



# ACCI SUBMISSION

## Chemicals and Plastic Regulation

Productivity Commission  
Issues Paper  
September 2007



AUSTRALIAN CHAMBER OF  
COMMERCE AND INDUSTRY



## **Australian Chamber of Commerce and Industry (ACCI)**

The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations. Members of ACCI represent employers of all sizes, in all regions and across all industry sectors. ACCI and its members have particular, but not exclusive, interest in workplace and industrial issues.

Membership of ACCI is made up of State and Territory Chambers of Commerce, together with employer and industry associations. ACCI, through its member organisations, is the largest and most representative business organisation in Australia with a strong and active network including:

- Wide coverage and representation of Australian business (over 350,000 enterprises nationally);
- Coverage of all key State and Territory based Chambers of Commerce and employer associations;
- Geographical coverage, including all capital cities and major regional centres nationally;
- All sectors of Australian commerce and industry;
- Large, small and medium sized enterprises, including:
  - The top 100 companies
  - Over 55,000 enterprises employing between 20 and 100 employees; and
  - Over 280,000 enterprises employing less than 20 employees.

The ACCI employer network employs over 4 million people.

ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

ACCI plays a major role in developing and promoting national OHS and workers compensation policy and strategies for Australian business with a particular focus on the development of national regulations, codes of practice, guidance materials and strategies.

Our unique network of State and Territory Chambers of Commerce and national peak employer and industry associations provides a mechanism to effectively represent all areas of Australian business and in turn access this

network for developing and implementing initiatives aimed at improving the OHS performance of Australian industry.

In addition to our 37 ACCI members, ACCI representation of Australian industry also extends through 22 employer associations that form part of the National Employers' OHS Consultative Forum, totaling 59 employer associations that form part of this extensive national network.

All ACCI members have been consulted in the development of this response.

This submission by ACCI does not limit or derogate from the position individual ACCI members may independently adopt or express. ACCI acknowledges that more detailed submissions are appropriate from some member organisations directly representing employers and contractors in the chemicals and plastics sector.

**In particular ACCI supports the submissions by the Plastic and Chemicals Industry Association (PACIA), ACCORD Australasia Limited and the Australian Paint Manufacturers Federation (APMF).**

## Introduction

1. ACCI supports the decision to undertake a study into chemicals and plastics regulation. The continued productivity and competitiveness of the chemicals and plastic industry is essential to the Australian economy. It is an industry that is presently subject to many enquires and reviews and participates in a broad range of regulatory reviews.
2. The study provides an opportunity to consolidate these reviews and presents an opportunity for the implementation of a best practice approach to the translation of national standards and implementation of the principles set out by COAG and in the Report by the Taskforce on 'Reducing Regulatory Burdens in Business' (January 2006).
3. Australian industry, including the chemicals and plastic industry, has a longstanding commitment to improved OHS performance and improved workplace safety. At a national policy level, it includes ACCI's ongoing engagement and work with the Australian Safety and Compensation Council, through commitment to the National OHS Strategy, and through the development of an industry Blueprint for improved OHS performance and regulation, *Modern Workplace: Safer Workplace*. Through that Blueprint, industry has developed a plan to achieve safer workplaces. That plan comprises improved workplace cultures with better quality OHS regulation.

### The ACCI Reform Blueprint

4. The key conclusions and recommendations in the ACCI OHS Blueprint are:
  - a. Making workplaces safer starts and finishes with workplace culture and attitude, not regulation. A commitment to prevention, to assessing risks and to managing risks does not just happen.
  - b. An effective health and safety culture requires all persons in the supply chain to accept shared responsibilities and to take them seriously. Aside from employers and employees, it includes manufacturers, product, process and workplace designers, employer representatives, trade unions, governments, politicians and regulators. Duties of each person should be independently held and not transferred to another.

- c. It is recognised internationally that sensible health and safety is about managing risks, not necessarily eliminating all of them. The people best placed to make workplaces safer are the employees and managers who work in them.
- d. Australian industry is investing more time, effort and capital in making workplaces safer. Many Australian employers have very good OHS systems which compare favourably with equivalent employers across the globe.
- e. The principles that underpin good workplace relations - communication, mutual respect, co-operation and personal responsibility, are the values that generate a culture of shared responsibility and the individual and collective pursuit of better OHS outcomes.
- f. There is a powerful business case for safer workplaces and, over time, achieving a significant and sustained reduction in workplace fatalities, injury and disease. The objective of productive and competitive employing businesses is assisted if the full productive capacities and skills of employees are available and harnessed for their mutual benefit. The employee duty of care is as important to achieving OHS outcomes as is the employer duty. This too should be a legislated duty. Employees, whose working lives are injury-free, at least in part because of the contribution they and those around them make to safety, make a valuable contribution to the business that engages them, the wider community and their own personal well-being.
- g. So far as is reasonable and practical, safety should be incorporated into workplaces at the design stage. Barriers which inhibit safe design of work environments, plant and equipment need to be addressed. Clear identification of design requirements and achievable contract conditions are important aspects of this. There is an important role here to facilitate the development of reasonable and practical best practice models based on the collective analysis of past experience and consensus models of foreseeable risk.
- h. Not even the best performing workplaces can guarantee a perfect safety environment. Despite the excellence of safety systems, accidents and injuries still occur.
- i. The role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates OHS awareness and culture in workplaces and not the

micromanagement of OHS in workplaces. For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and with a mobile labour force. Poorly established frameworks can detract from the achievement of safer workplaces through the objectives set out in this Blueprint.

- j. Regulation must adequately recognise the differing capacities of various employers, especially small and medium businesses. Given the growth of small business in Australia, examination should be made of:
  - i. OHS regulatory frameworks that are more responsive to business realities in this sector, and
  - ii. A network of OHS business advisers focusing on small and medium businesses.
- k. OHS regulation which is complex, out-of-date, impractical or uncertain is of no value to employers or employees in the workplace. It is unacceptable for an employer to not know what is expected of them by OHS regulators.
- l. Australian workplaces are over-regulated. There are multiple problems with current OHS systems. These problems are:
  - Poor quality (including impractical and impossible duties of care);
  - Excessive quantity;
  - Frequency of regulatory change;
  - Too much red-tape;
  - Little national consistency;
  - Inconsistent interpretation by regulators;
  - Unbalanced prosecution-oriented enforcement; and
  - Distortion by extraneous agendas.
- m. Poor regulation significantly undermines the commitment of employers and employees to improved safety performance, and for employers, can diminish the capacity to comply.
- n. To be effective, Australian OHS regulation needs to be changed so that it reflects the following characteristics:
  - Reasonableness;
  - Practicality;
  - Balance;
  - Mutuality;
  - Independence; and

- Consistent national principles.
- o. Duties of care should apply independently to all parties. The fact that a workplace injury has occurred should not automatically mean that a breach of law has occurred. These duties must not impose absolute or unreal obligations, whether by legislation or court interpretation. The concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical and achievable. New statements on the standard of the duty of care under OHS laws are required in those jurisdictions where the concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted. A standard based on the implementation and maintenance of a safety management system relevant to the industry, size and resources of each particular business, developed within a set of national principles, is an alternative. More realistic defences also need to be available to employers, designers and other persons in the supply chain.
- p. Whilst recognising the past and current role of State and Territory governments, there should be an informed debate whether a national set of OHS laws should apply in Australia. Where national OHS standards are appropriate, they should be developed through tripartite consensus involving balanced representation of governments, representatives of employers and representatives of employees and be nationally consistent in their implementation. In this context they should include:
- National Standard;
  - Model Regulation;
  - Code of Practice; and
  - Meaningful Guidance Materials.
- q. OHS legislation should generally create civil duties, rather than criminal offences. Penalties should be monetary, judicially determined and based on the seriousness of offences and the circumstances of the breach, not on the nature of the injury. Enforcement requires a mix between education and persuasion on the one hand and, in serious or repeated cases, prosecution and penalties on the other. A system of enforceable undertakings should be an alternative approach to prosecution. There is no justification for creating a new offence of industrial manslaughter given the already existing criminal law of manslaughter and related offences.

- r. There should be no absolute or strict liabilities, deemed guilt, reverse onus of proof in any civil or criminal proceedings, nor any other basis on which employers, directors, management personnel or employees are treated less favourably than the defendants in prosecutions under any other equivalent law or legislation. Persons charged with OHS offences should be accorded natural justice and in criminal cases the standard presumptions and protections of the general criminal law. Criminal offences should only be decided by established criminal courts of competent jurisdiction, not industrial tribunals.
  - s. There should be increased awareness and training on OHS issues. Governments and regulators would achieve greater levels of compliance with OHS legislation and regulations if they invested, in conjunction with business organisations, more directly in information, assistance, advice, education and training. OHS regulators should increase national co-ordination of communications activities.
  - t. OHS issues in the workplace should be dealt with in a non adversarial and non ideological manner.
5. These recommendations have been developed in the context of a consideration of the rights and obligations of private sector employers; they nevertheless are relevant to OHS regulation in a general sense, and outline an approach which can be utilised to produce better, more effective and more balanced OHS laws.
6. We commend the entire ACCI OHS Blueprint for consideration in the context of this review. The blueprint can be accessed at:

<http://www.acci.asn.au/OHSBlueprintMain.htm>



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

7. ACCI notes that as part of the Research Task that the Productivity Commission is to undertake, they are to examine the Australia's implementation of the United Nations' Globally Harmonised System of Classification and Labelling of Chemicals.
8. The GHS aims to provide a harmonised basis for globally uniform health and safety information on hazardous chemicals substances and mixtures. ACCI recognizes the potential benefits from the adoption of such a system are many. The reduced barriers to trade, as well as the enhanced protection of human health and the environment, the most significant. It is also anticipated that the introduction of the GHS will ultimately lead to a reduced need for testing of chemicals. The GHS provides a recognized framework for those countries without an existing system.
9. The trade and other benefits that are expected from the introduction of the GHS can not be realized unless there is harmonised adoption of the system globally. This can not be achieved without significant coordination and cooperation between countries and regions. Australia must to the greatest extent possible, benefit from the scope, the lessons learned and also the work undertaken by other countries. Australia cannot implement the GHS in isolation.
10. For Australia to implement this system successfully further information must be known on the intentions of our major trading partners. Australia cannot afford to implement this system in isolation; the costs could not be justified and would cripple the industry.

ACCI believes that confirmation of how the GHS will be adopted not only in the European Union, but in the United States and other key countries must be obtained prior to any further decisions are made on the adoption of this new system.

11. This information is currently being analysed as it becomes available. Industry is currently working closely with ASCC to identify the differences in implementation and interpretation and the effect this will have the proposal that Australia finally adopts.
12. In summary ACCI has recommended that the Australian Safety and Compensation Council (ASCC) considers the following recommendations proposed by industry for the draft revised framework for the regulatory control of workplace hazardous chemicals:

- a. That further consideration of the implementation of the GHS must be informed by activities of our major trading partners;
- b. That a report is produced by OASCC comparing the scope of implementation of the GHS by all of our major trading partners, and the proposed timeframes for implementation of the GHS by our major trading partners be presented for consideration by the ASCC;
- c. That ASCC agree to an implementation timeframe that is phased in after that of our major trading partners;
- d. That OASCC facilitate the consistent adoption of the proposed national framework, by ensuring the documents are written in a style that allows their easy adoption by the jurisdictions; and recognizes their legislative constraints ;
- e. That ASCC works cooperatively with industry and the jurisdictions to develop an implementation timeframe and framework that allows the smooth transition between systems;
- f. That ASCC ensures that industry understands and is familiar with this new classification scheme by supporting the development and delivery of appropriate training; and
- g. That ASCC uses this opportunity to develop an integrated hazardous chemicals regime that is simpler and more streamlined.

## **Issues for Comment**

### **The Case for Change**

13. ACCI is committed to the achievement of a nationally consistent system and framework for occupational health and safety legislation as outlined in the ACCI OHS Blueprint. It should be recognized that generally Australian industry is over regulated, and that implementation of reforms have been slow.
14. There are significant problems with regulatory design and administration of OHS in Australia.
15. Over the past decade qualitative and quantitative research and surveys of Australian business have identified OHS compliance as a critical issue for industry. It reflects a heightened awareness and commitment to OHS outcomes, it also reveals that the compliance and red tape burdens arising from OHS regulation are assuming a high order concern that needs to be tackled by governments and regulators. OHS systems have generated a plethora of regulation across Australia over the past generation.
16. The major problems identified by employers are:

#### The quantity of regulation

- multiple sources of regulation on the same topics,
- alternatives to regulation or black letter law are not properly considered or assessed.

#### The quality of regulation

- the 'duty of care' interpreted to impose extreme, absolute and, in some cases, literally impossible duties on employers and designers in meeting performance-based obligations;
- expressed in complex and legalistic terms;
- inadequate defences where conduct has been reasonable;
- fails to account for particular circumstances of small and medium businesses;
- developed without proper cost or economic impact assessments;
- once made, not accompanied by effective communication to industry;

#### Frequency of Change: The frequency of change to regulation

- regulation, once introduced, is not properly reviewed

- additions and amendments to regulation are ad hoc and based on inadequate industry consultation;
- employers can't keep up with the volume of new regulation – for example in the five years to 2003 there were been 166 amending instruments of OHS regulation in Australia involving 1,796 changes to rights and obligations of employers and employees on workplace safety; and
- the practical impossibility for many businesses of keeping pace with often obscure changes in scientific, technical, medical or attitudinal data affecting what they do and the way they work.

#### The compliance and red tape burden of regulation

- regulation creates excessive compliance and red tape burdens, especially form filling, written reporting and data collection;
- red tape focuses on compliance, not outcomes;
- this is increasingly a high order issue in business surveys, research and census
- businesses, especially smaller and medium businesses carry an excessive burden of compliance with ever changing laws and keeping abreast of those changes.

#### The lack of national consistency in core regulation

- regulation, even on common basic issues, differs amongst six States, two Territories and Commonwealth laws;
- nationally operating companies, as well as employees, are prejudiced by lack of national consistency;
- not all key OHS standards developed on a national basis are implemented on a nationally consistent basis, or implemented at all

#### The role of State and Territory Governments

17. To this day the State and Territory governments remain the primary jurisdiction with responsibility for OHS frameworks affecting the private sector.
18. State and Territory governments and key stakeholders in those jurisdictions therefore, retain the fundamental role in achieving reforms. They have the principle role in determining the extent to which greater harmonisation of existing state – based arrangements occur.

## Regulation at the International Level

19. Appropriately set international standards and instruments can provide assistance to Australian business in achieving workplace safety objectives, and in having employers with whom we trade and compete apply similar standards.
20. However, poorly researched or framed international standards or international standards that fail the test of good regulatory principles will not be helpful to Australian industry and should not be supported by regulators. International standards or instruments, whether on OHS of other subject matters, should not be incorporated into domestic Australian law or into corporate policy without a thorough assessment of their terms and not until domestic law and corporate practice is in substantial compliance.
21. ACCI believes that care and caution should however be exercised before international instruments are introduced into domestic law.
22. With this in mind however the unique needs of the chemicals' industry for globalisation must also be recognised. Due to the testing and certification processes that they must undergo it makes sound economic and regulatory sense to work towards acceptable principles and procedures for international chemicals management.

### **The need for effectiveness**

23. ACCI accepts that due to the nature of the inherent hazards associated with both the chemical industry and its products, quite complex and comprehensive regulatory regimes have been imposed. This is not to say that the burden of regulation is commensurate with the problems caused. There is still a need to ensure that any regulatory regimes proposed have been subject to rigorous assessment of the potential benefits versus the costs imposed.
24. It must also be ensured that a duplicative regime administered by varying sectors does not occur. There currently exists guidelines that clearly outline the expected procedures that should be undertaken by Government Authorities when developing or reviewing regulations. These guidelines produced by both the Council of Australian Governments – COAG (Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies) and the Office of Best Practice Regulation (Best Practice Regulation Handbook), more than adequately provides the framework to ensure that efficient and

effective regulations only are imposed that do not duplicate existing regulatory regimes.

25. It is essential that solutions to particular problems be developed based on both their safety features and their economic and practical sustainability.
26. One of the barriers to the implementation of reform is poor quality regulation and over regulation. There is constant demand on employers to find resources to respond to many agencies who are responsible for regulatory development. The plethora of new regulation and amendment to existing is a constant challenge and one that the average employer would find impossible. This simply adds to the complexity and inability of many employers to keep abreast of compliance requirements.
27. Regulations are often developed as a response to an immediate need or public reaction. In these instances their relationship to other regulations is often not adequately assessed, adding to the piecemeal of approach that employers are meant to comply.
28. There is little evidence that any definitive studies on the effectiveness of regulations are ever undertaken. Regulation must be developed with a clear understanding of what is to be achieved and how this in fact can be measured.

### **Alternatives to Government Regulation**

29. Responsible Care is an initiative of the international chemical industry to improve the health, safety and environmental performance of its operations and to increase community involvement and awareness of the industry. PACIA strongly promotes adherence to Responsible Care for all member companies manufacturing, importing and distributing chemicals.

Responsible Care is a HSE Management system, consistent with international approaches, including the ISO Quality, Environmental and OH&S series. The Responsible Care system consists of Codes, guidance notes and checklists for implementation of good HSE practices

30. The Australian Paint Manufacturers Federation (APMF) through their program Coatings Care offers the industry the means to:
  - more effectively use organisational and management resources for compliance with health, safety and environmental regulations;
  - integrate consideration of health, safety and environmental resource information in organisation planning and operations;

- enhance participation and direction of association activities;
- access health, safety and environmental management practices and resources being used or considered on an international basis.

Coatings Care offers participating paint manufacturers the opportunity to pursue a common, effective management approach for their health, safety and environmental programs. In addition, participation in Coatings Care provides a visible commitment by all levels of management to follow best practices in the four areas of particular concern to employees and the public at large, namely, manufacturing processes, health and safety, transport and distribution, and product stewardship.

31. Industry has proved the effectiveness of voluntary industry initiatives such as these. They promote awareness of community safety and environmental responsibility. The existence and application of these programs must be considered whenever regulatory controls in this sector are proposed.

### **Access to Information**

32. The provision of information on workplace hazards associated with the use of chemicals is the cornerstone of the national model regulatory regime for hazardous substances (National Model Regulation for the Control of Workplace Hazardous Substances) originally developed by the National Occupational Health and Safety Commission and currently being reviewed by the Australian safety and Compensation Council. The systems proposed by this model regulation including the provision of safety data sheets and labels are well established and accepted in industry.
33. It needs to be ensured however that the information that is supplied to the workplace is comprehensive and relevant to their needs. The provision of information in this way must be complemented by education, training and general awareness raising. This again is well established in workplaces, with processes defined in regulation. The community education programs in some industrial communities are also now well established.

### **Consultation**

34. The need for consultation with relevant stakeholders during the development of regulations is defined and clearly articulated in the COAG and OBPR guidelines. The effectiveness of this consultation is often lacking. The plethora of regulatory changes that industry faces makes it difficult for them to be able to effectively respond to all the demands.

35. Often limited time is allowed for industry sectors to respond on a collective basis and to give the issue the attention it warrants.
36. Governments have a clear moral responsibility to ensure that any proposed regulatory change is well advertised and communicated to those that will be affected by it. It is simply not sufficient to advertise in the national press that a change is proposed. Government has a responsibility to seek those that will be affected and consider their views. This may mean holding public forums, providing information that adequately informs those who are potentially affected or simply undertaking door to door interviews.
37. Innovation – and adequate time - is required to ensure that all interested parties have the opportunity to respond.

### **The need for coordination within and across jurisdictions**

38. The Occupational Health & Safety framework is a challenging policy in an operational environment for employers where OHS is regulated by eight (8) different jurisdictions using performance based regulations with a high level of enforcement powers and penalties. Each jurisdiction has its own regulations and even where individual matters appear to be consistent the application and interpretation may differ widely for example in such areas as 'duty of care'.
39. There is a clear case for national consistency and a need to find mechanisms to achieve that objective. Industry has been an active participant in national forums that have attempted to achieve this aim. ACCI currently represents employers on the ASCC.
40. The political will to achieve national consistency is all that is needed. The gaining of will and harnessing into action is however much more difficult.

### **Implementation and Administration of Regulation**

41. It is also essential to have nationally consistent legislation which achieves a fair balance between enforcement and prevention strategies. This will only be possible within a legislative framework which sets attainable standards and allows employer defences. For example, prosecution should not be an issue where employers have implemented a fair and reasonable OHS system that is objectively defensible and reflects a clear and ongoing commitment to workplace safety.
42. Legislation should also provide that the primary purpose of the regulators is to assist employers and other duty holders to manage and control risks effectively, focusing on the prevention of injury and the improvement of



workplace safety. Prosecution and penalties have limited deterrent value, do not contribute materially to outcomes in businesses not affected by prosecutions and, as a matter of regulatory policy, should be used only as a last resort.

### **Leveraging International Linkages**

43. Where global developments are in the best interests of Australian employers, Australia should include international strategies and programs into our frameworks. They should however still be subject to strict and stringent cost benefit analysis and not acceptable without adequate debate and discussion.

44. The introduction of the GHS is still under debate at the ASCC. While recognising there is considerable benefit in implementing the system in Australia, ACCI is aware that these benefits may well be lost if we hastily introduce the system prior to major trading partners.

45. The full implication of the move to introduce the GHS should not be overlooked. Industrial chemicals are in nearly all industry sectors to varying degrees. The impact of new classifications and the subsequent changes to safety data sheets and labels will be substantial. As will the flow on changes required by the general users of these substances.

46. Almost every Australian workplace will be required to review hazardous chemical registers and risk assessments, training, work procedures and information provided. The full cost implications which are to be closely examined by ASCC are expected to be huge. This must be countered by trade benefits for it to be effective.

### **Regulation of security sensitive ammonium nitrate.**

47. ACCI strongly supported the three policy aims for the COAG principles on SSAN:

- A nationally-consistent, effective and integrated approach to control access to security sensitive ammonium nitrate to those with legitimate need
- To ensure accountability at all stages of the ammonium nitrate supply chain, in order to address security and safety concerns
- To establish a framework for control which may be applicable for other materials of security concern

48. ACCI is disappointed that these aims were not met. The process that was undertaken and the commitment by the jurisdictions to achieving a

nationally uniform approach must be examined, to ensure that such a disappointing result does not occur again.

## **Conclusion**

49. There are many barriers and challenges to the implementation of regulatory reform including:
- the regulatory structure in which Australia has nine separate regulatory authorities;
  - poor quality regulation and over-regulation, including constant government reviews and the need for employer consultation process to allow response time and proper allocation of resources;
  - inappropriate approaches to compliance and penalties, and a failure to put prevention above enforcement as a policy priority;
  - lack of evaluation of the value of current and past programs and interventions, such as national standards and codes;
50. Commitment by industry, governments, regulators, courts, policy makers and other stakeholders (including trade unions, employee representatives and health and safety committees) to regulatory reform is essential if true gains are to be made.