

Business SA

*Performance Benchmarking of  
Australian Business Regulation:  
Occupational Health & Safety  
Submission to Productivity  
Commission*

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Australian Business Regulation: *Occupational Health & Safety*

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**Business SA's submission | Performance Benchmarking of  
Australian Business Regulation: *Occupational Health & Safety*****Introduction****Business SA**

The South Australian Employers' Chamber of Commerce and Industry, trading as Business SA, is the State's leading business organisation and represents approximately 5,000 businesses through direct membership and affiliated industry and association groups.

Business SA is a registered association of employers under the South Australian Industrial and Employee Relations Act 1994 and recognised under that and other legislation as South Australia's peak business and employer group.

**Business SA's submission**

In developing this submission, Business SA has drawn significantly on South Australian experience as evidence to support the information and recommendations presented.

Business SA has made a number of submissions to both National and South Australian government bodies with respect to changes or reform of Occupational Health and Safety regulations. The points presented below have been drawn from these submissions.

Business SA's submission is divided into two parts.

The first part outlines the role of OHS regulators and what is required from OHS Regulations.

The second part presents the current problems associated with OHS regulations, particularly in South Australia.

**Consultation**

In developing this submission Business SA has drawn upon consultation and interaction with its members and other South Australian based employer associations over many years.

## Part 1

### **The Role of Regulators**

Just as workplace safety matters, so does the quality of workplace regulation and its framework. Poor regulation or bureaucratic frameworks set by governments, parliaments or regulators can hinder, not help, the delivery of safe workplace outcomes.

Industry is seeking to improve the quality and structure of OHS regulation, not to seek the removal of sensible regulation in areas where it is needed.

The capacity of industry to deliver on its commitment to safety relies, in part, on the financial and productive cost of installing and maintaining all the elements of safe systems of work which are sustainable in a competitive, commercial environment.

Put simply, delivering safety, including the legislative and regulatory framework, must be realistic, affordable and, for the scale and nature of resources available to different businesses and employees, able to be designed and implemented in a practical manner. To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and effective human resource practices.

The role of governments and regulators is to focus on what is reasonable, practical and achievable, and to make the right interventions if and when they are needed. This means a framework that facilitates 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.

Regulators also have an important role as information providers, in conjunction with business and employer organisations.

### **What is required from OHS Regulation?**

Regulation, including OHS regulation, should not be an end in itself. Regulation can establish rights and obligations. It can act to educate, to change behaviour, to deter and, in some cases, to punish.

Regulation must be a step to a broader end objective. To justify regulating activity between private individuals and private business, strong underlying public interest considerations must exist. Whilst the prevention of workplace injury and fatality is obviously in the public interest, regulatory objectives can be achieved in many different ways.

The emphasis of regulatory frameworks must involve encouraging the development of this culture of mutual responsibility in the workplace, and open and active communication.

An effective OHS regulatory framework will, over time, help improve OHS awareness and behaviour. The principal focus needs to be outcome oriented – by encouraging safe design of workplaces, plant and equipment in the first instance, and then by due diligence; effective risk management and injury prevention. Scope must exist for enterprises and their employees to establish business specific commitments and approaches.

To be effective, OHS regulation must focus on injury prevention and the practical and achievable management of foreseeable risks. The concept of reasonableness that underpins so much of our law and the notion of 'a fair go' has traditionally applied to the regulation of workplace safety. This requires the application of a statutory, general OHS 'duty of care' pitched at:

- > reasonable care;
- > identification of foreseeable hazards; and
- > implementation of reasonably practicable measures to eliminate/control hazards/risks.

These are not novel propositions, nor outside of well established international approaches.

The regulatory framework must recognise that, in the real world, no matter how committed employers and employees are to workplace safety or the level of resources that are directed to occupational health and safety, neither an employer nor an employee can predict or control every activity or event around them. It cannot mandate that employers guarantee safety; the standard set should be the requirement to take all reasonable steps to prevent the foreseeable risk of injury.

Obligations, where specified, should be clearly defined and allow defences based on the development of practical and effective safety systems. Unless legal duties are realistic and fair in their application, the regulatory system becomes unworkable.

Regulation should also recognise the differing capacities of employers. Improvements in occupational health and safety performance must be underpinned by recognition of the needs for differing interpretation and implementation of standards, codes of practice and guidance materials by a variety of different sizes and levels of sophistication of OHS systems in enterprises.

There are well established principles, endorsed by the Council of Australian Governments (COAG) and the Commonwealth Office of Regulation Review (ORR), that provide guidance to policy makers and regulators on the nature of regulatory systems, where regulation is necessary.

The Office of Regulatory Review's checklist for assessing regulatory quality covers the design, implementation and enforcement of regulation. According to the checklist, regulation should be:

- > the minimum necessary to achieve objectives
- > not unduly prescriptive
- > integrated and consistent with other laws
- > designed to minimise the compliance burden imposed
- > accessible, transparent and accountable
- > communicated effectively
- > enforceable.

Industry welcomes and adopts this approach – and commends it to policy makers in OHS.

Proposals for legislative change should be accompanied by a Regulatory Impact Statement (RIS) which supports the proposition that the OHS&W benefits justify the costs that will be incurred by industry in the implementation of the proposed new rights or obligations.

OHS legislation also needs to be assessed in terms of its conflicting demands and impact on an organisation's compliance with the requirements of other statutes, notably employment protection, disability, privacy and discrimination regulation. Organisations should not be subject to a multiplicity of conflicting and competing demands. For example, OHS law cannot logically compel every reasonable step be taken by management to eliminate risks to OHS when privacy and discrimination law increasingly impose limits on the capacity of employers to know the OHS risks that employees may present to each other.

In the case of small and medium sized companies, approaches will differ. Some businesses with a high level of resource will be able to develop in-house safety systems, while smaller under resourced enterprises will use industry guidance materials developed through tri-partite consultation. These can be more detailed and provide information on 'what to do' and 'how to do it' in order to comply with relevant legislation.

## Part 2

### Problems with OHS&W Regulation

There are significant problems with regulatory design and administration of occupational health and safety in South Australia, and indeed Australia.

Over the past decade, qualitative and quantitative research and surveys of Australian business have identified occupational health and safety compliance as a critical issue for industry. While this is welcome in that it reflects a heightened awareness and commitment to OHS outcomes, it also reveals that the compliance and red tape burdens arising from OHS regulation is assuming a high level of concern that needs to be tackled by governments and regulators.

While some current regulation and the way it is interpreted and implemented is well intended, it is counterproductive rather than being a formula for improved OHS performance.

The major problems identified by employers are:

#### 1) The quantity of regulation, codes of practice and guidelines

*“Impossible to comply!”*

South Australia's OHS&W legislation is frequently represented as a pyramid.

*The peak of the pyramid is the OHS&W Act.*

The Act describes how to provide health and safety in South Australian workplaces. It outlines the general duty of care for all workplace parties. This includes:

- > employers
- > employees (and their representatives)
- > self-employed
- > designers
- > occupiers of buildings
- > owners of buildings used as workplaces
- > owners of plant
- > other people
- > manufacturers and suppliers of machinery.

*The second level of the pyramid is the Regulations.*

The OHS&W Regulations of 1995 are made under the Act and set out the general principles, providing the practical steps which should be followed in order to prevent

injuries and illness at work. The regulations should be read in conjunction with the Act. Everything in the regulations must be followed.

*The third level of the pyramid is the Approved Codes of Practice.*

These provide practical guidance on how to comply with the legal requirements. They must be followed unless there is another solution that is equal to or better than that in the Code.

*The fourth level is the Australian Standards.*

Australian Standards (AS) have been developed to provide minimal levels of performance or quality for a specific hazard, work process or product.

If an AS is mentioned in a regulation, it becomes part of the regulation and must be followed. If an AS is listed in the notes at the end of a Division of the regulations then it is an Approved Code of Practice and must be followed.

All other AS should be considered as general information which are available to provide assistance in meeting OHS&W obligations. These can be used as evidence in a prosecution.

*The bottom level is Guidelines and Other Information.*

Information sheets and guidelines are available on a number of topics to provide assistance in meeting the requirements of regulation or the general duty of care. These can also be used as evidence in a prosecution.





The above picture illustrates the volume of material that every employer, whether small, medium or large must comply with. The cost of purchasing this material can be excessive.

A comprehensive detailed legislative compliance audit (based on the above range of material) 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 legislation.

It is evident that alternatives to regulation or black letter law have not been properly assessed.

## **2) Red Tape: The compliance and red tape burden of regulation**

Today's businesses face a myriad of regulations from all levels of government, with the Australian Chamber of Commerce and Industry estimating regulation and compliance costs Australia \$86 billion a year – or 10 % of gross domestic product.

While many regulations are reasonable and should continue to govern aspects of the way that businesses operate, it is essential that the all governments review overall levels of regulation to identify areas where surplus, overlapping or outdated regulation exists.

Failure to do so restricts growth and reduces Australia's competitiveness both nationally and internationally.

When regulations are easy to follow more people follow them.

## **3) Record keeping**

The majority of South Australia's OHS&W 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.

A cursory review of the OHS&W regulations reveal the following record-keeping and documentation requirements that small business must comply with:

- > OHS Policy Statement
- > Policies and procedures for all OHS&W matters at the workplace
- > Certificates of Competency
- > Registration of defined plant and payment of appropriate fee
- > Risk Assessments:
  - § all manual handling tasks assessed
  - § all hazardous substances assessed
  - § all plant assessed
- > Workplace injuries (first aid)
- > RCD test records
- > Workplace inspections
- > Plant pre-use checks
- > Plant Register
- > Hazardous Substance Register (Material Safety Data Sheets)
- > Hazard Report Forms
- > Consultation
- > Standard Operating Procedures
- > Electrical testing and tagging
- > Residual Current Devices – and testing
- > First Aid – maintained
- > Personal Protective Equipment – provided and maintained
- > Training Records (indicative list only)
  - § Responsible Officer appointed and trained
  - § OH & S Policy signed and known by all staff
  - § Consultative systems in place and all staff included in systems
  - § All staff trained in manual handling in the last two years
  - § All staff trained in standard operating procedures
  - § All staff trained in emergency evacuation system in last 12 months
  - § Employee induction
  - § Manual handling
  - § Hazardous Substances
  - § Responsible officers (and depending on the size of the organisation – managers, supervisors)
  - § Fire and Evacuation
  - § First Aid training (and re-training)
  - § Standard Operating Procedures
  - § Forklift operator and other specialized equipment training.
- > Documentation
  - § Have copies available of OHS&W Act, Regulations and possibly Approved Codes of Practice, Australian Standards and Guidelines
- > Registration with WorkCover.

Any changes to the OHS legislation, systems or structures must reduce the burden of record keeping (particularly for small business) and ensure that the focus of OHS&W activity is on prevention and not the maintenance of records.

#### 4) The quality of regulation

The quality of regulation has become a major concern. Concerns have arisen that regulations are often expressed in complex and legalistic terms and do not allow for adequate defences where conduct has been reasonable.

In addition, regulation fails to account for particular circumstances of small and medium businesses.

Also of concern is that regulations are frequently developed and implemented without proper cost or economic impact assessments. All regulations must be subject to full regulatory impact assessments.

In developing and implementing regulations, it must be mandatory that there is an effective communication strategy to ensure that industry is aware of the new regulation requirement. Feedback from employers is that too often requirements are changed without a significant, appropriate and effective consultation or communication strategy.

The major problems identified by employers with regard to quality of regulations are:

- > additions and amendments to regulation are ad hoc, with inadequate industry consultation
- > regulation is introduced without testing its efficacy
- > regulation, once introduced, is not properly reviewed
- > the practical impossibility for many businesses of keeping pace with often obscure changes in scientific, technical, medical or attitudinal data affecting what they do and the way they work.

## 5) Performance or Prescriptive based Regulations

The legislative design adopted in most Australian systems is known as 'performance based' legislation. It is a model where a primary statute exists which imposes general and specific duties on employers, employees and some third parties. The primary duty is the duty of care. In theory at least, this model does not specifically direct employers and employees on how they should meet their duty of care, but requires management in each workplace to undertake active prevention activities and hazard management in consultation with employees.

Prescriptive regulations that mandate specific actions and requirements should only be used where it is evident that the mandated requirement is indeed the only way in which safety can be ensured.

Too frequently prescriptive regulations (coupled with an excessive reliance on Australian Standards) are utilised through South Australia's regulatory framework.

All regulations must be reviewed to ensure that wherever possible, performance based regulations are implemented. It is only through this approach that the regulations continue to be relevant in a changing workplace environment.

## 6) General regulations – not industry sector specific

South Australia's regulatory framework is based on the concept of general regulations which are applicable to all workplaces. Where there are unique hazards and risks at identified workplaces, regulations for these unique hazards and risks are presented in section 5 of the Regulations. Business SA does not support any attempt to go 'back to the future' by developing regulations for specific industry sectors.

## 7) Excessive duplication

Duplication between the OHS&W Act and the Regulations should be removed. This will assist in reducing the apparent volume of the Regulations and ensure a focus on workplace hazards and risks.

**8) Distortion by Other Agendas: The undermining of objectives in OHS regulation by non OHS laws**

Beyond specific statutory occupational health and safety systems, other laws also impact on the rights and obligations of employers and employees. Workers compensation laws impose duties associated with the management and compensation of injuries.

Employment and workplace relations law also adds to rights and obligations, whether through binding workplace agreements made during enterprise or industry bargaining, or through orders and decisions of industrial tribunals in industry-wide or company specific awards.

Other laws that bind employers can also affect occupational health and safety policy – but not always in a consistent manner. For example, some laws limit the capacity of employers to control conduct in their businesses or take action against employees or other parties that put the health and safety of others at risk, such as unfair dismissal laws, privacy laws and some discrimination laws.

The increasingly absolute interpretation of the employer duty of care necessarily requires employers to have full control over the conduct of all staff, contractors and third parties on or within their business.

Employment law, discrimination law and privacy law is increasingly encroaching upon, and denying employers, that right of control. Laws which prevent employers from dismissing or disciplining staff for OHS breaches or inadequate attention to safe work practices, and laws or guidelines that shield employees from employer scrutiny under the guise of privacy (such as property searches, information technology control, or drug and alcohol testing in appropriate circumstances) are counterproductive and contrary to OHS objectives.

These regulatory problems are manifested in a variety of ways.

First and foremost, they can make the regulatory system unworkable, unbalanced or unfair. If confidence in the OHS framework is undermined, the capacity to use the framework as a basis for delivering prevention and compliance is eroded, especially within smaller and medium businesses.

Secondly, they can distort incentives among people in the workplace to achieve safer workplaces by requiring a focus on process rather than outcomes. Process driven compliance activities and associated red-tape, bureaucracy and reporting obligations absorb time, cost and resources that deflect the attention of business owners, managers

and employees away from active outcome-based prevention programs and raising of awareness.

An example of the problem of OHS regulation being distorted by other agendas is with respect to trade union right of entry into some workplaces. While properly accredited trade union officials can, in a representative role of union members, constructively contribute to dialogue and awareness raising of OHS issues, it is important that trade unions do not use the cover of OHS right of entry to pursue industrial relations agendas. The culture of joint responsibility for improving OHS referred to in Business SA's *A blueprint for South Australia's future*<sup>1</sup> does not exclude trade union officials exercising a representative role of union members. Union officials whose right of entry permits have been withdrawn under general industrial laws as a consequence of inappropriate conduct should not be allowed to use OHS laws as a back-door means of securing entry.

#### **Summary**

Whilst ensuring that there is no reduction or compromise in the standards for legitimate safety concerns, consideration must be given to opportunities which:

- > address the principles outlined above
- > promote national consistency
- > improve regulations via streamlining or consolidation
- > make better use of guidance material to support regulatory requirements.

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<sup>1</sup> A blueprint for South Australia's future, Business SA, 2006