



ACCI SUBMISSION

Productivity Commission Issues Paper:
Performance Benchmarking of
Australian Business Regulation:
Occupational Health & Safety

May 2009



ACCI – Leading Australian Business

The Australian Chamber of Commerce and Industry (ACCI) has been the peak council of Australian business associations for more than 100 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.
- Business representation on a range of statutory and business boards, committees and other fora.
- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Safe Work Australia Council, International Labour Organisation, International Organisation of Employers, International

Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.

- Research and policy development on issues concerning Australian business.
- The publication of leading business surveys and other information products.
- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

ACCI and OHS

On OHS issues, ACCI also consults with a wide range of peak employer bodies which are members of ACCI or are members of the ACCI employers' network through the National Employers' OHS Consultative Forum (NEOHSCF).

A full list of ACCI members is available on our website at www.acci.asn.au.

As the peak national employer business organisation, ACCI represents industry on the Safe Work Australia Council and its predecessor bodies. As a member of the Safe Work Australia Council, ACCI is also involved in the tripartite technical groups that involve workers' compensation matters and the review and developments of regulations, OHS Standards and Codes of Practice.

ACCI is also a signatory to the government's National OHS Strategy which supports a nationally consistent OHS framework. A nationally consistent approach is essential for employers and employees.

ACCI takes a leading role in OHS and workers' compensation, representing views of Australian business to government, ensuring that the voice of Australian business is heard. Some of our specific activities include:

- Representation and advocacy to government, parliaments and policy makers both domestically and internationally;
- Representing business on OHS and workers' compensation matters in national and international fora such as the Safe Work Australia Council and the International Labour Organisation; and
- Research and policy development on key issues for Australian business.

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1 Introduction

1. The Australian Chamber of Commerce and Industry (ACCI) welcome the opportunity to make a submission to the Productivity Commission in response to their Issues Paper *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*.
2. Over the past several decades, compliance with Occupational Health and Safety (OHS) regulations has consistently rated high amongst industry's concerns and is frequently cited as a factor inhibiting business.
3. Medium and large sized private sector employers that operate in multiple states or territories currently have to navigate a plethora of OHS legislation and regulations across nine separate OHS jurisdictions, with the inconsistencies across jurisdictions adding significantly to the cost of doing business.
4. Small business owners grapple with OHS regulation that is unnecessarily complex and therefore they expend substantial resources to understand and comply with regulation and keep abreast of frequent and ad hoc regulatory changes.
5. ACCI supports sensible, practicable and reasonable OHS regulation that adequately recognises the differing capabilities of various employers, especially small and medium size businesses.
6. However, Australian workplaces are over-regulated and there are multiple problems with current OHS regulation, which will be expanded upon in this submission, including:
 - Poor quality;
 - Excessive quantity;
 - Regulatory change occurring too frequently;
 - Unnecessary red tape;
 - Little national consistency;
 - Inconsistent interpretation by regulators; and
 - Unbalanced prosecution-oriented enforcement.
7. Poor quality or excessive OHS regulation serves only to tie up valuable business time and resources that could be better expended on the implementation of policies, procedures and improvements that ultimately lead to the provision of a safe work place.
8. Safer workplaces are primarily driven by the development of a safety culture and safe work attitudes at all levels of an organisation, leading to a

- commitment to incident prevention, risk assessment and risk management. Regulation does not drive such commitment.
9. In April 2005 ACCI developed a blueprint for OHS reform, *Modern Workplace: Safer Workplace 2005-2015*.¹
 10. The vision articulated in the blueprint is of a nationally consistent framework of OHS regulation which leads to reducing rates of workplace death and injury and which embodies best practice principles of regulation.
 11. The principles advanced by ACCI for best practice regulation are reasonableness, practicality, balance, mutuality, independence and consistency.
 12. These are aligned with the *COAG Principles of Best Practice Regulation* which include:
 - Establishing a case for action before addressing a problem;
 - A range of feasible policy options must be considered (including non-regulatory approaches);
 - Ensuring that regulation remains relevant and effective over time;
 - Consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and
 - Government action should be effective and proportional to the issue being addressed.²
 13. Governments and regulators would achieve greater levels of compliance with OHS legislation and regulations and better safety outcomes, if they invested in conjunction with business organisations, more directly in information, assistance, advice, education and training.
 14. The current process of national harmonisation of OHS legislation and regulation has the potential to reduce the overlap and inconsistency of OHS regulation across jurisdictions, and therefore potentially lessen the OHS compliance burden for employers.
 15. However, the quality of the legislation and regulation and the approach to its enforcement will be critical determinants as to whether those gains are in fact realised in practice.

¹ Australian Chamber of Commerce and Industry, 2005 *Modern Workplace: Safer Workplace An Australian Industry Blueprint for Improving Occupational Health and Safety 2005-2015*, Melbourne

² *COAG Requirements*, Department of Finance and Deregulation, <http://www.finance.gov.au/obpr/proposal/coag-requirements.html#coag>

16. Without a fundamental shift in the approach to OHS regulation in Australia it is foreseeable that any reduction in OHS compliance burden as a result of national harmonisation could be quickly eroded as the overall stock of regulation continues to grow unabated, in the absence of effective mechanisms and the collective will to regularly review regulation and eliminate regulation that does not facilitate tangible safety outcomes.

2 Issues About which the Productivity Commission is Seeking Comment

17. Provided below are ACCI's views on the sixteen issues raised by the Productivity Commission in their Issues Paper.

2.1 Issue 1

Has OHS regulation and/or its burden changed significantly prior to or since 30 June 2008? If so, please provide details of the changes you have observed.

18. Until around the 1970s each Australian state had an OHS statute adopting the British model of OHS regulation, a prescriptive approach that relied upon detailed specification standards.³
19. In 1972 the British Committee on Safety and Health at Work, chaired by Lord Robens, examined the British OHS legislation as a whole and described its weaknesses as having too much law, an over-reliance on external state regulation leading to workplace apathy, a focus solely on physical hazards, and fragmentation of administrative jurisdictions.⁴
20. The Robens Report advocated a new approach to OH&S that relied upon greater self-regulation by employers:
- “The most fundamental conclusion to which our investigations have led us is this. There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system”.⁵
21. Australian Parliaments progressively, and to varying degrees, adopted a Robens style approach to OHS legislation, which involved replacing multiple health and safety statutes with a principal act in each jurisdiction, converting subordinate legislation to mandate the broad outcomes required rather than prescribe how they were to be achieved, and utilising voluntary standards or codes of practice to legislation.⁶
22. As a result of the above reforms, Australia currently has nine OHS jurisdictions which give rise to ten specific OHS statutes and over 50 other legislative instruments applying to offshore petroleum, mining, construction, public health, public safety and statutes relating to

³ *About Occupational Health and Safety Regulation in Australia* 2009, National Research Centre for OHS Regulation, viewed 5 May 2009, <http://ohs.anu.edu.au/ohs/index.php>

⁴ Johnstone, R 2004, *Occupational Health and Safety Law and Policy*, 2nd edition, Lawbook Co, Sydney, p.63

⁵ Lord Robens, *Report of the Committee on Safety and Health at Work*, HMSO, London, 1972, paragraph 41

⁶ Industry Commission, 1995 *An Inquiry into Occupational Health and Safety* Volume 1, Industry Commission, Canberra, p.39-40

- explosives, transport of dangerous goods, radioactive materials and many more.⁷
23. A count of a list of OHS regulation across all jurisdictions, published in the *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, reveals that, in addition to prolific OHS legislation there are also 16 principal OHS regulations, 65 other relevant OHS regulations, and 264 approved codes of practice across Australia.⁸
 24. Despite the promise of better workplace safety outcomes and a more self-regulated OHS system with a reduced OHS compliance burden for employers, by the mid 1990s both the British and Australian Governments commissioned extensive workplace health and safety reviews amid signs that the intended reform benefits had not been realised.
 25. In 1994 the British Health and Safety Commission reviewed British OHS laws in order to recommend ways of making the legislation clearer, simpler and more effective, without lowering OHS standards, and found:
“... wide spread support for supporting the overall architecture of regulation suggested by the Robens Committee but indicated that the British legislation was still overly complex, fragmented and voluminous”.⁹
 26. In its 1995 report on Health and Safety at Work, Australia’s Industry Commission gave a mixed report card to Robens style reforms, reporting that in the post-Robens period “over 150 Acts or regulations (or part thereof) have been repealed but more than 60 new Acts and regulations have been introduced” in the same period.¹⁰
 27. Further more, in its submission to the Industry Commission’s 1995 report, ACCI stated:
“While the principal acts have been amended to incorporate the Robens-style approach, Australia is still largely operating under a prescriptive regime in the subordinate legislation”.¹¹
 28. So while the initial Robens style legislative reforms did appear to provide some reduction in the OHS compliance burden for employers, primarily in

⁷ Australian Government, 2008, *National Review into Model Occupational Health and Safety Laws: First Report*, Australian Government, Canberra, p.2

⁸ Workplace Relations Ministers’ Council, 2008 *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand 5th Edition*, Department of Education, Employment and Workplace Relations, Canberra, p.70-90

⁹ Johnstone, R 2004, *Occupational Health and Safety Law and Policy*, 2nd edition, Lawbook Co, Sydney, p.74

¹⁰ Industry Commission, 1995 *An Inquiry into Occupational Health and Safety Volume 1*, Industry Commission, Canberra, p.40

¹¹ Australian Chamber of Commerce and Industry, 1995, *Submission to Industry Commission Report on Health and Safety at Work*, Melbourne, p.28

- the 1980s, the stock and complexity of OHS burden has grown incrementally over time, exacerbated by a lack of consistency in legislation and regulation across jurisdictions.
29. This fragmented, piecemeal and incremental approach to building up OHS regulation has cost industry significantly both in explicit, implicit and opportunity costs.
 30. The Industry Commission described the problem as follows:

“Workplace health and safety agencies are imposing regulation without adequate understanding of the costs of that regulation. Requirements imposed on industry could cost millions of dollars annually. These resources could have been spent on new products and created employment for Australians”.¹²
 31. Two key proposals from the Industry Commission’s 1995 report were to:
 - “Streamline but strengthen regulation using fewer legislative rules, in less detail, which focus on the minimum level of protection to be provided;
 - Allow greater flexibility for employers and their employees to determine the ways to make their workplace safer”.¹³
 32. There is little evidence to suggest that either proposal was implemented in a substantive way by any of the jurisdictions.
 33. In 2004, the Productivity Commission in its *Inquiry Report on National Workers’ Compensation and Occupational Health and Safety Frameworks* found:

“The compliance burdens and costs imposed by multiple regimes, regulations, administration and enforcement, compounded by regular amendment, are a feature of OHS across the jurisdictions”.¹⁴
 34. So while Robens advocated achieving better OHS outcomes through one principal act and a reduction in regulation underpinned by codes of practice and guidance material, the philosophy has not translated into practice in any of Australia’s OHS jurisdictions.
 35. ACCI asserts that a key issue for employers regarding the OHS regulatory burden is the overall stock of regulations and the gradual incremental increase in that stock over time, and that examining only the incremental

¹² Industry Commission, 1995 *An Inquiry into Occupational Health and Safety* Volume 2, Industry Commission, Canberra, p.167

¹³ Industry Commission, 1995 *An Inquiry into Occupational Health and Safety* Volume 1, Industry Commission, Canberra, p. xxxiii

¹⁴ Productivity Commission, 2004 *Productivity Commission Inquiry Report: National Workers’ Compensation and Occupational Health and Safety Frameworks*, Productivity Commission, Canberra, p.xxvii

increase in burden over the past few years while ignoring the stock of regulations would paint a misleading picture.

36. The most recent qualitative data regarding OHS regulation collected by ACCI was in a September 2007 Pre-Election Survey of ACCI members. In response to the question “Please indicate your present level of concern regarding compliance with health and safety laws” some 21.1% of respondents indicated they had major concerns, 33.1% had moderate concerns, 34.5% had minor concerns while the remaining 11.4% had no concern.¹⁵
37. Therefore, in 2007 some 54.2% of all ACCI members had either major or moderate concerns regarding compliance with health and safety laws, and while qualitative in nature only, the survey results provide an insight into the level of concerns that a large proportion of employers have with respect to OHS regulation.
38. Similarly, ACCI member Australian Business Limited (now the NSW Business Chamber) conducted a survey in 2005 and found that two in five businesses believed the current OHS regulations either do not work or hinder their business performance.¹⁶
39. In October 2005 the Prime Minister and the Treasurer announced the establishment of a Regulation Taskforce, to be chaired by Gary Banks, with the brief to identify actions to address areas of Australian Government regulation that are unnecessarily burdensome, complex, redundant, or duplicate regulations in other jurisdictions.¹⁷
40. The Banks Report found that in relation to OHS regulation, “deficiencies in the way they have been implemented and are administered emerged as a common theme in a wide range of submissions to the Taskforce”¹⁸.
41. It is very difficult for employers to quantify the overall OHS regulatory burden given that no official statistics are collected on this matter.
42. Back in 1995 the Industry Commission highlighted the importance of the collection of such data:

“Therefore, from an economy-wide perspective it is important to determine the impact of workplace health and safety regulations on the

¹⁵ Australian Chamber of Commerce and Industry, 2007 *2007 Pre-Election Surveys No. 3*, Melbourne, p. 3

¹⁶ Australian Business Limited, 2006, *NSW Regulation Review to the Independent Pricing and Regulatory Tribunal of New South Wales*, Sydney, p.6

¹⁷ Productivity Commission, 2006, *Rethinking Regulation: Report of the Taskforce on reducing Regulatory Burdens on Business*, Canberra, p. i

¹⁸ See page 36 of the report

economy. To undertake this task, accurate compliance cost data is required”.¹⁹

43. However, no such data has been collected, leaving a substantial data gap for OHS policy makers and legislators, whom should be taking an evidenced based approach when making decisions in their respective roles.
44. Collecting data about the OHS regulatory burden is a complex and difficult task, but one that would provide a net benefit to industry.
45. ACCI recommends that either the Productivity Commission or the Australian Bureau of Statistics design, develop and conduct a survey of employers to capture benchmark data regarding the OHS regulatory burden, to be conducted at intervals of no less than every three years.
46. It would be timely to collect such data prior to the implementation of harmonised OHS legislation and regulation so that baseline data are available to assist in measuring the OHS compliance burden impact of the reforms.

¹⁹ Industry Commission, 1995 *An Inquiry into Occupational Health and Safety* Volume 2, Industry Commission, Canberra, p.167

2.2 Issue 2

Which existing studies or sources of data do you consider suitable for use in this study?

47. As outlined in ACCI's response to Issue 1, there is a substantial data gap with respect to the size, scale and impact of Australia's OHS regulatory burden.
48. ACCI understands that in previous years the Australian Safety and Compensation Council (ASCC) was going to undertake some research in this area but that the work did not eventuate.
49. Statistically valid and reliable quantitative and qualitative data should be collected at regular intervals by government agencies to ensure that key policy makers and decision makers have data and evidence to draw upon when making key decisions or policies.
50. According to the COAG *Best Practice Regulation Guide*, regulators use draft Regulation Impact Statements (RIS) for consultation to "canvass the regulatory options under consideration, in order to determine the relative costs and benefits of those options".²⁰
51. One limitation of a RIS process is that it identifies costs associated with the proposed regulation only and does not take into account the existing stock of regulation and the associated regulatory compliance burden for employers.
52. Therefore, most regulatory compliance cost increases which are examined in isolation will be viewed by a regulator as acceptable, but meanwhile the total OHS employer compliance burden grows incrementally and unabated.
53. ACCI advocates that the entire OHS regulatory burden should be taken into account in any RIS process, not just the additional costs associated with the proposed regulation.

²⁰ Council of Australian Governments, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, 2007 http://www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf, p.7

2.3 Issue 3

Is there any other regulation related to OHS that should be covered in this benchmarking study? For example, should industry-specific statutes and regulations that cover OHS issues also be covered?

54. All OHS related statutes, regulations, standards and codes of practice should be within the scope of this study whether they are broad based or industry specific, as they each contribute to the overall OHS regulatory burden.

2.4 Issue 4

What OHS outcomes or indicators might best be used to explain differences in the effectiveness of OHS regulation between jurisdictions?

55. To answer the question of “What OHS outcomes or indicators might best be used to explain differences in the effectiveness of OHS regulations between jurisdictions?” one must first define “effectiveness of OHS regulation”.
56. ACCI asserts that if a jurisdiction were to have effective OHS regulation it would be characterised by low rates of injury and incidents, regulation that is reasonable, practicable and balanced, therefore imposing a reasonable OHS regulatory compliance burden, and a demonstrable proactive approach being taken to improving workplace OHS by all duty holders.
57. Many OHS initiatives and improvements to workplace OHS are driven by employers, management and employees independent of regulation and regulators, and therefore indicators such as injury rates and workers’ compensation premium rates are not in and of themselves evidence of an effective OHS regulatory approach.
58. Therefore the best approach to attempt to explain differences in the effectiveness of OHS regulation between jurisdictions would be a balanced scorecard approach.
59. Such a balanced scorecard could comprise the following three broad areas:
- Injury and incident rates;
 - The OHS business compliance burden; and
 - Proactive OHS measures
60. There is currently a wealth of injury and incident rate data readily available and disseminated in relation to area (a) above.

61. The OHS regulatory compliance burden survey proposed in response to Issue 1 could provide data for indicators relating to area (b) above.
62. Proactive OHS measures include those actions that contribute to the prevention of injuries from occurring rather than just managing the consequences once an incident has occurred.
63. Indicators of proactive OHS measures may include OHS training delivered (the type and amount), innovative safety solutions developed and implemented by industry, education campaigns conducted by regulators, and incorporation of safety into educational curricular (e.g. schools, tertiary education).
64. Regulation and its enforcement can lead to either positive or negative systemic differences in OHS outcomes. For example, the New South Wales regulatory and enforcement environment may result in employers having some shift in focus from managing for better safety outcomes to managing for litigation outcomes, compared with other jurisdictions.
65. ACCI encourages the Productivity Commission to further examine the link between regulation and differences in OHS outcomes across jurisdictions.
66. Another area that requires more detailed examination in the context of the Productivity Commission's review is that performance against the *National OHS Strategy 2002-2012* is behind target, with the interim target of a 20 percent reduction in injuries by June 2007 not being met, and current improvements in injury rates are insufficient to meet the long term target of a 40 percent improvement by June 2012²¹.
67. The insufficient improvement to injury rates over the past several years provides weight to the argument that regulation of OHS issues will provide improvements to OHS outcomes only to a certain extent, and beyond that point it is initiatives such as training, education and innovation driven by an organisation wide safety culture that will lead to the next step change in OHS injury rates.
68. Therefore the current OHS regulatory burden should be reviewed in the context that step improvements in OHS outcomes will come through developing a safety culture in each workplace rather than through additional regulation. Hence the effectiveness of existing regulation should be reviewed, and any regulation that does not improve safety outcomes should be modified or removed.

²¹ Safe Work Australia, *National OHS Strategy 2002-2012 Progress Against Targets*, <http://www.safeworkaustralia.gov.au/NR/rdonlyres/6F8CFF3D-DD46-4F19-83D5-7A066CED9C3D/0/NationalStrategyProgress200607.pdf>

2.5 Issue 5

Are differences between jurisdictions in average workers' compensation premiums a useful indicator of differences in regulatory outcomes?

69. Differences between jurisdictions in average workers' compensation premiums are generally not a useful indicator of differences in regulatory outcomes, for a number of reasons.
70. Firstly, the *Comparative Performance Monitoring Report* prepared for the Workplace Relations Ministers' Council outlines the many issues that affect the comparability of premium rates across jurisdictions/schemes such as differences in benefits and coverage for certain types of injuries and variations in funding arrangements.²²
71. While the availability of standardised average premium rates adjusts for some of the key differences (e.g. employer excess and journey claim coverage), other differences are not adjusted for which renders a like for like comparison of premium rates across jurisdictions very difficult.
72. Secondly, analysis of differences in standardised average premium rates between jurisdictions is uninformative due to the impact of compositional differences in each jurisdiction's workforce.
73. For example, the *Comparative Performance Monitoring Report's* analysis of standardised average premium rates by jurisdiction reveals that the Australian Government scheme recorded the lowest premium rate of all jurisdictions. This result most likely reflects the generally lower risk industry and occupation mix of employees insured in the Australian Government jurisdiction, rather than pointing to a superior OHS performance when compared with other jurisdictions.
74. Thirdly, average premium rates are influenced by the type of workers' compensation fund, how well that fund is managed and the current financial position of the fund.
75. Employers in jurisdictions where the scheme is in debt or poorly administered will generally pay higher premiums than their interstate counterparts and therefore the premium rate will not necessarily be indicative of a jurisdiction's OHS regulatory performance.
76. Fourthly, even if there were data available for making valid comparisons of average premium rates across jurisdictions (and within specific industries across jurisdictions), it would be erroneous to draw conclusions

²² Workplace Relations Ministers' Council, 2008 *Comparative Performance Monitoring Report 10th Edition*, Department of Education, Employment and Workplace Relations, Canberra, p.38

- of a causal relationship between effective OHS regulation and reduced average workers' compensation premiums.
77. Many OHS initiatives and improvements to workplace OHS are driven by employers, management and employees independent of regulation, because it is a cost effective way to run a successful business and would be considered by most to be part of the moral obligation of all workplace parties.
 78. An interesting statistic to analyse in conjunction with jurisdictional differences in average workers' compensation premium rates would be the average cost of the OHS regulatory burden in each jurisdiction.
 79. It is possible that those jurisdictions with a lower average premium rate may still have high average OHS regulatory burden costs, masking the true OHS compliance cost burden.

2.6 Issue 6

In your experience, what are the OHS regulations that impose the most significant burden on your business? For these, what is the size and cost of this burden?

80. Whilst there are instances where specific OHS regulations impose a significant burden on an individual business, feedback from industry is that it is a combination of a range of problems with OHS regulation that leads to excessive burden.
81. These factors are outlined below.
82. **Quantity of regulation:** There are multiple sources of regulation on the same topics across multiple jurisdictions and while new regulation is consistently introduced, rarely is ineffective or obsolete regulation repealed.
83. **Quality of regulation:** Regulation is often expressed in complex and legalistic terms, is some times developed without proper cost or economic impact assessments, and once made is not accompanied by effective communication to industry.
84. **Frequency of change:** Regulation once introduced is not usually properly or regularly reviewed, additions and amendments are often ad hoc and it is difficult for employers to keep up with the volume of new regulation, plus there is an explicit cost for employers to obtain the information.
85. **Red tape:** The growing stock and complexity of regulation creates excessive red tape including form filling, written reporting and data

- collection, with the result being that the OHS focus shifts to compliance activities at the cost of proactive new safety initiatives.
86. **Lack of national consistency:** There is currently a lack of consistency in OHS legislation and regulation across the jurisdictions, which adds substantially to the OHS regulatory burden for those businesses operating in more than one jurisdiction. The current process that is under way to harmonise OHS laws and regulations across jurisdictions will address this issue, although the quality and quantity of model legislation will be vitally important as it will substantially determine the regulatory burden for all Australian employers.
87. **Unbalanced enforcement:** 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.
88. Therefore, a holistic approach needs to be taken when looking at the problem of the OHS regulatory burden, rather than focusing only on specific regulations that are adding to business’ burden.

2.7 Issue 7

In conducting your business, do you face additional regulatory burdens because of differences in regulations between states and territories – if so, what are they?

89. That Australia has nine OHS jurisdictions giving rise to separate principal OHS acts, other OHS acts, principal OHS regulations, other OHS regulations and codes of practice, is a major source of OHS regulatory burden for those businesses operating in more than one jurisdiction.
90. This array of regulation is daunting for any employer seeking compliance guidelines in an effort to improve their OHS performance, even for large businesses.
91. The National OHS Strategy, to which the nine jurisdictions, the Australian Council of Trade Unions (ACTU) and ACCI are signatories, includes a ‘nationally consistent regulatory framework’ as one of nine areas requiring national action.²³

²³ National Occupational Health and Safety Commission, 2002 *National OHS Strategy 2002-2012*, Commonwealth of Australia, p. 10

92. More recently, in February 2006, the Council of Australian Governments (COAG) agreed to address six priority cross-jurisdictional 'hot spot' areas where overlapping and inconsistent regulatory regimes are impeding economic activity, one of which is occupational health and safety, and that process is currently under way.²⁴
93. In the 2004 review of Victoria's OHS Act, Chris Maxwell noted that under the current system of multiple OHS jurisdictions "the compliance cost for employers operating in more than one jurisdiction is inevitably greater".²⁵
94. 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.²⁶
95. 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.
96. This invariably reduces workplace productivity due to increased regulatory compliance costs, while delivering no additional safety benefits.
97. 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.

²⁴ Council of Australian Governments Meeting 10 February 2006

http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm

²⁵ Maxwell, C. 2004, *Occupational Health and Safety Act Review*, State of Victoria

²⁶ Productivity Commission, 2004 *Productivity Commission Inquiry Report: National Workers' Compensation and Occupational Health and Safety Frameworks*, Productivity Commission, Canberra, p. 17

2.8 Issue 8

Occupational health and safety regulation may have different impacts on businesses operating in the same industry. For example, certain regulation may impose greater relative costs on a small business compared with a large business. Where a regulation has different impacts on businesses operating in the same industry, please provide details of the specific regulation and the differing impacts it has on businesses.

98. According to the Council of Small Business of Australia (COSBOA), Australia has 1.88 million small businesses, representing over 95 percent of all businesses and employing almost half (47%) of Australia's workforce.²⁷
99. COSBOA statistics also show that approximately 35 percent of Australia's businesses operate in non-metropolitan areas and some 30 percent of business operators were born overseas, therefore rural or remote locations and language barriers add to the challenges that some small business owners face in dealing with complex OHS regulation.
100. Many small and medium sized businesses simply do not have adequate resources, expertise or assistance to comply with the sheer quantity and complexity of OHS regulation.
101. Small business operators find some OHS laws and regulations to be complex, bureaucratic, difficult to understand, and very difficult to implement effectively. In some cases they are not practically possible to deliver.
102. Whilst businesses with significant OHS skills and resources need to be allowed to apply appropriate common systems across the nation, the OHS system must also be crafted to the special needs of businesses with lower levels of OHS skills or resources.
103. To achieve improved OHS performance in the small and medium enterprise (SME) sector, initiatives must be developed which provide:
 - meaningful guidance materials;
 - a reduced level of regulation;
 - improved quality of regulation where it is needed;
 - targeted workplace assistance; and
 - face-to-face advice.
104. If regulators were to reduce unnecessary OHS regulation and red tape and provide higher quality and additional guidance material and specific

²⁷Council of Small Business of Australia, Statistics,
<http://www.cosboa.org/webs/cosboa/cosboaweb.nsf/2802af822bd6b039ca257186001416b2/Statistics>

advice to employers, it would facilitate improved compliance and workplace safety by removing some of the impediments that small businesses in particular face in providing a safe place of work.

105. ACCI's views on the issue of the OHS regulatory burden for small business is best summarised by recommendation 10 of its OHS Blueprint:

“Regulation must adequately recognise the differing capabilities of various employers, especially small and medium businesses. Given the growth of small business in Australia, examination should be made of:

- OHS regulatory frameworks that are more responsive to business realities in this sector, and
- A network of OHS business advisors focusing on small and medium businesses.”²⁸

2.9 Issue 9 & Issue 10

In your experience, what are the OHS codes of practice that impose the most significant burden on business? For these, what is the size and cost of this burden? and

How do codes of practice and other guidance material assist compliance with OHS regulations? Alternatively, do these codes hinder businesses choosing the most appropriate compliance strategy for their individual situations?

106. Generally it is not an offence in itself to contravene any code of practice, standard or guidance note however some of the Australian OHS statutes provide that once the prosecutor establishes a failure to comply with a relevant code, there is a rebuttable presumption that the general duty or relevant regulation has been contravened by the party who owes the duty.²⁹

107. It was noted in the 1972 Robens Report that:

“Non-statutory codes of practice and standards are more flexible (than statutory regulations). They are easier to introduce and revise. They are more progressive in that they need not be restricted to minimum standards, and they are less likely to inhibit new developments”.³⁰

108. So while in theory, codes of practices should be a means of providing employers with guidance for how they may meet their duty of care, in some jurisdictions they are in practice mandatory due to the standing they have in certain legislation.

²⁸ Australian Chamber of Commerce and Industry, 2005 *Modern Workplace: Safer Workplace An Australian Industry Blueprint for Improving Occupational Health and Safety*, Melbourne, p. 20

²⁹ Johnstone, R 2004, *Occupational Health and Safety Law and Policy*, 2nd edition, Lawbook Co, Sydney, p.323

³⁰ Lord Robens, *Report of the Committee on Safety and Health at Work*, HMSO, London, 1972, p.45

109. In 1995 the Industry Commission was critical of existing codes of practice made under Australian OHS statutes and said that there was “a need for OHS legislation to encourage actively the development and application of ... industry based codes of practice (which will) enable employers and their employees to choose their own process and technical measures”.³¹
110. ACCI supports a tiered approach to regulation and stresses that codes of practice must be developed via a genuinely consultative process involving industry.
111. This will help ensure that codes of practice serve to assist businesses to meet their regulatory compliance obligations, rather than serve to confuse business through poorly designed codes or codes that are too general.
112. If no jurisdictions were to have a rebuttable presumption that breach of a code is a breach of a relevant duty or regulation, then codes of practice, if developed with proper consultation, would provide useful and practical guidance for employers as to how they might meet their duty of care with respect to a specific OHS issue, while not limiting the option to devise other valid OHS solutions to the issue.
113. Unfortunately, codes of practice have lost their way. They are often too detailed and prescriptive, and as they currently exist in Australian OHS regulation they do not resemble the Robens vision for effective codes being progressive, flexible and non-restrictive.

2.10 Issue 11

How are codes of practice promoted and enforced?

114. Given that it is generally not an offence to contravene a code of practice, there is no related enforcement activity as such.
115. However in those jurisdictions where there is a rebuttable presumption that breach of a code is a breach of a relevant duty or regulation, there is de facto enforcement of the code via enforcement of the Act.
116. Approaches to enforcement differ from jurisdiction to jurisdiction, as does promotion of codes of practice.
117. Industry advocates that regulators should increase their resource allocation for proactive measures such as education and advice to duty holders and promotion of codes of practice, as a far more effective workplace safety lever than further enforcement.

³¹ Industry Commission, 1995 *An Inquiry into Occupational Health and Safety* Volume 1, Industry Commission, Canberra, p. xxxvi

2.11 Issue 12

What observations can you make about the frequency, thoroughness and efficiency of OHS inspections? Which aspects impact adversely on business?

118. Frequency, thoroughness and efficiency of OHS inspections vary within and across jurisdictions.
119. 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.
120. A proactive, strategic approach to inspections based upon the risk profile of an industry and the characteristics of businesses within that industry should be utilised in all jurisdictions, with businesses with higher OHS risk factors having a greater chance of a proactive inspection compared with a business with a lower risk profile.
121. The biggest impact on business is that of the actual inspector who conducts the inspection.
122. Inspectors have a difficult job to perform that requires extensive technical knowledge, in-depth understanding of legislation and regulation, analytical skills, excellent interpersonal and communication skills and the ability to discharge their duties in an independent and professional manner.
123. Inspectors are also much more effective in their role when they have a good level of knowledge of the industry in which the organisation being inspected operates and a genuine understanding of business practices.
124. Those businesses which are visited by an inspector who meets the above criteria generally report positively about their experience, while businesses inspected by an inspector lacking in some of those criteria often report negatively about the experience.
125. Negative experience with an inspector will invariably leave businesses with an unfavourable impression of the regulatory body and serves as a demotivator with respect to their efforts to ensure a safe and healthy workplace.
126. Regulators need to focus on recruiting high calibre people from a range of occupational backgrounds (i.e. not predominately people with trade union or law enforcement backgrounds) that meet the requirements of a contemporary inspector, and should be provided with comprehensive and on-going training and support to help them perform their duties consistently and effectively.

2.12 Issue 13

Is there a significant incidence of non-enforcement or partial enforcement of OHS regulations? Where does it occur? How does it affect safety outcomes?

127. ACCI is not aware of any incidence of partial or non-enforcement of OHS regulations. It would be inappropriate for regulators to be selective in their approach to enforcement.
128. Thus it is important that OHS legislation, regulations, standards and codes of practice are reviewed regularly to ensure that only relevant, practicable and nationally consistent regulation is in place that facilitates better OHS outcomes, while redundant, superfluous or poorly constructed regulation is repealed.

2.13 Issue 14 & 15

Do educative or punitive approaches to regulatory enforcement lead to changes in compliance costs faced by businesses? If so, how? and

In your experience, what are the interactions with regulators that impose the most significant burden on business? For these, what is the size and cost of this burden? Do these burdens vary by business size?

129. It is inevitable that any interaction with an OHS regulator will lead to increased compliance costs for a business, much in the same vein that an individual taxpayer who gets selected for an audit by the Australian Taxation Office will have a greater compliance burden relative to other similar taxpayers in that particular financial year.
130. Under an OHS regulatory regime some interaction with regulators is a necessity, however given the complexity and quantity of OHS regulation that must be complied with and in many cases a punitive rather than educative approach taken by regulators, OHS inspections do place a significant burden on those employers that are targeted.
131. The costs of an OHS inspection for an employer will typically include aspects such as a request for information prior to the inspector's arrival, staff time taken up during the inspection and time taken responding to requests for information or follow up activities post-inspection.
132. One way to minimise the compliance burden with respect to regulatory enforcement is for regulators to take, wherever possible, an educative approach rather than punitive approach.

133. Having inspectors work with industry to provide information and advice is a far more effective approach to improving OHS outcomes than a heavily punitive one.
134. Punitive approaches should be used for only the very small proportion of instances where an employer blatantly breaches their duty of care and refuses to take reasonable and practicable steps to address the relevant safety issue.
135. The vast majority of employers want to provide a safe and healthy workplace for their employees and an educative approach from regulators will further facilitate such an outcome.
136. The Banks Report viewed provision of compliance advice to businesses as a key initiative, as outlined in recommendation 4.29:

“COAG should direct the Australian Safety and Compensation Council to examine the capacity of occupational health and safety bodies to respond to direct requests from business for advice on compliance and provide options for removing any impediments”.³²
137. Small business, in particular, would benefit substantially from provision of advice on compliance, and benefits would also be realised in the form of reduced workplace injury rates.

³² Productivity Commission, 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Canberra, p. 39

2.14 Issue 16

What are your 10 top burdens in order of their impact? These can include responses already made to issues highlighted earlier, as well as burdens not previously identified.

In forming your opinion of the regulations imposing the greatest cost, you should consider the ways regulatory requirements have resulted in:

- altering inputs to production
- altering production processes
- using a less preferred technology.

Participants should also consider the ways regulatory requirements have resulted in:

- alterations to the characteristics of the goods or services they produce
- cessation of the production of goods or services
- missed opportunities to produce goods or services, for example, arising from regulatory constraints that prevent them from taking advantage of emerging opportunities such as technological change and new markets.

138. It is difficult to specify the top ten OHS regulatory burdens in order, as these vary across businesses, industries and jurisdictions and the burdens are somewhat interdependent. An indicative top ten list of burdens in no particular order are:

- The excessive quantity of regulation;
- The quality of regulation (complex and legalistic);
- Frequent changes to legislation;
- Ad hoc approaches to changing regulation, some times without proper industry consultation;
- The compliance and red tape burden (e.g. form filling, written reporting, duplication and overlap of regulation etc);
- Lack of national consistency;
- Inconsistent interpretation of regulation;
- Unbalanced enforcement;
- Disproportionate burden and difficulty complying for small business; and
- The opportunity cost for businesses, with the time and resources expended on unnecessary OHS regulatory burden those resources

could be better utilised to improve the productivity of the business and implement improved OHS practices.

3 ACCI Members

3.1 Chambers of Commerce and Industry

ACT and Region Chamber of Commerce & Industry

12A Thesiger Court
DEAKIN ACT 2600
Telephone: 02 6283 5200
Facsimile: 02 6282 5045
Email: chamber@actchamber.com.au
Website: www.actchamber.com.au

Business SA

Enterprise House
136 Greenhill Road
UNLEY SA 5061
Telephone: 08 8300 0000
Facsimile: 08 8300 0001
Email: enquiries@business-sa.com
Website: www.business-sa.com

Chamber of Commerce & Industry Western Australia (Inc)

PO Box 6209
EAST PERTH WA 6892
Telephone: 08 9365 7555
Facsimile: 08 9365 7550
Email: info@cciwa.com
Website: www.cciwa.com

Chamber of Commerce Northern Territory

Confederation House
1/2 Shepherd Street
DARWIN NT 0800
Telephone: 08 8936 3100
Facsimile: 08 8981 1405
Email: darwin@chambernt.com.au
Website: www.chambernt.com.au

Commerce Queensland

Industry House
375 Wickham Terrace
BRISBANE QLD 4000
Telephone: 07 3842 2244
Facsimile: 07 3832 3195
Email: info@commerceqld.com.au
Website: www.commerceqld.com.au

Australian Federation of Employers & Industries

PO Box A233
SYDNEY SOUTH NSW 1235
Telephone: 02 9264 2000
Facsimile: 02 9261 1968
Website: <http://www.afei.org.au/>

New South Wales Business Chamber

140 Arthur Street
NORTH SYDNEY NSW 2060
Telephone: 132696
Facsimile: 1300 655 277
Website: www.nswbusinesschamber.com.au

Tasmanian Chamber of Commerce and Industry Ltd

GPO Box 793
HOBART TAS 7001
Telephone: 03 6236 3600
Facsimile: 03 6231 1278
Email: admin@tcci.com.au
Website: www.tcci.com.au

Victorian Employers' Chamber of Commerce & Industry

GPO Box 4352
MELBOURNE VIC 3001
Telephone: 03 8662 5333
Facsimile: 03 8662 5367
Email: vecci@vecci.org.au
Website: www.vecci.org.au

3.2 Industry Associations

ACCORD

Suite 4.02, Level 4, 22-36 Mountain Street
ULTIMO NSW 2007
Telephone: 02 9281 2322
Facsimile: 02 9281 0366
Email: bcapanna@accord.asn.au
Website: www.accord.asn.au

Agribusiness Employers' Federation

GPO Box 2883
ADELAIDE SA 5001
Telephone: 08 8212 0585
Facsimile: 08 8212 0311
Email: aef@aef.net.au
Website: www.aef.net.au

Air Conditioning and Mechanical Contractors' Association

30 Cromwell Street
BURWOOD VIC 3125
Telephone: 03 9888 8266
Facsimile: 03 9888 8459
Email: deynon@amca.com.au
Website: www.amca.com.au/vic

Association of Consulting Engineers Australia (The)

Level 6, 50 Clarence Street
SYDNEY NSW 2000
Telephone: 02 9922 4711
Facsimile: 02 9957 2484
Email: acea@acea.com.au
Website: www.acea.com.au

Australian Beverages Council Ltd

Suite 4, Level 1
6-8 Crewe Place
ROSEBERRY NSW 2018
Telephone: 02 9662 2844
Facsimile: 02 9662 2899
Email: info@australianbeverages.org
Website: www.australianbeverages.org

Australian Hotels Association

Level 1, Commerce House
24 Brisbane Avenue
BARTON ACT 2600
Telephone: 02 6273 4007
Facsimile: 02 6273 4011
Email: aha@aha.org.au
Website: www.aha.org.au

Australian International Airlines Operations Group

c/- QANTAS Airways Limited
QANTAS Centre
QCD1, 203 Coward Street
MASCOT NSW 2020
Telephone: 02 9691 3636

Australian Made Campaign Limited

Suite 109, 161 Park Street
SOUTH MELBOURNE VIC 3205
Telephone: 03 9686 1500
Facsimile: 03 9686 1600
Email: ausmade@australianmade.com.au
Website: www.australianmade.com.au

Australian Mines and Metals Association

Level 10
607 Bourke Street
MELBOURNE VIC 3000
Telephone: 03 9614 4777
Facsimile: 03 9614 3970
Email: vicamma@amma.org.au
Website: www.amma.org.au

Australian Paint Manufacturers' Federation Inc

Suite 1201, Level 12
275 Alfred Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 3955
Facsimile: 02 9929 9743
Email: office@apmf.asn.au
Website: www.apmf.asn.au

Australian Retailers' Association

Level 2 104 Franklin Street
MELBOURNE VIC 3000
Telephone: 03 9321 5000
Facsimile: 03 9321 5001
Email: info@vic.ara.com.au
Website: www.ara.com.au

Live Performance Australia

Level 1 - 15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
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Website: www.liveperformance.com.au

Master Builders Australia Inc.

16 Bentham Street
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Telephone: 02 6202 8888
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Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia (The)

525 King Street
WEST MELBOURNE VIC 3003
Telephone: 03 9329 9622
Facsimile: 03 9329 5060
Email: info@mpmsaa.org.au
Website: www.plumber.com.au

National Baking Industry Association

Bread House, 49 Gregory Terrace
SPRING HILL QLD 4000
Telephone: 1300 557 022
Email: nbia@nbia.org.au
Website: www.nbia.org.au

National Electrical and Communications Association

Level 4
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ST LEONARDS NSW 2065
Telephone: 02 9439 8523
Facsimile: 02 9439 8525
Email: necanat@neca.asn.au
Website: www.neca.asn.au

National Fire Industry Association

PO Box 6825
ST KILDA CENTRAL VIC 8008
Telephone: 03 9865 8611
Facsimile: 03 9865 8615
Website: www.nfia.com.au

National Retail Association Ltd

PO Box 91
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Email: info@nra.net.au
Website: www.nra.net.au

Oil Industry Industrial Association

c/- Shell Australia
GPO Box 872K
MELBOURNE VIC 3001
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia

PO Box 7036
CANBERRA BC ACT 2610
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Facsimile: 02 6270 1800
Email: guild.nat@guild.org.au
Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc

Level 1
651 Victoria Street
ABBOTSFORD VIC 3067
Telephone: 03 9429 0670
Facsimile: 03 9429 0690
Email: info@pacia.org.au
Website: www.pacia.org.au

Printing Industries Association of Australia

25 South Parade
AUBURN NSW 2144
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Email: info@printnet.com.au
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Restaurant & Catering Australia

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ARTARMON NSW 2604
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Standards Australia Limited

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