemicals Industries Association considered that only 2 to 3 per cent of 'new' chemicals would be subject to control as a workplace hazardous substance. It suggested that many are introduced to replace older chemicals which are more hazardous:

The New Chemicals Program has in effect discouraged the introduction of less hazardous chemicals and in some cases deprived downstream industry of the latest and best technology (sub. 208, attachment, p. 1).

The Commission considers that NICNAS could be made more effective by prioritising assessments to those chemicals which are likely to pose the greatest risks to workers, the public and the environment. Instead of automatically assessing all 'new' chemicals, a limited screening could be conducted to determine whether a 'new' chemical needs to be fully assessed prior to being introduced in Australia. If the requirement to assess every 'new' chemical is

maintained, it would not be feasible to adequately address the hazardous 'old' chemicals with the current level of resources.

This is consistent with the recommendation of the Gwynne Review (1995, p. 37, rec 2.4) that all new industrial chemicals be subjected to a pre-screening to identify what type of assessment is necessary and whether the chemical is suited for an exemption from assessment.

The selection of chemicals for assessment should be based on a set of criteria that includes the likelihood of causing harm to people and the environment, the number of people affected, and the size of the environmental impact.

There needs to be greater flexibility to choose the type of assessment that best meets the Scheme's objectives. That said, the assessments should continue to be conducted in an open way, with a right of appeal on decisions.

Chemical producers and importers could be allowed to nominate chemicals for assessment, or to prepare their own assessments for auditing by NICNAS. This would create an incentive for companies to develop safer chemicals.

In order to prioritise chemicals for review, statutory powers are required to obtain information such as material safety data sheets (MSDS) from suppliers to enable government to prioritise assessments toward the most hazardous industrial chemicals. This would be an extension of existing powers. Better use should be made of other information, such as data collected as part of health effects studies, and the reporting of workplace injury and disease.

There is broad agreement that a change to a more flexible approach to assessment of new industrial chemicals is necessary.

Role of NICNAS in enforcement

State and Territory OHS agencies are responsible for enforcing the requirements of chemical suppliers as set out in OHS legislation, including the provision of information to users about the health and safety risks of hazardous substances.

NICNAS could assist the general enforcement efforts of State and Territory government agencies, by highlighting cases where MSDS are found to inadequately address the hazards of a particular chemical. The enforcement agencies would then prosecute suppliers who had breached their duty of care, based on the information provided by NICNAS.

Central repository of MSDS

Worksafe has established a repository of MSDS. The hazardous substances model regulations — when implemented — would require manufacturers and importers of hazardous substances to provide a current MSDS to the national MSDS repository.

During the inquiry, several participants, including Worksafe Australia, the Australian Food, Metals and Engineering Union and the Public Interest Advocacy Centre, supported the creation of a central repository of MSDS. It was argued that a central repository of MSDS would serve to:

- provide information to help identify problems and to prioritise chemicals for assessment; and
- encourage suppliers to provide more reliable information in MSDS.

If the repository were to be made accessible to the public it would be a source of information for the research community, workers and potential users of chemicals.

The Commission supports the establishment of a national repository of MSDS, and the creation of a legal requirement upon manufacturers and importers of hazardous substances to lodge an MSDS. The cost to manufacturers and importers (who should already have produced an MSDS to meet their duty of care responsibility) should be relatively low.

There are differing views on how the repository should operate. Some participants argued that the repository should be accessible free of charge. For example, the Queensland Farmers' Federation argued that this should be the case since employers are required to provide MSDS to their employees (sub. 362, p. 6).

The Plastics and Chemicals Industries Association (PACIA) commented that many chemical companies are reluctant to lodge their MSDS to a public repository because it would enable a competitors to easily view their full product range (sub. 377, p. 7). Suppliers are also concerned about information being copied incorrectly from the repository (sub. 377, p. 7).

For this reason, PACIA considers that lodgement of an MSDS to the repository should be voluntary (sub. 377, p. 6).

The Commonwealth Environment Protection Agency agreed on the need for a central repository of MSDS, but considered that such a repository need not necessarily be administered by a Commonwealth agency (sub. 400, p. 5).

The Commission considers that the costs of maintaining and updating the repository should be met by government. However, the avoidable costs

associated with providing reports to the public using the information contained in the MSDS repository should be on a fee-for-service basis. This arrangement recognises that there are public good aspects to information about the risks of hazardous chemicals.

In certain situations, it may be appropriate to withhold some confidential information, similar to the current reporting arrangements for NICNAS.

NICNAS's relationship with Worksafe

The Commission's proposed changes to NOHSC and Worksafe outlined in Chapter 11 are aimed at clarifying lines of responsibility, increasing administrative efficiency and improving accountability. The Commission considers that these objectives would be enhanced if NICNAS were administered as a separate entity. If NICNAS were to be retained within the new Worksafe it would be difficult to ensure independent decision-making, and clear lines of responsibility to the detriment of accountability.

Furthermore, as the new NOHSC would be a joint Commonwealth–State body, it would be inappropriate to continue to locate NICNAS — a purely Commonwealth program — within the new Worksafe.

Separating NICNAS from Worksafe would:

- make clear the Commonwealth's sole responsibility for administering NICNAS and assessing the workplace health and safety, environmental and public health risks of industrial chemicals;
- differentiate chemical assessments, which are determined largely by the application of technical skills, from other functions such as standards development; and
- facilitate the integration of assessments conducted for OHS reasons, with similar assessment activities conducted by other Commonwealth agencies for environmental and public health reasons.

Nearly all inquiry participants support the separation of NICNAS from Worksafe. Many participants agreed with the Commission's view that a separation would allow NICNAS to be operated more independently. The ACCI said it:

... has been concerned for some time now about the role of NOHSC in the operations of NICNAS and the accountability of NICNAS to NOHSC. ... the proposal to separate NICNAS overcomes these concerns and ensures that the assessment of industrial chemicals is seen as an independent scientific evaluation not blurred by the politics and industrial consequences of a tripartite body (sub. 349, p. 24).

Options for locating NICNAS include:

- creating an *autonomous unit* within the Industrial Relations or some other Commonwealth Government portfolio;
- an *independent statutory authority*; and
- combining some or all of NICNAS's functions with one of the other chemical assessment schemes operated by the Commonwealth Government.

The Health Department of Western Australia has doubts about the benefits of making NICNAS an autonomous unit:

Whilst it is recognised that the current arrangements may not be ideal, the arguments for creating an autonomous unit within the industrial relations portfolio or combining NICNAS with other Government chemical assessment schemes remain unconvincing in terms of administrative efficiency and effectiveness and cost minimisation (sub. 387, p. 1).

The Department of Health and Human Services also disagreed with the creation of a independent statutory authority for NICNAS. It considered that this would be incompatible with the aim of developing a national co-operative approach to chemicals policy. It also considered that the creation of an autonomous unit outside a Commonwealth departmental structure may not be financially viable given the relatively small size of NICNAS (sub. 403, p. 2).

Some participants wanted to see the administrative responsibility for NICNAS transferred from the Department of Industrial Relations to another government department. For example, the Commonwealth Environment Protection Authority (CEPA) said that:

In the event that NICNAS is separated from Worksafe, transfer to either the EPA or the Department of Human Services and Health would seem to be the most efficient and effective solution (sub. 400, p. 2).

The Department of Community and Health Services of Tasmania argued that NICNAS should be located within the Commonwealth Human Services and Health portfolio (sub. 386, p. 1).

The Australian Institute of Occupational Hygienists (AIOH) noted that NICNAS was originally set up as an environmental initiative. It supported the transfer of NICNAS's administration to the Commonwealth Department of the Environment (sub. 389, p. 1). This is based on a perception that NICNAS under the administration of Worksafe has produced poor quality reports:

... so far as OHS is concerned, NICNAS assessment reports are considered by many of our members to be to well below acceptable standards for application in the area of occupational health (sub. 389, p. 1).

The Gwynne Review (1995, p. 35) considered that NICNAS could be located in, or linked to, another Commonwealth Government agency to achieve administrative efficiencies, but the management of NICNAS would need to be independent of that agency.

In deciding where to locate NICNAS, governments should also consider its relationship with the other Commonwealth chemical assessment schemes, and its role as part of the overall approach to managing industrial chemical risks in the community. Several participants — including the South Australian Government (sub. 275, p. 31) and the Department of Human Services and Health (sub. 403, p. 2) — also emphasised the need to ensure that NICNAS is adequately resourced.

13.2 Other assessment schemes

Currently, the Commonwealth Government operates separate assessment schemes to determine the risks of chemicals for humans and the environment. NICNAS — the assessment scheme for industrial chemicals — is administered by Worksafe.

The National Registration Authority (NRA) within the Primary Industries and Energy portfolio administers a national registration and assessment scheme for agricultural and veterinary chemicals. Under this scheme, Worksafe provides advice on the work-related health and safety risks of agricultural and veterinary chemicals, while the departments of health and the environment provide advice on the risks of these chemicals to the public and the environment.

The Therapeutic Goods Administration (TGA) within the Human Services and Health portfolio administers an assessment and health effects reporting scheme for pharmaceuticals.²

The National Food Authority within the Human Services and Health examines the health risks of food and food additives.

Some State and Territory governments are also involved in activities associated with chemical assessments (TGA, sub. 393, p. 1).

There are concerns about the assessment of chemical risks being conducted by multiple agencies. The proliferation of schemes and dispersion of assessment activities across several government departments and agencies increases the costs to industry of complying with legislation.

² The draft Gene Technology Authority Act proposes to establish a Gene Technology Authority which will control occupational health and safety, environment, public health and transport issues relating to genetically modified organisms (sub. 50, p. 41).

A multiplicity of schemes also increases the costs of government administration. The Department of Primary Industries and Energy said:

In any reorganisation or reassignment of tasks we would favour arrangements which tend toward simplicity, that is the avoidance of a multiplicity of organisations. The reason for this is the avoidance of possible duplication of work, costs of interfacing, and minimisation of overhead costs (sub. 326, p. 1).

The lack of integration of chemical assessments at the Commonwealth level — which generates information on which government decisions are based — works against the development consistent and balanced chemical policies. For example, it is difficult for governments to develop coherent decisions that simultaneously address concerns about occupational health and safety, public health and the environment. The CFMEU, ACT branch said that it had experienced difficulty in getting the OHS risks of organochlorins on construction sites recognised, since it was assessed as an agricultural rather than an industrial chemical (transcript, p. 2814).

Fragmentation of assessment schemes also discourages the development of consistent regulatory approaches and integration of administrative responsibilities in State and Territory governments.

Some State governments are moving towards a more integrated approach to managing risks to work health and safety, public health and safety, and the environment. For example, in Victoria the Health and Safety Organisation now has responsibility for both OHS and public safety. However, at the Commonwealth level there has been little attempt to rationalise government functions.

Assessment schemes attract different levels of funding. These are largely due to historical factors, rather than being based on judgements about the likely risks of particular chemicals for workers, the public, and the environment.

The problems of poor co-ordination and fragmented administration are not new. Over the past 13 years, every major inquiry or study on chemicals has highlighted these problems in Australia (see Appendix N). However, governments have been unable to find an effective solution.

A number of government initiatives are already in place aimed at ensuring better co-ordination of advice. These involve meetings between the different agencies concerned, rather than integration of departmental functions.

The NICNAS Interagency Co-ordinating Committee, comprising representatives from Worksafe, and the departments of primary industry, industrial relations, industry and technology, and health, meet from time to time to discuss matters associated with NICNAS.

The Gwynne Review (1995, p.32) recommended that the heads of Worksafe, CEPA and the Commonwealth Department of Human Services and Health be requested through their ministers to jointly advise on the best mechanism for co-ordinating national industrial chemicals policy, and to provide NICNAS with guidance and direction on how it might assist Federal and State agencies to meet their chemical responsibilities.

The Clearing House on Chemical Safety meets on an ad hoc basis to advise on Australia's representation in international forums.

However, this may not be enough. The Commission considers that there is a strong case — based on the concerns expressed in this inquiry and similar findings in other recent government inquiries — for rationalising current functions.

An integrated chemical assessment body

One possibility of ensuring greater integration would be to combine the functions associated with the provision of independent scientific policy advice, while leaving enforcement and administration of the various assessment schemes with Departments. Creating a single body to conduct assessments would:

- provide greater integration of policy advice, taking into account the risks of a chemical to OHS, public health and safety, and the environment;
- provide an integrated forum for addressing the needs of the users of chemical assessments, including State and Territory Governments, workers, industry, and community groups;
- increase the cost-effectiveness of chemical assessments, since co-ordination of advice would occur in-house rather than externally;
- eliminate the scope for duplication of assessments, to the extent that there are difficulties in classifying a particular substance to a single assessment scheme;
- ensure that community funding provided for different types of chemical assessments is commensurate with the risks from a particular chemical; and
- allow a pooling of the relevant skills required for chemical assessments that are currently dispersed across a range of agencies.

Another possibility is to combine some or all of the schemes, including technical assessments as well as administrative functions.

The benefits of an integrated approach across occupational health and safety, public health and the environment would be greater for those chemicals which pose risks for all three areas, such as agricultural, veterinary and industrial chemicals. For food additives and pharmaceuticals, the environmental effects are generally thought to be small because these chemicals are metabolised by the body and then discharged into waste streams (sub 338, p. 27).

Employers supported more efficient chemical assessments. The Business Council of Australia said it:

... strongly supports measures that will reduce the plethora of agencies and regulations that an individual business has to deal with in order to go about its business activities (sub. 380, p. 3).

The Plastics and Chemicals Industries Association agreed that creating an integrated assessment body would lead to an improvement in administrative efficiency. However, it expressed some reservation about the potential difficulties of dealing with a new and enlarged bureaucracy (sub. 377, p. 8).

The Public Interest Advocacy Centre supports the integration of assessment advice by an agency with the following features:

- independence from interest groups;
- resourcing which is sufficient to allow for more systematic assessments; and
- transparency, participation and accessibility in its decision-making processes (sub. 356, p. 2).

The Queensland Government saw 'tangible benefits from the integration of the major chemical assessment schemes, particularly the environment and agriculture–veterinary schemes' (sub. 316, p. 28).

The National Safety Council supports the integration of assessment advice (transcript, p. 2956). It considers that an important function of an integrated agency would be to provide national advice on risk acceptance criteria for occupational health and safety, public health and the environmental protection.

The main arguments of participants against an integrated assessment body were that the forms of assessment are too different to be combined in a single body, it would lead to a separation of technical assessments from policy formulation, and potential efficiencies would be offset by new problems of administration.

The Department of Industrial Relations (DIR) commented that different levels of risk imply the need for different types of assessment to be conducted for OHS, public health and the environment (sub. 338, p. 27). The Therapeutic Goods Administration argued that the different types of skills required for assessment of OHS, public health and environmental risks need to be accommodated within different government agencies (sub. 393, p. 2).

Similarly, Queensland Health did not support an integration of assessments, as it considered that a single agency would be unable to account fully for the variation in the health status of the general community, which requires a range of assessment techniques (sub. 391, p. 1). As did the ACTU, which cited different levels of risks and different methods of risk assessment as impediments (sub. 336, pp. 25–26).

DIR does not support an integrated assessment body because the necessary link between technical assessment and policy awareness would be lost. It said that:

While this proposal may enhance the efficiency of assessment work, to separate assessors and assessment processes from relevant administration and policy areas may adversely affect efficiency in the longer term. The assessment process is not ‘pure’ science which takes place in a policy vacuum, rather it is a scientific process which requires practical judgement and responsiveness to wider policy objectives of government (sub. 338, p. 27).

CEPA considered that creating an integrated assessment body would add to co-ordination problems at the Commonwealth level, without addressing the more important issue of Commonwealth–State harmonisation. It argued that similar proposals had been put forward in the past without being agreed (sub. 400, p. 1).

The Commission notes that under the current arrangements, assessment of chemicals is separated from policy development in many areas. For example, although NICNAS assessments are conducted jointly by Worksafe, CEPA and the Department of Human Services and Health, these assessments feed into policy formulation in a range of areas outside these agencies, notably at the State and Territory government level. Creating an integrated assessment body would reduce some of the costs of policy co-ordination.

It is unclear whether the types of assessment skills vary so greatly between the individual schemes that there would be potential conflicts if these skills are combined within the one agency. However, even where there is a demonstrated need for special skills, it should be possible to accommodate this through specialised units within an integrated structure.

Over time, it may be appropriate to contract out some of the work of the assessment agency, where the requisite expertise is not available internally, or where it is more cost-effective to have the assessments conducted elsewhere. This would help address a finding of the Gwynne Review (1995, p. 45) that there is a scarcity of skills required for conducting chemical assessments in Australia.

There would continue to be a need for linkages between the new body and the departments and agencies that would continue to administer individual schemes under the proposed approach, and which develop policy. However, the

administering agencies would need to take into account the integrated assessment advice coming from the new body.

Recommendation 46

The Commission recommends that the National Industrial Chemicals Notification and Assessment Scheme be separated from Worksafe. The Commission recommends that the Commonwealth Government consider creating a single agency to provide scientific advice on hazardous materials.

14 ADMINISTERING AGENCIES

The Commonwealth, State and Territory governments each have one or more agencies to administer their OHS legislation — be it a statutory authority or a department of State. The major activity of these agencies is the development and enforcement of legislation. They also deliver a range of preventative programs — research, education, awareness and training.

The appropriateness of the administrative arrangements under which the occupational health and safety agencies operate are examined in this chapter. In particular the factors determining the accountability of the agencies are identified and proposals for improving the effectiveness and transparency of current arrangements are suggested.

14.1 Current arrangements

In 1993–94, government agencies spent in excess of \$117 million on occupational health and safety activities — approximately 97 per cent by State and Territory Government agencies and 3 per cent by agencies of the Commonwealth Government.

Outlays by State and Territory agencies on the development and enforcement of OHS legislation totalled about \$90 million in 1993–94 — 79 per cent of all expenditure (see Table 14.1). This includes the cost of formulating and administering OHS legislation as well as the costs of operating inspectorates.

Other services provided by occupational health and safety agencies include:

- promotion, awareness and education campaigns (about \$10 million);
- OHS research (about \$1.9 million); and
- training programs conducted by the agencies (about \$1.7 million).

Expenditure by the States and Territories per employed person is roughly the same in most jurisdictions at about \$15 to \$17. Of all the jurisdictions, the Commonwealth has the lowest (\$10.60 per employed person) and the Northern Territory the highest (\$20.10 per employed person).

Table 14.1 Outlays by Government OHS agencies, 1993–94

<i>Item</i>	<i>Commonwealth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas^d</i>	<i>ACT</i>	<i>NT</i>
	(\$ million)								
Regulatory activities	3.5 ^b	15.2	4.2	7.3	c	1.8	0.8	na	c
Enforcement	0.4	17.8	15.8	15.3	9.2	7.1	0.8	na	1.5
Promotion, awareness and education	na	3.5	1.7	0.8	1.0	0.8	1.6	na	0.2
Research	0	1.0	0	0.2	0	0.7 ^d	0	na	0
Training	na	0.3	0.3	0.7	0.3	0.1	0	na	0
Consultative body	na	0.1	na	na	1.1	..	na	na	na
Total	3.9	38.0	22.0	24.4	12.1	10.5	3.3	1.1	1.7
	(\$)								
Outlays per employed person (\$) ^e	10.6	14.2	11.1	16.6	15.0	16.2	16.7	7.0	20.1

a Figures are approximate.

b Includes promotion, education, awareness and training, together with some enforcement.

c Regulatory costs are included in enforcement and inspection costs.

d Expenditure by WorkCover Corporation through its Research & Education Grants Committee and Mining and Quarrying OHS Committee.

e The figures for the States and Territories do not include OHS funding by Comcare in respect of Commonwealth Government employees within their borders. This is particularly relevant to the ACT.

na not available

.. not applicable

Notes: Overheads have been allocated to programs based on the proportion of program expenditure to total expenditure.

Figures exclude OHS expenditure in the mining, petroleum and gas industries.

Source: Industry Commission; and ABS (1994, p. 10).

Inspectorates are generally located within the OHS agency in each jurisdiction. The only exception to this is South Australia where inspection is the responsibility of the Department for Industrial Affairs. The cost of enforcement and inspection accounts for about 60 per cent of all expenditure by the State and Territory agencies. Comcare Australia contracts its inspection requirements to State and Territory inspectorates at a cost of \$400 000 a year.

Each State and Territory has a consultative body with representatives of employer associations and the trade unions that advises the responsible Ministers on occupational health and safety matters (see Table 14.2). Only the advisory bodies in Queensland and Western Australia include OHS experts.

14.2 Agency performance and accountability

It is important to have appropriate accountability mechanisms in place to ensure that occupational health and safety agencies have the right incentives to serve the public interest. Agencies have the power to influence the behaviour of individuals in the workplace and impose costs on industry. They also spend about \$117 million a year on occupational health and safety activities with revenue obtained from the taxpayer and the business sector (through workers' compensation premiums).

Ideally, the performance of occupational health and safety agencies should be judged by changes in outcomes — the incidence and severity of injury and disease in each jurisdiction. However, there are factors which influence health and safety which are independent of the effects of public injury and disease prevention programs. The lack of relevant and reliable statistics on work-related injury and disease levels further complicates this problem. Owen Evans from Latrobe University commented that:

If adverse outcomes are either very rare, but of substantial consequence, or are of slow, insidious onset, it may be difficult to devise performance measures that have both face validity and are useful in devising protective or preventative countermeasures (sub. 340, p. 1).

The performance of agencies cannot be judged by simple financial measures such as profit levels, nor is it currently possible to show that public prevention programs have contributed to improvements in workplace health and safety. Consequently, it is necessary to construct alternative criteria by which agency performance can be assessed.

The following criteria provide guidance as to how agencies can be held more accountable for the effectiveness and efficiency of their programs:

- objectives are clear, implementable and measurable;
- programs are regularly evaluated;
- formal reporting mechanisms are in place; and
- progress is reported against predetermined performance indicators.

A criterion underlying all of those listed above is that agency operations should be transparent and open to public scrutiny. Agencies should regularly review and publicise their corporate plans, performance indicators and program evaluations.

The Commission has assessed how the key occupational health and safety agency in each jurisdiction satisfies these criteria. Its assessment was based upon the responses from each agency to a survey by the Commission as well as a review of their annual reports and corporate plans (see Appendix P).

Clear and measurable objectives

Vague or conflicting objectives do not provide clear direction for an agency and can be used to justify the implementation of any number of programs. The most appropriate objectives are those which relate to outcomes rather than inputs. Outcome-based objectives are more likely to encourage an effective use of resources where they have the maximum benefit. For an occupational health and safety agency this would mean that objectives are specified in terms of the impact its programs have in reducing work-related injury and disease.

Each OHS agency has developed a corporate plan or business plan. These plans elaborate their objectives and give guidance as to the strategies and performance measures that the agency will follow to satisfy its objectives.

Most agencies have formal objectives and corporate plans that specify a mix of outcome and input goals. Most corporate plans detail programs to be implemented and the outcomes to be achieved in the upcoming year and over a four year period. For example, the Western Australian Department of Occupational Health, Safety and Welfare has set itself the goal of reducing work-related injury and disease by 10 per cent between July 1993 and July 1997. To enable it to achieve this goal, the Department details annual 'major planned achievements' for each of its program areas.

The goal of the prevention program of the South Australian WorkCover Corporation is to reduce the number of workers' compensation claims by 6 per cent in 1994–95 and by 25 per cent in the period 1992–93 to 30 June 1998 (see Box 14.1). Achievement of such a goal does not necessarily mean that the number or severity of injuries and disease has fallen — it could reflect tighter management of claims.

Program evaluations

Program evaluations are necessary because they give an indication as to whether programs are efficient and effective.

When an agency is developing its programs it should identify a strategy for achieving the program objectives, who is to be targeted by the program, deadlines for implementation, and projected costs and benefits. With these in place, an agency's management can be held responsible for ensuring that costs are within budget, the benefits are realised and that the milestones are reached.

Box 14.1 The Corporate Plan of the South Australian WorkCover Corporation

The South Australian WorkCover Corporation has four goals in its Corporate Plan 1994–95 to 1997–98. The principal OHS goal is to ‘prevent injury, fatality and disease in the workplace’.

These goals are supported by key strategies with the following objectives:

- Achieve a cultural change in the workplace where employers and their employees work together to improve workplace safety (supported by eight key strategies).
- Ensure employers and employees are able to manage the hazards and risks specific to their industry or occupation (supported by three key strategies).
- Have best practice systems in place that ensure the Corporation effectively uses and develops State-wide information (supported by three key strategies).
- Make workplace safety a community issue (supported by two key strategies).

The Corporation said that the performance of its key strategies is evaluated against their impact on claim numbers and costs and their achievements against key objectives, major milestones and budget.

The Corporation has the following six ‘Goal Performance Measures’:

- Improve prevention awareness by employers and employees (at least 6 per cent above the level measured in 1993–94).
- Increase the number of non-exempt employers participating in the Safety Achiever Bonus Scheme (350 employers by June 1995).
- Improve the extent and effectiveness of OHS systems and controls in the workplace (implement a measuring process to monitor the extent to which employers have introduced OHS policies and their effectiveness by December 1995).
- Increase in OHS representation in the workplace (10 per cent of employers with Health and Safety representatives by December 1995 and 100 per cent of prescribed employers/industries with Health and Safety Committees).
- Reduce the number of workplace fatalities (10 per cent reduction per annum to 1998).
- Improvement in ‘exempt employer’ performance.

Most agencies agreed with the need to conduct evaluations. However, few agencies could show examples of program evaluations. In some cases, where evaluations had been carried out, the agencies withheld the results.

The lack of effort to assess the impact of OHS programs is a cause for concern. Public accountability for taxpayer-funded OHS programs is lacking if there is no attempt to evaluate the benefits and costs of an agency's OHS initiatives.

Formal reporting mechanisms

All agencies provide annual reports to their Minister and the Parliament, either as a separate organisation or as a part of the departmental report. The content of these reports varies — most concentrate on program development initiatives.

From these annual reports it is difficult to determine the resources that each agency puts into its various prevention activities. Financial statements detail the levels and items of revenue and expenditure, but a program by program breakdown of funding and staff resources is seldom provided.

All OHS agencies publish a strategic or corporate plan, with some publishing a range of planning documents. The level of detail in these plans varies significantly. Some set out in detail their objectives, performance measures and time frames. For others, the corporate plan only restates the agency's broad objectives.

Performance indicators

Each agency should have a set of predetermined performance indicators that allow government, clients and taxpayers to judge the agency's progress (see Box 14.2). It is important to have indicators that are consistently applied so that trends in performance can be observed through time. Performance indicators provide the basis for the continual improvement in the efficiency with which each agency uses its resources.

Some agencies have spent considerable resources developing performance indicators and benchmarks. For example, each year the Queensland Department of Employment, Vocational Education, Training and Industrial Relations publishes an annual report, a strategic plan, an operational plan and an annual program review. The annual program review systematically reports on the Department's progress in satisfying the performance measures that are set out in the strategic plan and operations plan.

It is a positive sign that some agencies have invested the time and effort to develop performance measures. However, there is very little reporting of progress in meeting and satisfying those measures. The usefulness of performance measures is reduced if OHS agencies are not held accountable for

the outcomes that they planned. Each agency's annual report should provide a systematic review of whether performance measures were achieved. Yet no jurisdiction carries out such a review in its annual report — program successes are widely reported but program delays or failures are rarely noted.

Box 14.2 Designing and monitoring performance indicators

Performance indicators are a useful management tool for identifying potential problems in an organisation. Agencies can also use indicators to demonstrate they are attempting to satisfy their objectives.

Indicators should only be used as a guide to identifying possible problems or successes. There is no substitute for a comprehensive program evaluation for judging the overall merits of a particular strategy.

Jackson and Palmer (1988) suggest the following range of performance yardsticks:

- *Workload indicators* or indicators of the volume of output (for example, the number of workplaces inspected);
- *Economy indicators* which show actual input costs compared to planned costs (for example, cost of an awareness campaign compared to the budgeted cost);
- *Efficiency indicators* which give actual inputs as ratio of actual outputs (for example, unit cost for each workplace inspected);
- *Effectiveness indicators* which show whether the corporate objectives have been achieved (for example, workplace injury and disease outcomes);
- *Equity indicators* which measure access to different services to various groups in the community (for example, availability of OHS published material for groups from non-English speaking backgrounds);
- *Excellence indicators* show how satisfied client groups are with the services provided.

Performance indicators are given meaning when they are compared against a benchmark — targeted performance, the trend in performance or when benchmarked against the performance of similar organisations.

Summary

Although some jurisdictions are better than others, the Commission considers that overall accountability of occupational health and safety agencies to government and those affected by their policies is generally poor. Little effort is

made to assess the benefits of individual programs and it is difficult to distinguish program costs.

There is little systematic reporting of progress in achieving performance measures in annual reports.

Given the value of the resources under the control of the agencies, the lack of accountability of OHS administrations for the programs they conduct is a major failing. It is an area where agencies can and should improve.

Recommendation 47

The Commission recommends that OHS agencies are accountable for their performance. This means that their programs should:

- have clearly defined and measurable objectives;
- are adequately evaluated before implementation;
- have key performance measures; and
- be regularly monitored for their effectiveness and the results published.

14.3 Funding of OHS activities

The funding of OHS agency activities mostly comes from either consolidated revenue or workers' compensation premiums. In 1993–94, Comcare Australia and the State and Territory OHS agencies raised over \$117 million for their OHS programs — \$68.6 million was from premiums and \$41.8 million was appropriated from consolidated revenues (see Table 14.3).

In 1993–94, State and Territory agencies earned \$33.7 million from fee-for-service activities such as licensing fees and the sale of publications. The majority of this revenue was paid to consolidated revenue.

The jurisdictions with integrated OHS and workers' compensation agencies tend to raise the bulk of their revenues from workers' compensation premiums (with the exception of the Northern Territory). In 1993–94, New South Wales funded 97 per cent of its OHS activities from workers' compensation premiums.

The States with separate OHS administrations generally rely on consolidated revenue to fund OHS activities. The OHS authorities in Western Australia and Tasmania obtain almost all of their funds from consolidated revenue.

Queensland obtains about 75 per cent of its OHS budget from consolidated revenue.

Comcare Australia imposes a contribution levy on all Commonwealth Government agencies. The contribution is determined as a percentage of each agency's premium payments. A notional premium is used to calculate contributions for those organisations which do not pay a workers' compensation premium to Comcare. In 1993–94, Comcare raised \$3.9 million for its OHS program.

Table 14.3 Source of funds for Government OHS agencies, 1993–94
(\$ million)

<i>Sources</i>	<i>Commonwealth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA^a</i>	<i>Tas^b</i>	<i>ACT</i>	<i>NT</i>
Workers' compensation	3.8 ^c	38.0	17.0	6.5	0.2	3.1	0	0	0
Consolidated Revenue	0	0	5.5	17.7 ^e	12.0	0.9	3.3	0.8	2.6
Retained Revenues ^d	0.1	1.2 ^f	0	0.2	0	5.9	0	0.1	0.1
Total funds	3.9	39.2	22.3	24.4	12.2	9.9	3.3	0.8	2.8
Revenues paid to consolidated revenue ^c	0	0	7.2	17.1 ^f	0.4	0	0.9	0.5	0

a Since 1 July 1994 funding for OHS activities other than enforcement has been obtained through WorkCover premiums.

b Figures are approximate.

c Comcare obtains OHS funding from employer contributions, drawn from outside the premium system. Workers' compensation premiums, and notional premiums in the case of self-insurers, form the basis for calculation of OHS employer contributions.

d Revenue earned from regulatory, enforcement and fee-for-service activities.

e Revenue raised mainly through a workplace registration fee and a construction work notification fee.

f WorkCover Authority retains all costs and disbursements and half of total fines.

Source: Industry Commission.

As ties between the workers' compensation and occupational health and safety authorities become closer, the proportion of occupational health and safety funding from insurance premiums has generally risen. State and Territory governments may see an advantage in funding their occupational health and safety programs this way, particularly where business benefits.

Many OHS administrators see workers' compensation premiums as a potential source of revenue that they could use to expand the range of prevention

activities they provide. For example, a 2 per cent levy on all workers' compensation premiums would raise about \$100 million a year.

The use of premiums to fund injury and disease prevention can have the advantage that the beneficiaries of health and safety programs fund those programs. An occupational health and safety surcharge on premiums is one way for governments to recover those costs of work-related injury and disease that are not borne by employers.

Funding occupational health and safety programs from surcharges on workers' compensation premiums can also create a financial incentive for experience-rated firms to improve their safety records. This is because better performers have relatively lower premiums and therefore contribute less to public occupational health and safety activities than those businesses with poor safety records.

In practice, a number of inequities arise from the use of premiums surcharge as a source of funding. For instance, those employers who are committed to providing a safe working environment, but not experience-rated, contribute disproportionately to the cost of public OHS programs. In addition, many beneficiaries of OHS programs do not pay workers' compensation premiums — for example, the self-insured and self-employed.

In the Commission's view, there is a case for a mix of funding sources to be used to resource OHS prevention campaigns. Whatever the mix, there ought to be transparency in the sources of funding.

Funding from consolidated revenue is necessary to cover those groups in the community that do not contribute to a workers' compensation system. Enforcement activity is one area where the business targeted for inspection does not necessarily pay a compensation premium.

Premium funds are most appropriately used where the beneficiaries of the OHS activity are those employers that pay workers' compensation. Some awareness and research programs satisfy this criterion.

Safeguards should be put in place to ensure the transparent use of premium funds. For example, business should be aware of how much of their premium payment goes into workers' compensation insurance and how much goes into injury and disease prevention.

The Health and Safety Organisation of Victoria supports a mix of funding sources:

It provides a mix of funding for the overall prevention activity which recognises both the direct compensation insurance benefits and the broader community benefits of such public sector actions (sub. 176, p. 33).

Most OHS agencies charge a fee for some of their services. A fee-for-service policy is appropriate where those who pay for the service are the major beneficiaries of the service. As noted by the Western Australian Department of Occupational Health, Safety and Welfare, fee-for-service has the potential to free up valuable resources:

In recent years occupational safety and health agencies in a number of jurisdictions have moved to give the private sector a role in conducting certification and licensing functions previously conducted exclusively by government agencies. These changes have resulted in employers paying for services previously provided either free of charge or below cost by government agencies ... The use of external assessors has allowed the reallocation of human and financial resources to areas of high priority for the prevention of occupational injury and disease (sub. 222, p. 19).

Recommendation 48

The Commission recommends that the funding of OHS programs be from a mix of sources including fee-for-service. Programs with broad community benefits should be largely funded by the taxpayer. Those that directly benefit employers with workers' compensation insurance should be largely funded by workers' compensation premiums.

14.4 Integrating OHS, workers' compensation and rehabilitation

In all States and Territories, the same government agency administers both occupational health and safety and workers' compensation legislation. In Victoria, Queensland, Western Australia and Tasmania the legislation is administered by separate divisions of the same department.¹ Victoria is the only State where different ministers are responsible for the two policy areas.

There are five integrated occupational health and safety, workers' compensation and rehabilitation agencies in Australia. All integrated administrations have been given corporate names to identify the agency. These are Comcare Australia, NSW WorkCover Authority, SA WorkCover Corporation, ACT WorkCover, NT Work Health Authority.

In most integrated agencies, the workers' compensation arm has objectives related to prevention. For example, one of the functions of the Western

¹ The Victorian Department of Business and Employment services six ministerial portfolios including the Minister for Industry Services (OHS) and the Minister with Responsibility for WorkCover.

Australian Workers' Compensation and Rehabilitation Commission is to 'assist in encouraging the prevention or minimising of accidents, injuries, losses of functions, and diseases in respect of which compensation may be payable under the *Workers' Compensation and Rehabilitation Act 1981*'.

The *Queensland Workers' Compensation Act 1990* provides for the payment of monies from the Workers' Compensation Fund for purposes that will assist in the prevention of injury to workers. One of the objectives of the Victorian WorkCover Authority under the *Victorian Accident Compensation Act 1985* is to 'assist employers and workers in achieving healthy and safe working environments'. In order to meet this objective, the Authority has been conducting an extensive public awareness campaign over the last two years to promote health and safety in the workplace.

Integration in administration

The potential exists for an integrated workplace health and safety, workers' compensation and rehabilitation agency to create mutually beneficial incentives for both programs, provided that prevention is the dominant strategy for reducing workers' compensation costs.

OHS agencies are interested in compensation policy because prevention incentives can be applied through premium levels and structures (see Chapter 10). An integrated agency with a strong preventative focus would be encouraged to implement innovative premium arrangements that fully exploit the financial incentives for health and safety which are available from the workers' compensation system.

On the other hand, critics of administrative integration argue that workplace health and safety priorities become misplaced when there is joint management of the two activities. Hopkins (1993), for example, opposed integration:

The concerns of compensation and prevention agencies are not the same and the fear is that the merger of the two will result in prevention being swamped by the 'bottom line' of compensation costs ... Compensation commissions are far more accountable for their financial performance than OHS authorities are for the level of industrial accidents. Thus compensation concerns are likely to take priority over those of prevention whenever a choice between the two has to be made (1993, p. 5).

The South Australian Government supported integration but cautioned that:

If functions are integrated there is the ... risk that OHS will become subservient to compensation issues. Issues like cancer, noise induced hearing loss, lung disorders and other toxicology related matters, particularly those with long latency periods, are significantly under-reported in workers' compensation statistics. Thus targeting based on workers' compensation statistics will under-emphasise these types of issues (sub. 275, p. 40).

Some integrated agencies have set up an OHS unit within their organisational structure to ensure that their preventative programs are appropriately targeted. The South Australian WorkCover Corporation has an OHS Division and the WorkCover Authority of New South Wales has a Risk Management Services Division.

The Commission recognises that there are a number of potential advantages from integrating the administration of workplace health and safety, workers' compensation and rehabilitation. However, it is unable to conclude it is the best administrative structure in all circumstances. It is more important to integrate the *policy making* in workplace health and safety, workers' compensation and rehabilitation irrespective of whether the administration is carried out by one or more agencies.

As discussed in Chapter 10, workers' compensation premiums provide an incentive for employers to improve health and safety at work. It is in the interests of those responsible for occupational health and safety policy to ensure that full use is made of this incentive. It would be beneficial if, as far as possible, premiums are set to reflect the risks in each workplace and compensation cover the cost of work-related injury and disease.

Data from workers' compensation claims provides useful information for policy makers to design prevention programs for occupational health and safety agencies. Therefore, it is important that communication channels are established so that claims data can be shared. It is equally important for occupational health and safety policy makers to supplement this information with other data and evidence.

The influence of prevention programs on the incidence and severity of work-related injury and disease is difficult to determine. The difficulties increase when two government agencies operate similar programs to achieve the same goal. Under this situation there would be a natural tendency for each agency to take credit for the successes of the other organisation and to pass on responsibility for policy failures.

The Commission considers that there should only be one agency responsible for implementing prevention programs in each jurisdiction. This is not a problem where there is an integrated organisation responsible for both workplace health and safety and workers' compensation. However, public accountability in those jurisdictions with separate administrations is jeopardised when the workers' compensation agency conducts injury and disease prevention activities independently of the OHS agency.

Recommendation 49

The Commission recommends that governments integrate their occupational health and safety and workers' compensation policy making.

14.5 Inspectorates

The Commission proposes that inspectorates adopt a more deterrence orientated approach to enforcement, that inspections be targeted on workplaces where the potential benefits of prevention are greatest and that inspectorates use a wider range of penalties (see Chapter 7). Given this sharper focus on enforcement, it is important that those responsible are accountable for their administration.

On a day-to-day basis inspectorates have to operate at arms length from government. This is to assure the community that there is no political interference in decisions to use sanctions in particular cases. Such operational independence necessitates stronger accountability for overall performance.

A United Kingdom review of OHS legislation by the Health and Safety Commission (1994) emphasised the importance of an enforcement authority to be accountable by having a transparent policy that details how it will carry out its responsibilities:

[Companies] want to be clear what the law requires, and what is advice rather than mandatory; about who will inspect them, and roughly how often; and about the criteria which the inspectors will apply in seeking to secure compliance with the law (p. 34).

The Commission considers that responsibility for the inspectorate in each jurisdiction should be clearly delineated from any other functions conducted by the parent agency. There should be clear lines of responsibility for those in charge of enforcement.

Mining inspectorates

The mining industry has traditionally been located within the department responsible for mineral resources. In some States there is specific mining legislation administered by a specialist inspectorate (Victoria, Queensland, Western Australia and the Northern Territory). In New South Wales, there is a specialist mining inspectorate which administers the application of the general OHS legislation to the mining industry. South Australia, Tasmania and the Australian Capital Territory do not have separate legislation or inspectorates for the mining industry.

In States and Territories with separate OHS legislation for mines, the legislation tends to duplicate the principal OHS legislation. Separate administration of such legislation compounds the likelihood of duplication of effort in the development of OHS standards and policy.

The greatest concern with specialist mining inspectorate located within a department of mineral resources is the potential for conflict between departmental objectives to enforce safety standards and to encourage mining development. After considering this issue, Kelly recommended that responsibility for health and safety in the Western Australian mining industry be transferred to the Minister for Productivity and Labour Relations:

There is nothing wrong ... with the Department of Mines and the Chamber [of Mines] having a co-operative relationship. However, one must entertain some doubt as to whether the degree of endorsement, each of the other, is healthy in a case where one is to be the auditor of the members of the other and responsible for discipline when it is necessary ... it is ... important ... that the ability and the will to prosecute when it is necessary is not compromised by a too friendly relationship (1991, p. 106).

Perceptions that the relationship between mining inspectorates and the mining industry may become 'too friendly' are reinforced by the history of prosecutions in the mining sector. During the period 1990–91 to 1993–94, neither the Queensland nor the Northern Territory mining inspectorates prosecuted a single employer. Similarly, the mining inspectorate in Western Australia did not record a single prosecution over the period 1991–92 to 1993–94.

The South Australian Government considered the integration of mining inspectorates with general OHS inspectorates to be 'highly appropriate', because 'it is important to avoid conflict of interest between OHS considerations and resource management matters' (sub. 275, p. 41).

The ACTU also expressed concern about potential conflict of interest problems. It referred to the report of the inquiry into the Piper Alpha disaster chaired by Lord Cullen:

In that case, it was found that the Health and Safety Executive could have ensured a better standard of health and safety due to its OHS expertise and that the Department of Energy had difficulty resolving the conflict between its roles in increasing oil production and health and safety outcomes (sub. 149, p. 17).

Some inquiry participants believed there was a case for having a specialist mining inspectorate. The New South Wales Minerals Council (sub. 327), the New South Wales Coal Mine Managers' Association (sub. 383) and Woodlawn Mines (sub. 372) contended that the mining industry has to deal with unique health and safety issues that require specialised expertise. They feared that integration would lead to a loss of this expertise within the inspectorate, and

could result in a diminution and downgrading of inspection activities in the mining sector.

The Commission is sympathetic to these concerns. However, it considers that such expertise should be maintained within a discrete unit within the general OHS inspectorate. This would ensure that the inspectorate could deal adequately with the unique health and safety issues faced by the mining sector, while at the same time reaping the benefits of integration — removal of the potential for conflicts of interest, pooling of skills and experience, and savings in administration overheads and services.

The Tasmanian Government recently moved to integrate its mining inspectorate with the general OHS inspectorate in the Department of Development and Resources. Mr Beaton from the Department stated that this approach can work as long as there is a discrete unit in the inspectorate with the expertise to regulate the mining industry:

... the department's manager would not wish to break down or disperse expertise within the mining inspectorate or indeed in what were other workplace inspectorates but the departmental manager believes that can be achieved in this situation (transcript, p. 1828).

The NSW Coal Association considered that it was important to ensure that sufficient trained inspectors were available, irrespective of the location of the inspectorate:

... administrative arrangements for the location and operation of inspectorates should be as cost-effective as possible. While there is a need for specialist industry expertise within the inspectorate, the overriding issue is that sufficient inspectors competent to perform the role required by regulation are available to encourage and support industry efforts to improve OHS and to enforce legislative provisions (sub. 112, p. 9).

Recommendation 50

The Commission recommends that State and Territory Governments integrate mining inspectorates with the OHS inspectorate. However, a discrete and specialised mining inspection unit should be maintained within the OHS inspectorate.

15 CO-ORDINATION OF OHS AND OTHER RELATED POLICIES

Government policies on occupational health and safety, public health and safety, and the environment have similar or complementary objectives. In the area of hazardous materials, these policies relate to such matters as assessment of risks, mandatory controls on use, storage, handling and transportation, provision of information, enforcement, and consultation with the public.

Policy responsibility often falls in different portfolios. There are a large number of administering agencies — sometimes co-located with the policy department, but often in separate agencies. The agencies involved in developing and implementing policies relating to hazardous materials include OHS, health, environment, transport, planning, and emergency services.

Different levels of government are also involved. For example, the Commonwealth Government regulates the importation of chemicals and other hazardous substances, assesses chemical risks, and sets national standards. State and Territory governments control their use through legislation covering occupational health and safety, dangerous goods, factories and shops, pesticides, poisons and radiation. In some States and Territories, local government also has jurisdiction.

Business has to simultaneously satisfy government health, safety and environmental protection requirements. These requirements can necessitate interaction with a number of agencies, at different levels of government. The requirements that have to be met can be inconsistent. Where they are similar, effort is duplicated in separately meeting essentially the same requirement.

These problems have been raised many times. Governments have looked at ensuring a consistent approach and rationalising administrative arrangements. However, difficulties in standardising legislative requirements and changing the machinery of government have prevented sufficient change to quell concerns about unnecessary impositions on business.

They were raised again in this inquiry. Participants argued that more could be done to co-ordinate policy, harmonise requirements and rationalise administrative arrangements.

Given the limited scope of this inquiry, the Commission has not inquired into all the issues in depth. The focus of the inquiry has been the co-ordination of OHS policy with other related policies.

Some recent studies that touch upon the issue of policy co-ordination in the area of hazardous chemicals management are mentioned in Appendix N.

15.1 Case for better co-ordination

The need for better co-ordination in the administration of chemicals legislation has been raised in recent studies such as the NSW Government's Chemical Inquiry (1991), and the Auditor-General of Victoria (1995) report on dangerous goods management.

The need to integrate policies for occupational health and safety, the environment and public health was recognised by the Robens Committee:

It is obvious that many health problems of the working environment and of the public environment emanate from the same sources within workplaces. Clearly, it is important to integrate the approaches to control of the working environment and control of the general environment (1972, p. 34).

Robens concluded that where the internal and external problems arise simultaneously from the same source of hazard, it is not sensible to divide the control arrangements. The Cullen Inquiry into the Piper Alpha accident in 1988 in the United Kingdom recommended that a single agency be responsible for managing the risks of major hazards such as offshore oil platforms (UK Department of Energy 1990).

Many participants in this inquiry complained about poor policy co-ordination. For example, the Public Interest Advocacy Centre argued that the artificial separation of occupational health and safety from other concerns results in inconsistent treatment of hazards such as lead, in terms of its impact on occupational health and safety, public health and the environment (sub. 109, p. 5). Another example of inconsistent policy is the different requirements concerning the provision of information about OHS, public health and environmental risks of chemicals to the public (Fuller 1995).

The recent Ministerial Review of NICNAS conducted by Dr Howard Gwynne noted that similar problems associated with co-ordinating chemical hazards policy occur in other countries:

Many countries are struggling with these same problems as environmental, health and chemical issues emerge as issues of increasing community concern. There is no 'world's best' model for combining occupational health and safety, public health and environmental concerns and developing a co-ordinated approach to chemicals. Yet governments everywhere can expect increasing pressures for an integrated approach to managing chemical hazards (Gwynne 1995, p. xiii).

The Plastics and Chemicals Industries Association (PACIA) attributes poor policy co-ordination in part to competition between government departments:

There's certainly need for better co-ordination of government departments and involvement of industry with respect to international chemicals management issues. We see a level of competition between government departments in this area which doesn't help us and I don't think it helps them or the country (transcript, p. 3552).

In recognition of the inter-related nature of workplace risks, many enterprises have set up integrated management systems to deal with the risks posed by business operations to workers, the public and the environment. For example, the Shell Company of Australia has set up a Health, Safety and Environment Management System (sub. 67, p. 5).

Mr Jones, representing Hoechst Australia, a large chemicals manufacturer, commented:

Certainly we feel that the integration of health safety [and] environment is increasing in companies. Companies have come to recognise that there shouldn't be boundaries in there between what really is safety inside the plant and safety outside the plant, that those boundaries don't really exist, it's a historical thing the way things have developed (PACIA, transcript, p. 3563).

The Commission considers that any scope to increase the consistency of policies across portfolios dealing with occupational health and safety, public health, the environment, transport, planning and emergency services should be exploited if practicable. To this end, the new Ministerial Council (proposed in Chapter 11) should take on the responsibility of co-ordinating OHS policies and actively seek to integrate OHS policy with Commonwealth and State policies in related areas.

15.2 Co-ordination of functions

One way of ensuring consistency between occupational health and safety, public health and safety, and the environment is to combine the programs of government agencies and departments responsible for these areas.

The Commission suggested in its Draft Report that there might be efficiency gains from combining the inspections of workplaces for occupational health and safety, public health and safety, and environmental reasons. Joint inspections would lead to administrative savings, and lower business costs, since employers would reduce the time spent on inspections. Furthermore, there may be scope to combine research and advisory functions.

Some State governments have integrated occupational health and safety with other policy areas. In Victoria, the Health and Safety Organisation (formerly the

Occupational Health and Safety Authority) has responsibility for both occupational health and safety and public safety.

In South Australia, the Department of Environment and Natural Resources is examining ways of harmonising management of environmental risks with the consolidated OHS regulations introduced in April 1995 (sub. 399, p. 2). The Department considers that a central agency should provide technical assistance on chemical safety issues within the South Australian Government, and that this agency should be allowed to conduct a single risk assessment for hazardous substances used in all government work sites.

Most inquiry participants considered that it would be difficult to fully integrate government functions across occupational health and safety, public health and safety, and the environment. For example:

- Queensland Health did not consider a combination of inspectorate functions feasible for Queensland due to the different approaches and expertise required (sub. 391, p. 2).
- The South Australian Government considered that there is little further scope to combine inspection functions in South Australia (sub. 275, p. 51).
- The Victorian Environment Protection Agency said that it would be impractical to consolidate functions or legislation across OHS, public health and safety, and the environment (sub. 392).
- The NSW Health Department argued that regulatory responses in the environment often need to be more far ranging than the approach in OHS legislation. in order to account for the complexities of major urban pollutants (sub. 395, p. 1).
- The CFMEU, ACT branch expressed reservations about combining occupational health and safety and public health, due to their different policy focus (transcript, p. 2815).
- VECCI argued that the benefits associated with reducing the number of bureaucracies 'may be offset by the negative aspects of producing one massive inflexible bureaucracy' (sub. 313, p. 26).

Other participants, however, saw scope for consolidation of some government functions. For example, Shell Australia supported health departments having responsibility for occupational and public health and safety (sub. 308, p. 4). Farmsafe Australia said that the public health industry has the required skills in health improvements for small business. It argued that integration, or at least networking of OHS, the environment and public health agencies should be a priority in the interests of small business (sub. 366, p. 1).

QCCI argued there would be benefits in combining government programs for occupational health and safety, the environment and public health where these areas overlap. QCCI cited noise management at the work site as an area where there is an overlap between environmental protection and occupational health and safety (sub. 300, p. 22).

PACIA recognises the practical difficulties of combining government departments, since they serve different groups of people. Nonetheless, PACIA agreed there would be efficiency gains from combining inspection functions (transcript, p. 3564).

The Department of Industrial Relations suggested several ways of ensuring better co-ordination between government agencies without requiring full integration of functions (sub. 338, pp. 25–26). These include, for example, membership of multi-jurisdictional committees, each agency seeking and accommodating comment from other agencies in drafting of new policy and legislation, seeking for consistent definitions in relevant policy statements, and commitment to consistency of policies and the concept of a lead agency.

The most effective institutional arrangements for delivering OHS, public health and safety and environmental programs are likely vary. In some cases, integration of functions will be appropriate (as has occurred in Victoria). In others, co-ordination might be better served by a lead agency arrangement (as, for example, with hazardous substances and major hazardous facilities) or inter-departmental committees (for example, in NICNAS). The ACT Government said that it has been able to achieve effective co-ordination through inter-governmental committees, because of the small size of its administration (Department of Health and Community Care, sub. 388, p. 1).

The aim should be for governmental approaches that promote the best occupational and public health and safety, and environmental outcomes at the workplace.

Innovative approaches may be required. In Victoria, the Department of Business and Employment (DBE) co-ordinates the Best Practice Regulation Program at the Altona Chemical complex. As part of the Program, the five chemical companies in the complex co-operate with State Government agencies responsible for occupational health and safety, environment, planning, emergency services, water supplies and natural resources, to devise better means of supervision that achieve the objectives in existing legislation in more effective ways.

Similar programs exist in the State of New Jersey in the United States, Canada, Holland, Singapore and Japan (Rust PPK and Luminico, transcript, p. 3588).

Greater co-ordination of Commonwealth and State government activities is also required. For example, the Gwynne Review (1995, p. 32) found that there needs to be greater focus on ensuring effective co-ordination between the administration of NICNAS and State and Territory Governments which implement programs to control the use of hazardous chemicals. CEPA agreed with this finding (sub. 400, p. 4).

The Queensland Department of Environment and Heritage argued that State governments should be involved directly in the assessment of chemical risks, since they are one of the main users of the outputs of chemical assessments:

... as the States will remain the major regulatory agencies, their exclusion from the assessment process could have undesirable effects and the alternative of placing the assessment in a joint Commonwealth–State agency has some advantages (sub 398, p. 1).

In the Commission's view, governments should look at ways of improving co-ordination of assessment advice between the Commonwealth and the State and Territory agencies — occupational health and safety, health, environment, transport and planning — that administer legislation controlling the use, storage, handling and transportation of hazardous materials. The integration of assessment advice at the Commonwealth level proposed in Chapter 13 would facilitate such co-ordination.

The Commission notes that there are several initiatives underway aimed at ensuring better co-ordination, such as the Clearing House on Chemical Safety hosted by the Department of Human Services and Health. However, DIR considered that there is scope for better co-ordination and harmonisation of functions, such as in the area of classification and labelling requirements (sub. 338, p. 27).

In the Commission's view, more can be done to reduce the scope for administrative overlap, by clarifying responsibilities. If it is not possible to combine relevant functions in a single agency, a lead agency should be appointed to oversight co-ordination.

The need for co-ordination would be reduced if legislation is rationalised so that administration and compliance is simplified. This would be facilitated by adopting similar regulatory principles, harmonising regulatory requirements and consolidating legislation wherever possible. Some options for legislative reform are raised in the following section.

15.3 Reform of legislative approaches

There are many inconsistencies in the regulation of occupational health and safety, public health and safety, and the environment. For example, in nearly all jurisdictions, under the principal OHS Act an employer has a duty of care to ensure the health and safety of their employees and members of the public. However, this duty of care does not extend to the environment near the workplace, even though failure to observe the duty of care would in many situations lead to damage to the environment (for example, when pollutants are negligently discharged from a factory).

Exposure limits developed by Worksafe Australia aim to address the effects of exposure to a particular hazard on workers. These levels could in some cases be different from the levels which would be needed to protect the public and the environment. The NSW Government emphasised the need to avoid any overlap and inconsistencies between the OHS exposure limits developed by the proposed Ministerial Council, and the role of the National Environment Protection Council in setting national ambient standards for air and water quality, and for noise (sub. 397, p. 17).

Generally speaking, the effects of workplace activities on public health and safety, and the environment are regulated under separate legislation. This legislation differs in regulatory approach from that adopted for OHS legislation. This is despite similarities between the way environmental, public health and occupational health and safety risks at workplaces are managed. Indeed, many companies have chosen to implement integrated safety management systems that deal with these risks.

For example, dangerous goods legislation is aimed at protecting the risks of flammable, explosive and corrosive substances to workers, the public and the environment. It contains highly prescriptive process requirements and additional licensing requirements to those contained in OHS legislation. Most environmental legislation (such as the *Environmental Protection Act* in Victoria) requires licensing of workplaces that discharge industrial wastes. Public health and safety is also regulated by Health Acts in some States.

Some inquiry participants referred to areas where OHS and environmental legislation are in conflict. For example, Mr Farr of the Queensland University of Technology argued that in the manufacture of fibre-reinforced plastics, adherence to occupational health and safety exposure limits leads to a conflict with environmental legislation (sub. 78, p. 4).

Other inquiry participants cited potential conflicts between occupational health and safety and other areas of regulation. For example, the National Farmers' Federation considered that the requirements of OHS legislation were at odds

with the unfair dismissal provisions of federal industrial relations legislation (sub. 345, p. 2). The Aged Services Association of NSW and the ACT argued that residents' rights legislation in New South Wales conflicts with OHS legislation (transcript, p. 2984). The Queensland Mining Council considered there is a potential conflict between OHS and anti-discrimination legislation (sub. 302, p. 2).

Some States and Territories are seeking to consolidate legislation. For example, the ACT Government is currently developing a new Public and Environmental Health Act (ACT Department of Health and Community Care, sub. 388, p. 2).

Participants' views differed on the scope for further consolidation of legislation between OHS, public health and safety and the environment. The QCCI said:

If all three legislative areas were consolidated the resultant Act could be unmanageable for the Department responsible for administration, employers and unions (sub. 300, p. 23).

The South Australian Employers' Chamber of Commerce and Industry agreed that there are overlapping principles associated with regulation of occupational health and safety, the environment and public health and potential duplication in these areas. However, it said that:

it may be premature to consider combining government departments and consolidating legislation. It is necessary to firstly ensure that the legislative requirements are harmonised (sub. 372, p. 24).

The South Australian Health Commission noted that occupational and environmental matters in South Australia were originally encompassed by public health, but considers that reintegrating these functions or consolidating legislation would be difficult:

It may be difficult to achieve ... consolidation of legislation under various agencies but there may be ways of documenting links between the various pieces of legislation so that a person may readily identify relevant and/or interacting legislation (sub. 394, p. 2).

However, other participants thought that some legislation could be consolidated. For example, Ms Carol O'Donnell considered that the grouping of licensing requirements and related issues in a Public Health and Safety Act might promote integrated and effective administration, overcoming these concerns (sub. 50, p. 17). Ms O'Donnell also suggested that an employer's duty of care should be extended to the environment (sub. 250, p. 1).

In the Commission's view, governments should consider harmonising and, if appropriate, consolidating legislative provisions concerning occupational health and safety, public health and the environment. It would be appropriate to undertake this task when the recommended review of OHS legislation takes place (see Chapter 5).

There would also be benefits in governments considering the adoption of a duty of care approach to public health and safety and environmental protection. The duty of care has been found to be a useful approach to occupational health and safety. In most jurisdictions, the duty is owed to members of the public at or near a workplace.

Requiring an employer to also have a duty of care for the environment would appear to be a logical extension of the requirement to provide a safe and healthy workplace. It would ensure that a consistent approach is applied to OHS, public health and safety, and the environment.

This approach would be similar to that recommended for occupational health and safety in this report, with the legislation:

- defining a general duty of care;
- elaborating the general duty with specific duties, as appropriate;
- providing for mandated requirements as measurable and enforceable performance outcomes, unless it is more efficient to prescribe inputs or processes; and
- providing for risk management at the enterprise level or industry-level codes of practice.

16 INFORMATION, TRAINING AND EDUCATION

Information, training and education are essential to successful management of health and safety at work. Without them, those at the workplace are unlikely to identify and assess hazards adequately or implement effective risk management.

Accordingly, government facilitation of information, training and education is an important component of any effective occupational health and safety strategy. Such actions can complement other government programs by:

- identifying and encouraging best practice in the management of risk;
- mitigating ignorance, thereby reducing the need for prescriptive regulation;
- informing employers about their gains from prevention; and
- empowering workers and their representatives to participate in the management of risk at the workplace.

State OHS agencies spend around \$10 million a year on ‘promotion, awareness and education’ (see Table O.1 in Appendix O). They are also involved in ensuring that appropriate training is given to health and safety professionals and to students in vocational courses at tertiary and secondary institutions.

Employers, employer organisations, unions and OHS professionals can all play a role in providing information, training and education. The Commission’s proposed reforms will enhance their various roles because they will reinforce the responsibility of those at the workplace to observe their duty of care.

16.1 Government information programs

Governments provide information on health and safety to employers (and others with a duty of care such as suppliers and employees) and the general public by way of mass-media campaigns, documentation and advice to workplaces.

Mass-media campaigns are primarily provided by governments. The main objective of these campaigns is to raise community awareness of both the nature and extent of work-related injury and disease, and the legal rights and responsibilities of employers, employees and others with a duty of care.

Documentation is provided to workplaces by a range of providers, including government agencies, employer organisations, trade unions, OHS professional societies and consultants, and specialist publishers. Generally, this type of

information is not only aimed at raising awareness of the problem, but also to increase understanding of *how* to reduce work-related injury and disease.

All the providers mentioned above also provide *workplace advice* to individual enterprises on effective management of risks to health and safety.

Many inquiry participants, including trade unions and employer associations, believed governments ought to use each of these means to a greater degree, as insufficient information was provided by the private sector in the absence of government intervention. For example, the Victorian Employers' Chamber of Commerce and Industry stated that it 'sees a continuing need for governments to support the provision of information to industry' (sub. 313, p. 26).

Governments intervene because they believe that without their involvement, the level of understanding — both of the risks of injury and disease, and of effective risk management measures — would not be at a level which minimises the net costs of injury and disease to the community. There are several reasons for this.

First, individuals are unlikely to form accurate perceptions about the nature and incidence of work-related injury and disease based on their own personal experiences. The Robens Committee stated:

But safety is mainly a matter of the day-to-day attitudes and reactions of the individual, and whatever the total picture, the fact is that serious accidents at work are rare events in the experience of individuals. Even rarer is personal awareness of the more subtle hazards of insidious diseases which manifest themselves long after periods of exposure in an unhealthy working environment ... if individual experience is not in the normal course conducive to safety awareness, then safety awareness must be deliberately fostered by as many specific methods as can be devised (1972, p. 1).

Second, as with other types of information, individuals may not be aware of the expected benefits of information on occupational health and safety. Where individuals underestimate the expected benefits, they will be unwilling to pay for a socially desirable level of information.

Third, it is not always possible to exclude individuals from receiving some types of information if they do not pay for it. For example, some employers may benefit from television campaigns on occupational health and safety without having to pay. In this situation, other employers will be reluctant to pay for the campaigns.

The rationale for government involvement is most compelling where it is directed at preventing death and permanent disability. In Chapter 2, it is suggested that the prevention of such outcomes would have the greatest saving to the community. The benefits to employers of information designed to prevent such injury and disease are relatively small because most of the costs are borne by workers and the community.

These considerations can only establish whether or not there is a *prima facie* case for government to intervene. Before intervening, governments need to be sure that doing so will improve outcomes in an efficient manner.

Mass-media campaigns

Governments use mass-media campaigns to attempt to raise community awareness about health and safety at the workplace. The community's level of awareness will have a bearing on the level of resources devoted to workplace health and safety. As Comcare Australia stated:

Social acceptance of occupational injury and disease is relative to society's knowledge of the extent and seriousness of the problem (sub. 174, p. 14).

Existing level of awareness

Awareness about occupational health and safety — both at the workplace and in the community — is poor. A South Australian survey revealed that many workers, employers and doctors believe that a major cause of workplace accidents is worker carelessness, and that accidents at work are a fact of life (WorkCover Corporation (SA) 1994b). Details are provided in Appendix O.

These studies indicate that many employers and employees are generally unaware of the causes of work-related injury and disease, the potential benefits of reducing them, and the rights and responsibilities of those at the workplace.

Role of mass-media campaigns

Most mass-media campaigns seek to raise community understanding of both the nature and extent of work-related injury and disease, and the legal rights and responsibilities of the parties. In general terms, the campaigns aim to:

- provide a basic level of understanding on which other prevention initiatives can be built; and
- enable the community to make better informed decisions about the level of resources to devote to occupational health and safety.

The South Australian Government described its role as follows:

The role of an awareness program is to alert people to the need for change and provide heightened awareness of OHS culture in the workplace or in the community generally, in which change is encouraged. Awareness must be supported by the means (information and understanding) to create change and motivation or incentives to implement it (sub. 147, p. 40).

Government involvement

Agencies in South Australia and Victoria are heavily involved in mass-media campaigns to raise awareness of occupational health and safety. The South Australian Government's recent *Stop the Pain* campaign received \$300 000 in funding for 1994–95. The National Occupational Health and Safety Commission (NOHSC) recently agreed to fund a national 'cultural change' campaign. The project is to receive funding of approximately \$800 000 for 1995–96. Details of government activities in this area are provided in Appendix O.

Although there is a *prima facie* case for governments funding such campaigns, they should do so only if it is efficient — that is, if they reduce injury and disease to the extent that the savings to the community outweigh the cost of the campaign. There is considerable uncertainty that existing campaigns satisfy this requirement. Worksafe claimed:

There is a paucity of empirical evidence on the effectiveness of occupational health and safety awareness campaigns (sub. 50, p. 68).

This uncertainty is reflected in the conflicting views on the campaigns.

Many participants felt that such campaigns are essential to prevention. They argued that the campaigns make workers and employers more aware of the benefits of improving health and safety at work, and thus more receptive to management systems designed to improve health and safety. The Tasmanian Farmers and Graziers Association argued:

We believe an awareness campaign to be an integral part of the implementation process of all OHS strategies (sub. 61, p. 7).

Others were sceptical about their value. Mr Goodbourn of the Victorian Institute of Occupational Safety and Health said:

I tend to be fairly sceptical about the ability of awareness campaigns to actually achieve anything very much, particularly if they are not supported by, 'Okay, where to from there?' (transcript, p. 1264).

The Chamber of Mines and Energy (Western Australia) believes that mass-media campaigns are not as effective as industry-specific initiatives:

It is not our experience that promotional public campaigns have achieved the same level of success (sub. 31, p. 4).

Before devoting substantial funds to a campaign, governments should be satisfied that it represents an efficient and effective means of improving health and safety at work. Further research into the nature and strength of the linkages between mass-media campaigns and the level of work-related injury and disease is needed.

It is not clear whether mass-media campaigns are best run at the State or national level. However, greater co-ordination may enable more effective use of resources by reducing duplication in the design and evaluation of campaigns, to the extent that it does not constrain innovation. The proposed Ministerial Council would be an appropriate forum to determine the scope of any national co-ordination of these campaigns.

In some States, agencies run separate campaigns on occupational health and safety. Such duplication is a cause of some concern. First, accountability is blurred. Second, the risk of duplication is greater. Third, independent development and delivery of campaigns raises the danger of their key messages being incompatible or not adequately supported by other programs, even if the two agencies work closely together.

Design and evaluation of campaigns

Careful design, ongoing performance measurement and regular evaluation of mass-media campaigns are important for several reasons. They:

- maximise the likelihood of a campaign being effective;
- place a discipline on the development and implementation of a campaign;
- provide for continuous improvement in measures and strategy; and
- help policy makers assess the effectiveness of different preventative measures, guiding decisions about the optimal mix of measures.

To be effective, campaigns should be designed and evaluated against the principles applied to agency performance and accountability in Chapter 14.

First, campaigns need to be part of a co-ordinated prevention strategy, encompassing regulation, enforcement and financial incentives. The strategy should be based upon an empirical analysis of the effectiveness of the strategy and its components. The Department of Occupational Health, Safety and Welfare of Western Australia (DOHSWA) stated that it:

... views an integrated approach to the prevention of occupational injury and disease which includes both enforcement and information elements as the most effective and efficient strategy available to occupational safety and health agencies. In this approach enforcement and information strategies are focussed on common objectives rather than being pursued for different ends (sub. 222, p. 24).

Second, the aim of the campaign needs to be defined in measurable terms. It should be based upon an empirical analysis of the nature, extent and location of the awareness deficiencies in the community. The campaign should seek to inform rather than to change community values, as the latter is notoriously difficult to achieve. The campaign should not be used to justify or promote government policy, as it may introduce a political flavour to the campaign —

qualitative research suggests that such a flavour alienates the audience and reduces the credibility of the campaign (WorkCover Corporation (SA) 1994a).

Third, the target audience of a campaign — employers, workers or the general community — needs to be clearly identified. The decision on the target audience should relate to the campaign's objectives and be based on the empirical analysis of information deficiencies referred to earlier.

Fourth, the key messages for the campaign need to be carefully researched, as does the way in which they are to be presented. This could involve using sample audiences or focus groups to analyse responses to proposed messages.

Fifth, campaign performance needs to be measured and evaluated on an ongoing basis so that the campaign and its supporting strategy can be adjusted subsequently. Measurement should be linked to the aims of the campaign. At the very least, the evaluation should analyse how effectively the key messages are being disseminated, using techniques such as audience recall surveys. In addition, evaluations should measure the overall impact of a campaign on the level of awareness of the target audience, and the effect this change in awareness has on health and safety outcomes.

Many participants believed that mass-media campaigns are not being adequately evaluated. For example, the National Safety Council of Australia argued:

Evaluation of effectiveness appears to be non-existent. There is a perception of being seen to be doing something rather than setting goals and measuring outcomes (sub. 89, p. 15).

The Local Government Association of South Australia claimed:

Many high profile awareness campaigns are ill-conceived and lack proper marketing assessments and evaluation (sub. 54, p. 6).

In the Commission's view, the principles outlined above are not being universally applied. Often, the effectiveness of campaigns is assessed using fairly simple methods, such as audience recall surveys and audience response surveys. Although these techniques are important components of program design and evaluation, they are not sufficient. As Mr Goodbourn and Mr Culvenor stated:

... while such evaluation may be able to measure recall or even change in 'attitudes', this level of evaluation is based on the assumption that the supposed progressive sequence from knowledge to attitude change to performance improvement is valid and will necessarily follow (sub. 406, p. 7).

Evaluation of a mass-media campaign needs to consider, at the very least, its impact on the level of awareness of its target audience. The South Australian Government is attempting to do this for its recent *Stop the Pain* campaign

(see Box 16.1). The recently announced national awareness campaign by NOHSC is to be evaluated along similar lines to the South Australian campaign.

Box 16.1 Campaign design and evaluation in South Australia

In South Australia, the WorkCover Corporation developed and introduced the *Stop the Pain of Work Injury* campaign in conjunction with Comcare and the Self-Insurers of South Australia. The campaign, which had a budget of \$300 000 for 1994–95, involves the use of television, radio, print and billboard advertising on roadsides and buses (sub. 147).

To guide the campaign, WorkCover conducted a pre-campaign survey of awareness in early 1994. The survey measured awareness of existing WorkCover publicity, attitudes towards health and safety at work and knowledge of the causes of work-related injury and disease. The survey, in conjunction with qualitative research, formed the basis for the campaign.

WorkCover conducts follow-up surveys and compares the results to those of the initial survey. The aim is to quantify the impact of the campaign on awareness levels. However, the South Australian Government admitted that:

Measurement of the *effectiveness* of such a campaign is difficult. Surveys will show how much the campaign is noticed, that is, the level of awareness aroused, however the impact in the workplace on injury and disease rates may not be known for several years (sub. 147, p. 43).

However, even these techniques do not adequately measure the impact of campaigns on health and safety *outcomes*. This will only be possible with more research into the links between awareness and health and safety outcomes. Until this is done, there will continue to be uncertainty about the effectiveness of mass-media campaigns compared to other prevention measures.

Worksafe Australia cited a lack of resources as a key reason why OHS agencies may not always evaluate their programs adequately:

In the face of scarce resources, decisions tend to be made to put resources into getting the message out there rather than evaluating its impact (sub. 50, p. 72).

In the Commission's view, resource constraints reinforce the need for agencies to carry out detailed program evaluations. They need to be able to justify to the public the expenditure of public funds no matter what constraints apply.

Recommendation 51

The Commission recommends that agencies evaluate the effectiveness of their existing awareness programs in terms of their effects on outcomes before determining the nature and scale of future funding of such programs.

Documentation

State and Commonwealth Governments, employer associations and trade unions all provide written material on occupational health and safety that is typically more detailed and more specific than that contained in mass-media campaigns. This type of information — which includes booklets, brochures and posters — often has two purposes.

First, it seeks to raise awareness of:

- the nature and extent of work-related injury and disease;
- the legal rights and responsibilities of the relevant parties; and
- the needs of particular groups in the workforce, such as contractors, out-workers, women and those from non-English speaking backgrounds.

Second, it seeks to provide practical advice on:

- how to manage health and safety risks at the workplace;
- how to exercise legal rights and meet legal obligations; and
- how to meet the special needs of particular groups in the workforce.

There is a role for governments to assist in the provision of this type of information. The appropriate level and direction of government involvement depends on the extent to which the information possesses those characteristics that justify government intervention, as discussed earlier.

The need for government funding of health and safety information products would be lessened if the Commission's recommendations relating to codes of practice are adopted. Information contained in these codes of practice could replace much of the information currently provided in the form of brochures and booklets. However, there may be a role for governments to facilitate the development of these codes (codes of practice, and the government's role in facilitating their development, are discussed in Chapter 6).

Workplace advice

Most occupational health and safety agencies provide information and advice to workplaces that are specific to their particular circumstances. The Victorian Health and Safety Organisation (formerly the Occupational Health and Safety Authority) has trained officers to provide such information and provides access to technical and specialist advice from health and safety professionals (sub. 176). Most inspectorates have the dual role of ensuring compliance and providing advice.

The private sector also provides this type of advice. Professionals such as health and safety management consultants, occupational hygienists, safety professionals and ergonomists provide a range of specialist advisory services relating to the identification, assessment and control of hazards in workplaces.

In Queensland, employers with thirty or more workers have to appoint a Workplace Health and Safety Officer to advise the employer on health and safety conditions at the workplace. The Department of Employment, Vocational Education, Training and Industrial Relations in Queensland claimed that employer associations looked favourably upon this provision (sub. 79). Furthermore Mr Farr, a lecturer in occupational health and safety at the Queensland University of Technology, said:

Although this person has minimal training, a recent survey of approximately 150 workplaces found that 95 per cent of employers felt that the workplace health and safety officer had played a positive role in improving health and safety performance in their workplace (sub. 293, p. 2).

The Commission considers that employers and others who have a duty of care should be primarily responsible for paying for any advice necessary to meet their legal obligations. Furthermore, the Commission expects that its proposed reforms, particularly in the areas of regulation and enforcement, would strengthen the incentives to be adequately informed on health and safety matters. This is likely to raise private sector demand for advice and hence lessen the need for government involvement in the provision of these services.

Nevertheless, some government involvement in providing workplace advice may be justified, particularly for small employers. The benefits to a small employer from investing in advice on safety — in terms of benefits to other areas of the business — are likely to be less apparent than for a larger, more sophisticated enterprise.

Facilitation of advice

Governments facilitate advice from private sector providers by alerting employers to the services available. The South Australian Government

publishes a guide titled *Choosing an Occupational Health and Safety Consultant — A Guide for Managers*. The Victorian Government publishes a similar guide. These documents provide information on the various types of health and safety consultants available and the respective roles they can perform, the circumstances in which a consultant may be useful, the recommended procedures for selecting a consultant, and where to go for further information.

Governments are not the only ones providing this type of information. The Safety Institute of Australia recently published *Selecting a Health and Safety Adviser*, which addresses similar questions to the government guides.

In addition, some governments maintain directories of health and safety consultants. The Victorian Government produced such a directory in 1991 (OSHA 1991), and intends to produce it on computer database so that it can be updated easily. The Northern Territory Government also publishes a directory of private sector consultants.

Accreditation of providers

Many participants felt that the lack of accreditation for health and safety professionals posed a problem for employers. For example, Mr Farr claimed that those seeking the services of a health and safety professional cannot be sure that their skills and qualifications match their needs (transcript, p. 186).

Similarly, the Victorian Institute of Occupational Safety and Health argued:

This situation [the lack of accreditation] makes it difficult for industry to readily identify OHS services which have high calibre professional OHS support. This is a particular problem for an emerging profession, given the potential damage that poor quality practitioners (especially consultants) can inflict on the image of a profession trying to establish itself (sub. 246, p. 22).

In response to these concerns, at least two professional associations — the Safety Institute of Australia and the Occupational Health Nurses' Association — are in the process of establishing their own accreditation systems. In the Safety Institute's case, prospective members would be required to demonstrate high levels of knowledge, skill and experience in contemporary occupational health and safety, and be required to seek ongoing re-accreditation.

Voluntary accreditation should alleviate the uncertainty faced by those seeking the services of a health and safety professional. However, some feel that establishment is not progressing quickly enough. Several participants cited a lack of resources as the main obstacle to faster progress.

The demand for advice on occupational health and safety should increase as governments proceed to implement the Commission's proposed reforms. This

should provide an added impetus to the professional associations to speed up the development of their accreditation arrangements.

Governments may wish to do more to speed up the implementation to provide greater certainty for firms seeking advice. Facilitation could take a variety of forms, including assisting in negotiations between the various professional associations, supporting particular accreditation systems, or providing modest financial assistance.

Recommendation 52

The Commission recommends that OHS agencies encourage the provision of workplace-specific advice on occupational health and safety by third parties. Governments should inform employers about the potential role such advice can play and consider facilitating the establishment of systems of voluntary accreditation within the private sector.

Language and literacy barriers

For some groups in the community, traditional methods of raising awareness may prove ineffective. This is particularly true for workers from non-English speaking backgrounds (NESB) and workers with poor literacy skills.

Many participants suggested there is a need to provide more multi-lingual OHS information in the workplace. However, this involves a number of difficulties.

First, the provision of multi-lingual information may be impractical for employers with workers from a large number of ethnic backgrounds. Many large manufacturers employ people representing up to 50 different nationalities. Providing information in so many languages may be prohibitively expensive, difficult to implement and not very effective. As Australia Post commented:

If you only put it in six languages, the other 10 groups will kill you ... To get one sentence out in the languages required takes a double-sided page, so you can only get very brief, short messages out in that way (transcript, p. 2018).

Second, the benefits of providing multi-lingual information may be limited for NESB workers who have poor literacy skills in their native language. Kellogg (Australia) commented that:

Occasionally one will hear people saying, 'We must provide it [OHS information] in community languages', but what one needs to consider is ... a lot of our people did not have the opportunity of more than a very basic education in their own country, so they are not going to be fluent in their language — their literacy is not going to be good, let alone in English (transcript, p. 404).

Information provided through graphics (for example, pictograms and posters) may be more effective in ethnically diverse workplaces. A more direct way of tackling the problem is to improve workers' language and literacy skills. Kellogg (Australia) provides English classes at the workplace (transcript, p. 404).

Language and literacy initiatives are discussed in Appendix O.

16.2 Training

Health and safety training of employers and employees refers to:

- on-the-job training that addresses health and safety at work;
- training courses with some health and safety content; and
- specialist training courses in health and safety.

Many inquiry participants commented on the importance of adequate training for workers, managers and others with health and safety responsibilities, in light of the modern approach of involving all workplace parties in the management of health and safety risks. For example, the ACTU argued:

... there is no hope of success unless the key workplace parties are adequately trained to be able to put the legislation into effect (sub. 149, p. 25).

BHP stressed the need to train managers:

BHP believes that all managers need training in OHS if they are to fulfil their responsibilities in relation to the duty of care (sub. 141, p. 18).

Else (1992) highlighted the importance of training for those at the workplace:

Clearly providing the workforce with the appropriate skills to cost-effectively control the occupational hazards in the workplace is fundamental to achieving the vision we have for Australian workplaces. Central to this is the effective training of managers, supervisors, occupational health and safety representatives and other key decision makers (p. 1).

Despite the overwhelming acceptance of the need for such training, studies indicate that participation — particularly by managers — is low. Else (1989) cites the finding of Lacey Management Services that just 20 per cent of managers and supervisors had received health and safety training (see Appendix O for details of the importance and extent of health and safety training).

Provision of health and safety training

At present, the principal OHS Acts of all jurisdictions require employers to provide instruction and training to their employees to enable them to work safely.

In addition, all jurisdictions currently have legislative provision for the training of health and safety representatives or members of health and safety committees. In most cases, employers are obliged to permit health and safety representatives or committee members to participate in training at an accredited course on full pay. Tasmania and the Northern Territory do not include the ‘full pay’ provision, and the Northern Territory does not require accreditation.

Some jurisdictions only accredit a few providers to train health and safety representatives. Safework (part of the Queensland Branch of the ACTU) is the only training provider accredited by the Queensland Department of Employment, Vocational Education, Training and Industrial Relations. Others — such as Victoria — are opening up accreditation to other providers.

Case for reform

At present, the regulation of health and safety training — particularly for health and safety representatives and committee members — focuses on processes rather than outcomes. This reflects the obligation on employers to permit representatives or committee members to attend an accredited training course provided (usually) by an accredited provider.

This process-oriented approach is at odds with the recent reforms to Australia’s vocational education and training system in general. The emerging system has a clear focus on training outcomes — that is, the achievement of specified *competences* (see Box 16.2).

Furthermore, health and safety training has not been integrated into the broader vocational education and training system, with the result that it remains marginalised. This limits the extent to which health and safety is able to be an integral part of workplace systems and practices. Ms Shaw from Effective Change Consultants commented:

As long as it’s seen as an added extra or something that your reps do or your committee members do, then health and safety is not going to be integrated into people’s skills that they need to do their job (transcript, p. 3532).

Box 16.2 Vocational education and training in Australia

In recent years, the direction of vocational education and training in Australia has undergone significant change. Australia now has a *competency-based training system*.

Competency-based training involves the delivery and assessment of training being related to attaining the knowledge and skills that are required for effective performance on-the-job at the required level. These competences are specified in national competency standards. Competency standards are classified into three types — national industry standards (the main category), cross-industry standards, and enterprise standards. There is nothing to prevent competences relating to occupational health and safety being incorporated into these standards.

National competency standards are developed by Competency Standards Bodies (CSBs). These bodies comprise employer, employee and government representatives. They are formally recognised by the Standards and Curriculum Council as having responsibility for developing, maintaining and submitting national competency standards for their industry. The standards are then endorsed by the National Training Board.

Once endorsed, competency standards become the benchmark by which accredited courses and recognised training programs are measured. They also become the basis for delivery of vocational education and training.

State and Territory recognition authorities are usually located within the department responsible for education, training and/or industrial relations. Their function is to accredit courses (typically certificates, advanced certificates, associate diplomas and diplomas) and recognise training programs. These can be developed and submitted by individuals or organisations. State and Territory recognition authorities also register training providers as being competent to offer a particular accredited course or recognised training program.

Finally, OHS legislation provides employers with little guidance as to how they are to meet their duty to provide ‘adequate’ instruction and training to their workforce. Consequently, there is some uncertainty about what this duty means in practice. Providing greater guidance on this duty would enhance both its clarity and enforceability. The New South Wales Government stated that:

... there may be a case for paying greater attention to the specification of core competencies so that employees are aware of the particular knowledge and skills necessary to maintain a safe workplace (sub. 397, p. 21).

Proposed reforms

The Commission favours the retention of the duty on employers to provide their employees with adequate instruction and training in occupational health and safety (see Recommendation 3). To give practical effect to this, in its Draft Report the Commission proposed that OHS legislation specify the health and safety competences needed for employees to perform their work safely.

Most participants felt that competences specified in legislation would either be overly broad (to account for differences between industries and so forth) or lack sufficient flexibility. Furthermore, they argued that this proposal would conflict with recent reforms to vocational education and training in Australia.

The Commission accepts these concerns and consequently has modified its proposed training reforms. Rather than actually specifying the health and safety competences, subordinate OHS legislation should merely direct employers to the national industry competency standards for guidance. Specifically, possession of — not necessarily training in — the health and safety competences in the relevant national industry competency standard should mean that an employer has met his or her duty to provide training. That is, the health and safety competences in the relevant national competency standard would provide the guidance as to what level of training is ‘adequate’.

This proposal does not necessarily require employers to send every employee on a training program. Rather, employers have to ensure that employees possess the knowledge and skills they need to perform their work safely. For some employees, the amount of health and safety training needed may be modest.

Many participants believed that health and safety training ought to be integrated into mainstream vocational education and training. For example, the Department of Industrial Relations argued:

The integration of OHS training into these arrangements represents an efficient means of ensuring that industry itself is addressing the training requirements needed to support the development of the skills and knowledge required for workplace implementation of OHS programs and compliance with regulatory requirements (sub. 338, p. 13).

NOHSC has recognised the importance of health and safety competences in national competency standards. Its *National Guidelines for Integrating Health and Safety Competences into National Industry Competency Standards* provide generic health and safety competences. These can be tailored by the various Competency Standards Bodies (CSBs) to produce national industry competencies.

The NOHSC guidelines aim to encourage CSBs to develop health and safety competencies that are consistent across industries yet allow for industry-specific and occupation-specific issues to be addressed. They set out competencies for

those with no supervisory responsibilities, those with supervisory responsibilities, and those with managerial responsibilities.

Recommendation 53

The Commission recommends that national Competency Standards Bodies consider including OHS competences in all national industry competency standards.

In Chapter 4, the Commission proposed that OHS legislation should confer on employers a ‘duty to train’ their employees to perform their work safely. It also proposed that employees should have a ‘right to be represented’ at their workplace on health and safety issues. On the face of it, these provisions in combination should obviate the need for further regulation of the training for employee representatives. Provided they are both effectively enforced, employers will have an incentive to see that health and safety representatives at their workplace receive the training that they need to perform their role successfully.

Although most governments regulate the training of employee representatives, it is not clear whether, and to what extent, this is a consequence of shortcomings in their OHS legislation or their failure to effectively enforce it. In any event, regulation seeks to control the training process, rather than what comes out of it, in terms of the competences acquired by the trainees.

Employee representatives need two sets of competences. In the first place they need to have the confidence of those they represent at their workplace. These competences can only be determined and judged by those that elect them.

Health and safety representatives also need certain technical competencies related to health and safety — knowledge of OHS law in their jurisdiction, the nature of the hazards in their industry, how to identify and assess the risks to health and safety at their workplace, and the practicalities of managing those risks. Although possession of these technical competences would clearly enhance the effectiveness of a health and safety representative, not having them should not disqualify someone from offering to represent their colleagues.

The Commission considers that formal specification of these technical competencies would help to ensure that the training of employee health and safety representatives is effective and efficient. The proposed Ministerial Council should give consideration to how this might best be done.

Many participants believed that specifying competences for employee representatives is inappropriate. The South Australian Government argued:

The workplace health and safety representative is a voluntary position and one which is determined by election from members of a work group. Therefore, members of the work group should determine whether or not their elected representative is competent to represent their health and safety concerns to management (sub. 275, p. 47).

The ACTU agreed:

The ACTU's view is that formal competencies, *per se*, should not be set for elected health and safety representatives and committee members because their positions are voluntary and accountability for their performance rests with the workers they represent rather than the employer (sub. 336, p. 28).

For the Commission's proposals to work effectively, employers would need to be able to assess whether their employees actually possess the relevant competencies. The NOHSC guidelines provide some examples of techniques which may help in assessing competences, including direct observation, report from a supervisor, written or oral questioning, or simulation.

For those workplaces with health and safety committees, the committee should be the appropriate body to determine training requirements and identify preferred providers. The committee should make recommendations to management, which would be responsible for making the final decision. Involving the committee in this way would ensure that the interests of all employees are represented. In the absence of a committee, management should make the decision after consulting with the workforce, including the relevant unions where appropriate.

Implementing reform

Before these proposed training reforms could be put in place, the national industry competency standards would need to contain appropriate health and safety competencies. This is yet to be achieved.¹

Worksafe Australia is currently working towards this end. It is promoting its *National Guidelines for Integrating Occupational Health and Safety Competences into National Industry Competency Standards* to competency standards bodies, OHS agencies and vocational training bodies. This approach

¹ The Fire Trainers Association of Australia expressed frustration at their inability to get their training competences endorsed by the National Training Board (sub. 225).

has seen health and safety competences integrated into competency standards in a number of industries, such as the chemical, oil and water supply industries.

Resource constraints have limited the extent to which Worksafe has been able to promote integration. As a result, many industries are yet to have health and safety competencies in their national competency standards. This lack of progress needs to be addressed as a matter of priority. Additional funding may be required. As Ms Shaw from Effective Change Consultants argued:

I think what's needed to improve health and safety training in Australian industry is more support and resources and much more effort going into working with CSBs to get these standards implemented (transcript, p. 3534).

Encouraging the adoption of health and safety competencies should provide an added spur to the integration process. In addition, the Commission's proposed reforms in the areas of regulation and enforcement should create added demand from industry for national competency standards to provide guidance on how employers can meet their duty to provide adequate training.

Joint training

Many inquiry participants, including the trade union movement, argued that joint health and safety training — which involves training employee health and safety representatives and their managers simultaneously — was inappropriate unless the representatives had already undergone separate introductory training. The Victorian Trades Hall Council claimed:

The essentially different and distinct roles of worker and employer representatives demands that their training, initially at least, be separate (sub. 187, p. 20).

Else (1992) argued that initial joint training could deter health and safety representatives from asking basic questions, whilst managers were reluctant to admit openly to a lack of knowledge in the presence of representatives.

Other participants believed that joint training provides significant advantages. The Victorian Employers' Chamber of Commerce and Industry argued that joint training fosters a shared understanding of workplace health and safety issues:

VECCI are currently a provider of joint training and find the experience very positive. Joint training provides the foundation for open communication and co-operation between health and safety representatives and managers/supervisors from the outset (sub. 313, p. 28).

Ms Armour, an occupational health and safety consultant, described the benefits of joint training:

One of the most fascinating things about joint training is that not only do the workers get to know what their rights are, the managers sitting next to them in the course get to

know what their rights are and the workers get to know what their managers' responsibility is. That is very helpful on both sides (transcript, p. 612).

The Labour Council of New South Wales strongly supported joint training:

A few years ago, unions were absolutely adamant that we would train our people and management should look after their own people ... but the majority now are saying it should be joint and it should be joint presentation ... we all should be hearing the same story and we all should be in the same room when we are hearing it and working together on it (transcript, p. 2885).

In the Commission's view, joint training — even at the introductory level — can be positive for all. However, joint training may not be appropriate in all cases but will depend on the nature of the enterprise. It will produce the best results where the traditional manager–worker relationship has been replaced by a non-hierarchical, team-oriented structure (see Else 1992). Even in these circumstances, it may be necessary to conduct part of the training separately, such as that dealing with negotiation skills.

The Victorian Government recognised training had to cater for different workplace cultures:

In considering the merits of bipartite training, it needs to be recognised that there are diverse, respected views on the value of joint versus separate training, especially at the introductory level. Victoria's course approval process allows introductory training to be done either jointly or separately, appreciating the differing workplace cultures that exist (sub. 382, p. 15).

Even where joint training is considered inappropriate, there are still benefits to having training materials jointly prepared. An example of this is the *Everyone's Business* training package, which was publicly endorsed by unions, employer associations and Worksafe. As Else (1992 p. 27) wrote:

Translating training into practical workplace change is ... likely to be much slower in the absence of jointly agreed resource materials.

Funding health and safety training

Employers, unions and governments all contribute to the funding of training for managers and health and safety representatives. This section deals with the government's role in this area.

Existing arrangements

Health and safety training for managers, health and safety representatives and committee members is partly funded by the Commonwealth and some States.

NOHSC (through Worksafe) has provided annual OHS training grants to the ACTU and the ACCI since 1985.² The grants are given to the two organisations on the condition that they meet targets on, among other things, the number and type of persons trained, and the type of training conducted. Since 1985, grants to the two organisations have totalled around \$12 million (DOHSWA, sub. 222). Currently, the grants to the ACTU and ACCI are \$600 000 and \$585 000 respectively (sub. 50).³ With these grants, the ACTU annually trains approximately 3000 and the ACCI about 8000 persons (sub. 50).

Training grants by the States vary considerably. Information supplied by Worksafe indicates that the Queensland Government provided \$180 000 to employer associations and \$550 000 to unions in 1994–95. In the same year, the South Australian Government provided a total of \$470 000 to these groups, and the Western Australian Government \$330 000. In all other States, grants to employers and unions are either negligible or non-existent.

Problems with existing arrangements

A review of the NOHSC training grants was conducted by Ellis in 1994. The review highlighted a number of problems with the existing scheme.

First, the grants were inadequately evaluated both prior to allocation and after they had been used. Worksafe compared the proposed and achieved training targets in terms of courses offered, numbers trained and so forth. However, Ellis concluded that:

Despite requesting this information, Worksafe does not appear to use the information to close the link between performance and planning for further action. The current arrangements do not see Worksafe review impact or outcome in any form on a regular basis (1994 p. 8).

Second, the stated purpose of the grants was found to be non-specific and process-oriented. Not enough direction was given regarding their use.

Third, 'the structure of the program perpetuated separate training' (Ellis 1994, p. 20). The Western Australian Department of Occupational Health, Safety and Welfare (DOHSWA) echoed this view (sub. 222).

Finally, the grants were not open to competition from other training providers. Several participants were highly critical of this aspect, including the National Safety Council (sub. 89) and the Local Government Association of South Australia (sub. 271).

² Prior to the formation of the ACCI, corresponding grants were provided to the Confederation of Australian Industry (CAI).

³ The ACCI estimated that the grant amounts to approximately \$60 per person for a course with operating costs of \$180 per person (sub. 133, p. 56).

Ellis concluded that despite these problems, the existing arrangements should be maintained with some modifications, including:

- setting clear objectives, performance indicators and appraisal methods;
- NOHSC should increase its involvement in management of the scheme;
- joint training should be an objective of the scheme; and
- the grants should be allocated either solely to the ACTU and ACCI (as now), or to other unions and employer associations.

In December 1994, NOHSC agreed to restructure the scheme to reflect many of these recommendations. The revised scheme came into operation in June 1995.

The Commission's view

The Commission agrees that, in principle, opening up the grants to competition would lead to more responsive and effective training. However, the relatively modest funding pool available (under \$1.2 million) means that the additional costs of administering an open-tender system may well outweigh any associated benefits. As Ellis stated:

It could be argued that the funds should be used to develop a broader national OHS training infrastructure, however the pool of money is rather small for such ambitions (1994, p. 34).

The current arrangements make the best use of existing infrastructure and expertise within the two organisations, whilst minimising administration costs. For this reason, the Commission proposes that NOHSC continue to provide grants to the ACTU and ACCI for the time being, albeit in a modified form.

In its Draft Report, the Commission proposed the development of jointly administered occupational health and safety training by the ACTU and ACCI. NOHSC's current training grants should be redirected to this end, with the proviso that a significant component of its training program involve the joint training of managers and health and safety representatives.

Such an approach was supported by the Department of Occupational Health, Safety and Welfare of Western Australia:

DOHSWA is of the strong view the effectiveness and efficiency of training in occupational safety and health would be enhanced by the delivery of integrated training to employees, managers and supervisors by providers that are jointly managed and operated by employer representatives and unions (sub. 222, p. 29).

Similarly, the South Australian Government supported using the grants to foster bipartite training, arguing that:

... funding should be shared between the two groups [ACTU and ACCI], with the major proportion used as a seeding grant to establish joint training ventures. This would

allow both the employers and the unions some capacity to conduct separate training (sub. 275, p. 50).

Most participants supported continuation of the training grants scheme but some expressed concern that bipartite training would add to administration costs. The Australian Council of Trade Unions (Queensland Branch) argued:

A significant amount of the grant monies would be spent on the duplication of administration and training resources (sub. 268, p. 22).

These concerns are based on having to establish a new organisation. However, the Commission is proposing the establishment of a *jointly administered* training structure — not the establishment of a new bipartite organisation. Bipartite training should be able to make use of the existing infrastructure in the two organisations. Any additional administrative costs should be insignificant.

Ideally, all governments would agree to fund training grants through the proposed Ministerial Council. This would increase the sense of ownership by all governments for the scheme. That said, the Commission recognises that some States may wish to fund additional health and safety training themselves.

The proposal has a number of positive features. By continuing to allocate the grants solely to the ACTU and ACCI, it would provide the two bodies with the time to try to establish a sustainable training infrastructure which minimised administration costs. The emphasis on the joint development and delivery of training would increase the benefits of joint training. As DOHSWA argued, joint training ‘would serve to break down adversarial attitudes towards occupational safety and health issues in workplaces’ (sub. 222, p. 29).

After the proposed training arrangements settle down, the new funding arrangements should be reviewed by NOHSC to evaluate the effectiveness of the new bipartite training arrangements. NOHSC should also consider the need for continued subsidisation of health and safety training in light of developments under the proposed new regulatory regime.

Recommendation 54

The Commission recommends that, for the time being, the National Occupational Health and Safety Commission continues to provide grants to the Australian Council of Trade Unions and the Australian Chamber of Commerce and Industry for workplace training in occupational health and safety. However, these grants should be ultimately used to facilitate bipartite training administered jointly by these two organisations.

16.3 Education

The education system can improve occupational health and safety in three ways — by educating health and safety professionals, by integrating occupational health and safety into other professional education such as engineering, architecture and medicine, and by including it in the secondary school curricula.

Educating health and safety professionals

Some governments provide financial support for tertiary occupational health and safety courses. The Department of Employment, Vocational Education, Training and Industrial Relations in Queensland has provided funds for developing new courses at Griffith University, Queensland University of Technology and the University of Southern Queensland (sub. 79, p. 26).

Worksafe is involved in the education of health and safety professionals. Until recently, its Professional Education Program, which costs over \$800 000 a year, provided several post-graduate programs at the University of Sydney, the provision of advice and assistance to tertiary institutions and the delivery of short courses on occupational health and safety topics (see Appendix O).

Some participants questioned the role of OHS agencies, particularly Worksafe, in educating health and safety professionals. The ACTU argued:

Professional education ... should now be left to universities and tertiary institutions. Worksafe Australia had a role in the early days ensuring that this area of academic study was addressed, but now its resources can and should be targeted at the workplace (sub. 149, p. 27).

The Queensland University of Technology criticised the Sydney focus of Worksafe's Professional Education Program and argued that 'the benefits of this program are virtually non-existent outside this area' (sub. 78, p. 12). Worksafe noted that:

... there has been some resentment conveyed to Commission [NOHSC] members at the perceived narrow relationship with a single university in one city (correspondence, March 1995).

In December 1994, NOHSC decided to end its relationship with the University of Sydney. In its place, NOHSC plans to enter into 'partnerships' with universities through an open tender process. The partnerships are to cover a range of areas, including education and research. To the extent that this is consistent with the Commission's proposal for 'centres of excellence' to conduct research, the initiative is a step in the right direction (see Chapter 12).

However, in the Commission's view, there is little justification for NOHSC to be involved in teaching health and safety professionals. Although seed funding

may have been justified to initiate courses, the recent rapid growth in their number suggests funding is no longer necessary (see Appendix O). NOHSC's role should be to assist and advise tertiary institutions in developing and improving their courses. NOHSC's guidance note for the development of courses for health and safety professionals is a step in the right direction.

Occupational health and safety and tertiary education

Many governments, employers, unions and academics stressed the need to integrate occupational health and safety into particular areas of tertiary education, such as medicine, engineering, architecture, management, agriculture and some TAFE courses. The ACTU argued that:

... the integration of OHS into management education courses is crucial. OHS is integral to most management decisions in the workplace. Potential managers must be educated about the basic principles of good OHS management (sub. 149, p. 27).

Similarly, BHP stated:

BHP believes that some training grants should target tertiary institutions, in particular undergraduate training where this can be shown to have some impact on OHS outcomes or performance, for example undergraduate engineers, medical students and nurses (sub. 344, p. 8).

Many inquiry participants felt that medical practitioners in particular were not adequately educated in occupational health and safety. Undergraduate medical students are taught very little about diagnosis of occupational injury and disease. This is underlined by a recent survey which found that over half of the doctors surveyed incorrectly believed that worker carelessness was the most common reason for workplace accidents (WorkCover Corporation (SA) 1994b).

The effectiveness of actively seeking greater occupational health and safety content in tertiary courses is unclear. Courses have to balance competing demands and, in many cases, the competition is strong. Experience has shown students were unlikely to select subjects devoted to occupational health and safety, even in Masters of Business Administration. Professor Cross said:

There have been safety modules as electives within the MBA but they do not get elected (transcript, p. 460).

Finally, even if there is success in getting more occupational health and safety content in these courses, there is some doubt about its ability to improve safety outcomes because most students lack sufficient work experience. Professor Cross described the problem with engineering students:

So it is possible to get over some sort of awareness when they can relate it to a real live workplace. But it is very, very hard if they have got no work experience, which most undergraduate engineers do not have ... [Undergraduate engineers have] very little perception of anything to do with industrial relations or people in the workplace or all

of these issues that are intrinsically tied up with health and safety management (transcript, p. 459).

These problems are highlighted by attempts to include occupational health and safety in TAFE vocational courses. In 1989 Worksafe Australia, in conjunction with the TAFE National Centre for Research and Development, developed a series of publications under the title *Integrating Occupational Health and Safety into TAFE Courses*. By Worksafe's own admission, implementation has been 'patchy in terms of achievements' (sub. 50, p. 90). Worksafe cited the failure to put in place implementation mechanisms at the State level as the reason for this.

Strategies aimed at influencing demand for occupational health and safety in courses are likely to be more effective than those seeking to directly influence the provision and content of courses. Those responsible for course development have a greater incentive to ensure that their courses adequately cover occupational health and safety if employers are requesting such coverage. Governments should liaise with professional associations (such as the Australian Medical Association) and industry associations to highlight the relevance of occupational health and safety to their field. These organisations often have close ties with tertiary institutions.

The Commission also anticipates that its proposed reforms to regulation and enforcement would increase employers' demand for graduates with knowledge of occupational health and safety. This is because employers would seek skilled managers and staff to help them meet their legislative responsibilities.

Occupational health and safety and secondary education

Many unions, employers and other participants called for occupational health and safety to be taught in secondary schools to raise awareness among students entering the workforce.⁴ The Australian Chamber of Manufactures argued that:

Secondary schools should present OHS concepts and legal requirements as part of all study areas, as ultimately most students will be employed in workplaces (sub. 128, p. 7).

Similarly, the ACCI wanted measures to 'be adopted to ensure that attention is paid to OHS teaching in the secondary schooling system' (sub. 133, p. 69).

Most States have developed OHS educational packages for secondary schools. In 1991–92 the Victorian Occupational Health and Safety Commission and the Victorian Curriculum and Assessment Board produced occupational health and safety resource materials for 20 different subjects for years 11 and 12.

⁴ See, for example, Safety Equipment Australia (sub. 106) and K. Burke (sub. 211).

Many inquiry participants considered these materials to be of high quality. The ACTU stated that it ‘supports this model as being the most effective way of integrating OHS into school curricula’ (sub. 149, p. 28). Despite this, the Victorian materials are not being utilised in the schools. Mr Goodbourn, from the Victorian Institute of Occupational Safety and Health, said:

... it was somewhat disappointing then that effectively, anecdotally anyway, they are not being used within schools because there was no support for their distribution and application (transcript, p. 1261).

Teaching occupational health and safety in schools encounters the same difficulties experienced in the tertiary sector, namely the need to balance competing demands on the curricula, and a lack of interest and work experience on the part of students. The information would need to be very general to cater for the wide variety of working environments in which the school children may work in the future. The more general this information, the less likely it can provide practical, meaningful advice about occupational health and safety.

17 ECONOMIC, SOCIAL AND ENVIRONMENTAL GAINS FROM REFORM

The state of health and safety at work has wide-ranging implications for the performance of the economy, for equity and social justice in the community and for the protection of the environment. For these reasons the Commission's proposed reforms potentially have significant consequences.

Work-related injury and disease costs workers, employers and taxpayers around \$20 billion each year (see Chapter 2). These costs consist of the losses in labour and productive capacity by industry and the cost of treating and supporting workers and their families.

Improvements in health and safety at work would allow the resources currently lost or consumed as a consequence of injury and disease to be used to produce other goods and services. This redirection would thereby increase the nation's material living standards.

Injury and disease are a cause of social disadvantage and dislocation. Besides forgoing income while they are off work for medical treatment and rehabilitation, workers can end up permanently losing job skills and capabilities. In the extreme, some are disabled permanently and cannot work again.

Hazards that pose risks to the health and well-being of workers can also pose risks to the environment and to public health. This is particularly true of hazards that are highly mobile (for example industrial chemicals) or with considerable potential for damage to the immediate environment (for example petroleum platforms).

The economic, social and environmental consequences of the Commission's proposed reforms are canvassed in this chapter. Also included is a discussion of the opportunities for the export of occupational health and safety services and related products.

17.1 Economic gains from improved performance

Enterprises can increase their productivity and competitiveness by improving the health and safety of their employees. For example, health and safety improvements can reduce the working time lost and additional overtime associated with injury and disease at work. The Commission estimates that, on average, employers lose just under one day per worker each year due to these

causes. This is equivalent to a reduction of just under half of one per cent in the size of workforce.

For employers who are covered by workers' compensation, improving workplace health and safety can lead to lower insurance premiums or claims costs. Workers' compensation premiums amount to around \$5 billion each year, some 2.4 per cent of the labour costs for industries other than agriculture.

Improvements in health and safety at work bring indirect gains in productivity as well. They improve worker morale, reduce equipment down time and reduce the damage to materials and machinery. Employers also save on the administrative expenses associated with injuries and diseases — by not having to recruit and train replacement employees.

The community also benefits from improvements to health and safety at work. For example, 62 per cent of the medical services for treating work-related injury and disease are paid through workers' compensation. The rest, valued at about \$400 million in 1991–92, is largely funded by the taxpayer. Moreover, workers may seek care and material support from friends and community social welfare organisations. This diverts support from other community welfare activities.

The Commission's estimates of the costs of injury and disease at work imply that the ratio is three times those costs (see Appendix C). However, this is likely to be conservative because the estimates are based on the level and structure of workers' compensation benefits in South Australia, which are more generous than those of other jurisdictions.

There are flow-on effects to other sectors of the economy from a reduction in work-related injury and disease. The costs saved by reducing injury and disease in one industry usually pass through the economy to other industries and consumers, thus stimulating an expansion of economic activity generally. The size of expansion depends on the extent to which the labour market can fully adjust to the increase in productivity and investment that occurs because of fewer injuries and diseases.

ORANI — a multi-sectoral model of the Australian economy — was used to quantify the economy-wide impacts of changes to the following costs:

- work time lost during the absence of injured workers;
- loss of labour force resulting from fatalities and permanent disability;
- cost of workers' compensation premiums charged to employers; and
- expenditure on medical and hospital treatment for injured workers.

Modelling the combined effects for a 10 per cent reduction in each of the above four costs produced an increase to real GDP by \$40 million in 1993–94 dollars

(see Table 17.1).¹ The assumptions and more detailed results are presented in Appendix R.

The major effects come from savings of labour resources, for which the gains in GDP amount to \$200 million. Reducing business expenditure on workers' compensation along with lower occupational risk would raise GDP by \$70 million. The corresponding impact from savings on medical and hospital services is \$30 million.

Table 17.1 Economy-wide benefits of a 10 per cent reduction in the incidence of workplace injury and disease

<i>Aggregate variables</i>			<i>Change^a</i>
	<i>(\$ per injury or disease)</i>	<i>\$ per day saved</i>	<i>(\$m)</i>
Real GDP	13 000	495	339
Exports	7 000	252	173
Imports	3 000	111	76

a Expressed in terms of ABS's 1993–94 National Accounts estimates.

Source: Industry Commission.

Two thirds of the overall gain in real GDP is attributable to the increase in effectiveness of the workforce from reduced absences. The improved output performance encourages investment activity. This helps establish a larger and more cost-effective capacity of the economy. Australian products become more competitive internationally and exports increase by \$170 million as a result.

The output growth could be expected to create jobs for the expanded labour force. Workers could generally earn higher wages, in line with their higher productivity, without an increase in the level of unemployment.

The average gain to the economy from preventing a workplace injury or disease was found to be about \$13 000 in 1993–94 dollars. Alternatively, the value of each work day saved would be approximately \$500 per day. Either estimate, however, needs to be adjusted for the cost of compliance implementation before it can indicate the net gains from increased prevention. The cost of compliance could be expected to increase as the saving increase.

¹ In its Draft Report the Commission estimated that a 10 per cent reduction in work-related injury costs would produce an increase in real GDP of \$423 million. The Final Report estimate of \$339 million is lower, because of refinements in the data and in the structure of the ORANI model.

17.2 Social impact of reforms

Workplace injury and disease is a significant source of social disadvantage. The Coburg Injured Workers Association said:

The participants of our group have expressed deep concern at the human loss and suffering due to the condition of many workplaces. We believe this should not be allowed to continue in a country that is trying to promote social justice (sub. 2, p. 1).

The social disadvantage of workplace injury and disease is greatest for permanently incapacitated workers and the families of deceased workers. As described in Chapter 2, many permanently incapacitated workers subsist on incomes at or below the poverty line. Prior to their injury or disease, most had enjoyed stable employment.

In addition to emotional loss, the families of deceased workers suffer the financial hardship of losing a stable income. The Commission estimates that the loss of future income exceeds \$200 000 for a work-related fatality. Although families receive some financial compensation from employers through workers' compensation and some financial support from government, the assistance received is much less than the income lost.

About 200 000 to 270 000 Australians have had to change jobs or permanently cut down the amount of paid work they can do because of workplace injury and disease. As a result, their income forgone is substantial and they often have to abandon the career of their choice — sometimes after many years of education or vocational training. For example, many nurses have had to leave their profession and accept lower paid, less skilled jobs because of back injury. Although some permanently injured workers who remain in their jobs do not lose income, they suffer pain and often have to cut down on their leisure activities.

The Commission found that a significant number of retirees are suffering from work-related health problems. Injuries such as hearing loss and back problems contribute to the isolation of the elderly.

Workplace injury is greatest among blue collar workers such as labourers, trades persons, and plant and machine operators and drivers. But because injury occurs in relatively well paid industries such as mining, construction and transport, the average pre-injury income of injured workers is not significantly different from that of other workers.

In the case of new migrants, especially those from non-English speaking backgrounds, workplace injury and disease compounds pre-existing social disadvantage. This group of workers also has a significantly higher risk of workplace fatality.

The Commission expects that its proposed reforms will have favourable social impacts.

Regulatory reform will both require and assist employers to meet their responsibilities for health and safety. The greater focus on the duty of care is expected to lead to lower risks to health and safety in the workplace.

The Commission's recommendations for more effective *enforcement* would ensure that more employers meet their responsibilities for health and safety. Better targeting of inspection activities and substantially higher penalties will deter recalcitrants. Better targeting would also ensure that those employers who are meeting their legal responsibilities do not suffer the disadvantage of competing against employers who are not meeting their duty of care.

The Commission proposes that inspectorates penalise unsafe workplaces before a harmful incident occurs, and focus on breaches of the duty of care. This will increase the incentive for employers to invest in safety before injury or illness occurs. The proposal for private actions will give injured workers the power to seek redress where employers have not met their responsibilities.

The heightened focus on the responsibilities of employers, and the enforcement of these responsibilities, will provide strong incentives for employers to make the workplace safe. The Commission expects that employers will respond to these incentives by seeking more information about workplace health and safety, by training their managers and employees, and by systematically identifying, assessing and controlling workplace hazards.

Improvements in the eligibility and level of *workers' compensation*, and the experience-rating of premiums, will strengthen financial incentives for employers to make the workplace safe.

The positive social impact of the recommendations in this report complement those made by the Commission in its report on workers' compensation report. The recommendations in that report will improve social outcomes by ensuring a more equitable sharing of the costs of work-related injury and disease, and by enhancing opportunities for injured workers to return to work through rehabilitation.

The Commission's recommendation that 'employers be liable to pay a significant part of the cost of compensating employees suffering work-related injury or disease for long periods' should improve incentives for employers to prevent serious incidents (1994a, p. xliv). This is particularly important, since under existing arrangements, the share of costs borne by employers for different injuries and diseases is least for fatalities and permanent disablements.

Overall, the Commission expects that implementation of its proposals would substantially improve health and safety at work. The reforms are expected to have greatest impact on fatalities and permanent disablement — the incidents that cause the greatest social disadvantage.

The Commission's reforms should benefit all workers. However, they would be of most benefit to those workers who already suffer social or economic disadvantage. This group includes those with limited work skills, those who face language, literacy or cultural barriers, and those who have a disability. Workers in this group are often at greater risk to their health and safety at work because of the occupations or industries in which they tend to be concentrated. They are also the workers who are less able to avail themselves of legal protection or compensation when they become injured.

17.3 Environmental impact of reforms

The Commission's proposed reforms are aimed at strengthening the commitment to health and safety in the workplace and securing better occupational health and safety outcomes. To the extent that they are positively linked, improvements in occupational health and safety should also lead to improvements in the environment and to public health and safety.

There are strong linkages between work safety and environmental protection. For example, hazardous substances can cause harm to both workers and the environment. Asbestos contaminates workplaces, houses and water supplies. Noise affects workers as well as those who live near an industrial site.

The Robens Committee recognised that many occupational health and safety, public health and environmental problems emanate from the same sources within workplaces (1972, p. 34). For this reason, the Committee stressed the importance of integrating control measures.

Generally, the linkages are positive. An environmental impact occurs when a workplace activity pollutes air, water or land, or generates industrial noise that can be heard outside the workplace. The abatement of workplace hazards that pose a risk to both workers and the environment will lead to improved occupational health and safety as well as environmental outcomes. On the other hand, there may be some preventative strategies such as the waste removal that potentially have a detrimental effect on the environment.

An increasing number of workplaces are adopting integrated approaches to health, safety and the environment, in recognition of their inter-related nature. They set up integrated management systems to deal with the risks posed by business operations to workers, the public and the environment. For example,

the Shell Company of Australia Ltd has introduced a Health, Safety and Environment Management System (sub. 67, p. 5).

The ACCI commented that there is likely to be greater integration of systems in the future:

It may well be, as we progress further down the path of developing our approaches to health and safety, that we in fact encompass health and safety in with environment and public health issues far more than we have done in the past. If you go to most major enterprises, they don't have health and safety people per se. They bring the issues together because that's their perception of how the public and their workforce perceive these matters (transcript, p. 1408).

Penrice Soda Products Pty Ltd suggested that complementary systems should be encouraged:

There are substantial similarities between occupational health and safety, environment and quality management systems. Although this should not be prescribed by regulation, organisations should be encouraged to develop complementary systems ideally under the umbrella of an overall management system (sub. 163, p. 2).

The Commission's proposed reforms for occupational health and safety will not necessarily guarantee that workplaces will meet the community expectations on environmental protection. However, they should assist employers in their efforts to meet mandated environmental protection requirements. This is because the proposed reforms are complementary in the following ways:

- Employers would be better placed to develop flexible risk management systems capable of satisfying both occupational health and safety and environmental regulation where these are presently in conflict.
- Industry or enterprise-specific solutions to occupational health and safety, developed jointly by employers and employees are also appropriate to environmental control. The approach of applying localised rather than generic solutions through consultation with employees should also be useful when dealing with environmental problems.
- The adoption of systems 'quality management' approach to addressing occupational health and safety problems would be encouraged. The skills developed in the resolution of occupational health and safety issues are complementary to those required for developing management systems to deal with concerns about the environment and public health and safety.
- Management would be required to take greater responsibility for occupational health and safety. Increasing management awareness about the social impact of workplaces could be expected to encompass not only occupational health and safety, but also the related issues of the environment and public health and safety.

Historically, governments in Australia have regulated occupational health and safety, the environment and public health through separate legislation and administration. In some areas, such as the assessment of chemicals and the regulation of major hazardous facilities, governments have recently introduced a broader framework for managing workplace risks to encompass the effects on workers, the public and the environment.

Despite these initiatives, there is still a long way to go to achieve effective policy harmonisation in the areas of occupational health and safety, the environment and public health. Worksafe Australia noted that:

... across the environment, public health and OHS sectors, harmonisation and co-operation on chemical control can still be significantly improved (sub. 50, p. 41).

Other participants, such as the Public Interest Advocacy Centre, criticised governments' failure to integrate occupational health and safety with the environment and public health (sub. 109, p. 5). The Aged Services Association of NSW and ACT emphasised the link between management decisions on workers and their impact on the environment and society (sub. 23, p. 6).

Unless policy development is co-ordinated, changes aimed at improving occupational health and safety will not necessarily result in sound environmental outcomes. For example, a factory could remove toxic fumes from the workplace by using an exhaust fan, but would add to air pollution. A pesticide might be used in a concentration that is harmless to farm workers, but might still be harmful to wildlife in surrounding areas. Governments need to ensure that environmental protection measures and occupational health and safety policies are complementary.

The Victorian Employers' Chamber of Commerce and Industry (transcript, p. 1167) and the Queensland Chamber of Commerce and Industry (sub. 100, p. 5) cited the regulation of dangerous goods as an area where there is multiple agency involvement and poor co-ordination.

The Commission has identified the following possibilities for reform in the area of occupational health and safety which have implications for the protection of the environment:

- integrating the Commonwealth Government's technical chemical assessment functions that are currently fragmented across multiple schemes and administering departments — where the policy functions would remain (see Section 13.2);
- harmonising the functions of different administering agencies responsible for occupational health and safety, public health, the environment, transport, and planning (see Section 15.2); and

- amending legislation where there is conflicting regulation of occupational health and safety and the environment.

As discussed in Chapter 14, the Commission also considers that there may be benefits in adopting a ‘duty of care’ approach to regulation of environmental protection and public health, similar to the approach which the Commission has recommended in the area of occupational health and safety.

17.4 Export opportunities

In recent years, the importance of services to the Australian economy has been recognised. A report by LEK Partnership (1994), commissioned by the Australian Trade Commission (Austrade), found that services make up to 20 per cent of Australian exports and 70 per cent of Gross Domestic Product.

Occupational health and safety encompasses a broad range of services and related products. These include safety management systems, information products, education and training in occupational health and safety, advice on occupational hygiene, stress management and safety engineering.

Given this diversity of potential services, it is difficult to assess accurately the export income that Australia generates in the area of occupational health and safety services and products. Austrade estimates that current exports of occupational health and safety services and products to be less than \$10 million per year, compared with total exports of around \$60 billion (sub. 235, p. 3).

Examples of exported occupational health and safety services are:

- courses for overseas students provided by several Australian educational institutions, such as the Department of Safety Science of the University of New South Wales or the Victorian Institute of Occupational Health and Safety of the University of Ballarat;
- training manuals and consultancy services provided to the overseas subsidiaries or affiliates of Australian companies;
- training of OHS inspectors;
- accreditation of construction workers, such as those provided by the Western Australian Department of Occupational Health, Safety and Welfare; and
- training in Australian safety standards provided by the Occupational Safety and Health Network — a grouping of organisations in Western Australia that provide OHS services.

Market potential

Inquiry participants generally expressed confidence about Australia's ability to supply occupational health and safety services to developing countries, particularly in the Asia-Pacific region. This is based on a perception that in many areas of occupational health and safety, Australia has a well developed skills base and wide-ranging experience.

For example, Professor Cross considered education in occupational health and safety to be an area where there is a large potential for exports (sub. 19, p. 3). Mr Boucaut considered that there is huge potential to export training packages and consultancy services in the area of physiotherapy (sub. 30, p. 3).

Rising living standards in developing countries in the Asia-Pacific region are expected to bring about increasing demand for higher occupational health and safety standards. This could lead to a demand for more exacting regulation in these developing countries and a greater interest in Australia's experience. The Australian Nuclear Science and Technology Organisation noted:

Countries in the Asia-Pacific region are generally in considerable need of professional, but practical, occupational health and safety services. The willingness to pay is not so evident (sub. 111, p. 5).

Offsetting this are some factors that limit the potential for rapid expansion of exports of occupational health and safety services, especially in the poorer developing countries. For example, many developing countries are under fiscal pressures, and are seeking help with occupational health and safety in the form of aid.

Also, government programs in developing countries often do not give priority to occupational health and safety. Austrade noted that developing country governments often place priority on basic health care, rather than on occupational health and safety (sub. 235, p. 4).

The Department of Industrial Relations (DIR) commented that in most regional countries, the emphasis at present is on OHS policy development and the regulatory infrastructure:

In the rapidly evolving economic and social conditions of regional countries, most countries are still at the point where the development of a national capability in OHS policy development, regulatory implementation, research and inspectorate services is the overriding national priority. This is the area in which Australia's, and Worksafe's co-operative activities have been largely focussed to date (sub. 395, p. 12).

However, it argued that, although there is currently limited export activity, the potential is likely to rise as a result of increasing OHS capabilities:

The commercial export of OHS services will remain a small component of activity, arising from a small number of the more advanced regional economies, for the

immediate future. As the national OHS capability matures in each regional country and there is a higher requirement on industry to enhance its OHS performance, there is likely to be a growing demand for more commercial OHS services ... (sub. 395, p. 12).

How can OHS exports be increased?

The LEK report found that a potential exporter of services has to meet three main challenges (1994, p. 15). Specifically, they have to:

- develop a strategic and successful export formula;
- overcome funding and financing problems; and
- meet challenges associated with market access, including regulation, trade barriers and marketing difficulties.

The report noted that flexible strategies need to be adopted, according to the type of service being exported.

Many of the Commission's proposed reforms will assist the export effort. For example, improvements in the area of education and training, and the accreditation of trainers will increase Australia's capacity to export training programs and consultancies. Australian skills, and hence export potential will be enhanced as industries and businesses develop their own codes of practice under the new regulatory framework proposed by the Commission.

Exporters have access to a range of government export facilitation programs, such as the International Trade Enhancement Scheme, the Export Markets Development Grants Scheme, and the services provided by Austrade.

In addition to general export facilitation, Commonwealth, State and Territory Governments are co-ordinating occupational health and safety export (and aid) activities. For example, the National Occupational Health and Safety Commission (NOHSC) has developed a national policy framework for engagement of Australian health and safety professionals in the Asia-Pacific region, and identified the strengths and weaknesses of Australia as a provider of OHS products and services (see Appendix A). The Northern Territory and Queensland Governments, are also developing strategies to facilitate exports to the region.

Some inquiry participants believe that governments could do more to facilitate the exports of occupational health and safety services. Professor Cross (sub. 19, p. 13) and Forestry Tasmania (sub. 229, p. 3) argued that Worksafe Australia should perform this role.

Austrade noted that many of the current export facilitation programs are suitable for service exporters. Nevertheless, occupational health and safety has not been targeted in its own right for a specialised export strategy (sub. 235, p. 4).

The Commission considers that it is appropriate for Austrade to co-ordinate national strategies for the exports of occupational health and safety services and products. Austrade is familiar with the government services and programs available to exporters, and has contacts with relevant private and public sector organisations. However, it would be appropriate for Austrade to seek advice from the OHS agencies on ways to increase exports. As with all exports, Austrade should also ensure that exporters of occupational health and safety services are aware of the types of services that are available.

As part of their other activities, OHS agencies such as Worksafe Australia may come across requests for Australian expertise from overseas governments, private sector organisations, and international agencies such as the World Bank, Asian Development Bank and the International Labour Organisation. These requests should be referred to Austrade, which should have access to a listing of service providers in Australia.²

In its response to the Draft Report, the Department of Industrial Relations commented that requests for OHS services and products are currently referred to OHS agencies rather than to Austrade. It argued that Austrade has only a general interest in stimulating trade in OHS services (sub. 338, p. 21). DIR asked that the Commission provide further clarification of Austrade's role.

The Commission's view is that Austrade — rather than an OHS agency — should provide referrals of suppliers, as this is consistent with Austrade's role. Exports of OHS services and products are provided by both the private and public sectors, and it would be inappropriate for referrals to be provided by an OHS agency that is also potentially a service provider. Also, Austrade is better placed to provide relevant information about government export assistance programs to suppliers of OHS services.

OHS agencies such as Worksafe may be more familiar with the OHS services and products demanded overseas in some cases. Where this is so, it would be appropriate for Austrade and potential suppliers to work closely with the agencies to develop export markets. Austrade has asked Worksafe to develop capability statements which set out Australia's capacity to provide OHS services (DIR, sub. 338, p. 21). It has also been involved in the development of the

² The Victorian Health and Safety Organisation has compiled a listing of OHS service providers in Victoria (see OSHA 1991), and a private firm, ACEL, provides an updated list of service providers as part of its information database.

NOHSC's policy framework for Australia's role in the improvement of occupational health and safety in regional countries.

The Commission's reports on *Exports of Education Services* (IC 1991a) and *Exports of Health Services* (IC 1991b) contained detailed analyses of the impediments to exports in these areas and ways of overcoming them. The findings of those reports are relevant to exports of OHS services in the education and health sectors.

Role of government OHS agencies

In recent years, Worksafe Australia has actively sought opportunities to provide OHS advice to developing countries such as Fiji, Indonesia and China. Nearly all of these activities are aid-related.

The Australian Agency for International Development (AusAID) funds many of the occupational health and safety services provided to developing countries by Australian organisations and individuals. For example, it has partly funded Worksafe Australia's involvement in Fiji, and the costs of some overseas students studying in Australia. AusAID has also provided funding for an ILO-sponsored project under which Australia provides training courses in occupational hygiene to four regional countries (sub. 395, p. 11).

The three principal reasons why it might be appropriate for an OHS agency to provide services to other countries are:

- to fulfil humanitarian objectives under the Australian aid program;
- to achieve Australia's objectives under international occupational health and safety programs (for example, the harmonisation of OHS standards); and
- to generate export income.

Government OHS agencies that engage in commercial activities should ensure that they do not conflict with other functions such as their role in enforcement and providing advice to workplaces. Several participants, including the National Safety Council of Australia, voiced concern about the involvement of government OHS agencies in export activities, given the constraints on resources provided for occupational health and safety generally (sub. 89, p. 21).

The Commission considers that where services are provided primarily as aid, AusAID should co-ordinate the activity. Occupational health and safety services provided as aid should follow a similar process of evaluation to other parts of the Australian aid program.

DIR agreed that AusAID has a primary responsibility for ensuring that OHS is incorporated into all relevant areas of its activities. It said that:

Worksafe Australia is working with both AusAID and regional countries' OHS authorities to ensure that the priority of enhanced OHS capability is recognised in bilateral discussions on developmental assistance priorities (sub. 395, p. 11).

AusAID should contract government OHS agencies or private organisations and individuals to provide these services. Worksafe Australia and State OHS agencies could provide these services to AusAID.