



Australian Chamber of Commerce and Industry

MODERN WORKPLACE: SAFER WORKPLACE

**An Australian Industry Blueprint
for Improving
Occupational Health and Safety
2005-2015**

April 2005

ACCI

LEADING AUSTRALIAN BUSINESS

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations and was created by the merger of the Australian Chamber of Commerce and the Confederation of Australian Industry in 1992.

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

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

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

OUR ACTIVITIES

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

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

Our specific activities include:

- representation and advocacy to governments, parliaments and policy makers both domestically and internationally;
- business representation on a range of statutory and business boards, committees and other fora;
- representing business in national and international fora including the Australian Industrial Relations Commission, National Occupational Health and Safety Commission, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers;
- research and policy development on issues concerning Australian business;
- the publication of leading business surveys and other information products; and
- providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

PUBLICATIONS

A range of publications is available from ACCI, with details of our activities and policies including;

- the *ACCI Review* a monthly analysis of major policy issues affecting the Australian economy and business;
- issue papers commenting on business' views of contemporary policy issues;
- *Policies of the Australian Chamber of Commerce and Industry* – the annual bound compendium of ACCI's policy platforms;
- the *Westpac-ACCI Survey of Industrial Trends* – the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia;
- the *ACIL Tasman-ACCI Survey of Investor Confidence* – which gives an analysis of the direction of investment by business in Australia;
- the *St.George-ACCI National Survey of Business Expectations* – which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories;
- the *St.George-ACCI Survey of Small Business* – which is a survey of small business derived from the *National Survey of Business Expectations* data;
- workplace relations reports and discussion papers, including the *ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint*;
- occupational health and safety guides and updates, including the *National OHS Strategy* and this *Modern Workplace: Safer Workplace Blueprint*;
- education and training reports and discussion papers;
- the *ACCI Annual Report* providing a summary of major activities and achievements for the previous year; and
- the *ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004-2014*.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports is available on our website – www.acci.asn.au

FOREWORD

As Australia's peak national employer and business organisation, the Australian Chamber of Commerce and Industry (ACCI) has developed this *Modern Workplace: Safer Workplace* Blueprint as the next step in improving Australia's Occupational Health and Safety (OHS) performance and systems of regulation and to provide leadership for industry in that task.

This Blueprint clearly states industry's OHS Vision for safer workplaces over the next decade and a plan to get us there.

The Blueprint is outcome oriented. It outlines steps that should be taken by all stakeholders. It is also timely. In 2005 the Australian Government is establishing a new national body - the Australian Safety and Compensation Council, has ratified an international treaty on OHS and has adopted an ACCI initiated program of OHS Advisors in small and medium businesses. State and Territory governments are making new laws on OHS and the Productivity Commission has released a report on national frameworks.

Just as OHS in workplaces must be a collective effort, the development of the *Modern Workplace: Safer Workplace* Blueprint is a collective response by Australia's leading employer bodies that form the ACCI network of 350,000 small, medium and large employers employing more than four million Australians.

Beyond this Blueprint there is more to be done in related areas. Our workers' compensation systems, for example, require reform and too often inhibit good health, safety and injury management outcomes. ACCI and our members are participating in that debate.

We invite industry and all stakeholders to actively implement the ideas and Vision of the ACCI *Modern Workplace: Safer Workplace* Blueprint.



Neville Sawyer
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April 2005

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PART 1

OVERVIEW

Part 1 of this Blueprint is a summary. It contains:

- Why this Blueprint is Needed;
- The Vision 2005-2015;
- The Outcomes 2005-2015;
- Achieving these Outcomes 2005-2015;
- Conclusions and Recommendations.

Why this Blueprint is Needed

- An inherent part of managing a business and employing in our economy is that occupational health and safety issues must be addressed. Australian law requires employers and employees, from the smallest to the largest, to take active steps to make workplaces safer.
- Many employers, especially small and medium businesses, who want to make their workplaces safer do not alone have the resources, expertise, or assistance that will make this happen.
- Good safety records benefit business. They can be undone unless commitment by all parties to safer workplaces is ongoing.
- Whilst Australia has an improving OHS record, it can be better.
- The human and economic costs and consequences of fatalities, injury and disease in the workplace, like the costs of road trauma, are profound.
- There is an excessive growth of OHS regulation and red-tape. Many employers, especially small and medium businesses, find OHS laws and regulations to be complex, bureaucratic, difficult to understand and almost impossible to implement effectively.
- There is a lack of balance in some existing legislation and court decisions. The trend across jurisdictions has been to broaden legal duties beyond reasonable limits, increase penalties, extend liability to individuals in the management and supply chain and seek to punish rather than prevent.
- Leadership on OHS issues is required at all levels. The Australian Chamber of Commerce and Industry (ACCI) and employer and business organisations are taking leadership on OHS issues through this Blueprint.

The Vision 2005 - 2015

Occupational Health and Safety policies and systems that support employers, employees and all those in the supply chain to develop cultures and attitudes, and accept responsibilities, that achieve safer places of work and safer methods of working so that Australian workplaces are free from death, injury and disease.

The Outcomes 2005 - 2015

1. A significant and sustained reduction in workplace fatalities and injuries in Australian workplaces.
2. Reduced human and economic costs from workplace fatalities and injuries.
3. Increased awareness, communication and co-operation on Occupational Health and Safety amongst employers, employees and all persons in the supply chain.
4. Reasonable, balanced and practical Occupational Health and Safety regulation that contributes to Australia having world class OHS systems and performance.
5. Safer communities.

Achieving These Outcomes 2005 - 2015

OUTCOME	HOW IT CAN BE ACHIEVED
<p>1. A significant and sustained reduction in workplace fatalities and injuries</p>	<ul style="list-style-type: none"> ➔ by employers, employees, designers, manufacturers, contractors, governments and regulators working co-operatively together and each with responsibility in their areas of influence to identify, eliminate, reduce or avoid risks and hazards in the workplace; ➔ by governments and regulators understanding their proper role to put in place a framework of laws and programs that is reasonable, balanced and practical; ➔ by OHS being integrated into design and supply, business management and the way employees work.
<p>2. Reduced human and economic costs from workplace fatalities and injuries</p>	<ul style="list-style-type: none"> ➔ by a significant reduction in workplace fatalities and injuries through the implementation of relevant safety management systems in the workplace.
<p>3. Increased awareness, communication and co-operation on OHS amongst employers, employees and all persons in the supply chain</p>	<ul style="list-style-type: none"> ➔ by active communication and sharing of information and solutions on health and safety issues; ➔ by accepting mutual responsibilities for making workplaces safer and by improving health and safety knowledge through training, information and education; ➔ by a network of OHS business advisors providing small and medium businesses with relevant, accessible and meaningful advice and resources.
<p>4. Reasonable, balanced and practical OHS regulation that contributes to having world class systems and performance in Australia</p>	<ul style="list-style-type: none"> ➔ by regulation that is achievable and relevant (including appropriate and reasonable standards, codes and meaningful guidance materials); ➔ by duties of care based on what is reasonable, practical, foreseeable and controllable; ➔ by the implementation of reasonable and relevant safety management systems: giving priority to prevention over enforcement; putting outcomes above process; reducing red tape; adopting a set of consistent national principles and national consistency on other key issues;

- ➔ by allowing businesses with significant OHS skills and resources to apply appropriate common systems across the nation; regulation sympathetically crafted to the special needs of businesses with lower level skills and resources; and, where regulation is required, it is developed on its merits on the basis of scientific evidence.

5. Safer communities

- ➔ by inculcating, from an early stage, safer habits, practices and procedures into everyday life away from work that lead to safer communities and feed into personal approaches when entering the workforce;
- ➔ by increasing awareness, knowledge and skills about personal and community safety and responsibility;
- ➔ by providing access to information and training on safety and responsibility in workplaces and in day-to-day life.

Conclusions and Recommendations

1. Making workplaces safer starts and finishes with workplace culture and attitude, not regulation. A commitment to prevention, to assessing risks and to managing risks does not just happen.
2. An effective health and safety culture requires all persons in the supply chain to accept shared responsibilities and to take them seriously. Aside from employers and employees, it includes manufacturers, product, process and workplace designers, employer representatives, trade unions, governments, politicians and regulators. Duties of each person should be independently held and not transferred to another.
3. It is recognised internationally that sensible health and safety is about managing risks, not necessarily eliminating all of them. The people best placed to make workplaces safer are the employees and managers who work in them.
4. Australian industry is investing more time, effort and capital in making workplaces safer. Many Australian employers have very good OHS systems which compare favourably with equivalent employers across the globe.
5. The principles that underpin good workplace relations - communication, mutual respect, co-operation and personal responsibility, are the values that generate a culture of shared responsibility and the individual and collective pursuit of better OHS outcomes.
6. There is a powerful business case for safer workplaces and, over time, achieving a significant and sustained reduction in workplace fatalities, injury and disease. The objective of productive and competitive employing businesses is assisted if the full productive capacities and skills of employees are available and harnessed for their mutual benefit. The employee duty of care is as important to achieving OHS outcomes as is the employer duty. This too should be a legislated duty. Employees whose working lives are injury-free, at least in part because of the contribution they and those around them make to safety, make a valuable contribution to the business that engages them, the wider community and their own personal well-being.
7. So far as is reasonable and practical, safety should be incorporated into workplaces at the design stage. Barriers which inhibit safe design of work environments, plant and equipment need to be addressed. Clear identification of design requirements and achievable contract conditions are important aspects of this. There is an important role here for governments

to facilitate the development of reasonable and practical best practice models based on the collective analysis of past experience and consensus models of foreseeable risk.

8. Not even the best performing workplaces can guarantee a perfect safety environment. Despite the excellence of safety systems, accidents and injuries still occur.
9. The role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates OHS awareness and culture in workplaces and not the micro-management of OHS in workplaces. For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and with a mobile labour force. Poorly established frameworks can detract from the achievement of safer workplaces through the objectives set out in this Blueprint.
10. Regulation must adequately recognise the differing capacities of various employers, especially small and medium businesses. Given the growth of small business in Australia, examination should be made of:
 - OHS regulatory frameworks that are more responsive to business realities in this sector, and
 - a network of OHS business advisers focusing on small and medium businesses.
11. OHS regulation which is complex, out-of-date, impractical or uncertain is of no value to employers or employees in the workplace. It is unacceptable for an employer to not know what is expected of them by OHS regulators.
12. Australian workplaces are over-regulated. There are multiple problems with current OHS systems. These problems are:
 - poor quality (including impractical and impossible duties of care);
 - excessive quantity;
 - frequency of regulatory change;
 - too much red-tape;
 - little national consistency;
 - inconsistent interpretation by regulators;
 - unbalanced prosecution-oriented enforcement; and
 - distortion by extraneous agendas.
13. Poor regulation significantly undermines the commitment of employers and employees to improved safety performance, and for employers, can diminish the capacity to comply.

14. To be effective, Australian OHS regulation needs to be changed so that it reflects the following characteristics:
 - reasonableness;
 - practicality;
 - balance;
 - mutuality;
 - independence; and
 - consistent national principles.

15. Duties of care should apply independently to all parties. The fact that a workplace injury has occurred should not automatically mean that a breach of law has occurred. These duties must not impose absolute or unreal obligations, whether by legislation or court interpretation. The concepts of 'reasonably practicable', 'foreseeable' and 'control' have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical and achievable. New statements on the standard of the duty of care under OHS laws are required in those jurisdictions where the concepts of 'reasonably practicable', 'foreseeable' and 'control' have been significantly distorted. A standard based on the implementation and maintenance of a safety management system relevant to the industry, size and resources of each particular business, developed within a set of national principles, is an alternative. More realistic defences also need to be available to employers, designers and other persons in the supply chain.

16. Whilst recognising the past and current role of State and Territory governments, there should be an informed debate whether a national set of OHS laws should apply in Australia. Where national OHS standards are appropriate, they should be developed through tri-partite consensus involving balanced representation of governments, representatives of employers and representatives of employees and be nationally consistent in their implementation. In this context they should include:
 - National Standard;
 - Model Regulation;
 - Code of Practice; and
 - Meaningful Guidance Materials.

17. OHS legislation should generally create civil duties, rather than criminal offences. Penalties should be monetary, judicially determined and based on the seriousness of offences and the circumstances of the breach, not on the nature of the injury. Enforcement requires a mix between education and persuasion on the one hand and, in serious or repeated

cases, prosecution and penalties on the other. A system of enforceable undertakings should be an alternative approach to prosecution. There is no justification for creating a new offence of industrial manslaughter given the already existing criminal law of manslaughter and related offences.

18. There should be no absolute or strict liabilities, deemed guilt, reverse onus of proof in any civil or criminal proceedings, nor any other basis on which employers, directors, management personnel or employees are treated less favourably than the defendants in prosecutions under any other equivalent law or legislation. Persons charged with OHS offences should be accorded natural justice and in criminal cases the standard presumptions and protections of the general criminal law. Criminal offences should only be decided by established criminal courts of competent jurisdiction, not industrial tribunals.
19. There should be increased awareness and training on OHS issues. Governments and regulators would achieve greater levels of compliance with OHS legislation and regulations if they invested, in conjunction with business organisations, more directly in information, assistance, advice, education and training. OHS regulators should increase national co-ordination of communications activities.
20. OHS issues in the workplace should be dealt with in a non adversarial and non ideological manner.

PART 2

THE INDUSTRY PLAN FOR OCCUPATIONAL HEALTH AND SAFETY

Part 2 of the Blueprint outlines the Industry Plan for Occupational Health and Safety.

It deals with the following topics:

- The Australian Experience
- Safety as a Corporate Aim
- Integrating Workplace OHS
- Training and Education
- Community Safety
- Safety and Rehabilitation Systems
- Putting Policy into Practice
- Small Business and OHS
- Reporting Systems

If this Industry Plan is implemented, the following Outcomes of this Blueprint would be achievable:

- ➔ A significant and sustained reduction in workplace fatalities and injuries in Australian workplaces.
- ➔ Reduced human and economic costs from workplace fatalities and injuries.
- ➔ Safer communities.

The Australian Experience

Policy Direction

Over the past two decades Australia has witnessed a progressive improvement in the safety performance of most workplaces, resulting in overall lower rates of injury, disease and fatalities being recorded across most industries – and at a time when employment levels have been growing.

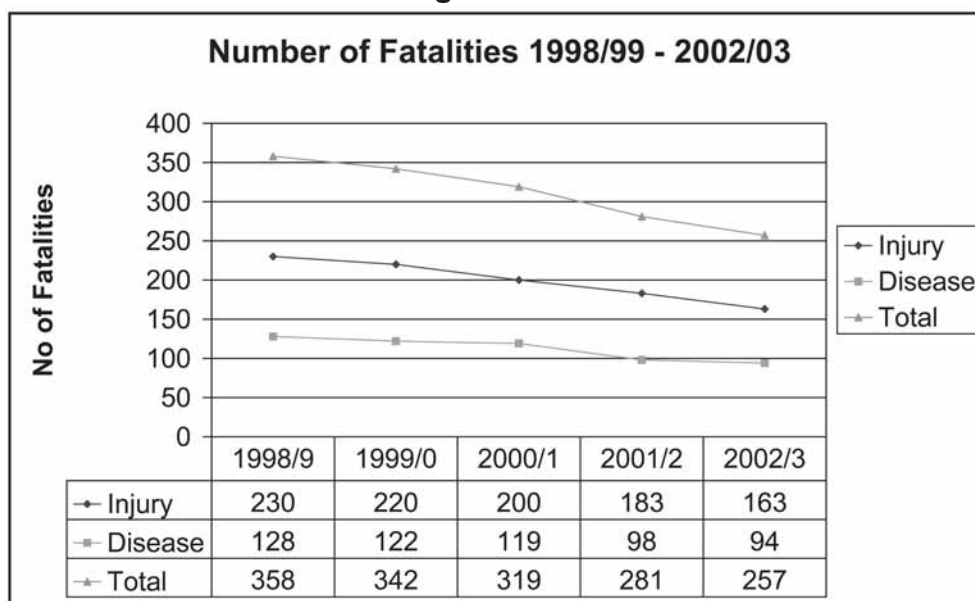
Key areas of improvement have occurred through investment in technology, equipment and design, and investment in people through training, skills development and education. Developments in medical treatment, rehabilitation and health systems have also contributed to better outcomes.

Most workplaces now have better designed plant, greater use of safety materials and equipment, higher awareness of safe systems of work, clearer warning signs of danger, labelling of dangerous materials, more regular health and safety monitoring and active safety arrangements.

This improving trend is supported by Australian and international data which indicates a gradual and continuous improvement in workers' compensation claim numbers since at least the mid-1970s. The 2003/04 report of the National Occupational Health and Safety Commission, whilst recognising the need to do more, referred to a "19% overall improvement in the incidence of injury and disease in the previous five years and a 35% improvement in the number of traumatic work-related fatalities". The data set out in Figure 1 indicates the trend in fatalities as reported in the 6th Comparative Performance Monitoring (CPM) Report (dated November 2004) presented to the Australian Workplace Relations Ministers Council.

While the number of workers' compensation claims for all employers has been reducing over time, the average cost and duration of claims have risen significantly, without any evidence of increased severity of injury. These increases in cost and duration are frequently wrongly interpreted as evidence of deteriorating OHS performance by

Figure 1



Source: CPM - Sixth Edition 2004

employers, whereas the reverse is the case. Claim costs are heavily impacted by health, legal and other costs, whilst duration rates are the product of claims management. In most cases, both of these issues are, by regulation and the approach taken by the courts, put beyond the control of employers.

The improvements in injury rates over the last several decades indicate that there is no evidence that radically onerous and complex regulatory standards bring with them radical performance gains. On the contrary, smaller employers particularly find that complex bureaucratic standards leave them with little or no hope of compliance and with diminished faith in the practicality and fairness of regulators or the possibility of improved outcomes. Heavy or inappropriate regulation also inhibits the design of innovative solutions to individual safety problems.

What Needs to be Done?

Despite these beneficial declining trends, the costs of injury and disease are high.

Australia's safety performance is within the average range of international, developed nation experience. That is a good performance, given our industry profile, yet it is in everyone's interest that we strive to do better.

Doing better can be achieved by all players - employers, employees, designers, manufacturers, suppliers and governments - adopting the approaches set out in this Blueprint.

Safety as a Corporate Aim

Policy Direction

There is a powerful business case for safer workplaces and, over time, achieving a significant and sustained reduction in workplace fatalities, injury and disease. OHS management should be viewed in the same business context as production, efficiency and cost control.

To the extent practical, publicly listed companies and large employers should put in place arrangements where executive management and those responsible for corporate governance and legal compliance – including boards of directors – are committed to the priority that is necessary to achieve workplace safety and demonstrate leadership in that regard. Directors and senior executives need to lead by example and ensure that the size of their business and layers of decision making do not diminish accountability or the capacity of staff to provide leadership on workplace safety.

Policies need to be seen and understood as a means to an end – not an end in themselves. Owners, executives and directors do have OHS responsibilities in the workplace that extend beyond the existence of safety policies or procedures.

Small and medium sized employers are well placed to use the close personal relationships developed in their businesses between owners, managers and employees for regular and two-way communication on risk and hazard identification. At the same time, small and medium sized employers should ensure that the informality of their workplace relations is not a substitute for specific attention to workplace safety issues.

What Needs to be Done?

Subject to the scale, size and resources of a business, a safety management system should be developed incorporating the following elements:

- the establishment of a health and safety policy that defines the OHS roles and responsibilities of workplace parties and sets workplace safety as a high level corporate aim with a view to achieving defined outcomes;
- consideration of the elements of safe design; of work environments, plant and equipment;
- a joint approach that involves employees at the workplace;
- the provision of appropriate information and training;
- risk minimisation including the identification, assessment and control of hazards; and
- ongoing monitoring, evaluation and review of outcomes.

Businesses could also consider incorporating aspects of the goals, strategies, priorities or targets of this Blueprint and the *National OHS Strategy* in their corporate and management planning.

The method of implementing these measures needs to take into account differing sizes, cultures and capacities of businesses.

The culture required at all levels is to move from a punitive focus (punish those responsible for the incident), to a learned and correction focus (fix up the problems created by the incident) and ultimately to a prevention focus (have in place systems that prevent the incident in the first place).

Integrating Workplace OHS

Policy Direction

Effective OHS management should be integrated into business activities.

OHS is the shared responsibility of all persons at the workplace and in the supply chain. A proactive approach to safety management is vital if industry is to meet these responsibilities.

There are five significant staff levels at which embracing responsibility for workplace safety will make a significant difference to safety outcomes: owner/manager or board of directors; chief executive officer; other managers; front-line supervision; and other employees.

OHS should be an integral element of the role and responsibilities of all staff at every one of these levels. There is clear evidence that an active focus on health and safety at all these levels, and at all times, can pay significant dividends in terms of a reduction in accidents and injuries. When the safety message descends the management chain, the demonstration effect is widespread. Likewise, however, any unchecked failure to heed the safety message will ultimately lead to its disuse. This is as true if the failure lies in senior management as it is if it resides on the 'shop floor'. And when this happens the cost of implementing safe work methods rises significantly.

Consequently, business owners and managers accept that they have a responsibility to implement measures to ensure the safety message is heard, adopted and adhered to at all levels of staff. Governments should ensure

that any legislative or judicial impediments to this process are removed.

Successful preventive measures can only be achieved through the full support of all those who can directly influence the way work is performed and systems of work and methods of working. Whilst employers accept their responsibility for workplace safety, achieving a safe workplace also requires a mutual employer-employee obligation and a shared commitment to safety from all those who participate in the supply chain. The objective of productive and competitive employing businesses is assisted if the full productive capacities and skills of employees are available and harnessed for their mutual benefit. Employees whose working lives are injury-free, at least in part because of the contribution they and those around them make to safety, make a valuable contribution to the business that engages them, the wider community and their own personal well-being.

This includes all parties involved in design and layout, construction and development, and suppliers of plant and equipment. The responsibility and liability of each of these parties should be independently held and not transferred to another party.

The principles that underpin good workplace relations - communication, mutual respect, co-operation and personal responsibility, are the values that generate a culture of shared responsibility and the individual and collective pursuit of better outcomes.

What Needs to be Done?

A safety management system for workplace OHS should be implemented by employers (consistent with their scale size, resources,

industry and risk) as the method of integrating OHS into their business.

So far as is reasonable and practical, safety should also be incorporated into workplaces at the design stage. Barriers which inhibit safe design of work environments, plant and equipment need to be addressed. Clear identification of design requirements and achievable contract conditions are important aspects of this. There is an important role here for governments to facilitate the development of reasonable and practical best practice models based on the collective analysis of past experience, and consensus models of foreseeable risk.

Businesses need, on an ongoing basis, to proactively meet their duties of care – including by conducting risk assessments, hazard identification and eliminating, so far as is reasonable and practical, risks and hazards to workplace safety. These elements should be incorporated into each businesses' safety management system.

Making workplaces safer starts and finishes with workplace culture and attitude, not regulation. A commitment to prevention, to assessing risks and to managing risks does not just happen. An equal challenge for management, as well as governments and regulators, is to keep the OHS message fresh amongst all those involved in their workplace. The message *'if you can't manage safety, you can't manage'* requires ongoing reinforcement in a positive and inclusive manner.

An effective health and safety culture in a changing economy requires employers, employees and all those in the supply chain to take their responsibilities seriously, not transfer them to others, and to have the

workforce fully involved. Managers often find that some of the best OHS initiatives come from the floor up, not from the top down. Harnessing the knowledge, commitment and training of employees can be a powerful tool in managing OHS and in turn making both the employer and employee 'OHS competent'.

It is well recognised internationally that sensible health and safety in the workplace, and in the design and development of safe workplaces, is about managing risks, not necessarily eliminating them, and the best placed people to make workplaces safer are the employees and managers who work in them.

Australian industry is investing more time, effort and capital in making workplaces safer. Many Australian employers have very good OHS systems which compare favourably with equivalent employers across the globe.

Employees, contractors and other third parties in the supply chain also need to meet their duties of care to the business in so far as is reasonable and practical.

Industry, including designers and manufacturers, needs to continue, where appropriate, to increase investment in workplace safety and prevention activities.

In some businesses, the use of OHS committees and appointment or election of OHS representatives can add value to communication, awareness, risk-assessment and strategic planning.

Training and Education

Policy Direction

Training and education initiatives play a vital role in ensuring that everyone in the workplace is equipped with the necessary OHS knowledge and skills. The attitudes and behaviour of workplace parties will be influenced by information and training that is directly relevant to them and deals with the environment in which they operate. Information and training programs should therefore be tailored to the needs of the industry or the enterprise. They can help drive cultural change.

What Needs to be Done?

Every opportunity should be taken to ensure that an awareness of OHS issues is incorporated into appropriate vocational education and training programs, as well as employee induction. However, training and education is best delivered through business organisations and at the enterprise level through direct engagement between employers and employees. Industry stakeholders should contribute to the process of developing a training culture, whilst ensuring that OHS training is sufficiently flexible to be relevant to the diversity of Australian workplaces.

At a workplace level, the effectiveness and impact of training and information which is provided should be evaluated for its ability to bring about workplace change and improved OHS performance.

Wherever practicable, training initiatives should involve both management and employees to ensure common understandings and approaches to workplace safety. The workplace parties should be provided with consistent messages to implement systems for OHS management and to constructively resolve problems as they are encountered.

Community Safety

Policy Direction

The workplace is an integral part of the community, and employers and employees bring into the workplace the attitudes and approaches that are reflective of their role in the broader community. This includes their knowledge and awareness of safety issues, whether in the home, on the road, from schools or from experiences in other workplaces or in sport and leisure activities.

An emerging issue is the need for greater focus on safety within the community as a whole, including in the pre-tertiary and pre-vocational education system. A progressive increase in the awareness and knowledge of students in managing risks, especially those parallel to risks in domestic or public environments, would be helpful as one element of job readiness, especially amongst young people and entrants or re-entrants to the labour market (including migrants and employees returning from extended periods of unemployment or parental leave). This educational initiative can be achieved through the schooling and pre-vocational systems and be supplemented by industry training.

What Needs to be Done?

Without mandating requirements across the board, business owners, managers and employees should encourage and co-operate with pre-vocational or community-based safety programs amongst students or prospective entrants or re-entrants into the labour market. Inculcating, from an early age, safer habits, practices and procedures into everyday life away from work should lead to safer communities and feed into personal approaches when entering the workforce.

Safety and Rehabilitation Systems

Policy Direction

There is considerable scope to further reduce the human and economic losses that arise from injury and disease at work. The total cost of work related injury and disease borne by workers, employers and the community is very large. In 2003/04 Australian employers contributed \$7.5 billion in workers' compensation premiums alone.

The workers' rehabilitation and compensation environment should seek to reduce the incidence and cost of workplace injury and illness. Workers' compensation and complementary arrangements can play a vital role in improving workplace health and safety. They can encourage prevention of work related injury and disease, compensate for such disabilities when they occur and make provision for rehabilitation and early return to work.

What Needs to be Done?

One of the key objectives of any workers' compensation system must be to create an incentive for injured employees to return to work, wherever possible, whilst undergoing rehabilitation if necessary.

ACCI is committed to the achievement of best practice workers' rehabilitation and compensation arrangements for the protection and treatment of workers in respect of workplace injury and disease.

This OHS Blueprint recognises the strong inter-relationships between efficiently operating workers' rehabilitation and compensation schemes and improving Australia's OHS performance and workplace culture. It encourages industry and governments to do more work in these interrelated areas of policy, using as a launching pad for analysis some of the recommendations of the Productivity Commission's Inquiry Report No. 27 (March 2004) into 'National Workers' Compensation and Occupational Health and Safety Frameworks'. Our workers' compensation systems, for example, require reform to ensure that they provide consistent incentives that drive employers and employees to achieve better OHS outcomes. Too often, such schemes inhibit good health, safety and efficient injury management arrangements. ACCI and business and employer organisations within the ACCI network are actively participating in that debate at a State, Territory and national level. ACCI will supplement this Blueprint with additional analysis of workers' compensation arrangements in the years ahead.

Putting Policy into Practice

There are five basic steps that can guide the translation of OHS policy into practice – even amongst small and medium employers. These are:

Step 1 – Commitment to a safe workplace

Effective management of OHS relies on a commitment from everyone in the workplace. People need to know what their OHS responsibilities are and what is expected of them whilst they are at work.

Commitment can be demonstrated through a written health and safety policy. The health and safety policy needs to be simple, easily understood and developed jointly by business managers and employees.

Step 2 – Employee involvement

Involving employees, and where appropriate their representatives, in health and safety programs encourages commitment to the achievement of business OHS goals and an awareness of shared responsibilities. Employees can provide some of the most practical and constructive suggestions on OHS risks and the management of those risks.

Employees can be involved through briefing sessions, staff meetings, focus groups and in some cases it may be appropriate or necessary to have a health and safety committee. Regular OHS information can also be provided on noticeboards, in newsletters, through memos and emails.

Step 3 – Managing hazards

There are a number of ways to recognise hazards and make the necessary changes to remove or reduce them. Although employers have the primary responsibility for providing a safe workplace, the most effective way of managing hazards is by working with employees. A simple guide for employers and employees is to use the ‘**SAFE**’ approach to hazard management: **S**ee it, **A**ssess it, and **F**ix it, **E**arly.

Step 4 – Maintaining a safe workplace

Identifying and managing workplace hazards is the first step in maintaining a safe workplace, but there are other processes that should also be in place to ensure new problems do not occur. These include safety checks, maintenance and repair, reporting of workplace hazards, information and training, supervision, incident investigation and planning for emergencies.

Step 5 – Safety records and information

Records relating to hazards in the workplace, relevant OHS Acts, regulations, standards and codes of practice need to be kept at the workplace. As legislation and associated standards are subject to change, employers should check to ensure that they are relying on current obligations and materials.

Businesses can best ensure they maintain appropriate safety records by identifying what records should be kept, where they are kept and for how long they should be kept.

Everyone in the workplace should be aware of the central point where the health and safety information is kept if needed. Some regulations have specific requirements for the retention of health and safety records.

Small Business and OHS

Reaching and actively engaging with small to medium sized business (SMEs) on OHS issues has been and continues to be a major challenge for governments and regulators. They rely heavily on employer and industry associations for this purpose.

Meeting that challenge is a stated priority in the *National OHS Strategy*.

SMEs operate the majority of workplaces in Australia and employ around half of all employees. Small business must be recognised by all stakeholders as having a different range of needs to other OHS stakeholders.

Whilst businesses with significant OHS skills and resources need to be allowed to apply appropriate common systems across the nation, the OHS system must also be sympathetically crafted to the special needs of businesses with lower level skills or resources.

To achieve improved OHS performance in the SME sector, initiatives must be developed which provide:

- meaningful guidance materials;
- a reduced level of regulation;
- improved quality of regulation where it is needed;
- targeted workplace assistance; and
- face-to-face advice.

In 2004 ACCI published and released nationally a tool box for small business in the ACCI *Small Business Safety Solutions* package. This tool box is being supplemented by training programs conducted through business and employer organisations, much of which is directed to small and medium employers.

The timeliness of such material cannot be underestimated. Small business is the growth sector of the Australian economy, yet is the sector with fewest capacities and resources to manage OHS regulatory obligations or to invest heavily in new plant or equipment.

A report produced in 2004 for the federal Office of Small Business in the Department of Industry, Tourism and Resources entitled *Research into Compliance Burden of OHS and Workers Compensation Legislation/Regulation on Small Business in Australia* concluded that there was a need for streamlining administration requirements, improving the clarity of legislation, regulations and codes of practice and measures to address the lack of control felt by small business operators in these areas.

That report said that “*understanding OHS and workers’ compensation compliance is just one part of the overall capacity of a small business to comply with a myriad of laws that impact their ability to operate.*” It concluded that small business operators often do not possess the capacity in both resources and knowledge to achieve the desired outcomes. The report noted with concern the “*creation of a negative attitude to meeting the compliance requirements associated with their duty of care as employers, rather than a positive approach*

to active prevention.” It concluded that “*A large proportion of the concerns expressed by small business operators in relation to OHS relate to the quality of guidelines and support relevant to small business, and the paper work requirements for processing OHS claims*”

These conclusions are consistent with survey work conducted by ACCI and employer bodies. ACCI’s *2004 Pre-Election Survey* (reported in the September 2004 edition of the *ACCI Review*) found that while workers’ compensation was the dominant issue of workplace concern amongst small and medium employers, OHS regulations were a concern for approximately two thirds of all respondents, especially regional and rural employers. The issue of OHS inspections was a particular concern, with union OHS inspections causing greater concern than industrial action.

These conclusions strongly support the recommendations for OHS regulatory reform outlined in this Blueprint. Regulation must adequately recognise the differing capacities of various employers, especially small and medium businesses. Given the growth of small business in Australia, examination should be made of OHS regulatory frameworks that are more responsive to business realities in this sector. Innovative approaches to the design of OHS regulatory frameworks that work in small business should be considered, including a simpler framework for meeting their duty of care and the provision of appropriate guidance material. This could include legal recognition of a safety management system that deals in a more certain way with issues of both employer and employee liability in small business.

A Network of OHS Business Advisors

The 2004 report *Research into Compliance Burden of OHS and Workers' Compensation Legislation/Regulation on Small Business in Australia* made some observations on how the OHS compliance burden on small business could be rectified. Whilst noting that OHS regulators do provide some material designed for small business, it concluded that “*small business operators will think twice about accessing advisory services that are provided by the same authority that manages the inspectorate services.*”

The OHS message will not effectively register with the majority of SMEs unless governments adopt a proactive approach through employer representatives to achieve direct contact with small business to influence OHS behaviour. Bridge building between OHS regulators and small business can be highly productive.

Such an approach will require a well planned and effectively implemented national program supported and resourced by government to demonstrate its commitment to the *National OHS Strategy*, as it applies to small business.

In brief, such a program would provide resources to conduct workplace visits, follow-up advice and practical guidance and information on how smaller employers and their staff can understand their rights and responsibilities, be a part of the *National OHS Strategy* and improve OHS performance.

The program would provide resources to contact and visit workplaces to:

- sell the business-case benefits of good OHS and of compliance with OHS regulations;
- provide an initial workplace OHS inspection including a brief report on OHS issues which need attention;
- advise employers to address any urgent unsafe conditions;
- conduct a follow-up visit to review progress; and
- provide advice on how to implement an effective OHS system for the workplace.

Such a program will be of no value to smaller employers unless it is credible and delivered in a non threatening environment. Employer and industry associations can play a positive, constructive and practical role in reaching SMEs, as has been demonstrated in a number of previous federal government programs. ACCI can play a co-ordinating role in developing a national strategy to address the lack of service and assistance to SMEs. Between 2001 and 2004 ACCI submitted proposals to all Australian governments for such a ‘business-advisors’ program.

In October 2004 the Australian Government announced that it would provide “\$7 million to establish a network of Small Business OHS Advisors to assist small business in complying with OHS laws and standards...*The OHS Advisors will operate from and come under the auspices of the various employer organisations. They will perform the dual role of adviser and educator but not prosecutor. This will ensure continuous improvement in OHS at the workplace level.*”

In announcing this timely program, the Australian Government has taken a major step in recognising the need identified by business

organisations on behalf of the small business sector for governments to establish co-operative arrangements with industry on small business OHS issues. The ACCI proposals have also had support from a number of State and Territory governments. Upon its implementation, the OHS Business Advisors concept, when supplemented with the existing investment by business organisations in OHS, has the potential to lay the foundation for a renewed and meaningful engagement by small business and their employees in OHS improvement.

This program will also be a significant contribution by the Australian Government and industry organisations to the implementation of the *National OHS Strategy* that all Australian governments and stakeholders adopted in 2002.

Reporting Systems

Workplaces must have access to OHS reporting systems that provide timely and relevant data on their own performance and enable them to benchmark their performance against comparable workplaces. Governments at State and federal levels should provide consistent reporting systems and performance standards to enable effective benchmarking in enterprises and across industries.

Traditional measures of OHS performance such as lost time injury rates, whilst valuable as performance targets for comparisons with national data or other industries and enterprises, cannot be assumed to be sufficient or appropriate on their own as they are often not responsive enough to assist in the evaluation of preventive approaches. Positive performance indicators should also be developed to be used internally by enterprises and for comparisons with other enterprises.

PART 3

REFORMING OCCUPATIONAL HEALTH AND SAFETY REGULATION

Part 3 of the Blueprint deals with Reforming OHS Regulation.

It deals with the following topics:

- The Role of Regulators
- The Current Regulatory System
- What is required from OHS regulation?
- Problems with OHS regulation
- Compliance
- The National OHS Strategy
- OHS Regulation at a National Level
- The Australian Safety and Compensation Council
- Debating a National OHS System
- The role of State and Territory governments
- OHS Regulation at an International Level
- Industry Solutions for OHS regulators
 - reasonableness;
 - practicality;
 - balance;
 - mutuality;
 - independence; and
 - consistent national principles

If these Reforms to OHS Regulation were implemented, the following Outcomes of this Blueprint would be achievable:

- ➔ Increased awareness, communication and co-operation on OHS amongst employers, employees and all those in the supply chain.
- ➔ Reasonable, balanced and practical OHS regulation that contributes to Australia having world class OHS systems and performance.

The Role of Regulators

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

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

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

Put simply, delivering safety, including the legislative and regulatory framework, must be realistic and affordable. Safe systems of work should be able to be designed and implemented in a practical manner reflecting the scale and nature of resources available to different businesses and employees.

To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and good human resource practices.

The role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates high level OHS awareness and culture in workplaces, and not the micro-management of OHS in workplaces.

For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and the mobile labour force. Poorly established frameworks detract from the achievement of safer workplaces through the objectives set out in this Blueprint.

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

The Current Regulatory System

The Australian Government does not have a specific constitutional power to make laws with respect to OHS (although a combination of other powers could be used). As a consequence, there are nine separate OHS systems of regulation throughout Australia – one in each of the six States, one in each of the two Territories, and a system of Commonwealth regulation for Commonwealth government employees or employees of companies formerly owned by the Commonwealth (and a maritime industry scheme).

The principal source of law in each of these systems is legislation of the relevant parliament. That legislation is supplemented by regulations, codes of practice, guidance material and by specialist statutes. International instruments, if and when ratified by Australia, can also form part of the body of regulation

Statutory authorities, government agencies and government inspectorates administer these systems. The courts have a continuing role. As with other statute-made law, the parliaments make the law but the courts interpret and enforce it.

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

The primary legislative objects of all of the systems are based around prevention of injuries and the identification and elimination of risks. The underlying philosophy is to impose an active responsibility on employers, managers, supervisors and employees to maintain a safe and healthy workplace. Put simply, OHS laws require managers and employees in workplaces to treat OHS as a core business issue. It is not possible to contract out of statutory OHS obligations, although employment contracts can impose additional duties.

Beyond specific statutory OHS systems, other laws also impact on the rights and obligations of employers and employees. Workers’ compensation laws impose duties associated with the management and compensation of injuries. The common law tort of negligence also establishes a basis for litigation, although statutory workers’ compensation schemes have limited (and in some cases) wholly excluded employee-based negligence actions (but generally not third party actions against employers).

Further, employment and workplace relations law also adds to rights and obligations, whether through binding workplace agreements made

during enterprise or industry bargaining, or through orders and decisions of industrial tribunals in industry-wide or company specific awards, where such provisions are allowable.

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

What is Required from OHS Regulation?

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

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

The emphasis of regulatory frameworks must be on encouraging the development of a culture of mutual responsibility in the workplace and open and active communication.

An effective OHS regulatory framework will, over time, help improve OHS awareness and behaviour. The principal focus needs to be outcome oriented – by encouraging safe design of workplaces, plant and equipment in the first instance and then by due diligence, effective risk management and injury prevention. Scope

must exist for enterprises and their employees to establish business specific commitments and approaches.

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

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

These are not novel propositions, nor are they outside of well established international approaches. Yet, too often, the Australian experience of legislative and judicial approaches to regulation does not evidence this character. The concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical or achievable.

The *Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond* recently released by the United Kingdom Health and Safety Executive (HSE) puts it succinctly:

“HSE continues to believe that sensible health and safety is about managing risks, not necessarily eliminating them. Recognising this, it has re-emphasised its commitment to making sound judgements based on balancing harm

against cost and risk against benefit, and adhering to the concept of reasonable practicality.”

The regulatory framework must recognise that, in the real world, no matter how committed employers and employees are to workplace safety or what level of resources are directed to OHS, neither an employer or an employee can predict or control every activity or event around them. The framework cannot mandate that employers guarantee safety. The standard set should be the requirement to take all reasonable steps to prevent the foreseeable risk of injury.

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

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

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

The ORR checklist for assessing regulatory quality covers the design, implementation and

enforcement of regulation. According to the checklist, regulation should be:

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

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

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

OHS legislation also needs to be assessed in terms of its conflicting demands and impact on an organisation's compliance with the requirements of other statutes, notably employment protection, disability, privacy and discrimination regulation.

Organisations should not be subject to a multiplicity of conflicting and competing demands. OHS laws cannot logically expect management to control activities of employees which are beyond their control, or which the employer is specifically prohibited by other laws from knowing or controlling. For example:

- OHS law cannot logically compel every step be taken by management to eliminate risks to OHS, when privacy and discrimination law increasingly impose

limits on the capacity of employers to know the OHS risks that employees may be presenting.

- Unfair dismissal laws often limit the right of management to sanction inappropriate, risky or unsafe employee behaviour, even where this is inconsistent with employer instructions or agreed approaches to safe working.

In applying nationally consistent OHS standards, employers use differing approaches. Performance-based standards can be used to develop corporate plans and in-house safety systems to comply with legislation. Some international companies will seek to achieve world's best practice.

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

Problems with OHS Regulation

There are significant problems with regulatory design and administration of OHS in Australia.

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

ACCI's *2004 Pre-Election Survey* showed that:

- OHS regulations and inspections rated fourth and fifth highest in the level of business concern with government regulation;
- over 60% of employers were concerned at the level of OHS regulation;
- 50.8% of employers regarded workplace health and safety inspections as a major or moderate problem;
- workers' compensation was the dominant workplace issue of concern; and
- union OHS inspections caused greater concern amongst employers than industrial action.

Where regulatory problems exist, they need to be rectified.

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

OHS systems have generated a plethora of regulation across Australia over the past generation.

The major problems identified by employers are:

Quantity: The quantity of regulation

- multiple sources of regulation on the same topics, including by each Australian government, each Australian parliament and multiple government departments, WorkCover authorities, OHS regulators and in some cases, industrial tribunals; and
- alternatives to regulation or black letter law are not properly considered or assessed.

Quality: The quality of regulation

- the 'duty of care' interpreted to impose extreme, absolute and, in some cases, literally impossible duties on employers and designers in meeting performance-based obligations – to foresee the unforeseeable, to know the unknowable and to control the uncontrollable;
- expressed in complex and legalistic terms;
- inadequate defences where conduct has been reasonable;
- fails to account for particular circumstances of small and medium businesses;
- developed without proper cost or economic impact assessments; and
- once made, not accompanied by effective communication to industry.

Frequency of Change: The frequency of change to regulation

- regulation, once introduced, is not properly reviewed;
- additions and amendments to regulation are ad hoc and based on inadequate industry consultation;
- employers can't keep up with the volume of new regulation – for example in the five years to 2003 there were 166 amending instruments of OHS regulation in Australia involving 1,796 changes to rights and obligations of employers and employees on workplace safety; and
- the practical impossibility for many businesses of keeping pace with often obscure changes in scientific, technical, medical or attitudinal data affecting what they do and the way they work.

Red Tape: The compliance and red tape burden of regulation

- regulation creates excessive compliance and red tape burdens, especially form filling, written reporting and data collection;
- red tape focuses on compliance, not outcomes;
- this is increasingly a high order issue in business surveys, research and census data; and
- businesses, especially smaller and medium businesses carry an excessive burden of compliance with ever changing laws and keeping abreast of those changes.

No National Consistency: The lack of national consistency in core regulation

- regulation, even on common, basic issues differs amongst six States, two Territories and Commonwealth laws;
- nationally operating companies, as well as employees, are prejudiced by lack of national consistency; and
- not all key OHS standards developed on a national basis are implemented on a nationally consistent basis, or implemented at all as demonstrated in the following Figure 2 (page 42).

Inconsistent Meaning: The inconsistent interpretation of regulation

- regulators, courts and tribunals interpret OHS rights and obligations in different ways – even the same regulation or duties;
- the employer duty of care has been progressively distorted from its initial statutory purpose through interpretation and re-interpretation; and

- in some jurisdictions the duty of care remains based on a test of reasonableness and foreseeability, whereas in others an absolute duty has been interpreted – one hostile to the common law intent and to common sense.

Unbalanced Enforcement: The selective and unbalanced enforcement of regulation

- enforcement through a judicious mix of education, training and – where necessary – prosecution and penalty requires balance and judgement;
- balance and judgement in prosecutorial discretion amongst regulators has been inconsistent – often reflecting underlying and differing government objectives;
- independence of decision makers on enforcement is open to compromise – by governments, unions or interest groups;
- penalties and concepts of deterrence have been differently applied by the courts; and
- union campaigns for new and extreme policy, such as offences of industrial manslaughter outside of accepted criminal or industrial norms, risk distorting the objectives of safer workplaces and substitute reason with poor policy.

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

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

However, employment law, discrimination law and privacy law is increasingly encroaching upon and denying employers that right of control. Laws which prevent employers from dismissing or disciplining staff for OHS breaches or inadequate attention to safe work practices and laws or guidelines that shield employees from employer scrutiny under the guise of

privacy (such as property searches, information technology control or drug and alcohol testing in appropriate circumstances) are counterproductive and contrary to OHS objectives.

These regulatory problems are manifest in a variety of ways:

Figure 2

Status of Adoption of NOHSC National Standards into Regulation as at October 2005

National Standard	Extent of Adoption by Jurisdiction ¹								
	NSW	VIC	QLD	WA	SA	TAS	NT	C'wth	ACT
Noise (2000)	Y	M	Y	Y	Y	M	M	Y	C
Certification (Last revised 2001)	Y	Y	Y	Y	Y	Y	Y	Y	Y
Manual Handling (1990)	Y	M	Y	M	M	Y	M	Y	Y
Major Hazard Facilities (Declared 1996) (Revised 2002)	N1	M	M	N1	N1	N1	N1	N1	N/A
Plant (1994)	M	M	M	M	Y	M	M	Y	C
Dangerous Goods (2001)	N1	Y	Y	N1	N1	N1	N1	N1	M
Hazardous Substances (1995)	Y	Y	Y	Y	Y	Y	Y	Y	C
Carcinogenic Substances (1995)	Y	Y	N	Y	N	Y	Y	Y	N
Hazardous Substances (1999)	Y	Y	Y	Y	Y	Y	Y	Y	Y
Lead (1994)	Y	Y	Y	M	M	Y	Y	Y	Y
Synthetic Mineral Fibres (1990)	Y	N	M	Y	Y	M	Y	Y	C
Atmospheric Contaminants (1995)	Y	Y	Y	Y	Y	Y	Y	Y	C

Notes:

¹ Adoption is assessed against key elements of the national standards (which are defined as aspects of the standard for which national consistency is considered important). The assessment is not restricted to OHS regulations. It is determined by whether a jurisdiction has a legal requirement equivalent to the key element irrespective of the body of legislation or legal practice that provides the basis for the requirement. The assessment uses the following coding:

- Y** the key elements have been fully adopted
- M** most of the key elements have been adopted
- N1** Parliamentary counsel drafting bill; or bill in parliament
- N** the key elements have not been adopted
- C** adopted as Code of Practice
- N/A** no MHFs identified

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

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

As examples of these problems, the following are extracts from decisions under NSW OHS legislation:

In *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority* (1999) Full Bench of NSW IRC said:

“The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances.... Under s15(1) the obligation of the employer is “to ensure” the health, safety and welfare of employees at work. There is no warrant for limiting the detriments to safety contemplated by that provision, to those which are reasonably foreseeable..... the terms of s15(1) specify that the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety.”

In *WorkCover NSW v Woolworths* (1994) NSW IRC - Peterson J said:

“Whilst it might be thought that a specific instruction to a worker not to perform a particular task might, in the ordinary course, absolve an employer from liability for a breach of that instruction, the fact that the employees are enabled in this case by the provision of appropriate special equipment and also opportunity to perform the work raises a failure in the context of supervision.”

In *WorkCover Authority of NSW (Inspector Twynam-Perkins) v Maine Lighting Pty Ltd* (1995) NSW IRC - Bauer J said:

“The Act was designed to protect against human errors including inadvertence, inattention, haste and even foolish disregard of personal safety as well as foreseeable technical risks in industry.”

In *WorkCover NSW v TRW* (2001) NSW IRC - Boland J said:

“The duty to provide a risk free work environment is a duty owed not only to the careful and observant employee but also to the hasty, careless, inadvertent, inattentive, unreasonable or disobedient employee in respect of conduct that is reasonably foreseeable.”

An example of the problem of OHS regulation being distorted by other agendas is with respect to trade union right of entry into some workplaces. Whilst properly accredited trade union officials can, in a representative role of union members, constructively contribute to dialogue and awareness raising of OHS issues, it is important that trade unions do not use the cover of OHS right of entry to pursue industrial relations and other agendas. The culture of joint responsibility for improving OHS referred to in this Blueprint does not exclude trade union officials exercising a representative role

for union members. Union officials whose right of entry permits have been withdrawn under general industrial laws as a consequence of inappropriate conduct should not be allowed to use OHS laws as a back-door means of securing entry.

Compliance

Industry recognises that a regulatory framework must provide enforcement mechanisms for mandatory obligations and, in appropriate cases involving serious or repeat offenders, prosecution and penalties.

Whilst there is a role for clearly defined legal obligations and ultimate sanctions and penalties for breach of obligations, enforcement activities by Australian OHS policy makers and authorities need to be carefully reviewed. Compliance activities require a judicious mix of information, assistance and persuasion on the one hand and penalties and enforcement on the other. Above all, they require proportionality to the circumstances and nature of the relevant workplace incident and associated business circumstances.

Compliance activities and penalties for OHS breaches should also be capable of equal application to all stakeholders – whether employers, employees, others in the chain of supply, governments or Ministers of the Crown.

Compliance activities require regulators and inspectorates to give more than lip-service to the over-riding objective of their principal statutes – that is, prevention. Compliance activities directed towards prevention stand to benefit the many. Compliance activities directed towards punishment deal only with the few.

A regulatory approach that insists on prosecuting the few and not assisting the many is poor public policy, as well as an unwise diversion of resources. Australian OHS regulators, when contacted by employers and small businesses, will all too often simply direct employers to the law as it is and refuse to assist in helping those businesses make their workplaces safer. A re-direction of resources and priorities, especially for small business, onto the objective of ‘how to make workplaces safer’ is sorely needed – and would be the most meaningful way in which compliance levels can be increased.

Most offences under OHS law should be civil not criminal, and tried before a court. Due processes should apply, including privilege against self incrimination. Prosecutions should only be initiated and investigated by an independent authority.

Under each Australian system, enforcement of statutory duties is by the courts, with government authorities and accredited inspectors investigating breaches and initiating prosecutions. Penalties for breaches of OHS laws vary according to the type of breach. Penalties are heavier for employers than they are for employees. The level of penalties varies from jurisdiction to jurisdiction, even for comparable offences.

Legislation in each jurisdiction also allows inspectors to issue improvement and prohibition notices. In some jurisdictions provision is also made for alternative or additional forms of enforcement, including on the spot fines, enforceable undertakings and ordering the publication of OHS breaches or that specific expenditure be made by an employer on remedial OHS measures.

Whilst prosecution and heavy penalties may be appropriate for the worst offenders who manifestly fail in their duties, the deterrent effect of prosecutions or extreme, new law-making focused on punishment (such as the industrial manslaughter offence introduced by the ACT in 2004) are marginal and symbolic at best and virtually non-existent as deterrents for the great majority of employers not directly affected by the specific prosecution.

A review by ACCI in 2004 of compliance and enforcement data over the preceding four years reveals that there has been a sharp increase in the number of improvement and prohibition notices by the jurisdictions with a resultant increase in prosecutions, convictions and fines awarded by the courts. This trend suggests that the jurisdictional focus has developed an imbalance of emphasis on regulation and enforcement as the means of achieving compliance. Past history suggest that such a strategy is not effective as an incentive or motivator and is not supported by hard evidence. A more personalised and non-threatening approach, especially towards small business with a focus on advice and assistance, is more likely to bring about improved OHS performance.

The regulatory framework and enforcement activities should also take into consideration the development of in-house safety systems and associated audit tools as a defence against, or in mitigation of, court penalties.

In-house systems which in large corporations often encompass world's best practice, should not be used as a new benchmark for compliance.

OHS legislation should generally create civil duties, rather than criminal offences. There

should be no absolute or strict liabilities. Penalties should be monetary, judicially determined and based on the seriousness of offences and the circumstances of breach. Enforcement requires a mix between education and persuasion on the one hand, and in serious or repeated cases, prosecution and penalties on the other.

A system of enforceable undertakings should be an alternative approach to compliance, provided that such undertakings are developed in consultation with business and do not confer inappropriate discretions on regulators. This system has been used successfully in other areas of public policy (such as competition law).

Enforceable undertakings in this context are legally binding commitments made by the duty holder to take certain specific actions or programs to redress unsatisfactory systems or conduct and to prevent future breach and/or to implement other publicity or educative programs for those purposes.

The advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in terms of lasting compliance with the law and do so across a wider range of workplaces. Whilst the system would not replace prosecutions, they would be a superior alternative in most cases given the time consuming and resource intensive nature of prosecutions. They move compliance focus from court outcomes to 'real outcomes', given that undertakings can cover a broader range of measures than court orders. The rationale is to have inspectorates stop thinking about what courts can do after a breach, but rather what needs to be done to improve OHS in the workplace.

Whilst a system of enforceable undertakings may not be relevant in all cases, even in serious cases they could be used if superior outcomes could be achieved. They would enable authorities to better recognise that even in cases of serious injury or even workplace death, managers and employers are subject to trauma and grief. This is a reality far removed from the sterile surrounds of a courtroom and the sentencing submission of lawyers or sentencing remarks by judges. A 2004 report commissioned by the Creative Ministries Network in Victoria *Treated Like a Leper – A Report of a Survey of Companies Prosecuted after a Work Related Death* provides an insight into a number of issues relevant to personal and corporate recovery from a work-related death for all parties. The report identifies a two-fold impact on companies prosecuted for a work-related death – the personal effect on managers and co-workers and families and a deeper and unresolved trauma and grief arising from the prosecution itself and the legal process. It referred to senior management of relevant companies having identified “*disappointment and dismay that both WorkCover and the judicial system should place so little value on the company as an employer and be so determined to maximise the economic cost to the employer*”, as well as the length of time taken to finalise court proceedings.

In this context, as well as for reasons of good public policy, there is no public interest in creating a new offence of industrial manslaughter given the already existing criminal law of manslaughter and related offences. Of grave concern to Australian industry is the trend emerging in some Australian jurisdictions for such new offences that seek to rewrite established criminal law. Given that workplace fatalities are reducing, and given the absence of any evidence that such laws act as a deterrent, they are not merited. The objective

of OHS policy should be to improve the performance of the many, not to gaoil the few.

Nor should there be a deemed guilt or reverse onus of proof in any civil or criminal proceedings for OHS breaches, nor any other basis on which employers, directors, management personnel or employees are treated less favourably than the defendants in prosecutions under any other equivalent law or legislation. This too is a concerning and emerging trend in some jurisdictions, that is wrongly interpreting community concern at OHS death and injury as an emotive ‘lock them up’ mentality rather than a considered assessment of what is good public policy and legal principle. All parties charged with OHS offences should be accorded natural justice and, in criminal cases, the standard presumptions and protections of the general criminal law.

The fact that a person happens to be a supervisor, a manager, an executive or an owner of a business or a designer should not in and of itself lead to a removal of that person’s ordinary rights under criminal law. Moreover, criminal offences should only be determined by established criminal courts of competent jurisdiction, not industrial tribunals which perform multiple functions – an issue being highlighted in legal challenges brought in 2005 in New South Wales to the jurisdiction of the NSW Industrial Relations Commission over OHS compliance.

Governments and regulators would achieve greater levels of compliance with OHS legislation and regulations if they invested, in conjunction with business organisations, more directly in information, assistance, advice, education and training.

The National OHS Strategy

The *National OHS Strategy*, adopted in 2002 by each Australian government (Commonwealth, State and Territory), plus the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) established national targets for a significant, sustained and continual reduction in workplace fatalities and injuries.

The *National OHS Strategy* has gained the commitment of each Australian government, ACCI and the ACTU to a number of action priorities and targets over this decade.

ACCI welcomes this style of 'business plan' in the field of workplace health and safety – one that sets an example of how a planned approach in each workplace can help eliminate risks and hazards.

Achieving the objectives of the *National OHS Strategy* also requires commitment and cooperation of employers, employees, governments, regulators and unions.

This cannot be done unless all parties recognise that OHS is a mutual workplace responsibility – not just an employer responsibility.

From an employer perspective this means:

- a high level of awareness and prevention activities in individual businesses;
- a recognition that the workplace 'duty of care' applies to both employers and employees;
- practical, performance-based standards and guidelines, rather than heavy-handed prescriptive regulation;

- an educative and 'working together' policy from governments, third party regulators and unions; and
- a tighter compensation system that does not give incentives for injuries incurred outside of the workplace to be attributed to the workplace.

If there is a failure to adopt the right policy balance between education, workplace assistance and strategic enforcement then the regulatory system will fail employers and employees. State and Territory jurisdictions – which are the major OHS regulatory bodies over the private sector in Australia – must work constructively with industry to meet the objectives of the *National OHS Strategy*.

ACCI and many of its member employer bodies have committed to an Employer Engagement Strategy under the theme '*OHS Employers Making A Difference*' to seek the individual commitment of employers to undertake OHS activities within the framework of the *National OHS Strategy*, which will assist in achieving its objectives and targets.

OHS Regulation at a National Level

ACCI represents industry in national and international forums dealing with OHS, including tri-partite consultative bodies and the International Labour Organisation (ILO).

For many years ACCI and its predecessors have developed strong, specific and separate commitments to OHS – as one crucial component of workplace management.

The ACCI Occupational Health and Safety Policy and Workers' Compensation Policy (both

appendices to this Blueprint) have become national templates for industry policy and have been developed through the collective decision making of Australia's employer bodies.

ACCI members and Australia's employer organisations also deliver a substantial amount of training to industry on OHS issues and industry specific bodies have expertise in safe design.

ACCI's representation of industry on OHS issues is matched by our commitment to a co-operative and non adversarial approach to workplace safety. The common interests that exist between employers and employees on OHS in workplaces should be replicated by the work of employee representatives and ACCI. ACCI supports and will actively work with governments and trade unions in bilateral and tri-partite forums to foster common objectives for safer Australian workplaces.

ACCI supports a national tri-partite consultative body to provide a national mechanism to examine and advise on a nationally consistent regulatory framework. This body was formerly the National Occupational Health and Safety Commission (NOHSC), to become the Australian Safety and Compensation Council (ASCC) from 2005.

This tri-partite advisory and consultative structure is not a regulator in its own right. It neither makes OHS law, nor enforces it – and should not have an enforcement role. It depends on others to do so. Accordingly, its role, its business plan and its resourcing must be tailored to the objectives set out in its enabling statute. ACCI supports those objectives.

For this mechanism to work effectively it needs the full cooperation and commitment of key stakeholders to OHS promotion, education and training, and to the objective of a nationally consistent regulatory framework on appropriate national issues.

Those key stakeholders include:

- employers and employees;
- peak national industry and trade union bodies;
- employer associations and trade unions on an industry, occupational and at a State/Territory level;
- Commonwealth, State and Territory Ministers and governments responsible for OHS – individually and collectively through the Workplace Relations Ministers Council (WRMC);
- Commonwealth State and Territory OHS regulators, including WorkCover agencies and State/Territory government departments.

These stakeholders should ensure that they work co-operatively together on issues of common interest, seek to build and achieve consensus on matters requiring agreement, keep the tri-partite structure informed of the views and attitudes of their constituencies and take all reasonable steps to implement agreements and commitments made through the tri-partite process.

The tri-partite structure has the opportunity to use the WRMC endorsed *National OHS Strategy* to provide national leadership and coordination of national OHS resources through the jurisdictions, leading to improved national consistency and improved national OHS performance.

The tri-partite structure should not see its primary role as standards development – even on matters that lend themselves to national standard setting. Whilst this is one appropriate role, both its statutory objectives and its capacity to make a difference suggest that a stronger focus on awareness, communication and co-ordination of a workplace safety message amongst employers and employees and throughout the community is appropriate.

There is no reason why the States and Territories should not, for example, use this process to achieve a co-ordinated national plan for ‘safety weeks’ and public relations workplace safety campaigns – rather than the hotchpotch approach that in the past has seen duplication of effort and the unnecessary expenditure of public funds with no real linkages between State and Territory regulators on such issues. This should include sharing of jurisdictions resources’ to develop standards, codes and guidance material (building on existing materials where appropriate) and in the coordinated development and delivery of workplace safety campaigns.

In addition to working on OHS issues through the tri-partite structure, the activities of employer and industry organisations are co-ordinated by ACCI through the National Employers’ OHS Consultative Forum. In this way, industry representatives on the tri-partite body can convey a consensus or collective view of industry bodies to governments and other stakeholders on matters that need to be considered at a national policy level.

The Australian Safety and Compensation Council

The proposed creation of the Australian Safety and Compensation Council (ASCC) in 2005 has

the support of ACCI and the employer and business organisations that comprise the ACCI network. It is fundamentally important that such a body operates on a tri-partite basis, as national OHS policy should, wherever possible, be formulated on consensual principles. It provides an opportunity to progress the case for a national effort on OHS, building on the foundation of the *National OHS Strategy* established by NOHSC.

It also provides an opportunity for OHS regulators to nationally co-ordinate communications activities.

For the ASCC to work as intended, it requires the active and ongoing commitment of the governments that have regulatory responsibility for OHS issues (that is, the Australian Government and each State and Territory government). The slow and sometimes quite inadequate move towards national consistency on core OHS standards that governments themselves had signed up to was a powerful criticism of NOHSC made by the Productivity Commission in its March 2004 report on National Workers’ Compensation and OHS Frameworks. Indeed, it is not as much a criticism of NOHSC as it is of the political commitment to appropriate national consistency by governments and regulators. To overcome this, the ASCC will need to establish a close bilateral relationship with the governments and relevant Ministers in each jurisdiction, as well as multilaterally with the Workplace Relations Ministerial Council.

Debating a National OHS System

The ongoing reform of OHS regulatory frameworks in Australia will inevitably lead to

a debate about whether OHS regulation should be national or State/Territory based, or a hybrid of both.

This is a discussion that should emerge over the life of this Blueprint, and will invariably do so as our economy takes on more national and international characteristics. Australia's business and employer organisations should actively participate in that debate, with the objective of keeping the focus of governments on the regulatory principles established by this Blueprint. For many employers, including the majority who still operate solely in one jurisdiction, the issue of regulatory quality is critical, whether the source of law is national or from within separate jurisdictions.

Given the deficiencies in the regulation of OHS in Australia, this Blueprint deliberately focuses an immediate priority on those issues rather than the national OHS system debate, as important as that may become.

The Role of State and Territory Governments

In discussing future OHS regulatory framework(s) that may apply in Australia it is appropriate to recognise the historical and current role that State and Territory governments play in occupational health, safety and related matters.

Since the first Factories and Shops Acts were introduced into the Australian colonies in the 1890s, the States have had a long term association with industry on these issues.

To this day, the State and Territory governments remain the primary jurisdiction with responsibility for OHS frameworks affecting the private sector. The role of the States and Territories has extended to:

- oversight and amendment of principal OHS legislation in each jurisdiction;
- development of OHS regulations, codes of practice and guidance material;
- discussion papers, working parties and consultative bodies;
- information and promotion services;
- investigative and inspectorate activities;
- compliance, prosecution and enforcement;
- functioning of State regulatory bodies (such as WorkCover agencies);
- conduct of State courts and judicial services; and
- participation in national tri-partite consultation.

In some State and Territory jurisdictions, the funding of these activities has not only come from general revenue (including monies from OHS prosecutions) but also compulsory employer premiums levied through local workers' compensation systems.

Given this situation, State and Territory governments, and key stakeholders in those jurisdictions, retain a fundamental role in enabling the achievement of the Vision and Outcomes outlined in this Blueprint. In particular, State and Territory governments and key stakeholders have a principal role in determining the extent to which greater harmonisation of existing state-based arrangements occurs.

OHS Regulation at an International Level

The global economy requires Australian businesses to be efficient, highly skilled, attractive to labour and, above all, competitive.

Given the strong business case for good OHS management, an active and ongoing commitment to and investment in OHS by individual businesses is compatible with the pressures of a global economy.

However, inefficient regulatory systems, unproductive diversion of resources on process, procedure or red-tape or (worse still) inappropriate costs to business through overregulation or poor quality regulation hold Australian businesses back when competing in international markets.

Appropriately set international standards and instruments can provide assistance to Australian business in achieving workplace safety objectives and having employers with whom we trade and compete, apply similar standards.

However, poorly researched or framed international standards, or international standards that fail the test of good regulatory principles will not be helpful to Australian industry and should not be supported by regulators. International standards or instruments, whether on OHS or other subject matters, should not be incorporated into domestic Australian law or into corporate policy without a thorough assessment of their terms and not until domestic law and corporate practice is in substantial compliance.

The ratification in 2004 by the Australian Government of ILO Convention 155 'Occupational Health and Safety' met these conditions and was supported by ACCI and ACCI members. Treaty obligations of the Australian Government under that standard commenced from March 2005. Meeting the obligations of that Convention requires Australian governments to have in place a regulatory framework that actively improves OHS outcomes and systems. In particular the Convention requires the Australian Government to:

- formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment; the aim of the policy being to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment;
- indicate the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers and others, taking account both of the complementary character of such responsibilities and of national conditions and practice;
- identify major problems, evolving effective methods for dealing with them and priorities of action and evaluating results;
- have in place a system whereby the enforcement of laws and regulations concerning occupational safety and health and the working environment is secured by an adequate and appropriate system of inspection; and

- take measures to provide guidance to employers and workers so as to help them to comply with legal obligations.

Care and caution should however be exercised before international instruments are introduced into domestic law.

Industry Solutions for OHS Regulators

Solutions to the problems of OHS regulation can be achieved by translating the principles underpinning good quality regulation into the OHS framework. Australian OHS law and practice would then reflect the following six characteristics:

- reasonableness;
- practicality;
- balance;
- mutuality;
- independence; and
- consistent national principles.

These six reform solutions are discussed below.

REGULATION REFORM 1: REASONABLENESS

OHS LEGISLATION BASED ON A GENERAL DUTY LIMITED BY WHAT IS REASONABLE, FORESEEABLE, CONTROLLABLE AND REALISTIC

Policy Direction

OHS regulation, and the standards, codes and guidance material that flows from it, must be performance based and founded on the general duty to take reasonable care in identifying and dealing with foreseeable hazards and risks. The concept of reasonableness is at the heart of capacity of an employer or any person in the supply chain to control or foresee risks and hazards. It should allow for the overall circumstances of individual businesses to be taken into account in meeting these important duties.

What Needs to be Done?

- The legal framework should provide for a general duty in which employers, employees and all persons in the supply chain are to take reasonable steps in all of the circumstances within their actual influence or control to prevent work related injuries or health risks in the workplace.
- Duties of each party should be independently held and not transferred to another party.
- Neither parliaments nor courts should impose extreme, absolute or impossible duties on employers or designers of workplace environments, plant or equipment in meeting performance-based obligations. To do so, undermines

confidence in the law and leads to unfair and unsustainable legal liabilities.

- By way of example, it is not reasonable for a user of manufactured goods to be liable for safety risks arising from deficiencies in the manufacture of those goods. Each party holds separate and independent duties of care and should not carry the duty of care of other parties.
- As mentioned earlier in this Blueprint, the concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical and achievable. This has led some employers to reappraise the viability of jobs and even business operations or parts of business operations. To foresee the unforeseeable, to know the unknowable and to control the uncontrollable is simply not reasonable.
- If these concepts are to be retained as the standard for meeting the OHS duty of care, clear legislative guidance should exist on what is meant by ‘reasonable, practicable and foreseeable’ and capable of being achieved, economically and practically. An overall, common-sense approach and examination of the workplace safety management system

should determine what was reasonable in all of the circumstances. Certainty, to the extent possible, is important to achieving compliance with legal duties. The approach to the issue of foreseeability set out in the High Court decision *Koehler v Cerebos (Australia) Limited* [2005] HCA 15 (6th April 2005) should be reflected in statutory regulation. That approach recognises that limits clearly exist to the employer’s duty of care, in that case the duty to take reasonable care to avoid psychiatric injury. Those limits are based on an objective test of reasonableness, and include limits drawn from the contract of employment itself, with the court concluding that “*insistence upon the performance of a contract cannot be in breach of a duty of care*” and that “*agreement to undertake the tasks stipulated (hesitant as that agreement was) runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed risks to the appellant’s psychiatric health.*”

- In assessing what is reasonable, practicable and capable of being achieved, legislation should reflect workable and respected international standards (a useful starting point would be the approach required by the Department of Labour, Alberta, Canada which is less absolute than Australian standards).
- New statements on the standard of the duty of care under OHS laws are required in those jurisdictions where the concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted. A standard based on the implementation and maintenance of a safety management

system relevant to the industry, size and resources of each particular business, developed within a set of national principles, is an alternative.

- Under this concept, the principles and scope of such systems could be determined by consensus at a national level, based on safety, practicality, reasonableness, brevity and affordability (that is, the principles of good regulatory design referred to earlier in this Blueprint). Implementation and maintenance of a safety management system would meet the standard of care and thereby represent compliance with the legislated duty of care. It would also be a complete defence to a prosecution for breach.
- Court decisions (such as *The Queen v ACR Roofing* [2004] VSCA 215 at para 54) which suggest that an employer’s liability could extend to employees of contractors regardless of the layers of contractual relations that separate the contractor from the principal, do not represent a fair or rational application of legal liability. A principal contractor remains under a general duty to ensure that, to the extent reasonably practicable, persons are not exposed to risks to health and safety from the conduct of the principal contractor’s undertaking.
- More realistic defences also need to be available to employers, employees, designers and other persons in the supply chain.
- The duty of care concept applies throughout the supply chain and similar redesign of the concept of reasonableness needs to apply to all affected parties when

assessing liability. An effective statutory duty of care of employees to take reasonable care for OHS of themselves and others is a critical element of a system where shared responsibilities are core values. An employee's responsibility to take reasonable care should include the requirement to work consistently with safe work methods and procedures, including those which may be taught through:

- formal OHS training (in educational or technical institutions or on the job);
 - informal training on the job; and
 - lawful instructions from the employer, managers and supervisors.
- If the employer is not otherwise in breach of their own duty, then failure of an employee to work consistently in a way that gives effect to the employee's duty of care should represent a defence for the employer if prosecuted as vicariously liable for the conduct of the employee that led to a safety risk, accident or injury.
 - Where there is a breach by an employee of their duty of care the employee should be accountable for that breach, irrespective of whether the employer is or is not also in breach of their obligations.
 - Where an employee is terminated because of failure to work consistently in a way that gives effect to the employee's duty of care then termination should not be regarded as an unfair dismissal (or give rise to an 'unfair contract' action) under federal or State workplace relations laws. The basic principle should be that an employer taking action to meet their obligations under health and safety laws, including terminating or otherwise disciplining an employee due to that employee's breach of safety laws, should not face liability under other industrial laws for having done what safety law would require.
 - Where it is alleged that a breach of duty has occurred, the onus of proof for making out alleged breaches should be on the prosecuting authorities.
 - The fact of a workplace injury or illness should not in and of itself constitute a breach of the legal duty. A key element of the duty (and the establishment of breach) should be that a person did not act reasonably in all of the circumstances.
 - Adherence to regulations or codes in the workplace should constitute compliance and prima facie meeting of the duty of care. Non compliance resulting from an employee or contractor departing from or disobeying directions, standards, codes, procedures, policies, work method statements, the legislation or the regulations should be a defence for an employer against an allegation of breach of the duty of care.
 - Appropriate limitations on liability should exist. Whilst it may be reasonable to impose particular duties on companies, their directors and managers, the legislation should require guilt to be proven rather than be presumed or deemed by the legislation. The onus of proof should not be reversed.

REGULATION REFORM 2: PRACTICALITY

AFFORDABLE AND PRACTICAL PREVENTION OF INJURY, ASSISTING EMPLOYERS TO IMPROVE OHS PERFORMANCE AND ENCOURAGING SAFETY INITIATIVES

Policy Direction

The over-riding focus of a workable OHS system at the national, jurisdictional and workplace level must be the prevention of injuries and the management of foreseeable risk which is practical and achievable.

This requires a national legislative framework which is consistent and straightforward, supported by useful and relevant standards, codes and guidance materials. These must be easily understood and accessible, especially for those employers without sophisticated resources to deal with OHS matters.

Regulation that is practical will emphasise outcomes above process. It will assist duty holders to improve OHS performance and encourage safety initiatives tailored to individual industries or businesses. It will set compliance standards which are practical and realistic.

It also requires assessment of the cost and practical effect of the national instruments in the workplace and on improving health and safety outcomes. Solutions to particular problems must be developed based on both their safety features and their economic and practical sustainability.

What Needs to be Done?

- Prevention-based OHS materials should be developed by governments in close and genuine consultation and agreement with employers or their representatives, with the allocation of adequate time and resources to undertake this process and review the outcomes.
- Regulatory duties should be performance-based with a focus on risk assessment and hazard identification.
- Affordability of the system is represented in a number of areas all of which impact on the cost to employers and which need to be identified and controlled including: workers' compensation premiums; compliance costs and the negative effect on workplace activities of injuries including productivity; absence; and loss of skills.
- Better access to, and improved data should be provided by regulators to alert industry to areas of risk and expected remedial measures which can be relied on, including the status of certain hazards, emerging issues and solutions to risk management.
- Employers, employees and jurisdictions should agree to genuinely work together to

develop and adopt national packages of materials based on prevention of injury and disease in industry sectors.

- The OHS ‘duty of care’ should be applied by the jurisdictions in a balanced and equitable manner recognising that employers and employees cannot predict or control every activity or event in the workplace. An employer’s workplace health and safety liability should be limited to those factors over which the employer has direct and actual influence or control and which are truly OHS in character.
- Incentive based and reducing workers’ compensation premiums as measured by the Comparative Performance Measurement (CPM) program as developed by the Workplace Relations Ministers Council and published by the federal Department of Employment and Workplace Relations, should be pursued.
- Nationally consistent application of the ‘as far as is practicable’ components of these regulatory materials, should be applied by the jurisdictions.
- Tri-partite processes in each jurisdiction must be useful, relevant and earn the respect of employers and employees at the workplace level.
- Regulators, before regulation is made, need to be in touch with the realities of business operations and the views of employers and employees on prevention and regulatory compliance.
- Regulation should also be based on practical and effective approaches to the design of safety in the workplace.
- ACCI, its member employer bodies and industry generally, will lobby government to achieve nationally consistent regulation and OHS guidance materials.
- ACCI, its member employer bodies and industry generally, will work with tri-partite bodies to implement, standards package development processes which will deliver nationally consistent materials focused on prevention which are capable of consistent implementation in the workplace.
- Tri-partite bodies and regulators, in conjunction with industry, should develop evaluation and assessment methods to gauge the effectiveness and the impact and outcome of legislation and guidance materials.
- Tri-partite bodies, WRMC, regulators, employer and employee representatives should promote research into the cost of injury and disease in the community on a multi-level basis, including industry costs such as absenteeism, labour replacement, loss of skills and compensation premiums.

- Tri-partite bodies, WRMC, regulators, employer and employee representatives should promote research into the level of investment by Australian industry in OHS (including investment in training, education, compliance, risk identification and plant modifications).
- ACCI, ACCI member employer bodies and industry generally, should continue to lobby for more active involvement by employers in decision making on rehabilitation post-injury and return to work.
- Governments, WorkCover authorities, regulators and employers should implement measures that facilitate the effective management of claims and reduce the administrative and legal costs of claims management, whether or not injury management programs are conducted in-house or through insurance-related claims managers.

REGULATION REFORM 3: BALANCE

BALANCED DUTIES OF CARE, PROVIDING FOR FAIR ENFORCEMENT

Policy Direction

OHS regulation must be balanced. Balance must be reflected in the mutuality of duties – duties owed not just by employers to employees, but also by employees to employers and to fellow staff and third parties entering the workplace.

It is also essential to have nationally consistent legislation which achieves a fair balance between enforcement and prevention strategies. This will only be possible within a legislative framework which sets attainable standards and allows employer defences. For example, prosecution should not be at issue where employers have implemented a fair and reasonable OHS system that is objectively defensible and reflects a clear and ongoing commitment to workplace safety.

Legislation should also provide that the primary purpose of the regulators is to assist employers and other duty holders to manage and control risks effectively, focusing on the prevention of injury and the improvement of workplace safety. Prosecution and penalties have limited deterrent value, do not contribute materially to outcomes in businesses not affected by prosecutions and, as a matter of regulatory policy, should be used only as a last resort.

What Needs to be Done?

- Jurisdictions should develop a focus on prevention and on assisting employers and employees to improve OHS performance through education, training, advice and assistance as a more effective use of resources than heavy-handed compliance and enforcement.
- New laws and regulatory and judicial decision making should be based on reason, hard evidence, data, practical design principles and rationality, not emotion, ideology, unsubstantiated opinion or assertion, or inappropriate collective generalisation.
- Regulatory bodies should have a dual role as both information providers and enforcers, but it must be clear that compliance with the regulator's advice and guidance material may legitimately be used as a defence when something goes wrong.
- Appropriate caveats should be written into the legislation to protect the regulator in these circumstances.
- Offences should reflect traditional concepts of civil liability (and criminal liability, if

criminal offences are to exist). As outlined in this Blueprint, new offences of industrial manslaughter that distort traditional concepts of criminal liability should not be pursued. Proposals for systems of enforceable undertakings should be pursued.

- Where a breach is alleged, the allegation that a person did not act reasonably in all of the circumstances (or, if a safety management system approach is adopted – did not adhere to the safety management system) should be an element of the offence to be proved by the prosecution and not a legal burden borne by the accused. OHS laws should reflect the well-established legal principles that prosecuting authorities are required to prove each of the elements of an offence and that a person charged is presumed innocent unless or until found guilty according to proper legal process. Those prosecuted should only be required to make out any defences on which they rely, if it is established that their duty has been breached.
- Penalties imposed by courts need to reflect the circumstances of the commission of offences, the status of the business (e.g. a small to medium sized business as opposed to a multi-national corporation), need to recognise the very limited deterrent value of OHS prosecutions and should appropriately balance the multiple duties of care associated with breaches of OHS law.
- There should be consistency in approach, so that employers managing similar risks in similar circumstances are not exposed to different enforcement measures.
- Prosecution should be used as a last resort.
- Prosecutorial discretion and related enforcement should be based on legal principles of shared responsibility, relating the circumstances of the risk and the conduct of all relevant parties.
- Prosecutions should be initiated and investigated only by an impartial and independent authority, whose officers are properly trained and accredited by the regulator and are adhering to pre-published, transparent rules.
- The regulator should clearly distinguish between statutory requirements and guidance about what is desirable but not compulsory.
- Clear and regular statistics and data on prosecutorial activities should be published.
- There should be a framework for policy making and the exercise of prosecutorial discretion which is flexible enough to cater for labour market change that affects the realities of control and foreseeability, including outsourcing and labour hire arrangements.
- ACCI, its member employer bodies and industry generally, should lobby governments on the need for balanced duties of care and compliance activities by regulators, backed by research to

demonstrate that complex, heavy handed enforcement and extreme fines do not automatically translate into improved compliance and improved OHS performance.

- Tri-partite bodies, WRMC, regulators, ACCI and the ACTU should undertake research, gather and monitor data on OHS performance and jurisdictional compliance activities to analyse the correlation between penalties and injury reduction in each jurisdiction.
- Governments and WorkCover authorities should be encouraged to provide improved training of inspectors/advisors to focus on improving OHS performance by assisting employers to develop a safer workplace and establishing consistent compliance strategies with the use of nationally consistent, industry specific, practical guidance materials.
- Governments and WorkCover authorities should work with industry to develop practical tools to assist designers of plant and equipment to improve design safety.

REGULATION REFORM 4: MUTUALITY

A CULTURE OF MUTUAL RESPONSIBILITY

Policy Direction

- OHS regulation must, at all levels, encourage mutual obligation. Commitments given by one party should be matched by others in the workplace. The relationship one party has with the other will govern the nature of mutual obligation.
- There should be a culture of jurisdictions working together with workplace parties to achieve a better understanding of what is reasonably achievable in the workplace to improve workplace prevention strategies and practices.

What Needs to be Done?

- Industry wants to achieve a workplace culture where employees, employers and all persons in the supply chain work co-operatively, recognising shared responsibility in the interests of the enterprise, the community, the environment and the health and safety of employees. Industry is convinced that this approach, above all, will drive improved OHS outcomes and help achieve the objectives of the *National OHS Strategy*.
- At government level, an approach which recognises mutual responsibility can facilitate workplace safety outcomes. This is preferred to prescribing and mandating one size fits all consultation process and protocols.
- Mutual responsibility in the workplace is consistent with modern management practice and procedures and has the potential to lead to improved employer/employee relationships, improved productivity and enhanced OHS performance.
- There should be a workplace culture where employees and employers work together to achieve not only compliance with OHS regulations but the genuine prevention of injury and work-related illness.
- There should be individual recognition that safety is a vital part of all jobs. The skills and values needed for this should be taught from school level onward.
- Shared responsibility should be acknowledgement in the combined interests of the enterprise and the health and safety of employees - that each individual has responsibilities and shares a common interest in preventing accidents and injuries.
- Genuine, workplace specific rather than mandated, consultation should be encouraged which has as its objective, improved health and safety.

- ACCI, its member employer bodies and industry generally, should lobby federal and state/territory governments to amend legislation to reflect a more balanced approach in establishing the general duty of care, from an absolute duty on employers to one of reasonable care and foreseeability – as an essential first step to an OHS framework characterised by mutuality.
- ACCI, its member employer bodies and industry generally, should lobby governments and regulators to balance employer duties with clearer and more direct duties and responsibilities of employees towards themselves (such as in the use of safety equipment), their employer, their work colleagues and other third parties in the work environment.
- Employers should educate and inform employees of the mutual (employer and employee) ‘duty of care’ obligations - through OHS policies, job descriptions, performance standards, training, induction and OHS committees.
- ACCI, its member employer bodies and industry generally, should adopt a policy that all school-to-work training include safety awareness and responsibility training.
- Governments, regulators, ACCI, its member employer bodies, industry generally and trade unions, should encourage community safety programs to incorporate life safety skills which also have relevance for the workplace.
- Governments, WorkCover authorities and the ASCC, in consultation with industry, should develop industry and occupation-specific guidance material where appropriate, to assist employers and employees build a culture of mutual responsibility.
- Industry should establish co-operative mechanisms in the workplace through policies and work procedures, workplace agreements and management initiatives, including:
 - education and induction of employees to raise awareness of their role, contribution to OHS and duties in the workplace;
 - consultation and participation in workplace changes which may impact on health and safety;
 - cooperation, open and active communication;
 - high quality workplace relations – characterised by mutual respect for employer and employee interests; and
 - mechanisms to deal with injuries, issues arising out of risk assessments and OHS breaches by employers, employees or other parties in the work environment.

REGULATION REFORM 5: INDEPENDENCE

A LEGISLATIVE FRAMEWORK WHICH DOES NOT ENCOURAGE THE USE OF OHS FOR POLITICAL OR INDUSTRIAL RELATIONS AGENDAS

Policy Direction

OHS regulation must be based on the merits and importance of OHS in its own right. It should not be used or misused to further political or industrial relations agendas of governments, industry or trade unions.

OHS is a workplace issue. If it is diluted or influenced by external factors, such as political and industrial agendas, then its importance is diminished.

The use of economic, political or industrial pressure or coercion to achieve changes to wages or employment conditions unrelated to OHS, but using OHS as a guise for achieving such objectives, is contrary to the public interest and the proper management of OHS issues.

What Needs to be Done?

- OHS needs to reflect a co-operative workplace culture, not an adversarial industrial culture.
- OHS should not be used as an industrial or political weapon to achieve extraneous agendas.
- All stakeholders should recognise that exploitation of health and safety issues for non-OHS purposes damages genuine commitment to improving safety and health.
- Matters which are more appropriately the province of public health or which arise beyond the work environment should not be construed as safety issues for which the employer has sole responsibility. Industrial matters where changes are sought to job security, manning levels, hours of work and supervision should not be pursued under cover of the OHS system.
- National OHS policy should be developed in a genuinely tripartite manner.
- Workplace OHS policy and practice should be developed and implemented in a cooperative culture of working together with mutual responsibility.
- Persons entering a workplace for the purpose of OHS inspections or dealing with an OHS complaint need to be appropriately authorised with current entry permits issued under the relevant legal framework, act in a manner that is responsible, reasonable, safe and conducive to good workplace relationships, identify a genuine OHS purpose or purposes for which entry is sought, not interfere with the safe performance of work and not use OHS entry to pursue non OHS objectives.
- Jurisdictions should take an impartial and objective stance in prosecutions, in identifying

- injury and illness hazards and in targeting areas of risk.
- OHS inspectors and those recommending or exercising compliance and prosecutorial authority should be independent and without conflicts of interest.
- Matters which are within the jurisdiction of industrial tribunals should generally not come within the province of OHS regulators (and vice versa).
- OHS should not be used as means of cost-shifting community and public health issues into the workplace.
- Commitment by governments, regulators, employers, employees and their representatives (industry bodies and trade unions), should work cooperatively to achieve high quality OHS outcomes on their merits and in a non adversarial manner.
- Employers and employees should be jointly responsible for identifying relevant hazards/risks.
- Employers and employees should work together to develop, implement and monitor their own OHS arrangements.
- Governments and regulators should ensure that inspectorates operate independently of industrial or political interference, and that officers are appropriately qualified and experienced to deal with employers and employees in a meaningful and constructive manner.
- Governments and policy makers should resist calls for trade union officials, or other parties with industrial agendas, having an inspectorate, quasi inspectorate or prosecutorial role over OHS issues or workplace investigation and inspection.
- ACCI, its member employer bodies and industry generally, should establish processes and make submissions which see OHS issues assessed on their merits and divorced from the adversarialism inherent in the system of conciliation and arbitration of claims for changes to wages and employment conditions through industrial tribunals.
- ACCI, its member bodies and industry generally, should highlight to the relevant parties (including employees) and where appropriate in the public arena, where OHS issues are being misused to pursue political or industrial agendas.

REGULATION REFORM 6: CONSISTENT NATIONAL PRINCIPLES

A NATIONALLY CONSISTENT REGULATORY FRAMEWORK

Policy Direction

OHS regulation, particularly on key areas where national standards are set or in core concepts, should be nationally consistent.

This reflects the longstanding ACCI policy objective supporting a nationally consistent OHS regulatory regime capable of assisting employers to improve their safety systems and performance and at the same time being simple to understand, practical and economically responsible for businesses of all sizes and levels of resources.

What Needs to be Done?

- Nationally consistent standards, codes of practice and guidelines on those core issues that lend themselves to common national outcomes should be developed in close consultation with industry.
- Nationally consistent packages of standards, codes of practice, guidance materials and regulations should be developed against the following principles:
 - scientific evidence, including appropriate, sound, measured statistical data;
 - an industry impact assessment;
 - reasonable and practical standards designed to deal with identified and foreseeable hazards;
 - standards developed by a tri-partite body (such as the ASCC) comprising senior representatives of the main organisations representing employers, employees and government, being ACCI, the ACTU and the jurisdictions;
 - where existing standards meet these criteria they should be adopted without re-inventing the wheel;
 - core national standards and codes adopted and implemented consistently or uniformly across Australia by the jurisdictions;
 - an employee's role in understanding and working to a standard, code or procedure should be reflected in the drafting and to include clear enforceable employee statutory duties; and
 - objectively-based and focused on OHS outcomes devoid of subsidiary industrial or political agendas.
- They should be written in plain English and have a focus on 'what to do' and 'how to do it' at the workplace level. Nationally consistent material should be easy to understand, presented in brief form, be industry and workplace focused and be readily accessible

and available to employers, employees and their workplace representatives.

- The core national standards that have already been agreed through a national tri-partite process should be implemented on a nationally consistent basis, subject only to reviewing and assessing their continuing applicability.
- The ultimate forum for managing and developing national consistency should be a tripartite, evidence-based, consensus-driven body at the national level. Standards should not be developed unless an evidence-based case exists for their development and should be preceded by a commitment by the jurisdictions (reflected through the WRMC) to their development.
- New standards should not be adopted without a Regulatory Impact Statement (including employment impact).
- There should be a reduction of compliance costs for industry through nationally consistent materials resulting in less volume, less complexity, less uncertainty and more resources to devote to prevention activities.
- The development of a nationally consistent regulatory framework based on nationally consistent standards packages should be implemented and adopted by the Australian jurisdictions through nationally adopted certification systems and national standards, codes of practice and/or guidance materials to assist employers in understanding and complying with their industry-specific needs and obligations.
- National standards, where developed, should include (as appropriate):
 - The National Standard
 - * performance based framework
 - Model Regulation
 - * reflecting the National Standard
 - * designed to be adopted as regulations by the jurisdictions
 - * written and presented in an agreed standard model regulation format
 - Code of Practice
 - * generic
 - * written to clarify and explain the regulations in simple easy to read plain English
 - Meaningful Guidance Materials
 - * workplace based
 - * industry/hazard/risk specific
 - * focused on what to do and how to do it
 - * brief, simple, easy to read and understand
 - * easily accessible either in hard copy or electronically
- Employers, employees and jurisdictions should agree to work together to develop and adopt national standards packages.
- There needs to be a focus on reducing the regulatory burden on industry and achieving a culture of cooperation rather than an unworkable legal standard of an absolute duty of care.

- Once adopted by the appropriate national tri-partite body, the Workplace Relations Ministers Council (WRMC) should:
 - endorse the national standard;
 - monitor its implementation;
 - refer to the national body any matters the WRMC wants investigated; and
 - refer back to the national body for further investigation any elements of the proposed standard with which the WRMC does not agree.
- The development of industry-specific guidance materials should be undertaken by the jurisdictions on a shared basis facilitated by the tri-partite bodies and developed in close consultation with, and agreed by, industry.
- The nationally consistent regulatory framework should also include mechanisms to incorporate international moves towards global harmonisation where global developments are in the best interests of Australian employers (such as current issues in the chemical industry).
- The development of simple, brief, industry-focused guidance materials should be undertaken by the jurisdictions on a shared basis facilitated by the national body and developed in consultation with industry.
- The *National OHS Strategy* provides the opportunity for the jurisdictions, working together and through national tri-partite structures, to co-ordinate national OHS resources leading to improved national consistency and improved national OHS performance.
- Effective evaluation methodologies should be adopted to assess the practical and economic effects of the national instruments in the workplace.
- The first step towards achieving these objectives has been the approval by WRMC of protocols for developing/adopting new, or revising current standards which includes:
 - approval by WRMC for the tri-partite body to develop new, or to review current, national standards;
 - submitting new or revised standards together with an implementation plan and an agreed timeframe to WRMC for endorsement/approval;
 - the tri-partite body facilitating and coordinating the development and implementation of the national standards and providing an annual report to WRMC on the adoption of the national standards by jurisdictions; and
 - WRMC to review the annual reports as an implementation monitoring process.
- The annual reporting of implementation to the tri-partite body and to WRMC must be open and the jurisdictions held to account for adoption within an agreed time frame.

PART 4

CONCLUSION: RISING TO THE CHALLENGE OF OHS REFORM

This Blueprint sets out the principles underpinning the main features of ACCI's model for improving the Australian OHS regulatory systems and a framework to assist employers and employees make a difference to workplace safety outcomes.

The reform of the OHS system in Australia is a long term policy objective and there are many challenges to be addressed in developing and implementing this *Modern Workplace: Safer Workplace* Blueprint over the next decade.

There are many barriers and challenges to the implementation of OHS reform including:

- the regulatory structure in which Australia has nine separate regulatory authorities for OHS and workers' compensation;
- lack of priority given to OHS issues in their own right and generally inadequate resourcing of such issues by stakeholders;
- an historically reactive approach by industry, and the need to be more proactive on OHS issues in an era of performance-based regulation;
- the need for prevention strategies for new employees, apprentices and those on work experience;
- poor quality regulation and over-regulation, including constant government reviews of OHS legislation and the need for employer consultation process to allow response time and proper allocation of resources;
- lack of adequate data on the level of investment by Australian industry in OHS and on the cost of occupational injury and disease, as the basis for underpinning the business case for OHS resourcing;
- inappropriate approaches to compliance and penalties and a failure to put prevention above enforcement as a policy priority;
- a 'tick the box' OHS compliance mentality by governments and industry;
- undermining of the 'reasonable duty of care' concept;
- need for greater integration of OHS policy with upstream inputs including design and manufacture of plant, equipment and facilities;
- lack of public profile of OHS issues and failure by regulators to nationally co-ordinate on public relations activities;
- lack of evaluation of the value of current and past programs and interventions such as national standards and codes;

- increasing removal of the rights of managers to manage businesses and thereby meet their obligations to control OHS behaviour and practices in the workplace; and
- lack of resources and lack of knowledge and assistance to small to medium sized businesses, especially in a period of constant OHS change to rights and obligations.

This Blueprint will need to be expanded with new, fresh and updated material as it is implemented.

The commitment of Australian industry to better OHS outcomes and systems can and should be joined by a renewed commitment by all stakeholders based on the underlying proposition of this Blueprint – that modern workplaces must be safer workplaces and that this can only be achieved through an ongoing program of cultural change, awareness and regulatory reform.

In an area as important as workplace OHS, regulatory systems must be wholly directed at helping employers and employees to improve safety outcomes. They must be regularly reviewed and updated – and necessary but not excessive changes made.

Change should be planned and not made just for the sake of change.

Commitment by industry, governments, regulators, courts, policy makers and other stakeholders (including trade unions, employee representatives and health and safety committees) to the principles for regulatory reform set out in this Blueprint will complement their broader commitments to workplace safety.

ACCI, its member employer bodies and industry generally, will need over the period 2005-2015 to raise awareness of the need for legislative changes to reflect the principles appropriate for an OHS regulatory framework. Industry will need to make out the case for regulatory reform that this Blueprint outlines.

APPENDIX A

ACCI OHS POLICY

ACCI WORKERS' COMPENSATION POLICY



AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Occupational Health and Safety Policy

Principles of OHS Policy

ACCI is committed to the achievement of an Occupational Health and Safety (OHS) outcome for Australian workplaces where every person in the workplace has a safer place of work and a safer method of working.

Policy Objectives

ACCI's overarching policy objectives are:

- to achieve improved workplace OHS performance;
- to achieve a nationally consistent OHS regime.

Specific policy objectives include:

- implementation of effective OHS management;
- implementation of effective OHS training programs through members;
- the promotion of OHS to small businesses;
- the adoption of performance based legislation in all jurisdictions;
- limiting the development and adoption of new national standards;
- effective implementation of the recognised priority national standards.

Strategies to Achieve Policy Objectives

In order to achieve these objectives, ACCI will continue to pursue a number of specific strategies which include:

- raising awareness amongst employers of the importance of improved OHS;
- increasing the capacity of employers to achieve improved OHS performance;
- implementation of ACCI's policies by the National OHS Commission;
- circulation of publications and general information to promote a nationally consistent OHS regime;
- further development and implementation of the ACCI Small Business Strategy;
- influencing policy makers in state and territory jurisdictions to implement the recognised priority National Standards in OHS.

The Policy Framework

Management

Effective OHS management should be an integral element of the role and responsibilities of all workplace managers. OHS management must be viewed with at least the same importance as production, efficiency and cost control. OHS is the responsibility of all persons at the workplace. A proactive approach to safety management is essential if industry is to achieve best practice. Safety must be considered a corporate aim.

A management plan is essential and should incorporate the following:

- the establishment of a health and safety policy that clearly defines roles and responsibilities of workplace parties;
- a joint approach that involves all employees at the workplace;
- the provision of appropriate information and training;
- risk minimisation including the identification, assessment and control of hazards
- ongoing monitoring, evaluation and review.

Training and Education

Training and education initiatives play a vital role in ensuring that everyone in the workplace is equipped with the necessary OHS knowledge and skills. The attitudes and behaviour of workplace parties will be influenced by information and training that is directly relevant to them and which deals with the environment they operate in. Information and training programs should therefore be tailored to the needs of the enterprise.

Every opportunity should be taken to ensure that an awareness of OHS issues is incorporated into appropriate vocational education and training programs.

The effectiveness and impact of training and information which is provided should be evaluated for its ability to bring about workplace change and improved OHS performance.

Wherever practicable, training initiatives should involve both management and employees to ensure consistency of approach. The workplace parties should be provided with consistent messages to implement systems for OHS management and to constructively resolve problems as they are encountered.

Reporting Systems

Workplaces must have access to OHS reporting systems that provide timely and relevant data on their own performance and enable them to benchmark their performance against comparable workplaces. Governments at State and Federal levels should ensure that there are consistent reporting systems and performance standards to enable effective benchmarking in enterprises and across industries.

Traditional measures of OHS performance such as lost time injury rates are no longer considered sufficient or appropriate for a large part of industry as they are often not responsive enough to assist in the evaluation of preventive approaches. Positive performance indicators should be developed to be used internally by enterprises and for comparisons with other enterprises.

Legislation

Performance based OHS legislation provides a framework for compliance with the general duty of care. The principal focus should be to encourage and support the implementation of healthy and safe work practices, giving scope for enterprises to establish their own approaches.

Successful preventive programs will only be achieved through the full support of all those who can directly influence workplace practices. Only employers and employees working together can put into effect real workplace change. The role of Government agencies is to assist and facilitate change through the provision of guidance and advice developed in consultation with industry.

Enforcement of regulatory requirements by prosecution should not be the primary focus of policy and should only be used as a last resort.

National Consistency

There should be consistency in the regulatory and standards framework throughout Australia, and this should be achieved through appropriate consultation and co-operation.

The States and Territories have responsibility for the implementation of the regulatory and standards regime within their jurisdiction. National approaches should be directed toward encouraging States to achieve consistency between the different jurisdictions.

In this context, there should be co-ordination between the OHS prevention systems and compensation and rehabilitation systems.

Costs/Benefits of Standards Implementation

Standards must be based on a sustainable, and substantially agreed, scientific and technical appraisal of the issues involved.

To facilitate workplace implementation standards must be practical and understandable and free from industrial or political agendas.

It is imperative that in the development of standards full account must be taken of the international environment and of the need for competitiveness in Australian industry. It must be recognised that any new standards which are imposed represent costs to industry. Standards should only be adopted where it is clear that the OHS benefits justify the costs that will be incurred by industry in their implementation.

Responsibilities

The achievement of a safety culture in the workplace requires the commitment and participation of everyone in that workplace. OHS regulation should:

- recognise the obligation on all workplace parties to carry out their work activities in a safe manner
- clearly identify the roles and responsibilities of all workplace parties encourage a consultative and participative approach in the workplace.



AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Workers' Compensation Policy

Principles of Workers' Compensation Policy

ACCI is committed to the achievement of best practice workers' compensation arrangements for the protection and treatment of workers in respect of workplace injury and disease.

Policy objectives

ACCI's overarching policy objective is to achieve nationally consistent workers' compensation schemes with an emphasis on a Total Injury Management Approach.

Specific policy objectives include:

- reform of existing workers' compensation schemes;
- promotion of a nationally consistent benefits structure;
- promotion and encouragement of rehabilitation and early return to work.
- promotion of a positive incentive based premium system, encouraging improved performance

Strategies to Achieve Policy Objectives

In order to achieve these objectives, ACCI will continue to pursue a number of specific strategies, which include:

- circulation of publications and general information which supports ACCI's proposed reforms to Workers' Compensation schemes;
- influencing policy makers towards the adoption of a nationally consistent workers' compensation model.
- support employers in developing an appropriate Total Injury Management approach

The Policy Framework

ACCI believes there is considerable scope to further reduce the human and economic loss that arises from injury and disease at work. The total cost of work related injury and disease is borne by workers, employers and the community at large.

The member organisations of ACCI are committed to workers' compensation environment, which seeks to reduce the incidence and cost of workplace injury and illness.

Workers' compensation and complementary arrangements can play a vital role in improving workplace health and safety. They can encourage prevention of work related injury and disease, compensate for

such disabilities when they occur and make provision for rehabilitation and early return to work as a normal expectation.

One of the key objectives of any workers' compensation system must be to create an incentive for injured employees to return to work, with adequate compensation while undergoing rehabilitation.

A workers' compensation scheme must be fully self funding with experience rated premiums and incentives to prevent injuries and rehabilitate injured workers.

In order not to become expensive, inefficient and subject to abuse, a workers' compensation system must incorporate the following features within a Total Injury Management approach:

- injury prevention, with a view to minimising work related injuries;
- rehabilitation, with a view to ensuring early return to work by injured or ill workers;
- employee responsibility to co-operate with their employers in injury prevention and return to work; and
- the identification and recognition of costs which should properly be borne by the general community rather than only employers.

In pursuing these fundamental principles and objectives, ACCI believes that the following elements must be contained in every workers' compensation scheme.

Employer Responsibility

In order that workers are adequately protected, all workers' compensation schemes must operate on a "no-fault" basis.

For the "no fault" principle to work effectively however, it must be shown that the injury or illness truly arose out of or in the course of employment, or that employment played a major or significant part in the development of the injury or disease.

Common law has no place in a "no-fault" workers' compensation system. Common law is based on an adversarial system, which inhibits the rehabilitation process and the normal expectation of a return to work by encouraging both parties to become entrenched in their adversarial roles in order to achieve maximum gain. However, if common law is to be retained it must be restricted to those seriously injured, leading to severe disability or death and balanced against the total benefits provided to injured workers under the scheme.

Injuries sustained by workers while traveling to and from work should not be included in any workers' compensation scheme. Such injuries or illnesses cannot properly be said to have a direct causal connection with work to qualify them as work related injuries.

Benefits Structure

All workers' compensation systems must have a benefits structure that provides adequate compensation for injured workers but which at the same time encourages them to remain at or return to work. Weekly

benefits to injured workers should be based on the worker's pre-injury ordinary time earnings, excluding over-time. At all stages, a worker's entitlements to weekly benefits must be determined by having regard to the worker's level of incapacity. Weekly benefits should be capped at a level which is affordable by the scheme.

Only workers who have a permanent total or partial impairment or loss of use of any part of the body should be entitled to a lump sum payment under the table of maims. Such payments must take into account the worker's pain and suffering as a result of the injury.

Premiums

Premiums should be based on claims experience so as to provide an incentive to employers to prevent workplace injuries. In addition, this will reduce cross-subsidisation and provide a framework within which all employers pay their true-risk premium. Claims costs relating to a particular claim must only be included in an employer's premium calculations for a defined period of time. Containment of premiums at an affordable and stable level is vital to the continuing viability of business generally. Incentives that encourage rehabilitation assist in these aims.

Given the difficulties associated with applying fully experience rated premium systems to small businesses, it is important that all workers' compensation schemes contain additional incentives, which will encourage accident prevention in small businesses. These incentives need not be included in the premium system. Given that the majority of Australian businesses are small to medium-sized businesses, all workers' compensation schemes need to address the special needs of small businesses as a priority.

Rehabilitation and Return to Work

Rehabilitation and return to work should be the cornerstone of all workers' compensation systems.

All workers' compensation schemes should incorporate a Total Injury Management System and seek to achieve a return to work culture by encouraging both employers and employees to actively participate in rehabilitation programs for their workplaces.

This can be done by:

- encouraging employers to provide, as far as practicable, suitable duties for an injured worker for an appropriate period of time, but at the same time recognising the difficulties faced by small and medium sized businesses in meeting this objective;
- encouraging employers to establish rehabilitation programs for their workplaces and implement return to work plans for injured workers;
- encouraging workplace-based rehabilitation and early referral;
- linking an injured worker's entitlement to ongoing weekly benefits to their participation in rehabilitation, including return to work;
- encouraging the re-training of injured workers to enable them to return to their pre injury employment or other employment
- emphasising the benefits of early return to work and resultant lower premiums.

Insurance Regulation

Wherever possible, private insurers should have the right to participate in every workers' compensation scheme irrespective of whether it is a fully privatised scheme or a government monopoly. As much as possible the requirements governing the operation of private insurers should be consistent across all states. Competition amongst insurers should be encouraged as this will result in improvements in the quality of service being provided and ultimately result in lower workers' compensation premiums.

All workers' compensation schemes should provide for self insurance of suitably credentialled employers. The requirements for self insurance should as much as possible be consistent across all jurisdictions.

National Consistency

ACCI is committed to the achievement of nationally consistent workers' compensation schemes. In order to ensure equity and fairness, it is important that all workers' compensation schemes are consistent in their approach. There should be co-operation between jurisdictions in order to identify those elements that should as far as possible be consistent across all schemes.

However the pursuit of consistency should, in order to achieve the best outcomes, involve consultation with all relevant parties.

In particular consistency should be sought in the following areas:

- Access and entitlement - the definition of key terms such as "injury", "worker" and "independent contractor". These must be clear and take into account changes in the labour market, especially the increased contracting out of services.
- Premiums - formulae for the calculation of premiums, especially integration to matters such as the definition of remuneration and experience rating. The double payment of premium by employers who operate in more than one state/territory must be avoided.
- Benefits - definitions and classification of the various levels and periods of incapacity, the calculation of weekly payments, access to common law and lump sum payments.
- Insurance Regulation - the licensing, monitoring and auditing of insurers, self insurers, and other providers, self insurance arrangements or requirements and workers' compensation reporting and statistics requirements.
- Rehabilitation - employers' and employees' obligations on rehabilitation and return to work and accreditation and monitoring of occupational rehabilitation providers.
- Dispute Resolution - the use of cost-effective alternative dispute resolution mechanisms is critical to the maintenance of an affordable workers' compensation system; legal costs should be kept to a minimum.

APPENDIX B

EMPLOYER AND BUSINESS ORGANISATIONS IN THE ACCI NETWORK

Chambers of Commerce and Industry

ACT and Region Chamber of Commerce and Industry

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

Australian Business Limited

140 Arthur Street
NORTH SYDNEY NSW 2060
Telephone: 02 9927 7500
Facsimile: 02 9923 1166
Email: member.services@australianbusiness.com.au
Website: www.australianbusiness.com.au

Business SA

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

Chamber of Commerce and Industry of Western Australia (Inc)

180 Hay Street
EAST PERTH WA 6004
Telephone: 08 9365 7555
Facsimile: 08 9365 7550
Email: info@cciwa.com
Website: www.cciwa.com

Chamber of Commerce Northern Territory

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

Commerce Queensland

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

Employers First™

313 Sussex Street
SYDNEY NSW 2000
Telephone: 02 9264 2000
Facsimile: 02 9261 1968
Email: empfirst@employersfirst.org.au
Website: www.employersfirst.org.au

State Chamber of Commerce (NSW)

Level 12, 83 Clarence Street
SYDNEY NSW 2000
Telephone: 1800 137 153
Facsimile: 02 9350 8199
Email: enquiries@thechamber.com.au
Website: www.thechamber.com.au

Tasmanian Chamber of Commerce and Industry Ltd

30 Burnett Street
HOBART TAS 7000
Telephone: 03 6236 3600
Facsimile: 03 6231 1278
Email: admin@tcci.com.au
Website: www.tcci.com.au

Victorian Employers' Chamber of Commerce and Industry

486 Albert Street
EAST MELBOURNE VIC 3002
Telephone: 03 8662 5333
Facsimile: 03 8662 5462
Email: vecci@vecci.org.au
Website: www.vecci.org.au

National Industry Associations

Agribusiness Employers' Federation

6th Floor, 41 Currie Street
ADELAIDE SA 5000
Telephone: 08 8212 0585
Facsimile: 08 8212 0311
Email: christopher.platt@aef.net.au
Website: www.aef.net.au

ACCORD

Dalgety Square
Suite C7, 326-428 Wattle Street
ULTIMO NSW 2007
Telephone: 02 9281 2322
Facsimile: 02 9281 0366
Email: bcapanna@acspa.asn.au
Website: www.acspa.asn.au

Association of Consulting Engineers Australia (The)

75 Miller Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 4711
Facsimile: 02 9957 2484
Email: acea@acea.com.au
Website: www.acea.com.au

Australian Beverages Council Ltd

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

Australian Entertainment Industry Association

Level 1
15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
Facsimile: 03 9614 1166
Email: aeia@aeia.org.au
Website: www.aeia.org.au

Australian Hotels Association

24 Brisbane Avenue
BARTON ACT 2600
Telephone: 02 6273 4007
Facsimile: 02 6273 4011
Email: reception@aha.org.au
Website: www.aha.org.au

Australian International Airlines Operations Group

c/- QANTAS Airways Qantas Centre
QCA4 203 Coward Street
MASCOT NSW 2020
Telephone: 02 9691 3636

Australian Made Campaign Limited

486 Albert Street
EAST MELBOURNE VIC 3002
Telephone: 03 8662 5390
Facsimile: 03 8662 5201
Email: ausmade@australianmade.com.au
Website: www.australianmade.com.au

Australian Mines and Metals Association

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

Australian Paint Manufacturers' Federation Inc

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

Australian Retailers' Association

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

Housing Industry Association

79 Constitution Avenue
CANBERRA ACT 2612
Telephone: 02 6249 6366
Facsimile: 02 6257 5658
Email: enquiry@hia.asn.au
Website: www.buildingonline.com.au

Insurance Council of Australia

Level 3, 56 Pitt Street
SYDNEY NSW 2000
Telephone: 02 9253 5100
Facsimile: 02 9253 5111
Email: ica@ica.com.au
Website: www.ica.com.au

Investment & Financial Services Association

Level 24, 44 Market Street
SYDNEY NSW 2000
Telephone: 02 9299 3022
Facsimile: 02 9299 3198
Email: ifsa@ifsa.com.au
Website: www.ifsa.com.au

Master Builders Australia Inc.

16 Bentham Street
YARRALUMLA ACT 2600
Telephone: 02 6202 8888
Facsimile: 02 6202 8877
Email: enquiries@masterbuilders.com.au
Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia (The)

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Email: info@mpmsaa.org.au
Website: www.plumber.com.au

National Electrical and Communications Association

Level 3, 100 Dorcas Street
SOUTH MELBOURNE VIC 3205
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Facsimile: 03 9645 5577
Email: necanat@neca.asn.au
Website: www.neca.asn.au

National Retail Association Ltd

395 St Pauls Terrace
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Email: info@nationalretailassociation.com.au
Website: www.nationalretailassociation.com.au

NSW Farmers Industrial Association

Level 10, 255 Elizabeth Street
SYDNEY NSW 2000
Telephone: 02 8251 1700
Facsimile: 02 8251 1750
Email: emailus@nswfarmers.org.au
Website: www.iressentials.com.au

Oil Industry Industrial Association

c/- Shell Australia
8 Redfern Road
HAWTHORN VIC 3122
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia

Level 2, 15 National Circuit
BARTON ACT 2600
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Facsimile: 02 6270 1800
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Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc

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Website: www.pacia.org.au

Printing Industries Association of Australia

25 South Parade
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Website: www.printnet.com.au

Restaurant & Catering Australia

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Standards Australia International

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**Victorian Automobile Chamber of
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