



Australian Government  
Productivity Commission

Performance  
Benchmarking of  
Australian Business  
Regulation:  
*Occupational Health & Safety*

Productivity Commission  
Issues Paper

April 2009

### ***The Productivity Commission***

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## THE ISSUES PAPER

The Commission has released this issues paper to assist individuals and organisations to prepare submissions to the study 'Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety'. This paper contains and outlines:

- the scope of the study
- matters about which the Commission is seeking comment and information
- the Commission's approach to the study
- how to make a submission.

## KEY DATES

Receipt of terms of reference	23 December 2008
Due date for submissions	15 May 2009
Release of draft report	October 2009
Final Report	December 2009

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# 1      **Scope of the study**

## **What has the Commission been asked to do?**

The Commission has been asked to continue the program of performance benchmarking Australian business regulation ('the benchmarking program'). Specifically, the Commission has been asked to benchmark the burdens on business arising from food safety regulation and from occupational health and safety regulations (see Attachment A for the Terms of Reference). This study considers the burdens arising from current occupational health and safety (OHS) regulation and will not make any recommendations for change. (A separate companion benchmarking study will consider the burdens arising from food safety regulation.)

## **How can you participate in this study?**

As part of the study process, the Commission will engage in a number of rounds of consultation with stakeholders, such as individual businesses, business groups, government agencies, regulators, consumer groups and unions. The Commission is also seeking written submissions from interested parties on those regulatory matters of most concern as well as details of data sources that may be useful to the study. Given that OHS affects every workplace, the Commission is interested to receive submissions from any business, large or small, in any area of business activity.

For the purpose of this study, 'business' is defined in broad terms to include activities of an industrial or commercial nature, whether or not for profit or gain, where the person in control engages workers or in other ways influences the activities of workers at work, and excludes activities carried out solely for private or domestic purposes (for a discussion of the definition of a business for the purpose of OHS legislation see Stewart-Crompton, Mayman and Sherriff 2009, pp. 32-44). While this paper sets out a variety of matters on which the Commission is seeking information and comment, participants are free to raise any matters in their submission(s) that may be relevant to the study.

The Commission is aware that some interested parties may have already invested significant resources in drafting submissions to other studies and reviews into OHS regulations. To save the time and resources of these participants, the Commission is happy to accept that material, in particular as it relates to regulatory burdens and inconsistencies, as a submission to this study. The details of how to make a submission are contained in Attachment B.

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The Commission intends to release a draft report in October 2009. Following the release of the draft report, the Commission envisages further rounds of stakeholder consultations.

## **Background to this study**

In February 2006, the Council of Australian Governments (COAG) agreed that all jurisdictions would aim 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).

On 24 October 2008, COAG's Business Regulation and Competition Working Group agreed that the Commission should study food safety and occupational health and safety for the next phase of the benchmarking program. It is intended that these studies would complement COAG's reform processes and initiatives, and those of the jurisdictions themselves.

An Advisory Panel, established to facilitate advice from governments on the benchmarking study and to coordinate data provision for the previous two reports, continues to operate. An initial meeting of the panel for this project, involving representatives from the Australian Government, and state and territory governments was held on 5 February 2009. This meeting informed the scope, coverage and methodology outlined in this paper.

## **2 Contextual matters**

### **What is regulation?**

For this study, 'regulation' is broadly defined to include 'government rules' that influence and control behaviour, as well as the administration and enforcement of those rules. These government rules include legislation and formal regulations as well as quasi-regulation, such as codes of conduct and guidance materials that do not involve 'black letter' law.

Given the breadth of OHS regulation, the Commission proposes to target this benchmarking study on those aspects of regulation intended to serve the same objective, but with differences between jurisdictions as to how they seek to achieve that objective. Such differences may arise either due to the content of the regulation or differences in how it is administered and enforced.

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## Box 1      **Performance benchmarking — previous studies**

### **The ‘feasibility’ study**

To help implement COAG’s 2006 agreement on benchmarking and measuring regulatory burdens, the Commission examined the feasibility of developing quantitative and qualitative performance indicators and reporting framework options (PC 2007). The Terms of Reference for that study are contained in Attachment A. The study concluded that benchmarking was technically feasible and could yield significant benefits.

### **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. In light of this, the Commission was requested to:

- examine the quantity and quality of regulation
- benchmark the administrative compliance costs of business registrations.

In December 2008, the Commission released two companion reports addressing these areas. The reports served to test the usefulness of different benchmarking indicators and approaches to collecting benchmarking data. The reports also provided lessons for future studies. In particular, the business registrations report highlighted the potential challenges in obtaining data from individual businesses.

#### *Performance Benchmarking of Australian Business Regulation: Quantity and Quality*

The ‘quantity and ‘quality’ report (PC 2008a) provides indicators of the stock and flow of regulation and regulatory activities, and quality indicators for a range of regulatory processes, across all levels of government. 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 (PC 2008b) provides estimates of compliance costs for business in obtaining a range of registrations required by the Commonwealth, state, territory and selected local governments. 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 business (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 across jurisdictions relating to fees and charges.

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## What is a ‘regulatory burden’?

Regulatory burdens arise in the first instance through the requirements contained in legislation, regulations and other regulatory instruments. In order for most regulations to achieve their objectives, it is unavoidable that some burden is placed on business. However, not all regulations create an ‘incremental burden’. When a business would behave in an identical manner regardless of whether a certain regulation was in effect, that regulation could not be considered to impose an incremental burden. On the other hand, where regulations induce businesses to behave differently or undertake additional tasks, an incremental burden can be said to exist. In the case where regulations are poorly designed, or enforcement and administration is poorly executed, they may impose greater burdens and costs than are necessary to achieve their objectives.

The institutional framework under which regulation is administered may also impose unnecessary burdens on business. For example, a business seeking information on regulatory requirements in a jurisdiction with three regulators may face higher search costs than in a jurisdiction with a single regulator. Alternatively, a single regulator with multiple regulatory responsibilities may not provide as prompt, or as relevant, advice compared to a regulator (or regulators) for whom OHS regulation is their sole responsibility.

The actions of regulators may further create burdens for business. For example, a regulator’s inconsistent application (or interpretation) of regulatory requirements may necessitate a number of changes in the operations of a business in order to achieve compliance, despite the underlying regulatory requirements remaining unchanged. Even where a business does not need to undertake such changes, the uncertainty caused by the inconsistent approach of regulators can, in itself, cause a regulatory burden. The partial enforcement, or non-enforcement, of a regulation may also create a regulatory burden by placing businesses complying with the regulation at a competitive disadvantage when compared to non-complying businesses.

All these potential burdens can be exacerbated for enterprises doing business across jurisdictional borders. They are likely to have their compliance costs compounded because of differing or duplicated regulatory requirements, even if that regulation has the same policy objectives.

The aim of this study is to benchmark some regulatory burdens imposed on business by OHS regulation by all levels of government. For this study, regulatory burden has been broadly defined to include:

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- additional administration and operational costs (including paperwork costs) needed to meet regulatory requirements
  - additional costs associated with changing the ways that things are done by businesses in order to meet regulatory requirements
  - additional costs associated with changing or restricting what is produced by businesses in order to meet regulatory requirements
  - constraints to the capacity to respond to changing technology and market demand.

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 objectives
- specific regulations that cover much the same ground as other generic regulations
- unduly prescriptive regulation that limits the ways in which businesses may meet the underlying objectives of regulation
- unwieldy licence/approval processes
- excessive time delays in obtaining responses and decisions
- 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.

Box 2 provides some guidance on the identification of regulatory burdens.

### **The focus is on ‘performance benchmarking’**

The Commission’s feasibility study identified two types of regulatory benchmarking that could be undertaken — performance benchmarking and standards benchmarking (box 3). For the reasons outlined in box 3, a performance benchmarking approach is considered more appropriate for this study. Despite this, in future it may be possible to develop agreed standards of measurement for well defined areas of regulation with common objectives (standards benchmarking).

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## Box 2      **Identifying and estimating regulatory burdens**

### **Administration and operational costs**

Regulatory costs are only those additional costs that arise from regulation. The following categories can be used as a guide to identifying administration and operational costs.

- The cost of reporting (or providing notification) before or after an event.
- The cost of the education and training required to maintain an awareness of the regulations and changes to regulatory requirements, as well as training staff about regulatory requirements.
- The cost of applying for, and maintaining, permission to conduct an activity. For example, applying for and maintaining to licences and permits.
- The cost of record keeping in order to keep statutory documents up-to-date. For example, keeping records of accidents in the workplace.
- The cost of cooperating with audits, inspections and enforcement.
- The cost associated with publication and documentation, including the signs and documents required for particular activities.
- The costs associated with procedures, including the costs associated with doing non-administrative tasks, such as equipment inspection.
- Other costs not covered in the above categories.

### **Changing the way things are produced**

Regulations can lead businesses to change their production methods. This can be because of constraints put on inputs, processes or technologies, resulting in higher costs of production.

### **Changing what is produced**

Although excluded from accounting measures of compliance, lost opportunities can pose a significant compliance cost. These often result from regulation-induced changes in prices and resource allocation, trade effects and delays in the introduction of new products and services. Regulations can change the incentives facing businesses in ways that lead them to change the characteristics of their products or even to change what they are producing.

*Source:* PC (2008b).

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### **Box 3      Framework options for benchmarking**

The Commission's report, *Performance Benchmarking of Australian Business Regulation*, identified two possible frameworks for undertaking a benchmarking study of business regulation:

- performance benchmarking — involves measuring and comparing indicators of regulatory performance across jurisdictions, and over time, without reference to any specific standards or performance
- standards benchmarking — involves the comparison of jurisdictions' performance against standards or policy targets.

There are a number of obstacles to benchmarking regulatory burdens using a standards benchmarking methodology:

- there is no established 'best practice' standard against which regulatory burdens alone can be measured. The burden of regulation varies with the objectives of that regulation and the manner in which it operates to achieve its objectives. Consequently, any benchmarking standard(s) for regulatory burdens will vary with the objectives of the regulation, the extent to which those objectives are realised and the benefits created within the economy
- time constraints make the development of standards as part of the study process infeasible
- a standards benchmarking approach may limit the potential gains from the benchmarking exercise, particularly if the standards are applied in practice as a 'tick the box' exercise by regulators. The consequence of setting minimum standards may be that regulators have little incentive to move beyond those standards.

*Sources: PC (2007); PC (2008a).*

Benchmarking involves the collection of data on an agreed set of indicators, or measures from different sources, to enable comparisons. Benchmarking can assist in setting targets for future performance, identifying areas for improvement and measuring progress against set objectives. Performance benchmarking can:

- highlight potentially unnecessary burdens on businesses, where differences in regulatory burden across jurisdictions are not attributable to differences in regulatory objectives
- highlight the regulatory approaches, for comparable objectives, that generate lower burdens on business
- increase government accountability for the efficient delivery of regulation, through the increased transparency afforded by benchmarking
- promote 'yardstick' competition among jurisdictions on compliance costs.

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### *The reference period for benchmarking*

The reference date for benchmarking OHS regulation and its burden on business will be 30 June 2008. However, because the Commission intends to use existing data wherever possible, it may be difficult to present figures on burdens for a common period. As a consequence, the Commission may need to put caveats on some of the benchmarking indicators due to changes to relevant regulations between the sourcing of data and 30 June 2008.

*Issue 1 — Has OHS regulation and/or its burden changed significantly prior to or since 30 June 2008? If so, please provide details of the changes you have observed.*

## **3 The Commission's approach**

The Commission will use submissions, as well as consultation with business, regulators and other stakeholders (such as consumer groups and unions), to help identify where differences between jurisdictions impose an unnecessary burden on business and so warrant benchmarking. In order to identify useful areas to benchmark, the Commission will apply the following criteria to the list of regulations and administration and enforcement practices raised by stakeholders as being of concern as well as those areas identified by the Commission. The following criteria will be used to ensure that regulations (and administration and enforcement practices) most relevant to future reform are covered in the study:

1. there are differences in either the regulation itself or in the administration/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 significant difference between jurisdictions in the cost the regulation or its enforcement/administration imposes on business
4. in jurisdictions where the costs are higher, the difference in the cost of a regulation or its enforcement/administration does not appear to be matched by a commensurate increase in the effectiveness of the regulation
5. it appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data.

Once potential areas are selected, the Commission intends to use four groups of qualitative and quantitative indicators:

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- regulatory quantity and quality indicators: stock and flow of regulations (including volume and coverage of regulations) and quasi-regulations such as codes of practice and guidance materials
  - regulator indicators: characteristics such as size (number of employees and budget); the level of, and manner in which, information is provided to businesses and individuals; how inspections are conducted; and the style of enforcement (for example promoting ‘cultural changes’ through education campaigns or a punitive approach).
  - business cost indicators: how regulations and regulatory administration contribute to business compliance costs
  - outcome indicators: measures of aggregate outcomes of OHS regulatory intervention such as levels of and changes in the rate of work-related injury, disease and death.

## **Data collection**

Although the Commission will undertake its own research and data gathering activities, it will need to rely on the cooperation of governments and businesses to provide much of the information and data it needs. The Commission may also engage consultants to assist with certain aspects of the data collection process. However, to the extent possible, the Commission will endeavour to minimise the burdens placed on jurisdictions and businesses through requests for data and information by utilising existing data sources.

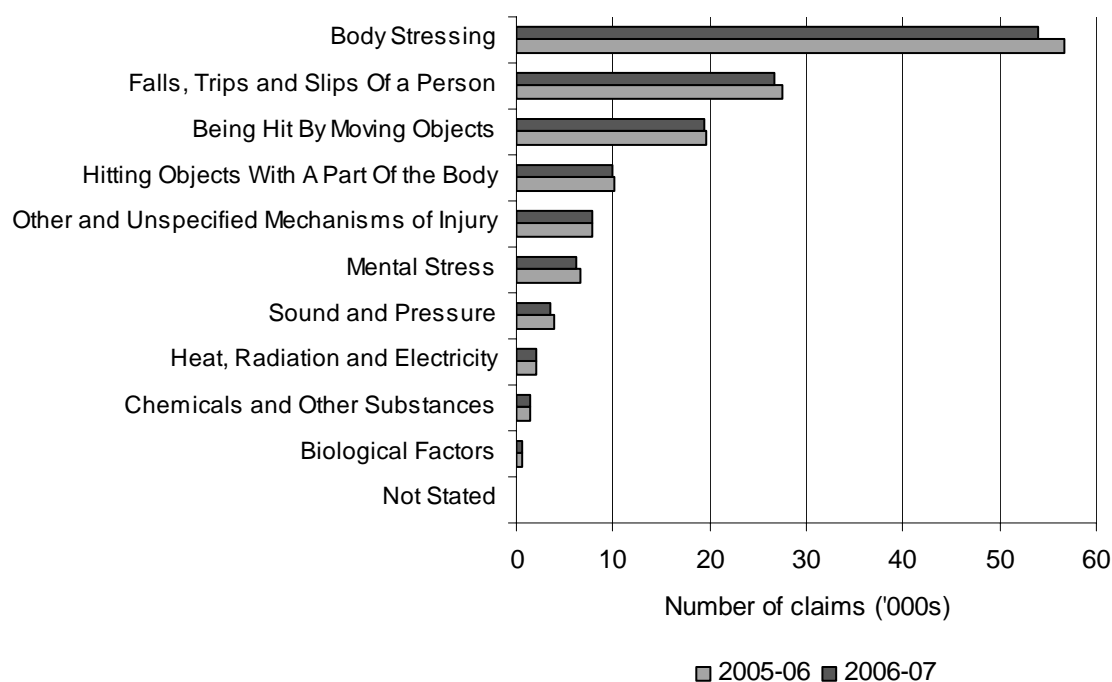
*Issue 2 — Which existing studies or sources of data do you consider suitable for use in this study?*

## **4 Why have occupational health and safety regulations?**

OHS issues affect all businesses and their employees. An extreme example of the risks to health and safety faced in workplace is the exposure over a number of years to asbestos by employees and customers of James Hardie Industries Limited. James Hardie announced that as at 2001 it had been sued by over 2000 sufferers or their families who been injured or killed by its products. The company anticipated that this number would grow in the future.

In other cases, the risks to health and safety are more immediately apparent. In 2006-07, most OHS workers compensation claims are a result of body stressing (injuries such as sprains and strains of joints and muscles) and falls, trips and slips (figure 1).

**Figure 1 Workers' compensation claims 2005-06 and 2006-07<sup>a</sup>**



<sup>a</sup> 2006-07 is provisional data. Data excludes fatalities.

Data source: (WRMC 2008).

In total, in 2006-07, close to 1.4 per cent of the Australian workforce received workers' compensation for an injury or illness involving temporary incapacity of one or more weeks, permanent incapacity or fatality (table 1). As not all work-related injuries or illness result in workers' compensation claims, these figures are likely to understate the true incidence. Indeed, as measured by the Australian Bureau of Statistics, in 2005-06, over 6 per cent of Australian workers reported experiencing some form of work-related injury or illness. Of these, 2 per cent reported experiencing a work-related injury or illness which resulted in one or more weeks off work. (ABS 2006)

Workplace injuries also represent a significant cost to both society and businesses. In 2004-05, as a result of workplace injuries more than 146 000 claims were lodged for workers' compensation with median payments of close to \$6000 — costing businesses more than \$850 million in compensation alone (ASCC 2008). The true cost of injury and death is far greater when factors such as medical treatments and

physical and psychological trauma on families and individuals are taken into account, along with forgone earnings and reductions in workforce productivity of those affected workers. The ASCC (2009) estimated that the direct and indirect costs associated with workplace injury and disease was close to \$57.5 billion for the 2005-06 financial year, up from \$34 billion in 2000-01 (NOHSC 2004). Of this, it was estimated that 3 per cent was borne by employers, 49 per cent by workers and 47 per cent by the broader community.

**Table 1 Incidence of workplace injury and disease by jurisdiction 2002-03 to 2006-07**  
Claims per 1000 workers<sup>a</sup>

<i>Jurisdiction</i>	<i>2002-03</i>	<i>2003-04</i>	<i>2004-05</i>	<i>2005-06</i>	<i>2006-07</i>
	no.	no.	no.	no.	no.
NSW	19.0	18.2	17.7	15.0	13.9
VIC	12.9	12.9	12.3	13.1	12.2
QLD	19.5	18.7	18.5	18.3	18.1
SA	20.6	21.0	20.7	18.6	16.1
WA	14.3	14.9	15.1	13.7	13.2
TAS	18.5	18.0	18.3	18.3	17.3
NT	14.7	14.7	15.5	15.6	13.2
ACT	16.6	18.8	16.1	15.8	14.4
Commonwealth	11.8	12.8	11.8	10.0	8.1
Australia total	16.9	16.7	16.2	15.2	14.2

<sup>a</sup> Figures reported are accepted workers compensation claims involving temporary incapacity of one or more weeks plus all claims for fatalities and permanent incapacity.

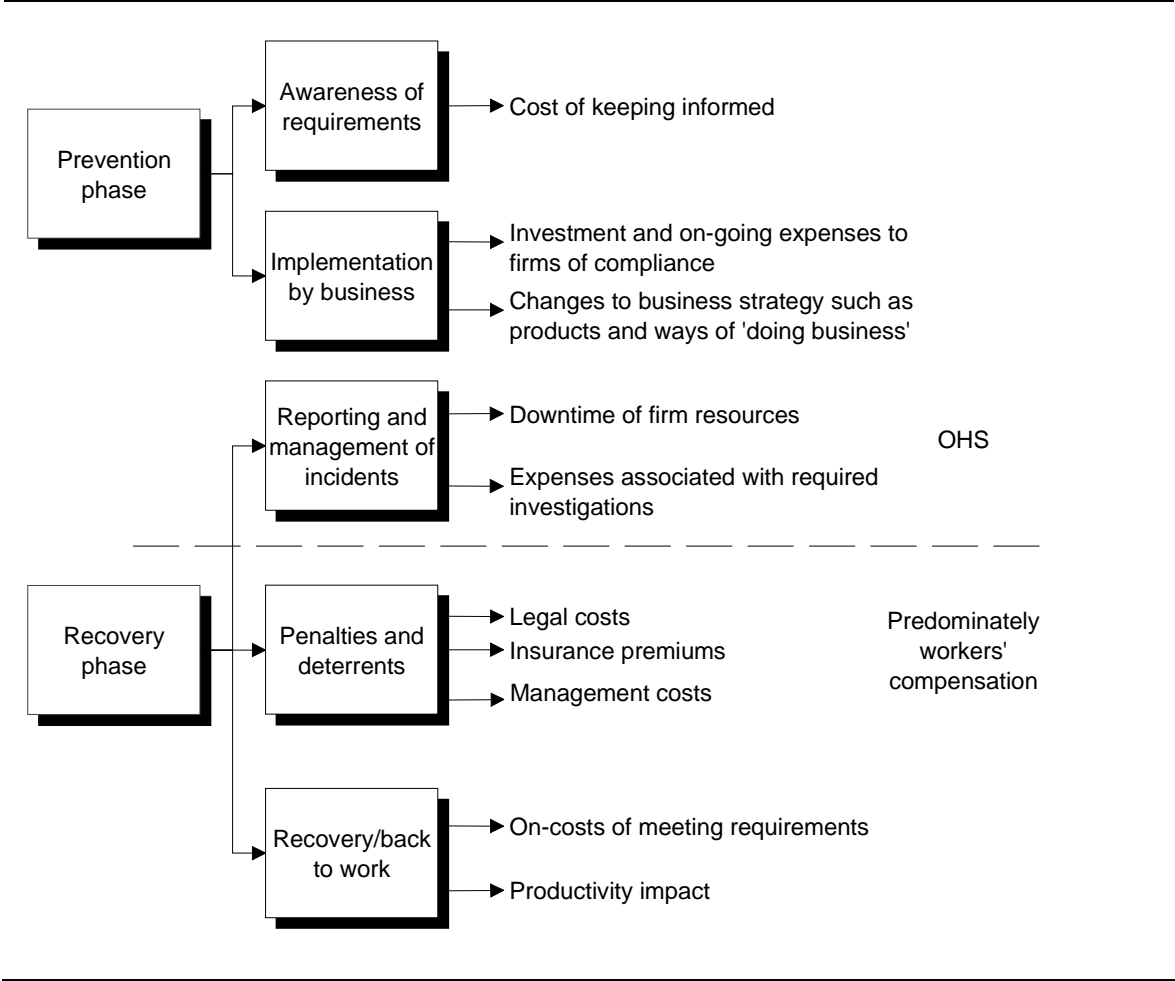
Source: WRMC (2008).

To help address these dangers, all jurisdictions have OHS regulations. Regulations try to prevent injury in the first instance. The OHS regulations are designed to provide a safe workplace for workers, customers and the public by imposing a duty of care on businesses. The underlying justification for this extensive intervention rests on the arguments that owners/employers would not otherwise be sufficiently mindful of the health and safety of everyone in the workspace and workers can under-rate the risks of familiar hazards. These concerns are exacerbated where disease onset is delayed. The objectives of individual OHS Acts are extensive, but all broadly aim to secure and promote safety and welfare at work.

While regulations addressing workplace disease and injury generate beneficial outcomes for society, they also impose costs on business in both the prevention and response phases (figure 2). The costs depicted in figure 2 capture the costs of not only OHS regulations, but also workers' compensation regulations. Although they are excluded from this study, 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 OHS regime, for the purpose of this study the focus is mainly on the costs and incentives associated with the awareness of requirements, implementation of measures by business and reporting and management of incidents.

Figure 2      **Compliance costs associated with OHS regulation**



## 5      Occupational health and safety regulations in Australia

OHS regulation prior to the 1970s was prescriptive, specifying standards and technical rules. While the prescriptive standards had some advantages — they provided some compliance and enforcement certainty — a number of weaknesses also existed. Along with the constant need to update technical rules, it was felt that

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the prescriptive regulation discouraged firms from finding innovative and cost effective ways of dealing with OHS issues in the workplace (NRCFOHSR 2002).

In the 1970s, the Robens Report in the United Kingdom recommended the introduction of more general OHS acts, with specific OHS provisions to be contained in formal regulations. The report recommended that non-enforceable codes of practice and other guidance materials be developed to help businesses comply with the legislation. All jurisdictions in Australia subsequently followed the Robens model and introduced new legislation which imposed a general duty of care on employers and required them to consult with employees over strategies to minimise the risk of injury.

## **The current OHS regulatory landscape**

Currently, all jurisdictions have their own OHS regulations and regulators (table 2). All OHS acts are generally goal oriented — that is, they set out what outcomes are desired, such as avoidance of workplace injuries, and what processes should be in place to minimise the risk of injury. The adoption of a broader legislative model of general duty of care has put the onus on businesses to consult and to develop practices that will minimise the risk of injury and lessen their liability of being prosecuted.

**Table 2      OHS primary legislation and regulators**

<i>Jurisdiction</i>	<i>Act</i>	<i>Regulator</i>
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
Commonwealth	Occupational Health and Safety Act 1991	Comcare

The Commonwealth Government also established the Australian Safety and Compensation Council (ASCC), which replaced the National Occupational Health and Safety Commission (NOHSC). The ASCC consisted of members from the Commonwealth and state governments, the Australian Chamber of Commerce and Industry, and the Australian Council of Trade Unions. The ASCC provided a forum

for these government, employer and employee representatives to have discussions and participate in the development of a nationally consistent regulatory framework.

The ASCC had statutory powers to declare national standards and codes of practices to prevent workplace death, injury and disease. However, the council had an advisory role only, with no enforcement or regulatory power. Legislative action by the jurisdictions needs to occur in order for the council's declarations to have legal force. The ASCC last met in September 2008 and has been replaced by the Safe Work Australia Council (see below).

All jurisdictions have formal regulations in addition to their primary acts. Regulations made under the various OHS acts cover a wide range issues pertaining to particular industries, hazards or processes. Generally, while OHS legislative coverage is extensive, significant differences exist between jurisdictions in the areas specifically detailed in the regulations (table 3). It should be noted that the number of areas regulated and number of codes of practice do not necessarily provide a good indicator of the overall regulatory requirements or burdens imposed in each jurisdiction.

**Table 3 Formal OHS regulations**

<i>Jurisdiction</i>	<i>Regulation(s)</i>	<i>Areas detailed in the regulations<sup>a</sup></i>
NSW	Occupational Health and Safety Regulations 2001	55
VIC	Occupational Health and Safety Regulations 2007	36
QLD	Workplace Health and Safety Regulations 2008	36
SA	Occupational Health, Safety & Welfare Regulations 1995	62
WA	Occupational Health and Safety Regulations 1996	67
TAS	Workplace Health and Safety Regulations 1998	32
NT	Workplace Health and Safety Regulations 2008	56
ACT	Occupational Health and Safety (General) Regulation 2007	27
	Occupational Health and Safety (Certification of Plant Users and Operators) Regulation 2000	
	Occupational Health and Safety (Manual Handling) Regulation 1997	
Commonwealth	Occupational Health and Safety (Safety Arrangements) Regulations 1991	12
	Occupational Health and Safety (Safety Standards) Regulations 1994	

<sup>a</sup> Areas detailed in regulations relate to particular industries, hazards or processes.

In addition to primary acts and regulations, all jurisdictions have developed codes of practice (or their equivalents) which attempt to set out 'minimum standard' guidelines for businesses to enable them to comply with the legislation (table 4). These non-enforceable codes are generally developed by regulators and, as with the

regulations themselves, vary in number and coverage between jurisdictions. Codes of practice also have evidentiary status in court proceedings in most jurisdictions.

**Table 4 Codes of practice covering OHS**

	<i>NSW</i>	<i>VIC</i>	<i>QLD</i>	<i>SA</i>	<i>WA</i>	<i>TAS</i>	<i>NT</i>	<i>ACT</i>	<i>Commonwealth<sup>a</sup></i>
Number	56	8	30	89	37	18	19	25	21
<b>Areas covered</b>									
Industries	32	–	7	36	12	4	1	4	1
Hazards	15	–	18	44	20	3	15	15	16
Processes	4	–	2	2	1	2	1	1	2
Mixed	5	–	3	7	4	9	2	5	2

<sup>a</sup> In June 2008, the Commonwealth consolidated its codes of practice into one document, *Occupational Health and Safety Code of Practice 2008*, with 21 parts.

Source: ASCC (2009 unpublished).

Despite the broad similarities in the OHS legislative framework, there are many differences between jurisdictions such as in the detail and substantive matters included in OHS legislation and what is covered in regulations and codes of practice. The acts also do not always cover the same hazards and often have different structures and length. There is also no consistent approach to who is a duty holder — whether it is an employer or more generally a person conducting business.

Further, some jurisdictions also have industry-specific OHS regulations. This further complicates the OHS regulation landscape and creates the potential for overlap and inconsistencies. For example, some mining industry legislation cover OHS issues that are also set out in generic OHS legislation.

#### *Developing harmonised OHS regulation is already underway*

Harmonisation of OHS regulations is seen by leading business organisations as a necessary process to building a seamless national economy. The Business Council of Australia identified OHS as a ‘hot spot’ area for reform (BCA 2008).

Recently, moves to significantly reform OHS regulation have been undertaken under the COAG’s 2008 Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. Under this agreement all state and territory governments have committed to harmonise OHS regulation by 2011 and adopt a nationally consistent approach to compliance and enforcement. This will result in all jurisdictions harmonising their OHS acts, regulations and the associated codes of practice. The Commonwealth Government has also recently replaced the ASCC with the Safe Work Australia Council, a body with the

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responsibility for developing nationally consistent policy for OHS and workers' compensation.

In order to develop a model OHS act, the Australian Government commissioned an expert panel (Stewart-Crompton, Mayman and Sherriff 2008, 2009) to recommend to the Workplace Relations Ministers' Council (WRMC) the optimal structure and content of a model OHS Act that can be adopted by all jurisdictions. The panel recently released two reports. The Safe Work Australia Council will be responsible for developing a model OHS Act in accordance with WRMC's response to the review recommendations and for WRMC's approval. The Council will consult on the model Act, including by releasing an exposure draft bill and a regulatory impact statement.

Apart from the moves to harmonisation, a number of jurisdictions have also published reports on, or reviews of, their OHS regulatory regimes (see, for example, Hooker 2006 and Stensholt 2007).

Despite the push to harmonisation, as indicated in submissions to the expert panel, some jurisdictions may wish to preserve elements of their current OHS system that they consider are efficient and effective, and provide competitive advantage to their business interests.

While this study will not make recommendations on the content of what should be included in any model act, the results of this study should inform COAG about areas of OHS regulation where differences exist in business compliance costs. In doing so, this study can help highlight areas where there are likely to be substantial potential benefits from harmonisation.

## **6 What areas should be benchmarked?**

All OHS legislation, regulations and regulators represent possible areas to benchmark (see table 2 and 3) along with quasi-regulations such as codes of practice and guideline materials.

***Issue 3** — Is there other regulation related to OHS that should be covered in this benchmarking study? For example, should industry-specific statutes and regulations that cover OHS issues also be covered?*

The Commission aims to select regulations, regulator activities and practices that generate unnecessary burdens for case studies. These regulations can occur across all types of businesses, from those in industries where there are significant physical risks such as mining, transport, construction, agriculture and manufacturing, to

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those where there may be less physical but greater mental stress, such as the finance industry.

## **Outcomes of OHS regulation**

Quality regulatory intervention achieves policy objectives at the lowest possible cost to government and businesses. Any benchmarking of quality of OHS regulations would require indicators of efficiency and effectiveness in producing desired outcomes. While a full analysis of the effectiveness of the overall OHS regulatory regime is outside the scope of this study, it is useful to benchmark OHS outcomes such as the rate of workplace injury, diseases and death across jurisdictions (for example, see table 1). Such results can provide some information to qualify differences in observed compliance costs between jurisdictions and provide a proxy for the community wide benefits created by OHS regulations.

Benchmarking outcomes of specific components of regulations, however, is difficult as usually only overall outcomes can be observed. And, at a jurisdictional level, differences in industrial structure will affect aggregate outcomes. Nevertheless, differences in outcomes raise questions about the relative effectiveness of different approaches to OHS with some differences potentially more clearly attributed to specific aspects of these approaches.

***Issue 4** — What OHS outcomes or indicators might best be used to explain differences in the effectiveness of OHS regulation between jurisdictions?*

Workers' compensation premiums, for example, can be viewed as one indicator of the outcomes of OHS regulatory regimes. It could be expected that workers' compensation premiums in jurisdictions with more effective regulations would be lower due to the lower probability of workplace accidents, although it is recognised that many other factors also determine premiums.

***Issue 5** — Are differences between jurisdictions in average workers' compensation premiums a useful indicator of differences in regulatory outcomes?*

## **The regulations**

The sheer volume of regulations and quasi-regulations has the potential to impose unnecessary burdens on businesses. Problems arise if these regulations or quasi-regulations have inconsistent requirements related to similar areas of business activities or if businesses have to repeat similar paperwork without any tangible

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benefit. For example, businesses may be required to report injury to two different regulators in different forms and timeframes.

These duplications and inconsistencies may impose significant costs for businesses operating in a single jurisdiction and can be amplified for those businesses operating across jurisdictions. Differences may also exist between jurisdictions in regulations that aim to achieve similar outcomes. For example, all jurisdictions, under certain circumstances, require businesses to establish designated OHS committees and/or to employ OHS specialists (Western Australia instead places an obligation on some employers), obtain licences or permits and protective clothing for specific work, keep records and provide training. But differences exist in the requirements placed on businesses — such as the type and number of licences required and the composition of committees. Additionally, businesses also need to identify, evaluate and prevent the risk of workplace injuries.

An example of regulatory differences between jurisdictions relates to the reporting requirements placed on businesses. In Queensland, workplace incidents are required to be reported within 24 hours and records kept for a minimum of one year. In comparison, at the Commonwealth level, Comcare also requires notification on an event within 24 hours, but requires records to be kept for a minimum of 30 years.

The Commission has been made aware during industry consultations to date of a number of other inter-jurisdictional differences between regulations that have the potential to impose unnecessary burdens on businesses. These include:

- the existence of good regulatory practices such as review periods and industry consultation
- access rights
- working in confined spaces
- asbestos handling
- working at heights
- bullying in the workplace
- risk management and assessment requirements
- qualification and training requirements of inspectors
- training requirements for licences and OHS committees.

**Issue 6** — *In your experience, what are the OHS regulations that impose the most significant burden on your business? For these, what is the size and cost of this burden?*

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**Issue 7** — *In conducting your business, do you face additional regulatory burdens because of differences in regulations between the states and territories – if so, what are they?*

**Issue 8** — *Occupational health and safety regulation may have different impacts on businesses operating in the same industry. For example, certain regulation may impose greater relative costs on a small business compared to a large business.*

*Where a regulation has different impacts on businesses operating in the same industry, please provide details of the specific regulation and the differing impacts it has on businesses.*

### **Codes of practice**

Where primary legislation cover generic OHS issues and regulations focus on procedural and administrative aspects, regulators have an important role in guiding specific business compliance. Regulators do this by developing codes of practice and guidance materials. The areas covered by these materials, and the way they are promoted and enforced, vary significantly across jurisdictions.

Normally businesses follow codes of practice established by regulators in developing compliance strategies. However, there may be cases where they decide to depart from this, for example, where businesses have interstate operations or where specific voluntary industry codes of practice exist.

**Issue 9** — *In your experience, what are the OHS codes of practice that impose the most significant burden on business? For these, what is the size and cost of this burden?*

**Issue 10** — *How do codes of practice and other guidance material assist compliance with OHS regulations? Alternatively, do these codes hinder businesses choosing the most appropriate compliance strategy for their individual situations?*

**Issue 11** — *How are codes of practice promoted and enforced?*

### **The regulators**

Regulators are responsible for implementing OHS regulations and are the most important point of contact for businesses. The way they 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.

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To enforce regulations, regulators conduct inspections and impose notices and/or fines to change OHS practices. Generally, regulators conduct two types of inspections:

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

***Issue 12** — What observations can you make about the frequency, thoroughness and efficiency of OHS inspections? Which aspects impact adversely on business?*

***Issue 13** — Is there a significant incidence of non-enforcement or partial enforcement of OHS regulations? Where does it occur? How does it affect safety outcomes?*

Regulators in each jurisdiction put different emphasis on reactive and proactive inspections. At the national level, the proportion of proactive interventions is usually around 60 percent. However, there are significant differences among jurisdictions. For example, in 2006-07 the percentage of proactive inspections were two times higher in the Northern Territory than in Tasmania (WRMC 2008).

Debate exists over which type of regulator behaviour yields better outcomes. Further, it is likely that cost burdens imposed on businesses and the administrative costs borne by regulators differ with the approach taken.

***Issue 14** — Do educative or punitive approaches to regulatory enforcement lead to changes in compliance costs faced by businesses? If so, how?*

A number of other areas of regulator activities impact on businesses' ability to comply with OHS regulations and thus are potentially useful to benchmark. These include:

- information provision by regulators — accessibility, usefulness, costs of provision
- levels of penalties for breaches and shut down periods after accidents
- appeals and review processes — methods to overcome disputes over breaches and licensing such as access to alternative dispute resolution or resolution with courts

However, it should be noted that in some jurisdictions, regulator control over some of these areas is limited by legislated requirements.

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**Issue 15** — *In your experience, what are the interactions with regulators that impose the most significant burden on business? For these, what is the size and cost of this burden? Do these burdens vary by business size?*

### **What are the ‘top 10’ burdens?**

To ensure the study includes the most significant burdens on business, the Commission invites participants to provide details of the 10 occupational health and safety obligations that, in their experience, can give rise to the most significant burdens. The Commission would welcome any information participants can supply on the size/cost of their ‘top 10’ burdens.

**Issue 16** — *What are your 10 top burdens in order of their impact? These can include responses already made to issues highlighted earlier, as well as burdens not previously identified.*

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

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

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

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

*If you are a business, it would assist the Commission if you could supply some brief details on your business along with your information on the ‘top 10’ burdens. Information on the following would be especially useful:*

- *jurisdiction of operation*
- *type of business*
- *number of employees*
- *the number of sites/locations of business operations.*

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## Attachment A: Background documents

### *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

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*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.

*Letter from the Treasurer requesting the Commission to commence the second stage of the benchmarking program*



**TREASURER**

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- 3 SEP 2007

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.

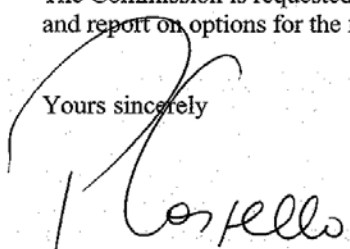
Accordingly, and consistent with the decision of 13 April 2007 by the Council of Australian Governments, I request that the Commission commence stage two of the study extending over the next three years. In keeping with the terms of reference, stage two of the study is to examine the regulatory compliance 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

*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 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**

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Parliament House  
CANBERRA ACT 2600



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<http://assistant.treasurer.gov.au>

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## **Attachment B: How to make a submission**

This is a public study and the Commission invites all interested individuals and organisations to take part. Anyone can make a public submission. In your submission, you do not need to address all the issues raised in this paper and you may comment on any other issues that you consider relevant to the terms of reference.

There is no specified format

A submission can be anything from a short note or email outlining your views on a few matters to a more substantial document covering a wide range of issues. Where possible, you should give evidence to support your views, such as data and documentation. Although we welcome every submission, multiple, identical submissions do not carry any more weight than the merits of an argument in a single submission.

Participants can make subsequent submissions throughout the course of the study. In particular, participants will be invited to make further submissions to respond to the draft report, which is expected to be released in October.

Submissions should be public documents

The Commission seeks to have as much information as possible on the public record. This is a public study, and the Commission will make submissions available for others to read. Submissions will become publicly available documents once placed on the study website. This will normally occur shortly after receipt of a submission, unless it is marked confidential or accompanied by a request to delay release. Any confidential material sent to the Commission should be provided under separate cover and clearly marked.

Email lodgement is preferred

If possible, submissions should be lodged by email or as a text or Microsoft Word document (.txt, .rtf, .doc), rather than Adobe Portable Document Format (.pdf), to ensure screen readers can read them. (Submissions may also be sent by mail, fax or audio cassette, and arrangements can be made to record oral submissions over the telephone.)

Please ensure that the version sent to the study is the final version, and that you have removed any drafting notes, track changes, annotations, hidden text, marked revisions, as well as any internal links. Please also remove large logos and decorative graphics (to keep file sizes down). This will enable the submission to be more easily viewed and downloaded from the website. Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.

Each submission should be accompanied by a submission cover sheet containing the submitter's personal and organisational contact details. The submission cover sheet is available at the end of this attachment or from the study's website.

Please lodge your submission with us by 15 May 2008 so that we can make full use of it in our draft report. Other key dates, submission addresses and contact details are provided at the front of this paper.

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# Productivity Commission SUBMISSION COVER SHEET

(not for publication)

## *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety*

**Please complete and submit this form with your submission:**

By email: [ohs@pc.gov.au](mailto:ohs@pc.gov.au) OR by fax: (02) 6240 3377  
Or by post: Performance Benchmarking Australian Business Regulation  
Productivity Commission  
PO Box 1428  
Canberra City ACT 2601

**Organisation**.....

**Street address** .....

**Suburb/city** ..... **State & Postcode**

**Postal address** .....

**Suburb/city** ..... **State & Postcode**

**Principal contact** ..... **Phone** .....

**Position** ..... **Fax** .....

**Email address** ..... **Mobile** .....

**Please indicate if your submission:**

- ☐ contains NO confidential material  
☐ contains SOME confidential material (provided under separate cover and clearly marked)  
☐ contains confidential material and the WHOLE submission is provided 'IN CONFIDENCE'

*Please note:*

- For submissions made by individuals, all personal details other than your name and the state or territory in which you reside will be removed from your submission before it is published on the Commission's website.
- Submissions will be placed on the Commission's website, shortly after receipt, unless marked confidential or accompanied by a request to delay release for a short period of time, where they will remain indefinitely.
- Confidential material should be provided under a separate cover and clearly marked 'IN CONFIDENCE'.
- Copyright in submissions resides with the author(s), not with the Productivity Commission.

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