Dear Sir/Madam

Please accept and consider the submission below and related direction attached to the Productivity Commission inquiry into Performance Benchmarking of Australian Business Regulation. Cheers, Carol O'Donnell, Glebe, Sydney NSW 2037.

SUBMISSION ON PERFORMANCE BENCHMARKING OF AUSTRALIAN BUSINESS REGULATION: OCCUPATIONAL HEALTH AND SAFETY

Support a Data Driven Risk Management Approach to Business Burdens

This submission responds more fully later to questions in the Productivity Commission (PC) Issues Paper entitled 'Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety (OHS)' (2009). The PC was asked 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 burdens on business. However, one man's burden may be others' new opportunity for more effective risk management and business growth. Ideally, a business burden may be seen as a general incentive for improved business management or production, which also lifts the costs of business operation off the shoulders of workers who may otherwise be injured in the production process, or off the shoulders of a related community and its environment. If business and consumers do not bear the burden of preventing injuries at work or in communities, or curtailing greenhouse gases or dealing with other environmental problems caused through production, the burdens of unfettered production will still be borne by others inside or outside business in one form or another.

In short, a 'business burden' ideally generates scientific progress towards a better quality of life for all and is also the generator of many new types of business. (For example, see attached submission on 'A National Waste Policy: Managing Waste to 2020'). Whether this occurs depends on many factors, including managerial competence. Ideally, OHS needs to be treated from consistently coordinated risk management perspectives which take into account the risks of production to workers, clients, communities and environments. Risk management is defined as a way of achieving continuous improvement in production and its outcomes. It is a logical and systematic method of identifying, analysis, treating, monitoring and communicating risks associated with any activity, function or process in a way which will enable organizations to minimize losses and maximize opportunities. It begins with establishment of the strategic, organizational and risk management context in which action will occur. The next step is to identify and analyze risks so as to assess, prioritize and treat them. The final step is to monitor and review performance. (AS/NZS 4360 – 1999). Risk management is discussed again later.

Workers' compensation costs ideally provide an incentive to the employer to deal with OHS problems. If workers are injured, the cost and other effects are borne by the injured and through workers' compensation premium increases, or through Medicare and related rehabilitation and disability support costs, depending on the design of compensation coverage. If an economic burden (e.g. the cost of preventing falls or dust diseases in construction) is lifted, the economic burden will grow and be shifted to injured individuals and the community through its hospitals where it will show up in related statistics on admissions, deaths and disability support payments. Courts are a related cost burden characterised by adversarial, prescientific operations that undermine the potential for more scientific approaches and data capture which is designed to improve all performance.

In general, the conceptualisation of the task the PC has been asked to undertake seems flawed and too general. I am unclear how the terms of reference or related questions should be answered, other than pointing out the importance of using a risk management approach supported by the following key data:

- The relevant Australian and New Zealand Industrial Classification (ANZSIC) and related occupational classification system for the workplace and worker
- Workers compensation injury and cost data
- Death and serious injury data required under OHS acts
- Data on hospital admissions and deaths

- Data on the disability support pension
- Australian Bureau of Statistics survey data on general health
- Other data about the environment such as that required under Dangerous Goods Acts or under the new National Greenhouse and Energy Reporting (NGER) Act
- At any workplace any injury or near miss incident should immediately be recorded to provide an initial record of the event and to explain the hazard to be dealt with.

It is necessary to look at workplace, hospital and general health report data together, in their relevant workplaces and related community environments, because the level of risk and its costs relate to a workers' genetic legacy, their personal habits and surroundings, as well as to the type of work performed. For example, a disaster which killed and destroyed the lives of thousand of Indians outside as well as inside a major hazardous facility at Bhopal, may possibly have been comparatively cheap for business in comparison with the compensation costs generated over time by bad backs experienced by Australian workers as a result of manual handling. One needs the statistics for the comparative analysis.

The writers of the 'Climate Change Impacts and Risk Management Guide' for business and government, which is criticised below and in the attached submission, stated they used the Australian and New Zealand Standard for Risk Management (AS/NZS 4360:2004) to guide their recommended process. I taught students at Sydney University how to prevent or reduce risks of injury to workers, communities, consumers or environments, using an earlier version of the same standard (AS/NZS 4360: 1999), which I regarded as a very good guide to the general process of risk management for use at work or in other communities and environments. In the 1999 approach one first establishes the business or community context in order to identify, analyse and evaluate the risks to people and the environment which arise from within it, so as to prioritize and treat them effectively. However, in the 'Climate Change Impacts and Risk Management Guide' a different approach is used, which seems wrong and expensive and which is discussed later. I am not prepared to buy the 2004 risk management standard to see if it has changed since 1999. Standards are expensive. **I recommend standards, codes of practice and guidance notes are made freely available on relevant industry websites. Buying them is a major business burden, especially if they appear to be wrong or unhelpful.**

On the other hand, I am no apologist for bad legislation or for bad use of legislation, codes of practice or guidance notes. This is common and may be driven by lawyers or others whose practice is narrowly prescriptive rather than broadly scientific. Legislation should have clear aims and related key definitions consistent with common dictionary usage wherever reasonable. This is necessary for clear and broadly consistent and scientific practice to achieve legislative aims. People should use common sense and expert knowledge to implement legislation, especially when it is voluminous, incomprehensible, in conflict with other legislation, obviously outdated, inappropriate to the specific situation or bad in many other common ways. One does not need legislation to lead an intelligent or moral life. One needs education, access to a range of relevant expertise, (which may have varying perspectives and/or supporting vested interests), and the wish to be fair to those involved in the context under consideration.

Industry should look more at the general practices of engineering, medicine or other relevant science, rather than law, in order to develop better ways of acting to treat specific situations. Unless it outlines minimum standards (e.g. for hours of work or for concrete in bridges to avoid collapse under specified conditions) legislation is ideally treated more as a risk management guide to achieve its objectives, rather than a Bible. That is, a broadly scientific approach to life is better than many narrowly prescriptive ones, driven by pre-scientific rules and related adversarial practices. For example, the Victorian government recently asked the Victorian Competition and Efficiency Commission to identify:

- The type of environmental regulation with the highest regulatory burden
- Victoria's largest regulatory opportunities for, and barriers to, maximising the economic benefits in the transition to a low carbon economy that responds to the state's emerging environmental sustainability challenges.

The Commission pointed out the broad reach and complexity of Victoria's framework of environmental regulation alone, is comprised of 43 environmental acts and over 9000 pages of related legislation (2009, p. 37). More regionally and organizationally balanced and openly scientific methods of

consultative operation and assessment are necessary to meet regional industry and community goals which are economic, social and environmental. This approach contrasts with all the one-dimensional, narrowly regulation driven, prescriptive and unrealistic modes of operation that laws may require and inspectors scrutinize occasionally. Such practices occur to the detriment of those who must suffer them, while the secret financial business tries to carry on as usual.

At the national level, the development of the Australian national reserve system has been based since the 1960s on the biodiversity related principles of comprehensiveness, adequateness and representativeness (CAR). These international scientific principles are directly related to the development of the Interim Biogeographic Regionalisation of Australia (IBRA) system which divides Australia into 85 distinct biogeographic regions and 403 sub-regions. IBRA provides a scientific land planning framework and tool which should aid development proposal evaluation and the realization of the CAR principles in the related development of all national and regional planning for more sustainable development. The following general direction is recommended:

1. Plan agriculture, mining, forestry and eco-tourism in their regional land matrix contexts nationally and internationally to achieve economic, social and environmental goals of sustainable development.
2. Consider carbon trading and offset development in the context of the land matrix regionally, nationally and internationally to address global warming and loss of biodiversity.
3. Act to reduce carbon pollution and protect biodiversity by weed and pest removal, planting native vegetation and protecting river banks.
4. Seek more innovative, better coordinated management of urban and rural waste, pursued in more open markets
5. Intervene in the national broadband communication content planning and service delivery processes to achieve all community education goals as scientifically, effectively and competitively as possible.

Industrial production is ideally managed from related broadly scientific perspectives which invest industry and other funds safely and competitively to improve their comparative returns. (See the related response to the PC issues paper entitled ‘Contribution of the Not for Profit Sector’ which is attached.) Open and consultative management operation is vital for broadly scientific practice and comparative evaluation of all production processes and outcomes in order to improve them. This is the risk management approach. I now turn to the following PC questions to address them in this context:

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

In late 2007, the Australian Greenhouse Office (AGO) in the Department of Environment and Water Resources produced the ‘Climate Change Impacts and Risk Management Guide for Business and Government’ using a process supposedly based on implementing the Standard for Risk Management (AS/NZS 4360:2004). I taught students at Sydney University how to prevent or reduce risks of injury to workers, communities, consumers or environments, using an earlier version of the same standard (AS/NZS 4360: 1999). As I pointed out in the comparative discussion in the attached submission, I have not seen the 2004 standard and am not prepared to buy it. However, if the ‘Climate Change Impacts and Risk Management Guide’ is an indication of how risk management is now being done, it seems to have changed alarmingly since 1999. This is important because the concept of risk management ideally needs to be clear, simple and able to be used consistently by anyone managing risks to workers, consumers, communities and environments.

Getting one’s goals or hypothesis clear is also vital for research, but the ‘Climate Change Impacts and Risk Management Guide’ is confusing about the concept of ‘adaptation’ to climate change, which is not clearly defined. The Guide does not appear to recognize that reducing greenhouse gases that occur during production is ideally an aim of the risk management process. The AGO approach to risk management appears to expect that managers in organizations will first estimate the potential effects of various future climate change scenarios on each of the business units. This is extremely difficult to do and also far removed from the central task of business improvement. Reduction of evaluations to numbers may be highly problematic, although it always looks scientific. This is a continuing problem throughout the guide, which in my estimation will become a mystical nightmare driven by expensive

professionals rather than a useful tool which anybody can use for identifying and controlling the hazards of work. I note the AGO risk management guide was developed through a series of case studies with four partner organizations, including a large private company, a public utility, a government agency and a local government body. The process of risk management must be clear but the Guide suggests the relevant risk management standard and understanding of the risk management process have travelled backwards since 1999. (See related discussion in the attached.)

I retired from work at Sydney University in 2007, but previously advised, managed and taught in areas related to OHS, workers compensation, health and health insurance for over twenty years, first in the Department of Industrial Relations and Employment, followed by the WorkCover Authority and then in the Faculty of Health Sciences at Sydney University. However, I have little idea where waste goes or how it is treated, especially the hazardous kind. At Christmas 2008, shortly after the international financial crash, plumbers repairing a drain on the property of one of the 18 townhouses where I live, discovered $14,000 worth of asbestos to be removed (with no approved signature from any designated expert to guarantee that asbestos was present). The lights along a pathway also went out suddenly and the electricians called in to fix them claimed that plumbers who did nearby work six years ago had done it unsafely, and that it had to be ripped out.

At the same time, lawyer associates of the Institute of Strata Title Management suggested to the Institute that body corporate members appear to be controllers of premises under the OHS act and so should carry out a range of work, starting with inspections of all properties for asbestos, and so as to fix other potential problems for workers. As I pointed out to our body corporate, I have never felt more out of control of any premises in my entire life. I would say the electricity black-out which occurred uniquely in my house proves it, but I prefer to think that I'm just an anxious and wrong old woman, like the others on the body corporate. The problem with legislation is that people may use it for industrial purposes, helped or led by lawyers. A major financial crisis is likely to exacerbate this tendency.

Australian technical standards, codes of practice and guidance notes support state OHS legislation and if called up specifically in it, are expected be followed. People are expected to use codes of practice relevant to their job operations, unless the evidence is that another course of action is preferable in the specific situation under consideration. This approach ideally provides the legislative context for a generally more independent and informed approach to work, which can be compared with the scientific, evidence based approach required of health workers. For example, a health worker is ideally expected to identify a client's problem and to apply treatment after consultation and consideration of the relevant body of scientific evidence or expert treatment protocols, which are like codes of practice. However, the treatment may vary as far as this appears to be necessary to meet the particular health needs of a specific individual or situation. The reasons for any deviation from the generally expected expert practice should be documented. Ideally, all such information may contribute to research aimed at improving the outcomes for specific individuals, communities and environments, in the light of the study of broad ranges of grouped environments, diagnoses, treatments and outcomes.

However, lawyers often undermine a 'duty of care' approach and turn it into a prescriptive one, because this is the narrow way courts have always worked and lawyers and others get ahead by this. Public servants, knowing that ministers come and go, operate in a way which pleases courts, the highest authority in the land. Most people working in bureaucracies follow words on a page to the letter, it being the easiest way to protect their backs. Codes of practice are prone to this treatment. Instead of using their knowledge and common sense about how to reduce a hazard, people who have seen the relevant code often feel compelled to follow it to the letter, no matter what the unintended consequences or cost of this might be. The point of legislation, codes of practice and guidance notes for OHS during production should be like the point of medical education for doctors or nurses. It should provide knowledge and make the practitioner responsible for considering the particular situation and treating it sensibly. Unfortunately, a lot of people feel much more comfortable following orders. This is likely to reduce their capacity, wherever they work.

A broadly scientific and comparative approach to regulation to achieve its general aims is sometimes called 'outcomes based', whereas prescriptive legislation may have no aims but is composed of rules which must be followed to the letter. In the 1980s, Labor and Liberal governments both appeared to understand the need for the former in OHS and elsewhere. However, in the last twenty years many bureaucrats and politicians appear to have lost the plot or, like lawyers, determinedly never knew it existed in the first place. As a result, the great bulk of Australian legislation is growing rapidly upon its earlier, more thoroughly feudal models. This means it has no clearly identified aims, no consistent definitions of key terms, and interpretations of the Word in court, using adversarial methods, is often

paramount. This ‘black letter’ approach undermines all potential for more reasonably scientific and data driven management. Broader and better coordinated risk management approaches are required to assist new thinking, which is necessary to encourage innovation to support more sustainable development and triple bottom line accounting which has economic, social and environmental goals. Australians have hardly started thinking about this direction. If it happens it can save a lot of money by simplifying systems drastically and by establishing product and service delivery and accountability more effectively. A risk management approach to dispute resolution is addressed later and in the attached.

My general impression is that mental health, discrimination and harassment issues have been increasingly driven by lawyers and health professionals in an increasingly costly and sometimes dysfunctional manner over time. For example, at universities a lot of academics get occupational overuse syndrome (OOS), probably because they are stressed about writing. As a result, OHS audits are often carried out on staff workstations. In 2006 they tried to change mine but I pointed out that I have typed like this every day since the age of fourteen without getting OOS. I also used to run up the stair for health reasons. One day, a colleague wearing high heeled shoes fell down the stairs. As a result a sign was put up stating nobody is allowed to run up stairs. I pointed out that those concerned about health might ban cakes from the tea room and high heeled shoes from the building instead of banning running up stairs. People often seek to avoid the obvious because to do so may open up difficult issues for the culture to deal with. Freud knew what this was all about but the modern psychologist is more likely to realize how their bread is buttered.

The business that health professionals may generate for themselves through ‘concern’ over someone’s mental health may be an increasing problem. People in not very dangerous places, like universities, libraries and offices may have a ball tormenting those they do not like by pretending to be concerned about their mental health. Such big organizations pay the money from their workers’ compensation budget for any requested visits to health professionals who may run up big bills. Professional ‘expertise’ is not easily challenged.

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

First check out Australian WorkCover websites, the Australian Bureau of Statistics and other reputable health websites through Google for whatever basic information is wanted. Over the past 15 years, as I recall, the PC has done a number of large and competent reports on OHS and workers’ compensation. Why not go back there for guidance? The Standards Association of Australia and New Zealand produces many expensive documents, probably of varying utility. If people need to use them they should be freely available on relevant industry websites. As indicated earlier, the general principles of risk management need to be understood and in my view the Standard on Risk Management ((AS/NZS 4360: 1999) was clear and good. God knows about the later versions. (Hazpak is also a useful teaching tool produced by the NSW WorkCover Authority which is discussed in the attached.) Google allows one to check out European Community or other reputable international websites for specific industry, occupation or hazard information. The following appear to be the major data sources for analysis in Australia.

- The relevant Australian and New Zealand Industrial Classification (ANZSIC) and related occupational classification system for the workplace and worker
- Workers compensation injury and cost data
- Death and serious injury data required under OHS acts
- Data on hospital admissions and deaths
- Data on the disability support pension
- Australian Bureau of Statistics survey data on general health
- Other data about the environment such as that required under Dangerous Goods Acts or under the new National Greenhouse and Energy Reporting (NGER) Act
- At any workplace any injury or near miss incident should immediately be recorded to provide an initial record of the event and to explain the hazard to be dealt with.

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 be covered?

The regulation that should be dealt with should normally depend upon the industry and the related type and level of risk one needs to understand and address. For example, if one is managing a large off-shore oil rig, one should normally be paying a lot more attention to health and safety matters than if one is managing a small classics department in a university. The likely severity and frequency of hazards are also important for prioritizing their treatment. The hierarchy of hazard control, (outlined in Hazpak) which asks people to think about controlling a hazard through using an **engineering solution**, or through **isolating** the hazard, or **substituting** a less hazardous product for a more hazardous one, or through **changing work practices** to reduce exposure to the hazard, provides a useful and simple way to think about hazard control, which any person can use.

The Productivity Commission (PC) recently held a review of regulatory burdens on the upstream petroleum (oil and gas) sector (2008). It is logical that all production related 'value chains' for sustainable development are now ideally developed not only through linear concepts like 'upstream' and 'downstream' production, but also from production clearly conceptualized in geographic arenas. This requires government, industry and community cooperation to achieve many global and local aims together and competitively. It also requires open information and education. Putting all key legislation or other standards for mining and protection of its related communities and environments on an industry website in a short and readable way for all to see would be an ideal start.

The management of concern about OHS is ideally done in combination with management of many related concerns, such as discrimination, harassment or bullying at work. For example, there have been a number of horrific cases of injury to apprentices who have been bullied by workmates. This may be common, but workers may be frightened to report it or fear that doing so will only make it worse. On the other hand, apparent honesty may be regarded as highly offensive in some white collar areas, such as health or education faculties, striving to be polite. It is important to have management policies and practices which acknowledge and deal with all workers' concerns early and sensibly to reduce future stresses and costs. Mechanisms for this should be in place and supported broadly. One guesses, however, that in many male dominated work environments such complaints are viewed as impossible to make or ignored because toughness is the expected norm and emotion is discouraged. In female dominated environments, on the other hand, the offended complainant may be automatically supported by the manager, and her identity remains a secret. This randomly privileges the most censorious in the environment, which is particularly alarming in a university, as I have often pointed out. In my view, the way the issues of discrimination, harassment and bullying are dealt with in various environments requires ongoing discussion to address the variety of social practices. If this does not happen students may not be sufficiently prepared for working in some of the most hazardous environments, which are male dominated, and may cling to those most refined.

The distinction between severity and frequency in the analysis and treatment of risk should always be recognized in its related institutional and broader environmental contexts. For example, people may report more stress or disability in workplaces or social environments which may appear objectively to be less stressful or disabling than others. In Australia around 18% of people are reported as having a disability. The figure in China is around 3%. The society, its wealth, institutions, benefits and gender expectations may naturally influence the nature of reported experience and statistics.

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

The same data set outlined earlier should be used. However, it should be recognized that scheme structure, coverage and related management and treatment also explain the data. For example, if the journey to work is included in workers' compensation scheme coverage, the scheme injuries and costs will be greater than if it is not. For years in NSW, manual handling injuries in mining were dealt with in the general workers compensation court, even though the mining industry had a separate legislation and insurance premium structure. This practice shifted the cost of workers compensation from the miners' premiums to spread some of it across all employers. Better management to reduce court costs is vital because the adversarial approach greatly increases legal, medical and other experts' costs to the scheme and reduces the chances of fast and effective rehabilitation for workers. Better management of the relationship of workers compensation and Medicare costs, to reduce cost shifting and red tape is also necessary.

For example, in Australia between 1973 and 1989, ten inquiries concluded the adversarial court system is detrimental to rehabilitation of injured workers (NSW WorkCover Review Committee 1989). Many later Australian inquiries gathered evidence that the traditional court process hinders rehabilitation, injury prevention and other service management. This is partly because courts do not keep data to assist injury prevention, rehabilitation, cost containment, or premium setting, which also promotes economic instability. (See National Committee of Inquiry 1974; NSW Govt. 1986; NSW WorkCover Review Committee 1989; House of Representatives Committee on Transport, Communications and Infrastructure 1992; Review of Professional Indemnity Arrangements for Health Care Professionals 1995; Standing Committee on Law and Justice 1997; Heads of Workers Compensation Authorities, 1997; Industry Commission 1997; Grellman 1997; Senate Economic References Committee 2002; The HIH Royal Commission 2003).

The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) advised health ministers to support national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints. From this risk management perspective, all dispute resolution should logically be managed as a service, like health or education provision, which aims to improve community health, social and environmental outcomes. The attached article shows that health and related environment development are at the centre of a new international governance paradigm which also raises risk management to new importance. Implementation of this paradigm requires broad administrative reform in Australia and beyond to meet the evidentiary requirements of scientific and quality management. Recommendations for the development of alternative dispute resolution systems (ADR) are made in this context. This risk management approach is relevant for OHS and all related matters. Supporting education and research into the comparative role and effectiveness of ADR and courts are also required.

There were five insurance company insolvencies in the mid eighties in NSW, when over forty insurance companies were underwriting workers' compensation. Competition on premium price led to pricing wars and to insurer reserves running low when courts were making increasing lump sum payments. This led NSW and other state governments to introduce the current managed fund structure where a dozen insurance companies manage the business on behalf of government and industry which own the premium fund and benefit from its competitive investment by insurers. The structure maintains and maximises the benefits of fund ownership and competition for government and industry, rather than for the private sector insurers. This new fund management structure ended an era when Liberal governments traditionally set up schemes with multiple insurance companies owning the funds and benefiting from its investment. Labor governments traditionally owned the fund but had no competitive incentives for good administration.

The current structure obtains the best of both worlds for industry and government.

The Treasury Retirement Income Consultation Paper (2008) notes 'the age pension and superannuation systems are intended to have complementary roles' but developed and operate largely in isolation from each other'(p.41). The same is true of state workers compensation systems, the Medicare system, private health care services and insurance, accident insurance, life insurance, the disability support pension, the carer's pension, and a range of related services. Australian policy makers have been very interested in the extent to which all health and related funds for services or pensions should be underwritten (owned) and managed by government or in the private sector, to gain the best outcomes for individuals, taxpayers, premium holders and the community. Nationally designed, health and social or environment related funds owned by government and/or industry, which are transparently, regionally and competitively managed, are likely to provide superior outcomes to market based underwriting of risk and related service provision. It is necessary to construct broader understanding that the coordinated and competitive pursuit of stakeholder interests is more broadly functional than pursuit of stockholder interests.

Thank you for the opportunity to make this submission.

Yours truly,
Carol O'Donnell