Australian Government
Productivity Commission

Performance Benchmarking of Australian Business Regulation:

Occupational Health & Safety

Productivity Commission
Draft Research Report

January 2010

This is a draft research report prepared for further public consultation and input.

The Commission will finalise its report after these processes have taken place.

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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.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au) or by contacting Media and Publications on (03) 9653 2244 or email: maps@pc.gov.au

Opportunity for further comment

You are invited to examine this draft report and to provide written comments to the Productivity Commission on the draft report and on areas which might be examined in future years of this study.

Written comments should reach the Commission by 22 February 2010. If possible, please provide your comments by email. After comments have been received and discussions with the interested parties have been held, a final report will be prepared.

The Commission will present its final report to Government by the end of March 2010.

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Terms of reference

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

16 DEC 2008

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

Dear Mr Gary 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 sincerely

CHRIS BOWEN

RECEIVED
23 DEC 2008
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OVERVIEW

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 are greater in Western Australia which has a lesser reliance on performance and process-based 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.
- Only Queensland and Western Australia provide a code of practice on how to detect and manage bullying, even though this and other psychosocial hazards place very high costs on business.
- 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. (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 psychological and physical harm arising from working. 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 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.

While this study does not make recommendations, attention is drawn 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, for the Intergovernmental Agreement for Regulatory and Operational Reform in OHS.

However, any review which focuses on the costs imposed on business rather than the costs and benefits on all groups must necessarily be more limited in the insights it can provide. Also, focusing on particular aspects of the regulatory regimes rather than the entire 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.

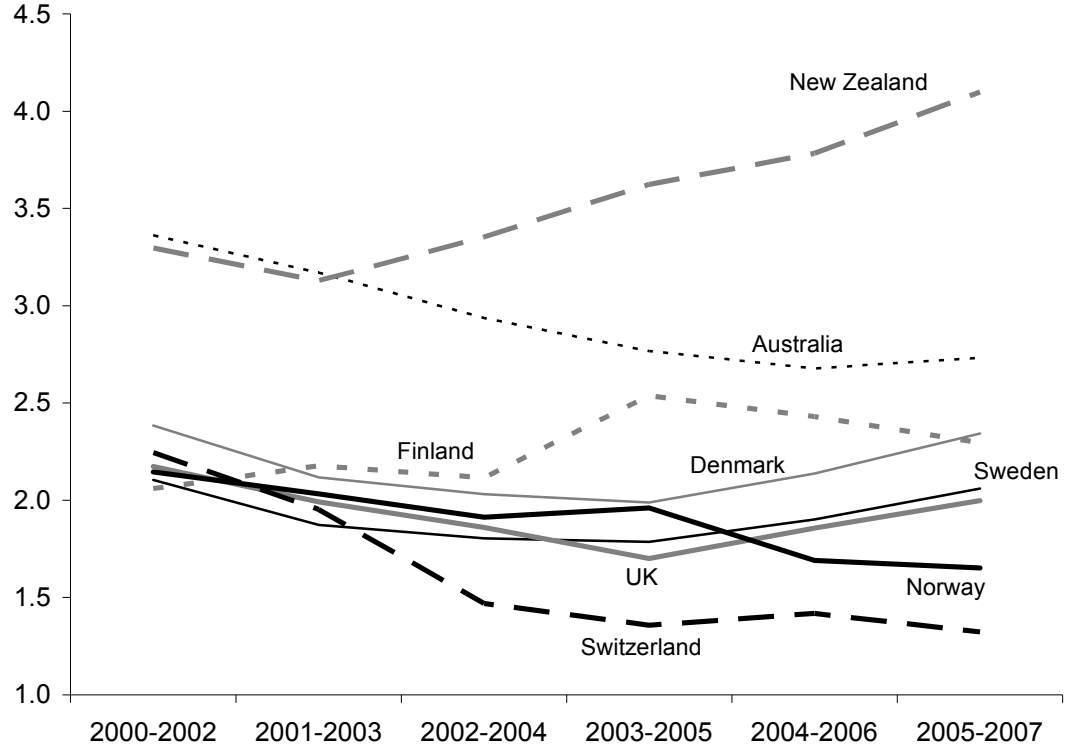
OHS outcomes have been steadily improving

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.

Figure 1 **Trends in fatality rates across countries**



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 indicates 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 Tasmania
- 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. The Commonwealth Government has taken on a coordination role through Safe Work Australia and its predecessors, and has assumed regulatory responsibility for employees of the large national firms insured under the Comcare scheme and Commonwealth employees.

Every Australian jurisdiction (state, territory and the Commonwealth) has a core OHS Act, with a specific regulator responsible. Most 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 general OHS Acts, which cover OHS issues relating to specific industries or hazards. The number of additional Acts varies from three in Western Australia to nine 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, jurisdictions have adopted a similar number of national standards, with Tasmania adopting the most (16) and the Northern Territory adopting the least (10) out of a total of 17.

The costs national firms face due to 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 and with different regulatory burdens on businesses. For example, mining regulation in Western Australia has more prescriptive elements

and does not require process and management systems such as are required by the mining legislation in Queensland and New South Wales.

Requirements vary for 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, Queensland and ACT OHS Acts also explicitly require general risk management processes, although these three jurisdictions set out a risk management process for some hazards. Given that all jurisdictions either imply or specify risk management processes, it is not possible to say whether the greater prescription in some regulation has any real impact on costs.

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 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 (2007).

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 while, at the other extreme, Tasmania had a specific training requirement only to manage the removal of asbestos
- only Victoria, South Australia and Tasmania required OHS information to be provided in appropriate languages, whereas 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, the exceptions being 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 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 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 are exempt, and employers with fewer than 50 employees are exempt under the Commonwealth regime.

Jurisdictions vary with respect to provisions for union involvement in OHS consultations and in investigations of possible OHS breaches. The Commonwealth, Tasmania and South Australia are the only jurisdictions not to confer rights of entry to unions to investigate possible breaches of OHS regulations (though the latter two have since taken steps to introduce them). All statutes providing a right of entry for

OHS purposes include safeguards intended to prevent the misuse of the powers conferred on authorised representatives.

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

Duplication of the regulation of hazardous substances and dangerous goods

The operation of two separate systems for the regulation of hazardous substances and dangerous goods gives rise to: confusion among businesses; and duplication of requirements and effort for businesses complying with both requirements.

There are significant differences in asbestos regulation

Significant differences across the jurisdictions in the regulation of asbestos include:

- the annualised fees applying to a licence to remove friable asbestos range from $27 in Queensland (or $17 for an individual in the Northern Territory) to $3536 in South Australia, and there are 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, require 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 (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 charges the second highest licence fee — $1925 per annum)
- only the Commonwealth and the Northern Territory do 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 varies greatly among those jurisdictions requiring one.

'Psychosocial hazards' receives relatively little regulatory attention and jurisdictions vary in the guidance provided to employers

While workplace stress claims, which include cases of bullying and harassment, tend to be more costly on average than claims for less serious physical injuries —

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. This adds to the uncertainty placed on business 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. Some jurisdictions address this issue with guidance notes, including on some regulators' websites. South Australia is the only jurisdiction to include clauses specifically referring to inappropriate behaviours in the workplaces in its OHS Act. Only Queensland and Western Australia provide a code of practice on how to detect and manage bullying (although the Commonwealth includes psychosocial injury in the definition of harm in its code of practice). Thus businesses in these three states are provided with more certainty, and possibly also less flexibility, as to their responsibilities than elsewhere in Australia.

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)
- businesses in the Northern Territory need to pay $1477 for the private standards (usually Australian Standards) to be informed of minimum compliance requirements (unless they are accessed at the Northern Territory Library at Parliament House), while, at the other extreme, businesses in Queensland would not have to pay to be similarly informed.

Overall, there are indications that lower height thresholds 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 in 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. As the remaining jurisdictions differ from the national standard, it is likely that comparatively high compliance burdens for manual handling are placed on businesses, with possibly less effective outcomes, within these 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. 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.

Despite consistency in licensing, workplace accidents related to forklifts vary significantly across the jurisdictions, with Victoria having the lowest injury rate.

The regulators

Awareness of the need to administer and enforce well

Over the last 10 years or so, regulators appear to 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 given the assistance needed to comply. This targeted approach reduces unnecessary burdens.

This is reflected in the establishment of the Heads of Work Safe Authorities and its development of the 'National OHS Compliance and Enforcement Policy', to assist regulators to implement consistent and effective enforcement practices across jurisdictions.

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 regulators that a Material Safety Data Sheet (MSDS) is not required for obsolete chemicals, while other regulators were unable or unwilling to provide advice on the matter and one deemed that an MSDS was required.

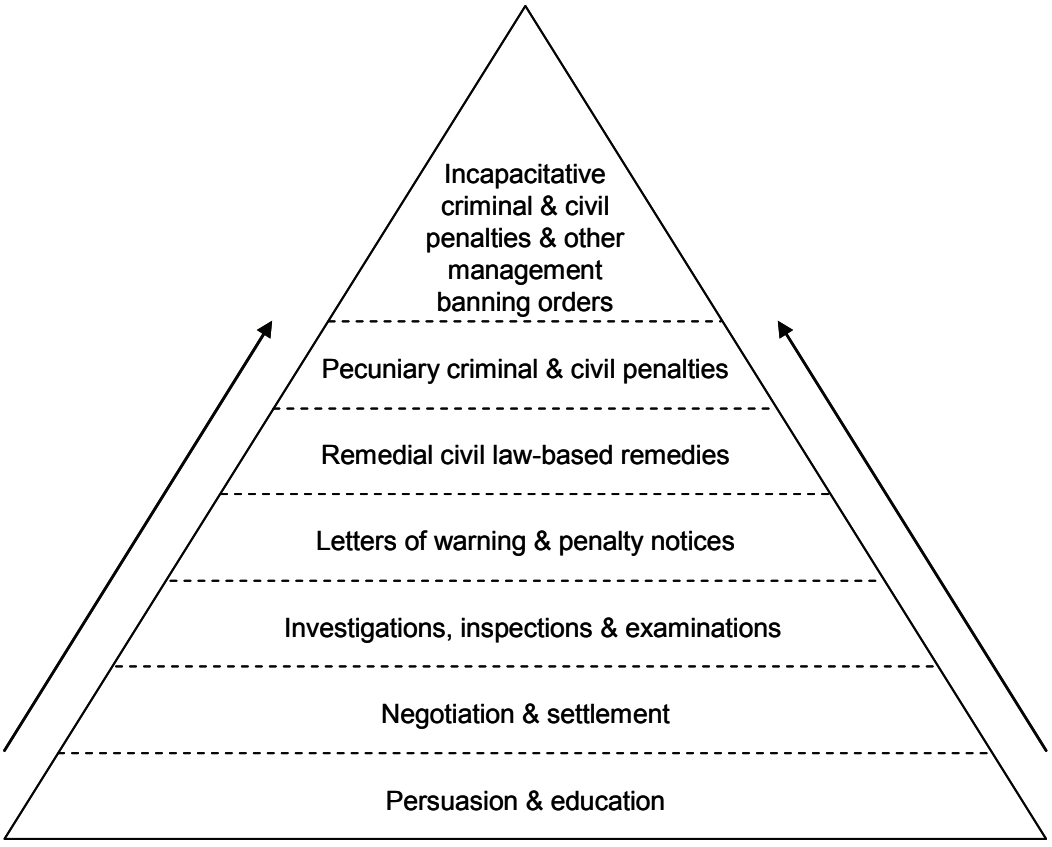
Risk management and responsive enforcement are used widely

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 building and construction.

Most also apply a 'responsive regulation' model. This involves an escalation of sanctions, ranging from helpful to punitive, applied as appropriate to the circumstances and response of the business being regulated.

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.

Figure 2 **Example of an enforcement pyramid**



Source: 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 result in unnecessarily high costs for some businesses in New South Wales, South Australia and for Queensland mining. (Queensland mining contends that it can achieve the same outcome with the use of statutory directives.)

Table 1 **Availability of enforcement tools**
2008–09

										Mining		
	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*	*NSW*	*Qld*	*WA*
Educate/advise		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Verbal warning		✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Written directive	✓	✓	✓				✓	✓		✓	✓	✓
Improvement notice	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Prohibition notice	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Licence suspension	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Licence cancellation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Adverse publicity			✓		✓		✓	✓	✓			
Infringement/penalty notice		✓	✓	✓	✓		✓		✓			
Prosecution	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Enforceable undertaking	✓		✓	✓		✓	✓	✓	✓			✓
Other	✓**a**		✓**b**	✓**c**								

a Injunctions, remedial orders. **b** Voluntary compliance, non-disturbance notices, letters of caution, letters of warning. **c** 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 (96 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.

Table 2 **Use of enforcement tools**
2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*TAS*	*NT*	*ACT*
Educate/advise	na	2 453	nr	nr	nr	nr	1 986[a]	4 000	nr
Verbal warning	na	nr	nr	nr	nr	2 986		na	nr
Written directive	nr	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	na	na	0	na	60	na	0	0	nr
Infringement/penalty notice	na	686	nr	471	10	na	17	na	nr
Prosecution	nr	108	118	141	62	37	30	nr	4
Enforceable undertaking	1	na	1	20	na	na	na	na	na

nr non response. **na** not applicable. [a] Statistic includes educate/advise, verbal warning and written directives.
Source: Productivity Commission survey of OHS regulators (2009 unpublished).

It is apparent that Victoria and South Australia had the highest inspection and audit rates (equivalent to 1 in 5 worksites inspected or audited during 2008–09) followed closely by the Northern Territory (1 in 6). New South Wales had the lowest OHS inspection and audit rate (1 in every 49 worksites). However, the New South Wales core regulator spent the highest proportion of its expenditure on education (33 per cent) whereas the Victorian regulator spent the smallest proportion (3 per cent).

Sometimes the differences in 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 inspection rate may reflect its provision of informal education during inspections, 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.

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 $5765 per worksite, followed by Victoria and South Australia. Western Australia was the least resourced among the regulators, with an expenditure of $88 per worksite, with the Western Australian regulator responsible for far more worksites (1375) per OHS staff member. At the other extreme, Comcare has 32 worksites per employee.

Table 3 **Resourcing indicators**
2008–09

		Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*[a]	*ACT*
OHS staff (FTE)	no.	126.7	691	411	482.6	232	149.1	77	44	25
OHS expenditure	$'000	23 061	100 639	53 879	55 460	28 965[b]	18 085	6 427	–	3 640
Worksites regulated	'000s	4	664	220	390[c]	144	205	nr	–	nr
OHS expenditure per FTE staff	$'000	182	146	131	115	125	121	83	na	146
Worksites to OHS staff ratio	no.	32	961	535	808	621	1 375	na	na	na
OHS expenditure per worksite	$	5 765	152	245	142	201	88	na	na	na

nr non response. **na** not applicable. [a] The Northern Territory is not currently able to provide information on total OHS expenditure and the number of worksites regulated in 2008-09. [b] Budget includes WorkCover activities. [c] 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 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 does not provide for appeals to a higher court against prosecutions undertaken in its Industrial Court
- South Australia only has an external review mechanism for notices, while all other jurisdiction provide an 'arms length' internal review process
- the Northern Territory has only an external appeals process for its licensing decisions — the Local Court.

Differences in the transparency of the core OHS regulators include:

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

While all jurisdictions use written notices to inform businesses of OHS breaches or remedies, the information 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
- the Queensland prohibition and infringement notices provide no instruction or guidance on how to improve the practice that resulted in the notice
- the Northern Territory provides only limited contact information on its improvement notice — a post box address.

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 three 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 considers the burdens created by food safety regulatory regimes.

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.

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.

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).

The 'quantity and quality of regulation' and 'cost of business registrations' reports

In April 2007, COAG agreed to proceed to the second stage of the program of regulation benchmarking and asked the Commission to examine two aspects of regulatory burdens. In December 2008, the Commission released two companion reports addressing these areas.

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 (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 (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.

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).

The WRMC recently 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.

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 SWA (WRMC 2009e). 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 compliance, including education and enforcement.

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.

Table 1.1 **OHS primary legislation and regulators**

	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

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* and *Mining and Quarrying Safety and Health Act 1999* 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).

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.

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.

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. The 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.

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. Further details of the conduct of the study are provided in appendix A.

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.

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 are the only jurisdictions not to confer rights of entry to unions to investigate possible breaches of OHS regulations. 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.
- 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[a]	Occupational Health and Safety Act 1989

[a] 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.

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.

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.

Table 2.2 **Coverage of primary duty of care provisions of employers 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**	✓	✓**b**	✓
Provide information, instruction, training and supervision to ensure safety	✓**c,d**	✓	✓**c**	✓	✓**c,e**	✓**a**	✓**ce**		✓
Provide information, instruction and training for **managers and supervisors** to ensure safety					✓**c**		✓**c**		
Provide adequate facilities for welfare	✓	✓	✓		✓		✓		✓
Consult on decisions/matters affecting OHS		✓	✓					✓	✓
Monitor the health of employees and workplace conditions (and keep records)	✓		✓		✓**f**		✓	✓	✓
Keep records of safety training					✓				
Ensure the accommodation, eating, recreational and other facilities provided for work are safe					✓		✓		
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	✓								

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

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

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)

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 contractors 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.

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.

Table 2.3 **Other duty of care holders**
2008-09

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

Source: Major OHS Acts .

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 classes of primary duty holders be designated who are involved in work activities or are present when work is being done. 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 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.

In New South Wales and Queensland, under an unqualified duty of care, defendants can invoke a number of defence provisions. In New South Wales, employers can invoke that it was not 'reasonably practicable' to comply with a provision in the Act and they had no control over the causes of an offence. In Queensland employers can claim adherence to a regulation or a code of practice and/or provide evidence that they took reasonable precautions and exercised due diligence.

Reverse onus of proof is also a feature of the OHS legislation in the United Kingdom. However, unlike in New South Wales and Queensland, the OHS legislation in the United Kingdom limits the duties by application of reasonably practicable.

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

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 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.[1] 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

1 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 are the only jurisdictions not to provide union right of entry for OHS purposes in their OHS Act. 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 jurisdictions that provide entry powers, four 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.

The Tasmanian Parliament has passed legislation providing for union right of entry but the legislation has yet to be proclaimed. 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.[2]

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.

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2 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.

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 New South Wales have 14 and 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.

Table 2.4 **Comparison of coverage and size of OHS regulations**
2008-09

	Title and primary Acts	*Parts or chapters*
Cwlth	Occupational Health and Safety (Safety Arrangements) Regulations 1991 Made under Occupational Health and Safety Act 1991	8
	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
Qld	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[a]	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

a The O*ccupational 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

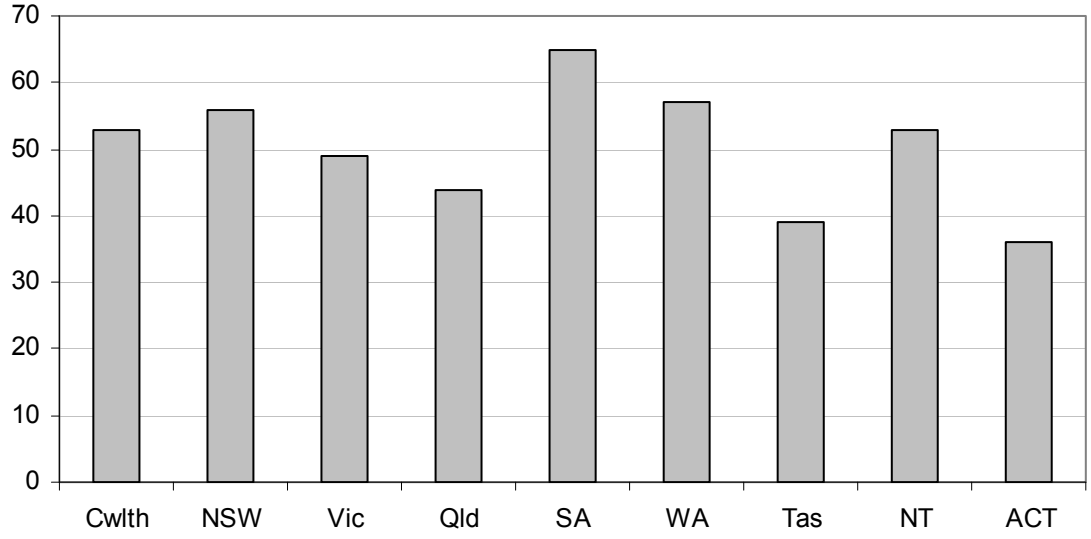
- risk management and consultation
- general and specific requirements for employers to provide information, instruction and training to employees
- specific hazards relating to plant (including design, manufacture, import, supply, installation and use)
- treatment of hazardous substances (including 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 numbers of 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



Data source: OHS regulations.

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*,

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, which require more specific and prescriptive regulation. 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.

Table 2.5 **Index of national standards, codes of practice and guidance notes[a]**

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

a Relates to areas covered and not the number of national standards, codes of practice or guidance notes. **b** Relates to integrating OHS into national industry training packages. **c** Relates to the development of tertiary courses for professional education in OHS. **d** 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

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.

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.

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. Overall, jurisdictions have adopted a similar number of national standards, with Tasmania adopting the most (16) and the Northern Territory adopting the least (10).

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

2008-09

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	✓	**a**	✓	✓		✓	✓	**a**	**a**	**5**
	National Standard for Manual Tasks	✓						✓		**b**	**2**
1003 (1995) 2	Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment	✓	✓	✓	✓	✓	✓	✓	✓	✓	**9**
1004 (1990)	National Standard for Synthetic Mineral Fibres	✓	✓	✓	✓	✓	✓	✓	✓	✓	**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		✓	✓		✓		✓		✓	**5**
1007 (2000) 1	National Standard for Occupational Noise	✓	✓	✓	✓	✓	✓	✓	✓	✓	**9**
1008 (2004)	Approved Criteria for Classifying Hazardous Substances	✓	✓	✓	✓	✓	✓	✓	✓	✓	**9**
1009 (1994)	Safe Working in a Confined Space	✓	**c**		✓	**c**	✓	✓	**c**	**c**	**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 of Inorganic Lead at Work	✓	✓	✓	✓		✓	✓		✓	**7**
1013 (1995)	National Standard for Limiting Occupational Exposure to Ionizing Radiation									✓	**1**
1014 (2002)	National Standard for the Control of Major Hazard Facilities	✓	✓	✓	**a**	✓	✓	✓	✓	**ae**	**7**
1015 (2001)	National Standard for the Storage and Handling of Workplace Dangerous Goods	✓	✓	✓	✓	✓	✓	✓	✓	✓	**9**
1016 (2005) 1	National Standard for Construction Work	✓	✓	✓	✓	✓	✓	✓	✓	✓	**9**
Total		**14**	**12**	**14**	**11**	**12**	**13**	**16**	**10**	**11**	

a Planned adoption through adoption of model regulations. **b** ACT has adopted the National Standard as a code of practice. **c** Referenced in code of practice. **d** Adopted as an Advisory Standard in QLD and as an Approved Code of Practice in ACT. **e** 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.

Table 2.7 **Number of codes of practice by jurisdiction**
2008-09

Areas covered	*Cwlth*[a]	*NSW*[b]	*Vic*[c]	*Qld*[d]	*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[e]	-	1	-	3	7	4	9	2	5
Compliance codes	na	na	8	na	na	na	na	na	na
Total	**25**	**44**	**14**	**30**	**89**	**37**	**18**	**19**	**25**

na not applicable. [a] 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 construction are specific to particular industries. [b] 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. [c] 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. [d] Queensland repealed the Code of practice for storage and use of rural chemicals at a rural workplace on 1 September 2009. [e] 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.

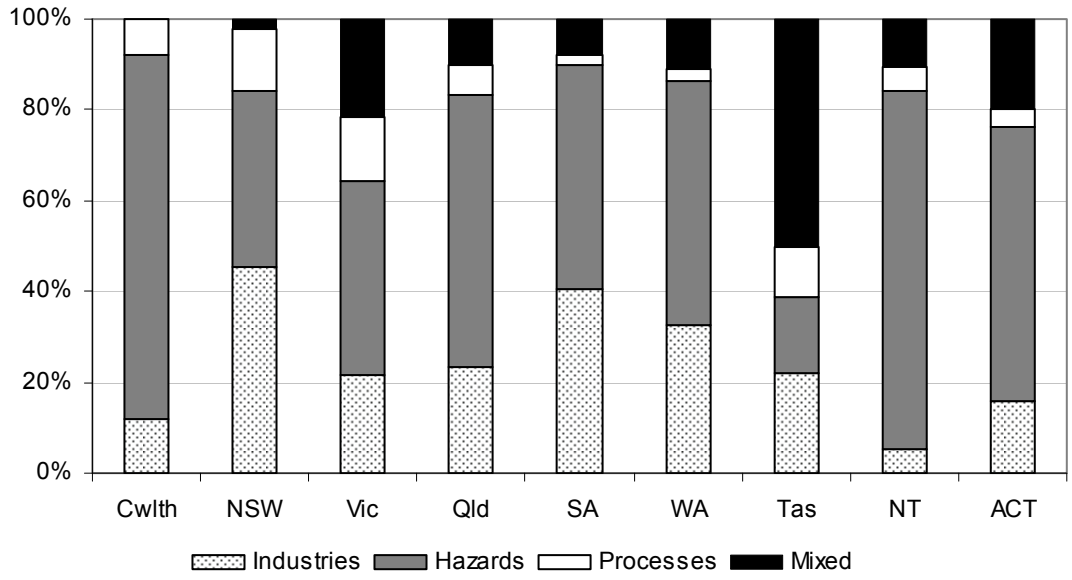
Figure 2.2 shows that the Northern Territory, the Commonwealth, Queensland, Western Australia and the ACT have a relatively high proportion of their codes dedicated to specific hazards, while New South Wales and South Australia have a relatively high proportion of codes related to specific industries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

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.

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



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.

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.

2.6 OHS Regulators

Each jurisdiction has a specific regulator responsible for implementing OHS rules and regulations. The way 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 regulators operating in each jurisdiction is provided in table 1.1 in chapter 1.

There are also a number of regulators who deal with 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.

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.

Table 2.8 **Regulators dealing with OHS matters in other Acts**[a]

	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*
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 Act 2008
	Rail safety – Independent Transport Safety and Reliability Regulator	
	WorkCover NSW	*Explosives Act 2003*
Vic[b]	Public Transport Safety Victoria	*Rail Safety Act 2006*
	WorkSafe Victoria	*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*

(Continued next page)

Table 2.8 **(continued)**

	Regulator	*Act*
Qld[c]	Queensland Transport	*Transport Operations (Road Use management) Act 1995*
	Maritime Safety Queensland	*Transport Operations (Marine Safety) Act 1994*
	Queensland Mines Inspectorate (QMI) through the Mines and Energy Division of the Dept of Employment, Economic Development and Innovation	*Coal Mining Safety and Health Act 1999* *Mining and Quarrying Safety and Health Act 1999* *Petroleum and Gas (Production and Safety) Act 2004* *Explosives Act 1999*
	Workplace Health and Safety Queensland	*Dangerous Goods Safety Management Act 2001*
	Department of Employment and Industrial Relations	*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*
	Dept for Transport, Energy and Infrastructure	*Rail Safety Act 2007*
WA	Department for Planning and Infrastructure	*Rail Safety Act 1998*
	Department for Mines and Petroleum	*Dangerous Goods Safety Act 2004* *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*

(Continued next page)

Table 2.8 **(continued)**

	Regulator	*Act*
NT	Department of Planning and Infrastructure	*Northern Territory Rail Safety Act 1998*
		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 Development, Primary Industry, Fisheries and Resources	*Petroleum Act 1984*
		Radioactive Ores and Concentrates (Packaging and Transport) Act 1980
ACT	ACT WorkCover (Office of Regulatory Services)	*Dangerous Substances Act 2004*
		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*

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

Sources: WRMC (2008a); regulator websites.

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).

Generally, OHS outcome indicators are easy to collect and comprehend, are clearly linked with safety performance, are comparable across jurisdictions and industries, and can be used to identify trends. However, the data 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 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.

Table 3.1 **Workers' compensation claims[a] — 2007-08**
Summary statistics

	Compensated fatalities number (rate)[b]	*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**

[a] Claims data Includes all workers' compensation claims involving temporary incapacity of one or more weeks plus all claims for fatality and permanent incapacity. [b] Compensated fatalities per 100 000 employees.

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

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.

Compensated, notified and traumatic fatalities 2006-07

	Compensated		*Notified*		*Traumatic*	
	No.	*Rate*[a]	*No.*	*Rate*[a]	*No.*	*Rate*[a]
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**

[a] 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).

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).

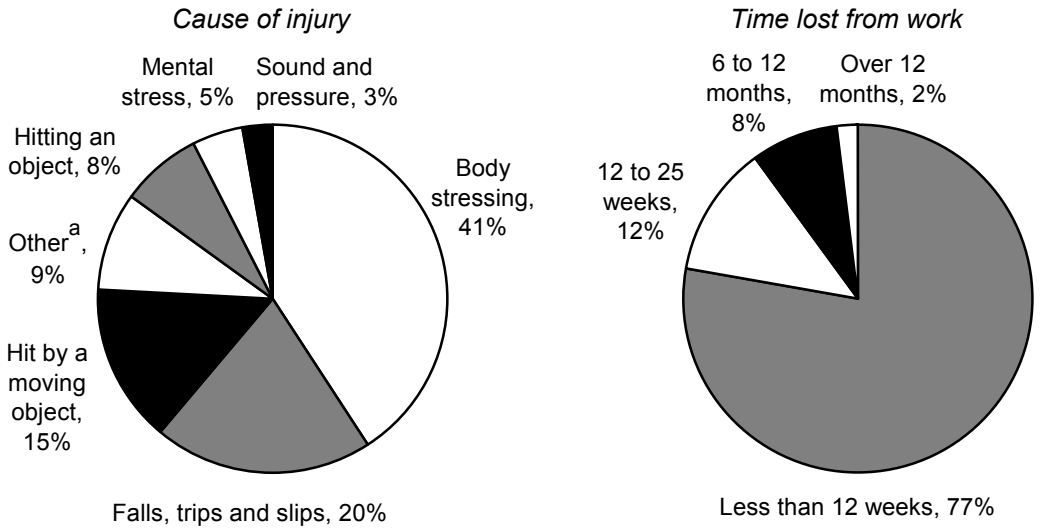
It might be expected that workers' compensation premiums in jurisdictions with more effective regulations would be lower due to the lower probability of workplace accidents. However, as discussed in appendix C, many other factors also determine premiums. It is therefore problematic to use premium data 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 — 2007-08 Percentage of serious claims**



a Other includes heat, radiation and electricity, chemicals, biological factors and not stated.

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 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).

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

Serious claims per 1000 workers

	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[a]	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[a]	11.7[a]	15.0	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[a]	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[a]	np	7.0[a]	na	na	**7.1**
Finance/insurance	1.7	3.6	2.6	4.0	2.2	1.5	3.4	np	5.7[a]	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**

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).

Table 3.3 **Compensated fatalities, jurisdiction[a] and industry, 2007-08**

Incidence — fatalities per 100 000 employees

	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**
Accommodation, 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**

na not applicable. **a** 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 1 000 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 1 000 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 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.

Transport and storage: incidence of injury

Serious claims per 1000 workers, 2007-08

	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**

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 most sectors it is not possible to report injury incidence rates at lower levels of industry because of small injury numbers resulting in confidentiality 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 work-related 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.

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

	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**

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

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.

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

	% injuries	*Injury rate per persons employed*[a]
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**

[a] 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).

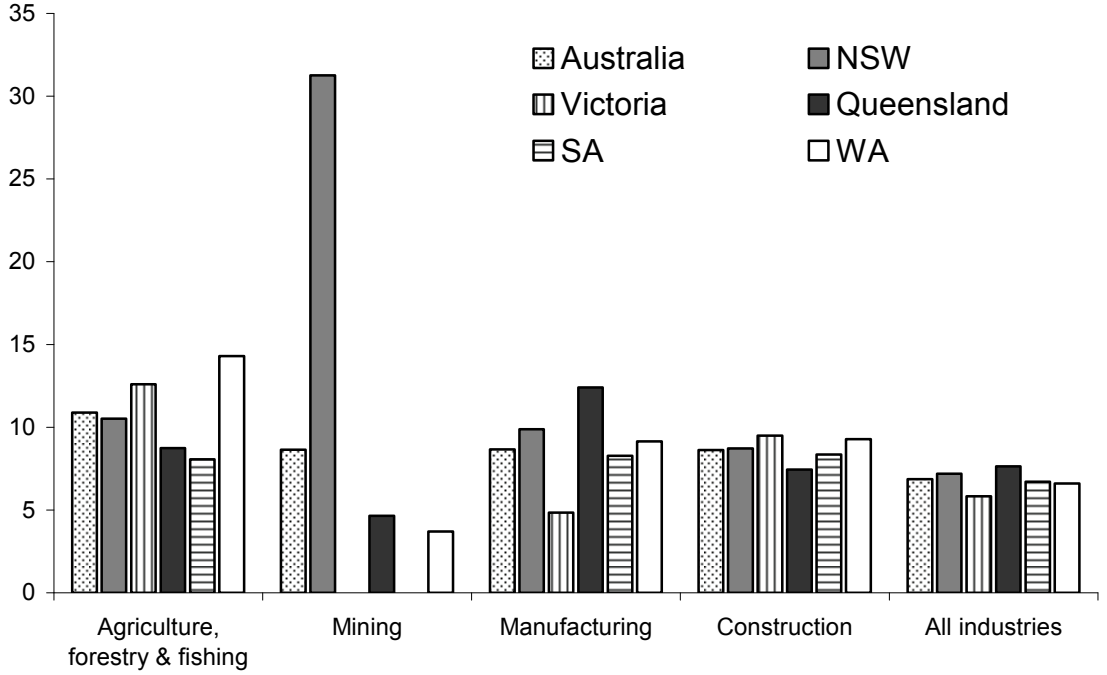
Source: ABS (*Work-Related Injuries,* Cat. no. 6324.0).

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[a, b] — 2005-06**
Per cent of employment



a 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. **b** 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).

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

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 cramped or unchanging position	1.9
Cut/open wound	19.2		
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**

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 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).

Table 3.7 **SMEs reporting injury by state**
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**

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 3.8 SMEs 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 comparison of data sources

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 rates		
Transport/storage (24.4)	Agriculture[a] (10.9)	Manufacturing (32.7)
Agriculture[a] (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 rates		
Finance/insurance (2.9)	Finance/insurance (1.9)	Finance/insurance (6.9)
Communications (7.1)	Property/business (3.6)	Communications/property/business (13.3)
Education (8.1)	Communications (3.7)	Cultural/recreation/personal (16.1)
Electricity/gas/water (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)**

[a] Agriculture includes forestry and fishing.

Source: Tables 3.2, 3.5 and 3.8.

3.3 OHS outcomes over time

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).

In contrast, 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.

National strategy injury targets and interim results

Incidence rates and percentage improvement in injury rates

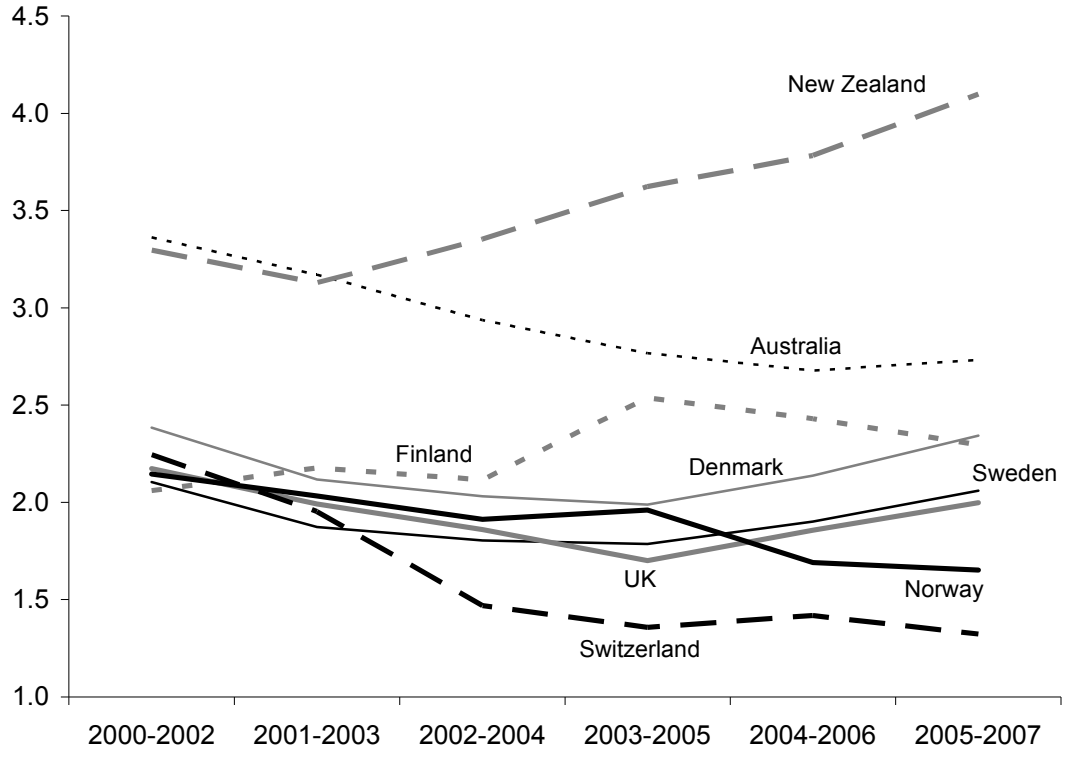
	Base period (2000-01 to 2002-03) claims per 1000 employees	*2006-07 interim target claims per 1000 employees*	*2006-07 claims per 1000 employees*	*Improve-ment %*	*2011-12 target claims per 1000 employees*
Cwlth	8.8	7.0	6.7	23.9	5.3
NSW	17.1	13.7	12.5	26.9	10.3
Vic	11.3	9.0	9.3	17.7	6.8
Qld	16.6	13.3	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**

Source: WRMC (2008b and 2009d).

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



a 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.

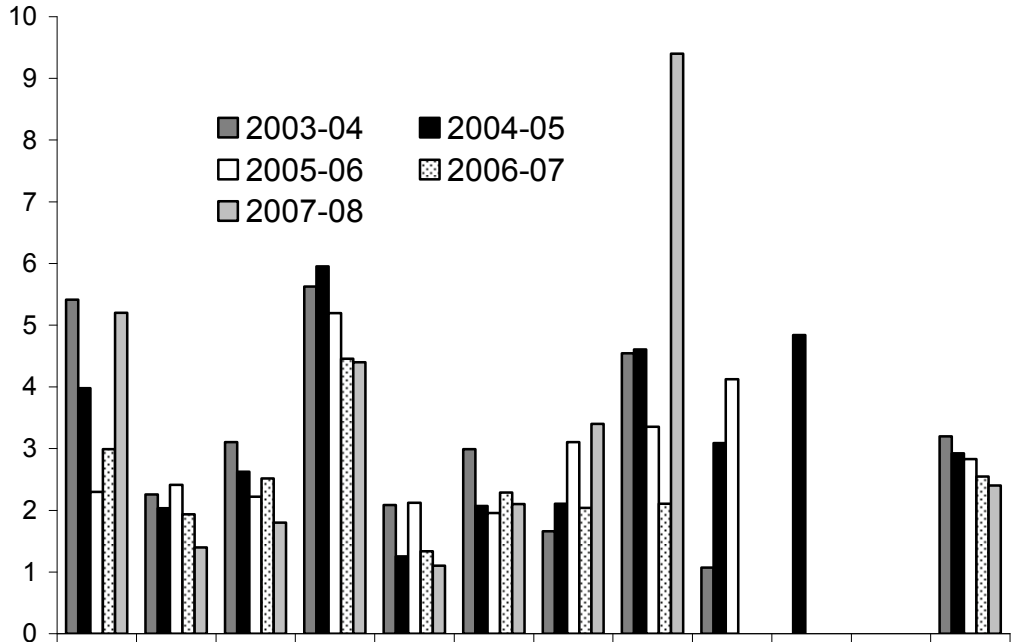
Data source: Data provided by Safe Work Australia with permission from state and territory governments.

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 2007-08**
Compensated fatalities per 100 000 employed



	Com.	NSW	Vic.	Qld.	SA	WA	Tas.	NT	ACT priv.	ACT Govt.	Sea-care	Aus.
2003-04	5.4	2.3	3.1	5.6	2.1	3.0	1.7	4.5	1.1	0.0	0.0	3.2
2004-05	4.0	2.0	2.6	6.0	1.3	2.1	2.1	4.6	3.1	4.8	0.0	2.9
2005-06	2.3	2.4	2.2	5.2	2.1	2.0	3.1	3.4	4.1	0.0	0.0	2.8
2006-07	3.0	1.9	2.5	4.5	1.3	2.3	2.0	2.1	0.0	0.0	0.0	2.5
2007-08	5.2	1.4	1.8	4.4	1.1	2.1	3.4	9.4	0.0	0.0	0.0	2.4

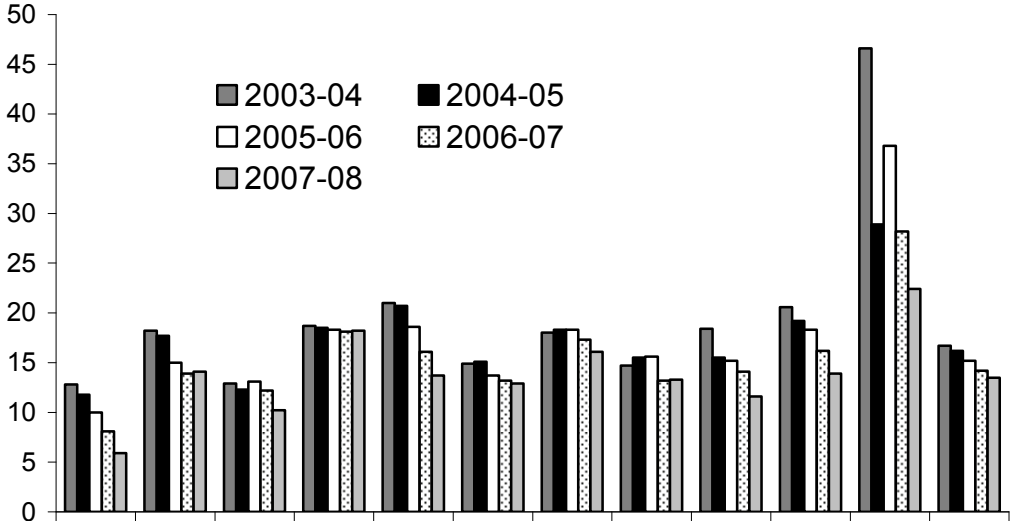
Data source: Data provided by Safe Work Australia with permission from state and territory governments.

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).

Figure 3.5 **Incidence of injury/disease, by state — 2003-04 to 2007-08**
Serious claims per 1000 workers



	Com.	NSW	Vic.	Qld.	SA	WA	Tas.	NT	ACT priv.	ACT Govt.	Sea-care	Aus.
2003-04	12.8	18.2	12.9	18.7	21	14.9	18	14.7	18.4	20.6	46.6	16.7
2004-05	11.8	17.7	12.3	18.5	20.7	15.1	18.3	15.5	15.5	19.2	28.9	16.2
2005-06	10	15	13.1	18.3	18.6	13.7	18.3	15.6	15.2	18.3	36.8	15.2
2006-07	8.1	13.9	12.2	18.1	16.1	13.2	17.3	13.2	14.1	16.2	28.2	14.2
2007-08	5.9	14.1	10.2	18.2	13.7	12.9	16.1	13.3	11.6	13.9	22.4	13.5

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).

Table 3.10 **Incidence rate of injury/disease, by industry — 2003-04 to 2007-08**

Serious claims per 1000 workers

	2003-04	*2004-05*	*2005-06*	*2006-07*	*2007-08*	*change (per cent)*
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**

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

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

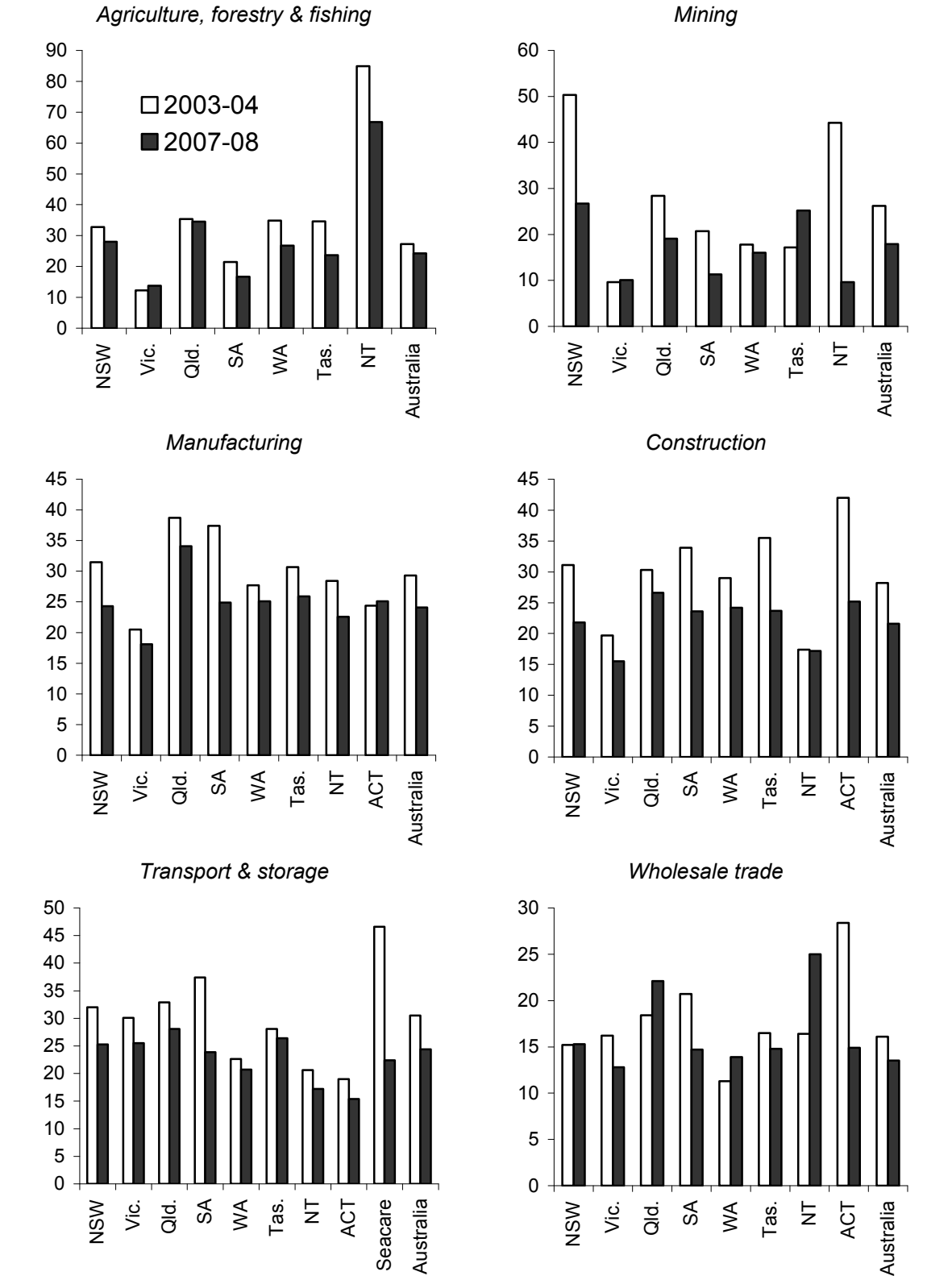
in injury rates were less significant in Wholesale trade; Agriculture, forestry and fishing; and Property and business services (table 3.10).

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. Falls in Manufacturing and Transport and storage have been less significant.
- 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 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.

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

Serious claims per 1000 workers



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

- 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).

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 sub-standard 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).

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.

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).

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.

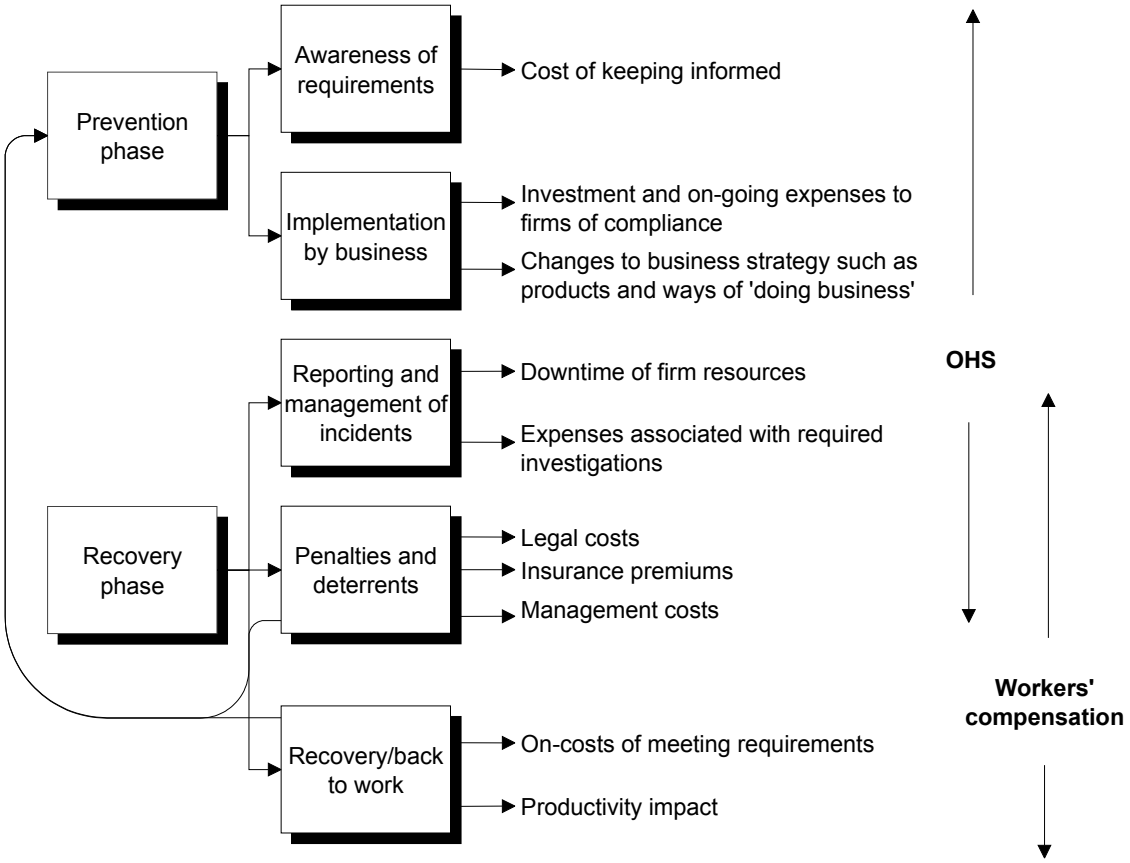
For OHS, these costs occur at different regulatory phases. Broadly, business compliance with OHS (and workers' compensation) regulation can be thought to occur in two phases — the prevention and recovery phase. The prevention phase occurs prior to any workplace incident, and includes all the activities 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 4.1 **Areas of high compliance costs to SMEs associated with 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 SMEs. 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.

Table 4.2 **Costs to SMEs associated with complying with OHS regulation[a]**

12 months to May 2009

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

na not applicable. **nc** not collected. **a** 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[a]	77	4
Other policy[b]	47	2
Other	307	12

[a] Actions of regulators refer to inspections, audits and prosecutions. [b] 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 of 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.

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.

Table 4.4 **Selecting areas to benchmark**

	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	×	×	✓	✓	✓
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	✓	✓	✓	✓	✓

Those which did not satisfy 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.[1] 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

[1] 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:

> … 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) regulations effective.
- The resourcing levels of regulators, both financial and staff, differed significantly:
  - Comcare (the Commonwealth's principal OHS regulator) is relatively well resourced ($5765 per worksite), followed by Victoria ($245 per worksite), while Western Australia is the least well resourced ($88 per worksite)
  - Comcare has the lowest ratio of worksites to inspectors (57) compared to New South Wales (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 inspections/audits were found between regulators:
  - Victoria has the highest rate of inspections/audits (equivalent to 1 in 5 worksites inspected every year) compared to New South Wales (1 in 49 worksites).
- Victoria has the widest range of enforcement instruments (16) while the mining regulators in New South Wales and Queensland have a more limited range (4).
- All regulators use a risk based approach to enforcement, with regulators focusing inspections on high risk industries, such as building and construction.
- Regulators applied the enforcement pyramid differently:
  - Tasmania used the highest proportion (96 per cent) of soft enforcement tools
  - New South Wales spent the highest proportion of their expenditure on education (33 per cent) while the Victorian regulator spent the smallest proportion (3 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 New South Wales (core and mining) and Victorian regulators employed the most strategies, including providing assistance to 'special' businesses.

Regulators represent the most significant interface between government regulations and business. Given this, the characteristics of, and approach taken by, regulators can significantly influence the burden created 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 in 2009-10.

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 between other agencies
- the *enforcement activities* of regulators which directly impact on business costs including audits and inspections 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.

Some caution should be taken in regards to the accuracy and comparability of the data in this chapter. In particular, the number of regulated worksites across jurisdictions may not be reliable due to the lack of consistently collected data. Thus, comparisons using these, as well as other, estimates which use this data 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.[1] In contrast, Queensland, South Australia and Western Australia have a separation of responsibilities. Shared responsibilities for some regulators mean that

[1] While ACT WorkCover is responsible for OHS enforcement, ACT Government employees are covered by the Comcare scheme for workers' compensation.

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.

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

Table 5.1 **Core OHS regulators**
2008-09

	Regulator	*Industries covered*
Cwlth	Comcare	Those in which Comcare insured firms operate
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

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

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).

Table 5.2 **Mining-specific OHS regulators**
2008-09

	Regulator
NSW	New South Wales Department of Primary Industries[a]
Qld	Department of Employment, Economic Development and Innovation
WA	Department of Mines and Petroleum

[a] 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* (and associated regulations) with the Environmental Protection Authority and other local authorities, and SafeWork SA share 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

Resourcing indicators of core OHS regulators are shown in table 5.3. In absolute terms, New South Wales had the highest OHS expenditure amount among the core

regulators in 2008–09, almost double the second largest expenditure amount of Queensland. However, after taking into account the number of worksites covered by each regulator, Comcare was the most well resourced with expenditure of $5765 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 provides 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 ratio among the core regulators, compared with Western Australia which has the highest.

Table 5.3 **Resourcing indicators**
2008–09

		Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*[a]	*ACT*
OHS staff (FTE)	no.	126.7	691	411	482.6	232	149.1	77	44	25
OHS expenditure	$'000	23 061	100 639	53 879	55 460	28 965[b]	18 085	6 427	–	3 640
Worksites regulated	'000s	4	664	220	390[c]	144	205	nr	–	nr
OHS expenditure per FTE staff	$'000	182	146	131	115	125	121	83	na	146
Worksites to OHS staff ratio	no.	32	961	535	808	621	1 375	na	na	na
OHS expenditure per worksite	$	5 765	152	245	142	201	88	na	na	na

nr non response. **na** not applicable. [a] The Northern Territory is not currently able to provide information on total OHS expenditure and the number of worksites regulated in 2008-09. [b] Budget includes WorkCover activities. [c] 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.

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.

Half of the OHS regulators that responded had a mixed OHS income source — that is, a mix of recovered costs and central funding. This result was not related to whether or not the regulator had other responsibilities (such as administering the workers' compensation scheme). 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).

Table 5.4 **OHS income components**
2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*[a]	*ACT*
Source	Cost recovery	Mixed	Central	Mixed	Mixed	Mixed	Central	Central	nr
Fee income components as a percentage of total fee income %									r
Licensing	nr	11	84	nr	47	90	83	–	4
Permits	nr	1	0	nr	0	4	3	–	0
Inspections	nr	0	0	nr	0	0	nr	–	19
Audits	nr	nr	0	nr	0	0	nr	–	0
Appeals	nr	nr	0	nr	0	0	nr	–	0
Other	nr	87[b]	16[c]	nr	53[d]	6[e]	13[f]	–	77[g]

nr non response. [a] The Northern Territory is not currently able to provide information on OHS fee income and its components received in 2008-09. [b] Contributions from the Workers' Compensation Scheme and Self and Specialised Insurers to fund operations as well as income from investments, commercial activities and minor other sources. [c] Revenue collected from fines and penalties. [d] Additional funding from WorkCover for OHS functions and other miscellaneous charges. [e] Registration of plant application, design review application, plant registration assessment, publications of instrument books, miscellaneous revenue, FOI fees, staff contribution to GVS, staff contributions to government housing. [f] Design and Survey Approval Fees. [g] Revenue received by the OHS Commissioner: $6,160 for Training and Seminar Fees, $50,000 Grants from other ACT Govt agencies, $86,750 is for Sponsorship.

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

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 (57 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 30 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 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 had the highest proportion of staff with more than 10 years experience (67 per cent), while the ACT and Western Australia had the highest proportion of inspectors with less than 3 years experience (29 per cent for both regulators) as at 30 June 2009. In terms of 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.

Table 5.5 **Inspectorate resources**
2008–09

		Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*TAS*	*NT*	*ACT*
FTE OHS inspectors	no.	70.0	289.1	202.5	234.6	89.0	103.0	47.0	12.0	17.0
Worksites to OHS inspectors ratio	no.	57	2 296	1 086	1 662	1 618	1 986	na	1 917	na
FTE inspector positions filled as at 30 June 2009	%	100	92	95	83	78	87	87	75	100
Turnover of OHS inspectors	%	19	3	6	9.3	8	6.3	9	30	9
Starting salary of a full time OHS inspector	$	57 985	74 011	71 295	57 000	56 245	53 291	52 276	**a**	59 800
Average salary of a full time OHS inspector	$	76 397	82 099	75 573	69 700	66 168	77 627	67 670	**a**	71 423
Experience of OHS inspectors:										
less than 3 years	no.	6	48	0	45	5	26	10	1	5
3 to 10 years	no.	29	112	136	109	24	20	19	7	10
More than 10 years	no.	35	136	94	80	60	44	18	6	2
Average professional development per OHS inspector (annually)	hrs	nr	34	26	21	30	100	nr	230	20

nr non response. **na** not applicable. **a** The Northern Territory is not currently able to provide information on the starting and average salaries of full time OHS inspectors in 2008-09.

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).

Table 5.6 Resourcing indictors — mining OHS regulators

2008–09

	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 ratio	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	15 800	27
Licensing	0	0	0
Permits	0	0	0
Inspections	0	0	0
Audits	0	0	0
Appeals	0	0	0
Other	933[a]	15 800[b]	27[c]

[a] Income from seminars, workshops, courses, exams, sale of publications and refunds, services rendered, consultancy. [b] Industry levy – industry is levied an amount per employee based on the cost of maintaining the Mines inspectorate and support services. [c] 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 ratio	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[a]
Average salary of a full time OHS inspector	$	125 162	102 000	103 500[b]
Experience of inspectors:				
Less than 3 years	no.	12	2	1
3 to 10 years	no.	28	35	1
More than 10 years	no.	24	27	41
Average professional development per OHS inspector (annually)[c]	hrs	42	80	8

[a] Taken as the lowest starting salary. [b] Survey response included a range for an 'average' salary, as such the mid-point was chosen for comparison. [c] Internal and external.

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 and 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.

Table 5.8 **Enforcement constraints**
2008-09

			Constraints					
	Regulator	*Fully enforce*[a]	*Budget limits*	*Insufficient staff*	*Regulatory complexity*	*Responsibilities unclear*	*Limited powers*	*Other*
Cwlth	Core	Yes	High	Low	Low	Low	Low	
NSW	Core	Yes	–	–	–	–	–	
	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	–	–	–	–	–	
	Mining	No	High	High	Low	Low	Low	
Tas	Core	No	High	Medium	Low	Low	Low	
NT	Core	No	Medium	High	Low	Low	–	
ACT	Core	No	High	High	Medium	Low	Low	

[a] In practice, the regulator considers that it is currently able to fully enforce all of the OHS regulation for which it is responsible. [b] 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

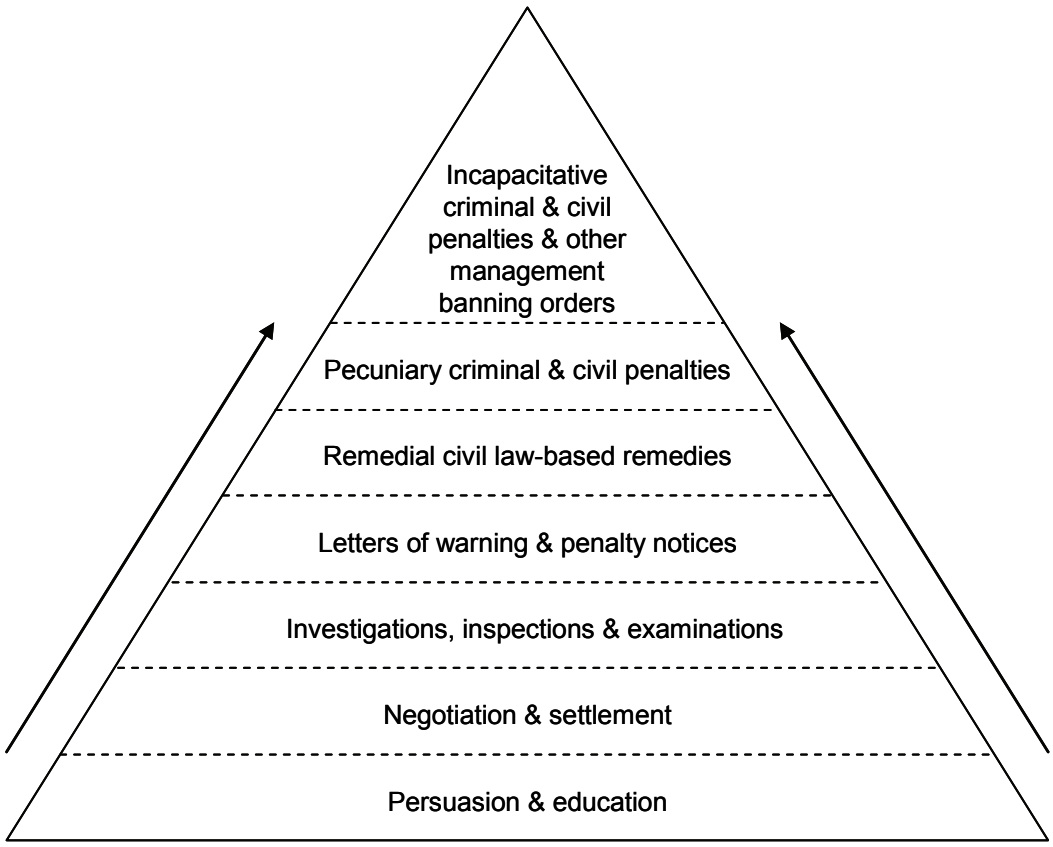
resistance if the focus on punishing is deemed unfair. On the other hand, a regulator with a pure advise and persuade strategy could embolden recalcitrant businesses which choose not to comply. Moreover, as businesses 'get away with it' because of lax enforcement, this could in turn have a discouraging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

Figure 5.1 **Example of an enforcement pyramid**



Source: Gilligan, Bird and Ramsay (1999).

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.

Inspections and investigations

Regulators can use accreditation through audits and/or inspections of workplaces 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 accreditation also have implications for the costs for businesses in complying with OHS regulation.

Across the jurisdictions, regulators have adopted either inspections or audits or both in order to assess compliance.

- The Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia and the ACT use a mix of inspections and audits to assess compliance (investigations are conducted in the Commonwealth, which are essentially equivalent to inspections).

- In Tasmania and the Northern Territory, compliance is primarily assessed using inspections.

Regulators have published enforcement policies that detail their case for inspections, the rights of the inspector and employers and other information that would explain the inspection process. The level of transparency in these policies varies across the jurisdictions (chapter 6).

Table 5.9 provides some indicators of regulator activity in terms of inspections and audits. Victoria and South Australia have the highest inspection and audit rates (equivalent to 1 in 5 worksites inspected or audited during 2008–09) followed closely by the Northern Territory (1 in 6). New South Wales has the lowest OHS inspection and audit rate, with an inspection or audit of only 1 in every 49 worksites. Table 5.10 provides the activity indicators of mining regulators and shows that the Western Australian mining regulator has the highest inspection/audit rate, followed by Queensland.

Table 5.9 **Activity indicators**

2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Total inspections[a,b]	298[c]	13 452	42 169	1 288	19 934	10 067	6 638	4 007	2 402
Routine	265	1 110	25 903	0	13 894	5 376	4 568	3 342	nr
Complaint initiated inspections	16	6 938	17 832	108	6 040	4 691	1 679	544	nr
Re-inspections	17	nr	210	1 180	0	0	nr	121	nr
Total audits	13	nr	74	18 844	8 844	122	nr	nr	1
Routine	nr		nr	nr	nr	11			nr
Re-inspections	nr		nr	nr	nr	111			nr
Complaint initiated inspections	nr		nr	nr	nr	0			nr
Worksites to inspection and audit ratio	13	49	5	19	5	20	nr	6	nr
Total value of fines imposed on businesses by regulator ($'000s)	nr	5 710	6 796	397	1 356	na	136	[d]	nr

nr non response. **na** not applicable. [a] The sum of routine, complaint initiated and re-inspections does not always sum the total number of inspections due to recording errors. [b] Some caution should be taken when comparing inspection figures across jurisdictions as regulators may have interpreted multiple visits to one worksite as one visit, or counted each visit separately. [c] Comcare conducts 'investigations', which are essentially equivalent to inspections. [d] The Northern Territory is not currently able to provide information on the total value of fines imposed on businesses in 2008-09.

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

On one hand, the frequency of inspections 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 inspections could allow inspectors to give advice and educate employers and employees on OHS obligations and issues — easing the compliance burden in the future.

Generally, regulators conduct two types of inspections:

- complaint initiated (reactive): following a reported work injury, dangerous occurrence or issuing notices
- routine (proactive): that includes all planned interventions, routine visits, audits and various educational functions.

Tables 5.9 and 5.10 also break down the total inspections in 2008–09 into routine (proactive) or complaint initiated (reactive) inspections. Regulators that conduct more proactive inspections or audits, relative to reactive inspections, may be considered to impose greater burdens on businesses by requiring them to accommodate visits which have arguably less cause. However, proactive visits may seek to provide awareness and education to employers which may reduce regulatory burdens imposed on businesses as, in the future, the business is likely to be more informed.

Table 5.10 **Activity indicators — mining OHS regulators**
2008-09

	NSW	*Qld*	*WA*
Total inspections	1 369[a]	1 524	1 895[b]
Routine	nr	190	nr
Re-inspections	nr	nr	nr
Complaint initiated inspections	nr	21	nr
Total audits	285	65	29
Routine	nr	nr	nr
Re-inspections	nr	nr	nr
Complaint initiated inspections	nr	nr	nr
Worksites to inspection and audit ratio	1.5	0.6	0.2
Total investigations	2 219[c]	190	127
Total value of fines imposed on businesses	370 000	82 950	na

nr non response. **na** not applicable. [a] In New South Wales, inspections are visits that are not in response to an incident. [b] Although the Western Australian mining regulator conducts both proactive and reactive inspections (like the Queensland mining regulator), specific numbers could not be provided [c] Of these investigations, the regulator undertook 9 major investigations but the majority simply involved telephone and reporting.

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

Table 5.10 also shows the total number of investigations undertaken by mining OHS regulators in 2008-09. Distinct from inspections, investigations generally take place after an incident or significant breach has been detected, can be more involved and may include the acquisition of relevant data, followed by analysis and the drawing of conclusions depending on the situation. For example, in Western Australia, mining investigations usually involve multiple workplace visits and require in-depth reporting. This is similar to Queensland mining's approach to investigations. In New South Wales, mining investigations are in response to a reported incident and can involve three stages ranging from telephone and reporting (level one), investigations (level two) and more serious major investigations (level three).

It should be noted that the number of total inspections and investigations for mining regulators are not directly comparable given differences in the definition of workplace visits and in the interpretation of the survey questions among regulators. For example, the total inspection figure for New South Wales mining does not include those undertaken for investigations and thus underestimates the true number of workplace visits. Conversely, the inspection figures for Queensland include those undertaken as part of investigations and thus provides a more accurate estimate of the total number of workplace visits.

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.

Table 5.11 **Inspections and investigations by industry**

2008–09

Industry	*Cwlth*	*NSW*[a]	*Vic*[b]	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Agriculture, forestry and fishing					545	152	866	28	9
Manufacturing	7	850		468	3 077	1 425	739	287	218
Building/construction	58	3 779		744	3 543	4 659	1 244	1 682	948
Mining[c]		3		18	513	38	29	165	
Retail and wholesale		675		209	3 749	721	814	670	598
Hospitality						304	321	254	
Transport and storage	77			147	868	1 179	281	109	80
Consumer and business services	25	1 061				623		149	123
Education						146	274[d]	124	16
Health and community services		324		121	1 407	280		85	30
Government	69	251			675	195		190	38
Other industries	62[e]	153[f]		1 153[g]	5 557[h]	399[i]		264 [j]	342[k]
Manufacturing logistics and agriculture, storage, trade			20 014						
Construction, utilities, quarries			12 593						
Community services, public administration, finance, property and business services, recreation, personal and other services			6 668						
Major hazards unit			1 850						
Public safety			45						
Total	**298**	**7 096**	**41 170**	**2 860**	**19 934**	**10 121**	**4 568**	**4 007**	**2 402**

[a] Nil entries denote lack of correlation with industry categories used by WorkCover NSW and thus were not provided. [b] Nil entries denote lack of correlation with industry categories used by WorkSafe Victoria and thus were not provided. [c] Investigations by core OHS regulators in mining could occur during collaboration with the mining-specific regulator, such as the sharing of information, skills and expertise (see chapter 13). [d] Figure includes inspections/investigations in education, health and community services and government. [e] Defence. [f] Retail/wholesale/transport. [g] Hospitality, recreation and other services and other industries. [h] Electric, gas and water, finance, manufacturing food and beverage, recreation, personal and other, non-classified. [i] Personal and other, cultural and recreational, communications, electrical/gas/water. [j] Communication services, electricity, gas and water supply, finance and insurance, personal and other services. [k] Electricity, gas and water supply; communication services; property and business services; cultural and recreational services; personal and other services; and those not identified.

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

In general, all 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 what industries they focus their investigations on (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 inspections and investigations of core OHS regulators by industry. It appears that visits during 2008–09 concentrated on higher risk industries, particularly building and construction. For example, around 50 per cent of inspections by WorkCover NSW occurred in this sector.

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 5.1).

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. 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, the Commonwealth and the ACT) and, in the case of Victoria, 'softer' enforcement tools such as letters of caution and warning. 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, that is, in line with responsive regulation and an enforcement pyramid.

Box 5.1 Examples of enforcement tools

Written or verbal directives: 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 notices: 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 notices: these 'on the spot fines' can be issued by an inspector for non-indictable 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 undertakings: 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 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 these mining regulators in their 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 regulators use a more limited set of tools to achieve the desired OHS outcomes.

Table 5.12 **Availability of enforcement tools**

2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Educate/advise		✓	✓	✓	✓	✓	✓	✓	✓
Verbal warning		✓	✓	✓	✓	✓	✓		✓
Written directive	✓	✓	✓				✓	✓	
Improvement notice	✓	✓	✓	✓	✓	✓	✓	✓	✓
Prohibition notice	✓	✓	✓	✓	✓	✓	✓	✓	✓
Licence suspension	✓	✓	✓	✓	✓	✓	✓	✓	✓
Licence cancellation	✓	✓	✓	✓	✓	✓	✓	✓	✓
Adverse publicity			✓		✓		✓	✓	✓
Infringement/penalty notice		✓	✓	✓	✓		✓		✓
Prosecution	✓	✓	✓	✓	✓	✓	✓	✓	✓
Enforceable undertaking	✓		✓	✓		✓	✓	✓	✓
Other	✓[a]		✓[b]	✓[c]					

[a] Injunctions, remedial orders. [b] Voluntary compliance, non-disturbance notices, letters of caution, letters of warning. [c] Seizures, electrical safety protection notices.

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

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

2008-09

	NSW	*Qld*	*WA*
Educate/advise	✓	✓	✓
Verbal warning	✓	✓	✓
Written directive	✓	✓	✓
Improvement notice	✓		✓
Prohibition notice	✓		✓
Licence suspension	✓		✓
Licence cancellation	✓		✓
Adverse publicity			
Infringement/penalty notice			
Prosecution	✓	✓	✓
Enforceable undertaking			✓

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.

Table 5.14 **Use of enforcement tools**
2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Educate/advise	na	2 453	nr	nr	nr	nr	1 986[a]	4 000	nr
Verbal warning	na	nr	nr	nr	nr	2 986		na	nr
Written directive	nr	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	na	na	0	na	60	na	0	0	nr
Infringement/penalty notice	na	686	nr	471	10	na	17	na	nr
Prosecution	nr	108	118	141	62	37	30	nr	4
Enforceable undertaking	1	na	1	20	na	na	na	na	na

nr non response. **na** not applicable. [a] Statistic includes educate/advise, verbal warning and written directives.

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).

Table 5.15 **Use of enforcement tools — mining OHS regulators**
2008-09

	NSW	*Qld*	*WA*
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

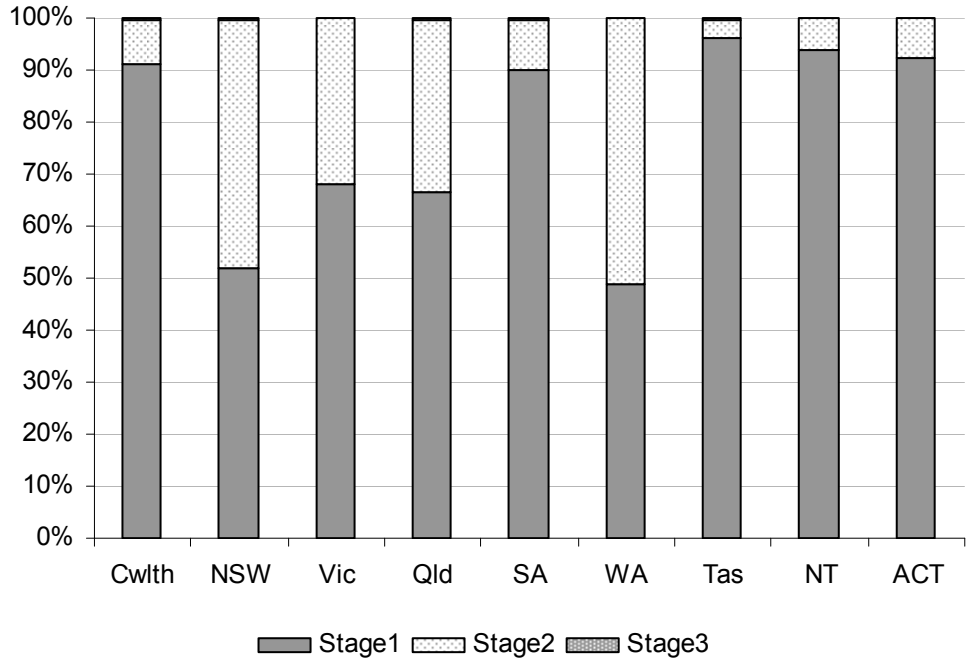
nr non response. **na** not applicable.

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

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.

Figure 5.2 **Relative use of the enforcement pyramid**
2008–09



Data 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 total inspections and audits 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 regulators heavily rely on the 'soft' approaches to enforcement (96 per cent, 94 per cent and 92 per cent of their enforcement actions respectively) compared

with the regulators in Western Australia and New South Wales (49 per cent, and 52 per cent respectively).

On the one hand, this could be an indication that the Tasmanian, Northern Territory and ACT regulators are using 'soft' enforcement approaches in excess of what is desirable in an enforcement pyramid. On the other hand, these differences could also be driven by the fact that it was not necessary for those regulators to use harsher enforcement tools. Indeed the ACT and Tasmania reported they had found a softer approach had led to higher compliance and improved outcomes.

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 (the Commonwealth, Queensland, Tasmania, the ACT and the Western Australian mining regulator did not provide a response for this question). Both the New South Wales core and mining regulators spent the greatest proportion of their expenditure on education activities (33 per cent and 31 per cent respectively) compared with all other jurisdictions in 2008–09, while the Victorian and Western Australian (core) regulators spent the smallest amounts (3 per cent and 7 per cent respectively).

Table 5.16 OHS expenditure components

2008-09

	Regulator	*Total expenditure*	*Administration*	*Enforcement*	*Education*	*Other*
		$'000s	%	%	%	%
Cwlth	Core	23 061	nr	nr	nr	nr
NSW	Core	100 639	31	12	33	24[a]
	Mining	18 518	17	52	31	0
Vic	Core	53 879	19	55	3	23
Qld	Core	55 460	nr	nr	nr	nr
	Mining	15 800	22	78	0	24
SA	Core	28 965	20	47	17	16
WA	Core	18 085	10	61	7	22[b]
	Mining	8 386	nr	nr	nr	nr
Tas	Core	6 247	nr	nr	nr	nr
NT[c]	Core	–	–	–	–	–
ACT	Core	3 640	nr	nr	nr	nr

nr non response. [a] Activities not included elsewhere. Also includes TestSafe which is the testing facility providing nation wide services. [b] Includes commission, policy, division indirect costs. [c] The Northern Territory is not currently able to provide information on total OHS expenditure and its components in 2008-09.

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 (such as inspections and audits), and less on formal education, for their 'soft' enforcement approach. Indeed, the enforcement tools used by Victoria (table 5.12) suggest this, with the inclusion of additional 'soft' enforcement approaches such as voluntary compliance and letters of warning which would be used during inspections and may explain the large discrepancy in education spending (and relatively large *stage 1* use in figure 5.2).

Enforcement accounts for the greatest proportion of expenditure by Queensland mining (78 per cent), followed by the Western Australian core OHS regulator (61 per cent) and Victoria (55 per cent). The New South Wales core OHS regulator spent the smallest percentage of total expenditure on enforcement compared to other regulators.

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.

Table 5.17 **Maximum penalties for corporations and imprisonment terms for individuals possible for breaches of OHS Acts**
2008–09

		Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Maximum penalty[a]	$'000s	495	1 650	1 021	750	1 200	625	180	–	1 000
Imprisonment term	yrs	[b]	5	5	3	5	2	–	–	7

[a] Maximum penalties for corporations. [b] 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).[2] For those jurisdictions with maximum imprisonment terms, they varied

[2] Under the new model OHS Act, the highest maximum penalty for a corporation will increase to $3 million with an imprisonment term of 5 years (Access Economics 2009).

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' 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 further investigation 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 NSW State Library when asbestos was detected on the premises. The site was shut down until the risk was assessed (The *Australian*, 25 July 2007). This enforcement option would only be used in more serious situations where the perceived risks of the OHS hazard in the workplace justifies the shut down and cessation of operations.

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 regulator in the ACT used shut down periods in 2008–09.

Table 5.18 **Shut down periods**
2008-09

	Regulator	*Used*	*Imposed*	*Shortest period*	*Longest period*	*Average period*
			No.	Days	Days	Days
Cwlth	Core	×				
NSW	Core	×				
	Mining	✓	117	nr	nr	nr
Vic	Core	×				
Qld	Core	×				
	Mining	✓	63	1	4	1
SA	Core	×				
WA	Core	×				
	Mining	✓	nr	nr	nr	nr
Tas	Core	×				
NT	Core	×				
ACT	Core	✓	2	1	3	2

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, Victoria, the Northern Territory 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.

Table 5.19 **Uniform interpretation of regulation**
2008-09

	Regulator	*Supervisory oversight*	*Structured training*	*Staff rotation*	*Secondment*	*Peer review*	*Other*
Cwlth	Core	✓	✓	✓		✓	
NSW	Core	✓	✓	✓	✓	✓	
	Mining	✓	✓	✓		✓	✓[a]
Vic	Core	✓	✓		✓	✓	✓[b]
Qld	Core	✓	✓			✓	
	Mining	✓	✓				✓[c]
SA	Core	✓	✓			✓	✓[d]
WA	Core	✓	✓	✓		✓	✓[e]
	Mining	✓	✓	✓		✓	✓[f]
Tas	Core	✓	✓	✓			
NT	Core	✓	✓			✓	
ACT	Core	✓	✓			✓	

[a] Relates to training to standardise reporting. [b] Communication of learning through newsletters or "team talk kits"; reference material in guidance sections of relevant operational procedures. [c] 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. [d] 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. [e] 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. [f] 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.

Table 5.20 **Liaison with other agencies**

2008-09

	Regulator	*Regulatory overlap*	*Regulatory gaps*	*Enforcement consistency*	*Policy interpretations*	*Other*
Cwlth	Core	✓				
NSW	Core	✓	✓	✓	✓	
	Mining	✓	✓	✓	✓	✓[a]
Vic	Core	✓	✓	✓	✓	
Qld	Core	✓	✓	✓	✓	
	Mining	✓		✓	✓	
SA	Core					✓[b]
WA	Core	✓	✓	✓	✓	
	Mining	✓	✓	✓	✓	✓[c]
Tas	Core	✓		✓		
NT	Core	✓	✓	✓	✓	
ACT	Core	✓	✓	✓		✓[d]

[a] Refers to activities relating to certificates of competency, standards and guidelines. [b] Refers to issues related to audits, legislative reform and guidance material. [c] Relates to activities to consult with sister state-based agencies, Comcare and WorkSafe WA. [d] 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, the Commonwealth regulator 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.

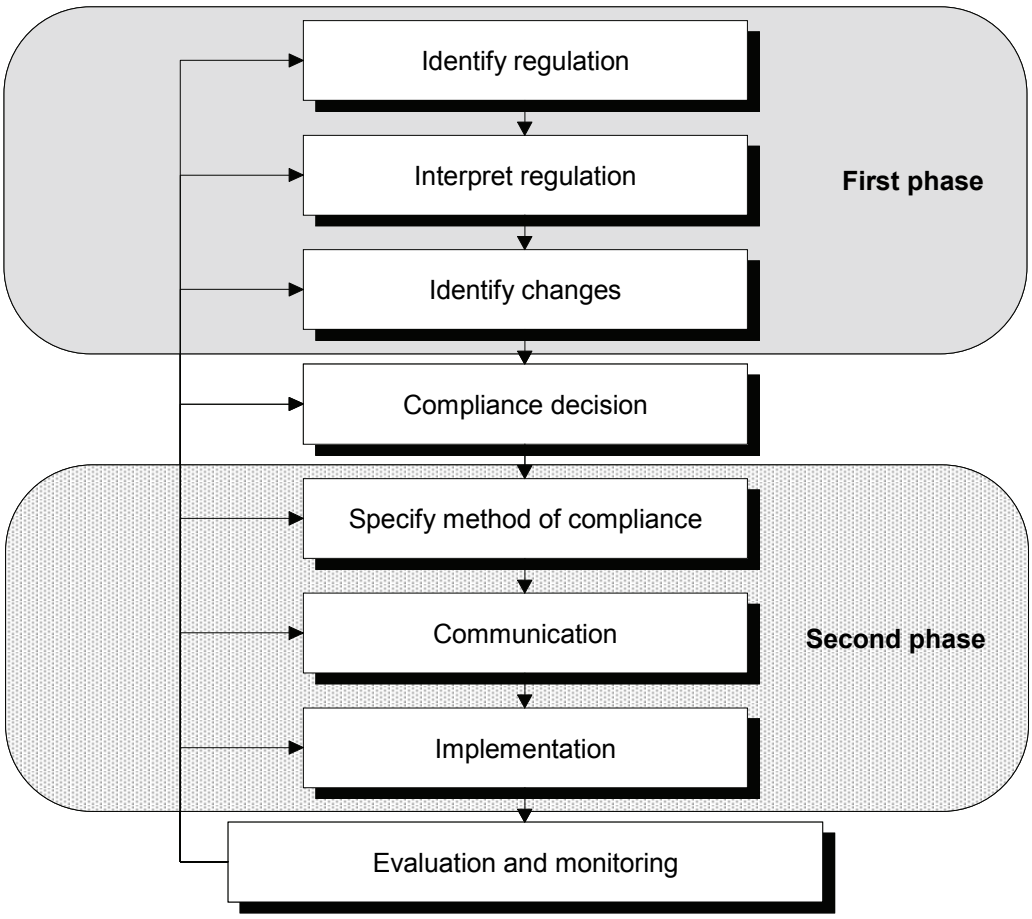
The compliance decision

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.

Figure 5.3 **The compliance decision process**



Source: Adapted from Henson and Heasman (1998).

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.

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.

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.

Table 5.21 **Methods to lodge enquiries**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Online form	✓	✓		✓					
Email	✓	✓	✓	✓	✓	✓	✓	✓	✓
Phone	✓	✓	✓	✓	✓	✓	✓	✓	✓
Fax	✓	✓	✓	✓	✓	✓	✓	✓	✓
In writing	✓	✓	✓	✓	✓	✓	✓	✓	✓
In person	✓	✓	✓	✓	✓	✓	✓	✓	✓

Source: Regulator 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 all jurisdictions regularly make use of information campaigns and education, some jurisdictions, such as 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).

Table 5.22 **Encouraging a culture of compliance**
2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*TAS*	*NT*	*ACT*
Information campaigns	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular
Education activities	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular	Regular
Industry awards	No	Regular	Regular	Regular	Regular	Regular	Seldom	No	Regular
Incentives	No	Regular	Regular	No	No	No	Seldom	No	No
Reduced workers' comp premiums	No	No	Regular	No	No	No	Yes[a]	No	No
Free OHS training	No	Regular	No	No	Regular	Regular	Regular	No	Regular
Fee-based OHS training	No	No	No	No	No	No	No	No	No
Confidential compliance advice	Regular	Regular	Regular	No	No	Regular	No	No	No
Other		Yes[b]	Yes[c]						

[a] Open insurance market means market will determine but insurers are required to take OHS performance into account when setting premiums. [b] Small Business safety enquiries at counter, phone, hotline, email, Safe Business website. [c] Other measures used include advertising campaigns, compliance codes, inspector visits.

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

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, such as incentives and industry awards, compared to the Queensland and Western Australian mining OHS regulators.

Table 5.23 **Encouraging a culture of compliance — mining OHS regulators**

2008-09

	NSW	*Qld*	*WA*
Information campaigns	Regular	Regular	Regular
Education activities	Regular	Regular	Regular
Industry awards	Regular	No	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	Yes[a]	Yes[b]	No

[a] 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. [b] 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, print or 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 5.2.

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 5.2 **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.

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.

Small Business

Australia has a significant small business community. According to the 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).

Table 5.24 **Special assistance for businesses**

2008–09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Assistance for small business	na	✓	✓	✓	✓	✓	✓	×	×
Online		✓	✓	✓	✓	✓	✓		
Workshops		✓	✓	✓	✓	✓	✓		
Campaigns		✓	✓	✓	ns	ns	✓		
Assistance for non-English background employers	na	✓	✓	✓	✓	✓	×	✓	×
Interpreter/translation services		✓	✓	✓	✓	ns		ns	
Assistance for non-metropolitan businesses	✓	✓	✓	✓	✓	✓	✓	✓	×
Campaign	ns	✓	✓	ns	✓	ns	ns	✓	
Workshops	✓	✓	✓	✓	✓	✓	ns	ns	

na not applicable. **ns** not specified in survey response and the Commission were unable to identify on regulator website.

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

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).

Table 5.25 **Special assistance for businesses — mining OHS regulators**

2008-09

	NSW	*Qld*	*WA*
Assistance for small business	✓	✓	✓
Online	✓	ns	ns
Workshops	ns	✓	ns
Campaigns	✓	ns	ns
Assistance for non-English background employers	✓	×	×
Interpreter services	✓		
Assistance for non-metropolitan businesses	✓	✓	✓
Campaign	✓	✓	ns
Workshops	ns	✓	ns

ns not specified in survey response and the Commission were unable to identify on regulator website.

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

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 5.3). 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 special assistance to small businesses.

Box 5.3 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).

Employers from non-English speaking backgrounds and non-metropolitan areas

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).

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 5.4).

Box 5.4 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, high quality, efficient, 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).

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).

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 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 and the Northern Territory.
- 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 Northern Territory provides only limited contact information on its improvement notice — a post box address.
- 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, 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.

Table 6.1 **Appeals processes for inspectorate decisions**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Internal	✓	✓	✓	✓	×	✓	✓	✓	✓
Arms length	✓	✓	✓	✓		✓	✓	✓	✓
Timeframe (days to lodge)	ns	7[a]	14	14		ns	14	14	ns
Fee	$0	$0	$0	$0		$0	$0	$0	$0
External	✓	✓	✓	✓	✓	✓	✓	✓	✓
Timeframe (days to lodge)	ns	ns	ns	30	14	ns	ns	21	ns
Number (total)	1	49	1 125[b]	109	nr	918[b]	2	8	ns
Success rate	0%	39%	87%[c]	42%	nr	2.2%	0%	100%[d]	nr

nr non response. **ns** not specified in the survey response. [a] 28 days is allowed for forfeiture notices. [b] Figure includes requests for a review of notices of which the majority are for an extension of time. [c] 90 per cent of the successful appeals were related to time extensions. [d] 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.

Table 6.2 **Appeals against court decisions**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Available	✓	✓	✓	✓	✓	✓	✓	✓	✓
Higher court	✓	×	✓	✓	✓	✓	✓	✓	✓
Number of prosecutions	3	209	119	146	63	37	30	4	2
Number of prosecutions per worksite (%)	0.08	0.03	0.05	0.04	0.04	0.02	nr	0.02	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

nr non response.

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

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.

Table 6.3 **Appeal processes for licensing decisions**
2008-09

	Appeal available	*Details*
Cwlth	**a**	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	✓	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	✓	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.

na not applicable. **a** 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).

Table 6.4 Information available from OHS regulators

As at May 2009 based on information published online

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Enforcement activities[a]	✓	✓	✓	✓	✓	✓	✓	✓	×
Enforcement outcomes	✓	×	✓	✓	✓	✓	×	×	✓
Budgets	✓	✓	✓	×	×	×	✓	×	×
Appeals processes	×	×	✓	✓	✓	✓	×	✓	✓
Details provided about method to submit an appeal/enquiry:									
Online	×	×	×	✓	×	×	×	×	×
Phone	×	×	×	✓	×	×	×	×	×
In writing	×	×	✓	✓	×	×	×	✓	✓
In person	×	×	×	✓	×	×	×	×	×

[a] 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.

Table 6.5 **Enforcement policy statements**
As at May 2009

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Enforcement policy published in stand alone document	✓	✓	✓	✓	✓	×	✓	✓[a]	✓
Available on website	✓	✓	✓	✓	✓	✓	✓	✓	✓
Number of pages	26	31	44	8	11	1(16)[b]	16	13	6
Year of publication	2005	2004	2005	2005[c]	2007	2006	2009	2008	2004

[a] The Northern Territory has adopted the *National Occupational Health & Safety (OHS) Compliance and Enforcement Policy*. [b] 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. [c] 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).

Table 6.6 **Information in annual reports**
For the financial year 2007-08

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Annual report published	✓	✓	✓	✓	✓	✓	✓	✓	✓
Stand alone	✓	✓	✓	×	×	×	×	×	×
Available on own website	✓	✓	✓	✓	×	✓	✓	×	×
Includes:									
Details on contribution to policy objectives	✓	✓	✓	✓	✓	✓	✓	✓	✓
Indicators on contributions to policy objectives	✓	✓	✓	✓	✓	✓	×	✓	✓
Details on efforts to reduce burdens on business	✓	×	✓	×	×	×	×	×	×
Indicators of compliance with enforcement policies	✓	✓	✓	✓	✓	✓	×	✓	✓
Details on consultations and/or consultations policies	✓	✓	✓	✓	×	×	✓	×	✓

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).

Table 6.7 **Written notices**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Provided for									
Inspections	×	×	×	×	×	×	×	✓	nr
Improvements	✓	✓	✓	✓	✓	✓	✓	✓	nr
Breaches/Prohibition	✓	✓	✓	✓	✓	✓	✓	×	nr
Contain contact information	✓	✓	✓	✓	✓	✓	✓	**b**	nr
Contain details on what needs to be done to comply with notice	✓	✓	✓	**a**	✓	✓	✓	✓	nr
Contain reason	×	✓	✓	✓	✓	✓	✓	✓	nr
Contain information on appeal/review	×	✓	✓	✓	✓	✓	✓	✓	nr

nr non response. **a** 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. **b** Only a post box address is provided on the improvement notice.

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. Despite this, the contact information on the improvement notice only lists a post box address, while the inspection report 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.

Table 6.8 **Publically available client feedback surveys**
As at May 2009

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Conducted	✓	✓	✓	✓	×	✓	×	×	✓
Published	✓	✓	✓	✓	×	✓	×	×	✓
Online	✓	×	×	×		✓			✓
Summary form in annual report	×	✓	✓	✓		×			×
Other complete source	×	×	×	×		✓			×

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 receive feedback during inspections or other contacts. The use of these mechanisms by OHS regulators is detailed in table 6.9.

Table 6.9 **Seeking feedback**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Online	✓	✓	✓	×	×	✓	×	×	✓
Surveys	✓	✓	✓	✓	✓	✓	×	✓	×
Complaints handling	✓	✓	✓	✓	✓	✓	×	✓	✓
Focus groups	✓	✓	✓	✓	✓	✓	×	×	×
Point of contact consultation	✓	×	✓	✓	✓	✓	×	✓	×
Other	✓	×	×	✓	✓	×	×	✓	×

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.

Table 6.10 **Appeal processes for mining-specific OHS decisions**
2008-09

Process	*NSW*[a]	*Qld*[b]	*WA*
Internal	✓	✓	✓
Timeframe to appeal	7 days	7 days	ns
Fee	$0	$0	$0
External	✓	✓	✓
Timeframe to appeal	ns	28-30 days	ns
Licensing decisions	na	×	na

na not applicable. **ns** not specified. [a] 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. [b] 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.

Table 6.11 **Written notices from mining-specific OHS regulators**
2008-09

	NSW	*Qld*[a]	*WA*
Provided for			
Advice	✓	×	×
Inspections	×	✓	×
Improvements	✓	×	✓
Prohibition	✓	✓	×
Investigation	✓	×	×
Closure	✓	×	×
Contain contact information	✓	×	b
Contain details on what needs to be done to comply with notice	✓	✓	✓
Contain reason	✓	✓	✓
Contain information on appeal/review	✓	✓	✓

nr non response. [a] 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. [b] 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.

Table 6.12 **Seeking feedback — mining OHS regulators**

2008-09

	NSW[a]	*Qld*	*WA*
Online	✓	✓	✓
Surveys	✓	×	✓
Complaints handling	✓	✓	✓
Focus groups	×	✓	✓
Point of contact consultation	✓	✓	✓
Other	✓	✓	✓

[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 businesses' awareness of OHS provisions in that state.

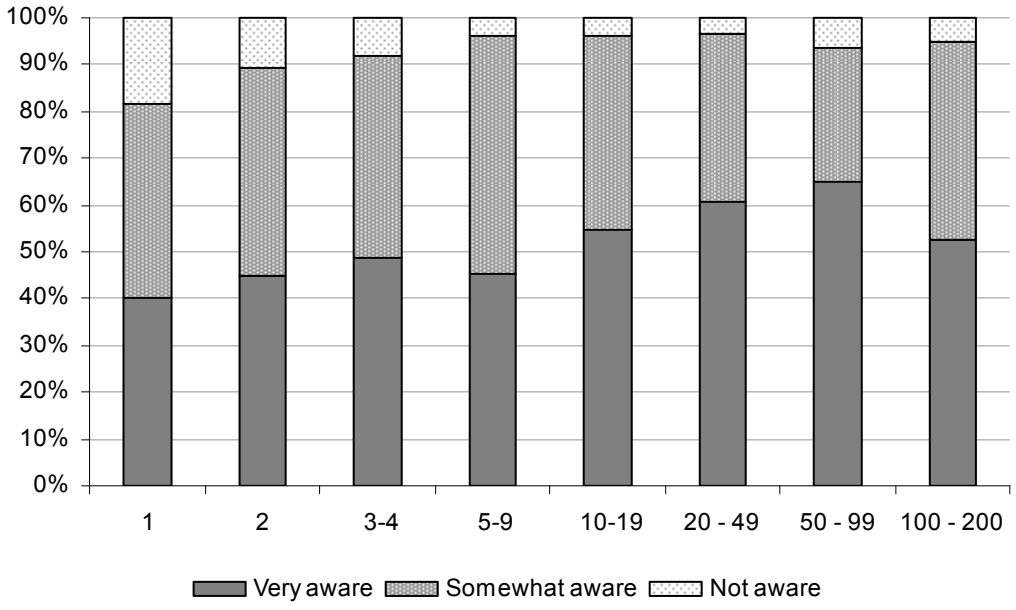
Occupational health and safety (OHS) laws operating in each jurisdiction require employers to undertake a number of processes related to improving awareness of OHS issues with a view to increasing the commitment to compliance within the workplace. These include risk management of hazards and record keeping, 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

Figure 7.1 **Awareness of SMEs of requirements by firm employee size[a,b]**

12 months to May 2009



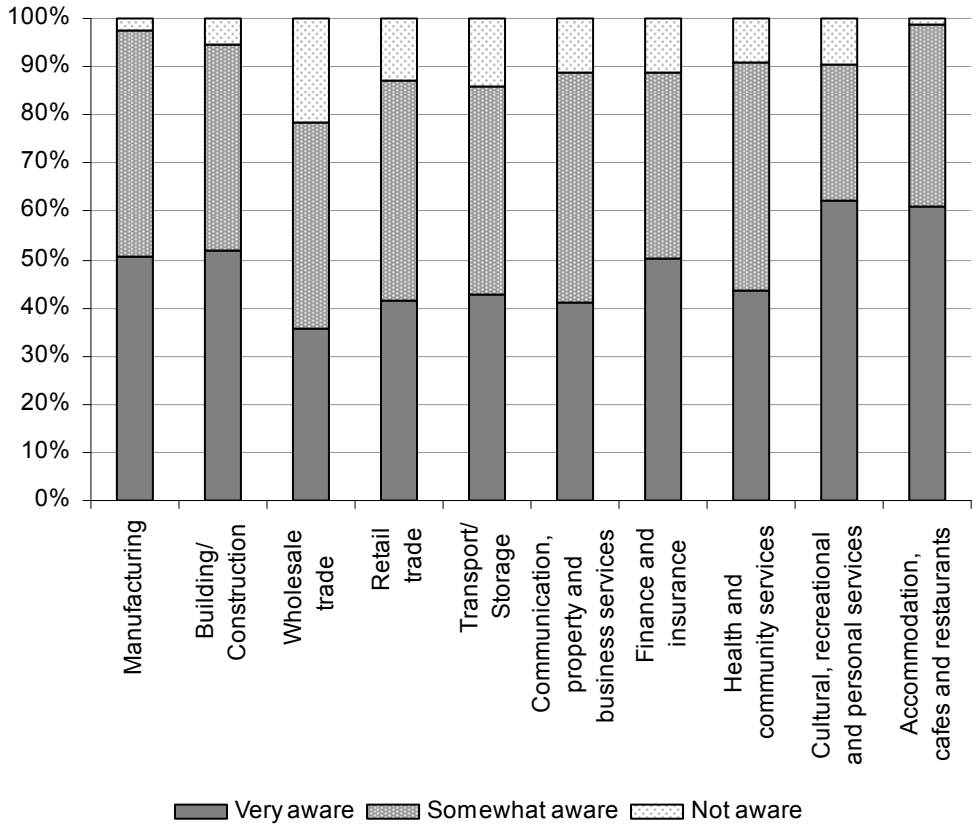
a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights. **b** The result for businesses with 100 to 200 employees should be treated with caution due to the relatively small sample size.

Data source: Sensis Survey of SMEs (2009 unpublished).

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.

Figure 7.2 **Awareness of SMES of requirements by industry[a]**

12 months to May 2009



a 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).

Responses to the survey of small and medium sized businesses reveal a number of differences in reported awareness of OHS regulatory requirements.[1] 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). As evident in figure 7.1, reported overall awareness of OHS regulatory requirements increased with business size.

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.

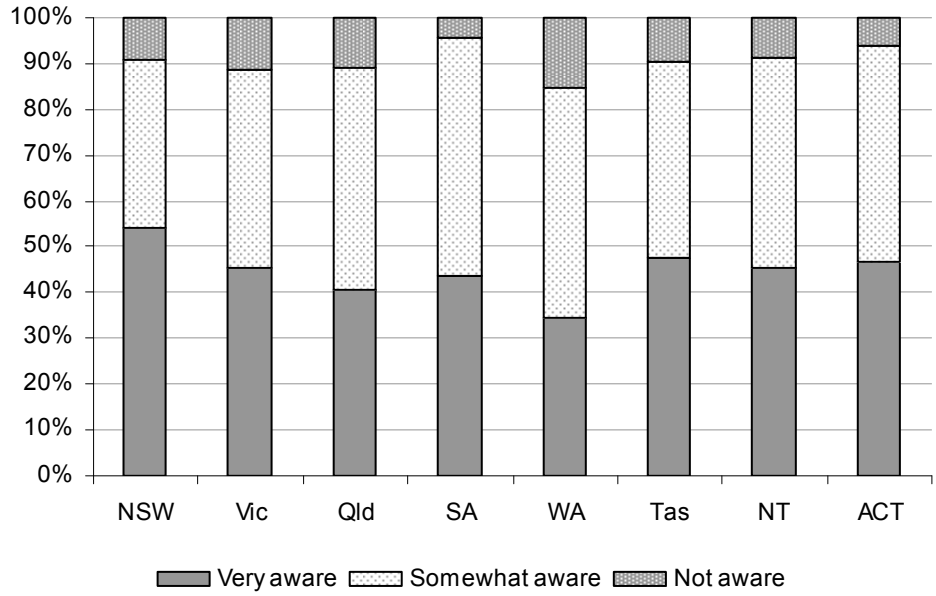
Awareness of regulatory requirements varied by jurisdiction. While the significant majority of businesses reported that they were either very or somewhat aware, the proportion which were very aware varied from 54 per cent for businesses located in New South Wales to 34 per cent for those located in Western 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.

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.

[1] 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.

Figure 7.3 **Awareness of SMEs of requirements by jurisdiction[a]**
12 months to May 2009

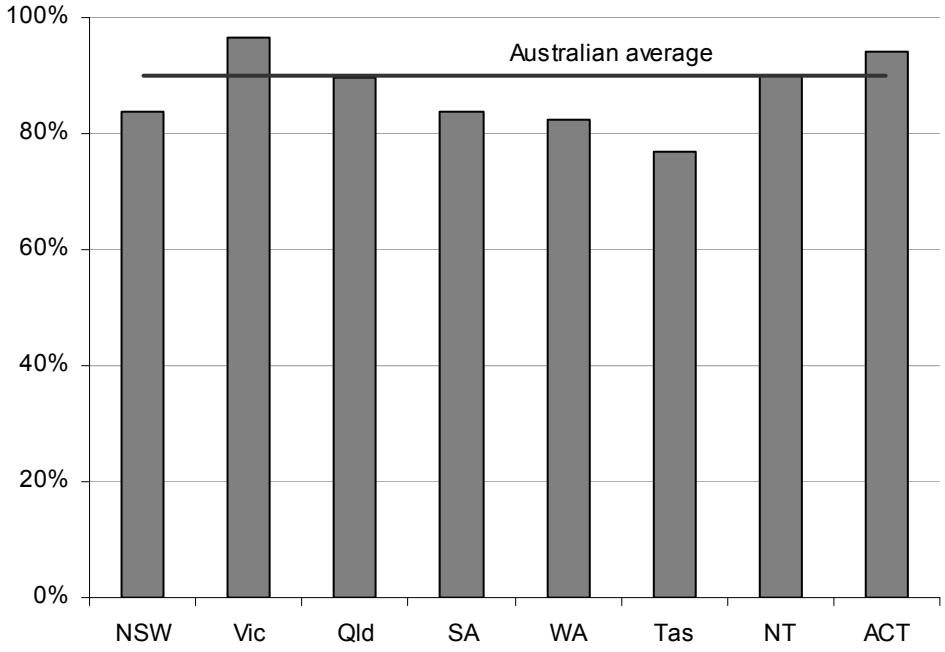


a Reported figures in comparisons were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

Data source: Sensis Survey of SMEs (2009 unpublished).

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).

Figure 7.4 **Collective agreements with OHS provisions by jurisdiction**
Per cent of all collective agreements as at 31 March 2009



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)

Table 7.1 **Enactments of risk management/assessment processes**
Acts and regulations in force 2008-09

	In primary legislation	*In formal regulation*
Cwlth[a]	×	✓ Regulation 1.05
NSW	×	✓ Regulations 9 to 12
Vic[b]	×	✓ Used in relation to particular hazards and not set out generally
Qld[c]	✓	✓ Used in relation to particular hazards
SA	×	✓ Regulation 1.3.2
WA	×	✓ Regulation 3.1
Tas	×	✓ Regulations 18 and 19
NT	✓	✓ Regulations 38 to 42
ACT[d]	×	✓ Used in regulations pertaining to confined spaces and not set out generally

[a] Regulation 1.05 in the Occupational Health and Safety (Safety Standards) Regulations 1994 (Commonwealth). [b] Victoria requires hazard identification, the control of risk and the review of control measures for manual handling, falls, confined spaces and plant. [c] 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. [d] 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	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: (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
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[a]	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

a These provisions have changed with the introduction of the *Work Safety Act 2008* on 1 October 2009.

Source: Stewart-Crompton, Mayman, and Sherriff (2009).

The costs of hazard identification and risk control

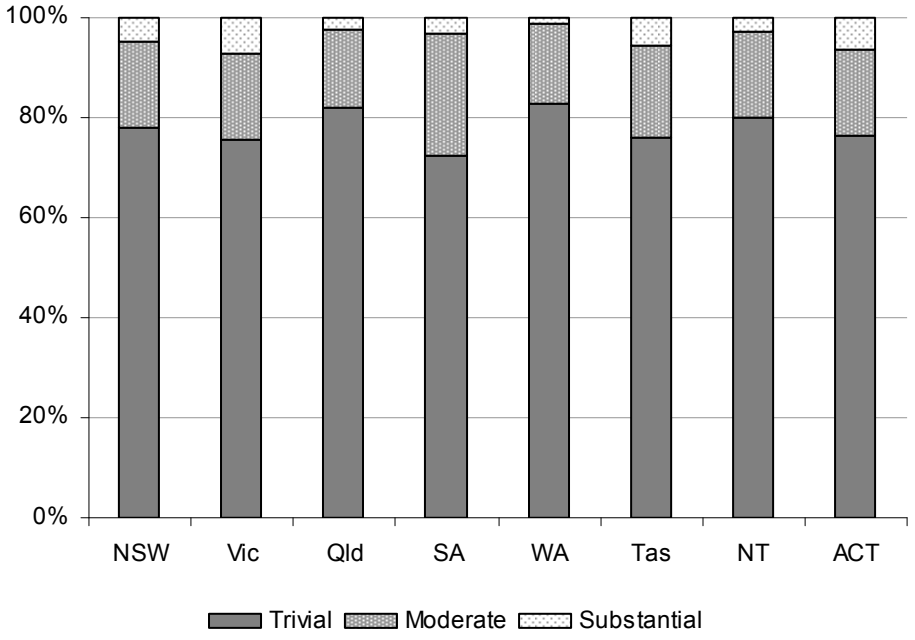
The costs imposed on businesses through requirements for hazard identification and risk control are likely to be in the form of: time taken to conduct reviews of the workplace and workplace activities; the resulting modifications to processes and procedures to control for risks; and, in conducting the paperwork associated with the requirements (including providing auditable documented evidence).

In a survey of SMEs conducted by Sensis Pty Ltd (see appendix B), 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.[2] 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[a]**

12 months to May 2009



a 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[3] reported by SMEs of conducting hazard

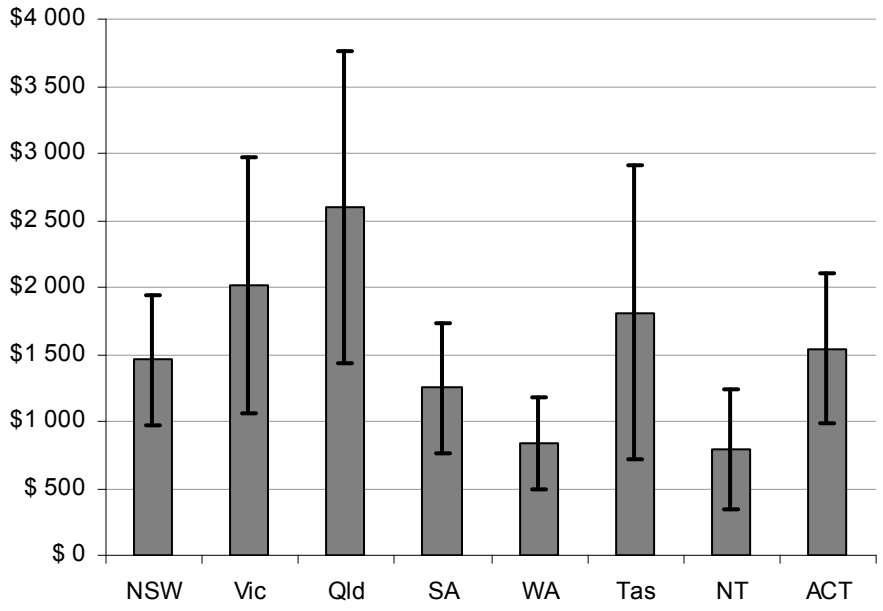
2 Reported figures were weighted to ensure the sample reflected the actual small and medium business population distribution in each state. See Sensis (2009) for further details on the weights.

3 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[4] — 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[a]**

12 months to May 2009



a 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.

4 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 7.3 **Record keeping requirements**[a]

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[b]	Confined spaces, health monitoring.

[a] Excludes records associated with training and high risk work licensing. [b] 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).

Table 7.4 **Written incident notification and subsequent record keeping**

Requirements in 2008-09

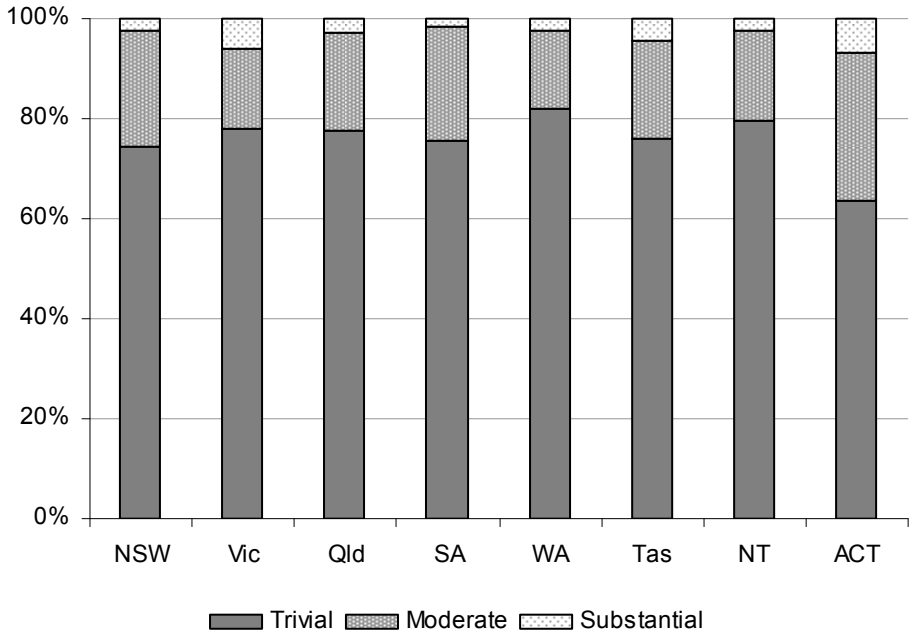
	Reporting requirement	*Record keeping requirement*	*Notification method*					
			Phone	*In person*	*Fax*	*Mail*	*Email*	*Online*
Cwlth	Report within 24 hours (2 hours for death).	30 years	✓	×	✓	×	×	✓
NSW	For workers, report immediately (via phone) to insurer if workers' compensation payable (they pass 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		✓	✓	✓	✓	✓	×
Tas	Notify immediately (via phone), written report within 48 hours.		✓	×	✓	✓	✓	×
NT	Notify as soon as practicable (via phone), report within 48 hours.	5 years	✓	×	✓	×	✓	×
ACT	Report as soon as practicable, but no later than 7 days.	5 years	✓	×	✓	✓	×	×

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[a]**
12 months to May 2009



[a] 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).

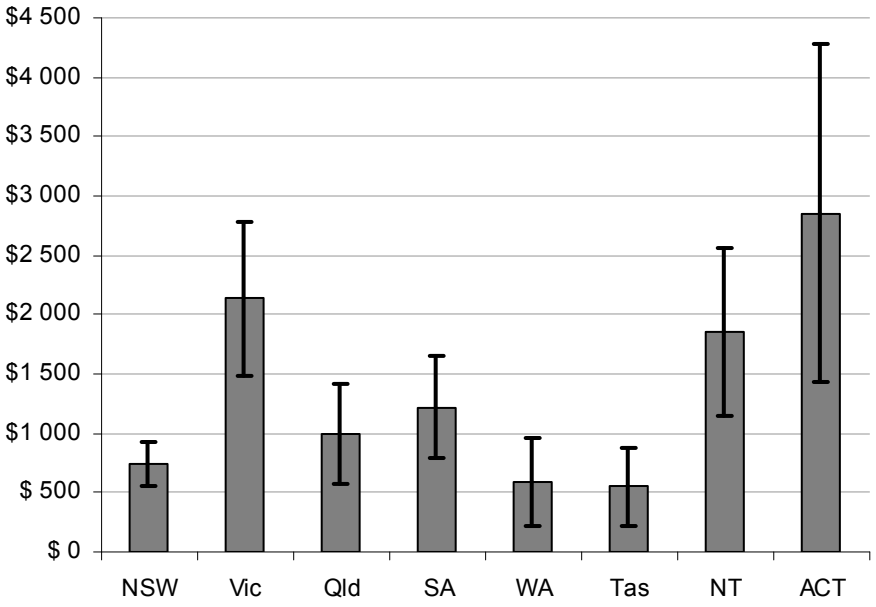
Overall, 58 per cent (1051) of all SMEs surveyed reported that they faced some costs associated with keeping OHS records. Of these 75 per cent reported the costs were trivial, with 20 and 5 per cent reporting moderate and substantial costs respectively. Across the jurisdictions, a larger proportion of 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[a]**

12 months to May 2009



a 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 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 7.5 Duties on designers

Primary legislation in effect in 2008-09

	Duties on designers of:		
	Plant	*Substances*	*Structures*
Cwlth	×	×	×
NSW	✓	✓	×
Vic	✓	×	✓
Qld	✓	×	✓
SA	✓	×	✓
WA[a]	✓	×	✓
Tas[a]	✓	×	✓
NT	✓	✓	✓
ACT[a,b]	×	×	×

[a] Duties for designers of substances in Western Australia, Tasmania and the ACT are imposed in dangerous goods legislation. [b] In the ACT duties in relation to design for plant and structures have been imposed under the *Work Safety Act 2008* 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 employers, 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.

Table 7.6 Limitations on duties of designers of structures

Summary of qualifiers on duties 2008-09

	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

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 Financiers 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.

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.

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).

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.

Table 7.8 **Elements of duty of care coverage — employer/contractor relationship**

2008-09

	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	✓			
NSW				✓
Vic	✓		✓	
Qld			✓	
SA	✓			
WA	✓		✓	
Tas			✓	
NT		✓	✓	✓
ACT[a]				

[a] 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 depend 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, a reasonable practicable defence is possible.

Table 7.9 **Qualification of duties**
2008-09

	Qualification on employer's duty	*Qualification on controller's duty*
Cwlth	Reasonably practicable	
NSW	na	None — reasonably practicable defence exists
Vic	Limited to aspects over which an employer can control	
Qld	na	None — reasonably practicable defence exists
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

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. For example, it would be expected that the interpretation of reasonably practicable would address the issue of control.

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.[5] As these requirements are not legislative provisions, only apply in

[5] 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[6] must appoint an officer (referred to as a workplace health and safety officer (WHSO)) for each of its workplaces with 30 or more employees.[7] 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).

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6 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.

7 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)

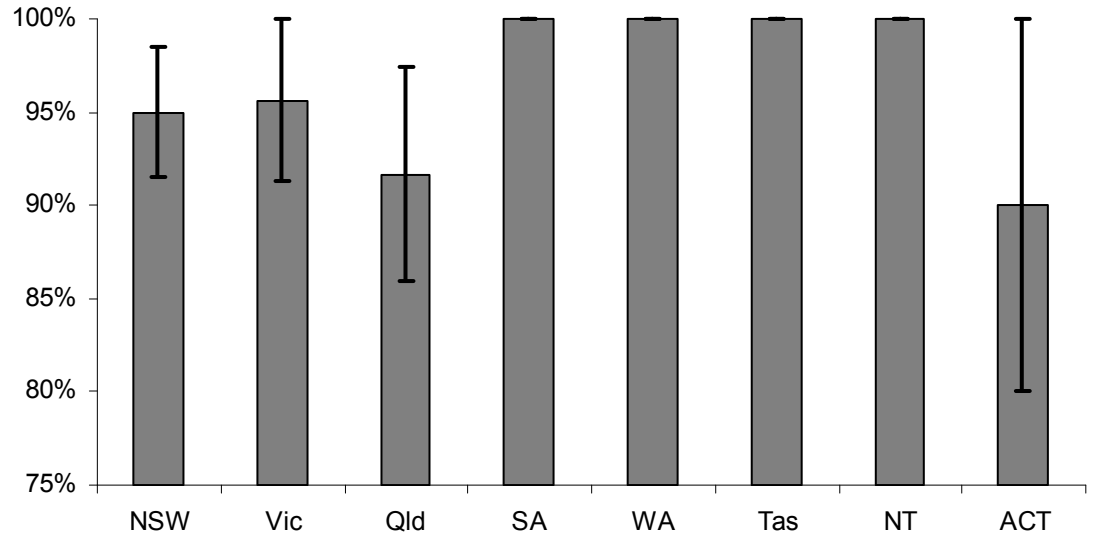
However, the more stringent requirement to employ a WHSO in Queensland does not appear to have translated into greater awareness of OHS regulations. Results from a survey of SMEs indicate that Queensland businesses with over 50 employees reported no better levels of awareness of OHS requirements than 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[a]**

12 months to May 2009 for businesses with 50 or more employees



a 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[a]**

	Gross annual income		
	Less than $52 000	*$52 000–$72 800*	*Over $72 800*
	%	%	%
Queensland — 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 of Occupational and Environmental Health Professionals	31	24	45

a 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 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.

Table 7.12 Laws which caused overly cautious decision making

Degree to which laws were responsible (0 to 6) — 2008

	None	*Low*		*Medium*		*High*		*Rating*	*Response*
	0	*1*	*2*	*3*	*4*	*5*	*6*	*Av.*	*Count*
	%	%	%	%	%	%	%		
i) The duty to act in good faith in the best interests of the company in section 181 of the Corporations Act 2001.	31	5	22	14	16	7	4	2	94
ii) The duty to act with reasonable care and diligence in section 180 of the Corporations Act 2001.	16	9	27	18	13	11	7	3	94
iii) The duty to prevent insolvent trading in section 588G of the Corporations Act 2001.	17	7	19	12	12	21	12	3	94
iv) The continuous disclosure laws (section 674 of the Corporations Act 2001).	1	5	11	12	31	29	12	4	94
v) Derivative liability laws, under which you may be found liable for the misconduct of your company because you are a director (e.g. some occupational health and safety laws, environmental 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

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 OHS training requirements among the jurisdictions include:
  - employers in all jurisdictions apart form 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 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 for employers to provide OHS training in their OHS Act 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 8.1 **Requirements for OHS training included in major OHS Acts**

Acts in 2008-09

	Training requirements
Cwlth	s. 16 **Duty of employers in relation to their employees etc**. (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	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. 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
Qld	s. 29 **Obligations of persons conducting a business or undertaking include** (e) providing information, instruction, training and supervision to ensure health and safety.
SA	s. 19 **Duties of employers** (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 **Duties of employers** (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 **Duties of employers** (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 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 **Duty to consult** - 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. Employers also have an obligation to provide training to health and safety representatives under section 42.
ACT	s. 37 **Duties of employers in relation to employees** (d) to provide to the employees 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.

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:
  - f) the provision of information and training for workers.
- Recommendation 151[1]: 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).

[1] Recommendation 151 received in principle support from WRMC subject to qualifications specific to New South Wales.

Table 8.2 Differences in regulatory requirements for employers to provide OHS training to employees

2008-09

	General requirement	*Training for specific hazards*	*Keep records of training*
Cwlth	✗	✓ Reg. 2.05 High risk work Reg. 4.18 Plant Reg. 5.04 Manual handling Reg. 6.18 Hazardous substances Reg. 7.11 Confined spaces Reg. 8.35 & 8.58 Storage or handling of dangerous substances Reg. 9.52 Major hazard facilities Reg. 11.07 Driver fatigue Reg. 12.12 Construction work Reg. 12.24 Construction work induction training Reg. 13.12 Falls	✓ Hazardous substances – 5 years Confined spaces – for period of employee's employment Storage or handling of dangerous substances – 5 years Construction work training – 5 years Falls – 5 years
NSW	✓ Reg. 13 Employer to provide instruction, training and information	✓ Reg. 77 Confined spaces Reg. 80 (2) (c) Manual handling Reg. 136A Plant Reg. 213 Principal contractors to ensure induction construction OHS training Reg. 214 Employers to ensure induction construction OHS training Reg. 215 Self employed persons to undergo induction construction OHS training Reg. 259 (c) Workers informed of risks of asbestos	✓ Reg. 174ZV 5 years
Vic	✓ Reg. 2.1.2 Employer to provide information, instruction and training	✓ Reg. 3.1.2 (3) Manual handling Reg. 3.5.45 Plant Reg. 4.3.47 Self employed persons involved in asbestos removal to undergo training Reg. 5.1.12 Site specific OHS training in construction Reg. 5.1.20 Construction induction training Reg. 5.2.19 Operators of major hazard facilities to provide training Reg. 5.3.40 Operator of mine to provide training re hazards	✓ Reg. 4.3.46 Employer to keep training records for people involved in asbestos removal and retain records while work is performed Reg. 4.3.47 Self employed persons to keep training records if involved in asbestos removal and retain records for the duration of work Reg. 5.2.20 Owners of major hazard facilities to keep records of training while employee employed at facility Reg. 5.3.41 Operator of mine to keep records of training while employee employed at mine

(Continued next page)

Table 8.2 **(continued)**

	General requirement	*Training for specific hazards*	*Keep records of training*
Qld	✓ Reg. 49 Employer to provide training in safe working methods to workers who undertake prescribed activities	✓ Reg. 32 Earthmoving or crane occupation or high risk work Reg. 49 Training in prescribed activities including demolition work and removal of asbestos Reg. 211 Hazardous substances Reg. 243 Lead Reg. 302 Employers to ensure construction workers hold general induction evidence before commencing work	✓ Reg. 211 (3) 5 years for training about hazardous substances Reg. 244 (3) 5 years for training about lead
SA	✓ Reg. 1.3.4 Employer to provide information, instruction and training Reg. 1.3.5 Induction to new work	✓ Reg. 2.4.8 Confined spaces Reg. 2.9.4 Manual handling Reg. 2.10.3 Noise Reg. 2.12.1 Use of protective equipment and clothing Reg. 2.13.1 Prevention of falls Reg. 3.2.20 Use of plant Reg. 4.1.14 General hazardous substances Reg. 4.2.8 Asbestos Reg. 5.12.35 Use of explosives in mining	✓ Reg. 1,3.4 (d) in relation to implementation of regulations records (related to information, instruction and training) to be kept for 5 years from the last date of entry ✓ Reg. 4.1.19 (1) (c) 5 years
WA	✗	✓ Reg. 3.87 Confined spaces Reg. 3.136 Construction industry safety awareness Reg. 5.21 Hazardous substances Reg. 5.58 Lead	✓ Reg. 5.21 (2) Hazardous substances – no specified period Reg. 5.58 (2) Lead – no specified period
Tas	✗	✓ Reg. 118 (7) Asbestos	✗
NT	✓ Reg. 43 Information, instruction and training	✓ Reg. 87A Use of plant	✓ Reg. 43.3 (b) general obligation but no specific period for keeping records
ACT	✗	✓ OHS General Regulations 2007 Reg. 28 (1) (c) Use of protective equipment Reg. 33 (5) (a) Protection against falls Reg. 65 Confined spaces Reg. 71 Noise management OHS Manual Handling Regulations 1997 Reg. 6 (2) (b) Manual handling tasks Reg. 6 (3) (b) Use of mechanical aids, manual handling procedures or personal protective equipment	✓ Reg. 66 keep records for training undertaken by workers exposed to confined spaces for the period in which the worker 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 more details about the survey). 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 SMEs which have employees or operations based interstate, 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. By comparison, medium sized businesses only accounted for 22 per cent of the sample of SMEs used by Sensis Pty Ltd. 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. After removing some large outliers[2] 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 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.

[2] 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.

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.[3]

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 and purchased external OHS training. New South Wales recorded the highest percentage of SMEs undertaking both 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. For other industry groups, the proportion which conducted training was close to the national average of 43.6 per cent (table 8.4).

[3] 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.

Table 8.3 **SMEs undertaking and purchasing OHS training by jurisdiction**
12 months to May 2009[a]

	Undertook internal OHS staff training (%)	*Purchased OHS training externally (%)*
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

[a] 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).

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 has a very similar use of both internal and external OHS training (38.0 per cent and 36.1 per cent respectively). The relatively higher take-up of external training by construction firms possibly reflects the necessity for construction workers to undertake construction awareness training which is 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).

Table 8.4 **SMEs who undertook and purchased OHS training by industry**
12 months to May 2009[a,b]

	Undertook internal OHS staff training (%)	*Purchased OHS training 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

[a] 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. [b] 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).

8.4 Costs associated with internal and external OHS training

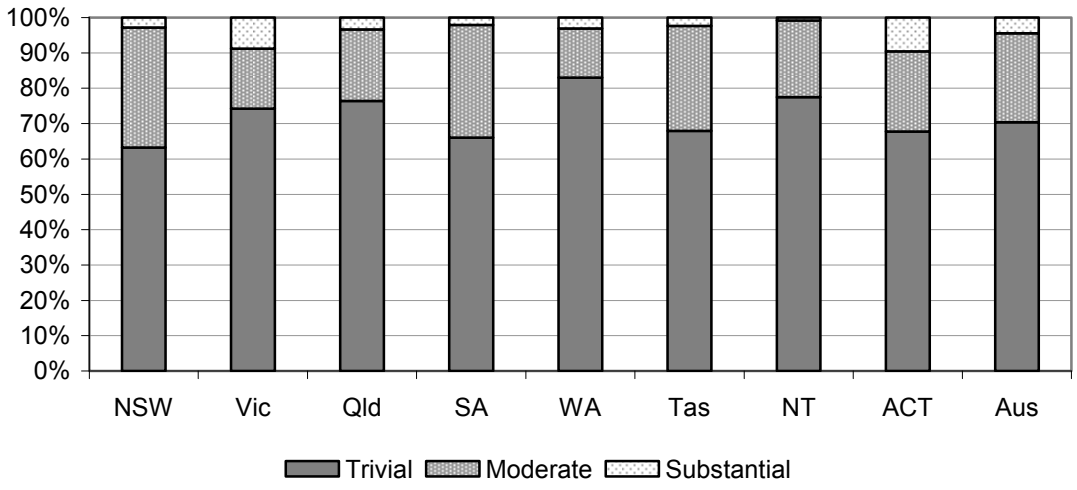
Costs of internal OHS training

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).

Figure 8.1 **Relative costs faced by SMEs undertaking OHS training internally by jurisdiction**

12 months to May 2009[a]



[a] 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.

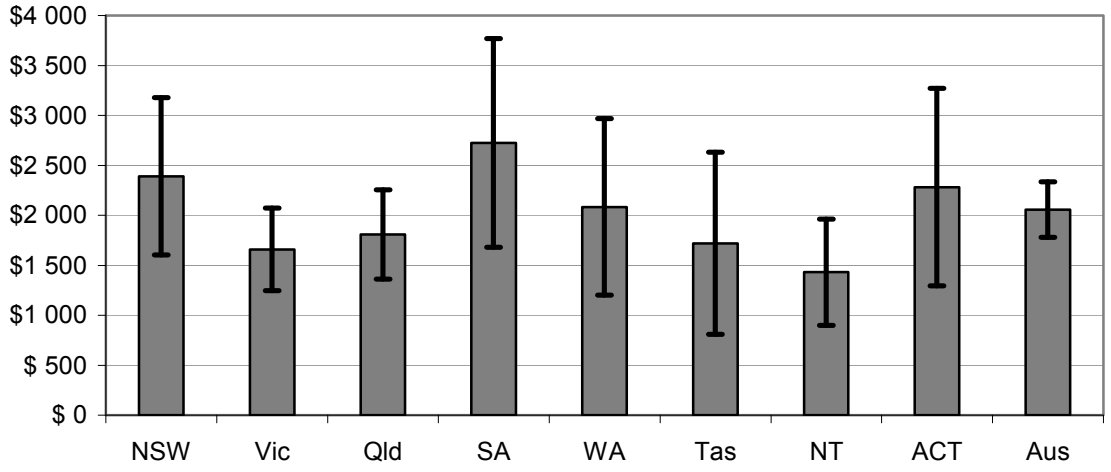
Data source: Sensis Survey of SMEs (2009 unpublished).

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[4] are shown by the lines on figure 8.2.

Figure 8.2 **Average costs faced by SMEs conducting OHS training internally by jurisdiction**
12 months to May 2009[a,b]



a 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. **b** 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

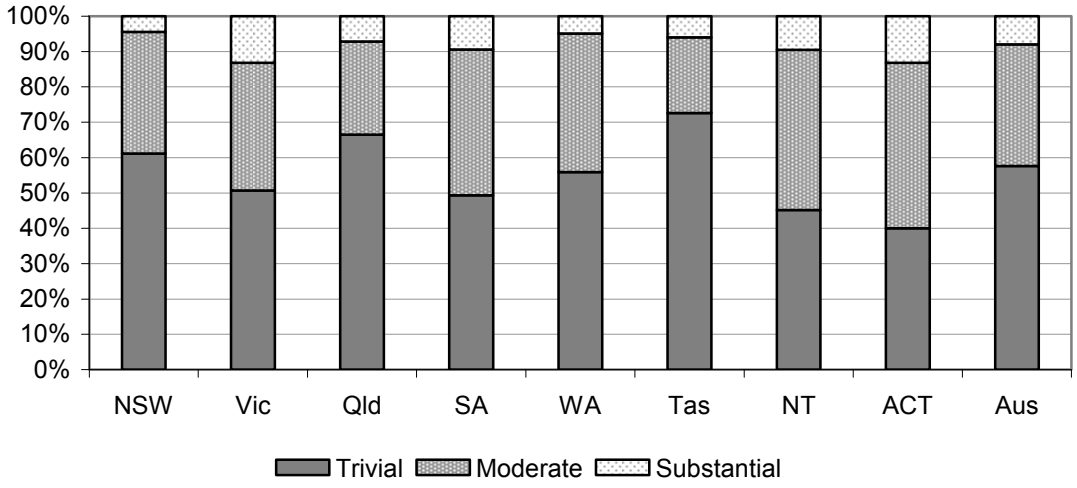
4 Standard errors are one measure of sampling error, which result from surveying a sample of SMEs as distinct from conducting a census of the whole population.. Standard errors indicate the degree to which an estimate may vary from the value which would have been obtained from a full enumeration or the 'true value'. There are about two chances in three that a sample estimate differs from the true value by less than one standard error.

$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 complexity of a 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 (see figure 8.3).

Figure 8.3 **Relative costs faced by SMEs purchasing OHS training externally by jurisdiction**
12 months to May 2009[a]



[a] 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).

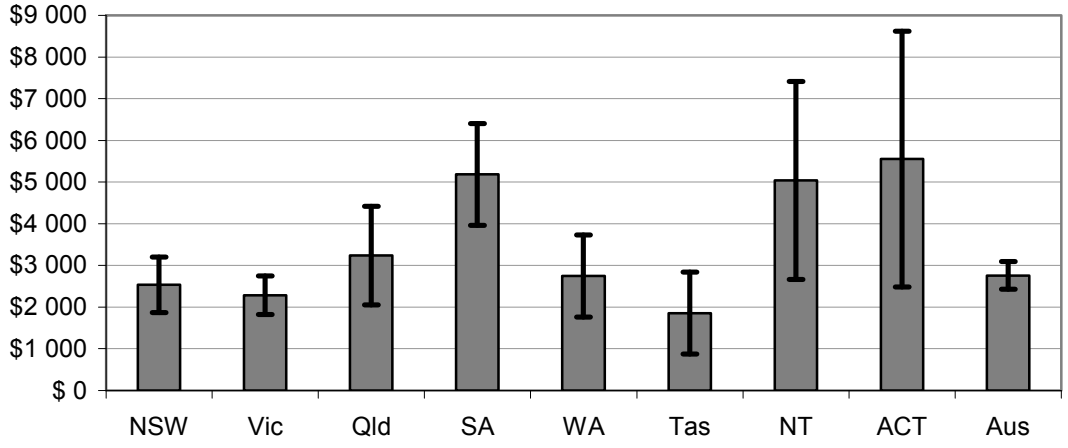
Again, differences were observed between SMEs operating in different industries. A higher proportion of SMEs in Retail trade and Wholesale trade reported substantial costs associated with purchasing external OHS training than SMEs in other industries in the 12 months to May 2009, while only 4.3 per cent 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, the data is not as reliable given the small sample sizes in these jurisdictions which contribute to a greater variation in estimates possible as shown in figure 8.4.

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.

Figure 8.4 **Average costs faced by SMEs purchasing OHS training externally by jurisdiction**
12 months to May 2009[a,b]



[a] 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. [b] 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).

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*).

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).

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.

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. The vast majority of jurisdictions who provide this form of training mutually recognise similar training provided by other jurisdictions. This facilitates the mobility of workers between jurisdictions without unnecessary delays or lost working time to complete similar training requirements. 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 (green cards).

The Commonwealth recognises all construction awareness training conducted in the various states and territories.

Table 8.5 **Mutual recognition by states and territories of construction safety induction training**
2008-09

	Recognised by:					
	Vic	NSW	Qld	WA[a]	SA	ACT/NT/Tas[b]
Vic – Red card (Prior 1 July 2008)		✓	✓	✓	✓	na
Vic – white card (Post 30 June 2008)		✓	✓	✓	✓	na
NSW – green card (pre 29 March 2004)	✓		✓	×	✓	na
NSW – White card (post 29 March 2004)	✓		✓	✓	✓	na
Qld – Blue card	✓	✓		✓	✓	na
WA	✓	✓	✓		✓	na
SA – white card	✓	✓	✓	✓		na

na not applicable. [a] Western Australia only recognises cards issued in the past 3 years. Green cards formerly issued in NSW are no longer recognised by WA. [b] The ACT, Northern Territory and Tasmania 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 includes non-legally binding requirements for 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.

It is envisaged that all jurisdictions will recognise each others current construction induction training certificates (with the exception of the older green cards issued in New South Wales) with the possibility of a single national construction induction card being available in the future.

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 ranges 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 are exempt from the duties relating to health and safety committees (HSCs) and so do not face any regulatory burden from HSC requirements. Employers with less than 50 employees under the Commonwealth regime are similarly exempt.
- New South Wales and the Northern Territory place 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, is 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, and 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), 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 the responsibilities and powers given to HSRs (sections 9.1 and 9.3), HSCs (section 9.2 and 9.3) and trade unions (section 9.4) as well as the OHS legislation affecting their operation.

Box 9.1 **What are HSRs?**

HSRs are elected by their co-workers to represent them on health and safety issues in the workplace. HSRs have varying powers depending upon the state or territory 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.

The provisions within the OHS laws of the jurisdictions relating to 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 recommendations of that review (or a summary of those recommendations), along with the response of the Workplace Relations Ministerial Council (WRMC) and details of the relevant provisions of the model work health and safety provisions (as amended in December 2009), have been included throughout this chapter to provide further 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 HSRs and HSCs 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.[1] For those businesses where HSR and/or HSC provisions have been activated, the resultant burdens should be considered in light 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). For example, in some jurisdictions, HSRs have the ability to direct a cessation of work where the workplace has become unsafe. While the exercise of this power may come at a cost to business, it may not constitute a net cost if it prevents workplace accidents.

Under the Queensland OHS regime, 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 (section 7.4).

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).

HSR requirements placed no burden on businesses with less than 10 employees in Tasmania, the Northern Territory and the ACT in 2008-09, as these businesses were exempt from the HSR requirements. Aside from New South Wales and the Commonwealth, where the possibility of a regulator initiating an HSR election may create some limited 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

[1] Based on a survey of 1802 small and medium enterprises (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.

(2009a) — there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009).

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		✓	✓	✓**d**				✓	
Direction from regulator	✓**e**	✓							

a An employee representative may initiate the request on behalf of 'workers' following the request of the workers. **b** Only for workplaces where there are 10 or more employees. **c** This exemption ceased from 1 October 2009 with the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008. **d** '[W]orkers may elect a [HSR]… at their employer's suggestion' (*Workplace Health and Safety Act 1995* (Qld), s. 71). **e** 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).

Determining 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' or equivalent (hereafter, collectively referred to as 'work groups').[2] Work groups are typically established to allow HSRs to represent workers with similar functions within a workplace.[3] For example, in a manufacturing business, one work group may be comprised of secretarial and office administration staff, while another may be comprised of machine operators. As a workplace can be categorised into a number of work groups, those jurisdictions that allow for work groups within their OHS legislation (table 9.2) are allowing, in effect, 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 of the HSRs — this is a potential burden that is not faced by

2 Depending on the jurisdiction, work groups are also referred to as 'worker consultation units' and 'areas of representation'.

3 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.

businesses operating in jurisdictions where multiple HSRs (per work group) are not provided for.

Table 9.2 **Determining an HSR's area of representation**

2008-09

	Provision for a work group (or equivalent)	*Possibility for more than one HSR per work group (or equivalent)*	*Parties/conditions for discussions about election of HSRs and formation of work groups*
Cwlth	✓[a]	×	Employer and employees or (at the employee's request) an employee representative
NSW	✓	np	Employer and employees[b]
Vic	✓	✓[c]	To be determined by negotiation between the employer and workers
Qld	✓[d]	np	Workers may request discussions with the employer
SA	✓	✓[c]	Employer and any interested employees (or person appointed by those employees)
WA	✓[e]	✓	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[f]

na not applicable. **np** no provision. [a] The *Occupational Health and Safety Act 1991* (Cwlth) provides that all employees may be included in one work group. [b] 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. [c] HSR and deputy HSR. [d] Employees may negotiate with their employer to elect more than one HSR for a workplace. [e] An election scheme may provide for the election of HSR(s) for any group of employees that constitute a distinct unit of the workforce. [f] 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 Tasmania (2004); WorkCover NSW (2001); WorkCover Tasmania (2009b).

Tasmania is the only jurisdiction that does not provide for work groups in its legislation. As Tasmania provides for only one HSR per workplace, the area of responsibility for a Tasmanian HSR is the whole workplace.

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 even multiple HSRs per work group)[4]
- there is no need to consult employees or their representatives regarding an HSR's area of representation.

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

Recommendation (no. 102 and 103) of the *National Review into Model Occupational Health and Safety Laws:*

In summary, the National Review recommended 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 most directly engaged with the work group.

The National Review 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 most directly engaged with the workers (Stewart-Crompton, Mayman and Sherriff 2009).

WRMC response:

> **Agreed in principle, subject to qualifications outlined below**
>
> The principles underlying [the recommendation] are supported, however, much of the detail should be dealt with by a head of power in the Act with detail to be covered in the regulations. (WRMC 2009a, p. 24–25)

The relevant model work health and safety provisions (as amended in December 2009) provide the person conducting the business 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.

Delegate structures for consultation, 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 require consultation with workers/employees in general). The Victorian model of negotiating over the consultation process could add a layer of bureaucracy (and cost) to the process —

4 While there is no statutory provision for doing so, Tasmanian employers can voluntarily allow more than one HSR per workplace (WorkCover Tasmania 2004).

however, an effective negotiation process might reduce the overall costs of consulting on the nature of work groups.

The National Review into Model OHS Laws considered HSRs' areas of representation and the number of HSRs in workplaces — the National Review's recommendations, the WRMC's response and the relevant model work health and safety provisions (as amended in December 2009), are outlined in box 9.2.

Election requirements

There are many variations in the statutory requirements 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 the possibility of unions and/or industrial organisations playing a role in running an HSR election. In contrast, the OHS inspector can be called upon in Victoria to run an HSR election
- 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 — the National Review's 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 **HSRs elections — recommendations from the National Review into Model OHS Laws**

Recommendation (no. 104) of the *National Review into Model Occupational Health and Safety Laws:*

In summary, the National Review recommended:

- 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 (by majority) request a union or other organisation assist in the conduct of the election
- no election should be required where the number of HSR candidates equals the number of HSR vacancies
- the members of a work group should be advised of their HSR as soon as possible after that HSR has been elected. (Stewart-Crompton, Mayman and Sherriff 2009)

WRMC response:

Agreed in principle, subject to qualifications outlined below

The principles underlying [the recommendation] are supported, however, much of the detail should be dealt with by a head of power in the Act with detail to be covered in the regulations. (WRMC 2009a, p. 25)

Terms 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 productivity). 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 have chosen maximum terms of either two years (the Commonwealth,[5] New South Wales,[6] Queensland, Western Australia, the Northern Territory and the ACT) or

5 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.

6 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).

three years (Victoria, South Australia and Tasmania). For the model Act, a three year term has been recommended (Stewart-Crompton, Mayman and Sherriff 2009) and agreed 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).

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 9.3 **Selected powers of health and safety representatives**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Issue provisional improvement notices (PIN) or equivalent (box 9.4)	✓	np	✓**a**	✓**ab**	✓**c**	✓**b**	✓	✓	✓**d**
Direct the cessation of work where it is unsafe	✓	np	✓	np	✓	np	✓	✓	✓**d**
Request an inspector conduct an inspection	✓	✓	np	np	np	np	✓**e**	np	np
Inspect a workplace	✓	np**f**	✓	✓	✓	✓	✓	np	✓
Accompany an inspector during an inspection	✓	✓	✓	np	✓	np	✓	np	✓
Accompany a worker during an OHS interview	✓	✓	✓	✓**g**	✓	✓**h**	✓	np	✓
Investigate/review an accident or dangerous occurrence (or inspect the workplace after such an occurrence)	✓	np**fi**	✓	✓	✓	✓	✓	np	✓

np no provision. **a** An HSR may only issue the direction/PIN after consulting with the employer. **b** A power exercisable by 'qualified' HSRs only. **c** Can only be issued if the matter cannot be resolved by the OHS Committee. **d** From 1 October 2009, an HSR may only exercise this power if they have completed the relevant training. **e** Only after consultation with the employer. **f** HSRs have the power to 'investigate any matter that may be a risk to health and safety' at the workplace. **g** Only for interviews related to workplace incidents. **h** An obligation on employers to allow the HSR to be present. **i** 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. The power of an HSR to direct a cessation of work, if exercised, will place a material burden on business.

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 (in the case of those operating under the Commonwealth regime, the HSR must first consult with the supervisor of the person(s) involved in the breach).

If the person to whom the PIN is issued does not agree with the notice, that person may request that an inspector attend the workplace to review the circumstances surrounding the issue of the PIN and 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.

Source: *Occupational Health and Safety Act 1991* (Cwlth); Stewart-Crompton, Mayman and Sherriff (2009).

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).

Box 9.5 HSR powers — recommendations from the National Review into Model OHS Laws

Recommendation (no. 106 and 109) of the *National Review into Model Occupational Health and Safety Laws:*

In summary, the National Review recommended 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 the assistance of an inspector at the workplace
- 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 — these provisions should be modelled on those in the current OHS Acts of Victorian or Queensland with some modifications:
  - the PIN should clearly state the person required to comply with it
  - a PIN that has been affirmed by an inspector (with or without modifications) is deemed to be an improvement notice of the inspector
- direct that work cease where there is an immediate threat to the health and safety of any person.

The National Review 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.

WRMC response (summary):

Agreed in principle — the head of power should reside in the Act, with details contained in regulations.

Source: Stewart-Crompton, Mayman and Sherriff (2009); WRMC (2009a).

Similarly, the power of HSRs to issue provisional improvement notices (PINs — box 9.4), or equivalent notices, in all jurisdictions aside from New South Wales represents the vesting of considerable authority in HSRs and potentially

poses a significant burden for business — particularly should the power be abused.[7] 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 that OHS issue being addressed in a timely manner without the involvement of the regulator — an outcome that benefits both workers (through timely resolution) and employers (through timely resolution and the absence of the regulator's involvement). A 2001 survey of HSRs by the Australian Council of Trade Unions (ACTU) 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).

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.[8]

The National Review into Model OHS Laws considered the powers that should be provided to HSRs in the model Act — the National Review's recommendations, and the WRMC's response, are outlined in box 9.5 (there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009)).

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 (all jurisdictions except New South Wales) or in some other way fail to fulfil their responsibilities (South Australia only, where repeatedly neglecting HSR duties is grounds for seeking the removal of an HSR from office). The Queensland provisions amount to a limitation of an HSR's powers rather than the HSR's removal from office (table 9.4).

7 The ability of employers to remove an HSR from office, which is discussed below, is an important means by which employers can protect themselves from the costs of HSRs that abuse their power.

8 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'.

Table 9.4 **Provision for the disqualification of HSRs**

2008-09

	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 under the Act 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 this 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[a]	*Disqualification*: 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 their role as an HSR *Objection to selection*[b]: 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

a 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). **b** 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,[9] it is expected that where the regulator administers the process (the Commonwealth, Tasmania, the Northern Territory and the ACT) a lower burden would be imposed on businesses

9 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.

compared to those jurisdictions that direct the process through the courts (Victoria, Queensland and Western Australia) or a review committee of the court (South Australia).

Box 9.6 Disqualifying HSRs — recommendations from the National Review into Model OHS Laws

Recommendations (no. 113) of the *National Review into Model Occupational Health and Safety Laws:*

A relevant court or tribunal may, on application, disqualify or suspend an HSR or suspend the right of the HSR to exercise a power for a specified period, for:

a) repeatedly neglecting their HSR functions; or

b) exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or

c) acting unreasonably in the performance of their functions and exercise of their powers as an HSR.

Persons able to make such applications include:

a) a person detrimentally affected by the performance or failure to perform the functions or the exercise of powers by the HSR …; or

b) the regulator; or

c) a member of the HSR's work group.

The onus in such proceedings is on the applicant to prove, on the balance of probabilities that the grounds exist for disqualification or suspension. (Stewart-Crompton, Mayman and Sherriff 2009, p. 120)

WRMC response:

Agreed in principle, subject to qualifications outlined below

A court or tribunal should be able to disqualify or suspend an HSR for improper use of their powers, but court or tribunal involvement is not appropriate in cases of poor performance as an HSR as per the first paragraphs (a) and (c) of this recommendation. These should not be included during drafting ie. 'repeatedly neglecting the HSR function' and 'acting unreasonably in the performance of the HSR functions and exercise of HSR powers'. (WRMC 2009, p. 29)

The National Review into Model OHS Laws considered the disqualification of HSRs — the National Review's recommendations, and the WRMC's response, are outlined in box 9.6 (there are no material differences between the WRMC's response and the model work health and safety provisions (as amended in December 2009)).

Training requirements

The OHS statutes of all jurisdictions include provisions for the training of HSRs. The Commonwealth, New South Wales and Tasmania are the only jurisdictions in which the training is compulsory.[10] In the other jurisdictions, an employer only need provide training when requested by the HSR (table 9.5).

The training course costs in table 9.5 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.[11]

The training costs in table 9.5 are based on 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).[12] The course costs in table 9.5 are taken from those that could be obtained from the websites of OHS training providers. As such, these course costs are indicative only and may not represent the full range of course costs for the jurisdictions. Accordingly, there may be both higher and lower training costs applicable to other providers in each jurisdiction. Even so, this sample of course costs shows significant variation across, and within, jurisdictions. Variation within a jurisdiction can create a burden for business in the form of the search costs arising from seeking 'value for money' training.

In addition to the course costs, employers in all jurisdictions must provide HSRs with leave to attend the training. Based on full-time adult ordinary time earnings (ABS 2009) for February 2009, the time spent at training courses (table 9.5) translates to:

- $1183 for employers in Victoria, South Australia and Western Australia, as well as those operating under the Commonwealth's jurisdiction
- $946 for employers in New South Wales, Tasmania and the ACT

---

10 From 1 October 2009, training was also compulsory in the ACT under the *Work Safety Regulation 2009* (ACT).

11 Depending upon the organisation of which they are a member and the training sought, employers can obtain discounts of up to 18 per cent of the cost of a training course by virtue of their membership.

12 These costs were not included as it is problematic to determine typical costs for a business. For example, travel and accommodation costs will vary from business to business based on factors such as their distance from training centres and internal policies on travel and accommodation — a business located in a capital city may not incur any accommodation costs arising from the attendance of their HSRs at training, whereas the corresponding accommodation costs for a regional business may be quite high.

- $710 for employers in Queensland.

Table 9.5 HSR training

30 June 2009

	Cwlth[a]	*NSW*	*Vic*[b]	*Qld*	*SA*[b]	*WA*	*Tas*	*NT*[b]	*ACT*
Employer obligations									
Training to be provided	✓	✓	✓[c]	✓[c]	✓[c]	✓[c]	✓	✓[c]	✓[c,d]
Refresher training to be provided	np	np	✓[c]	✓[c]	✓[c]	np	✓[e]	✓[c]	np[d]
Employer to meet course costs	✓[f]	✓	✓	✓	✓	✓	✓[f]	✓	np[d]
Paid time off to attend training	✓	✓	✓	✓	✓	✓	✓[g]	✓	✓
Cost of training to employers									
Course costs									
Lowest estimated cost (per employee including GST)	$690	$495	$715	$500	$580	$550	$770	ul	$550
Highest estimated cost (per employee including GST)	$879	$615	$1 250	$645	$820	$1 340			$593
Cost of time spent at training									
Number of days training	5[h]	4	5	3	5	5	4	ul	4
Time cost[i]	$1 183	$946	$1 183	$710	$1 183	$1 183	$946		$946

np no provision. **ul** unable to locate. [a] Training must be accredited by the regulator. [b] Training must be approved (or conducted) by the regulator. [c] Only if requested by the HSR / is an HSR entitlement. [d] 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. [e] Only if elected to a second term as an HSR. [f] 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. [g] Training is to take place during normal work hours. [h] One provider offers a 3½ day course. [i] 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 number of days required for training in each jurisdiction (table 9.5) does not appear to be related to the powers on which HSRs need to be trained (table 9.3). For example, Tasmanian HSRs have the most powers, yet require only four days training, compared to a jurisdiction such as Western Australian, where HSRs have fewer powers but require five days training. Some of the variation in the length of training courses may be related 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 fewer (and comparatively minor) powers compared to most jurisdictions, they still require four days training — indicating there may be some 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 more powers but still only 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 9.7).

Box 9.7 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)

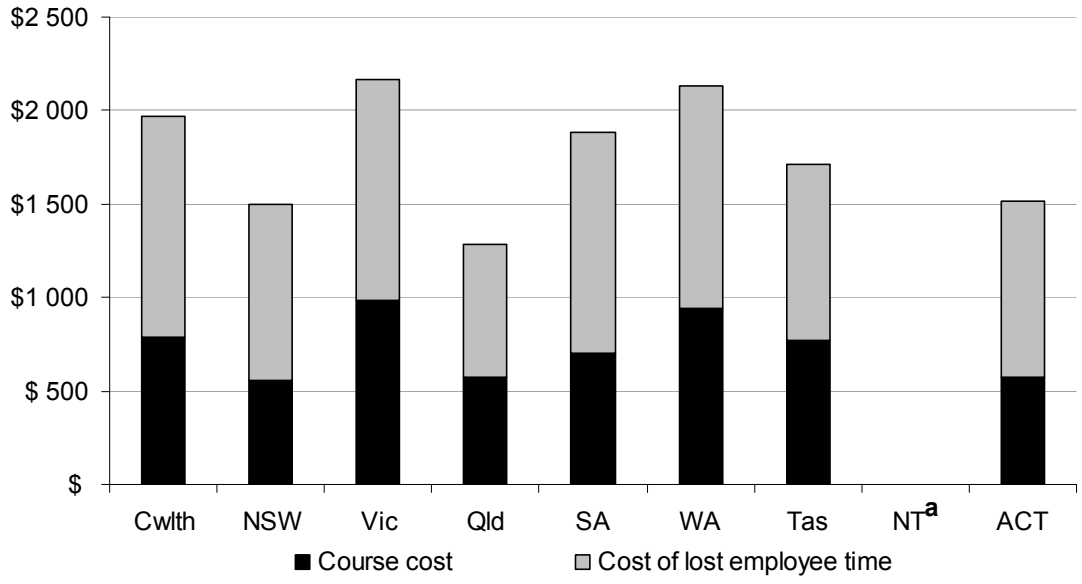
A Western Australian facilitator's guide for HSR training (Commission for Occupation Safety and Health (Western Australia), 2009) includes the following topics among those to be covered in the training: the OHS legislative framework (including the duty of care and the roles and responsibilities of the key duty holders); the functions of HSRs, and resources and tools to help HSRs in their roles; and, the use of Provisional Improvement Notices.

Queensland employers potentially face the least total 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.

Employers in South Australia are explicitly obligated to reimburse HSRs for any reasonable expenses incurred in attending the training, including the costs associated with travelling, obtaining meals or accommodation and parking fees. However, offsetting the overall training costs in South Australia, 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 business may be eligible for subsidies of up to $100 per HSR per day (of training) to offset the cost of the training. Subsidies are granted subject to the employer meeting the relevant acceptance criteria and are assessed on a case by case basis for new and expanding industries, as well as those industries located wholly or predominantly in non

metropolitan regions (South Australian Government, pers. comm., 9 December 2009).

Figure 9.1 **Estimates of the cost of HSR training**
Based on mid-point of minimum and maximum course costs (table 9.5)



a No data available to support estimates for the Northern Territory.

Data source: Table 9.5.

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 show that well-trained HSRs (or equivalent) are effective in improving OHS outcomes (Johnstone, Quinlan and Walters 2004; Walters 1997; Walters, Kirby and Daly 2001), including a reduction in injuries and the economic costs associated with those injuries (James and Walters 2002).

The National Review into Model OHS Laws considered the training requirements for HSRs — the National Review's recommendations, the WRMC's response and the relevant model work health and safety provisions (as amended in December 2009), are outlined in box 9.8.

The different training requirements of the jurisdictions (for example, box 9.7) 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.

Box 9.8 HSR training — recommendations from the National Review into Model OHS Laws

National Review into Model Occupational Health and Safety Laws

The National Review addressed training specifically in **recommendations 110 and 111**. In summary, the National Review recommended the model Act should include provision for the initial training of HSRs, including:

- 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.

The National Review also made recommendations on provision of '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)
- such further training courses as may be agreed between the HSR and the person conducting the business or undertaking, or as directed by an inspector (Stewart-Crompton, Mayman and Sherriff 2009).

WRMC response:

The WRMC agreed in principle with **recommendations 110 and 111**, noting:

> The model Act should provide that:
>
> - HSRs are entitled to attend training;
> - The training should be approved by the regulator, but the Act should not specify the length of the training or whether or not it is competency based;
> - While attendance at such training is not mandatory, HSRs are not able to exercise their power to issue PINs or stop work directions unless they have completed the training;
> - The cost of the training is to be borne by the person conducting the business or undertaking;
> - The HSR is entitled to paid leave whilst attending training at the rate of pay as they would otherwise have been entitled to receive from the employer for working during that period as well as reimbursement of any costs associated with attending the training. (WRMC 2009a, p. 27-28).

The relevant 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'.

9.2 Health and safety committees

Although HSCs are not automatically mandatory in any jurisdiction, all jurisdictions require an employer to establish an HSC when requested to do so by employees. The regulatory provisions relating to the formation of HSCs vary from jurisdiction to jurisdiction (table 9.6). Employers with less than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory, were (in 2008-09) 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 from HSC requirements.

Table 9.6 **Forming HSCs**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*[a]
Committee provisions apply when employee numbers exceed	50	20	np	np	20	np	20	20	np
Establishment of OHS committees required:									
On request of HSR	✓	np	✓	✓	✓	np	np	✓	np
On request of employees	✓	✓	np	np	✓	✓	✓	✓	np
Restriction on composition of members	np	✓[b,c]	✓[b,d]	✓[e]	✓[b]	✓[b]	✓[f]	✓[b,g]	np
Prescribed frequency of committee meetings (months)	np	np	3	3	3	np	3	3	np

np no provision. [a] 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, including the election of HSC members. [b] The number of employer representatives on the OHS committee should not exceed the number of elected employee representatives. [c] The chairperson must be one of the employee representatives. [d] As far as practicable, the employee representatives on the committee should be HSRs or deputy HSRs. [e] See box 9.9. [f] The committee must be comprised of a majority of employees unless otherwise agreed between the employer and employees. [g] The committee must include the HSR (if there is one).

Source: OHS Acts and regulations; WorkCover NSW (2001).

In New South Wales and South Australia, the OHS statutes 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 on business arising from the HSC requirements. In contrast, the Western Australian legislation 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.

Box 9.9 **Requirements for HSCs in Queensland**

In Queensland, the membership of the HSC is subject to a number of requirements:

- a committee member must be an employer, principal contractor or an employee at the workplace
- the workplace health and safety officer (see section 7.4, chapter 7) and HSR for the workplace are to be members
- at least half the committee members must be employees other than those nominated by the employer or principal contractor
- other committee 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).

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.

In New South Wales, Queensland and Western Australia, an employer must form an HSC if directed to do so by the regulator.

Accordingly, Western Australia is the jurisdiction where an employer would be most likely to be obliged to form an HSC (and bear the associated burdens) given it only requires one employee to request its formation and it can also be directed to do so by the regulator.

The National Review into Model OHS Laws considered the requirements that should apply in relation to the formation of HSCs and HSC meetings — the National Review's recommendations and the WRMC's response are outlined in box 9.10 and 9.11, along with relevant model work health and safety provisions (as amended in December 2009) (box 9.11).

Box 9.10 Forming HSCs — recommendations from the National Review into Model OHS Laws

Recommendations (no. 114) of the *National Review into Model Occupational Health and Safety Laws:*

The model Act should provide that a workplace 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)

WRMC response:

Agreed in principle, subject to qualifications outlined below

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)

Box 9.11 HSC meetings — recommendations from the National Review into Model OHS Laws

Recommendations (no. 115) of the *National Review into Model Occupational Health and Safety Laws:*

The details of the structure and functions, minimum frequency of meetings and other operational matters relating to an HSC be provided for in regulations to the model Act. (Stewart-Crompton, Mayman and Sherriff 2009, p. 126)

WRMC response:

Agreed. (WRMC 2009a, p. 29)

The relevant model work health and safety provisions (as amended in December 2009) provide that an HSC must meet at least every 3 months and at any time upon the request of at least half of its members.

Functions

Once formed, HSCs serve a number of functions (table 9.7). 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 its duties, an HSC may seek to discharge its functions by:
  - encouraging and maintaining an interest in OHS matters in the workplace
  - informing workers on OHS matters
  - considering measures for training the workplace on OHS matters
  - helping in the resolution of OHS issues in the workplace
  - reviewing the circumstances of an incident (where that incident has been referred to the committee) and advising the employer (or principal contractor) of the results of the review and making recommendations arising out of the review
- 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 employees 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 employees who suffer from any form of disability
- in the Northern Territory, an HSC is to consider, and make recommendations on, changes to be made at the workplace following an accident or reportable incident.

As a result, a business operating across a number of jurisdictions must be prepared to interact with HSCs in different ways, depending on the jurisdiction.

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).

Table 9.7 **Selected functions of HSCs**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*[a]
Assist and/or facilitate cooperation in the development, implementation, review and updating of OHS measures	✓	✓[b]	✓	✓	✓	✓	✓	✓	✓
Assist the employer disseminate OHS information to employees	✓		✓		✓				
Investigate and attempt to resolve OHS issues		✓			✓				
Provide advice/recommendations to the employer on OHS matters		✓		✓		✓	✓	✓	
To keep, in an accessible place and form, information about the hazards workers may face in the workplace						✓	✓	✓	

[a] 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. [b] Review only.

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 functions for HSCs:

- 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
- assist in developing standards, rules and procedures relating to OHS that are to be followed or complied with at the workplace
- such other functions as are prescribed by the regulations or agreed between the person conducting the business or undertaking and the committee.

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 committee (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'.

Table 9.8 **Selected duties of employers in relation to HSCs**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Make relevant information on OHS matters available to the committee	✓	✓					✓	✓	✓
Permit the committee to undertake its functions	✓	✓					✓	✓	✓
Permit the committee, or committee member, to inspect the workplace		**a**						✓	
Provide adequate facilities to the committee		✓					✓	✓	
Must not act to the detriment of a committee member because they are a committee member		✓	✓	✓	✓	✓			
Consult with the committee on OHS matters		✓			✓		✓	✓	
Advise the committee of any workplace accident							✓	✓	

a HSCs have the power to 'investigate' OHS risks (which may entail an inspection of the workplace).

Source: OHS Acts and regulations; WorkCover NSW (2001).

9.3 The overall costs of HSR and HSC requirements

In a survey of 1802 small and medium enterprises (SMEs) (appendix B), 18 per cent reported they had incurred a cost from implementing an HSR, HSC or both (Sensis Survey of SMEs 2009, unpublished).[13] 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 these costs 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. Also, jurisdictions with high estimated costs of training for HSRs,

[13] The survey did not, however, capture any information on the proportion of SMEs that had HSRs or HSCs in their workplaces.

such as Victoria and Western Australia (figure 9.1), had high overall costs reported in the SME survey.

Table 9.9 **Cost of HSRs and HSCs[a]**

12 months to May 2009

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
HSRs									
Initiating election	H	H					L	L	L
Areas of representation			H				L		H
HSRs per workplace			H		H	H	L		H
Election requirements			L		L				
Powers[b]	H	L							
Disqualification	L	H					L	L	L
Training	H		H	L		H			
HSCs									
Forming	L					H			
Duties of employers		H	L	L		L		H	
Estimated average cost to SMEs of HSRs and HSCs[c] ($)	**np**	**1 798**	**4 010**	**3 169**	**1 213**	**4 421**	**958**	**3 741**	**1 338**
Relative standard error[d] (%)	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. **a** 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. **b** 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. **c** 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. **d** 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).

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, measures such as HSRs and HSCs are more/less likely to be requested by the employees.

9.4 Trade union involvement in the workplace on OHS matters

In consultations, 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 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.

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 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.

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 (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).

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 non-regulators, 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)

Box 9.12 **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 health and safety committee 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 health and safety committees 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).

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 9.12.

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 but the legislation has yet to be proclaimed. 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 is the only jurisdiction that 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 9.10 **Differences in union rights of entry – purpose of entry, and rights and conditions upon entry[a]**

2008-09

	NSW	*Vic*	*Qld*	*WA*	*NT*	*ACT*
Enter to investigate breach	✓[b]	✓	✓	✓[c]	✓	✓
Notice needed before investigating suspected breach	×	×	×	×	×	×
Enter to consult and discuss OHS issues	×	×	✓	✓	✓	×
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]	✓	✓	✓	✓
Interview members or eligible persons of the employee organisation[e]	×	✓	✓	×	✓	✓
Speak with occupier or employer	×	✓	✓	×	×	×
Take measurements and make records	✓	×	×	×	✓	✓
Examine, copy, or take extracts from any document produced	✓	×	✓	✓	✓	✓
Entry only to workplaces of a member or eligible member	✓	✓	✓	✓	✓	✓
Authorised representative to show permit upon request	✓	✓	✓	✓	✓	✓
Entry only during working hours	✓	✓	×	✓	✓	✓

na not applicable — the relevant as entry power is not available. [a] As the right of entry does not exist in South Australia and Tasmania, these jurisdictions are excluded from the table. [b] 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). [c] 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 O*ccupational Health and Safety Act 1984* (WA), the *Mines Safety and Inspection Act 1994* (WA) or an award. [d] Must not be exercised if it will cause work to cease (unless with permission of employer). [e] Interviews with workers must have the worker's consent.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

While New South Wales, Victoria, Queensland and the ACT do not require notice to be provided to the occupier prior to entry to investigate a suspected breach, they impose conditions on entry for this purpose, 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 when urgent intervention is needed

- 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 a soon as practicable after entry
- 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, there are restrictions on who may hold an entry permit under section 81 of the OHS Act — 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 — however this is not a requirement in New South Wales and Western Australia
- 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,[14] 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* (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 premises or accessing 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.

There are some inconsistencies between entry provisions provided in the *Fair Work Act 2009 (Cwlth)* and State and Territory OHS Acts. For example, in Queensland authorised union representatives do not appear to be restricted to entering a workplace to investigate a suspected breach during working hours. However, under provisions under the *Fair Work Act 2009 (Cwlth)* a permit holder may exercise a state or territory OHS right only during working hours. Also, only three jurisdictions require 24 hours notice to conduct OHS consultations. However, 24 hours notice appears mandatory to activate a right to inspect or access an employee record.

Section 109 of the Constitution provides that, where a State law is inconsistent with a law of the Commonwealth, the law of the Commonwealth will prevail to the extent of the inconsistency and the State law will be invalid. State and Commonwealth laws can operate concurrently, if they are not inconsistent.

[14] A constitutional corporation is defined as a foreign corporation, or a trading or financial corporation formed within Australia. Corporations include proprietary companies, not-for-proft associations incorporated under State or Territory legislation, and statutory authorities incorporated under special legislation.

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; duplicate the role of regulators when investigating potential breaches of OHS regulations; or undertake workplace inspections outside of working hours. Businesses operating in Tasmania and South Australia do not face any direct costs resulting from union rights of entry as these rights do not exist in these two states.

The misuse of entry provisions to discuss industrial matters, instead of OHS matters, highlighted by some industry and employer groups, should only have the potential to occur for businesses operating under Queensland, Western Australian and the Northern Territory regimes, as these are the only jurisdictions to provide the power to authorised union representatives to consult with workers on OHS matters.

Businesses covered by OHS legislation in Western Australia and Northern Territory could face higher costs from potential misuse of entry provisions because there is no requirement for unions to provide notice of entry to investigate a breach. 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, as well as to 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 costs arising from their misuse.

Table 9.11 **Differences in grounds for actions for activating safeguards against misuse of union entry rights**[a]
2008-09

	Act/Section	*Grounds for action*
NSW	*Industrial Relations Act 1996* s. 299 (4)	• Intentionally hindered or obstructed employers or employees during their working time • Otherwise acted in an improper manner
Vic	*Occupational Health and Safety Act 2004* s. 85	• Intentionally hindered or obstructed an employer or employee • Acted unreasonably or otherwise for the purposes of exercising a power under this Part; or • 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 and Safety Act 1995* ss. 90O and 90Q	• Unreasonably hinder or obstruct a worker or other person at the workplace • Intimidate or threaten a worker or other person at the workplace • Contravention of a provision of the Part (7a Authorised representatives) • Contravention of a condition of employment
WA	*Industrial Relations Act 1979* s. 49J	• Act in an improper manner • Intentionally and unduly hindered an employer or employees during their working time
NT	*Workplace Health and Safety Act 2007* s. 52	• Contravene a condition of appointment , which includes: • Entering a workplace other than in accordance with this Division • Non-compliance with any relevant law of the Commonwealth • Intentionally hinder or obstruct an employer or worker • Misrepresent the extent of the representative's authority • Use of disclosure or information acquired at the workplace for a purpose not reasonably connected with the health and safety of a worker
ACT[c]	*Occupational Health and Safety Act 1989* s. 76	• Contravention of the division or likelihood of contravention of the division • Intentionally hindered or obstructed an employer or employee or otherwise acted improperly

[a] As the right of entry does not exist in South Australia and Tasmania, these jurisdictions are excluded from the table. [b] Applies where employers and their employees are covered by the federal or national industrial relations system. [c] In the ACT, from 1 October 2009 authorised representatives may be disqualified under Reg. 65 of the *Work Safety Regulation 2009*.

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); 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. These actions can include: the suspension, cancellation, or revocation

of permits; banning the use of entry permits to an organisation; removal or disqualification from office; imposition of conditions on entry; and, amendment of conditions of appointment (table 9.12).

Table 9.12 **Different actions available to punish misuse of union entry rights**[a]

	NSW	*Vic*	*Qld*	*WA*	*NT*	*ACT*
Impose conditions on entry permits	×	×	✓	×	×	×
Subject future entry permits to specified conditions	×	×	×	×	×	×
Suspend	×	×	✓	✓	×	×
Revoke	✓	✓	✓	✓	×	×
Ban use of entry permits to organisation	×	×	×	×	×	×
Disqualify from holding office	×	✓	×	×	✓	✓
Remove from office	×	×	×	×	✓	×

[a] As the right of entry does not exist in 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. Under section 67 of the *Work Safety Act 2008* (ACT) which took effect from 1 October 2009, authorised representatives 'must take all reasonable steps to ensure that the representative causes as little inconvenience, detriment and damage as is practicable' in the exercise, or purported exercise, of entry powers available. Further, under section 68 'a person may claim compensation from a registered organisation if the person suffers loss or expense because of the exercise, or purported exercise, of a function under this division by an authorised representative of the organisation'.

Fair Work Australia has the power to revoke or suspend entry permits under section 510 (f) of the *Fair Work Act 2009* 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.

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 9.13.

Box 9.13 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

- In 2008-09, the operation of separate systems for the regulation of hazardous substances and dangerous goods gave rise to confusion among business, duplicated effort for businesses complying with the requirements and other costs.
- Consistent legislation can be undermined by differing regulatory approaches and interpretations. For example, during 2008, an Australian business was advised by some regulators that a Material Safety Data Sheet (MSDS) is not required for obsolete chemicals, while other regulators were unable/unwilling to provide advice on the matter and another regulator deemed a MSDS was required.
- In 2008-09, there were significant differences in the fees applying to asbestos removal licences applying to businesses — ranging, on an annualised basis, from $27 in Queensland to $3536 in South Australia for a licence to remove friable asbestos. There were also significant differences in the nature and content of the supporting information that applicants must supply as part of applying for an asbestos licence.
- In the Northern Territory, which licenses only individuals (not businesses), the annualised cost of an asbestos removal licence was $17 per individual.
- In 2008-08, 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). The New South Wales permits to remove friable asbestos are the only such permit/notification to attract a fee.
- Western Australia was the least burdensome jurisdiction in relation to many aspects of asbestos removal work, however, it may not be the least burdensome jurisdiction overall given its licence fees are the second highest of any jurisdiction ($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).
- 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 between those jurisdictions requiring one, thereby creating an additional regulatory burden for those that own non-residential property in some jurisdictions.

A ‘hazardous substance’ is one that poses a risk to the health of people exposed to it (box 10.1). The occupational health and safety (OHS) requirements specific to hazardous substances are contained in the OHS legislation in most jurisdictions, with the ACT being the only exception (table 10.1).

Box 10.1 **Hazardous substances in the workplace — health effects**

In the workplace, hazardous substances often take the form of fumes, dusts, mists and vapours. However, hazardous substances 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 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 health effects can be either acute or chronic, long-term or immediate and, in some instance, can lead to premature death.

The 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.

Source: WorkSafe Victoria (2009c).

Table 10.1 **Regulations specifying OHS requirements for hazardous substances**

2008-09

	Regulations specifying OHS requirements for hazardous substances	*Act under which the regulations were issued*
Cwlth	Occupational Health and Safety (Safety Standards) 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 Regulations 1995	Occupational Health, Safety and Welfare 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

This chapter explores four aspects of the burden on business arising from the regulation of hazardous substances for OHS purposes:

1. the existence and take up of national standards relating to hazardous substances

2. a brief case study on the requirement for Material Safety Data Sheets (MSDSs)
3. regulatory duplication in the regulation of hazardous substances and dangerous goods
4. an examination of selected regulatory requirements relating to asbestos (specifically: licensing asbestos removalists; notifications/permits for asbestos removal work; and, asbestos registers for workplaces).

10.1 Take up of national standards and codes of practice

The National Occupational Health and Safety Commission (NOHSC) and the Australian Safety and Compensation Council (ASCC)[1] previously declared national standards, codes of practice and guidance notes for the control of hazardous substances (table 10.2). As outlined in chapter 2, the states and territories 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. Even though the states and territories have adopted the national standards and codes of practice to differing degrees (figure 10.1) and in different ways (chapter 2 — section 2.5),[2] they all share a common basis for their classification and treatment of hazardous substances:

- NOHSC: 1008 — Approved criteria for classifying hazardous substances
- NOHSC: 2011 — Preparation of material safety data sheets (2nd edition)
- NOHSC: 2012 — Labelling of workplace substances.

The consistent classification of chemicals is further supported by the Hazardous Substances Information System (HSIS — box 10.2).

[1] Both the National Occupational Health and Safety Commission and the Australian Safety and Compensation Council are predecessors of Safe Work Australia (SWA).

[2] The jurisdictions also adopt the national standards in different ways. For example, in New South Wales, rather than reference all of the specific standards within their OHS regulation, the relevant standards form the basis of individual areas of OHS regulation. Figure 10.1 may not capture those instances where the take up of the national standards is not so 'obvious' (also see chapter 2 — section 2.5).

Table 10.2 **National standards, codes of practice and related guidance material for hazardous substances**

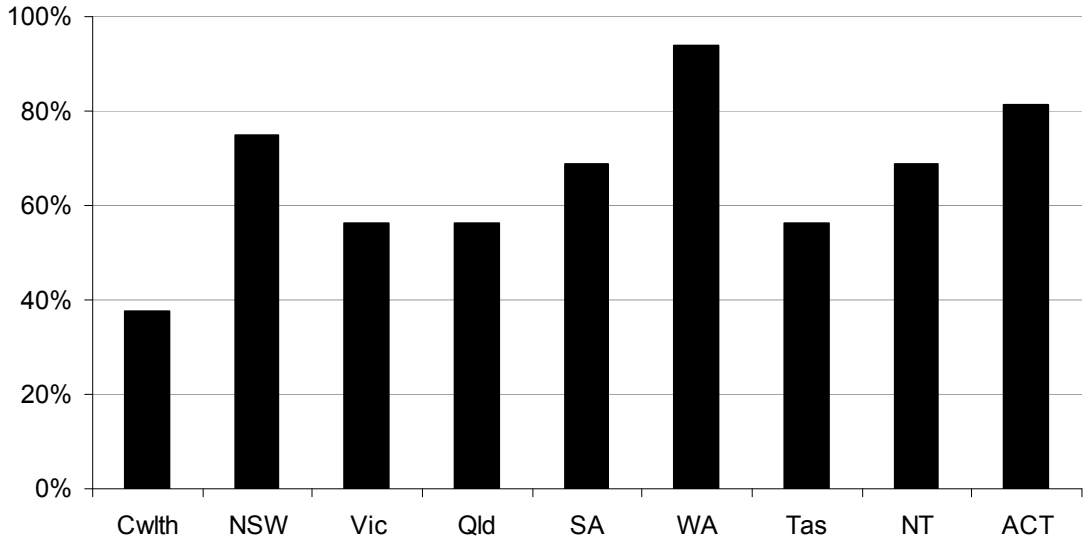
2008-09

NOHSC standard number	*NOHSC standard name*
Model Regulations	
1005	Control of workplace hazardous substances
1011	Control of scheduled carcinogenic substances
National Standards	
1003	Adopted national exposure standards for atmospheric contaminants in the occupational environment
1004	Synthetic mineral fibres
1008	Approved criteria for classifying hazardous substances
1012	Control of inorganic lead at work
Codes of Practice	
2002	Safe removal of asbestos (2nd edition)
2003	Safe handling of timber preservatives and treated timber
2004	Safe use of vinyl chloride
2006	Safe use of synthetic mineral fibres
2007	Control of workplace hazardous substances
2011	Preparation of material safety data sheets (2nd edition)
2012	Labelling of workplace substances
2014	Control of scheduled carcinogenic substances
2015	Control and safe use of inorganic lead at work
2018	Management and control of asbestos in the workplace
Guidance Notes	
3003	Membrane filter method for estimating airborne asbestos fibres (2nd edition)
3007	Safe handling of timber preservatives and treated timber
3008	Interpretation of exposure standards for atmospheric contaminants in the occupational environment (3rd edition)
3009	Placarding stores for dangerous goods and specified hazardous substances
3016	Safe use of ethylene oxide in sterilisation/ fumigation processes
3017	Assessment of health risks arising from hazardous substances in the workplace
3018	Control of workplace hazardous substances in the retail sector
7039	Guidelines for health surveillance

Source: CRCCI (2007).

Figure 10.1 **Inclusion of national standards and codes of practice in jurisdictions' regulatory frameworks**[a]

Percentage of standards adopted — 2008-09



[a] There are 16 hazardous substance specific national standards and codes of practice— see the first three groupings in table 10.2. Guidance notes have been excluded as their purpose is to inform business rather than create compliance requirements.

Data sources: CRCCI (2007); Productivity Commission survey of OHS regulators (2009 unpublished); Safe Work Australia (2009, unpublished).

Box 10.2 Hazardous Substances Information System (HSIS)

The HSIS is a publicly accessible (via the internet) database maintained by Safe Work Australia (SWA) that lists those substances that have been classified in accordance with the Approved Criteria for Classifying Hazardous Substances (NOHSC:1008) and/or that have National Exposure Standards declared under the Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment (NOHSC:1003).

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), which was a list of the more commonly used workplace hazardous substances. The last edition of the List was published in hardcopy in 1999.

Sources: SWA (2010b); PC (2008a).

While the national standards and codes of practice have not been consistently taken up by the jurisdictions, certain individual standards and codes have been widely accepted. For example, aside from NOHSC: 1008, NOHSC: 2011 and NOHSC: 2012, eight of the nine jurisdictions have also taken up:

- NOHSC: 1003 — Adopted national exposure standards for atmospheric contaminants in the occupational environment
- NOHSC: 2002 — Safe removal of asbestos (2nd edition)
- NOHSC: 2007 — Control of workplace hazardous substances
- NOHSC: 2015 — Control and safe use of inorganic lead at work.

Differences in regulation across jurisdictions create regulatory burdens for those businesses operating across jurisdictions. For example, burdens arise for businesses in the resources they expend identifying and understanding the different regulatory requirements of the jurisdictions. However, as the key national standards and codes of practice for hazardous substances (NOHSC: 1008, NOHSC: 2011 and NOHSC: 2012) have been taken up by the jurisdictions, businesses should face similar overall costs regardless of the jurisdiction in which they operate.[3] Differing regulatory burdens, where they arise, would largely be limited to those businesses dealing with specific hazardous substances (such as vinyl chloride) where the adoption of the national standards and codes of practice have been less uniform.

10.2 Material Safety Data Sheets — case study

All states and territories require MSDSs (box 10.3) to be made available to workers who will potentially be exposed to a hazardous substance. While the MSDS requirements differ in their form and content across the OHS legislation of the jurisdictions, the regulatory requirements of all jurisdictions for hazardous substances (and dangerous goods — discussed in section 10.3) can be satisfied by an MSDS that has been prepared in accordance with NOHSC: 2011— National Code of Practice for the Preparation of Material Safety Data Sheets (PC 2008a and Department of Education, Employment and Workplace Relations (Cwlth), pers. comm., 7 January 2010).

[3] 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.

Box 10.3 **What is an MSDS?**

An MSDS is an 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.

Within the workplace, an MSDS is a well recognised and important source of information. The MSDS can be used to inform hazard and risk assessments, and 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 state and territory is responsible for determining whether an MSDS complies with the relevant provisions within their legislation. The Commonwealth and Western Australia explicitly require an MSDS be prepared in accordance with NOHSC: 2012 — National Code of Practice for the Labelling of Workplace Hazardous Substances, while the requirements of other jurisdictions reflect that code of practice.

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 5 years.

Source: SWAC (2009d).

In its submission (3M Australia 2008) 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).[4] Table 10.3 reflects the outcome of 3M Australia's enquiries at that time (circa March 2008). 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 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 for that business. Such uncertainty, more generally, may stifle product innovation and the exploration of business opportunities, thereby creating significant opportunity costs for business.

4 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.

Table 10.3 **Regulator responses to 3M Australia's MSDS inquiries**
Circa 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).

10.3 Hazardous substances — duplication with dangerous goods regulation

'Dangerous goods' comprise a separate category of workplace substances to hazardous 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 combinations 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, which contrasts with the effects of some hazardous substances that are not immediately 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 different sets of regulatory requirements. While many of these requirements are consistent,[5] there are differences between them and, depending upon the substance in question, compliance can be a complex matter. Some businesses contend that the two separate systems give rise to unnecessary costs, confusion among business and duplicated effort for businesses complying with the requirements (ASCC 2006a). On this point, the Commission has previously noted:

> Replacing the existing parallel systems of regulation for hazardous substances and dangerous goods with a single system of regulations for all workplace hazardous

[5] 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).

chemicals would potentially reduce some of the costs faced by firms, and could increase compliance. Moving to a new system would also involve significant costs… [which] would likely exceed the benefits. (PC 2008a, p. 137)

Box 10.4 The new regulatory framework for workplace chemicals

NOHSC, a predecessor of SWA, determined there should be a single regulatory framework for dangerous goods and hazardous substances. NOHSC considered that any new regulatory framework should be based on the Globally Harmonised System of Classification and Labelling of Chemicals (the GHS — box 10.5).

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 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 implementing the GHS. As part of this process, SWA will also be preparing guidance material and introducing training courses on the GHS.

Sources: ASCC (2006a); SWA (2010a); SWAC (2009g).

Box 10.5 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.

Source: SWAC (2009a).

In July 2009, the Safe Work Australia Council (SWAC) (now Safe Work Australia (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 10.4). These model regulations are scheduled to be introduced in 2012 (SWA 2010a).

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 (if at all) 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 10.2 shows how the number of new cases of mesothelioma have grown since the early-1980s notwithstanding the absence of commercial uses of asbestos since that time.[6]

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.

The regulation of asbestos removal proved to be 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).[7]

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6 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 removal/renovation of those buildings and structures where the *in situ* asbestos has been disturbed. A significant proportion of residences constructed prior to the 1980s are said to have included some form of asbestos.

7 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 **New cases of mesothelioma**[a]

Number of new cases — 5-year rolling averages (1982–2005)

a As the number 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).

This section does not seek to provide exhaustive coverage of asbestos-related OHS regulation, but rather considers three specific aspects of the jurisdictions' regulation of asbestos, namely:

- licensing requirements for asbestos removal
- the notification and permit requirements to be satisfied prior to undertaking asbestos removal
- requirements for an 'asbestos register' to be maintained for a 'non-residential' building or workplace.

Licensing asbestos removalists

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.[8] 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).

8 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.

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 (table 10.4). Table 10.5 shows the number of licensed removalists in each jurisdiction).

Table 10.4 Licensing authority for asbestos removalists

2008-09

	Licensing authority
NSW	WorkCover Authority of New South Wales
Vic	WorkSafe Victoria
Qld	Workplace Health and Safety Queensland
SA	SafeWork SA
WA	WorkSafe WA
Tas	Workplace Standards Tasmania
NT	NT WorkSafe
ACT	ACT Planning and Land Authority

Sources: OHS Acts and regulations; asbestos licence application forms.

Table 10.5 Number of asbestos removal licences on issue by jurisdiction

2008-09

Form of asbestos	*NSW*	*Vic*	*Qld*	*SA*	*WA*[a]	*Tas*	*NT*[b]	*ACT*[c]
Friable (or equivalent)[d]	93	25	113	10		23	27	44
Bonded (or equivalent)	829	238	12 884[b]	58		15	42	16
Other					9			

nr no response. [a] Western Australia has only one class of an asbestos removal licence — for the removal of 'thermal and acoustic asbestos' products. [b] Licences are available to individuals only (not companies or other business structures). [c] Active licences as at 23 December 2009. [d] Provides for the removal of all forms of asbestos.

Sources: ACTPLA (2009); Productivity Commission survey of OHS regulators (2009 unpublished).

Aside from Western Australia, each jurisdiction provides for two types of licence (table 10.6). Some of the unique features of the jurisdictions' licensing regimes are:

- in Victoria, the Class A/B licence structure is further categorised into two types of licences — an unlimited Class A or B licence and a limited Class A or B licence that is related to the removal of specific 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)

- Tasmania provides a number of licensing exemptions that are not available in other jurisdictions, including licensing exemptions for:
  - 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[9] and less than 20 square metres from other buildings and structures
  - the removal of one full glove bag of friable asbestos material.

Table 10.6 **Licensing requirements**

2008-09

Licence type	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*[a]	*ACT*
Removal of any kind of asbestos-containing material	✓	Class A	Class A[b]	✓	×	Class A	✓	Class A
Exemption from maintenance and/or repair work[c]				✓			✓	
Removal of non-friable asbestos-containing material	✓	Class B	Class B[a]	✓[d]	×	Class B	✓[e]	Class B
Exemption from licensing requirements for non-friable asbestos (area removed)	<10m^2	<10m^2[f]	<10m^2	<10m^2	Other[g]	Other[g]	<10m^2	<10m^2

[a] Licences available only to individuals. [b] Licences available only to companies. [c] 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. [d] A 'limited licence'. [e] Restricted to the removal of asbestos cement products only. [f] Only applies where the total time over which asbestos removal work is performed in any period of 7 days does not exceed 1 hour. [g] Exemption applies to asbestos-cement which is a form of non-friable asbestos.

Sources: OHS Acts and regulations; asbestos licence application forms.

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. Where only individuals are licensed, a businesses still has a duty of care for the safety of its workers under the relevant OHS Act and it should also ensure those removing asbestos are licensed to do so. Accordingly, under

9 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.

'individual only' licensing regimes, a business may face the cost of multiple licences for its workers compared to the cost of a single business licence in other jurisdictions.[10] Also, under 'individual only' licensing regimes, because the licence 'attaches' to the individual, 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 is required in Western Australia is likely to result 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 (given fewer businesses are required to be licensed) and, in turn, OHS outcomes inferior to those jurisdictions that have tighter controls for asbestos removal activities.

Time and difficulty estimates for obtaining a licence for asbestos removal work

Based on a synthetic analysis[11] of the jurisdictions' asbestos licensing process, applicants would experience different degrees of difficulty in initiating the licensing process, depending on the jurisdiction (table 10.7 and box 10.6). Western Australia was the jurisdiction in which it was the least time consuming and easiest to locate and complete the relevant forms, whereas in Queensland the process is likely to be the most difficult and time consuming for applicants.

[10] 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).

[11] Appendix B outlines the methodology employed in undertaking that analysis.

Table 10.7 **Obtaining 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)[a]	140	160	170[c]	140[d]	120	100	110	120
Difficulty[b]	2	3	4	3	2	1	4	3
Completing the form								
Time (minutes)	10	uc	nf	uc	5	uc	10	20[e]
Difficulty[b]	3	uc	nf	uc	1	uc	2	2[f]

nf no form to complete. **uc** unable to complete. [a] All estimates include 80 minutes for finding and reviewing the relevant NOHSC standards. [b] See table B.7 in appendix B for difficulty scale. [c] Includes a 10 minute phone call to regulator to confirm requirements. [d] Includes a 15 minute phone call to the regulator to obtain the form. [e] 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. [f] Rating applies to the application forms for both organisations and individuals.

Source: PC estimates.

Box 10.6 **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.

Table 10.8 **Documentation/information requirements — friable asbestos licence**

Company applicant requirements — 2008-09

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Company extract		✓						✓[a]
Public liability insurance			✓					
Safety Management System (or equivalent)		✓				✓		
Worker's compensation policy or policy details	✓		✓			✓		
Demonstrate a competent supervisor			✓			✓		
Demonstrate compliance with OHS laws			✓	✓				
Demonstrate personnel with knowledge of the OHS requirements in respect to asbestos			✓	✓		✓	✓	
Demonstrate that operational practices ensure the safe removal of asbestos			✓	✓	✓	✓	✓	
Details of asbestos licences held in other jurisdictions				✓	✓	✓		
Details of personal protection equipment and removal equipment		✓		✓	✓	✓	✓	
Details of waste disposal equipment				✓				
Details of arrangements for air monitoring				✓				
Examination				✓		✓		
Interview						✓	✓	
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 and investigation requirements (including training of 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			✓					
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			✓	✓	✓		✓	
Written work health and safety policy			✓					
Details of asbestos removal work previously undertaken				✓				

[a] 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.

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 (as distinct from the

step of determining what these supplementary requirements are — the time and difficulty for which are included in the estimates in table 10.7) that places the greatest impost on applicants.

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 (table 10.8) in New South Wales (a copy of the applicant's worker's compensation policy) and the ACT (a company extract or copy of the applicant's partnership agreement) are relatively minor. 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:

- 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 non-disposable clothing will be cleaned
- 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.

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 10.10). In addition to the requirements in table 10.9, there are other differences across the jurisdictions:

- in New South Wales, applicants 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, the evidence is to show 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, applicants 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.

Table 10.9 Documentation/information requirements — friable asbestos licence

Nominated supervisor and employee requirements — 2008-09

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
For nominee(s) / supervisor(s)								
Curriculum vitae					✓	✓	✓	
Evidence of experience	✓[a]	✓	✓	✓[b]	✓	✓	✓	✓[c]
Evidence of training and/or qualifications	✓		✓	✓[b]	✓	✓	✓	✓[c]
Demonstrate a knowledge of the class A licence holders OHS policy and procedures and OHS requirements			✓					
For employees (involved in asbestos removal)								
Details of medical practitioner who will examine employees		✓						
Evidence of training and/or qualifications		✓						

[a] Applies if nominated for the first time. [b] A requirement of the *Occupational Health, Safety and Welfare Regulations 1995* (SA) but not explicit in the licensing material. [c] 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.

Table 10.10 Experience requirements for nominees/supervisors — friable asbestos removal

2008-09

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Years experience	3[a]	2	3	ns	ns	3	ns	2[b]

ns not specified. [a] Only applies if nominated for the first time. [b] Only a requirement for Category A applications 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.

Overall, Queensland has the most requirements for supporting information and demonstrating experience — although this may be due, in part, to the licensing process being based on an independent assessment rather than being 'form based'. In contrast, New South Wales and the ACT had the least onerous requirements for supporting information and demonstrating experience.

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 10.11). 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 where 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.

Table 10.11 **Means of lodging application forms and paying fees**
2008-09

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*[a]	*NT*[b]	*ACT*
Means of lodging application form								
Mail	✓	✓	na	✓	✓	×	×	✓
Fax	×	×	na	×	✓	×	×	✓
Email	×	×	na	×	✓	×	×	×
In person	×	×	na	×	✓	✓	✓	✓
Other	×	×	na	×	×	×	×	×
Means of paying fees								
Cash[c]	×	×	×	×	✓	✓	✓	✓
Cheque / Money Order	✓	✓	✓[d]	✓	✓	✓	✓	✓
Credit card	✓	✓	✓[c]	✓	✓	✓	✓	✓
EFTPoS[c]	×	×	✓	×	✓	✓	✓	✓
BPay	×	×	×	×	×	×	×	×
Direct debit / direct credit	×	×	×	×	×	×	×	×

na not applicable (no application form). [a] Applications can only be lodged at Service Tasmania Outlets. [b] Applications can only be lodged at Territory Business Centres. [c] Only available when lodging an application or paying fees in person. [d] May be paid in person or via mail.

Sources: Asbestos licence application forms; regulator websites.

Western Australia demonstrated the most flexible regime for lodging applications 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 applications via only one medium.

Fees for obtaining a licence for asbestos removal work

The fees payable for asbestos licences demonstrate considerable variation across the jurisdictions (box 10.7 and table 10.12) — ranging from $27 (Queensland) to $3536 (South Australia) per annum (for a 'business' licence for friable asbestos removal in June 2009). As the South Australian licence has a two year term, South Australian applicants needed to pay $7071 'upfront' to obtain their licences. 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.

Box 10.7 **Fees for asbestos removal licences**

As licences in the Northern Territory and Queensland (Class B (non-friable asbestos removal 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 covered 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 pay a fee or charge to the 'authorised accredited provider' assessing their application. The amount of these fees (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 asbestos removal work applications, 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.

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,[12] while New South Wales applicants will be refunded only $800 of their $1000 licence fee (for friable asbestos) if their application is unsuccessful.

[12] The application fees apply to new applications only. They are not payable upon the renewal of an existing, unexpired licence.

Table 10.12 **Licence fees payable**

Dollars — 2008-09

	NSW	Vic	Qld	SA[a]	WA[a]	Tas	NT[b]	ACT[c]
Friable asbestos licence								
Application fee						212		378
Licence fee (annualised)[d]	1 000[e]	507	27[a]	3 536	1 925	793	17	688[f]
Non-friable asbestos licence								
Application fee						212		378
Licence fee (annualised)[d]	100[g]	469	11[h]	557	—	529	17	688[f]

[a] Licences valid for 2 years. [b] Licence valid for 3 years. Licences available to individuals only. [c] Combined fees for an organisation and an individual. No fees apply if the applicant holds an unexpired builder's licence. [d] Fees have been normalised to those applicable for one year. [e] Licence period of up to 2 years. Licence fee is payable on application and includes a non-refundable $200 fee. [f] Based on three year licence (fee $2064). A one year licence is also available (fee $814). [g] Licence period of up to 2 years. [h] 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 10.13). Business can typically only access the external appeals processes after having availed themselves of the internal appeals processes (where they exist).

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.

Table 10.13 **Appeals process**

2008-09

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Internal review	✓	✓	✓	×	✓	✓	×	×
External review	✓	✓	✓	✓	✓	✓	✓	✓

Sources: OHS Acts and regulations; asbestos licence application forms.

Undertaking asbestos removal work — notification and permit requirements

In the majority of jurisdictions, a licensed asbestos removalist must either notify the OHS regulator or obtain a permit/approval before commencing a new asbestos removal assignment (table 10.14).

Table 10.14 **Notification and permit requirements — asbestos removal**
2008-09

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Friable asbestos work								
Notification/permit required before commencing work	P	N	×	P[a]	N	N	N	×
Notification/permit period (days before commencing work)	7	5[b]	na	2	7	5[c]	7	na
Notification/permit fees and charges	$500[d]	nil	na	nil	nil	nil	nil	na
Non-friable asbestos work								
Notification/permit required before commencing work	N	N	×	P[a]	×	N	N	×
Notification/permit period (calendar days before commencing work)	7[e]	5[b]	na	2	na	5[c]	7	na
Notification/permit fees and charges	nil	nil	na	nil	na	nil	nil	na

na not applicable. **N** notification required. **P** permit (or equivalent) required. [a] Work on a particular site must not commence without the prior approval of the regulator. [b] A 24 hour notification period applies for 'sudden, unexpected situations' and the removal of 10m^2 or less of non-friable asbestos-containing material. [c] 5 working days. [d] Applicable for works over $5000 in value. [e] 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.

New South Wales (friable asbestos removal only) and South Australia are the only jurisdictions that operate a 'permit/approval system' so that asbestos removal on individual sites cannot commence until the permit is issued by, or approval received from, the regulator. In contrast, a 'notification scheme' (Victoria, Western Australia, Tasmania, the Northern Territory and non-friable asbestos removal in New South Wales) allows 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 10.14). As such, the 'permit/approval system' places a greater burden on business than the 'notification system', while the absence of any such requirements in Queensland and the ACT means businesses in those jurisdictions do not face any burden in this area. As New South Wales levies a fee for its permits (the only jurisdiction to do so for either permits or notifications), it imposes the highest burden of any jurisdiction for this requirement.

The overall costs of asbestos licensing

Table 10.15 summarises the preceding assessments of the different aspects of the jurisdictions' asbestos removal licensing regimes. Western Australia was the least burdensome jurisdiction in relation to many aspects, however it may not be the least burdensome jurisdiction overall given its licence fees are the second highest of any jurisdiction ($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).

Table 10.15 **Cost of asbestos regulation**
2008-09

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Asbestos licence								
Activities requiring licence	H	H	H	H	L	H	H	H
Time/difficulty			H		L			
Supporting documentation — applicant	L		H	H		H		L
Supporting documentation — supervisor	L	H		L				L
Lodging forms/paying fees	H	H		H	L			
Fees			L	H				
Appeal mechanisms	L	L	L	H	L	L	H	H
Notification/permits	H		L					L

H highest (or equal highest) cost (subjective assessment). **L** lowest (or equal lowest) cost (subjective assessment).

Asbestos registers for workplaces

The majority of jurisdictions have a duty to maintain an asbestos register for 'non-residential' premises, although the duty holders (table 10.16) and mandated contents of the asbestos registers (table 10.17) vary. Although neither the Commonwealth (under the *Occupational Health and Safety Act 1991* (Cwlth)) nor the Northern Territory have an explicit requirement to identify the location of asbestos in a building or maintain an asbestos register, businesses operating under these jurisdictions might reasonably be expected to do so given their jurisdiction's promotion of the National Code of Practice for the Management and Control of Asbestos in Workplaces (NOHSC: 2018), which contains such requirements.

In New South Wales, Queensland and Western Australia, where the National Code of Practice (NOHSC: 2018) applies, the person with a duty to identify the presence and location of asbestos (table 10.16) may assume the presence of asbestos. In contrast, in South Australia and the ACT, the duty holder 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.[13] These requirements create differing burdens for business. For example, allowing an assumption of the presence of asbestos removes the costs associated 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.[14] On the other hand, requiring assessments (particularly by professional assessors) 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. In this light, the Victorian legislation would seem to strike a balance by allowing a business to assume asbestos is present in situations of uncertainty or inaccessibility.

Table 10.16 **Duty to maintain an asbestos register**

2008-09

	Duty to maintain an asbestos register	*Duty to identify the presence and location of asbestos*	*Duty holder*
Cwlth	No explicit register or 'asbestos identification' requirement		
NSW	✓**a**	✓**a**	The controller of a premises
Vic	✓	✓	A person who manages or controls a workplace
	✓	✓	An employer
Qld	✓**a**	✓**a**	The owner of the structure
SA	✓	✓**b**	The owner of the building
	✓	✓**b**	The person in possession of plant that contains, or has on it, any asbestos containing material
WA	✓**a**	✓**a**	A person who, at a workplace, is an employer, the main contractor, a self-employed person or the person having control of the workplace
Tas	✓	✓	The accountable person who has management or control of a building, structure or mine
NT	No explicit register or 'asbestos identification' requirement		
ACT**c**	✓	✓**b**	A person in control of non-residential premises

a In compliance with the Code of Practice for the Management and Control of Asbestos in Workplaces (NOHSC: 2018). **b** The duty holder must use a 'competent person'/licensed assessor to identify the presence of asbestos. **c** The requirements are being progressively phased by class of building until 1 September 2010.

Source: OHS Acts and regulations.

[13] 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.

[14] This is an 'unnecessary cost' business would voluntarily take on by assuming the presence of asbestos in a building or structure.

Table 10.17 **Asbestos registers — non-residential buildings**
Information requirements — 2008-09

	NOHSC: 2018	*Cwlth*	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Date of each inspection/ assessment	✓		✓		CP	CP	CP			✓
Name of person conduction inspection	✓		CP		CP	CP	CP			✓
Location, type and condition of each asbestos product	✓		✓	✓	CP	✓	CP	✓		✓
Location, type and condition of any material assumed to contain asbestos	✓		CP	✓	CP	CP	CP			✓
Details of any inaccessible location likely to contain asbestos	✓		CP		CP	CP	CP			
Details of any analysis confirming whether material in does or does not contain asbestos	✓		CP		CP	CP	CP			✓
Details of the risk assessments made on asbestos materials	✓		CP		CP	CP	CP			✓
Details of any review of the risk assessments (on asbestos materials) by a licensed asbestos assessor (or others)	✓		CP		CP	CP	CP			✓
Results of any air monitoring for airborne asbestos fibres and an assessment of these results	✓		CP		CP	CP	CP			
Information about the control measures in place in the building and/or any control action(s) taken	✓		✓		CP	CP	CP			✓
Date control actions undertaken	✓		✓		CP	CP	CP			
Date each piece of asbestos product was 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				✓						

CP requirements by virtue of reference in the regulation to the Code of Practice.

Sources: OHS Acts and regulations.

The differing duty holders and mandated contents of the asbestos registers present regulatory burdens for those business either operating across jurisdictions or which hold commercial property in different jurisdictions. For example, the differing information requirements (table 10.17) 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.

11 Psychosocial hazards

Key points

- Psychosocial hazards such as bullying and harassment in the workplace are not given the same attention in OHS legislation, and by inspectors, as managing physical hazards such as hazardous substances (including lead and asbestos), manual handling and working at heights. This adds to uncertainty for businesses about the extent of their duty of care and how to address psychosocial hazards.
- Workplace stress claims, which include cases of bullying and harassment, tend to be more costly on average than claims for less serious physical injuries, both in terms of direct costs and time taken off work. These costs should provide a strong incentive for businesses to manage workplace stress effectively.
- Whether the way this potential hazard is handled in OHS legislation constitutes a substantial regulatory burden or cost to firms is a matter of conjecture. Very little information exists on employer perceptions of the adequacy of the legislation to ensure compliance with prevention of bullying and harassment and the adequacy of information provided by regulators to manage this hazard.
- Nevertheless, differences in how this hazard is handled in legislation and guidance material across jurisdictions may contribute to some unnecessary burdens.
  - The responsibility to manage bullying and harassment is generally covered by the employer's duty of care to provide a healthy and safe workplace. While all jurisdictions provide guidance material, only Queensland and Western Australia provide a separate code of practice on how to detect and manage bullying.
  - The presence of codes of practice in Queensland and Western Australia provides business with more certainty as to their responsibilities than elsewhere in Australia, and indicate the seriousness of the potential impact of the hazard.
  - Queensland has inspectors who specialise in addressing psychosocial hazards.
  - South Australia is the only jurisdiction to include clauses specifically referring to inappropriate behaviours in the workplaces in their OHS Act.
- It is likely that businesses in Queensland, South Australia and Western Australia feel a greater pressure or incentive to address and deal with psychosocial issues than firms in other jurisdictions due to the use of codes, provisions in Acts and inspectors. These jurisdictions have all experienced significant declines in claims related to bullying and harassment in the past five years. The resultant savings may have matched or even outweighed any extra compliance costs firms have faced as a result of these measures.

The focus of this chapter is on the differences in how psychosocial hazards, including workplace stress and bullying and harassment in the workplace, are treated in the various Occupational Health and Safety (OHS) Acts and regulations and whether these differences impose different costs on businesses.

The importance of psychosocial hazards has grown in importance 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. Psychosocial hazards are not an obvious risk or hazard in the workplace as is managing the handling of dangerous substances such as lead or asbestos or risks associated with manual handling. However the management of psychosocial hazards is an area of responsibility for employers which is treated differently in OHS legislation in the jurisdictions. The chapter provides an overview of these differences and attempts to gauge whether these differences contribute to cost burdens in some jurisdictions relative to others.

11.1 Workplace bullying, stress and harassment

The responsibility to prevent workplace stress and bullying and harassment in all jurisdictions is covered in OHS legislation by the duty of care held by employers to provide a healthy and safe working environment for their employees. Workers also have a duty or responsibility to ensure that their actions do not constitute a risk to the health and safety of themselves or other people in the workplace.

Only South Australia makes specific reference to 'inappropriate behaviour in the workplace', which includes detecting and managing bullying and harassment, in their Act and regulations. Only Queensland and Western Australia have specific codes of practice related to this topic. The Commonwealth makes reference to foreseeable hazards such as psychological injury in its *Occupational Health and Safety Code of Practice 2008*. South Australia has also addressed the issue of excessive working hours by developing a code of practice on the topic which will become operational on 1 July 2010. All jurisdictions provide guidance notes on bullying and harassment. These differences are discussed further in section 11.2.

What constitutes stress in the workplace?

According to the World Health Organisation (WHO) workplace 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'. Workplace stress is exacerbated if employees feel they have little support from supervisors or colleagues, as well as little control over work processes (WHO (World Health Organisation) 2009).

Workplace stress can be triggered by: 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 contributes to job insecurity and high staff turnover); and, relationships at work (for example poor relationships of staff with supervisors, management and colleagues which may contribute to bullying and harassment or violence) (WHO (World Health Organisation) 2009).

What are the costs associated with workplace stress?

Sheehan et al. (2002) have estimated that 350 000 people are subjected to long-term bullying in Australia, while 2.5 million experience some aspect of bullying over the course of their working lives. The researchers also estimated that workplace bullying is costing Australian business somewhere between $6 billion and $13 billion per year based on a prevalence rate of 3.5 per cent. These costs include the cost of absenteeism, staff turnover, legal and compensation costs, decreased productivity, and management time lost in addressing claims for bullying.

More recent research conducted into the cost of workplace stress (including bullying) in Australia found that there were considerable costs borne by employers due to both increased absenteeism and presenteeism (Econtech 2008). The former is time taken off work as a result of workplace stress, while the latter 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' (Econtech 2008, p. 2). It was estimated that the combination of 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 (Econtech 2008, p. 7).

These costs do not include the hidden costs associated with restaffing and reskilling associated with staff turnover. There are also many instances of workers resigning due to stress before the impacts of workplace stress fully manifests as lost productivity in their current job. In these circumstances employers would simply bear the cost of having to replace those staff rather than suffer 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 workplace stress and the impact on morale and productivity on the entire workforce (not just individual workers) of increasing workloads and performance expectations.

Costs associated with bullying

Employer costs resulting from workplace bullying include: staff turnover; litigation; long-term absences; potential workers' compensation claims; early retirement costs; and counselling costs. High costs are also incurred by agencies and organisations when investigating bullying complaints, including the interviewing of the complainant, the alleged harasser and witnesses.

Along with the direct and indirect costs associated with bullying, there are also behavioural costs which include declining morale, motivation and productivity of workers affected by bullying which can lead to either absenteeism, presenteeism or higher staff turnover. The reputation of the organisation responsible for allowing bullying to take place will also suffer as the result of any publicity associated with court action. Apart from the costs borne by employers, there are also the costs experienced by victims of bullying which can include: isolation and withdrawal; fear of dismissal or loss of job promotion opportunities; stress and anxiety; low self esteem; reduced productivity; and, a number of physical and mental health symptoms.

Workers' compensation claims involving mental stress

Safe Work Australia (SWA) keeps data on mental stress compensation claims[1] which result from:

- 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

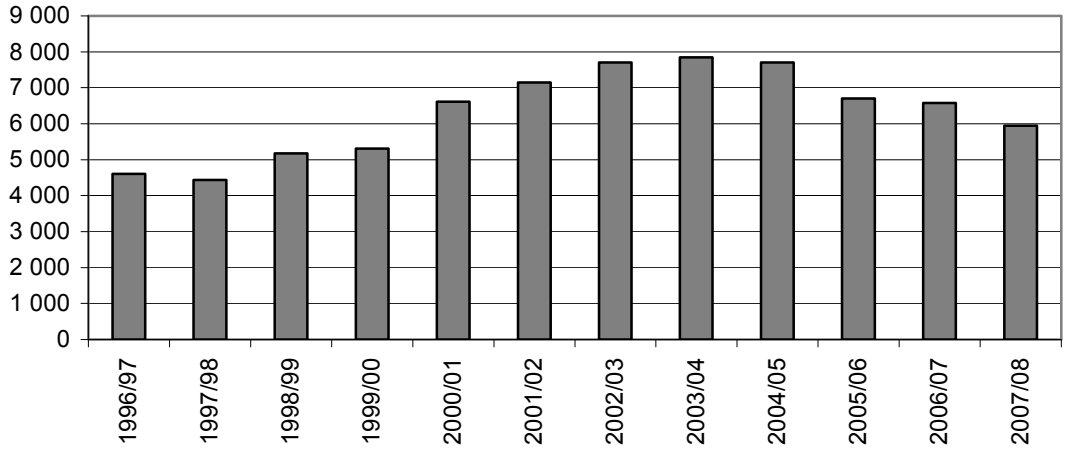
[1] Workers' compensation claims are a record of the action, exposure or event that was the direct cause of a serious injury or disease sustained by an employee. The claims referred to in this section are serious claims that include temporary incapacity involving one or more weeks off work, plus claims for a fatality or permanent incapacity.

- 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.

Trends in mental stress claims

Data from SWA shows an increase in 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 (see figure 11.1). Despite a fall in mental stress claims in recent years the number recorded in 2007-08 is 34.0 per cent above the figure recorded in 1997-98.

Figure 11.1 **Number of mental stress claims in Australia**
1996-97 to 2007-08



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

In 2007-08, the most common subcategories of mental stress claims in Australia were work pressure (35.4 per cent of all mental stress claims), workplace related harassment (24.0 per cent), exposure to workplace or occupational violence (19.2 per cent), and other mental stress factors (14.7 per cent) (Safe Work Australia 2007-08 data).

In 2007-08, jurisdictions to record above the national average for workplace related harassment and/or bullying claims (of 24.0 per cent of total mental stress claims) were ACT Government Services (37.5 per cent), Victoria (37.4 per cent), and the Commonwealth (24.3 per cent). The share of total mental stress claims accounted

for by workplace related harassment and/or bullying was much lower in Western Australia (6.1 per cent), Tasmania (16.1 per cent) and Queensland (17.0 per cent) (table 11.1) (Safe Work Australia unpublished 2007-08 data).

Table 11.1 **Mental stress claims by category each jurisdiction**

Per cent of total mental stress claims 2007-08

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT Priv.*	*ACT 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

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.

Table 11.2 shows the number of claims for bullying and harassment in the workplace have been trending downwards in Queensland, South Australia and the Commonwealth. Also the number of claims made in Western Australia is very low compared with other jurisdictions. The jurisdictions which experienced significant declines in claims in the past five years have either a separate code of practice, or clauses in either their OHS legislation or code of practice dedicated to bullying or harassment.

Unfortunately, it is unclear whether the differences in reported outcomes represent differences in OHS performance in relation to bullying and harassment, industry compositional issues, or jurisdictional recording differences. For example, the data from SWA could be skewed by employees in the public sector being more likely to lodge a harassment claim because they perceive a greater chance of success compared with employees in industries such as manufacturing and construction where incidents may be more likely to go unreported. SWA also claim that

jurisdictions have different coding conventions which reduce the comparability of results.

Table 11.2 **Trends in workplace bullying or harassment claims by jurisdiction**
2003-04 to 2007-08

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT Priv.*	*ACT Govt*	*Aus*
2003-04	95	500	545	255	165	65	55	15	5	10	1 705
2004-05	145	470	610	220	105	55	50	10	np	30	1 695
2005-06	110	355	560	215	125	65	45	15	np	20	1 510
2006-07	90	425	610	155	110	45	35	15	5	20	1 515
2007-08	45	475	595	130	95	20	45	10	np	15	1 435

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.

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

Characteristics of people lodging mental stress claims

Women accounted for: almost two thirds of the harassment claims made in 2003-04 and 2004-05 combined, 60 per cent of work pressure claims, and close to 60 per cent of claims related to exposure to traumatic events. 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 and social workers. For men, the highest frequency rate of workers' compensation mental stress claims were made by train drivers and assistants, prison officers, police officers and welfare associate professionals (ASCC 2007a, p. 74).

Mental stress claims tend to be made by employees in service industries, with relatively low numbers recorded in traditional male employee dominated industries such as Manufacturing, Construction, Mining, and Agriculture. For example, Health and community services accounted for 21 per cent of new mental stress claims recorded in 2003-04 and 2004-05 (combined). ABS *Labour Force Survey* data shows that the same industry accounted for around 10 per cent of all employment at this time.

Higher cost of mental stress claims

The median time taken off work for mental stress claims is much longer than the median time taken off for all claims: 11 weeks compared with 4 weeks respectively

in 2003-04. The median direct cost of a harassment claim was also much higher at $13 500 which compared to the median for all workers' compensation claims of $5800. Claims involving work pressure had the highest median direct cost at $14 500 (ASCC 2007a).

11.2 Differences in regulatory treatment of bullying and their impact

Governments have enacted provisions within OHS regulation aimed at preventing bullying and harassment, however the approach taken by each jurisdiction varies.

Differences in definitions of bullying and harassment

Individual jurisdictions have developed their own definitions of workplace bullying which are included in codes of practice and guidance notes. So, there is no single nationally accepted statutory definition. South Australia is the only jurisdiction to provide a definition of bullying in their OHS Act (s. 55A). There are some differences in terms of whether that bullying is defined as being directed at persons or workers. Queensland is unique in defining bullying as a form of harassment (table 11.3).

While there is some consistency between jurisdictions in defining bullying as 'repeated acts', New South Wales leaves open the interpretation that isolated incidents could be regarded as bullying, which would require management by employers (WorkCover NSW 2009b).

Section 55A (1) of the South Australian OHS Act refers to inappropriate conduct towards employees which includes 'behaviour that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed'.

Section 55A (2) of the South Australian OHS Act includes actions which should not be constituted as bullying. These include 'reasonable actions' taken by employers to either discipline, counsel, demote, dismiss or retrench workers. Other 'reasonable actions' also includes decisions made by employers on 'reasonable grounds' not to award or provide a promotion, transfer, or benefit to a worker. These provisions were included to strike a balance between the needs of business to manage its

workforce in a reasonable manner but also ensure the safety of workers in a climate of increasing incidence of workplace bullying.

Table 11.3 **Definitions of bullying included in OHS Acts, codes of practice and guidance notes**

		Definition of bullying
Cwlth (Comcare)	Guidance note	'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'. [a]
NSW	Guidance note	'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'
Vic	Guidance note	'repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.'
Qld	Code of practice	'repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a co-worker or group of co-workers of the person that: (a) is unwelcome and unsolicited (b) the person considers to be offensive, intimidating, humiliating or threatening (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening. '
SA	s. 55 (A) of 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.' [b]
WA	Code of practice	'repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety.'
Tas	Guidance note	'behaviour (that) goes beyond a one-off disagreement, … increases in intensity and becomes offensive or harmful to someone..'
NT	Guidance note	'repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety'
ACT	Guidance note	'repeated, unreasonable behaviour directed towards a person or group of persons at a workplace, which creates a risk to health and safety'

[a] '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. [b] 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.

South Australia is the only jurisdiction to state that inappropriate conduct which includes bullying behaviour can be both repeated and systematic. The fact that South Australia specifies in its legislation what constitutes inappropriate conduct may provide more certainty to employers and consequently reduced information costs compared with costs faced by employers in other jurisdictions.

Box 11.1 **Review of Section 55A of the *Occupational Health and Safety Act 1986 (SA)***

- A review was published by SafeWork SA in September 2008 into the impact of the inclusion of Section 55A in the OHS Act in South Australia in the period since it was introduced in 2005. Among the areas considered was whether to retain a definition of inappropriate behaviour in the Act. The inclusion of a definition was debated at the time of the introduction of the clause with some support for including it in a Code of Practice or guidance material rather than the Act.
- On balance the review recommended that a definition be retained in the Act and that guidance material or codes of practice were not a viable substitute for a definition. It was considered that the inclusion of a definition of bullying in the Act helps define what constitutes bullying in the workplace but it leaves open the need for regular review of the provision given that bullying is a developing area of law. Broad support was received for inclusion of a definition in the Act from stakeholder feedback. The review concluded that it may be arguable whether having a definition can assist the dispute resolution process, but its inclusion provides a heightened awareness among employers and employees of the consequences of inappropriate workplace behaviour.
- Some support was provided by employee representatives to expand the provision to include all persons who may be bullied in the workplace such as volunteers, labour hire employees and contractors. However employer groups expressed a strong preference not to alter the current coverage of the provision. In its recommendations the review noted that it is arguable whether section 4 (2) of the OHS Act already covers some labour hire and contractor relationships and considered there was potential merit in looking at coverage of these employment types if an amendment is considered appropriate in the future.
- It was also recommended that no amendments be made to change the provision to include severe and isolated incidents. Such incidents may already be covered by the general duty of care held by employers, workers and others in the workplace.
- SafeWork SA considered that health and safety representatives (HSRs) and responsible officers as defined under the *Occupational Health Safety and Welfare Act 1986* should be provided with training about the meaning and relevance of section 55A and the requirements to prevent bullying behaviour.
- The review into the inclusion of section 55A in the South Australian OHS Act looked at the adequacy of guidance material on inappropriate behaviour in the workplace and concluded that existing materials should be updated to include case studies of successfully managed and resolved bullying incidents, which could be distributed to employers, employees and employee representatives. A booklet addressing these matters has been drafted and will be released in early 2010.

Source: SafeWork SA (2008).

A review was conducted into the impact of section 55A in 2008. Among the issues considered were various aspects of the definition of workplace bullying, whether guidance should be provided in the Act on the impact of workplace bullying and the time taken between reporting of bullying incidents and investigation. Some of the outcomes of this review are included in box 11.1

Differences in provisions for dealing with bullying and harassment

Apart from South Australia, in all other OHS Acts responsibility to prevent inappropriate behaviour in the workplace is only implicit as part of the employers' all encompassing duty of care to provide a healthy and safe environment.

OHS regulations which require employers to identify problems such as bullying and harassment in the workplace come under the umbrella of identifying foreseeable hazards arising from work (table 11.4). While New South Wales requires employers and controllers of premises to 'take reasonable care to identify hazards including for employers to identify 'the potential for workplace violence' section 9 (2) (j), regulations in other jurisdictions do not explicitly refer to psychosocial hazards.

All jurisdictions provide information on the negative impacts of workplace bullying to employers and employees in the form of guidance notes. Only Queensland and Western Australia provide codes of practice. The Queensland code of practice, *Prevention of Workplace Harassment Code of Practice 2004*, is directed at preventing abuse, ridicule and other forms of what would be construed as bullying in other jurisdictions.

The Queensland code provides: definitions of non-sexual harassment in the workplace (which is equivalent to bullying in other jurisdictions); the impact of workplace harassment; the legislation that covers workplace harassment; the risk management process which should be conducted by employers; consultations which should take place in the risk management process); measures to prevent or control risks; and monitoring and review of these processes.

The Western Australian code, *Violence, Aggression and Bullying at Work 2006*, targets violence and aggression at work as well as bullying. For the latter it includes: a definition of what bullying constitutes; prevention through consultations (with HSRs), prevention plans and policy, provision of information and training, and monitoring and review of polices; and, response processes to bullying incidents including plans for dealing with complaints and investigation procedures.

Table 11.4 **Coverage of bullying and harassment in OHS Acts, regulations, and codes of practice**

2008-2009

	Major OHS Act	*Major OHS regulations*	*Code of Practice*
Cwlth	✓ s.16&21 General duties of employers and employees	✓ Regs. 4.31, 4.32 & 4.32 'persons' to undertake hazard identification, risk assessment, and risk control	*Occupational Health and Safety Code of Practice 2008* s1.17 (f) employers to classify hazards including bullying and harassment.
NSW	✓ s.8&20 General duties of employers and employees	✓ Regs. 9-12 and 34-37 Employers and controllers of premises to undertake hazard identification, and risk assessment and control Reg 9 (2) (j) Employers to identify the potential for workplace violence	×
Vic	✓ s.21&25 General duties of employers and employees	× no general requirement to undertake hazard identification and risk assessment	×
Qld	✓ s.21 to 36 General duties of employers, persons in control of workplaces, workers, other persons, labour hire companies, and host organisations	× no general requirement to undertake hazard identification and risk assessment	✓ *Prevention of workplace harassment*
SA	✓ s.19&21 General duties of employers and workers ✓ s55A deals with inappropriate conduct towards employees and defines what bullying does and does not constitute	✓ Regs. 1.32 & 1.33 hazard identification and based on risk assessment ensure all hazards are eliminated or minimised	×
WA	✓ s.19&20 General duties of employers and employees	✓ Reg. 3.1 the employer, the main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must, as far as practicable identify, assess and reduce any hazards	✓ *Violence, aggression and bullying at work*
Tas	✓ s.9&16 General duties of employers and employees	✓ Regs. 17-21 an 'accountable person' must as far, as is reasonably practicable, identify and assess risks in the workplace and implement appropriate measures to control that risk	×
NT	✓ s.55&59 General duties of employers and workers	✓ Regs. 38&39 hazard identification, risk assessment and risk management	×
ACT	✓ s.37&40 General duties of employers and employees	× no general requirement to undertake hazard identification and risk assessment	×

Source: OHS Acts, regulations and codes of practice.

The Queensland code is more prescriptive than the Western Australian code in making suggestions for managing bullying through a well defined risk management process. The Western Australian approach has similar objectives but approaches it in a less structured way..

The Commonwealth makes specific reference to foreseeable hazards such as psychological injury in its *Occupational Health and Safety Code of Practice 2008*. Under s. 1.17 (f) of the code, a number of potential psychosocial hazards are identified including 'workplace stressors, which arise from a variety or combination of sources, and includes, but is not limited to, bullying and harassment'. After hazards have been identified, employers need to establish the likelihood of the hazard causing harm, followed by detailing measures to control those risks either by elimination or minimisation. While not as detailed as the codes operating in Western Australia and Queensland, the statements in the Commonwealth code place a similar obligation on employers to manage psychosocial hazards.

The guidance material provided by New South Wales, Victoria, South Australia and the Northern Territory on bullying, includes the need for employers to use risk management as a vehicle for identifying psychological hazards and preventing or controlling exposure to bullying or harassment. Risk management in Victoria includes consultation between employers and HSRs and health and safety committees to prevent bullying.

New South Wales and Victoria share guidance material for employers and employees which defines bullying, outlines the risk management process in identifying, assessing and controlling bullying behaviours and provides alternative responses to bullying. As a result, systems set up by organisations in one of these jurisdictions to manage bullying and harassment would be recognised by the other. These arrangements would benefit firms operating in both jurisdictions and potentially reduce costs of managing psychosocial hazards.

Guidance material provided by Workplace Standards Tasmania on hidden hazards in the workplace includes the understanding and managing of drug and alcohol abuse, along with managing and understanding workplace stress and bullying. The Tasmanian Government considered that psychosocial hazards must be addressed under generic duty of care provisions and guidance material on bullying would achieve similar objectives as codes of practice (Tasmanian Government, pers. comm., 16 December 2009).

Employers in Tasmania are supportive of a mixture of prescriptive and more flexible approaches to managing hidden workplace hazards such as stress, bullying, alcohol and other drug abuse. During the development of the guidance material in

Tasmania employers provided feedback which supported the use of prescriptive polices to manage alcohol and drug abuse in the workplace through the use of random testing, while also recommending that the management of workplace stress could involve other less prescriptive risk management strategies. The complexity of these issues is also highlighted by the fact that it was necessary for Workplace Standards Tasmania to bring in consultants to make presentations to inspectors and inform employers of their obligations under the legislation (Johnstone, Quinlan and McNamara 2008, pp. 8–9).

Are the current regulations imposing different burdens on business?

The differences in how bullying in the workplace is covered by OHS regulations in the jurisdictions may contribute to variations in how approaches to bullying are implemented in the jurisdictions, with consequent increases in information and training costs for businesses, particularly those operating in multiple jurisdictions.

It is possible that the more prescriptive approach taken in Queensland's code of practice could contribute to higher costs to employers in this state than the less formal approach taken in the code developed in Western Australia, and the guidance material provided on the topic in other jurisdictions. 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 bullying and harassment in the workplace. Data for Queensland (section 11.1) shows a halving in the number of claims for workplace harassment and bullying from 255 in 2003-04 to 130 in 2007-08.

Another finding of the study by Johnstone, Quinlan and McNamara (2008) was 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, as to the significance of psychosocial issues as a workplace hazard, and to inspectors, in terms of giving them stronger direction to monitor compliance behaviour.(Johnstone, Quinlan and McNamara 2008).

Similarly, while South Australia's specific clauses in its OHS Act may also contribute to higher costs being borne by employers data for South Australia shows a reduction in the number of claims for workplace harassment and bullying from 165 in 2003-04 to 95 in 2007-08.

How have cases of bullying been handled in the courts?

Compensation for bullying has generally been sought by victims through avenues other than OHS laws. 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, but not so much in order to meet OHS requirements but rather for other legal reasons.

There have been very few cases where employers have been prosecuted for contravention of major OHS Acts for allowing bullying to take place. This is despite the existence of fairly comprehensive legislation covering the duty of care of employers to provide a safe working environment and a fairly steady number of compensation claims for bullying and harassment. Of the cases that have proceeded, many are related to physical violence.

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 s.26 of the Act even though they were not directly involved in the incident. Inspector Maddaford 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.

This was the first instance of directors being prosecuted for a breach of the Act in New South Wales as a result of workplace bullying. The company was fined $24 000 by the chief industrial magistrate for the breach (less than half of the maximum fine possible of $55 000) under s.8 of the Act, while the directors were initially only fined $1000 each. WorkCover NSW appealed against the leniency of the fines on the individual directors which were later upgraded to $9000 and $12 000 respectively. The success of the appeal sent a fairly strong message to directors of companies of the seriousness of workplace bullying, and the responsibility they hold in their position as directors to detect and prevent bullying from occurring. All of the employees involved in the initiation had a conviction recorded against them with one incurring a $500 fine. This decision implies that, as with any other safety issue, directors and managers that do not publish and enforce a

workplace bullying policy risk a significantly greater fine, even for a single incident of workplace bullying.

Inspectors and psychosocial hazards

OHS inspectors generally find psychosocial issues in the workplace harder to address than physical hazards. Inspectors reported 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).

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 coverage was broadened to include workplace stress and fatigue. A number of Queensland OHS inspectors have issued improvement notices for cases of harassment. It is difficult 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.

Conclusion

It is likely that businesses in Queensland, South Australia and Western Australia feel the greatest pressure and have the greatest incentive to manage stress and bullying issues than in other jurisdictions. This is because of the existence of codes of practice targeted at bullying and harassments in Queensland and Western Australia, the inclusion of clauses specifically referring to inappropriate behaviour in the workplaces in the OHS Act in South Australia, and the presence of inspectors specialising in psychosocial issues in Queensland. While the existence of codes and legislation may have increased compliance costs in these jurisdictions, these costs may have been matched or even outweighed by the benefits of reduced incidence of claims over the past five years. The successful prosecution of directors in a case of bullying in New South Wales has also sent a strong message as to the seriousness of bullying which can involve personal as well as company liability. See also the section on direct liability in Chapter 7.

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 and the 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.
  - 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 (ASCC) 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
  - As the remaining jurisdictions differ from the national standard, it is likely that comparatively higher compliance burdens for manual handling are placed on businesses, with possibly less effective outcomes, within these jurisdictions.
- All jurisdictions require licences for high risk work.
  - They are generally consistent among jurisdictions with all effectively applying the national standard for high risk work. 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.[1]

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

[1] 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.[2] 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

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[2] 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 & Vic	Where an individual would be injured by a fall of **2 metres** or more	The employer is to complete a hazard analysis and either eliminate or minimise the risk according to a hierarchy of controls (ranging from performing the work on a 'solid construction'[a] to the use of fixed ladders)
	Where there is a horizontal gap of more than **300 millimetres** from the edge of a surface and there is no barrier to prevent a fall	A hazard analysis is to be undertaken
NSW	Where a person could fall **4 metres** or more from a scaffold	The scaffold is subject to inspection, signage, erection and disassembly requirements
	Where the provision of fencing work platforms (such as scaffolding) and handrails (or other physical 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 **2 metres**
Qld	Where there is a risk of falling less than **3 metres** in housing construction work or less than **2 metres** in other construction work (or on a roof with slope of 26° or less)[b]	The relevant person is to ensure hazards have been identified and controlled
	Where there is a risk of falling more than **3 metres** in housing construction work or more than **2 metres** in other construction work (or on a roof with slope over 26°)[b]	The relevant person must use control measures to prevent a fall of any distance and, if prevention is not practicable, to arrest the fall
SA & NT	Where a person is working in an elevated workplace from which they could fall, in the vicinity of an opening through which they could fall or in any other place from which they could fall, and it is reasonably foreseeable that the person would be injured in such a fall due to the distance of the fall	The relevant person must provide reasonable protection against a fall by the provision of a safe means of access to the workplace and the provision of secure fences, covers or other forms of safeguarding or, if that is not reasonably practicable, by the provision and maintenance of safe systems of work
WA	Where there is a risk that a person could fall **2 or more metres** from an edge	Compliant edge protection is to be installed
	Where there is a risk that a person could fall **3 or 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 millimetres x 200 millimetres (or 200 millimetres diameter) but less than 2 metres x 2 metres (or 2 metres diameter) exists	The hole is to be 'blocked' or mesh installed to prevent persons (or things) falling through the opening. The opening should be signed 'DANGER — HOLE BENEATH'
Tas[c]	—	—

(Continued next page)

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 **6 feet**[d]	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 **5 feet deep**[d]	The relevant person is to provide fencing in the manner prescribed in the regulation

[a] 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. [b] 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. [c] Tasmania has no height-specific or fall-specific requirement in its OHS acts and regulations. [d] 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 2 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 2 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 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. While the data showed Queensland had the lowest incidence of falls (on average) over the period, the Queensland regulations over that period provided for a 'fall threshold' of 2.4 metres rather than the thresholds currently in place (table 12.1). Victoria, which had a fall threshold of 2 metres, had a greater incidence of falls than Queensland over the same period (1999-2000 to 2003–2004, except for 2002-2003)[3] but a lower incidence than the national average.

Since 2003-2004, a sustained increase in the incidence of falls in Queensland has seen its incidence rate rise above that of Victoria (figure 12.1). Part of the reason for the deterioration of Queensland's performance could be the growth in construction activity over the period (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 would contribute to a higher rate of falls.

Access Economics (2009) found that, following the introduction of a 2 metre 'fall threshold' in New South Wales and Victoria, there was a reduction in the rate of injuries from falls in those two jurisdictions compared to all other Australian jurisdictions. However, notwithstanding the improvement in both jurisdictions, since 2004-05 Victoria has consistently maintained an incidence rate around 1 claim per 1000 employees less than New South Wales (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.

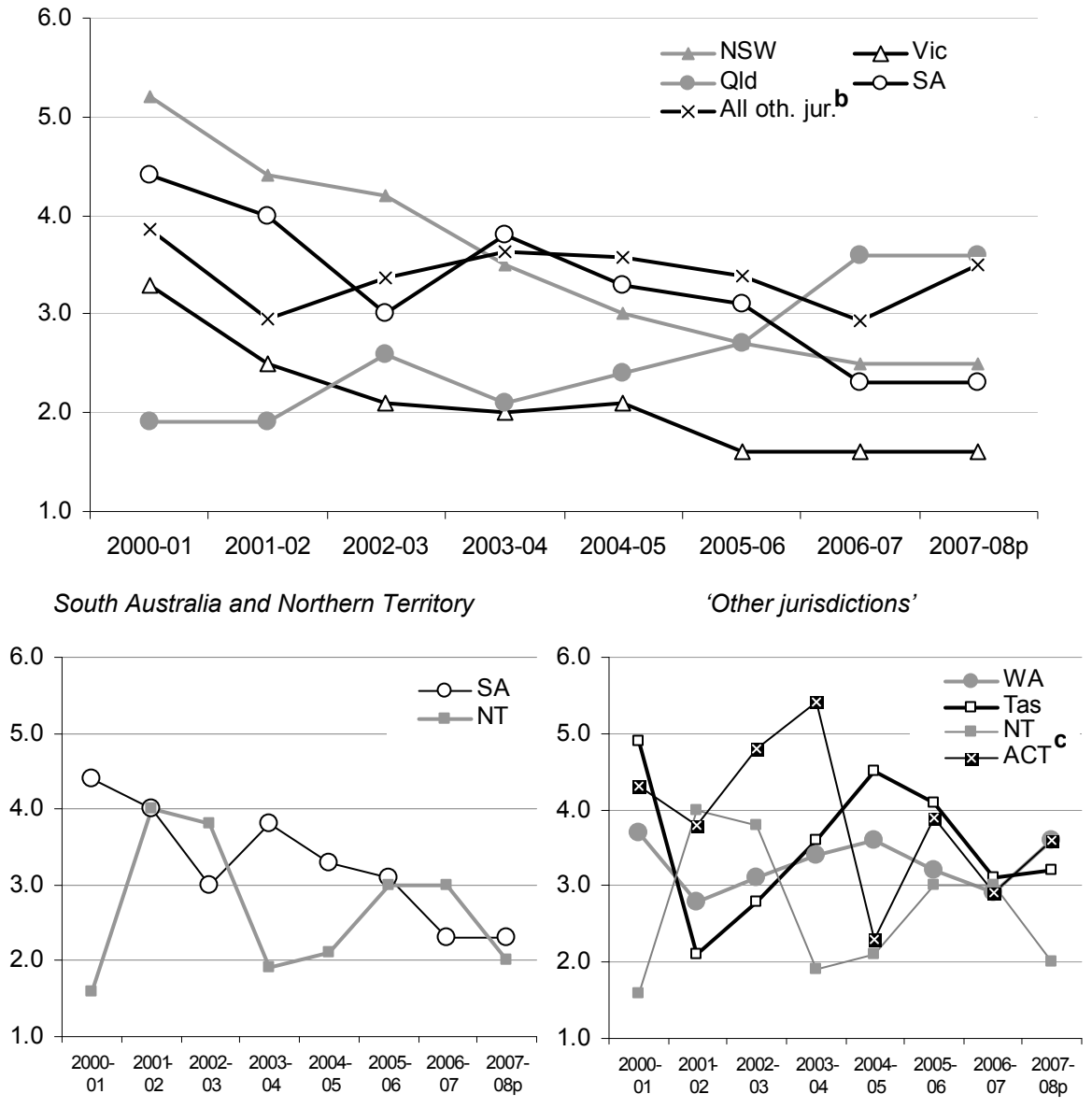
Although South Australia and the Northern Territory have similar legislative requirements in relation to falls (table 12.1), they had differing incidences of falls over the period 2000-2008 (figure 12.1). The volatility in the Northern Territory's incidence rate can be partially explained by the small population of incidents — typically 10–20 falls per year that result in claims.

[3] The 2003-2004 outcomes for Victoria and Queensland were approximately equal. The data used in the ASCC (2008) report showed Queensland as achieving a marginally better outcome than Victoria.

Overall, figure 12.1. indicates that lower height thresholds contribute to a lower incidence of falls. However, the influence of other factors (such as growth rates and workloads) means that those jurisdictions with lower falls thresholds do not necessarily outperform those with higher thresholds or no thresholds.

Figure 12.1 **Falls from a height in the construction industry (2000-01 to 2007-08[a])**

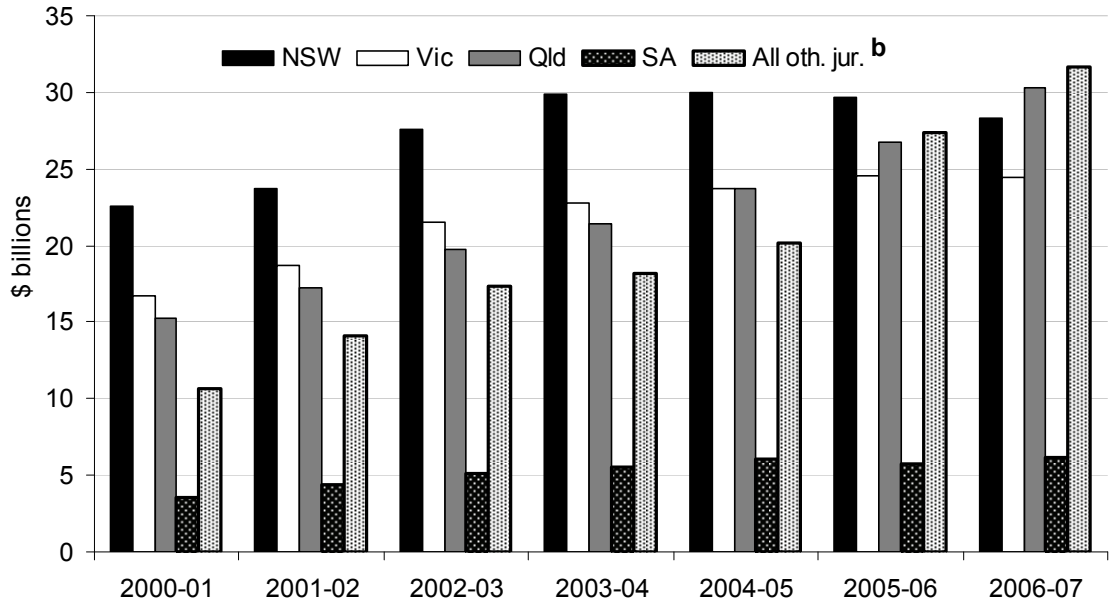
Incidence rate (claims per 1000 employees)



a Provisional data for 2007-08 period. **b** 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). **c** 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[a] — original data



[a] Chain volume estimates measure changes in value after the direct effects of price changes have been eliminated and therefore only reflect volume changes. [b] All other jurisdictions (Western Australia, Tasmania, Northern Territory and ACT).

Data source: ABS (*Construction Work Done, Australia (Preliminary, Jun 2009*), Cat. no. 8755.0).

Business compliance with falls regulation

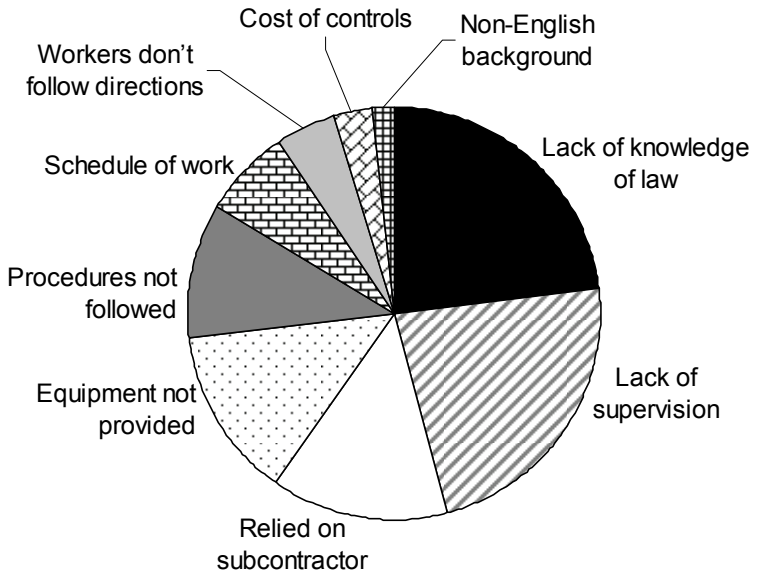
In 2008, the Heads of Workplace Safety Authorities (HWSA) released their final report into falls in the construction industry (2008) which summarised the key outcomes of over 1000 site inspections completed by OHS regulators during 2006-07. The report found that only 35 per cent of worksites were compliant 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.

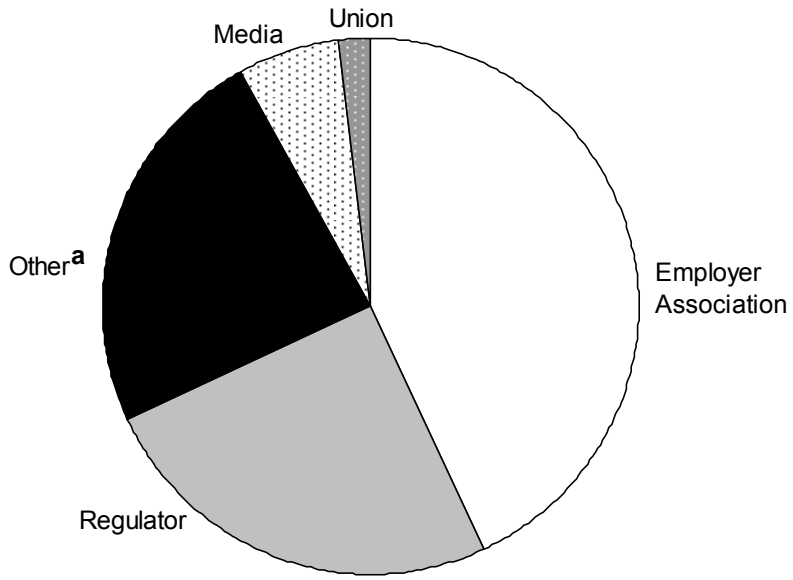
Figure 12.3 **Primary reason for non-compliance with falls requirements**
HWSA campaign — falls prevention in construction 2008



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



a 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 prevention of falls 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 AS1337 (Eye protectors for industrial applications), AS1337 is not included in table 12.2 as it does not relate directly to the prevention of falls.

Table 12.2 **Non-government standards in 'falls' regulations**

As at September 2009

Non-government standard[a]	*Cwlth*	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
AS 1577		C						R	
AS 1639		C							C
AS 1657		C	RC		C*	C			C
AS 2001.2.4				C					
AS 2317						C			
AS 2319						C			
AS 2424		C			R				C
AS 2626		C			C*				C
AS 3569						C			
AS 4142.3						C			
AS/NZS 1170.2				C					
AS/NZS 1576	R	RC		C	C*	RC	C	R	C
AS/NZS 1891		C	C		RC*	C		R	RC
AS/NZS 1892		C	C		C*	RC	R		RC
AS/NZS 4040.4		C							
AS/NZS 4389		C	C			C			
AS/NZS 4488			C			C			
AS/NZS 4576		C	C	C		C*			C
AS/NZS 4994(Int)		C	C						
BS 3913		C							C
BS 5845								R	
CP93		C							C

R Referred to in a Regulation. **C*** Designated a Code of Practice. **C** Referred to in a Code of Practice. [a] 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[a]	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[a]	Plastics building sheets
AS 2626[b]	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[c]	British standard specification for safety nets
BS 5845[d]	Specification for permanent anchors for industrial safety belts and harnesses
CP93[e]	British standard institution code of practice for the use of safety nets on constructional work

[a] 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). [b] Superseded by **AS/NZS** 1891.4 (Industrial fall-arrest systems and devices — Selection, use and maintenance). [c] Superseded by **BS EN 1263 (**Safety nets — safety requirements, test methods). [d] 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). [e] 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 regulations**[a]

Derived from 19-26 May 2009 prices

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
	$	$	$	$	$	$	$	$	$
Minimum regulatory 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

a 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 12.5 **Changes to non-government standards in 'falls' regulation**
As at September 2009

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Number of standards (including sub-standards) likely to change over a 12 month period[a]	1	5	3	2	3	5	2	2	4
Number of standards (including sub-standards) listed in regulations/codes of practice that have been superseded	0	5[b]	0	0	2[c]	0	0	1[d]	4[e]

[a] 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). [b] 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. [c] Includes one standard that has been replaced by four other standards. [d] Includes one standard that has been replaced by two others. [e] 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 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 regulatory impact statement (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 pre-existing 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 (estimated to be $18.1 million) 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. (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.

Table 12.6 **Uptake of national standards and code of practice**
2008-09

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
National Standard for Manual Tasks (2007)	**AL**	**Ref**		**Ref**	**Ref**		**AL**	**Ref**	**a**
National Code of Practice for the Prevention of Musculoskeletal Disorders from Performing Manual Tasks at Work (2007)	**COP**	**COP**		**Ref**	**Ref**			**b**	

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. **a** 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. **b** The Northern Territory approves the superseded National Code of Practice for Manual Handling [NOHSC: 2005 (1990) 1].

Source: Regulations and websites of regulators.

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.

The variation in adoption of the national standard and code of practice on manual handling indicates that there may exist inconsistencies and differing burdens for business operating in differing states and territories. More significantly, those jurisdictions that have not adopted the standard — New South Wales, Victoria, Queensland, South Australia, Western Australia, the ACT and the Northern Territory — may not be gaining the potential benefits derived from the national standard's best practice measures for manual handling management and control in the workplace.

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.

Table 12.7 **Jurisdiction-specific licences for other high risk work**
2008-09

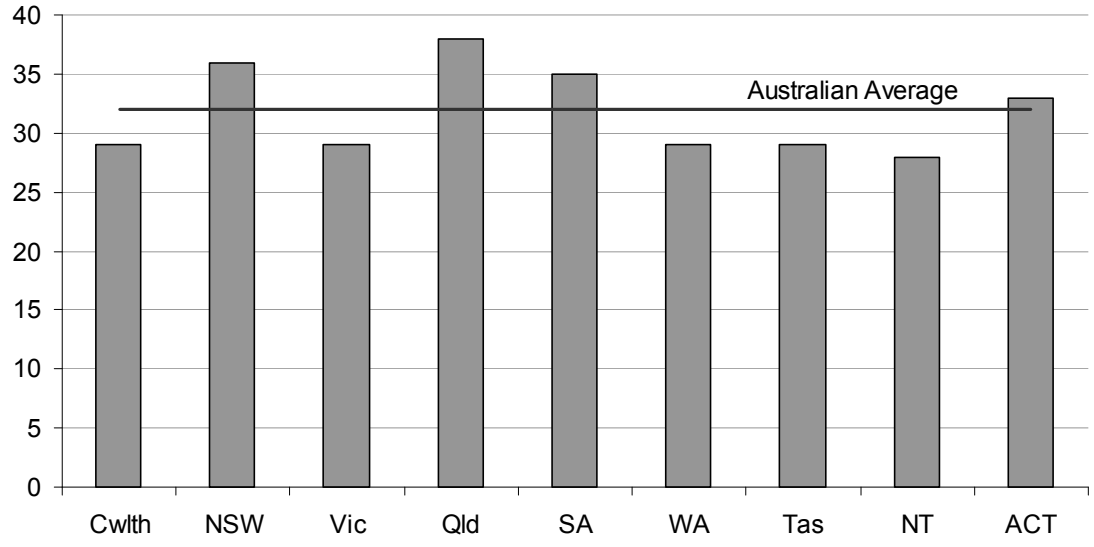
Licence	*Cwlth*	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Asbestos removalist[a]	×	×	×	×	×	×	×	✓	×
Application of pesticides	×	✓	×	×	×	×	×	×	×
Use of fumigants	×	✓	×	×	×	×	×	×	×
Cableway/flying foxes	×	×	×	×	✓	×	×	×	×
Dozer	×	×	×	✓	✓	×	×	×	×
Dragline	×	✓	×	×	✓	×	×	×	✓
Excavator	×	✓	×	✓	✓	×	×	×	✓
Front-end loader	×	✓	×	✓	✓	×	×	×	✓
Front-end loader (skid steer type)	×	✓	×	✓	✓	×	×	×	✓
Front-end loader/backhoe	×	✓	×	✓	✓	×	×	×	✓
Grader	×	×	×	✓	×	×	×	×	×
Road roller	×	×	×	✓	×	×	×	×	×
Scraper	×	×	×	✓	×	×	×	×	×
Total	**0**	**7**	**0**	**8[b]**	**7**	**0**	**0**	**1**	**5**

[a] Asbestos removalist licences are not categorised under 'high risk work' for most jurisdictions (see chapter 10). [b] 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.

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.

Figure 12.5 **Quantity of licences/certificates for high risk work**
2008-09



Data source: OHS regulations.

Additional licence costs

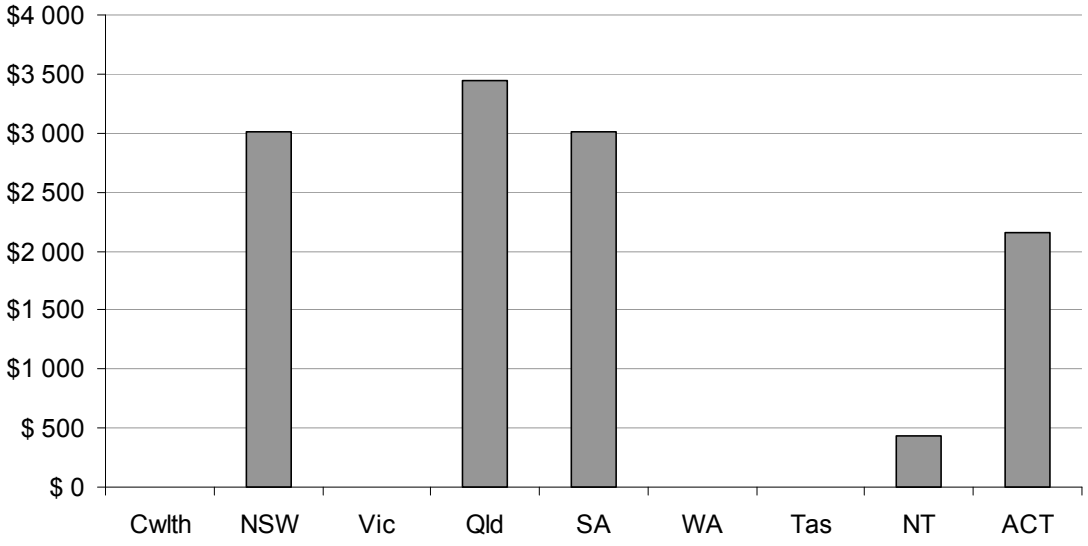
Following the cost estimates used in the RIS (ASCC 2006d) that was prepared for the *National Standard for Licensing Persons Performing High Risk Work* (ASCC 2006c), indicative additional costs imposed on businesses that operate in those jurisdictions which have required licences additional to those 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).

Figure 12.6 **Indicative additional costs on individual businesses and/or employees from all additional licence classes**[a]
2008-09



[a] Above calculations assume that all additional licence classes are held in equal proportions.

Data source: PC estimates.

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.

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.

Table 12.8 **Cost, payment and lodgement of licence applications**
2008-09

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Application forms								
Available online/from regulator	×	✓	×	✓	✓	✓	✓	✓
Available other source[a]	✓	✓	✓	×	×	×	×	×
Cost								
Licence fee	$65.00	$60.00	$68.10	$97.50	$73.00	$56.32	$50.00	$50.00
Fee basis[b]	CR	PCR	PCR	PCR/O	CR	PCR	PCR	O
Processing								
Average time taken (days)	31.7	11	4	5	42	14	3	2
Means of payment								
Cheque	✓	✓	✓	✓	✓	✓	✓	✓
Credit card	✓	✓	✓	✓	✓	✓	✓	✓
Cash	✓	✓	✓	✓	✓	✓	✓	✓
Other	×	×	×	×	×	×	×	×
Means of lodging application								
Mail	✓	×	×	✓	✓	×	×	✓
Fax	×	×	×	×	×	×	×	×
Email	×	×	×	×	×	×	×	×
In person	✓	×	×	✓	✓	×	×	✓
Other[c]	✓	✓	✓	×	×	✓	✓	×

CR cost recovery. **PCR** partial cost recovery. **O** other. [a] 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. [b] Other in South Australia refers to fee levels being set in regulations. [c] 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).

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.

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[a]	… covers the operation of a **powered industrial truck** equipped with a **mast** and an e**levating load carriage** to which is attached a pair of **forkarms** or **other attachment**. (p. 24 ASCC 2006c)
NSW	… means a **powered industrial truck** equipped with a **mast** and **elevating load carriage** to which is attached a pair of **fork arms** or **other loadholding attachment** but does not include any pedestrian-operated fork-lift truck or a pallet truck capable of providing a maximum lift not exceeding 225 millimetres. (p. 150)
Vic	… means a **powered industrial truck** equipped with a **mast** and an **elevating load carriage** to which is attached a pair of **fork arms** or **other loadholding attachment**, 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 **powered industrial truck** equipped with a **mast** and an **elevating load carriage** to which is attached a pair of **forkarms** or another form of **loadholding attachment**, and includes a truck on which the operator is raised with an attachment for order picking, but does not include a pedestrian operated industrial truck … (p. 7)
WA	… means a **powered industrial truck** equipped with lifting media made up of a **mast** and an **elevating load carriage** to which is attached a pair of **forkarms** … (p. 363)
Tas[b]	… covers the operation of a **powered industrial truck** equipped with a **mast** and an e**levating load carriage** to which is attached a pair of **forkarms** or **other attachment**. (p. 24 ASCC 2006c)
NT[c]	… means an item of **mobile plant** equipped with an **elevating load carriage** to which is normally attached **fork arms** or other **load-holding attachments**. (p. 5)
ACT	… 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)

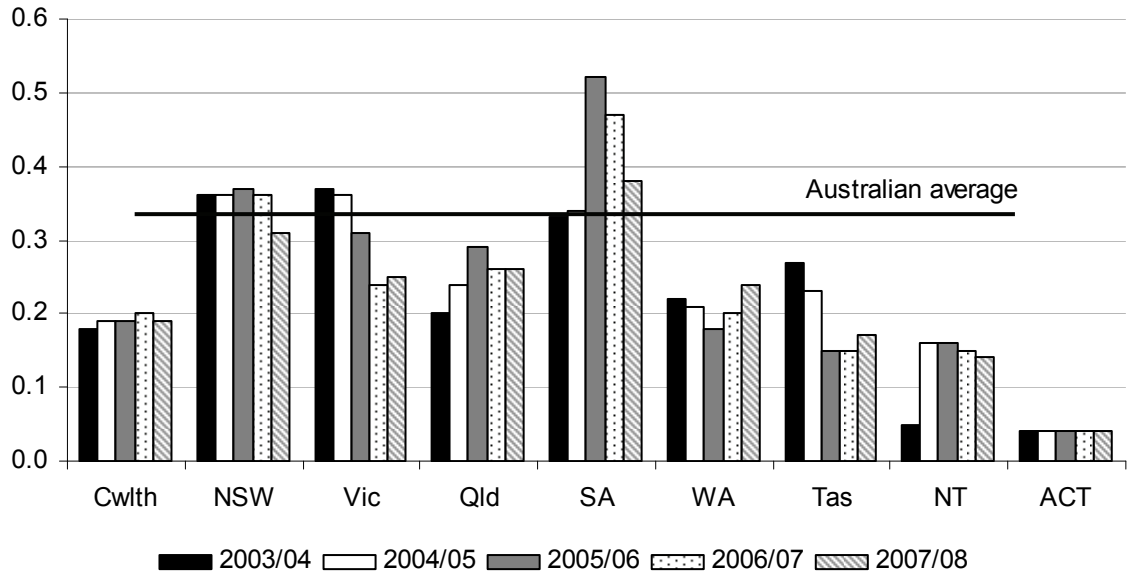
a The Commonwealth regulations do not define a forklift truck but state that the section on licensing arrangements for high risk work be read in conjunction with ASCC (2006c). **b** Tasmania's regulation states that the definition for high risk work relating to forklifts can be found in ASCC (2006c). **c** 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.

Figure 12.7 **Incidence rates of compensated forklift related injury claims**

Claims per 1000 workers: 2003 to 2007-08[a]



[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.

The Commission is seeking further information as to the different apparent forklift related outcomes across jurisdictions and possible explanations, particularly any that may relate to differences in regulations or the operations of regulators.

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.

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**
Number and employment 1998

Size of business (employee number)	*Single state*		*Multi-state*		*Multi-state*	
	Number of businesses	*Number of employees*	*Number of businesses*	*Number of employees*	*Share of businesses*	*Share of employees*
	No.	No.	No.	No.	%	%
< 200	886 147	3 868 395	6 725	245 842	0.8	6
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

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*[a]	*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

[a] 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. 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 13.3 **Ways in which differences in jurisdictions' OHS laws impact upon businesses**

12 months to May 2009

Impact	*Number*	*Per cent*[a]
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 and territories	12	7
Financial impact	10	6
Training	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

[a] 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:

> … 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 (see 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:

> … 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 13.4 **Selected comparisons of regulatory compliance between Comcare and state and territory regimes**

Regulations in force 2008-09

Indicator	*Under Comcare*	*Under all jurisdictions other than Comcare*
Pages of primary legislation[a]	147	1 068
Pages of formal regulations[a]	474	2 324
Codes of practice	25	276
Regulators	1	8
Licensing		
High risk work licences/certificates[b]	29	29
Load-shifting licences/certificates[b]	0	9
Other high risk work licences/certificates[b]	0	4
Hazardous materials licences/certificates[c]	0	9
Formwork and explosive-powered tools	0	2
Other licences/certificates/permits[d]	1	37
Compliance reporting processes required	1	8
Regulated employee based OHS consultative committees	1	7

[a] Page numbers for legislation and regulations based on PDF format versions where available, and if not Word or text format versions. [b] See chapter 12 for details on licences/certificates for high risk work, load-shifting and other high risk work activities. [c] Licences for hazardous materials include those for asbestos removal (except the Northern Territory as it is defined under high risk work). [d] 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 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. For example, in reviewing the need for the licences for formwork and for explosive-powered tool operators, WorkCover NSW (2009a) found that certification of individuals had not achieved any observable decline in injury rates and, if maintained, would impose 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. These costs represent unnecessary burdens not only for both inter- and intrastate businesses, but also for taxpayers.

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)).

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.)

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 self-insured 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, Western Australia and South 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).

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[1], 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.

[1] 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.

Table 13.5 **Regulator access to selected worksites**

Regulations in force during 2008-09

Site-type	*Scenario 1*			*Scenario 2*		
	Comcare	*State OHS regulator*[a]	*No.*	*Comcare*	*State OHS regulator*[a]	*No.*
New South Wales						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Victoria						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Queensland						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	×	1
South Australia						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Western Australia						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2
Tasmania						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	×	1
Northern Territory						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	✓	2	✓	✓	2
ACT						
Comcare company with state-based contractor	×	✓	1	✓	✓	2
State-based company with Comcare contractor	✓	×	1	✓	✓	2

[a] State OHS regulator refers to the relevant state or territory general OHS regulator.

Source: PC estimates.

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 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.

Table 13.6 **Areas of mutual coverage**

Mining and general OHS Acts in force during 2008-09

	Qld[a]			*WA*	
Provision	*General*	*Coal*	*Minerals*	*General*	*Mining*
General duties	✓	✓	✓	✓	✓
Regulator powers	✓	✓	✓	✓	✓
Employee consultation	✓	✓	✓	✓	✓
Notification/reporting	×	✓	✓	✓	✓
Competency standards/licensing	✓	✓	✓	✓	✓
Safety management plans	×	✓	✓	×	×
Major hazards	×	×	×	×	×

[a] 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) pp. 6–8).

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.[2] However, it is 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 one mines inspector for every 1795 people working in the Western Australian resources sector compared with a ratio of about one to every 880 mining employees in Queensland, and one to every 550 mining employees in New South Wales. The Report stated that the low number

[2] 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).

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.

Table 13.7 **Approaches to mining-specific OHS regulation**[a]

Regulations in force during 2008-09

Type of standard	*NSW*		*Qld*		*WA*	
	no.	%	no.	%	no.	%
Prescriptive standards	75	56	57	46	57	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]	63	68	27	47	12

[a] 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. [b] 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

“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.*[1]

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 draft 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

[1] 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 draft 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.

”

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 have participated so far (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 16 submissions received by the Commission prior to the release of this draft 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.

Participants are invited to send any additional submissions in response to this draft to the Commission by 22 February 2010. The Commission will send the final report to the Australian Government in March 2010.

The Commission would like to thank all those who have contributed to the study so far.

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

TREASURER

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www.treasurer.gov.au

- 3 SEP 2007

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05 SEP 2007
CHAIRMAN'S
OFFICE

Mr Gary Banks AO
Chairman
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

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 sincerely

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

16 DEC 2008

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

Dear Mr Gary 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 sincerely

CHRIS BOWEN

RECEIVED
23 DEC 2008
CHAIRMAN'S OFFICE

PO Box 6022
Parliament House
CANBERRA ACT 2600

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A.2 Submissions

Table A.1

Participant	*Submission number*
Association of Consulting Engineers Australia	5
Australian Chamber of Commerce and Industry	6
Australian Finance Conference	15
Boral Limited	3
Business SA	2
Carol O'Donnell	10
Chamber of Commerce and Industry WA	7
CRC Construction Innovation	16
Department of Commerce WA	4
Master Builders of Australia	1
National Disability Services	14
Northern Territory Horticultural Association	12
NSW Business Chamber	11
NSW Minerals Council	9
Safety Institute of Australia Inc	13
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
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

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Table A.3 **(Continued)**

South Australia
Department of Premier and Cabinet and Department of Treasury (SA)
Hickinbotham Homes
Meals on Wheels (Australian Secretariat)
SafeWork SA
South Australian Farmers Federation
Western Australia
Chamber of Commerce and Industry (WA)
Department of Treasury and Finance (WA)
Fortescue Metals Group
Small Business Development Corporation (WA)
Unions WA
VDM Construction
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
Department Treasury and Finance (Tas)
Incat
Mundy & Sons Fine Foods
WorkCover Tasmania
Workplace Standards Tasmania
New Zealand
NZ Department of Labour
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.4). 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.

Table A.4 **Australian and state and territory government OHS safety 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

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 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 Industries	Mining
Qld	Department of Employment, Economic 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 from the surveys

Data for 2008-09 was sought in the surveys. Table B.3 details the questions asked in the survey. 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 table B.3 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).

Table B.3 **OHS Regulator Questionnaire 2008-09**

Survey question	*Table / figure number*
Part 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
Part 2 General	
4. What proportion of total expenditure and total employees are allocated to OHS?	Section 5.3
5. Are there any OHS related acts/regulations administered jointly with another agency? If you answered 'yes', please provide details.	Section 5.3
Part 3 Financial	
6a. What was your agency's total expenditure on OHS activities in 2008-09?	Table 5.16
6b. What was your agency's expenditure on the following categories of OHS activities in 2008-09?	Table 5.16
i) Administration	
ii) Enforcement	
iii) Education activities	
iv) Other	
v) Total	
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. What was your agency's revenue from the following categories of OHS related fees collected from businesses in 2008-09?	Table 5.4 and 5.6
i) Licensing	
ii) Permits	
iii) Inspections	
iv) Audits	
v) Appeals	
vi) Other (please detail)	
vii) Total	
7c. What was the total value of fines imposed on businesses (for OHS regulatory compliance breaches) by your agency in 2008-09?	Table 5.9
Part 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. Do you have any problems recruiting OHS inspectors?	Section 5.4
12. What is the minimum qualification requirements and experience/attributes that your agency looks for in OHS inspectors?	

(Continued next page)

Table B.3 **(continued)**

Survey question	*Table / figure 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: — starting salary of a full time mining inspector during 2008-09? — average salary of a full time mining inspector during 2008-09?	Table 5.7
16. As at 30 June 2009, how many OHS inspectors had: i) Less than 3 years of relevant regulatory or OHS experience 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	Table 5.5 and 5.7
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 and 5.7
Part 5 Licensing/Certification	
18. Do you recognise OHS licences/certificates of other jurisdictions and if so, please provide details	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 (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: 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)	Table 5.8
25. Is compliance assessed by inspection, accreditation or a mix of approaches? Please specify and provide reason	Section 5.5
26. Are private OHS systems recognised in assessing compliance with OHS laws and used in place of standard reporting where possible? Please detail	Section 5.5

(Continued next page)

Table B.3 **(continued)**

Survey question	*Table / figure number*
27. What type of actions are available to your agency to use in response to OHS breaches? Indicate their use in 2008-09 with penalty (fines) where appropriate	Table 5.12, 5.13, 5.14 and 5.15
i) Educate/advise	
ii) Verbal warning	
iii) Written directive	
iv) Provisional improvement notice	
v) Improvement notice	
vi) Prohibition notice	
vii) Licence suspension	
viii) Licence cancellation	
ix) Adverse publicity	
x) Infringement/penalty notice	
xi) Prosecution	
xii) Enforceable undertaking	
xiii) Other (please list)	
28a. How many OHS inspections and audits were undertaken in 2008-09?	Table 5.9 and 5.10
28b. Of these inspections/audits, how many were:	Table 5.9 and 5.10
i) Routine investigations	
ii) Initiated by a complaint	
iii) Reinvestigations following a compliance breach	
29. Please detail the number of workplace investigations by industry conducted in 2008-09:	Table 5.10 and 5.11
i) Agriculture, forestry and fishing	
ii) Manufacturing	
iii) Building/construction	
iv) 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. Please detail the number of enforcement actions by type of breach (e.g. hazardous materials, heights etc.)	
31a. In 2008-09, were shutdown periods imposed on businesses due to an OHS breach?	Table 5.18
31b. If shutdown periods were used, how many were imposed during 2008-09?	Table 5.18
31c. What was the shortest shut down period imposed on businesses?	Table 5.18
31d. What was the longest shutdown period imposed on businesses?	Table 5.18

(Continued next page)

Table B.3 **(continued)**

Survey question	*Table / figure number*
31e. What was the average shutdown period imposed on businesses?	Table 5.18
32. Please comment on the hierarchy of enforcement actions used to deal with different types of compliance breaches	Section 5.5
33. What measures did you use to promote a culture of OHS compliance among businesses in 2008-09? If 'yes', indicate their frequency of use (seldom/regularly)	Table 5.22 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 and 5.25
i) Small businesses	
ii) Employers from non-English speaking backgrounds	
iii) Non-metropolitan businesses	
If 'yes' for any, please detail	
35. Do you actively seek feedback from businesses? If you answered 'yes', what mechanisms do you use:	Table 6.9 and 6.12
i) Online	
ii) Surveys	
iii) Complaints handling	
iv) Focus groups	
v) Point of contact consultation	
vi) Other (please detail)	
36. Which of your regulatory responsibilities do you receive the most queries about from businesses?	
37. Which of the following processes are used to facilitate the uniform interpretation of OHS regulations 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 which issues relevant to OHS does your agency liaise with other State/Territory and National OHS agencies?	Table 5.20
i) Regulatory overlap	
ii) Regulatory gaps	
iii) Enforcement consistency	
iv) Policy Interpretations	
v) Other matters (please specify)	

(Continued next page)

Table B.3 **(continued)**

Survey question	*Table / figure 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 and Section 6.4
40b. List and detail the appeal processes for prosecutions available to businesses	Table 6.2 and Section 6.4
40c. How many prosecution cases were appealed in 2008-09?	Table 6.2 and Section 6.4
40d. Of these appealed prosecution cases, how many were successful?	Table 6.2 and Section 6.4
40e. Of these appealed prosecution cases, how many are ongoing?	Table 6.2 and Section 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?	

(Continued next page)

Table B.3 **(continued)**

Survey question	*Table / figure number*
Part 9 Standards, Codes of Practice and Guidance Notes	
46a. Attachment A provides a table of the adoption of National Health and Safety Commission (NOHSC) standards, codes of practice and guidance notices across the jurisdictions, as of 1 November 2007. Please fill in or update the information for your jurisdiction where appropriate.	Table 2.5 and Section 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: • Inspection notice • Infringement notice • Improvement notice	Table 6.7 and 6.11

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 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.4).

Table B.4 **Total time spent completing the survey (minutes)**

	Cwlth	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Total time (minutes)	ns	2505[a]	9600	900[b]	240	1500	240	240	ns

ns not supplied. [a] Two regulators completed the survey. [b] 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.5) were asked the questions listed in table B.6.

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.

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).

Table B.5 **SME survey — respondents by jurisdiction and industry**

	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 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 **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? Have you…

1b. What has been the approximate cost for the past twelve months of the following things that you have done?

- 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?

(Continued next page)

Table B.6 **(continued)**

Survey question

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)

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? Have you incurred…

3g. Can you rank in order the three highest 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)

(Continued next page)

Table B.6 **(continued)**

Survey question
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

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.[1] 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:

[1] 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).

- 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.

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^2 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[2] 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.

[2] Table B.7 provides the scale by which 'difficulty' was measured.

Table B.7 **Level of difficulty: rating scale**

Rating	*Meaning*	*Examples*
1	No difficulty in finding or completing the form (very easy)	• 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. • 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.
2	Easy to find and complete	• 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. • In the case of completing the form, the form needed information which was slightly more detailed, with some guidance from accompanying documentation being needed.
3	Neither easy nor difficult (medium difficulty)	• 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. • In the case of completing the form, the form required less standard information, however, the information could be obtained reasonably quickly.
4	Difficult to find or complete the form	• 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. • 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.
5	Very difficult to find or complete the form	• In the case of finding the form, there was no intuitive means of finding it. The regulator was contacted and once the form was located, it was only available after some time. • In the case of completing the form, the form was complex, required a lot of assistance from the guidelines and would need the input of third parties.

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

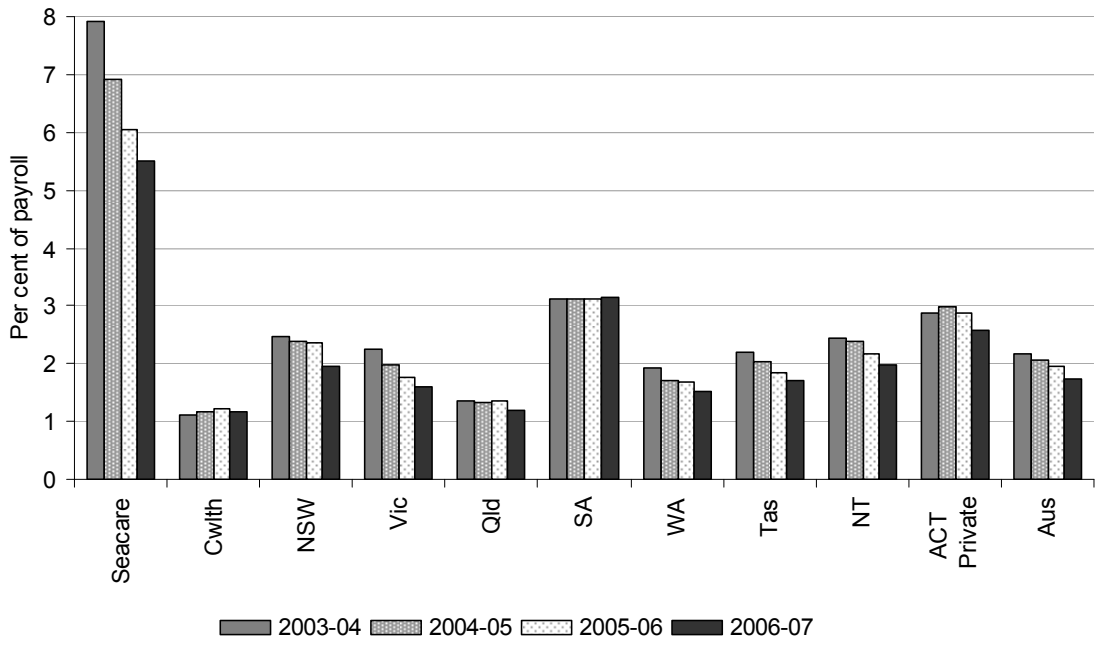
Workers' compensation premiums are paid by businesses to insure themselves against claims that arise from work-related injury or disease. If correct, premiums provide a proxy for the risk of a claimable work-related injury or disease occurring (along with a component which represents a return for the 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.[1] 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).

[1] 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).

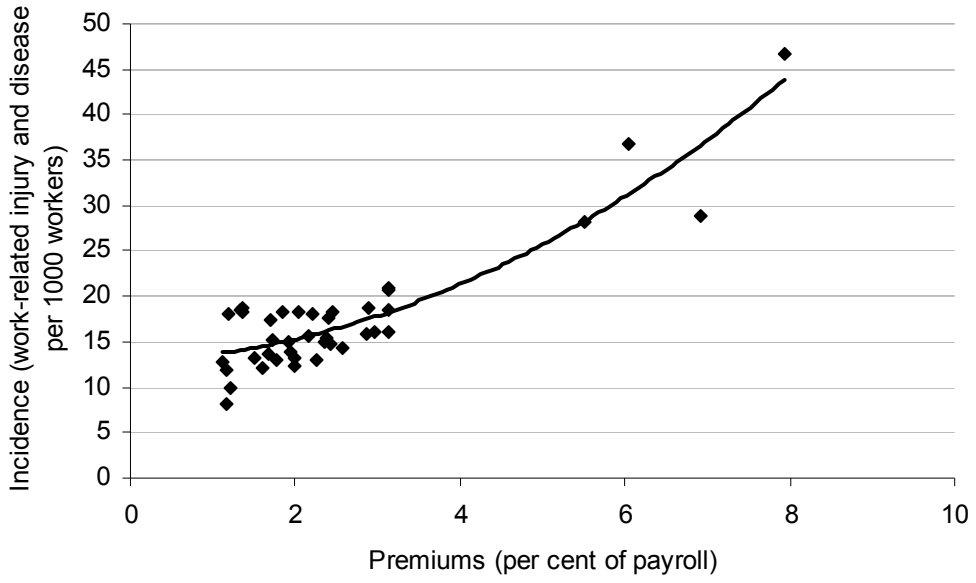
A simple comparison of these adjusted premiums against the incidence of work-related injuries and disease that have resulted in a workers' compensation claim for each jurisdiction shows a high correlation (figure C.2).

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**[a]

2003-04 to 2006-07



[a] 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[2])
- 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.

2 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.

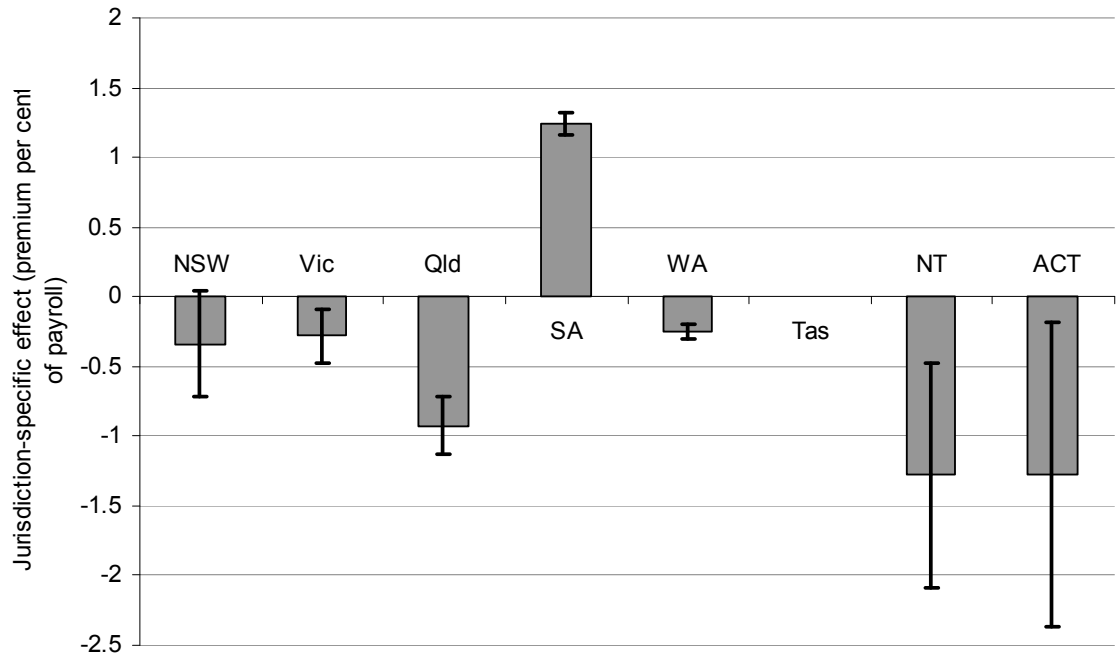
Table C.1 **Estimated results**

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

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**[ab]

Average 2003-04 to 2006-07



a 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. **b** 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; Professional, scientific and technical services; Administrative and support 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.

Table C.2 **Estimated results from the expected incidence rates model**

Variable	Coefficient	Standard error	t-statistic	P-value
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 waste 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 services	-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 proportion of the variation in incidence rates between jurisdictions are explained by differences in industry composition.

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.

Table C.3 **Actual and estimated expected incidence rates**[a]

Average 2003-04 to 2006-07

Jurisdiction	*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

a 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.1 **Statutory authority notifiable incidents matrix (state and 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).

(Continued next page)

Table D.1 **(continued)**

	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).

(Continued next page)

Table D.1 **(continued)**

	Serious Injury ***'An incident in the Workplace which results in:***
WA	• 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.
NT	• 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.2 Statutory authority notifiable incidents matrix (state and territory specific) developed by a leading Australian 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.

(Continued next page)

Table D.2 **(continued)**

	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.

(Continued next page)

Table D.2 **(continued)**

	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.
SA	• 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.

(Continued next page)

Table D.2 **(continued)**

	Dangerous Occurrence ***'An incident in the Workplace which results in:***
NT	• 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.
ACT	• 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).

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