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#### The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

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# Foreword

Benchmarking the burdens imposed on business by regulation is an important part of the regulatory stream of the National Reform Agenda of the Council of Australian Governments (COAG). The Agenda focuses on reducing the regulatory burden imposed by the three levels of government.

Almost all businesses are affected by occupational health and safety (OHS) regulation, some of which is unnecessarily burdensome. In undertaking this review, the Commission compared written regulation and assessed the performance of OHS regulators to identify where administration and enforcement practices may be imposing unnecessary burdens on business. The insights provided should help governments ensure the benefits from regulation are not outweighed by the costs imposed and remove unnecessary compliance costs.

The study was overseen by Commissioner David Kalisch and Associate Commissioner Paul Coghlan, with a staff research team led by Sue Holmes.

The Commission has been greatly assisted by many discussions with participants in the sector, by submissions and by the regulators who filled in detailed questionnaires. Thanks are extended to all those who have contributed.

Gary Banks AO Chairman March 2010

## **Terms of reference**



#### The Hon Chris Bowen MP Assistant Treasurer Minister for Competition Policy and Consumer Affairs

1 6 DEC 2008

Mr Gary Banks AO Chairman Productivity Commission GPO Box 1428 CANBERRA CITY ACT 2601

Dear Mr/Banks

I am writing to you regarding the 2009 work plan of the Productivity Commission's Performance Benchmarking of Australian Business Regulation study.

In response to your request of 12 September 2008, this matter was raised at the 24 October 2008 Council of Australian Governments' Business Regulation and Competition Working Group meeting.

The BRCWG:

- noted the merit in continuing the benchmarking work program;
- agreed that occupational health and safety and food safety regulation should be considered by the Commission in year 2;
- requested that the Commission complete the OH&S and food safety benchmarking reports by December 2009; and
- agreed to revisit the Commission's future work plan in relation to the benchmarking study in 12 months time.

I would be grateful if you could undertake whatever action is necessary to fulfil the BRCWG's direction. The Commission may structure its work as it sees fit within the timeframe indicated above.

I have copied this letter to the Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation.

Yours sinderely

**CHRIS BOWEN** 

PO Box 6022 Parliament House CANBERRA ACT 2600



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# **O**VERVIEW

## Key points

- This study compares inter-jurisdictional differences in occupational health and safety (OHS) legislation in 2008-09 and its administration and enforcement and the costs they imposed on business. Such benchmarking provides information which can support current moves to establish a consistent regulatory approach to OHS across all jurisdictions.
- Generally, OHS performance has been improving. National injury incidence rates have fallen almost 20 per cent between 2002-03 and 2007-08.
- The core OHS Acts of all jurisdictions are all based on the principle of allocating duties of care to those most able to influence OHS outcomes and yet the Acts differ.
- In addition, there are 70 industry or hazard-specific Acts which regulate OHS in some way. For states with separate mining regulations (New South Wales, Queensland, Western Australia) compliance burdens on large mining companies are greater in Western Australia which makes limited use of performance and processbased regulation.
- The burdens from jurisdictional differences in OHS regulation fall most heavily on businesses which operate in more than one state or territory.
- Among regulations aimed at improving the culture of compliance, different requirements across jurisdictions for record keeping, training, and worker participation and representation result in differences in the burdens imposed on business.
- Among regulations aimed at managing particular hazards, the different requirements across the jurisdictions with regard to asbestos, manual handling and falls result in differences in the burdens imposed on business.
- Given the costs they impose, all jurisdictions give relatively less attention to psychosocial hazards than to physical hazards. All jurisdictions provide guidance material on various aspects of psychosocial health. Victoria and New South Wales provide harmonised guidance on bullying and on fatigue. Only Queensland and Western Australia provide a code of practice on bullying. Western Australia and South Australia are the only jurisdictions to have a code of practice on working hours, while Western Australia is the only jurisdiction to have a code that addresses occupational violence. Victoria and New South Wales pursue bullying the most vigorously in the courts.
- Australian OHS regulators commonly use a cooperative, graduated approach to achieve compliance. They apply a risk-based approach to enforcement and generally seek to minimise adverse side effects on business.
- There are significant differences among OHS regulators in: their level of resources; funding sources; availability and application of enforcement tools; appeal mechanisms; and transparency.

## Overview

The regulatory stream of the National Reform Agenda of the Council of Australian Governments (COAG) focuses on reducing the regulatory burden imposed by all levels of government. COAG agreed that effective regulation is essential to ensure markets operate efficiently and fairly, to protect consumers and the environment and to enforce corporate governance standards. However, the benefits from regulation must not be outweighed by the costs imposed and there should be no unnecessary compliance costs.

In February 2006, as part of the Agenda, COAG agreed to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden for all levels of government. COAG particularly wants to identify unnecessary compliance costs, enhance regulatory consistency across jurisdictions and reduce regulatory duplication and overlap. COAG's concern is not only with written regulation but also with the role and operation of regulatory bodies.

This report on the regulatory burdens imposed on business by occupational health and safety (OHS) regulatory regimes is one of two studies undertaken during 2009 and into 2010. (A companion report, benchmarking the regulatory burdens imposed by food safety regulation and regulators, was released in December 2009.)

## Purpose and conduct of the study

The purpose of this study is to benchmark, across the jurisdictions, the regulatory burden on business associated with OHS regulatory regimes. The focus is on regulation directed at reducing psychosocial and physical harm arising from the activities of a business or undertaking. Regulations serving other objectives, such as industrial relations or environmental impacts of industry, are generally not within the scope of this study.

The process adopted for the review has been to invite submissions from, and consult widely with, interested parties, including: industry associations; national, state and territory governments; consumer groups; and businesses across a wide spectrum of industries. The Commission also drew on public submissions to other reviews, annual reports and studies estimating relevant costs, in order to reduce the cost of participation on interested parties. As well, the Commission surveyed small and

medium enterprises, and regulators. All these sources of information contributed to both the identification of regulatory differences and to the analysis, and where feasible the quantification, of the associated burdens.

Given OHS affects virtually every business from all industries, it has not been possible to measure the total compliance burden imposed on a typical business in each jurisdiction. Instead, the Commission has:

- identified differences in either regulation or regulator behaviour and highlighted which jurisdictions are likely to impose higher costs in each case
- devised and estimated indicators which were likely to show which differences in requirements impose relatively high costs on business both performance comparisons across jurisdictions and comparisons against agreed best practice standards were used
- sought evidence as to whether or not identified higher regulatory costs might be associated with better outcomes to shed light on whether they are unnecessary.

By focusing on the costs imposed on business rather than the costs and benefits on all groups, the study is necessarily more limited in the insights it can provide. Also, focusing on particular aspects of the regulatory regimes rather than the entire OHS regulatory regime of each jurisdiction and how different components interact (such as how requirements for more training may mean fewer inspections are needed) may miss important comparisons.

While no recommendations are included in this study, it does draw attention to areas of OHS regulation where there are differences in the compliance burdens between the jurisdictions and thus where there may be benefits from further reform. This information may contribute to the work on national uniformity of legislation and a nationally consistent approach to compliance and enforcement policy, all part of the Intergovernmental Agreement for Regulatory and Operational Reform in OHS.

## OHS outcomes have been steadily improving

Information on OHS outcomes provides useful context when benchmarking different approaches to OHS regulation. It is clear that Australia's performance has been improving compared to other high performing countries, including fatalities from workplace accidents (figure 1).

In 2007-08, there were 232 compensated work-related fatalities in Australia or 2.4 compensated fatalities for every 100 000 employees (data not strictly comparable

with figure 1). The highest fatality rates were recorded by the Northern Territory, Commonwealth and Queensland.

In the same year, for every 1000 people employed in Australia there were 14 serious workers' compensation injury claims. Injury rates were relatively high for Seacare (which covers Australian maritime employees), and in Queensland and Tasmania.





<sup>a</sup> Data were standardised against Australia to take account of different industry mixes and a three year average was used to remove some volatility associated with the small numbers. Safe Work Australia notes that while the methodology has attempted to address concerns associated with comparing different data sets across countries some issues have not been fully resolved and may impact on the final results. <sup>b</sup> Preliminary data for 2006-2008 shows a significant improvement in outcomes data in New Zealand.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

Industries for which there has been a relatively high risk of injury in particular jurisdictions, include:

- Agriculture, forestry and fishing in the Northern Territory and Queensland
- Manufacturing in Queensland
- Construction in Queensland and the ACT
- Transport and storage in Queensland and Tasmania
- Mining in New South Wales and Tasmania.

Outcome indicators are also useful in identifying broad trends in OHS over time. Trend data indicate the Commonwealth and Victoria have achieved the lowest injury rates in recent years while rates have been relatively high for Seacare, Queensland, South Australia and Tasmania. However, outcomes have been improving in all jurisdictions, with serious injury rates reducing significantly for Seacare, the Commonwealth, South Australia and the ACT.

For particular industries and jurisdictions, significant improvements in injury rates were recorded for:

- Mining in the Northern Territory, New South Wales, South Australia and Queensland
- Construction in the ACT, Tasmania, South Australia and New South Wales
- Transport and storage for Seacare and South Australia
- Wholesale trade in the ACT
- Manufacturing in South Australia
- Agriculture, forestry and fishing in Tasmania.

## Australia's regulatory and institutional structure

The prime responsibility for regulating OHS rests with Australia's states and territories, and with the Commonwealth for employees of the large national firms insured under the Comcare scheme and Commonwealth employees. The Commonwealth Government has also taken on a coordination role through Safe Work Australia and its predecessors.

Every Australian jurisdiction (state, territory and the Commonwealth) has a core OHS Act, with a specific regulator responsible. Most OHS regulators are also responsible for workers' compensation. The OHS legislation in all jurisdictions contains common themes and addresses the same core aspects of OHS, including: duties of care; worker participation and representation; OHS training and information; incident notification and record keeping; licensing, registration or use of permits; inspectors; and risk management.

Each jurisdiction also has a number of other pieces of primary legislation, apart from the core OHS Acts, which cover OHS issues relating to specific industries or hazards. The number of additional Acts varies from 3 in Western Australia to 9 in the Commonwealth. In total, there are around 70 additional Acts relating to OHS Australia wide. This highlights the complexity of the task facing businesses in complying with OHS obligations, particularly for those that operate nationally or in a number of jurisdictions.

## The regulations

## Harmonisation is incomplete and complexity remains

Up till now there has been no national model OHS Act. While progress has been made in developing national OHS standards, not all have been adopted by all states and territories. Also, a variety of mechanisms have been used to integrate the standards into the jurisdictions' legislation. Based on whether key elements of each standard were adopted in legislation, Tasmania has adopted the most (16) and the Northern Territory has adopted the least (10) out of a total of 17.

An indicator of the complexity of the combined OHS regimes of the states and territories is that the costs national firms face under the differing OHS regulatory regimes of the jurisdictions exceed those of the Comcare system. For example, firms operating Australia-wide have to be aware of 3392 pages of regulation — 1068 from primary legislation and 2324 from formal regulations — and face 282 codes of practice at the state and territory level. In contrast, firms operating under Comcare have to be aware of 621 pages of regulation — 147 from the primary legislation and 474 from formal regulations — and 21 codes. The volume and complexity of the OHS regulatory regimes has been a critical motivation for those companies which have joined the national Comcare scheme.

## Regulatory requirements focus on OHS responsibility and awareness

During the 1980s and 1990s, Australian jurisdictions adopted OHS regulatory systems which reflected the recommendations of the Robens Report (1972) from the United Kingdom. Robens shifted the focus of regulations from prescriptive requirements to process-and-outcome-related duties of care. This has been an important over-arching influence on reforms over the last 30 years.

Consistent with the Robens framework, there has been a growing focus on regulatory requirements that increase awareness and knowledge of OHS issues and thus change the commitment and abilities of all involved rather than rely on prescriptive guidance on particular hazards to improve prevention generally.

Jurisdictions have progressed down this path to different degrees, with Victoria being the most innovative as indicated by their consolidated compliance codes and greater focus on processes to identify risks and hazards more broadly.

While regulations are broadly similar and often seek the same outcomes, regulatory differences remain sometimes with different regulatory burdens on businesses. For example, mining regulation in Western Australia has more prescriptive elements

which as a general rule are more burdensome on large business in contrast to the process and management systems which characterise mining legislation in Queensland and New South Wales.

# Requirements vary for some regulations aimed at engendering a culture of compliance in the workplace

## Hazard identification, risk management and record keeping

The general OHS duties imposed on employers in all jurisdictions imply they should conduct risk management. In addition, all except the Victorian and ACT core OHS Acts also explicitly require general risk management processes, although these two jurisdictions set out a risk management process for some hazards. Given that all jurisdictions either imply or specify risk management processes, it is perhaps unsurprising that businesses report similar costs for risk management across the jurisdictions.

All jurisdictions impose a number of record keeping arrangements in relation to workplace safety and they differ significantly. For example, the ACT only requires record keeping for confined spaces and health monitoring, whereas New South Wales and Victoria have requirements for 12 and 11 different hazards, respectively.

Victoria also takes a significantly different approach to other jurisdictions in placing greater emphasis on assessing the suitability of outcomes, rather than records kept, when assessing compliance. WorkSafe Victoria (2007) found that while 89 per cent of workplaces had adequate risk controls in place for plant hazards, only 49 per cent had documented risk assessments.

Requirements to keep records relating to workplace incidents also vary considerably. At one extreme, the Commonwealth requires businesses to keep records relating to OHS incidents for at least 30 years. At the other extreme, Queensland only requires records to be kept for one year; and Western Australia and Tasmania have no formal record keeping requirements for OHS incidents.

## OHS training requirements

Significant differences in training requirements with differing burdens among the jurisdictions during 2008-09, included:

• employers in all jurisdictions had a duty to provide OHS training and instruction to workers with the exception of the Northern Territory, where training was a matter for which employers were required to consult with workers

- New South Wales and South Australia had the most comprehensive training requirements to manage specific hazards in their OHS regulations while, at the other extreme, Tasmania only had a specific training requirement to manage the removal of asbestos
- only Victoria, South Australia and Tasmania required OHS information to be provided in appropriate languages, and the Commonwealth required information, instruction, training and supervision all to be in appropriate languages
- most jurisdictions required people employed in the construction industry to complete OHS awareness training, except for Tasmania, the Northern Territory and the ACT (though all three have introduced induction training since 2008-09)
- the Commonwealth, New South Wales, Queensland and South Australia required records to be kept for up to five years for training associated with specific hazards, while other jurisdictions either have no requirement, or require records to be kept for the period of the employee's employment or the duration of the work.

## Worker consultation, participation and representation

Differences in requirements for electing health and safety representatives (HSRs) which appear to involve differences in regulatory burdens across jurisdictions include:

- Tasmania provides for one HSR per workplace, whereas all other jurisdictions (without necessarily precluding one HSR per workplace) provide for multiple HSRs in a workplace
- in Tasmania, the Northern Territory and the ACT, businesses with fewer than 10 employees were exempted from the HSR requirements, in 2008-09
- HSR training is compulsory only in the Commonwealth, New South Wales and Tasmania.

With regard to health and safety committee (HSC) requirements, employers with fewer than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory were exempt in 2008-09, and employers with fewer than 50 employees were exempt under the Commonwealth regime.

Jurisdictions varied in respect to provisions for union involvement in OHS consultations and in investigations of possible OHS breaches. The Commonwealth, Tasmania and South Australia were the only jurisdictions not to confer rights of entry to unions to investigate possible breaches of OHS regulations as at June 2009. Tasmania has since introduced rights of entry in February 2010 while South Australia has delayed making a decision after releasing a Bill on entry for public comment in 2009. All statutes providing a right of entry for OHS purposes include

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safeguards intended to prevent the misuse of the powers conferred on authorised representatives. Views vary as to how effective the safeguards are.

## Greater uniformity in the control of specific workplace hazards has been achieved, but differences and unnecessary costs remain

## Regulating hazardous substances

Through the adoption of key national standards and codes of practice, all jurisdictions have developed a common basis for the classification and treatment of hazardous substances. However, the operation of overlapping systems for the regulation of hazardous substances and dangerous goods gave rise to confusion and duplicated effort for businesses in complying with the requirements.

## There are significant differences in asbestos regulation

In 2008-09, there were significant differences across the jurisdictions in the regulation of asbestos (and most are still current), including:

- the annualised fees applying to a business licence to remove friable asbestos ranged from \$27 in Queensland (or \$17 for an individual in the Northern Territory) to \$3536 in South Australia. There were also significant differences in the nature and content of the information that applicants must supply as part of applying for an asbestos licence
- all jurisdictions, except Queensland and the ACT, required an asbestos removalist to either notify the regulator prior to starting an asbestos removal project (Victoria, Western Australia, Tasmania, the Northern Territory and non-friable asbestos removal in New South Wales) or obtain a permit prior to so doing (South Australia and friable asbestos removal in New South Wales). Only New South Wales charges a fee for these permits
- Western Australia was the least burdensome jurisdiction in relation to many requirements for asbestos removal work (although it charged the second highest licence fee \$1925 per annum)
- only the Commonwealth and the Northern Territory did not have explicit requirements for the owners/controllers of non-residential buildings to maintain an asbestos register
  - the level of prescription regarding the contents of the register varied greatly among those jurisdictions requiring one.

# *'Psychosocial hazards' received relatively little regulatory attention and jurisdictions varied in the guidance provided to employers*

While work-related stress claims, which include cases of bullying and harassment, occupational violence and work pressure, tend to be more costly on average than claims for most types of physical injury — both in terms of direct costs and time taken off work — psychosocial hazards are not given as much attention in OHS legislation and by inspectors as physical hazards. This may add to uncertainty for businesses about the extent of their duty of care and how to address psychosocial hazards.

In all jurisdictions, the obligation to address psychosocial hazards is implicitly covered by the employer's duty of care to provide a healthy and safe workplace. However, there are a number of differences in the way in which psychosocial hazards are specifically addressed in the formal regulations and regulatory practice:

- Victoria, New South Wales and the ACT explicitly refer to psychological health or needs in their OHS statutes, and South Australia refers to inappropriate bullying behaviours in the workplace in its OHS Act
- there are different definitions of bullying, occupational violence and fatigue across the jurisdictions, making comparisons problematic
- all jurisdictions cover bullying and occupational violence in guidance material, while all jurisdictions except Tasmania and the ACT address fatigue in separate guidance material
- Victoria and New South Wales have produced harmonised guidance on bullying and on fatigue which should reduce costs for businesses operating in both states
- Queensland and Western Australia are the only jurisdictions to provide a code of practice on bullying
- Western Australia and South Australia are the only jurisdictions to have a code of practice on working hours, while Western Australia is the only jurisdiction to have a code that addresses occupational violence
- with regard to administration and enforcement, some jurisdictions maintain specialist bullying or other psychosocial teams
- a number of jurisdictions prosecute breaches relating to psychosocial health with New South Wales and Victoria being the most active, particularly in relation to cases of bullying.

## Costs imposed on businesses from 'falls regulation' varies

Particular differences among jurisdictions which are likely to impact on costs on businesses include:

- a combination of the ACT's regulatory framework (comprising two overlapping Acts in 2008-09 (the *Scaffolding and Lifts Act 1912* (ACT) and the *Occupational Health and Safety Act 1989* (ACT)) and continuing use of the imperial measurement system, makes it the most burdensome jurisdiction for businesses seeking to understand their obligations
- New South Wales has a more complex code of practice (which sets out additional actions and height thresholds to those contained in its regulations)
- in order to be informed of minimum compliance requirements, it would cost businesses in the Northern Territory \$1477 to purchase the private standards (usually Australian Standards) referred to in falls regulations (unless they are accessed at the Northern Territory Library at Parliament House where the standards can be viewed free of charge). At the other extreme, businesses in Queensland would not need to purchase any such standards to be similarly informed.

Overall, there are indications that lower height thresholds may contribute to a lower incidence of falls, although other factors (such as industry growth rates and workloads) mean that jurisdictions with lower thresholds do not always outperform the others.

## Manual handling

Queensland is the only jurisdiction not to specifically cover manual handling in either its Act or regulations. Instead it is covered by the general duty of care and in codes of practice.

The Australian Safety and Compensation Council (ASCC) introduced a revised best practice National Standard for Manual Tasks in 2007, but only the Commonwealth and Tasmania have adopted it in their OHS regulations and so burdens continue to differ across the jurisdictions.

# While there is significant consistency in requirements for licences for high risk work, some jurisdictions require additional licences

All jurisdictions require licences for high risk work. These are generally consistent, with all effectively applying the national standard. Licences are also mutually recognised by all jurisdictions. However, New South Wales, Queensland, South Australia, the Northern Territory and the ACT require some additional high risk work licences, which may impose further costs on businesses and employers.

## The regulators

The regulatory burden also depends upon the actions and interpretations of the regulators, not just the regulatory requirements contained in legislation.

## Awareness of the need to administer and enforce well

Through meetings held with stakeholders across the country, the Commission formed the opinion that over the last 10 years or so, regulators have improved their capacities to deliver regulatory outcomes in ways that try to minimise adverse impacts on businesses, provide assistance in complying with the law and focus efforts on those most likely to offend. Demonstrated compliers receive the minimum of inspections, and non-compliant but cooperative businesses are assisted to comply. This targeted approach reduces unnecessary burdens.

As well, the establishment of the Heads of Workplace Safety Authorities and its development of the 'National OHS Compliance and Enforcement Policy' assists regulators to implement consistent and effective enforcement practices across jurisdictions and reflects a desire to improve consistency.

However, differences in enforcement decisions and interpretations persist, which can undermine the benefits of consistent regulations. For example, one Australian business was advised by some OHS regulators that a Material Safety Data Sheet (MSDS) was not required for obsolete chemicals, while other regulators were unable or unwilling to provide advice on the matter and another regulator deemed that an MSDS was required.

## Risk management and responsive enforcement are used widely

All regulators use a risk-based approach to enforcement, with regulators focusing on high risk industries and on high risk hazards. For example, inspections and investigations of core OHS regulators in 2008-09 were concentrated on higher risk industries, particularly in Building and construction.

Most also apply a 'responsive regulation' model. This involves an escalation of responses by the regulator, ranging from helpful to punitive, applied as appropriate to the circumstances and response of the business being regulated (figure 2).

Responsive and risk-based enforcement strategies are compatible. Combined, they maximise the effectiveness of regulator enforcement, direct limited resources to where there is the greatest need, and reduce the burden of regulatory activity on those businesses which have demonstrated a high probability of compliance.



Source: Adapted from Gilligan, Bird and Ramsay (1999).

### There are significant differences in the availability of instruments

The greater the range of enforcement instruments available to a regulator, the greater the scope for a more proportionate approach to dealing with businesses in breach of their requirements. Sometimes, constraints in the legislation limit the flexibility of regulators. The enforcement tools available to OHS regulators are shown in table 1. Victoria has the largest range of enforcement instruments at its disposal, closely followed by Queensland. In addition to the standard 11 instruments, Victoria has 4 'softer' enforcement tools.

The mining-specific OHS regulator in Queensland has the lowest number of available enforcement tools (4). Overall, such limited flexibility may result in higher compliance burdens for mining businesses in Queensland compared to other jurisdictions. The lack of enforceable undertakings, which are much cheaper than prosecutions, may also result in unnecessarily high costs for some businesses in New South Wales and South Australia, as well as in mining for New South Wales

and Queensland mining. (Queensland mining contends that it can achieve the same outcome with the use of statutory directives.)

										М	lining	
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	NSW	Qld	WA
Educate/advise	✓	✓	✓	✓	✓	~	~	✓	✓	✓	✓	~
Verbal warning		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$
Written directive	$\checkmark$	$\checkmark$	$\checkmark$				$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$	✓
Improvement notice	$\checkmark$		✓									
Prohibition notice	$\checkmark$		✓									
Licence suspension	$\checkmark$		✓									
Licence cancellation	√8	a 🗸	$\checkmark$		✓							
Adverse publicity	$\checkmark$		$\checkmark$		$\checkmark$		$\checkmark$	$\checkmark$	$\checkmark$			
Infringement/penalty notice		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$	$\checkmark$			
Prosecution	$\checkmark$	✓										
Enforceable undertaking	$\checkmark$		$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$			✓
Other	√t	)	√C	√d								

## Table 1Availability of enforcement tools

2008-09

<sup>a</sup> Comcare has the ability to revoke licences based on a graduated tier system. This system allows for employers to be ranked and apply a self-assessment based approach where Comcare provides oversight and monitoring.
 <sup>b</sup> Injunctions, remedial orders.
 <sup>c</sup> Voluntary compliance, non-disturbance notices, letters of caution, letters of warning.
 <sup>d</sup> Seizures, electrical safety protection notices.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### There are some differences in the use of instruments

As well as using softer enforcement instruments as a first response, regulators try to improve the capacities of businesses to comply, such as with training and awareness raising. There are differences in the relative use of these two broad strategies and in the use of instruments within each. A complication is that there can be a blurring of these strategies, such as when inspections are used to provide guidance and education.

The actual use of the enforcement tools by the core regulators in 2008-09 is shown in table 2. Generally, improvement notices were used most regularly and more serious actions (prosecutions and enforceable undertakings) were relatively rare. Tasmania used the highest proportion (94 per cent) of soft enforcement tools. Similarly, mining-specific OHS regulators used less punitive responses far more frequently: written directives in New South Wales and Queensland; improvement notices in Western Australia.

It is apparent that Victoria had the lowest number of worksites relative to (combined) inspections and investigations conducted in 2008–09 — indicating high

interaction with the regulator compared to other jurisdictions. The Queensland core regulator had the highest number in this regard. In terms of the number of worksites to proactive visits by regulator, Victoria also had the lowest number among the core regulators.

Expenditure patterns also provide an indication of regulator priorities. For example, the Victorian regulator and both the New South Wales core and mining OHS regulators allocated the greatest proportion of their expenditure on education activities (37 per cent, 33 per cent and 31 per cent respectively) compared to all other jurisdictions in 2008–09, while the Northern Territory regulator spent the smallest amounts (2 per cent).

2	2008–09								
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Educate/advise	2 368	2 453	nr	nr	nr	nr	1 986 <b>a</b>	4 000	nr
Verbal warning	na	nr	nr	nr	nr	2 986		na	nr
Written directive	0	122	nr	na	na	na		12	na
Improvement notic	ce 13	10 830	18 363	7 584	2 396	9 842	129	193	99
Prohibition notice	16	767	1 078	1 991	630	721	98	70	101
Licence suspension	on nr	1	nr	nr	nr	0	nr	0	nr
Licence cancellati	on nr	1	nr	nr	nr	0	nr	0	nr
Adverse publicity	13	na	0	na	60	na	0	0	nr
Infringement/pena notice	lty na	686	nr	471	10	na	17	0	nr
Prosecution	2	108	118	141	62	37	30	5	4
Enforceable undertaking	1	na	1	20	na	na	na	0	na
Other			6 313 <b>b</b>	115 <b>c</b>					

## Table 2Use of enforcement tools — core OHS regulators2008-09

**nr** non response. **na** not applicable. <sup>**a**</sup> Statistic includes educate/advise, verbal warning and written directives. **b** Voluntary compliances (6163), Letters of warning (81), Non disturbance notice (54), Letters of caution (15). **c** Electrical safety protection notice (94), Seizures (21).

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Sometimes the differences in the use of instruments result from the different ways regulators may deliver the same objective, such as New South Wales' formal education programs as against Victoria's use of inspections to informally provide advice and education during inspections. Victoria's higher workplace visit rate may reflect its provision of informal education during visits, to help businesses achieve compliance, in addition to identifying compliance breaches.

## There are significant differences in regulator resourcing

The financial and staffing resources of a regulator can give a broad indication of its capacities for more effective regulatory action. By influencing the quality and extent of activities such as information campaigns, consultations with business and enforcement, business compliance burdens can be affected. However, each regulator faces a different mix of industries and hazards and these will influence cost. The Commonwealth particularly faces a different business mix by virtue of only regulating large self-insured private companies and government agencies and may explain why it is frequently the highest or lowest in the range of a number of these indicators.

Resourcing indicators of core OHS regulators are shown in table 3. After taking into account the number of worksites covered by each regulator, Comcare was the most highly resourced with expenditure of \$3655 per worksite, followed by Victoria (\$296) and South Australia (\$201). Western Australia was the least resourced among the regulators, with an expenditure of \$88 per worksite, with the Western Australian regulator also responsible for far more worksites per OHS staff member (1375) compared to the other jurisdictions. At the other extreme, Comcare had 32 worksites per OHS employee.

	2000-	-03								
		Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
OHS staff (FTE)	no.	126.7	691	411	482.6	232	149.1	35	44	25
OHS expenditure	\$'000	14 620	100 639	65 166	55 460	28 965 <b>a</b>	18 085	6 427	4 979	3 640
Worksites regulated	'000	4 <b>b</b>	664	220	390 <b>c</b>	144	205	nr	nr	nr
OHS expenditure per FTE staff	\$'000	115	146	159	115	125	121	184	113	146
Worksites to OHS staff	no.	32	961	535	808	621	1 375	na	na	na
OHS expenditure per worksite	\$	3 655	152	296	142	201	88	na	na	na

## Table 3Resourcing indicators — core OHS regulators200809

**nr** non response. **na** not applicable. <sup>**a**</sup> Budget includes funds transferred from WorkCoverSA. <sup>**b**</sup> Figure refers to registered locations, not individual worksites. <sup>**c**</sup> Figure refers to number of regulated businesses and thus may underestimate the number of worksites regulated.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

With the exception of the Commonwealth, New South Wales and Victoria, all core OHS regulators indicated that they experienced problems recruiting OHS

inspectors. Differences in the salaries of OHS inspectors may explain some of the differences. While the starting salaries of the regulators with recruiting problems ranged from \$52 276 to \$59 800 in 2008-09, the starting salaries in Victoria and New South Wales were almost \$20 000 higher.

## Transparency and accountability of regulators

All jurisdictions allow for reviews and appeals of core OHS inspectorate decisions internally or externally. However, there are some differences:

- New South Wales did not provide for appeals to a higher court against prosecutions undertaken in its Industrial Court except on matters of law
- South Australia only had an external review mechanism for notices, while all other jurisdictions provided an 'arms length' internal review process
- the Northern Territory had only an external appeals process for its licensing decisions the Local Court.

Differences in the transparency of the core OHS regulators included:

- the Commonwealth, New South Wales and Tasmania did not provide information on appeal mechanisms on dedicated web pages on their websites
- only the Commonwealth, New South Wales and Victorian regulators published stand alone annual reports
- all jurisdictions, except Tasmania and the Northern Territory, conducted feedback surveys and published this information in some form.

While all jurisdictions use written notices to inform businesses of OHS breaches or remedies, the information on these forms differed in 2008-09:

- the Commonwealth provided the least amount of information no information on the reason for the breach or appeal/review provisions are contained on the notices
- the Queensland prohibition and infringement notices provided no instruction or guidance on how to improve the practice that resulted in the notice although the improvement notice issued at the same time does contain such information.

The mining regulators in New South Wales, Queensland and Western Australia have similar levels of transparency and accountability, although the mining regulator in New South Wales provides more information than the others on its written notices.

# 1 About the study

## 1.1 Origins of this study

In February 2006, the Council of Australian Governments (COAG) agreed to adopt a common framework for benchmarking, measuring and reporting the regulatory burden on business (COAG 2006). Since then, the Commission has produced four reports to help implement that decision (box 1.1).

On 24 October 2008, COAG's Business Regulation and Competition Working Group agreed that the Commission should study the regulatory burden of food safety and occupational health and safety (OHS), for the next phase of the benchmarking program. In a letter, received 23 December 2008, the Assistant Treasurer requested the Productivity Commission to benchmark the burdens placed on business by OHS regulation. In doing so, the Commission is to take account of 'the objectives of Commonwealth, state and territory and local government regulatory systems'.

This report considers the burdens placed on business by OHS regulation. OHS regulation is one of a number of specific areas identified by COAG and business groups as being a 'hot spot' for reform (BCA 2008b; COAG 2008). A separate companion report published in December 2009 considered the burdens created by food safety regulatory regimes (PC 2009).

## 1.2 Harmonisation of OHS regulation already underway

All Australian governments, industry and trade unions place a priority on ensuring safe working environments, which is reflected in the targets for improvements in OHS outcomes set under the National OHS Strategy (box 1.2). The review and reform of unnecessary burdens on business from OHS requirements is also regarded as important as long as it does not compromise the ability for OHS regulatory regimes to meet safety objectives.

1

### Box 1.1 **Performance Benchmarking of Australian Business Regulation** — the Commission's previous studies

#### The 'feasibility' study

The Commission was asked to examine the feasibility of developing quantitative and qualitative performance indicators and reporting framework options. This feasibility study concluded that benchmarking was technically possible and could yield benefits (PC 2007).

# Performance Benchmarking of Australian Business Regulation: Quantity and Quality

The 'quantity and 'quality' report provides indicators of the stock and flow of regulation and regulatory activities, and quality indicators for a range of regulation-making processes, across all levels of government for the period 2006-07 (PC 2008c). The indicators provide some baseline information for each jurisdiction, against which trends in the quantity and quality of regulation might be assessed in the future. It is apparent that there are significant differences across jurisdictions, reflecting different regulatory approaches as well as the characteristics of the jurisdictions themselves.

# Performance Benchmarking of Australian Business Regulation: Cost of Business Registrations

The 'cost of business registrations' report provides estimates of compliance costs for business in obtaining a range of registrations required by the Australian, state, territory and selected local governments during 2006-07 (PC 2008b). The registrations include generic requirements for incorporation, taxation and business name registrations. In addition, the Commission benchmarked specific registration costs incurred for five types of businesses (a café, builder, long day child care, real estate agent and winery). It emerged that the estimated time costs of business registrations were generally relatively low, with most costs and differences in costs across jurisdictions relating to fees and charges.

# Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety

The 'food safety' report compared indicators of regulatory burdens associated with food safety regulatory regimes across the Australian jurisdictions and New Zealand during 2008-09 (PC 2009). The report identified opportunities for all jurisdictions to improve food safety regulation and its enforcement in order to reduce burdens on business and costs to the community. Among other things, the report found:

- there were significant differences across the Australian states and territories in the regulation of primary production and processing activities
- Australian food exporters faced higher costs and more regulatory duplication compared to New Zealand food exporters
- there were inconsistencies across Australian local councils and across New Zealand territorial authorities in the intensity of their regulatory activities and associated costs to business.

## Box 1.2 The National OHS Strategy 2002-2012

The National Strategy was agreed by all Australian governments, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions in 2002. The strategy provides a basis for developing sustainable, safe and healthy work environments and for reducing the number of people hurt or killed at work.

The following national targets have been agreed:

- a continual reduction in the incidents of work-related fatalities with a reduction of at least 20 per cent by 30 June 2012 (with a reduction of 10 per cent being achieved by 30 June 2007)
- a continual reduction in the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent being achieved by 30 June 2007).

The National Strategy sets out five priorities to reach these OHS goals:

- to reduce high incidence/severity risks:
  - the high risk injuries being targeted have been identified as musculoskeletal disorders, falls from heights, and hitting or being hit by objects
  - the priority industry sectors have been identified as building and construction, transport and storage, manufacturing, health and community services, and agriculture, forestry and fisheries
- to develop the capacity of business operators and workers to manage OHS effectively
- · to prevent occupational disease more effectively
- to eliminate hazards at the design stage
- to strengthen the capacity of government to influence OHS outcomes.

Sources: ASCC (2002); SWA (2009f).

Under the 2008 COAG Inter-Governmental Agreement (IGA) for Regulatory and Operational Reform in Occupational Health and Safety, all jurisdictions agreed to harmonise OHS acts, regulations and associated codes of practice. The IGA also provides for a nationally consistent approach to enforcement and compliance. The Australian Government commissioned an expert panel to recommend to the Workplace Relations Ministers' Council (WRMC) the optimal structure and content of a model OHS Act to be adopted by all jurisdictions. The panel released two reports (Stewart-Crompton, Mayman and Sherriff 2008, 2009) which detail its recommendations.

On 18 May 2009, the WRMC responded to the recommendations of the two reports and agreement was reached between the Commonwealth, state and territory

governments on the model OHS Act (WRMC 2009a). On 28 September the WRMC released a suite of documents for public comment, including:

- the draft model OHS Act
- draft Administrative Regulations
- a discussion paper (which includes, as appendices, two interpretative guidelines and a list of proposed penalties)
- a Consultation Regulatory Impact Statement.

A total of 480 submissions were received, analysed, and informed the amendment of the exposure draft. Reflecting the expanded reach of the proposed legislation, the draft provisions will now be known as 'work health and safety provisions' rather than 'occupational health and safety provisions'.

At a meeting on 11 December 2009, the majority of the members of the WRMC endorsed the Model Work Health and Safety Act as amended by Safe Work Australia (SWA) (WRMC 2009e).<sup>1</sup> Western Australia was the only State that did not endorse the legislation. While Western Australia will participate with SWA in the harmonisation process, it is unlikely to adopt aspects of the model legislation including: the level of penalties; right of entry provisions; power for health and safety representatives to stop work; and, the reverse onus of proof on discrimination matters.

National harmonisation of OHS in the mining industry is also underway. In June 2001, COAG established the Ministerial Council on Mineral and Petroleum Resources (MCMPR). A major initiative of the MCMPR is the National Mine Safety Framework, which aims to achieve a nationally consistent and efficient OHS regime for the Australian mining industry.

## 1.3 Purpose and scope of the study

The purpose of this study is to benchmark indicators of regulatory burden associated with OHS regulatory regimes across the jurisdictions. For this study, 'regulatory regime' is defined to include both 'government rules' that influence and control behaviour as well as the activities of regulators responsible for implementing strategies to increase business compliance, including education and

<sup>&</sup>lt;sup>1</sup> The WRMC established Safe Work Australia (SWA) to replace the Australian Safety and Compensation Council. SWA is a tripartite body, jointly funded by all Australian governments, responsible for developing and maintaining nationally consistent policy for OHS and workers' compensation. It became an independent statutory body on 1 November 2009.

enforcement. It should be noted that while voluntary regimes such as contractual arrangements may impose compliance burdens on businesses, they are not within the scope of this benchmarking study.

While this study will not make recommendations regarding OHS regulation, it will complement the current national reform developments by highlighting areas where differences and potential benefits from harmonisation exist. The focus of the analysis is on the current regulatory environment and, by addressing the status quo, will also provide a benchmark against which the national reforms can be assessed at some future point in time.

## What regulations are in scope?

Regulation includes statutes and formal delegated legislative instruments, as well as quasi-regulation, such as some codes of practice and guidance materials that are not strictly mandatory.

Currently, all jurisdictions have OHS acts, delegated regulatory instruments and codes of practice (or equivalent) covering OHS which apply to the majority of businesses. See table 1.1 for the primary OHS act and regulator for each jurisdiction.

	Act	Regulator
Cwlth	Occupational Health and Safety Act 1991	Comcare
NSW	Occupational Health and Safety Act 2000	WorkCover NSW
Vic	Occupational Health and Safety Act 2004	WorkSafe Victoria
Qld	Workplace Health and Safety Act 1995	Workplace Health and Safety Queensland
SA	Occupational Health, Safety and Welfare Act 1986	SafeWork SA
WA	Occupational Safety and Health Act 1984	WorkSafe WA
Tas	Workplace Health and Safety Act 1995	Workplace Standards Tasmania
NT	Workplace Health and Safety Act 2007	NT WorkSafe
ACT	Occupational Health and Safety Act 1989	ACT WorkCover

 Table 1.1
 OHS primary legislation and regulators

Delegated regulations, made under the various OHS acts, cover a wide range of issues pertaining to particular industries, hazards or processes. Differences exist between jurisdictions in the areas specifically detailed in the regulations. For example, while all jurisdictions have regulation covering general OHS licensing, specific coverage of training and assessment requirements and classes of licences differ across states and territories.

Similarly, the number and coverage of codes of practice (or their equivalents) vary across the jurisdictions. These codes set out 'minimum standard' guidelines for businesses to enable them to comply with the legislation. Generally developed by regulators, these non-enforceable codes have evidentiary status in court proceedings in most jurisdictions.

In addition to the general OHS legislation, each state and territory also has a number of other pieces of primary and subordinate legislation which address OHS issues. They are industry or hazard-specific (for example, the *Coal Mining Safety and Health Act 1999* (Qld) and *Mining and Quarrying Safety and Health Act 1999* (Qld) in Queensland) and are also within the scope of this study, particularly with regard to their interaction with the general OHS legislation and potential for inconsistencies and duplication (chapter 13).

## Which regulators?

A regulator, in the context of this study, refers to a body that administers and enforces regulation. In Australia, each jurisdiction has its own regulator for OHS (table 1.1). In addition, many jurisdictions have industry-specific OHS regulators. The activities of the New South Wale mining industry, for example, are regulated by the Mine Safety Operations branch of Industry and Investment NSW. Therefore, general and industry-specific regulators are within the scope of this study.

The strategies and approaches of regulators, including enforcement policies, the interpretation of regulation and extent of assistance given to business can have significant impact on the effectiveness of OHS regulation as well as on the burden for businesses in achieving compliance. These aspects are, therefore, also within the scope of this study.

## What is a regulatory burden on business?

For this study, regulatory burdens arise from the costs imposed by OHS regulation and enforcement that would otherwise not arise for businesses. Where requirements from regulation create a change in business behaviour and practices, a regulatory burden can be said to exist.

While it is usually necessary that some burden is placed on business for regulation to achieve its objectives, where it is poorly designed, or its enforcement and administration is not implemented well, it may impose greater burdens than necessary. In this study, it is those regulatory burdens which can be considered 'unnecessary' that are of primary interest (box 1.3).

<sup>6</sup> REGULATION BENCHMARKING — OHS

## Box 1.3 Examples of unnecessary burdens

Unnecessary burdens might arise from:

- excessive coverage of the regulations, including 'regulatory creep' that is, regulations that encompass more activity than was intended or required to achieve their objective
- subject-specific regulations that cover much the same ground as other generic regulation
- unduly prescriptive regulation that limits the ways in which businesses may meet the underlying objectives of regulation
- unwieldy licence application and approval processes
- excessive time delays in obtaining responses and decisions from regulators
- rules or enforcement approaches that inadvertently provide incentives to operate in less efficient ways
- unnecessarily invasive regulator behaviour, such as overly frequent inspections or information requests
- an overlap or conflict in the activities of different regulators.

Such unnecessary burdens may arise as technology changes, markets and tastes change, and regulatory frameworks and approaches evolve.

Differences in regulations also have the potential to place additional burdens on businesses operating across jurisdictions. Regulations with the same objective, but imposing different requirements, can result in businesses having to plan and undertake a number of different approaches to meeting compliance in different geographical regions. If these different compliance activities yield similar outcomes, the differences can be viewed as unnecessary burdens.

In addition, a business may have to interact with more than one regulator, either within or across jurisdictions. Different approaches to enforcement by these regulators could also create additional burdens.

Furthermore, the relative burden placed on small businesses may be greater than that imposed on larger businesses as they may have to devote proportionately more effort to achieve equivalent compliance.

Sometimes regulation does not impose any additional burden on business because it does not result in any changes to business behaviour. In some of these circumstances businesses can fully comply or go beyond compliance. For example, the internal reporting and monitoring of workplace injuries in some mining companies are said to meet, or exceed, the comparable reporting requirements within OHS regulations.

## 1.4 Conduct of the study

In December 2008, on receipt of the terms of reference, the Commission issued a circular announcing the study to interested parties. In January 2009, The Commission advertised the study in *The Australian Financial Review* and *The Australian*.

In April 2009, the Commission released an issues paper outlining its proposed study on the performance benchmarking of Australian OHS regulation and invited interested parties to make submissions. In response, the Commission received 16 formal submissions.

In conducting the study, the Commission was assisted by an Advisory Panel comprised of representatives from the Commonwealth and each state and territory government. The Panel met in February 2009 and provided advice regarding the scope, coverage and methodology of the benchmarking exercise, and facilitated and coordinated the provision of data from jurisdictions. The Panel met again on 9 December to discuss a working draft of the report. Some Panel members also provided comments from their jurisdictions to be included in the report.

The Commission held extensive visits with stakeholders, including government, industry and unions as well as OHS regulators, across the jurisdictions. These meetings helped identify and assess relevant issues for the study as well as inform the areas and regulations to be benchmarked.

The Commission also collected and analysed data from a variety of sources. Workers' compensation data was provided by the SWA with permission from the Commonwealth and every state and territory government. The Australian Bureau of Statistics also provided data from their work related injury survey.

In addition to collecting information from a range of business types, the Commission engaged a consultant to conduct phone surveys with small and medium enterprises about the cost of OHS regulation on their operations. These phone surveys were conducted in May 2009.

Further, the Commission requested information from the Commonwealth, states and territories through a survey of general and some industry-specific OHS regulators with the aim of examining and comparing regulator characteristics and activities across the jurisdictions.

<sup>8</sup> REGULATION BENCHMARKING — OHS

The Commission released its Draft Research Report in January 2010. Interested parties had the opportunity to comment on the analysis in the report through written submissions.

The Commission received a total of 26 formal submissions.

The terms of reference, study particulars, survey questionnaires and submissions are also listed on the Commission's website at www.pc.gov.au/projects/study/ regulation benchmarking/ohs.

## 1.5 Report outline

Chapter 2 provides an overview of OHS regulatory objectives and frameworks in Australia. Chapter 3 examines OHS outcomes in Australia. Chapter 4 discusses possible approaches to benchmarking regulatory burdens. The benchmarking of specific aspects of OHS regulation is covered in chapters 5 to 13:

- chapter 5: Regulator characteristics and enforcement practices
- chapter 6: Accountability of regulators
- chapter 7: Risk, duty of care and advice
- chapter 8: OHS training requirements
- chapter 9: Worker consultation, participation and representation
- chapter 10: Regulating hazardous substances
- chapter 11: Psychosocial hazards
- chapter 12: Other hazards and activities
- chapter 13: Duplication.

Chapter 14 contains responses from governments to the report.

Appendix A provides details of the conduct of the study by providing the terms of reference, submission and visit lists as well as the details of those parties that responded to the surveys. Appendix B outlines the various data collection methods used to obtain data for this benchmarking study. Appendix C analyses workers' compensation premiums as a possible indicator of overall OHS regulatory performance. Appendix D provides one business' interpretation of reporting requirements across the jurisdictions. Appendix E analyses claims for mental stress in Australia.

9
# 2 Regulatory framework and objectives

### Key points

- Each state and territory and the Commonwealth has responsibility for developing and administering occupational health and safety (OHS) regulations in their jurisdiction. The overarching common objective of the primary OHS Acts is to secure the health, safety and welfare of employees and others in the workplace. This objective is achieved by placing a duty of care on employers, employees and others to manage, minimise or eliminate risks or hazards in the workplace.
- Only in New South Wales and Queensland does the OHS Act include a reverse onus of proof where, in cases of a breach of OHS laws, the onus is on the employer to prove they have complied with OHS requirements.
- Employers as duty holders under all OHS Acts have the flexibility to determine, in consultation with their employees, how they will comply with general duties to provide a safe and healthy workplace.
  - This system provides choices to businesses to meet or exceed the basic standards laid out in OHS regulations.
  - Some firms (usually smaller firms) tend to favour a more prescriptive approach which provides greater certainty of basic OHS requirements under the legislation.
- All state, territory and Commonwealth OHS Acts include provisions and regulations requiring consultation with employees on OHS matters. This may involve direct consultations with employees or consultations with elected representatives or with OHS committees.
- The Commonwealth, South Australia and Tasmania were the only jurisdictions not to confer rights of entry to unions to investigate possible breaches of OHS regulations as at June 2009. These powers are available in all other jurisdictions under OHS or industrial relations Acts. New South Wales was the only jurisdiction to confer authorised union representatives with the power to prosecute for breaches of OHS regulations in 2008-09. Tasmania introduced union right of entry powers in February 2010 and it is under review in South Australia.
- Non-mandatory codes of practice and guidance notes are provided by jurisdictions to inform employers and employees as to how regulatory objectives can be met. Variations exist between jurisdictions in terms of the numbers of codes of practice and volume of OHS regulation which can add to complexity faced by businesses.
  - Victoria is in the process of replacing their codes of practice with a small number of compliance codes.

This chapter outlines the structure and function of the occupational health and safety (OHS) regulatory framework in Australia. The framework is focused on identifying, preventing and minimising hazards which may impact on the physical, mental and social well-being of employees in the workplace.

The system adopted in Australia to ensure health and safety in the workplace is outcome based, and uses a combination of risk assessment and prescription through regulations, guidelines and codes of practice to facilitate the development of safe work practices that best suit the individual circumstances of organisations.

Where workers are injured, a number of workers' compensation schemes provide income support to injured workers and facilitate their return to work. While preventing injuries and providing compensation to injured employees are closely connected, this report focuses on injury and disease prevention as addressed by the OHS regulatory regimes, and does not include any analysis of workers' compensation.

### 2.1 How is OHS regulated in Australia?

OHS matters are the responsibility of the individual state, territory, and Commonwealth governments. The Commonwealth regulates OHS in those areas where it has constitutional responsibility, principally in activities involving employees of the Commonwealth, as well as the maritime and offshore petroleum industries and, more recently, for companies covered by its workers' compensation scheme (Comcare). The states and territories have responsibility for regulating OHS in all remaining sectors.

### The influence of the Robens Report on the OHS regulatory system

The regulatory approach adopted by all Australian jurisdictions continues to be very much influenced by the recommendations of a committee headed by Lord Robens in the United Kingdom. The Robens Report was released in 1972 (Robens 1972) and recommended that the United Kingdom introduce a single enabling Act to replace the mass of existing legislation which regulated specific hazards or types of workplaces in that country.

The Robens report recommended that this overarching 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
- reform the administration and enforcement of the law by a single national authority
- be supported by regulations and voluntary industry codes of practice and standards.

In line with Robens' proposed approach for the UK, during the 1980s and 1990s each jurisdiction in Australia adopted a three-tiered OHS regulatory system consisting of Acts, regulations, and codes of practice or guidance material. The Acts set out the key principles, duties and rights of employers and employees. Legally enforceable regulations made under those Acts are more detailed and specify procedures and administrative matters. Codes of practice and guidance materials are not legal requirements as such, but provide interpretation of legal requirements imposed by the Acts and regulations, as well as practical guidance on how to comply with them.

Without being comprehensive, the OHS legislation in all jurisdictions contains common themes and addresses the same core aspects of OHS. These include:

- duties of care that are conferred on a number of economic agents to ensure the health and safety of people at the workplace
- responsibilities for employers to consult with workers on issues and work practices which may affect their health and safety and that of others. This responsibility includes the formation of health and safety committees (HSCs) and the election of health and safety representatives (HSRs) to facilitate the consultation process. The legislation also outlines the roles and powers of HSCs and HSRs
- the requirement for employers to provide relevant OHS training and information to workers to make them aware of safe work procedures
- incident notification and record keeping
- requirements for licensing, registration or use of permits
- the role and powers of inspectors
- the requirement to undertake OHS risk management which involves the identification and management of general or specific risks or hazards.

OHS legislation in all jurisdictions apart from the Commonwealth, South Australia and Tasmania outlines the entry powers available to authorised union representatives to investigate suspected breaches of OHS regulations and to discuss OHS matters.

## 2.2 The OHS acts and their objectives

### **OHS Acts**

There are nine principal OHS Acts — one for the Commonwealth and one for each state and territory (table 2.1).

Table 2.1	OHS Acts
	2008-09
	Name of the Act
Cwlth	Occupational Health and Safety Act 1991
NSW	Occupational Health and Safety Act 2000
Vic	Occupational Health and Safety Act 2004
Qld	Workplace Health and Safety Act 1995
SA	Occupational Health, Safety and Welfare Act 1986
WA	Occupational Safety and Health Act 1984
Tas	Workplace Health and Safety Act 1995
NT	Workplace Health and Safety Act 2007
ACT <sup>a</sup>	Occupational Health and Safety Act 1989

<sup>a</sup> The Work Safety Act 2008 superseded the Occupational Health and Safety Act 1989 in the ACT on 1 October 2009. All benchmarking exercises conducted in the report unless specified otherwise were conducted using the provisions from the Occupational Health and Safety Act 1989.

### **Objectives of the OHS Acts**

The overarching common objective of the principal OHS Acts is to secure the health, safety and welfare of employees in the workplace, and the public and others who visit the workplace. This objective is achieved by placing responsibilities on employers to eliminate risks or hazards in the workplace, promoting OHS, and fostering a consultative and cooperative approach between employers and employees to improving OHS.

The wording in the Queensland Act deviates slightly from this objective. The main object of the Queensland OHS Act is to 'prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place' (*Workplace Health and Safety Act 1995*, s.7) without specifically referring to the responsibilities to employees or the public or other persons.

The Northern Territory OHS Act is more recent and the wording of its objectives differs substantially from other jurisdictions. The main objectives are: 'to achieve for the Territory the highest possible standards of occupational health and safety',

and 'to achieve as far as possible elimination of avoidable risks and control and mitigation of unavoidable risks to the health or safety of workers' (*Workplace Health and Safety Act 2007*, s.3(a) and (b)). The Tasmanian OHS Act is the only one not to provide a separate section which specifies the objectives of the Act.

Some other differences in the objectives of the OHS Acts include:

- the Commonwealth OHS legislation includes an objective to 'ensure that expert advice is available on OHS matters affecting employers, employees and contractors' (*Occupational Health and Safety Act 1991*, s.3(c))
- the Commonwealth also includes an objective of effective remedies if obligations are not met these include both civil and criminal sanctions
- the New South Wales Act includes the objective to 'develop and promote community awareness of occupational health and safety issues'
- the Western Australia Act includes a provision for the 'formulation of policies and for the coordination of the administration of laws relating to occupational safety and health' and another provision 'to promote education and community awareness on matters relating to occupational safety and health' (*Occupational Safety and Health Act 1984*, s.5(f) and (g)).

### Other Acts covering OHS issues

In addition to the primary OHS Acts, there are a number of specific Acts and regulations that relate to certain hazards, industries or occupations. They have similar objectives to the general OHS Acts but may pursue them differently. Section 2.6 of the chapter includes a table which lists the other Acts and their associated regulator while chapter 13 discusses the interaction between general OHS and mining specific OHS Acts.

## 2.3 Key provisions under the OHS Acts

Jurisdictions currently differ in how they define and allocate responsibilities and powers with regard to four key elements of the OHS Acts — duty of care, onus of proof, requirement for consultations and union rights of entry. This section provides *existing* definitions of the four provisions and shows the nature of *current* differences. Information is also included on how each area will be covered in the model work, health and safety provisions including the recommendations laid out in the Workplace Relations Ministers' Council (WRMC) communiqué of May 2009 (WRMC 2009a) and the Exposure Draft Model Occupational Health and Safety Provisions released in December 2009 (WRMC 2009e).

### Duty of care

The principle of duty of care is central to all the core OHS Acts of all jurisdictions. Duty of care is used to confer responsibilities for OHS to those who can influence OHS outcomes. For example, as duty holders, employers are empowered to determine, in consultation with their employees, how they will comply with general duties to ensure health and safety in the workplace. This creates a flexible system which provides incentives for organisations to move beyond prescription and either meet or exceed the basic standards laid out in OHS regulations. In particular, this provides opportunities for enterprises (usually medium or large) to develop their own cost effective and efficient OHS practices which best suit their individual circumstances. Greater levels of prescription may give more certainty to small businesses as to their obligations under OHS legislation but it can reduce flexibility and stifle opportunities for more cost effective OHS practices for other organisations.

The expression 'duty of care' refers to the responsibility or the legal obligation of a person or organization to avoid acts or omissions (which can be reasonably foreseen) to be likely to cause harm to others. The duty of care of employers can extend beyond their employees to include customers, visitors, contractors, and 'others'. This duty involves ensuring the health and safety of persons from any work activities conducted at a workplace, and the use of any plant or equipment at the workplace.

Depending on the jurisdiction, duty holders include:

- employers (including those self-employed, in some jurisdictions), principal contractors and employees
- owners, occupiers and designers of premises
- designers, manufacturers and suppliers of plant, substances and structures to be used in the workplace
- persons in control of workplaces.

The nature of the duty can vary depending upon the level of responsibility that people in the workplace hold. For example the duty of care of employees is limited to taking care of their own health and safety and of other persons who may be affected by their actions or omissions. In contrast the duty of an employer, manager or controller (or in some cases a designated 'responsible officer') is much broader.

In jurisdictions other than New South Wales and Queensland, the statutory duty of care of employers requires them to ensure as far as is 'reasonably practicable' the health and safety of their employees and others at the workplace. This embodies the

principle that employers (or any duty-holders) are not obliged to eliminate risk, but they need to act reasonably in attempting to do so. Further it is clear that 'reasonably practicable' is not a strict liability standard but relates to the standard of behaviour expected of a reasonable person in the position of duty holder. The use of 'reasonably practicable' also reflects the principle that measures need not be taken simply because they are available or possible but takes into account other factors into the decision making process such as cost considerations (Douglas 2008).

Criteria which duty holders need to consider as part of what is deemed as 'reasonably practicable' in ensuring health and safety include: the likelihood of a risk or hazard occurring; the degree of harm likely to result from the hazard or risk; what persons should be expected to know about the hazard or risk and ways of eliminating them; the availability and suitability of means to eliminate or minimise the hazard or risk; and the cost of eliminating or minimising the hazard or risk.

The relative weighting of these factors can be problematic. For example, employers may need to weigh up the likelihood of a risk of an event occurring which may not lead to significant harm against the lesser likelihood of another event occurring but which could lead to serious or even fatal consequences.

In New South Wales, under the *Occupational Health and Safety Act 2000*, the duty of employers extends, without limitation, to: ensuring premises are safe and without risk to employees; ensuring any plant or substance provided for use is safe; ensuring systems of work and the working environment of the employees are safe and without risks to health; providing information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work; and providing adequate facilities for the welfare of the employees at work.

While the duty of employers in New South Wales is without limitation, section 28 of the Act provides a defence to any proceeding against a person for an offence against a provision of the Act or regulations if the person can prove that 'it was not reasonably practicable for the person to comply with the provision' or 'the commission of the offence was due to causes over which the person had no control'.

Duty of care in Queensland is called an obligation in the *Workplace Health and Safety Act 1995*. The obligation on persons conducting a business or undertaking is to ensure the safety and health of themselves, their workers and any other person affected by their business activities. This is achieved by: providing and maintaining a safe and healthy work environment; providing and maintaining safe plant; ensuring the safe use, handling, storage, and transport of substances; ensuring safe systems of work; and providing information, instruction, training and supervision to ensure health and safety. The Act provides duty holders with three defences against

a prima facie breach: two involve demonstrated adherence to either a regulation or a code of practice, and the third requires the duty holder to show he/she took 'reasonable precautions and exercised due diligence'.

# Major differences in coverage of primary duty of care of employers to their employees

Table 2.2 shows the differences and similarities in coverage of duty of care provisions of employers or persons conducting a business or undertaking to their employees under the OHS acts.

The table shows similarities between jurisdictions in employer duties to provide a safe workplace or working environment for their employees and the safe use of plant, substances and systems. In terms of differences, the Northern Territory is the only jurisdiction not to require employers to provide OHS information, instruction, training and supervision to their employees to ensure safety as part of their duty of care. The Commonwealth is alone in requiring information, instruction, training and supervision to be provided in 'appropriate languages', while another three jurisdictions require OHS information to be provided in 'appropriate languages'.

As table 2.2 is limited to employers' duties to employees under the definitions of the respective OHS Acts, it does not represent the extent of regulatory responsibilities and obligations (as distinct from duties of care) of a business with employees, and the duties of care such a business may have to its employees in capacities other than as an employer. For example, the Commonwealth is the only regime to include a duty for employers to provide safe entry and egress to and from the workplace. A comparable responsibility duty resides with 'occupiers' in South Australia (those with management or control of a place) and persons who have control of a workplace in Western Australia (to list just two jurisdictions). Similarly, while Victorian employers have a duty to 'employ suitably qualified persons to provide OHS advice', other jurisdictions place comparable obligations on employers/businesses. For example, Queensland employers with over 30 employees who operate in particular industries are obligated to employ a qualified Workplace Health and Safety Officer.

Further, while the table shows that South Australia is the only jurisdiction which requires employers to keep records of OHS training under their duty of care, all jurisdictions apart from Tasmania have this requirement, albeit separate to the employer's duty of care which is contained in their OHS regulations (see chapter 8).

# Table 2.2Coverage of primary duty of care provisions of employers<br/>to their employees under OHS Acts

2008-09

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Provide a safe workplace and/or work environment	✓	~	✓	~	~	√a	~	~	~
Provide safe plant, substances and systems	~	√	√	~	√	√a	√	√p	~
Provide information, instruction, training and supervision to ensure safety	√C,C	I √	√C	√	√C,e	√a	√C,e		✓
Provide information, instruction and training for <b>managers and supervisors</b> to ensure safety					√C		√C		
Provide adequate facilities for welfare	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$		$\checkmark$		$\checkmark$
Consult on decisions/matters affecting OHS		~	$\checkmark$					~	✓
Monitor the health of employees and workplace conditions (and keep records)	~		√		√f		$\checkmark$	✓	✓
Keep records of safety training					$\checkmark$				
Ensure the accommodation, eating, recreational and other facilities provided for work are safe					✓		$\checkmark$		
Prepare and maintain OHS policies/arrangements in consultation with employees and/or their representatives	✓				✓				
Use risk management processes to ensure workplace safety								✓	✓
Employ suitably qualified persons to provide OHS advice			✓						
Where it is not practicable to avoid exposure to hazards, provide adequate protective clothing and equipment						~			
Provide safe access and egress to the workplace	~								
Provide appropriate medical and first aid services	✓								

<sup>a</sup> Duties are framed in terms of not exposing employees to hazards, rather than in terms of 'safety'. <sup>b</sup> Duty relates to 'workplace infrastructure, equipment and materials'. <sup>c</sup> Information to be provided in 'appropriate languages'. <sup>d</sup> Instruction, training and supervision to be provided in 'appropriate languages'. <sup>e</sup> Including for hazardous work, new or changed work and for inexperienced employees. <sup>f</sup> No requirement to keep records in relation to this monitoring.

Sources: Stewart-Crompton, Mayman and Sherriff (2008); Occupational Health and Safety Act 1984 (WA).

#### Primary duty of care of employers to persons other than employees

Differences also exist in the range of duties that employers have to groups other than employees. Employers (or persons conducting a business or undertaking) in New South Wales, Victoria, Queensland, South Australia and Western Australia have a duty to persons other than employees. Employers in South Australia also have a duty to protect their own safety and health at work.

In Tasmania, employers and 'principals' have a duty to persons other than employees, contractors, a contractor's employees and visitors. 'Principals' are defined as persons who engage any person (other than as an employee) to perform work for gain or reward.

In the Northern Territory, the duty of employers extends to include volunteers, contractors, apprentices and any others. In the ACT, persons conducting a business or undertaking have a duty to people in relation to work which includes volunteers, contractors, themselves and others. Under Commonwealth OHS legislation, employers have a duty to deemed contractors and third parties other than employees or contractors.

Contractors have a duty of care to their own employees as an employer while a host employer has a duty to ensure the health and safety of contractors they may employ as well as their employees. Some differences exist in how contractors are covered in OHS legislation. The primary duty of employers to contractors or deemed employees is specified in the OHS legislation of all jurisdictions apart from New South Wales. However contractors in New South Wales would be covered by the employer duty to others at the workplace.

### Primary duty of care of self-employed persons

Primary duty of care also extends to self-employed persons in New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania and the ACT. This requirement is not evident in the legislation of the Northern Territory and the Commonwealth. The Commonwealth OHS laws apply predominantly to larger businesses so including a duty for self-employed persons may be considered unnecessary.

# Duties of persons other than employers and persons conducting a business or undertaking

There is a range of other duty holders apart from employers and persons conducting a business or undertaking as shown in table 2.3.

-	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Persons erecting or installing plant in a workplace	√		~	~			$\checkmark$		√
Controllers of plant or substances		$\checkmark$							
Persons who manage or control workplaces or premises		$\checkmark$	$\checkmark$	~		$\checkmark$	√		$\checkmark$
Designers of plant		$\checkmark$	$\checkmark$	$\checkmark$			$\checkmark$		
Manufacturers of plant or substances	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$		$\checkmark$
Suppliers of plant or substances Clients	$\checkmark$	$\checkmark$	$\checkmark$	√ √			$\checkmark$		$\checkmark$
Importers							$\checkmark$		
Designers of buildings or structures			$\checkmark$	$\checkmark$	$\checkmark$				
Owners of buildings					$\checkmark$				
Principal contractors				$\checkmark$					
Project managers				$\checkmark$					
Persons in control of fixtures, fittings or plant in relevant workplace areas				✓					
Owners of plant				$\checkmark$					
Employees	$\checkmark$	$\checkmark$	$\checkmark$			$\checkmark$	$\checkmark$		$\checkmark$
Workers				$\checkmark$	$\checkmark$			$\checkmark$	
Other persons at a workplace (who are not employers, employees or occupiers)				√	✓				
Occupiers of workplaces					$\checkmark$				
Owners of plant					$\checkmark$				
Body corporate					$\checkmark$	$\checkmark$			
'Responsible officers' that are appointed by employers							√		
Service providers							$\checkmark$		

### Table 2.3 Other duty of care holders

2008-09

Source: Major OHS Acts.

There is a level of consistency between jurisdictions in terms of categories of duty holders other than primary duty holders. For example a duty exists for:

- manufacturers of plant in the Commonwealth, New South Wales; Victoria, Queensland, South Australia, Western Australia and the ACT
- designers of plant in New South Wales, Victoria, Queensland, South Australia and Tasmania
- employees in the Commonwealth, New South Wales, Victoria, Western Australia, Tasmania and the ACT and workers in Queensland, South Australia and the Northern Territory
- installers or erectors of plant and equipment in six jurisdictions and designers of plant and equipment in five jurisdictions.

Duty holders are unique to some jurisdictions including:

- importers, 'responsible officers' appointed by employers and service providers in Tasmania
- project managers, principal contractors and clients in Queensland
- owners of plant in South Australia and Queensland
- the 'body corporate' in Western Australia.

Not only do the duties owed by employers to employees vary by jurisdiction, but so does the definition of an employee or worker (see chapters 7 and 13). As a consequence, employers who have employees in more than one jurisdiction are confronted with not only interpreting differences in how duties are owed to their employees, but also different definitions of workers to whom those duties apply.

The Northern Territory is the only jurisdiction to include contractors in their definition of workers. This convention will be followed in the model work, health and safety provisions. Issues surrounding contractors are explored in more detail in chapter 7.

### How will duty of care be covered in the model work, health and safety provisions?

Many of the recommendations agreed to in the communiqué from the 18 May 2009 meeting of the WRMC related to duty of care provisions. The recommendations include an agreed definition of duty holders under the new model work, health and safety provisions, the nature of hazards and risks they must seek to eliminate or minimise, and how breaches of duty of care will be penalised. For example, the primary duty of care on persons conducting a business or undertaking in the model laws will include employers, self-employed persons and principal contractors.

The model work, health and safety provisions released as part of the WRMC Communiqué of 11 December 2009, confirm 'reasonably practicable' as the form used to achieve compliance. The definition of 'reasonably practicable' in the model OHS Act is similar to the one currently used by jurisdictions as outlined earlier in the chapter.

The WRMC has also recommended specific duties for persons who, in conducting their business or undertaking, influence the way work is carried out, as well as for those persons responsible for the integrity of products used for work. Under the model OHS provisions the primary duty holders include: persons with management or control of workplaces; persons with management or control of fixtures, fittings or plant at a workplace; persons who design plant, substances or structures; persons

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who manufacture plant, substances or structures; persons who import plant, substances or structures; persons who supply plant, substances and structures; persons installing, constructing or commissioning plant or structure. Duties are also extended to 'officers', 'workers', and 'other persons at the workplace'. These persons do not owe the primary duty of care (WRMC 2009e).

Under the model work, health and safety provisions, persons conducting a business or undertaking will have a duty that goes beyond the traditional concept of employer/employee to include any person who works in any capacity in, or as part of, the business or undertaking (recommendation 16, WRMC 2009a).

Under the new model Act 'officers' who have responsibility for making decisions that affect businesses will also have a duty to be proactive and exercise 'due diligence' in ensuring compliance with duties of care (recommendation 40, WRMC 2009a).

### Onus of proof

The onus of proof in cases of liability for causing significant injury to employees is applied differently across jurisdictions. Of the nine principal OHS Acts which operate in jurisdictions in Australia, only the New South Wales and Queensland Acts provide for a 'reverse onus of proof' for offences relating to duty of care, whereby defendants have to prove they have complied with OHS requirements. In all other jurisdictions the OHS Act confers the onus of proof on the prosecution in cases where there is a breach of OHS regulations.

### How will onus of proof be covered in the model work health and safety provisions?

Agreement was reached by the WRMC at their May meeting in 2009 that under the model work health and safety provisions the prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to noncompliance with a duty of care (recommendation 62).

### Requirements for worker consultation and participation

All state, territory and Commonwealth OHS Acts include provisions requiring employers to consult with employees on OHS matters. These provisions may involve direct consultations with employees or consultation with employee representatives such as HSCs or elected HSRs.

### Health and safety committees (HSCs)

All jurisdictions provide for the formation of HSCs as part of their OHS framework — although HSCs are not automatically mandatory in any jurisdiction. For example, the Western Australian OHS Act only requires employers to establish an HSC under certain circumstances: after the coming into operation of a regulation requiring the employer to do so; as a result of a notice being served on them by the Commissioner to do so; or as a result of an employee who works at a workplace requesting the employer to establish a committee.

The primary role of HSCs is to consult with employers on OHS initiatives and to facilitate the agreed initiatives. This role is defined in a broadly similar way across jurisdictions though there are some differences. In New South Wales, for example, HSCs have the power to investigate matters that may be a risk to health and safety in a workplace and to request an investigation if the matter is not resolved. Chapter 9 contains a more detailed description and discussion of HSC requirements and powers.

### Health and safety representatives (HSRs)

HSRs also feature in all OHS frameworks. HSRs are employees elected by their peers to represent them in OHS matters. Once elected, HSRs continue to fulfil their regular employment duties and are not paid for taking on the HSR role.

In all jurisdictions, the election of an HSR is initiated at the request of employees. However, in 2008-09, businesses in Tasmania, the Northern Territory and the ACT with less than 10 employees were exempt from the HSR requirements.<sup>1</sup> The powers and functions of an HSR also vary under the OHS Acts in each jurisdiction. HSRs have the ability to issue Provisional Improvement Notices (PINs) in all jurisdictions apart from New South Wales. HSRs in jurisdictions aside from New South Wales, Queensland and the Northern Territory also have the capacity to issue stop work directions (where work is unsafe).

There is a relationship between HSRs and HSCs. The New South Wales OHS Act stipulates that HSRs may also be appointed to an HSC. The OHS Acts in Victoria, Queensland, South Australia, Western Australia and the Northern Territory either require or encourage HSRs to be on an HSC. The Tasmanian OHS Act specifies that membership of HSC should comprise employees working at the workplace who are chosen by employees and persons chosen by the employer. The ACT OHS Act

<sup>&</sup>lt;sup>1</sup> This exemption ceased in the ACT from 1 October 2009 with the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008.

includes clauses on functions of OHS committees but not how membership of the committee should be selected.

More detailed analysis of HSCs and HSRs is included in chapter 9 including how they are covered by the model work, health and safety provisions.

### Union right of entry and prosecution

The OHS Acts which operate in New South Wales, Victoria, Queensland, the Northern Territory and the ACT all provide authorised representatives of unions the right to enter workplaces. In Western Australia, the right of entry is provided to unions under the Industrial Relations Act 1979 (WA). The Commonwealth, Tasmania and South Australia were the only jurisdictions not to provide union right of entry for OHS purposes in their OHS Act as at June 2009. Tasmania passed legislation providing for union right of entry in November 2009 and the legislation was proclaimed on 24 February 2010. South Australia has released a Bill on right of entry which was released for public comment until 13 March 2009. The Commonwealth Fair Work Act 2009 sets out requirements for exercising rights of entry which exist under state or territory OHS laws. These requirements are discussed in more detail in chapter 9.

The powers conferred to authorised union representatives vary. While in all cases representatives may investigate breaches and observe or inspect systems of work, plant and equipment, and materials and substances, there are variations in relation to gaining access to discuss OHS issues, interview members, and take measurements. Of the six jurisdictions that provide entry powers, three provide the right to enter worksites to discuss OHS issues and three do not. Queensland is the only jurisdiction not to restrict entry for authorised union representatives to investigate suspected breaches at workplaces of working hours. Only in Victoria is access denied to examine, copy or take extracts of documents.

South Australia has released a Bill on right of entry for public comment. The relevant clause of the *Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009* in South Australia provides that an authorised representative may only enter a workplace for the purposes of viewing the workplace and engaging in consultation.

New South Wales and the ACT are the only jurisdictions to confer the power to prosecute to unions in relation to breaches of their respective OHS Acts. The ACT provides powers to prosecute to third parties including secretaries of unions and chief executives of employer organisations under the *Work Safety Act 2008* which became operational from 1 October 2009. Third parties will not have the right to

prosecute under the model work health and safety provisions. However the model Act allows for certain third parties to request that the regulator bring a prosecution for alleged Category 1 or 2 offences.<sup>2</sup>

Issues surrounding union rights of entry are analysed in more detail in chapter 9 including jurisdictional differences in entry provisions, rights and conditions upon entry, safeguards against misuse of entry powers, and how such powers are covered by the model work health and safety provisions.

## 2.4 OHS Regulations

*Subordinate legislation* (or regulations) made under OHS Acts is used to prescribe particular requirements or standards to be observed in the workplace. These requirements may take the following forms:

- *technical requirements* that specify the safety features of plant, substances and structures 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 where the risks do not admit to ready measurement such as manual handling, industrial plant or safe work practices (for example, working in confined spaces and at heights)
- *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 relevant OHS agency.

Provisions in regulations are mandatory, whereas codes of practice (discussed in the next section) contain non-mandatory guidance material but which nevertheless can be used as evidence in a prosecution for an alleged contravention of an applicable regulation or general duty provision.

<sup>&</sup>lt;sup>2</sup> A category 1 offence is the most serious, involving recklessness, and death or serious illness or injury, or a high risk of the same. A category 2 offence is essentially the same as a category 1 offence, but without any recklessness.

<sup>26</sup> REGULATION BENCHMARKING — OHS

As at 30 June 2009 all jurisdictions apart from the Commonwealth and the ACT had consolidated OHS regulations made under their OHS Acts and other Acts into a single document. The ACT has subsequently consolidated their regulations into the *Work Safety Regulation 2009* which commenced from 1 October 2009. The Commonwealth has recently completed a process to consolidate its regulations resulting in two documents — one addresses administrative requirements while the other addresses safety requirements.

The coverage of OHS regulations differs significantly across jurisdictions. Table 2.4 shows under which Acts OHS regulations have been sourced. The table shows significant differences in the structure of OHS regulations. While there is some consistency in how jurisdictions may cover particular hazards in the workplace, there is less consistency in how the parts and/or chapters are organised. In addition, the titles of parts and chapters sometimes use different terminology that may not be compatible or comparable with the terminology used by another jurisdiction. At one extreme, Queensland (27) and the Commonwealth (22) have the most parts or chapters in their OHS regulations, the Northern Territory and the ACT have 14 chapters, New South Wales has 12 chapters respectively, while the remaining five jurisdictions have streamlined their regulations to between 6 and 8 chapters.

The volume of pages associated with regulations also varies significantly between jurisdictions. At the upper end one jurisdiction has 518 pages of regulations while at the lower end another jurisdiction has only 79 pages. However, using a simple number count of pages of OHS legislation as a proxy for complexity faced by employers in different jurisdictions is problematic. For example some jurisdictions may have simply referenced the adoption of national standards in their legislation, while others may have included lengthy description of the national standards. Furthermore, the inclusion of more detailed regulations may provide greater certainty to employers of their obligations in complying with OHS. Also, some jurisdictions may not include some aspects of OHS in their regulations but cover them either in their OHS Act, codes of practice or guidance material.

The table highlights the diversity which currently exists in how OHS is covered in Acts and regulations in different jurisdictions, and the potential difficulties faced by a business operator who may be familiar with specific OHS regulations in one jurisdiction in trying to find information on comparable OHS regulations in other jurisdictions.

	Title and primary Acts	Parts or chapters
Cwlth	Occupational Health and Safety (Safety Arrangements) Regulations 1991	8
	Made under Occupational Health and Safety Act 1991 Occupational Health and Safety (Safety Standards) Regulations 1994 Made under Occupational Health and Safety Act 1991	14
NSW	Occupational Health and Safety Regulation 2001 Made under Occupational Health and Safety Act 2000	12
Vic	Occupational Health and Safety Regulations 2007 Made under Occupational Health and Safety Act 2004 and Dangerous Goods Act 1985	8
QId	Workplace Health and Safety Regulation 2008 Made under: Building Act 1975; Child Employment Act 2006; Dangerous Goods Safety Management Act 2001; Environmental Protection Act 1994; Explosives Act 1999; Fire and Rescue Service Act 1990; Queensland Building Services Authority Act 1991; State Penalties Enforcement Act 1999; Transport Operations (Road Use Management) Act 1995; and, Workplace Health and Safety Act 1995	27
SA	Occupational Health, Safety and Welfare Regulations 1995 Made under Occupational Health, Safety and Welfare Act 1986	7
WA	Occupational Health, Safety and Welfare Regulations 1996 Made under Occupational Safety and Health Act 1984	7
Tas	Workplace Health and Safety Regulations 1998 Made under Workplace Health and Safety Act 1995	6
NT	Workplace Health and Safety Regulations 2008 Made under Workplace Health and Safety Act 2007	14
ACT <sup>a</sup>	Occupational Health and Safety (General) Regulation 2007 Made under Occupational Health and Safety Act 1989	7
	Occupational Health and Safety (Certification of Plant Users and Operators) Regulation 2000 Made under Occupational Health and Safety Act 1989	6
	Occupational Health and Safety (Manual Handling) Regulation 1997 Made under Occupational Health and Safety Act 1989	1

# Table 2.4Comparison of coverage and size of OHS regulations2008-09

<sup>a</sup> The Occupational Health and Safety (General) Regulation 2007 in the ACT was replaced by the Work Safety Regulation 2009 on 1 October 2009. Source: OHS regulations.

As at 30 June 2009 there were 109 different categories or topics of OHS regulation operating in Australia. Among the categories or topics of regulations are:

• the application, interpretation and coverage of regulations

- risk management and consultation
- general and specific requirements for employers to provide information, instruction and training to employees
- specific hazards relating to plant (including design, manufacture, import, supply, installation and use)
- treatment of hazardous substances (including carcinogens, asbestos and lead)
- handling of dangerous goods (including those goods that pose an immediate threat to people and property through causing fires or explosions or poisoning)
- treatment of physical hazards such as manual handling, noise, working at heights, and working in confined spaces
- hazardous industries including construction (excavation and demolition), mining and logging
- hazardous processes of work (including spray painting, abrasive blasting, welding, electroplating, foundry, electrical, diving and driver fatigue)
- high risk work
- amusement structures
- control measures
- first aid and emergency procedures
- lighting and ventilation
- personal protective equipment
- notification of injuries, illnesses and dangerous events
- access to and egress from work
- amenities at work
- health and safety committees and health and safety representatives
- licensing, registration and record keeping.

There is considerable jurisdictional diversity in coverage of categories of OHS regulation. For example South Australia covers the most categories (at 65) while the ACT and Tasmania cover the least (36 and 39 respectively) (figure 2.1). No jurisdiction has complete coverage of the 109 different categories of OHS regulations which currently exist nationally.

The OHS regulations of all jurisdictions contain a preliminary part which addresses general issues such as interpretation of regulations or responsibilities under the regulations. Some regulations are peculiar to only one jurisdiction while others are common to many jurisdictions. For example, Queensland is the only jurisdiction to cover recreational diving but all jurisdictions have regulations for use of personal protective equipment. All jurisdictions, except the ACT, have regulations which cover specific hazards associated with plant design and item registration. All jurisdictions include regulations relating to noise and confined spaces.



Figure 2.1 Number of categories of OHS regulation by jurisdiction 2008-09

All jurisdictions, apart from Tasmania, cover working at heights, although Tasmania does address this hazard with codes of practice and a guidance note. All jurisdictions apart from Queensland have regulations which cover manual handling. Instead, Queensland has a *Manual Tasks Advisory Code of Practice*. In line with the national standards, all jurisdictions have regulations relating to the application for, and suspension of, licences to conduct high-risk work.

The ACT is notable in that it is the only jurisdiction which does not have regulations targeted at hazardous substances such as asbestos and lead under general OHS regulations. The treatment and handling of asbestos in the ACT is covered by building regulations and separate regulations which deal with dangerous substances. In the ACT, laws that manage and regulate asbestos include the *Building Act 2004*, *Construction Operations (Licensing) Act 2004, Dangerous Substances Act 2004, Dangerous Substances General Regulations Act 2004, Environment Protection Act 1997, Occupational Health and Safety Act 1989, Building Regulation 2004, 2004* 

Data source: OHS regulations.

Construction Occupations (Licensing) Regulation 2004 and Part 3.4 of the Dangerous Substances (General) Regulations 2004.

It is not clear that having a higher or lower coverage of OHS regulation contributes significantly to better or poorer OHS outcomes but it highlights the extent of differences which exist. A lower count of OHS categories in one jurisdiction could be indicative of less regulation being required to achieve similar results, while a higher count could be indicative of comparatively more high risk industries being present in some jurisdictions. For example, a higher concentration of employees in Manufacturing, Agriculture and Mining in some jurisdictions could require a greater diversity of regulations than jurisdictions which have a greater proportion of employees in industries which face lower risks of injury or disease. For example, in the case of the ACT, the absence of large heavy manufacturing industries and mining precludes the need for particular hazard management associated with these heavy industries. As a result their count of OHS regulation categories is much lower than other jurisdictions.

The diversity of OHS regulation coverage further highlights the difficulties faced by employers located in multiple jurisdictions in understanding their OHS regulatory responsibilities.

# 2.5 National standards, codes of practice and guidance notes

### What are standards?

*National standards* capture agreed principles, approaches and requirements and provide the mechanisms for jurisdictions to readily set and update various technical requirements of the National OHS Framework. A current list of national OHS standards is included in table 2.5.

As required by COAG, national standards should contain the minimum required to achieve agreed outcomes and be written in plain English. Quasi-legalistic styles are used only where the standard is designed to be taken up directly or given effect by reference in jurisdictional legislation, such as exposure limits. Unless a national standard is adopted into a jurisdiction's legislation it is not mandatory. National standards are public and accessible via electronic media.

Topic	National Standard	Code of Practice	Guidance Note
Asbestos		✓	✓
Atmospheric Contaminants	$\checkmark$		$\checkmark$
Carcinogenic substances	$\checkmark$	$\checkmark$	
Competencies in industry <sup>b</sup>			$\checkmark$
Confined spaces	$\checkmark$		
Construction	$\checkmark$	$\checkmark$	
Dangerous goods	$\checkmark$	$\checkmark$	$\checkmark$
Education <sup>c</sup>			$\checkmark$
Environmental tobacco smoke			$\checkmark$
Ethylene oxide		$\checkmark$	$\checkmark$
Explosives — transported by road and rail		$\checkmark$	
Hazardous substances	$\checkmark$	$\checkmark$	$\checkmark$
Health surveillance			$\checkmark$
Hepatitis and HIV		$\checkmark$	
Injury and disease recording	$\checkmark$		
Inorganic lead	$\checkmark$	$\checkmark$	
Ionizing radiation	$\checkmark$		$\checkmark$
Labelling workplace substances		$\checkmark$	
Licensing <sup>d</sup>	$\checkmark$		$\checkmark$
Major hazard facilities	$\checkmark$	$\checkmark$	
Manual tasks	$\checkmark$	$\checkmark$	
Material safety data sheets		$\checkmark$	
Noise	$\checkmark$	$\checkmark$	$\checkmark$
Occupational disease			$\checkmark$
Occupational overuse syndrome		$\checkmark$	$\checkmark$
Plant	$\checkmark$		
Printing (chemical controls)			$\checkmark$
Safe design			$\checkmark$
Stevedoring			$\checkmark$
Synthetic mineral fibres	$\checkmark$	$\checkmark$	$\checkmark$
Treated timber		$\checkmark$	$\checkmark$
Ultraviolet radiation			$\checkmark$
Vinyl chloride		$\checkmark$	

# Table 2.5Index of national standards, codes of practice and<br/>guidance notes<sup>a</sup>

<sup>a</sup> Relates to areas covered and not the number of national standards, codes of practice or guidance notes.
 <sup>b</sup> Relates to integrating OHS into national industry training packages.
 <sup>c</sup> Relates to the development of tertiary courses for professional education in OHS.
 <sup>d</sup> The national standard relates to the licensing of high risk work activities and the guidance note to the operation of loadshifting equipment.

Source: SWAC (2009c).

The Australian Safety and Compensation Council determined and 'declared' OHS standards for hazards common to many industries and workplaces across Australia, and for priority, high-risk industries. Once declared, standards and codes were

<sup>32</sup> REGULATION BENCHMARKING — OHS

endorsed by the WRMC. National standards are in the process of being phased out and replaced by model regulations which will be developed by Safe Work Australia.

### OHS codes of practice and guidance notes

*National codes of practice* are intended to provide more thorough guidance on the principles and options for action under a standard, thus allowing standards to be more simply and clearly stated than might otherwise be the case. Declared national codes must be endorsed by the WRMC. Codes of practice provide focused and practical guidance to help employers and employees meet obligations under the requirements of a national standard. However, as the codes are not mandatory, they provide those who have a duty of care under the Act with the flexibility to choose the method best suited to the conditions prevailing in the workplace.

It should be noted that the failure to observe a provision of an approved code of practice does not, in itself, constitute a breach of the Act. However, an approved code of practice is admissible as evidence in legal proceedings. A court may determine that a failure to comply with an approved code of practice constitutes proof of a breach of the duty of care responsibility, unless it can be shown that the actions taken achieved compliance in another way.

*Guidance notes* provide practical advice to employers, employees and others on how to prevent risks to health and safety from hazards identified in the workplace. These guides provide information on how to identify, manage and control these risks. The guides are not meant to be comprehensive and citing adherence to examples provided in them does not ensure compliance with legal obligations as set out in individual Acts and regulations. A current list of codes of practice and guidance notes is provided in table 2.5.

Comcare introduced the Commonwealth Occupational Health and Safety Code of Practice in June 2008 which replaced 27 individual codes of practice. The new Code is a single document of 261 pages which replaces 50 documents totalling 2800 pages of material. The new code covers 25 separate areas including twenty different hazards, as well as risk management, first aid, construction induction training, cash in transit and falls in constructions. The changes were a response to concerns raised about the previous codes of practice including: excessive prescription; a perceived lack of clarity on safety requirements and responsibilities; a number of outdated references; and instances of duplication of requirements with other legislative frameworks.

Victoria recently replaced some of their codes of practice with 'compliance codes'. The important legal distinction between compliance codes and codes of practice is that compliance with the former satisfies requirements of the Victorian OHS Act. There are currently eight compliance codes in Victoria which were developed in consultation with key industry bodies, employers, employees, government agencies and the community. Compliance codes which cover workplace amenities and work environment; communicating OHS across languages; and first aid in the workplace, are relevant to every workplace in Victoria. Guidance for managing specific hazards in compliance codes is limited to asbestos, prevention of falls, foundries and confined spaces. Advice on other hazards such as bullying and dangerous goods are provided in guidance notes. In addition to the eight compliance codes, Victoria has six codes of practice that relate to: hazardous substances; lead; dangerous goods handling and storage; manual handling; plant; and safety precautions in trenching operations. These codes have not as yet been superseded by compliance codes.

### Adoption of national standards and codes of practice

It is difficult to measure the true extent of take up of national standards and codes of practice. For those jurisdictions which have not adopted a national standard into their legislation, it does not necessarily imply they do not follow the requirements of the standard. Indeed, they may have adopted the requirements but have done so using different wording.

This may be further complicated if a jurisdiction has referred to a national standard in a code of practice, which, while not providing full legal effect, suggests to an employer that if they follow the national standard they will comply with that jurisdiction's OHS regulatory requirements. A similar complication exists for codes of practice. As such, it is difficult to gauge the true extent of differences from comparing the uptake of national standards and codes of practice.

Based on a criteria which identified the key elements of each standard, and then examined whether these elements were adopted in legislation or regulation, the numbers of adopted standards by each jurisdiction are presented in table 2.6. Tasmania have adopted the most (16) while Northern Territory has adopted the least (10).

For national guidance material, as it is not intended to be legally enforceable, or act as a code of practice, it is not possible to compare the uptake across jurisdictions as it is intended as an additional source of information. This information is available to all businesses, irrespective of the actions of individual jurisdictions, due to it being posted on the Safe Work Australia website. Thus, it is not possible to link the uptake or otherwise of guidance material to business compliance costs associated with jurisdictional regulatory differences.

NOHSC Number	Standard Name	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
	Workplace Injury and Disease Recording Standard			✓		✓		✓			3
	National Standard for Licensing Persons Performing High Risk Work	✓	а	~	~		√	✓	а	а	5
	National Standard for Manual Tasks	$\checkmark$						~		b	2
1003 (1995) 2	Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment	✓	$\checkmark$	~	~	~	~	~	~	~	9
1004 (1990)	National Standard for Synthetic Mineral Fibres	$\checkmark$	√	√	✓	√	~	~	✓	$\checkmark$	9
1005 1	National Model Regulation for the Control of Workplace Hazardous Substances	✓	~	~	~	√	~	~	~	✓	9
1006 (2001) 1	National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment		$\checkmark$	~		~		~		~	5
1007 (2000) 1	National Standard for Occupational Noise	$\checkmark$	$\checkmark$	~	✓	√	✓	✓	✓	√	9
(2000) 1 1008 (2004)	Approved Criteria for Classifying Hazardous Substances	~	✓	✓	✓	✓	~	√	~	√	9
1009 (1994)	Safe Working in a Confined Space	✓	С		✓	C	~	~	c	С	4
1010 (1994) 1	National Standard for Plant	✓	√	✓	d	~	√	~	√	d	7
1011 (1995)	National model regulation for the control of scheduled carcinogenic substances	✓	~	✓	~	√	~	✓	~	~	9
1012 (1994) 2	National Standard for the Control	$\checkmark$	✓	$\checkmark$	✓		$\checkmark$	✓		$\checkmark$	7
(1997) 1013 (1995)	National Standard for Limiting Occupational Exposure to Ionizing Radiation									√	1
1014 (2002)	National Standard for the Control of Major Hazard Facilities	~	✓	√	а	✓	~	~	√	a,e	7
1015 (2001)	National Standard for the Storage and Handling of Workplace Dangerous Goods	✓	~	~	~	~	~	~	✓	✓	9
1016 (2005) 1	National Standard for Construction Work	$\checkmark$	~	✓	√	✓	~	√	~	✓	9
Total		14	12	14	11	12	13	16	10	11	

### Table 2.6 Take up of national standards in legislation

2008-09

<sup>a</sup> Planned adoption through adoption of model regulations. <sup>b</sup> ACT has adopted the National Standard as a code of practice. <sup>c</sup> Referenced in code of practice. <sup>d</sup> Adopted as an Advisory Standard in Queensland and as an Approved Code of Practice in the ACT. <sup>e</sup> No major hazard facilities currently.

Source: Safe Work Australia (2009 unpublished).

Across the standards, the Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment has been adopted by all jurisdictions, whereas the National Standard for Limiting Occupational Exposure to Ionizing Radiation has only been adopted by the ACT.

The reasons for non-adoption of national standards across the jurisdictions vary. In some instances, the standards lie outside the scope of the core OHS regulations. In others, non-adoption is driven by the provisions being updated in more recent regulations, or the jurisdiction has decided to reference the standard within its code of practice.

A number of national codes have also been modified by jurisdictions while other codes have been developed independently. Jurisdictions have also developed their own codes of practice in response to particular OHS incidents. For example, in Tasmania a code of practice titled *Applicable Standards for Underground Mining and Associated Operations* came into operation in November 2008 in response to the coroner's findings following the deaths of three mining employees at Renison Mine. The code provides practical guidance for mine operators with regard to safety management systems, risk management, safety requirements for conveyors and the application of exposure standards for atmospheric contaminants.

### OHS Codes of practice by jurisdiction

Table 2.7 shows that South Australia has 89 codes of practice but Victoria has streamlined its codes to just 8 compliance codes and 6 codes of practice. Victoria's compliance codes include: communicating occupational health and safety across languages; workplace amenities and work environment; confined spaces; first aid in the workplace; prevention of falls in general construction; foundries; managing asbestos in workplaces; and removing asbestos in workplaces.

The quantity of codes, on its own, may not be a sufficient benchmarking indicator of the support provided to businesses. However a smaller number of well directed codes may be more helpful to employers and employees than a large number of codes. It is possible that similar outcomes may be achieved in jurisdictions with a lower number of codes of practice, combined with a well developed program of proactive inspections providing OHS advice in the workplace.

Figure 2.2 shows the distribution of codes of practice currently operating in each jurisdiction in terms of whether they are focused on specific industries, hazards, processes or a mixture of these categories.

2	-000-03								
Areas covered	Cwlth <sup>a</sup>	NSW <sup>b</sup>	Vic <sup>c</sup>	Q/d <sup>d</sup>	SA	WA	Tas	NT	ACT
	no.	no.	no.	no.	no.	no.	no.	no.	no.
Industries	3	20	_	7	36	12	4	1	4
Hazards	20	17	6	18	44	20	3	15	15
Processes	2	6	_	2	2	1	2	1	1
Mixed <sup>e</sup>	_	1	_	3	7	4	9	2	5
Compliance code	s na	na	8	na	na	na	na	na	na
Total	25	44	14	30	89	37	18	19	25

## Table 2.7Number of codes of practice by jurisdiction2008-09

**na** not applicable. <sup>a</sup> In June 2008 the Commonwealth consolidated its code of practice into 25 different areas — 20 are focussed on hazards in the workplace while the remainder include risk management, first aid, construction induction training, cash in transit and falls in constructions. Risk management and first aid are classified as processes while construction induction training, cash in transit and falls in constructions. Risk management and first aid are specific to particular industries. <sup>b</sup> Apart from codes targeted at hazards and industries New South Wales includes a number of codes related to the working environment such as workplace amenities, noise management and managing hot and cold environments. <sup>c</sup> Victoria has a set of 8 compliance codes which have superseded many of the previous codes of practice that existed, and 6 codes of practice which remain in operation relating to hazardous substances; lead; storage and handling of dangerous goods; manual handling; plant; and safety precautions in trench operations. <sup>d</sup> Queensland repealed the Code of practice for storage and use of rural chemicals at a rural workplace on 1 September 2009. <sup>e</sup> The category tiled 'mixed' includes codes that cover a combination of areas such as a specific hazard *and* an industry.

*Sources*: Safe Work Australia (2009 unpublished); WorkSafe Victoria (pers. comm. 2009); Occupational Health and Safety Code of Practice 2008 (Cwlth), NSW Better Regulation Office, Department of Premier and Cabinet.

The purpose of this exercise is not to highlight an optimal or best practice mix of codes for jurisdictions to adopt in order to manage risks to health and safety at work but to indicate the extent of variation that currently exists as to how jurisdictions approach the provision of guidance on dealing with hazards in the workplace.

Figure 2.2 shows that the Northern Territory, the Commonwealth, Queensland, Western Australia and the ACT have a relatively high proportion of their codes dedicated to specific hazards, while New South Wales and South Australia have a relatively high proportion of codes related to specific industries compared with other jurisdictions.

In some jurisdictions, codes can be classified as addressing a mix of hazards and processes or a mix of hazards and industries. For example, in Victoria there are separate codes of practice that are targeted at the use of hazardous substances and the storage and handling of dangerous substances, but both codes also include a requirement to prepare material safety data sheets which is a process.



Figure 2.2 Codes of practice and compliance codes covering OHS 2008-09

There are also codes which could be classified as both hazard and industry codes. Examples include the prevention of falls in the Northern Territory (mainly in the construction industry), electrical work in Queensland, and the safe use of lasers in the construction industry in South Australia. There are cases where similar activities are given separate codes such as recreational and professional diving in Queensland. This may create compliance confusion, particularly where the two activities are combined, for example, in circumstances where recreational divers dive with professional diving instructors to recover objects from the seabed.

Some jurisdictions provide codes to deal with particular hazards which have not been adopted elsewhere. For example, Queensland and Western Australia are the only jurisdictions to have codes of practice specifically directed at violence, aggression, bullying and harassment in the workplace. The Queensland code is titled *Prevention of Workplace Harassment Code of Practice 2004* which is directed at preventing abuse, ridicule and other forms of what would be construed as bullying. The Western Australian code is titled *Violence, aggression and bullying at work 2006*. The Commonwealth has a clause in its *Occupational Health and Safety Code of Practice 2008* which relates to psychosocial hazards in the workplace. The remaining jurisdictions provide guidance notes to employers and employees on this topic. The differences in how jurisdictions approach hazards such as bullying and mental stress is covered in more detail in chapter 11.

*Data sources*: Safe Work Australia (2009 unpublished); WorkSafe Victoria (pers. comm. 2009); Occupational Health and Safety Code of Practice 2008 (Cwlth); NSW Better Regulation Office, Department of Premier and Cabinet.

### 2.6 OHS Regulators

Each jurisdiction has a specific regulator with primary responsibility for implementing OHS rules and regulations. The way these primary regulators operate, provide information, issue licences or permits, organise reporting, conduct inspections, and cooperate with businesses can have a significant impact on the levels of compliance costs and any associated burdens. A list of the primary regulators operating in each jurisdiction is provided in table 1.1 in chapter 1.

Some primary regulators and a number of other regulators have responsibility for OHS matters contained in industry specific Acts and Acts relating to specific hazards which are shown in table 2.8. These Acts relate to a range of industries and activities including the mining industry, railways, electricity generation and delivery, transportation of hazardous material, handling of explosives, handling of radioactive material, marine safety, and electrical and plumbing work.

	Regulator	Act
Cwlth	Comcare	Australian Workplace Safety Standards Act 2005
		Occupational Health and Safety (Maritime Industry) Act 1993
		Road Transport Reform (Dangerous Goods) Act 1995
		Safety, Rehabilitation and Compensation Act 1988
	Seafarers Safety, Rehabilitation and Compensation Authority	Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992
		Seafarers Rehabilitation and Compensation Act 1992
	Australian Building and Construction Commissioner	Building and Construction Improvement Act 2005
	Australian Maritime Safety Authority	Occupational Health and Safety (Maritime Industry) Act 1993
	National Offshore Petroleum Safety Authority	Offshore Petroleum and Greenhouse Gas Storage Act 2006

Table 2.8 Regulators dealing with OHS matters in other Acts<sup>a</sup>

(Continued next page)

Table 2.8	(continued)
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	Regulator	Act
NSW	Department of Industry and Investment	Coal Mine Health and Safety Act 2002 Mine Health and Safety Act 2004 Mine Safety (Cost Recovery) Act 2005 Petroleum (Onshore) Act 1991
	WorkCover NSW	Rural Workers' Accommodation Act 1969
	Dangerous goods — Department of Environment and Climate Change (licensing of drivers) and WorkCover NSW	Dangerous Goods (Road and Rail Transport) Act 2008
	Rail safety — Independent Transport Safety and Reliability Regulator	Rail Safety Act 2008
	WorkCover NSW	Explosives Act 2003
Vic <b>b</b>	Public Transport Safety Victoria WorkSafe Victoria	Rail Safety Act 2006 Equipment (Public Safety) Act 1994 Dangerous Goods Act 1985
	Energy Safe Victoria	Electricity Safety Act 1998
		Energy Safe Victoria Act 2005
	Department of Primary Industries	Mines Act 1958
Qld	Queensland Transport	Transport Operations (Road Use management) Act 1995
	Maritime Safety Queensland	Transport Operations (Marine Safety) Act 1994
	Queensland Mines Inspectorate	Coal Mining Safety and Health Act 1999
	(QMI) through the Mines and Energy Division of the Dept of Employment, Economic	Mining and Quarrying Safety and Health Act 1999 Petroleum and Gas (Production and Safety) Act 2004
	Development and Innovation	Explosives Act 1999
	Workplace Health and Safety Queensland	Dangerous Goods Safety Management Act 2001
	Department of Employment and Industrial Relations <sup>c</sup>	Electrical Safety Act 2002
	Department of Health	Radiation Safety Act 1999
SA	Safework SA	Dangerous Substances Act 1979
		Explosives Act 1936
		Petroleum Products Regulation Act 1995
		Mines and Works Inspection Act 1920
	Environment Protection Authority	Radiation Protection and Control Act 1982
	SafeWork SA	Mines and Works Inspection Act 1920
	Department for Transport, Energy and Infrastructure	Rail Safety Act 2007

(Continued next page)

### Table 2.8 (continued)

	Regulator	Act				
WA	Department for Planning and Infrastructure	Rail Safety Act 1998				
	Department for Mines and	Dangerous Goods Safety Act 2004				
	Petroleum	Mines Safety and Inspection Act 1994				
Tas	Department of Infrastructure, Energy and Resources	Rail Safety Act 1997				
	Workplace Standards Tasmania	Dangerous Goods Act 1998				
		Dangerous Substances (Safe Handling) Act 2005				
		Electricity Industry Safety and Administration Act 1997				
		Security-sensitive Dangerous Substances Act 2005				
		Occupational Licensing Act 2005				
		Electricity Industry Safety and Administration Act 1997				
	Department of Infrastructure, Energy and Resources	Rail Safety Act 1997				
NT	Department of Planning and	Northern Territory Rail Safety Act 1998				
	Infrastructure	Marine Act 1981				
	NT WorkSafe	Dangerous Goods Act 2008				
		Dangerous Goods (Road and Rail Transport) Act 2005				
		Radioactive Ores and Concentrates (Packaging and Transport) Act 2002				
		Electricity Reform Act 2005				
		Electrical Workers and Contractors Amendment Act 2008				
		Workers' Rehabilitation and Compensation Act 2007				
	Department of Regional	Petroleum Act 1984				
	Development, Primary Industry, Fisheries and Resources	Radioactive Ores and Concentrates (Packaging and Transport) Act 1980				
ACT	ACT WorkCover (Office of	Dangerous Substances Act 2004				
	Regulatory Services)	Radiation Protection Act 2006				
		Machinery Act 1949				
		Scaffolding and Lifts Act 1912				
		Road Transport Reform (Dangerous Goods) Act 1995				
		Clinical Waste Act 1990				
		Workers' Compensation Act 1951				
		Magistrates Court Act 1930				
		Public Sector Management Act 1994				
	ACT Gambling and Racing Commission	Racing Act 1999				

<sup>a</sup> Other than the principal OHS Acts listed in table 2.1. <sup>b</sup> The Road Transport (Dangerous Goods) Act 1995 in Victoria was subsumed by the Dangerous Goods Act 1985 in January 2009. <sup>c</sup> The Department of Justice and Attorney-General in Queensland now has responsibility for administering the *Electrical Safety Act 2002*.

Sources: WRMC (2008a); regulator websites.

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There are around 70 such Acts relating to OHS responsibilities in Australia which highlights the complexity of the task facing businesses in complying with OHS obligations, particularly those that operate in a number of jurisdictions.

In some jurisdictions, regulators have combined the administration and enforcement of OHS and workers' compensation regulations. Regulators for the Commonwealth, New South Wales, Victoria, Tasmania. the Northern Territory and the ACT have responsibility for both OHS and workers' compensation. In contrast, Queensland, South Australia, and Western Australia have separate regulators for OHS and workers' compensation, but in some instances these regulators also have other responsibilities.

## 3 Outcomes of OHS

### Key points

- In 2007-08, there were 232 compensated work-related fatalities in Australia or 2.4 compensated fatalities for every 100 000 employees. The highest fatality rates were recorded by the Northern Territory, Commonwealth and Queensland.
- In the same year, for every 1000 people employed in Australia there were 14 serious workers' compensation injury claims. Work-related injury and disease rates were relatively high for Seacare, Queensland and Tasmania.
- Workers' compensation data in 2007-08 show that workers were at highest risk from injury or illness in Transport and storage; Agriculture, forestry and fishing; Manufacturing; and Construction.
- At the jurisdictional level, industries with a high risk of work-related injury and disease included:
  - Agriculture, forestry and fishing in the Northern Territory and Queensland
  - Manufacturing in Queensland
  - Construction in Queensland and the ACT
  - Transport and storage in Queensland and Tasmania
  - Mining in New South Wales and Tasmania.
- Trend data indicate the Commonwealth and Victoria have achieved the lowest injury rates in recent years.
- Outcomes have been improving in all jurisdictions, with serious claim rates declining significantly for Seacare, the Commonwealth, South Australia and the ACT.
- By industry, significant improvement in serious claim rates were recorded for:
  - Mining in the Northern Territory, New South Wales, South Australia and Queensland
  - Construction in the ACT, Tasmania, South Australia and New South Wales
  - Transport and Storage for Seacare and South Australia
  - Wholesale trade in the ACT
  - Manufacturing in South Australia
  - Agriculture, forestry and fishing in Tasmania.
- While this information cannot help to judge the effectiveness of a particular regulation, let alone particular aspects of a regulation, it provides a broad context for benchmarking different approaches to occupational health and safety regulation.

Occupational health and safety (OHS) regulation exists to reduce workplace injury and its impact on individuals, families, the community, and economy. Outcome measurement may provide a systematic way of monitoring and evaluating the overall effectiveness of regulation. Measuring outcomes may show not only where regulations are being successful but also where they are being less effective. Thus, measuring outcomes can potentially offer findings that governments, regulators and businesses can use to adapt, improve, and become more effective at managing and implementing regulation. While a full analysis of the effectiveness of the overall OHS regulatory regime is outside the scope of this study, broad-based outcomes data (such as the incidence of workplace injury, disease and death across jurisdictions) is used to identify differences in OHS outcomes between jurisdictions and industries, and indicate trends over time.

This chapter presents a range of OHS indicators from various sources including workers' compensation statistics, the ABS work-related injury survey and a survey of small and medium businesses conducted by Sensis Pty Ltd on behalf of the Commission. In doing so, the chapter draws attention to a number of limitations associated with OHS outcome indicators. Of particular importance, OHS outcome data tend to be under-reported. For example, work-related injury and illness, measured using workers' compensation data, includes only those covered by workers' compensation. It does not include injured employees who did not claim compensation, the self employed or employees of companies that self insure. Outcome indicators may also underestimate long latency occupational diseases such as musculoskeletal disorders and cancers which can be difficult to attribute to work.

## 3.1 Work-related injury and illness

Most attempts to measure outcomes from OHS focus on the incidence of work-related injury, illness and death. Work-related injury and illness has a significant impact on individuals, families, the community and economy (box 3.1).

At a jurisdictional level, differences in industrial structure can affect aggregate outcomes. However, OHS outcome indicators are generally broadly based, that is they are provided at either the aggregate state/territory level or the two digit ANZSIC level by jurisdiction. At this level, the data are often not sufficiently disaggregated to allow consistent performance comparisons across jurisdictions and there are often gaps in industry survey data for some of the smaller jurisdictions. Because of the limited availability of robust outcomes data at a disaggregated level, the Commission does not attempt to attribute causation for any differences in OHS outcomes between jurisdictions.

### Box 3.1 The cost of work-related injury and illness

### Cost to employees

For employees, the cost of a workplace injury is not only the pain and suffering incurred from the injury (and in some cases long-term health issues) but also the cost of non-compensated medical expenses and the loss of any current and future earnings for both the sufferers and carers.

### Cost to employers and industry

Workers' compensation premiums are paid by employers to fund financial support for injured workers. Employers of injured workers may face significant costs including closure as the incident is investigated, a short term loss in output until the worker returns or is replaced, and a longer term loss in productivity and potential output. Other costs incurred by employers include costs associated with recruitment and training of new staff, legal costs, and fines and penalties associated with prosecution.

#### Cost to government and the community

The government and community bear a number of costs associated with work-related injury and illness. These include the cost of Medicare rebates for medical expenses incurred by injured workers, the cost of providing social welfare programs for injured or incapacitated workers, costs in administering compensation schemes and investigating accidents, and a potential loss of output and revenue.

### Quantifying the cost of work-related injury and illness

The most recent estimate by the Australian Safety and Compensation Council (2009) found the total economic cost of work-related injury and illness for the 2005-06 financial year to be \$57.5 billion, representing 5.9 per cent of GDP. Injuries (as distinct from disease) accounted for the majority of this cost — \$38.3 billion or 67 per cent of the total economic cost.

This was a significant increase in costs as a proportion of GDP from the previous estimate in 2000-01 which was 5 per cent. The ASCC attributed most of this increase to growth in average weekly earnings (which grew 66 per cent over this period) relative to GDP (which grew 40 per cent).

Further, the ASCC found that workers bear much of the cost of workplace injury and illness. In 2005-06 the ASCC estimated that:

- under four per cent (\$2.2 billion) of the total cost was borne by employers
- 49 per cent (\$28.2 billion) was borne by workers and their families
- 47 per cent (\$27.1 billion) was borne by the community.

Source: ASCC (2009).

## 3.2 A snapshot of OHS outcomes data

### Workers' compensation statistics

The most comprehensive source of information measuring OHS outcomes are workers' compensation data. Workers' compensation data are published annually by industry and cause of injury in the Australian Safety and Compensation Council's *Compendium of Workers' Compensation Statistics*. A comparison of workers' compensation data in all Australian states and territories and New Zealand is published in the Workplace Relations Ministers' Council's *Comparative Performance Monitoring Report*. Each state and territory also gave permission for Safe Work Australia to provide unpublished workers' compensation data to the Commission for use in this report.

Work-related fatalities and injuries, sourced from workers' compensation statistics, are key outcome indicators for OHS. Other indicators include workers' compensation premiums, time lost from work and the cause of work-related injury. An overview of workers' compensation statistics by jurisdiction is presented in table 3.1.

	,			
	Compensated fatalities number (rate) <sup>b</sup>	Incidence rate serious claims per 1000 workers	Frequency rate serious claims per million hours worked	Standardised average premium rate % of payroll
Cwlth	19 (5.2)	5.9	3.3	1.2
NSW	42 (1.4)	14.1	8.3	1.9
Vic	44 (1.8)	10.2	6.2	1.4
Qld	79 (4.4)	18.2	10.9	1.1
SA	8 (1.1)	13.7	8.3	2.8
WA	21 (2.1)	12.9	7.4	1.3
Tas	7 (3.4)	16.1	10.1	1.5
NT	10 (9.4)	13.3	7.4	1.8
ACT priv.	0 (0.0)	11.6	7.3	2.2
ACT Govt.	0 (0.0)	13.9	8.9	na
Seacare	0 (0.0)	22.4	4.3	4.7
Australia	232 (2.4)	13.5	8.0	1.6

## Table 3.1 Workers' compensation claims<sup>a</sup> — 2007-08p Summary statistics

**p** preliminary data. <sup>a</sup> Claims data Includes all workers' compensation claims involving temporary incapacity of one or more weeks plus all claims for fatality and permanent incapacity. <sup>b</sup> Compensated fatalities per 100 000 employees.

Source: Data provided by Safe Work Australia with permission from state and territory governments.
The data have a number of limitations including:

- they are not indicative of the actual level and rate of work-related injury and illness in the community as they include only those workers covered by workers' compensation
- the data reflect worker injury and under-report the incidence of disease
- timing issues as there can be significant lags between when injuries occur and when compensation is made (and therefore reported)
- the data are based on accepted workers' compensation claims, so they can vary according to the eligibility and scheme rules associated with each jurisdiction's workers' compensation scheme. For example, some jurisdictions place a time limit on the provision of benefits, whereas others, such as the Commonwealth, do not. Those jurisdictions with a time limit will always appear to have fewer long-term claims than those jurisdictions which do not apply a limit.

### Work-related fatalities

In 2007-08, there were 232 compensated work-related fatalities or 2.4 compensated fatalities for every 100 000 employees. The highest fatality rates were recorded in the Northern Territory (10 fatalities or 9.4 fatalities per 100 000 employed), by the Commonwealth (19 fatalities or 5.2 fatalities per 100 000 employed) and in Queensland (79 deaths or 4.4 fatalities per 100 000 employed) (table 3.1). However, fatality results can vary dramatically from one year to the next and no general conclusions can be based on any single year's outcomes; see section 3.3 for data on outcome trends over time.

Compensated fatalities provide the most recent information on work-related fatalities, however, its coverage is not complete (box 3.2).

### Incidence and frequency of serious injury and disease

The standard workers' compensation outcome measure for work-related injury and disease is the incidence rate of serious claims which is defined as the number of accepted workers' compensation claims for temporary incapacity involving one or more weeks off work plus all claims for a fatality or permanent incapacity.

In 2007-08, for every 1000 people employed in Australia there were 14 serious workers' compensation claims. At the jurisdictional level, claims were relatively high for Seacare (22 serious claims per 1000 workers), Queensland (18 serious claims) and Tasmania (16 serious claims).

### Box 3.2 Measuring work-related fatalities

Three data sets are available on work-related fatalities in Australia — compensated fatalities, notified fatalities and traumatic injury fatalities. **Compensated fatalities** is not a comprehensive measure of work-related fatalities because not all work-related fatalities are compensated. Uncompensated fatalities are captured in **notified fatalities** — work-related injury fatalities which are notified to state and territory OHS authorities under their relevant OHS legislation. Notified fatalities are known to undercount the number of work-related deaths that occur as a result of vehicle accidents on public roads as, in several jurisdictions, these are notified and investigated by the police rather than by the OHS authority. Compensated and notified fatalities cannot be combined as a measure of total work-related fatalities because of double counting. For example, some notified fatalities are also compensated.

The most comprehensive statistics compiled by Safe Work Australia on work-related fatalities are *traumatic injury fatalities*. The data are compiled using workers' compensation statistics, notified fatalities and the national coroner's information system. This measure includes all those killed while working for an income, as well as work-related vehicle accidents that occur on public roads. The measure does not include those injured or killed while travelling to or from work or bystanders who are not working but are killed as a result of someone else's work activity. While this data is the most comprehensive, it is not the most recent indicator of work-related fatalities. The latest traumatic injury fatality data available is for 2006-07.

The table below compares the three fatality series. In 2006-07 there were 295 traumatic injury fatalities compared with 260 compensated fatalities and 149 notified fatalities.

	Compe	Compensated		ïed	Traumatic	
	No.	Rate <sup>a</sup>	No.	Rate <sup>a</sup>	No.	Rate <sup>a</sup>
Cwlth	14	4.4	8	2.5	0	0.0
NSW	52	1.7	37	1.1	101	3.0
Vic	66	2.8	31	1.3	66	2.6
Qld	88	5.0	27	1.3	62	2.9
SA	9	1.3	5	0.5	12	1.1
WA	24	2.4	21	2.8	37	4.9
Tas	4	2.0	6	2.7	12	5.3
NT	2	2.0	3	2.8	3	2.8
ACT priv.	1	0.8	na	na	2	1.0
ACT Govt.	0	0.0	na	na	0	0.0
Seacare	0	0.0	na	na	0	0.0
Other	0	0.0	11	na	0	0.0
Australia	260	2.7	149	1.4	295	2.8

Compensated.	notified and	traumatic	fatalities	2006-07
••••••••••••••••••••••••••••••••••••••				

**a** Fatalities per 100 000 employees.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

The lowest injury rates in 2007-08 were recorded for workers covered by Comcare (6 serious claims per 1000 people employed) and in Victoria (10 serious claims per 1000 people employed) (table 3.1).

To allow for differences in the number of hours worked across industries, serious claims can also be expressed in terms of frequency. In 2007-08, for every million hours worked in Australia there were 8 serious workers' compensation claims. Queensland (11 serious claims for every million hours worked) and Tasmania (10 serious claims for every million hours worked) had the highest frequency rate of serious claims.

The frequency rate of serious claims for Seacare (significantly below the national average) appears to be inconsistent with its incidence rate (significantly higher than the national average). This is because hours worked (and hours covered by workers' compensation) are recorded by Seacare claimants as time at sea (24 hours a day) rather than time spent working at sea. As a result, the recorded number of hours worked by Seacare claimants are significantly higher than the number of hours worked by claimants in other industries. Frequency rates for Seacare are therefore not comparable with estimates in other jurisdictions and industries.

Leaving Seacare data aside, the lowest number of serious claims, as a proportion of hours worked, were recorded for the Commonwealth (3 serious claims per million hours worked) and Victoria (6 serious claims per million hours worked) (table 3.1).

### Workers' compensation premiums

Workers' compensation premiums are paid by employers (other than self insurers) to fund financial and medical support for injured workers. In 2007-08 the standardised average premium rate in Australia was 1.6 per cent of payroll. Seacare (4.7 per cent) and South Australia (2.8 per cent) recorded the highest premium rates. In contrast, Queensland (1.1 per cent) and the Commonwealth (1.2 per cent) recorded the lowest premium rates (table 3.1).

It might be expected that workers' compensation premiums in jurisdictions with more effective regulations would be lower due to the lower probability of workplace accidents. However, as discussed in appendix C, many other factors also determine premiums. It is therefore problematic to use premium data as a basis for comparing differences in OHS outcomes or risks. For example, table 3.1 shows that Queensland has a relatively high incidence and frequency rate of injury but also has the lowest premium rate, thereby suggesting that risk of injury is not the predominant driver of premium rates in Queensland.

#### Cause of work-related injury

Other OHS outcomes data sourced from workers' compensation statistics include the mechanism or cause of injury and time lost from work.

In 2007-08, over 40 per cent of serious workers' compensation claims in Australia were caused by body stressing. A significant number of serious claims were also recorded by workers involved in falls, trips and slips (20 per cent) and workers being hit by a moving object (15 per cent). Over three quarters of serious claims (77 per cent) resulted in absence from work of less than 12 weeks and very few serious claims (2 per cent) resulted in absences of 12 months or more (figure 3.1). These trends are broadly consistent across jurisdictions.

## Figure 3.1 Cause of injury/disease and time lost from work — 2007-08p Percentage of serious claims



**p** preliminary data. <sup>a</sup> Other includes heat, radiation and electricity, chemicals, biological factors and not stated. <sup>b</sup> Body stressing includes muscular stress caused by lifting, pushing, pulling, carrying or putting down objects, as well as injuries caused by bending, twisting, reaching, turning, working in cramped conditions and repetitive movement.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

### Outcomes by industry

At a jurisdictional level, differences in industrial structure can affect aggregate outcomes. Tables 3.2 and 3.3 present national, state and territory injury and disease incidence rates and compensated fatality rates by industry in order to examine how OHS outcomes differ for the same industry in different jurisdictions.

In 2007-08, serious claim rates were highest for Transport and storage (24.4 serious claims per 1 000 employed); Agriculture, forestry and fishing (24.3 serious claims

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per 1000 employed); Manufacturing (24.1 serious claims per 1000 employed); Construction (21.6 serious claims per 1000 employed); and Mining (17.9 serious claims per 1000 employed). In contrast, service sector industries such as Finance and insurance, Communications, Education and Electricity, gas and water supply recorded very few serious claims (table 3.2).

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT priv.	ACT Govt	Sea- care	Total
Ag, forestry/fishing	na	28.0	13.8	34.5	16.7	26.8	23.7	66.8 <b>a</b>	np	na	na	24.3
Mining	na	26.7	10.1	19.1	11.3	16.0	25.2	9.6	np	na	na	17.9
Manufacturing	9.2	24.3	18.1	34.1	24.9	25.1	25.9	22.6	25.1	na	na	24.1
Electric/gas/water	na	13.0	3.7	8.0	4.4	7.5	7.5	22.0 <sup>a</sup>	11.7 <sup>a</sup>	<b>1</b> 5.0	na	8.1
Construction	6.0	21.8	15.5	26.6	23.6	24.2	23.7	17.2	25.2	na	na	21.6
Wholesale trade	na	15.3	12.8	22.1	14.7	13.9	14.8	25.0 <b>a</b>	14.9	na	na	15.5
Retail trade	na	8.6	6.0	10.5	7.9	9.3	8.7	8.5	14.0	na	na	8.4
Accom/cafes etc.	na	15.1	4.8	14.4	10.5	10.5	8.5	11.2	12.0	na	na	11.6
Transport/storage	7.6	25.3	25.5	28.1	23.9	20.7	26.4	17.2	15.4	na	22.4	24.4
Communications	8.0	10.1	0.8	7.7	np	4.7	20.1 <sup>a</sup>	np np	7.0 <sup>a</sup>	na na	na	7.1
Finance/insurance	1.7	3.6	2.6	4.0	2.2	1.5	3.4	np	5.7 <b>°</b>	na na	na	2.9
Property/business	4.5	8.5	3.9	19.1	12.4	5.0	12.7	23.7	6.2	na	na	8.8
Govt and defence	5.2	16.2	8.1	18.1	8.4	2.5	22.7	4.4	3.2	15.6	na	10.3
Education	4.1	11.6	6.0	7.4	6.1	6.7	8.4	8.9	2.0	11.2	na	8.1
Health/community	9.1	13.7	11.7	17.9	15.8	14.2	20.2	12.6	16.5	15.5	na	14.4
Cultural/recreation	21.0	9.2	10.8	10.7	7.2	12.1	7.7	8.2	2.7	na	na	10.2
Personal & other	15.0	13.4	13.6	18.7	13.1	14.1	20.2	11.3	8.7	na	na	14.5
Total	5.9	14.1	10.2	18.2	13.7	12.9	16.1	13.3	11.6	13.9	22.4	13.5

### Table 3.2 Incidence rate of injury/disease — 2007-08p

Serious claims per 1000 workers

**p** preliminary data. **na** not applicable. **np** data could not be provided because of confidentiality concerns. **a** Relative standard error greater than 25 percent.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

In the same year, industries with the highest compensated fatality rates were Transport and storage (68 fatalities or 15 fatalities per 100 000 employees); Agriculture, forestry and fishing (22 fatalities or 13 fatalities per 100 000 employees); and Construction (37 fatalities or 6 fatalities per 100 000 employees) – reflecting the high risk nature of work in these industries. In comparison, service sector industries such as Health and community services; Education; and Finance and insurance had very few compensated fatalities (table 3.3).

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	Total
Agriculture, forestry & fishing	na	9.1	14.7	13.2	4.1	13.0	9.4	140.5	12.6
Mining	na	0.0	0.0	5.5	21.3	5.4	0.0	0.0	5.0
Manufacturing	0.0	2.6	2.2	3.5	0.0	4.4	0.0	0.0	2.5
Electricity, gas & water	0.0	0.0	0.0	10.8	0.0	0.0	0.0	0.0	2.3
Construction	69.1	3.4	3.1	9.8	5.3	3.7	17.5	11.8	5.6
Wholesale trade	na	0.0	1.5	2.9	0.0	2.4	12	0.0	1.4
Retail trade	na	0.4	0.3	0.7	0.0	0.7	0.0	0.0	0.4
Accom, cafes & restaurants	0.0	0.5	0.0	0.9	0.0	0	0	0.0	0.4
Transport & storage	0.0	5.1	15.1	40.2	8.3	9.3	11.7	28.3	15.1
Communication services	3.7	0.0	0.0	6.5	0.0	0.0	0.0	0.0	2.3
Finance & insurance	6.0	0.0	1.2	0.0	0.0	0.0	0.0	0.0	1.3
Property & business services	0.0	1.5	1.2	2.1	1.3	1.5	0.0	24.5	1.6
Govt. admin. & defence	3.4	2.0	1.6	0.0	0.0	0.0	10.3	7.4	2.0
Education	0.0	0.4	0.0	0.0	0.0	0.0	0.0	0.0	0.2
Health & community services	0.0	0.0	0.0	0.0	0.0	0.0	3.5	0.0	0.2
Cultural & rec. services	0.0	2.7	1.3	0.0	0.0	0.0	0.0	28.9	1.5
Personal & other services	51.0	0.9	2.4	3.1	0.0	0.0	0.0	0.0	2.6
Total	5.2	1.4	1.8	4.4	1.1	2.1	3.4	9.4	2.4

# Table 3.3Compensated fatalities, jurisdictiona and industry,<br/>2007-08p

Incidence — fatalities per 100 000 employees

**p** preliminary data. **na** not applicable. <sup>**a**</sup> No compensated fatalities were recorded in the ACT and for Seacare. *Source*: Data provided by Safe Work Australia with permission from state and territory governments.

A number of differences in OHS outcomes can be observed across industries at the state and territory level.

- In New South Wales, serious claim rates in the mining sector stand out. In 2007-08 there were 27 serious injury claims per thousand workers in the mining sector compared with 18 claims per thousand workers nationally. New South Wales also recorded the highest serious claim rates in Education and Accommodation, cafes and restaurants.
- Victoria achieved the lowest serious claim rates in many industries in 2007-08 including Agriculture, forestry and fishing; Electricity, gas and water; Wholesale and Retail trade; Accommodation, cafes and restaurants; Communication services; and Property and business services.
- Across most industries in Queensland, serious claim rates were higher than the national average. For example, Queensland recorded the highest serious claim rate in Manufacturing 34 serious claims per thousand workers in 2007-08 compared with a national average of 24 claims per thousand workers. Queensland also recorded the highest serious claim rates in Transport and storage, and Construction.

- In South Australia, serious claim rates across most industries were around the national average. In particular, South Australia achieved relatively low serious claim rates in Mining, Electricity, gas and water and Finance and insurance.
- Western Australia achieved relatively low serious claim rates in a number of sectors including Wholesale trade, Communications, Finance and insurance and Government administration and defence.
- Tasmania recorded the highest serious claim rates in a number of service sectors including Communications services, Government administration and defence, Health and community services and Personal and other services. Tasmania also recorded relatively high serious claim rates in Mining and Transport and storage.
- The Northern Territory recorded the highest serious claim rates in Agriculture, forestry and fishing; Electricity, gas and water; Wholesale trade; and Property and business services. In particular, serious claim rates in Agriculture, forestry and fishing sector were significantly higher than the national average 67 serious claims per 1000 workers compared with 25 claims per 1000 workers. However, the Northern Territory also recorded relatively low serious claim rates in a number of service sectors including Government administration and defence, Health and community services, Cultural and recreational services and Personal and other services.
- In 2007-08 the ACT recorded the highest serious claim rates in Retail trade and Finance and insurance, as well as relatively high claim rates in Construction. In the government sector, the ACT also recorded one of the highest rates of serious claims in Education. In contrast, the ACT recorded low serious claim rates in Transport and storage, private education and Cultural and recreational services (table 3.2).

Disparities in serious claim rates across jurisdictions become even more evident at lower levels of industry aggregation. For example, box 3.3 presents a disaggregated look at the incidence of injury and disease for the Transport and storage sector.

Participants in this study also commented that injury risks within the mining sector can be highly variable and that higher claim rates in the mining industry in New South Wales (where underground coal mining is prevalent) may be at least partly explained by the high risk nature of underground mining relative to open cut mining. While mining claims data are not available at a disaggregated level because of confidentiality concerns, data published in the annual *Safety Performance* reports by the Minerals Council of Australia support this view. In 2006-07, there were 19 lost time injuries per million hours worked from underground mining in Australia compared with 5 lost time injuries per million hours worked in open cut coal mining (Minerals Council of Australia 2008).

### Box 3.3 Disaggregating industry data: Transport and storage

In 2007-08 there were 24 serious claims per 1000 workers in the Transport and storage sector in Australia. Within this sector incidence rates ranged from 11 serious claims per 1000 workers in services to air transport to 41 serious claims per 1000 workers in services to water transport (table below).

At the jurisdictional level disparities in injury incidence are even more apparent. For example, in 2007-08 in the Transport and storage sector Victoria recorded 26 serious claims per 1000 workers. However, within this sector injury rates ranged from 10 serious claims per 1000 workers in services to air transport to 65 serious claims per 1000 workers in rail transport. Similarly in South Australia, Transport and storage incidence rates averaged 24 serious claims per 1000 workers but ranged from 4 serious claims per 1000 workers in services to air transport to 50 serious claims per 1000 workers in services to air transport to 50 serious claims per 1000 workers in services to water transport.

Moreover, in 2007-08 Queensland had the highest claim rate for Transport and storage at the aggregate level (28 serious claims per 1000 workers compared with the national average of 24 serious claims per 1000 workers). At a more disaggregated level the data showed that while Queensland had the highest claim rates for road freight transport (45 serious claims per 1000 workers compared with the national average of 34 serious claims per 1000 workers) it also had one of the lowest incidence rates for storage (11 serious claims per 1000 workers compared with the national average of 24 serious claims per 1000 workers) (table below).

Therefore at the aggregate (Transport and storage) level the data is unable to identify which individual industries are achieving good outcomes or which industries may be underperforming.

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT priv.	Sea- care	Total
Road freight transport	7.1	29.6	32.8	45.1	34.2	31.9	37.1	18.8	22.6		34.0
Road passenger transport		26.2	12.2	23.9	13.8	12.8	26.3	5.3	10.4		19.5
Rail transport	11.3	34.5	64.8	21.8	15.2	23.4		np	np		30.0
Water transport		15.5	3.3	19.2	4.1	4.6	2.3	23.6		22.4	15.3
Air and space transport		17.7	15.5	29.4	17.6	16.9	6.7	12.9	27.1		19.4
Other transport	8.2	np	np		np	24.2			np		24.5
Services to road transport		48.5	16.2	np	np	30.7		np			37.2
Services to water transport		45.3	48.3	36.4	50.3	27.5	41.1	92.1	np		41.2
Services to air transport	3.4	16.4	10.1	12.5	3.5	21.8	np	5.0	10.7		10.6
Other services to transport		9.7	12.0	20.3	16.4	12.6	33.5	14.4	18.6		13.3
Storage		30.3	29.6	11.2	18.0	12.6	18.4	0.0	40.4		24.2
Total	7.6	25.3	25.5	28.1	23.9	20.7	26.4	17.2	15.4	22.4	24.4

### Transport and storage: incidence of injury

Serious claims per 1000 workers, 2007-08p

**p** preliminary data. **np** data could not be provided because of confidentiality concerns.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

However, for many sectors such as construction and mining it is not possible to report injury incidence rates at lower levels of industry by jurisdiction because of small injury numbers resulting in confidentiality and accuracy concerns. For this reason the Commission has not been able to attribute causation for differences in serious claim rates across jurisdictions.

### ABS work-related injuries survey

The ABS work-related injuries and illness data are collected as part of the ABS Multi-Purpose Household Survey. It is a periodic survey and was last collected in 2005-06. The ABS survey measures both uncompensated and compensated work-related injuries.

The results of the ABS work-related injuries survey show that the majority of workrelated injury or illness is not captured by workers' compensation statistics. In 2005-06, of those who experienced a work-related injury or illness (in the previous 12 months) 31 per cent received workers' compensation. However, that said, almost two thirds (65 per cent) of workers who reported an injury in the survey stated that they did not apply for workers' compensation because the injury or illness was minor and they did not consider it necessary.

Therefore, unlike the workers' compensation data reported earlier (which defined injury as serious claims involving one or more weeks off work) ABS data includes both major and minor injuries and illness, some of which required no time off work. Further, ABS work-related injury and illness data also include injuries sustained by self employed persons, such as farmers, who are not covered by workers' compensation. Clearly, the work-related injury and illness rates reported by ABS are higher and are not directly comparable with workers' compensation data.

The ABS work-related injuries survey found that in 2005-06, of the 10.8 million people employed, 6.4 per cent (or 64 per 1000 employed) experienced a work-related injury or illness. This injury or illness rate was highest in Queensland (7.1 per cent) and lowest in Victoria (5.4 per cent) (table 3.4).

The survey found that most injuries and illnesses in 2005-06 occurred in Retail trade (16 per cent); Manufacturing (14 per cent); and Health and community services (12 per cent). However, as a proportion of employment, injury and illness rates were highest in Agriculture, forestry and fishing (10.9 per cent); Manufacturing (8.7 per cent); Construction and Mining (each 8.6 per cent) and Transport and storage (8.5 per cent). These higher risk industries tend to be associated with labour intensive manual work. Conversely, relatively low rates of work-related injury or illness were recorded in the services sector — including

Finance and insurance (1.9 per cent); Property and business services (3.6 per cent); and Communication services (3.7 per cent) (table 3.5). These rankings are similar to those based on serious injury claims from workers' compensation statistics.

	•		
	Number of persons ('000) with an injury	Injury rate %	
NSW	240.3	6.8	
Vic	143.2	5.4	
Qld	154.0	7.1	
SA	49.1	6.2	
WA	68.5	6.1	
Tas	15.3	6.4	
NT	6.1	6.9	
ACT	13.1	6.9	
Total	689.5	6.4	

Table 3.4 Work-related injuries and illnesses — 2005-06

Source: ABS (Work-Related Injuries Cat. no. 6324.0).

### Table 3.5Work related injury — 2005-06

	% injuries	Injury rate per persons employed <sup>a</sup>
Agriculture, forestry and fishing	6.0	10.9
Mining	1.7	8.6
Manufacturing	13.8	8.7
Electricity, gas and water	0.7	6.5
Construction	11.0	8.6
Wholesale trade	3.2	5.7
Retail trade	15.8	7.4
Accommodation, cafes and restaurants	5.0	7.7
Transport and Storage	5.7	8.5
Communication Services	1.1	3.7
Finance and Insurance	1.0	1.9
Property and business services	6.3	3.6
Government administration and defence	5.1	7.2
Education	5.3	5.2
Health and community services	11.5	7.7
Cultural and recreational services	2.6	6.4
Personal and other services	4.2	7.3
Total	100.0	6.9

<sup>a</sup> These injury rates are calculated by ABS by dividing the number of injured workers by the number of persons employed at the time of interview and differs from the injury rates in table 3.4 which are calculated as the percentage of injured workers divided by the number of people who worked some time in the last 12 months (including those who were unemployed or not in the labour force at the time of the interview).

Source: ABS (Work-Related Injuries, Cat. no. 6324.0).

At the jurisdictional level, compared with the Australian average, reported injury and illness rates were found to be high in Mining in New South Wales, Manufacturing in Queensland, Agriculture, forestry and fishing in Western Australia and Construction in Victoria (figure 3.2).

The ABS work-related injury and illness survey also collects information on the nature of the injury or illness. In 2005-06 the most common types of injuries or illnesses sustained (across all industries) were sprains or strains (30 per cent), cuts and open wounds (19 per cent) and chronic joint or muscle conditions (19 per cent). These were most likely to be caused by lifting or pulling an object (32 per cent) or being hit or cut (30 per cent) (table 3.6).

#### Figure 3.2 Work related injury by industry and state<sup>a,b</sup> — 2005-06 Per cent of employment



<sup>a</sup> ABS were unable to provide data for all individual industries by state because of high standard errors. Estimates for Agriculture, forestry and fishing; Mining in New South Wales and Western Australia and Construction in South Australia have relative standard errors between 25 per cent and 50 per cent and the estimate for Mining in Queensland has a standard error exceeding 50 per cent. The ABS advises that these estimates need to be treated with caution. <sup>b</sup> Injury rates are calculated by the ABS by dividing the number of injured workers by the number of persons employed at the time of interview and differs from the injury rates in table 3.4 which are calculated as the number of injured workers divided by the number of people who worked some time in the last 12 months (including those who were unemployed or not in the labour force at the time of the interview).

Data source: ABS (Work-Related Injuries, Cat. no. 6324.0, unpublished data).

Type of injury or illness	%	How the injury or illness occurred	%
Fracture	6.4	Lifting, pulling or pushing an object	31.7
Chronic joint or muscle condition	18.6	Repetitive movement	8.2
Sprain/strain	30.1	Prolonged standing or working in a	1.9
Cut/open wound	19.2	cramped or unchanging position	
Crushing, internal organ injury or amputation	4.0	Vehicle accident	3.6
Superficial injury	7.5	Hitting or being hit or cut by an object	26.6
Stress or other mental condition	4.5	Fall or slip on same level	8.6
Other	9.7	Fall from height	4.3
		Exposure to mental stress	5.0
		Contact with chemical or substance	4.6
		Other	5.6
Total	100	Total	100

### Table 3.6 Type of injury, and cause of injury — 2005-06

Source: ABS (Work-Related Injuries, Cat. no. 6324.0).

### Survey of small and medium enterprises

The quarterly Sensis Business Index is an ongoing series of surveys tracking the confidence and behaviour of Australia's small and medium enterprises (SMEs). The Commission contracted Sensis Pty Ltd to include questions relating to OHS in their June 2009 survey. Three questions were asked regarding work-related injury:

- has your businesses had a work-related injury in the last 12 months?
- if so what was the type of injury?
- what was the extent of injury?

Further details about the survey can be found in Appendix B.

Unlike workers' compensation data and the ABS work-related injuries data which record information about work-injury from employees, Sensis Pty Ltd data are based on responses from SMEs. Injury rates from the survey reflect the percentage of businesses which reported an injury in the previous 12 months rather than the number of injuries per persons employed. While injury rates from the survey cannot be compared with workers' compensation or ABS injury rates, the data provide a useful source of information on the prevalence of injury amongst SMEs in Australia.

In June 2009, of the 1802 businesses surveyed, just over 20 per cent reported a work-related injury in the previous 12 months. The majority of injuries were reported as being minor in nature:

- of the 372 SMEs that reported a work injury, 85 per cent stated that the injury was minor and there was no disruption to work
- 9 per cent of SMEs that reported a work injury said that it was an injury that resulted in lost production due to a shut down while the cause of the accident was investigated
- 6 per cent SMEs reported a major work injury that resulted in significant lost production while OHS practices were changed to prevent future accidents.

In relation to the type of injury sustained, a large proportion of SMEs (88 per cent) stated that the injury was physical. About 2.5 per cent reported that the injury was related to harassment; 5 per cent stated that the injury was psychological and 3.5 per cent reported that the injury sustained was both physical and psychological.

The highest injury rate was recorded in New South Wales where almost 30 per cent of businesses reported a work-related injury. Injury rates were also relatively high in Victoria and Western Australia — over 20 per cent of businesses in these jurisdictions reported a work-related injury. The lowest injury rate (around 14 per cent) was recorded in Tasmania (table 3.7).

	12 months to May 2009		
	Number of businesses	Number of businesses reporting injury	Injury rate
NSW	300	87	29.0
Vic	300	64	21.3
Qld	300	55	18.3
SA	225	42	18.7
WA	224	46	20.5
Tas	151	21	13.9
NT	151	28	18.5
ACT	151	29	19.2
Total	1 802	372	20.6

### Table 3.7SMEs reporting injury by state

Source: Sensis Survey of SMEs (2009 unpublished).

By industry, the highest injury rates were recorded by SMEs in Manufacturing where over 32 per cent of businesses reported a work-related injury. SMEs in Construction (29 per cent); Transport and storage (24 per cent); and Health and community services (23 per cent) also reported relatively high injury rates. In

contrast, SMEs in Financial services (7 per cent) and Communication, property and business services (13 per cent) reported relatively low injury rates (table 3.8). These findings are consistent with those presented earlier based on serious injury claims from workers' compensation and the ABS work-related injury survey (table 3.9).

### Table 3.8SMEs reporting injury by industry

12 months to May 2009

	Number of businesses	Number of businesses reporting injury	Injury rate
Manufacturing	260	85	32.7
Building/Construction	220	63	28.6
Wholesale trade	152	30	19.7
Retail trade	295	54	18.3
Transport/Storage	99	24	24.2
Communication, property and business services	317	42	13.3
Finance and Insurance	87	6	6.9
Health and Community services	96	22	22.9
Cultural, recreational and personal services	137	22	16.1
Accommodation, cafes and restaurants	139	24	17.3
Total	1 802	372	20.6

Source: Sensis Survey of SMEs (2009 unpublished).

### Table 3.9 Highest and lowest injury rates by industry

A	compar	ison of data sources	5		
Workers' compensation — serious claims per 1000 workers, 2007-08		ABS — work-related injuries per persons employed, 2005-06		Sensis survey of SMEs — % of businesses reporting injury, previous 12 months to May 2009	
Highest injury rat	tes				
Transport/storage	(24.4)	Agriculture <sup>a</sup>	(10.9)	Manufacturing	(32.7)
Agriculture <sup>a</sup>	(24.3)	Manufacturing	(8.7)	Construction	(28.6)
Manufacturing	(24.1)	Construction	(8.6)	Transport/storage	(24.2)
Construction	(21.6)	Mining	(8.6)	Health/community	(22.9)
Mining	(17.9)	Transport/storage	(8.5)	-	. ,
All industries	(13.5)	All industries	(6.9)	All industries	(20.6)
Lowest injury rat	es				
Finance/insurance	(2.9)	Finance/insurance	e (1.9)	Finance/insurance	(6.9)
Communications	(7.1)	Property/business	(3.6)	Communications/property/business	s (13.3)
Education	(8.1)	Communications	(3.7)	Cultural/recreation/personal	(16.1)
Electricity/gas/wat	er (8.1)	Education	(5.2)	Accommodation/cafes/restaurants	(17.3)
Retail trade	(8.4)	Wholesale trade	(5.7)		
All industries	(13.5)	All industries	(6.9)	All industries	(20.6)

<sup>a</sup> Agriculture includes forestry and fishing.

Source: Tables 3.2, 3.5 and 3.8.

### 3.3 OHS outcomes over time

Governments and regulators monitor and target changes in OHS outcomes over time in order to become more effective at managing OHS regulation and improve outcomes. Since 2002, Australian Governments have been targeting improvements in OHS outcomes through the National OHS Strategy (box 3.4).

Internationally, data published by the WRMC illustrates that Australia currently ranks in seventh place among the best OHS performing countries in the world (in terms of work-related injury fatality rates), behind Switzerland, Sweden, the United Kingdom, Denmark, Norway and Finland. Of greater significance, since 2001 Australia's work-related fatality rate has generally decreased at a faster rate than the best performing countries in the world (figure 3.3).

#### Figure 3.3 International comparison, best performing OHS countries Fatalities per 100 000 employees<sup>a</sup>



<sup>a</sup> Data were standardised against Australia to take account of different industry mixes and a three year average was used to remove some volatility associated with the small numbers. Safe Work Australia notes that while the methodology has attempted to address concerns associated with comparing different data sets across countries some issues have not been fully resolved and may impact on the final results. <sup>b</sup> Preliminary data for 2006-2008 shows a significant improvement in outcomes data in New Zealand.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

### Box 3.4 Outcome targets: the National OHS Strategy

As outlined in chapter 1 (box 1.2), Australian states and territories have agreed to the following national OHS targets:

- a reduction in the incidence of work-related fatalities by at least 20 per cent by 30 June 2012 (with an interim target of a 10 per cent reduction by 30 June 2007)
- a reduction in the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with an interim target of a 20 per cent reduction by 30 June 2007).

Progress on the National Strategy is reported in the WRMC's *Comparative Performance Monitoring Report*. It is important to note that the strategy uses a standard definition of *serious* claims due to injury or musculoskeletal disorders to monitor changes in the incidence rate of workplace fatalities and injuries. As a consequence the following data are not directly comparable with the measure of claims (which includes all injury and disease) used in the chapter.

Between 2002-03 and 2006-07, Australia recorded a 17 per cent decline in the incidence of injury and musculoskeletal claims — just short of the interim target of a 20 per cent reduction. New South Wales (down 27 per cent), Seacare (25 per cent), the Commonwealth (24 per cent) and South Australia (22 per cent) exceeded the interim national target. Despite recording declines in injury rates, Victoria (down 18 per cent), the Northern Territory (8 per cent), Queensland (4 per cent), Tasmania and Western Australia (both 3 per cent) did not achieve the 20 per cent reduction target while the ACT recorded no change in injury outcomes (see table below).

The interim fatality target at the national level was achieved. The incidence of compensated fatalities from injuries and musculoskeletal disorders in Australia decreased by 16 per cent between 2002-03 and 2006-07, exceeding the 10 per cent target. Fatality data was not reported by jurisdiction because of its volatility.

	Base period (2000-01 to 2002-03) claims per 1000 employees	2006-07 interim target claims per 1000 employees	2006-07 claims per 1000 employees	Improvement %	2011-12 target claims per 1000 employees
Cwlth	8.8	7.0	6.7	23.9	5.3
NSW	17.1	13.7	12.5	26.9	10.3
Vic	11.3	9.0	9.3	17.7	6.8
Qld	16.6	13.3	15.9	4.2	10.0
SA	18.3	14.6	14.3	21.9	11.0
WA	12.5	10.0	12.1	3.2	7.5
Tas	16.2	13.0	15.7	3.1	9.7
NT	12.4	9.9	11.4	8.1	7.4
ACT	11.4	9.1	11.4	0.0	6.8
Seacare	36.3	29.0	27.1	25.3	21.8
Aus	14.8	11.8	12.3	16.9	8.9

#### National strategy injury targets and interim results

Incidence rates and percentage improvement in injury rates

At the jurisdictional level in Australia, compensated fatality rates have been volatile in recent years. For example, in 2007-08 the compensated fatality rate in the Northern Territory increased to over 9 claims per 100 000 employed compared with 2 claims per 100 000 employed in the previous year.

No compensated fatalities were recorded for Seacare between 2003-04 and 2007-08 and the ACT in 2006-07 and 2007-08. Aside from Seacare and the ACT, the lowest compensated fatality rates over the five year period were observed in South Australia and New South Wales. In contrast, in Queensland and the Northern Territory compensated fatality rates were significantly higher than the national average over the same period (figure 3.4).

Figure 3.4 Compensated fatality rates by state — 2003-04 to 2007-08p Compensated fatalities per 100 000 employed



p preliminary data for 2007-08.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

Work related fatalities are a key OHS outcome indicator, however, they can be highly volatile over time because of the low probability of a fatality occurring. A major incident can have a significant influence on the data for a particular year. Trends in the incidence and frequency of work-related injury provide more consistent indicators of the change in OHS outcomes over time. Between 2003-04 and 2007-08, the incidence rate of serious injury and disease in Australia fell 3.2 percentage points (from 16.7 serious claims per 1000 workers in 2003-04 to 13.5 serious claims per 1000 workers in 2007-08) or by 19 per cent. The lowest serious claim rates during this period were achieved by the Commonwealth and Victoria, while the average serious claim rates over the period were highest for Seacare, Queensland, South Australia and Tasmania (figure 3.5).





**p** preliminary data for 2007-08.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

Reductions in the incidence of injury and disease were observed in all jurisdictions between 2003-04 and 2007-08. Seacare and the Commonwealth experienced the largest declines (both falling by over 50 per cent). In the case of Seacare the fall was from a very high base and the data is subject to extreme annual volatility. The rate of serious claims in South Australia and the ACT (private and public sectors) also declined significantly over the five year period (falling by over 30 per cent in each jurisdiction) while in New South Wales and Victoria the serious claim rate fell over 20 per cent.

In the other states and territories, reductions in the incidence of injury and disease recorded between 2003-04 and 2007-08 were less significant:

- Queensland (3 per cent fall) and Tasmania (11 per cent fall) recorded the smallest reductions
- in the Northern Territory the incidence of serious claims increased between and 2003-04 and 2005-06 before declining in 2006-07. Overall, the serious claim rate in the Northern Territory fell 10 per cent between 2003-04 and 2007-08
- similarly, in Western Australia serious claim rates increased between 2003-04 and 2004-05 before declining in each subsequent year. Overall, the serious claim rate in Western Australia fell by 13 per cent between 2003-04 and 2007-08 (figure 3.5).

Between 2003-04 and 2007-08, every broadly defined (two digit ANZSIC) industry also recorded improvement in the incidence of injury and disease. In percentage terms, the biggest improvements were recorded in Mining; Communication services; Finance and insurance; and Electricity, gas and water supply. Reductions in injury rates were less significant in Wholesale trade; Agriculture, forestry and fishing; and Property and business services (table 3.10).

# Table 3.10Incidence rate of injury/disease, by industry — 2003-04 to<br/>2007-08p

	2003-04	2004-05	2005-06	2006-07	2007-08	change (%)
Agriculture, forestry & fishing	27.3	26.5	25.9	25.3	24.3	-11.0
Mining	26.2	24.2	19.1	19.0	17.9	-31.7
Manufacturing	29.3	29.1	28.8	27.6	24.1	-17.7
Electricity, gas & water supply	11.0	12.0	8.3	9.1	8.1	-26.4
Construction	28.2	26.4	25.0	22.1	21.6	-23.4
Wholesale trade	16.1	16.8	17.7	15.5	15.5	-3.7
Retail trade	10.8	10.0	9.4	9.2	8.4	-22.2
Accommodation cafes/restaurants	14.4	13.2	13.3	12.4	11.6	-19.4
Transport & storage	30.5	28.4	27.6	25.7	24.4	-20.0
Communication services	10.4	9.4	8.2	7.2	7.1	-31.7
Finance & insurance	4.2	3.7	3.5	3.1	2.9	-31.0
Property & business services	10.1	10.3	9.1	7.6	8.8	-12.9
Government admin. & defence	12.8	12.2	10.8	10.8	10.3	-19.5
Education	9.9	10.0	9.1	9.0	8.1	-18.2
Health & community services	18.6	18.4	16.2	15.2	14.4	-22.6
Cultural & recreational services	12.1	11.0	10.9	9.7	10.2	-15.7
Personal & other services	19.2	18.9	17.1	16.1	14.5	-24.5
Total	16.7	16.2	15.2	14.2	13.5	-19.2

Serious claims per 1000 workers

**p** preliminary data for 2007-08.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

At the jurisdictional level, there have been a number of changes in OHS outcomes across industries in recent years. Figure 3.6 shows a jurisdictional breakdown of the incidence of work injury and disease for industry sectors with relatively high claim rates — Agriculture, forestry and fishing; Mining; Manufacturing; Construction; Transport and storage; and Wholesale trade.

- In New South Wales, with the exception of Wholesale trade, serious claim rates have fallen by over 15 per cent in each of these high risk industries. In particular, the serious claim rate in Mining has fallen significantly (albeit from a high base), falling 47 per cent between 2003-04 and 2007-08. Serious claim rates in Construction also fell considerably over this period (30 per cent).
- In Victoria, there has been a small increase in the incidence of serious claims in Agriculture, forestry and fishing and Mining and a 20 per cent fall in serious claim rates in both Construction; and Wholesale trade.
- In Queensland, falling serious claim rates have been observed in Mining; Agriculture, forestry and fishing; Manufacturing; Construction; and Transport and storage. Of particular significance is a fall in the serious claim rate in Mining of 33 per cent. However, over the five year period serious claim rates in Wholesale trade have increased 20 per cent.
- In South Australia, serious claim rates have fallen considerably in the selected high risk industries. Of most significance is a 45 per cent fall in serious claim rates in Mining and over 30 per cent falls in serious claim rates for Transport and storage; Manufacturing; and Construction.
- In Western Australia, improvements in the incidence of serious claims were recorded in all of the selected high risk industries with the exception of Wholesale trade which increased 23 per cent over the period. Of most significance, the serious claim rate fell 23 per cent in Agriculture, forestry and fishing and 17 per cent in Construction.
- In Tasmania, serious claim rates recorded in Construction fell significantly (33 per cent). Declines were also recorded for Agriculture, forestry and fishing; Manufacturing; Construction; and Wholesale trade. However, in the Mining sector claim rates increased 47 per cent over the period.
- In the Northern Territory, serious claim rates in Mining fell significantly (78 per cent). Claim rates in Agriculture, forestry and fishing; Manufacturing; and Transport and storage also declined. However, in Wholesale trade serious claim rates increased 52 per cent between 2003-04 and 2007-08.
- In the ACT, serious claim rates for Wholesale trade (48 per cent decline); Construction (40 per cent decline); and Transport and storage (19 per cent decline) have fallen significantly since 2003-04. In contrast, over the same period, serious injury rates in Manufacturing increased marginally (figure 3.6).



# Figure 3.6 Incidence rate of injury/disease, selected industries — 2003-04 and 2007-08p

**p** preliminary data for 2007-08.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

### 3.4 Outcomes and regulation

It is difficult to draw conclusions on the performance of OHS regulation from outcomes data.

Firstly, there are data limitations. OHS outcome indicators:

- tend to be under-reported. Work-related injury and illness, measured using workers' compensation data, includes only those covered by workers' compensation. It does not include the self employed or employees of companies that self insure. Further, outcome indicators underestimate long latency occupational diseases such as musculoskeletal disorders and cancers which can be difficult to attribute to work
- are subject to random variation making it difficult to identify trends over short time periods. In particular, fatalities have a low probability of occurring and a major incident can have a significant influence on the data
- are lagging, generally reflecting the outcomes of past OHS practices because there is often a time lag before OHS outcomes data reflects changes in regulation
- at an aggregate level, can be affected by differences in industrial structure such that it is difficult to judge (using outcomes data alone) whether differences across jurisdictions are the result of poor performance or reflect differences in risks across industries.

Secondly, notwithstanding data limitations, it is usually difficult to link changes in outcomes with particular regulatory changes. Even attributing better or worse performance to whole regulatory regimes is dubious. Knowing what would have happened in the absence of OHS regulation (the counterfactual) and isolating the impact of that regulation from other non-regulatory determinants of OHS outcomes is problematic. For example, it is difficult to assess the impact of regulation against non-regulatory factors such as a company's individual effort to manage OHS in order to maintain a productive working environment. Further, outcomes based on workers' compensation data are sensitive to policy and administrative changes to the scheme and it is difficult to ascertain whether fluctuation in claims data are the result of regulatory change or changes in the propensity of individuals to claim compensation. Regulatory arrangements can also influence the reporting of outcomes, as distinct from the underlying patterns.

Finally, outcome indicators largely measure negative performance. For example, it can be argued that outcome indicators give no information about how well the most serious safety hazards are being managed. Indeed, it is not unusual that investigations into a fatality or serious injury reveal that the company had a good record prior to a particular incident.

Outcome indicators are most useful at providing the regulator with an indication of where remaining risks are the highest, and where regulation may need to be more focussed. For example, workers' compensation data in 2007-08 found that:

- serious claim rates are relatively high for Seacare, Queensland, and Tasmania
- body stressing and falls, trips and slips account for the majority of claims
- by industry, the highest work-related injury and disease risks occur in Transport and storage; Agriculture, forestry and fishing; Manufacturing; and Construction
- at the jurisdictional level, industries with a relatively high risk of work-related injury and disease include:
  - Agriculture, forestry and fishing in the Northern Territory and Queensland
  - Manufacturing in Queensland
  - Construction in Queensland and the ACT
  - Transport and storage in Queensland, and Tasmania
  - Mining in New South Wales and Tasmania.

Conversely, outcome indicators can provide information on where the remaining risks of injury are relatively low. For example, workers' compensation data in 2007-08 identified low serious claim rates for the Commonwealth and Victoria and in service sector industries including Finance and insurance; Communication services; Education; and Electricity, gas and water supply.

Outcome indicators are also useful at identifying broad trends in OHS over time. Overall, the Commonwealth and Victoria have achieved the lowest serious claim rates in recent years, as evidenced by workers' compensation data between 2003-04 and 2007-08. Over the same period, average serious claim rates were highest for Seacare, Queensland, South Australia and Tasmania.

Importantly, in all jurisdictions outcomes in OHS have been improving and in some areas there has been a significant improvement. For example, between 2003-04 and 2007-08 serious claim rates fell over 50 per cent for Seacare and the Commonwealth and over 20 per cent in South Australia, the ACT, New South Wales and Victoria. Further, by industry, serious claim rates in Mining; Communications services; Finance and insurance; and Electricity, gas and water supply fell by over 25 per cent in Australia over the same period.

At the jurisdictional level significant improvement in injury rates was recorded in a number of industries including:

- Mining in the Northern Territory, New South Wales, South Australia and Queensland
- Construction in the ACT, Tasmania, South Australia and New South Wales
- Transport and storage for Seacare and South Australia
- Wholesale trade in the ACT
- Manufacturing in South Australia
- Agriculture, forestry and fishing in Tasmania.

In each of these industries serious claim rates improved at least 30 per cent between 2003-04 and 2007-08. Further, very few of the high risk industries (figure 3.6) recorded increases in incidence rates at the jurisdictional level over this period. Between 2003-04 and 2007-08 the most significant increases in serious claim rates were recorded in Mining in Tasmania and Wholesale trade in the Northern Territory, Western Australia and Queensland.

This information does not usually help to judge the effectiveness of a particular regulation, let alone particular aspects of a regulation. However, when used in conjunction with indicators of the current regulatory environment (such as the number of inspectors, number of OHS inspections conducted and percentage of substandard conditions identified) it provides a broad context for benchmarking different approaches to OHS regulation.

# 4 Approach to benchmarking OHS regulation

### Key points

- The Commission's approach to this benchmarking study has been informed by the rationale for the broader benchmarking program as well as the lessons from the Commission's previous regulation benchmarking studies and international studies.
- The methodology used has been to:
  - identify differences in either the regulation itself or its enforcement
  - devise indicators which are likely to show which requirements impose higher costs on business
  - seek evidence as to whether or not the higher costs could be associated with better outcomes.
- Participants to this study suggested regulatory differences across the jurisdictions resulted in different compliance costs in relation to:
  - regulator characteristics and enforcement practices
  - the accountability of regulators
  - regulations aimed at influencing the culture of compliance
  - the regulation of particular hazards or processes
  - mining regulation in New South Wales, Queensland and Western Australia.
- Concern was also raised about duplication between regulatory regimes in relation to:
  - Comcare and state and territory regimes
  - industry-specific and general OHS regimes.
- Those areas chosen for benchmarking were selected on the basis that they were likely to provide useful information to policy makers seeking reforms aimed at reducing the compliance cost of OHS regulation.

As detailed in earlier chapters of this report, occupational health and safety (OHS) regulation plays an important role in securing safety outcomes for Australian workers. That said, while most businesses agree that this regulation is both necessary and beneficial, many have suggested that the sheer volume of regulation and inconsistencies that exist between jurisdictions have imposed significant compliance burdens. This chapter sets out what benchmarking is and details some

insights gained from international attempts to benchmark compliance burdens on business. It then describes most of the concerns raised by participants to this study and explains the reasoning behind the issues selected for further examination and benchmarking in this report.

### 4.1 What is benchmarking?

Benchmarking is the process of comparing an area of interest using one or more indicators resulting in a standard, or point of reference, against which that area of interest can be 'compared, assessed, measured or judged' (OECD 2006). Benchmarking depends upon having a standardised method for collecting and reporting the data underpinning the indicators on which the comparisons will be based.

Benchmarking helps an organisation understand how it is performing relative to either its peers or against some standard (such as a best practice standard). Organisations may compare themselves to their peers in order to diagnose problems in their performance, identify their strengths and weaknesses (relative to their peers) and/or to determine best practice (Vlăsceanu, Grünberg and Pârlea 2004). The organisations being compared usually share some features, for example, they may compete in the same market or regulate similar areas of business activity.

In general, benchmarking is best used as a tool to inform decision making rather than to simply establish some hierarchy of performance amongst a peer group. In using benchmarking to inform decision making, the benchmarking outcomes need to be considered in light of the circumstances of the organisation(s) being compared. For example, it would be reasonable to expect that in order for a regulator in a geographically larger state (such as Western Australia) to achieve the same level of regulatory coverage as a smaller state (such as Tasmania), the larger state regulator will need to have a greater number of regional offices, or have their staff spending more time travelling. If both states recover the full cost of regulation from business, then the geography of the larger states will contribute to a potentially higher cost of regulation for businesses in those states.

### Why benchmark Australian business regulation?

The Regulation Taskforce (2006) provided the impetus for a program of benchmarking business regulation when it concluded that benchmarking across jurisdictions would assist in improving regulatory regimes. This view was endorsed by the Australian Bankers' Association in their submission to the Commission's 2008 benchmarking study (ABA 2008) wherein it noted that benchmarking could lead to a number of benefits, including: improving the efficiency and effectiveness of regulation; ensuring the consistency of regulation across jurisdictions; improving the transparency of decision making and accountability of regulators; and ensuring regulation delivers 'net benefits'.

The use of benchmarking to identify improvements in regulatory regimes has precedent in international studies. The OECD (1997) observed that many international studies focused on benchmarking of regulatory regimes shared common objectives, including to:

- 1. create sustained pressure for improvement in the public sector
- 2. expose areas where improvement is needed and reveal underlying problems of an organisation (or group of organisations)
- 3. identify superior processes which can be adopted and provide insights as to what constitutes best practice
- 4. focus on the links between processes and performance
- 5. assess performance objectively
- 6. test whether the implementation of improvement plans and strategies resulting from benchmarking have been successful.

The majority of these objectives are also relevant to this study.

The simple public reporting of benchmarking indicators on regulatory burdens, even without any accompanying analysis, can also be beneficial. Benchmarking can provide useful information to policy makers and stakeholders by:

- highlighting potentially unnecessary burdens on businesses, where differences in regulatory burden across jurisdictions are not attributable to differences in regulatory objectives or outcomes
- highlighting the regulatory approaches, for comparable objectives, that generate lower burdens on business
- increasing government accountability for the cost-effective delivery of regulation, through the increased transparency afforded by benchmarking.

The benchmarking of regulatory burdens over time may assist in identifying the jurisdictions that have been the most successful in reducing the burdens on business. Benchmarking could also strengthen the accountability of regulators to business and the community by requiring them to demonstrate the benefits of regulation where those benefits are said to more than offset the costs of the regulation (PC 2007).

### 4.2 Insights from international benchmarking studies

Outside of Australia there are a number of examples of benchmarking studies in which attempts have been made to compare regulatory regimes at a point in time or regulatory burdens over time (box 4.1).

### Box 4.1 International studies of regulatory burden

### **Comparisons across countries**

The World Bank's *'Doing Business'* report presents a range of quantitative indicators on business regulations and the protection of property rights across 181 countries. This annual exercise can be used to compare aspects of regulatory regimes across countries. For example, in the 2009 report, Australia was ranked ninth in terms of ease of doing business and third in terms of ease of starting a business.

The OECD's report, *Cutting Red Tape: Comparing Administrative Burdens across Countries,* considers the administrative burdens faced by transport businesses in 11 countries undertaking two activities: 'hiring a worker' and 'operating a vehicle'. This report produced a number of insights into how the regulatory regimes could be simplified or made more efficient.

### Comparisons within countries (or jurisdictions)

Most benchmarking studies of a country or jurisdiction are undertaken as part of a broader government program of 'red tape reduction'. The studies are typically undertaken to establish a baseline regulatory burden and then to track progress against a stated goal of reducing that regulatory burden. As a result, these studies typically make comparisons over time, rather than a comparison at a point in time (which is the primary purpose of the Commission's benchmarking program).

The Canadian province of *British Columbia* measured regulatory burdens by using a count of regulatory requirements to quantify the burden. A regulatory requirement was defined as 'a compulsion, obligation, demand or prohibition placed on an individual, entity or activity by or under the authority of a provincial Act, regulation or related policy'. This approach has the advantage of being readily measured and providing a consistent basis for measurement over time, but the disadvantage of giving equal weight to each requirement, regardless of its nature.

### Other studies

*Reducing the risk of policy failure: challenges for regulatory compliance* (Parker) considers the emerging issues for regulatory compliance and the possible explanations for differing compliance levels. A number of 'smart principles' for promoting regulatory compliance can be gleaned from the report (box 4.2).

*Sources*: HSE (2009); Ministry of Small Business and Revenue — Government of British Columbia (2008); World Bank (2008); OECD (2007); Jones et al. (2005); Parker (2000).

### Box 4.2 'Smart' principles for promoting regulatory compliance

- Maximise the potential for voluntary compliance:
  - avoid unnecessarily complex regulation
  - ensure regulation is effectively communicated
  - minimise the costs of compliance (in terms of time, money and effort)
  - ensure regulation fits well with existing market incentives and is supported by cultural norms and civic institutions
  - consider providing rewards and incentives for high/voluntary compliance, for example, by reducing the burden of routine inspections and granting penalty discounts when minor lapses occur
  - nurture compliance capacity in business, for example, by providing technical advice to help businesses, especially small and medium sized enterprises, to comply with regulation.
- Maintain an ongoing dialogue between government and the business community, to ensure that regulators have a good understanding of the types of businesses they are targeting.
- Adequately resource regulatory agencies.
- Use risk analysis to identify targets of possible low compliance.
- Develop a range of enforcement instruments so regulators can respond to different types of non-compliance.
- Monitor compliance trends in order to gauge the effectiveness and efficiency of enforcement activities.

Source: Based on Parker (2000).

The international studies provide valuable insights that have been applied in this study, including:

- planning the study so that it is not heavily reliant on representative data from business
- establishing comparable measures of regulatory burden through an analysis of the actual requirements on business and, where appropriate, using simplifying assumptions (such as assumed time frames for certain business processes)
- using the smart principles for promoting regulatory compliance (box 4.2) as the best practice indicators against which to assess and compare regulators and their administration and enforcement of OHS regulation
- narrowing the scope of the study, wherever possible, to specific aspects of regulation (or business activity)
- linking the benchmarking indicators to specific regulatory requirements.

Collectively, the international studies suggest a range of alternative measures for quantifying regulatory burdens. The studies also suggest that reliance on a single measure (such as a count of regulatory requirements) or on a single aspect of the regulatory burden (such as the administrative burden) may result in a failure to identify the major source(s) of regulatory burden on businesses.

### 4.3 What can be benchmarked?

Regulatory benchmarking can either construct and compare indicators of current compliance costs across jurisdictions, without reference to any specific best practice, or compare indicators against best practice standards or policy targets (PC 2007). In essence, the former pinpoints areas where current regulations could be delivered more cost-effectively by identifying agencies or jurisdictions regulating at a higher cost than others. The latter focuses less on how agencies or jurisdictions compare to each other and more on how they measure up against best practice and thus highlights areas where improvements can be made.

This report focuses predominantly on the benchmarking of current regulation and is separate from, but cognisant of, the development of model national OHS regulation that is taking place following the recent review (Stewart-Crompton, Mayman and Sherriff 2008, 2009 — see chapter 1). Some of the information provided by this benchmarking exercise will be useful for policy makers to assess proposed changes in regulatory regimes. Benchmarking also allows some measurement of any perverse incentives created by regulations, even those which are considered 'best practice'. Further, a comparison of practical enforcement practices can provide useful insights under any regulatory regime. This section presents some general perspectives on how OHS regulation can impose compliance burdens on businesses, and for these burdens, how benchmarking can aid policy makers in delivering better regulation.

### Compliance burdens and regulation

As discussed in chapter 1, all regulations that address market or other failures attempt to induce changes in behaviour. It is through such changes in behaviour that compliance costs can be imposed on individuals and businesses where they have to adopt new practices (which in some cases can represent changes in the level or type of production) or complete additional tasks to those that they would have otherwise undertaken. However, regulation does not necessarily impose costs on all individuals or businesses. For example, for many areas of regulation, individuals and businesses would otherwise meet or exceed the requirement of the regulation in

order to meet consumer demands or because it represents sound business practice to do so. In these instances the regulations impose no compliance costs.

Governments also incur administrative costs in implementing and enforcing regulations. Governments, usually through regulators, need to inform individuals and businesses of their responsibilities under regulation, monitor the actions of those covered by the regulations, and enforce the duties for those who are not compliant. These activities can feed into business costs when regulators charge fees for inspection services or use financial penalties for non-compliance.

For OHS, these costs occur at different regulatory phases. Broadly, business compliance with OHS (and workers' compensation) regulation can be thought to occur in two phases — the prevention and recovery phase. The prevention phase occurs prior to any workplace incident, and includes all the activities undertaken in becoming aware of, and implementing, various regulatory requirements. The recovery phase comprises all the required activities post an incident such as reporting and complying with any penalties imposed.

The regulations and regulators target desired outcomes through a variety of methods and instruments during both phases. For example, in the prevention phase, to limit the risks of certain hazards, regulations may prohibit businesses from exposing those in the workplace to certain situations. Codes of practice are often developed to inform businesses of ways in which they can achieve this. Then, to ensure compliance, regulators will inspect workplaces, provide education about risks and issue penalties when businesses are in breach of their duties. Then, after an accident (recovery phase), regulators will require incident reports, conduct further inspections and investigations and issue penalties. For OHS, regulators generally target the prevention phase.

Notwithstanding the benefits created by OHS regulation, costs are imposed on businesses during both the prevention and recovery phases (figure 4.1).

The indicators of costs depicted in figure 4.1 capture the costs of not only OHS regulations, but also workers' compensation regulations. Although not under reference, workers' compensation regulations affect incentives for employers to take preventative action against workplace injury and disease. While, overall, policy makers are interested in all cost aspects when assessing the effectiveness of any regime aimed at preventing injury and then reducing harm after it has occurred, for the purpose of this study the focus is mainly on the costs and incentives associated with the prevention phase: awareness of requirements, implementation of measures by business and reporting and management of incidents (which are the focus of most OHS regulations).



Figure 4.1 Compliance costs associated with OHS regulation

Another complicating aspect of attempts to measure the compliance burden of OHS regulation is the use of general duties that confer responsibilities on those individuals who can influence health and safety outcomes. These broad duties impose responsibilities that can create significant burdens irrespective of any specific requirements.

Given these broad duties, the addition of specific requirements in subordinate legislation may not materially add to the compliance burden created by the more general duty. In some cases, it may even reduce it by making the requirements implied by the general duty more transparent. However, in other cases, if the requirements are overly prescriptive they may add to compliance costs through reducing the flexibility businesses have in complying with their general duty of care.

### 4.4 Main complaints raised

Through submissions and stakeholder consultations, the Commission was made aware of various areas of OHS regulation which imposed significant burdens on businesses and also where differences existed between jurisdictions in their regulatory approach to OHS. Further to this, through a survey of 1802 small and medium sized enterprises (SMEs) conducted by Sensis Pty Ltd (see appendix B), the Commission asked respondents what were the three elements of OHS regulation that concerned them the most in terms of compliance costs. While 60 per cent said no individual elements concerned them, or that they did not know, the remainder identified a number of areas (table 4.1). Not all responses related to specific aspects of OHS regulation, with ongoing training costs, the costs associated with compliance with the regulatory regime overall, and the cost of purchasing and maintaining safety equipment the most significant cost items raised.

# Table 4.1Areas of high compliance costs to SMEs associated with<br/>OHS regulation

12 months to May 2009

Area	Responses	Responses	
	no.	%	
Ongoing training	277	17	
Compliance with legislation	277	17	
Purchasing/maintaining safety equipment	217	14	
Time costs	108	7	
Paperwork	78	5	
Changes to equipment	64	4	
Record keeping and reporting	59	4	
Maintaining safety	56	3	
Modifications/maintenance of business premises	47	3	
Additional staff/wages	38	2	
Dealing with regulators	35	2	
Hazard/risk control	34	2	
Need for consultants/specialists	32	2	
Licensing/staff qualifications	20	1	
Monitoring/managing staff	19	1	
Cost/time involved maintaining health and safety committee	16	1	
Other	237	15	

Source: Sensis Survey of SMEs (2009 unpublished).

### Differences by firm size

During consultations, the Commission was informed by many large businesses that they adopted more stringent OHS requirements than those imposed by regulation as they valued achieving good OHS outcomes. Further, many large businesses also maintain strong standards in order to achieve self-insurance accreditation under various workers' compensation arrangements.

Despite this, larger businesses are likely to face a number of costs associated with reporting requirements and maintaining an understanding of their regulatory requirements irrespective of their self-imposed standards. A leading Australian retailer, for example, put forward a number of cost estimates associated with OHS regulation. They estimated that keeping on top of their OHS legal requirements cost them around \$25 000 in annual subscriptions to information providers alone. Other costs included those related to understanding the powers of inspectors (\$11 000); understanding the various fire certification requirements (\$10 000); forklift training (\$100 000); and other legal training for executives (\$15 000).

Also, OHS regulation appears to be a significant component of total regulatory compliance activities for larger businesses. In a survey of over 500 businesses, the Australian Industry Group found that for large businesses (defined as those with more than 100 employees), OHS compliance activities dominated the total resources used in regulatory compliance — more than 70 per cent stated that most of their resources used in regulatory compliance were directed to OHS activities compared to under 50 per cent for medium, small and micro firms (those with less than 100 employees) surveyed (AIG 2009).

The Sensis survey provides a more detailed picture of the OHS compliance costs faced by 1800 SMEs.<sup>1</sup> The costs of complying with individual components of OHS regulation were generally viewed as trivial compared to their overall costs (table 4.2). The costs identified were spread across a number of areas and were predominantly trivial with the exception of those associated with employing an additional person with specific skills; purchasing training externally; engaging OHS consultants; providing protective clothing; and those relating to replacing plant and equipment earlier than otherwise.

<sup>&</sup>lt;sup>1</sup> The Australian Federation of Employers and Industries submission (AFEI sub. DR26, table 1) provides a comparison of the SME data with a survey of 400 its members. A direct comparison of the Sensis and AFEI data may not be appropriate as the AFEI considers its membership to have a 'heightened awareness of their [OHS] obligations' (sub. DR26, p. 10).

Action	SMEs	Trivial	Moderate	Substantial
	%	%	%	%
Employed an additional employee with specific skills	10	38	39	23
Engaged an external consultant	25	54	34	12
Tasked existing staff to implement OHS	56	65	28	7
Developed an health and safety committee and/or appointed an health and safety representative	30	71	24	5
Conducted hazard identification and risk control	61	75	20	6
Provided protective clothing	53	59	32	8
Kept records	58	76	20	5
Purchased information from external sources	33	68	25	6
Purchased staff training externally	35	53	37	10
Undertook staff training internally	53	67	27	6
Modified existing plant and equipment	34	55	29	16
Replaced plant and equipment earlier than otherwise	19	45	32	23
Changed what is produced	3	53	32	15
Changed production processes	12	67	21	11
Changed inputs or materials	7	64	22	14
Other	1	nc	nc	nc
None of these	16	na	na	na

# Table 4.2Costs to SMEs associated with complying with OHS<br/>regulation<sup>a</sup>

12 months to May 2009

**na** not applicable. **nc** not collected. <sup>**a**</sup> Sum of columns exceed 100 due to multiple responses. Proportions expressed as a percentage of responses.

Source: Sensis Survey of SMEs (2009 unpublished).

Overall, the main reason cited by SMEs for undertaking actions was to ensure compliance with OHS regulation — accounting for 49 per cent of the actions taken (table 4.3). The activities of regulators were also important, accounting for 9 per cent of the reasons for why businesses undertook compliance activities. Compliance with other policies such as workers' compensation only accounted for 2 per cent of the actions taken.

Interestingly, the significance of motivations of SMEs not related to complying with OHS regulations (such as to create a safe working environment, common sense/good business practice and to retain staff which account for 28 per cent of reasons given for the actions taken) suggest that the actual burden created by OHS regulatory regimes for this group is less than the costs put forward because many businesses are likely to have undertaken these activities in the absence of OHS regulation.

### Table 4.3 Reasons for SME compliance activities

12 months to May 2009

Reason for action	Responses	Responses	
	no.	%	
Part of compliance with regulations	1 064	49	
Safe working environment	380	18	
Common sense/good business practice	130	6	
Information from regulator	112	5	
Retain staff	93	4	
Actions of regulator <sup>a</sup>	77	4	
Other policy <sup>b</sup>	47	2	
Other	307	12	

<sup>a</sup> Actions of regulators refer to inspections, audits and prosecutions. <sup>b</sup> Includes workers' compensation and environmental policy.

Source: Sensis Survey of SMEs (2009 unpublished).

The issues raised by SMEs in the survey, along with other differences between jurisdictions identified by participants to this study and those identified by the Commission can be classified into two broad groups:

- differences across the jurisdictions in:
  - regulator characteristics and enforcement practices
  - the accountability of regulators
  - regulations aimed at influencing the culture of compliance
  - the regulation of particular hazards or processes
  - mining-specific regulations in New South Wales, Queensland and Western Australia.
- duplication between regulatory regimes in relation to:
  - Comcare and state and territory regimes
  - industry-specific and general OHS regimes.

### Differences across the jurisdictions

### Regulator characteristics and enforcement practices

Regulators represent the most significant, and often the only, interface between government regulations and business. Thus the characteristics of, and approach taken by, regulators can significantly influence the burden created by OHS regulations.
A number of participants have suggested that the enforcement approach of regulators varies significantly. For example, as put by the Australian Chamber of Commerce and Industry (ACCI):

Enforcement through a judicious mix of education, training and — only where necessary — prosecution and penalty requires balance and judgement, and this aspect of a regulator's role has been inconsistent both within and across jurisdictions. Such inconsistency is confusing for businesses and is counter-productive relative to the goal of achieving safer workplaces. Employers require additional and better quality guidance material that does not generate additional burdens. (sub. 6, p. 19)

Further, ACCI suggested that inspection activity also varies and with it compliance costs:

Frequency, thoroughness and efficiency of OHS inspections vary within and across jurisdictions.

OHS inspections impose a significant burden on those businesses who are inspected as well as on tax payers who fund regulator activity, and therefore regulators should aim to conduct the minimum number of inspections required to achieve broad OHS outcomes in their jurisdiction. (sub. 6, p. 24)

One participant also suggested that regulators need to work with, not against, businesses to achieve good safety outcomes:

Despite New South Wales having more prosecutions and imposing more fines than all other jurisdictions safety performance resources will have little impact if they are not supported by an appropriate organisational philosophy and culture. If, as has been the suspicion of employers in New South Wales, the regulator views those who it regulates as, prima face, wrong ... simply because they are the subject to regulation then it is unlikely a cooperative relationship which focus on the intended result, safer workplaces, will emerge. (NSW Business Chamber, sub. 11, p. 4)

Following these concerns, there are a number of possible areas which can be benchmarked to provide insight into the practices of regulators and the subsequent burden placed on business:

- regulators' characteristics such as their size and resourcing
- allocation of resources to enforcement activities regulators may have different approaches to allocating their resources to ensure the greatest level of compliance
- information provision the different approaches regulators take to informing businesses of their compliance requirements
- the mutual recognition of compliance activities required by other regulations and self regulatory instruments whether these can be used to demonstrate compliance under specific state or territory regimes

- available enforcement and compliance instruments and their use regulators differ both in the education and enforcement tools legally available to them to use and the extent to which each instrument is actually used to achieve compliance
- levels of penalties penalties vary between jurisdictions.

### Accountability of regulators

The accountability and transparency of regulators are important features of a good regulatory system. Businesses that interact with regulators, and face penalties for breaches in compliance, should be aware of the reasons behind regulator decisions and know how they can appeal them. This point was highlighted by the NSW Business Chamber:

Clearly regulators need to be held to account for their performance, however, we do need to find ways to encourage them to focus on "getting it right" rather than "not being wrong". (sub. 11, p. 4)

Further, to ensure the general public is fully aware of the resources used to enforce these policies (so that decisions about cost effectiveness can be made), regulators should have transparent reporting processes.

In the area of regulator accountability, several characteristics of regulators can provide useful areas to benchmark, including:

- the appeal processes available to contest decisions made (including licensing) and penalties imposed
- the transparency of regulators' decision making and reporting
- the feedback provided to, and obtained by, regulators.

### Regulations aimed at influencing the culture of compliance

Interventions to encourage compliance through increasing knowledge and awareness of OHS issues, such as training requirements and worker consultation and representation, have been increasingly used within OHS regulations. Differences, however, exist between jurisdictions in these interventions.

Business SA suggested that for such regulatory interventions to be successful:

... governments and regulators ... [should] 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 high level OHS awareness and culture in workplaces, and not the micro-management 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 mobile labour force. (sub. 2, p. 4)

However, Business SA suggested that instead of this, governments have made it impossible to comply or be fully aware of regulations due to the sheer quantity of regulation. As a result they suggest that rates of non-compliance are high:

A comprehensive detailed legislative compliance audit ... of any organisation (or indeed government department) will reveal areas of non-compliance. While these non-compliances may not be associated with 'high risk' activities they indicate that it has become almost impossible to fully comply with South Australia's OHS&W [occupational health, safety and welfare] legislation. (sub. 2, p. 9)

The views put forward by Business SA suggest that the success of intervention aimed at engendering a culture of compliance with OHS legislation will be influenced by a businesses' awareness of their requirements.

### Hazard identification, risk control and record keeping

All OHS regulation requires businesses to identify hazards, control risks and keep records. Some say these processes have led to adverse outcomes by shifting the focus of regulation from prevention to record keeping. As put by Business SA:

The majority of South Australia's OHS&W [occupational health, safety and welfare] regulations and Codes of Practice contain requirements to maintain records. The production of these records is now perceived by SafeWork SA inspectors and the Industrial Court as the only system to prove compliance with any OHS&W regulation or standard.

The unfortunate outcome of this emphasis on record keeping is to create the perception that the focus of OHS&W in South Australia has shifted from prevention to that of record keeping. (sub. 2, p. 9)

This sentiment was also expressed by National Disability Services, who expressed concern that reporting requirements drew resources unnecessarily away from their core activities:

In order to provide services outside a standard segregated facility, disability service providers are required to undertake detailed risk assessments of the premises at which work is to be undertaken (eg. client's home, local café), and to document those assessments. Whilst consideration of risk is important to ensure the safety of the worker and the person with a disability, in the current funding environment, the need to document this process in order to meet legislative obligations reduces the time available for the client to participate in their chosen activity. (sub. 14, p. 3)

Further, it was suggested that differences in reporting requirements also placed unnecessary costs on interstate businesses when they move staff between jurisdictions. As put by Boral Limited:

Transfers of staff have cost implications when they take place across State boundaries, including retraining where requirements differ e.g. incident notification timeframes, preservation of incident site, documentation, Codes of Practice, etc. This is particularly important for OH&S personnel and for supervisors and managers especially where working environments may be industrially sensitive. (sub. 3, p. 3)

Given hazard identification and risk control (and the resulting reporting requirements) are a central feature of OHS regulation, they can significantly alter business compliance costs.

### Workplace consultation and representation requirements

As discussed in chapter 2, OHS regulation requires businesses to consult with staff over health and safety issues. These measures are aimed at improving safety outcomes through both creating a holistic approach to OHS and by allowing the early identification of workplace risks. However, some argue that the extensive employee consultation requirements impose costs without improving safety outcomes:

... some employers report that legislative requirements for formal consultation systems which identify specific structures and mechanisms (such as OHS Committees for organisations of a certain size) impose a burden which does not demonstrate an outcome of reduced risk of injury or illness. (National Disability Services, sub. 14, p. 4)

It has also been suggested that differences between jurisdictions in these consultation requirements, which extend to training requirements, create unnecessary costs for interstate businesses:

... there are differences in costs between States associated with in house activities e.g. OH&S Representatives selection, training including refresher training, and range of responsibilities which impact on time on the job, etc. (Boral Limited, sub. 3, p. 3)

Differences in attempts to encourage a union presence in the workplace have also been highlighted as an area where businesses believe unnecessary costs could evolve. Concern was raised over the extent of union access rights into worksites with the Master Builders Australia suggesting that, to avoid unnecessary disruption and potential duplication in compliance activities, union officials should be accompanied by government inspectors during visits (sub. 1, attachment 1).

### Specific duty of care provisions

Duty of care provisions help ensure employers and others to continue to identify and manage workplace risks. Some participants suggested, that for some groups, these provisions have gone 'too far' and created unnecessary compliance burdens, and that the differences that exist between jurisdictions add to compliance costs and uncertainty. As put by the Association of Construction Engineers Australia (ACEA):

The ACEA believes consulting engineering firms, especially those that operate in multiple jurisdictions, are unnecessarily burdened by inconsistent designer specific duties of care that are in effect in each jurisdiction.

This is because the role and responsibility of a designer of buildings or structures has started to increase beyond the design process in the last decade. In some jurisdictions a designer now has a duty of care to ensure persons who construct the design project are not unduly exposed to hazards or risks, whereas others jurisdictions don't. (sub. 5, p. 4)

In a similar vein, the Australian Finance Conference suggested that the duties imposed on suppliers have had some unintended consequences. In particular, they raised concerns that financiers of plant and equipment could be captured by supplier duties where exemptions for passive financiers did not exist:

We recently consulted our members about their concerns about the compliance burden created for financiers by inconsistencies in current OHS laws and the risks placed on financiers of plant and equipment in jurisdictions which do not have "passive financier" provisions. Members have confirmed that this remains a concern and would be a factor in making a decision about providing finance in some jurisdictions and about the cost of finance. In some cases, the financier may not provide finance at all, such as for high risk transportation vehicles used to transport dangerous or explosive substances, waste management and health services equipment. (sub. 15, pp. 1–2)

A central issue in these duty of care provisions is whether or not they extend past a point where an individual or business is in a position to retain control of the workplace.

### Personal liability provisions

The regulatory regimes of state and territory governments have adopted different approaches to the extent to which individuals within companies are personally liable for OHS breaches. The Safety Institute of Australia suggested that personal liability provisions of individuals within businesses went too far and should be limited:

Liability should be assigned to Corporations, and only to individuals in the event of deliberate, negligent and/or reckless practice. (sub. 13, attachment 1, p. 8)

As with duty of care, these provisions intend to create an incentive for those who can influence OHS outcomes in a positive way to do so.

### Onus of proof

Differences in who holds the onus of proof in each state and territory were identified by participants as sources of high compliance costs. For example, Master Builders Australia suggested that the approach in New South Wales has not led to improvements in safety outcomes:

The NSW system which is highly regulated and with its absolute duty of care does not deliver the best safety outcome when compared with other state jurisdictions where safety has not been compromised. (sub. 1, attachment 1, p. 4)

Similarly, the ACEA suggested that the reversal of onus of proof increased the compliance burden placed on business:

The ACEA believes the reverse onus of proof provisions imposed in OHS laws in NSW and Qld inflict an additional regulatory burden on consulting firms that operate in those jurisdictions.

This is because reverse onus of proof provisions mean an employer in NSW and Qld has an absolute duty of care to provide a safe working environment for its employees, and that when an accident occurs in the workplace the onus is then upon the employer to prove that is was not 'reasonably practicable' for them to eliminate or reduce the hazard and risk. This strict liability approach is onerous for consulting engineering firms to control and manage. (sub. 5, p. 7)

This issue was addressed in the recent review into model OHS laws (Stewart-Crompton, Mayman and Sherriff 2008, 2009 — see chapter 1) and is not examined further in this report.

### Possible areas to benchmark

Regarding the regulations aimed at influencing the culture of compliance, participants raised the following differences as areas of greatest concern:

- awareness of regulatory requirements businesses report different levels of awareness of what they are required to do under OHS regulations
- hazard identification and risk control documentation and requirements
- record keeping and requirements to report incidents
- the extent and coverage of specific duties of care
- personal liability provisions
- training requirements for staff and required resourcing

- models for employee safety representatives and committees
- union access rights.

### The regulation of particular hazards or processes

The identification, management and control requirements for particular hazards within the regulations of different jurisdictions can differ. Such requirements and the resulting differences have the potential to impose compliance burdens on some businesses. For example, as put by the Northern Territory Horticultural Association:

Occupational health and safety (OHS) standards vary between states and territories, sometimes making requirements complicated or hard to ascertain. For example, farm machinery may meet the Australian manufacturer's safety standards but not meet local OHS standards. Furthermore some standards are relevant to one use but impractical for other purposes. For example, elevated work platform requirements are designed for the construction industry and unsafe in the context of the horticultural industry. (sub. 12, p. 2)

Further, as these requirements are a significant component of all OHS regulations, they can impose significant compliance costs on businesses.

Areas where participants raised concerns about the burdens imposed from differences between jurisdictions included the regulation of the following hazards:

- falls from heights
- working in confined spaces
- workplace stress, bullying and harassment
- exposure to noise
- manual handling in the workplace
- transportation of hazardous materials
- working with hazardous substances
- driver fatigue
- licences required for high risk work.

### **Duplication between OHS regulatory regimes**

### Comcare and state and territory regimes

The OHS regulatory landscape is populated by eight state and territory schemes, a Commonwealth scheme which operates in all states and territories — the Comcare

scheme — along with a maritime regime to cover offshore OHS issues and other OHS related legislation contained within industry-specific Acts.

ACCI suggested that the existence of multiple regimes across the states and territories creates significant costs for the economy:

While multi-state businesses comprise less than 1 percent of all businesses they are typically larger firms and account for almost 30 percent of Australia's employment.

Such businesses are required to understand, keep up to date with and comply with the voluminous and complex array of legislation and regulation for each jurisdiction within which they operate.

This invariably reduces workplace productivity due to increased regulatory compliance costs, while delivering no additional safety benefits.

Increased costs for employers operating in multiple OHS jurisdictions include keeping abreast of regulatory changes in multiple jurisdictions, greater administrative costs (e.g. record keeping), employing additional staff, higher OHS training costs, and difficulties implementing company wide OHS policies and procedures where the regulatory requirements differ by jurisdiction. (sub. 6, p. 20)

The issue of potential overlap between OHS regulations of the Commonwealth and state and territory regulatory regimes was also raised by several participants during consultations (see chapter 2 and chapter 13 for details of the regulatory regimes). It was suggested that different operators on the one worksite may be subject to differing OHS laws, one set developed by the Commonwealth and the other by a state or territory. It was suggested that this situation, while not only representing duplication in regulatory effort, also created confusion for businesses. These sentiments were captured in the Victorian Government's submission to the review of Comcare by the Department of Employment, Education and Workplace Relations in 2008:

Rather than being provided with less red tape, businesses who swap schemes are now subject to two sets of safety regulation at their worksites - where there was previously only one - as contractors and others on those sites remain subject to State safety laws. The reluctance to remedy this runs counter to the shift toward less and simpler regulation recommended by the Banks Report, Reducing the Regulatory Burden on Business, and which is central to the COAG National Reform Agenda. (Victorian Government 2008, p. 1)

During consultations, the Commission heard similar views from others to those put forward by Victoria.

A number of areas relating to duplication between core OHS regimes provide possible areas to benchmark:

• the additional burden imposed by differences in OHS regulation between jurisdictions — for those businesses that operate across borders, knowledge of

the requirements of multiple OHS systems, and their reporting, was suggested to create additional burdens

- the differences in costs for national businesses in complying with the Commonwealth's scheme compared with those which must comply with eight (each state and territory) OHS regimes
- the potential for overlap, inconsistency, duplication and uncertainty created by the Comcare scheme for example, issues of who holds the duty of care on a site for which the main work is conducted by a Comcare insured company, but which also employs a number of subcontractors regulated under individual state and territory legislation.

### Industry-specific and general OHS regulations

The NSW Minerals Council said that industry-specific OHS regulations could create duplication and increase the costs faced by some businesses:

... there are two main areas that impede/burden the NSW mining industry in the area of OHS:

- the overlapping and sometimes conflicting obligations imposed on the NSW mining industry by the:
  - Occupational Health and Safety Act 2000 and its regulation
  - Coal Mine Health and Safety Act 2002 and its regulation
  - Mine Health and Safety Act 2004 and its regulation.
- the inconsistencies between the two governing regulators NSW Department of Primary Industries and NSW Workcover, and the subsequent impediments to safe, innovative and efficient operations. (sub. 9, p. 1)

Similar concerns were also raised by mining companies in Queensland and Western Australia during consultations.

Master Builders Australia (sub. 20) also suggested that the requirements imposed by the Federal Safety Commissioner imposed significant additional burdens to those imposed by state, territory and Commonwealth OHS regulatory regimes. The scheme, however, is not compulsory for all businesses and is entered into when seeking to engage in a commercial relationship with the Commonwealth Government. Given its voluntary and contractual nature, it is not assessed in this report.

A number of areas relating to duplication between industry-specific and general OHS regimes provide possible areas to benchmark:

- the potential for overlap, inconsistency, duplication and uncertainty created by the boundaries that exist between generic OHS regulation and that of industry-specific regulation within the one jurisdiction for example, how construction activities undertaken on a mine site are dealt with
- differences between the general OHS and the mining-specific OHS regulations in those states where they exist (New South Wales, Queensland and Western Australia).

### 4.5 Criteria for selecting areas to benchmark

In order to identify the most useful areas to benchmark and to avoid potentially erroneous comparisons, the Commission has developed criteria for selecting regulations (and administration and enforcement practices) raised by stakeholders as being of concern as well as those areas identified by the Commission to benchmark. Areas to benchmark were selected where:

- 1. there are differences in either the regulation itself or in the administration and enforcement of that regulation
- 2. the benchmarking analysis of the regulation or its enforcement/administration should contribute to either current or proposed reforms
- 3. there appears to be a difference between jurisdictions in the cost the regulation or its enforcement/administration imposes on business
- 4. where there are differences in the costs imposed by regulations, those differences do not appear to be matched by a difference in the effectiveness of those regulations
- 5. it appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data.

The reference date chosen for benchmarking OHS regulation and its burden on business is the 2008-09 financial year. However, as the Commission has made use of existing data wherever possible, some indicators make use of data collected in earlier or later periods.

### Areas of OHS regulation selected for benchmarking

To select the areas which will be benchmarked, the criteria developed above were used to filter the proposed areas detailed in section 4.4. How these areas ranked against the criteria is given in table 4.4. Areas that will be investigated and benchmark indicators will be developed were those which satisfied all the criteria.

#### Criterion 1 2 3 4 5 Regulator characteristics and enforcement practices – chapter 5 Regulator structure and resources Information provision by regulators ~ Mutual recognition √ Available instruments, their use and the level of penalties ~ Educative and punitive approaches Allocation of resources according to risk Accountability of regulators – chapter 6 Appeal provisions Transparency Feedback Regulations aimed at influencing the culture of compliance Risk, duty of care and advice – chapter 7 Awareness of regulatory requirements **Risk management** Record keeping and reporting requirements ~ Duty of care Personal liability provisions in OHS regulatory regimes OHS training requirements – chapter 8 Training requirements for staff and required resourcing Worker consultation, participation and representation – chapter 9 Health and safety representatives and committees Union access rights in OHS regulatory regimes Particular hazards Confined spaces × Noise x Transportation of hazardous materials × Driver fatigue ~ Regulating hazardous substances - chapter 10 Asbestos and other hazardous substances Psychosocial hazards – chapter 11 Stress, bullying and harassment Other hazards and activities – chapter 12 Falls from heights Manual handling Licences for high risk work **Duplication – chapter 13** The costs of inconsistencies for businesses that operate across borders Comcare and state and territory OHS regimes ~ General versus mining-specific OHS regulatory regimes ~ Differences in mining-specific OHS regulatory regimes

### Table 4.4 Selecting areas to benchmark

Those which did not satisfy all the criteria, such as confined spaces and noise were not investigated further (and were also not raised as significant concerns by participants to this study). In the case of confined spaces and noise, the regulatory approach taken in each jurisdiction is similar, and thus developing benchmark indicators that highlighted potential differences in compliance burdens would not provide useful information for policy makers.<sup>2</sup> Items relating to transportation of hazardous materials and driver fatigue were also excluded from the analysis as they lay primarily outside OHS regulation.

For the remaining areas put forward by participants or those identified by the Commission, the investigation and development of indicators to benchmark jurisdictions was believed to provide useful information for policy markers. In particular, many of these areas are the subject of proposed reforms, making comparisons of the current regulations particularly useful so that changes can be evaluated post the reform process — for example, those relating to differences in the legislative approach by various jurisdictions. Further, issues relating to interactions between the Comcare scheme and those that exist in each state and territory have the potential to remain after the development and adoption of a nationally consistent model OHS Act, and thus provide a useful area to benchmark irrespective of regulatory changes (the Commonwealth will look into Comcare's OHS responsibilities after the implementation of the model OHS Act). In the following chapters of this report, these areas are explored in more detail, indicators are developed and benchmarks presented.

### Selecting benchmarking indicators

Wherever possible, indicators should shed light on the size and nature of the differences in compliance burdens. These indicators will either be quantitative (statistical or empirical) or qualitative (descriptive) depending on information available and characteristic to be compared.

While quantitative indicators provide a direct basis for the benchmarking comparisons, there is normally only a narrow range of indicators suitable for direct quantitative measurement. Also, the range of such indicators is further limited by the need to ensure comparability of the results. In contrast, while qualitative indicators are usually less precise and require close attention to ensure consistent application and analysis, they can capture more broadly-based sources of costs, such as the costs imposed by the approach of regulators to the administration and

<sup>&</sup>lt;sup>2</sup> A national standard for working in confined spaces (AS2865) exists has been adopted by all jurisdictions except Victoria as a code of practice. However, the national standard was originally modelled on Victoria's approach so that any differences are limited.

enforcement of regulation. Accordingly, a mix of quantitative and qualitative indicators is required in order to provide a reasonable balance of precision and coverage in the study.

In selecting the indicators used in this study, the Commission was mindful of the following principles:

- *relevance* the indicators should illuminate an important aspect of the burden of regulation on business and also be relevant to the possible policy responses for reducing unnecessary burdens
- *ease of interpretation* wherever possible, the indicators should be easy to interpret and it should be apparent what they are being used to measure
- *ease of data collection* the data required for an indicator should be obtainable at a reasonable cost or already be available. Where gaps or limitations in the data exist, they should not materially undermine the usefulness of the indicator(s) reliant on that data
- *timeliness* the indicators should be based on a reference period as close to the present as possible
- *comparability* the indicators should facilitate meaningful comparisons between jurisdictions
- *robustness* the indicators should be conducive to producing comparable benchmarking results over time.

The indicators used in this study were tailored to the specific aspects of the regulatory burden being benchmarked. Further, the indicators have been developed in light of the feedback received from stakeholders through their submissions and the Commission's consultation process.

### Sourcing the data

A number of previous studies (such as PC 2008b, KPMG 2007, Allen Consulting Group 2007b and PC 2004) experienced difficulty in obtaining data on the compliance costs incurred by business. In the context of OHS regulation, Allen Consulting Group (2007b) noted that businesses:

 $\dots$  were not able to disaggregate costs that were incurred or attributable to the Regulations from those that are general business costs, or those due to the general duties of the Act. (p. 60)

In addition to these challenges, the Commission was also mindful that this study should minimise the burden on those businesses and regulators supplying data — especially given the considerable resources they have expended in the supply of

information to a number of other studies into OHS in recent times. In order to minimise the burden on businesses and regulators, the Commission sought to obtain the data used in this study from publicly available sources wherever possible. For those instances where public data were not available, and direct indicators of the burden on business were required, the Commission:

- worked with organisations that had expressed an interest in providing data to the benchmarking study
- participated in an ongoing private sector survey of SMEs in order to obtain data on the impact of various aspects of OHS regulation
- sought information from governments on their administration and enforcement practices through a survey of national, state and territory regulators.

Appendix B contains further details of the Commission's approach to collecting data.

This approach reflects the lessons from the 'cost of business registrations' report (PC 2008b), namely:

- using a wide round of stakeholder consultation to help ensure surveys and other information gathering activities are well constructed and appropriately targeted
- data should be sought from the source best placed to provide it. For example, businesses complying with particular requirements would be best placed to know the costs of complying with those requirements. Similarly, regulators should have the best knowledge of the regulations they enforce and administer, and how they undertake their responsibilities
- the importance of working closely with those supplying data in order to achieve an acceptable response rate and quality of data.

### Interpreting the benchmarking results

Even though the Commission has been careful to design its data requirements and benchmarking indicators to minimise the limitations of previous benchmarking studies, not all of the challenges referred to above can be completely overcome. This results in data sets that are subject to caveats and qualifications. Further, the indicators initially selected may not illustrate the regulatory burden as well as was first thought. The 'Cutting Red Tape' report (OECD 2007) provides an example of the difficulties that can be experienced in this regard — out of an original 17 indicators, only eight were deemed appropriate for comparative analysis.

The Commission has sought to minimise the significance of these challenges, by:

- basing its data specifications and approach to data collection on a thorough understanding of the underlying regulatory requirements
- consulting with regulators to clarify any aspects of the regulations and requirements on business that may affect the data collected
- not reporting data or using indicators where their comparability has been substantially compromised
- providing suitably detailed caveats to the benchmarking indicators where appropriate.

## 5 Regulator characteristics and enforcement practices

### Key points

- Regulator practices are critical to making occupational health and safety (OHS) regulation effective and to minimise unnecessary burdens on business.
- The resourcing levels of regulators, both financial and staff, differed significantly:
  - Comcare (the Commonwealth's principal OHS regulator) is relatively well resourced (\$3655 per worksite), followed by Victoria (\$296 per worksite), while Western Australia is the least well resourced (\$88 per worksite)
  - Comcare had the lowest number of worksites per inspector (98) and the core New South Wales regulator had the highest number (2296).
- Half of all regulators indicated they were not able to fully enforce their regulations. 'Budget limits' and 'insufficient staff' were rated as 'high' constraints.
- Differences in the rate of workplace visits were found between regulators:
  - Victoria had the lowest ratio of worksites to combined inspections and investigations and the lowest ratio of worksites to proactive workplace visits.
- Victoria has the widest range of available enforcement tools (15) while the mining regulator in Queensland has the most limited range (4).
- All regulators seem to use a risk based approach to enforcement, with regulators focusing proactive workplace visits on high risk industries such as Building and construction.
- Regulators applied the enforcement pyramid differently:
  - Tasmania used the highest proportion (94 per cent) of soft enforcement tools
  - Victoria spent the highest proportion of expenditure on education (37 per cent) while the Northern Territory regulator spent the smallest proportion (2 per cent).
- Regulators use measures to ensure consistency in enforcement practices:
  - the New South Wales and Western Australian mining regulators liaised with other agencies on more issues concerning consistency in enforcement than other regulators.
- Regulators use a range of strategies to encourage a culture of compliance:
  - the Commonwealth, New South Wales (core and mining) and Victorian regulators employed the most strategies, including providing assistance to 'special' businesses.

Regulators provide the most significant interface between government regulations and business. Given this, the characteristics of, and approach taken by, regulators can significantly influence the burden imposed by occupational health and safety (OHS) regulations.

This chapter presents the results of the Commission's survey of core OHS regulators (see appendix B for details), along with those of the mining regulators in the three states with mining-specific OHS regulation — New South Wales, Queensland and Western Australia. The data presented in this chapter are for the 2008-09 financial year unless otherwise stated and thus does not reflect any changes or events that have occurred since then.

In order to gain an understanding of how regulators influence business compliance costs, indicators of several aspects of the resourcing and enforcement approach of OHS regulators have been developed.

### 5.1 Role of a regulator

A regulator plays an important role in regulatory regimes by encouraging compliance through education and advice, as well as enforcing laws and regulations through disciplinary means.

OHS regulations set out requirements on businesses (such as incident reporting or staff training) with the purpose of maintaining safety in the workplace. The way in which regulators provide OHS information to businesses, monitor and inspect worksites and their use of enforcement tools to deal with businesses that contravene OHS legislation impact both on the effectiveness of OHS regulations and the costs for businesses in complying with these regulations. In Australia, each jurisdiction has a core OHS regulator and three states have a mining-specific regulator (chapter 2).

The strategies and approaches of OHS regulators across the Australian jurisdictions vary and are likely to result in different burdens on businesses. In addition to the issue of consistency of approach of one regulator, there is also the potential for inconsistencies between regulators, both within jurisdictions (such as between core and mining-specific regulators) and across jurisdictions. As such, developing indicators to compare the differing approaches taken by regulators can provide insights into which jurisdictions may impose unnecessary burdens on business.

### 5.2 Methodology

The Commission sent detailed questionnaires to the OHS regulator in each jurisdiction as well as to the three OHS mining regulators (see appendix B for details). The questionnaire covered the following broad areas:

- the level of *human* and *financial resources* devoted to OHS regulation and the training and experience of inspectors enforcing and administering jurisdictional OHS laws
- the *approach to enforcement* in terms of priorities: across different OHS activities and regulations; the hierarchy of measures used to achieve compliance with OHS laws and how often each is used; processes used to ensure uniform application of those laws by staff; as well as the level of coordination with other agencies
- the *enforcement activities* of regulators which directly impact on business costs including inspections and investigations and fees and charges levied on businesses
- *transparency*, *accessibility* and *accountability* with respect to the publication of enforcement strategies and activities, and the availability of appeal mechanisms for businesses in breach of OHS regulations.

The remainder of this chapter (and the following chapter on the accountability of regulators) draws out the key regulator differences across jurisdictions that were evident from the survey responses. These will highlight areas which may impose greater compliance costs and burdens on businesses.

Almost all the information provided in this chapter was supplied by the states and territories. While every effort has been made to confirm the figures and ensure comparability of data among the jurisdictions because this is original research there may be some inconsistencies. For example, the number of regulated worksites across jurisdictions may not be reliable due to the lack of consistently collected data and comparisons using these estimates should be treated with caution.

### 5.3 OHS regulators in Australia

The core OHS regulator of each jurisdiction is shown in table 5.1. In the Commonwealth, New South Wales, Victoria, Tasmania, Northern Territory and the ACT, the regulator for OHS is also responsible for the workers' compensation

systems.<sup>1</sup> In contrast, Queensland, South Australia and Western Australia have a separation of responsibilities. Shared responsibilities for some regulators mean that a significant proportion of their expenditure and staff is not allocated to OHS. Workplace Standards Tasmania, for example, allocated 40 per cent of total expenditure and 55 per cent of total staff to OHS in 2008-09, whereas WorkSafe Victoria devoted 22 per cent and 36 per cent respectively.

Further, it should be noted that some jurisdictions have a separation of OHS related functions. The Commonwealth, for example, has separated their policy making function (to the Department of Education, Employment and Workplace Relations) from the regulator, Comcare. In the ACT, OHS related functions are jointly performed by the Office of Industrial Relations (ACT Chief Minister's Department), the Office of Regulatory Services (WorkCover) and the ACT Work Safety Commissioner. Such divisions may lead to differences across regulators, in resourcing levels for example, and comparisons should take this into account.

	2000-09	
	Regulator	Industries covered
Cwlth	Comcare	All (including Defence) except mining, farming and agriculture <sup>a</sup>
NSW	WorkCover Authority of New South Wales	All except mining
Vic	WorkSafe Victoria	All
Qld	Workplace Health and Safety Queensland (a division of the Department of Justice and Attorney-General)	All except mine, coal mine, explosives, petroleum and gas, green house gas or geothermal exploration sites
SA	SafeWork SA	All
WA	WorkSafe WA (a division of the Department of Consumer and Employment Protection)	All except mine, petroleum well or petroleum pipeline sites
Tas	Workplace Standards Tasmania (a division of the Department of Justice)	All
NT	NT WorkSafe (the administrative and regulatory arm of the Northern Territory Work Health Authority)	All
ACT	ACT WorkCover	All except mining

## Table 5.1Core OHS regulators2008 00

<sup>a</sup> These industries include potential overseas and off-shore sites.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Most core OHS regulators have responsibilities for all OHS issues in all industries (state-based regulators do not cover firms operating under the Commonwealth's

<sup>&</sup>lt;sup>1</sup> While ACT WorkCover is responsible for OHS enforcement, ACT Government employees are covered by the Comcare scheme for workers' compensation.

Comcare scheme), with the exception of the New South Wales, Queensland, Western Australian and ACT regulators (table 5.1).

There are also regulators for specific industries in many of the jurisdictions. This chapter will cover the separate regulators of the mining industry in New South Wales, Western Australia and Queensland (table 5.2).

	2008-09						
	Regulator						
NSW	New South Wales Department of Primary Industries <sup>a</sup>						
Qld	Department of Employment, Economic Development and Innovation						
WA	Department of Mines and Petroleum						

Mining\_enocific OHS regulators Table 5.2

<sup>a</sup> The regulator became the New South Wales Department of Industry and Investment in 2009-10. Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Some regulators jointly administer OHS related acts/regulations with other agencies. The New South Wales, Victorian, South Australian and ACT core regulators, as well as the New South Wales mining-specific regulator all indicated that they have shared OHS responsibilities with other agencies or authorities. For example, WorkSafe Victoria jointly administers the Dangerous Goods Act 1985 (Vic) (and associated regulations) with the Environmental Protection Authority and other local authorities, and SafeWork SA shares responsibilities with Primary Industries and Resources SA (PIRSA) in regards to mining and petroleum activities.

#### 5.4 **Regulator resourcing**

The resources of an OHS regulator give a broad indication of its capacities to provide oversight and monitor worksites across a jurisdiction. Although the level of resourcing may not directly affect compliance burdens on businesses, finance and staffing levels may give an indication of a regulator's capacity for smarter and more effective regulatory action. By influencing the quality and extent of activities such as information campaigns, consultations with business and enforcement, business compliance burdens can be affected.

In this section, results from the regulator survey are presented separately for core versus mining OHS regulators given the large difference in scope (and thus size) of their operations.

### **Resources of core regulators**

2008-09

Resourcing indicators of core OHS regulators are shown in table 5.3. In absolute terms, New South Wales had the highest OHS expenditure among the core regulators in 2008-09, almost double the second largest expenditure amount of Victoria. However, after taking into account the number of worksites covered by each regulator, Comcare was the most well resourced with expenditure of \$3655 per worksite, followed by Victoria and South Australia. Western Australia was the least well resourced among the regulators, with an expenditure amount of \$88 per worksite.

A regulator's staffing resources can be viewed as a proxy for its capacity for administrative and enforcement activity, and provide a possible insight into business compliance burdens. A regulator with a higher ratio of worksites to staff numbers may be less able to provide efficient oversight and assistance to businesses, compared to a regulator with a lower ratio. A higher ratio can therefore mean there is less activity by the regulator, which may reduce the compliance burden on business. However, this may also generate less benefits from the regulation as there is greater scope for lower rates of compliance. In terms of the ratio of worksites to full-time equivalent (FTE) OHS staff, Comcare has the lowest among the core regulators, compared with Western Australia which has the highest.

		Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
OHS staff (FTE)	no.	126.7	691	411	482.6	232	149.1	35	44	25
OHS expenditure	\$'000	14 620	100 639	65 166	55 460	28 965 <b>a</b>	18 085	6 427	4 979	3 640
Worksites regulated	'000	4 <b>b</b>	664	220	390 <b>c</b>	144	205	nr	nr	nr
OHS expenditure per FTE staff	\$'000	115	146	159	115	125	121	184	113	146
Worksites to OHS staff	no.	32	961	535	808	621	1 375	na	na	na
OHS expenditure per worksite	\$	3 655	152	296	142	201	88	na	na	na

### Table 5.3 Resourcing indicators — core OHS regulators

**na** not applicable. **nr** non response. <sup>a</sup> Budget includes funds transferred from WorkCoverSA. <sup>b</sup> Figure refers to registered locations, not individual worksites. <sup>c</sup> Figure refers to number of regulated businesses and thus may underestimate the number of worksites regulated.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

The manner in which regulators raise their income provides an indicator of the cost burden placed on business. However, comparisons should be treated with caution. If a regulator raises income through cost recovery (through fees and levies) as opposed to central funding, then the direct cost impost on business will be higher. But the cost imposed on the broader community through central funding would be similar. A judgement as to the extent to which costs should be covered by central versus cost recovered funds should relate to the level of private versus public benefits created by the regulatory regime.

	•								
	Cwlth	NSW	Vic	Qlda	SA	WA	Tas <sup>t</sup>	NT	ACT
Total income (\$'000)	16 932	100 639	65 166	56 186	28 965	18 085	6 427	4 655	nr
Source (%) Central funding Fees generated	2 98	0 100	88 <sup>0</sup> 12	° 100 0	68 32	75 25	100 0	100 0	nr nr
Fee income components as a percentage of total fee income (%)									
Licensing	33	11	84	na	33	90	83	na	4
Permits	0	1	0		0	4	3		0
Inspections	0	1	0		0	0	0		19
Audits	0	0	0		0	0	0		0
Appeals	0	0	0		0	0	0		0
Other	67 <b>9</b>	d 879	<b>e</b> 16 <sup>1</sup>	F	679	9 6 <sup>h</sup>	14 <sup>i</sup>		77 <b>j</b>

Table 5.4OHS income components — core OHS regulators2008-09

**na** not applicable. **nr** non response. <sup>**a**</sup> OHS related fees collected are classified as administrative revenue and are not retained by WHSQ. <sup>**b**</sup> All expenditure for OHS activity is funded from appropriation. Revenue collected in fees is paid back directly into Consolidated Revenue and is not available to meet OHS costs. <sup>**c**</sup> Income allocated from workers' compensation premiums. <sup>**d**</sup> Other regulatory contributions, interest, training, conference and other fee income <sup>**e**</sup> Other income primarily relates to contributions from the Workers' Compensation Scheme and Self and Specialised Insurers, as well as investments, commercial activities and other minor revenue sources, which are used to fund WorkCover operations. <sup>**f**</sup> Revenue collected from fines and penalties. <sup>**g**</sup> Employer registration fees. <sup>**h**</sup> Registration of plant application, design review application, plant registration assessment, publications of instrument books, miscellaneous revenue, Fol fees, staff contribution to GVS, staff contributions to government housing. <sup>**i**</sup> Design and Survey Approval Fees. **j** Revenue received by the OHS Commissioner: for training and seminar fees, grants from other ACT Govt agencies, and sponsorship.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

With this caution in mind, some differences in the OHS income components of regulators can be seen in table 5.4, including the source of OHS income and the categories of different fee income for OHS related activities in 2008-09. Licensing fee income was most important for Western Australia (90 per cent of OHS fee income), followed by Victoria (84 per cent) and Tasmania (83 per cent). Other sources of fee income were important for New South Wales (87 per cent), the ACT

(77 per cent) and South Australia and the Commonwealth (both at 67 per cent). In New South Wales' case most of this income is derived from contributions from the Workers' Compensation Scheme and Self and Specialised Insurers.

Inspectorate resourcing is another important measure of the ability of regulators to enforce their regulations. They provide a proxy for the costs associated with compliance for business as they will relate, albeit imperfectly, to the frequency of interactions businesses have with regulators. Table 5.5 shows the level of inspectorate resources of the regulating agencies.

The ratio of worksites to inspectors indicates the extent that the regulator can oversee different worksites across their jurisdiction. Comcare has the lowest worksite to inspector ratio (98 worksites per inspector), followed by Victoria and South Australia. New South Wales has the highest worksite to inspector ratio. It should be noted that, on average, about half of the OHS staff of regulators were classified as active inspectors, and thus the worksites to inspector ratios are significantly higher than the worksites to OHS staff ratios in table 5.3.

With the exceptions of the Commonwealth, New South Wales and Victoria, all core OHS regulators indicated that they experienced problems recruiting OHS inspectors into their agency in 2008-09. These regulators generally had lower percentages of inspector positions filled (total available positions) and higher turnover — with the exception of the ACT. For example, while Victoria had 95 per cent of its inspector positions filled as at 30 June 2009, South Australia had only 78 per cent filled. Further, annual turnover of inspectors was 3 per cent in New South Wales compared with 15 per cent in the Northern Territory.

Differences in the salaries of OHS inspectors across the jurisdictions provides one possible reason why recruiting difficulties may differ. While the starting salaries of the regulators with recruiting problems ranged from \$52 276 to \$59 800, the starting salaries of Victoria and New South Wales were almost \$20 000 higher, at \$71 295 and \$74 011 respectively. The level of average salaries of OHS inspectors across jurisdictions also reflects this trend (with the exception of Western Australia, which has a slightly higher average inspector salary than Victoria).

The quality of inspections also impacts on the compliance cost on businesses. One proxy to measure this is to examine the training provided to, and experience of, inspectors. Inspectors that lack knowledge and experience may take more time to flexibly apply OHS laws to different worksites due to the idiosyncratic nature of workplaces or industries. Thus, employers may be required to spend more time explaining situations and issues during visits, or this may even lead to unsound inspectorate decisions. From the surveys, South Australia and the Commonwealth had the highest proportion of staff with more than 10 years experience (67 per cent

and 51 per cent respectively), while the Northern Territory had the highest proportion of inspectors with less than 3 years experience (50 per cent) as at 30 June 2009. In terms of (internal or external) professional development, the Northern Territory and Western Australia provided the most hours, on average, to their inspectors compared to the other regulators in 2008-09.

		-								
		Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
FTE OHS inspectors	no.	41.0	289.1	202.5	234.6	89.0	103.0	47.0	12.0	17.0
Worksites per OHS inspector	no.	98	2 296	1 086	1 662	1 618	1 986	na	na	na
FTE inspector positions filled as at 30 June 2009	%	100	92	95	83	78	87	87	75	100
Turnover of OHS inspectors	%	14	3	6	9.3	8	6.3	9	15	9
Starting salary of a full time OHS inspector	\$	57 985	74 011	71 295	57 000	56 245	53 291	52 276	54 196	59 800
Average salary of a full time OHS inspector	\$	76 397	82 099	75 573	69 700	66 168	77 627	67 670	63 043	71 423
Experience of OHS inspectors										
less than 3 years	%	7	16	0	19	6	29	21	50	29
3 to 10 years	%	41	38	59	47	27	22	40	42	59
More than 10 years	%	51	46	41	34	67	49	38	8	12
Average professional development per OHS inspector (annually)	hrs	nr	34	26	21	30	100	nr	230	20

## Table 5.5Inspectorate resources — core OHS regulators2008-09

na not applicable. nr non response.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### **Resources of mining-specific regulators**

The resourcing and income components of mining OHS regulators are shown in table 5.6. While the Western Australian and Queensland mining regulators are well resourced relative to New South Wales in terms of their ratio of OHS expenditure

per worksite, the Western Australian mining regulator is the best resourced in terms of the number of worksites to OHS staff.

The inspectorate resourcing of the mining regulators are also shown in table 5.7 and similarly the ratios of worksites to inspectors is lower for the Western Australian mining regulator compared with Queensland and New South Wales. Western Australia also has the greatest proportion of inspectors with more than 10 years experience (95 per cent of total inspectors).

2000-03			
	NSW	Qld	WA
OHS staff (FTE)	129	64	72
OHS expenditure (\$'000)	18 518	15 800	8 386
Worksites regulated	2 483	1 010	416
OHS expenditure per FTE staff (\$'000)	144	247	116
Worksites to OHS staff	19	16	5.7
OHS expenditure per worksite	7 458	15 644	20 159
Total Income (\$'000)	22 029	15 800	8 386
Source	Mixed	Cost recovery	Mixed
Total fee income (\$'000)	933 <b>a</b>	15 800 <b>b</b>	27 <b>°</b>

## Table 5.6Resourcing indictors — mining OHS regulators2008 09

<sup>a</sup> Income from seminars, workshops, courses, exams, sale of publications and refunds, services rendered, consultancy. <sup>b</sup> Industry levy — industry is levied an amount per employee based on the cost of maintaining the Mines inspectorate and support services. <sup>c</sup> Certificates of competency issued by the Board of Examiners.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### Table 5.7 Inspectorate — mining OHS regulators

2008-09

		NSW	Qld	WA
FTE OHS inspectors	no.	64	45	43
Worksites to OHS inspector	no.	39	22	10
FTE inspectors positions filled as at 30 June 2009	%	98	96	87
Turnover of OHS inspectors during 2008-09	%	2	4	10
Starting salary of a full time OHS inspector	\$	50 069	86 140	74 000 <b>a</b>
Average salary of a full time OHS inspector	\$	125 162	102 000	103 500 <b>b</b>
Experience of inspectors:				
Less than 3 years	%	19	3	2
3 to 10 years	%	44	55	2
More than 10 years	%	38	42	95
Average professional development per OHS inspector (annually)	hrs	42	80	8

<sup>a</sup> Taken as the lowest starting salary. <sup>b</sup> Survey response included a range for an 'average' salary, as such the mid-point was chosen for comparison.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### Are there constraints on enforcement activities?

The responses from core and mining regulators on their ability to fully enforce their regulatory responsibilities were mixed — six considered that resourcing levels did not prevent them from fully enforcing all the OHS regulation for which they are responsible. However, for the regulators that indicated constraints to their enforcement activities, a limited budget or insufficient staffing levels were cited as being of high importance (table 5.8). For example, as put by South Australia:

Much of the enforcement work that SafeWork SA does is reactive, i.e. complaints, workplace injuries and dangerous occurrences. SafeWork SA also undertakes compliance audits. Clearly, with more resources e.g. staff, SafeWork SA would be able to [conduct] more proactive enforcement activity as well as [provide] general advice etc. (Productivity Commission survey of OHS regulators 2009 unpublished)

When regulators are limited in their ability to fully enforce their regulatory responsibilities, there is a greater chance that the full benefits possible from OHS regulation will not be achieved as there is greater scope for businesses to evade their obligations. Further, if some business are able to 'fly under the radar' it may create an uncooperative environment among those businesses which are the target of enforcement action and the regulators, thereby increasing both administration and compliance costs.

			ConstraintsIlyBudgetInsufficientRegulatoryResponsibilitiesLimitedCcealimitsstaffcomplexityunclearpowersCesMediumLowLowLowLowLowesnrnrnrnrnrnrloLowHighLowLowLowLowesLowLowLowLowLowloLowHighMediumLowLowloHighMediumLowLowLowesLowHighLowLowLowloHighHighLowLowLowloHighHighLowLowLowloHighMediumLowLowLowloHighHighLowLowLowloHighHighLowLownr					
	Regulator	Fully enforce <sup>a</sup>	Budget limits	Insufficient staff	Regulatory complexity	Responsibilities unclear	Limited powers	Other
Cwlth	Core	Yes	Medium	Medium	Low	Low	Low	
NSW	Core	Yes	nr	nr	nr	nr	nr	
	Mining	No	Low	High	Low	Low	Low	√b
Vic	Core	Yes	Low	Low	Low	Low	Low	
Qld	Core	No	High	Medium	Low	Low	Low	
	Mining	Yes	Low	High	Low	Low	Low	
SA	Core	Yes	Low	Medium	Low	Low	Low	
WA	Core	Yes	nr	nr	nr	nr	nr	
	Mining	No	High	High	Low	Low	Low	
Tas	Core	No	High	Medium	Low	Low	Low	
NT	Core	No	High	High	Low	Low	nr	
ACT	Core	No	High	High	Medium	Low	Low	

### Table 5.8Enforcement constraints

2008-09

**nr** non response. <sup>**a**</sup> In practice, the regulator considers that it is currently able to fully enforce all of the OHS regulation for which it is responsible. <sup>**b**</sup> Competitive remuneration to recruit mining, mechanical and electrical engineers from the mining industry to be appointed as inspectors.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### 5.5 Enforcing OHS regulations

### Strategies for enforcement

The educative and enforcement strategies adopted by regulators affect the level of businesses compliance (Parker 2000). Although it is inevitable to have a degree of tension in the relationship between regulators and the regulated (Regulation Taskforce 2006), some regulator approaches may be more effective in achieving compliance than others.

In the study of regulation, there has been considerable debate about the effectiveness of different methods, particularly whether the stance of a regulator should be focused more on discipline or cooperation (Burdach and Kagan 1982; Scholz 1984).

### 'Tough' verses 'soft' approaches to enforcement

In general, a distinction has been made between two types of enforcement strategies: a 'tough' deterrent strategy and a 'soft' advise and persuade strategy. The effectiveness of either strategy will be influenced by the nature and motivations of the business being regulated, and the skills and approach of the regulator.

On one hand, businesses which are adversarial to regulatory agencies and 'amoral calculators' will only meet legal requirements if the perceived risk of harsh penalties outweighs the cost of compliance (Kagan and Scholz 1984). In such a case, a confrontational deterrence enforcement strategy that centres on punishment and applying sanctions on businesses that breach legislation is likely to be more effective (Grabowski and Braithwaite 1986).

On the other hand, some businesses can be typified as 'political citizens' who believe in the law and genuinely want to comply with regulation (Lamm 1992). Cooperation between such a business and a regulator is taken for granted and an advise and persuade enforcement strategy is encouraged through consultation and conciliation, with punitive enforcement merely a background threat.

However, businesses do not strictly conform to either of these two motivations. Thus an exclusive strategy of either the tough deterrence or soft advise and persuade enforcement style by a regulator is considered to be ineffective in encouraging business compliance.

An enforcement strategy based solely on deterrence would antagonise the businesses which are willing to comply, as well as risk a subculture of regulatory

resistance if the focus on punishing is deemed unfair. On the other hand, a regulator with a pure advise and persuade strategy could embolden recalcitrant businesses which choose not to comply. Moreover, as businesses 'get away with it' because of lax enforcement, this could in turn have a discouraging effect on compliant businesses (Ayers and Braithwaite 1992).

Therefore, because of the limitations of a strict adoption of either strategy, it has generally been accepted that an effective enforcement strategy needs to comprise both deterrence and advise and persuade elements.

### A mix of strategies

'Responsive regulation' is a model of regulation enforcement that encapsulates both strategies and recommends that a regulator should have an enforcement policy that uses an escalation of sanctions (Ayers and Braithwaite 1992). Figure 5.1 shows an example of a responsive regulation enforcement pyramid. The less severe advise and persuade options are reflected on the lower half of the pyramid and the more severe punitive strategies are represented at the peak of an enforcement pyramid.

In applying such an enforcement pyramid, it would be expected that the less severe options would be used more frequently, with other more punitive measures used less and less with movements up the pyramid.

This sliding scale of enforcement options allows for a 'tit-for-tat' strategy where a regulator is initially cooperative and adopts a soft approach to encourage business compliance. But, if a business remains uncompliant, the regulator can adopt more severe enforcement options. When a business chooses to comply, the regulator can revert to its cooperative position (Ayers and Braithwaite 1992). Thus a regulator can be both confrontational and forgiving and, with a mix of options, can apply a variety of enforcement tools and approaches to promote compliance and deter non-compliance. For example, as put by SafeWork SA in the case of their jurisdiction:

Inspectors act under the Principles of Operation and Enforcement Policy [which sets out] the hierarchy of enforcement actions. Inspectors also work under an Investigation Manual which details the process of issuing compliance notices and writing prosecution briefs. A verbal direction is given only when the matter is minor and can be fixed while the inspector is on site. An improvement notice [is] used to address breaches of legislation in the workplace that do not constitute an immediate risk to health and safety, but that may develop into a serious situation if the risk is not rectified in the near future. Prohibition notices are used to immediately stop activity to prohibit that activity where there is an immediate risk to health and safety of a person at a workplace. (Productivity Commission survey of OHS regulators 2009 unpublished) This provides an example of how having a mix of strategies can be used to ensure compliance and achieve the potential benefits from OHS regulation.



Figure 5.1 Example of an enforcement pyramid

Source: Adapted from Gilligan, Bird and Ramsay (1999).

### Inspections and investigations

Regulators use inspections and investigations to assess and monitor whether a business has created a safe environment for workers and non-workers, and investigate possible breaches of OHS regulation. It is through these processes that regulators decide whether enforcement action is warranted, as well as the appropriate level of punitive action if necessary. Differences in the characteristics of inspections and investigations also have implications for the costs on businesses in complying with OHS regulation.

While all regulators used both inspections and investigations to assess compliance, definitions of both activities are not uniform across the jurisdictions. In terms of the causes and 'triggers' of inspections and investigations:

- for the Queensland core and mining regulators, the Western Australian and New South Wales mining regulators and the Tasmanian, Victorian and South Australian regulators, inspections are proactive (in the sense they are conducted without the receipt of prior information which may suggest a business is in breach of its OHS responsibilities) and investigations are reactive in nature (in response to information about a suspected or actual breach)
- the Commonwealth conducts a range of interventions such as site visits and investigations (which may involve site visits), that may be proactive or reactive in nature. Audits are also conducted
- the New South Wales core regulator conducts both proactive and reactive inspections (which may involve a site, fact or document inspection), as well as investigations that are in response to complaints, incidents, illnesses or dangerous occurrences
- the Western Australian core regulator conducts investigations which may include several inspections (workplace attendances)
- the ACT regulator predominantly uses information provided to them as the basis for conducting inspections (escalating to more serious investigations if necessary)
- the Northern Territory regulator conducts both inspections and investigations to monitor compliance and respond to incidents and accidents in the workplace, however, under its Act all are termed investigations.

The processes involved in an inspection and investigation also differ across the jurisdictions (see some examples in box 5.1).

Regulators also have published enforcement policies that detail their case for inspections and investigations, as well as the rights of the regulator and the employers. The level of transparency in these policies varies across the jurisdictions (chapter 6).

Table 5.9 and table 5.10 provides some indicators of regulator activity in terms of the total number of inspections and investigations conducted in 2008-09. However, given the variation in the definitions of inspections and investigations, these indicators are not directly comparable across jurisdictions. Despite this, the number of inspections and investigations does provide an indicator of how often businesses are likely to interact with their OHS regulator — either in response to an incident or otherwise. Across the jurisdictions, Victoria has the lowest number of worksites relative to the number of inspections and investigations conducted — that is, Victorian businesses were much more likely to receive a visit from an OHS inspector than those in other jurisdictions. Conversely, the New South Wales core regulator has the highest number of worksites to inspections and investigations, as well as the highest number of worksites to proactive visits.

## Box 5.1 Examples of workplace inspection and investigation processes

### Inspection processes

• In Tasmania, the inspection process can involve:

1. Basic compliance assessment — desktop check against basic legislative requirements and quick observation of physical work environment

2. Complex compliance assessment — process 1 plus a detailed inspection of physical work environment

3. Systems audit - check of management systems using an appropriate audit tool

4. Comprehensive workplace assessment — combination of processes 2 and 3 above.

• For the Western Australian mining regulator, an inspection involves attendance at a mine site with a formal inspection of facilities and activities noted in the officer's note book, followed by an entry in the Mine Record book or confirmation letter.

### Investigation processes

- For the Western Australian core regulator, investigations involve activities such as telephone calls, visits, meetings and correspondence.
- For Queensland mining, investigations may involve inspecting the accident scene, interviewing witnesses and taking statements, reviewing documents and procedures and conducting an analysis of information gathered using the Incident Causal Analysis Method (ICAM) to determine root causes of the accident.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

It is not clear whether increased presence of regulators increases compliance costs. On one hand, the frequency of workplace visits (inspections and investigations) would increase the compliance burden on business in terms of the production time lost during visits and the impost of having an inspector assess the worksite. On the other hand, more frequent workplace visits could allow regulators to give advice and educate employers and employees on OHS obligations and issues — easing the compliance burden in the future.

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Total inspections	580	13 452	42 169	16 852	19 934	11 339 <b>a</b>	6 280 <b>b</b>	4 007 <b>c</b>	2 304
Total investigations	298	nr	1 289	1 225	1 754	10 085	358 <b>d</b>	nr	nr
Proactive visits	36	4 478	25 903	20 097	6 375	6 499	4 518	3 342	nr
Return visits	17	502	nr	na	na	na	na	121	nr
Reactive visits:	772	8 160	17 832	22 748	13 156	4 840	1 762	544	nr
Complaint	51	6 955	nr	1 012	3 603	nr	nr	nr	nr
OHS incident with injury	162	990	nr	1 598	2 106	nr	nr	nr	nr
Near-miss	264	215	nr	41	1 793	nr	nr	nr	nr
OHS compliance breach	52	0	nr	20 097	4 604	nr	nr	nr	nr
Worksites to inspections and investigations	6.9 <b>e</b>	49	1.5	21.6	6.6	18.1 <sup>f</sup>	na	na	na
Worksites to proactive visits	111	148	3	19	22	32	na	na	na
Total value of fines imposed on businesses \$'000	nr	5 710	6 796	3 644	1 356	na	136	0	nr

## Table 5.9Activity indicators — core OHS regulators2008-09

**na** not applicable. **nr** non response. <sup>a</sup> Figure is the total number of workplace visits conducted during 2008-09 and thus includes visits which were a part of an investigation. <sup>b</sup> Workplace interventions which are not a consequence of an accident or dangerous incident being notified to the regulator (termed 'Type 1 investigations), but does include repeat visits once a breach has been found either as a result of a complaint or proactive visit (termed Type 2 investigations). <sup>c</sup> Figure indicates total workplace interventions which may be proactive or reactive in nature. <sup>d</sup> Type 1 investigations only. <sup>e</sup> Ratio counts total inspections only as figure may be double counting the inspections conducted within investigations.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

2008-09			
	NSW	Qld	WA
Total inspections	1 955	1 589	1 730
Total investigations	446	211	126
Proactive visits	1 955	nr	243
Return visits	na	nr	na
Reactive visits:	446	nr	255
Complaint	15	21	129
OHS incident with injury	147	nr	126
Near-miss	16	nr	0
OHS compliance breach	268	nr	0
Worksites to inspections and investigations	1.0	0.6	0.2
Worksites to proactive visits	1.3	na	1.7
Total value of fines imposed on businesses \$	370 000	82 950	na

### Table 5.10 Activity indicators — mining OHS regulators

na not applicable. nr non response.

2000 00

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

### Workplace visits

Apart from inspections and investigations, regulators may also visit worksites for other reasons. As such, the frequency of all workplace visits provides a more comparable indicator of regulator activity, their focus and the possible burdens on businesses. Generally, regulators conduct three types of workplace visits:

- *Proactive*: visits not in response to a workplace incident, complaint, or breach and may include planned interventions, routine visits, audits and various educational functions
- *Return*: to check that a breach or other issue identified in a proactive visit has been rectified
- *Reactive*: to examine an OHS incident with injury, near miss, complaint or suspected compliance breach after the event.

The breakdown of workplace visits into these three categories is also provided in tables 5.9 and table 5.10. In terms of worksites to proactive visits, Victoria has the lowest ratio among the core regulators.

Regulators that conduct more proactive workplace visits may be considered to impose greater burdens on businesses by requiring them to accommodate visits which have arguably less cause. However, they may also increase incentives to comply, are generally structured to focus more intensively on riskier industries, and may also provide awareness and education to employers. Indeed all regulators (with the exception of the ACT) indicated that the purposes of workplace visits extend beyond assessing compliance or responding to complaints:

- the Commonwealth, Victorian, Queensland, South Australian and Western Australian core regulators indicated that workplace visits are used to provide training and education (Tasmania and New South Wales indicated education only). Other purposes of workplace visits include stakeholder engagement sessions (the Commonwealth) and workplace consultation on systems performance (Queensland)
- the Queensland and Western Australian mining regulators indicated that workplace visits are also used to provide training and education, as well as the mentoring of mine and quarry sites (Queensland) and giving safety presentations (Western Australia). During workplace visits, the New South Wales mining regulator conducts presentations and workshops about legislative systems and various safety issues.

### Enforcement policies and a risk-based approach

The Heads of Workplace Safety Authorities (HWSA) developed the 'National OHS Compliance and Enforcement Policy' with the aim of assisting regulators in each jurisdiction to implement effective enforcement practices. Some key principles of the policy include regulator consistency (similar workplace circumstances leading to similar enforcement outcomes), proportionality (responses being proportionate to the seriousness of the non-compliance) and transparency (demonstrating impartiality and balance in decisions). The document also highlights the need for responsive regulator enforcement, including using a mixture of tools to encourage business compliance. While each regulator across the jurisdictions has its own enforcement policy (excluding the Northern Territory which adopted the national policy), similar key principles and approaches to enforcement are commonly stated.

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Indicator type <sup>a</sup>	na	pv	in	pv	in	in <sup>b</sup>	pv	inc	in <sup>d</sup>
Industry									
Agriculture, forestry and fishing	na	15		257	545	209	706	28	9
Manufacturing		251	20 014	1 216	3 077	1 417	699	287	218
Transport and storage		37		414	868	1 179	279	109	80
Building/construction	ı	1 464	10 500	2 985	3 543	2 921	1 370	1 682	948
Mining <sup>e</sup>		2	12 593	11	513	0	30	165	0
Retail and wholesale	;	65		1 025	3 749	720	824	670	598
Hospitality		0		825	0	303	334	254	123
Consumer and business services		280	6 668	0	0	634	0	149	61
Education		0		0	0	201	0	124	16
Health and community services		58	45	1 354	1 407	384	0	85	30
Government (including Defence)		209	45	0	675	195	276	190	38
Other industries		2 097 <sup>f</sup>	1 850 <b>9</b>	6 150 <b>h</b>	5 557 <sup>i</sup>	1 922 <b>j</b>	0	264 <b>k</b>	183 <sup>I</sup>
Total		4 478	41 170	14 237	19 934	10 085	4 518	4 007	2 304

# Table 5.11Risk-based approach to enforcement — core OHS<br/>regulators<br/>2008-09

**na** not applicable. **pv** number of proactive workplace visits conducted in 2008-09. **in** total number of inspections conducted in 2008-09. <sup>a</sup> Where proactive workplace visits were not available, the number of total inspections by industries is used as a proxy (where inspections are defined by the regulator as being proactive in nature). <sup>b</sup> The Western Australian data may not be comparable as it could also reflect reactive activity. <sup>c</sup> The Northern Territory data may not be comparable as it could also reflect reactive regulator activity. <sup>d</sup> The ACT data may not be comparable as inspections are predominantly in response to information provided to the regulator, such as the sharing of information, skills and expertise (see chapter 13). <sup>f</sup> Non-classified. <sup>g</sup> Major hazards unit. <sup>h</sup> Non-classified <sup>i</sup> Non-classified (2206), Recreation (1608), Finance (853), Manufacturing – food beverage (721), Electricity, gas and water (169). <sup>j</sup> Other ANZIC categories (1522), Personal and other services (186), Cultural and recreational services (162), Electricity, gas and water (61), Communication services (3), Finance and insurance (1). <sup>I</sup> Personal and other services (76), Cultural and recreational services (51), Electricity, gas and water supply (26), Unidentified (29), Communication services (1).

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

In general, regulators take a targeted or risk-based approach to enforcing regulations. That is, they claim to focus their enforcement activities on areas where the risk of non-compliance is highest or where non-compliance carries the greatest risk of harm. For example, Workplace Health and Safety Queensland's enforcement policy cites how their strategy of 'risk-based compliance and enforcement seeks to target the available resources to areas of greatest need and where they are most likely to have the greatest impact on improving working and community
environments' (Queensland Government 2009, p. 3). ACT WorkCover also lists specific compliance areas of focus such as poor performing organisations and high risk hazards and industries (ACT WorkCover 2004). This is beneficial as it maximises the effectiveness of regulator enforcement and directs limited resources to where there is the greatest need for them (Regulation Taskforce 2006). Risk-based enforcement strategies are compatible with a responsive regulation approach and ensures that the objectives of regulation are met while reducing the burden of regulatory activity on those businesses which have demonstrated a low probability of non-compliance.

One method of gaining an insight into the risk-based approach of OHS regulators is to examine on which industries they focus their proactive workplace visits (given mining regulators only regulate the one industry, this approach cannot be used to assess whether or not they apply a risk-based approach to enforcement). While there are differences in the way core OHS regulators define industry groups, some patterns emerge.

Table 5.11 shows the number of proactive workplace visits (or total inspections, where inspections are proactive in nature and the regulator could not provide the total number of proactive visits) of core OHS regulators by industry. It appears that proactive visits during 2008-09 concentrated on higher risk industries, particularly in Building and construction. For example, around 30 per cent of inspections by Workplace Standards Tasmania occurred in this sector. By contrast, Victoria focused more on Agriculture, forestry and fishing; Manufacturing; and Transport and Storage (combined) than Building and construction and Mining (combined).

It should be noted that the data for Western Australia, the Northern Territory and the ACT may not be directly comparable given their definition of inspections. Specifically, their number of inspections could also include reactive workplace visits by regulators in 2008–09.

## Use of enforcement instruments

## Remedial and punitive actions

Regulators have the option of using a range of enforcement instruments against businesses which are deemed non-compliant with OHS regulations, or if a risk to health and safety is detected in a workplace (box 5.2).

## Box 5.2 Examples of enforcement tools

**Written or verbal directive:** generally, these would be given by an inspector in light of less serious breaches. If compliance is achieved, no further enforcement action need be taken.

**Improvement notice**: inspectors can also issue improvement notices when non compliance is detected but does not necessarily impose an immediate risk to health and safety. These notices usually include directions and actions the duty holder must take in order to rectify the workplace situation and within a specified time.

**Prohibition notice**: these are issued by inspectors when an immediate risk to health and safety is detected in a workplace and a cessation of an activity is deemed necessary. The notice may include directions on how a duty holder is to remedy the risk and that activity can resume once that action has occurred.

**Infringement notice:** these 'on the spot fines' can be issued by an inspector for nonindictable offenses as an alternative to prosecution. They have immediate punitive effect without the need for court proceedings and vary in the amount of penalty rate across the jurisdictions.

**Enforceable undertaking:** this written undertaking is another alternative to prosecution and requires the duty holder to remedy the alleged contravention in a manner specified, and take any actions agreed to, in the undertaking.

**Prosecution:** a business can be prosecuted when a serious alleged breach has occurred. The outcome of these court proceedings could be monetary fines, imprisonment or health and safety undertakings among other sentences.

The enforcement tools available to core OHS regulators are shown in table 5.12. All regulators have a range of different enforcement actions they can apply to businesses depending on the extent of the alleged breach, however, there are some differences. The Commonwealth, Victoria and Queensland have the greatest range of enforcement instruments at their disposal, including enforceable undertakings (a cooperative alternative to prosecutions, which is also available in Western Australia, Tasmania, the Northern Territory and the ACT) and, in the case of Victoria, 'softer' enforcement instruments available to a regulator, the greater the scope for a more proportionate approach to dealing with businesses in breach of their requirements, that is, in line with responsive regulation and an enforcement pyramid.

The mining-specific OHS regulator in Queensland has a more limited array of enforcement tools compared to the New South Wales and Western Australian mining regulators (table 5.13). Also, one notable difference for the New South Wales and Queensland mining OHS regulators is the lack of enforceable

undertakings which provide an alternative to prosecution. Overall, given the reduced flexibility available to mining regulators in the enforcement of their regulations, through fewer enforcement tools, it is possible that compliance burdens are greater for mining businesses in Queensland than those in other jurisdictions as there is a more limited set of tools to achieve the desired OHS outcomes.

	Cwlth	NSW	Vic	Old	54	1//	Tas	NT	ΔΟΤ
	Owith	/////	VIC	QIU	54	MA.	143	111	701
Educate/advise	$\checkmark$								
Verbal warning		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$
Written directive	$\checkmark$	$\checkmark$	$\checkmark$				$\checkmark$	$\checkmark$	
Improvement notice	$\checkmark$								
Prohibition notice	$\checkmark$								
Licence suspension	$\checkmark$								
Licence cancellation	√a	$\checkmark$							
Adverse publicity	$\checkmark$		$\checkmark$		$\checkmark$		$\checkmark$	$\checkmark$	$\checkmark$
Infringement/penalty notice		✓	$\checkmark$	✓	✓		✓	✓	√
Prosecution	$\checkmark$								
Enforceable undertaking	✓		$\checkmark$	✓		✓	✓	✓	√
Other	√b		√C	√d					

Table 5.12	Availability of enforcement tools — core OHS regulators
	2008-09

<sup>a</sup> Comcare has the ability to revoke licences based on a graduated tier system. This system allows for employers to be ranked and apply a self-assessment based approach where Comcare provides oversight and monitoring.
 <sup>b</sup> Injunctions, remedial orders.
 <sup>c</sup> Voluntary compliance, non-disturbance notices, letters of caution, letters of warning.
 <sup>d</sup> Seizures, electrical safety protection notices.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

2008-09			
	NSW	Qld	WA
Educate/advise	$\checkmark$	$\checkmark$	✓
Verbal warning	$\checkmark$	$\checkmark$	$\checkmark$
Written directive	$\checkmark$	$\checkmark$	$\checkmark$
Improvement notice	$\checkmark$		$\checkmark$
Prohibition notice	$\checkmark$		$\checkmark$
Licence suspension	$\checkmark$		$\checkmark$
Licence cancellation	$\checkmark$		$\checkmark$
Adverse publicity			
Infringement/penalty notice			
Prosecution	$\checkmark$	$\checkmark$	$\checkmark$
Enforceable undertaking			$\checkmark$

## Table 5.13 Availability of enforcement tools — mining OHS regulators

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

## Applying an enforcement pyramid

As discussed above, regulators use the suite of tools available to them to promote businesses to comply with their OHS responsibilities. For core regulators, the use of the enforcement tools is shown in table 5.14. Generally, improvement notices were most regularly used and the use of more serious enforcement actions such as prosecutions and enforceable undertakings was relatively rare compared to all enforcement activities conducted in 2008-09.

Numb	er of en	forcemer	nt tools us	ed — 20	08-09		-		
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Educate/advise	2 368	2 453	nr	nr	nr	nr		4 000	nr
Verbal warning	na	nr	nr	nr	nr	2 986	1 986 <b>a</b>	na	nr
Written directive	0	122	nr	na	na	na		12	na
Improvement notice	13	10 830	18 363	7 584	2 396	9 842	129	193	99
Prohibition notice	16	767	1 078	1 991	630	721	98	70	101
Licence suspension	nr	1	nr	nr	nr	0	nr	0	nr
Licence cancellation	nr	1	nr	nr	nr	0	nr	0	nr
Adverse publicity	13	na	0	na	60	na	0	0	nr
Infringement/penalty notice	na	686	nr	471	10	na	17	0	nr
Prosecution	2	108	118	141	62	37	30	5	4
Enforceable undertaking	1	na	1	20	na	nr	nr	0	nr
Other:			6 313 <b>b</b>	115 <sup>c</sup>					

## Table 5.14 Use of enforcement tools — core OHS regulators

**na** not applicable. **nr** non response. <sup>a</sup> Statistic includes educate/advise, verbal warning and written directives. <sup>b</sup> Voluntary compliance (6163), Letters of warning (81), Non disturbance notice (54), Letters of caution (15). <sup>c</sup> Electrical safety protection notice (94), Seizures (21).

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

For mining-specific OHS regulators written directives were frequently used as enforcement tools in New South Wales and Queensland, while improvement notices were more frequently used in Western Australia during 2008-09 (table 5.15).

To consider whether OHS regulators apply the enforcement pyramid, the relative use of instruments was assessed. The pyramid was divided into three main stages:

- *stage 1*: includes the informal enforcement approaches relating to education and verbal advice/warnings (the bottom two segments of the pyramid)
- *stage 2*: includes the less punitive formal enforcement approaches such as notices that arise from inspections (improvement, prohibition among others)
- *stage 3*: includes the more serious and punitive formal enforcement actions relating to prosecutions and enforceable undertakings.

	NSW	Qld	WA
		4.6	
Educate/advise	nr	nr	nr
Verbal warning	nr	nr	nr
Written directive	652	586	nr
Improvement notice	95	na	636
Prohibition notice	117	na	140
Licence suspension	0	na	0
Licence cancellation	0	na	0
Adverse publicity	na	na	na
Infringement/penalty notice	na	na	na
Prosecution	4	10	1
Enforceable undertaking	na	na	0

#### Table 5.15 Use of enforcement tools — mining OHS regulators

Number of enforcement tools used — 2008-09

na not applicable. nr non response.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Given that several regulators were not able to quantify the number of educative actions or advice given to businesses (table 5.14), the number of proactive workplace visits (or if unavailable, the total number of inspections where inspections are proactive in nature) conducted in 2008-09 by the regulators has been used as a proxy for *stage 1*. The relative uses of the three stages of the enforcement pyramid by the core OHS regulators surveyed are shown in figure 5.2.

From figure 5.2, it appears that the Tasmanian, Northern Territory and ACT core regulators heavily rely on the 'soft' approaches to enforcement (94 per cent, 93 per cent and 92 per cent of their enforcement actions respectively) compared with other regulators such as in New South Wales (27 per cent) and Western Australia (38 per cent).

It is difficult to draw firm conclusions as to whether some jurisdictions over use soft or tough enforcement tools. For example, there may be less need for the ACT, Northern Territory and Tasmanian regulators to use harsher tools. Indeed, these jurisdictions reported that they had found a softer approach had led to higher compliance and improved outcomes.



# Figure 5.2 Relative use of the enforcement pyramid — core OHS regulators

Data source: Productivity Commission survey of OHS regulators (2009 unpublished).

As soft enforcement approaches such as education and advisory programs will not always be picked up in the use of inspections or enforcement tools, expenditure patterns provide another measure of the relative importance given to each aspect of the enforcement pyramid. Table 5.16 provides the OHS expenditure components of regulators. There are significant differences in the expenditures of OHS regulators, suggesting their priorities may also differ (Tasmania, the ACT and the Western Australian mining regulator did not provide a response for this question). The Victorian regulator and both the New South Wales core and mining OHS regulators allocated the largest proportion of their expenditure on education activities (37 per cent, 33 per cent and 31 per cent respectively) compared with all other jurisdictions in 2008-09, while the Northern Territory regulator spent the smallest amounts (2 per cent).

200					
Regulator	Total expenditure	Administration	Enforcement	Education	Other
	\$'000	%	%	%	%
Core	14 620	91	7	21	0
Core	100 639	31	12	33	24 <b>a</b>
Mining	18 518	17	52	31	0
Core	65 166	16	43	37	4b
Core	55 460	12	69	7	12
Mining	15 800	22	78	С	0
Core	28 965	20	47	17	16
Core	18 085	10	61	7	22 <b>d</b>
Mining	8 386	nr	nr	nr	nr
Core	6 247	nr	nr	nr	nr
Core	4 979	11	76	2	11 <sup>e</sup>
Core	3 640	nr	nr	nr	nr
	Regulator Core Core Mining Core Core Mining Core Core Mining Core Core Core Core	Regulator         Total expenditure           \$'000         \$'000           Core         14 620           Core         100 639           Mining         18 518           Core         65 166           Core         55 460           Mining         15 800           Core         28 965           Core         18 085           Mining         8 386           Core         6 247           Core         4 979           Core         3 640	Regulator         Total expenditure         Administration           \$'000         \$'000         \$'000           Core         14 620         91           Core         14 620         91           Core         100 639         31           Mining         18 518         17           Core         65 166         16           Core         55 460         12           Mining         15 800         22           Core         28 965         20           Core         18 085         10           Mining         8 386         nr           Core         6 247         nr           Core         4 979         11           Core         3 640         nr	Regulator         Total expenditure         Administration         Enforcement           \$'000         %         %           Core         14 620         91         7           Core         14 620         91         7           Core         100 639         31         12           Mining         18 518         17         52           Core         65 166         16         43           Core         55 460         12         69           Mining         15 800         22         78           Core         28 965         20         47           Core         18 085         10         61           Mining         8 386         nr         nr           Core         6 247         nr         nr           Core         6 247         nr         nr           Core         4 979         11         76           Core         3 640         nr         nr	Regulator         Total expenditure         Administration         Enforcement         Education           \$'000         %         %         %           Core         14 620         91         7         21           Core         100 639         31         12         33           Mining         18 518         17         52         31           Core         65 166         16         43         37           Core         55 460         12         69         7           Mining         15 800         22         78         c           Core         28 965         20         47         17           Core         18 085         10         61         7           Mining         8 386         nr         nr         nr           Core         6 247         nr         nr         nr           Core         4 979         11         76         2           Core         3 640         nr         nr         nr

## Table 5.16 OHS expenditure components

2008-09

**nr** non response. <sup>a</sup> Other includes TestSafe (commercial safety testing) activities and other regulatory and policy activities undertaken by the organisation. <sup>b</sup> Related to areas of OHS strategy or policy. <sup>c</sup> While the Queensland mining regulator was unable to quantify its education expenditure, the Commission was informed that the regulator does organise safety conferences and information and education campaigns on a regular basis. <sup>d</sup> Includes commission, policy, division indirect costs. <sup>e</sup> Includes office-based staff involved in the provision of OHS advice and information.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

It should be noted that although the differences in education spending (as a proportion of total expenditure) is large, this may reflect the fact that the regulators use other means (during workplace visits), and less on formal education, for their 'soft' enforcement approach.

Enforcement accounts for the greatest proportion of expenditure by Queensland mining (78 per cent), followed by the Northern Territory regulator (76 per cent) and the Queensland core OHS regulator (69 per cent). The Commonwealth and New South Wales core OHS regulator spent the smallest percentages of total expenditure on enforcement compared to other regulators (7 per cent and 12 per cent respectively).

#### Penalties

Financial penalties imposed on businesses and imprisonment terms that apply to individuals within those firms act as an added deterrent for businesses considering non-compliance. The maximum penalties applicable to businesses, and imprisonment terms possible for individuals found in breach of their responsibilities under OHS Acts, are given in table 5.17.

	OHS A 2008-09	OHS Acts 2008-09										
		Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT		
Maximum penalty <sup>a</sup>	\$'000	495	1 650	1 021	750	1 200	625	180	na	1 000		
Imprisonment term	years	b	5	5	3	5	2	na	na	7		

## Table 5.17 Maximum penalties for corporations and possible imprisonment terms for individuals for breaches of core

na not applicable. <sup>a</sup> Maximum penalties for corporations. <sup>b</sup> The Commonwealth has no personal liability provisions - see chapter 7.

Source: Access Economics (2009).

Table 5.17 shows that there is significant variability across the jurisdictions in terms of penalties that can be imposed on businesses. Maximum penalty amounts for corporations range from \$180 000 (Tasmania) to \$1.65 million (New South Wales).<sup>2</sup> For those jurisdictions with maximum imprisonment terms, they varied from 2 years (Western Australia) to 7 years (in the ACT). The higher penalties increase the incentive to comply with the law and thus may increase costs for firms that would otherwise be recalcitrant, though from an efficiency perspective it would be argued that this is a good outcome.

The complexity in finding the 'optimal' penalty level is termed the 'deterrence trap' for regulators (Coffee 1981). On one hand, the size of the possible penalties should be large enough to convince recalcitrant businesses that the risks and associated cost of being caught outweigh any gains from non-compliance. That is, a regulator should have a large enough deterrent or 'big stick' to compel business compliance. On the other hand, the size of the penalty should not be so large that they could bankrupt smaller or less-resourced businesses which lack the capacity to pay. Enforcement action that is skewed towards high monetary penalties may adversely and unreasonably impact on businesses that, though non-compliant, do so involuntarily — for example, due to lack of information.

Given these difficulties, additional measures have been suggested to complement business liability. For example, Foster (2009) suggests that the prospect of criminal liability encourages officers within companies to pay greater attention to OHS issues when making company decisions. Further, Braithwaite (2002), for example, argues that individual liability measures can improve compliance for 'hard targets'

 $<sup>^2</sup>$  Under the model work health and safety provisions, the highest maximum penalty for a corporation will increase to \$3 million with an imprisonment term of 5 years (Access Economics 2009).

such as those corporations who cannot be deterred by modest maximum penalties set by regulators facing the 'deterrence trap'.

As such, all jurisdictions, except for the Commonwealth, have adopted some level of personal liability provisions to complement their enforcement tools (see chapter 7 for more detail on the provisions).

## Shut down periods

Businesses and workplaces can be shut down for a given period by regulators when their operations are considered to have imminent and high OHS risks to workers and/or the general public. For example in 2007, WorkCover NSW shut down a site working on renovations at the New South Wales State Library when asbestos was detected on the premises. The site was shut down until the risk was assessed (The Australian, 25 July 2007).

Core regulators would typically use a prohibition order (box 5.2) to direct a business to shut down its operations. However, while not instructed to do so by a regulator, a business may need to shut down in order to take the remedial actions required under any improvement notices it receives or enforceable undertakings it agrees to. Non-disturbance notices (tables 5.12 and 5.14) may also have the effect of shutting down a business for a given period. The decision of a regulator to shut down a workplace, or require remedial action that may necessitate the shut down of a workplace, would be taken in the context of each situation and the enforcement policy of the regulator.

Table 5.18 shows the frequency and duration of shut down periods by regulators. The survey responses found that only OHS mining regulators and the core OHS regulator in the ACT used shut down periods in 2008-09. It should be noted that while indications of the use of shut down periods were provided, the NSW mining regulator did not provide the duration of the shut down periods conducted, and WA mining did not provide the duration or number of shut down periods conducted in 2008-09.

	2000-0	19				
	Regulator	Used	Imposed	Shortest period	Longest period	Average period
			No.	Days	Days	Days
Cwlth	Core	×				
NSW	Core	×				
	Mining	$\checkmark$	117	nr	nr	nr
Vic	Core	×				
Qld	Core	×				
	Mining	$\checkmark$	63	1	4	1
SA	Core	×				
WA	Core	×				
	Mining	$\checkmark$	nr	nr	nr	nr
Tas	Core	×				
NT	Core	×				
ACT	Core	$\checkmark$	2	1	3	2

## Table 5.18 Shut down periods

2008-09

nr non response.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

## **Recognising private systems**

'Responsive regulation' suggests that regulators should be responsive to different industry structures and the self regulation of businesses. Some large corporations have their own risk management system and OHS standards in place which can be above the minimum requirements of the law. If a regulator does not take this into account, the business may have to perform additional compliance activities in order to satisfy the regulator's requirements without contributing to achieving a safer workplace. In this case, an unnecessary compliance burden would be created by the regulator's actions.

In order to gain an understanding of whether regulators take a responsive regulatory approach, they were asked whether or not they recognised private OHS systems when assessing compliance, where possible, in place of standard OHS reporting. With the exceptions of the Commonwealth, Victorian and Northern Territory core regulators and the Queensland and Western Australian mining regulators, no OHS regulators surveyed indicated that they recognised private OHS systems. As such, businesses in these jurisdictions with their own good internal OHS systems are likely to face lower compliance burdens than equivalent businesses in other jurisdictions or regulated elsewhere.

## Ensuring a uniform approach to enforcement

The uniform interpretation of OHS regulation is important as it provides a consistent message to businesses over what actions they need to take to ensure their compliance with OHS regulation. As such, measures taken to ensure the consistent interpretation of OHS regulation can directly reduce business compliance costs as additional or incorrect compliance actions are avoided.

	2000-	09					
	Regulator	Supervisory oversight	Structured training	Staff rotation	Secondment	Peer review	Other
Cwlth	Core	$\checkmark$	✓	✓		✓	
NSW	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
	Mining	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	√a
Vic	Core	$\checkmark$	$\checkmark$		$\checkmark$	$\checkmark$	√b
Qld	Core	$\checkmark$	$\checkmark$			$\checkmark$	
	Mining	$\checkmark$	$\checkmark$				√C
SA	Core	$\checkmark$	$\checkmark$			$\checkmark$	√d
WA	Core	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	√e
	Mining	$\checkmark$	$\checkmark$	$\checkmark$		$\checkmark$	√f
Tas	Core	$\checkmark$	$\checkmark$	$\checkmark$			
NT	Core	$\checkmark$	$\checkmark$			$\checkmark$	
ACT	Core	$\checkmark$	$\checkmark$			$\checkmark$	

## Table 5.19Uniform interpretation of regulation2008-09

<sup>a</sup> Relates to training to standardise reporting. <sup>b</sup> Communication of learning through newsletters or "team talk kits"; reference material in guidance sections of relevant operational procedures. <sup>c</sup> Planning meetings prior to all inspections and audits are used to ensure that inspectors have a thorough and common understanding of the regulations and the manner in which they will be enforced. <sup>d</sup> Staff work under the Principles of Operation which details the appropriate actions depending on the given situation. There is also an Investigation Manual which details standard operation principles to ensure uniform actions by inspectors. <sup>e</sup> WorkSafe uses Priority Inspection Reports (PIRs) to achieve consistent inspection outcomes for hazards identified as a priority, including mobile plant; traffic management; manual handling (particularly lifting); electricity and working at heights. <sup>f</sup> Regular Mine Safety Branch and Section meetings, quarterly management meetings, publication and distribution of Safety Incident Reports, creation of a Divisional Enforcement and Prosecution Policy.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

In some respects, having one core OHS regulator responsible for all (or at least most) industries aids the development of a consistent approach to enforcement. However, as businesses commonly reported, it is often differences in the knowledge, experience and approach of the individual inspector which has the greatest impact on the enforcement approach adopted at any given worksite. In order to get a more uniform approach to enforcement, OHS regulators undertake a number of activities (table 5.19).

Among both the core and mining OHS regulators, the Queensland mining regulator undertook relatively few activities to ensure uniformity in the interpretation of regulation.

Another important aspect of reducing compliance burdens associated with an inconsistent approach to the enforcement of OHS regulations, is whether or not regulators work with other agencies to ensure consistency (table 5.20). All regulators liaise in some form with other agencies in order to gain greater consistency in the enforcement and interpretation of OHS laws. For example in Queensland, a Health and Safety Regulators Council has been established and includes membership from the Department of Employment and Industrial Relations, Department of Mines and Energy and Department of Premier and Cabinet and other relevant agencies that address health and safety matters. The aim of the collaboration is to ensure, where possible, the consistency of OHS regulatory approaches, including the enforcement and administration of regulations, as well as identifying key issues and areas of reform.

	Regulator	Regulatory overlap	Regulatory gaps	Enforcement consistency	Policy interpretations	Other
Cwlth	Core	$\checkmark$	$\checkmark$	√	✓	
NSW	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
	Mining	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	√a
Vic	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
Qld	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
	Mining	$\checkmark$		$\checkmark$	$\checkmark$	
SA	Core					√b
WA	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
	Mining	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	√C
Tas	Core	$\checkmark$		$\checkmark$		
NT	Core	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	
ACT	Core	$\checkmark$	$\checkmark$	$\checkmark$		√d

## Table 5.20Liaison with other agencies

2008-09

<sup>a</sup> Refers to activities relating to certificates of competency, standards and guidelines. <sup>b</sup> Refers to issues related to audits, legislative reform and guidance material. <sup>c</sup> Relates to activities to consult with sister statebased agencies, Comcare and WorkSafe WA. <sup>d</sup> Licence currency, dangerous substances responsibilities.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Despite this, there are some differences in the level of such cooperation. While the mining regulators in New South Wales and Western Australia liaised with other agencies on the widest range of issues, South Australia and Tasmania liaised on the fewest issues concerning the consistency of the OHS regulatory framework than other regulators.

There is also regular and established collaboration between OHS regulators through HWSA. HWSA is a body which comprises the General Managers and senior executives of the Australian OHS regulators (as well as those from New Zealand) which promotes uniformity in OHS enforcement, as well as in other issues. For example, in a meeting in Sydney on 14 October 2009:

HWSA discussed licensing arrangements for asbestos removalists and training for removalists and auditors, with a view of developing a national approach as part of the harmonisation process. (HWSA 2009, p. 1)

By cooperating and coordinating through a range of networks and working groups, such as the HWSA Small Business Network and the HWSA Construction Implementation Group, HWSA aims to progress the harmonisation, consistency and best practice of OHS regulation and its administration across the jurisdictions.

## 5.6 Encouraging business compliance

Regulations in isolation cannot ensure good safety outcomes and punishment by regulators would not result in improved business practices if, among other factors, businesses do not know about what is required and are not encouraged to, and assisted to, comply with their obligations.

According to a survey of 1800 small and medium business enterprises (SMEs) in 2004, the regulator or state government was generally identified as the main source of OHS information (Sensis 2004). For the SMEs in manufacturing, for example, 32 per cent identified state governments as their main source of OHS information.

Therefore, an important role of a regulator, and a component of their enforcement strategy, is to encourage and support business compliance through the dissemination of OHS information, incentives and other forms of support.

## The compliance decision

When businesses face the requirements of OHS regulations, they face a compliance decision. Originally designed in the context of food regulation, Henson and Heasman (1998) developed a 'compliance process model' that conceptualised this decision process and can be generalised to capture the process for any business facing regulation, including OHS regulation (figure 5.3).

The process can be divided into two distinct phases — stages before, and stages after, the compliance decision. For both phases, the provision of information to businesses is an important element in influencing the decision process. Prior to the

compliance decision, businesses need to be able to identify and interpret the regulation. In other words, businesses need to be aware of and understand their OHS obligations and requirements in order to actually comply with regulations. Following this, informed businesses need to decide whether they will comply with the regulation.

In the second phase, and assuming that businesses choose to comply with the regulation, the method of compliance and implementation of steps to promote safety in the workplace need to be communicated to businesses.



Figure 5.3 The compliance decision process

Source: Adapted from Henson and Heasman (1998).

OHS regulators can adopt a number of strategies to encourage business compliance during these two phases, such as:

- using various modes of communication
- providing measures to encourage compliance
- conducting education campaigns and workshops

• providing special assistance.

## Modes of communication

There are various modes of communication available between a regulator and employer (table 5.21). The more channels available, the easier it is for businesses to request information and clarify OHS issues. For example, an employer may want to contact the regulator about information on obtaining or renewing a particular licence. If a regulator is able to be contacted through telephone, email, fax and other means, information will be more efficiently delivered and the compliance burden on business would be less than on an employer who can only contact the regulator in person.

	2008-05	2000-09										
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT			
Online form	✓	✓		$\checkmark$								
Email	$\checkmark$											
Phone	$\checkmark$											
Fax	$\checkmark$											
In writing	$\checkmark$											
In person	$\checkmark$											

Table 5.21Methods to lodge enquiries — core OHS regulators2008-09

Source: Regulator websites.

In general, all regulators have the same standard modes of communication available to businesses. The only difference is in the availability of an online form for enquiries. The New South Wales, Queensland and the Commonwealth regulators have this communication option available on their websites.

## Measures to encourage a culture of compliance

Regulators can adopt various measures to encourage and influence the culture of compliance among businesses, such as providing information and training, conducting education activities, and offering incentives to comply with regulatory requirements. Table 5.22 shows the use and frequency of a range of measures to encourage business compliance.

While most jurisdictions regularly make use of information campaigns and education, some jurisdictions, such as the Commonwealth, New South Wales and Victoria, take an even more proactive approach by also offering a range of incentives for businesses to comply with regulations (such as reduced rates of inspections and positive advertising). The Northern Territory adopted the least number of tools to encourage compliance. It should also be noted that many regulators would not be in a position to influence workers' compensation premiums given that this lies outside their regulatory responsibilities and, thus, no inferences can be drawn from comparisons on that particular option (table 5.22).

Mining-specific OHS regulators also adopted a range of tools to encourage compliance (table 5.23). The mining OHS regulator in New South Wales uses a greater range of strategies compared to the Queensland and Western Australian mining OHS regulators.

	2008-09								
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Information campaigns	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Seldom	Regular
Education activities	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular
Industry awards	Regular	Regular	Regular	Regular	Regular	Regular	Seldom	No	Regular
Incentives	Regular	Regular	Regular	No	No	No	Seldom	No	No
Reduced workers' comp premiums	No	No	Regular	No	No	No	Yes	No	No
Free OHS training	Regular	Regular	No	Regular	Regular	Regular	Regular	No	Regular
Fee-based OHS training	Regular	No	No	No	No	No	No	No	No
Confidential compliance advice	Regular	Regular	Regular	No	No	Regular	No	No	No
Other		Yes <sup>k</sup>	Yes	•					

Table 5.22	Encouraging a culture of compliance — core OHS
	regulators

<sup>a</sup> Open insurance market means market will determine but insurers are required to take OHS performance into account when setting premiums. <sup>b</sup> Small Business safety enquiries at counter, phone, hotline, email, Safe Business website. <sup>c</sup> Other measures used include advertising campaigns, compliance codes, inspector visits.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

# Table 5.23Encouraging a culture of compliance — mining OHS<br/>regulators — mining OHS regulators

2008-09

	NSW	Qld	WA
Information campaigns	Regular	Regular	Regular
Education activities	Regular	Regular	Regular
Industry awards	Regular	Regular	No
Incentives	Regular	No	No
Reduced workers' comp premiums	No	No	No
Free OHS training	Regular	Regular	Regular
Fee-based OHS training	Regular	No	Seldom
Confidential compliance advice	Regular	Yes	Regular
Other	Yesa	Yesb	No

<sup>a</sup> The NSW Mine Safety Advisory Council, which is a multilateral partnership between employer, regulatory and employee groups in the NSW mining and extractives industry that provides a forum for direct feedback from businesses. <sup>b</sup> Notices to appear before an Inspector or Chief Inspector and the Commissioner for Mine Safety and Health.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

## Education workshops and campaigns

Regulators provide education activities such as workshops and awareness campaigns in order to better inform both employers and employees about their obligations and rights in the workplace. These initiatives can be conducted through different media such as television or print, or during face-to-face consultations. They can also be general in nature or targeted at specific groups or OHS issues. Educating businesses and informing them of their responsibilities and regulatory requirements, as well as changes in regulation, can contribute to greater compliance and potentially better outcomes in the workplace. Some examples of OHS awareness campaigns are outlined in box 5.3.

Further, by investing in more persuasive and preventative enforcement options such as education activities, a regulator may also reduce the likelihood of pursuing more costly punishment options such as lengthy investigations and prosecutions in the future (Ayers and Braithwaite 1992).

Many of these education activities also require face to face contact with businesses and this interaction with a regulator can be an important determinant of compliance, in particular for employers who may need additional assistance.

## Box 5.3 Examples of OHS awareness campaigns

#### WorkSafe WA 'Come Home Safe' September 2007

A six week mass-media campaign, including television and radio coverage, posters, information brochures and other promotional items. The aim of the campaign was to increase safety awareness at work by focusing on families waiting for their loved ones to come home.

#### SafeWork SA 'Look After Your Mate' September 2007 — June 2008

A mass media campaign including television, radio and press, billboard signage and other advertising. The aim of the campaign was to promote safety in the workplace, with a focus on blue collar workers, young workers and priority industries. Also, to increase awareness of SafeWork SA as a focal point for OHS information and assistance

#### *WorkCover ACT 'Workplace injury — it can hurt you in more ways than you realise' November 2007*

A series of television and radio advertisements. The aim of the campaign was to increase understanding of the consequences of workplace injuries. The campaign drew on an emotional response by graphically highlighting the effects on families. The campaign focused on potential hazards associated with forklifts, scaffolding and manual tasks.

#### Comcare 'Safety for Cadets' — April 2009 (ongoing)

The Safety for Cadets initiative covers all cadets — Navy, Air Force and Army — following the death of an army cadet and other incidences involving cadets. Comcare works in collaboration with Defence to raise awareness of the safety requirements, risk management and duty of care obligations for both employers and the cadets themselves. A communications program was launched as well as the distribution of safety bulletins to Defence personnel and cadet schools.

## Special assistance

There are types of businesses that require additional assistance in order to comply with OHS regulation. In particular, small businesses with limited resources, those employers from a non-English speaking background and those who are remote from information sources often are unaware of their OHS requirements, increasing the incidence of involuntary non-compliance. To overcome this, regulators may provide special assistance to some of these groups (tables 5.24 and 5.25). All regulators do so with the exception of the ACT.

2000 00									
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Assistance for small business	na	√	~	✓	$\checkmark$	$\checkmark$	✓	×	×
Online		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		
Workshops		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$		
Campaigns		$\checkmark$	$\checkmark$	$\checkmark$	ns	ns	✓		
Assistance for non- English background employers	na	✓	✓	✓	✓	✓	×	✓	×
Interpreter/translation services		~	✓	√	√	ns		ns	
Assistance for non- metropolitan businesses	✓	✓	√	√	√	✓	√	✓	×
Campaign	ns	$\checkmark$	$\checkmark$	ns	$\checkmark$	ns	ns	$\checkmark$	
Workshops	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	ns	ns	

## Table 5.24Special assistance for businesses — core OHS regulators2008-09

**na** not applicable. **ns** not specified in survey response and the Commission were unable to identify on regulator website.

Sources: Productivity Commission survey of OHS regulators (2009 unpublished); regulator websites.

# Table 5.25Special assistance for businesses — mining OHS<br/>regulators

2008-09

	NSW	Qld	WA
Assistance for small business	$\checkmark$	✓	✓
Online	$\checkmark$	ns	ns
Workshops	ns	$\checkmark$	ns
Campaigns	$\checkmark$	ns	ns
Assistance for non-English background employers	✓	×	×
Interpreter services	✓		
Assistance for non-metropolitan businesses	$\checkmark$	$\checkmark$	✓
Campaign	$\checkmark$	$\checkmark$	ns
Workshops	ns	$\checkmark$	ns

**ns** not specified in survey response and the Commission were unable to identify on regulator website. *Sources*: Productivity Commission survey of OHS regulators (2009 unpublished); regulator websites.

#### Small Business

Australia has a significant small business community. According to the Australian Bureau of Statistics (ABS), there were 1.23 million private sector small businesses (those with less than 20 employees) in Australia during 2000-01 (ABS 2002).

Ensuring that small business operators follow OHS laws and support a safe working environment is a particularly important objective as they also employ almost half of Australia's workforce (ABS 2002).

However, because they have fewer resources than larger firms, small businesses have less capability to comply with regulations. Currie and Wilson (2001) suggest that there is a general lack of awareness of OHS obligations for small businesses and that awareness is an important factor influencing compliance. This was also reflected in the submissions from business groups such as ACCI (sub. 6) and the Chamber of Commerce and Industry WA (sub. 7).

Fairman and Yapp (2005a) argue that small businesses require special assistance from regulators. In particular, small businesses need regular contact with the regulator about relevant compliance issues, rather than simply additional general information. This was also emphasised by Master Builders Australia (sub. 1) in their submission to this study. According to a survey of SMEs, face to face interaction was the most preferred method to access OHS and workers' compensation information (Sensis 2004).

Regulators can target small businesses by conducting workshops and programs that cater to their needs (see examples in box 5.4). The results from the survey (table 5.24 and table 5.25) show that all core and mining OHS regulators, with the exception of the ACT and the Northern Territory, provide targeted special assistance to small businesses.

According to the ABS, about 29 per cent of small business operators in Australia were born overseas (ABS 2008). Of those, employers from non-English speaking backgrounds could be at a greater disadvantage in understanding OHS requirements and thus increase their likelihood of involuntary non-compliance.

Similarly, non-metropolitan businesses also face a barrier to OHS information because of their remote locations. The Council of Small Business of Australia (COSBOA) statistics show that approximately 35 per cent of Australia's businesses operate in non-metropolitan areas (COSBOA 2009).

## Box 5.4 **OHS assistance for small businesses**

WorkSafe WA — ThinkSafe Small Business program

- Delivers free OHS advice through an independent consultation to small businesses.
- In 2007-08, a three hour consultation was delivered to 525 small businesses.

WorkSafe Victoria — Small Business Safety Assistance Program

- Offers employers with less than 50 employees a free three-hour consultancy at their workplace with an independent health and safety consultant.
- Since the program commenced, around 10,140 consultancies have been delivered.

Workplace Health and Safety Queensland — Small Business Program

- Available to Queensland businesses with less than 20 workers which involves free workplace consultations of up to three hours by Small Business advisors. Priority is given to high risk industries such as manufacturing, transport and storage.
- In 2007-08, 773 one-on-one workplace consultations were conducted.

WorkCover Tasmania — WorkCover Advisory Service

• Provides support to small businesses, including workplace visits, educational forums and presentations.

*Sources*: Department of Consumer and Employment Protection (2008); WorkSafe Victoria (2008); DEIR (2008); WorkCover Tasmania (2009a).

Regulators can target these employers by providing avenues of additional language assistance through website translation options or non-English language phone assistance. Moreover, regulators can target more remote businesses by conducting workshops in non-metropolitan areas (box 5.5).

Most regulators (excluding the ACT and Tasmanian core regulators, and the Queensland and Western Australian mining regulators), offer language assistance to non-English speakers, and all regulators, with the exception of the ACT, provide some sort of assistance to non-metropolitan businesses (table 5.24 and table 5.25).

### Box 5.5 **OHS assistance for non-English speakers and non**metropolitan businesses

#### WorkSafe Victoria 'Safer Work Zones/Towns' 2008-09

This campaign aimed to promote workplace safety in Melbourne and regional Victoria, with a focus on a particular metropolitan area or regional town and small businesses that traditionally have limited exposure to inspectors. Sixteen campaigns were run across Victoria which provided information to employers about work safety for around 2000 businesses.

#### WorkCover NSW

WorkCover NSW regularly target OHS forums and presentations to Chinese businesses and wider community. This includes the use of interpreters, translators, and ethnic press. A number of smaller and targeted projects for culturally and linguistically diverse (CALD) industries such as the nail, meat, cleaning and construction industry are also held. WorkCover also runs a Community Language Allowance scheme which provides verbal and written interpreter services by CALD inspectors.

#### SafeWork SA

Employers and employees can use the Interpreting and Translating Centre (ITC) to speak with SafeWork SA in languages other than English. The (ITC) provides comprehensive, confidential and professional interpreting and translating services and has developed linguistic and technical expertise in approximately 112 languages and dialects. In 2006/2007, the ITC provided services to over 50,000 clients from a wide range of cultural and linguistic backgrounds.

*Sources*: WorkSafe Victoria (2009a); Productivity Commission survey of OHS regulators (2009 unpublished).

## 6 Accountability of regulators

## Key points

- All jurisdictions allow for reviews and appeals of core OHS inspectorate and regulator decisions internally and/or externally. However, there are some differences:
  - South Australia has no internal review mechanism for notices, only external all other jurisdictions provide an 'arm's length' internal review process
  - New South Wales does not provide for appeals to a higher court against prosecutions undertaken in its Industrial Court
  - the Northern Territory has an external appeals process only for its licensing decisions — the Local Court.
- There are differences in the transparency of core OHS regulators:
  - the Commonwealth, New South Wales and Tasmanian regulators do not provide information on appeal mechanisms, such as how to initiate an appeal, on dedicated web pages on their websites
  - only regulators in the Commonwealth, New South Wales and Victoria publish stand alone annual reports.
- Most jurisdictions conduct feedback surveys and publish this information in some form, the exceptions being Tasmania which does not do either and the Northern Territory which does not publish the results.
- Written notices are used by all jurisdictions to inform businesses of OHS breaches and/or remedies. Despite this, the information contained on these forms differs:
  - the Commonwealth provides the least amount of information no information on the reason for the breach or appeal/review provisions are contained on the notices
  - in Queensland, the prohibition and infringement notice provides no instruction or guidance on how to improve the observed practice that resulted in the notice.
- The mining regulators in New South Wales, Queensland and Western Australia have similar levels of transparency and accountability with some exceptions, for example, the mining regulator in New South Wales provides more information on its written notices than the mining regulators in Queensland and Western Australia.

The transparency and accountability of regulators is important not only to provide clarity around the way particular laws are enforced and how effective this is, but also to ensure businesses do not feel that enforcement decisions are arbitrary and without recourse. Where administrators have incorrectly penalised a business, appeal mechanisms increase the likelihood that businesses can avoid costs that should not be imposed on them.

In this chapter, indicators of the transparency and accountability of core and mining-specific occupational health and safety (OHS) regulators are presented. In section 6.1, the appeal provisions available to dispute core OHS inspectorate decisions and prosecutions are presented. Section 6.2 examines measures of transparency and accountability of core OHS regulators through what information they publish on their website, while section 6.3 examines core OHS regulators' approaches to providing and seeking feedback. Data used to construct indicators for core OHS regulators was collected from the Commission's survey of OHS regulators (see appendix B) and from that collected during desk-based research. Transparency and accountability indicators for mining-specific regulators are presented in section 6.4 making use of the Commission's survey of OHS regulators.

## 6.1 Appeal provisions — core OHS regulators

## Appeals against inspectorate decisions

When regulators take enforcement actions against businesses they deem to be in breach of OHS legislation, they are making a judgement based on the evidence that they have. However, these judgements are not infallible and may be based on the inadequate information they have access to at this stage. Because of this, there must be adequate review processes to help ensure fair decisions are made. The Regulation Taskforce (2006) considered appeal processes as an important indicator of good regulator performance, particularly given the nature of the decisions they have to make:

Errors are inevitable. Indeed this should be *anticipated* in regulatory design, so that regulators are not obliged to over-reach their capabilities. The likelihood that errors will be made means there needs to be adequate appeal and review mechanisms, both to avoid or rectify adverse consequences for regulated entities and provide discipline on regulators to make sound decisions. (Regulation Taskforce, 2006. p.162)

If a business receives a notice of improvement, notice of prohibition or other breach notices from inspectors because of an apparent contravention of OHS legislation, processes should be available for them to appeal against these decisions. This includes an internal review with the regulator and, if unsatisfied with the verdict, a business can pursue further appeals through external processes. The appeals processes available to businesses in regard to inspectorate decisions are detailed in table 6.1. All jurisdictions, except South Australia, have internal appeal processes available for businesses. The timeframe to appeal against decisions ranges between 7 days in New South Wales to 14 days in Victoria, Queensland, Tasmania and the Northern Territory. As a business may need time to prepare their case, a more limited timeframe could impact on their decision to pursue an appeal. In South Australia, only external appeals are available.

	2008-09								
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Internal	✓	~	✓	✓	×	$\checkmark$	$\checkmark$	✓	√
Arms length	$\checkmark$	$\checkmark$	$\checkmark$	~		$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$
Timeframe (days to lodge)	ns	<sub>7</sub> a	14	14		ns	14	14	ns
Fee	\$0	\$0	\$0	\$0		\$0	\$0	\$0	\$0
External	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$
Timeframe (days to lodge)	ns	ns	ns	30	14	ns	ns	21	ns
Number (total)	1	49	1 125 <b>b</b>	109	nr	918 <b>b</b>	2	8	ns
Success rate	0%	39%	87% <sup>c</sup>	42%	nr	2.2%	0%	100% <b>d</b>	nr

# Table 6.1Appeals processes for inspectorate decisions — core OHS<br/>regulators

**nr** non response. **ns** not specified in the survey response. <sup>a</sup> 28 days is allowed for forfeiture notices. <sup>b</sup> Figure includes requests for a review of notices of which the majority are for an extension of time. <sup>c</sup> 90 per cent of the successful appeals were related to time extensions. <sup>d</sup> All appeals were for an extension of time.

Source: OHS Acts; Productivity Commission survey of OHS regulators (2009 unpublished).

Despite common elements in the appeals processes, some differences exist across the jurisdictions.

- For the Commonwealth, an internal appeal can be made to a senior manager, with an external appeal possible to the Australian Industrial Relations Commission.
- In New South Wales, internal appeals of inspector notices can be made in writing to WorkCover NSW's Audit Management and Operational Governance Team, and then on to the Local Court for selected notices (improvement, prohibition, investigation, penalty and forfeiture notices) for external appeal.

- In Victoria, for certain notices a business can apply for an internal review and, if unsatisfied, an external review is possible through the Victorian Civil and Administrative Tribunal for a fee of \$300.
- In Queensland, a client can appeal an inspector's decision to Workplace Health and Safety Queensland for review. An external appeal is also possible to the Queensland Industrial Commission.
- In South Australia, an application can be made to the President of the Industrial Court to have prohibition and improvement notices reviewed by a review committee.
- In Western Australia, an application for internal review can be made to the WorkSafe Commissioner. External reviews can then be sought from the Occupational Health and Safety Tribunal.
- In Tasmania, internal appeals can be made on improvement and prohibition notices in the first instance to the Secretary of the Department of Justice, and then for external appeal to the administrative appeals division of the Magistrates Court. No appeals are possible against infringement notices; instead, a business can choose not to accept the notice and try to resolve the matter when it is taken to formal prosecution.
- In the Northern Territory, an application for internal review can be made in writing to NT WorkSafe, with an external appeal possible to the Work Health Court.
- In the ACT, an internal appeal can be made to the Executive Director of ACT WorkCover. If unsatisfied, a business can appeal a decision to the ACT Civil and Administrative Decisions Tribunal, for a fee of \$255, prior to any court action being undertaken.

Overall, appealing against inspectorate decisions is likely to be most burdensome in South Australia as no internal review is possible. As the external provisions in Victoria and Western Australia avoid the court system, these jurisdictions are likely to impose the lowest burdens on businesses in terms of appealing against inspectorate decisions.

## Appeals against court decisions

For some breaches of the OHS Acts, regulators will seek to punish the offending business through legal action. Prosecutions are used for the more serious breaches, and is a component of the enforcement pyramid (see chapter 5).

Overall, New South Wales had the largest number of prosecutions in 2008-09. Despite this, the number of cases, and those appealed, was only small relative to the total number of businesses regulated (well below 1 per cent). On a percentage of worksites basis, while rates were low for all jurisdictions, the Commonwealth had the highest rate of prosecutions, followed by Victoria, Queensland and South Australia.

The process to appeal against prosecutions differs across the jurisdictions (table 6.2). While all jurisdictions have provisions for appeals, and generally make use of the court system and its appeal provisions, in some states these differ. In New South Wales, while appeals are possible, they are not made to a higher court — matters are initially heard by a judge sitting alone in the Industrial Court of New South Wales and appeals are made to its full bench (matters of law, however, can be appealed to the High Court). The limitation on appeals to higher courts than the Industrial Court occurs via the *Industrial Relations Act* 1996 (NSW) which prohibits an appeal against a review, the quashing or calling into question of a 'decision' of the Industrial Court.

20	2000-03										
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT		
Available	$\checkmark$	✓	$\checkmark$	✓	✓	~	✓	$\checkmark$	~		
Higher court	$\checkmark$	×	$\checkmark$								
Number of prosecutions	3	209	119	146	63	37	30	5	2		
Number of prosecutions per worksite (%)	0.08	0.03	0.05	0.04	0.04	0.02	nr	na	nr		
Number appealed	0	5	3	5	2	1	2	0	1		
Number appeals successful	0	1	2	1	1	1	0	0	0		
Number appeals ongoing	0	3	1	0	1	0	0	0	1		

Table 6.2Appeals against court decisions — core OHS regulators2008-09

na not available. nr non response.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

A recent decision by the High Court (*Kirk v WorkCover NSW (and Ors)*) has brought into question the limiting of appeals in New South Wales to the Industrial Court. The High Court held in this case:

... that "decision" does not include a purported decision made outside the limits of the powers of the Industrial Court. Furthermore, Chapter III of the Constitution requires there to be a body in each state fitting the description "the Supreme Court of a State". A

necessary feature of a Supreme Court, which it is beyond the power of a State legislature to take away, is the ability to grant relief on account of jurisdictional errors made by courts and tribunals of limited jurisdiction. Thus s 179 could not prevent the Court of Appeal, nor the High Court on appeal, from quashing the convictions and sentences ... (High Court Of Australia 2010, p. 2)

Further, the High Court held that any statement of an offence arising from a breach of an employer's duty had to identify both the risk and what measure the employer could have taken to address the risk irrespective of the reverse onus of proof arrangements that exist in New South Wales (High Court of Australia 2010). Previously, WorkCover NSW pursued prosecutions after an incident had occurred where the statement of offence was only that an employer had not ensured the health, safety and welfare at work of all the employer's employees. The High Court held that such an approach made it impossible for a defendant to establish whether or not they had done all that was reasonably practicable to prevent the incident and therefore whether or not they had breached their OHS obligations. As a result of this decision, the cost to employers defending future alleged breaches of the New South Wales OHS Act is likely to be lower as they will now know what measure they should have done to prevent the incident from occurring and thus mount a defence more easily.

## Appeals against licensing decisions

All jurisdictions provide the opportunity to appeal against licensing decisions made by OHS regulators (table 6.3). (The Commonwealth does not have licences of its own and instead recognises those issued by the states and territories.)

In jurisdictions, the availability of both internal and external appeal provisions varies:

- in New South Wales, Victoria, Queensland and Tasmania, both internal and external provisions are available
- in South Australia, the appeal process is either internal (for certificates of competency) or external (Dangerous Substance Driver, Explosives, Fireworks and Ammonium Nitrate licensing decisions)
- in Western Australia, only internal appeal provisions are available
- in the Northern Territory, only external appeal provisions are available.

	2008-09	
	Appeal available	Details
Cwlth	а	na
NSW	✓	An internal review can be requested, and if the appellant remains unsatisfied, they can request a review by the NSW Administrative Decisions Tribunal.
Vic	~	A two-step internal review is available whereby initially WorkSafe considers submissions and makes its decision. If applicants remain unsatisfied, they may then appeal to the Authority's Internal Review Unit for process review of the decision. External review to the Victorian Civil and Administrative Tribunal (after exhausting the internal processes) is then possible.
Qld	✓	An application for review of a decision can be made to the Director of Licensing Services as delegate of Chief Executive. Appeal to Industrial Court of Queensland is also available.
SA	~	Dangerous Substance Driver, Explosives, Fireworks and Ammonium Nitrate licensing decisions can be appealed to District Court. Certificate of Competency decisions can be reviewed internally.
WA	$\checkmark$	An internal review conducted by the WorkSafe Western Australia Commissioner can be requested.
Tas	✓	An internal appeal can be made within 14 days to the Secretary. An external appeal to the Administrative Appeals Division of the Magistrates Court is also possible if an appellant is unsatisfied with the outcome of the internal appeal.
NT	$\checkmark$	An appeal can be made to the Local Court within 28 days of the decision.
ACT	~	Same provisions as to which apply for inspectorate decisions — internal review followed by appeals to the ACT Civil and Administrative Decisions Tribunal.

# Table 6.3Appeal processes for licensing decisions — core OHS<br/>regulators

**na** not applicable. <sup>a</sup> As discussed further in chapter 12, the Commonwealth does not issue its own licences and instead recognises those issued in the states and territories.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

In terms of licensing decisions, the Northern Territory has the least flexible approach as it only allows for external appeals through the court system.

## 6.2 Transparency

The transparency of a regulatory system encompasses many facets (Argy and Johnson 2003). This section focuses on how regulators perform in terms of communicating, applying and enforcing their regulations. As noted by the Organisation for Economic Cooperation and Development (OECD), transparency can improve the administrative decisions made by regulators:

Transparency ... helps reduce the incidence and impact of arbitrary decisions in regulatory implementation. (OECD 2002, p. 66)

Given the importance of transparency in achieving good administrative outcomes, it is useful to benchmark some of the characteristics of OHS regulators that enhance their transparency. Useful characteristics include:

- publication of enforcement activities
- publication of enforcement outcomes (such as case details of ongoing and past prosecutions)
- publication of budgets
- publication of the appeals process and how applications for review can be lodged.

The transparency of OHS regulators was examined by assessing what information is available on their websites in relation to the characteristics above. The transparency of OHS regulators varies. While most report their enforcement activities by type of enforcement measure (the ACT only reports the number of investigations in the Office of Regulatory Services annual report of which ACT WorkCover is a part), the approach to publication of enforcement outcomes and the appeals process is less consistent (table 6.4).

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Enforcement activities <sup>a</sup>	✓	✓	✓	$\checkmark$	✓	✓	$\checkmark$	✓	×
Enforcement outcomes	$\checkmark$	×	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	×	$\checkmark$
Budgets	$\checkmark$	$\checkmark$	$\checkmark$	×	×	×	$\checkmark$	×	×
Appeals processes	×	×	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	$\checkmark$
Details provided about method to submit an appeal/enquiry:									
Online	×	×	×	$\checkmark$	×	×	×	×	×
Phone	×	×	×	$\checkmark$	×	×	×	×	×
In writing	×	×	$\checkmark$	$\checkmark$	×	×	×	$\checkmark$	$\checkmark$
In person	×	×	×	$\checkmark$	×	×	×	×	×

## Table 6.4 Information available from core OHS regulators

As at May 2009 based on information published online

<sup>a</sup> Enforcement activities are typically published with annual reports.

Source: Regulator websites.

In relation to the publication online of the appeals process for inspector decisions/notices:

• the Commonwealth and New South Wales provide no information on appeal/review provisions outside what is contained within the regulations themselves, such as how to initiate an appeal

- Victoria and Queensland provide the most comprehensive guidance on what to do to appeal an inspector's decision on dedicated pages on their website. The Northern Territory also provides clear guidance in the form of an information bulletin
- South Australia states that an appeal can be lodged with the President of the Industrial Court but provides no guidance on how to do this or further contact information
- Western Australia states that work safety notices can be appealed to the WorkSafe Commissioner or WorkSafe itself but provides no further details/guidance on how this is to be done
- Tasmania does not mention any information about appealing an inspector's decision or having it reviewed. Their website does state that complaints can be made in writing which may inturn lead to an internal review of procedures
- the ACT mentions an appeals process only in relation to infringement notices.

Overall, Tasmania provides the least amount of information on their website, with Victoria and Queensland providing the most.

## Published information

Interlinked with transparency is the amount of information published by a regulator about their activities. The Regulation Taskforce (2006) identified this as a significant issue for business. The Taskforce suggested that in addition to legislation providing clear guidance to regulators about policy objectives, regulators should develop indicators which would allow stakeholders to evaluate their performance against these policy objectives.

By having regulators publish relevant information about their activities, greater pressure would be placed on regulators to ensure they followed best practice, thus increasing the likelihood that compliance burdens placed on business for a given set of policy objectives were minimised.

In examining the OHS regulators, the following indicators can be used to test whether best practice approaches to transparency are being followed:

- publication of enforcement policies (that is, the 'statement of intent')
- publication of annual reports which contain information on:
  - the regulator's contribution to relevant policy objectives

- indicators of performance against policy objectives (such as reporting workplace injury and disease rates)
- efforts to lessen the compliance burden on business
- indicators of their compliance with their enforcement policies
- consultation policies and consultations.

## Enforcement policies

The regulators in all jurisdictions have developed and published on their websites enforcement policies (table 6.5). Of these, Victoria's is the most detailed and spans 44 pages, with Western Australia's being the shortest at only 1 page. Victoria has also produced a summary document which is 4 pages in length and Western Australia has a separate prosecution policy which is 16 pages in length.

As at May 2009											
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT		
Enforcement policy published in stand alone document	<b>v</b>	•	•	<b>v</b>	•	×	•	√a	<b>√</b>		
Available on website	V	V	v	V	v	V	V	V	V		
Number of pages	26	31	44	8	11	1(16) <sup>b</sup>	16	13	6		
Year of publication	2005	2004	2005	2005 <b>c</b>	2007	2006	2009	2008	2004		

Table 6.5	Enforcement policy statements — core OHS regulators
	As at May 2009

<sup>a</sup> The Northern Territory has adopted the *National Occupational Health & Safety (OHS) Compliance and Enforcement Policy.* <sup>b</sup> While Western Australia does not have a stand alone enforcement strategy published, it does have a separate stand alone prosecution policy of 16 pages in length. <sup>c</sup> In July 2009, Queensland released a new compliance and enforcement policy which is 16 pages in length and published as a stand alone document. It is also available on Workplace Health and Safety Queensland's website. *Source*: Regulator websites.

#### Information contained in annual reports

Only regulators in the Commonwealth, New South Wales and Victoria published stand alone annual reports. Despite this, the information contained within the annual reports of the regulators, or their administering department, was reasonably consistent (table 6.6). The greatest area of difference was in the published details of efforts to reduce the compliance burdens on businesses. Only the Commonwealth and Victoria have developed indicators on business compliance costs and reported details on efforts to reduce these costs (it should be noted that most jurisdictions

reported that the move towards national harmonisation would reduce business compliance burdens).

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Annual report published	√	$\checkmark$	✓	$\checkmark$	✓	✓	✓	$\checkmark$	√
Stand alone	$\checkmark$	$\checkmark$	$\checkmark$	×	×	×	×	×	×
Available on own website	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	$\checkmark$	×	×
Includes:									
Details on contribution to policy objectives	$\checkmark$	~	~	√	~	$\checkmark$	$\checkmark$	~	$\checkmark$
Indicators on contributions to policy objectives	~	$\checkmark$	~	✓	~	$\checkmark$	×	$\checkmark$	√
Details on efforts to reduce burdens on business	~	×	✓	×	×	×	×	×	×
Indicators of compliance with enforcement policies	✓	~	✓	~	~	$\checkmark$	×	~	√
Details on consultations and/or consultations policies	√	√	~	~	×	×	~	×	$\checkmark$

Table 6.6Information in annual reports — core OHS regulatorsFor the financial year 2007-08

Source: Regulator websites.

Overall, the Commonwealth and Victoria have the most transparent reporting approach within their annual reports based on these measures, with Tasmania being the least transparent.

## 6.3 Providing and seeking feedback

Providing and seeking feedback is another method of improving the transparency and accountability of regulators. Feedback from OHS regulators to businesses can help clarify the reason businesses are in breach of their OHS responsibilities and, as a result, make it easier for them to rectify the problem and become compliant. Similarly, obtaining feedback from regulated businesses can help the regulator identify potential problems in its enforcement approach. For example, dissatisfaction with the way inspectors go about their task can create an adversarial relationship with negative impacts on OHS outcomes.

The following indicators can be used to benchmark how regulators are providing and seeking feedback:

• whether written notices are provided to clients providing information on reasons for breaches/improvement notices along with avenues for appeal/review

• whether client feedback surveys are conducted and published.

## Written notices

All jurisdictions make use of written notices to inform clients of breaches of their OHS responsibilities or to request improvements to current practices or equipment. The information contained on these notices can help improve the transparency of regulator decisions by including information on why a business may be in breach of their requirements and what review or appeals mechanism exist. Further, by including the reason for a notice, and a suggested remedy, notices can be an effective tool to aid compliance. The more information provided, the lower the likely compliance burden associated with the inspectorate decision in the notice.

To assess the written notices used by each jurisdiction, OHS regulators were asked to provide, where available, copies of their inspection, improvement and breach/prohibition notices (table 6.7).

	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Provided for									
Inspections	×	×	×	×	×	×	×	$\checkmark$	nr
Improvements	$\checkmark$	nr							
Breaches/Prohibition	$\checkmark$	nr							
Contain contact information	$\checkmark$	nr							
Contain details on what needs to be done to comply with notice	✓	$\checkmark$	~	а	✓	√	✓	✓	nr
Contain reason	×	$\checkmark$	nr						
Contain information on appeal/review	×	~	$\checkmark$	√	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	nr

## Table 6.7Written notices from core OHS regulators2008-09

**nr** non response. <sup>a</sup> Only the improvement notice details what needs to be done to rectify the workplace/practice that was observed to be in breach of the Act. The other notices provide information on how to pay the incurred fine.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

While most jurisdictions' notices contain basic information such as contact points, what needs to be done to comply, the reason for breach and the opportunity for review, there are some differences:

• the Commonwealth provides the least amount of information — no information on the reason for the breach or appeal/review provisions are contained on the notices

- in Queensland, the prohibition and infringement (breach) notice provides no instruction/guidance on how to improve the observed practice that resulted in the notice, whereas the improvement notice does
- the Northern Territory is the only jurisdiction to have an inspection report, although it contains no contact information.

Overall, most jurisdictions have adopted a broadly similar approach to the information provided on their notices, and thus the burdens imposed on businesses in complying with the notice are likely to be broadly similar. That said, with the Commonwealth not providing information on the reason for the breach, or what review/appeal provisions are available, it is likely to impose the greatest burden on business. Also, as Queensland provides less guidance on possible solutions to overcome the breach identified, it is possible that the compliance burden for businesses receiving these notices is greater than those in other jurisdictions (aside from the Commonwealth).

## Published feedback surveys

In order to assess the effectiveness of advice, awareness campaigns and enforcement activities, feedback should be sought from regulated businesses. To assess OHS regulators on whether or not they conduct and publish feedback surveys, regulator websites and annual reports were examined. In a number of jurisdictions, feedback is sought from regulated businesses by OHS regulators in terms of their satisfaction with the inspectorate and the level of support they receive (table 6.8).

However, despite most OHS regulators publishing information from such surveys, the level of detail varies:

- Victoria, Queensland and the ACT appear to conduct the most comprehensive surveys of regulated businesses
- WorkCover NSW mentions a customer satisfaction survey in its annual report, with some summary results provided. However, it is unclear whether the focus was on OHS or workers' compensation activities or both
- Comcare and WorkSafe WA have conducted surveys of particular programs but do not appear to have surveyed regulated businesses more broadly
- SafeWork SA, Workplace Standards Tasmania and NT WorkSafe do not appear to have conducted surveys, with no mention found on their websites or in their annual reports. This, however, does not mean they are not conducted, but if they are conducted and the results are not made public, it limits the transparency of these regulators.

AS	at May 20	09							
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Conducted	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	×	а	$\checkmark$
Published	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	×	×	$\checkmark$
Online	$\checkmark$	×	×	×		$\checkmark$			$\checkmark$
Summary form in annual report	×	$\checkmark$	$\checkmark$	~		×			×
Other complete source	×	×	×	×		~			×

# Table 6.8 Publically available client feedback surveys — core OHS regulators

<sup>a</sup> The Northern Territory conducts surveys but did not publish information about either the survey itself, or results, on their website as at May 2009.

Source: Regulator websites.

### Other attempts to seek feedback

Apart from those attempts to seek feedback from regulated businesses that are publicly available, regulators use a number of other methods to gather information about their compliance activities with the aim of achieving more effective outcomes. As reported in the Commission's survey of OHS regulators, regulators were found to make use of feedback from online contact points, surveys, comments received from complaints handling, views of focus groups and from information obtained during inspections or other contacts. The use of these mechanisms by OHS regulators is detailed in table 6.9.

2008-09									
	Cwlth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Online	✓	$\checkmark$	$\checkmark$	×	×	$\checkmark$	×	×	~
Surveys	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	×
Complaints handling	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	$\checkmark$
Focus groups	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	×	×
Point of contact consultation	$\checkmark$	×	$\checkmark$	$\checkmark$	$\checkmark$	$\checkmark$	×	$\checkmark$	×
Other	$\checkmark$	×	×	$\checkmark$	$\checkmark$	×	×	$\checkmark$	×

## Table 6.9Seeking feedback — core OHS regulators

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

While most regulators seek feedback from regulated businesses, Tasmania has no formal processes to do so and the ACT has the least number of processes of those that do. For the remaining jurisdictions, most use all available means to elicit feedback regarding their regulatory approach, with the Commonwealth making use
of the most number of processes. The Northern Territory also makes use of a Workplace Health and Safety Advisory Council to engage stakeholders.

# 6.4 Transparency and accountability of mining-specific OHS regulators

# Appeals under mining-specific OHS regulation

The mining-specific OHS legislation that exists in New South Wales, Queensland and Western Australia is enforced by a separate group of regulators (see chapter 5). Decisions made by these regulators are also subject to review, with the processes detailed in table 6.10.

2000 00			
Process	NSW <sup>a</sup>	Q/d <sup>b</sup>	WA
Internal	$\checkmark$	$\checkmark$	$\checkmark$
Timeframe to appeal	7 days	7 days	ns
Fee	\$0	\$0	\$0
External	$\checkmark$	$\checkmark$	$\checkmark$
Timeframe to appeal	ns	28-30 days	ns
Licensing decisions	na	×	na

# Table 6.10Appeal processes for mining-specific OHS decisions2008-09

**na** not applicable. **ns** not specified. <sup>**a**</sup> In New South Wales, the 7 day timeframe for internal appeals relates to improvement and prohibition notices, for other decisions a timeframe is not stated. Fees are those to lodge an application for appeal to the Administrative Decisions Tribunal. Other fees may also be incurred during this process. <sup>**b**</sup> While no formal fee is set by the regulator for external appeals, appellants are required to pay the costs associated with bringing a case before the Industrial Magistrates Court and therefore cost comparisons to New South Wales are not valid.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

In New South Wales, both low-cost internal and external review mechanisms are available. Regulations provide for appeal to an inspector and/or Chief Inspector, with no cost involved. If the business is unsatisfied with the internal review outcome, an application for external review can be made to the New South Wales Administrative Decisions Tribunal (General Division) — at a cost of \$142.

In terms of court decisions, in New South Wales the process is the same as that under the general OHS legislation (it should also be noted that in New South Wales, the general OHS Act also applies to mining sites unlike in Queensland and Western Australia). That is, a prosecution is first heard before a judge sitting alone in the Industrial Court of New South Wales, with an appeal possible to the full bench of the Court. Appeals based on matters of law can also be made to the High Court of Australia. In 2008-09, only four prosecutions took place, with one the subject of an ongoing appeal (as at December 2009).

In Queensland, inspectorate decisions can be appealed to the Industrial Court if a business is unhappy with the internal review procedures. In 2008-09 only one appeal (internal and external) against an inspectorate decision was made. For prosecutions, appeals may be made to the Industrial Court. In 2008-09, 10 prosecutions took place with none appealed.

In Western Australia, the provisions are similar to those of the core OHS regulator. Businesses can appeal a decision to the State Mining Engineer (improvement and prohibition notices) and then on to the Occupational Health and Safety Tribunal.

Overall, all mining regulators provide similar internal and external appeals processes so there are unlikely to be any significant differences in burdens placed on businesses. However, mining business in New South Wales have limited opportunity to appeal against prosecutions which may impose greater burdens compared to mining businesses in other jurisdictions.

# Written notices from mining-specific OHS regulators

Mining-specific OHS regulators also make use of written notices when conducting their compliance activities. Details of the information provided in the notices are in table 6.11.

In New South Wales, the notices provided to businesses contain a significant amount of information making compliance easier, and reducing any search cost associated with attempts to ask questions, find out how to comply, or how to have the decision reviewed. In comparison, Queensland and Western Australia provide similar information on their notices (albeit a limited number of notices) but in less detail.

	NSW	Qld <sup>a</sup>	WA
Provided for			
Advice	$\checkmark$	×	×
Inspections	×	$\checkmark$	×
Improvements	$\checkmark$	×	$\checkmark$
Prohibition	$\checkmark$	$\checkmark$	×
Investigation	$\checkmark$	×	×
Closure	$\checkmark$	×	×
Contain contact information	$\checkmark$	×	b
Contain details on what needs to be done to comply with notice	$\checkmark$	$\checkmark$	√
Contain reason	$\checkmark$	$\checkmark$	$\checkmark$
Contain information on appeal/review	$\checkmark$	$\checkmark$	$\checkmark$

# Table 6.11Written notices from mining-specific OHS regulators2008-09

**nr** non response. <sup>a</sup> Queensland does not have stand alone notices similar to those used in New South Wales and Western Australia but does create similar notices based on its Mine Record Entry System. These are used as the basis for comparison. <sup>b</sup> Only contains address information.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

## Seeking feedback

Mining-specific regulators also report the use of various methods to gain feedback from clients (table 6.12). Western Australia uses the most methods to gain feedback from regulated businesses, followed by New South Wales. New South Wales has also established the Mine Safety Advisory Council to provide a forum for seeking feedback from business:

The NSW Mine Safety Advisory Council (MSAC) is a multilateral partnership that provides a forum for direct feedback from businesses. MSAC facilitated a CEO Summit for CEOs in the NSW mining and extractives industry on 28 November 2008. This summit provided a direct forum for input from the highest levels of business in NSW (and Australia). In addition MSAC has a Health Working Party, a Fatigue Working Party, World-leading OHS Culture Working Party and a Musculoskeletal Disorders Project Steering Group, all of which actively seek input from business in the form of stakeholder representation and participation. These working parties and project steering group hold workshops, with businesses also having active representation in the workshops. Under the auspices of MSAC are also three sector specific Safety Advisory Committees for coal, metalliferous and extractives sectors. (Productivity Commission survey of OHS regulators 2009 unpublished)

A similar body — the Mining Industry Advisory Council — exists in Western Australia, while in Queensland, a Mining Health and Safety Advisory Council has been created for both coal, and quarrying and metalliferous mining.

	NSWa	Qld	WA
Online	$\checkmark$	$\checkmark$	~
Surveys	$\checkmark$	×	$\checkmark$
Complaints handling	$\checkmark$	$\checkmark$	$\checkmark$
Focus groups	×	$\checkmark$	$\checkmark$
Point of contact consultation	$\checkmark$	$\checkmark$	$\checkmark$
Other	$\checkmark$	$\checkmark$	$\checkmark$

### Table 6.12 Seeking feedback — mining OHS regulators 2008-09

**a** Other relates to the activities of the MSAC.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

# 7 Risk, duty of care and advice

# Key points

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

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

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

# 7.1 Awareness of regulatory requirements

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

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

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

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

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



### Figure 7.1 SMEs' awareness of requirements by firm employee size<sup>a,b</sup> 12 months to May 2009

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

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

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



# Figure 7.2 SMEs' awareness of requirements by industry<sup>a</sup> 12 months to May 2009

d figures in comparisons were weighted to ensure the sample reflected the actual

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

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

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



Figure 7.3 SMEs' awareness of requirements by jurisdiction<sup>a</sup> 12 months to May 2009

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

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

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





Data source: DEEWR (2009 unpublished).

# 7.2 Risk management and record keeping

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

#### **Risk management**

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

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

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

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

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

As a result, the panel suggested that:

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

	-	
	In primary legislation	In formal regulation
Cwlth <sup>a</sup>	×	✓ Regulation 1.05
NSW	×	✓ Regulations 9 to 12
Vic <sup>b</sup>	×	<ul> <li>✓ Used in relation to particular hazards and not set out generally</li> </ul>
Qld <sup>c</sup>	$\checkmark$	✓ Used in relation to particular hazards
SA	×	✓ Regulation 1.3.2
WA	×	✓ Regulation 3.1
Tas	×	✓ Regulations 18 and 19
NT	$\checkmark$	✓ Regulations 38 to 42
ACT <sup>d</sup>	×	<ul> <li>Used in regulations pertaining to confined spaces and not set out generally</li> </ul>

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

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

Source: OHS Acts and regulations.

Irrespective of the debate over whether or not risk management processes should be specifically detailed in legislation, the approaches taken by each jurisdiction differ and are detailed in table 7.1. In essence, while all employers may have to undertake risk management processes and keep documentation to satisfy their general duties, only in those jurisdictions where it is included in the Act or regulation is this a necessary requirement irrespective of ensuring compliance with the general duty.

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

## Monitoring health and safety

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

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

### Table 7.2 Requirements to monitor worker health and safety

Details in primary legislation in effect in 2008-09

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

<sup>a</sup> These provisions have changed with the introduction of the *Work Safety Act 2008* (ACT) on 1 October 2009. *Source*: Stewart-Crompton, Mayman, and Sherriff (2009).

### The costs of hazard identification and risk control

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

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

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

# Figure 7.5 Cost to SMEs of conducting hazard identification and risk control by jurisdiction<sup>a</sup>



12 months to May 2009

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

On a reported actual cost basis, however, there were greater differences between states and territories. The average costs<sup>4</sup> reported by SMEs of conducting hazard

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

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

identification and risk control are shown on figure 7.6 along with the standard errors<sup>5</sup> — plus and minus one standard error is indicated by the black lines. Despite the differences in average costs, most estimates had large standard errors meaning that the costs for all jurisdictions were not statistically different.

# Figure 7.6 Reported average costs incurred by SMEs due to conducting hazard identification and risk control by jurisdiction<sup>a</sup>



12 months to May 2009

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

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

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

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

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

# **Record keeping**

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

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

### Table 7.3Record keeping requirementsa

Summary of requirements in regulations 2008-09

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

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

Source: General OHS regulations.

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

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

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

# Table 7.4Written incident notification and subsequent record<br/>keeping

Requirements in 2008-09

Source: Regulator websites.

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

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



## Figure 7.7 Costs incurred by SMEs to keep records by jurisdiction<sup>a</sup> 12 months to May 2009

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

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

The reported actual costs of record keeping do, however, reveal differences between the jurisdictions (figure 7.8). SMEs in the ACT, Victoria and the Northern Territory all reported higher costs due to record keeping activities relating to OHS over the past 12 months. These three jurisdictions have significantly higher average costs than for SMEs in New South Wales, Western Australia and Tasmania. However, given the similarities in the hazard identification and risk control requirements and their associated record keeping, along with similarities in other record keeping requirements (with the exception of the ACT), it is unclear if these differences are driven by the regulations themselves. Instead, differences are possibly driven by the approach of the regulators, which may place a greater focus on record keeping in contrast to observed outcomes. Alternatively, differences may be driven by what businesses in these jurisdictions perceive is required in order to comply with OHS regulations.

# Figure 7.8 Reported average costs incurred by SMEs due to record keeping by jurisdiction<sup>a</sup>



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

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

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

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

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

# 7.3 Duty of care

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

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

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

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

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

Despite the valid reasons for imposing a range of duties, participants to this study and others have expressed concern that these provisions have gone 'too far' in some jurisdictions by imposing unnecessary burdens on businesses, and that the variation between jurisdictions has created confusion. The Commission has not benchmarked duty of care in its entirety but has instead narrowed the focus to three aspects that were raised by participants — duties of care for designers, financiers and the coverage of contractors by an employer's duty of care.

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

The ACEA believes consulting engineering firms, especially those that operate in multiple jurisdictions, are unnecessarily burdened by inconsistent designer specific duties of care that are in effect in each jurisdiction.

This is because the role and responsibility of a designer of buildings or structures has started to increase beyond the design process in the last decade. (sub. 5, p. 4)

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

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

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

## **Duties of designers**

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

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

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

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

# Table 7.5Duties on designers

	Duties on designers of:			
	Plant	Substances	Structures	
Cwlth	×	×	×	
NSW	$\checkmark$	$\checkmark$	×	
Vic	$\checkmark$	×	$\checkmark$	
Qld	$\checkmark$	×	$\checkmark$	
SA	$\checkmark$	×	$\checkmark$	
WA <sup>a</sup>	$\checkmark$	×	$\checkmark$	
Tas <b>a</b>	$\checkmark$	×	$\checkmark$	
NT	$\checkmark$	$\checkmark$	$\checkmark$	
ACT <sup>a,b</sup>	×	×	×	

Primary legislation in effect in 2008-09

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

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

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

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

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

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

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

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

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

Table 7.6 Limitations on duties of designers of structures

Summary of qualifiers on duties 2008-09

na not applicable.

Source: General OHS Acts.

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

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

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

# **Duties of financiers**

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

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

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

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

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

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

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

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

### Table 7.7 Duties of suppliers and passive financier provisions

Summary of duties 2008-09

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

Source: General OHS Acts and regulation.

## Duties imposed on employers with respect to contractors

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

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

### Who holds a duty of care?

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

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

	2008-09	шÞ		
	Duty owed to contractor by an employer (expressly stated)	Contractor defined as employee/worker	Contractor covered in controllers duty – access, egress and supplied equipment/plant only	Contractor covered in controllers duty – access, egress and worksite more generally
Cwlth	$\checkmark$			
NSW				$\checkmark$
Vic	$\checkmark$		$\checkmark$	
Qld			$\checkmark$	
SA	$\checkmark$			
WA	$\checkmark$		$\checkmark$	
Tas			$\checkmark$	
NT		$\checkmark$	$\checkmark$	$\checkmark$
ACT <sup>a</sup>				

# Table 7.8Elements of duty of care coverage — employer/contractor<br/>relationship

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

Source: General OHS Acts.

The combination of general duties of care placed on employers, the definition of an employee/worker, and those duties placed on a person in control of a workplace appears to imply that an employer owes a duty of care to a contractor and the contractor's employees over aspects of the work and worksite for which the employer has control in all jurisdictions. In some jurisdictions (New South Wales, Queensland, Tasmania and the ACT) this is limited to access to, and egress from,

the worksite and any provided plant or equipment. For the Commonwealth, Victoria, South Australia and Western Australia it is potentially broader and relies on an interpretation of what an employer has control over, either on a site or in terms of the activities of a contractor. In the Northern Territory, it is explicit — an employer owes a duty of care to a contractor and the contractor's employees.

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

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

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

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

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

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

	2008-09	
	Qualification on employer's duty	Qualification on controller's duty
Cwlth	Reasonably practicable	
NSW	na	None — reasonably practicable and control defences exist
Vic	Limited to aspects over which an employer can control	
Qld	na	None — reasonably practicable and control defences exist
SA	Limited to aspects over which an employer can control	
WA	Limited to aspects over which an employer can control	
Tas	na	Reasonably practicable
NT	Reasonably practicable	
ACT	na	Reasonably practicable

# Table 7.9 Qualification of duties

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na not applicable.

Source: OHS Acts.

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

# 7.4 Duty to be informed on OHS matters

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

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

### Box 7.1 National Review into Model Occupational Health and Safety Laws

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

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

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

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

#### Workplace Relations Ministerial Council response:

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

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

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

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

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

#### Information and advisory services provided by regulators

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

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

### Information and advisory services provided by business groups

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

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

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

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

<sup>&</sup>lt;sup>6</sup> These provisions typically apply to larger organisations or organisations undertaking high risk work.

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

### Table 7.10 Requirements to be informed on OHS matters

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

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

# Box 7.3 **Responsible officer requirements of South Australia and Tasmania**

#### South Australia

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

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

#### Tasmania

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

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

industries<sup>7</sup> must appoint an officer (referred to as a workplace health and safety officer (WHSO)) for each of its workplaces with 30 or more employees.<sup>8</sup> A Queensland employer may, with the prior approval of the regulator, arrange for a WHSO to be responsible for more than one workplace.

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

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

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

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

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

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

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

# Box 7.4 WHSO training — courses and costs

The initial WHSO training courses comprise two stages:

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

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

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

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

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

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

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

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

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

# Figure 7.9 Awareness of OHS requirements by medium-sized businesses<sup>a</sup>

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



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

# Table 7.11 Salaries of Occupational and Environmental Health Professionals — 2008<sup>a</sup>

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

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

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

These salaries provide some indication as to the average annual burden of the WHSO on those Queensland businesses required to employ a WHSO, while the training costs in box 7.4 are, potentially, another cost to business of WHSOs (albeit
a cost that may only arise every five years). Further, as illustrated in figure 7.9, it does not appear that the Queensland WHSO requirements are producing better outcomes (compared to other jurisdictions) in terms of employers in medium sized businesses being informed (or considering themselves informed) on OHS matters.

### 7.5 Direct liability

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

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

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

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

Currently, each jurisdiction with the exception of the Commonwealth has adopted differing levels of personal liability within their OHS regulatory regimes. Most jurisdictions extend the liability to 'officers' for breaches of the OHS Act made by the company. Officers are those who are involved in the decision-making processes and are defined by Victoria, South Australia and the Northern Territory using the definition of an officer under the *Corporations Act 2000* (Cwlth). In other jurisdictions the definition varies to include:

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

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

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

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

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

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

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

### Table 7.12Laws which caused overly cautious decision makingDegree to which laws were responsible (0 to 6) - 2008

Source: Treasury (2008).

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

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

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

### 8 OHS training requirements

#### Key points

- Significant features of occupational health and safety (OHS) training requirements among the jurisdictions include:
  - employers in all jurisdictions apart from the Northern Territory have a duty to provide OHS training and instruction to workers
  - New South Wales and South Australia have the most comprehensive training requirements to manage specific hazards
  - the Commonwealth, Victoria, South Australia, and Tasmania require information about OHS to be provided to employees in 'appropriate' languages. The Commonwealth extends this requirement to instruction, training and supervision
  - the Commonwealth, New South Wales, Queensland and South Australia require records to be kept for up to five years for training associated with specific hazards, while other jurisdictions either have no requirement or require records to be kept for the period of the employee's employment or the duration of work.
- Small and medium enterprises (SMEs) in New South Wales are more likely to face moderate or substantial internal OHS training costs than SMEs in other jurisdictions which may be due to their more stringent training requirements.
- Additional training and information costs were reported by over half of SMEs operating or trading across state borders as result of differences in OHS regulatory arrangements. Of this group:
  - higher training costs were more likely to be reported by medium sized businesses
  - smaller firms were more likely to nominate costs associated with obtaining information on differences in OHS regulations as the highest cost they faced.
- Only 4 per cent of SMEs considered that the cost of conducting OHS training internally was substantial in relation to their total costs. A slightly higher percentage reported external OHS training costs as substantial 8 per cent.
- Some differences in the use and costs of OHS training are evident:
  - SMEs in New South Wales were more likely to have provided internal or external OHS training than in other jurisdictions, while the Northern Territory had the lowest percentage of SMEs who undertook internal OHS training – this outcome appears directly related to the nature of regulatory requirements
  - a larger percentage of SMEs in Victoria, South Australia, the ACT and the Northern Territory reported having incurred moderate or substantial external OHS training costs.

One of the major requirements of occupational health and safety (OHS) regulations is for employers to provide OHS training to their employees. The purpose of OHS training is to increase employee awareness of OHS issues which can help secure their own health and safety and that of others in the workplace, and assist in building a culture of compliance to improve OHS outcomes.

This chapter identifies differences in training requirements as contained in OHS Acts and regulations and uses indicators to benchmark whether some of these differences impose different costs on business. Where possible, attempts have been made to identify whether these are unnecessary.

One of the cost indicators referred to in the chapter is the expenditure on OHS training by small and medium enterprises (SMEs) over a 12 month period. At issue is whether levels spent on training were influenced by differences in regulatory regimes during this period.

A case study of the construction industry is also included later in the chapter in which aspects of the impacts and costs of training are examined including: differences in requirements for construction awareness training; the degree of mutual recognition of certificates in construction awareness training; and the impact of changes in OHS regulations on construction sub-contracting firms in New South Wales.

It should be noted that this chapter covers the duty of employers to provide training to their employees. The requirement for training of health and safety representatives (HSRs) is covered in chapter 9.

### 8.1 Regulatory provisions for OHS training

### **Differences in Acts**

All jurisdictions apart from the Northern Territory include a requirement in their OHS Act for employers to provide OHS training as part of their duty of care to their employees (table 8.1). These provisions will also be part of the model OHS Act (box 8.1). In the Northern Territory, provision of information and training for workers is listed as an example of matters for which employers have a duty to consult with their workers to enable them to contribute to decisions on their health and safety at work. The Northern Territory places an obligation on employers in its OHS regulations to ensure workers receive sufficient information, instruction and training to enable them to perform work which does pose risks to their own health and safety and that of others.

### Table 8.1Requirements for OHS training included in major OHS Acts2008-09

|       | Training requirements                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth | s. 16 <b>Duty of employers in relation to their employees etc</b> . (e) to provide to the employees, in appropriate languages, the information, instruction, training and supervision necessary to enable them to perform their work in a manner that is safe and without risk to their health.                                                                                                                                                                                                   |
| NSW   | s. 8 Duty of employers (1) Employees (d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work.                                                                                                                                                                                                                                                                                                                |
| Vic   | <ul> <li>s. 21 Duties of employers to employees (e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.</li> <li>s. 22 Duties of employers to monitor health and conditions etc. (c) provide information to employees of the employer (in such other languages as appropriate) concerning health and safety at the workplace.</li> </ul> |
| Qld   | s. 29 <b>Obligations of persons conducting a business or undertaking include</b> (e) providing information, instruction, training and supervision to ensure health and safety.                                                                                                                                                                                                                                                                                                                    |
| SA    | s. 19 <b>Duties of employers</b> (1) (c) must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.                                                                                                                                                                                                                                                                                   |
|       | (3) (c) provide information to the employer's employees (in such languages as are appropriate) in relation to health, safety and welfare in the workplace                                                                                                                                                                                                                                                                                                                                         |
| WA    | s. 19 <b>Duties of employers</b> (1) (b) provide such information, instruction, and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards.                                                                                                                                                                                                                                                    |
| Tas   | s. 9 <b>Duties of employers</b> (1) (c) provide any information, instruction, training and supervision reasonably necessary to ensure that each employee is safe from injury and risks to health.                                                                                                                                                                                                                                                                                                 |
|       | (2) (c) provide information to the employer's employees, in such languages as are<br>appropriate, in relation to health, safety and welfare in the workplace.                                                                                                                                                                                                                                                                                                                                     |
| NT    | There is no prescribed requirement for employers to provide OHS training under the employers' duty of care provisions. However under s. 30 <b>Duty to consult</b> - An employer must consult with workers to enable the workers to contribute to the making of decisions affecting their health or safety at work. One of the examples of issues on which an employer is required to consult included in the legislation is: (5) The provision of information and training for workers.           |
|       | representatives under section 42.                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| ACT   | s. 37 Duties of employers in relation to employees (d) to provide to the employees<br>the information, instruction, training and supervision necessary to enable them to<br>perform their work in a manner that is safe and without risk to their health.                                                                                                                                                                                                                                         |

Source: The relevant OHS Acts.

Of the remaining jurisdictions which have adopted a similar duties based approach to training, there are some differences. A significant difference occurs in the Commonwealth Act, because it requires employers to provide necessary information, instruction, training and supervision *in appropriate languages* to enable employees to perform in a manner that is safe and without risk to their

health. Victoria, South Australia and Tasmania also require employers to provide information to their employees in 'appropriate languages' to achieve the same objective.

#### Recommendation from WRMC in relation to OHS training

The model OHS laws will include a requirement for OHS training under the primary duty of care as well as under the obligation to consult (see box 8.1).

### Box 8.1 Recommendations for model laws in relation to OHS training

The *National Review into Model OHS Laws* developed three recommendations in relation to OHS training which were subsequently agreed to by the Workplace Relations Ministerial Council. These included:

• Recommendation 19: The primary duty of care should include specific obligations, namely ensuring so far as is reasonably practicable:

... e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their safety and health from the conduct of the business or undertaking.

- Recommendation 96: The model Act should include a broad obligation for the person conducting the business or undertaking most directly involved in the engagement or direction of the affected workers to consult with those workers (and their representatives), as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety. Consultation should occur when any of the following activities is undertaken:
  - $\ldots$  f) the provision of information and training for workers.
- Recommendation 151<sup>1</sup>: The model Act should:

a) subject to the final decisions about its objects and principles, make clear in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety.

Sources: Stewart-Crompton, Mayman, and Sherriff (2008); WRMC (2009a).

#### **Differences in OHS regulations**

Combined with the general duties to provide training, in most jurisdictions specific training requirements are also set out for some hazards within the formal regulations (table 8.2).

<sup>&</sup>lt;sup>1</sup> Recommendation 151 received in principle support from WRMC subject to qualifications specific to New South Wales.

|       | General requirement                                                                | Training for specific hazards                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Keep records of training                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|-------|------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth | X                                                                                  | <ul> <li>✓ Reg. 2.05 High risk work<br/>Reg. 4.18 Plant<br/>Reg. 5.04 Manual handling<br/>Reg. 6.18 Hazardous<br/>substances</li> <li>Reg. 7.11 Confined spaces</li> <li>Reg. 8.35 &amp; 8.58 Storage or<br/>handling of dangerous<br/>substances</li> <li>Reg. 9.52 Major hazard<br/>facilities</li> <li>Reg. 11.07 Driver fatigue</li> <li>Reg. 12.12 Construction work</li> <li>Reg. 12.24 Construction work</li> <li>induction training</li> </ul>                                                                          | <ul> <li>✓ Hazardous substances – 5 years<br/>Confined spaces – for period of<br/>employee's employment<br/>Storage or handling of dangerous<br/>substances – 5 years<br/>Construction work training – 5<br/>years<br/>Falls – 5 years</li> </ul>                                                                                                                                                                                                                                                                                                               |
| NSW   | ✓ Reg. 13 Employer<br>to provide<br>instruction, training<br>and information       | <ul> <li>Reg. 13.12 Falls</li> <li>✓ Reg. 77 Confined spaces</li> <li>Reg. 80 (2) (c) Manual handling</li> <li>Reg. 136A Plant</li> <li>Reg. 213 Principal contractors to ensure induction construction OHS training</li> <li>Reg. 214 Employers to ensure induction construction OHS training</li> <li>Reg. 215 Self employed persons to undergo induction construction OHS training</li> <li>Reg. 215 Self employed persons to undergo induction construction OHS training</li> <li>Reg. 259 (c) Workers</li> </ul>           | ✓ Reg. 174ZV - 5 years                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Vic   | ✓ Reg. 2.1.2<br>Employer to<br>provide information,<br>instruction and<br>training | <ul> <li>Informed of risks of asbestos</li> <li>✓ Reg. 3.1.2 (3) Manual<br/>handling</li> <li>Reg. 3.5.45 Plant</li> <li>Reg. 4.3.47 Self employed<br/>persons involved in asbestos<br/>removal to undergo training</li> <li>Reg. 5.1.12 Site specific OHS<br/>training in construction</li> <li>Reg. 5.1.20 Construction</li> <li>induction training</li> <li>Reg. 5.2.19 Operators of<br/>major hazard facilities to<br/>provide training</li> <li>Reg. 5.3.40 Operator of mine<br/>to provide training re hazards</li> </ul> | <ul> <li>Reg. 4.3.46 Employer to keep<br/>training records for people involved<br/>in asbestos removal and retain<br/>records while work is performed<br/>Reg. 4.3.47 Self employed persons<br/>to keep training records if involved<br/>in asbestos removal and retain<br/>records for the duration of work<br/>Reg. 5.2.20 Owners of major<br/>hazard facilities to keep records of<br/>training while employee employed<br/>at facility</li> <li>Reg. 5.3.41 Operator of mine to<br/>keep records of training while<br/>employee employed at mine</li> </ul> |

## Table 8.2Differences in regulatory requirements for employers to<br/>provide OHS training to employees<br/>2008-09

(Continued next page)

|     | Ge | eneral requirement                                                                                                         | Tra      | aining for specific hazards                                                                                                                                                                                                                                                                                                                                                            | Ke | ep records of training                                                                                                                                                                                                    |
|-----|----|----------------------------------------------------------------------------------------------------------------------------|----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Qld | ✓  | Reg. 49 Employer<br>to provide training<br>in safe working<br>methods to workers<br>who undertake<br>prescribed activities | <i>↓</i> | Reg. 32 Earthmoving or crane<br>occupation or high risk work<br>Reg. 49 Training in prescribed<br>activities including demolition work<br>and removal of asbestos<br>Reg. 211 Hazardous substances<br>Reg. 243 Lead<br>Reg. 302 Employers to ensure<br>construction workers hold general<br>induction evidence before<br>commencing work                                               | ✓  | Reg. 211 (3) - 5 years for<br>training about hazardous<br>substances<br>Reg. 244 (3) - 5 years for<br>training about lead                                                                                                 |
| SA  | •  | Reg. 1.3.4<br>Employer to<br>provide information,<br>instruction and<br>training<br>Reg. 1.3.5<br>Induction to new<br>work | •        | Reg. 2.4.8 Confined spaces<br>Reg. 2.9.4 Manual handling<br>Reg. 2.10.3 Noise<br>Reg. 2.12.1 Use of protective<br>equipment and clothing<br>Reg. 2.13.1 Prevention of falls<br>Reg. 3.2.20 Use of plant<br>Reg. 4.1.14 General hazardous<br>substances<br>Reg. 4.2.8 Asbestos<br>Reg. 5.12.35 Use of explosives in<br>mining                                                           | ✓  | Reg. 1,3.4 (d) in relation to<br>implementation of regulations<br>records (related to information,<br>instruction and training) to be<br>kept for 5 years from the last<br>date of entry<br>Reg. 4.1.19 (1) (c) - 5 years |
| WA  | ×  |                                                                                                                            | •        | Reg. 3.87 Confined spaces<br>Reg. 3.136 Construction industry<br>safety awareness<br>Reg. 5.21 Hazardous substances<br>Reg. 5.58 Lead                                                                                                                                                                                                                                                  | ~  | Reg. 5.21 (2) Hazardous<br>substances — no specified<br>period<br>Reg. 5.58 (2) Lead – no<br>specified period                                                                                                             |
| Tas | ×  |                                                                                                                            | ✓        | Reg. 118 (7) Asbestos                                                                                                                                                                                                                                                                                                                                                                  | ×  |                                                                                                                                                                                                                           |
| NT  | •  | Reg. 43<br>Information,<br>instruction and<br>training                                                                     | ✓        | Reg. 87A Use of plant                                                                                                                                                                                                                                                                                                                                                                  | •  | Reg. 43.3 (b) general obligation<br>but no specific period for<br>keeping records                                                                                                                                         |
| ACT | ×  |                                                                                                                            | •        | OHS General Regulations 2007<br>Reg. 28 (1) (c) Use of protective<br>equipment<br>Reg. 33 (5) (a) Protection against<br>falls<br>Reg. 65 Confined spaces<br>Reg. 71 Noise management<br>OHS Manual Handling Regulations<br>1997<br>Reg. 6 (2) (b) Manual handling<br>tasks<br>Reg. 6 (3) (b) Use of mechanical<br>aids, manual handling procedures<br>or personal protective equipment | V  | Reg. 66 keep records for<br>training undertaken by workers<br>exposed to confined spaces for<br>the period in which the worker<br>is employed                                                                             |

Source: OHS regulations.

It is unclear whether the additional provisions lead to any additional burden on business as it is likely that the specific detail clarifies the requirements under the more broad duty. It is also possible that as these provisions improve the transparency of the requirements, they may reduce the compliance burden on businesses by making it easy to understand and comply with OHS regulation.

Despite general similarities there are some differences.

- New South Wales, Victoria, South Australia, and the Northern Territory include general requirements on employers in their OHS regulations to provide information, instruction and training to their employees to make them aware of any risks or hazards that may exist in the workplace, and to assist in identifying and implementing measures that can be put in place to control risks.
- Queensland, Western Australia, Tasmania and the ACT do not have a general provision in their OHS regulations to provide OHS training but instead include training requirements which cover the identification and management of specific hazards. In Queensland employers need to provide training to workers who undertake 'prescribed activities' such as removing asbestos and demolition work.
- Tasmania does not include any general requirements to provide training, instruction or information in their OHS regulations. Instead this requirement is covered under their duty of care in the *Workplace Health and Safety Act 1995*. Training requirements included in the OHS regulations in Tasmania are focussed on training needed to manage specific hazards such as asbestos.
- The Commonwealth's *Occupational Health and Safety (Safety Standards) Regulations* do not include a general requirement for employers to provide training but provide requirements to provide training to manage specific hazards such as high risk work; plant; manual handling; hazardous substances; confined spaces; storage or handling of dangerous substances; driver fatigue; construction work training; and falls.

### Differences in record keeping requirements for OHS training

There is considerable variation between jurisdictions in record keeping requirements for OHS training with New South Wales and South Australia requiring record keeping of training for five years for all OHS training (table 8.2). OHS regulations in Queensland requires the keeping of training records for the same period but only for specific training required for managing hazardous substances and lead.

Victoria and the ACT require records of OHS training which applies to specific hazards to be kept for the period in which an employee is employed with a particular organisation. The Northern Territory has a general obligation in its OHS regulations for employers to keep records of OHS training but does not specify the length of time for which they should be kept.

The Commonwealth regulations also have variations in record keeping requirements for training associated with managing various hazards. Employers need to provide records for five years for training associated with hazardous substances, storage or handling of dangerous substances and falls. However, records only need to be kept for the duration of the employee's employment in relation to training for working in confined spaces. No requirement exists for keeping records of training for other hazards such as high risk work, plant, manual handling.

The requirement for records to be kept for up to five years could constitute an unnecessary administrative cost burden for employers compared to lower costs faced by organisations in jurisdictions where records are only required to be kept for the period in which an employee is employed or the duration of work performed in which particular hazards are faced.

### Which jurisdictions have the most demanding requirements for OHS training?

South Australia has comprehensive and rigorous regulatory requirements to provide OHS training including a general requirement as well as specific requirements which cover hazards such as: confined spaces; manual handling; noise; use of protective clothing and equipment; prevention of falls; use of plant; managing general hazardous substances; managing the removal of asbestos; and, the use of explosives in mining. New South Wales also has very comprehensive OHS training requirements. Along with a general requirement to provide OHS training to all employees, training requirements exist for confined spaces, manual handling, plant, construction safety awareness, and handling of asbestos. Additionally, as reported earlier, New South Wales and South Australia require records to be kept of OHS training for five years.

In contrast Tasmania has fewer specific regulatory requirements for OHS training, albeit they have a broad requirement for employers to undertake training under the *Workplace Health and Safety Act 1995*. As all jurisdictions with the exception of the Northern Territory impose duties on employers in relation to OHS training, it is unclear whether any specific jurisdiction places greater compliance burdens on businesses than others by examining the regulatory requirements alone.

Despite this, only the Commonwealth requires instruction, training and supervision to be provided in appropriate languages, which may increase costs for businesses if the availability of training services is not available in a range of languages. Four jurisdictions require information about OHS to be provided in appropriate languages.

## 8.2 Costs faced by SMEs operating in multiple jurisdictions

In their submission, ACCI identified the costs of OHS training as one of the major costs facing firms operating in multiple jurisdictions:

Increased costs for employers operating in multiple OHS jurisdictions include keeping abreast of regulatory changes in multiple jurisdictions, greater administrative costs (e.g. record keeping), employing additional staff, higher OHS training costs, and difficulties implementing company wide OHS policies and procedures where the regulatory requirements differ by jurisdiction. (sub. 6, p. 20)

The Commission engaged Sensis Pty Ltd to ask a number of questions about the impact of OHS regulations operating in different jurisdictions on SMEs as part of their quarterly survey (*Sensis Business Index – Small and Medium Enterprises*) (see appendix B for details). One of the questions related to the nature of activities undertaken by firms to comply with OHS regulations in the previous 12 months. Two of the predominant actions undertaken were internal OHS training and purchasing of OHS training from external sources.

The results of the Sensis survey show that of the relatively small proportion of SMEs which have employees or operations based interstate (who accounted for just over 12 per cent of all SMEs in the sample), a quarter faced extra costs due to differences in OHS regulations between jurisdictions. Of this group, just over a half (53 per cent) reported that training costs were incurred to make existing staff aware of the differences in OHS regulations in jurisdictions, and 31 per cent reported that they incurred added costs such as training when recruiting staff from interstate.

Further, a fifth of all SMEs who responded to a question on the ranking of the three highest costs they faced from differences in OHS regulations between jurisdictions, nominated training costs for staff to make them aware of the differences as the highest cost they faced. Medium sized businesses were more likely to nominate training costs for staff to make them aware of the differences as the highest cost they faced, compared with smaller firms (32 per cent versus 13 per cent). Smaller firms were more likely to nominate costs associated with obtaining information on

differences in OHS regulations as the highest cost they faced compared with medium sized firms (47 per cent versus 18 per cent).

### Estimate of cost burden on medium sized enterprises of interstate differences in OHS regulations

The Sensis data show that just over 70 per cent of those businesses which faced higher training costs as a result of interstate differences in OHS regulations were medium sized. This result is to be expected given that medium or larger enterprises are more likely to have operations in multiple jurisdictions than smaller enterprises.

The cost burden on enterprises of interstate differences in OHS regulations was estimated by restricting analysis to expenditure on OHS training by medium businesses only. Medium sized businesses accounted for 22 per cent of the sample of SMEs used by Sensis Pty Ltd. After removing some large outliers<sup>2</sup> the average expenditure on internal OHS training for medium enterprises which responded that they faced additional training costs as a result of interstate differences in OHS laws in the 12 months to May 2009 was \$17 640, which compared with average expenditure for all medium enterprises of \$10 100 on internal OHS training for the same period.

While this cost imposition appears reasonably significant, some caution needs to be exercised in interpreting this data. Only a relatively small number of medium sized enterprises reported facing additional training costs as a result of interstate differences – just over 10 per cent of medium sized enterprises which provided responses on costs of OHS training. Hence it would not be prudent to interpret this data as representative of the population of medium enterprises. However, the data highlight that differences in OHS regulations imposed significant internal OHS training cost burdens on those medium sized firms which responded.

### How do costs associated with OHS training rank alongside other compliance costs?

The ongoing costs associated with OHS training was reported by 7 per cent of all surveyed SMEs as the most significant element of OHS regulations which imposed costs on their business in the previous 12 months. While this share may seem

<sup>&</sup>lt;sup>2</sup> One small manufacturing firm from the Northern Territory reported that it spent \$200 000 on internal OHS training, two firms spent \$300 000 (one medium sized manufacturing firm from the Northern Territory and one small manufacturing firm from Queensland) and one small communications firm from Queensland spent \$350 000 on internal OHS training. All were removed from the sample.

relatively low, it needs to be noted that 44 per cent of businesses responded that they faced no significant costs from OHS regulations while a further 14 per cent stated that they did not know.

To put this information in another perspective, training costs accounted for just over 15 per cent of those factors which were reported as the most significant costs faced as a result of OHS regulations. The next highest factor reported was compliance costs at 8 per cent. It should be noted that there were some multiple responses from some firms as to the most significant elements of OHS regulations which imposed costs on businesses.<sup>3</sup>

### 8.3 Use of OHS Training by SMEs

### Use of internal and external OHS training

The results of the survey showed differences in the extent to which businesses conducted internal OHS training and purchased external OHS training. New South Wales recorded the highest percentage of SMEs undertaking internal OHS training (51.0 per cent) and purchasing OHS training externally (30.7 per cent) in the 12 months to May 2009. Conversely, SMEs in the Northern Territory were the least likely to have undertaken OHS training internally in the previous 12 months (37.9 per cent) while Western Australia had the lowest percentage of SMEs purchasing OHS training externally (19.8 per cent) (table 8.3). The lower proportion of businesses in the Northern Territory conducting internal OHS training may be related to it being the only jurisdiction to not impose a general duty on employers to conduct training.

Differences in training, however, were observed across industries. SMEs in Accommodation, cafes and restaurants were most likely to have conducted internal OHS training in the 12 months to May 2009 (59.4 per cent), followed by SMEs in Cultural, recreational and personal services (53.5 per cent) and Retail trade (51.7 per cent). In contrast, SMEs in low risk industries such as Communications, property and business services (31.6 per cent) were the least likely to have conducted internal OHS training in the previous 12 months. Perhaps surprisingly,

<sup>&</sup>lt;sup>3</sup> The choice of response to the question on most significant cost faced due to OHS regulations was open ended and not necessarily mutually exclusive. In other words some SMEs nominated a number of factors as the most significant costs they faced, with a total of 61 different categories of responses being recorded. This contributed to a very wide distribution of responses and a smaller number of firms reporting training as the highest the cost than may have been the case if a more limited number of cost options were made available in the question.

given the higher risks to safety, only 38.0 per cent of SMEs in Construction undertook internal OHS training in the previous 12 months (table 8.4).

### Table 8.3SMEs undertaking and purchasing OHS training by<br/>jurisdiction

12 months to May 2009<sup>a</sup>

|     | Undertook internal OHS staff<br>training (%) | Purchased OHS training externally<br>(%) |
|-----|----------------------------------------------|------------------------------------------|
| NSW | 51.0                                         | 30.7                                     |
| Vic | 39.3                                         | 29.6                                     |
| Qld | 40.5                                         | 20.7                                     |
| SA  | 39.5                                         | 21.9                                     |
| WA  | 39.7                                         | 19.8                                     |
| Tas | 39.7                                         | 25.4                                     |
| NT  | 37.9                                         | 20.3                                     |
| ACT | 45.5                                         | 23.7                                     |
| Aus | 43.6                                         | 26.5                                     |

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

Source: Sensis Survey of SMEs (2009 unpublished).

### Table 8.4SMEs who undertook and purchased OHS training by<br/>industry

|                             | Undertook internal OHS staff<br>training (%) | Purchased OHS training<br>externally (%) |
|-----------------------------|----------------------------------------------|------------------------------------------|
| Manufacturing               | 48.8                                         | 31.5                                     |
| Building & construction     | 38.0                                         | 36.1                                     |
| Wholesale trade             | 40.7                                         | 26.0                                     |
| Retail trade                | 51.7                                         | 20.3                                     |
| Transport & storage         | 47.5                                         | 25.5                                     |
| Communications, property &  |                                              |                                          |
| business services           | 31.6                                         | 27.1                                     |
| Finance & insurance         | 40.8                                         | 17.3                                     |
| Health & community services | 45.9                                         | 20.8                                     |
| Cultural, recreational &    |                                              |                                          |
| personal services           | 53.5                                         | 21.4                                     |
| Accommodation, cafes &      |                                              |                                          |
| restaurants                 | 59.4                                         | 44.3                                     |
| All industries              | 43.6                                         | 26.5                                     |

12 months to May 2009<sup>a,b</sup>

<sup>a</sup> Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. <sup>b</sup> All industries only refers to those industries covered in the Sensis survey of SMEs. Industries excluded from the survey include Agriculture, forestry and fishing; Mining; Electricity, gas and water supply; Government administration and defence; and Education.

Source: Sensis Survey of SMEs (2009 unpublished).

Generally, SMEs made less use of external training than internal — overall 27 per cent purchased external training. On an industry basis, Building and construction stands out as an industry which had a higher use of external OHS training (36.1 per cent). The relatively higher take-up of external training by construction firms possibly reflects the necessity for construction workers to undertake construction awareness training provided by external training providers. Construction firms or individual construction workers may bear the cost of this training. This issue is discussed further later in the chapter.

Also, business size influenced the use of training. Medium sized enterprises (20 to 200 employees) were far more likely to have conducted internal OHS training in the previous 12 months than small enterprises (79.7 per cent versus 41.7 per cent) and much more likely to have purchased external OHS training (63.9 per cent versus 24.6 per cent).

## 8.4 Costs associated with internal and external OHS training

### Costs of internal OHS training

SMEs were asked to rate whether the costs they faced in providing internal OHS training were trivial, moderate or substantial, when compared with other costs they faced as part of running their business. Note that these costs relate to expenditure on OHS training by SMEs over a 12 month period. These costs will include those incurred as part of the requirements laid out in OHS regulations, training that exceeds these requirements, and any incremental cost burdens resulting from differences in regulatory requirements in jurisdictions. An approximation of the extent of the cost burden is presented earlier in section 8.2. It should also be noted that the cost of training HSRs could be included in the cost estimates of internal and external OHS training provided by respondents. For further discussion on costs of training HSRs see chapter 9.

Just over 70 per cent of SMEs reported that they faced trivial costs (compared with other running costs) associated with purchasing OHS training in the 12 months to May 2009, 25 per cent faced moderate costs and just over 4 per cent faced substantial costs. In terms of jurisdictional comparisons 63.2 per cent of SMEs in New South Wales reported facing trivial costs compared to 83.0 per cent in Western Australia. SMEs in the ACT and Victoria are more likely to have incurred substantial costs from internal OHS training (9.6 per cent and 8.8 per cent respectively) than other jurisdictions. SMEs in the Northern Territory were the least

likely to face substantial costs associated with internal OHS training (less than 1 per cent) (figure 8.1).







As with usage rates, part of the observed jurisdictional differences in training costs are driven by industry mix. SMEs in Wholesale trade and Retail trade reported that they were more likely to face substantial costs when undertaking internal OHS training than SMEs in other industries. SMEs in Cultural, recreational and personal services were the least likely to incur substantial costs.

On an actual cost basis, average reported costs faced by SMEs for conducting internal OHS training in the 12 months to May 2009 were highest in South Australia (\$2730) and lowest in the Northern Territory (\$1430). Average costs faced by SMEs in Australia for internal OHS training was estimated at \$2060. Average internal OHS training costs were not significantly different across jurisdictions – all estimates with plus or minus one standard error<sup>4</sup> are shown by the lines on figure 8.2.

<sup>&</sup>lt;sup>4</sup> Standard errors are one measure of sampling error, which result from surveying a sample of SMEs as distinct from conducting a census of the whole population. Standard errors indicate the degree to which an estimate may vary from the value which would have been obtained from a full enumeration or the 'true value'. There are about two chances in three that a sample estimate differs from the true value by less than one standard error.





12 months to May 2009<sup>a,b</sup>

<sup>a</sup> Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. <sup>b</sup> In order to exclude outliers which distorts average costs the data omits two manufacturing firms in the Northern Territory who responded that they spent \$200 000 and \$300 000 respectively on internal OHS training, and two firms in Queensland who spent \$300 000 and \$350 000 respectively.

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

The broad similarity in reported costs of OHS training across the jurisdictions is a reflection of similarities in provisions. While the estimate of the cost reported by Northern Territory businesses is not significantly different from those in other jurisdictions, its lower range is possibly a reflection of the absence of a requirement for employers to deliver OHS training under the duty of care of employers to their employees.

On an industry basis, all reported cost estimates were similar with the exception of those reported by SMEs in Manufacturing and Wholesale trade. SMEs in these industries reported the highest average costs associated with internal OHS training compared with SMEs in other industries — an average of \$4740 and \$4590 respectively in the 12 months to May 2009 compared to the industry average of \$2060. Further, as might be expected given their greater number of employees, medium sized firms face much higher average costs associated with conducting internal OHS training than smaller firms (\$8490 versus \$1420).

#### Costs associated with purchasing external OHS training

The costs associated with purchasing external training associated with complying with OHS laws can be linked to a range of things including additional regulatory requirements, the level of complexity of business operations, a lack of capacity of the firm to conduct internal training and the overall complexity of the OHS regulatory system. SMEs in Victoria, South Australia, the Northern Territory and the ACT, were more likely to face moderate or substantial costs from purchasing external OHS training in the previous 12 months than other jurisdictions. In contrast, almost three quarters of SMEs in Tasmania who reported that they had purchased external OHS training considered those costs to be relatively trivial (figure 8.3).

### Figure 8.3 Relative costs faced by SMEs purchasing OHS training externally by jurisdiction



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

Again, differences were observed between SMEs operating in different industries. A higher proportion of SMEs in Retail trade and Wholesale trade reported substantial costs associated with purchasing external OHS training than SMEs in other industries in the 12 months to May 2009, while only 4.3 per cent of SMEs in Communication, property and business services reported substantial costs. SMEs in Accommodation, cafes and restaurants; Retail trade; and Manufacturing were more likely to report either moderate or substantial costs associated with purchasing external OHS training (53.4 per cent, 52.4 per cent and 48.9 per cent respectively).

On an actual cost basis, some jurisdictional differences were observed. SMEs in South Australia faced significantly higher average costs in purchasing external OHS training costs in the 12 months to May 2009 (at \$5180) compared to those SMEs located in New South Wales, Victoria, Western Australia and Tasmania. While SMEs in the Northern Territory and the ACT also appear to face much higher average internal OHS training costs, that data is not particularly reliable given the small sample sizes in these jurisdictions (figure 8.4).

### Figure 8.4 Average costs faced by SMEs purchasing OHS training externally by jurisdiction



12 months to May 2009<sup>a,b</sup>

<sup>a</sup> Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. <sup>b</sup> In order to exclude outliers which distorts average costs the data omits two manufacturing firms in the Northern Territory who responded that they spent \$200 000 and \$300 000 respectively on internal OHS training, and two firms in Queensland who spent \$300 000 and \$350 000 respectively.

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

The high external training costs faced by SMEs in South Australia (and potentially for the ACT and Northern Territory) could be due to more demanding OHS training requirements contained in regulations or additional complexity of the regulatory system. Alternatively, given that South Australia, the ACT and Northern Territory are smaller jurisdictions, these differences may be driven by fewer suppliers of state-specific OHS training, thus placing upward pressure on training costs.

Despite the similarities across the jurisdictions, some industry differences were observed. SMEs in Health and community services (\$7600) faced greater average costs of external OHS training in the 12 months to May 2009 than other industries — the average for all industries surveyed was \$2760. For other industries, training costs were broadly similar to the Australia average.

While data reported earlier show that medium sized firms are heavier users of external training than smaller firms, the average costs they face for this purchased training is no different. This could reflect the fact that medium sized firms have the capacity to conduct their own internal OHS training and are less reliant on employing external training consultants than smaller firms.

## 8.5 Industry example of OHS training — requirement for construction safety awareness training

The following section outlines the requirement for construction awareness training in jurisdictions and highlights where mutual recognition of qualifications exists, which can facilitate the mobility of workers in the construction industry.

In 2008-09, all jurisdictions apart from Tasmania, the Northern Territory and the ACT required people employed in the construction industry to complete OHS awareness training. This requirement is stipulated in the OHS regulations which operate in the Commonwealth (Reg. 12.12), Western Australia (Reg. 3.136), Queensland (Regs. 301 and 302), and in Victoria (Reg. 5.1.20). Regulations 213 and 214 of the OHS regulations in New South Wales refer to major contractor and employer responsibility to ensure OHS induction training is undertaken in the construction industry, while regulation 215 refers to the requirement for self-employed persons in the industry to undergo training (see box 8.2 for some costs associated with information and training provisions of the New South Wales laws). In Western Australia the requirement for OHS training is extended to employees performing construction work in the mining industry.

In Western Australia it is compulsory for a worker to have a Construction Safety Awareness Card (Blue Card) if they wish to work in the building and construction industry. The Blue Card is valid for three years. Main contractors, employers, or people in control of construction work must ensure that workers do not undertake construction work without completing the training. Employees and self employed people engaged in construction work at the worksite also have a responsibility to ensure that they have completed the training (Regulation 3.136 (3) of the *Occupational Safety and Health Regulations 1996*).

Other workers who need to have safety awareness training in construction work in Western Australia include supervisors, site foremen and managers, professional consultants who spend time on construction sites, casual and/or part-time building labourers, and labour hire personnel working on building sites.

### Box 8.2 Impact of OHS laws on construction subcontractors in New South Wales

In 2001, new OHS regulations were introduced in New South Wales that saw a shift toward a more self-regulated, consultative and performance-based approach to OHS which placed greater responsibilities on principal contractors and subcontractors for the effective management of OHS risks. This change posed particular challenges for small sub-contractors such as those in the construction industry.

Andonakis and Loosemore's 2005 study, which was based on 30 face-to-face interviews with subcontractors in the construction industry, found that:

- subcontractors relied heavily on the principal contractor (rather than the regulator) for information about OHS regulations and the need for compliance
- subcontractors believed the principal contractor was responsible for informing them of how they could comply
- noncompliance was significant among respondents from non English speaking backgrounds (largely because construction awareness training was only provided in English at the time that the interviews were conducted)
- sub-contractors had difficulties understanding terms such as hazards and risk management
- cost represented by far the greatest barrier to compliance (reported by a third of respondents). One respondent cited that it cost:
  - \$1000 to have a safety plan prepared
  - \$1700, in total, for their workers to obtain a 'green card'
  - the loss of half a day for each worker to attend the training course
  - around half an hour lost time for an OHS induction each time they arrived at a new construction site.
- the extent of costs were directly related to firm size costs were a less significant issue for sub-contractors employing five people or fewer, whereas sub-contractors with a larger number of employees all reported costs due to the need to induct and train their employees
- sub-contractors employing a health and safety officer reported lower levels of difficulty in complying with OHS regulations.

Source: Andonakis and Loosemore (2005).

The cost of construction safety training in Western Australia can range between \$80 and \$110. People already in the construction industry can claim up to 80 per cent of the cost from the Building and Construction Industry Training Fund, which was introduced to improve the quality of training and increase the number of skilled workers in the industry in Western Australia. It is funded by a small training levy on all construction projects in Western Australia.

The length of training may vary across jurisdictions but usually involves a full day. While this would result in reduced output for construction firms while workers attend the course, the benefits would include the reduced likelihood of accidents occurring in the workplace, which would contribute to lower costs for individual firms and the industry in the longer term.

The training course is also available to people working or looking to work in mining and resource industries. Among the topics covered in the course are OHS legislation in the workplace, communication and consultation on OHS, implementing OHS risk management, first aid procedures, and key principles of workplace injury management.

WorkSafe WA recognises the construction industry induction training conducted in Victoria, Queensland and South Australia as meeting the requirements of the Western Australian regulations. These three States deliver nationally recognised induction training, similar to the course in Western Australia. As a result, workers from those States do not need to repeat the Western Australian course to be able to work in construction, provided they can show evidence that they completed the induction training in their home State.

Construction induction training in New South Wales is available to all new workers carrying out construction work, including: self-employed persons; labourers; apprentices; trainees; trades-persons; supervisors and project managers; and employees who have not worked in the construction industry for over two years. The training course satisfies the legal requirements for general OHS construction induction for construction workers in New South Wales. The course is often referred to as the 'Green Card' or 'White Card' safety course. The white card replaced the green card on 29 March 2004. The training includes courses in OHS legislation in the workplace, communication and consultation in OHS, implementing OHS risk management, and principles of safe systems of work in construction. The cost of training associated with attaining a white card in New South Wales varies between \$85 and \$110. The cost of training can be either borne by individual employees or firms.

Other jurisdictions also provide construction safety awareness training with mutual recognition of certificates available. This removes the requirement for a person holding certificates or cards from these jurisdictions from having to undertake an additional induction training course when they perform construction work.

Table 8.5 shows how cards or certificates received after completion of construction safety induction training were recognised by the different jurisdictions in Australia in 2008-09. All jurisdictions which provide construction safety training (including

the Commonwealth), mutually recognise similar training provided by other jurisdictions. There are some minor exceptions such as Western Australia not recognising the safety awareness training provided in New South Wales prior to 29 March 2004 (also known as green cards). Such recognition facilitates the mobility of workers between jurisdictions without unnecessary delays or lost working time to complete similar training requirements.

|                                                |              |              | Recog        | gnised by:      |              |                         |
|------------------------------------------------|--------------|--------------|--------------|-----------------|--------------|-------------------------|
|                                                | Vic          | NSW          | Qld          | WA <sup>a</sup> | SA           | Tas/NT/ACT <sup>b</sup> |
| Vic — red<br>card (prior 1<br>July 2008)       |              | V            | $\checkmark$ | $\checkmark$    | ✓            | na                      |
| Vic — white<br>card (post<br>30 June<br>2008)  |              | √            | ✓            | ✓               | ✓            | na                      |
| NSW —<br>green card<br>(pre 29<br>March 2004)  | $\checkmark$ |              | ~            | ×               | $\checkmark$ | na                      |
| NSW —<br>white card<br>(post 29<br>March 2004) | $\checkmark$ |              | ~            | $\checkmark$    | $\checkmark$ | na                      |
| Qld — blue<br>card                             | $\checkmark$ | ~            |              | ~               | $\checkmark$ | na                      |
| WA                                             | $\checkmark$ | $\checkmark$ | ✓            |                 | $\checkmark$ | na                      |
| SA — white card                                | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$    |              | na                      |

## Table 8.5Mutual recognition by states and territories of construction<br/>safety induction training<br/>2008-09

**na** not applicable. <sup>a</sup> Western Australia only recognises cards issued in the past 3 years. Green cards formerly issued in New South Wales are no longer recognised by Western Australia. <sup>b</sup> Tasmania, the Northern Territory and the ACT did not have regulatory requirements for construction induction training as at 30 June 2009.

Source: Regulator websites.

The National Code of Practice for Induction for Construction Work was declared by the Australian Safety and Compensation Council (ASCC) in July 2007. At this meeting, ASCC members committed to having nationally consistent induction training by 1 July 2008. While Tasmania, the Northern Territory and the ACT did not have construction induction training available during the scope of our study (2008-09), subsequent initiatives have seen this type of training become available in these jurisdictions in the second half of 2009.

Tasmania introduced a code of practice titled Induction for Construction Work in July 2009. The code has legislative directionary status and places an obligation on employers to provide induction training within 12 months of gazettal of the code to employees who have been working in the construction industry for less than five years, and within 24 months for those working in the industry for five years or more.

# 9 Worker consultation, participation and representation

#### Key points

- In 2008-09, differences in requirements for electing health and safety representatives (HSRs) which made a difference in regulatory burdens across jurisdictions included:
  - Tasmania provided for one HSR per workplace, whereas all other jurisdictions (without necessarily precluding one HSR per workplace) provided for multiple HSRs in a workplace, thereby potentially imposing higher burdens
  - in Tasmania, the Northern Territory and the ACT, businesses with less than 10 employees were exempt from the HSR requirements.
- All jurisdictions required employers to be responsible for the costs of training HSRs, although the Commonwealth, New South Wales and Tasmania were the only jurisdictions where the training was compulsory in 2008-09.
  - Based on a limited sample, the costs of initial HSR training courses were found to range from \$495–615 (New South Wales) to \$550–1340 (Western Australia). The estimated average cost of providing paid leave to HSRs who attend such training ranged from \$710 (Queensland) to \$1183 (the Commonwealth, Victoria, South Australia and Western Australia).
- Employers with less than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory were exempt from the duties relating to health and safety committees (HSCs) and so did not face any regulatory burden from HSC requirements. Employers with less than 50 employees under the Commonwealth regime were also exempt.
- New South Wales and the Northern Territory placed the highest number of duties on employers in relation to HSCs. The single duty of employers in Queensland, Victoria and Western Australia, not to discriminate against HSC members, was unlikely to create a material burden for business.
- As at June 2009, the Commonwealth, South Australia, and Tasmania were the only jurisdictions not to provide union right of entry to workplaces to investigate possible breaches of occupational health and safety (OHS) regulations.
- Union right of entry can impose a burden on business where it results in a duplication of inspections (duplicating those of the relevant regulator), lost worker time arising from the discussion of OHS issues with union representatives and misuse of powers. However the presence of authorised union representatives in workplaces can provide a means of monitoring OHS compliance in circumstances where the capacity and resources of regulators are limited. Studies have shown that union presence can lead to improved OHS performance.

The participation of workers, and the representation of their interests, in matters of occupational health and safety (OHS) are an important driver of OHS outcomes (Stewart-Crompton, Mayman and Sherriff 2009). In Australia, this participation and representation is promoted by provisions relating to health and safety representatives (HSRs — box 9.1), health and safety committees (HSCs) and employee representative organisations (trade unions) within the OHS laws of the Commonwealth, states and territories. However, the Commonwealth, states and territories differ in their OHS provisions regarding HSRs (sections 9.1 and 9.3), HSCs (section 9.2 and 9.3) and trade unions (section 9.4).

#### Box 9.1 What are HSRs?

HSRs are elected by their co-workers to represent them on OHS issues in the workplace. HSRs have varying powers depending upon the jurisdiction in which they are acting as an HSR.

Once elected, an HSR continues to perform his/her normal duties as an employee and typically receives no additional remuneration for the HSR role. HSRs are not paid OHS officers or advisers of the employer. In the normal course of business, the principal cost to the employer of an HSR is the time spent away from their regular duties for HSR training and for fulfilling their responsibilities as an HSR.

HSRs, HSCs and trade unions were considered in the *National Review into Model Occupational Health and Safety Laws: Second Report* (Stewart-Crompton, Mayman and Sherriff 2009). Where relevant, the details of the recommendations of that review, along with the response of the Workplace Relations Ministerial Council (WRMC) and details of the relevant model work health and safety provisions (as amended in December 2009), have been included throughout this chapter to provide context to the benchmarking results.

A significant portion of the workforce is directly engaged as either an HSR or HSC member — a survey of Victorian employees showed that six per cent were HSRs and eight per cent were sitting on an HSC (Keegel 2009). Given this level of participation, the burdens faced by businesses as a result of HSR and HSC requirements are likely to be material in aggregate. However, as HSRs and HSCs are not automatically mandatory requirements in any jurisdiction, not all businesses are subject to such burdens.<sup>1</sup> For those businesses where HSR and/or HSC provisions have been activated, the resultant burdens should be considered in light

<sup>&</sup>lt;sup>1</sup> Based on a survey of 1802 small and medium enterprises across Australia (Sensis Survey of SMEs 2009, unpublished), 82 per cent of small and medium enterprises did not incur any costs in relation to HSRs and/or HSCs for the 12 months to May 2009. The survey did not, however, capture any information on the proportion of SMEs that had HSRs or HSCs in their workplaces.

of the widely accepted importance of worker consultation and participation as a 'necessary condition of the effective regulation of health and safety at the workplace' (Maxwell 2004, p. 9).

Queensland employers in prescribed industries must appoint an officer (referred to as a workplace health and safety officer (WHSO)) for each of its workplaces with 30 or more employees. While these WHSOs may be used as a conduit for worker consultation (in a similar manner to HSRs), this is not their primary purpose. The role and regulatory burden associated with WHSOs is discussed in chapter 7.

### 9.1 Health and safety representatives

#### Initiating the election process

In all jurisdictions, it is only once the HSR election process has been initiated that the obligation to have an HSR for a workplace arises. The process of electing an HSR can be initiated in three ways: the employee's initiative; the employer's initiative; or, a direction from a regulator (table 9.1).

#### Table 9.1 Initiation of HSR election process

2008-09

|                          | Cwlth | NSW          | Vic          | Qld | SA | WA | Tas | NT           | ACT  |
|--------------------------|-------|--------------|--------------|-----|----|----|-----|--------------|------|
| Employee's initiative    | √a    | ~            | ~            | ✓   | ✓  | ✓  | √b  | √b           | √b,c |
| Employer's initiative    |       | $\checkmark$ | $\checkmark$ | √d  |    |    |     | $\checkmark$ |      |
| Direction from regulator | √e    | $\checkmark$ |              |     |    |    |     |              |      |

<sup>a</sup> An employee representative may initiate the request on behalf of 'workers' following the request of the workers.
 <sup>b</sup> Only for workplaces where there are 10 or more employees.
 <sup>c</sup> The exemption for workplaces with less than 10 employees ceased from 1 October 2009 with the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008.
 <sup>d</sup> '[W]orkers may elect a [HSR]... at their employer's suggestion' (*Workplace Health and Safety Act 1995* (Qld), s. 71).
 <sup>e</sup> The Safety, Rehabilitation and Compensation Commission can initiate the election of an HSR in certain circumstances.

*Sources:* Department of Education, Employment and Workplace Relations (Cwlth) (pers. comm., 7 January 2010); OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001).

In 2008-09, HSR requirements placed no burden on businesses with less than 10 employees in Tasmania, the Northern Territory and the ACT, as these businesses were exempt from the requirements. Aside from the Commonwealth and New South Wales, where the possibility of a regulator initiating an HSR election may create some uncertainty for business, there would be no differences in the burdens across the other jurisdictions.

The National Review into Model OHS Laws recommended the model Act provide for the election of HSRs to be initiated by workers (Stewart-Crompton, Mayman and Sherriff 2009). This recommendation was accepted, in principle, by the WRMC (2009a) — there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009).

#### The area of representation and number of HSRs for a workplace

After the process for electing an HSR has been initiated, the area of representation for the proposed HSR needs to be determined. In most jurisdictions, this area of representation is defined as a 'work group'.<sup>2</sup> Work groups are typically established to allow HSRs to represent workers with similar functions within a workplace.<sup>3</sup> For example, in a manufacturing business, one work group may be comprised of secretarial and office staff, while another may be comprised of machine operators. As a workplace can be categorised into multiple work groups, those jurisdictions allowing for work groups (table 9.2) are, in effect, allowing for more than one HSR per workplace.

Victoria, South Australia, Western Australia and the ACT allow for the possibility of having more than one HSR per work group (table 9.2) — albeit in the form of deputy HSRs in Victoria, South Australia and the ACT. Where multiple HSRs are elected for a work group, the employer faces the cost of training and work time lost to HSR duties for each HSR — this is a potential burden that is not faced by businesses operating in jurisdictions that do not provide for multiple HSRs (per work group).

The Tasmanian regime for determining an HSR's area of representation should place the smallest burden on business as it limits the number of HSRs to one per workplace (compared to other jurisdictions where there may be multiple work groups per workplace and/or multiple HSRs per work group).<sup>4</sup>

Delegate structures for consultation on work groups, such as that employed in Western Australia, might reduce the burden for employers as it reduces the number of contact points in the consultation process — especially compared to regimes that

<sup>&</sup>lt;sup>2</sup> Depending on the jurisdiction, work groups are also referred to as 'worker consultation units' and 'areas of representation'. 'Work groups' is used throughout this chapter to collectively refer to HSRs' areas of representation.

<sup>&</sup>lt;sup>3</sup> If agreed by the employer and employees, a work group can be designated to cover all employees, thereby resulting in one HSR for the workplace.

<sup>&</sup>lt;sup>4</sup> While there is no statutory provision for doing so, Tasmanian employers can voluntarily allow more than one HSR per workplace (WorkCover Tasmania 2004).

require consultation with workers/employees in general. The Victorian approach of negotiating over the consultation process could add a layer of bureaucracy (and cost) to the consultation process — however, an effective negotiation process might reduce the overall costs of consulting on the nature of work groups.

|       | 2000                                             | -09                                                                        |                                                                                                                                                                                                                       |
|-------|--------------------------------------------------|----------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|       | Provision for a<br>work group<br>(or equivalent) | Provision for<br>more than one<br>HSR per work<br>group<br>(or equivalent) | Parties/conditions for discussions about election of HSRs and formation of work groups                                                                                                                                |
| Cwlth | √a                                               | ×                                                                          | Employer and employees or, at the employees' request, an employee representative                                                                                                                                      |
| NSW   | $\checkmark$                                     | np                                                                         | Employer and employees <sup>b</sup>                                                                                                                                                                                   |
| Vic   | $\checkmark$                                     | √C                                                                         | To be determined by negotiation between the employer and workers                                                                                                                                                      |
| Qld   | √d                                               | np                                                                         | Workers may request discussions with the employer                                                                                                                                                                     |
| SA    | $\checkmark$                                     | √C                                                                         | Employer and any interested employees (or person appointed by those employees)                                                                                                                                        |
| WA    | √e                                               | $\checkmark$                                                               | Employer and the delegate(s) appointed by the workers                                                                                                                                                                 |
| Tas   | ×                                                | na                                                                         | na                                                                                                                                                                                                                    |
| NT    | ~                                                | np                                                                         | Employer(s) and workers who are to be members of the proposed group. Where the employer fails to commence consultation, the regulator may decide how the work group is to be constituted and establish the work group |
| ACT   | ~                                                | √c                                                                         | Each union representing employees and, if there is no such union, as many employees as the employer considers appropriate <sup>f</sup>                                                                                |

### Table 9.2Determining an HSR's area of representation2008.00

**na** not applicable. **np** no provision. <sup>**a**</sup> The Occupational Health and Safety Act 1991 (Cwlth) provides that all employees may be included in one work group. <sup>**b**</sup> Under the Occupational Health and Safety Regulation 2001 (NSW), an industrial employee organisation may, at the request of employees, represent those employees for the purposes of consultation on OHS consultative arrangements. <sup>**c**</sup> HSR and deputy HSR. <sup>**d**</sup> Employees may provide for the election of HSR(s) for any group of employees that constitute a distinct unit of the workforce. <sup>**f**</sup> This requirement changed to a duty to consult 'workers' from 1 October 2009 (the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008).

*Sources*: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001); WorkCover Tasmania (2004); WorkCover Tasmania (2009b).

The National Review into Model OHS Laws considered HSRs' areas of representation and the number of HSRs in workplaces — its recommendations, the WRMC's response and the relevant model work health and safety provisions are outlined in box 9.2.

#### Box 9.2 Areas of representation for HSRs and the number of HSRs in a workplace — recommendations from the National Review into Model OHS Laws

In summary, recommendations 102 and 103 of the **National Review** were that workers should be grouped into work groups for the purposes of representation by HSRs. The nature and number of work groups should be determined by discussion between the workers (and any person authorised to represent them) and the person conducting the business or undertaking most directly engaged with the work group.

It also recommended that no limit should be placed on the number of HSRs that could be elected for a workplace and that such matters should be determined through discussions between the workers and the person conducting the business or undertaking most directly engaged with the workers (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed, in principle, with these recommendations.

The **model work health and safety provisions** (as amended in December 2009) provide that the person conducting the business or undertaking must 'take all reasonable steps to commence negotiations with the workers within 14 days after a request is made' for the election of an HSR.

### Election requirements

There are differences in the OHS laws of the jurisdictions relating to the election of HSRs. Some of the differences affecting the burden on business include:

- the Commonwealth's *Occupational Health and Safety Act 1991* is the only OHS Act to explicitly require employers to bear the cost of running the HSR elections
- the Commonwealth, New South Wales, Queensland, Western Australia and Tasmania all provide for unions and/or industrial organisations having a role in running an HSR election. In contrast, the OHS inspector can be called upon to run an HSR election in Victoria
- the Commonwealth, Victorian and South Australian regimes do not require an election to be held where the number of candidates equals the number of vacancies (the legislation of other jurisdictions are silent on this point)
- the Tasmanian regime requires more than 50 per cent of employees to cast a vote in order for an HSR election result to be valid.

How HSR elections are run in practice may differ from the minimum requirements specified in legislation — for example, some employers may well cover the cost of an HSR election even though they are not bound to do so. While such arrangements

may pose a cost to business, they are not costs that arise due to OHS regulation, but rather they arise due to the voluntary actions of business.

The National Review into Model OHS Laws considered the requirements for HSR elections — its recommendations, and the WRMC's response, are outlined in box 9.3 (there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009)).

### Box 9.3 HSR elections — recommendations from the National Review into Model OHS Laws

In summary, recommendation 104 of the National Review was that:

- HSRs should be elected by the members of the work group they will represent
- the members of the work group should determine how the election is conducted and they may request a union or other organisation assist in conducting the election
- no election should be required where the number of HSR candidates equals the number of HSR vacancies (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed, in principle, with these recommendations.

### Term of appointment

All jurisdictions prescribe a maximum term for HSR appointments. At the conclusion of an HSR's term, an election is conducted to either reappoint the HSR or appoint a replacement. The shorter the HSR's term of appointment, the more frequent are HSR elections and the associated potential disruption to the workplace (and lost output). When a new HSR is elected, the employer will also incur costs for the training of the replacement HSR (see below) and in building an effective working relationship with that HSR. On the other hand, more frequent elections allow ineffective HSRs to be replaced sooner, thereby potentially improving the effectiveness of the worker consultation and participation process.

Despite the differing merits of longer and shorter HSR terms, all jurisdictions, in 2008-09, had maximum terms of either two years (the Commonwealth,<sup>5</sup> New South Wales,<sup>6</sup> Queensland, Western Australia, the Northern Territory and the ACT) or three years (Victoria, South Australia and Tasmania). A three year term was recommended by the National Review into Model OHS Laws (Stewart-Crompton,

<sup>&</sup>lt;sup>5</sup> Under the Commonwealth regime, if a term of office is not specified in the arrangements of a designated work group, the term of office is two years.

<sup>&</sup>lt;sup>6</sup> In New South Wales, an HSR is to be elected for a maximum period of two years (but the term of office may be shortened in connection with a change in OHS consultation arrangements).

Mayman and Sherriff 2009), agreed by the WRMC (2009a) and included in the model work health and safety provisions (as amended in December 2009).

#### Powers

Each jurisdiction provides HSRs with certain powers to allow them to fulfil their role — table 9.3 outlines some of the key powers. Except in emergency circumstances, HSRs are typically able to exercise their powers only in relation to the work group they represent.

Table 9.3Selected powers of health and safety representatives2008-09

|                                                                                                                  | Cwlth        | NSW           | Vic          | Qld          | SA           | WA           | Tas          | NT | ACT          |
|------------------------------------------------------------------------------------------------------------------|--------------|---------------|--------------|--------------|--------------|--------------|--------------|----|--------------|
| Issue provisional improvement notices (PIN — box 9.4) or equivalent                                              | ~            | np            | √a           | √a,b         | √C           | √b           | ~            | √  | √d           |
| Direct the cessation of work where it is unsafe                                                                  | ✓            | np            | ✓            | np           | ✓            | np           | ✓            | ~  | √d           |
| Request an inspector conduct an inspection                                                                       | √            | $\checkmark$  | np           | np           | np           | np           | √e           | np | np           |
| Inspect a workplace                                                                                              | $\checkmark$ | np <b>f</b>   | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | np | $\checkmark$ |
| Accompany an inspector during an inspection                                                                      | ✓            | $\checkmark$  | ~            | np           | ~            | np           | ✓            | np | ~            |
| Accompany a worker during an OHS interview                                                                       | ~            | ✓             | ✓            | √g           | ✓            | √h           | ✓            | np | √            |
| Investigate/review an accident or<br>dangerous occurrence (or inspect the<br>workplace after such an occurrence) | ~            | np <b>f,i</b> | ~            | ✓            | ✓            | ✓            | ✓            | np | ✓            |

**np** no provision. <sup>a</sup> An HSR may only issue the direction/PIN after consulting with the employer. <sup>b</sup> Exercisable by 'trained'/'qualified' HSRs only. <sup>c</sup> Can only be issued if the matter cannot be resolved by the HSC. <sup>d</sup> From 1 October 2009, an HSR may only exercise this power if they have completed the relevant training. <sup>e</sup> Only after consultation with the employer. <sup>f</sup> HSRs have the power to 'investigate any matter that may be a risk to health and safety' at the workplace. <sup>g</sup> Only for interviews related to workplace incidents. <sup>h</sup> Obligation on employers to allow the HSR to be present. <sup>i</sup> An HSR may be an observer at investigations related to an accident or dangerous occurrence.

*Sources*: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001); WorkCover Tasmania (2009b).

The powers of HSRs have the potential to create a burden on business because of the things business must do to facilitate the exercise of a power and the consequences of exercising of a power. For example, with respect to an HSR's power to attend an OHS interview with an employee/worker, an employer may need to make all employees/workers aware that they can call on an HSR for this purpose and also, where such an interview is to take place, ensure it is undertaken at a time at which the HSR can attend.

### Box 9.4 **Provisional improvement notices (PINs)**

While a number of jurisdictions refer to PINs, the equivalent instruments are 'default notices' in South Australia, 'written directions' in Tasmania and a 'notice of safety hazard' in the Northern Territory.

Where they have the power, an HSR may issue a PIN where they believe a person at the workplace is breaching, or has breached and is likely to again breach, the relevant OHS Act or regulations. Before issuing a PIN, the HSR must first consult with the person(s) involved in the breach and attempt to rectify the problem (for those operating under the Commonwealth regime, the HSR must first consult with the supervisor of the person(s) involved in the breach).

The person to whom a PIN is issued may request an inspector review the circumstances surrounding the issue of the PIN and the inspector may either cancel or affirm (with or without modifications) the PIN. It is an offence not to comply with a PIN that has not been the subject of review by an inspector or that has been affirmed by an inspector.

Sources: Occupational Health and Safety Act 1991 (Cwlth); Stewart-Crompton, Mayman and Sherriff (2009).

HSRs have comparatively minor powers in New South Wales, the least of any jurisdiction, and so are likely to pose the lowest direct costs for business. These comparatively minor powers may be due, at least in part, to the primacy of HSCs over HSRs as the consultation mechanism for New South Wales workplaces.<sup>7</sup>

The cost to business of an HSR using his/her powers needs to be offset against the benefits such an exercise of powers creates. For example, where an HSR directs a cessation of work due to an unsafe environment, a business may benefit from the prevention of workplace injuries and the associated costs of: further workplace disruptions; possible regulatory investigations; and increases in workers' compensation premiums (to list but a few possible costs).

Similarly, the power of HSRs to issue a PIN (box 9.4) or equivalent notice potentially poses a significant burden for business — particularly should the power be abused.<sup>8</sup> However, the actions of a prudent HSR in issuing a PIN, or raising an OHS issue as a precursor to issuing a PIN, can result in OHS issues being addressed in a timely manner without the involvement of the regulator — an outcome that benefits both workers and employers. An Australian Council of Trade Unions'

<sup>&</sup>lt;sup>7</sup> Regulation 23 of the *Occupational Health and Safety Regulation 2001* (NSW) provides that 'OHS consultation arrangements that include both an [HSC] and an [HSR] for a work group must ensure that the [HSC] is the principal mechanism for consultation for that work group'.

<sup>&</sup>lt;sup>8</sup> The ability of employers to remove an HSR from office (discussed below) is an important means by which they can protect themselves from the costs of HSRs that abuse their power.

(ACTU) survey of HSRs found that while only 10 per cent of HSRs had issued a PIN, 95 per cent of those issuing a PIN said it was effective in addressing the underlying OHS issue (ACTU 2002).

The recommendations of the National Review into Model OHS Laws on the powers that should be provided to HSRs in the model Act are outlined in box 9.5. There are no material differences between those recommendations and the model work health and safety provisions (as amended in December 2009)).

### Box 9.5 HSR powers — recommendations from the National Review into Model OHS Laws

In summary, recommendations 106 and 109 the **National Review** were that HSRs should have the rights and powers to:

- inspect the workplace (either after giving reasonable notice or immediately after a workplace incident or situation involving an OHS risk), investigate OHS complaints, accompany an inspector during an inspection and request an inspector's assistance
- be present with a member of their work group during an OHS interview
- receive information affecting the OHS of workers and enquire into anything that appears to be an OHS risk to their work group
- request the establishment of an HSC, represent the members of the work group on OHS matters and monitor the OHS measures implemented in the workplace
- issue a PIN and direct that work cease where there is an immediate OHS threat.

It also recommended that HSRs' rights, powers and functions be limited to the work group they represent, unless: under certain conditions, a member of another work group requests an HSR's assistance; or, there is an immediate risk to health or safety that affects or may affect another work group and the HSR (and any deputy HSR) for that other work group is not available (Stewart-Crompton, Mayman and Sherriff 2009).

The WRMC (2009a) agreed, in principle, with these recommendations.

### Training requirements

The OHS laws of all jurisdictions include provisions for HSR training. However, the training is compulsory only under the Commonwealth, New South Wales and Tasmanian regimes.<sup>9</sup> In the other jurisdictions, an employer is to arrange training if it is requested by the HSR. Table 9.4 compares the obligations of employers and estimates of some of the costs they incur in respect to HSR training.

<sup>&</sup>lt;sup>9</sup> From 1 October 2009, training was also compulsory in the ACT under the *Work Safety Regulation 2009* (ACT).
| Table 9.4 | HSR training — employer obligations and cost estimates |
|-----------|--------------------------------------------------------|
|           | 30 June 2009                                           |

|                                                               | Cwlth <sup>a</sup> | NSW          | <sub>Vic</sub> b | Qld          | SAL              | <b>W</b> A   | Tas   | <sub>N7</sub> b | ACT          |
|---------------------------------------------------------------|--------------------|--------------|------------------|--------------|------------------|--------------|-------|-----------------|--------------|
| Training to be provided                                       | $\checkmark$       | ~            | √C               | √C           | ; <sub>√</sub> 0 | ; √c         | ✓     | √C              | √c,d         |
| Refresher training to be provided                             | np                 | np           | √C               | √C           | ; <b>√</b> 0     | p np         | √e    | √C              | np <b>d</b>  |
| Employer to meet course costs                                 | √f                 | $\checkmark$ | $\checkmark$     | $\checkmark$ | $\checkmark$     | $\checkmark$ | √f    | $\checkmark$    | np <b>d</b>  |
| Lowest estimated course cost<br>(per employee including GST)  | \$690              | \$495        | \$715            | \$500        | \$580            | \$550        | \$770 |                 | \$550        |
| Highest estimated course cost<br>(per employee including GST) | \$879              | \$615        | \$1 250          | \$645        | \$820            | \$1 340      | ψΠΟ   | u               | \$593        |
| Paid leave to attend training                                 | $\checkmark$       | $\checkmark$ | $\checkmark$     | $\checkmark$ | $\checkmark$     | ~            | √g    | $\checkmark$    | $\checkmark$ |
| Number of days training                                       | 5 <b>h</b>         | 4            | 5                | 3            | 5                | 5            | 4     |                 | 4            |
| Time cost <sup>i</sup>                                        | \$1 183            | \$946        | \$1 183          | \$710        | \$1 183          | \$1 183      | \$946 | ul              | \$946        |

**np** no provision. **ul** unable to locate. <sup>a</sup> Training must be accredited by the regulator. <sup>b</sup> Training course must be approved (or conducted) by the regulator. <sup>c</sup> Only if requested by the HSR / is an HSR entitlement. <sup>d</sup> From 1 October 2009, this training was compulsory in the ACT under the *Work Safety Regulation 2009* (ACT) and employers were obligated to meet the cost of the training course. <sup>e</sup> Only if elected to a second term as an HSR. <sup>f</sup> While not contained in legislation, the regulator's guidance material indicates that, because the training is compulsory, the costs of that training are the employer's responsibility. <sup>g</sup> Training is to take place during normal work hours. <sup>h</sup> One provider offers a 3½ day course. <sup>i</sup> Based on full-time adult ordinary time earnings (ABS 2009) for February 2009.

*Sources*: AES (2009); AIM (2009); AITT (2009); ASLS (2009b); ACHS (2009); Business SA (2009); CCIQ (2009); Easy HR (2009); IPM (2009); Job Safety Assistance (2009); Stewart-Crompton, Mayman and Sherriff (2009); NSCA (2009a, 2009b and 2009c); Recovre (2009); SA Unions (2009); SDA Training Centre (2009); SIAG (2009); SRCC (2008); VECCI (2009); WorkCover Tasmania (2009b); Workwatch (2009).

The costs in table 9.4 relate to the costs of the training course and lost work time only, and do not include costs such as travel, accommodation and incidental expenses (such as meal allowances). These costs were excluded as it is problematic to determine typical costs for a business. For example, travel and accommodation costs will vary based on factors such as a business' distance from training centres and internal policies on travel and accommodation — a business located in a capital city may incur nominal travel and accommodation costs in having their HSRs trained, whereas the travel and accommodation costs for a rural business may be quite high, especially if training is only available in the state/territory capital.

The course costs in table 9.4:

- are premised on the assumptions that:
  - the training is for newly elected HSRs in their first year of office
  - the employer is not a member of any group (such as a Chamber of Commerce and Industry) and so is not entitled to any discounts on training fees<sup>10</sup>

<sup>&</sup>lt;sup>10</sup> Depending upon the organisation of which they are a member, employers can obtain discounts of up to 18 per cent of the cost of a training course by virtue of their membership.

• were those that could be obtained from the websites of OHS training providers. As such, they may not represent the full range of course costs — that is, there may be higher and lower course costs applicable in each jurisdiction.

Queensland employers potentially face the least cost (per HSR) from HSR training requirements and Victorian employers face the highest cost (figure 9.1). The difference in cost between the two is less than \$1000 per HSR and the costs are contingent on training being requested by an HSR.

### Figure 9.1 Estimates of the cost of HSR training — course costs and paid leave



Based on mid-point of minimum and maximum course costs (table 9.4)

<sup>a</sup> No data available to support estimates for the Northern Territory. *Data source*: Table 9.4.

South Australia is unique among the jurisdictions in placing a specific obligation on employers to reimburse HSRs for any reasonable expenses incurred in attending HSR training, including the costs associated with travel, meals, accommodation and parking fees. However, SafeWork SA subsidises HSR training (as well as training for HSC members) for certain employers. For example, employers (except self-insured employers) within specific high risk industries, specific high risk occupations and small businesses may be eligible for subsidies of up to \$100 per HSR per day of training. Subsidies are assessed on a case by case basis for new and expanding industries, as well as those located wholly or predominantly in non-metropolitan areas (South Australian Government, pers. comm., 9 December 2009).

While business may face a burden from the requirements to provide HSR training, it also benefits from having trained HSRs. For example, a number of studies (Johnstone, Quinlan and Walters 2004; Walters 1997; Walters, Kirby and Daly 2001) show that well-trained HSRs (or equivalent) are effective in improving OHS outcomes, including a reduction in injuries and the economic costs associated with those injuries (James and Walters 2002).

The number of days required for HSR training in each jurisdiction (table 9.4) appear unrelated to the powers of HSRs (table 9.3). For example, Tasmanian HSRs have the most powers yet require four days training, whereas Western Australian HSRs have fewer powers but require five days training. Some of the differences in the length of training courses may be due to the complexity of the broader OHS system in which the HSRs are required to operate. For example, while HSRs in New South Wales have few and comparatively minor powers, they still require four days training — indicating there may be aspects of the New South Wales regime that take longer to train HSRs in compared to a jurisdiction, such as Tasmania, where the HSRs have greater powers but also require four days training. Finally, some of the differences in course lengths may be due to training content prescribed by the jurisdictions and/or their OHS regulators (box 9.6).

### Box 9.6 HSR training course requirements

The Commonwealth has set four objectives for its HSR training courses: to understand the structure, purpose and key provisions of the OHS Act; to understand the role, function and powers of an HSR; to develop the knowledge and skills necessary to carry out the role of an HSR; and to gain practical skills for implementing the HSR role in the workplace.

While the Commonwealth does not set requirements for length of the training course, it notes that, '[i]n the past, full courses have been run over five consecutive days in a classroom setting'. (SRCC 2007, p. 8)

ACT guidance material provides that the training course should,

[h]ave a minimum duration of 28 hours in order to ensure sufficient time to adequately cover the course content. The course should be delivered over a period of no more than eight (8) weeks to ensure maximum effectiveness. (Chief Minister's Department (ACT Government) 2006, p. 6)

A Western Australian facilitator's guide for HSR training (Commission for Occupation Safety and Health (Western Australia) 2009) includes the following topics among those to be covered in the training: the OHS legislative framework (including the duty of care and the roles and responsibilities of the key duty holders); the functions of HSRs, and resources and tools to help HSRs in their roles; and the use of PINs.

The different training requirements of the jurisdictions (for example, box 9.6) create a cost for national training providers as they need to devise separate courses for each jurisdiction. A common set of training requirements would allow these providers to create a single training program, thereby eliminating the costs of creating and maintaining up to nine separate programs on a common matter (such as HSR training). If these reduced costs were reflected in lower prices for training courses, those businesses seeking training would also benefit from decreased costs.

The National Review into Model OHS Laws considered the training requirements for HSRs — its recommendations, the WRMC's response and the relevant model work health and safety provisions, are outlined in box 9.7.

### Box 9.7 HSR training — recommendations from the National Review into Model OHS Laws

The **National Review** addressed HSR training in recommendations 110 and 111. In summary, it recommended:

- that an HSR attend training as soon as is reasonable after his/her election and that the training should: comprise a regulator-approved, five day competency-based training course; and be either of the HSR's choice or as directed by an inspector
- the HSR be entitled to paid leave in order to attend the training
- the training should be undertaken at a time agreed between the HSR and the person conducting the business or undertaking.

It also made recommendations on 'refresher training', including that an HSR may attend and receive paid leave for:

- one day's regulator approved refresher training per year (after the first year)
- other training as agreed between the HSR and the person conducting the business or undertaking, or as directed by an inspector (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** agreed in principle with these recommendations, noting that:

- the model Act should not specify the nature or duration of the training
- the training should not be mandatory, but HSRs should be unable to exercise their power to issue PINs or stop work directions unless they have completed the training
- the cost of the training falls to the person conducting the business or undertaking
- in addition to paid leave to attend training, HSRs should also be reimbursed any costs associated with attending the training (WRMC 2009a).

The **model work health and safety provisions** (as amended in December 2009) provide that the employer must, 'as soon as practicable within the period of 3 months after the request is made, allow the HSR time off work to attend the course of training'.

### Provisions for an employer to initiate the disqualification or removal of an HSR from office

The ability to remove an HSR from office in a timely manner is an important means by which employers can protect themselves from the costs of HSRs that abuse their power or in some other way fail to fulfil their responsibilities. New South Wales provides no means for employers to seek the removal of an HSR from office, while the Queensland provisions amount to a limitation of an HSR's powers rather than the HSR's removal from office (table 9.5).

### Table 9.5Provision for the disqualification of HSRs2008-09

|                  | Provision for the disqualification of HSRs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth            | The regulator may disqualify an HSR, for a specified period not exceeding five years for acting with the intention of causing harm to the employer or their undertaking, or acting unreasonably, capriciously or otherwise than for the purpose for which the power was conferred, including the disclosure of information                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| NSW              | No provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Vic              | The Magistrates Court may disqualify an HSR for a specified period or permanently, if the HSR has misused powers, intending to cause harm to the employer or their undertaking                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Qld              | An application can be made to the Industrial Commission to suspend or cancel an HSR's entitlement to issue a provisional improvement notice                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| SA               | A review committee of the Industrial Court (comprising a judge or industrial magistrate, an employee representative and an employer representative) can review an application for the disqualification of an HSR. The disqualification can be for a specified period and may proceed where an HSR: repeatedly neglects their HSR functions; or, exercises powers or functions for an improper purpose (including the inappropriate disclosure of information)                                                                                                                                                                                                                                                                                                                                                                       |
| WA               | The Industrial Relations Commission (sitting as the Occupational Health and Safety Tribunal) may disqualify an HSR, for a specified period or permanently, for having done anything with the intention only of causing harm to the employer or their undertaking, including the use or disclosure of information, or for failure to adequately perform functions under the OHS Act                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Tas              | The regulator may cancel an appointment and may prohibit a person from being appointed as an HSR for any period up to five years, for acting with the intention of causing harm to the employer or the employer's work activities or for acting unreasonably, capriciously or otherwise than for the purpose for which he or she was appointed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| NT               | The regulator may disqualify an HSR for misusing the powers of an HSR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| ACT <sup>a</sup> | <i>Disqualification</i> : The regulator may cancel an HSR appointment and may prohibit a person from being appointed as an HSR for any period up to five years, for: acting with the intention of causing harm to the employer or the employer's work activities; for acting unreasonably, capriciously or otherwise than for the purpose for which a power was given to the HSR; or, for intentionally using or disclosing information obtained from the employer for a purpose not connected with being an HSR <i>Objection to selection</i> <sup>b</sup> : If a notice of objection to the selection of the current representative, signed by the employer of all the employees included in the designated work group is lodged with the regulator, the regulator shall conduct an election of an HSR to replace the current HSR |

<sup>a</sup> These provisions were amended from 1 October 2009 (the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008). <sup>b</sup> Provision does not apply to HSRs elected under this process (i.e. following a election arising from a notice of objection).

*Source*: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); South Australian Government, pers. comm., 15 December 2009; WorkCover NSW (2001).

Of those jurisdictions providing for the removal of an HSR,<sup>11</sup> those where the regulator administers the process (the Commonwealth, Tasmania, the Northern Territory and the ACT) are likely to impose a lower burden on business compared to the jurisdictions that direct the process through the courts (Victoria, Queensland and Western Australia) or a review committee of the court (South Australia).

The National Review into Model OHS Laws considered the disqualification of HSRs — its recommendations, and the WRMC's response, are outlined in box 9.8 (there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009)).

#### Box 9.8 **Disqualifying HSRs — recommendations from the** National Review into Model OHS Laws

Recommendation 113 of the **National Review** was that applications to disqualify an HSR should be able to be made to the relevant court/tribunal by the regulator, a member of the HSR's work group or any person detrimentally affected by an HSR's performance (or non-performance) of their duties. Following such an application, the relevant court or tribunal may disqualify or suspend an HSR, or suspend the right of the HSR to exercise a power for a specified period, for:

- repeatedly neglecting their HSR functions; or
- exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or
- acting unreasonably in the performance of their functions and exercise of their powers as an HSR (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed in principle with the recommendation, but noted that the involvement of a court/tribunal was not appropriate in cases of poor performance of an HSR and, as such, 'repeatedly neglecting HSR functions' and 'acting unreasonably in the performance of their functions and exercise of their powers as an HSR' should not be grounds for disqualification or suspension.

<sup>&</sup>lt;sup>11</sup> In 2008-09, in most jurisdictions (the Commonwealth, Victoria, South Australia, Western Australia, the Northern Territory and the ACT) the employees represented by HSRs could also initiate some form of action for the removal of that HSR from office. While in Tasmania, situations where the HSR did not have the support of the majority of the employees they represented were grounds for the employer or regulator seeking the HSR's removal from office.

### 9.2 Health and safety committees

HSCs are not automatically mandatory in any jurisdiction. However, in 2008-09, all jurisdictions (except the ACT)<sup>12</sup> had OHS provisions either requiring an employer to establish an HSC when requested to do so by employees or by an HSR (depending on the jurisdiction — table 9.6).

| 2008-09                                           |              |              |              |              |              |              |              |              |                  |
|---------------------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|------------------|
|                                                   | Cwlth        | NSW          | Vic          | Qld          | SA           | WA           | Tas          | NT           | ACT <sup>a</sup> |
| HSC provisions apply when employee numbers exceed | 50           | 20           | np           | np           | 20           | np           | 20           | 20           | np               |
| Establishment of HSCs requi                       | red:         |              |              |              |              |              |              |              |                  |
| On request of HSR                                 | √b           | np           | $\checkmark$ | $\checkmark$ | $\checkmark$ | np           | np           | $\checkmark$ | np               |
| On request of employees                           | $\checkmark$ | $\checkmark$ | np           | np           | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | np               |
| Direction of the regulator                        | np           | $\checkmark$ | np           | $\checkmark$ | np           | $\checkmark$ | np           | np           | np               |
| Restriction on composition of members             | np           | √c,d         | √c,e         | √f           | √C           | √C           | √g           | √c,h         | np               |
| Prescribed frequency of<br>HSC meetings (months)  | np           | np           | 3            | 3            | 3            | np           | 3            | 3            | np               |

### Table 9.6 Forming HSCs

**np** no provision. <sup>a</sup> From 1 October 2009 and the commencement of the *Work Safety Regulation 2009* (ACT), there are requirements for the formation of HSCs in the ACT. <sup>b</sup> An 'involved union' for a workgroup may also request the formation of an HSC. <sup>c</sup> The number of employer representatives on the HSC should not exceed the number of elected employee representatives. <sup>d</sup> The chairperson must be one of the employee representatives. <sup>f</sup> See box 9.9. <sup>g</sup> The HSC must be comprised of a majority of employees unless otherwise agreed between the employee and employees. <sup>h</sup> The HSC must include the HSR (if there is one).

Source: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001).

The obligation of an employer to grant an employee's request to form an HSC is subject to varying thresholds. An HSC need only be formed where:

- a single employee makes the request in Western Australia
- a minimum of five employees make the request in South Australia
- over 50 per cent of employees make the request in New South Wales, Tasmania and the Northern Territory.

Of those employers in jurisdictions where employees can request the formation of an HSC, Western Australian employers would be most likely to be obliged to form an HSC (and bear the associated burdens) given the obligation arises with the

<sup>&</sup>lt;sup>12</sup> The *Work Safety Regulation 2009* (ACT), which came into effect from 1 October 2009, provides for the formation of an HSC following the request of a majority of employees or agreement between the employer and worker consultation unit (i.e. the work group).

request of a single employee or the direction of the regulator. Employers with less than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory, were exempt from the duties relating to HSCs and so did not face any burden from these requirements. Commonwealth employers with less than 50 employees were also exempt.

### Box 9.9 **Requirements for HSCs in Queensland**

In Queensland, the membership of the HSC is subject to a number of requirements:

- a HSC member must be an employer, principal contractor or an employee at the workplace
- the workplace health and safety officer (see chapter 7) and HSR for the workplace are to be members
- at least half the HSC members must be employees other than those nominated by the employer or principal contractor
- other HSC members are determined by negotiation between the employer/principal contractor and employees
  - employees may be represented during negotiations by the union of which they are members if they have told the employer or principal contractor that they want to be represented by their union (if the workers are members of more than one union, each of the unions may be involved in the negotiations).

In New South Wales and South Australia, the OHS laws allow for more than one HSC per workplace, while the Commonwealth holds that the creation of an HSC does not preclude the creation of other committees dealing with OHS matters. The existence of multiple HSCs for a workplace could compound the burden of HSC requirements on business. In contrast, Western Australia allows for an HSC to cover more than one workplace, thereby potentially reducing the aggregate burden of HSCs for Western Australian businesses operating more than one workplace.

The National Review into Model OHS Laws considered the requirements that should apply in relation to the formation of HSCs and HSC meetings — its recommendations and the WRMC's response are outlined in box 9.10, along with relevant model work health and safety provisions (as amended in December 2009).

### Box 9.10 Forming HSCs and HSC meetings — recommendations from the National Review into Model OHS Laws

Recommendation 114 of the National Review was that an HSC:

- a) must be established:
  - i) where requested by an HSR; or
  - ii) where requested by 5 or more workers; or
  - iii) if initiated by one or more persons conducting businesses or undertakings; or
  - iv) if specified by regulation; or
  - v) in workplaces with 20 or more workers; or
- b) may be established in any business or undertaking; and
- c) must include equal membership of workers (excluding managers or supervisors) and managers. (Stewart-Crompton, Mayman and Sherriff 2009, p. 126)

The **WRMC** agreed in principle with this recommendation, but noted:

Mandatory establishment of HSCs where there are 20 or more workers is not supported, and paragraph (a)(v) should be deleted. There should also be provision for "other agreed arrangements". Paragraph (c) should be amended to provide only that at least half the members of an HSC should be workers, noting the practical difficulties which would be faced in many workplaces if there had to be equal numbers of management and worker representatives. (WRMC 2009a, p. 29)

Recommendation 115 of the **National Review** was that the operational matters relating to HSCs, such as structure and meeting frequencies, should be provided for in the regulations of the model Act (Stewart-Crompton, Mayman and Sherriff (2009).

The **WRMC** (2009a) agreed with this recommendation.

The **model work health and safety provisions** (as amended in December 2009) provide that an HSC must meet at least every three months and at any time upon the request of at least half of its members.

### Functions

All jurisdictions require HSCs to assist in the development, implementation, review and updating of OHS measures, while most jurisdictions require HSCs to keep themselves informed on OHS matters. Aside from the functions listed in table 9.7, there are some unique provisions related to HSCs:

- in New South Wales, an HSC is to attempt to resolve OHS issues and can request an investigation by an inspector if it is unable to do so
- in Queensland, while not prescribed as duties, an HSC may seek to discharge its functions by:
  - helping in the resolution of OHS issues in the workplace

- reviewing the circumstances of an incident (where that incident has been referred to the HSC) and advising the employer (or principal contractor) of the results of the review and making recommendations based on the review
- encouraging and maintaining an interest in OHS matters in the workplace and informing workers on OHS matters
- considering measures for training the workplace on OHS matters
- in South Australia, an HSC is to:
  - keep under review developments in the field of rehabilitation of employees who suffer work-related injuries and the employment of those who suffer from any form of disability
  - assist in the return to work of employees who have suffered work-related injuries and the employment of those who suffer from any form of disability
- in the Northern Territory, an HSC is to consider, and make recommendations on, changes in the workplace following an accident or reportable incident.

| Table 9.7 | Selected | functions | of HSCs |
|-----------|----------|-----------|---------|
|-----------|----------|-----------|---------|

2008-09

|                                                                                                                 | Cwlth        | NSW | Vic | Qld | SA | WA           | Tas | NT           | ACT <sup>a</sup> |
|-----------------------------------------------------------------------------------------------------------------|--------------|-----|-----|-----|----|--------------|-----|--------------|------------------|
| Assist and/or facilitate cooperation in the development, implementation, review and updating of OHS measures    | ✓            | √p  | ~   | ~   | ✓  | ~            | ✓   | ~            | ~                |
| Assist the employer disseminate OHS information to employees                                                    | $\checkmark$ |     | ✓   |     | ✓  |              |     |              |                  |
| Investigate and attempt to resolve OHS issues                                                                   |              | ✓   |     |     | ~  |              |     |              |                  |
| Provide advice/recommendations to the employer on OHS matters                                                   |              | ✓   |     | ~   |    | $\checkmark$ | ~   | $\checkmark$ |                  |
| To keep, in an accessible place and form,<br>information about the hazards workers<br>may face in the workplace |              |     |     |     |    | ~            | ~   | ✓            |                  |

<sup>a</sup> From 1 October 2009 and the commencement of the *Work Safety Act 2008* (ACT), these functions were expanded to also include: assisting the employer resolve work safety matters; and establishing, reviewing and publishing procedures in relation to work safety.
 <sup>b</sup> Review only.

Source: OHS Acts and regulations; WorkCover NSW (2001).

Given the functions assigned to HSCs in some jurisdictions, well functioning HSCs can reduce the regulatory burden on business in those jurisdictions by supporting the maintenance of a safe workplace. For example, such functions include to:

• assist the employer disseminate OHS information to employees (the Commonwealth, Victoria and South Australia)

• keep and make available to workers information about the hazards they may face in the workplace (Western Australia, Tasmania and the Northern Territory).

While not covered in the National Review into OHS Laws, the model work health and safety provisions (as amended in December 2009) prescribe the following functions for HSCs:

- assist in developing standards, rules and procedures relating to OHS that are to be followed or complied with at the workplace
- facilitate cooperation between the person conducting a business or undertaking and workers in instigating, developing and carrying out measures designed to ensure the health and safety at work of the workers
- such other functions as are prescribed by the regulations or agreed between the person conducting the business or undertaking and the HSC.

### **Duties of employers**

No two jurisdictions place the same obligations on employers in relation to HSCs (table 9.8). New South Wales and the Northern Territory place the highest number of duties on employers. The single duty of employers in Queensland, Victoria and Western Australia, not to discriminate against HSC members, would seem unlikely to create a material burden for business. The duty to provide adequate facilities to the HSC (applicable in New South Wales, Tasmania and the Northern Territory) may create a material burden on business, depending upon what level of facilities is considered to be 'adequate'.

|                                                                             | Cwlth        | NSW          | Vic | Qld          | SA           | WA | Tas          | NT           | ACT |
|-----------------------------------------------------------------------------|--------------|--------------|-----|--------------|--------------|----|--------------|--------------|-----|
| Make relevant information on OHS matters available to the HSC               | ~            | ✓            |     |              |              |    | ~            | ~            | √   |
| Permit the HSC to undertake its functions                                   | $\checkmark$ | $\checkmark$ |     |              |              |    | $\checkmark$ | $\checkmark$ | ✓   |
| Permit the HSC, or HSC member, to inspect the workplace                     |              | а            |     |              |              |    |              | ✓            |     |
| Provide adequate facilities to the HSC                                      |              | $\checkmark$ |     |              |              |    | $\checkmark$ | $\checkmark$ |     |
| Must not act to the detriment of a HSC member because they are a HSC member |              | ✓            | ✓   | $\checkmark$ | ✓            | ~  |              |              |     |
| Consult with the HSC on OHS matters                                         |              | $\checkmark$ |     |              | $\checkmark$ |    | ✓            | $\checkmark$ |     |
| Advise the HSC of any workplace accident                                    |              |              |     |              |              |    | ~            | ✓            |     |

### Table 9.8Selected duties of employers in relation to HSCs2008-09

<sup>a</sup> HSCs have the power to 'investigate' OHS risks (which may entail an inspection of the workplace). *Source*: OHS Acts and regulations; WorkCover NSW (2001). While not covered in the National Review into OHS Laws, the model work health and safety provisions (as amended in December 2009) prescribe the following duties for a person conducting a business or undertaking:

- they must allow each member of the HSC such time as is reasonably necessary to attend HSC meetings and carry out their duties as an HSC member
- allow the HSC to have access to information on OHS hazards and the health safety of workers
- pay HSC members for the time spent performing their duties as an HSC member. Payment should be made according to what they would be entitled to in performing their normal duties.

### 9.3 The overall costs of HSR and HSC requirements

In a survey of 1802 small and medium enterprises (SMEs) (see appendix B for details), 18 per cent reported they had incurred a cost from implementing an HSR, HSC or both (Sensis Survey of SMEs 2009, unpublished). The survey sought responses from business on the approximate costs they incurred in the process of 'developing' an HSC and/or 'appointing' an HSR — table 9.9 reports the average of these costs for each jurisdiction.

While the costs in table 9.9 are only indicative and not necessarily representative of all SMEs, they are consistent with some of the qualitative assessments of regulatory costs associated with HSR and HSC requirements discussed in this chapter (table 9.9 also summarises these qualitative assessments). For example, Tasmania was assessed to be least burdensome jurisdiction for a number of HSR and HSC requirements and it also had the lowest costs reported in the SME survey.

Aside from the nature of the regulations, part of the reason for the variation in costs reported by SMEs (table 9.9) may be the differing industry composition of the jurisdictions. For example, the Manufacturing and Building and construction sectors reported the highest average costs — \$6292 and \$3716, respectively. In contrast, the health and community services sector reported the lowest average cost of \$827 (Sensis Survey of SMEs 2009, unpublished). These differences may reflect the differing inherent OHS risks of these sectors and that, in light of these risks, HSRs and HSCs are more/less likely to be requested by the employees.

#### Table 9.9 Cost of HSRs and HSCs<sup>a</sup>

12 months to May 2009

|                                          | Cwlth | NSW   | Vic   | Qld   | SA    | WA    | Tas | NT    | ACT   |
|------------------------------------------|-------|-------|-------|-------|-------|-------|-----|-------|-------|
| HSRs                                     |       |       |       |       |       |       |     |       |       |
| Initiating election                      | Н     | н     |       |       |       |       | L   | L     | L     |
| Areas of representation                  |       |       | Н     |       |       |       | L   |       | Н     |
| HSRs per workplace                       |       |       | Н     |       | Н     | Н     | L   |       | Н     |
| Election requirements                    |       |       | L     |       | L     |       |     |       |       |
| Training                                 | Н     |       | Н     | L     |       | Н     |     |       |       |
| Powers <b>b</b>                          | Н     | L     |       |       |       |       |     |       |       |
| Disqualification                         | L     | Н     |       |       |       |       | L   | L     | L     |
| HSCs                                     |       |       |       |       |       |       |     |       |       |
| Forming                                  | L     |       |       |       |       | Н     |     |       |       |
| Duties of employers                      |       | Н     | L     | L     |       | L     |     | Н     |       |
| Estimated average cost to                | np    | 1 798 | 4 010 | 3 169 | 1 213 | 4 421 | 958 | 3 741 | 1 338 |
| SMEs of HSRs and HSCs <sup>C</sup> (\$)  |       |       |       |       |       |       |     |       |       |
| Relative standard error <sup>d</sup> (%) | np    | 46    | 23    | 68    | 48    | 40    | 55  | 121   | 57    |
| Number of observations                   | np    | 85    | 59    | 56    | 53    | 25    | 23  | 15    | 30    |

**H** highest (or equal highest) cost (subjective assessment). **L** lowest (or equal lowest) cost (subjective assessment). **np** not provided. <sup>**a**</sup> Of the matters covered in the preceding sections, it was not possible to make a subjective assessment of the burdens arising a result of a HSR's 'term of appointment' and the functions of HSCs. <sup>**b**</sup> HSR powers potentially create a burden on business through the things business must do to facilitate the exercise of a power and the consequences of the exercise of a power — as such, it is unlikely these costs were included in the cost estimates provided by SMEs. <sup>**c**</sup> Reported costs relate to the 12 months to May 2009. The observations have been weighted to ensure the sample reflected the actual small and medium business population distribution in each state/territory. <sup>**d**</sup> A measure of a statistical estimate's reliability obtained by dividing the standard error by the estimate (and multiplying the result by 100 to express it as a percentage).

*Sources*: OHS Acts and regulations; Sensis Survey of SMEs (2009 unpublished); Stewart-Crompton, Mayman and Sherriff (2009).

## 9.4 Trade union involvement in the workplace on OHS matters

This section examines the impact of union presence in the workplace related to OHS matters and examines differences across the jurisdictions in both the nature of union rights in relation to OHS issues and in the constraints on any misuse of such powers.

In consultations with the Commission, a number of participants expressed concern about the potential disruption to workplaces where unions are given rights of access to investigate suspected breaches of OHS regulations and consult on OHS issues. Some participants were also concerned about the different penalties or actions available in jurisdictions which can be used in circumstances where unions have

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failed to comply with conditions attached to rights of entry. In contrast, union organisations supported the positive impact that union presence and entry rights have on OHS outcomes.

In their submission to the National Review into Model OHS Laws, the ACTU gave strong support for the statutory right of entry for OHS matters at all workplaces (irrespective of union membership) (ACTU 2008). The ACTU stated that the potential benefits of union right of entry provisions include: enabling education of workers on OHS matters; extending the reach of inspectorates by monitoring compliance and identifying serious breaches; providing an avenue for workers to report problems anonymously; and enabling resolution of OHS problems with management, with all these factors contributing to reduced incidence of workplace injury.

The Public Sector Union Group of the Community and Public Sector Union (2008) also gave strong support for union right of entry provisions in their submission to the National Review into Model OHS Laws. The submission highlighted the inability of the union to support and assist HSRs and members working at Centrelink offices in South Australia after a number of employees had been subjected to serious incidents of customer aggression and verbal abuse and, it was claimed, Centrelink took no action to address these concerns. South Australia currently does not provide right of entry to authorised union representatives.

These opinions contrast with the views of some employer groups which give greater emphasis to the costs of union involvement. For example, the Master Builders Association (MBA) (sub. 1) cites examples of union entry rights and union presence in workplaces leading to duplication of inspections (on top of inspections carried out by regulators), as well as the need to shut down business operations to facilitate union inspections resulting in reduced output and productivity.

Given the history and ongoing occurrence of abuse of right of entry for OH&S purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body (sub. 1, attachment 1, p. 11).

The MBA also cited a number of examples of unions using entry powers available under OHS legislation to pursue other industrial agendas which were unrelated to health and safety issues. These are discussed later in the chapter.

John Holland also recommended specific restrictions be placed on persons given rights of entry apart from inspectors from the regulator in the model OHS laws.

The right of entry for persons other than inspectors and investigators should only be exercisable after detailing a specific workplace OHS issue and registering it with the regulator. This measure aims to reduce industrial interference and seek to legitimise apparent OHS issues. In the event that the model Act includes a right of entry for nonregulators, there needs to be a mandated provision that any site entry is to be only when accompanied by a regulator's representative such as an inspector or investigator. An alternative to that is for a right of entry for a non-inspector to have powers of referral only, either to site management or the regulator. (John Holland 2008, p. 5)

Johnstone, Quinlan and Walters (2004) and Stewart-Crompton, Mayman Sherriff (2009) have also reviewed a number of Australian and international studies into the potential benefits from union presence in the workplace which are facilitated by rights of entry, a summary of which is provided in box 9.11.

#### Box 9.11 Benefits from union presence in the workplace

- Hawke and Wooden (1997) found that unionised workplaces in Australia were three times more likely to have a HSC and twice as likely to have undergone a management health and safety audit in the previous 12 months.
- In an international context, a comparison of unionised and non-unionised construction workers in the United States (Dedobblear, Champagne and German 1990) and health and safety in the manufacturing industry in Britain and France (Grunberg 1983) shows evidence of higher standards of health and safety in unionised workplaces than non-unionised.
- In the United Kingdom a number of studies were conducted using information from the Workplace Industrial Relations Survey (1990) which linked lower injury rates to workplaces with joint consultation arrangements, particularly where trade union involvement existed, and higher rates of injuries where management failed to consult over OHS (Reilly, Paci and Holl 1995).
  - Researchers using more recent 1998 data from the same survey found that where there was a union presence workplace injury rates were 24 per cent lower than where there was no union presence (Litwin 2000).
- A Canadian study by Shannon, Mayr and Haines (1997) showed that empowerment of the workforce — which included unions, shop stewards, union support for HSCs and general worker participation and decision-making — contributed to lower injury rates.
- Another Canadian study (O'Neill 2002) found that 78–79 per cent of unionised workplaces reported high compliance with health and safety legislation with only 54–61 per cent of non-unionised workplaces reporting such compliance.
- Evidence from Norway, Italy and Spain cited in Walters (2001) indicates that the engagement of trade unions and mobile workers' representatives are influential in raising awareness and contributing to the establishment of better OHS arrangements in small firms.

Sources: Johnstone, Quinlan and Walters (2004); Stewart-Crompton, Mayman Sherriff (2009).

While there is some variation in the findings, in aggregate they provide support to the proposition that joint arrangements, trade unions and trade union representation on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation (Johnstone, Quinlan and Walters 2004, p. 4).

### Union right of entry for OHS matters

The right for authorised union representatives to enter workplaces to investigate possible breaches of OHS regulations and consult with workers on OHS matters exists in all jurisdictions apart from the Commonwealth, South Australia and Tasmania. Tasmania passed legislation providing for union right of entry in November 2009 and the legislation was proclaimed on 24 February 2010. South Australia has released a Bill on right of entry which was released for public comment until 13 March 2009.

One justification for providing unions with entry rights is that they provide additional scrutiny of duty holders and their compliance with OHS regulations, thereby contributing to improved OHS outcomes (including reduced incidence of accidents in the workplace). The rights of unions to enter workplaces also provide workers with a separate source of information on OHS matters (particularly in relation to their own workplace) and a channel through which they can report instances of non-compliance.

### Differences in union rights to enter workplaces

There are a number of differences across the jurisdictions in the rights unions have to enter workplaces in respect to OHS matters (table 9.10). Of the six jurisdictions (those other than the Commonwealth, South Australia and Tasmania) that provide for the right of unions to enter a workplace:

- all include the right to investigate breaches
- three jurisdictions (Queensland, Western Australia and the Northern Territory) provide the right to enter workplaces to consult and discuss OHS issues and three do not (New South Wales, Victoria and the ACT)
- of the three jurisdictions which provide entry for OHS consultation purposes, Queensland and Western Australia require a minimum of 24 hours notice before entry, while the Northern Territory does not explicitly require notice to be provided

• it is not made explicit in the wording of the OHS legislation in Queensland that union right of entry is restricted to working hours.

There are a number of jurisdictional differences in conditions attached to the right to investigate suspected breaches listed in table 9.10.

### Table 9.10Differences in union rights of entry – purpose of entry, and<br/>rights and conditions upon entry<sup>a</sup>

2008-09

|                                                                                 | NSW          | Vic          | Qld          | WA           | NT           | ACT          |
|---------------------------------------------------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Enter to investigate breach                                                     | √b           | ✓            | $\checkmark$ | √C           | $\checkmark$ | ✓            |
| Notice needed before investigating suspected breach                             | ×            | ×            | ×            | ×            | ×            | ×            |
| Enter to consult and discuss OHS issues                                         | ×            | ×            | $\checkmark$ | $\checkmark$ | $\checkmark$ | ×            |
| Notice needed to conduct OHS consultation                                       | na           | na           | 24 hrs       | 24 hrs       | ×            | na           |
| Observe or inspect systems of work, plant, equipment, materials and substances  | ✓            | √d           | √            | $\checkmark$ | $\checkmark$ | √            |
| Interview members or eligible persons of the employee organisation <sup>e</sup> | ×            | $\checkmark$ | $\checkmark$ | ×            | √            | √            |
| Speak with occupier or employer                                                 | ×            | $\checkmark$ | $\checkmark$ | ×            | ×            | ×            |
| Take measurements and make records                                              | $\checkmark$ | ×            | ×            | ×            | $\checkmark$ | $\checkmark$ |
| Examine, copy, or take extracts from any document produced                      | ✓            | ×            | ~            | $\checkmark$ | $\checkmark$ | ✓            |
| Entry only to workplaces of a member or eligible member                         | ✓            | ✓            | ✓            | $\checkmark$ | $\checkmark$ | √            |
| Authorised representative to show permit upon request                           | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Entry only during working hours                                                 | ✓            | ✓            | ×            | ~            | $\checkmark$ | ✓            |

**na** not applicable — the relevant as entry power is not available. <sup>a</sup> As the right of entry does not exist in South Australia and Tasmania, these jurisdictions are excluded from the table. <sup>b</sup> Allows for entry to investigate breaches of the *Coal Mine Health and Safety Act 2002* (NSW) and the *Mines Health and Safety Act 2004* (NSW). <sup>c</sup> The *Industrial Relations Act 1979* (WA) provides for investigating breaches of that act, the *Long Service Leave Act 1958* (WA), the *Minimum Conditions of Employment Act 1993* (WA), the *Occupational Health and Safety Act 1984* (WA), the *Mines Safety and Inspection Act 1994* (WA) or an award. <sup>d</sup> Must not be exercised if it will cause work to cease (unless with permission of employer). <sup>e</sup> Interviews with workers must have the worker's consent.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

New South Wales, Victoria, Queensland and the ACT impose conditions on powers of entry to investigate possible breaches, including:

- in New South Wales and the ACT, authorised representatives must notify the occupier immediately after entry. However, they do not need to do so if such a notification would defeat the purpose of the visit or cause delay
- in Victoria, authorised representatives need to provide notice immediately after entry, with the notice to include a description of the suspected breach
- in Queensland, authorised representatives need to provide written notice of the entry to the occupier, and the reasons for the entry, as soon as is practicable

• the ACT legislation does not include a requirement for authorised representatives to notify the occupier upon entry if they have already been notified in writing. An authorised representative needs to provide the occupier and the regulator written notice if they consider there has been a breach of the *Work Safety Act 2008* (ACT) within two days of entering the premises.

Further features of entry provisions include:

- all jurisdictions that have right of entry provisions require authorised representatives to show the appropriate permit to enter on request
- in Victoria a person may hold an entry permit as an authorised representative employee organisation if they: are a permanent employee or officer of that organisation (working on a full-time or part-time basis); have completed a course of training approved by the regulator; and have not been disqualified from holding an entry permit
- authorised representatives need to have completed a course of training prescribed in regulations before they may hold an entry permit in Victoria, Queensland, the Northern Territory and the ACT
- Victoria is the only jurisdiction not to confer rights to authorised representatives to examine, copy or take extracts from any document produced
- only in Victoria and Queensland do authorised representatives have the right to speak with the occupier or employer
- in New South Wales and Western Australia no provision exists for representatives to interview members or eligible members of the employee organisation (Stewart Crompton, Mayman and Sherriff 2009, pp. 304–305).

### Provisions under Commonwealth legislation which relate to OHS

The Occupational Health and Safety (Commonwealth Employment) Act 1991 does not include union right of entry provisions. Further, employees of the 29 self-insurers who are registered with the Comcare scheme are not covered by union right of entry provisions.

While the Commonwealth OHS Act does not provide any union right of entry powers, provisions exists in the *Fair Work Act 2009* (Cwlth) which relate to OHS matters. Under section 494 of the Act authorised union representatives need a federal permit to gain access to a workplace which is controlled by the

Commonwealth, a Commonwealth authority, a constitutional corporation,<sup>13</sup> a body corporate incorporated in a Territory or premises located in a Commonwealth place.

The right to enter and investigate is only available where such rights of entry currently exist under either a State or Territory OHS Act (in New South Wales, Victoria, Queensland, the Northern Territory and the ACT) or the *Industrial Relations Act 1979* (WA). Section 494 of the Fair Work Act also applies to persons employed by, or who are, independent contractors.

Under the *Fair Work Act 2009* (Cwlth) conditions apply when exercising State or Territory OHS rights. A permit holder must not exercise a State or Territory right to inspect unless they have given the occupier of the premises, and any affected employer, a written notice setting out the intention to enter and the reasons for doing so. Notice needs to be given at least 24 hours before inspecting an employee record of an employer, and a permit holder may only exercise a State or Territory OHS right during working hours. Permit holders are required to produce their entry permit upon request.

### Burdens on business arising from union rights of entry

There are potential costs to business if union representatives: misuse entry provisions by hindering or obstructing employers and workers; use OHS entry powers to discuss non-OHS matters or undertake unlawful industrial action unrelated to OHS matters; duplicate the role of regulators when investigating potential breaches of OHS regulations; or undertake workplace inspections outside of working hours.

The misuse of entry provisions to discuss industrial matters, instead of OHS matters, highlighted by some industry and employer groups, have the potential to occur for businesses operating under Queensland, Western Australian and the Northern Territory regimes, as these are the jurisdictions which provide the power to authorised union representatives to consult with workers on OHS matters.

The MBA cited a number of examples where, in its view, union entry powers to investigate suspected breaches of OHS regulations were used excessively or to pursue other industrial agendas. These examples range across a number of jurisdictions and are mainly concentrated in Mining and the Building and construction industry. For example, in the case of *Cruse vs CFMEU and Stewart*,

<sup>&</sup>lt;sup>13</sup> A constitutional corporation is defined as a foreign corporation, or a trading or financial corporation formed within Australia. Corporations include proprietary companies, not-for-profit associations incorporated under State or Territory legislation, and statutory authorities incorporated under special legislation.

workers had voted to go on strike at a mine site in Hamilton (Victoria) for 10 days after a bus had almost been involved in an accident on a train level crossing. This was despite the site OHS representative agreeing that it was safe for workers to return to work following the repainting of lines on the road, the installation of electronic signs and the erection of a stop sign. In making his decision, the Federal Magistrate found that there could be no basis for justifying such unlawful industrial actions on the basis of health and safety concerns (sub. DR20).

In another case, powers available under OHS legislation were used by union officials as a defence for influencing the termination of a contract of a sub-contractor. In *Draffin vs CFMEU, Allen, Benstead, Oliver and Walton Constructions* the union claimed that a decision by a head contractor to terminate the contract of a subcontractor was based on the subcontractor's inadequate qualifications to undertake traffic management services (which is essentially an OHS issue) for a construction site. However, the union officials subsequently admitted that their motivation was to terminate the subcontractor's contract because their employees were covered by Australian Workplace Agreements (AWAs) rather than a certified agreement (sub. DR20).

It is possible that businesses covered by OHS legislation in Western Australia and Northern Territory could face higher costs from potential misuse of entry provisions as there is no requirement for unions to provide notice of entry to investigate a breach. For example, unions could visit worksites for less serious matters resulting in more delays/interruptions to business operations than in other jurisdictions. On the other hand, the lack of notification requirements allows much quicker access to workplaces where a suspected breach is taking place. Additional costs could also be imposed on businesses in Queensland because it appears that they are not restricted to working hours to investigate suspected breaches. In the Northern Territory additional costs could arise for businesses because unions are not required to provide notice of entry to consult on OHS issues or investigate a breach.

Employers operating in multiple jurisdictions incur additional information costs in determining the nature of union rights to enter their premises to investigate a breach of OHS regulations or discuss OHS matters and the nature of any conditions attached, such as different notification requirements. Employers would also need to cooperate in making documents available for inspection, as well as make copies of documents available that are related to a suspected contravention.

#### Safeguards against misuse of entry powers

All statutes providing a right of entry for OHS purposes include safeguards against the misuse of entry powers, which may reduce the incidence of misuse and their associated costs (table 9.11).

| Table 9.11 | Differences in grounds for actions for activating safeguards against misuse of union entry rights <sup>a</sup> |
|------------|----------------------------------------------------------------------------------------------------------------|
|            | 2008-09                                                                                                        |

|                  | Act/Section                      | Grounds for action                                                                                                                                                                  |
|------------------|----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| NSW              | Industrial Relations<br>Act 1996 | <ul> <li>Intentionally hindered or obstructed employers or employees during their working time</li> </ul>                                                                           |
|                  | s. 299 (4)                       | Otherwise acted in an improper manner                                                                                                                                               |
| Vic              | Occupational Health              | <ul> <li>Intentionally hindered or obstructed an employer or employee</li> </ul>                                                                                                    |
|                  | and Safety Act 2004<br>s. 85     | <ul> <li>Acted unreasonably or otherwise for the purposes of exercising a power<br/>under this Part; or</li> </ul>                                                                  |
|                  |                                  | • Intentionally used or disclosed, for a purpose not reasonably connected with the exercise of a power under this Part, information that was acquired from any employer or employee |
| Qld              | Workplace Health                 | Unreasonably hinder or obstruct a worker or other person at the workplace                                                                                                           |
|                  | and Safety Act 1995              | <ul> <li>Intimidate or threaten a worker or other person at the workplace</li> </ul>                                                                                                |
| QId<br>WA        | ss. 900 and 90Q                  | Contravention of a provision of the Part (7a Authorised representatives)                                                                                                            |
|                  |                                  | <ul> <li>Contravention of a condition of employment</li> </ul>                                                                                                                      |
| WA               | Industrial Relations             | Act in an improper manner                                                                                                                                                           |
|                  | <i>Act 1979</i><br>s. 49J        | <ul> <li>Intentionally and unduly hindered an employer or employees during their working time</li> </ul>                                                                            |
| NT               | Workplace Health                 | <ul> <li>Contravene a condition of appointment , which includes:</li> </ul>                                                                                                         |
|                  | and Safety Act 2007              | <ul> <li>Entering a workplace other than in accordance with this Division</li> </ul>                                                                                                |
|                  | s. 52                            | <ul> <li>Non-compliance with any relevant law of the Commonwealth</li> </ul>                                                                                                        |
|                  |                                  | <ul> <li>Intentionally hinder or obstruct an employer or worker</li> </ul>                                                                                                          |
|                  |                                  | <ul> <li>Misrepresent the extent of the representative's authority</li> </ul>                                                                                                       |
|                  |                                  | • Use of disclosure or information acquired at the workplace for a purpose not reasonably connected with the health and safety of a worker                                          |
| ACT <sup>C</sup> | Occupational Health              | Contravention of the division or likelihood of contravention of the division                                                                                                        |
|                  | and Safety Act 1989<br>s. 76     | <ul> <li>Intentionally hindered or obstructed an employer or employee or otherwise<br/>acted improperly</li> </ul>                                                                  |

<sup>a</sup> As the right of entry does not exist in the Commonwealth, South Australia and Tasmania, these jurisdictions are excluded from the table. <sup>b</sup> Applies where employers and their employees are covered by the federal or national industrial relations system. <sup>c</sup> In the ACT, from 1 October 2009 authorised representatives may be disqualified under Reg. 65 of the *Work Safety Regulation 2009* (ACT).

Sources: OHS and IR Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

All of the safeguards (table 9.11) have provisions that apply to the hindering or obstructing of employers, employees and other persons at the workplace. There is some variation in other grounds which may activate safeguards against misuse, including: acting in an improper manner (available in five jurisdictions); using

intimidatory or threatening behaviour (Queensland); and unauthorised disclosure of information acquired during consultations (Victoria and the Northern Territory).

#### Actions available to punish misuse of entry powers

The actions that are available to be taken against misuse of powers vary considerably (table 9.12).

### Table 9.12Different actions available to punish misuse of union entry<br/>rights<sup>a</sup>

|                                                      | NSW          | Vic          | Qld          | WA           | NT           | ACT          |
|------------------------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Impose conditions on entry permits                   | ×            | ×            | ~            | ×            | ×            | ×            |
| Subject future entry permits to specified conditions | ×            | ×            | ×            | ×            | ×            | x            |
| Suspend                                              | ×            | ×            | $\checkmark$ | $\checkmark$ | ×            | x            |
| Revoke                                               | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | ×            | ×            |
| Ban use of entry permits to organisation             | ×            | ×            | ×            | ×            | ×            | ×            |
| Disqualify from holding office                       | ×            | $\checkmark$ | ×            | ×            | $\checkmark$ | $\checkmark$ |
| Remove from office                                   | ×            | ×            | ×            | ×            | $\checkmark$ | ×            |

<sup>a</sup> As the right of entry does not exist in the Commonwealth, South Australia and Tasmania, these jurisdictions are excluded from the table.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

Three jurisdictions provide the power to disqualify authorised representatives from holding office and only the Northern Territory and the ACT do not provide the power to revoke.

Fair Work Australia has the power to revoke or suspend entry permits under section 510 (f) of the *Fair Work Act 2009* (Cwlth) in circumstances where it can be demonstrated that the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law.

As evidenced in the examples provided above, opinions vary as to how effective these safeguards are in limiting abuse of the union right to enter.

### How will union right of entry be covered in the model work health and safety provisions?

The model work health and safety provisions (as amended in December 2009) related to union right of entry are outlined in box 9.12.

### Box 9.12 Union right of entry provisions included in the model work, health and safety provisions

#### Right of entry to inquire into suspected contraventions

- A Work Health and Safety (WHS) entry permit holder may enter a workplace to inquire into a suspected contravention of the Act that relates to or affects a relevant worker
- The WHS entry permit holder must reasonably suspect before entering that the contravention has occurred or is occurring

#### Rights that may be exercised

- Inspect and work system, plant, substance, structure or other thing relevant to the suspected contravention
- Consult with the relevant workers in relation to the suspected contravention
- Consult with the person conducting the relevant business or undertaking about the suspected contravention
- Inspect and make copies of any record or document that is directly related to the suspected contravention
- Consult and advise workers on OHS matters

#### Notice of entry

- A WHS entry permit holder must as soon as is reasonably practicable after entering a workplace give notice of entry and the suspected contravention to the person conducting the relevant business or undertaking and the person with management or control of the workplace
- The above does not apply if it would either defeat the purpose of the entry or unreasonably delay the permit holder in an urgent case
- At least 24 hours but no more than 14 days notice must be given before entry to inspect employee records, inspect information held by another person and consult and advise workers

#### When rights may be exercised

• Usual working hours at the workplace

#### Dealing with disputes

- The authorising authority may deal with a dispute about the exercise or purported exercise by a WHS permit holder through means of mediation, conciliation or arbitration.
- The authorising authority has the power to impose conditions on a WHS entry permit, and suspend or revoke an WHS entry permit, and make decisions about the future issue of WHS entry permits.

Source: Model Work Health and Safety Provisions, December 2009.

### 10 Regulating hazardous substances

### Key points

- Through the adoption of key national standards and codes of practice, all jurisdictions have developed a common basis for the classification and control of hazardous substances.
- Consistent legislation can be undermined by differing interpretations from regulators. For example, a business was advised by some OHS regulators that a Material Safety Data Sheet was not required for obsolete chemicals, while other regulators were unable/unwilling to provide advice on the matter and another regulator deemed it was required.
- In 2008-09, the operation of overlapping systems for the regulation of hazardous substances and dangerous goods gave rise to confusion among business and duplicated effort for businesses in complying with the requirements.
- In 2008-09, there were significant differences in the fees applying to asbestos removal licences for businesses — ranging, on an annualised basis, from \$27 in Queensland to \$3536 in South Australia for a licence to remove friable asbestos. In the Northern Territory, which licenses only individuals (not businesses), the annualised cost of an asbestos removal licence was \$17 per individual.
  - There were also significant differences in the nature and content of the supporting information required as part of the application process.
- In 2008-09, South Australia was the most burdensome jurisdiction in relation to the licensing of asbestos removalists even if only by virtue of its licence fees which were over three times those of any other jurisdiction (aside from Western Australia).
- In 2008-09, all jurisdictions (except Queensland and the ACT) required an asbestos removalist to either:
  - notify the regulator prior to starting an asbestos removal project (Victoria, Western Australia, Tasmania, the Northern Territory and non-friable asbestos removal in New South Wales); or
  - obtain a permit prior to starting an asbestos removal project (South Australia and friable asbestos removal in New South Wales)

New South Wales, the only jurisdiction to levy a fee for its permits, imposed the greatest burden for this permit/notification requirement.

 In 2008-09, all jurisdictions, except the Commonwealth and the Northern Territory, had explicit requirements for the owners/controllers of non-residential buildings to maintain an asbestos register. Where a register was required, the level of prescription regarding the contents of the register varied greatly between jurisdictions, thereby creating differences in regulatory burden for owners/controllers of non-residential property across jurisdictions. A 'hazardous substance' is one that poses a risk to the health of people exposed to it. It can take any form — solid, liquid or gas. People can be exposed to hazardous substances by absorbing (through the skin), inhaling or ingesting them. The possible adverse health effects arising from exposure to hazardous substances include poisoning, irritation (for example to the skin or eyes), chemical burns, cancer and birth defects. They can also cause diseases of certain organs such as the lungs, liver, kidneys and nervous system. These effects can be either acute or chronic, immediate or delayed onset and, in some instance, can lead to premature death. The adverse health effects of hazardous substances are not always obvious and the symptoms may only develop years after exposure to a substance — for example, mesothelioma (a form of cancer) typically occurs 20–40 years after exposure to asbestos (WorkSafe Victoria 2009c).

All jurisdictions have requirements specific to hazardous substances within their occupational health and safety (OHS) laws except the ACT. The ACT has specific legislation regulating 'dangerous substances' (table 10.1).

| 2008-09 |                                                                       |                                                     |
|---------|-----------------------------------------------------------------------|-----------------------------------------------------|
|         | Regulations specifying OHS requirements for<br>hazardous substances   | Act under which the regulations were issued         |
| Cwlth   | Occupational Health and Safety (Safety Standards)<br>Regulations 1994 | Occupational Health and Safety Act 1991             |
| NSW     | Occupational Health and Safety Regulation 2001                        | Occupational Health and Safety Act 2000             |
| Vic     | Occupational Health and Safety Regulations 2007                       | Occupational Health and Safety Act 2004             |
| Qld     | Workplace Health and Safety Regulation 2008                           | Workplace Health and Safety Act 1995                |
| SA      | Occupational Health, Safety and Welfare<br>Regulations 1995           | Occupational Health, Safety and Welfare<br>Act 1986 |
| WA      | Occupational Safety and Health Regulations 1996                       | Occupational Safety and Health Act 1984             |
| Tas     | Workplace Health and Safety Regulations 1998                          | Workplace Health and Safety Act 1995                |
| NT      | Workplace Health and Safety Regulations 1992                          | Workplace Health and Safety Act 2007                |
| ACT     | Dangerous Substances (General) Regulation 2004                        | Dangerous Substances Act 2004                       |

Table 10.1Regulations specifying OHS requirements for hazardous<br/>substances

As outlined in chapter 4, the OHS requirements for hazardous substances and, in particular, asbestos were raised as areas of concern by participants. This chapter explores four aspects of the burden on business arising from the regulation of hazardous substances for OHS purposes:

- 1. the take up of national standards relating to hazardous substances
- 2. a case study on the requirement for Material Safety Data Sheets (MSDSs)
- 3. duplication in the regulation of hazardous substances and dangerous goods
- 4. an examination of selected OHS requirements relating to asbestos.

## 10.1 Take up of national standards and codes of practice

Separate to the OHS laws of the jurisdictions (table 10.1), the predecessors of Safe Work Australia (SWA) declared national standards, codes of practice and guidance notes for the control of hazardous substances (table 10.2) in order to form the basis of a nationally consistent regulatory approach (SWA 2010d).<sup>1</sup> Jurisdictions are under no obligation to adopt these standards and codes and, unless they do so, the standards and codes do not have any legal authority in their jurisdiction.

Of the 16 national regulations, national standards and codes of practice for the control of hazardous substances (table 10.2), all jurisdictions have adopted the:

- Approved Criteria for Classifying Hazardous Substances [NOHSC: 1008 (2004)]
- National Model Regulation for the Control of Workplace Hazardous Substances [NOHSC: 1005 (1994)]
- National Code of Practice for the Preparation of Material Safety Data Sheets (2<sup>nd</sup> edition) [NOHSC: 2011 (2003)]
- Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC: 1003 (1995)]
- National Standard for Synthetic Mineral Fibres [NOHSC: 1004 (1990)]
- National Model Regulation for the Control of Scheduled Carcinogenic Substances [NOHSC: 1011 (1995)]. (CRCCI 2007; Productivity Commission survey of OHS regulators 2009, unpublished; Safe Work Australia 2009, unpublished)

By adopting the first three of the national regulations, standards and codes listed above (NOHSC: 1008, NOHSC: 1005 and NOHSC: 2011), the jurisdictions have established a common basis for, and approach to, the classification and general control of all hazardous substances. This is reinforced by the Hazardous Substances Information System (HSIS — box 10.1). As a result, the regulatory burdens arising from the general requirements for hazardous substances should be similar for business regardless of the jurisdiction(s) in which they operate.<sup>2</sup> Differing regulatory burdens, where they arise, should largely be limited to the specific

<sup>&</sup>lt;sup>1</sup> The national standards, codes of practice and guidance notes were declared by the National Occupational Health and Safety Commission (NOHSC) and the Australian Safety and Compensation Council (ASCC).

<sup>&</sup>lt;sup>2</sup> While the common regulatory base of the jurisdictions should result in similar regulatory burdens, businesses may still encounter differing burdens on account of differing enforcement of these regulations by jurisdictions — see section 10.2.

treatments required for individual hazardous substances (such as, but not limited to, asbestos, vinyl chloride, timber preservatives, inorganic lead and carcinogenic substances) where the national standards and codes of practice (table10.2) have not been uniformly adopted by all jurisdictions and/or individual jurisdictions have implemented their own requirements.

# Table 10.2National standards, codes of practice and related guidance<br/>material for hazardous substances2008-09

|                             | 2000 00                                                                                                                     |
|-----------------------------|-----------------------------------------------------------------------------------------------------------------------------|
| NOHSC<br>standard<br>number | Subject                                                                                                                     |
| Model Regula                | tions                                                                                                                       |
| 1005 (1994)                 | Control of workplace hazardous substances                                                                                   |
| 1011 (1995)                 | Control of scheduled carcinogenic substances                                                                                |
| National Stan               | dards                                                                                                                       |
| 1003 (1995)                 | Adopted national exposure standards for atmospheric contaminants in the occupational environment                            |
| 1004 (1990)                 | Synthetic mineral fibres                                                                                                    |
| 1008 (2004)                 | Approved criteria for classifying hazardous substances                                                                      |
| 1012 (1994)                 | Control of inorganic lead at work                                                                                           |
| Codes of Prac               | ctice                                                                                                                       |
| 2002 (2005)                 | Safe removal of asbestos (2 <sup>nd</sup> edition)                                                                          |
| 2003 (1989)                 | Safe handling of timber preservatives and treated timber                                                                    |
| 2006 (1990)                 | Safe use of synthetic mineral fibres                                                                                        |
| 2007 (1994)                 | Control of workplace hazardous substances                                                                                   |
| 2011 (2003)                 | Preparation of material safety data sheets (2 <sup>nd</sup> edition)                                                        |
| 2012 (1994)                 | Labelling of workplace substances                                                                                           |
| 2014 (1995)                 | Control of scheduled carcinogenic substances                                                                                |
| 2015 (1994)                 | Control and safe use of inorganic lead at work                                                                              |
| 2018 (2005)                 | Management and control of asbestos in the workplace                                                                         |
| а                           | Safe use of vinyl chloride                                                                                                  |
| Guidance Not                | tes                                                                                                                         |
| 3003 (2005)                 | Membrane filter method for estimating airborne asbestos fibres (2 <sup>nd</sup> edition)                                    |
| 3006 (1989)                 | Membrane filter method for the estimation of airborne synthetic mineral fibres                                              |
| 3007 (1989)                 | Safe handling of timber preservatives and treated timber                                                                    |
| 3008 (1995)                 | Interpretation of exposure standards for atmospheric contaminants in the occupational environment (3 <sup>rd</sup> edition) |
| 3009 (1990)                 | Placarding stores for dangerous goods and specified hazardous substances                                                    |
| 3017 (1994)                 | Assessment of health risks arising from hazardous substances in the workplace                                               |
| 3018 (1994)                 | Control of workplace hazardous substances in the retail sector                                                              |
| 7039 (1995)                 | Guidelines for health surveillance                                                                                          |

 $^{\mathbf{a}}$  The National Code of Practice for the Safe Use of Vinyl Chloride does not have a NOHSC Standard Number.

Source: CRCCI (2007).

### Box 10.1 Hazardous Substances Information System (HSIS)

The HSIS is a publicly accessible (via the internet) database maintained by SWA that lists those substances that have been classified according to the Approved Criteria for Classifying Hazardous Substances [NOHSC: 1008 (2004)] and/or that have National Exposure Standards declared under the Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC: 1003 (1995)].

The HSIS is only updated from time to time, with the most recent updates being:

• April 2009 — 958 entries amended, added or deleted

• July 2008 — 919 entries amended or added.

The HSIS superseded the previously published List of Designated Hazardous Substances (the List) — a hardcopy list of the hazardous substances commonly used in workplaces. The last edition of the List was published in 1999.

Sources: SWA (2010c); PC (2008a).

### 10.2 Material Safety Data Sheets — case study

All states and territories require an MSDS (box 10.2) to be made available to workers who will potentially be exposed to a hazardous substance or a dangerous good (dangerous goods are discussed in section 10.3). As outlined in section 10.1, all jurisdictions have incorporated the National Code of Practice for the Preparation of Material Safety Data Sheets [NOHSC: 2011 (2003)] into their respective OHS regulatory frameworks and, as a result, businesses can satisfy the MSDS requirements of all jurisdictions with an MSDS prepared in compliance with this code of practice (PC 2008a; Department of Education, Employment and Workplace Relations (Cwlth), pers. comm., 7 January 2010).

In its submission to the Commission's *Chemicals and Plastics Regulation* report (PC 2008a), 3M Australia outlined its experience in seeking information from each state and territory on whether an MSDS was required for obsolete products (those that had not been supplied commercially for over two years) (3M Australia 2008).<sup>3</sup> The time taken to be provided with advice varied from 2 days (in South Australia) to over 90 days (in New South Wales). 3M Australia was advised by one regulator that they needed an MSDS while two other regulators advised that they did not need one. In addition, some regulators were either unwilling or unable to provide advice and one referred the decision to another authority (table 10.3).

<sup>&</sup>lt;sup>3</sup> While the regulations of the jurisdictions have different requirements for when an MSDS must be supplied to a person, no jurisdiction explicitly addresses the issue of whether an MSDS was required for obsolete products.

### Box 10.2 What is an MSDS?

An MSDS is a document prepared by the supplier (manufacturer or importer) of a hazardous substance and/or dangerous good that describes the chemical and physical properties of the substance and provides advice on its safe storage, handling and use. The MSDS should include details of the hazards (health and physicochemical), exposure controls, personal protective equipment, safe handling and storage instructions, emergency procedures and disposal advice applicable to the substance.

The MSDS can be used to inform hazard and risk assessments and to establish appropriate work practices to control risks associated with the use of the chemical in the workplace.

An MSDS does not need to be formally approved. However, the OHS regulator in each jurisdiction is responsible for determining whether an MSDS complies with the relevant provisions within their legislation.

In all jurisdictions, an MSDS must be reviewed periodically to keep it up to date, for example when any new or significant information becomes available on the hazards of the substance. Otherwise, an MSDS should be reviewed and reissued every five years.

Source: SWAC (2009d).

### Table 10.3Regulator responses to 3M Australia's MSDS inquiriesCirca March 2008

|     | Time taken to get an answer | MSDS required for obsolete products?                                                            |
|-----|-----------------------------|-------------------------------------------------------------------------------------------------|
| NSW | More than 90 days           | No reply                                                                                        |
| Vic | Less than one week          | No                                                                                              |
| Qld | 1 week                      | No                                                                                              |
| SA  | 2 days                      | Unclear — referred to National Industrial Chemicals Notification and Assessment Scheme (NICNAS) |
| WA  | More than 60 days           | No reply                                                                                        |
| Tas | Less than 30 days           | Yes                                                                                             |
| NT  | More than 60 days           | No reply                                                                                        |
| ACT | 2 weeks                     | Unclear — referred to National Codes of Practice                                                |

Source: PC (2008a).

While this was the experience of only one business and not necessarily reflective of the broader experience of business, it provides an example of how, even where there are consistent regulatory requirements across jurisdictions, different interpretations of those requirements by regulators can create differing burdens for business across the jurisdictions. It also shows how the difficulty experienced by a business in interpreting OHS requirements can be compounded by differing interpretations of the requirements by regulators (or the failure of a regulator to respond to an enquiry), thereby resulting in considerable uncertainty (and its associated burden).

# 10.3 Hazardous substances — duplication with dangerous goods regulation

For OHS purposes, 'dangerous goods' are an additional category of workplace substances. A dangerous good is one that poses a physical risk to the people and property in its proximity. For example, a dangerous good is a substance, or combination of substances, that can cause fires, explosions, rapid chemical reactions or immediate health risks (such as poisoning). The effects of dangerous goods are generally sudden and obvious.

A number of substances are classified as both a hazardous substance and a dangerous good, although the classifications may be due to different traits of the substance. Any substance classified as both a hazardous substance and a dangerous good will require any business dealing with it to be familiar with two sets of regulatory requirements. While many of these requirements are consistent,<sup>4</sup> there are differences between them and, depending upon the substance in question, compliance can be a complex matter. Some businesses contend that the two sets of requirements give rise to unnecessary costs, confusion among business and duplicated effort for businesses complying with the requirements (ASCC 2006a).

In July 2009, the Safe Work Australia Council (SWAC) (now SWA) agreed that the Draft National Standard for the Control of Workplace Hazardous Chemicals would form the basis for new model OHS regulations for workplace chemicals (box 10.3). These model regulations are scheduled to be introduced in 2012 (SWA 2010e).

In considering the replacement of the parallel regulatory systems for hazardous substances and dangerous goods with a single system common to both, the Commission (2008a) previously noted the change would potentially reduce some of the costs faced by firms and could increase compliance. However, the Commission also noted that the transition costs of such a change would likely outweigh those benefits.

<sup>&</sup>lt;sup>4</sup> For example, as discussed in section 10.2, a business can satisfy the MSDS requirements for both hazardous substances and dangerous goods by preparing the MSDS in accordance with National Code of Practice for the Preparation of Material Safety Data Sheets [NOHSC: 2011 (2003)].

### Box 10.3 **The new regulatory framework for workplace chemicals**

NOHSC, a predecessor of SWA, determined there should be a single regulatory framework for hazardous substances and dangerous goods. NOHSC considered that any new regulatory framework should be based on the Globally Harmonised System of Classification and Labelling of Chemicals (the GHS — below).

A draft national standard, codes of practice and regulatory impact statement (RIS) were released for public comment in late 2006. From March 2007, a technical group comprising six members from the jurisdictions' OHS regulators, two members representing industry and one representing employees, revised the drafts in light of the responses to the public consultation process.

From July 2009, SWA has been drafting model regulations based on the Draft National Standard for the Control of Workplace Hazardous Chemicals. Among other things, this will combine the previously separate regulations for hazardous substances and dangerous goods, as well as implement the GHS. As part of this process, SWA will also be preparing guidance material and introducing training courses on the GHS.

#### Globally Harmonised System of Classification and Labelling of Chemicals (GHS)

The GHS was developed under the auspices of the United Nations to be the internationally agreed system for the classification and labelling of chemicals. It includes harmonised criteria for the classification of physical hazards (such as flammability), health hazards (such as carcinogenicity) and environmental hazards. It is also intended to address how labels and safety data sheets should be used to convey information about the hazard(s) and how to protect people from the effects of those hazards. The GHS will be extended to hazardous chemical substances, dilute solutions and mixtures.

The GHS is expected to:

- enhance the protection of people (and the environment) by providing an internationally comprehensive system for chemical hazard communication
- provide a recognised framework for those countries without an existing system
- reduce the need for duplicative testing and evaluation of chemicals
- facilitate international trade for those chemicals where hazards have been properly assessed and identified.

Sources: ASCC (2006a); SWAC (2009a); SWA (2010e); SWAC (2009g).

# 10.4 Regulating occupational health and safety concerns relating to asbestos

All jurisdictions have legislation dealing with the risks asbestos poses for workplace health and safety, recognising that the health effects of asbestos exposure may take many years to manifest. For example, even though asbestos has been seldom used in Australian industry since the mid-1980s, it is expected that the incidence of mesothelioma (a cancer caused by exposure to asbestos) will not peak until after 2010 (SWAC 2009e). Figure 10.1 shows how the number of new cases of mesothelioma have grown since the early-1980s.<sup>5</sup> The consequence of asbestos exposure is evidenced by asbestos related diseases, mesothelioma (32 deaths) and asbestosis (12 deaths), being the two most common diseases causing (compensated) fatalities in the Australian construction industry over the period of 1 July 2005 to 30 June 2008 (SWA 2010b).





<sup>a</sup> As the number of new cases for the Northern Territory and the ACT are relatively low over the period (1–4 and 1–6, respectively), they cannot be plotted clearly on the scale of this figure and so have been excluded. *Data source*: SWAC (2009e).

The Commission received a number of complaints about differences in the OHS requirements for asbestos during visits with interested parties. On this basis, the Commission decided to use asbestos as the basis for a case study on the regulation of a specific hazardous substance.

<sup>&</sup>lt;sup>5</sup> From the mid-1980s, the majority of the commercial uses of asbestos were progressively banned in Australia, with a complete ban on the use of asbestos (with some time limited exceptions) coming into effect on 31 December 2003. However, the ban does not extend to asbestos that was already in buildings and structures at the time the ban took effect. Accordingly, 'new' instances of asbestos exposure have occurred since the 1980s — notably as a result of exposure to airborne asbestos fibres during the renovation of, or removal of asbestos from, those buildings and structures with *in situ* asbestos.

The regulation of asbestos removal proved to be a topical subject over the course of the study with ACT WorkCover shutting down a worksite in October 2009 following reports that workers appeared to be removing asbestos without the required protective equipment and that visible asbestos fibres were being released into the air. People who had visited the site were subsequently contacted by ACT Health and encouraged to seek medical advice regarding their potential exposure to asbestos fibres (Kretowicz 2009).<sup>6</sup>

This section does not seek to provide exhaustive coverage of asbestos-related OHS regulation, but rather considers specific facets of the jurisdictions' regulation of asbestos, namely:

- duties to identify the presence and location of asbestos in a workplace and associated requirements to maintain an 'asbestos register'
- aspects of OHS legislation relating to asbestos removal, including: licensing requirements for asbestos removalists; the notification and permit requirements to be satisfied prior to undertaking the removal of asbestos; and the regulatory requirements and obligations of asbestos removalists and their clients when removing asbestos.

## Identifying asbestos in the workplace and maintaining an asbestos register

The Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)] outlines some general principles for the management of asbestos in the workplace (figure 10.2 shows how these principles should be applied in practice). The first step in managing asbestos in the workplace is to determine whether asbestos is present.

The Commonwealth (under the *Occupational Health and Safety Act 1991* (Cwlth)) and the Northern Territory are the only jurisdictions not to have an explicit requirement within their OHS legislation to identify the location of asbestos in a workplace or non-residential building (table 10.4). However, businesses operating in these jurisdictions might reasonably be expected to do so given their jurisdiction's promotion of the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)], which contains such requirements.

<sup>&</sup>lt;sup>6</sup> ACT Health also noted that, given the relatively short duration of the possible exposure to asbestos, the probability of any of the 156 people affected contracting an asbestos-related disease was low.



## Figure 10.2 Applying the general principles of an asbestos management plan in practice

Source: Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)].

## Table 10.4Requirements to identify asbestos and maintain an<br/>asbestos register

2008-099

|                  | Duty holder                                                                                                                                   | Duty to identify the<br>presence and location<br>of asbestos | Duty to maintain an asbestos register |
|------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|---------------------------------------|
| Cwlth            | No explicit register or 'asbestos identification' requirement                                                                                 | ×а                                                           | ×                                     |
| NSW              | The controller of a premises                                                                                                                  | √b                                                           | √b                                    |
| Vic              | A person who manages or controls a workplace<br>An employer                                                                                   | √<br>√                                                       | √<br>√                                |
| Qld              | The owner of the structure                                                                                                                    | √b                                                           | √b                                    |
| SA               | The owner of the building                                                                                                                     | √C                                                           | $\checkmark$                          |
|                  | The person in possession of plant that contains, or has on it, any asbestos containing material                                               | √C                                                           | $\checkmark$                          |
| WA               | A person who, at a workplace, is an employer, the<br>main contractor, a self-employed person or the<br>person having control of the workplace | √b                                                           | √b                                    |
| Tas              | The accountable person who has management or control of a building, structure or mine                                                         | $\checkmark$                                                 | $\checkmark$                          |
| NT               | No explicit register or 'asbestos identification' requirement                                                                                 | ×                                                            | ×                                     |
| ACT <sup>d</sup> | A person in control of non-residential premises                                                                                               | √C                                                           | $\checkmark$                          |

<sup>a</sup> Employers in control of a construction project have a duty to identify hazards arising from the presence of asbestos. <sup>b</sup> In compliance with the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)]. <sup>c</sup> The duty holder must use a 'competent person'/licensed assessor to identify the presence of asbestos. <sup>d</sup> The requirements are being progressively phased in by class of building until 1 September 2010.

Source: OHS Acts and regulations.

In South Australia and the ACT, the duty holder (table 10.4) must engage a competent 'assessor' to identify the presence of asbestos. Victoria and Tasmania also require the duty holders to identify the presence of asbestos, although not necessarily by engaging an 'expert' to do so.<sup>7</sup> In contrast, in New South Wales, Queensland and Western Australia, where the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)] applies, the person with a duty to identify the presence and location of asbestos may assume the presence of asbestos.

These different requirements create differing burdens for business. For example, allowing an assumption of the presence of asbestos removes the costs associated

<sup>&</sup>lt;sup>7</sup> In Victoria, if there is uncertainty (based on reasonable grounds) as to whether any material is asbestos or if there are inaccessible areas that are likely to contain asbestos, it may be assumed that asbestos is present.
with engaging experts and sampling suspicious material, but creates possibly unnecessary costs (albeit voluntarily borne by business) by requiring businesses to act as though asbestos were present in building when, in fact, it might not be. On the other hand, requiring assessments of buildings creates a cost for business, possibly in excess of the costs it would bear were it able to assume the presence of asbestos and treat the building accordingly — particularly where the use of professional assessors is required. In this light, the Victorian legislation would seem to strike a balance by requiring a business to identify the presence and location of asbestos but allowing it to assume asbestos is present in situations of uncertainty (based on reasonable grounds) or inaccessibility.

In those jurisdictions requiring a duty holder to identify the presence of asbestos, the duty holder is also bound to maintain an asbestos register (table 10.4). The mandated contents of asbestos registers vary from jurisdiction to jurisdiction (table 10.5) and in those jurisdictions where a business may assume the presence of asbestos (New South Wales, Queensland, Western Australia and, in certain circumstances, Victoria), the asbestos register should reflect any assumptions made about the presence and location of asbestos. The differing duty holders and mandated contents of the asbestos registers present regulatory burdens for those businesses either operating across jurisdictions or which hold non-residential property in different jurisdictions. For example, the differing information requirements (table 10.5) means that any 'national asbestos register template' a business might employ will see them exceed the regulatory requirements of a number of jurisdictions. Further, the absence of any explicit requirements for an asbestos register in the Northern Territory and for those operating under the Occupational Health and Safety Act 1991 (Cwlth), render them lower cost jurisdictions compared to those where such requirements apply.

Comments from focus groups of OHS consultants and OHS regulators participating in a SWA (2010a) compliance study suggest that compliance with asbestos register requirements is comparatively low. In particular, they noted that asbestos registers are:

- often absent from workplaces, with larger, more organised workplaces the more likely to have a register
- not always made available to contractors and workers entering the workplace either through the lack of a proactive approach to making it available or deliberately withholding it
- not necessarily requested by the contractor or worker when entering a workplace
- often incomplete or inaccurate.

|                                                                                                                         | NOHSC:<br>2018 | NSW          | Vic | Qld | SA | WA | Tas          | ACT          |
|-------------------------------------------------------------------------------------------------------------------------|----------------|--------------|-----|-----|----|----|--------------|--------------|
| Date of each inspection/ assessment                                                                                     | ✓              | $\checkmark$ |     | CP  | СР | СР |              | ~            |
| Name of person conduction inspection                                                                                    | ✓              | CP           |     | CP  | CP | CP |              | $\checkmark$ |
| Location, type and condition of each asbestos product                                                                   | 1              | ~            | ✓   | CP  | ~  | СР | $\checkmark$ | ✓            |
| Location, type and condition of any material assumed to contain asbestos                                                | ~              | CP           | ~   | CP  | CP | СР |              | ✓            |
| Details of any inaccessible location likely to contain asbestos                                                         | 1              | CP           |     | CP  | CP | СР |              |              |
| Details of any analysis confirming whether material does or does not contain asbestos                                   | 1              | CP           |     | CP  | CP | СР |              | ~            |
| Details of the risk assessments made on asbestos materials                                                              | 1              | CP           |     | СР  | СР | СР |              | ~            |
| Details of any review of the risk assessments<br>(on asbestos materials) by a licensed<br>asbestos assessor (or others) | √              | СР           |     | СР  | СР | СР |              | ✓            |
| Results of any air monitoring for airborne<br>asbestos fibres and an assessment of these<br>results                     | ✓              | СР           |     | СР  | СР | СР |              |              |
| Information about the control measures in place<br>in the building and/or any control action(s)<br>taken                | *              | $\checkmark$ |     | СР  | СР | СР |              | $\checkmark$ |
| Date control actions undertaken                                                                                         | ✓              | $\checkmark$ |     | CP  | CP | CP |              |              |
| Date each piece of asbestos product was<br>identified                                                                   |                |              | ✓   |     |    |    |              |              |
| Details of any review of the register by a licensed asbestos assessor (or others)                                       |                |              |     |     |    |    |              | ~            |
| Details of those undertaking control work (if contracted out)                                                           |                | ~            |     |     |    |    |              |              |
| Information about maintenance and service work                                                                          |                |              |     |     |    |    |              | ✓            |
| Details of any activities undertaken that are likely to disturb the asbestos                                            |                |              | ✓   |     |    |    |              |              |

### Table 10.5 Asbestos registers — non-residential buildings<sup>a</sup> Information requirements — 2008-09

CP requirements by virtue of reference in the regulation to the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)]. <sup>a</sup> As there are no requirements for an asbestos register under the Commonwealth and Northern Territory regimes, they have been excluded from the table.

Sources: Dangerous Substances (General) Regulation 2004 (ACT); Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC:2018 (2005)]; OHS Acts and regulations.

#### **Removing asbestos**

If asbestos is identified in a workplace or non-residential building, one of the 'control alternatives' (figure 10.2) is to remove the asbestos. Businesses and, in some jurisdictions, individuals engaged in the removal of asbestos are required to be licensed in the state or territory in which the removal work will take place.<sup>8</sup> However, most jurisdictions provide an exception to the licensing requirements for those removing a small sample of material for testing (including testing to determine whether the material is asbestos). The states and territories also place obligations and responsibilities on asbestos removalists and their clients in respect of the process of removing asbestos from buildings, including notification and permit requirements.

#### Licensing asbestos removalists

The ACT, where licensing is the responsibility of the ACT Planning and Land Authority, is the only jurisdiction where the licensing of asbestos removalists is not the responsibility of the OHS regulator. The number of asbestos removalists licensed in each jurisdiction is reflected in table 10.6.

Aside from those outlined in table 10.6, some unique features of the jurisdictions' licensing regimes include:

- in Victoria, Class A and Class B licences (table 10.6) are further categorised into: unlimited Class A or B licences; and limited Class A or B licences that are related to the removal of specific asbestos containing material
- Western Australia has only one class of an asbestos removal licence. The licence is only required for the removal of 'thermal and acoustic asbestos' products. For the removal of over 200 square metres of asbestos cement 'building products' (a form of non-friable asbestos) a 'class 3 demolition licence' is required (a licence is not required for the removal of lesser areas)<sup>9</sup>
- Tasmania provides a number of licensing exemptions that are not available in other jurisdictions, including exemptions for:
  - the removal of one full glove bag of friable asbestos material

<sup>&</sup>lt;sup>8</sup> There is no licensing requirement under the *Occupational Health and Safety Act 1991* (Cwlth), with Comcare deferring to the asbestos laws of the states and territories on this matter.

<sup>&</sup>lt;sup>9</sup> From 1 June 2010, a new asbestos removal licensing regime will commence in Western Australia. From that date, the current Asbestos Removal Licence will become an Unrestricted Asbestos Removal Licence — it will allow the removal of all forms of asbestos and will be valid for a three year term (instead of the current two year term). A new class of licence (a Restricted Asbestos Removal Licence) will be required by those removing more than 10m<sup>2</sup> of non-friable asbestos. A class 3 demolition licence will continue to be required for the removal of over 200 square metres of asbestos cement 'building products' (WA DoC 2010).

the removal of asbestos cement (or similar non-friable products) from an area covering less than 100 square metres from Class 1a or Class 10 buildings<sup>10</sup> and less than 20 square metres from other buildings and structures.

| Table 10.6 | Licensing requirements for asbestos removalists and number of licences on issue by jurisdiction |
|------------|-------------------------------------------------------------------------------------------------|
|            | 2008-09                                                                                         |

| Licence type                                                                   | NSW               | Vic                        | Qld                  | SA                | WA                 | Tas                | NT                | ACT                  |
|--------------------------------------------------------------------------------|-------------------|----------------------------|----------------------|-------------------|--------------------|--------------------|-------------------|----------------------|
| Removal of any kind of asbestos-containing material                            | √                 | Class A                    | Class A <sup>b</sup> | ✓                 | ×                  | Class A            | √                 | Class A              |
| Number of licences on issue<br>Exemption for maintenance<br>and/or repair work | 93                | 25                         | <sub>113</sub> b     | 10<br><b>√d</b>   | na                 | 23                 | 27<br>√ <b>0</b>  | <sub>44</sub> c<br>I |
| Removal of non-friable asbestos-containing material                            | √                 | Class B                    | Class B <sup>a</sup> | √e                | ×                  | Class B            | √f                | Class B              |
| Number of licences on issue                                                    | 829               | 238                        | 12 884 <b>a</b>      | 58                | na                 | 15                 | 42                | 16 <b>c</b>          |
| Exemption for non-friable asbestos (area removed)                              | <10m <sup>2</sup> | <10m <sup>2</sup> <b>9</b> | <10m <sup>2</sup>    | <10m <sup>2</sup> | Other <sup>h</sup> | Other <sup>h</sup> | <10m <sup>2</sup> | <10m <sup>2</sup>    |
| Other type of licence                                                          |                   |                            |                      |                   | √i                 |                    |                   |                      |
| Number of licences on issue                                                    |                   |                            |                      |                   | 9 <b>i</b>         |                    |                   |                      |

na not applicable. <sup>a</sup> Licences available only to individuals (not companies or other business structures).
<sup>b</sup> Licences available only to companies. <sup>c</sup> Active licences as at 23 December 2009. <sup>d</sup> Applies where the material removed does not extend more than one metre in any direction from the place of maintenance or repair and the total amount of material to be removed does not cover more than 0.5 square metres. <sup>e</sup> A 'limited licence'. <sup>f</sup> Restricted to the removal of asbestos cement products only. <sup>g</sup> Only applies where the total time over which asbestos removal work is performed in any period of 7 days does not exceed 1 hour.
<sup>h</sup> Exemption applies to asbestos-cement which is a form of non-friable asbestos. <sup>i</sup> Western Australia has only one class of an asbestos removal licence — for the removal of 'thermal and acoustic asbestos' products.

Sources: ACTPLA (2009); OHS Acts and regulations; asbestos licence application forms; Productivity Commission survey of OHS regulators (2009 unpublished).

The approach of licensing only individuals, such as applies in the Northern Territory (all licences) and Queensland (Class B licences), creates a different burden on business compared to those approaches where companies and other business structures can be licensed. For example, where a business holds the asbestos removal licence, that business is typically responsible (as part of its licence) for ensuring its workers are suitably trained and equipped for the asbestos removal tasks undertaken — without the need for those workers removing asbestos to be licensed to do so. Under 'individual only' licensing regimes, a business may face the cost of multiple licences for its workers compared to the cost of a single

<sup>&</sup>lt;sup>10</sup> A Class 1a building is detached house, or one of a group of two or more attached dwellings (such as a terrace house) where each dwelling is separated by a fire-resisting wall. A Class 10 building is a non-habitable building or structure.

business licence in other jurisdictions.<sup>11</sup> Also, under 'individual only' licensing regimes, an asbestos removalist business must find licensed workers to replace those leaving its employment (rather than meeting the asbestos licensing requirements by virtue of its 'business licence').

The comparatively narrow definition of asbestos removal activities for which a licence was required in Western Australia in 2008-09 is likely to have resulted in fewer businesses requiring a licence and so a lower burden for Western Australian businesses in aggregate. While Western Australian businesses may face lower aggregate burdens, this may be accompanied by a lower level of regulatory scrutiny of asbestos removal activities and, in turn, OHS outcomes inferior to those jurisdictions that have tighter controls for asbestos removal activities.<sup>12</sup>

### Time and difficulty estimates for obtaining a licence for asbestos removal work

Based on a synthetic analysis<sup>13</sup> of the jurisdictions' asbestos licensing processes, applicants in different jurisdictions would experience different degrees of difficulty in initiating the licensing process — Western Australia was the least time consuming and was the easiest jurisdiction to locate and complete the relevant forms, whereas in Queensland, the process is likely to be the most difficult and time consuming (table 10.7 and box 10.4).

The overall time taken in all jurisdictions to 'obtain information and forms' and 'complete the application form' (where it was possible) was generally less than three hours. This is in keeping with the observations from the Commission's report *Performance Benchmarking of Australian Business Regulation: Cost of business registrations* (PC 2008b) that such imposts are typically quite low. However, that report also showed that it is often in fulfilling the requirements for supplementary documentation and/or information to support the application that places the greatest impost on applicants. While it was not possible to replicate the fulfilment of these requirements in the synthetic analysis, the time taken and difficulty experienced in determining what these supplementary requirements are is included in the estimates in table 10.7.

<sup>&</sup>lt;sup>11</sup> As the licence attaches to an individual, some employers may seek to avoid the cost of the licence by, for example, employing individuals who are already licensed. Also, the cost of individual licences are very modest compared to the cost of businesses licences (the costs of these licences is discussed below).

<sup>&</sup>lt;sup>12</sup> From June 2010, Western Australia's new licensing regime will bring more businesses within the scope of the licensing requirements. In turn, the aggregate costs and benefits of the Western Australian regime will also come into closer alignment with the other jurisdictions.

<sup>&</sup>lt;sup>13</sup> Appendix B outlines the methodology employed in undertaking that analysis.

# Table 10.7Obtaining information/forms and completing the form —licence to remove friable asbestos

| Time | and | difficulty |
|------|-----|------------|
|      |     |            |

|                                 | NSW | Vic | Qld          | SA               | WA  | Tas | NT  | ACT             |
|---------------------------------|-----|-----|--------------|------------------|-----|-----|-----|-----------------|
| Obtaining information and forms |     |     |              |                  |     |     |     |                 |
| Time (minutes) <sup>a</sup>     | 140 | 160 | 170 <b>¢</b> | <sub>140</sub> d | 120 | 100 | 110 | 120             |
| Difficulty <sup>b</sup>         | 2   | 3   | 4            | 3                | 2   | 1   | 4   | 3               |
| Completing the form             |     |     |              |                  |     |     |     |                 |
| Time (minutes)                  | 10  | uc  | nf           | uc               | 5   | uc  | 10  | 20 <sup>e</sup> |
| Difficulty <sup>b</sup>         | 3   | uc  | nf           | uc               | 1   | uc  | 2   | 2 <sup>f</sup>  |
|                                 |     |     |              |                  |     |     |     |                 |

**nf** no form to complete. **uc** unable to complete. <sup>**a**</sup> All estimates include 80 minutes for finding and reviewing the relevant NOHSC standards. <sup>**b**</sup> See table B.8 in appendix B for difficulty scale. <sup>**c**</sup> Includes a 10 minute phone call to regulator to confirm requirements. <sup>**d**</sup> Includes a 15 minute phone call to the regulator to obtain the form. <sup>**e**</sup> Estimate comprises the time to complete an application form for both an 'organisation' and an 'individual' — companies must have a licensed individual as their nominated supervisor. Accordingly, company applicants need to complete two application forms (one for the company and one for an individual) where their nominated supervisor is not already licensed. <sup>**f**</sup> Rating applies to the application forms for both organisations and individuals.

Source: PC estimates.

#### Box 10.4 Factors affecting the difficulty ratings in table 10.7

The ease with which a regulator's website could be navigated was a distinguishing factor in the difficulty ratings assigned to jurisdictions. For jurisdictions with higher difficulty ratings (Queensland and the Northern Territory), their websites were characterised by either an apparent absence of sufficiently detailed information or poor functionality (such as an ineffective 'search' function).

Application forms are not available from the regulator's website in Queensland and South Australia — which increased the difficulty of obtaining the application form. In Queensland, there is no application form as applicants are assessed for the licence by an accredited provider. In South Australia, the form is only available by email or regular post (and after telephoning SafeWork SA to request the form). From the perspective of SafeWork SA, their approach facilitates the timely explanation of the application process to the applicant (including the examination component) and also ensures the applicant is aware of the requirements (such as previous experience) that need to be met before the grant of a licence (South Australian Government, pers. comm., 15 December 2009).

In Victoria, South Australia and Tasmania, the ability to complete the application form is dependent upon documenting matters such as previous experience in asbestos removal. While similar evidence is required in other jurisdictions, they allow it to be provided separately to the application form — thereby giving business some flexibility to draw on their own records/material to satisfy the licensing requirements and, as a result, potentially lowering the burden of supplying this information.

There is considerable variation in the jurisdictions' requirements for documentation and information to support an application (tables 10.8 and 10.9). For example, the supporting documentation required by a company applicant in New South Wales (a copy of the applicant's workers' compensation policy) and the ACT (a company extract or copy of the applicant's partnership agreement) are relatively minor (table 10.8). In contrast, Queensland, South Australia and Tasmania require far more extensive supporting documentation and information. In the case of Queensland, some of these requirements may be due to the licensing process being based on an independent assessment rather than being 'form based'.

Some of the other notable differences in supporting documentation and information required by the jurisdictions include:

- Tasmanian Class A licence applicants need to sit a three and a half hour open book exam. By comparison, South Australian applicants sit a closed book exam
- Victorian applicants need to have an 'authorised verifier' sight some form of identification and confirm the applicant's identity on an identification form. The applicant also needs to supply a passport size photograph of themselves
- as part of satisfying the equipment requirements, Victorian and South Australian applicants are required to provide details of the vacuum cleaner they will use. Victorian applicants also need to provide details of the laundry where nondisposable clothing will be cleaned.

All jurisdictions require evidence of past experience in asbestos removal for a company applicant's nominated supervisor (table 10.9). In some jurisdictions, the requirements include a minimum number of years of experience in asbestos removal (table 10.9). In addition to the requirements in table 10.9, there are other differences across the jurisdictions:

- in New South Wales, supervisors must demonstrate experience in undertaking at least one asbestos encapsulation. Acceptable evidence includes photographs of work completed, descriptions of work completed, evidence of ownership of appropriate safety equipment and examples of safe work procedures
- in Victoria, supervisors are to provide details of at least six projects (including four friable projects) with those projects not being more than two years old. The experience is to be documented on the application form
- in Queensland, supervisors need to demonstrate the successful completion of at least three major projects involving friable asbestos removal. Acceptable evidence includes written records showing supervisory experience and the nature of the projects.

Overall, Queensland requires the most information to support an application and demonstrate supervisor experience — this may be due, in part, to the licensing process being based on an assessment process rather than being form based.

## Table 10.8Documentation/information requirements — friable<br/>asbestos licence

Company applicant requirements - 2008-09

|                                                                                                                                               | NSW          | Vic          | Qld          | SA           | WA           | Tas          | NT ACT       |
|-----------------------------------------------------------------------------------------------------------------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Company extract                                                                                                                               |              | √            |              |              |              |              | √a           |
| Public liability insurance                                                                                                                    |              |              | $\checkmark$ |              |              |              |              |
| Safety Management System (or equivalent)                                                                                                      |              | $\checkmark$ |              |              |              | $\checkmark$ |              |
| Workers' compensation policy or policy details                                                                                                | $\checkmark$ |              | $\checkmark$ |              |              | $\checkmark$ |              |
| Demonstrate a competent supervisor                                                                                                            |              |              | $\checkmark$ |              |              | $\checkmark$ |              |
| Demonstrate compliance with OHS laws                                                                                                          |              |              | $\checkmark$ | $\checkmark$ |              |              |              |
| Demonstrate personnel with knowledge of the OHS requirements in respect to asbestos                                                           |              |              | ✓            | √            |              | ✓            | ✓            |
| Demonstrate that operational practices ensure the safe removal of asbestos                                                                    |              |              | ✓            | √            | ~            | ✓            | $\checkmark$ |
| Details of asbestos licences held in other jurisdictions                                                                                      |              |              |              | $\checkmark$ | $\checkmark$ | $\checkmark$ |              |
| Details of personal protection equipment and removal equipment                                                                                |              | ~            |              | √            | ✓            | ✓            | ✓            |
| Details of waste disposal equipment                                                                                                           |              |              |              | $\checkmark$ |              |              |              |
| Details of arrangements for air monitoring                                                                                                    |              |              |              | $\checkmark$ |              |              |              |
| Examination                                                                                                                                   |              |              |              | $\checkmark$ |              | $\checkmark$ |              |
| Interview                                                                                                                                     |              |              |              |              |              | $\checkmark$ | $\checkmark$ |
| Written evidence of a process for the preparation of effective work method statements for each asbestos removal project                       |              |              | ✓            | √            |              |              |              |
| Written evidence of a system to meet incident reporting<br>and investigation requirements (including training of<br>workers on how to use it) |              |              | ~            |              |              |              |              |
| Written evidence of an awareness of OHS obligations in relation to contractors and suppliers                                                  |              |              | ✓            |              |              |              |              |
| Written evidence of emergency planning                                                                                                        |              |              | $\checkmark$ |              |              |              |              |
| Written evidence of supervision processes for asbestos removal — including how supervisors meet the minimum regulatory requirements           |              |              | ✓            |              |              |              |              |
| Written evidence of worker training program or copy of training manual                                                                        |              |              | ✓            | ✓            | ~            |              | $\checkmark$ |
| Written work health and safety policy                                                                                                         |              |              | $\checkmark$ |              |              |              |              |
| Details of asbestos removal work previously undertaken                                                                                        |              |              |              | $\checkmark$ |              |              |              |

<sup>a</sup> A copy of the partnership agreement or other evidence of the existence of the partnership is to be provided for 'partnership' applications.

*Sources:* OHS Acts and regulations; asbestos licence application forms; South Australian Government, pers. comm., 15 December 2009.

# Table 10.9Documentation/information requirements — friable<br/>asbestos licence

Nominated supervisor and employee requirements - 2008-09

|                                                                                                             | NSW          | Vic          | Qld          | SA | WA           | Tas          | NT           | ACT            |
|-------------------------------------------------------------------------------------------------------------|--------------|--------------|--------------|----|--------------|--------------|--------------|----------------|
| For nominee(s) / supervisor(s)                                                                              |              |              |              |    |              |              |              |                |
| Curriculum vitae                                                                                            |              |              |              |    | $\checkmark$ | $\checkmark$ | $\checkmark$ |                |
| Evidence of experience                                                                                      | √a           | $\checkmark$ | $\checkmark$ | √b | $\checkmark$ | $\checkmark$ | $\checkmark$ | √C             |
| Evidence of training and/or qualifications                                                                  | $\checkmark$ |              | $\checkmark$ | √b | $\checkmark$ | $\checkmark$ | $\checkmark$ | √C             |
| Demonstrate a knowledge of the class A licence<br>holders OHS policy and procedures and OHS<br>requirements |              |              | ~            |    |              |              |              |                |
| Years experience required                                                                                   | з <b>а</b>   | 2            | 3            | ns | ns           | 3            | ns           | 2 <sup>c</sup> |
| For employees (involved in asbestos removal)                                                                |              |              |              |    |              |              |              |                |
| Details of medical practitioner who will examine employees                                                  |              | ✓            |              |    |              |              |              |                |
| Evidence of training and/or qualifications                                                                  |              | $\checkmark$ |              |    |              |              |              |                |

**ns** not specified. <sup>a</sup> Applies if nominated for the first time. <sup>b</sup> A requirement of the *Occupational Health, Safety and Welfare Regulations 1995* (SA) but not explicit in the licensing material. <sup>c</sup> Only a requirement where the nominee is not already licensed and so needs to apply for an 'individual licence' in order to be the nominee.

Sources: OHS Acts and regulations; asbestos licence application forms.

#### Lodging the application and paying licence fees

The jurisdictions vary in the means by which applications can be lodged and the means by which fees can be paid (table 10.10). The fewer alternatives a business has for fulfilling an obligation the more likely that obligation is to place a burden on that business. For example, where an application can only be lodged in person (such as in Tasmania and the Northern Territory), the applicant may incur travel costs to lodge the application (especially if the application can only be lodged in a capital city or major regional centre) whereas the ability to lodge by email or via the internet allows for simultaneous lodgement at lower cost. However, being able to lodge an application in person may reduce the burden for some businesses where they have a need to discuss some aspect of their application with the regulator.

Western Australia demonstrated the most flexible regime for lodging application forms and paying fees, while a number of jurisdictions (New South Wales, Victoria, South Australia, Tasmania and the Northern Territory) were more limited in their approach — accepting application forms via only one medium.

|                                   | NSW          | Vic          | Qld          | SA           | WA           | Tas <b>a</b> | <sub>N7</sub> b | ACT          |
|-----------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|-----------------|--------------|
| Means of lodging application form |              |              |              |              |              |              |                 |              |
| Mail                              | $\checkmark$ | $\checkmark$ | na           | $\checkmark$ | $\checkmark$ | ×            | ×               | $\checkmark$ |
| Fax                               | ×            | ×            | na           | ×            | $\checkmark$ | ×            | ×               | $\checkmark$ |
| Email                             | ×            | ×            | na           | ×            | $\checkmark$ | ×            | ×               | ×            |
| In person                         | ×            | ×            | na           | ×            | $\checkmark$ | $\checkmark$ | $\checkmark$    | $\checkmark$ |
| Other                             | ×            | ×            | na           | ×            | ×            | ×            | ×               | ×            |
| Means of paying fees              |              |              |              |              |              |              |                 |              |
| Cash <b>c</b>                     | ×            | ×            | ×            | ×            | $\checkmark$ | $\checkmark$ | $\checkmark$    | $\checkmark$ |
| Cheque / Money Order              | $\checkmark$ | $\checkmark$ | √d           | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$    | $\checkmark$ |
| Credit card                       | $\checkmark$ | $\checkmark$ | √C           | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$    | $\checkmark$ |
| EFTPoS <sup>C</sup>               | ×            | ×            | $\checkmark$ | ×            | $\checkmark$ | $\checkmark$ | $\checkmark$    | $\checkmark$ |
| BPay                              | ×            | ×            | ×            | ×            | ×            | ×            | ×               | ×            |
| Direct debit / direct credit      | ×            | ×            | ×            | ×            | ×            | ×            | ×               | ×            |

### Table 10.10 Means of lodging application forms and paying fees

2008-09

**na** not applicable (no application form). <sup>a</sup> Applications can only be lodged at Service Tasmania Outlets. <sup>b</sup> Applications can only be lodged at Territory Business Centres. <sup>c</sup> Only available when lodging an application or paying fees in person. <sup>d</sup> May be paid in person or via mail.

Sources: Asbestos licence application forms; regulator websites.

#### Fees for obtaining a licence for asbestos removal work

The fees payable for asbestos licences vary considerably across jurisdictions (box 10.5 and table 10.11) — for a 'business' licence for friable asbestos removal in June 2009, fees ranged from the equivalent of \$27 per annum in Queensland to \$3536 per annum in South Australia.<sup>14</sup> The fees for individual licences are significantly lower than those applying to business licences — the equivalent of \$11 per annum in Queensland (Class B licence) and \$17 per annum in the Northern Territory.

In many jurisdictions the licence fee is to be lodged with the application, with a refund being provided if the application is declined. In South Australia, however, the fee is not payable until after receipt of notification that an application has been successful. Tasmania and the ACT are unique in levying a non-refundable application fee,<sup>15</sup> while New South Wales applicants will be refunded only \$800 of their \$1000 licence fee (for friable asbestos) if their application is unsuccessful.

<sup>&</sup>lt;sup>14</sup> As the South Australian licence has a two year term, South Australian applicants needed to pay \$7071 'upfront' to obtain their licences.

<sup>&</sup>lt;sup>15</sup> The application fees apply to new applications only. They are not payable upon the renewal of an existing, unexpired licence.

#### Box 10.5 Fees for asbestos removal licences

As licences in the Northern Territory and Queensland (Class B licence) relate to individuals, they are payable for each employee/worker removing asbestos. For example, for a business with five employees workers removing asbestos, the costs to the business would be the equivalent of \$85 and \$55 per annum, respectively (assuming the employer, rather than the employee/worker paid the cost of the licence).

In addition to the fees paid by Queensland, applicants for both Class A and Class B asbestos removal licences, it is also likely that they will need to pay a fee or charge to the 'authorised accredited provider' assessing their application. The amount of these fees and charges (if any) would vary from provider to provider.

The fee for asbestos removal licences in South Australia were intentionally set at a level which allows for full cost recovery of the broader regulation of asbestos removal. For example, the fee revenue covers the costs incurred by the regulator in processing licence applications and applications for approval to commence asbestos removal work, the latter of which may include site visits by an OHS inspector.

*Sources:* OHS Acts and regulations; asbestos licence application forms; South Australian Government, pers. comm., 15 December 2009.

|                                       | NSW                | Vic | Qld             | SA <b>a</b> | WA <sup>a</sup> | Tas | <sub>N7</sub> b | АСТ <sup>С</sup> |
|---------------------------------------|--------------------|-----|-----------------|-------------|-----------------|-----|-----------------|------------------|
| Friable asbestos licence              |                    |     |                 |             |                 |     |                 |                  |
| Application fee                       |                    |     |                 |             |                 | 212 |                 | 378              |
| Licence fee (annualised) <sup>d</sup> | 1 000 <sup>e</sup> | 507 | 27 <b>a</b>     | 3 536       | 1 925           | 793 | 17              | 688 <b>f</b>     |
| Non-friable asbestos licence          |                    |     |                 |             |                 |     |                 |                  |
| Application fee                       |                    |     |                 |             |                 | 212 |                 | 378              |
| Licence fee (annualised) <sup>d</sup> | 100 <b>9</b>       | 469 | <sub>11</sub> h | 557         |                 | 529 | 17              | 688 <b>f</b>     |

#### Table 10.11 Licence fees payable

Dollars — 2008-09

<sup>a</sup> Licences valid for 2 years. <sup>b</sup> Licence valid for 3 years. Licences available to individuals only. <sup>c</sup> Combined fees for an organisation and an individual. No fees apply if the applicant holds an unexpired builder's licence. <sup>d</sup> Fees have been normalised to those applicable for one year. <sup>e</sup> Licence period of up to 2 years. Licence fee is payable on application and includes a non-refundable \$200 fee. <sup>f</sup> Based on three year licence (fee \$2064). A one year licence is also available (fee \$814). <sup>g</sup> Licence period of up to 2 years. <sup>h</sup> Licence/certificate is valid for 5 years. Licences available to individuals only.

Sources: OHS Acts and regulations; asbestos licence application forms.

#### Appeal mechanisms

Mechanisms for businesses to appeal regulator decisions should lead to improved 'final decisions' for business (PC 2008c). All jurisdictions have some form of appeals process for asbestos licence applications (table 10.12). Business can

typically only access the external appeals processes after having availed themselves of the internal appeals processes (where they exist).

| NSW          | Vic           | Qld                                                         | SA                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        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#### Table 10.12 Appeals process

2008-09

Sources: OHS Acts and regulations; asbestos licence application forms.

It should be noted that in each jurisdiction most government decisions can be appealed through the civil courts, such as the New South Wales Administrative Decisions Tribunal (for the review of the administrative decisions of New South Wales Government agencies), or state based small claims courts. These processes work over and above regulator-based appeal mechanisms.

#### Undertaking asbestos removal work — notification and permit requirements

In most jurisdictions a licensed asbestos removalist must either notify the OHS regulator or obtain a permit/approval before commencing a new asbestos removal project (table 10.13).

New South Wales (friable asbestos removal only) and South Australia are the only jurisdictions that operate a 'permit/approval system' such that asbestos removal on individual sites cannot commence until the permit is issued by, or approval received from, the regulator. In contrast, the notification requirements of Victoria, Western Australia, Tasmania, the Northern Territory and for non-friable asbestos removal in New South Wales allow work to proceed provided notice is given to the regulator within the specified time period prior to the commencement of work (2–7 days, depending on the jurisdiction — table 10.13). As such, the 'permit/approval system' places a greater burden on business than the notification requirements. The absence of any such requirements in Queensland and the ACT means businesses in those jurisdiction which levies a fee for its permits, it imposes the highest burden for this requirement.

| NSW            | Vic                                                           | Qld                                                                                                                                                                         | SA                                                                                              | WA                                                       | Tas                                                                                                                | NT                                                                                                                     | ACT                                                                                                                                                        |
|----------------|---------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|----------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                |                                                               |                                                                                                                                                                             |                                                                                                 |                                                          |                                                                                                                    |                                                                                                                        |                                                                                                                                                            |
| Р              | Ν                                                             | ×                                                                                                                                                                           | P <b>a</b>                                                                                      | Ν                                                        | Ν                                                                                                                  | Ν                                                                                                                      | ×                                                                                                                                                          |
| 7              | 5 <b>b</b>                                                    | na                                                                                                                                                                          | 2                                                                                               | 7                                                        | 5 <b>c</b>                                                                                                         | 7                                                                                                                      | na                                                                                                                                                         |
| \$500 <b>d</b> | nil                                                           | na                                                                                                                                                                          | nil                                                                                             | nil                                                      | nil                                                                                                                | nil                                                                                                                    | na                                                                                                                                                         |
|                |                                                               |                                                                                                                                                                             |                                                                                                 |                                                          |                                                                                                                    |                                                                                                                        |                                                                                                                                                            |
| Ν              | Ν                                                             | ×                                                                                                                                                                           | P <b>a</b>                                                                                      | ×                                                        | Ν                                                                                                                  | Ν                                                                                                                      | ×                                                                                                                                                          |
| 7 <b>e</b>     | 5 <b>b</b>                                                    | na                                                                                                                                                                          | 2                                                                                               | na                                                       | 5 <b>c</b>                                                                                                         | 7                                                                                                                      | na                                                                                                                                                         |
| nil            | nil                                                           | na                                                                                                                                                                          | nil                                                                                             | na                                                       | nil                                                                                                                | nil                                                                                                                    | na                                                                                                                                                         |
|                | NSW<br>P<br>7<br>\$500 <b>d</b><br>N<br>7 <sup>e</sup><br>nil | NSW         Vic           P         N           7         5b           \$500 <sup>d</sup> nil           N         N           7 <sup>e</sup> 5 <sup>b</sup> nil         nil | NSW Vic Qld<br>P N ×<br>7 5b na<br>\$500 <sup>d</sup> nil na<br>N N ×<br>7e 5b na<br>nil nil na | NSWVicQldSAPN×Pa75bna2\$500dnilnanilNN×Pa7e5bna2nilnanil | NSWVicQldSAWAPN×P <sup>a</sup> N75bna27\$500dnilnanilnilN×P <sup>a</sup> ×N×P <sup>a</sup> ×7e5bna2nanilnilnanilna | NSWVicQldSAWATasPN×PaNN75bna275c\$500dnilnanilnilnilN×Pa×N7e5bna2na5cnilnilnanilnilnilnilnilnanilna5cnilnilnanilnilnil | NSWVicQldSAWATasNTPN $\star$ PaNNN75bna275c7\$500dnilnanilnilnilnilNN $\star$ Pa $\star$ NN7e5bna2na5c7nilnilnanilnanilnilnilnana1na5c7nilnilnanilnanilnil |

### Table 10.13 Notification and permit requirements — asbestos removal 2008-09

**na** not applicable. **N** notification required. **P** permit (or equivalent) required. <sup>**a**</sup> Work on a particular site must not commence without the prior approval of the regulator. <sup>**b**</sup> A 24 hour notification period applies for 'sudden, unexpected situations' and the removal of  $10m^2$  or less of non-friable asbestos-containing material. <sup>**c**</sup> 5 working days. <sup>**d**</sup> Applicable for works over \$5000 in value. <sup>**e**</sup> The pro-forma 'notification of intent to remove bonded asbestos' requires the notice to be lodged at least 7 days before commencing work. The *Occupational Health and Safety Regulation 2001* (NSW) requires the notice be given at least 60 days prior to the commencement of work.

Sources: OHS Acts and regulations; South Australian Government, pers. comm., 9 December 2009.

#### The overall costs of asbestos licensing

Table 10.14 summarises the preceding assessments of the different aspects of the jurisdictions' asbestos removal licensing regimes. Western Australia was the least burdensome in relation to many aspects, however its licence fees are the second highest (the equivalent of \$1925 per annum). South Australia was the most burdensome jurisdiction — even if only by virtue of its licence fees which are over three times those of any other jurisdiction (aside from Western Australia). Queensland is the mirror image of Western Australia, having the lowest business licence fee but also having the most difficult and time-consuming requirements for obtaining that licence.

#### Table 10.14 Cost of asbestos regulation

2008-09

|                                       | NSW | Vic | Qld | SA | WA | Tas | NT | ACT |
|---------------------------------------|-----|-----|-----|----|----|-----|----|-----|
| Asbestos licence                      |     |     |     |    |    |     |    |     |
| Activities requiring licence          | Н   | н   | Н   | н  | L  | Н   | Н  | н   |
| Time/difficulty                       |     |     | Н   |    | L  |     |    |     |
| Supporting documentation — applicant  | L   |     | н   | н  |    | н   |    | L   |
| Supporting documentation — supervisor | L   | Н   |     | L  |    |     |    | L   |
| Lodging forms/paying fees             | Н   | Н   |     | Н  | L  |     |    |     |
| Fees                                  |     |     | L   | Н  |    |     |    |     |
| Appeal mechanisms                     | L   | L   | L   | Н  | L  | L   | Н  | Н   |
| Notification/permits                  | Н   |     | L   |    |    |     |    | L   |
|                                       |     |     |     |    |    |     |    |     |

 ${\bf H}$  highest (or equal highest) cost (subjective assessment).  ${\bf L}$  lowest (or equal lowest) cost (subjective assessment).

#### Asbestos removal — regulatory obligations and requirements

Both asbestos removalists and their clients (typically a person with a duty outlined in table 10.4) face a number of regulatory requirements when asbestos is being removed from a workplace or non-residential building (tables 10.15 and 10.16). These requirements are similar in New South Wales, Victoria or Queensland — in New South Wales and Queensland, the Code of Practice for the Safe Removal of Asbestos (2<sup>nd</sup> edition) [NOHSC: 2002 (2005)] is the designated compliance standard, while Victorian OHS legislation reflects that same code. Tasmania has the fewest obligations and requirements for asbestos removalists and their clients. However, the Tasmanian regime may create a burden of uncertainty for business due to a lack of clarity regarding their obligations.

#### Table 10.15 Asbestos removal obligations

OHS regulations<sup>a</sup> — 2008-09

|                                                                                           | NOHSC:<br>2002 | NSW | Vic | Qld | SA | WA              | Tas | NT | ACT |
|-------------------------------------------------------------------------------------------|----------------|-----|-----|-----|----|-----------------|-----|----|-----|
| Client obligations <sup>b</sup> :                                                         |                |     |     |     |    |                 |     |    |     |
| Provide a copy of asbestos register to asbestos removalist                                | 1              | СР  | √e  | СР  | ~  | C₽ <b>f</b>     |     |    | √   |
| Ensure risk assessment is performed by a<br>competent person prior to removing asbestos   | ~              | CP  |     | СР  |    | C₽ <sup>f</sup> |     |    |     |
| Specify exact requirements for the removal of asbestos <sup>c</sup>                       | ~              | CP  |     | СР  |    | C₽ <b>f</b>     |     |    |     |
| Ensure asbestos work is undertaken in<br>compliance with NOHSC: 2002                      |                |     |     |     |    | ✓               |     |    |     |
| Removal work is undertaken in compliance with any conditions applied to the licence       |                |     |     |     |    | ~               |     |    |     |
| Asbestos removalist obligations                                                           |                |     |     |     |    |                 |     |    |     |
| Ensure those removing asbestos are competent<br>and adequately trained and supervised     | ~              | СР  | √   | СР  | ~  |                 |     |    |     |
| Maintain written records of the training provided to those removing asbestos              | ~              | CP  | ✓   | СР  |    |                 |     |    |     |
| Provide information on health risks and health surveillance to those removing asbestos    | 1              | CP  | ✓   | СР  | ✓  |                 |     |    |     |
| Establish a health surveillance program for those removing asbestos <sup>d</sup>          | 1              | CP  | √g  | СР  |    |                 |     | √g |     |
| Notify the regulator of the medical practitioner who will examine those removing asbestos |                |     | ✓   |     |    |                 |     |    |     |
| Prepare a site-specific asbestos removal control<br>plan                                  | ~              | СР  | √   | СР  | √h | 1               |     |    | ~   |
| Notify the regulator in the event of an<br>'unexpected situation'                         |                |     | √   |     |    |                 |     |    |     |
| Maintain records of the work carried out by those removing asbestos                       |                |     |     |     |    |                 |     |    |     |
| Hold a copy of their licence and relevant<br>National Codes of Practice at each site.     |                |     |     |     |    | ✓               |     |    |     |

**CP** requirements by virtue of reference in the regulation to the Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)]. <sup>a</sup> ACT requirements are contained in the *Dangerous Substances (General) Regulation 2004* (ACT). <sup>b</sup> The client is the person who commissions the asbestos removal work. <sup>c</sup> These include matters such as: the asbestos to be removed; disposal arrangements; and information on hazards that may affect the removal of the asbestos. <sup>d</sup> Asbestos removalists are referred to the Guidelines for Health Surveillance (NOHSC: 7039) for further guidance on this requirement. <sup>e</sup> Obligation is for the asbestos removalist to obtain a copy of the register. <sup>†</sup> Actions are to be in compliance with the relevant sections of the Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)]. <sup>g</sup> Requirements include prescribed frequencies for medical examinations. <sup>h</sup> Records are to be retained for 40 years from the date of the last entry.

Sources: Building (Asbestos code – asbestos removal control plan) Determination 2006 (ACT); Dangerous Substances (General) Regulation 2004 (ACT); Code of Practice for the Safe removal of asbestos (2nd edition) [NOHSC: 2002 (2005)]; OHS Acts and regulations.

#### Table 10.16 Asbestos removal operational requirements

| Regulatory requirements relating to:                                                                                                | NOHSC:<br>2002 | NSW | Vic | Qld | SA | WA          | Tas | NT           | ACT |
|-------------------------------------------------------------------------------------------------------------------------------------|----------------|-----|-----|-----|----|-------------|-----|--------------|-----|
| Emergency plan                                                                                                                      | √a             | CP  |     | СР  |    |             |     |              |     |
| Control of electrical and lighting<br>installations                                                                                 | √a             | СР  |     | СР  |    |             |     |              |     |
| Barriers and signage for the site                                                                                                   | √a             | CP  | √b  | CP  |    |             |     |              |     |
| Air monitoring                                                                                                                      | √a             | CP  | √b  | CP  |    |             |     |              |     |
| Method used to remove asbestos —<br>including the method used, and the<br>equipment and personal protective<br>equipment to be used | √a             | CP  | √p  | СР  |    | √d          |     |              | ~   |
| Waste and storage                                                                                                                   | √a             | CP  | √b  | СР  |    |             |     | $\checkmark$ |     |
| Decontamination of workplace and equipment                                                                                          | √a             | СР  | √b  | СР  |    |             |     |              |     |
| Waste disposal                                                                                                                      | √a             | CP  | √b  | CP  |    | СР <b>е</b> | √b  | $\checkmark$ |     |
| Removal and/or laundering of<br>contaminated clothing                                                                               | √a             | СР  | √b  | СР  |    |             |     |              |     |
| Independent inspection after asbestos removed and prior to reoccupation of a site                                                   | ✓              | CP  | √C  | СР  |    |             |     |              |     |

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**CP** requirements by virtue of reference in the regulation to the Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)] — the person responsible for the requirement may vary depending upon the asbestos removal control plan for the site. <sup>a</sup> To be addressed in the asbestos removal control plan. <sup>b</sup> Responsibility of the asbestos removalist. <sup>c</sup> Responsibility of the client. <sup>d</sup> Requirements apply to protective equipment only. Actions are to be in compliance with the relevant sections of the Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)]. <sup>e</sup> Actions are to be in compliance with the relevant sections are to be in compliance with the relevant sections of the Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)]. <sup>e</sup> Actions are to be in compliance with the relevant sections of the Code of Practice for the Safe Removal of Asbestos (2nd edition) (NOHSC: 2002).

Sources: Building (Asbestos code – asbestos removal control plan) Determination 2006 (ACT); Dangerous Substances (General) Regulation 2004 (ACT); Code of Practice for the Safe Removal of Asbestos (2nd edition) [NOHSC: 2002 (2005)]; OHS Acts and regulations.

## 11 Psychosocial hazards

### Key points

- Work-related stress, and the psychosocial hazards of bullying, occupational violence and fatigue that give rise to it, are inconsistently defined by the jurisdictions and are not given the same attention in OHS legislation and by inspectors as physical hazards. These differences contribute to higher information and training costs for firms operating in more than one jurisdiction.
- Estimates of the prevalence and cost of psychosocial hazards vary considerably. For example, using international studies as a guide, estimates of the annual cost of workplace bullying to employers and the economy in Australia ranged from \$6 billion to \$36 billion (in 2000).
- The national total of accepted workers' compensation claims for mental stress has declined since reaching a peak in 2003-04. Declines were recorded in the combined rates of workers' compensation claims for workplace bullying/harassment and occupational violence in South Australia, Western Australia, Queensland and the Commonwealth in the five years to 2007-08.
- The average cost of claims for work-related mental stress are much higher than the average cost for all workers' compensation claims, both in terms of direct financial costs and time taken off work.
- Jurisdictional similarities and differences in managing psychosocial hazards include:
  - while all jurisdictions imply a duty of care for employers and others to manage psychosocial hazards in OHS legislation, Victoria has clarified this responsibility by specifically including 'psychological health' in its definition of health, South Australia refers to inappropriate bullying behaviours in its Act and New South Wales includes the need to adapt the work environment to physiological and psychological needs in its Act and regulations
  - all jurisdictions provide guidance material on bullying and occupational violence but only Western Australia provides a code of practice on both. Queensland has a code directed at preventing bullying
  - all jurisdictions provide guidance material on fatigue though Tasmania and the ACT do not provide this in a separate publication. In addition, South Australia and Western Australia have codes related to working hours
  - New South Wales and Victoria have produced harmonised guidance material on bullying and on fatigue
  - all jurisdictions train inspectors in psychosocial hazards with the larger jurisdictions having specialised inspectors
  - Victoria and New South Wales have been the most active in pursuing incidents of bullying in the courts.

Psychosocial hazards in the workplace contribute to work-related stress. Psychosocial hazards include: bullying and harassment; occupational violence or customer aggression; fatigue resulting from long hours of work or shiftwork; demands in excess of a worker's capacity to deliver; and alcohol and drug misuse. This chapter concentrates on bullying, occupational violence and fatigue. Psychosocial hazards have grown in prominence in recent years in response to a number of factors including increasing work intensification (in terms of longer working hours and greater workloads), changes in organisational practices, and changing social expectations of how employees should be treated by their supervisors, managers and fellow workers.

These hazards are also harder to define and to investigate than the traditional physical hazards in a workplace. Factors outside of the workplace can also contribute to stress on individuals. Hence the detection, management and regulation of work-related stress presents challenges to employers and regulators alike.

This chapter considers differences in how psychosocial hazards are treated in the various core OHS Acts, regulations, codes of practice and guidance material and whether these differences impose different costs on businesses. In doing so, this chapter provides: a broad outline of the concept of work-related stress, the psychosocial hazards that can trigger work-related stress and the costs to employers and the economy of work-related stress (section 11.1); an analysis of the jurisdictions' OHS regimes as they apply to work-related stress generally and the psychosocial hazards of bullying, occupational violence and fatigue — including the 'regulatory definitions' of these hazards (section 11.2); and the enforcement of the relevant OHS provisions by regulators and the treatment by courts of law of some cases of bullying (section 11.3).

### 11.1 Work-related stress

### What is work-related stress and what are its causes?

According to the World Health Organisation (WHO), work-related stress is 'the response people may experience when presented with work demands and pressures that are not matched to their knowledge and abilities and which challenge their ability to cope'. Work-related stress is exacerbated if employees feel they have little support from supervisors or colleagues, as well as little control over work processes (WHO 2009). Different individuals have different tolerance levels to mental stress with some being able to 'absorb' a certain amount of work-related stress without detriment. However each individual has a threshold over which work-related stress

becomes damaging. This provides a challenge to employers in developing plans to detect and manage hazards that can contribute to stress in the workplace.

Although bullying, occupational violence and fatigue are considered the major psychosocial hazards in Australia, WHO (2009) and Econtech (2008) provide a broader categorisation of the psychosocial hazards that can trigger work-related stress, including:

- work factors (such as excessive hours, unreasonable demands, or inflexible work arrangements leading to poor work-life balance)
- the physical work environment (such as noise or overcrowding or ergonomic problems)
- organisational practices (including poor lines of communication and unclear roles and responsibilities, poor leadership, and lack of clarity about organisational objectives and strategies)
- workplace change (which can contribute to job insecurity and high staff turnover)
- relationships at work (for example poor relationships of staff with supervisors, management and colleagues which may contribute to bullying and harassment or violence).

### Trends in claims for mental stress

National Safe Work Australia (SWA) data show an increase in accepted or successful mental stress claims from 4440 in 1997-98 to a peak of 7850 in 2003-04 since when there has been a steady decline to 5950 in 2007-08 (figure 11.1). Nevertheless, the number recorded in 2007-08 is 34.0 per cent above the figure recorded in 1997-98.

Trends in workers' compensation claim statistics for mental stress should give some indication of the effectiveness of regulatory frameworks used by jurisdictions to manage psychological hazards. However, the data may also indicate that greater attention has been given to risk management practices by employers in relation to psychological hazards in recent years and reflect improved reporting. The data can also reflect industry compositional issues such as a greater concentration of employment in industries in some jurisdictions with occupations which are more susceptible to psychosocial hazards. As a result it is difficult to attribute which factors are having a more significant impact in driving improvement or deterioration in mental stress claim outcomes than others.





**p** preliminary data.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

Further information on trends in aggregate mental stress claims, workers' compensation claims related to work pressure, and the characteristics of people who have had the claims for mental stress accepted are provided in Appendix E.

#### Differences in recording mental stress claims

There is considerable overlap in SWA definitions of claims for harassment (including bullying) and occupational violence (box 11.1). Both include assault and threatened assault, and verbal abuse (ASCC 2007c).

The two main differences between these two definitions are that:

- harassment/bullying involves repeated or systemic behaviour while occupational violence includes one-off instances
- harassment/bullying is conducted by a work colleague while occupational violence can be conducted by work colleagues or others.

These differences are likely to result in confusion for coders and may provide some explanation for the differences in figures provided across the jurisdictions. For example, while Western Australia records the highest rate for exposure to violence (accounting for 40.9 per cent of all mental stress claims in that state), it records the lowest rate for harassment/bullying (6.1 per cent). In contrast, Victoria's figures are the mirror opposite recording the lowest rate for exposure to violence (accounting

for only 4.4 per cent of that state's mental stress claims) and the second highest rate (37.4 per cent) for harassment/bullying (see table 11.1).

# Box 11.1 SWA definitions of different types of workers' mental stress claims

SWA also provides definitions of different types of workers' compensation claims that contribute to work-related stress, These claims can arise from a number of causes, some of which could be regarded as 'physical' such as occupational violence, and include:

- work pressure disorders arising from work responsibilities and workloads, workplace interpersonal conflicts and workplace performance or promotion issues
- various forms of harassment work related harassment and workplace bullying, sexual or racial harassment (including repeated assault or threatened assault and repeated verbal harassment), threats and abuse from a work colleague
- exposure to workplace or occupational violence includes being the victim of single acts of assault or threatened assault by work colleagues; and assault, threatened assault, verbal threat or abuse by persons other than work colleagues
- exposure to a traumatic event disorders arising from exposure to a traumatic event such as the witnessing of a fatal or other accident suicide or attempted suicide.

Source: ASCC (2007c).

Claims for work pressure account for between a quarter and just over a half of all accepted mental stress claims in all jurisdictions (table 11.1). The Australian Federation of Employers and Industries claimed that a significant proportion of workers' compensation claims related to stress involve circumstances in which an employer has taken action to investigate an employee's performance and thus may not be legitimate (sub. DR26, pp. 13-14). The Federation further claimed that insurers tend to side with the employee's interpretation of events at work having triggered a stressful condition.

### Table 11.1 Accepted mental stress claims by category by jurisdiction

|                                                | Cwlth | NSW  | Vic  | Qld  | SA   | WA   | Tas  | NT   | ACT<br>priv. | ACT<br>Govt | Aus  |
|------------------------------------------------|-------|------|------|------|------|------|------|------|--------------|-------------|------|
| Exposure to traumatic event                    | 8.1   | 2.0  | 7.5  | 9.8  | 7.7  | 15.2 | 7.1  | np   | 10.0         | na          | 6.3  |
| Exposure to workplace or occupational violence | 21.6  | 24.0 | 4.4  | 22.2 | 25.3 | 40.9 | 19.6 | 30.0 | np           | 12.5        | 19.2 |
| Work pressure                                  | 43.2  | 30.6 | 27.4 | 49.0 | 45.1 | 36.4 | 57.1 | 30.0 | 30.0         | 50.0        | 35.4 |
| Workplace related harassment or bullying       | 24.3  | 21.5 | 37.4 | 17.0 | 20.9 | 6.1  | 16.1 | 20.0 | np           | 37.5        | 24.0 |
| Suicide or attempted suicide                   | np    | 0.9  | np   | na   | na   | na   | np   | na   | na           | na          | 0.3  |
| Other mental stress factors                    | 2.7   | 20.9 | 23.0 | 1.3  | np   | np   | np   | np   | 40.0         | na          | 14.7 |

Per cent of total mental stress claims 2007-08p

**p** preliminary data. **na** cells are those where either no claims were recorded or jurisdictions don't include this type of classification. **np** are cells with fewer than 5 claims where information has been suppressed and hence not provided. As a result of suppression of some cells totals do not sum to 100 per cent in some jurisdictions.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

Differences between jurisdictions could also be affected by differences in the way claims are coded in individual jurisdictions. In addition, in some jurisdictions coding is undertaken internally by individual agencies while in others coding is undertaken by a central agency. In some cases jurisdictions have their own coding systems for recording mental stress claims which they subsequently reinterpret and align with the definitions supplied by SWA in order to supply data for recording national results.

#### Claims for workplace bullying/harassment and occupational violence

Despite these coding anomalies, trends in the combined totals for workplace bullying/harassment and occupational violence between 2002-03 and 2007-08 can be used to make jurisdictional comparisons if the data is consistently reported by each jurisdiction over the period. The data show significant declines in the rate of combined claims for bullying/harassment and occupational violence in the Commonwealth, Queensland, South Australia and Western Australia, and to a lesser extent in New South Wales. Tasmania was the only jurisdiction to record an increase in the rate of claims during the interval while the rate of accepted claims in Victoria, the Northern Territory and ACT Government were relatively stable (see table 11.2).

The relatively high figure recorded for bullying/harassment claims in Victoria may have been affected by the regulator being more active in highlighting bullying and harassment in the workplace through a combination of education programmes, proactive worksite visits by inspectors, and pursuing the prosecution of employers, owners and employees who have allowed bullying behaviour to persist in the workplace. In other words, bringing more attention to the problem may have encouraged more victims to come forward and make a claim for mental stress.

|                | Accepted   | d claims | per 10 | 0 000 e | mploye | es 2002 | 2-03 to 2 | 2007-08 | 3p           |             |      |
|----------------|------------|----------|--------|---------|--------|---------|-----------|---------|--------------|-------------|------|
|                | Cwlth      | NSW      | Vic    | Qld     | SA     | WA      | Tas       | NT      | ACT<br>priv. | ACT<br>Govt | Aus  |
| Bullying and h | narassment |          |        |         |        |         |           |         |              |             |      |
| 2002-03        | 22.4       | 10.0     | 22.8   | 11.1    | 18.2   | 8.1     | 22.1      | 16.6    | 4.9          | 26.6        | 14.5 |
| 2003-04        | 37.5       | 17.8     | 25.2   | 16.6    | 25.8   | 7.6     | 30.0      | 14.0    | 5.3          | 41.1        | 19.7 |
| 2004-05        | 54.8       | 16.7     | 27.1   | 13.7    | 15.9   | 5.9     | 27.0      | 13.1    | np           | 143.8       | 19.1 |
| 2005-06        | 37.9       | 12.3     | 24.5   | 13.0    | 18.3   | 7.1     | 21.9      | 15.9    | np           | 109.9       | 16.5 |
| 2006-07        | 27.8       | 14.3     | 26.2   | 8.9     | 16.0   | 4.7     | 18.1      | 16.0    | 4.1          | 106.7       | 15.9 |
| 2007-08        | 12.7       | 15.6     | 24.7   | 7.2     | 13.6   | 2.1     | 22.2      | 11.2    | np           | 67.4        | 14.7 |
| Occupational   | violence   |          |        |         |        |         |           |         |              |             |      |
| 2002-03        | 9.6        | 15.2     | 4.4    | 7.9     | 22.0   | 20.1    | 13.0      | 15.5    | np           | 42.6        | 11.9 |
| 2003-04        | 13.7       | 19.7     | 5.8    | 8.5     | 20.1   | 16.2    | 10.9      | 12.9    | np           | 66.8        | 13.4 |
| 2004-05        | 9.8        | 21.3     | 7.1    | 8.3     | 23.6   | 12.9    | 15.6      | 18.5    | 6.0          | 46.2        | 14.1 |
| 2005-06        | 10.2       | 17.3     | 3.5    | 8.2     | 19.2   | 13.2    | 10.2      | 30.8    | np           | 52.3        | 11.6 |
| 2006-07        | 11.6       | 17.9     | 3.3    | 9.5     | 21.0   | 8.5     | 20.6      | 16.9    | 4.9          | 48.0        | 11.7 |
| 2007-08        | 11.0       | 17.5     | 2.9    | 9.5     | 16.3   | 13.5    | 25.6      | 15.9    | np           | 25.9        | 11.7 |
| Total          |            |          |        |         |        |         |           |         |              |             |      |
| 2002-03        | 32.0       | 25.3     | 27.2   | 19.0    | 40.3   | 28.2    | 35.1      | 32.1    | 7.3          | 69.3        | 26.4 |
| 2003-04        | 51.2       | 37.5     | 31.0   | 25.1    | 45.9   | 23.8    | 40.9      | 26.9    | 5.3          | 107.8       | 33.1 |
| 2004-05        | 64.5       | 38.0     | 34.2   | 22.0    | 39.5   | 18.8    | 42.5      | 31.6    | 8.5          | 190.0       | 33.1 |
| 2005-06        | 48.1       | 29.6     | 27.9   | 21.2    | 37.4   | 20.3    | 32.1      | 46.7    | 5.2          | 162.2       | 28.1 |
| 2006-07        | 39.4       | 32.2     | 29.6   | 18.4    | 37.0   | 13.2    | 38.6      | 32.9    | 9.0          | 154.7       | 27.7 |
| 2007-08        | 23.7       | 33.2     | 27.6   | 16.8    | 30.0   | 15.6    | 47.8      | 27.2    | 5.1          | 93.3        | 26.4 |

#### Table 11.2 Trends in accepted claims for workplace bullying or harassment and occupational violence by jurisdiction

p preliminary data. np not provided — fewer than 5 claims and so the information has been suppressed. Source: Data provided by Safe Work Australia with permission from state and territory governments.

#### What are the costs associated with work-related stress?

Research conducted into the cost of work-related stress in Australia found that there were considerable costs borne by employers due to both increased absenteeism and presenteeism (Econtech 2008). Absenteeism is time taken off work as a result of work-related stress, while presenteeism is less well known and is defined as 'the lost productivity that occurs when employees come to work but as a consequence of illness, or other conditions, are not fully functioning'. Some studies have shown that presenteeism can reduce individual productivity by a third or more (Econtech 2007). It was estimated by Econtech that the combination of stress-related

absenteeism and presenteeism was directly costing employers in Australia around \$10.1 billion per year, while the cost to the economy was around \$14.8 billion per year (2008, p. 7).

These costs do not include the hidden costs associated with re-staffing and re-skilling associated with staff turnover. There are also many instances of workers resigning due to stress before the impacts of work-related stress fully manifest as lost productivity in their current job. In these circumstances employers bear the cost of having to replace those staff rather than the cost of the reduced productivity from workers who continue to remain in their jobs but do not function to their full capacity due to the effects of stress. Costs are also incurred through the need for greater supervision of staff who are experiencing work-related stress and the impact on morale and productivity on the entire workforce (not just individual workers) of increasing workloads and performance expectations.

The median time taken off work for accepted serious mental stress claims is much longer than the median time taken off for all workers' compensation claims — 10.9 weeks compared with 3.9 weeks respectively in 2006-07 (latest data available). The median direct cost of mental stress claims was also much higher at \$14 300 compared to the median for all workers' compensation claims of \$5800 (table 11.3) (SWA 2010b, p. 31).

# Table 11.3Median time lost and size of payment by mechanism of<br/>accepted mental stress claims<br/>2006-07

| Mechanism                                      | No. of claims | Median<br>payment | Median<br>weeks off |
|------------------------------------------------|---------------|-------------------|---------------------|
| Exposure to traumatic event                    | 420           | \$7 200           | 6.0                 |
| Exposure to workplace or occupational violence | 1 115         | \$10 100          | 7.4                 |
| Work pressure                                  | 2 560         | \$18 200          | 12.8                |
| Suicide or attempted suicide                   | 10            | \$11 600          | 1.9                 |
| Work-related harassment or bullying            | 1 395         | \$13 500          | 12.0                |
| Other harassment                               | 115           | \$14 100          | 12.7                |
| Other mental stress claims                     | 965           | \$12 300          | 10.0                |
| All mental stress claims                       | 6 580         | \$14 300          | 10.9                |
| All workers' compensation claims               | 134 105       | \$5 800           | 3.9                 |

Source: Data provided by Safe Work Australia with permission from state and territory governments.

Claims for work pressure involved the longest time off (median of 12.8 weeks in 2006-07) and were also the most costly (median of \$18 200) (table 11.3). The median time taken off for work-related harassment/bullying was 12.0 weeks while the median cost was \$13 500.

These figures indicate that the costs of work stress claims are significant for businesses; it follows that clear and consistent guidance on how to manage the causes of work-related stress could play an important role in reducing these costs.

### What are the costs associated with workplace bullying?

Workplace bullying is one of a number of causes of work-related stress. Estimates of the proportion of the Australian workforce subject to bullying/harassment and the costs it imposes vary considerably. As no surveys have been conducted of Australian workplaces on the incidence of bullying, researchers in Australia have used survey findings from other countries to estimate the numbers of people subjected to bullying. Estimates of annual prevalence rates range from a low of 3.5 per cent in Sweden (Leymann 1997) to 21.5 per cent in the United States of America.

Sheehan et al. (2001) applied a low and a high rate to Australia. The more conservative prevalence rate of 3.5 per cent was applied to the working population of 10 million in Australia, to estimate that 350 000 persons were bullied in Australia in 2000 and cost businesses somewhere between \$6 billion and \$13 billion.

A higher prevalence rate of 15 per cent was derived by using the approximate mid point of two international estimates — a survey of 5 300 employees in over 70 organisations in the United Kingdom which provided a bullying prevalence rate of 10.5 per cent (Cooper and Hoel 2000) and a survey conducted of the population of the state of Michigan in the United States which yielded a prevalence rate reported as 21.5 per cent (Jagatic and Keashly 2000). At this higher rate, 1 500 000 employees were estimated to be the victims of bullying in Australia in 2000 with estimated costs to businesses of somewhere between \$17 and \$36 billion.

Using the results of international research, the Beyond Bullying Association in Australia has estimated that somewhere between 2.5 million and 5 million Australians experience some aspect of bullying over the course of their working lives (AHRC 2010).

Indirect costs to businesses include declines in labour productivity and intra sector opportunity costs. Intra sector costs of bullying include: the costs of victims not taking up training or promotion opportunities due to stress; negative impacts on worker innovation and creativity which reduces company growth and profits; and the negative impact of publicised cases of bullying on the brand name and goodwill of a company.

Direct costs result from absenteeism, staff turnover, legal and compensation costs, and redundancy and early retirement payouts. Hidden direct costs include management time consumed in addressing claims for bullying, investigating allegations of bullying through formal grievance procedures and workplace support services such as counselling. Other costs include the loss of productivity resulting from: reduced performance of victims who continue to work; replacing victims with initially less experienced and so less productive staff; and internal transfers, and loss or absenteeism of co-workers (Sheehan 2001).

As well as the costs imposed on employers, victims of bullying also bear significant costs. These costs can include: isolation and withdrawal; fear of dismissal or loss of job promotion opportunities; stress and anxiety; low self esteem; other mental health symptoms; and a number of physical symptoms. Other costs to the economy include public sector costs such as the health and medical services needed to treat bullied individuals; income support and other government benefits provided to victims of bullying who become unemployed; and the legal costs associated with pursuing formal complaints.

# 11.2 Jurisdictional approaches to regulating psychosocial hazards

Much of the following analysis focuses on differences in the definitions and treatment of three psychosocial hazards — bullying, occupational violence and fatigue — among the jurisdictions without identifying which jurisdictions impose higher costs on businesses. Rather the diversity in definitions and regulatory treatment creates uncertainty and imposes unnecessary costs especially for businesses operating in more than one jurisdiction.

### Differences in definitions of psychosocial hazards

#### Bullying

Individual jurisdictions have developed their own definitions of workplace bullying (table 11.4) and, as a result, there is no single nationally accepted statutory definition which has been adopted by all jurisdictions. Notwithstanding the number of different definitions, all jurisdictions, except Queensland, South Australia and Tasmania, use reasonably consistent definitions embodying the words 'repeated unreasonable behaviour ... that creates a risk to health and safety'.

Some particular notable differences among those using the above phrase include:

- the Commonwealth and the ACT define bullying as being directed at persons in a workplace, while New South Wales, Victoria, Western Australia and the Northern Territory define bullying as being directed at workers/employees
- while these jurisdictions define bullying as repeated, New South Wales leaves open the interpretation that isolated incidents could be regarded as bullying (WorkCover NSW 2009b)
- Western Australia and the Northern Territory also include 'inappropriate' behaviour in their definition of bullying behaviour.

Queensland, South Australia and Tasmania use quite different definitions:

- Queensland clearly states bullying does not include sexual harassment
- Queensland and South Australia use the concept of what behaviour a reasonable person would find humiliating or threatening to define bullying
- South Australia defines bullying as 'systematic'
- Tasmania specifies that the behaviour can include psychological and physical violence.

The Occupational Health Safety and Welfare Act 1986 (SA) also outlines actions which should <u>not</u> be constituted as bullying. These include 'reasonable actions' taken by employers to discipline, counsel, demote, dismiss or retrench workers. Other 'reasonable actions' also include decisions made by employers on 'reasonable grounds' not to award or provide a promotion, transfer, or benefit to a worker.

# Table 11.4Definitions of bullying included in OHS Acts, codes of<br/>practice and guidance notes

|       | Source                  | Definition of bullying                                                                                                                                                                                                                                                                                                                                                                                                  |
|-------|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth | Guidance<br>note        | 'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'. <sup>a</sup>                                                                                                                                                                                                                                                                |
| NSW   | Guidance<br>note        | 'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'                                                                                                                                                                                                                                                                                               |
| Vic   | Guidance<br>note        | 'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'                                                                                                                                                                                                                                                                                               |
| Qld   | Code of<br>practice     | 'repeated behaviour, other than behaviour amounting to sexual harassment, by<br>a person, including the person's employer or a co-worker or group of co-<br>workers of the person that: (a) is unwelcome and unsolicited (b) the person<br>considers to be offensive, intimidating, humiliating or threatening (c) a<br>reasonable person would consider to be offensive, humiliating, intimidating or<br>threatening.' |
| SA    | s. 55 (A) of<br>OHS Act | 'any behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety.' <sup>b</sup>                                                                                                                               |
| WA    | Code of<br>practice     | 'repeated unreasonable or inappropriate behaviour directed towards a worker,<br>or group of workers, that creates a risk to health and safety.'                                                                                                                                                                                                                                                                         |
| Tas   | Guidance<br>note        | 'persistent and repeatedly aggressive behaviour (that) goes beyond a one-off disagreement, increases in intensity and becomes offensive or harmful to someone,can include psychological and physical violence'                                                                                                                                                                                                          |
| NT    | Guidance<br>note        | 'repeated, unreasonable or inappropriate behaviour directed towards a<br>worker, or group of workers, that creates a risk to health and safety'                                                                                                                                                                                                                                                                         |
| ACT   | Guidance<br>note        | 'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'                                                                                                                                                                                                                                                                              |

<sup>a</sup> 'Repeated' refers to the persistent or ongoing nature of the behaviour, not the specific type of behaviour, which may vary. 'Unreasonable behaviour' means behaviour that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten. 'Risk to health and safety' includes the risk to the emotional, mental or physical health of the person(s) in the workplace. <sup>b</sup> Repeated refers to the persistent or ongoing nature of the behaviour and can refer to a range of different types of behaviour over time. Systematic refers to having, showing or involving a method or plan.

Source: OHS Acts, codes of practice and guidance notes.

#### Fatigue

Work related fatigue can result from extended hours of work, shiftwork and inadequate time for sleep between shifts. Persons suffering from fatigue are likely to have impaired judgement, difficulty in concentration, reduced visual and hand to eye co-ordination and slower reaction times. These impacts are more likely to have more drastic consequences in work situations that involve heavy machinery or driving. However fatigue from working long hours or shiftwork is a possibility in a variety of occupations.

SWA records fatigue-related claims under 'work pressure' as disorders arising from work responsibilities and workloads, workplace interpersonal conflicts and

workplace performance or promotion issues. Work pressure or fatigue accounts for between quarter and a half of all mental stress claims for all jurisdictions.

Differences in definitions of fatigue are shown in table 11.5.

|       | guidance notes                                                                                                        | and coverage in OHS legislation                                                                                                                                                                                                                                               |
|-------|-----------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|       | Coverage of fatigue —<br>Guidance notes or codes                                                                      | Definition of fatigue                                                                                                                                                                                                                                                         |
| Cwlth | Guidance note                                                                                                         | an acute or ongoing state of tiredness that affects employee<br>performance, safety and health and requires rest or sleep<br>for recovery.                                                                                                                                    |
| NSW   | Guidance notes                                                                                                        | an acute and/or ongoing state of tiredness that leads to<br>mental or physical exhaustion and prevents people from<br>functioning within normal boundaries.                                                                                                                   |
| Vic   | Guidance notes                                                                                                        | same definition as provided in NSW.                                                                                                                                                                                                                                           |
| Qld   | Guidance notes                                                                                                        | the increasing difficulty in performing mental and physical activities as a consequence of inadequate restorative sleep.                                                                                                                                                      |
| SA    | <ul><li>Code of Practice</li><li>Approved Code of Practice<br/>on Working Hours Nov 2009</li></ul>                    | includes definitions of "fatigue critical tasks" that are<br>inherently dangerous and require a high level of<br>concentration, alertness and/or co-ordination (such as<br>operating machinery, working with electricity), "shift work",<br>"sleep debt" and "working hours". |
| WA    | Codes of Practice<br>• Code of Practice — Fatigue<br>Management for<br>Commercial Vehicle Drivers<br>2004             | the feeling of being tired, drained or exhausted. Fatigue is<br>accompanied by poor judgment, slower reactions to events,<br>and decreased skills, such as in vehicle control.                                                                                                |
|       | Code of Practice —<br>Working Hours 2006                                                                              |                                                                                                                                                                                                                                                                               |
| Tas   | Guidance note                                                                                                         | does not define fatigue but Includes work overload and                                                                                                                                                                                                                        |
|       | None dedicated to fatigue —<br>referred to in "Hidden hazards<br>— Stress, bullying alcohol<br>and other drug misuse" | irregular working hours (including shift work) in a list of potential stressors in the workplace.                                                                                                                                                                             |
| NT    | Code of practice                                                                                                      | a loss of alertness which eventually ends in sleep — can                                                                                                                                                                                                                      |
|       | <ul> <li>Fatigue Management —</li> </ul>                                                                              | result from long or arduous work, little or poor sleep and the                                                                                                                                                                                                                |
|       | Road Transport Code of<br>Practice                                                                                    | time of day when the work is performed and sleep obtained.                                                                                                                                                                                                                    |
|       | Information Bulletin                                                                                                  |                                                                                                                                                                                                                                                                               |
| ACT   | Guidance note                                                                                                         | does not define fatigue but included as one of the                                                                                                                                                                                                                            |
|       | None dedicated to fatigue — referred to in                                                                            | responsibilities of employers to monitor in transport and other workers.                                                                                                                                                                                                      |
|       | "Employer Occupational<br>Health and Safety Rights and<br>Responsibilities"                                           |                                                                                                                                                                                                                                                                               |

# Table 11.5Definitions of fatigue used in codes of practice and<br/>guidance notes and coverage in OHS legislation

Source: OHS Acts and regulations, codes of practice and guidance notes.

The Commonwealth, New South Wales, Victoria, Queensland and Western Australia all adopt a similar definition which characterises fatigue as tiredness which affects a worker's performance.

In contrast, South Australia defines 'fatigue critical tasks' that are inherently dangerous and require a high level of concentration, alertness and/or coordination (such as operating machinery, working with electricity), 'shift work', 'sleep debt' and 'working hours'. Tasmania includes work overload and irregular working hours in a list of potential workplace stressors. The Northern Territory has defined fatigue as a loss of alertness, while the ACT did not provide a definition.

The diverse definitions, identified causes and approaches to fatigue across the jurisdictions may create confusion for businesses operating in more than one jurisdiction.

Western Australia developed a code of practice on working hours in 2006 which formed the basis for the more recent development of the South Australian code on working hours in November 2009 (table 11.5). Both codes set out a risk management process for identifying potential sources of fatigue, and conducting risk assessment and risk control. The codes also identify the joint responsibilities of employers and employees to ensure safety, as well as the role of consultation and workplace education and awareness programmes to manage the risks associated with fatigue.

The South Australian code outlines a number of measures to control the impact of fatigue such as ensuring breaks are taken during and between work periods, examining the impact of additional hours of work on workers, designing shift work and rosters for staff that allows for sufficient sleep, and monitoring the impact of on-call work on staff.

While fatigue can have short-term catastrophic impacts in circumstances such as contribution to vehicle accidents and accidents involving heavy machinery there are also long-term impacts. For example, the long-term impact of fatigue has been linked to health effects such as cardio-vascular disease, depression and diabetes. As a result regulators are focusing on addressing the cumulative impacts of fatigue.

#### Occupational violence

Differences in how jurisdictions define occupational or workplace violence (also known as customer aggression) and the use of guidance material and codes of practice are highlighted in table 11.6. Most definitions do not clearly distinguish

between bullying/harassment and occupational violence except that the former is defined as being systematic and repetitive and the latter can be a single incident.

Notable differences in definitions include:

- New South Wales' has a more generic non-work specific definition of violence which includes attack on an individual's property as well as person
- Queensland's definition is limited to physical attack and threats of physical attack and extends to direct or indirect application of force on a person's clothing and any equipment they are wearing and provides individual definitions of threat and physical attack
- Victoria provides a number of examples of the types of behaviour that would be considered to be 'occupational violence' including verbal, physical or psychological abuse and sexual harassment or sexual assault
- South Australia describes occupational violence as a situation where people are abused, threatened or assaulted in work and provides individual definitions of what constitutes abuse, a threat or assault
- South Australia includes both employers and employees within its definition of those potentially affected by occupational violence, while Western Australia, the Northern Territory and the ACT refer to 'workers/employees and other people'. In contrast, Victoria and Queensland refer only to employees or workers.

Western Australia has a code of practice which focuses on occupational violence as well as the impact of bullying in the workplace (table 11.6). The code sets out a number of preventative measures to combat the potential for occupational violence such as consultation with workers, developing a management plan, hazard management, the provision of information and training on occupational violence and monitoring the effectiveness of actions taken.

# Table 11.6Definitions of occupational violence used in codes of<br/>practice and guidance notes

|       | Coverage in<br>codes, notes and<br>bulletins                                                             | Definition of occupational violence                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-------|----------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth | Guidance note                                                                                            | any action, incident or behaviour that departs from reasonable conduct in which a person is assaulted, threatened, harmed or injured in the course of, or as a direct result of, his or her work — can include threatening behaviour, verbal or written threats, harassment, verbal abuse and physical attacks.                                                                                                                                                  |
| NSW   | Guidance note                                                                                            | verbal and emotional threats, and physical attack to an individual's person or property by another individual or group — can include verbal abuse over the phone, threats of violence, threats of a sexual nature, ganging up on an individual and physical or sexual assault.                                                                                                                                                                                   |
| Vic   | Guidance note                                                                                            | any incident where an employee is abused, threatened or assaulted in circumstances arising out of, or in the course of, their employment — can include, but is not limited to, verbal, physical or psychological abuse, punching, scratching, biting, grabbing, pushing, threats, attack with a weapon, throwing objects/furniture, sexual harassment or assault, and any form of indecent physical contact.                                                     |
| Qld   | Guidance notes                                                                                           | any incident where a worker is physically attacked or threatened in the<br>workplace or during workplace activities. 'Threat' means a statement<br>(verbal) or behaviour that causes a reasonable person to believe they<br>are in danger of being physically attacked.                                                                                                                                                                                          |
|       |                                                                                                          | 'Physical attack' means the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person where that application creates a risk to health and safety.                                                                                                                                                                                                                                                  |
| SA    | Guidance notes                                                                                           | Violence at work is defined as any incident where an employer or<br>employee is abused, threatened or assaulted in situations relating to<br>their work. 'Abuse' is any unreasonable behaviour that involves the<br>misuse of physical or psychological strength or power. 'Threat' is a<br>statement of the intent to harm a person or damage their property; and<br>'assault' is any attempt to cause injury to a person and includes actual<br>physical harm. |
| WA    | <ul> <li>Code of Practice</li> <li>Violence,<br/>aggression and<br/>bullying at work<br/>2006</li> </ul> | actions or incidents that may physically or psychologically harm another<br>person. Violence and aggression are present in situations where<br>workers and other people are threatened, attacked or physically<br>assaulted at work.                                                                                                                                                                                                                             |
| Tas   | Guidance note                                                                                            | not defined separately from bullying. Includes psychological and/or physical violence (including physical abuse) under a broad definition of bullying.                                                                                                                                                                                                                                                                                                           |
| NT    | Information<br>Bulletin                                                                                  | any incident in which employees and others are abused, threatened or<br>assaulted in circumstances arising out of, or in the course of work<br>undertaken.                                                                                                                                                                                                                                                                                                       |
| ACT   | Guidance note                                                                                            | any action or incident which causes physical or psychological harm to<br>another person. It includes situations where workers and/or other<br>people are threatened, attacked or physically assaulted at work — it<br>also includes non-physical violence, such as verbal abuse, harassment,<br>intimidation and threatening behaviour, which may also significantly<br>affect a person's health and well being.                                                 |

Source: OHS Acts and regulations, codes of practice and guidance notes.

# Differences in regulatory requirements to detect and manage work-related stress

The responsibility to detect and manage psychosocial hazards which contribute to mental stress in the workplace is implied in the OHS legislation of all jurisdictions by the duty of care held by employers to provide a healthy and safe working environment for their employees at the workplace (these duties are discussed in chapters 2 and 7). Workers also have a duty or responsibility under OHS legislation to ensure that their actions do not constitute a risk to the health and safety of themselves or others in the workplace — although the duty of workers in New South Wales only extends to others.

Within these broad duties, jurisdictions have taken different approaches to the issue of work-related stress. Victoria has broadened the definition of 'health' in its OHS Act, and with it the duty of employers, to include 'psychological health'. The New South Wales OHS Act includes an object of promoting a safe and healthy work environment, including one that is adapted to their physiological and psychological needs, as has the ACT in its *Workplace Safety Act 2008* (which became operational from 1 October 2009).

OHS regulatory requirements to identify foreseeable hazards arising from work as part of the risk assessment process include the requirement to identify psychosocial hazards which contribute to work-related stress. Some are more specific:

- the Commonwealth's *Occupational Health and Safety Code of Practice 2008* requires the detection and management of potential psychosocial hazards
- New South Wales regulations require employers and controllers of premises to identify hazards arising from work practices, work systems and shift working (including hazardous processes, psychological hazards and fatigue related hazards), and the potential for workplace violence.

#### Bullying

South Australia has provisions under its OHS Act which gives inspectors the powers to take reasonable steps to resolve a case of bullying or abuse at work between the existing parties themselves or refer the matter to the Industrial Commission if it remains unresolved.

All jurisdictions provide material on the negative impacts of workplace bullying to employers and employees in the form of guidance notes.

Only Queensland (*Prevention of Workplace Harassment Code of Practice 2004*) and Western Australia (*Violence, Aggression and Bullying at Work 2006*) provide

codes of practice on bullying. Both provide information on: how to manage bullying and how to manage this hazard through risk management; consultations; and monitoring and review of processes (Queensland) and policies (Western Australia). The Queensland code also looks at the impact of workplace harassment; and the legislation that covers workplace harassment. The Western Australian code also provides information on: provision of information and training; and ways to respond to bullying including dealing with complaints and their investigation. In addition, Queensland provides guidance notes to particular industries (restaurant, road freight and take away food retailing industry) on dealing with harassment.

New South Wales and Victoria share guidance material for employers and employees on preventing and responding to bullying at work. This guidance note defines bullying behaviours, outlines the risk management process in identifying, assessing and controlling bullying behaviours and provides alternative responses to managing bullying behaviour. As a result of the development of common guidance material on the topic in these jurisdictions, systems set up by an organisation in one of these jurisdictions to manage bullying and harassment could be replicated in the other jurisdiction. These arrangements potentially reduce costs of managing psychosocial hazards for firms operating in both jurisdictions.

There is some debate about the relative merits of codes of practice and guidance material in achieving compliance outcomes in relation to bullying (and harassment). Codes of practice provide guidance to duty holders about how to meet their obligations under OHS legislation and do not generally constitute legal obligations.<sup>1</sup> Hence, it may be misleading to place too much emphasis on the significance of having a code as distinct from guidance material in ensuring compliance. On the other hand, a study by Johnstone, Quinlan and McNamara observed that having psychosocial issues regulated through a separate code of practice (in Queensland and Western Australia) rather than guidance material, sent a strong signal both to employers and to inspectors, in terms of giving them stronger direction to monitor compliance behaviour (2008, p. 30). A review conducted by SafeWork SA in 2008 concluded that a definition of inappropriate behaviour should be retained in South Australia's Act and that guidance material or codes of practice were not a viable substitute for the definition, as it provides a heightened awareness among employers and employees of the consequences of inappropriate workplace behaviour.

<sup>&</sup>lt;sup>1</sup> The exceptions are a few compliance codes operating under Victorian and Queensland legislation which have deemed to comply status.

#### Fatigue

In terms of detecting and managing fatigue, South Australia introduced a code of practice on working hours in November 2009 while Western Australia has a code of practice for working hours and a separate code for fatigue management for commercial vehicle drivers.

While all jurisdictions cover the issue of fatigue either directly within regulations, or within broader duties, the level of additional guidance varies. Some jurisdictions provide broad guidance material on managing fatigue which is appropriate to all workplaces. And some provide guidance material on fatigue for particular occupations and industries such as transport and commercial vehicle driving, forestry, security, mining and health and aged care. New South Wales and Victoria have developed mutual guidance material on fatigue management in the workplace.

Tasmania and the ACT do not provide separate guidance material on managing fatigue and instead provide references to management of a range of 'hidden hazards' in their guidance material. The ACT lists fatigue as a hazard for employers to manage under their responsibilities to ensure OHS.

### Occupational violence

Guidance material on managing aggression in health services was developed by WorkSafe Victoria and is shared with jurisdictions such as Western Australia, New South Wales, South Australia, Queensland, and Tasmania as apart of the working across borders initiative (WorkCover Victoria 2008). All jurisdictions apart from Tasmania provide separate guidance material on how to detect and deal with occupational violence in the workplace. Tasmania includes violence and aggression as bullying behaviours in their guidance material under the umbrella of managing a number of hidden hazards including stress, bullying and drug and alcohol abuse. Western Australia is the only jurisdiction to have a code directed at occupational violence (along with bullying).

# Do the different psychosocial provisions impose different burdens on business?

The differences in how psychosocial hazards are defined and are covered in the jurisdictions' OHS legislation, codes of practice and guidance material contribute to differences in how these hazards are treated and understood by business. In particular, these differences can lead to higher information and training costs — particularly for firms operating in multiple jurisdictions.

Differences can also contribute to greater diversity of costs for firms in terms of developing risk management plans to manage psychosocial hazards. Some jurisdictions such as New South Wales and Victoria have attempted to minimise these costs by developing mutual guidance material for managing bullying and fatigue through risk management.

To add to this uncertainty there is no nationally accepted definition of psychosocial hazards such as bullying across Australia. For example, Queensland refers to bullying behaviours as a form of harassment but this is not the case in other jurisdictions. There is also a blurring of definitions of some psychological hazards. For example instances of verbal abuse could come under the definition of bullying and occupational violence in jurisdictional guidance material.

Similarly, the management of fatigue through guidance material is restricted in some jurisdictions to some industries which are characterised by long working hours and shiftwork such as driving occupations within the transport industry and the potential for fatigue in mining and forestry. However, other jurisdictions have much more comprehensive codes of practice or guidance material to manage fatigue across all industries. Those jurisdictions requiring fatigue management across all industries places higher cost burdens on firms than jurisdictions which only have a requirement for specific industries. These differences also have the potential to place further cost burdens on firms operating in multiple jurisdictions in developing appropriate risk management procedures to meet all requirements.

It is also possible that the more prescriptive approach taken by jurisdictions in relation to risk management — for example in Queensland's code of practice for bullying — could contribute to higher costs to employers in this state than less formal approaches taken in the code developed in Western Australia, and the guidance material provided on the topic in other jurisdictions. However, any additional costs incurred by employers from a more prescriptive approach need to be balanced by the greater certainty and clarity and the possibility of reduced incidence of hazards such as bullying and harassment in the workplace. The Australian Federation of Employers and Industries considers that procedures needed to manage these hazards are resource intensive and may be beyond the capacities of some businesses (sub. DR26, p. 12).

Differences in the regulations are only one factor affecting the burden on business from regulation. As outlined in chapter 5, the enforcement approach of regulators also has an effect on the burdens arising from regulation. The enforcement of psychosocial hazard provisions is considered in the next section (11.3).
# 11.3 How do jurisdictions enforce their requirements for psychosocial hazards?

#### Inspectors and psychosocial hazards

OHS inspectors generally find psychosocial issues in the workplace harder to address than physical hazards. OHS inspectors responded in a survey that they found it much harder to get employers, particularly small manufacturing firms, to deal with psychosocial factors. They also found cases of bullying to be much more difficult to resolve. Inspectors described bullying cases as being emotive and involving a range of different individual interpretations of the events, making it more difficult to substantiate a claim. As a result of these difficulties, some inspectors reported that they were reluctant to handle psychosocial complaints (Johnstone, Quinlan and McNamara 2008).

The views expressed by a number of regulators that they have sufficient resources to meet their responsibilities (chapter 5) is not shared by a number of OHS inspectors who are members of the Community and Public Sector Union (CPSU) and have responsibility for tackling psychosocial hazards in the workplace (sub. DR19).

The results of consultations between the CPSU and its members included comments such as:

- investigations of psychosocial issues are more time consuming than other activities
- there is a lack of capacity and not enough staff focussed on the issue<sup>2</sup>
- workers' compensation data is sufficient to demonstrate that issues such as violence, bullying, fatigue and job stress are not being dealt with effectively (sub. DR19).

All jurisdictions trained their inspectors to deal with psychosocial hazards in 2008-09, however the smaller jurisdictions did not have inspectors who specialised in these areas. To better address psychosocial hazards, Queensland appointed a number of OHS inspectors in 2004 to focus specifically on bullying and harassment and to mentor other inspectors. Recently, responsibilities of these inspectors were broadened to include work-related stress and fatigue. Queensland OHS inspectors have issued a number of improvement notices for cases of harassment. It is difficult

<sup>&</sup>lt;sup>2</sup> The CPSU did not differentiate between the resource capacities of jurisdictions.

to judge the impacts of this new approach on costs outcomes and overall business costs but they are likely to differ from the other jurisdictions.

Victoria commenced a trial of a team of inspectors who targeted bullying behaviour in the workplace, which resulted in the full implementation of a dedicated bullying prevention inspectorate in September 2009. New South Wales has OHS inspectors who have multiple roles in relation to a number of hazards but have received specialist training in dealing with psychosocial hazards. Many of the smaller jurisdictions such as the ACT seek to recruit inspectors who also have a background in psychosocial issues so that they can handle these types of incidents as well as other breaches of OHS legislation. South Australia also has an inspector who has specific skills in handling psychosocial hazards and dealing with incidents of bullying.

#### How have cases of bullying been handled in the courts?

Along with attempts at improving the prevention of work-related stress through inspections, regulators have used prosecutions to both punish businesses and individuals who have breached their OHS responsibilities, and to provide greater clarity as to the responsibilities under OHS Acts.

Analysis of case law in Australia shows that New South Wales and Victoria have been the most active in terms of prosecution in clarifying the application of the law relating to bullying and harassment. There are a number of examples of courts having accepted evidence of less overt forms of bullying in actions for unfair dismissal, breaches of employment contracts and psychological injury. As most areas of bullying and stress are less tangible and attributable than physical harm, the acceptance of less overt forms of bullying is likely to increase the sense of responsibility and uncertainty faced by employers.

The CPSU complained that prosecution policy fails to aim for precedents in issues such as fatigue, stress and bullying, focussing instead on catastrophic incidents (sub. DR19). However, there have been a number of cases where employers have been prosecuted for contravention of major OHS Acts for allowing bullying to take place.

One notable example of prosecution of employers being liable for bullying occurred in 2004 where a company and two of its four directors were prosecuted for a breach of the *Occupational Health and Safety Act 2000* (NSW) in relation to the 'initiation' of a 16 year old labourer (*Inspector Maddaford v Coleman (NSW) Pty Ltd & Or* [2004] NSWIRComm 317). The two directors were found to be personally liable under the Act even though they were not directly involved in the incident. It was argued that the risk of bullying was foreseeable and that it was not sufficient for employers to be reactive to cases of bullying. The implication of this decision is that employers need to be proactive in preventing bullying in order to meet their obligations under OHS legislation to provide a safe and healthy working environment.

WorkSafe Victoria has successfully prosecuted a number of individuals and companies for bullying behaviours. For example, it took action against a radio announcer who had repeatedly verbally abused and issued threats of violence against his fellow employees in 2002 and 2003 (*WorkSafe Victoria vs Ballarat Radio Pty Ltd and R. Mowatt (August 2004)*). The radio announcer was convicted and fined \$10 000 on two counts of relating to intimidating co-workers and for failing to take care for the health and safety of others in the workplace. The broadcasting company was fined \$25 000 for failing to provide a safe workplace and \$25 000 for failing to provide instruction, training and supervision in relation to bullying.

In a more recent case, a company and four employees were prosecuted for the bullying of a female employee at a café operating in an inner city suburb of Melbourne. In the ruling made in February 2010 it was determined that the female employee had committed suicide in September 2006 as a result of the persistent and relentless bullying she faced in the workplace.

The four staff members, including a director, were convicted for failing to provide reasonable care for the health and safety of persons in the workplace, and were fined a combined total of \$115 000, while the company which owned the cafe was fined \$220 000. The magistrate said that the acts of the defendants carried a high risk of serious injury and their culpability was far too significant to warrant non-convictions.

As a result of the decision, the Victorian Government announced that there would be a renewed focus by WorkSafe Victoria inspectors on bullying. As part of the response, WorkSafe Victoria will assist employers to train staff, promote the development of anti-bullying strategies and investigate cases that can result in charges being laid.

New South Wales and Victoria use prosecution more extensively than other jurisdictions to clarify the application of the law, especially the general duty of care upon employers to provide healthy and safe workplaces, as to responsibilities to address psychosocial hazards, particularly bullying and occupational violence.

## 12 Other hazards and activities

#### Key points

- Measures required within occupational health and safety (OHS) regulation to minimise the risk of falls when working at heights vary across the jurisdictions:
  - a combination of the ACT's regulatory framework (comprising two overlapping Acts) and its use of the imperial measurement system makes it the most burdensome jurisdiction for businesses seeking to understand their obligations.
  - New South Wales, with a more complex code of practice (which sets out additional actions to those in the regulations), may also place greater compliance burdens on businesses compared with other jurisdictions.
- The inclusion of non-government standards within falls regulation creates a cost to businesses that need to obtain those standards to be informed of minimum compliance requirements.
  - The Northern Territory has the highest minimum regulatory compliance cost (\$1477) while Queensland has the lowest (\$nil).
- Queensland is the only jurisdiction not to specifically cover manual handling in either its Act or regulations. Instead it is covered by general obligations in the duty of care and codes of practice.
- The Australian Safety and Compensation Council introduced a revised best practice National Standard for Manual Tasks in 2007.
  - The Commonwealth and Tasmania are the only jurisdictions to adopt the new standard in their OHS regulations.
- All jurisdictions require licences for high risk work.
  - All jurisdictions have effectively adopted the 29 national standard licence classes for high risk work. These 29 licences are also mutually recognised.
  - New South Wales, Queensland, South Australia, the Northern Territory and the ACT, however, require some additional high risk work licences which may impose further costs on businesses and employers.
  - The ACT has the shortest processing time for licence applications (2 days) and Western Australia has the longest (42 days).
- Despite consistency in licensing, workplace accidents related to forklifts vary significantly across the jurisdictions with Victoria obtaining the lowest rates of injury.

This chapter explores other OHS hazards and activities that have been identified by the Commission, and through consultation, as being useful areas to benchmark, and where differences across the jurisdictions could impose additional burdens on business. These include:

- falls
- manual handling
- required licensing for high risk work.

The benchmarking of these issues indicates that, despite broad consistency across the jurisdictions in addressing these areas, differences remain, such as additional regulatory requirements to, or inconsistent adoption of, national standards. These may impose additional compliance costs for businesses.

### 12.1 Prevention of falls

### Differences in the regulations

All Australian jurisdictions have implemented some form of regulation to address the risks to OHS posed by falls. In most jurisdictions, the relevant legislation is their primary OHS act and the regulations issued under those acts. The sole exception to this arrangement is the ACT where, in 2008-09, the *Scaffolding and Lifts Act 1912* (ACT) and the *Occupational Health and Safety Act 1989* (ACT), and their associated regulations, comprise the relevant legislation.<sup>1</sup>

All jurisdictions, except the Northern Territory, provide further guidance on their regulatory requirements for falls by issuing codes of practice or, in the case of South Australia and Western Australia, by designating certain Australian Standards as

<sup>&</sup>lt;sup>1</sup> The Work Safety Act 2008 (ACT) has come into effect (from 1 October 2009), replacing the Occupational Health and Safety Act 1989 (ACT). While, the provisions of the Work Safety Act 2008 (ACT) take legal precedence over those of the Scaffolding and Lifts Act 1912 (ACT), both pieces of legislation remain in effect in the ACT as at December 2009 (ACT Government, pers. comm., 17 December 2009).

codes of practice.<sup>2</sup> A National Code of Practice for Housing Construction Falls is presently being developed by Safe Work Australia (SWA) (SWAC 2009b).

Some jurisdictions (Commonwealth and Victoria; South Australia and the Northern Territory) have similar legislative provisions directed at the prevention of falls. Other jurisdictions' regulations vary in matters such as the heights at which obligations arise, the level of prescription in the obligations and the nature of the obligations (table 12.1).

In addition to those requirements listed for the ACT in table 12.1, the *Scaffolding and Lifts Regulation 1950* (ACT) also contains a number of prescriptive requirements related to fall prevention, for example:

- A ladder used as a place from which a person has to work shall rise to a height of at least 3 feet 6 inches above the highest rung to be reached by the feet of the person working on the ladder or if that is impracticable then to the greatest practicable height ...
- Every ladder or run of ladders rising a vertical distance of 20 feet or over shall be provided with an intermediate landing place or places so that the vertical distance between any 2 successive landing places shall not exceed 20 feet.

In some jurisdictions, the codes of practice provide further height thresholds at which businesses should take action. For example, New South Wales' 'Formwork' code of practice indicates (at section 4.1) that:

The construction safety regulations require that:

- safeguards or accident prevention measures be taken where necessary or advisable; and
- where persons are exposed to a risk of falling 1.8m or more, fencing or other safe guards are to be provided.

A combination of the ACT's regulatory framework (two acts and two regulations) and the use of the imperial measurement system (feet and inches) in the *Scaffolding and Lifts Regulation 1950* (ACT) makes it one of the more burdensome

<sup>&</sup>lt;sup>2</sup> The following are designated codes of practice in South Australia: AS/NZS 1576 (Scaffolding) — parts 1–4; AS/NZS 1891 (Industrial fall-arrest systems and devices); AS/NZS 1892 (Portable ladders — Selection, safe use and care); AS 2626 (Selection, use and care of industrial safety harnesses); AS 1418 (Cranes, hoists and winches) and AS 1657 (Fixed platforms, walkways, stairways and ladders). AS1577 (Scaffolding planks) is also noted as an Approved Code of Practice under the Occupational Health, Safety and Welfare Regulations 1995 (SA), however it is so noted in relation to Division 3.4 (Registration of plant designs and items of plant), rather than directed at the prevention of falls.

In Western Australia, AS 4576 (Guidelines for scaffolding) has been designated a code of practice.

jurisdictions for a business seeking to understand its obligations in regard to preventing falls. Jurisdictions, such as New South Wales, which suggest additional actions within their codes of practice, and especially those with actions related to differing heights to those in the regulations, may also be burdensome for businesses seeking to understand (and comply with) their obligations.

| Table 12.1 | Obligations for preventing of falls in OHS Acts and |
|------------|-----------------------------------------------------|
|            | regulations                                         |

2008-09

|                | Event / circumstance                                                                                                                                                                                                                                                                                                         | Obligation(s)                                                                                                                                                                                                                                                                                                                     |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth<br>& Vic | Where an individual would be injured by a fall of <b>2 metres</b> or more                                                                                                                                                                                                                                                    | The employer is to complete a hazard<br>analysis and either eliminate or minimise the<br>risk according to a hierarchy of controls<br>(ranging from performing the work on a 'solid<br>construction' <sup>a</sup> to the use of fixed ladders)                                                                                    |
|                | Where there is a horizontal gap of more than<br><b>300 millimetres</b> from the edge of a surface and there<br>is no barrier to prevent a fall                                                                                                                                                                               | A hazard analysis is to be undertaken                                                                                                                                                                                                                                                                                             |
| NSW            | Where a person could fall <b>4 metres</b> or more from a scaffold                                                                                                                                                                                                                                                            | The scaffold is subject to inspection,<br>signage, erection and disassembly<br>requirements                                                                                                                                                                                                                                       |
|                | Where the provision of fencing work platforms (such<br>as scaffolding) and handrails (or other physical<br>barriers) is not reasonably practicable                                                                                                                                                                           | The employer is to provide physical restraints capable of arresting the fall of anyone falling from a height of more than <b>2 metres</b>                                                                                                                                                                                         |
| Qld            | Where there is a risk of falling less than <b>3 metres</b> in housing construction work or less than <b>2 metres</b> in other construction work (or on a roof with slope of 26° or less) <sup>b</sup>                                                                                                                        | The relevant person is to ensure hazards have been identified and controlled                                                                                                                                                                                                                                                      |
|                | Where there is a risk of falling more than <b>3 metres</b><br>in housing construction work or more than <b>2 metres</b><br>in other construction work (or on a roof with slope<br>over 26°) <sup>b</sup>                                                                                                                     | The relevant person must use control<br>measures to prevent a fall of any distance<br>and, if prevention is not practicable, to arrest<br>the fall                                                                                                                                                                                |
| SA &<br>NT     | Where a person is working in an elevated workplace<br>from which they could fall, in the vicinity of an<br>opening through which they could fall or in any other<br>place from which they could fall, and it is reasonably<br>foreseeable that the person would be injured in such<br>a fall due to the distance of the fall | The relevant person must provide reasonable<br>protection against a fall by the provision of a<br>safe means of access to the workplace and<br>the provision of secure fences, covers or<br>other forms of safeguarding or, if that is not<br>reasonably practicable, by the provision and<br>maintenance of safe systems of work |
| WA             | Where there is a risk that a person could fall <b>2 or</b><br><b>more metres</b> from an edge                                                                                                                                                                                                                                | Compliant edge protection is to be installed                                                                                                                                                                                                                                                                                      |
|                | Where there is a risk that a person could fall <b>3 or</b><br>more metres from an edge                                                                                                                                                                                                                                       | Compliant edge protection or a fall injury prevention system is to be installed                                                                                                                                                                                                                                                   |
|                | Where a hole or opening of more than 200<br>millimetres x 200 millimetres (or 200 millimetres<br>diameter) but less than 2 metres x 2 metres (or 2<br>metres diameter) exists                                                                                                                                                | The hole is to be 'blocked' or mesh installed<br>to prevent persons (or things) falling through<br>the opening. The opening should be signed<br>'DANGER — HOLE BENEATH'                                                                                                                                                           |
| Tas <b>c</b>   | _                                                                                                                                                                                                                                                                                                                            | _                                                                                                                                                                                                                                                                                                                                 |

Table 12.1 (continued)

|     | Event / circumstance                                                                                                                                                                      | Obligation(s)                                                                                                            |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| ACT | Where employees are working at a height from which they could fall and if they fell it is likely they would be injured                                                                    | The employer must provide reasonable protection against the employee falling                                             |
|     | Where a person is working where they may be liable to fall a distance of more than <b>6 feet<sup>d</sup></b>                                                                              | The relevant person is to provide for the safety of that person, so far as practicable, by means of fencing or otherwise |
|     | Where there are fall risks such as openings in floors, roofs and platforms into which a person could accidentally walk and excavations and holes more than <b>5 feet deep<sup>d</sup></b> | The relevant person is to provide fencing in the manner prescribed in the regulation                                     |

<sup>a</sup> A 'solid construction': is an even surface that is structurally capable of supporting people the loads applied to it; has barriers around its perimeter to prevent falls; has a safe means of access and egress. <sup>b</sup> Does not apply if the person could fall from a ladder, a platform supported by trestle ladders, scaffolding that the person is erecting or dismantling or an area near a ladder that the person needs to use to get on or off the ladder.
 <sup>c</sup> Tasmania has no height-specific or fall-specific requirement in its OHS acts and regulations. <sup>d</sup> Contained in the Scaffolding and Lifts Regulation 1950 (ACT).

Source: OHS Acts and regulations.

#### Cost of compliance and comparative effectiveness

SWA is preparing a regulation impact statement (RIS) for the proposed National Code of Practice for Housing Construction Falls. This RIS will contain business cost data based on a set of questions from the draft RIS on which SWA sought responses. The Commission has not sought further cost data from business on falls regulations in light of the work SWA has in progress in this area.

Pending the finalisation of the RIS by SWA, the submissions made to SWA regarding the draft National Code of Practice for Housing Construction Falls provide some indication of the differences in costs between jurisdictions. For example, the Master Builders Australia (MBA) submission indicates the implementation of the two metre threshold in New South Wales added '\$10 000 to \$20 000' to the cost of constructing a house (MBA 2009). As Queensland, South Australia, Tasmania and the Northern Territory do not apply a two metre threshold to housing construction (table 12.1) it could be inferred that their costs are less than those experienced in New South Wales — possibly in the order of \$10 000 to \$20 000.

The MBA submission also highlights how different building approaches and preferences for certain types of construction in different jurisdictions affect compliance costs. For example, as many houses in Western Australia are double brick, it is said that certain fall prevention mechanisms (such as 'framers' working internally) cannot be implemented. Accordingly, the differences in costs across jurisdictions may be caused as much by different building practices and consumer demand for certain types of houses as by different regulation.

The Australian Safety and Compensation Council (ASCC 2008) sought to compare the effectiveness of falls regulation using data on the incidence of falls in the construction industry for the period 1999-2000 to 2003-2004.<sup>3</sup> The data showed Queensland had the lowest incidence of falls (on average) over the period. However, the Queensland regulations during that period provided for a 'fall threshold' of 2.4 metres rather than the current Queensland fall thresholds of three metres for housing construction and two metres for other construction which came into effect in 2006.

Since 2003-2004, Queensland has experienced a sustained rise in its incidence of falls in the construction industry (figure 12.1) — a trend that is apparent both before and after the introduction new falls thresholds in 2006 (albeit on a limited number of observations and to a lesser extent from 2006-07 to 2007-08). Part of the reason for the increased incidence of falls in Queensland could be the growth in construction activity (figure 12.2) — between 2000-01 and 2006-07, the volume of Queensland construction grew by 98 per cent (compared to 26 per cent in New South Wales and 47 per cent in Victoria). Such growth may have reduced the 'compliance focus' of existing businesses due to work pressures, attracted new and less experienced operators to the industry (who possibly experience a higher rate of falls due to their inexperience) and stretched the resources of regulators — all of which could contribute to a higher rate of falls.

Access Economics (2009) found that, following a two metre 'fall threshold' coming into effect in New South Wales (2001) and Victoria (2004), there was a reduction in the rate of injuries from falls in those two jurisdictions compared to all other Australian jurisdictions (the incidence rate in Victoria was also improving prior to the two metre threshold coming into effect). Notwithstanding the improvement in both jurisdictions, Victoria has consistently maintained an incidence rate around 1 claim per 1000 employees less than New South Wales since 2004-05 (figure 12.1). Further, in 2006-07 (and in the 2007-08 provisional data), South Australia (which has no fall thresholds within its regulations) recorded a marginally better incidence rate than New South Wales.

Although South Australia and the Northern Territory have similar legislative requirements in relation to falls (table 12.1), they had differing incidences of falls over the period 2000-2008 (figure 12.1). The volatility in the Northern Territory's

<sup>&</sup>lt;sup>3</sup> As outlined in chapter 3, the level of aggregation in the data does not make it possibly to analyse the data below the level of industry — for example, a comparison of the incidence of falls in housing construction with that in other areas of construction is not possible.

incidence rate can be partially explained by the small population of incidents — typically 10–20 falls per year that result in claims.

## Figure 12.1 Falls from a height in the construction industry (2000-01 to 2007-08p)



p preliminary data.
 a All other jurisdictions (Western Australia, Tasmania, Northern Territory and ACT) weighted by number of incidents (see inset figure for detail of the incidence rates for these jurisdictions).
 b ACT data relates to incidents in the 'private sector' only.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.



Figure 12.2 Value of construction work completed (2000-01 to 2006-07) Chain volume measures<sup>a</sup> — original data

<sup>a</sup> Chain volume estimates measure changes in value after the direct effects of price changes have been eliminated and therefore only reflect volume changes.
 <sup>b</sup> All other jurisdictions (Western Australia, Tasmania, Northern Territory and ACT).

Data source: ABS (Construction Work Done, Australia (Preliminary, Jun 2009), Cat. no. 8755.0).

Overall, while figure 12.1 suggests that lower height thresholds contribute to a lower incidence of falls, the influence of other factors (such as growth rates, workloads and regulatory approaches) means that those jurisdictions with lower falls thresholds do not necessarily outperform those with higher thresholds or no thresholds.

#### Business compliance with falls prevention regulation

In 2008, the Heads of Workplace Safety Authorities (HWSA) released their final report into falls in the construction industry (2008) which summarised the key outcomes of over 1000 site inspections completed by OHS regulators during 2006-07. The report found that only 35 per cent of worksites were compliant with falls prevention requirements. In response to the instances of non-compliance, the regulators issued a combined total of:

- 230 prohibition notices (19 per cent of total enforcement actions)
- 350 improvement notices (28 per cent)
- 605 verbal directions (or voluntary compliance) (49 per cent)

• 46 penalty notices (4 per cent).

A notable finding of the report was that while only 3 per cent of businesses cited the 'costs of controls' as being the main reason for their non-compliance, 23 per cent cited 'lack of knowledge of the law' as the main reason (figure 12.3). This should not be interpreted to mean that the cost of compliance is trivial or not an issue for business as, had more businesses understood their obligations, the cost of compliance may have rated higher as an impediment to compliance.

#### Figure 12.3 **Primary reason for non-compliance with falls prevention** requirements



Data source: HWSA (2008).

With around a quarter of non-compliant businesses citing a 'lack of knowledge' as the reason for the non-compliance, the source of business' knowledge on OHS matters becomes an important consideration. Improving the quality of information provided and the availability of that information to duty holders should, in light of figure 12.3, contribute to improving business compliance. HWSA found that the majority of construction businesses obtain their OHS information from employer associations and around a quarter of businesses obtain their information from the regulator (figure 12.4).

#### Figure 12.4 Source of OHS information for OHS duty holders



HWSA campaign — falls prevention in construction 2008

<sup>a</sup> The HWSA survey limited respondents to the five options in the figure — no provision was made to collect information on the nature of the 'other' responses.

Data source: HWSA (2008).

#### Non-government standards in falls prevention regulation

Non-government standards, such as those issued by Standards Australia, are incorporated into regulatory frameworks for the prevention of falls in all jurisdictions. In some cases (South Australia and Western Australia) they are formally designated codes of practice, while in other cases (all jurisdictions except Queensland) they are referred to in the OHS regulations as either the compliance standard to be met or guidance on such a standard. In Queensland, they are referred to in codes of practice.

Table 12.2 details the prevalence of non-government standards in the regulatory frameworks for the prevention of falls of the jurisdictions (with table 12.3 providing descriptions of the standards). Table 12.2 only includes those non-government standards relevant to falls prevention — for example, although some codes of practice refer to AS 1337 (Eye protectors for industrial applications), AS 1337 is not included in table 12.2 as it does not relate directly to the prevention of falls.

| Non-government standard <sup>a</sup> | Cwlth | NSW | Vic | Qld | SA  | WA | Tas | NT | ACT |
|--------------------------------------|-------|-----|-----|-----|-----|----|-----|----|-----|
| AS 1577                              |       | С   |     |     |     |    |     | R  |     |
| AS 1639                              |       | С   |     |     |     |    |     |    | С   |
| AS 1657                              |       | С   | RC  |     | C*  | С  |     |    | С   |
| AS 2001.2.4                          |       |     |     | С   |     |    |     |    |     |
| AS 2317                              |       |     |     |     |     | С  |     |    |     |
| AS 2319                              |       |     |     |     |     | С  |     |    |     |
| AS 2424                              |       | С   |     |     | R   |    |     |    | С   |
| AS 2626                              |       | С   |     |     | C*  |    |     |    | С   |
| AS 3569                              |       |     |     |     |     | С  |     |    |     |
| AS 4142.3                            |       |     |     |     |     | С  |     |    |     |
| AS/NZS 1170.2                        |       |     |     | С   |     |    |     |    |     |
| AS/NZS 1576                          | R     | RC  |     | С   | C*  | RC | С   | R  | С   |
| AS/NZS 1891                          |       | С   | С   |     | RC* | С  |     | R  | RC  |
| AS/NZS 1892                          |       | С   | С   |     | C*  | RC | R   |    | RC  |
| AS/NZS 4040.4                        |       | С   |     |     |     |    |     |    |     |
| AS/NZS 4389                          |       | С   | С   |     |     | С  |     |    |     |
| AS/NZS 4488                          |       |     | С   |     |     | С  |     |    |     |
| AS/NZS 4576                          |       | С   | С   | С   |     | C* |     |    | С   |
| AS/NZS 4994(Int)                     |       | С   | С   |     |     |    |     |    |     |
| BS 3913                              |       | С   |     |     |     |    |     |    | С   |
| BS 5845                              |       |     |     |     |     |    |     | R  |     |
| CP93                                 |       | С   |     |     |     |    |     |    | С   |

### Table 12.2Non-government standards in falls prevention regulationsAs at September 2009

**R** Referred to in a Regulation. **C\*** Designated a Code of Practice. **C** Referred to in a Code of Practice. <sup>a</sup> See table 12.3 for a description of the subject matter of the standard.

Source: OHS Acts and regulations.

Table 12.4 provides estimates of the costs incurred by business to obtain those non-government standards referred to in the OHS regulations and codes of practice. They do not reflect the cost to business of complying with any of the requirements set down in those non-government standards. The table contains three cost estimates:

- *minimum regulatory compliance cost* the cost to obtain only those standards referred to in the OHS regulations (or OHS regulations and *Scaffolding and Lifts Regulation 1950* (ACT) in the case of the ACT)
- *synthetic cost* the cost for a business to obtain all the standards relevant to them (including those listed in the codes of practice), assuming the business only uses metal ladders and does not use suspended scaffolding
- *maximum potential cost* the cost to obtain all the standards referred to in the regulations and codes of practice.

#### Table 12.3 Description of non-government standards

As at September 2009

| Standard             | Standard description (subject matter from the title of the standard)                                                               |
|----------------------|------------------------------------------------------------------------------------------------------------------------------------|
| AS 1577              | Scaffold planks                                                                                                                    |
| AS 1639 <b>a</b>     | Design and installation of corrugated fibre                                                                                        |
| AS 1657              | Fixed platforms, walkways, stairways and ladders — Design, construction and installation                                           |
| AS 2001.2.4          | Methods of test for textiles — Physical tests — Determination of bursting pressure of textile fabrics — Hydraulic diaphragm method |
| AS 2317              | Collared eyebolts                                                                                                                  |
| AS 2319              | Rigging screws and turnbuckles                                                                                                     |
| AS 2424 <sup>a</sup> | Plastics building sheets                                                                                                           |
| AS 2626 <sup>b</sup> | Selection, use and care of industrial safety harnesses                                                                             |
| AS 3569              | Steel wire ropes                                                                                                                   |
| AS 4142.3            | Fibre ropes — Man-made fibre rope for static life rescue lines                                                                     |
| AS/NZS 1170.2        | Structural design actions - Wind actions                                                                                           |
| AS/NZS 1576          | Scaffolding                                                                                                                        |
| AS/NZS 1891          | Industrial fall-arrest systems and devices                                                                                         |
| AS/NZS 1892          | Portable ladders — Selection, safe use and care                                                                                    |
| AS/NZS 4040.4        | Methods of testing sheet roof and wall cladding — Resistance to impact (sandbag) — Sheet roof material                             |
| AS/NZS 4389          | Safety Mesh                                                                                                                        |
| AS/NZS 4488          | Industrial rope access systems                                                                                                     |
| AS/NZS 4576          | Guidelines for scaffolding                                                                                                         |
| AS/NZS 4994(Int)     | Temporary roof edge protection for housing and residential buildings                                                               |
| BS 3913 <b>C</b>     | British standard specification for safety nets                                                                                     |
| BS 5845 <b>d</b>     | Specification for permanent anchors for industrial safety belts and harnesses                                                      |
| СР93 <sup>е</sup>    | British standard institution code of practice for the use of safety nets on constructional work                                    |

<sup>a</sup> Superseded by AS 4040.4 (Methods of testing sheet roof and wall cladding — Resistance to impact (sandbag) — Sheet roof materials), AS/NZS 4040.5 (Methods of testing sheet roof and wall cladding — Resistance to impact (sandbag) for wall boards), AS/NZS 1562.3 (Design and installation of sheet roof and wall cladding — Plastic) and AS/NZS 4389 (Safety mesh). <sup>b</sup> Superseded by AS/NZS 1891.4 (Industrial fall-arrest systems and devices — Selection, use and maintenance). <sup>c</sup> Superseded by BS EN 1263 (Safety nets — safety requirements, test methods). <sup>d</sup> Superseded by BS EN 795 (Protection against falls from a height. Anchor devices — requirements and testing) and BS 7883 (Code of practice for the design, selection, installation, use and maintenance of anchor devices conforming to BS EN 795). <sup>e</sup> Superseded at least 3 times. Current standards are BS EN 1263-1 (Safety nets. Safety requirements, test methods) and BS EN 1263-2 (Safety nets. Safety requirements for the positioning limits).

Source: SAI Global (2009).

Table 12.4 shows that the Northern Territory has the highest minimum regulatory compliance cost (\$1477) while Queensland has the lowest (\$nil). However, to assist businesses in avoiding these costs, the Northern Territory does provide information on its website about how the standards 'can be viewed (but not printed or saved) online by visiting the Northern Territory Library, Parliament House'.

#### Table 12.4 Cost to obtain the non-government standards in falls prevention regulations<sup>\*</sup>

Derived from 19-26 May 2009 prices

|                                       | Cwlth | NSW   | Vic   | Qld | SA    | WA    | Tas | NT    | ACT   |  |  |  |
|---------------------------------------|-------|-------|-------|-----|-------|-------|-----|-------|-------|--|--|--|
|                                       | \$    | \$    | \$    | \$  | \$    | \$    | \$  | \$    | \$    |  |  |  |
| Minimum regulatory<br>compliance cost | 391   | 391   | 79    | Nil | 579   | 761   | 371 | 1 477 | 782   |  |  |  |
| Synthetic cost                        | 351   | 2 183 | 1 100 | 609 | 1 189 | 1 652 | 532 | 1 437 | 1 612 |  |  |  |
| Maximum potential cost                | 391   | 2 412 | 1 290 | 648 | 1 418 | 1 881 | 761 | 1 477 | 1 841 |  |  |  |

<sup>a</sup> The cost estimates are derived from the prices for hard copies of the standards as quoted at SAI Global's Webshop (www.saiglobal.com/shop/Script/search.asp) for non-members. The quoted prices were obtained over the period 19-26 May 2009.

Source: SAI Global (2009).

In practice, the costs listed in table 12.4 are not 'one-off' costs. Between 14 to 20 per cent of the standards change each year, prompting SAI-Global to note that 'managing your ever-changing library of local and international standards can be a complex administrative and compliance headache' (SAI Global 2007a). A business would initially pay the costs in table 12.4 to obtain the standards and, assuming a 20 per cent turn-over in standards, the business would potentially progressively pay those same costs again over the next five years to ensure the standards remained current. While SAI-Global (and others) provide packages by which business can be kept up-to-date regarding the changes to the standards, this comes at a cost. For example, a leading Australian retailer estimates its costs in this regard to be \$50 000 per annum (which includes a LawLex subscription as well as a subscription to SAI-Global).

These costs are not the only burdens arising for business due to the inclusion of non-government standards in regulation. Some non-government standards reference other non-government standards. For example: Australian Standard AS/NZS 1576.1 (Scaffolding) references, among other standards, AS 1170 (Minimum design loads on structures), AS 1170.1 (Dead and live loads and load combinations), AS 1170.2 (Wind loads) and AS 1170.3 (Snow loads) — the combined cost of which are \$553.86 (costs which would be additional to those detailed in table 12.4).

A number of the non-government standards referred to in regulations and codes of practice have been superseded (table 12.5). In some cases the jurisdictions require (or recommend) compliance with the superseded version and, in other instances, the requirements are not so clear. For example, BS 5845 has been superseded by BS EN 795 and BS 7883 (table 12.3) and it may not be clear to business which of the new standards, if not both, they should comply with.

## Table 12.5Changes to non-government standards in falls preventionregulation

As at September 2009

|                                                                                                                        | Cwlth | NSW        | Vic | Qld | SA         | WA | Tas | NT | ACT        |
|------------------------------------------------------------------------------------------------------------------------|-------|------------|-----|-----|------------|----|-----|----|------------|
| Number of standards (including sub-<br>standards) likely to change over a                                              | 1     | 5          | 3   | 2   | 3          | 5  | 2   | 2  | 4          |
| Number of standards (including sub-<br>standards) listed in regulations/codes<br>of practice that have been superseded | 0     | 5 <b>b</b> | 0   | 0   | 2 <b>c</b> | 0  | 0   | 1d | 4 <b>e</b> |

<sup>a</sup> Based on SAI Global's assertion that 'on average up to 20%' of their range of standards are revised in some way every year (SAI Global 2007b). <sup>b</sup> Includes one standard that has been replaced by four others (although only one of the replacement standards would apply in the context the original standard was referred to) and one standard that has been replaced by two other standards. <sup>c</sup> Includes one standard that has been replaced by two others standard that has been replaced by two others. <sup>e</sup> Includes two standards that have each been replaced by two other standards and one standard that has been replaced by four others (although only one of the replacement standards would apply in the context original standard that has been replaced by two others standards that have each been replaced by two other standards and one standard that has been replaced by four others (although only one of the replacement standards would apply in the context original standard was referred to).

Sources: OHS Acts and regulations; SAI Global (2007b).

### 12.2 Manual Handling

Dealing with an inconsistent approach to the prevention of workplace injuries related to manual handling was raised by some participants as an unnecessary cost related to complying with OHS regulation.

Manual handling is defined under the National Standard on Manual Tasks as:

A task comprised wholly or partly by an activity requiring a person to use his or her musculoskeletal system in performing his or her work and can include the use of force for lifting, lowering, pushing, pulling, carrying or otherwise moving, holding or restraining any person, animal or item. (ASCC 2007a, p. 5)

Given the prevalence of such tasks in virtually all workplaces, albeit to varying degrees, poor manual handling practices in Australia have led to significant costs to workers and the economy.

According to the Australian Bureau of Statistics (ABS), around 31.7 per cent of work injuries in Australia in 2005-06 were caused by lifting, pulling or pushing an object (ABS 2006). In terms of workers' compensation claims, manual tasks in the workplace resulted in 437 852 claims in Australia between July 1997 and June 2003 — equivalent to 41.6 per cent of all claims for that period. The direct cost to the economy of these injuries was estimated to be close to \$12 billion and includes the long-term impacts on the quality of life of the injured worker (ASCC 2006b). It was

also found that the risk of injury from manual tasks was greatest in sectors such as Manufacturing, Health and community services, and Construction (ASCC 2006b).

The costs of manual handling related injuries and illnesses on some jurisdictions have also been examined. For example, according to WorkCover NSW, approximately 17 000 people are seriously injured or suffer from illness related to manual handling each year in New South Wales (WorkCover NSW 2009c). This represents just over a third (37 per cent) of all injuries and costs workplaces around \$373 million (estimated to be around \$1.5 billion when hidden costs, such as the impact on a worker's family and friends or reduced morale in the workplace are included) (WorkCover NSW 2009c). In Victoria, while the number of claims for manual handling had been falling, they still represented 46 per cent of all workers' compensation claims in 2004-05. The cost of these claims were \$580 million (estimated to be around \$2.9 billion when hidden costs are included) (Allen Consulting Group 2007a).

#### Manual handling regulation across the jurisdictions

All Australian jurisdictions have implemented some form of regulation to address the OHS risks related to manual handling. In most jurisdictions, OHS regulations specifically define manual handling and include requirements to manage the associated risks. The only exception is Queensland, where the legal requirements to manage manual handling are covered in the OHS Act's overarching duty of care (with two codes of practice directed at manual handling).

Regardless, the requirements for addressing manual handling across the jurisdictions are broadly consistent in coverage and scope. According to the RIS prepared for the national standard on manual handling, duplication and burdens on businesses operating across jurisdictions were perceived to only be minimal (ASCC 2006b).

### National Standard for Manual Tasks

The Australian Safety and Compensation Council (ASCC) introduced the National Standard for Manual Tasks in 2007. The national standard sets out the principles for the effective management of hazardous manual tasks to avert musculoskeletal disorders (MSDs) arising from manual tasks in the workplace (box 12.1).

Revisions were intended to bring the national standard closer to those operating in Victoria, Queensland and Western Australia - identified as exceeding the preexisting national approach in terms of scope; content; precision and clarity; responsibilities; and risk identification, assessment and control (ASCC 2006b).

#### Box 12.1 Features of the National Standard for Manual Tasks

#### **Duty Holders**

The duty-holders under this standard are:

- persons who design plant and buildings or structures used as a place of work;
- persons who manufacture plant and substances;
- persons who supply plant and substances; and
- persons with control (of the work or workplace, such as an employer, owner, or principal contractor).

#### General duty of person with control

A person with control must, as far as reasonably practicable:

- identify hazardous manual tasks that may give rise to MSDs in workers handling a person or an animal, or using an item, a system of work, or a workplace;
- assess the risks posed by hazardous manual tasks; and
- eliminate the risks.

If this is not reasonably practicable, a person with control must minimise the risks of MSDs that may arise from hazardous manual tasks so far as is reasonably practicable.

#### Workers' duty to take care

Workers who perform manual tasks must, as far as they are able and with respect to manual tasks:

- take reasonable care of their own health and safety and the health and safety of others in the workplace;
- co-operate with all persons with control in complying with this standard;
- comply with all lawful instructions, information and training provided in relation to health and safety by persons with control;
- comply with risk control measures as instructed and trained; and
- notify persons with control about any matter known to them that affects or might affect the ability of the persons with control to comply with this Standard.

Source: ASCC (2007a).

Practical guidance on how to meet the national standard was included in a *National Code of Practice for the Prevention of Muskuloskeletal Disorders due to Manual Handling* (ASCC 2007b) which was introduced in August 2007. This code provides

assistance to employers and persons involved in performing tasks to manage risks, as well as information to health and safety representatives and OHS professionals.

#### Estimated costs and benefits associated with adopting the new national standard

A RIS was prepared by the ASCC prior to the revised national standard for manual handling being introduced, and a number of costs and benefits were identified based on take-up of the standard by the jurisdictions. Broadly, the costs involved were expected to be from familiarisation with new processes and obligations, while the benefits would result from greater consistency across the jurisdictions, reduced manual handling claims and enhanced quality of life for workers.

Under the revised national standard, those businesses which previously had obligations which were not clearly defined were expected to face some significant costs, for example:

- designers/manufacturers/suppliers would pay \$34.9 million per annum due to requirements to consult extensively with users, and remedying design flaws
- persons with control of workplaces were expected to incur \$9.9 million per annum for identifying and remedying hazards and \$12.9 million per annum for record keeping requirements
- training and familiarisation of the new standard was estimated to be a transitional cost of \$18.1 million (ASCC 2006b).

However, there were estimated savings expected from enhanced consistency across the jurisdictions — employers were expected to save \$0.18 million per annum, from the reduced need to train staff to familiarise them with differing processes and systems operating in individual jurisdictions (ASCC 2006b).

The significant benefit from adopting the national standard was expected to be its positive impact on the community from the reduction in manual handling incident claims — expected to peak at \$118 million in 2006-07. Of this figure, benefits in the order of \$3.5 million would go to employers, \$48.4 million to workers, and the rest of society would benefit by \$66.1 million. Reductions in: production disturbance costs (short-term losses of production and staff turnover); human capital costs (long-run loss of productive capacity of workers); and medical costs were among the expected savings (ASCC 2006b).

In addition, benefits from the improvement in living standards of workers due to avoidance of fatal and non-fatal incidents (ASCC 2006b) was estimated to be around \$495 million in 2006-07.

Overall, the net benefit to the community of changing the national standard for manual handling in net present value terms are potentially significant at \$630 million over ten years, while the improvement in quality of life is estimated at around \$400 million per annum for the next ten years (ASCC 2006b).

## Uptake of the national standard and national code of practice for manual handling across jurisdictions

Once the national standard and code of practice was introduced, individual jurisdictions had the responsibility of reviewing their own legislation and deciding whether to adopt, or incorporate elements of, the national standard. As the national standard for manual handling represents a 'best practice' approach to minimising these types of workplace risks, comparing the adoption of the standard to current practice will provide some insight into likely business compliance costs.

Based on evidence presented in the RIS, jurisdictions that have not adopted the standard should place marginally higher costs on businesses and achieve worse outcomes compared to those that have. Further, by not adopting the standard, differences remain across the jurisdictions which potentially increase the compliance burden for multi-state firms.

At the time of writing only two jurisdictions have adopted the national standard for manual handling in their OHS regulations — the Commonwealth and Tasmania (table 12.6). For example, under section 65 of the Tasmanian *Workplace Health and Safety Regulations 1998*, in addition to the responsibilities to undertake hazard identification, risk assessment and control of risk, 'an accountable person in a workplace' must take all reasonable steps to ensure that the national standard is complied with in the workplace' (part 4, division 1). The remaining jurisdictions adopt their own state regulation or code of practice relating to manual handling.

While the Commonwealth, New South Wales, Queensland, South Australia, and the Northern Territory have approved or referenced the national code of practice (or its superseded code) in some form, the codes of practice operating in other jurisdictions vary. In some cases, these were developed prior to the release of the National Standard and National Code of Practice in 2007. For example, Victoria has its own code of practice, *Code of Practice for Manual Handling 2000*, that provides practical guidance on how duty holders can comply with relevant OHS regulations on manual handling. Tasmania is the only jurisdiction that does not have a code of practice for manual handling, instead providing guidance material for employers, managers and workers.

| 2000 00                                                                                                                     |       |     |     |     |     |    |     |     |     |
|-----------------------------------------------------------------------------------------------------------------------------|-------|-----|-----|-----|-----|----|-----|-----|-----|
|                                                                                                                             | Cwlth | NSW | Vic | Qld | SA  | WA | Tas | NT  | ACT |
| National Standard for Manual Tasks (2007)                                                                                   | AL    | Ref |     | Ref | Ref |    | AL  | Ref | а   |
| National Code of Practice for the Prevention of<br>Musculoskeletal Disorders from Performing<br>Manual Tasks at Work (2007) | СОР   | СОР |     | Ref | Ref |    |     | b   |     |

Table 12.6Uptake of national standards and code of practice2008-09

**AL** The national standard has been adopted via legislation. **COP** The National code of practice has been approved. **Ref** Referenced on regulator's website and/or guidance material on the subject. <sup>a</sup> ACT has adopted the national standard as a code of practice. As of October 1, the ACT has implemented the National Standard for Manual Tasks (2007) and associated Code of Practice. <sup>b</sup> The Northern Territory approves the superseded National Code of Practice for Manual Handling [NOHSC: 2005 (1990) 1].

Source: Regulations and websites of regulators.

The variation in the adoption of the national standard and code of practice on manual handling indicates differing burdens across the jurisdictions. The costs of the uptake, however, may not have been captured by the RIS for certain industries. For example, Master Builders Australia views the RIS as underestimating the costs of applying the standard on the building and construction industry, and cites the impractical duties of the standards as a possible reason for its lack of universal adoption:

Chief among these concerns are the onerous training and consultation requirements, in particular the requirement in the Standard for training to be provided *when any aspect of the work changes*. Work in the building and construction industry is by its very nature constantly changing: it is neither feasible nor practical to meet this aspect of the Standard.( sub. DR20, p. 12).

Therefore on one hand, those jurisdictions that have not adopted the standard — New South Wales, Victoria, Queensland, South Australia, Western Australia, the Northern Territory and the ACT — may not be gaining the potential benefits derived from the national standard. On the other hand, lack of adoption may be driven by jurisdictional considerations and costs of compliance not captured by the RIS.

### 12.3 Licensing for high risk work

There are numerous occupational licences required under each jurisdiction's OHS regulations. During consultations, the Commission was informed by participants that, in some instances, licences for high risk work were either not transferable or inconsistently required across the jurisdictions. This section investigates these claims and details those licences or certificates of competency required for what is generally described as 'high risk work'. Thus it excludes licences or certificates that are required under other areas of OHS regulation such as handling hazardous

materials, demolition work or working with explosives unless explicitly included in high risk work schedules.

The ASCC developed a national standard for the licensing of persons conducting high risk work — *National Standard for Licensing Persons Performing High Risk Work* (ASCC 2006c). The RIS prepared when the standard was introduced estimated that the benefits in terms of reduced costs from differences were in the order of \$5 million over a 10 year time frame (ASCC 2006d). These benefits were made up of \$1.1 million in reduced OHS administration costs, \$3.8 million in reduced workplace costs and \$0.1 million in reduced costs due to movements between jurisdictions and the resulting need to apply for a new licence.

The national standard details 29 individual licence classes for those undertaking high risk work. In general, all state and territory regulation has adopted these standard classes, with only a few exceptions:

- Queensland has split the bridge and gantry crane licence into two categories (remote control and other)
- South Australia and the Northern Territory do not have separate self erecting tower crane licences or certificates of competency
- the Northern Territory does not have a separate 'order-picking' forklift truck licence.

Further, all governments mutually recognise licences/certificates of competency obtained in other jurisdictions if they comply with the national standard. In particular, while the Commonwealth requires licences for high risk work, it does not issue any licences and instead recognises those obtained in individual states or territories. In the Northern Territory, while other licences are recognised, holders must still apply to NT WorkSafe to obtain a reciprocal licence.

#### Licences required in addition to the national standard

Along with the national standard licences for high risk work, some state and territory governments also have licences/certificates of competency for other types of high risk work (table 12.7). For the load-shifting licences/certificates, those states and territories which issue these also recognise those issued in other jurisdictions. It should be noted that in South Australia, operators of load-shifting equipment are not required to hold a licence per se, but they are instead required to hold a 'Notice of Assessment' as proof of competency. As they effectively represent proof that a person is qualified to use this equipment (the purpose of a licence also), they have been included as licences in table 12.7.

In total, Queensland has the largest number of required licences/certificates for high risk work with 38, followed by New South Wales with 36 (figure 12.5). The Northern Territory has the least with 28.

| Licence                            | Cwlth | NSW          | Vic | Qld          | SA           | WA | Tas | NT           | ACT          |
|------------------------------------|-------|--------------|-----|--------------|--------------|----|-----|--------------|--------------|
| Asbestos removalist <sup>a</sup>   | ×     | ×            | ×   | ×            | ×            | ×  | ×   | $\checkmark$ | ×            |
| Application of pesticides          | ×     | $\checkmark$ | ×   | ×            | ×            | ×  | ×   | ×            | ×            |
| Use of fumigants                   | ×     | $\checkmark$ | ×   | ×            | ×            | ×  | ×   | ×            | ×            |
| Cableway/flying foxes              | ×     | ×            | ×   | ×            | $\checkmark$ | ×  | ×   | ×            | ×            |
| Dozer                              | ×     | ×            | ×   | $\checkmark$ | $\checkmark$ | ×  | ×   | ×            | ×            |
| Dragline                           | ×     | $\checkmark$ | ×   | ×            | $\checkmark$ | ×  | ×   | ×            | $\checkmark$ |
| Excavator                          | ×     | $\checkmark$ | ×   | $\checkmark$ | $\checkmark$ | ×  | ×   | ×            | $\checkmark$ |
| Front-end loader                   | ×     | $\checkmark$ | ×   | $\checkmark$ | $\checkmark$ | ×  | ×   | ×            | $\checkmark$ |
| Front-end loader (skid steer type) | ×     | $\checkmark$ | ×   | $\checkmark$ | $\checkmark$ | ×  | ×   | ×            | $\checkmark$ |
| Front-end loader/backhoe           | ×     | $\checkmark$ | ×   | $\checkmark$ | $\checkmark$ | ×  | ×   | ×            | $\checkmark$ |
| Grader                             | ×     | ×            | ×   | $\checkmark$ | ×            | ×  | ×   | ×            | ×            |
| Road roller                        | ×     | ×            | ×   | $\checkmark$ | ×            | ×  | ×   | ×            | ×            |
| Scraper                            | ×     | ×            | ×   | $\checkmark$ | ×            | ×  | ×   | ×            | ×            |
| Total                              | 0     | 7            | 0   | 8b           | 7            | 0  | 0   | 1            | 5            |

Table 12.7Jurisdiction-specific licences for other high risk work2008-09

<sup>a</sup> Asbestos removalist licences are not categorised under 'high risk work' for most jurisdictions (see chapter 10). <sup>b</sup> The additional licences in Queensland relate to earthmoving and crane operations — an area jointly addressed with high risk work in part 3 of the *Workplace Health and Safety Regulation 2008* (Qld). *Source*: OHS regulations.



Figure 12.5 Quantity of licences/certificates for high risk work 2008-09

Data source: OHS regulations.

#### Additional licence costs

Following the cost estimates used in the RIS (ASCC 2006d) that was prepared for the *National Standard for Licensing Persons Performing High Risk Work* (ASCC 2006c), indicative additional costs imposed on businesses that operate in those jurisdictions which have required licences additional to those in the national standard can be estimated. These costs represent:

- movement of labour costs the cost of obtaining a licence in one jurisdiction which is not required in another; assuming the applicant has the necessary skills to perform that work and has been doing so in a jurisdiction that does not require a licence
- costs of obtaining those extra licences.

The ASCC (2006d) used an indicative cost of \$208 per employee that moves between jurisdictions (assumed to be 0.5 per cent of licensed operators) to estimate the movement cost (made up of 6 hours of labour costs at \$28 per hour due to the need to apply for a licence and a \$40 licence cost). Using these estimates, a per licence cost can be obtained, which can then be summed over the number of additional licences. For example, in New South Wales there were 7 additional licence classes, and applying the 0.5 per cent movement rate, and the \$208 cost yields an additional costs to New South Wales businesses and employers of \$7 (7 x 0.5% x \$208).

The ASCC (2006d) also estimated that per licence, businesses would face a cost of \$28 per hour from lost production due to increased required training (taken as 1 additional day, or 8 hours, based on the average additional training requirements identified). Applying this cost estimate, the time cost in applying for the licence (6 hours at \$28 per hours) plus an average figure of \$40 for the cost of the licence and assuming that the remaining 99.5 per cent of licences within the additional licences classes represent new holders from within that jurisdiction, a per licence indicative cost can be obtained. Using New South Wales again as the example, the indicative cost estimate is obtained by multiplying the cost estimate (99.5% x 8 x \$28 + 6 x \$28 + \$40 = \$430) by the 7 additional licence classes (7 x \$430 = \$3008). The results are shown in figure 12.6. For those jurisdictions with no additional licences (the Commonwealth, Victoria, Western Australia and Tasmania), there are no additional costs.

The cost estimates in figure 12.6 should be treated with caution as the additional licence requirements may generate additional benefits in the form of reduced workplace accidents. However, if the national standard is viewed as best practice, any such additional benefits should be negligible.





<sup>a</sup> Above calculations assume that all additional licence classes are held in equal proportions. *Data source*: PC estimates.

#### Processing and costs of acquiring licences

Despite licences for high risk work generally being transferable between jurisdictions, the process used to apply for, lodge, and the cost to acquire them varies (table 12.8). For example, not all regulators directly provide application forms. In New South Wales, assessors provide forms for applications while in Queensland and Victoria, forms can be collected at Australia Post Offices.

The fees charged by each jurisdiction also vary considerably. The Northern Territory and the ACT have the lowest fees at \$50, compared with South Australia where the fee exceeds \$90. The means of payment for all jurisdictions is, however, consistent.

Processing times for licensing vary considerably from 2 days in the ACT to 42 days in Western Australia. There also does not appear to be a correlation between increased fees and faster processing times.

|                                     | NSW          | Vic          | Qld          | SA           | WA           | Tas          | NT           | ACT          |
|-------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Application forms                   |              |              |              |              |              |              |              |              |
| Available online/from regulator     | ×            | $\checkmark$ | ×            | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Available other source <sup>a</sup> | $\checkmark$ | $\checkmark$ | $\checkmark$ | ×            | ×            | ×            | ×            | ×            |
| Cost                                |              |              |              |              |              |              |              |              |
| Licence fee                         | \$65.00      | \$60.00      | \$68.10      | \$97.50      | \$73.00      | \$56.32      | \$50.00      | \$50.00      |
| Fee basis <sup>b</sup>              | CR           | PCR          | PCR          | PCR/O        | CR           | PCR          | PCR          | 0            |
| Processing                          |              |              |              |              |              |              |              |              |
| Average time taken (days)           | 31.7         | 11           | 4            | 5            | 42           | 14           | 3            | 2            |
| Means of payment                    |              |              |              |              |              |              |              |              |
| Cheque                              | $\checkmark$ |
| Credit card                         | $\checkmark$ |
| Cash                                | $\checkmark$ |
| Other                               | ×            | ×            | ×            | ×            | ×            | ×            | ×            | ×            |
| Means of lodging application        |              |              |              |              |              |              |              |              |
| Mail                                | $\checkmark$ | ×            | ×            | $\checkmark$ | $\checkmark$ | ×            | ×            | $\checkmark$ |
| Fax                                 | ×            | ×            | ×            | ×            | ×            | ×            | ×            | ×            |
| Email                               | ×            | ×            | ×            | ×            | ×            | ×            | ×            | ×            |
| In person                           | $\checkmark$ | ×            | ×            | $\checkmark$ | $\checkmark$ | ×            | ×            | $\checkmark$ |
| Other <sup><b>c</b></sup>           | $\checkmark$ | $\checkmark$ | $\checkmark$ | ×            | ×            | $\checkmark$ | $\checkmark$ | ×            |

## Table 12.8Cost, payment and lodgement of licence applications2008-09

**CR** cost recovery. **PCR** partial cost recovery. **O** other. <sup>a</sup> In New South Wales, licence application forms are provided by an assessor. In Victoria, application forms are available from the any Australia Post Office as the first point of contact but can also be obtained by calling WorkSafe Victoria's Advisory Service. In Queensland, forms must be collected from Australia Post Offices. <sup>b</sup> Other in South Australia refers to fee levels being set in regulations. <sup>c</sup> Other in New South Wales, Victoria and Queensland represents the option to pay at any Australia Post Office. In Tasmania, other refers to any Service Tasmania outlet. For the Northern Territory, other refers to the Territory Business Centre. In the ACT, the fees are set by the relevant Minister.

Sources: Regulator websites and/or information lines; Productivity Commission survey of OHS regulators (2009 unpublished).

#### Inconsistencies with national standard licences

Despite the existence of national standard licences, the Commission was informed that some differences remained. In particular, it was suggested that differences existed in the definition of equipment, and that licence requirements to operate the same equipment were not uniform in all jurisdictions. The case of forklifts was given as one example. It was also suggested that given the lack of consistency about the definition of a forklift, employers were encouraged to adopt and use machinery that fell short of the regulated definition to avoid having to license an employee, often making work practices less safe.

The definition of a forklift in each jurisdiction's regulation is given in table 12.9. Queensland is the only jurisdiction to not include a definition of a forklift in its regulation. Except for the Commonwealth and Tasmania which have adopted the definition of the national standard (ASCC 2006c), all jurisdictions have defined forklifts slightly differently. Despite this, most definitions include the same core aspects — a **powered industrial truck** equipped with a **mast** and **elevating load carriage** to which a pair of **fork-arms** or **other attachments** are attached. Only Western Australia and the Northern Territory do not include all five bolded elements:

- the Western Australian definition does not include other attachments
- the Northern Territory's definition does not include a mast.

#### Table 12.9 Definition of a forklift with regulations

In regulations - 2008-09

|                    | Definition                                                                                                                                                                                                                                                                                                                                                                                       |
|--------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cwlth <sup>a</sup> | covers the operation of a <b>powered industrial truck</b> equipped with a <b>mast</b> and an elevating load carriage to which is attached a pair of <b>forkarms</b> or <b>other attachment</b> . (p. 24 ASCC 2006c)                                                                                                                                                                              |
| NSW                | means a <b>powered industrial truck</b> equipped with a <b>mast</b> and <b>elevating load</b><br><b>carriage</b> to which is attached a pair of <b>fork arms</b> or <b>other loadholding attachment</b> but<br>does not include any pedestrian-operated fork-lift truck or a pallet truck capable of<br>providing a maximum lift not exceeding 225 millimetres. (p. 150)                         |
| Vic                | means a <b>powered industrial truck</b> equipped with a <b>mast</b> and an <b>elevating load carriage</b> to which is attached a pair of <b>fork arms</b> or <b>other loadholding attachment</b> , including a truck on which the operator is raised with the attachment for order-picking, but does not include a pedestrian operated industrial truck (p. 471)                                 |
| Qld                | Undefined.                                                                                                                                                                                                                                                                                                                                                                                       |
| SA                 | means a <b>powered industrial truck</b> equipped with a <b>mast</b> and an <b>elevating load</b><br><b>carriage</b> to which is attached a pair of <b>forkarms</b> or another form of <b>loadholding</b><br><b>attachment</b> , and includes a truck on which the operator is raised with an attachment for<br>order picking, but does not include a pedestrian operated industrial truck (p. 7) |
| WA                 | means a <b>powered industrial truck</b> equipped with lifting media made up of a <b>mast</b> and an <b>elevating load carriage</b> to which is attached a pair of <b>forkarms</b> (p. 363)                                                                                                                                                                                                       |
| Tas <sup>b</sup>   | covers the operation of a <b>powered industrial truck</b> equipped with a <b>mast</b> and an elevating load carriage to which is attached a pair of <b>forkarms</b> or <b>other attachment</b> . (p. 24 ASCC 2006c)                                                                                                                                                                              |
| NT <sup>C</sup>    | means an item of <b>mobile plant</b> equipped with an <b>elevating load carriage</b> to which is normally attached <b>fork arms</b> or other <b>load-holding attachments</b> . (p. 5)                                                                                                                                                                                                            |
| ACT                | $\ldots$ is a powered industrial truck with — (a) a mast; and (b) an elevating load carriage with fork arms or other load-holding attachment. (p. 24)                                                                                                                                                                                                                                            |

<sup>a</sup> The Commonwealth regulations do not define a forklift truck but state that the section on licensing arrangements for high risk work be read in conjunction with ASCC (2006c). <sup>b</sup> Tasmania's regulation states that the definition for high risk work relating to forklifts can be found in ASCC (2006c). <sup>c</sup> The Northern Territory defines a forklift as an industrial truck.

Source: OHS regulations.

Despite minimal differences in the definition, it is not clear whether these make a material difference to either business compliance costs or the outcomes sought from

the regulation (fewer forklift accidents). Indeed, it is difficult to obtain a comparable estimate of forklift related injuries in each jurisdiction. While data exists on forklift related injury claims (figure 12.7), incidence rates are expressed per 1000 workers and do not take into account total usage (that is, they are not per forklift hours) or industry structure (some industries make greater use of forklifts than others). Given this, it is unsurprising that vast differences exist between jurisdictions, with incidence rates relatively high in New South Wales and South Australia.





**p** preliminary data. **a** The numbers for the ACT excludes the ACT government as no data were recorded

during this period.

Data source: Data provided by Safe Work Australia with permission from state and territory governments.

## 13 Duplication

#### Key points

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

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

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

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

# 13.1 The costs associated with differences in OHS regulations

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

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

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

Number and employment 1998

Source: PC (2004) using unpublished ABS data.

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

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

### Table 13.2 Costs of differences in OHS regulation — SMEs

12 months to May 2009

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

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

Source: Sensis Survey of SMEs (2009 unpublished).

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

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

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

## Table 13.3Ways in which differences in jurisdictions' OHS lawsimpact upon businesses — SMEs

| 12 months to M | May 2009 |
|----------------|----------|
|----------------|----------|

| Impact                                                                               | Number | Per cent <sup>a</sup> |
|--------------------------------------------------------------------------------------|--------|-----------------------|
| Makes our costs higher than businesses in other states and territories               | 55     | 35                    |
| Rules not set for each state                                                         | 24     | 15                    |
| Makes it harder to compete with businesses undertaking similar activities interstate | 19     | 12                    |
| Time consuming                                                                       | 13     | 8                     |
| Results in cheaper prices for products and services from other states                | 40     | 7                     |
| and territories                                                                      | 12     | 7                     |
|                                                                                      | 10     | 6                     |
| Iraining                                                                             | 7      | 5                     |
| Makes it a safer place to work                                                       | 7      | 5                     |
| Hard work to keep up to standard/hard to implement changes                           | 7      | 5                     |
| Need to keep up to date                                                              | 4      | 3                     |
| Transport requirements                                                               | 4      | 3                     |
| Transferring information between states/companies                                    | 3      | 2                     |
| Increased paperwork/admin                                                            | 3      | 2                     |
| Additional policies in place                                                         | 2      | 1                     |
| Increase in red tape                                                                 | 2      | 1                     |
| Creates a more effective/productive environment                                      | 2      | 1                     |
| We already do everything that is required/work to the highest standard               | 2      | 1                     |
| It affects pricing                                                                   | 1      | 1                     |

<sup>a</sup> Sum exceeds 100 as respondents had multiple answers. Expressed as a percentage of total responses. *Source*: Sensis Survey of SMEs (2009 unpublished).

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

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

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

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

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

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

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

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

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

### 13.2 Comcare and state and territory OHS regimes

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

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

As a result of this, Boral Limited considered that:

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

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

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

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

Comparisons on the indicators above are detailed in table 13.4 and show the differences between a business that operates nationally and is regulated by Comcare, compared to another national business that is regulated separately in each
state and territory. It should be noted that the differences depicted are only due to requirements in the general OHS Acts and do not include the further complication of the other 70 or more OHS related statutes that exist across Australia.

### Box 13.1 The Comcare scheme

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

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

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

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

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

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

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

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

## Table 13.4Selected comparisons of regulatory compliance between<br/>Comcare and state and territory regimes

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

Regulations in force 2008-09

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

Source: PC estimates.

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

Having a number of different reporting requirements within each state and territory can also impose additional costs on large businesses not operating in the Comcare scheme. A leading Australian retailer not covered by the Comcare scheme, for example, reported that the cost of developing and implementing an incident reporting system, taking into account the differences in each state and territory, cost them \$50 000 (see appendix D for details of the different reporting requirements complied by the national retailer).

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

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

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

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

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

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

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

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

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

### Interactions between Comcare and state and territory regulators

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

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

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

The overlap in responsibilities has the potential to increase the compliance burden faced by businesses and create confusion over OHS responsibilities. Such confusion can hinder businesses achieving OHS outcomes. As stated by the Queensland Government, the existence of Commonwealth OHS regulation covering firms selfinsured under the Comcare scheme has:

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

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

### Potential overlaps due to duty of care provisions

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

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

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

In terms of provisions relating to those in control of a worksite, the Commonwealth is the only jurisdiction not to detail specific duties for those in control of a workplace (however, duties are imposed on employers in relation to third parties which have similar provisions to those imposed on persons in control of a worksite). However, for the remainder, the duties imposed vary:

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

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

### Overlap in regulator responsibilities?

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

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

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

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

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

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

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

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

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

|                                                                   | Scenario 1   |                        |     | Scenario 2   |                        |     |
|-------------------------------------------------------------------|--------------|------------------------|-----|--------------|------------------------|-----|
|                                                                   | State OHS    |                        |     | State OHS    |                        |     |
| Site-type                                                         | Comcare      | regulator <sup>a</sup> | No. | Comcare      | regulator <sup>a</sup> | No. |
| New South Wales                                                   | ×            | 1                      | 1   | <u> </u>     | 1                      | 2   |
| contractor                                                        | ~            | ·                      | 1   | ·            | ·                      | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | $\checkmark$           | 2   |
| <i>Victoria</i><br>Comcare company with state-based<br>contractor | ×            | $\checkmark$           | 1   | ✓            | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | √                      | 2   |
| Queensland                                                        |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | ~                      | 1   | $\checkmark$ | √                      | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | ×                      | 1   |
| South Australia                                                   |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | ~                      | 1   | $\checkmark$ | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | $\checkmark$           | 2   |
| Western Australia                                                 |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | $\checkmark$           | 1   | $\checkmark$ | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | $\checkmark$           | 2   |
| Tasmania                                                          |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | $\checkmark$           | 1   | $\checkmark$ | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | ×                      | 1   |
| Northern Territory                                                |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | $\checkmark$           | 1   | $\checkmark$ | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | $\checkmark$           | 2   | $\checkmark$ | $\checkmark$           | 2   |
| ACT                                                               |              |                        |     |              |                        |     |
| Comcare company with state-based contractor                       | ×            | $\checkmark$           | 1   | $\checkmark$ | $\checkmark$           | 2   |
| State-based company with Comcare contractor                       | $\checkmark$ | ×                      | 1   | $\checkmark$ | $\checkmark$           | 2   |

## Table 13.5 Regulator access to selected worksites

Regulations in force during 2008-09

<sup>a</sup> State OHS regulator refers to the relevant state or territory general OHS regulator.

Source: PC estimates.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

| •                              | •                |              | •            |              |              |
|--------------------------------|------------------|--------------|--------------|--------------|--------------|
|                                | Qld <sup>a</sup> |              |              | WA           |              |
| Provision                      | General          | Coal         | Minerals     | General      | Mining       |
| General duties                 | ✓                | ✓            | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Regulator powers               | $\checkmark$     | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Employee consultation          | $\checkmark$     | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Notification/reporting         | ×                | $\checkmark$ | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Competency standards/licensing | $\checkmark$     | √            | $\checkmark$ | $\checkmark$ | $\checkmark$ |
| Safety management plans        | ×                | $\checkmark$ | ✓            | ×            | ×            |
| Major hazards                  | ×                | ×            | ×            | ×            | ×            |
|                                |                  |              |              |              |              |

### Table 13.6 Areas of mutual coverage

Mining and general OHS Acts in force during 2008-09

<sup>a</sup> Queensland confers health and safety obligations instead of duties.

Source: Relevant mining and general OHS Acts.

### **Regulator overlap?**

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

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

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

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

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

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

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

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

# 13.4 Other differences in mining OHS regulatory regimes

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

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

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

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

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

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

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

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

| Type of standard                        | NSW         |     | Qld |          | WA |                     |
|-----------------------------------------|-------------|-----|-----|----------|----|---------------------|
|                                         |             | %   |     | %        |    | %                   |
| Prescriptive standards                  | 75          | 56  | 57  | 70<br>46 | 57 | <sup>70</sup><br>61 |
| General duties                          | 4           | 3   | 2   | 2        | 0  | 0                   |
| Performance-based standards             | 29          | 22  | 39  | 31       | 24 | 26                  |
| Systematic process-based standards      | 14          | 10  | 15  | 12       | 1  | <1                  |
| Definition or regulation administration | 12          | 9   | 11  | 9        | 12 | 13                  |
| Total number of regulations             | 134         | 100 | 124 | 100      | 94 | 100                 |
| Pages of regulation examined            | 44 <b>b</b> | 63  | 68  | 27       | 47 | 12                  |

## Table 13.7 Approaches to mining-specific OHS regulation<sup>a</sup>

Regulations in force during 2008-09

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

Source: PC estimates.

## Hazard management plans and systems in mining OHS regulation

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

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

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

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

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

## 14 Comments from jurisdictions

In conducting this study, the Commission was assisted by an Advisory Panel comprised of representatives from each of the Commonwealth, state and territory governments. In addition to providing advice to the Commission and coordinating the provision of data, government representatives examined the report prior to publication and provided detailed comments and suggestions to address factual matters and improve the analysis and presentation of the data.

The Commission also invited each jurisdiction, through its panel members, to provide a general commentary for inclusion in the report. These commentaries are included in this chapter, and presented in the same order as the data in the report.

### **New South Wales**

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NSW welcomes the Productivity Commission's study to benchmark occupational health and safety regulation across Australian jurisdictions. Measuring the costs of business regulation allows jurisdictions to better identify unnecessary regulatory burden and cut red tape. NSW is strongly committed to reform of the national occupational health and safety regulation through COAG. This report will be a useful tool to focus COAG, the NSW Government and stakeholders on particular areas for improvement.

The study provides useful information on the occupational health and safety frameworks in each jurisdiction and may be helpful to inform all jurisdictions of opportunities for further occupational health and safety harmonisation after the model Occupational Health and Safety Act is in place.

NSW notes that some of the data presented in the report may be difficult to accurately compare due to minor, but significant differences in legislation, policies and implementation in each jurisdiction. For example, variations in workers compensation definitions lead to key differences which make accurate comparisons difficult. Similarly, NSW notes that some of the indicators used in the study, such as fatality statistics, can be highly variable from year to year.

### Future Occupational Health and Safety Regulation Benchmarking

Although this study was a benchmarking exercise across jurisdictions at a particular point in time, NSW would support future benchmarking exercises in order to compare over time whether improvements are being achieved. Future studies will also be able to demonstrate the changes to occupational health and safety regulatory burden after the introduction of the model Occupational Health and Safety Act.

The Productivity Commission notes that this benchmarking report was unable to establish whether higher burdens deliver improved occupational health and safety outcomes. NSW would support further analysis of other indicators or case studies to better understand the relationship between occupational health and safety regulations and quality of outcomes. Further information on this relationship could inform Australian jurisdictions on best practice approaches to occupational health and safety and assist any future efforts to harmonise other areas of regulation.

### Victoria

The Victorian Government is both firmly committed to, and has taken a leading role in, the harmonisation of national Occupational Health and Safety (OHS) legislation. Victoria has made a significant investment to ensure that its OHS laws provide the highest workplace health and safety protections while at the same time minimising red tape for employers. Further and importantly, these laws are enforced by WorkSafe Victoria in a constructive way aimed at assisting duty holders in knowing what they need to do to comply.

The draft model laws largely reflect the Victorian approach to OHS — namely, the concept that duty holders do what is reasonably practicable to ensure a safe workplace, and that all workplace parties – including the regulator – play an important role. This approach is supported by business as being both fair and balanced and has recently been endorsed by the Workplace Relations Ministers' Council (WRMC) of COAG for national OHS model laws.

The Productivity Commission's report will be timely in terms of providing useful input to the development of harmonised OHS regulation by Safe Work Australia, under the auspices of WRMC. This process has commenced and is expected to be completed by mid 2011, in time for national implementation to coincide with model primary legislation coming into effect.

Regulatory burdens raise complex issues, no less so in the case of OHS regulations. Under the Inter-Governmental Agreement on nationalising OHS legislation, this is recognised in the objectives which include:

- addressing the compliance and regulatory burdens for employers with operations in more than one jurisdiction; while
- achieving significant and continual reductions in the incidence of death, injury and disease in the workplace.

In this context, it needs to be recognised that a suite of compliance measures are utilised in a coordinated manner for the purpose of achieving OHS outcomes. These include legislated duties and roles for workplace parties. Comparisons of regulatory burden that are made without a full analysis of the attendant workplace benefits and/or avoided costs in terms of the extra compliance activity required in the absence of such measures, are problematic. In this regard, the Victorian Government recognises the importance of a focus on the effectiveness of OHS requirements, including impact analysis undertaken to date to accompany the national reform of OHS legislation (the Decision Regulatory Impact Statement for a Model OHS Act and the Consultation Regulatory Impact Statement).



### Queensland

The Queensland Government is committed to a nationally harmonised OHS legislative framework aimed at enhancing OHS outcomes, reducing unnecessary regulatory burden on business and improving the protection of the health and safety of all workers in Queensland.

Queensland supports this initiative by the Commission to inform the Council of Australian Governments (COAG) about those areas of OHS regulation where differences in the compliance burdens between the jurisdictions exist.

The work-related injury and illness data of the report shows Queensland has shown less improvement in incidence rates particularly within the agricultural and manufacturing industry sectors. While Queensland is pleased that the Commission has recognised a number of limitations associated with workers' compensation statistics, Queensland wishes to raise further concerns about the suitability of this data for assessing the effectiveness of regulations involving injury prevention and intervention. This matter is also noted in the *Consultation Regulatory Impact Statement for a Model OHS Act.*<sup>1</sup>

Medium sized businesses (MSB) account for over 30% of all workers' compensation claims in Queensland. To achieve a reduction in work-related injury rates Queensland has identified the need for a concentrated effort for improvement in this sector. To this end, Queensland has implemented a new initiative to help MSBs better understand and manage their OHS risks by providing information, advice and encouragement before being audited. The initiative will run until mid-2011 during which time all MSBs involved can expect a visit by a Queensland health and safety inspector.

The report also suggests that provisions requiring obligation holders in Queensland to engage a workplace health and safety officer (WHSO) are more onerous than in other jurisdictions. The Queensland Government supported the inclusion of WHSOs in the Model Act, pointing to the strong support for WHSOs from Queensland stakeholders and research that demonstrated their effectiveness. Employers benefited from there being an appointed officer with OHS training, expertise and authority. Unions also found it highly beneficial to have a designated OHS officer as it clarified lines of communication and ensured that unions could quickly locate and liaise with OHS specialists at the workplace. The National OHS Review subsequently recommended WHSOs, however, this proposal was not supported by the majority of jurisdictions at the Workplace Relations Ministers' Council.

In Queensland, the *Workplace Health and Safety Act 1995* does not cover OHS in the mining industry. The mining and quarrying industry is covered by the *Coal Mining Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Act 1999* (the 'Mining Safety Acts'). Queensland supports the approach by the Ministerial Council on Mineral and Petroleum Resources which, through

<sup>&</sup>lt;sup>1</sup> Report by Access Economics Pty Limited for Safe Work Australia (Access 2009, p. 32).

the National Mine Safety Framework, has an objective of national harmonisation of mine safety legislation. COAG endorsed this approach in April 2009.

Queensland's mining OHS regulatory strategy is fundamentally proactive, in that inspections and audits are aimed at detecting shortcomings in safety and health management and enforcing improvements through issuing statutory directives. The Queensland Mines Inspectorate also works with industry through workshops, seminars and information sharing to improve safety and reduce the number of injuries. This strategy of taking the initiative before incidents occur, rather than reacting to non-compliance or accidents, significantly reduces regulatory burden; the Commission's report notes a 26% fall in the serious injury rate for the Queensland mining industry, and Queensland Mines Inspectorate statistics show a 66% reduction in lost time injury frequency rate since introduction of the Mining Safety Acts in 2001.

The Queensland Mines Inspectorate strongly supports the use of directives to enforce corrective action when risks are not managed to an acceptable level at mines. Statutory directives are considered to be effective enforcement tools as they can be issued immediately to address risk and, if necessary, shut down unsafe work. There are no provisions in the Mining Safety Acts for the use of enforceable undertakings, but in effect such undertakings can in many cases be obtained through directives.

Queensland is supportive of industry consultative arrangements through tripartite Advisory Councils as established under the Mining Safety Acts. These consultative arrangements have provided a forum for safety and health issues and have facilitated implementation of reforms. Regulatory burden has not been an issue in Advisory Council meetings and, in fact, the Councils consider mining OHS specific legislation to be a major influencing factor in safety performance in the mining industry.

This Government remains committed to improving Queensland's regulatory environment. At the national level, Queensland is working with other Australian jurisdictions to deliver a seamless national economy, and at the state level, is implementing the Smart Regulation Reform Agenda to reduce and prevent unnecessary regulatory burden on business, community and government by tackling the quantity of existing regulatory stock and the quality of future regulation simultaneously.

Two key actions under this Agenda are the: (i) Queensland Regulatory Simplification Plan 2009-13 which targets a reduction of \$150 million per annum in the compliance burden to business and the administrative burden to government by 30 June 2013; and (ii) enhanced regulatory development system which will introduce a streamlined, more rigorous and harmonised regulatory development and review system that will be implemented by 31 March 2010.

## ACT

The ACT Government welcomes the opportunity to comment on the Productivity Commission 2010, Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety, Research Report. The ACT supports the objectives of the Council of Australian Government's National Reform Agenda and all efforts to identify unnecessary compliance costs and enhance regulatory consistency.

As noted in the Research Report, since the majority of benchmarking exercises underpinning the Report were conducted, the principal legislation regulating work safety in the Territory has been replaced. On 1 October 2009, the Occupational Health and Safety Act 1989 was replaced by the Work Safety Act 2008 in the ACT.

In improving the regulation of OHS in the Territory, the ACT Government has sought to establish a legislative framework that ensures progressive improvement in real outcomes without imposing unnecessary costs and administrative burdens. Our new legislation was developed after significant public consultation and was guided by advice by the (then) ACT Occupational Health and Safety Council, an advisory body comprised of employer, worker and community representatives. A detailed Regulatory Impact Statement was also prepared for the new legislation.

The commencement of the Work Safety Act 2008 has led to substantial changes in the regulation of work safety. These changes have been designed to impact on real outcomes and the regulatory burden imposed on businesses. This includes the extension of protections to cover a range of contemporary work and employment arrangements, new duties for 'upstream' duty holders, the integration of systematic risk management principles, and, the extension of the duty to consult to all employers and all workers coupled with a range of flexible compliance options.

While welcoming the Productivity Commission's efforts, the ACT does not believe that benchmarking based on repealed legislation is of value in assessing the current and future impact of local regulation. Given the changes introduced by the Work Safety Act, data based on the repealed legislation is of little relevance in assessing current regulatory impacts. Further, as national harmonisation work has progressed significantly during 2009, the ACT believes that greater emphasis on the anticipated impact of harmonisation would have significantly increased the relevance of the benchmarking exercise.

The ACT continues to support all efforts to assess the effectiveness of regulatory action in achieving optimal work safety outcomes. That said, the data utilised in this Report should be examined with caution as, as noted in the Report, it can be difficult to obtain and reliably assess comprehensive data on real outcomes. In this context, the ACT is not convinced that the data presented in the Report provides meaningful insight into the regulatory burden on business in the Territory, or a real basis for comparing legislation between jurisdictions. No evidence presented in the Report supports the view that Territory businesses

actually face higher, unjustified compliance costs.

Education and enforcement strategies in the ACT are designed to advise business that operating safely is not an inherent cost to their operations. Rather, a structured approach to risk management is likely to result in a reduction in net costs, is highly likely to be more efficient, and is likely to lead to a reduction in direct input costs over time. The ACT believes that these benefits should be acknowledged in any assessment of work safety regulation in the Territory.

Since 1 October 2009, the ACT has implemented additional National Standards and Codes of Practice, a general risk management process that must be undertaken by duty holders and mandatory work safety representative training (although work safety representatives are not compulsory). The ACT is now working towards further regulatory reform, which will simplify existing work safety regulations that deal with falls from heights and other significant hazards.

The ACT Government bases its assessment of the performance of worker's compensation regulation in the public and private sectors on analysis of data obtained from the Comparative Performance Monitoring Reports. The Commission's Report utilises alternative data, which the ACT regards as less robust.

The ACT believes that, while work safety regulation imposes a prima facie regulatory burden on business, well-targeted regulation is necessary to obtain improved work safety outcomes in real terms for all workers in the Territory.



## A Conduct of the benchmarking study

This appendix details:

- the progress of the study (below)
- how the study was initiated (the Terms of Reference A.1)
- the organisations and individuals that participated (A.2–A.5).

The Commission advertised the study in national and metropolitan newspapers following receipt of the Terms of Reference on 23 December 2008, and an initial circular advertising the study was distributed to interested parties. The Commission released an Issues Paper in April 2009 to assist participants in preparing their submissions. The 26 submissions received by the Commission are listed in table A.1.

In addition, the Commission met with a number of industry stakeholders, including unions, business groups, individual businesses and government departments. A list of those meetings is in table A.2.

The Commission would like to thank all those who have contributed to the study.

## A.1 Terms of Reference

## A1.1 Text of the overarching terms of reference (11 August 2006)

The Productivity Commission is requested to undertake a study on performance indicators and reporting frameworks across all levels of government to assist the Council of Australian Governments (COAG) to implement its in-principle decision to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden on business.

## Stage 1: Develop a range of feasible quantitative and qualitative performance indicators and reporting framework options In undertaking this study, the Commission is to:

1. develop a range of feasible quantitative and qualitative performance indicators and reporting framework options for an ongoing assessment and comparison of regulatory regimes across all levels of government.

In developing options, the Commission is to:

- consider international approaches taken to measuring and comparing regulatory regimes across jurisdictions; and
- report on any caveats that should apply to the use and interpretation of performance indicators and reporting frameworks, including the indicative benefits of the jurisdictions' regulatory regimes;
- 2. provide information on the availability of data and approximate costs of data collection, collation, indicator estimation and assessment;
- 3. present these options for the consideration of COAG. Stage 2 would commence, if considered feasible, following COAG considering a preferred set of indicators.

The Stage 1 report is to be completed within six months of commencing the study. The Commission is to provide a discussion paper for public scrutiny prior to the completion of its report and within four months of commencing the study. The Commission's report will be published.

Stage 2: Application of the preferred indicators, review of their operation and assessment of the results It is expected that if Stage 2 proceeds, the Commission will:

4. use the preferred set of indicators to compare jurisdictions' performance;

5. comment on areas where indicators need to be refined and recommend methods for doing this.

The Commission would:

- provide a draft report on Stage 2 for public scrutiny; and
- provide a final report within 12 months of commencing the study and which incorporates the comments of the jurisdictions on their own performance. Prior to finalisation of the final report, the Commission is to provide a copy to all jurisdictions for comment on performance comparability and relevant issues. Responses to this request are to be included in the final report.

In undertaking both stages of the study, the Commission should:

- have appropriate regard to the objectives of Commonwealth, state and territory and local government regulatory systems to identify similarities and differences in outcomes sought;
- consult with business, the community and relevant government departments and regulatory agencies to determine the appropriate indicators.

A review of the merits of the comparative assessments and of the performance indicators and reporting framework, including, where appropriate, suggestions for refinement and improvement, may be proposed for consideration by COAG following three years of assessments.

The Commission's reports would be published.

PETER COSTELLO

11 August 2006

## A.1.2 COAG's response to stage 1 report (13 April 2007)

In its communiqué of 13 April 2007 (COAG 2007, Regulatory Reform Plan, p. 10), COAG responded to the Commission's stage one report as follows:

• COAG has agreed to proceed to the second stage of a study to benchmark the compliance costs of regulation, to be undertaken by the Productivity Commission. Benchmarking the compliance costs of regulation will assist all governments to identify further areas for possible regulation reform. The benchmarking study will examine the regulatory compliance costs associated with becoming and being a business, the delays and uncertainties of gaining approvals in doing business, and the regulatory duplication and inconsistencies in doing business interstate. COAG has asked Senior Officials to finalise by the end of May 2007 any variations to the areas of regulation to be benchmarked in the three-year program outlined in the Commission's feasibility study *'Performance Benchmarking of Australian Business Regulation'*. COAG noted the Commonwealth will fully fund the benchmarking exercise.

## A.1.3 Letter from the Treasurer requesting the Commission to commence the second stage of the benchmarking program



05-SEP 2007 CHAIRMAN'S

OFFICE

- 3 SEP 2007

Mr Gary Banks AO Chairman Productivity Commission PO Box 80 BELCONNEN ACT 2616

TREASURER

PO BOX 6022 PARLIAMENT HOUSE CANBERRA ACT 2600

Telephone: 02 6277 7340 Facsimile: 02 6273 3420 www.treasurer.gov.au

#### Dear Mr Banks

On 11 August 2006 I requested that the Productivity Commission conduct a two stage study on performance benchmarking of Australian business regulation. The Commission's stage one report, released on 6 March 2007, concluded that benchmarking of regulatory burdens across jurisdictions is feasible and would complement other initiatives to monitor and reform regulation.

Accordingly, and consistent with the decision of 13 April 2007 by the Council of Australian Governments, I request that the Commission commence stage two of the study extending over the next three years. In keeping with the terms of reference, stage two of the study is to examine the regulatory compliance costs associated with becoming and being a business, the delays and uncertainties of gaining approvals in doing business, and the regulatory duplication and inconsistencies in doing business interstate.

The Commission is requested to begin stage two of the study by providing a draft and final report on the quantity and quality of regulation, and results of benchmarking the administrative compliance costs for business registrations within 12 months.

In undertaking stage two of the study, the Commission is requested to convene an advisory panel, comprising representatives from all governments, to be consulted on the approach taken in the first year. The panel should be reconvened at strategic points, providing advice on the scope of the benchmarking exercise and facilitating and coordinating data provision. It must also be given the opportunity to scrutinise and comment on the preliminary results.

The Commission is requested to review the benchmarking exercise at the conclusion of year three and report on options for the forward programme of the benchmarking exercise.

Yours sincg fely

PETER COSTELLO

## A.1.4 Letter from the Assistant Treasurer requesting the Commission to commence this study



#### The Hon Chris Bowen MP Assistant Treasurer Minister for Competition Policy and Consumer Affairs

1 6 DEC 2008 Mr Gary Banks AO Chairman Productivity Commission GPO Box 1428 CANBERRA CITY ACT 2601

Dear Mr/Banks

I am writing to you regarding the 2009 work plan of the Productivity Commission's Performance Benchmarking of Australian Business Regulation study.

In response to your request of 12 September 2008, this matter was raised at the 24 October 2008 Council of Australian Governments' Business Regulation and Competition Working Group meeting.

The BRCWG:

- noted the merit in continuing the benchmarking work program;
- agreed that occupational health and safety and food safety regulation should be considered by the Commission in year 2;
- requested that the Commission complete the OH&S and food safety benchmarking reports by December 2009; and
- agreed to revisit the Commission's future work plan in relation to the benchmarking study in 12 months time.

I would be grateful if you could undertake whatever action is necessary to fulfil the BRCWG's direction. The Commission may structure its work as it sees fit within the timeframe indicated above.

I have copied this letter to the Minister for Finance and Deregulation and the Minister Assisting the Finance Minister on Deregulation.

Your's sinderely

**CHRIS BOWEN** 

PO Box 6022 Parliament House CANBERRA ACT 2600



## A.1.5 Letter from the Assistant Treasurer granting the Commission an extension to this study



#### ASSISTANT TREASURER SENATOR THE HON NICK SHERRY

Mr Gary Banks AO Chairman Productivity Commission GPO Box 1428 CANBERRA CITY ACT 2601

Dear Mr Banks

Thank you for your letter of 20 August 2009 requesting an extension of the reporting date for the Productivity Commission's study benchmarking the burdens on business of occupational health and safety regulatory regimes.

I note the delays in obtaining critical information required for the Commission's study from the heads of workplace safety authorities, because of their intent to meet COAG's requirement for delivery of a model OHS Act. As such, I agree to the extension you have requested and the Commission should now provide a final report to the Government at the end of March 2010.

I look forward to receiving a copy of the final report.

Yours sincerely NICK SHERRY

PO Box 6022 Parliament House CANBERRA ACT 2600 Telephone: 02 6277 7360 Facsimile: 02 6273 4125 http://assistant.treasurer.gov.au

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CONDUCT OF THE BENCHMARKING STUDY

## A.2 Submissions

### Table A.1

| Participant                                       | Submission number |
|---------------------------------------------------|-------------------|
| Association of Consulting Engineers Australia     | 5                 |
| Australian Chamber of Commerce and Industry       | 6                 |
| Australian Federation of Employers and Industries | 26                |
| Australian Finance Conference                     | 15                |
| Boral Limited                                     | 3                 |
| Business Council of Australia                     | 21                |
| Business SA                                       | 2                 |
| Carol O'Donnell                                   | 10                |
| Chamber of Commerce and Industry WA               | 7                 |
| Community and Public Sector Union                 | 19                |
| CRC Construction Innovation                       | 16                |
| Department of Commerce WA                         | 4                 |
| Housing Industry Association Ltd                  | 18                |
| Master Builders Australia                         | 20                |
| Master Builders of Australia                      | 1                 |
| Minerals Council of Australia                     | 25                |
| Music Council of Australia                        | 24                |
| National Disability Services                      | 14                |
| Northern Territory Horticultural Association      | 12                |
| NSW Business Chamber                              | 11                |
| NSW Minerals Council                              | 9                 |
| NT WorkSafe                                       | 22                |
| Safety Institute of Australia Inc                 | 13                |
| Suncorp                                           | 23                |
| The Brainary                                      | 17                |
| Workcover NSW                                     | 8                 |

## A.3 Advisory committee meetings

### Government Advisory Panel Roundtable (5 February 2009, Melbourne)

#### Commonwealth

Department of Finance and Deregulation Victoria Department of Premier and Cabinet Department of Treasury and Finance South Australia

Department of Premier and Cabinet Department of Treasury and Finance

#### Northern Territory

Department of the Chief Minister Northern Territory Treasury New South Wales Department of Premier and Cabinet Queensland Department of Treasury (Office for Regulatory Efficiency) Western Australia Department of Treasury and Finance Tasmania Department of Treasury ACT ACT Treasury

## A.4 Visits and consultations

### Table A.2

Commonwealth and National Organisations Australian Chamber of Commerce and Industry, Melbourne Australian Council of Trade Unions Australian Food and Grocery Council

Australian Industry Group, Melbourne

**Business Council of Australia** 

Comcare

Department of Innovation, Industry, Science and Research — Industry and Small Business Policy

Master Builders Australia National Farmers Federation

Safe Work Australia Council

Australian Capital Territory

ACT Government – Office of Industrial Relations

#### New South Wales

Australian Industry Group Department of Premier and Cabinet NSW John Holland Group New South Wales Minerals Council NSW Business Chamber Westpac Banking Corporation Woolworths WorkCover New South Wales

#### Victoria

Coles Department of Premier and Cabinet (Vic) Public Transport Safety Victoria Safety Institute of Australia Total Construction Victorian Department of Treasury and Finance WorkSafe Victoria

#### Queensland

Australian Mines and Metals Association CRC Construction Innovation Department of Employment, Economic Development and Innovation (Safety and Health) (Qld) — Mining OHS inspectorate Department of Premier and Cabinet (Qld) Department of Transport and Main Roads (Qld) Department of Treasury (Queensland Office for Regulatory Efficiency) Justice and Attorney-General (Workplace Health and Safety Queensland) Queensland Chamber of Commerce and Industry Rio Tinto

(Continued next page)

### Table A.2 (Continued)

| South Australia                                                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Department of Premier and Cabinet and Department of Treasury (SA)<br>Hickinbotham Homes<br>Meals on Wheels (Australian Secretariat)<br>SafeWork SA<br>South Australian Farmers Federation                                            |
| Western Australia                                                                                                                                                                                                                    |
| Chamber of Commerce and Industry (WA)<br>Department of Treasury and Finance (WA)<br>Fortescue Metals Group<br>Small Business Development Corporation (WA)<br>Unions WA<br>VDM Construction<br>WorkSafe WA                            |
| Northern Territory Department of the Chief Minister (NT) Energy Resources of Australia Ltd Fresha Products Northern Territory Horticultural Association Northern Territory Resources Council Northern Territory Treasury NT Worksafe |
| Tasmania                                                                                                                                                                                                                             |
| Cadbury Schweppes<br>Department Treasury and Finance (Tas)<br>Incat<br>Mundy & Sons Fine Foods<br>WorkCover Tasmania<br>Workplace Standards Tasmania                                                                                 |
| New Zealand                                                                                                                                                                                                                          |
| NZ Department of Labour<br>NZ Ministry of Economic Development                                                                                                                                                                       |

## A.5 Surveys and providers of information

As part of this study, the Commission surveyed all core OHS regulators and three mining-specific regulators in New South Wales, Queensland and Western Australia (table A.3). Details on those surveys are contained in appendix B.

In addition to submissions and consultations, data and information were also provided to the Commission by a leading Australian retailer.

|       | regulators                                                    |
|-------|---------------------------------------------------------------|
|       | Regulators                                                    |
| Cwlth | Comcare                                                       |
| NSW   | WorkCover Authority of New South Wales                        |
|       | NSW Department of Industry and Investment                     |
| Vic   | WorkSafe Victoria                                             |
| Qld   | Workplace Health and Safety Queensland                        |
|       | Department of Employment, Economic Development and Innovation |
| SA    | SafeWork SA                                                   |
| WA    | WorkSafe WA                                                   |
|       | Department of Mines and Petroleum                             |
| Tas   | Workplace Standards Tasmania                                  |
| NT    | NT WorkSafe                                                   |
| ACT   | ACT WorkCover                                                 |
|       |                                                               |

## Table A.3Australian and state and territory government OHS<br/>regulators
### B Approach to gathering information

As outlined in chapter 4, the Commission drew on submissions, as well as consultations with businesses, regulators and other stakeholders, to identify those differences in the OHS regulatory frameworks of the jurisdictions that warranted benchmarking. This appendix details the approach the Commission took to obtaining the data to facilitate this benchmarking.

#### Gathering information for benchmarking

The Commission sought to minimise the burdens placed on jurisdictions and businesses through requests for information by using existing data sources wherever possible. In particular, the Commission made use of:

- the *National Review into Model Occupational Health and Safety Laws* (Stewart-Crompton, Mayman and Sherriff 2008 and 2009)
- the reports of the Workplace Relations Ministers' Council (WRMC 2008a, 2008b, 2008c and 2009d)
- previously unpublished data provided to Safe Work Australia (SWA) by state and territory governments (used with the permission of the state and territory governments and SWA)
- Australian Bureau of Statistics data
- a Treasury survey of company directors (Treasury 2008).

While these sources provided valuable information for the study, they were not sufficient to adequately address the areas of OHS regulation selected for benchmarking (chapter 4). As a result, the Commission also sought data via:

- a survey of OHS regulators
- a survey of 1802 small and medium sized businesses
- a synthetic estimate of the compliance costs associated with applying for an asbestos removalist licence.

Some information on the costs of OHS regulation were also supplied by a leading Australian retailer.

#### Information from regulators

Regulators are the primary interface between businesses and the regulations. The way in which regulators approach their administration and enforcement responsibilities can significantly affect the compliance costs of business. As such, OHS regulators are an obvious source of information on the regulatory frameworks they administer and enforce. They should have a detailed knowledge of the regulatory requirements, how those requirements are enforced and how the regulation is administered. To access this information the Commission developed a survey to be completed by 'general' OHS regulators (table B.1) and 'industry-specific' OHS regulators (table B.2).

#### Table B.1 General OHS regulators surveyed

|       | Regulator                                                                                             |
|-------|-------------------------------------------------------------------------------------------------------|
| Cwlth | Comcare                                                                                               |
| NSW   | WorkCover Authority of New South Wales                                                                |
| Vic   | WorkSafe Victoria                                                                                     |
| Qld   | Workplace Health and Safety Queensland (a division of the Department of Justice and Attorney-General) |
| SA    | SafeWork SA                                                                                           |
| WA    | WorkSafe WA (a division of the Department of Consumer and Employment<br>Protection)                   |
| Tas   | Workplace Standards Tasmania (a division of the Department of Justice) and WorkCover                  |
| NT    | NT WorkSafe (the administrative and regulatory arm of the Northern Territory Work Health Authority)   |
| ACT   | ACT WorkCover                                                                                         |

#### Table B.2 Industry-specific OHS regulators surveyed

|     | Regulator                                                        | Industry |
|-----|------------------------------------------------------------------|----------|
| NSW | New South Wales Department of Primary<br>Industries              | Mining   |
| Qld | Department of Employment, Economic<br>Development and Innovation | Mining   |
| WA  | Department of Mines and Petroleum                                | Mining   |

#### Survey development

The surveys were based on those used in the Commission's previous benchmarking reports (PC 2008b and PC 2008c), but were refined to better target specific aspects of OHS regulation. The survey was further refined following a pilot survey completed during June–July 2009. The feedback from that pilot survey alerted the

Commission to aspects of the surveys where it could better target the questions and where the questions were ambiguous. Having addressed the issues raised in the pilot surveys, the amended surveys were distributed to all relevant regulators during July 2009 for completion by 31 October 2009 (this extended timeframe was provided to allow for the workload experienced by the regulators as the national OHS reforms progressed through this period).

There were 11 parts to the final survey, with:

- part 1 seeking information on the background of the regulator
- part 2 seeking general OHS information
- part 3 seeking information on financials
- part 4 seeking information on staffing
- part 5 seeking information on licensing/certification
- part 6 seeking information on the enforcement of regulations
- part 7 seeking information on appeals and inspectorate decisions
- part 8 seeking comment on OHS issues and the survey
- part 9 seeking information on standards, codes of practice and guidance notes
- part 10 and part 11 seeking additional information (such as copies of key enforcement documents) and contact details of the regulator.

Data for 2008-09 was sought in the surveys. Table B.3 details the questions asked in the survey.

Following the release of the release of the draft report, it became apparent some jurisdictions had used different definitions of 'inspections' and 'investigations' in completing part 6 of the survey. To clarify these responses the Commission sought further information from the jurisdictions on the inspections and investigations they undertook via a brief follow up survey — table B.4 details the questions asked in the survey.

#### Data from the surveys

The data collected from the surveys is reported in chapters 5–13, along with any caveats applicable to the data and its interpretation. In particular, the tables and figures indicated in tables B.3 and B.4 show where the survey responses have been used to compare regulators in chapters 5 and 6 (as well as specific tables in chapters 10 and 12).

| Su         | rvey question                                                                                                                                                                                                                                                                                                                | / Table<br>figure number   |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| Pa         | rt 1 Background Information                                                                                                                                                                                                                                                                                                  |                            |
| 1.         | Regulator name                                                                                                                                                                                                                                                                                                               | Table 5.1 and 5.2          |
| 2.         | How many worksites are covered with respect to your regulation of OHS?                                                                                                                                                                                                                                                       | Table 5.3 and 5.6          |
| 3          | List the industries/activities not covered under the OHS legislation you administer                                                                                                                                                                                                                                          | Table 5.1                  |
| Pa         | rt 2 General                                                                                                                                                                                                                                                                                                                 |                            |
| 4.<br>5.   | What proportion of total expenditure and total employees are allocated to OHS? Are there any OHS related acts/regulations administered jointly with another agency? If you answered 'yes', please provide details.                                                                                                           | Section 5.3<br>Section 5.3 |
| Pa         | rt 3 Financial                                                                                                                                                                                                                                                                                                               |                            |
| 6a.<br>6b. | <ul> <li>What was your agency's total expenditure on OHS activities in 2008-09?</li> <li>What was your agency's expenditure on the following categories of OHS activities in 2008-09?</li> <li>i) Administration</li> <li>ii) Enforcement</li> <li>iii) Education activities</li> <li>iv) Other</li> <li>v) Total</li> </ul> | Table 5.16<br>Table 5.16   |
| 7a.        | What was your agency's total income (appropriation and other) for OHS related activities in 2008-09? Indicate its source (central/cost recovery/mixed)                                                                                                                                                                       | Table 5.4 and 5.6          |
| 7b.        | <ul> <li>What was your agency's revenue from the following categories of OHS related fees collected from businesses in 2008-09?</li> <li>i) Licensing</li> <li>ii) Permits</li> <li>iii) Inspections</li> <li>iv) Audits</li> <li>v) Appeals</li> <li>vi) Other (please detail)</li> </ul>                                   | Table 5.4 and<br>5.6       |
| 7c.        | vii) Total<br>What was the total value of fines imposed on businesses (for OHS regulatory<br>compliance breaches) by your agency in 2008-09?                                                                                                                                                                                 | Table 5.9                  |
| Pa         | rt 4 Staffing                                                                                                                                                                                                                                                                                                                |                            |
| 8.         | How many full time equivalent staff (including permanent and casual staff) were engaged in OHS administration and enforcement as at 30 June 2009?                                                                                                                                                                            | Table 5.3 and 5.6          |
| 9.         | How many full time equivalent OHS inspectors were employed as at 30 June 2009?                                                                                                                                                                                                                                               | Table 5.5 and 5.7          |
| 10.        | What is the percentage of full time equivalent OHS inspector positions filled as at 30 June 2009?                                                                                                                                                                                                                            | Table 5.5 and 5.7          |
| 11.<br>12. | Do you have any problems recruiting OHS inspectors?<br>What is the minimum qualification requirements and experience/attributes that<br>your agency looks for in OHS inspectors?                                                                                                                                             | Section 5.4                |

#### Table B.3OHS Regulator Questionnaire 2008-09

| Survey question                                                                                                                                       | / Table<br>figure<br>number |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| 13. What was the turnover of OHS inspectors during 2008-09?                                                                                           | Table 5.5                   |
|                                                                                                                                                       | and 5.7                     |
| 14a. What was the starting salary of a full time OHS inspector during 2008-09?                                                                        | Table 5.5                   |
| 14b. What was the average salary of full time OHS inspectors during 2008-09?                                                                          | Table 5.5                   |
| 15. If your agency covers the mining industry, what was the:                                                                                          | Table 5.7                   |
| – starting salary of a full time mining inspector during 2008-09?                                                                                     |                             |
| - average salary of a full time mining inspector during 2008-09?                                                                                      |                             |
| 16. As at 30 June 2009, how many OHS inspectors had:                                                                                                  | I able 5.5                  |
| i) Less than 3 years of relevant regulatory or OHS experience                                                                                         | and 5.7                     |
| ii) More than 3 years, but less than 10 years of relevant regulatory or OHS experience                                                                |                             |
| iii) More than 10 years relevant regulatory or OHS experience                                                                                         |                             |
| 17. How many hours of specific OHS professional development (internal or external) was provided, on average, to each OHS inspector in 2008-09?        | Table 5.5<br>and 5.7        |
| Part 5 Licensing/Certification                                                                                                                        |                             |
| <ol> <li>Do you recognise OHS licences/certificates of other jurisdictions and if so,<br/>please provide details</li> </ol>                           | Section 12.3                |
| 19. What was the average processing time for requests for high risk work licences/certificates of competency in 2008-09?                              | Table 12.8                  |
| 20. What was the average processing time for requests for hazardous substance licences/certificates of competency in 2008-09?                         |                             |
| 21. What were the number of asbestos licences, per category, in effect at 30 June 2009? (e.g. friable/bonded)                                         | Table 10.4                  |
| 22. How are the fees set for licences/certificates of competency?                                                                                     | Table 12.8                  |
| 23a. If a licence/certificate application is rejected, what appeal processes<br>(internal/external) are available? Please detail                      | Table 6.3                   |
| 23b. What proportion of licensing/certification decisions were appealed in 2008-09?                                                                   |                             |
| 23c. What proportion of licensing/certification appeals were successful?                                                                              |                             |
| Part 6 Enforcement of Regulations                                                                                                                     |                             |
| 24a. In practice, does your agency consider that it is currently able to fully enforce all of the OHS regulation for which it is responsible?         | Table 5.8                   |
| 24b. Please indicate the importance of the following constraints on your current ability to enforce OHS regulation:                                   | Table 5.8                   |
| i) Budgetary limits                                                                                                                                   |                             |
| ii) Insufficient availability of OHS staff                                                                                                            |                             |
| iii) Regulations difficult to interpret/enforce                                                                                                       |                             |
| iv) Regulatory responsibilities unclear                                                                                                               |                             |
| v) Limited enforcement powers                                                                                                                         |                             |
| vi) Other reasons (please specify)                                                                                                                    |                             |
| 25. Is compliance assessed by inspection, accreditation or a mix of approaches? Please specify and provide reason                                     | Clarified in<br>follow up   |
| 26. Are private OHS systems recognised in assessing compliance with OHS laws<br>and used in place of standard reporting where possible? Please detail | Section 5.5                 |

| Su  | rvey qi            | uestion                                                                                                                                           | Table /<br>figure<br>number |
|-----|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| 27  | \//bat             | type of actions are available to your agoney to use in response to OHS                                                                            | Table 5 12                  |
| 21. | bread              | type of actions are available to your agency to use in response to OHS thes? Indicate their use in 2008-09 with penalty (fines) where appropriate | 5 13 5 14                   |
|     | i)                 | Educate/advise                                                                                                                                    | and 5.15                    |
|     | ii)                | Verbal warning                                                                                                                                    |                             |
|     | iii)               | Written directive                                                                                                                                 |                             |
|     | iv)                | Provisional improvement notice                                                                                                                    |                             |
|     | v)                 |                                                                                                                                                   |                             |
|     | vi)                | Prohibition notice                                                                                                                                |                             |
|     | vii)               |                                                                                                                                                   |                             |
|     | viii)              |                                                                                                                                                   |                             |
|     | ix)                | Adverse publicity                                                                                                                                 |                             |
|     | x)                 | Infringement/penalty notice                                                                                                                       |                             |
|     | xi)                | Prosecution                                                                                                                                       |                             |
|     | xii)               | Enforceable undertaking                                                                                                                           |                             |
|     | xiii)              | Other (please list)                                                                                                                               |                             |
| 28a | a. Hów             | many OHS inspections and audits were undertaken in 2008-09?                                                                                       | Clarified in<br>follow up   |
| 281 |                    | asso inspections/audits, how many were:                                                                                                           | Clarified in                |
| 201 | i)                 | Poutine investigations                                                                                                                            | follow up                   |
|     | 1)<br>ii)          | Initiated by a complaint                                                                                                                          | survey                      |
|     | " <i>)</i><br>iii) | Reinvestigations following a compliance breach                                                                                                    | ,                           |
| 20  | III)<br>Plaas      | e detail the number of workplace investigations by industry conducted in                                                                          | Clarified in                |
| 20. | 2008               | -09:                                                                                                                                              | follow up                   |
|     | i)                 | Agriculture, forestry and fishing                                                                                                                 | survey                      |
|     | íi)                | Manufacturing                                                                                                                                     | -                           |
|     | íií)               | Building/construction                                                                                                                             |                             |
|     | ív)                | Mining                                                                                                                                            |                             |
|     | v)                 | Retail and wholesale                                                                                                                              |                             |
|     | vi)                | Hospitality                                                                                                                                       |                             |
|     | vii)               | Transport and storage                                                                                                                             |                             |
|     | viii)              | Consumer and business services                                                                                                                    |                             |
|     | ix)                | Education                                                                                                                                         |                             |
|     | x)                 | Health and community services                                                                                                                     |                             |
|     | xi)                | Government                                                                                                                                        |                             |
|     | xii)               | Other industries (please list)                                                                                                                    |                             |
| 30. | Pleas<br>hazai     | e detail the number of enforcement actions by type of breach (e.g. dous materials, heights etc.)                                                  |                             |
| 31a | a. In 20<br>bread  | 008-09, were shutdown periods imposed on businesses due to an OHS sh?                                                                             | Table 5.18                  |
| 31  | o. If sh           | utdown periods were used, how many were imposed during 2008-09?                                                                                   | Table 5.18                  |
| 310 | . Wha              | t was the shortest shut down period imposed on businesses?                                                                                        | Table 5.18                  |
| 310 | d. Wha             | t was the longest shutdown period imposed on businesses?                                                                                          | Table 5.18                  |

| Su         | rvev aue          | ection                                                                                                                                                         | Table /<br>figure     |
|------------|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| <i>Su</i>  | vey que           | 5500/1                                                                                                                                                         | number                |
| 31e<br>32. | e. What<br>Please | was the average shutdown period imposed on businesses?<br>comment on the hierarchy of enforcement actions used to deal with<br>at types of compliance breaches | Table 5.18<br>Section |
| 33         | What m            | neasures did you use to promote a culture of OHS compliance among                                                                                              | Table 5 22            |
| 00.        | busine            | sses in 2008-09? If 'yes', indicate their frequency of use (seldom/regularly)                                                                                  | and 5.23              |
|            | i)                | Information campaigns (e.g. newsletters, pamphlets, website)                                                                                                   |                       |
|            | ii)               | Education activities (e.g. regulatory awareness workshops and campaigns)                                                                                       |                       |
|            | iii)              | Incentives (e.g. reduced rate of inspections, positive advertising)                                                                                            |                       |
|            | iv)               | Reduced workers' compensation premiums for good OHS performance                                                                                                |                       |
|            | v)                | Free OHS training for businesses (e.g. courses to comply with regulations)                                                                                     |                       |
|            | vi)               | Fee-based OHS training for businesses (e.g. courses to comply with regulations)                                                                                |                       |
|            | vii)              | Confidential compliance advice                                                                                                                                 |                       |
|            | viii)             | Other                                                                                                                                                          |                       |
| 34.        | Do you            | provide special assistance to:                                                                                                                                 | Table 5.24            |
|            | i)                | Small businesses                                                                                                                                               | and 5.25              |
|            | ii)               | Employers from non-English speaking backgrounds                                                                                                                |                       |
|            | iii)              | Non-metropolitan businesses                                                                                                                                    |                       |
|            | lf 'yes' f        | or any, please detail                                                                                                                                          |                       |
| 35.        | Do you<br>mecha   | actively seek feedback from businesses? If you answered 'yes', what nisms do you use:                                                                          | Table 6.9<br>and 6.12 |
|            | i)                | Online                                                                                                                                                         |                       |
|            | ii)               | Surveys                                                                                                                                                        |                       |
|            | iii)              | Complaints handling                                                                                                                                            |                       |
|            | iv)               | Focus groups                                                                                                                                                   |                       |
|            | V)                | Point of contact consultation                                                                                                                                  |                       |
|            | vi)               | Other (please detail)                                                                                                                                          |                       |
| 36.        | Which from b      | of your regulatory responsibilities do you receive the most queries about usinesses?                                                                           |                       |
| 37.        | Which<br>OHS re   | of the following processes are used to facilitate the uniform interpretation of egulations among OHS staff?                                                    | Table 5.19            |
|            | i)                | Supervisory oversight                                                                                                                                          |                       |
|            | ii)               | Structured training                                                                                                                                            |                       |
|            | iii)              | Staff rotation                                                                                                                                                 |                       |
|            | iv)               | Secondment                                                                                                                                                     |                       |
|            | V)                | Peer review                                                                                                                                                    |                       |
|            | vi)               | Other (please detail)                                                                                                                                          |                       |
| 38.        | On whi<br>and Na  | ch issues relevant to OHS does your agency liaise with other State/Territory ational OHS agencies?                                                             | Table 5.20            |
|            | i)                | Regulatory overlap                                                                                                                                             |                       |
|            | ii)               | Regulatory gaps                                                                                                                                                |                       |
|            | iii)              | Enforcement consistency                                                                                                                                        |                       |

- iv) Policy Interpretations
- v) Other matters (please specify)

| Survey question                                                                                                  | Table /<br>figure<br>number     |
|------------------------------------------------------------------------------------------------------------------|---------------------------------|
| Part 7 Appeals and Inspectorate Decisions                                                                        |                                 |
| 39a. Do you have appeal processes for inspectorate decisions available to businesses?                            | Table 6.1 and 6.10              |
| 39b. If yes, list and detail the internal appeal processes for inspectorate decisions, including when they apply | Table 6.1 and 6.10              |
| 39c. List and detail the external appeal processes for inspectorate decisions, including when they apply         | Table 6.1 and 6.10              |
| 39d. What fees, if any, are involved in the appeal processes for inspectorate decisions?                         | Table 6.1 and 6.10              |
| 39e. How many inspectorate decisions were appealed in 2008-09?                                                   | Table 6.1 and 6.10              |
| 39f. What proportion of appeals were successful?                                                                 | Table 6.1 and 6.10              |
| 40a. How many prosecutions took place in 2008-09?                                                                | Table 6.2<br>and Section<br>6.4 |
| 40b. List and detail the appeal processes for prosecutions available to businesses                               | Table 6.2<br>and Section<br>6.4 |
| 40c. How many prosecution cases were appealed in 2008-09?                                                        | Table 6.2<br>and Section<br>6.4 |
| 40d. Of these appealed prosecution cases, how many were successful?                                              | Table 6.2<br>and Section<br>6.4 |
| 40e. Of these appealed prosecution cases, how many are ongoing?                                                  | Table 6.2<br>and Section<br>6.4 |

#### Part 8 Comments

- 41. Do you have any comments on the accuracy/comparability of the data published in the Comparative Performance Monitoring Report: Comparison of Occupational Health and Safety and Workers' Compensation Schemes in Australia and New Zealand?
- 42. What do you consider to be the most burdensome regulations on business?
- 43. In your view, are there any regulatory compliance burdens on businesses that could be reduced without affecting OHS outcomes? If so, please provide information.
- 44. In your view, are there any innovative enforcement approaches or practices used by your agency that could be of benefit to other agencies in your jurisdictions or in other jurisdictions? If so, please provide information.
- 45. Do you have any general comments or observations about this survey?

| Survey question                                                                                                                                                                                                                                                                                   | / Table<br>figure<br>number     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------|
| Part 9 Standards, Codes of Practice and Guidance Notes                                                                                                                                                                                                                                            |                                 |
| 46a. Attachment A provides a table of the adoption of National Health and Safety<br>Commission (NOHSC) standards, codes of practice and guidance notices across<br>the jurisdictions, as of 1 November 2007. Please fill in or update the information<br>for your jurisdiction where appropriate. | Table 2.5<br>and Section<br>2.5 |
| 46b. Where your jurisdiction has not fully adopted the unamended national standard into legislation, please provide reasons below                                                                                                                                                                 | Section 2.5                     |
| 47. How many standards, codes of practice or guidance notes have you developed solely for your jurisdiction? Please provide reason for your answer as well as details on where these standards, codes of practice or guidance notes can be accessed, if applicable                                | Section 2.5                     |
| Part 10 Additional information request                                                                                                                                                                                                                                                            |                                 |
| Please attach a copy of the following written notices if applicable:<br>• Inspection notice<br>• Infringement notice<br>• Improvement notice                                                                                                                                                      | Table 6.7<br>and 6.11           |

#### Table B.4 OHS Regulator Follow Up Questionnaire 2008-09

Inspections and investigations

| Survey question                                                                                                                                                                                                                                                            | / Table<br>figure number |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| Part 1 - Workplace visits                                                                                                                                                                                                                                                  |                          |
| 1a. Does your agency conduct both inspections and investigations?                                                                                                                                                                                                          | Section 5.5              |
| <ul> <li>1b. If you answered 'yes', how does your agency define an:</li> <li>Inspection</li> <li>Investigation</li> </ul>                                                                                                                                                  | Section 5.5              |
| 1c. How many:                                                                                                                                                                                                                                                              | Tables 5.9,              |
| <ul> <li>Inspections were conducted during 2008-09?</li> <li>Investigations were conducted during 2008-09?</li> </ul>                                                                                                                                                      | 5.10 and 5.11            |
| 2a. Please detail and describe the processes involved in conducting a workplace investigation <i>For example, explain the different levels of investigation available (from phone calls to a number of workplace visits) depending on the seriousness of the situation</i> | Section 5.5              |
| 2b. Please provide the number of each investigation level, described in question 2a conducted in 2008-09                                                                                                                                                                   | , Section 5.5            |
| 3a. Please detail and describe the processes involved in conducting a workplace inspection                                                                                                                                                                                 | Section 5.5              |
| 3b. Please provide the number of each inspection level, described in question 3a, conducted in 2008-09                                                                                                                                                                     | Section 5.5              |
| <ol> <li>How many proactive visits did you conduct in 2008-09 to check compliance with<br/>OHS requirements? That is, visits not in response to a workplace incident,<br/>complaint, or breach</li> </ol>                                                                  | n Tables 5.9<br>and 5.10 |

| _   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Table /<br>figure               |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------|
| Su  | rvey question                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | number                          |
| 5.  | How many return visits did your agency conduct in 2008-09 to check that a breach or other issue identified in a proactive visit had been rectified?                                                                                                                                                                                                                                                                                                                                                                               | Tables 5.9<br>and 5.10          |
| 6a. | How many reactive visits did your agency conduct in 2008-09? That is, how many visits were to examine an OHS incident with injury, near miss, complaint compliance breach after the event, such as injury or death or exposure to toxic substances, etc for the purpose of identifying the cause and possible culpability                                                                                                                                                                                                         | Tables 5.9<br>or and 5.10<br>y? |
| 6b. | Of these reactive visits, how many were conducted because of a:<br>• Complaint<br>• OHS incident with injury<br>• Near-miss                                                                                                                                                                                                                                                                                                                                                                                                       | Table 5.9<br>and 5.10           |
| _   | •OHS compliance breach                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | o <i>i</i>                      |
| /a. | Do you also conduct specific visits to workplaces for purposes other than those detailed?                                                                                                                                                                                                                                                                                                                                                                                                                                         | Section 5.5                     |
| 7b. | If you answered 'yes', what are those purposes?  • Training  • Education  • Other (please specify)                                                                                                                                                                                                                                                                                                                                                                                                                                | Section 5.5                     |
| 8a. | For the following industries, please provide the number of proactive, return and reactive visits conducted in 2008-09                                                                                                                                                                                                                                                                                                                                                                                                             | Table 5.11                      |
| Ql  | <ul> <li>i) Agriculture, forestry and fishing</li> <li>ii) Manufacturing</li> <li>iii) Building/construction</li> <li>iv) Mining</li> <li>v) Retail and wholesale</li> <li>vi) Hospitality</li> <li>vii) Transport and storage</li> <li>viii) Consumer and business services</li> <li>ix) Education</li> <li>x) Health and community services</li> <li>xi) Government</li> <li>xii) Other industries (please list)</li> </ul>                                                                                                     |                                 |
| 8b. | If data are not available for the above visit categories, please provide the numb<br>of inspections and investigations, in terms of your agency's definitions,<br>conducted in 2008-09<br>i) Agriculture, forestry and fishing<br>ii) Manufacturing<br>iii) Building/construction<br>iv) Mining<br>v) Retail and wholesale<br>vi) Hospitality<br>vii) Transport and storage<br>viii) Consumer and business services<br>ix) Education<br>x) Health and community services<br>xi) Government<br>xii) Other industries (please list) | er Table 5.11                   |

The Commission reviewed the completed surveys and sought clarification from the regulators on any unusual responses. In November 2009, the Commission circulated a working draft of the study to the jurisdictions for their review and comment. The working draft contained the benchmarking data (from all sources) for all jurisdictions. The circulation of the working draft was the first time the jurisdictions had seen their survey responses in the context of the data from other jurisdictions.

#### Cost of data collection

Part 11 of the initial survey and part 2 of the follow up survey asked the regulators to record the time taken to complete the survey. This provides an indication of the cost to jurisdictions of providing data to the Commission (table B.5).

|       | 2008-09   |                               |                                 |
|-------|-----------|-------------------------------|---------------------------------|
|       | Regulator | Total time for initial survey | Total time for follow up survey |
|       |           | minutes                       | minutes                         |
| Cwlth | Core      | ns                            | 75                              |
| NSW   | Core      | 2505 <sup>a</sup>             | ns                              |
|       | Mining    | 2400                          | 440                             |
| Vic   | Core      | 9600                          | ns                              |
| Qld   | Core      | 900 <b>p</b>                  | ns                              |
|       | Mining    | ns                            | ns                              |
| SA    | Core      | 2400                          | 120                             |
| WA    | Core      | 1500                          | 150                             |
|       | Mining    | 800                           | 30                              |
| Tas   | Core      | 240                           | 120                             |
| NT    | Core      | 240                           | ns                              |
| ACT   | Core      | ns                            | ns                              |

### Table B.5Total time spent completing the surveys

**ns** not specified in the survey response. <sup>a</sup> Two regulators completed the survey. <sup>b</sup> Two regulators completed the survey, but only one provided the time to complete.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

#### Information from businesses

#### Survey of small and medium sized businesses

The Commission also sought information from small and medium enterprises (SMEs) on the impact of OHS regulation on their business activities. Among the responses sought were: their awareness of OHS regulations; the actions they had undertaken to comply with OHS regulations; the costs associated with those actions;

and whether differences in OHS regulations in different jurisdictions constituted a significant cost burden.

The first hand experience of SMEs in complying with OHS regulation was considered to be an important source of quantitative and qualitative information for the study.

To this end, the Commission engaged Sensis Pty Limited (Sensis) to ask a number of questions of SMEs as part of its quarterly *Business Index* survey (box B.1). Sensis also provided input into the design of the survey questions based on its extensive experience of surveying SMEs — including testing to ensure SMEs understood the questions included in the survey. The 1802 businesses surveyed (table B.6) were asked the questions listed in table B.7.

#### Box B.1 The Sensis Business Index

The Sensis® *Business Index* began in 1993 and has become one of the most extensive and regular surveys of small businesses in Australia. Initially, the *Business Index* was focused on businesses employing less than 20 people, but in November 2000 it was expanded to include medium-sized businesses (those with between 20 and 199 employees). The June 2009 *Business Index* was based on telephone interviews conducted with approximately 1400 small businesses and 400 medium businesses drawn from metropolitan and major non-metropolitan regions.

Source: Sensis (2009).

|                                               | NSW | Vic | QLD | SA  | WA  | Tas | NT  | ACT | Total |
|-----------------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-------|
| Manufacturing                                 | 13  | 43  | 14  | 49  | 41  | 17  | 39  | 44  | 260   |
| Building/Construction                         | 19  | 51  | 18  | 40  | 28  | 15  | 25  | 24  | 220   |
| Wholesale Trade                               | 9   | 34  | 6   | 29  | 24  | 13  | 24  | 13  | 152   |
| Retail Trade                                  | 26  | 44  | 33  | 39  | 41  | 23  | 45  | 44  | 295   |
| Accommodation, Cafes and Restaurants          | 8   | 18  | 21  | 20  | 10  | 16  | 25  | 21  | 139   |
| Transport/Storage                             | 2   | 14  | 7   | 24  | 9   | 11  | 20  | 12  | 99    |
| Finance and Insurance                         | 6   | 12  | 4   | 12  | 11  | 9   | 26  | 7   | 87    |
| Communication, Property and Business Services | 30  | 48  | 26  | 57  | 37  | 23  | 59  | 37  | 317   |
| Health and Community<br>Services              | 19  | 14  | 6   | 11  | 15  | 11  | 13  | 7   | 96    |
| Cultural, Recreational and Personal Services  | 19  | 22  | 16  | 19  | 9   | 13  | 24  | 15  | 137   |
| Total                                         | 151 | 300 | 151 | 300 | 225 | 151 | 300 | 224 | 1802  |

#### Table B.6 SME survey — respondents by jurisdiction and industry

#### Table B.7 Small and medium size enterprises survey — 2009

#### Survey question

#### Part 1

1a. What has your business done to comply with Occupational Health & Safety or OH&S laws and regulations? things that you have done? Have you...

1b. What has been the approximate cost for the past twelve months of the following

- Employed an additional employee with specific skills dedicated to handling **OH&S** matters
- Engaged an external consultant such as an accountant or HR expert to assist with OH&S matters as required
- Tasked existing staff to monitor and implement OH&S matters in-house as part of their duties
- Developed an OHS committee and/or appointed OHS representatives •
- Conducted hazard identification and risk control
- Provided protective clothing •
- Kept records
- Purchased information from external sources
- Purchased staff training externally
- Undertaken staff training internally
- Modified existing plant and equipment •
- Replaced plant and equipment earlier than otherwise
- Changed what we produce
- Changed production processes in order to produce the same products or services
- Changed the type of inputs or materials to produce products or services
- Anything else? (specify)
- 1c. As a proportion of your total business costs, over the past 12 months, would you say the total costs of the actions you have taken were trivial, moderate, or substantial?
- 1d. Why have you taken these actions to comply with OHS laws and regulations in the past 12 months?
  - As a result of a workplace injury
  - To lower workers' compensation premiums
  - To retain staff
  - Made aware of OH&S regulations by a workplace inspection or audit
  - Made aware of OH&S regulations by information supplied by a regulator or • government body
  - Made aware of OH&S regulation by information on TV or other media
  - As a result of a prosecution
  - As part of ongoing OHS compliance procedures
  - Other (specify)

#### Survey question

#### Part 2

2a. How aware are you of the OH&S requirements for your business? (Very aware/Somewhat aware/Not aware)

2b. Do you consider that your current OH&S practices are satisfactory? (Yes/No)

#### Part 3

- 3a. Does your business buy or sell goods or services interstate? (Buy/Sell/Both/Neither)
- 3b. Does your business have employees or operations based interstate? (Yes/No)
- 3c. As you may be aware, different States and Territories may have different OH&S legislation. Does this impact on your business either positively or negatively? (Does impact/Does not impact)

3d. In what ways do the different OH&S laws impact your business?

- Makes it harder to compete with businesses undertaking similar activities interstate
- Makes our costs higher than businesses in other States and Territories
- Results in cheaper prices for products and services from other States and Territories
- Other impact (specify)
- 3e. Has your business incurred any costs through having to deal with differences in OH&S regulations in other states and territories? (Yes/No)
- 3f. What was the nature of these costs?3g. Can you rank in order the three highest<br/>costs that you face?
  - Costs associated with obtaining information on the differences in OH&S?
  - Training costs for staff to make them aware of the differences?
  - Costs of additional inspections or audits?
  - Added costs such as training when recruiting staff from interstate?
  - Difficulties in ensuring machinery and equipment transferred or purchased from interstate complies with your state/territory OH&S laws?
  - Any other costs? (specify)

3h. And would you say that the total costs associated with differences in OH&S regulations between States and Territories are...? (Small/Moderate/Substantial)

#### Part 4

4. In order of significance, which three elements of OH&S regulations concern you the most in terms of the costs it imposes on your business?

#### Part 5

- 5a. Has your business experienced a workplace injury in the past 12 months, including any incidents of stress or harassment? (Yes/No)
- 5b. Were these injuries...?
  - Physical
  - Related to harassment
  - Other psychological injury or illness such as overwork, under work, client violence or abuse)

5c. What was the extent of the worst of these injuries? Was it...

- Minor injury/s only with no significant disruption to work
- A major injury that resulted in significant lost production due to shut down required while cause of the accident(s) was investigated
- A major injury that resulted in significant lost production while OH&S practices were changed to prevent future accidents

Among the advantages anticipated with using this approach was that the survey vehicle used — the Sensis Business Index — had a representative sample of 1802 small and medium firms spread across all states and territories and a range of industries. The firms to be surveyed had already agreed to participate in the quarterly survey of SME business activity, with the additional questions on OHS only expected to add a few minutes to the normal time taken to complete the survey. Hence the survey was expected to only constitute a minor additional burden on the participating businesses.

The survey data provided to the Commission included weights for each firm that responded to the survey. These weights, when applied to survey responses, provide for statistical measures that better reflect the actual population of SMEs in each jurisdiction. For example, the weighting corrects for the overrepresentation of medium sized firms (relative to the population) within the sample for some jurisdictions.<sup>1</sup> The use of weighted data better allows for assessments to be made regarding the population of SMEs within each jurisdiction, rather than simply just those firms responding to the survey.

The data collected through this process is presented throughout the report along with any caveats applicable to the data and its interpretation.

#### Information supplied by a leading Australian retailer

The Commission approached a leading Australian retailer to provide details of the costs it faced due to selected aspects of OHS regulation, including the costs of:

- understanding and staying up to date with the different OHS regimes in effect across Australia
- staying up to date with the Australian Standards referred to in OHS regulations
- incident reporting.

The information provided by this retailer is reported in chapters 4, 12 and 13, and appendix D.

<sup>&</sup>lt;sup>1</sup> The weights have been used to adjust for differences between the sample of SMEs and the actual population of SMEs for factors such as industry sector, firm size (in terms of number of employees), and location (in terms of whether they are located in metropolitan or non-metropolitan regions).

#### Synthetic analysis

This approach involved the Commission estimating the time required, difficulty experienced and cost incurred, in applying to become a licensed asbestos removalist. The Commission arrived at its estimates by replicating the experience of a hypothetical business in searching for information on the licensing requirements (and other regulatory requirements), obtaining copies of application forms and completing those forms. Box B.2 provides further details of the synthetic analysis and the characteristics of the hypothetical business.

The Commission used the synthetic analysis approach in the study *Performance Benchmarking of Australian Business Regulation: Cost of business registrations* ('*Cost of Business Registrations* report' — PC (2008b)). Based on the experience of that study, the Commission has focused the synthetic analysis in this study on those tasks that could be readily replicated and those which often represent the most burdensome aspect of a licensing process — providing the supporting information required by the regulator. The *Cost of Business Registrations* report showed the nature and availability of the supporting information to be provided to regulators varies from business to business and cannot be reliably replicated in a synthetic analysis. However, the process of determining what the requirements are for 'supporting information' can be replicated and so it was on this aspect of 'supplying supporting information' the synthetic analysis focused.

The principal benefit of the synthetic analysis approach is that it produces data which is readily comparable across jurisdictions, although this benefit comes at the cost of the data not necessarily being representative of the 'real world' experience of businesses.

### Box B.2 Synthetic analysis — scenario and hypothetical business characteristics

The synthetic analysis exercise was entirely desk based and used the internet as its primary source of information. The exercise involved assuming the role of a hypothetical business and commencing the application process to be licensed to remove asbestos. In addition to being provided with the details of the scenario below, those completing the synthetic analysis were provided with additional details for the company (and its sole director), including: address and contact details, referees and bank account details.

#### Scenario and hypothetical business characterises

You are the sole director (and secretary) of the company Asbestos Removals (Aus) Pty Limited (Asbestos Removals). You are also the sole shareholder. Asbestos Removals has only recently been established and its sole line of business will be the removal of asbestos.

Neither you, nor Asbestos Removals, have ever held a licence to remove asbestos or had a licence of any type revoked or cancelled. You do not have a criminal record and have never declared bankruptcy.

You have recently completed a training course on asbestos removal and supervision. You heard about this course from a colleague in the building industry who also told you that you will need a licence from the [details of relevant OHS regulator] before you undertake any asbestos removal work. Neither your colleague, or those providing the training course, could give you any more details on what you need to do before Asbestos Removals starts business as an asbestos removalist.

Asbestos Removals will specialise in the removal of 'friable asbestos'. Asbestos Removals has gained in principle agreement from the owners of 15 different sites to remove over 10m<sup>2</sup> of friable asbestos from each site. The work involves removal of asbestos only and no demolition work.

While Asbestos Removals is a new company, you have 7 years of (full time) experience in the removal of both bonded and friable asbestos. Your have not documented your experience, nor have prepared any:

- business plans or financial projections for the business
- risk management procedures or site control plans for the removal of asbestos
- policies or procedures of any type for the proposed operations of Asbestos Removals.

#### Methodology

For each of jurisdiction the Commission recorded:

- the time taken and difficulty<sup>2</sup> experienced in obtaining information on the requirements for asbestos removal and licensing, reviewing that information and obtaining the licence application form (*'obtaining information and forms'* in table 10.6)
- the time taken and difficulty experienced in completing the application form ('*completing the form*' in table 10.6). The estimates to do not include any allowances for sourcing any of the material or evidence that must accompany a licence application
- the details of the information required to support the application
- the method by which the application form could be lodged and any relevant fees paid
- the fees payable as part of the application and licensing processes.

In undertaking the synthetic analysis, there was potential for the estimates of those jurisdictions completed later in the process to be biased by a 'learning by doing' effect. The Commission sought to control for this by:

- undertaking the synthetic analysis tasks a number of days apart in order to reduce any familiarity with the overall licensing process
- undertaking the synthetic analysis before any research into the regulatory requirements had been commenced or the regulator's website extensively used
- not repeating common tasks for example, part of understanding the regulatory
  requirements in most jurisdictions involved locating and reviewing the national
  standards listed by SWA. This task was only undertaken once and the time
  estimate for that task incorporated into the time estimates for the jurisdictions
  where the requirement applied.

As the Commission's estimates were derived in a controlled working environment, they may underestimate the time taken by a typical businesses to perform the same tasks. However, the estimates provide a consistent basis on which to compare the burden imposed by similar processes in different jurisdictions.

<sup>&</sup>lt;sup>2</sup> Table B.8 provides the scale by which 'difficulty' was measured.

| Rating | Meaning                                                           | Examples                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------|-------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1      | No difficulty in finding<br>or completing the<br>form (very easy) | <ul> <li>In the case of finding the form, the website was very intuitive, links were off the home page or there was a self explanatory link to the forms. There were no problems in downloading the form.</li> <li>In the case of completing the form, the form was easy to complete, there was no reason to read a lot of information, it was short and only required generally available information.</li> </ul>           |
| 2      | Easy to find and complete                                         | <ul> <li>In the case of finding the form, the website provided self explanatory links, however, you had to go beyond the home page to find them. There were no problems in downloading the form.</li> <li>In the case of completing the form, the form needed information which was slightly more detailed, with some guidance from accompanying documentation being needed.</li> </ul>                                      |
| 3      | Neither easy nor<br>difficult (medium<br>difficulty)              | <ul> <li>In the case of finding the form, there were no self explanatory links, the search engine had to be used and/or the regulator had to be contacted (with a quick response) to find the form. There were no problems in downloading the form.</li> <li>In the case of completing the form, the form required less standard information, however, the information could be obtained reasonably quickly.</li> </ul>      |
| 4      | Difficult to find or complete the form                            | <ul> <li>In the case of finding the form, there was no intuitive means of finding it. The search engine did not assist greatly and/or the regulator was contacted and after considerable discussions the form was located and obtained.</li> <li>In the case of completing the form, the form would require input from a third party (for example, accountant or lawyer) and/or a detailed reading of guidelines.</li> </ul> |
| 5      | Very difficult to find<br>or complete the form                    | <ul> <li>In the case of finding the form, there was no intuitive means of finding it.<br/>The regulator was contacted and once the form was located, it was only<br/>available after some time.</li> <li>In the case of completing the form, the form was complex, required a lot of<br/>assistance from the guidelines and would need the input of third parties.</li> </ul>                                                |

Table B.8 Level of difficulty: rating scale

Source: Based on PC (2008b).

#### Fees

Fees imposed by regulators or required as a part of the licensing processes constitute a separate indicator to the time indicators discussed above. There can be two types fees payable in relation to an application for an asbestos removalist licence: an application fee and a licence fee. Payment of the application fee is required when the application is lodged, while the licence fee usually covers a specific (future) period and can vary depending on factors such as:

• the nature of the licence sought (for example, a licence to remove bond asbestos as opposed to a licence to remove friable asbestos)

• the legal structure of the applicant (for example, a sole trader as opposed to a company).

As the licence fees cover different periods across different jurisdictions, the fees were standardised to apply to a common period. For example, where the fee imposed by one jurisdiction covers two years and in other jurisdictions the comparable fee covers one year, the fee for the first jurisdiction is divided by two to bring it into line with the annual basis quoted in other jurisdictions.

In the ACT, business operators need to hold an individual licence prior to obtaining a company licence. In this instance, the Commission assumed the business operator did not hold a licence as an individual and so included the time, difficulty and fee estimates for both an individual and company licence.

### C Workers' compensation premiums

Workers' compensation premiums are paid by businesses to insure themselves against claims that arise from work-related injury or disease. If correct, premiums provide a proxy for the risk of a claimable work-related injury or disease occurring (along with a component which represents a return for the insurer taking on this risk).

However, comparisons of premiums at an individual firm level is difficult and potentially misleading given a range of factors can influence individual premiums. For individual firms, the PC (2004) noted that premiums were dependent on a range of factors such as the size of the firm, past claims experience, and the financial position of the insurer. (During consultations, however, the Commission was informed that for many small businesses, past claims experience does not affect premiums, and instead they are offered set rates depending on the industry in which they operate.)

Despite difficulties in making comparisons at an individual firm level, comparisons have been made by examining average premiums expressed as a percentage of payroll for each jurisdiction (WRMC 2008b). The premiums have been adjusted to reflect some differences in scheme design.<sup>1</sup> Adjusted premiums reveal that there are differences between jurisdictions in the cost of workers' compensation premiums, with those for businesses covered by Seacare and the South Australian system paying the highest rates (figure C.1).

<sup>&</sup>lt;sup>1</sup> The WRMC (2008b) adjust raw average workers' compensation premiums at the individual jurisdiction level to correct for firms which self insure, differences in employer excesses payable and coverage differences brought about by the treatment of journey claims. See WRMC (2008b), pp. 38-41 for details.



### Figure C.1 Standardised average premium rates 2003-04 to 2006-07

Data source: WRMC (2008b).

A simple comparison of these adjusted premiums against the incidence of workrelated injuries and disease that have resulted in a workers' compensation claim for each jurisdiction shows a high correlation (figure C.2).

Given the focus of occupational health and safety (OHS) regulation is on the prevention of work-related injury and disease in the first instance, workers' compensation premiums can in theory provide an indirect proxy to measure the performance of OHS regulatory regimes. However, it is not possible to differentiate the incentive effects of workers' compensation premiums to reduce work-related injury and disease, and those which are driven by OHS regulation.

Premiums also pick up various other characteristics of individual firms and the workers' compensation regime in place. Further, premiums will also vary by industry as, despite OHS regulations, some industries will have inherently riskier workplaces than others. For example, firms that operate in industries that expose workers to greater risks of injuries, such as construction, are likely to face commensurably higher premiums.

## Figure C.2 Workers' compensation premiums and work-related injury and disease incidence rates for each state and territory<sup>a</sup> 2003-04 to 2006-07



<sup>a</sup> Only includes injuries and diseases that have resulted in a workers' compensation claim. Also includes premiums and injury and disease rates for Seacare. *Data source:* WRMC (2008b).

At a jurisdictional level, average premiums will vary due to characteristics of the compensation scheme, the industry mix, and the distribution of small, medium and large firms. In terms of the workers' compensation scheme, aspects such as the nature of work-related injuries and disease which can result in workers' compensation claims and the maximum time/amount that can be claimed all affect premiums.

Given that premiums are affected by a number of factors, examining changes over time within individual jurisdictions brought about by changes in the OHS regulatory regime would best provide insights into the link between premiums and OHS regulatory performance. However, a consistent time series of suitable length is not available.

Despite this, some of the noted difficulties above can be overcome. Comparing *average* premiums for all firms within a given jurisdiction should remove some of the issues associated with premiums paid by individual firms. For example, it would be expected that:

- differences in premiums due to differences in firm size would be 'averaged' out (this should also remove variations across jurisdictions given all have similar distributions of small, medium and large businesses<sup>2</sup>)
- differences in premiums due to past work-related injury and disease performance for individual firms would also be 'averaged' out.

Differences in industry structure at the jurisdiction level, and some differences in workers' compensation schemes (such as coverage factors and the number of self insured firms), could also be partly overcome by:

- comparing *adjusted* premiums which have been adjusted for differences in scheme coverage such as those reported by the WRMC (2008b), and
- removing industry-specific effects from these adjusted premiums and estimating the differences that are driven by jurisdiction-specific characteristics, including the performance of the OHS regulatory regime in place.

It should be noted, however, that any differences in scheme coverage not adjusted for by the WRMC (2008b) will be captured by the jurisdiction-specific estimates, and thus these estimates may not provide a reliable representation of the performance of the OHS regulatory regime in place. For example, the access to common law provisions, maximum amounts payable and the treatment of disease (such as whether payments are based from point of exposure or point of diagnoses) will all influence the size of premiums to some degree. Further, other aspects such as differences in firm culture and awareness of workers' compensation arrangements can have significant impacts on the observed premium, through affecting whether claims are made by injured parties, and will be picked up by the jurisdiction-specific estimate. If these are significant issues, differences in jurisdiction-specific estimates will not reflect differences in OHS regulatory performance.

Using adjusted premium data from 2003-04 to 2006-07, the jurisdiction-specific estimates were estimated using Tasmania as the base for comparison (see box C.1). The results are shown on figure C.3, with the lines representing the 95 per cent confidence intervals for the jurisdiction-specific estimates.

<sup>&</sup>lt;sup>2</sup> For example, in 2006-07, the Northern Territory was the jurisdiction with the lowest proportion of small businesses — 94 per cent of all businesses were small businesses (less than 20 employees) — compared with to New South Wales with the greatest proportion at 96 per cent of total businesses (ABS *Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007*, Cat. no. 8165.0 2007).

#### Box C.1 Estimating jurisdiction-specific effects

A simple regression model was used to estimate the jurisdiction-specific effects on workers' compensation premiums. Adjusted premiums estimated by WRMC (2008b) from 2003-04 to 2006-07 (32 observations) were regressed against a time trend variable, the labour market share of non-service industries (agriculture, mining, manufacturing, construction and electricity, gas, water and waste services) and a dummy variable for each state and territory (Tasmania was used as the base). The composite variable 'non-service' was used instead of individual industry labour market shares as these proved insignificant in earlier formulations of the model. For the ACT, industry composition excluded workers in the government sector as many would be covered by Comcare. Further, several other variables were initially included in the model — average wages, proportion of small and medium enterprises in the economy and whether the insurance scheme was privately underwritten — but were excluded due to insignificance.

The results, corrected for heteroskedasticity, are in table C.1. All variables except the New South Wales dummy variables were found to be significant at a 5 per cent level of confidence. The R-squared value was 0.98.

| Variable    | Coefficient | Standard error | t-statistic | P-value |
|-------------|-------------|----------------|-------------|---------|
| Time        | -0.107      | 0.018          | -5.850      | 0.000   |
| Non-service | -15.039     | 3.722          | -4.040      | 0.001   |
| NSW         | -0.338      | 0.183          | -1.850      | 0.078   |
| Vic         | -0.278      | 0.093          | -2.990      | 0.007   |
| Qld         | -0.924      | 0.100          | -9.240      | 0.000   |
| SA          | 1.241       | 0.041          | 30.080      | 0.000   |
| WA          | -0.248      | 0.023          | -10.650     | 0.000   |
| NT          | -1.281      | 0.387          | -3.310      | 0.003   |
| ACT priv.   | -1.273      | 0.529          | -2.410      | 0.025   |
| Constant    | 6.356       | 1.007          | 6.310       | 0.000   |
|             |             |                |             |         |
|             |             |                |             |         |

#### Table C.1Estimated results

Bearing in mind the limitations of the comparisons, the results indicate that only South Australia has higher premiums to those paid on average in Tasmania and all other jurisdictions. That is, once industry composition is taken into account, the average workers' compensation premiums paid by South Australian businesses are greater than those paid on average by Tasmanian businesses and those in other states and territories. Average workers' compensation premiums in all other jurisdictions, except New South Wales, were all significantly lower than those in Tasmania once industry composition was taken into account. In New South Wales, average premiums were not significantly different to those in Tasmania.



#### Figure C.3 Estimated jurisdiction-specific effects<sup>a,b</sup> Average 2003-04 to 2006-07

<sup>a</sup> Jurisdiction-specific effects were estimated using an ordinary least squares regression where adjusted premium were regressed against a time trend, the proportion of the workforce employed outside the service sectors and dummy variables for states and territories. <sup>b</sup> The black bars indicate the 95 per cent confidence intervals.

Data source: PC estimates.

Given the limitations of comparing jurisdiction-specific estimates alone, it is useful to compare these results with other proxies of overall regulatory performance to provide some qualification of the results obtained. For example, 'expected' work-related injury and disease incidence rates — those adjusted for differences in industry structure — can be used to support or discredit the hypothesis that observed differences are driven by differences in OHS regulatory performance. For example, if a particular jurisdiction has a higher than 'expected' rate of work-related injury and disease, and its jurisdiction-specific estimated premium is comparatively higher, it could be argued that these differences are driven by differences in regulatory performance. It should be noted, however, that the incentive effects of higher premiums may induce firms to reduce their OHS risks beyond those required by OHS regulation, and thus the two indicators are likely to be related independently of the performance of the OHS regulatory regime.

Expected work-related injury and disease incident rates were also estimated for the period 2003-04 to 2006-07 (see box C.2), with the difference between the expected and actual rates shown in table C.3.

#### Box C.2 Estimating 'expected' incidence rates

'Expected' incidence rates were estimated using a simple regression model where incidence rates for serious work-related injury and disease that resulted in a workers' compensation claim from 2003-04 to 2006-07 (32 observations) from WRMC (2008b) were regressed against a time trend variable and the proportion of the workforce employed in each sector of the economy (Agriculture, forestry and fishing; Mining; Manufacturing; Electricity, gas, water and waste services; Construction; Wholesale and retail trade and accommodation and food services; Transport, postal and warehousing; a 'service industry' grouping (comprising Information, media and telecommunications; Financial and insurance services; Rental, hiring and real estate services; Education and training; Arts and recreational services); Public administration and safety; Health care and social assistance; and, Other services) (ABS *Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007*, Cat. no. 8165.0 2009).

The results, corrected for heteroskedasticity, are given in table C.2 (R-squared value of 0.69). The fitted results represent the 'expected' incidence rates.

| Variable                                                                                   | Coefficient<br>P-value    | Standard                  | error                     | t-statistic |
|--------------------------------------------------------------------------------------------|---------------------------|---------------------------|---------------------------|-------------|
| Time                                                                                       | -1.36                     | 0.36                      | -3.47                     | 0.00        |
| Agriculture, forestry and fishing                                                          | -349.06                   | 324.11                    | -1.08                     | 0.29        |
| Mining                                                                                     | -517.92                   | 350.38                    | -1.48                     | 0.16        |
| Manufacturing, electricity, gas, water and was                                             | ste services              | -433.20                   | 320.94                    | -1.35       |
|                                                                                            | 0.19                      |                           |                           |             |
| Construction                                                                               | -117.35                   | 296.02                    | -0.40                     | 0.70        |
| Wholesale trade, retail trade, accommodation                                               | and food ser              | vices                     | -357.67                   | 342.49      |
|                                                                                            | -1.04                     | 0.31                      |                           |             |
| Transport, postal and warehousing                                                          | -531.22                   | 453.64                    | -1.17                     | 0.26        |
| Service industries                                                                         | -448.07                   | 331.54                    | -1.35                     | 0.19        |
| Public administration and safety                                                           | -399.66                   | 319.30                    | -1.25                     | 0.23        |
| Health care and social assistance                                                          | -159.54                   | 310.63                    | -0.51                     | 0.61        |
| Other services                                                                             | -325.58                   | 343.30                    | -0.95                     | 0.35        |
| Constant                                                                                   | 381.68                    | 320.45                    | 1.19                      | 0.25        |
| The results indicate that a significant pr<br>between jurisdictions are explained by diffe | oportion of erences in in | the variati<br>dustry con | on in incid<br>nposition. | ence rates  |

#### Table C.2 Estimated results from the expected incidence rates model

Actual and expected incidence rates differed to the greatest extent for Victoria, South Australia and New South Wales. Differences indicate that for South Australia and to a lesser extent New South Wales, incidence rates are above what it expected given their industry structure (table C.3). Conversely, for Victoria rates are lower than expected. While for South Australia and Victoria, these results are in line with those obtained in workers' compensation premiums, for the remaining jurisdictions they are not. This suggests that the observed differences in average premiums are driven primarily by other factors apart from OHS regulatory performance (such as scheme design). The industry composition of each jurisdiction explains almost all the variation in observed workplace injury and disease, with very little difference between the expected and actual incidence rates. These results suggest that the OHS outcomes in each state and territory are very similar. Thus it is not likely that differences in OHS outcomes have driven the differences in workers' compensation premiums.

| Average   | Average 2003-04 to 2000-07 |          |            |  |
|-----------|----------------------------|----------|------------|--|
|           | Actual                     | Expected | Difference |  |
| NSW       | 16.20                      | 15.61    | 0.59       |  |
| Vic       | 12.63                      | 13.96    | -1.34      |  |
| Qld       | 18.40                      | 18.01    | 0.39       |  |
| SA        | 19.10                      | 18.09    | 1.01       |  |
| WA        | 14.23                      | 14.40    | -0.17      |  |
| Tas       | 17.98                      | 18.42    | -0.44      |  |
| NT        | 14.75                      | 14.89    | -0.14      |  |
| ACT priv. | 16.28                      | 16.17    | 0.11       |  |

### Table C.3 Actual and estimated expected incidence rates<sup>a</sup> Average 2003-04 to 2006-07

<sup>a</sup> Expected incidence rates were estimated by regressing incidence rates for serious work-related injury and disease which resulted in workers' compensation claims against a time trend and the proportion of the workforce employed in various sectors of the economy.

Sources: WRMC (2008b); PC estimates.

Given the results, adjusted workers' compensation premiums do not provide a good indicator of overall OHS regulatory performance. It is likely that the observed differences are driven to a greater extent by those differences in the workers' compensation schemes that are not controlled for, and other jurisdiction specific characteristics such as the reporting culture and access to common law provisions.

# D Reporting requirements compiled by a leading national retailer

### Table D.1Statutory authority notifiable incidents matrix (state and<br/>territory specific)

#### Serious Injury 'An incident in the Workplace which results in:

- NSW An injury resulting in person being killed;
  - the amputation of a limb;
  - the placing of a person on a life support system;
  - any event listed below that presents an immediate threat to life:
    - unconsciousness of a person caused by impact of physical force, exposure to hazardous substances, electric shock or lack of oxygen;
    - major damage to any plant, equipment, building or structure;
    - an uncontrolled explosion or fire;
    - an uncontrolled escape of gas, dangerous goods or steam;
    - imminent risk of explosion or fire;
    - imminent risk of an escape of gas, dangerous goods or steam;
    - a spill or incident resulting in exposure or potential exposure of a person to a notifiable or prohibited carcinogenic substance;
    - entrapment of a person in a confined space;
    - collapse of an excavation;
    - entrapment of a person in machinery;
    - serious burns to a person.
- Vic The death of any person;
  - a person requiring medical treatment within 48 hours of exposure to a substance;
  - a person requiring immediate treatment as an in-patient in a hospital;
  - · a person requiring immediate medical treatment for:
    - the amputation of any part of his or her body;
    - a serious head injury;
    - a serious eye injury;
    - the separation of his or her skin from underlying tissue;
    - electric shock;
    - a spinal injury;
    - the loss of a bodily function;
    - serious lacerations.
- Qld Serious bodily injury;
  - work caused illness;
  - serious electrical incident;
  - serious injury at a LPG storage facility (over 2000L bulk or 1000L/530Kg bottled).

#### Serious Injury 'An incident in the Workplace which results in:

- Qld A serious bodily injury means:
  - the injured person's death;
  - the loss of a distinct part of an organ of the injured person's body;
  - the injured person to be absent from the person's voluntary or paid employment for more than 4 days/shifts (only to be reported once it is known to be 4 days/ shifts).
  - A work caused illness means:
    - illness contracted to which work, a workplace, a workplace activity or specified high risk plant was a contributing factor;
    - the recurrence, aggravation, acceleration, exacerbation or deterioration in a person of an existing illness if work, a workplace, a workplace activity or specified high risk plant was a significant contributing factor to the recurrence, aggravation, acceleration, exacerbation or deterioration.
  - A serious electrical incident is an incident involving electrical equipment if:
    - a person is killed by electricity;
    - a person receives a shock or injury from electricity, and is treated for the shock or injury by a doctor;
    - a person receives a shock or injury from electricity at high voltage, whether or not the person is treated by a doctor.
  - A serious injury at a LPG Storage facility is defined as:
    - involving death of a person;
    - involving injury to a person requiring medical treatment.
- SA A work related injury that causes death;
  - a work related injury that has acute symptoms associated with exposure to a substance at work;
  - a work related injury that requires treatment as an in-patient at a hospital immediately after the injury.
- WA Fracture of the skull, spine or pelvis;
  - fracture of any bone in the arm, other than in the wrists or hand; in the leg, other than a bone in the ankle or foot;
  - amputation of an arm, a hand, finger, joint, leg, foot, toe or toe joint;
  - the loss of sight of an eye;
  - any other injury which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.
  - The kinds of diseases to an employee which must be notified are:
    - infectious diseases: tuberculosis, viral hepatitis, legionnaire's disease and HIV where these diseases are contracted during work.
  - Occupational Zoonoses: Q fever, anthrax, leptospiroses and brucellosis where these diseases are contracted during work involving the handling of, or contact with, animals, animal hides, skins, wool, hair, carcases or animal waste products.
  - Electric shocks from a mains source: Electricity (Licensing) Regulations 1991 (WA).

#### Serious Injury 'An incident in the Workplace which results in:

- The regulation requires that all electric shocks, incidents and accidents, irrespective of their seriousness, must be reported to:
  - the employer (if relevant); and the relevant network operator (supply authority). If the
    person making the report cannot identify the network operator, the fact must be
    reported to Energy Safety.
  - When the incident is reported to the employer, the employer is also required to report the occurrence to the relevant network operator (or Energy Safety if the network operator cannot be identified).
- Tas A person is killed or suffers serious bodily injury or illness.
- Causing the death of a person ;
  - causing or, on the basis of medical advice, appears likely to cause a worker to be absent from work for 5 or more working days;
  - where a worker receives an electric shock;
  - where a worker is injured and admitted to hospital as an in-patient following exposure to a hazardous substance.
- ACT Death of, or serious personal injury to, anyone.

Source: Information provided by a leading Australian retailer (2009, unpublished).

# Table D.2Statutory authority notifiable incidents matrix (state and<br/>territory specific) developed by a leading Australian<br/>retailer: dangerous occurrences

Dangerous Occurrence 'An incident in the Workplace which results in:

- NSW Damage to any plant, equipment, building or structure or other thing that impedes safe operation;
  - an uncontrolled explosion or fire;
  - an uncontrolled escape of gas, dangerous goods or steam;
  - a spill or incident resulting in exposure or potential exposure of a person to a notifiable or prohibited carcinogenic substance;
  - removal of workers from lead risk work;
  - exposure to bodily fluids that presents a risk of blood-borne diseases;
  - the use or threatened use of a weapon that involves a risk of serious injury to, or illness of, a person;
  - a robbery that involves a risk of serious injury to, or illness of, a person;
  - electric shock that involves a risk of serious injury to a person;
  - any other incident that involves a risk of:
    - explosion or fire
    - escape of gas, dangerous goods or steam
    - serious injury to, or illness of, a person
    - substantial property damage.

Dangerous Occurrence 'An incident in the Workplace which results in:

- Vic overturning, failure or malfunction of, or damage to, any item of Plant listed in Schedule 2 of the Occupational Health & Safety (Plant) Regulations 1995 (Vic):
  - boilers;
  - pressure vessels;
  - tower cranes;
  - lifts;
  - amusement structures;
  - concrete placing units;
  - mobile cranes.
  - the collapse or failure of an excavation or of any shoring supporting an excavation;
  - the collapse or partial collapse of any part of a building or structure;
  - an implosion, explosion or fire;
  - the escape, spillage or leakage of any substance in excess of 200 litres including Dangerous Goods as defined in the *Dangerous Goods Act 1985* (Vic);
  - the fall or release from a height of any plant, substance or object.

#### Qld • a dangerous event;

- dangerous electrical incident;
- dangerous occurrence at any LPG storage facility;
- a dangerous event means:
- an event caused by specified high risk plant;
- The event involves or could have involved exposure of persons to risk to their health and safety because of:
  - the collapse, overturning, failure or malfunction of, or damage to, an item of specified high risk plant;
  - collapse or failure of an excavation or of any shoring supporting an excavation;
  - damage to any load bearing member of, or the failure of any brake, steering device or other control device of, a crane, hoist, conveyor, lift or escalator;
  - implosion, explosion or fire;
  - escape, spillage or leakage of any hazardous material or dangerous goods;
  - fall or release from a height of any plant, substance or object;
  - damage to a boiler, pressure vessel or refrigeration plant;
  - uncontrolled explosion, fire or escape of gas or steam.
- Dangerous Electrical incident means:
  - the coming into existence of circumstances in which a person is not electrically safe, involving high voltage electrical equipment;
  - the coming into existence of the following circumstances, if a person had been at a
    particular place at a particular time, the person would not have been electrically safe;
  - an event that involves electrical equipment and in which significant property damage is caused directly by electricity or originates from electricity;
  - performance of electrical work by a person not authorised under an electrical work licence to perform the work;
  - performance of electrical work by a person if, as a result of the work, a person or property is not electrically safe.

#### Dangerous Occurrence 'An incident in the Workplace which results in:

- Qld Dangerous Occurrence at any LPG storage facility means:
  - an uncontrolled oil or gas leak by emergency services;
    - an incident involving damage to property that substantially increases the risk of damage to plant or equipment or injury to persons.
- Where there is an immediate and significant risk to any person in, or near the relevant place, or who could have been in, on or near the relevant place (whether or not a work related injury occurs).
  - That is attributable to any of the following:
    - the collapse, overturning or failure of the load bearing part of a scaffolding, lift, crane, hoist or mine-winding equipment;
    - damage to, or malfunction of, other major plant;
    - the unintended collapse or failure of an excavation that is more than 1.5 metres deep or of any shoring;
    - the unintended collapse or partial collapse of a building or structure under construction, reconstruction, alteration, repair or demolition;
    - the unintended collapse or partial collapse of the floor, wall or ceiling of a building being used as a workplace;
    - an uncontrolled explosion, fire or escape of any gas, hazardous substance or steam;
    - the unintended ignition or explosion of explosives;
    - an electrical short-circuit, malfunction or explosion;
    - an unintended event involving a flood of water, rockburst, rock fall, or a collapse of ground;
    - an incident where breathing apparatus intended to permit the user to breathe independently of the surrounding atmosphere malfunctions in such a way that the wearer is deprived of breathing air or exposed to an atmospheric contaminant to an extent that may endanger health;
    - any other unintended or uncontrolled incident or event arising from operations carried on at a workplace.
- WA None listed.
- Tas An accidental explosion of gas, dust or explosive material;
  - an incident involving a high probability of severe electrical shock;
  - a fire in confined space including underground;
  - a serious fire, other than a bush fire, requiring the attention of a trained fire fighting team;
  - an interference with, or obstruction of the use of, a sole emergency egress from an area in which a person is required to work;
  - an accident or incident involving a mine winder or shaft, including a serious mine winder overwind;
  - any uncontrolled escape of high pressure oil or water;
  - the tripping over of self propelled mobile plant;
  - an accident involving the failure of loading bearing or pressure retaining components of registered plant;
  - any other type of incident of which an inspector has specifically requested notification.

Dangerous Occurrence 'An incident in the Workplace which results in:

- Where a person, other than a worker, is injured as a result of a workplace activity or by designated plant;
  - involving the collapse, overturning or failure of a load bearing part of a lift, crane, hoist, lifting gear or scaffolding;
  - involving the failure of pressure equipment;
  - involving the collapse of shoring or an excavation which is more than 1.5 metres deep;
  - involving the unplanned collapse of a building or structure or part of a building or structure;
  - involving an explosion or fire that results in designated plant being inoperative, or normal work being suspended, for more than 24 hours;
  - involving an unplanned contact between plant and a live electrical conductor;
  - involving a malfunction or failure of personal protective equipment which effects the health and safety of a person.
- Damage to a boiler, pressure vessel, plant, equipment or other thing that endangers or is likely to endanger the health or safety of people at a workplace;
  - damage to, or failure of, a load-bearing member or control device of a crane, hoist, conveyor, lift escalator, moving walk, plant, scaffolding, gear, amusement device or public stand;
  - an uncontrolled fire, explosion, or escape of gas, a dangerous substance as defined in the *Dangerous Substances Act 2004* (ACT) or steam;
  - substantial damage to property.

Source: Information provided by a leading Australian retailer (2009, unpublished).

### E Claims for Mental Stress

This appendix details the characteristics of claims data related to mental stress as reported by Safe Work Australia.

#### Industry breakdown of mental stress claims

The highest rate of mental stress claims per 100 000 employees recorded in 2007-08 were in Personal and other services, followed by Education and Health and community services (table E.1).

Relatively low rates of mental stress claims were recorded in traditional male employee dominated industries such as Agriculture, forestry and fishing, Construction and Mining, with shares of total mental stress claims of around 1 per cent or less respectively. These industries also recorded very low shares of total bullying/harassment claims of around 1 per cent or less. In contrast Manufacturing, which also has a high proportion of male employees, accounted for 5.2 per cent of all mental stress claims and 8.7 per cent of bullying/harassment claims. This industry accounted for 9.9 per cent of all employment at this time (ABS 2010).

It is possible that men are more reluctant to report incidents of bullying/harassment than women for a number of reasons such as cultural factors or fear of retribution in the workplace. As a consequence, the figures for some industries such as Manufacturing and Construction may not reflect the actual incidence of bullying.

Some industries are overrepresented in accepted mental stress claims. For example, Health and community services accounted for 21.6 per cent of newly accepted mental stress claims recorded in 2007-08 and 24.0 per cent of bullying/harassment claims. However, this industry accounted for only around 10 per cent of all employment (ABS 2010). Similarly Education accounted for 19.4 per cent of all mental stress claims and 17.1 per cent of bullying/harassment claims in 2007-08 but only 7.4 per cent of total employment (ABS 2010).

|                                    | Exposure<br>to<br>traumatic<br>event | Exposure to<br>workplace or<br>occupational<br>violence | Workplace<br>harassment &<br>bullying | Work<br>pressure | Other | Total |
|------------------------------------|--------------------------------------|---------------------------------------------------------|---------------------------------------|------------------|-------|-------|
| Agriculture, forestry & fishing    | np                                   | np                                                      | 5.1                                   | np               | np    | 12    |
| Mining                             | 4.3                                  | np                                                      | np                                    | 7.9              | np    | 17.3  |
| Manufacturing                      | 2.1                                  | 3.2                                                     | 12.2                                  | 7.7              | 5.2   | 30.6  |
| Electricity, gas & water           | np                                   | np                                                      | 5.8                                   | 22               | np    | 31.2  |
| Construction                       | 2.3                                  | 1.5                                                     | 2.6                                   | 4.8              | 1.7   | 13    |
| Wholesale trade                    | np                                   | 3.6                                                     | 11.4                                  | 13.1             | 6.9   | 36.2  |
| Retail trade                       | 1.9                                  | 8.9                                                     | 5.5                                   | 7.2              | 2.6   | 26.1  |
| Accommodation, cafes & restaurants | 2.1                                  | 22.1                                                    | 8.9                                   | 10.4             | 3.4   | 46.7  |
| Transport & storage                | 23.3                                 | 18.9                                                    | 10.6                                  | 14.5             | 18.2  | 85.7  |
| Communication services             | np                                   | 5.8                                                     | 6.4                                   | 5.2              | np    | 19.1  |
| Finance & insurance                | 2.6                                  | 10.2                                                    | 13.2                                  | 19.5             | 4.2   | 50.2  |
| Property &<br>business services    | 1.5                                  | 5.4                                                     | 10.7                                  | 12.6             | 4.5   | 35    |
| Government admin & defence         | 2.6                                  | 9.7                                                     | 28.4                                  | 35.6             | 11.3  | 87.8  |
| Education                          | 1                                    | 32.4                                                    | 30.8                                  | 67.3             | 12.4  | 143.8 |
| Health &<br>community<br>services  | 7                                    | 19.9                                                    | 31.1                                  | 40.6             | 16.9  | 116   |
| Cultural & recreational services   | np                                   | 9.2                                                     | 7                                     | 10.2             | 6.9   | 34.8  |
| Personal & other services          | 13.1                                 | 20.9                                                    | 30.2                                  | 69.7             | 58.3  | 192.8 |
| Total                              | 3.8                                  | 11.7                                                    | 14.7                                  | 21.6             | 9     | 61    |

### Table E.1Rate of accepted mental stress claims by industrya2007-08p

**p** preliminary data. **np** are cells with fewer than 5 claims where information has been suppressed and hence not provided. As a result of suppression of some cells totals do not sum to 100 per cent in some jurisdictions. Total also includes a small number claims for attempted suicide. <sup>a</sup> Rates per 100 000 employees.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

#### Gender and occupational breakdown of people lodging mental stress claims

Women accounted for: almost two thirds of the accepted harassment claims made in 2003-04 and 2004-05 combined, 60 per cent of work pressure claims, close to 60 per cent of accepted claims related to exposure to workplace or occupational violence and 40 per cent of claims for exposure to traumatic events (ASCC 2007c).
For women, the highest frequency rate of workers' compensation mental stress claims were recorded (in order of highest frequency) by nurse managers, police officers, welfare associate professionals, social workers, welfare and community officers and various types of teachers (special education, vocational education and secondary school). For men, among the highest frequency rate of workers' compensation mental stress claims were train drivers and assistants, prison officers, police officers, welfare associate professionals and teachers (primary and secondary school) (ASCC 2007c, p. 74).

People in these occupation groups are more likely to work in industries such as Health and community services, Education and Government administration and defence as shown in table E.1). These findings are consistent with the Community and Public Sector Union's (CPSU) comment that psychosocial hazards are more prevalent in the occupations of child protection, corrective services, probation and parole/community corrections; public housing and the sheriff's office (sub. DR19).

## Trends in rate of claims for work pressure

The rate of accepted claims due to work pressure have declined markedly in the five years to 2007-08 in jurisdictions such as the Commonwealth, Victoria, Queensland, South Australia, the Northern Territory and the ACT Government (table E.2).

|         | 2003-04 to 2007-08p |      |      |      |      |      |      |      |              |             |      |
|---------|---------------------|------|------|------|------|------|------|------|--------------|-------------|------|
|         | Cwlth               | NSW  | Vic  | Qld  | SA   | WA   | Tas  | NT   | ACT<br>priv. | ACT<br>Govt | Aus  |
| 2002-03 | 71.3                | 25.5 | 32.3 | 46.7 | 48.5 | 13.9 | 70.8 | 33.2 | 10.6         | 207.8       | 34   |
| 2003-04 | 89.1                | 36.1 | 29.5 | 39.6 | 49.5 | 17.8 | 69.3 | 33.4 | 22           | 195.1       | 36.7 |
| 2004-05 | 79.6                | 36.9 | 27.5 | 34.9 | 43.7 | 16.6 | 63.3 | 38.1 | 14.5         | 102.7       | 34.3 |
| 2005-06 | 67.8                | 26.4 | 26.9 | 28.2 | 42   | 13.2 | 73.9 | 31.9 | 6.9          | 146.5       | 29   |
| 2006-07 | 54.7                | 26.4 | 22.9 | 23.4 | 46.1 | 14.6 | 76.3 | 16.9 | 4.1          | 122.7       | 26.9 |
| 2007-08 | 22.1                | 22.4 | 18.2 | 21.1 | 29.1 | 11.8 | 76.2 | 15   | 11.9         | 103.7       | 21.6 |

## Table E.2Trends in rate of accepted claims for work pressure by<br/>jurisdiction<sup>a</sup>

p preliminary data. <sup>a</sup> Rates per 100 000 employees.

Source: Data provided by Safe Work Australia with permission from state and territory governments.

Claims for work pressure include claims for disorders from work responsibilities and workloads along with claims for interpersonal conflicts and workplace performance or promotion issues. Claims for disorders from work responsibilities and workloads are close to jurisdictional definitions of factors which contribute to fatigue. However claims for interpersonal conflicts and workplace performance or promotion issues are beyond jurisdictional definitions of psychosocial hazards. Tasmania was the only jurisdiction to experience an increase in the rate of claims due to work pressure over this period. Despite these falls, claims due to work pressure account for a large proportion of claims for mental stress claims in many jurisdictions (see table 11.3 in Chapter 11). The ACT Government and Tasmania recorded the highest rates of claims for work pressure in 2007-08 (table E.2).

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