

# Harmonisation of OHS Regulation in Australia: An evaluation of three initiatives

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## INTRODUCTION

Recently released research reports into the construction industry in Australia argued that improved consistency in the regulatory environment could lead to improvements in innovation (Manley 2004; Price Waterhouse Coopers 2002), improved productivity (Productivity Commission 2004) and that, research into this area should be given high priority (Hampson and Brandon 2004). Productivity gains from an improved regulatory system have been estimated in the hundreds of millions of dollars (ABCB 2003).

The Cole Royal Commission (2003) highlighted occupational health and safety (OHS) in the construction industry as an area needing concerted effort to improve the conditions of workers, and the need to develop a national regulatory framework. Despite numerous industry submissions advocating a national OHS system, Cole (2003) concluded there was little prospect of the development of a national framework, apart from through the development and adoption of national OHS standards.

We argue that there are several harmonisation mechanisms that have been overlooked as a possible framework for understanding and operationalising a systematic approach to OHS. Harmonisation is concerned with coordination of regulation between jurisdictions that does not necessarily require ‘sameness’ across a national arena (Majone 1999). Consistency, especially on a national scale, has been the favoured approach (Cole 2003); however, there have been variable degrees of success in achieving a nationally consistent model and indeed significant barriers to pursuing this option.

Three initiatives to improve the harmonisation of OHS regulations across Australia are reviewed in this paper. The first is the *Occupational Health and Safety Act 1991* (Commonwealth) which enabled certain organisations to opt out of state-based regulatory regimes. The second is the standards, codes of practice and guidance documents developed by the National Occupational Health and Safety Council (NOHSC). The third is the attachment of conditions to special purpose payments from the Australian Government to the states, in the form of OHS accreditation with the Office of the Federal Safety Commissioner.

This paper examines and evaluates each of these attempts to promote consistency across Australia. It concludes that while there is a high level of information sharing between jurisdictions, particularly from the NOSCH standards, a fragmented OHS policy framework remains in place across Australia. The utility of emergent industry initiatives such as the Best Practice Guideline to enhance consistency are briefly discussed. Firstly, however, a broader discussion about achieving consistency in federal systems of government is undertaken to frame and evaluate the outlined initiatives.

## FEDERAL SYSTEMS OF GOVERNMENT

Under a federal system, powers are divided between a central government and regional governments. In Australia, power was divided between the Commonwealth Government<sup>18</sup> and the governments of the six colonies, which were renamed ‘states’ by the Constitution. Specific areas of legislative power (‘heads of power’) were given to the Commonwealth Government and the states (Australian Government 2005).

Despite this there has been considerable tension between the various spheres of government, as the wording of the Constitution has often created situations where the Commonwealth and the states both claim the authority to make laws over the same matter (Australian Government 2005). As OHS is historically viewed as the responsibility of the states (Cole 2003), achieving consistency across all of the states and territories of Australia can prove challenging. Indeed, there are limited options for improving consistency in OHS regulations, and these are outlined in the next section.

## ACHIEVING REGULATORY CONSISTENCY IN FEDERAL SYSTEMS OF GOVERNMENT

Mechanisms to improve regulatory consistency in a federated system of government have been identified from the literature, and they are summarised in Table 20.1. The mechanisms, which we have termed options, are listed from most coordinated to least coordinated.

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<sup>18</sup> The terms ‘Commonwealth Government’ and ‘Australian Government’ mean the same thing. Both terms are used in this chapter to match the reference material, or to reflect the contemporary use in a historical context.

**Table 20.1 Mechanisms for Harmonising Regulations in Federal Systems of Government**

<b>least coordinated</b>	<i>Option 1:</i> Unilateral exercise of power by the Commonwealth	Creating uniformity in regulation in Australia by the Commonwealth legislating in such a way as to override all similar state and territory regulations. For such an approach to work, legitimate authority in the constitution, termed a 'head of power', needs to be determined. As the Commonwealth lacks head of power for OHS this option is difficult to enact, although the Commonwealth can attach conditions to funding to the states.
	<i>Option 2:</i> Reference of power to the Commonwealth	The states can elect to refer a state power to the Commonwealth under the Constitution. If a 'matter' is referred to the Commonwealth by a state, the Commonwealth is then able to legislate. The Commonwealth government attempted this recently when it requested that the states refer workplace relations powers to the Commonwealth. This attempt failed when the 'states advised that they will not refer their [industrial relations] powers' (COAG Communiqué 2005) to the Commonwealth. Cole (2003) suggested this was also unlikely to occur for OHS regulation.
	<i>Option 3:</i> Incorporation by reference	The incorporation by reference application is where the various parliaments adopt the legislation of a single jurisdiction as amended from time to time in accordance with an intergovernmental agreement (Saunders 1994, p. 8). The advantage of this form of coordination is that there is need to only change a single piece of legislation, rather than several pieces of legislation although it requires extensive consultation. The <i>Building Code of Australia</i> could be considered an example of this. This option was endorsed by Cole (2003) as the most viable for the construction industry.
<b>moderately coordinated</b>	<i>Option 4:</i> Complementary or mirror legislation	This option requires that the Commonwealth and states work together to achieve legislative coverage of a particular policy area, particularly where there are dual, overlapping and or uncertain division of constitutional powers. In these instances, each jurisdiction enacts laws to the extent of its constitutional capacity and the matter is addressed by the participation of all of the legislatures of the federation. 'The Commonwealth and all participating states would pass separate, but totally consistent (although not necessarily identical) pieces of legislation' (Allen Consulting Group 2002, 40). An intergovernmental agreement is normally required to set out the terms and conditions of the arrangement.
	<i>Option 5:</i> Mutual recognition	Under mutual recognition, the rules and regulations of other jurisdictions are recognised. Mutual recognition enables goods or services to be traded across jurisdictions, and means that if the goods or services comply with the legislation in their own jurisdiction, and then are deemed to comply with the requirements of the second jurisdiction, pathways for achieving compliance are clearly established. Mutual recognition is a one of the vehicles governments can utilise to reduce the regulatory impediments to goods and services mobility across jurisdictions (Productivity Commission 2003).
	<i>Option 6:</i> Agreed legislation or policies	This mechanism is where governments in question agree to implement similar legislation or policies, which are then implemented by local legislation.
<b>most coordinated</b>	<i>Option 7:</i> Adoptive recognition	A jurisdiction recognises that the decisions of another jurisdiction meet the requirements of its own legislation regardless of whether this recognition is mutual.
	<i>Option 8:</i> Non-binding national standards model	A national authority makes decisions which are adopted to various extents by the respective state or territory ministers.
	<i>Option 9:</i> Exchange of information	Such an exchange can take many forms, including where meetings between ministers and/or public servants regularly occur to exchange information; or where best practice guidelines or demonstration projects are published with the intention that they will be adopted by other jurisdictions.
	<i>Option 10:</i> Independent unilateralism	Under this option each jurisdiction goes its own way – so there is no coordination at all between governments. Unlike option 1, this option means that the states and the Commonwealth all act in an uncoordinated way and pursue disparate policy objectives.

Adapted from Allen Consulting Group (2002), Farina (2004), and Opeskin (2001)

The set of mechanisms in Table 20.1 is advanced in this paper as a means to evaluate attempts to improve the consistency of OHS regulation in Australia. As will be demonstrated below, such a framework for analysis becomes very useful in examining specific attempts to harmonise regulation.

## **ATTEMPTS TO HARMONISE OHS REGULATION IN AUSTRALIA**

Three attempts to harmonise OHS regulation are examined below. The first is the Comcare scheme which focused on providing an arena for a national system of workplace health and safety insurance schemes. The second is the national approach to establishing standards, codes of practice and guidance documents through the National Occupational Health and Safety Council (NOHSC), now called the Australian Safety and Compensation Council. The third relates to conditions attached to Australian Government payments to the states, which require firms to be accredited with the Office of the Federal Safety Commissioner. In each example the framework detailed in Table 20.1 will be used to evaluate the effectiveness of the initiative.

### **Comcare insurance scheme: Opting out of state-based systems**

Due to the lack of harmony among the states, territories and the Commonwealth regarding workers' compensation schemes and OHS regulatory regimes, the Productivity Commission conducted an inquiry to assess possible models for *National Workers' Compensation and Occupational Health and Safety Frameworks* (Australian Government 2004a).

The report concluded that there are significant benefits to be obtained from a national approach (Australian Government 2004a, 23). They recommended that the Commonwealth 'amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to elect to be covered by the Australian Government's occupational health and safety legislation' (Australian Government 2004a, 103).

### **Comcare initiation and challenge**

While Coalition senators held that this initiative would promote competition for state OHS regimes and workers' compensation schemes and could lead to rigorous application of OHS principles and practices (Senate Committee 2006, 6-7), opposition senators argued that the standards enforced by Comcare are not as stringent as those which operate under state jurisdictions, thereby potentially lowering the standard of OHS for some corporations (Senate Committee 2006, 10). The Commonwealth Government accepted and implemented the scheme which was called Comcare (Australian Government 2004b, 9).

A High Court challenge to the Comcare scheme was instigated by four states. The High Court found the licensing provisions of the Commonwealth were valid, and Victorian-based Optus, which was the first company accredited, is no longer under obligation to comply with the requirements of compulsory WorkCover insurance under the Victorian scheme (High Court of Australia 2007).

While the Commonwealth and eligible employers may be satisfied with the amendments to the SRC Act and the High Court ruling, it appears as though the states and territories may not be so content, particularly as four states mounted a court case to challenge it. In regard to firms transitioning to the federal level, the Productivity Commission Report noted that, 'Some of the smaller (OHS) schemes may ultimately become unviable on a stand-alone basis if a significant number of employers move to a national scheme' (Australian Government 2004a, 134).

### **The current status of Comcare licences**

The High Court ruling may encourage other multi-jurisdictional, private employers to consider opting-out of state and territory workers' compensation schemes. There appear to be both administrative and financial advantages for eligible employers to move to the Comcare scheme. For example, Optus told the High Court that it expected to save \$186,000 per month, or over \$2m per year, on premiums by moving from Victoria's WorkCover scheme and into the Comcare scheme (High Court of Australia 2007). The key advantage of the Comcare scheme is the reduction in the amount of time and resources used in attempting to ensure compliance with separate requirements of each state and territory in which they operate.

While limited uptake of Comcare licenses has occurred to date, opting-out of state and territory workers' compensation schemes may increase, particularly now the High Court case has been resolved.

### **Summary: Effectiveness of Comcare self-insurance scheme**

Take-up of the scheme is quite low in the construction industry, with only one major company (John Holland) making application under the scheme. Large construction firms may have waited until the High Court case was resolved until applying to participate in the scheme. Consequently, there has been very little uptake afforded by this legislation to date in the construction industry. Nevertheless, there is potential here for this to occur, particularly now that the court case has been completed.

Using the harmonisation methods outlined in Table 20.1, the Comcare initiative could be seen as independent unilateralism (See Figure 20.1) as this initiative was implemented to provide an alternative to state regulation. While it was set up to overcome workers' compensation differences, the states right to legislate in this area has not been amended.

**Figure 20.1 Comcare as a Mechanism for Harmonisation**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
Non-Binding National Standards Model
Exchange of Information
<b>Independent Unilateralism</b>

## HARMONISATION THROUGH NATIONAL STANDARDS: NATIONAL OCCUPATIONAL HEALTH AND SAFETY COUNCIL

In 1985 the *National Occupational Health and Safety Commission Act 1985* (NOHSC Act) established the National Occupational Health and Safety Council (NOHSC). When NOHSC was established, two of the top priorities for the Commission were the development of a uniform legislative approach to occupational health and safety and the development of national standards (Parliament of Australia 2005, 12).

In 1991 NOHSC established standards for plant, certification of users and operators of industrial equipment, workplace hazardous substances, occupational noise, manual handling and major hazardous facilities (National Research Centre for OHS Regulation 2005, 12). Unfortunately, the standards were inconsistently adopted into regulation by the states and territories, and some were adopted in the form of codes of practice. By mid-1996, the new Howard government refocused the commission to examine the OH andS needs of small business, with a diminished emphasis on the development of national standards (Parliament of Australia 2005, 14-15). This was, in turn, reversed by the Cole Royal Commission which argued that national standards be developed for the building and construction industry, according to a timetable for completion (Cole 2003, 28).

In 2005, the Australian Safety and Compensation Council (ASCC) succeeded NOHSC. The Minister for Employment and Workplace Relations, Kevin Andrews, stated, 'The ASCC will establish a national approach to workplace safety and workers' compensation which currently does not exist in Australia ... ASCC will be a forum for better national discussion and coordination while respecting states' jurisdictions over workplace safety and workers compensation' (Andrews 2005a). While NOHSC was a statutory authority, the ASCC was only an advisory committee under the executive power of the Commonwealth. This arrangement could provide the Commonwealth Government with more flexibility and less bureaucracy in regard to the ASCC, but on the other hand, means that the ASCC powers and functions are not subject to the scrutiny of the parliamentary process.

### Current status of NOHSC standards as a harmonisation mechanism

The uptake by states and territories of national standards has typically been reported as quite high (ASCC 2006a, 61-63). The authors reviewed the uptake into legislation of NOHSC standards by the states and territories, and takes a different position to this – primarily due to way 'adoption' is defined in this paper.

As noted in Table 20.1 various levels of harmonisation are possible. Ideally, a national standard would be incorporated by reference into legislation (Option 3 in Table 20.1); that is, the standard is adopted by state legislation and thereby becomes law. This is arguably what was intended by the development of the standards in the first instance, as ASCC (2006c) notes:

*The National OHS standards and codes of practice are not legally enforceable unless state and territory governments adopt them as regulation or codes of practice under their principal OHS Acts.*

This is reinforced by various state authorities. For example, Court (2007) recently reminded the ASCC that construction firms 'have obligations under state OHS law, but no obligations under the national standard'. This is because the standard only becomes law if incorporated by reference into the state or territory laws.

However, as Table 20.1 demonstrates, it is possible for states to adopt a national standard at a lower level than by direct incorporation by reference in legislation. Some of these include:

- adoption of the national standard into policy, not regulation, for example as a code of practice – this could mean that the standard is not law, but provides advice on how to comply with the law
- adoption of key elements of the standard into the text of legislation, without reference to the specific standard itself – this would mean that the standard provides information which is incorporated into law
- replacement of key elements of the national standard with state codes or standards, where the standard is not incorporated into legislation, nor referred to in state legislation.

No doubt the policy intent of NOHSC was to establish national standards which would be adopted (incorporated by reference) in legislation. This paper argues that in order for a standard to become law it needs to be specifically referenced in legislation. Clearly there are examples of this occurring with NOHSC standards. However, such an uptake is somewhat patchy, with evidence that adoption has sometimes occurred at a lower level than direct incorporation by reference into legislation itself. (For a full list of the current status of the adoption of NOHSC standards please see Workplace Relations Ministers' Council (2006)). Thus, using the

definitions set out in Table 20.1, we argue that the NOHSC standards are effectively non-binding national standards that have a mixed level of adoption into regulation (Figure 20.2).

**Figure 20.2 Level of Harmonisation for NOHSC Standards**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
<b>Non-Binding National Standards Model</b>
Exchange of Information
Independent Unilateralism

### Current ASCC activity

In 2006, the Council of Australian Governments (COAG) agreed to a new reform agenda, one of which was OHS regulation. The report emphasised the need for the ASCC to reduce the time taken in developing national OHS standards, to consult with states and territories to ensure agreement on nationally consistent arrangements, and to create specific timeframes for implementation with each jurisdiction (COAG 2006, 40).

In April 2006, the Australian Government Productivity Commission report, *Rethinking Regulation* was released. The report highlighted the significance of OH andS regulation because it affects every workplace in Australia and it identified the lack of a coherent national approach to OHS (Australian Government 2006, 36-37).

In response to the two reports, the ASCC developed recommended strategies for implementing reforms to improve the development and uptake of national OHS standards, and to identify priority areas in state and territory OH andS Acts that should be harmonised (ASCC 2006b, 1). COAG endorsed a timetable and agreed that harmonisation of principal OHS Acts was essential to the uptake of national standards (COAG 2007, 4). In other words all states and the Commonwealth, through COAG, are outlining a framework for the establishment and adoption of the national standards which would develop ‘core elements’ of a national OHS framework (ASCC 2007b, 3). It is hoped that the latest initiatives of ASCC will improve the regulatory harmonisation of OHS regulation in Australia; however it remains to be seen what the outcome will actually be.

## **BUILDING AND CONSTRUCTION OCCUPATIONAL HEALTH AND SAFETY SCHEME: USING FUNDING POWERS TO ACHIEVE HARMONISATION**

The *Building and Construction Industry Improvement Act 2005* provided for establishing the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme (the Scheme) that applies to construction work funded by the Australian Government, and operates under the Office of Federal Safety Commission (OFSC). The Scheme was developed to allow the government to use its purchasing power to influence change, and to champion a cooperative approach to improve OHS performance in the industry. By acting as a model client, the government aims to promote safe work, performed on time and on budget (DEWR 2007a).

In order to obtain accreditation under the Scheme, head contractors must meet agreed criteria. For example, they must have appropriate OHS policies, procedures and practices in place, and must agree to audits conducted by the federal safety officers. Additionally, they must comply with reporting requirements and accreditation-related conditions imposed by the Federal Safety Commission.

Initially, Stage 1 of the Scheme applied only to those contracts valued at \$6m or more that were directly funded by the Australian Government. Stage Two of the Scheme lowered the threshold to include head contractors for constructions projects valued at \$3m or more and directly funded by the Australian Government. For indirectly funded work, the Scheme will apply where the value of the Australian Government contribution is at least \$5m and represents at least 50 per cent of the total value of the project; or the Australian Government contribution is \$10m or more, irrespective of the proportion of Australian Government funding (DEWR 2007b). Stage 2 is particularly important to the discussions of this paper, as the requirements apply to projects conducted by state governments, but funded by the Australian Government. A discussion of federal funding arrangements is necessary to understand the changes that have occurred under Stage 2 of the Scheme.

### Federal funding arrangements

State governments have three main sources of revenue – state-based taxes, other forms of state-based revenue (e.g. royalties from mining), and Australian Government funding. Over time, the amount of funding from the Australian government has steadily increased, (Costello 2007, p. 6), particularly after the introduction of the GST, and the Intergovernmental Agreement (IGA 1998). Funding provided by the Australian Government to the states and territories comes in two main forms – special purpose payments (SPP) and general purpose payments (GPP).

SPP are grants provided by the Australian Government to the states, for a particular purpose often with conditions attached (Costello 2007, 5). Major areas of SPP funding appear to be health (including disability), education and roads (Parliament of

Tasmania 2006). State governments have constitutional head of power for public works occurring within their jurisdiction. However, when the Australian Government provides financial grants to the states, it has the right to attach conditions to such grants. Specifically, the Australian Government: ‘may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’ (Australian Constitution, Section 96, published by the Australian Senate 2003). The High Court of Australia in the *Main Roads Case*, which is notable for its brevity, upheld the right of the Australian Government to place conditions on funding provided to the states under this section of the Constitution (High Court 1926). Some states have argued this limits their autonomy from the Commonwealth funding arrangements (Parliament of Tasmania 2006, 187).

GPP are payments provided by the Australian Government to the states and territories, who are permitted to use this money for any purpose (IGA 1998, 110). This is reiterated in state and territory budget papers. For example ‘Unlike SPPs, which must be spent in accordance with purposes agreed to between the Australian Government and the State (or as prescribed by the Australian Government), General Purpose Payments (GPPs) from the Australian Government can be applied at the State’s discretion’ (Parliament of Tasmania 2006, 185).

The critical issue here is that, hitherto, the Australian Government has not attached OHS conditions to SPP funds. Under Stage 2 of the revised Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme, construction projects indirectly funded by the Australian Government through SPP funding, will be required to comply with the Scheme. Thus OHS conditions have been attached to tied funding, and these conditions have included every project funded by the Australian Government through SPP funding, and conducted by state and territory governments.

There are some difficulties with this arrangement, however. Construction projects conducted by the states, which are funded directly or indirectly, by the Australian Government, would need to comply both with the OFSC Scheme *and* with state or territory government OHS legislation. This is certainly the opinion of Cole (2003) who felt that the application of conditions to Australian Government funding would mean that there were effectively two separate systems of regulation to every site, and that such a situation would be likely to undermine safety on the site, not improve it. This is because the conflicting and overlapping of OHS powers resulting from multiple systems would more than likely create more confusion, and not reduce it (Cole 2003).

Consequently, this initiative, as it results in duplication of requirements, rather than harmonisation of requirements, is argued to be an example of independent unilateralism (Option 10 from Table 20.1), as shown in Figure 20.3.

**Figure 20.3 Level of Harmonisation for Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
Non-Binding National Standards Model
Exchange of Information
<b>Independent Unilateralism</b>

## DEVELOPMENT OF A VOLUNTARY CODE OF PRACTICE

As argued elsewhere (Charles et al. 2007) there is considerable utility for a voluntary code of practice (VCOP) to be developed by industry, and Cole (2003) in fact endorses such a move. The CRC for *Construction Innovation* has just published a set of guidelines for safety in the construction sector after extensive consultation with industry (*Construction Innovation* 2007). A VCOP can establish a minimum code of conduct for industry. If adopted by most construction firms, it may well form the basis for harmonisation of practice. How well the code is adopted and the reception it receives by various legislatures remains to be seen. Various states and territories are reviewing the guidelines and how these may relate to their OHS regulations. Further longitudinal research is needed to ascertain the uptake of the guidelines into a VCOP and how this might affect regulatory harmonisation in Australia.

## CONCLUSION

Harmonisation is seen to provide a way of organising complex regulatory approaches. Various reports such as the Cole Commission (2003) and the Productivity Commission (Australian Government 2004a; 2004b) argued the case for increased harmonisation of OHS regulations. This paper examined three initiatives that have attempted to improve OHS harmonisation in Australia.

With the Comcare initiative, national firms can ‘opt out’ of state-based OHS workers compensation schemes, although uptake of this initiative has been limited to date. The recent High Court ruling which upheld the right of the government to implement the initiative, may lead to a significant increase in firms opting out, if enough construction firms perceive benefit in doing so. At the moment, however, this initiative still entails independent action by Australian jurisdictions, and is likely to remain so unless there is significant uptake by industry.

The NOHSC standards continue to hold significant promise for harmonisation. If the objective of the standards was to share information across state and territory governments, then the NOHSC standards have been successful. However, the standards need to be universally adopted into legislation in order to effectively form the basis of harmonisation. Recent COAG initiatives may lead to improved consistency of OHS regulation across the country, particularly through identifying common and core elements of OHS regulations.

The Stage 2 of the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme potentially extends the reach of the Australian Government requirements to all construction projects which are directly or indirectly funded by the Australian Government. Such a change does not encourage harmonisation directly, and in fact may, in the shorter term, increase overlap with duplicate accreditation schemes required on single construction sites.

Thus despite significant support (Cole 2003; Productivity Commission 2004), much work remains if we are to achieve increased consistency through harmonisation of OHS regulation in Australia.

An industry-sponsored and led voluntary code of practice may lead to the establishment of standardised benchmarks for OHS practice in the industry, provided it can garner the necessary critical mass within industry. Further research is needed to determine the outcome of such an initiative, particularly in how it might relate to extant state and territory legislation.

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