

Business
Council of
Australia



Business Council of Australia

**Submission to the Taskforce on Reducing
the Regulatory Burden on Business**

December 2005

Preface

The Business Council of Australia is an association of chief executives of 100 of the top companies in Australia, employing nearly one million people and generating revenues of around \$340 billion. The BCA was established in 1983 to provide a forum for Australian business leaders to contribute directly to public policy debates to build a better and more prosperous Australian society.

The key role of the BCA is to formulate and promote the views of Australian business. The BCA is committed to achieving the changes required to improve Australia's competitiveness and to establish a strong and growing economy as the basis for a prosperous and fair society that meets the aspirations of the whole Australian community.

The BCA has a particular responsibility to apply Australia's business experience and understanding to successfully resolving the challenges now facing Australia. In a global environment, Australia's future depends on achieving world class performance and competitiveness. On the basis of sound research and analysis, the BCA seeks to play a key role with Government, interest groups and the broader community to achieve world class performance and competitiveness.

With this in mind, the BCA makes the following submission.

Executive Summary

In May 2005, the Business Council of Australia (**BCA**) brought Australia's regulatory burden to attention when it released its *Business Regulation Action Plan for Future Prosperity*. The Action Plan detailed the state of over-regulation in Australia, analysed overseas experiences and made a number of recommendations on how the BCA believed the issue of over-regulation could best be addressed in the longer term.

Along with many others, the BCA continues to highlight the costs of regulation to Australia. Excessive and poorly executed regulation adds a significant deadweight to the economy, sapping the strength of Australian businesses and undermining their competitiveness. To remain competitive, Australia must remove this unnecessary burden on the economy.

The BCA therefore welcomes the establishment by the Commonwealth Government of the Taskforce on Reducing the Regulatory Burden on Business (**Regulation Taskforce**). The work of the Regulation Taskforce, to identify some immediate steps to alleviate the regulatory compliance burden and to point to longer term, sustainable reforms, is a vital first step in improving the business environment in Australia.

To alleviate the compliance burden, it is first necessary to understand what is driving high compliance costs for Australian corporations. The BCA, with its Member companies, has identified six drivers of high compliance costs:

1. the interaction between different laws, resulting in conflicting, overlapping or inconsistent regulation;
2. the constant changing of laws, making it difficult for companies to ensure they comply and adding considerably to their costs;
3. the inefficiencies and frustrations of multiple and unco-ordinated licensing and approvals processes;
4. the lack of clear delineation between the roles of different regulators, their powers and their objectives;
5. the perverse consequences of a 'zero tolerance' attitude by regulators, driving excessive, unproductive and, at times, counter-productive compliance responses; and
6. the excessive and growing focus on personal liability of Directors and officers, causing companies to inflict higher than necessary compliance costs upon themselves.

The BCA has identified a range of measures that the Commonwealth Government should put in place to counter these drivers and to reduce the cost of compliance to business over time. These measures could equally be adopted by State and Territory Governments to reduce the significant compliance costs imposed on business by State and Territory laws.

While adopting these measures will provide some relief, it will not address the specific issues that arise for companies from legislation and regulation that is already in place. To this end, BCA Member companies have identified a suite of specific

regulatory problems that need to be addressed to improve Australia's regulatory regime. These issues are set out in detail in Attachment A to this submission.

While the BCA welcomes the work of the Regulation Taskforce, it recognises that the Taskforce has both a limited brief and very limited time to fulfill that brief. Its work can therefore only be seen as the first round of reforms needed to improve Australia's business regulation. The BCA urges the Taskforce to use the opportunity of this inquiry to point Government in the direction of further substantial reforms that will be necessary to improve business regulation. These reforms must include putting in place institutional arrangements to ensure greater accountability and transparency around regulation making, improved processes for assessing the impacts of regulatory proposals and more effective consultation with those affected by regulation. The BCA made detailed recommendations on each of these areas in its *Business Regulation Action Plan for Future Prosperity*.

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1. Introduction

Regulation is necessary. It is vital to the running of complex economies and societies and much regulation has desirable policy objectives. Yet even where regulation has been put in place for apparently sound reasons, there is no guarantee that it is good regulation. Nor should we assume that regulation is the best way to achieve our goals, nor the best response to every problem or potential problem we see. Regulation is in fact a high-cost option. Every regulation imposes a cost: on the Government administering it; on those regulated; and on the economy as a whole. We must be certain, therefore, that whenever regulation is imposed, its benefits clearly outweigh its costs. Regulation also needs to remain under constant review to ensure it remains necessary, effective and the most efficient way of achieving its policy objectives.

The Business Council of Australia (**BCA**) has identified a tide of regulation that has crept over the Australian business sector and broader community over the past few decades. While society and business have undoubtedly become more complex, and the total level of regulation might be expected to grow with that complexity, this does not explain adequately the growth in regulation, at State and Commonwealth level, of around 10 per cent per annum. Section 2 of this submission sets out briefly some of the factors that the BCA believes are driving ever increasing levels of regulation and Government intervention.

When the BCA released its *Business Regulation Action Plan for Future Prosperity*¹ in May 2005, it made a number of recommendations on how the creeping tide of regulation could be reduced. The BCA believes firmly that the high levels of regulation that we now face are due to failings in the systems and processes through which regulation is developed, implemented and reviewed. Only fixing these failings will provide long term, sustained improvements in business regulation. Section 3 of this submission summarises the key arguments and recommendations the BCA advanced in its *Action Plan*.

The BCA recognises, however, that the current Taskforce has a narrower remit than to overcome Australia's regulatory burden. As the BCA understands it, the Taskforce has been charged with (i) identifying some immediate steps that could be taken to alleviate the regulatory compliance burden on Australian business, particularly at the Commonwealth level, and (ii) pointing in the direction of further, more sweeping changes that could be made to reduce Australia's regulatory burden over the longer term and in a sustainable way. Section 4, therefore, examines what causes high regulatory compliance costs for larger corporations. Section 5 identifies those immediate steps that could be taken to alleviate the regulatory compliance burden on Australian business, while Section 6 identifies the areas for more fundamental improvement in the regulatory burden on Australian business.

An important point the BCA has repeatedly emphasised is that there are no 'silver bullets' in dealing with the over-regulation of business. A key reason for this is that much of the compliance cost comes from the interaction, overlap and conflict that exists across a wide range of regulations. Another reason is that larger corporations do not represent a homogenous group of companies. Some operate in manufacturing, others in banking, and others in the resource, transport or health sectors, for example. As a result, a vitally important issue for one company will not

1 Business Council of Australia, *Business Regulation Action Plan for Future Prosperity* (23 May 2005) www.bca.com.au.

rate with another. If there is no homogeneity in their regulatory issues, it is difficult to identify broad brush solutions that will relieve the regulatory burden across all corporations. To illustrate this point, Attachment A provides a compendium of different regulatory issues faced by BCA Member companies. Nevertheless, the BCA has set out in this submission some generic steps that would either alleviate the current compliance burden or would help prevent that burden getting worse.

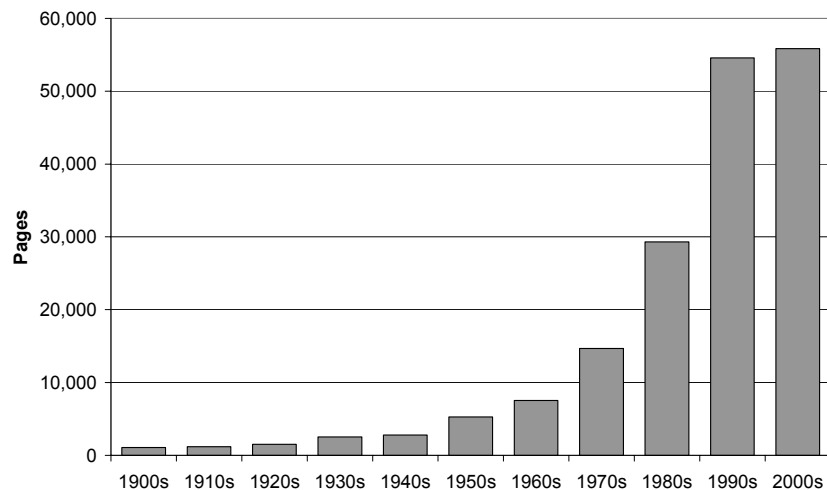
2. The Drivers of Over-Regulation

To develop long term, sustainable solutions to over-regulation, it is necessary to understand the forces behind the relatively recent surge in the level of regulation (see Figure 1). During the course of its work on regulatory reform, the BCA has identified a number of causes for the growth in regulation, these are discussed below. A theme that unites the various causes identified by the BCA is risk, and in particular, the desire to avoid risks and their consequences. Regulation is often resorted to as the tool to manage perceived risks, no matter whether it is an effective tool and regardless of the costs imposed by the regulation. The issue, not unique to Australia, has been aptly captured by the British Prime Minister, the Hon Tony Blair, MP²:

“We are in danger of having a wholly disproportionate attitude to the risks we should expect to run as a normal part of life. This is putting pressure on policy-making, not just in Government but in regulatory bodies, on local government, public services, in Europe and across parts of the private sector – to act to eliminate risk in a way that is out of all proportion to the potential damage. The result is a plethora of rules, guidelines, responses to ‘scandals’ of one nature or another that ends up having utterly perverse consequences.”

Technological advances (such as the internet or medical breakthroughs) and the increasing sophistication of markets and society (such as new financial products and services) mean that there is always a need to regulate new areas of the economy. Business accepts that increasingly complex and sophisticated economies will need new regulatory responses. The issue, however, is whether we need all the regulation we are getting and whether we are getting quality regulation.

Figure 1: Growth in Commonwealth Legislation (primary legislation)



Source: Business Council of Australia, *Business Regulation Action Plan for Future Prosperity* (23 May 2005)³

- 2 The Hon Tony Blair, MP, Prime Minister of Britain, *Speech to the Institute for Public Policy Research* (26 May 2005).
- 3 Figure for 2000s extrapolated from actual pages of legislation passed in 2000-2004.

2.1 Risk Aversion

Risk aversion manifests itself in a number of ways. When things go wrong in the community (a company collapses, a product or drug has adverse impacts, etc.), Ministers face political risk if they are not seen to react quickly and decisively to the real or perceived threat. Regulators face risk if they are perceived to have allowed, either explicitly or through omission, conduct that causes harm. Corporate Directors and officers face increased personal risk through the rapid growth of personal liability for corporate fault (discussed further in Section 4).

It also seems that society is becoming less tolerant of risk, or of 'things going wrong'. An example of this is society's ambivalent relationship with science and technology; on the one hand holding the view that science and technology can solve all of our problems; on the other, remaining highly suspicious of the uncertainty inherent in any scientific or technological breakthrough. In medicine, we therefore expect the highest quality health service to solve all of our problems, while demanding stringent action should something go 'wrong'. Accordingly, where the community perceives a risk, or if something does go wrong, there is a strong belief that someone must be to blame and that firm measures, such as new regulation, are needed to ensure such a thing never happens again.

Societies, particularly in prosperous developed nations, are often risk averse and concerned about protecting what they have. Anything that threatens to change the *status quo* is therefore resisted. This can manifest itself through increased regulation to prevent change or to prevent individual communities or businesses from suffering any loss as a result of change, even if society as a whole benefits (particularly in areas like competition law).

For these sorts of risks, regulation appears to provide a ready response.

Regulation can be announced quickly as a solution to a perceived problem. This makes new regulation particularly attractive where there is a political issue to deal with, with Governments seeing regulation as the 'quick-fix' alternative that can capture headlines and publicity (compared, for example, with announcing an inquiry, setting up a Government program or working with industry to identify alternatives to regulation, where the results can take longer to realise).

Some microeconomic reforms have also contributed to expanding regulation. For example, as Governments have reduced their role in running certain aspects of the economy, they have replaced direct control with indirect control through regulation (for example, public ownership of utilities has been replaced by private ownership subject to strict and intrusive regulatory controls).

What is not recognised is that, not only can regulation not remove risk, but the effort comes at a substantial cost. When Governments announce new regulations in response to some corporate misdemeanour, for example, it is often forgotten that the corporation and individuals whose conduct has triggered the new regulation will be prosecuted under the former laws. Their conduct also shows that the mere fact that certain behaviours are illegal will not stop some individuals anyway. New laws will therefore make no difference to those who are prepared to break the law. Any suggestion that new regulations will stop such misdemeanours every occurring again is therefore false. New regulations do, however, impose a cost burden on other businesses, effectively punishing the innocent in a vain effort to prevent law breakers.

Risk aversion not only adds to the ever increasing compliance costs to business. Some risk driven regulations actually have adverse consequences. For example, the restrictions on plumbing works are so severe in some States that householders are prevented from installing their own water efficient shower heads, undermining Government programs to promote water conservation. In some areas, councils require food sold at community and church stalls to be prepared in kitchens that meet the same health standards as permanent professional restaurants, effectively putting an end to the Saturday morning cake stall and undermining the efforts of volunteers to support their local communities.

2.2 Ease of Regulation

Another major contributor to over-regulation is the relative ease with which Governments can introduce new regulation.

Essentially, there are two main options for Government to change behaviour in the community or to achieve other public policy outcomes: (i) to regulate; or (ii) to provide incentives to change behaviour (usually financial incentives). Generally, it costs the Government money to provide incentives, whereas regulation is seen as a less costly alternative. In addition, there are strict processes regarding how a Government spends money, with procedural accountability mechanisms and budgetary restrictions. There are no comparable procedures of accountability for making regulation, so further regulation becomes the easiest response for Government to address an issue with.

The costs of regulation are often invisible and outsourced, whereas the costs of regulatory alternatives, such as financial incentives, are more easily identified (as they have an impact on the Budgets of Governments). For example, the cost of regulating to lower the speed limit outside schools is minimal. However, implementing driver education training or installing pedestrian crossings, for example, has an easily identifiable cost.

The cumulative effect of regulation is also usually ignored. Each piece of new regulation may, when proposed in isolation, look reasonable. The overall effect, however, can be a considerable regulatory burden. This is exacerbated by the interplay of a myriad of regulations from different parts, and different layers, of Government.

New regulation can also provide a clearly definable outcome that ambitious officials or Ministers can point to as the achievement of their term in office. There is therefore a powerful incentive for officials and Ministers to propose major new pieces of regulatory intervention as their 'legacy', rather than actively seek to streamline processes and cut red tape.

So long as the introduction of new regulation lacks the degree of accountability and transparency expected of Government expenditure, the level of regulation will continue to rise.

2.3 'Self-Generating' Properties of Regulation

Once regulation is in place, it is difficult to get rid of. In part, this is because it is 'self-generating', that is, the more regulation you have, the more you seem to need.

Regulation will rarely achieve the exact outcome that it was intended to achieve and will frequently have unintended consequences that are not anticipated when it is first put in place. There is a tendency, therefore, for regulatory 'tinkering' to fix minor problems, with these fixes in turn having further unforeseen consequences. This creates a cycle of regulation and expanding regulation. BCA Member companies have particularly pointed to the tax laws, superannuation legislation, and increasingly, the Corporations Act, as areas prone to 'tinkering'.

Another aspect of regulatory 'self-generation' is that more regulation leads to more regulators, which in turn act as advocates for yet more regulation or exercise enthusiastically the often wide ranging regulation making powers delegated to them by Parliament. The Chairman of the Productivity Commission, Mr Gary Banks, has recently highlighted that there are approximately 500-600 regulatory bodies in Australia⁴. The UK has a tenth of this number and is looking to reduce it further. As well as often being champions of further regulation, the high number of regulators in Australia means there is a much higher risk of overlap, duplication or conflict between the requirements of the regulators. Poor co-ordination between these regulators is a major contributor to the regulatory burden of businesses (see Section 4).

Regulation will continue to 'self-generate' while there is no body within Government expressly charged with driving regulatory reform and the prevention and removal of unnecessary regulation. Nor are there systematic procedures for reducing regulation. The BCA is therefore pleased with the Commonwealth Government's announcement that it plans "to introduce a new annual review process to examine the cumulative stock of Australian Government regulation and identify an annual red tape reduction agenda"⁵.

4 Mr Gary Banks, Chairman, Productivity Commission, *Regulation-making in Australia: Is it broke? How do we fix it?*, Speech to the Australian Centre of Regulatory Economics and the Faculty of Economics and Commerce, Australian National University, Canberra (7 July 2005).

5 The Hon John Howard, MP and the Hon Peter Costello, MP, Joint Press Release, *Taskforce on Reducing the Regulatory Burden on Business* (12 October 2005).

3. Sustainable Solutions to Over-Regulation

In May 2005, the BCA released its *Business Regulation Action Plan for Future Prosperity*. The *Action Plan* detailed the state of over-regulation in Australia, analysed overseas experiences and made a number of recommendations on how the BCA believed the issue of over-regulation could best be addressed in the longer term.

A critical finding of the *Action Plan* was that past 'red tape' reviews have been of limited use in reducing the overall trend towards more and more regulation and greater compliance burdens⁶:

"Most previous attempts to reform regulation and cut 'red tape' have focused on removing or improving existing regulations. These reviews have their benefits, particularly in stripping away the undergrowth of redundant regulation. But even as these reviews take place, new regulations are being developed and imposed. The gains from such 'red tape' reviews are therefore often only temporary."

The *Action Plan* therefore recommended a systemic reform process, designed to reform the processes through which regulation is generated. In essence, the BCA recommended structural and procedural changes that would see greater consideration given to whether regulation was needed and to the form of that regulation.

3.1 Eight Principles

As a starting point, the *Action Plan* recommended that all Governments adopt eight basic principles in developing, administering and reviewing business regulation⁷:

1. regulation should be the last, not first, response of Government and the benefits of proposed regulation should always be shown to outweigh the costs of administration and compliance;
2. regulation should set a framework, not try to cover the field;
3. regulation has a use-by date, after which it may no longer be necessary or appropriate;
4. the current law should always be tested and enforced before more law is added;
5. Governments should not impose regulation upon private persons or companies that they are themselves not prepared to adopt;
6. all businesses, whether large or small, private or public, should be treated equally;

6 Business Council of Australia, *Business Regulation Action Plan for Future Prosperity* (23 May 2005) p. 36, www.bca.com.au.

7 A more detailed discussion of these eight principals can be found in Section 3 of *Business Regulation Action Plan for Future Prosperity*.

7. where property rights are affected by regulation, there should be just compensation; and
8. there must be full transparency and accountability around the processes for making and administering regulation.

These principles should guide Governments when they are considering introducing regulation, when they are choosing the best regulatory response and when they are assessing whether existing regulation is still the best way of achieving desired policy goals. Businesses and others should also use these principles to test and challenge the regulations to which they are subject.

3.2 Fixing Future Regulation

The first practical step towards better business regulation is to fix the systems that continue to produce poor regulation. The initial focus of the BCA's *Action Plan* was on the Commonwealth Government. This does not suggest that the Commonwealth level is where the greatest need for improvement lies. Nevertheless, the Commonwealth is well placed to be the leader in terms of improving its regulation-making processes and hence its regulation. For this reason, it is a simpler matter to bring the Commonwealth system into line with world's best practice. The revised Commonwealth system then provides a model for State Governments to adopt. The BCA will be actively encouraging this adoption. State Governments also have a responsibility for improving the co-ordination of regulation between jurisdictions and for tackling the plethora of poor, redundant and overlapping regulation at the Local Government level. In terms of increased productivity and better economic outcomes for Australia, most reforms are likely to be needed at the State and Local Government levels and where regulatory responsibility is shared across jurisdictions.

To fix the current system of business regulation, the BCA recommended⁸:

- creating a Ministerial Task Force, similar to that in the UK and the Netherlands, to act as a 'gatekeeper' to prevent proposals for new business regulation being considered by Government unless the benefits of the proposed regulation clearly outweigh the costs;
- establishing a Business Regulation Advisory Council to advise the Government on priorities for regulation reform, including Commonwealth, State and Local regulation that should be removed or substantially improved;
- creating a champion for better business regulation within Government through enhancing the role and powers of the Office of Regulation Review to challenge the need for new regulation affecting business and to oversee the cost-benefit analyses of regulatory proposals;
- legislating the requirement that all regulatory proposals likely to have a significant impact on business must undergo a detailed regulatory impact assessment to ensure the benefits of the regulation clearly outweigh the costs;

⁸ A more detailed discussion of these recommendations can be found in Sections 5 and 6 of *Business Regulation Action Plan for Future Prosperity*.

- requiring the Minister proposing new business regulation to personally certify that the benefits of the regulation will outweigh the costs;
- introducing a two-stage impact assessment process, with all regulations likely to affect business subject to a preliminary assessment, and all regulations likely to have significant impacts on business subject to full assessment;
- requiring the release of draft regulatory impact statements for public comment and allowing sufficient time for consultation to make that consultation meaningful; and
- developing a standardised, sophisticated methodology for identifying and measuring the likely costs to business of proposed regulations.

The BCA would like to re-iterate these recommendations to the Regulation Taskforce, as they remain, in the view of the BCA, vital steps in ensuring a long term, sustainable solution to the over-regulation issue. The BCA is conscious that the Commonwealth Government has already acted, in part, on some of these recommendations. For example, the Government has announced it “*has already decided to put in place arrangements that will involve a more rigorous use of cost-benefit analysis within government before new regulations are introduced*” and “*intends to introduce a new annual review process to examine the cumulative stock of Australian Government regulation and identify an annual red tape reduction agenda*”⁹. While these initiatives are welcome, the BCA remains of the view that considerably more structural and procedural change is needed to embed reforms that will result in significant and sustainable reductions in the business regulatory compliance burden.

9 The Hon John Howard, MP and the Hon Peter Costello, MP, Joint Press Release, *Taskforce on Reducing the Regulatory Burden on Business* (12 October 2005).

4. The Causes of High Compliance Costs

The BCA has identified some of the underlying drivers for the rapid increase in the amount of legislation being passed by Parliaments and, in the previous section, set out some of the structural and procedural reforms necessary to reduce this tide of legislation and to minimise the costs legislation imposes on business.

Not all compliance costs, however, arise directly from legislation. When asked, many companies will in fact say they do not have a concern with the public policy objectives behind a piece of legislation, nor necessarily with the legislation itself (the 'black letter law'). They will still raise considerable concern, however, with the compliance costs imposed by that regulation.

In part, this is because large corporations have to absorb much of the legislation governing them into their systems and processes. Once a company's systems are in place, few within the company will appreciate the original legislative requirement behind the particular system or process.

In part, this response can also be motivated by a desire to avoid yet further change to legislation, adding more costs to the company (see Section 4.2 below). As one Chief Executive has put it, while the Financial Services Reform Act was a mess, the last thing his company needed was wholesale changes to the Act; the company had just spent millions implementing the current version.

The BCA has consulted widely with its membership to identify the factors, other than legislation itself, that add to the compliance costs for larger corporations. Because the remit of the Regulation Taskforce is to assess the compliance burden of regulation to business, much of the information provided in this submission deals with the compliance burden rather than the underlying policy of regulation that affects business. This does not mean that BCA Member companies necessarily agree with the underlying policy.

Based on the responses provided by BCA Member companies, the factors that unnecessarily and undesirably add to compliance costs include:

1. the interaction between different laws, which may be conflicting, overlapping or inconsistent;
2. constantly changing and poorly targeted laws, with *ad hoc* and often short implementation timeframes;
3. multiple and unco-ordinated licensing and approvals processes;
4. lack of delineation between the roles of regulators, lack of clarity over their powers, their objectives in exercising their powers and lack of co-ordination between regulators;
5. the 'zero tolerance' attitude of regulators; and
6. the excessive and growing focus on personal liability of Directors and officers.

It is important to understand how each of these factors contributes to the compliance burden of larger corporations if measures to reduce that compliance burden are to be effective.

4.1 Interaction Between Laws

One of the major contributors to the compliance burden of larger corporations is the interaction between different laws, which can result in conflicting, inconsistent or overlapping legal obligations. Perverse outcomes can arise from interaction between laws at one level of Government, between different levels of Government or between Australian and international requirements.

Conflicting or inconsistent laws, for example, can arise where companies face mutually exclusive or inconsistent legal obligations. These conflicts become extremely difficult to resolve because the conflicting laws are often managed by different agencies or even different Governments, with neither wishing to 'compromise' its regulation to resolve the conflict. Companies are usually left in the situation of either investing considerable time and effort themselves to develop often complex compliance measures to try and resolve the conflict, or accepting the risk of being in breach of one or other of its legal obligations.

Conflicting, inconsistent or overlapping legal obligations arise because regulation is typically developed in isolation, without a full appreciation of existing laws in other areas. For example, new regulations may be developed that require companies to report certain information to a regulator or Government agency without any appreciation that companies are already reporting similar information to another Government agency for different purposes. This results in overlapping reporting requirements for companies.

Inconsistency can also arise around the language of legislation, for example, where legislation gives different meanings to certain terms or defines common obligations in different ways. For example, across a range of legislation there can be different definitions of an 'employee' or of the duties of Directors and officers. This lack of consistency contributes significantly to the complexity of legislation and hence to compliance costs.

Overlapping laws frequently arise between different levels of Government. For example, companies may be subject to laws governing employee or customer privacy at both the Commonwealth and State levels, or may require environmental approval for new projects from all three levels of Government. Again, it is left to the company to reconcile these laws. Overlapping laws mean companies may be required to report similar information to different Governments, duplicate their compliance efforts or face unnecessary complexity because of lack of alignment between different laws.

One of the most significant contributions to the compliance burden of any company operating in a number of Australian jurisdictions is the multitude of different regulatory regimes aiming at the same policy objective. In particular, companies cite as a major contributor to their compliance costs the need to deal with, for example, multiple regimes covering workplace relations, occupational health and safety, workers' compensation, payroll tax and stamp duty calculations.

A further problem arises when Australia adopts an international standard or requirement, but rather than adopting it unchanged, makes modifications to the

standard or requirement, to 'Australianise' it. This means globally operating firms find themselves having to comply with one set of rules internationally, and a variation of those rules solely within the small Australian market. Problems also arise when Australian regulators introduce their own requirements in areas already subject to international regulation, but do not have regard for how the Australian requirements fit in with those at the international level.

Related to these issues are excessive compliance costs arising from multiple and uncoordinated licensing and approvals processes and from a lack of delineation between the roles of regulators, both discussed below.

Example 1: Excessive Paperwork

Overlapping and inconsistent legislation results in excessive documentation requirements for even the simplest matters. For example, a total of 227 pages of documentation needs to be given to a customer wishing to open a simple cheque account with overdraft limit and home loan:

- 139 pages of documentation for a cheque account with electronic access;
- 46 or more pages of documentation for the overdraft facility;
- 17 pages for the housing loan offer;
- 9 pages to perfect the bank's security position overdraft;
- 14 pages of documentation to perfect the security position for housing finance;
- and
- 2 letters confirming final fees and funding of each of the loan facilities.

Since deregulation of the banking industry, the level of documentation due to regulatory requirements has increased substantially. For example, the same transaction for an overdraft in 1985 (without electronic access option) was less than 20 pages and a similar amount of documentation was required for a home loan.

Example 2: Duplicating Reporting

The interaction and overlap between the *Corporations Act 2001* and accounting standards leads to companies having to report the same information more than once. For example, the Corporations Act requires certain disclosures to be reported in the full year accounts, such as the director's report disclosure of director fees. To comply with accounting standards, the financial accounts then require the same disclosure. There is scope for rationalising these double reporting requirements.

Example 3: Excessive Compliance Requirements

The compliance costs from the interaction between Australian Accounting Standards and International Financial Reporting Standards need to be monitored. For example, pursuant to the new accounting standard AASB 139, *Financial Instruments: Recognition and Measurement*, some companies will be required, each year, to revalue their investments to their 'fair value' for assets in companies which they do not control or have significant influence over. This results from the requirement of AASB 139 to classify investments in equity instruments as 'Available-for-sale financial asset', even when there is no intention to sell such assets. This means that each year, at significant cost and time, those businesses to which the standard applies will have to prepare a valuation, including for investments in companies over which they have no control or significant influence. This is a huge and costly exercise which delivers no benefit, particularly when there is no intention or likelihood that such investments will be sold. In contrast, under current Australian Accounting

Standards, companies are entitled to carry investments in their books at cost, and are only required to adjust the value of their investments if the carrying book value is above the recoverable amount.

Example 4. Inconsistent Policies

As well as adding to compliance costs, the interaction of different laws can undermine desirable public policy outcomes. For example, since its introduction, the fringe benefit tax (**FBT**) law has fallen out of step with the realities of the modern day workforce. Current business practices place a great deal of importance on policies which are family friendly and which promote work / life balance through health related benefits. Modern business also requires employees to be flexible about work related travel. Given the changing nature of today's employment environment, measures taken by companies to promote work / life balance or that reflect modern travel needs should not be discouraged through the FBT system and should be treated as exempt benefits.

Example 5: Payroll and Fringe Benefits Tax

Each of the States and Territories relies on the *Fringe Benefits Tax Assessment Act 1986* (Cth) to bring various employment benefits to tax as salary and wages for payroll tax liability purposes; but they each do it in slightly different way. Consequently, for any national employer, the payroll department is obliged to maintain different data to comply with each particular requirement.

In addition, with multiple payroll systems, no sooner does one jurisdiction complete a company's payroll tax audit / review than the next one commences. Costs of regulation include compliance with each of the relevant Acts, maintaining systems, reporting to each agency and attending to audits carried out by each jurisdiction. A set of consistent legislation is required, with administration shared across jurisdictions to reduce duplication.

Example 6: Privacy Act and Workplace Surveillance

State and Commonwealth legislation touching upon privacy issues (such as laws on privacy, direct marketing, anti-money-laundering, workplace surveillance and anti-terrorism¹⁰) should be uniform and express an appropriate balance between employer / business interests and employee / customer interests. There should also be clear legislative protection where a company discloses information about an individual for the purpose of the public good. Both the report of the Office of the Privacy Commissioner and the Senate Committee Report into privacy acknowledge that the privacy regime is fragmented.

Using workplace surveillance as an example, there is a growing trend towards State-based legislation. Recent reform proposals in Victoria and New South Wales would extend the concept of privacy to address the autonomy and dignity of employees at work. Invasions of privacy that would be prohibited include video and audio surveillance, email and internet surveillance and tracking surveillance. In New South Wales, the *Workplace Surveillance Act 2005*, and in Victoria, the Law Reform Commission '*Workplace Privacy Issues*' Paper, both cover the regulation of an employer's ability to monitor certain activities at work. Of particular concern is the

10 For example, *Privacy Act 1988* (Cth), *SPAM Act 2003* (Cth), *Privacy and Personal Information Act 1998* (NSW), *Information Privacy Act 2000* (Vic), *Workplace Surveillance Act 2005* (NSW), *Workplace Video Surveillance Act 1998* (NSW), *Workplace Privacy Bill 2004* (SA).

impact on the ability of employers to monitor email and internet use on computers belonging to the employer and provided for the purposes of employment.

These State Government requirements risk imposing workplace privacy restrictions that will deprive employers of the ability to comply with their obligations in respect of employees generally, especially in the area of harassment and bullying. There are sound reasons why companies may need to carry out surveillance in the workplace. These reasons include protection and safety of the workplace, particularly of branch staff. The proposed approach to employee protection may have the opposite effect of putting some employees at risk from the behaviour of others.

The need for companies to detect fraud and other criminal activities would also be compromised. For example, banks have prudential obligations with respect to operational risk and business continuity management. A bank's surveillance of its systems and activities (as well as those of its employees) is essential to the prudent management of risks, such as technological risk, reputational risk, fraud, compliance risk, legal risk, outsourcing risk, business continuity planning and key person risk.

Example 7: Ignoring Consequential Amendments

Without adequate consultation, initiatives to decrease compliance costs may not be successful because of competing policy or regulations in another jurisdiction. One example of this was the introduction of the tax consolidation regime. The intention was to decrease compliance costs through decreasing the number of income tax returns that need to be prepared for wholly-owned company groups by deeming all applicable companies to be a single entity. However, this legislation has not reduced compliance costs because, under the Corporations Act, separate accounts still need to be maintained by each legal entity, rather than on a tax consolidation basis. As a result, companies have been forced to continue to maintain records on an entity by entity basis.

Amending the Corporations Act so that companies could elect to only provide one set of consolidated accounts would reduce significantly the compliance costs for larger corporate groups.

Further examples are provided in [Attachment A](#).

4.2 Constant Change

Another major contributor to the compliance burden consistently identified by larger corporations is the amount of change to the law. Constant change significantly adds to compliance costs through the resources, time and effort companies need to invest to:

- ensure they are up to date on the latest state of the law;
- ensure they understand how new laws interact with existing legal obligations;
- redesign or develop new systems and processes to ensure compliance with the new legal requirements; and
- re-train staff on the new legal obligations.

There are a number of factors that drive constant change in the law. Laws might be changed because the Government is using regulation as a political tool to demonstrate a concrete response to a particular community or political issue. Ministers or bureaucrats looking to make a mark might do so through creating new regulatory regimes. Businesses themselves contribute through seeking changes to the law to deal with particular or new circumstances affecting their businesses.

It is difficult to come up with measures that will effectively counter-act these drivers of change. A number of contributors to the level of change to the law can, however, be remedied. One factor that drives constant change is the need to continually refine the law because new regulations are added without regard to existing laws. The development of these new regulations in policy silos will often result in unintended consequences that then require further changes to the law to correct (the compliance problems arising from these interactions between laws were discussed in detail in the previous section).

The rate of change of the law is exacerbated where Governments introduce new regulation to deal with specific issues without first testing the adequacy of the existing laws. This may be in response to a particular set of political circumstances, but is also frequently in response to poor enforcement of existing laws. Where regulators are resourced inadequately to enforce their existing regulations properly, they can be tempted to blame the lack of enforcement on inadequacies in the law and to then promote new regulations to overcome those alleged inadequacies¹¹.

Constant change in the law comes not only from amendments to the primary Act passed by Parliaments. New regulations or rules may be introduced, or the guidance material issued by regulators may change. Courts also hand down decisions that can change the interpretation of legal requirements, which then need to be incorporated into company compliance procedures.

Change to the law is inevitable and many of the changes may be desirable in and of themselves. The problems for companies, however, are the level of constant change, the lack of co-ordination between changes to different elements of the law, the lack of co-ordination around when changes come into effect and the limited time often made available between the laws changing and the date on which companies are expected to be fully compliant.

Example 8: Limited Transition Times

In June 2005, the Choice of Super Fund legislation (*Superannuation Legislation Amendment (Choice Of Superannuation Funds) Act 2005*) was still being debated in the Commonwealth Parliament, even though the legislation was to come into effect on 1 July 2005. The new legislation required companies to make major changes to their systems, processes and administration as well as engage in an extensive communication effort, yet even at the last minute key details of the requirements, some of which were to be included in regulations, were not known. Companies were then left not only with uncertainty about their legal obligations, but very short periods of time to make the necessary changes to comply, adding considerably, and unnecessarily, to their compliance costs. Similar issues were experienced with the CLERP 9 legislation passed just days before coming into effect in 2004, despite containing a number of significant changes to the Corporations Act.

¹¹ For a more complete discussion of this issue, see *Business Regulation Action Plan for Future Prosperity* pp. 20-21.

The area of maritime transport security provides another example of the sudden impact and cost of a new form of regulatory compliance. The *Maritime Transport Security Act 2003* (Cth) was introduced and passed by the Commonwealth Parliament in December 2003. “Maritime industry participants” (including State Government Port Authorities) were required to seek approval from the Commonwealth Government to operate from 1 July 2004.

Although purportedly based on the UN *Safety of Life at Sea Convention* and *International Ship and Port Facility Security Code*, the Australian law and its regulations contain additional risk assessment and approval requirements for private sector port facility operators and for coastal shipping operators.

Unlike countries such as the US and New Zealand, the Australian Government provided no direct financial assistance to businesses seeking approval. Unplanned compliance costs exceeding \$70 million were incurred by business in the period to 30 June 2004. A two year compliance audit program will mean additional costs to business until at least 2006.

A further example of excessive compliance costs from short implementation timeframes occurred when thin capitalisation rules for taxation were introduced with insufficient guidance as to how they should be interpreted. It was not until significantly after the legislation passed that guidelines were issued on the methodology to be adopted to calculate thin capitalisation ratios. More timely guidance would have created additional certainty by taking away the need for companies to make assumptions about how the new laws would work.

Example 9: An Alternative Approach

Governments often change the law in response to some perceived crisis or other. This can often result in ‘knee-jerk reaction’ legislation, with little regard given to the adequacy of the existing law.

The Commonwealth Government’s response to the issue of ‘long-tail liabilities’ provides an example of a better approach to testing the adequacy of the law and the range of alternatives available for Government to address any gaps that are found to exist.

The New South Wales Commission of Inquiry into James Hardie and its asbestos liabilities raised questions over the adequacy of the existing laws to deal with ‘long-tail liabilities’, that is, liabilities that are currently unknown but are likely to arise in the future. The finding resulted in calls for sweeping changes to corporations law to overcome this perceived shortcoming. As the Commission of Inquiry noted itself, however, addressing these matters raised wide and complex public interest considerations, not least of which was the potential to undermine fundamentally the concept of limited liability.

Rather than bow to the calls for immediate change to the law, the Commonwealth Government sensibly referred the matter to the Corporations and Markets Advisory Committee (**CAMAC**), asking CAMAC to assess proposed changes to the law to address the issues raised by the New South Wales Commission of Inquiry. This approach gives business, government and other interest parties the opportunity to assess the implications of the legislative amendments and to identify potential overlaps, inconsistencies or unintended consequences.

Further examples are provided in [Attachment A](#).

4.3 Licensing and Approvals Processes

Related to problems arising through the interaction of different laws discussed in Section 4.1 are the multiple and uncoordinated approval processes faced by most new developments. For example, a company's ability to expand its production facilities or update its plant will typically require a multitude of approvals from a number of Commonwealth, State and Local Government agencies. Agencies will frequently operate in isolation, will not co-ordinate their requests for information, nor the timing of their decisions. There may be different third party appeal rights attaching to different decisions.

Increasingly, major corporations are making investment decisions on a global scale, and the Australian operations of those corporations have to compete internally for capital investment. Where the uncoordinated approvals system results in significant delays in bringing new developments online, either the Australian investment will have to achieve a higher rate of return to cover the cost of delay, or the investment is likely to be directed to countries with faster approvals processes.

The BCA is aware that numerous past attempts have been made with 'one-stop shops' and major project facilitation units to overcome this problem. These past efforts have often been flawed, however, because they rely on the facilitator being able to coax, rather than demand, co-operation from approvals bodies, and because they have not been backed up with the legislative changes necessary to allow approvals bodies to co-operate with project facilitation (that is, statutory processes can constrain the ability of agencies to facilitate approvals).

A major advance would be for business to have a single interface with Government for the approval of new developments.

Example 10: Environmental Approvals

Legislation on environmental issues, while improving, is still not yet consistent, nor are standard national practices adopted on issues such as assessment of risk, clean up of contaminated land, contaminated land audit schemes and the measurement and management of emissions. For companies operating across State boundaries, these variations add considerable cost.

Local Government regulatory requirements are also imposing costs such as the variation between Local Government bodies in, for example, their application of national or state guidelines or codes of practice which results in significant variations in the requirements on businesses operating across these intrastate boundaries. This is particularly apparent in New South Wales and Queensland where there is significant difference in the level of attention some councils place on environmental management.

Example 11: Licensing Anomalies

Licensing requirements for those permitted to install steel roofs are controlled by State Governments. In Victoria, unlike every other State in Australia, you need to be a licensed plumber to install a steel roof; you do not need to be a licensed plumber to install a tile roof. This anomaly is largely historical, but it has the effect of restricting the supply of skilled labour to install steel roofs in Victoria, pushing up installation costs for home owners, and in some instances, discriminating against some products

compared with competitor roofing materials. This is primarily a State issue, but greater consistency could be brought about through a co-operative Commonwealth-State scheme of trades training and regulatory standards.

Example 12: Commonwealth-State Environmental Regulation Overlap

When the Commonwealth Government introduced the *Environmental Protection and Biodiversity Conservation Act 1999*, one of its primary objectives was to rationalise when Commonwealth or State environmental impact assessment and approval was necessary, with the Commonwealth limited to involvement in only those matters that raised environmental issues of national importance. This was to be achieved through bilateral agreements between the Commonwealth and States and Territories.

However, since the Act was introduced six years ago few agreements have been entered into, meaning that in many cases, project developers are still subject to environmental assessment and approval at a number of levels of Government.

Further examples are provided in [Attachment A](#).

4.4 Regulators

In addition to the contribution to the compliance burden made by legislation itself, the approach adopted by the regulators and enforcers of legislation can add considerable compliance costs. In particular, compliance costs can be unnecessarily high where there is a lack of delineation between the roles of regulators, a lack of clarity over their powers, confusion over their objectives in exercising those powers and a lack of co-ordination between regulators. The attitude of the regulator to the industry under regulation also has a major impact on compliance costs.

A number of companies provided examples where they have been subject to inquiries from different Commonwealth regulators over the same issue, requiring them to furnish the same or similar information and answer the same or similar questions, with no evidence that the two regulators had attempted to co-ordinate their inquiries. This issue arises most noticeably in the financial sector, regarding the operations of the Australian Prudential Regulation Authority (**APRA**) and the Australian Securities and Investments Commission (**ASIC**). It can also arise between regulators from different jurisdictions, such as the Australian Competition and Consumer Commission (**ACCC**) and state based fair trading agencies.

Regulators can also increase compliance costs by adopting inflexible approaches to regulatory compliance. The next section examines the compliance burden implications of regulators adopting 'zero tolerance' approaches to their roles.

Additional problems arise where, for example, regulators adopt approaches within their area of responsibility that are inconsistent with approaches adopted elsewhere. For example, in the area of corporate governance, the Australian Stock Exchange (**ASX**) Corporate Governance Council has adopted an 'if not, why not' approach to corporate governance, giving companies the flexibility to develop corporate governance approaches that best reflect the circumstances of individual companies. APRA, however, has sought to mandate these requirements. Not only does this inappropriately assume that there is a 'one size fits all' approach to corporate governance, but it also sends a clear and unfortunate warning to business of the ease with which Government agencies might turn industry self-regulation into mandatory requirements.

The BCA is also concerned that, increasingly, many regulators appear to see themselves as the last line of defence between helpless consumers and rapacious businesses¹². This creates a culture where regulators focus excessively on capturing 'corporate crooks' and are not focused on facilitating vibrant and dynamic business sectors that can best deliver the goods and services desired by customers. As a result, regulators put in place more and more compliance obligations to catch the elusive perceived 'corporate crooks', regardless of the costs and implications for the viability of the businesses they are regulating. To overcome this, all business regulators should have as one of their principal objectives facilitating vibrant, dynamic and competitive businesses in the sectors they regulate. Compliance and enforcement activities should be seen as a means towards that end, rather than an end in itself.

Example 13: Hobson's Choice

In an emerging conflict between trade practices investigations and stock exchange disclosure rules, the Australian Competition and Consumer Commission is concerned that its work will be stymied if companies rush to issue details to investors. ACCC chairman Graeme Samuel warned that cartel members helping the regulator in the hope of gaining immunity from prosecution could lose that immunity if they told the Australian Stock Exchange about the matter.¹³

The ACCC has introduced a leniency policy that allows companies involved in illegal cartel behaviour to gain immunity from prosecution if they alert the ACCC to the existence of the cartel and assist the ACCC with its investigations. A key part of that assistance may be to not alert other members of the cartel that the ACCC is investigating their activities. This is a reasonable expectation on behalf of the ACCC in return for leniency. Having identified cartel behaviour, however, the company may be under a disclosure obligation to alert the market to that behaviour and its possible consequences (such as litigation by suppliers or customers). Failure to disclose that information places the company, and the individuals involved, at risk of prosecution by ASIC. The company and its executives therefore face a dilemma: remain silent about the cartel and its consequences and risk fines for breaches of their continuous disclosure obligations; or fulfil their disclosure obligations and risk losing their immunity from prosecution for cartel behaviour.

Example 14: Lack of Smart Regulation of Intellectual Property

Currently, there is no single Government department responsible for administering intellectual property (IP) rights. Responsibility for IP rights should be consolidated in one department or Government agency. At the very least, there should be one department responsible for administering copyright.

The lack of a central agency responsible for IP regulation means that there is a wide variety of Government departments and filter organisations which propose the introduction of new intellectual property legislation. This leads to excessive regulation, inconsistency and conflict between proposals and requires significant time

12 The reported comments by a senior member of ASIC that financial planners are untrustworthy is just one recent and public illustration of an attitude many companies report encountering on a regular basis, particularly from more junior regulator staff, and despite efforts by the heads of regulatory agencies to counter this attitude.

13 David, Crowe, *ACCC wants informants to keep quiet*, Australian Financial Review (14 November 2005), p. 5.

to be spent by companies and their advisors assessing any changes. One Government body should be established through which all IP law reform proposals are channelled and assessed.

Example 15: Licences to Kill

There is considerable overlap and inconsistency between the various roles of major Australian regulators. For example, between banking and superannuation licences administered by APRA and Australian Financial Services Licences administered by ASIC; between capital requirements in relation to superannuation licences (administered by APRA) and Australian Financial Services Licences (administered by ASIC); between regulation of Managed Investment Schemes by ASIC and public offer superannuation funds by APRA, requiring companies to hold both a registrable superannuation entities licence (**RSE**) from APRA and an Australian financial services licence from ASIC. One BCA Member company estimates the cost of duplication in licensing to be \$500,000 per annum plus \$500,000 to obtain the separate RSE licences.

Example 16: More and More Reporting

Companies are required to report their energy consumption in various forms to various Government agencies. For example, many companies are required to report as follows:

- *Annual EPA report:* companies report mainly environmental performance data (energy use, water use and waste water and solid waste generation) and emissions data, as well as reporting on miscellaneous improvements. Included in the annual environmental protection agency (**EPA**) report are the Energy Improvement Report, Waste Tracking Summary Report and the Oxide Report. There is about a month's work in putting this report together;
- *Annual National Pollutant Inventory report:* companies report mainly on resource usage and emissions data. About two weeks' work is required to put this report together;
- *Australian Bureau of Agricultural and Resource Economics Report:* companies report fuel intensity for all fuels used and their prediction about fuel usage for the next four years. This report requires about three to four days' work.

The Commonwealth is now proposing to add yet further duplicative and overlapping reporting requirements through the Energy Efficiency Opportunities Bill 2005, which will require, in addition to the above reporting obligations, large energy users to assess the potential to improve their efficiency of energy use and report publicly on their findings. The existing reporting obligations, however, were not even considered in the regulatory impact statement that accompanies the Bill.

Further examples are provided in [Attachment A](#).

4.5 'Zero Tolerance'

One of the principal drivers for the increasing tide of regulation is risk aversion. Risk aversion in regulators is leading to a 'zero tolerance' approach to compliance and enforcement issues, regardless of the seriousness or impacts of potential breaches.

In terms of compliance, this is leading regulators into micro-management. Instead of regulators focusing on the overall objective of their regulation, and assessing business conduct against that overall objective, regulators are increasingly prescribing more and more detailed compliance requirements. These detailed requirements tend to evolve continually, adding significantly to the compliance costs arising from constant change in the law (see section 4.2 above). They also result in inflexible regulation. Where requirements are introduced to manage an issue at a few businesses, but are applied across all regulated businesses, they add considerable unnecessary compliance requirements to those businesses where the issue does not arise.

'Zero tolerance' can also discourage companies from self-regulating. The 'zero tolerance' approach means that regulators apply the full force of the law even where a company has only been in technical breach, has identified and reported that breach itself and has given effective restitution or compensation for that breach. There is therefore no incentive for companies to 'self-police'.

Excessive micro-management can also result in perverse regulatory outcomes. APRA, for example, is seeking access to the details of Directors' performance reviews. Knowing that the written reviews of Directors will be subject to APRA scrutiny will discourage Boards from undertaking full and frank discussions in those reviews and will lead companies to see reviews as purely a compliance exercise, counter to the regulatory objective of ensuring robust reviews and effective Directors and Boards.

Micro-management is driven by risk adverse regulators fearing something may go wrong if they are not managing the minutiae of business. Ironically, this approach is likely to increase the risk to regulators when, inevitably, something does go wrong. What, for example, is the legal exposure of a regulator that has micro-managed its sector's corporate governance performance when a company within that sector does eventually fail?

While not directly a compliance issue, a 'zero tolerance' attitude also reduces the ability of corporations to take reasonable commercial risks, reducing business and hence investor returns.

Example 17: Overly Restrictive Approaches

On 31 August 2005, APRA issued a discussion paper, *Adoption of International Financial Reporting Standards: Prudential Approach – 2. Tier 1 Capital and Securitisation*. This discussion paper sets out the proposed approach by APRA and is relevant to authorised deposit-taking institutions. If introduced as law, the proposals would form part of Prudential Standards that would be enforced under the *Banking Act 1959*.

As set out in the discussion paper, APRA would make use of more restrictive limits and forms of instruments that can comprise 'Residual Tier 1' capital instruments compared with other major OECD jurisdictions. This restrictive approach would add significantly to the return investors would need on 'pure' preference shares over other forms of capital raising, making it uneconomic for banks to issue this form of capital and unnecessarily restricting the capital raising activities of Australian banks.

Example 18: Excess Caution

A lack of commercial understanding and a risk averse approach by State environmental authorities is adding considerably to compliance costs. For example, environmental authorities outsource a lot of technical expertise to consultants, via the use of auditor schemes. The auditors are subject to both regulatory and commercial pressures to adopt a conservative approach to the issues they deal with, such as contaminated land. In essence, there is less risk for the auditor or the environmental authority in avoiding a decision that land is no longer contaminated than in confirming that remediation has been successful. Companies are therefore subject to excessive costs and limitations on the use of land.

Further examples are provided in Attachment A.

4.6 Personal Liability

Governments are increasingly making individuals within corporations personally responsible for corporate breaches. While the 'corporate veil' should never be used to shield individuals who knowingly break the law, the increased exposure of Directors and officers to individual liability is contributing to regulatory compliance costs.

The aim of greater personal liability is to increase the responsibility those individuals take for corporate regulatory compliance. In effect, however, where individuals are potentially personally liable for breaches not directly within their control, they will seek to protect themselves, their reputation and their assets by causing the company to over-comply with its regulatory obligations, to ensure no stone is left unturned. Where criminal sanctions attach to breaches, this reaction will intensify. As a result, companies will take on much more onerous compliance obligations than might otherwise be justified. In particular, there will be no sense of reasonable risk management in developing compliance systems or of balancing the cost of a compliance response with its likely benefits. Directors and officers will feel exposed unless everything that can be done is being done to ensure full compliance, regardless of the actual risks involved.

This unintended consequence of personal liability can be offset through proper due diligence defences or business judgment rules being attached to the personal liability. The BCA is worried that there appears to be an increasing tendency for Governments to introduce strict liability for Directors and officers, without these defences¹⁴. This trend can only lead to compliance costs increasing significantly and to many capable individuals refusing to join the Boards of companies in sectors that are particularly vulnerable (resulting therefore in poorer quality Boards and management in those sectors).

Example 19: Occupational Health and Safety Amendment (Workplace Fatalities) Bill 2004 (NSW)

Initial proposals for reform to the New South Wales Occupational Health and Safety (OH&S) legislation would have significantly increased the jeopardy for managers and Directors where breaches of OH&S requirements occurred. For example, under the legislation, bank hold ups are considered to create unsafe workplaces. Bank managers can therefore be held liable under the legislation for an OH&S breach. Changes to the law proposed by the New South Wales Government mean that managers can be found personally liable where, on the balance of probabilities, their

¹⁴ For example, recent amendments to the *Protection of the Environment Operations Act 1997* (NSW).

corporate employer was found to have breached the OH&S law. Ironically, it would have been easier to jail managers for OH&S breaches than those responsible for the bank hold up (who would be subject to proper criminal prosecution, including the need to prove guilt beyond reasonable doubt). The New South Wales Government has since moderated these changes, although concerns remain.

Changing the law in this way places intense pressure on companies to go overboard in trying to avoid potentially unsafe workplaces, to the point where the costs of preventative action far outweigh the actual risks.

Example 20: Removal of Indemnification

Proposed amendments to the *Trade Practices Act 1974 (TPA)* will prohibit a company from indemnifying an employee against pecuniary penalties incurred for breaches of the TPA. The provision is designed to prevent companies indemnifying employees who engage in flagrant breaches of the competition laws, such as those involved in price fixing or other cartel behaviour. Many parts of the TPA, however, involve potential breaches that are much more subjective in nature. For example, s 46 prohibits misuses of market power. There is no clear line, however, between desirable robust competition and anti-competitive abuses of market power. Therefore there is a real risk of employees inadvertently breaching the section, or avoiding strong competition for fear of inadvertently breaching it, given the personal consequences if they get it wrong. The problem could be moderated by providing an exception to allow indemnities against liability for contraventions of the TPA that are not *per se* contraventions and where the person in question has acted with reasonable grounds for believing that they were acting lawfully. The TPA should also make it clear that the prohibition does not prevent companies from paying insurance premiums for its officers in respect of civil penalties under the Act.

Further examples are provided in [Attachment A](#).

5. Immediate Steps to Reduce Compliance Costs

The *Issues Paper* released by the Regulation Taskforce states that the primary motivation for the Taskforce¹⁵:

“..is to reduce the regulatory compliance burden on business, rather than to reduce regulation per se.”

The previous section of this submission identified the contributors, other than legislation itself, to the compliance burden of larger corporations. None of these causes of excessive compliance costs can be remedied easily. There is, however, a range of actions Governments should take to reduce some of the compliance burden. These are set out below.

5.1 Interaction Between Laws

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from the interaction between different laws, which results in conflicting, inconsistent or overlapping legal obligations:

- all regulatory proposals be subject to stricter regulatory impact assessment processes, including detailed and public analysis of the relationship between the regulatory proposal and existing regulatory requirements (whether State or Commonwealth) and proposals for avoiding overlap and inconsistency;
- definitions of commonly used terms be standardised across all legislation;
- commonly used clauses, such as those setting out the basic duties of Directors and officers, be standardised across all legislation;
- the Commonwealth Government’s announced annual review process to examine the cumulative stock of regulation and to identify an annual red tape reduction agenda include examination of areas of regulatory overlap and inconsistency and recommendations to harmonise those regulations;
- simplified, multi-purpose reporting be introduced to allow companies to provide information once to Government, rather than repeatedly to different Government agencies; and
- the Council of Australian Governments (**COAG**) adopt as a priority the goal of reducing the regulatory burden imposed on Australian business of the multiple regimes covering issues such as occupational health and safety, workers’ compensation, payroll tax and stamp duty calculations (see further discussion in Section 6 below).

Conflicting, inconsistent or overlapping regulations arise when new regulations are added with inadequate consideration of existing laws and their interaction with the new laws. Frequently, full and detailed consultation with business will be needed to identify those interactions and to appreciate their practical implications.

15 Regulation Taskforce, *Taskforce Issues Paper* (25 October 2005) p. 4.

Some steps can be taken to moderate the compliance costs arising from existing inconsistencies and overlap through greater consistency in the use of terms across legislation and through harmonising and consolidating existing reporting requirements.

5.2 Constant Change

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from constantly changing laws:

- all regulatory proposals be subject to stricter regulatory impact assessment processes, including detailed and public analysis of the need for the regulation and the costs of different responses (regulatory and non-regulatory);
- all legislation come into effect on only one of two possible dates each year (1 January and 1 July);
- longer transition periods be adopted, with companies being given at least six months from the date legislation comes into effect to become compliant with new or changed legislative requirements;
- legislation not come into effect until all necessary subordinate legislation (regulations, etc) has been passed and the relevant regulator has released its guidance material;
- exposure drafts of all legislation be released for a minimum of 12 weeks public consultation;
- major legislation, such as the Corporations Act, be subject to only one amending Act each year;
- all legislation introduced for specific purposes be subject to fix term reviews of its implementation and actual compliance costs, to replace *ad hoc* reviews (for example, formal reviews every five years); and
- better co-ordination of major regulatory projects to avoid regulatory peaks or 'bottle-necks', where different agencies are seeking input from business across a range of regulatory proposals simultaneously.

These recommendations are designed in part to encourage Governments to undertake a more thorough examination of the currently available laws before they decide to impose new regulation and to ensure further regulation is actually necessary.

The recommendations are also designed to reduce the compliance costs that arise when new laws come into effect. By limiting the number of occasions on which new laws come into effect, allowing for longer lead or transition times and ensuring that all regulatory requirements are known before new laws come into effect, the cost to companies of becoming compliant with the new regulation can be minimised.

Providing for longer consultation periods will allow longer time for unintended consequences to be identified, reducing the need for subsequent amendments to the legislation.

Finally, by forecasting a review of the implementation and compliance burden of new regulation, there may be less temptation to continue 'tinkering' with recently passed laws, with any minor proposed amendments held over until the review of the regulation.

5.3 Licensing and Approvals Processes

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from multiple and uncoordinated approval processes:

- as agreed by COAG, all Governments develop effective 'one-stop shops' in each jurisdiction for project facilitation and approvals;
- 'one-stop shops' be given sufficient power to allow them to direct the approvals process;
- legislative changes be made to streamline, harmonise and synchronise the various approvals processes; and
- Governments co-ordinate their approvals processes across layers of Government so that business experiences a 'one-stop shop' even where more than one level of Government is involved in the approval.

The problems arising from multiple and uncoordinated approval processes have been known for many years and a number of attempts, largely unsuccessful, have been made to overcome those problems. 'One-stop shops' are attractive as they should simplify considerably the engagement of businesses with Government. For 'one-stop shops' to work, however, they must have real power and the legislation underpinning the various approvals processes must also be changed to facilitate the 'one-stop shop' model. Governments also need to collaborate to ensure 'one-stop shops' are not actually 'three-stop shops' covering Commonwealth, State and Local approvals processes.

5.4 Regulators

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from a lack of delineation between the roles of regulators, a lack of clarity over their powers, confusion over their objectives in exercising those powers and a lack of co-ordination between regulators:

- all legislation clearly sets out the overarching policy objectives of the legislation;
- the regulator be required to operate in a way that achieves that overarching policy objective in the most effective and efficient way possible, and to report annually on how it achieves this;
- all business regulators be given as a principal objective, the facilitation of vibrant, dynamic and competitive businesses in the sectors they regulate, with compliance and enforcement activities as one means towards that end;

- all regulatory proposals be subject to stricter regulatory impact assessment processes, including detailed and public analysis of the relationship between the regulatory proposal and existing regulatory requirements (whether State or Commonwealth) and proposals for avoiding overlap and inconsistency;
- regulatory impact assessment processes be applied not only to primary legislation, but also to subordinate and quasi-regulation, including rule making guidance from regulators (where regulators issue guidance material that advises the steps the regulator expects companies to take to be compliant with legislation); and
- where potential overlap between regulators is unavoidable, regulators be directed to co-operate and to co-ordinate their inquiries.

Compliance costs increase significantly when regulators operate in silos, do not have clearly defined roles, see their primary role as catching ‘corporate crooks’ or doing everything in their power to prevent any possible contraventions of the law. Consumers, suppliers and others dealing with business are best served by a vibrant, dynamic and competitive business sector, rather than a sector stifled by excessive regulation and intervention from regulators.

5.5 ‘Zero Tolerance’

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from the ‘zero tolerance’ approach of regulators:

- all Commonwealth regulators be given a directive that one of their performance indicators is to foster effective and competitive businesses in the areas that they regulate, consistent with their other objectives;
- all Commonwealth regulators report publicly and annually on how they have achieved that performance indicator;
- Commonwealth regulators be directed to put in place systems that encourage and provide incentives for ‘self-policing’ by companies; and
- Commonwealth regulators be directed to adopt risk profiling, that allows them to concentrate their compliance and enforcement activities on those companies with poor compliance records, while allowing a greater degree of freedom and lighter touch regulation for those companies with strong compliance records – there are encouraging signs from this approach being adopted by the Australian Taxation Office.

The ‘zero tolerance’ approach of regulators will not stop occasional contraventions of the law and is largely counter-productive. Instead, regulators should adopt risk management approaches to compliance, focusing their efforts where there is evidence of a real risk of non-compliance and encouraging ‘self-policing’ among the majority of corporations that will wish to be fully compliant with the law. Where contraventions do occur, regulators should take into account the overall compliance performance and good faith of the corporation in determining what remedial or legal action is appropriate.

5.6 Personal Liability

The BCA recommends the following steps be taken to reduce unnecessary compliance costs arising from the growth in personal liability for Directors and officers:

- individual liability only be introduced in exceptional circumstances;
- clauses setting out the basic duties of Directors and officers be standardised across all legislation; and
- wherever individual liability is imposed, it be accompanied by an appropriate defence, such as due diligence or a business judgment rule.

Directors and officers need to be confident that following accepted business practice, with due care and diligence, will generally be sufficient to ensure they are not held personally liable for any corporate contraventions. It is therefore vital that their duties and obligations be consistently set out and that they have access to proper defences should a contravention occur.

In addition to the recommendations set out above, BCA Member companies have identified further reforms that could be made to alleviate their compliance burden. These proposals draw on the range of regulatory issues identified by BCA Member companies in [Attachment A](#).

Some examples of measures that can be taken to reduce compliance costs include:

- increasing the FBT threshold for minor benefits from \$100 and index annually;
- rationalising and narrowing the definition of 'benefit' for FBT purposes;
- increasing the threshold for net BAS adjustments from \$300,000 in a three month period following the lodgment of a BAS;
- rationalising the number of financial statements required to be produced by companies, to reduce the costs of preparation and audit, including allowing corporate groups to produce one set of consolidated accounts; and
- lifting the threshold for Foreign Investment Review Board approval for foreign purchase of urban land to exclude, for example, real estate bought for employees or incidentally to project development.

In relation to the *Corporations Act 2001*, the *Superannuation Industry (Supervision) Act 1993* and the *Life Insurance Act 1995*, the single most significant initiative that should be adopted by Government is the introduction of a single mechanism, preferably in the *Corporations Act*, to enable the rationalisation of financial products that are uneconomic or represent serious operational risk.

6. Priority Areas for Ongoing Reform

Adopting the steps set out in Section 5 will provide some immediate and ongoing relief for business from their excessive compliance burdens. Even fully implemented, however, those steps will not be sufficient to overcome the problems that arise with over-regulation and will not guarantee long term and sustainable improvements to Australia's business regulation environment.

The BCA recognises that the Regulation Taskforce has both a limited brief and very limited time to fulfill that brief. We would urge the Taskforce, however, to use the opportunity of this inquiry to point Government in the direction of further substantial reforms that are necessary to improve business regulation. To assist with this, the BCA sets out below the priorities it sees for ongoing regulatory reform.

6.1 Better Regulation Making

A key concern for business is not the policy objectives behind legislation and related regulation, but the poor execution of those policy objectives, through poorly prepared and administered regulation.

6.1.1 Mind the Gap

One of the principal reasons for poor execution is that the officials developing the regulation frequently and understandably have limited appreciation of the practical implications of the regulations they are developing and the complexities of the businesses, activities and transactions they are seeking to control. This gap in understanding between those developing regulation and those that have to comply with it is compounded by the process typically followed within Government to develop regulatory proposals. Regulatory proposals are usually developed internally, within Government, before any engagement with the business or wider community. Typically, the lead agency will develop proposals, negotiate these proposals with other interested agencies and then gain Ministerial approval for their preferred regulation. Cabinet approval may also be sought. Only at this stage might officials consult with those outside of Government affected by the regulatory proposal. By this stage, however, officials are already strongly committed to the particular regulatory solution they have settled on. The 'consultation' process therefore becomes more one of justification and defence of the particular regulatory proposal already decided upon by officials, than of genuine inquiry for the best policy response to an issue.

Example 21: Anti-Money Laundering

Australia has committed itself to comply with the recommendations of the international Financial Action Task Force (**FATF**) on money laundering and terrorist financing. This commitment is supported by Australia's financial sector.

The FATF recommendations require Australia to amend substantially its current legislation, particularly the *Financial Transaction Reports Act 1988* (Cth). For some two years, Government officials worked on draft amending legislation designed to implement the FATF recommendations. Despite consultation with the industry, amendments were proposed that would have had significant and unnecessary compliance costs for financial institutions. One BCA Member company, for example,

estimated that the cost of customer identification for all its customers, as originally proposed, would have been \$100 million. Ultimately, the original 800 page Bill was rejected by Cabinet.

The Government then instructed officials to work closely with the finance sector to develop workable solutions to implementing the recommendations. In effect, industry was asked to show how it believed the recommendations could best be implemented. As a starting point, the Minister, officials and industry representatives agreed a set of principles that would guide the development of the legislation. While this is an ongoing exercise, asking the industry itself how best to achieve the outcomes both industry and the Government desire is a sensible approach that arguably should have been adopted at the start of the process in 2003¹⁶.

6.1.2 Closing the Gap

The gap between those charged with developing regulation and those that have to comply with it can only be closed through a changed approach and attitude to regulation making. The more complex an area of regulation, the more essential it is to close that gap.

Where Governments perceive a need for action that may involve new or amended regulation, they should first consult with those likely to be affected by any regulatory intervention. This should include businesses that are likely to bear the costs of regulation and those in the community that are expected to be the beneficiaries. Government consultation should be a genuine attempt to understand the need for the regulation, alternative approaches that might be adopted and the consequences of particular regulatory proposals.

This consultation process should be supported by more robust regulatory impact statements (**RIS**, see Section 6.1.3 below), which incorporate proper cost analyses of the different regulatory and non-regulatory proposals¹⁷. Consultation should be built around the draft RIS and costings. Once a preferred approach has been developed through this process, there should be further consultation and costings of the details of that preferred approach. This second round of consultation is important to help identify potential conflicts with other laws and any unintended consequences from the new regulation. More fully costing the preferred approach also allows the main contributors to the cost of the new regulation to be identified and consultations held on how that cost can be reduced.

This more robust approach to impact assessment, costing and consultation should be mandatory for all new regulations with an impact on business, unless Cabinet determines such an approach is inappropriate (for example, for urgent legislation). The process should also apply to subordinate legislation and quasi-legislation (such as rule making guidance from regulators, where regulators issue guidance material that advises the steps or actions the regulator expects companies to take to be compliant with legislation).

¹⁶ Unfortunately, despite this promising start, the Commonwealth Government has included some aspects of the original legislation into recently passed anti-terror laws, without consultation with industry.

¹⁷ Consistent with the Federal Government's recent commitment "to put in place arrangements that will involve a more rigorous use of cost-benefit analysis within government before new regulations are introduced" from The Hon John Howard, MP and the Hon Peter Costello, MP, Joint Press Release, *Taskforce on Reducing the Regulatory Burden on Business* (12 October 2005).

Only by closing the gap between those that develop regulation and those that have to comply with it can compliance costs be minimised, unintended consequences be avoided and policy objectives achieved efficiently and effectively.

6.1.3 Better Regulatory Impact Statements

Since 1997, the Commonwealth Government has required the preparation of an RIS for all reviews of existing regulation, proposed new or amended regulation, quasi-regulation and proposed treaties involving regulation, which will directly or indirectly affect business or restrict competition.

Despite this requirement, however, RISs have been less than successful in stemming the flow of new, costly business regulation. Only a handful of new regulations are subject to any cost-benefit analysis, and even where such analysis occurs, it is often too late in the process to influence the outcome and is based on very limited information about the actual costs to business.

Conceptually, RISs are a vital tool for managing regulation and its compliance burden. In practice, the potential of RISs has not been realised. The BCA sees a number of underlying reasons for this, of which the two most significant are:

- there are no real consequences when the RIS process is not adequately followed; officials are not held to account for the quality of their RIS¹⁸ and there are few incentives therefore to exploit fully the preparation of an RIS as a process to assess whether regulation is needed, alternative regulatory approaches and the likely costs of regulation; and
- there are few formal processes for officials to follow in preparing their RISs, including no standard methodology for assessing the impacts and costs of regulatory proposals and no requirements or standard processes for consulting those affected by regulatory proposals.

The BCA is firmly of the view that the RIS process must be retained, but must also be overhauled to make it more effective and to make those preparing RISs more accountable for the process and content of the RIS.

As a minimum, the following needs to be done to improve the RIS process:

- legislating the requirement to produce an RIS for all regulatory proposals likely to have an impact on business;
- introducing a two-stage impact assessment process, with all regulations likely to affect business subject to a preliminary assessment, and all regulations likely to have significant impacts on business subject to a full assessment;
- including in the RIS a clear statement of the policy objective of the legislation and how each proposal would achieve that objective;

¹⁸ The Office of Regulation Review does conduct an annual assessment of the adequacy of RISs prepared by Government agencies, and reports the results of that assessment, however, these assessments occur well after the new regulation is in place and there appears to be little evidence that consistent adverse assessments alter the behaviour of agencies.

- requiring the release of the preliminary RISs for public comment and allowing sufficient time for consultation to make that consultation meaningful (a minimum of six weeks);
- where a final RIS is prepared, allowing a further six week consultation period on that final RIS;
- developing a standardised, sophisticated methodology for identifying and measuring the likely costs to business of proposed regulations (see Section 6.1.4); and
- requiring the Minister proposing new business regulation to certify personally that the benefits of the regulation can reasonably be expected to outweigh the costs.

6.1.4 Cost-Benefit Analysis

At present, no Australian Government has a standard methodology for assessing the actual costs of regulation. The Commonwealth Government has recently announced that it has¹⁹

“..decided to put in place arrangements that will involve a more rigorous use of cost-benefit analysis within government before new regulations are introduced”.

The BCA welcomes this step; only proper analysis of the anticipated benefits and costs of regulatory proposals can determine whether new regulation is appropriate. Proper analysis of the costs to business of regulatory proposals also allows business and officials to identify those elements of a regulatory regime that are most costly and target them for improvement. Proper cost-benefit analysis should also be used on existing regulation to identify areas where significant reductions in compliance costs can be achieved.

Effective cost-benefit analysis of regulatory proposals does not need to be a complex or rigid process. In particular, it would not be realistic to assume that all costs and all benefits can be reduced to dollar values, with the decision on whether a regulatory proposal proceeds dependent on which value is greater. For example, while much of the discussion around the cost of regulation focuses on compliance costs, a greater cost can arise from the opportunity costs to business of excessive and unnecessary regulatory constraints.

Effective cost-benefit analysis should focus instead on identifying the specific costs new regulation would impose (such as capital investment, systems modification, training, etc) and assessing how many businesses would have to carry those costs. An advantage of deconstructing the costs into their component elements is that it allows officials and business to identify those elements that make the greatest contribution to compliance costs, to assess whether those specific costs are warranted and to consider more effective and less costly ways of achieving the objectives of that element of the regulation.

Effective cost-benefit analysis can also provide the basis for discussion between officials and business on the actual costs of regulatory proposals, requiring each side to verify their assertions on the anticipated impact of new regulation.

¹⁹ The Hon John Howard, MP and the Hon Peter Costello, MP, Joint Press Release, *Taskforce on Reducing the Regulatory Burden on Business* (12 October 2005).

The BCA welcomes the Commonwealth Government's commitment to the "*more rigorous use of cost-benefit analysis*" and looks forward to the application of more sophisticated costing analyses to all regulatory proposals affecting business.

6.2 Better Oversight

Improved processes for regulation making and Government commitments to reduce the regulatory burden on business will only be effective if there is proper oversight of their implementation. The BCA's *Action Plan* argued strongly for a body to advise Government on how to improve regulation and reduce the compliance burden²⁰. Without such a body, there is no element of Government with a clear mandate to drive better regulation on a day to day basis and to counter the factors that are driving ever great amounts of regulation. The BCA continues to believe that structures need to be established to ensure officials are accountable for the quality of regulation put in place and that the Government has an ongoing program of regulatory reform. The BCA welcomes the Government's announcement that it will "*introduce a new annual review process to examine the cumulative stock of Australian Government regulation and identify an annual red tape reduction agenda*"²¹, however, it believes that further changes are necessary, along the lines recommended in the BCA's *Action Plan*.

6.3 Regulation Requiring Further Review

As part of the preparation of this submission, the BCA has consulted widely with its Member companies. BCA Member companies were asked to identify regulations specific to their operations that caused unnecessary compliance burdens or created regulatory barriers to legitimate business activity. Attachment A of this submission sets out the wide range of regulatory issues that have been identified by BCA Member companies.

Many of the issues raised in Attachment A are examples of the generic problems leading to excessive compliance burdens discussed in this submission. Many others are regulatory issues specific to just one or a few companies. In the limited time available, the BCA has not been able to consult widely on these specific issues and has therefore not reached an agreed position with its Member companies on how some of these issues should be resolved. Attachment A should therefore be seen as a suite of regulatory issues facing different Australian corporations and a pointer to where further review or reform could be targeted. Attachment A should also help the Regulation Taskforce identify those sectors of business that are most afflicted with over-regulation. Those sectors should be priorities for further review and reform.

The BCA notes that the Regulation Taskforce's *Issues Paper* states that part of its brief is to²²:

20 For a more complete discussion of this issue, see *Business Regulation Action Plan for Future Prosperity*, pp. 41-44.

21 The Hon John Howard, MP and the Hon Peter Costello, MP, Joint Press Release, *Taskforce on Reducing the Regulatory Burden on Business* (12 October 2005).

22 Regulation Taskforce, *Taskforce Issues Paper* (25 October 2005) p. 4.

“..identify other areas of existing regulation where there appears to be a case for abolition or modification, but for which further examination is warranted.”

The regulatory issues set out in Attachment A fall within this category.

6.4 Priorities for COAG

A major contributor to the compliance burden of larger corporations in Australia arises from duplicated and overlapping regulation between States and between the Commonwealth and States. Businesses that operate across Australia face, for example, eight occupational health and safety systems, eight ways of calculating payroll tax and eight sets of environmental approvals. In many areas of regulation, Australia's 20 million people face greater regulatory diversity, overlap and duplication than Europe's 457 million.

Supporters of multiple regulatory regimes argue that a strength of this system is that it fosters competition between Governments and regulators and encourages innovation. Where innovations fail, only one jurisdiction bears the cost. Concerns are also voiced about centralising power, which is often seen as the necessary response to multiple regulatory regimes. While, these arguments have merit we also have to be sure that the benefits that multiple regulatory regimes bring clearly outweigh their costs. Those corporations that have to comply with and implement multiple regulatory regimes are skeptical that these additional costs bring adequate benefits.

Resolving these issues is beyond the scope of the current Regulation Taskforce, however, the BCA would urge the Regulation Taskforce to highlight the significance of these issues to the level of regulatory burden facing Australian business. To this end, the BCA provides the following list of the areas of multiple regulation that it sees as the priorities for reform:

- occupational health and safety law;
- workers' compensation;
- State tax calculations (particularly payroll and stamp duty);
- product standards;
- equal opportunity and anti-discrimination;
- trade and professional licensing;
- personal securities; and
- environmental laws

A range of other areas are identified in Attachment A.

In its *Action Plan*, the BCA argued that Australian Governments should adopt the principle that, where an area of regulation is a shared responsibility between jurisdictions, there should be a move towards a single, consistent national regime.

This is particularly the case where responsibility is shared between the Commonwealth and the States or between different States.

The BCA was at pains to argue, however, that this does not mean that the Commonwealth should necessarily take over responsibility for all regulation. There are a range of alternative models for ensuring shared responsibility for one single regulatory regime. These include the approaches of harmonisation and mutual recognition.

While moving to single regulatory regimes will be complex and take time, the BCA believes that, in the short term, Commonwealth, State and Territory Governments should agree collectively to reduce the regulatory burden on Australian business and to commit to a joint regulation reduction program, supported by independent oversight and clear incentives and penalties based on the performance of Governments in reducing the regulatory load.

Example 22: The Costs of Multiple Regulatory Regimes²³

BCA Member company:

"We have a direct cost of employment, legal costs, consultancy and senior management time generated by inconsistent laws and regulations around occupational health and safety, payroll tax, workers' compensation, environmental regulation, property transfer laws, tax laws, company law (particularly its inconsistency with globally accepted regulations) and consumer protection laws. We estimated that, if each of these areas was consistent across Australia and, where appropriate, consistent with our international obligations, we could reduce our costs in this area by 20 per cent. This would equate to approximately 0.75 per cent of our revenue and increase our company tax contribution to the economy by \$1-2 million per annum and provide an additional \$2-4 million per annum for investment. We have opportunity costs of many times that amount. The distraction to our organisation by this regulatory complexity should not be underestimated. If our regulatory framework were rationalised and simplified, our competitiveness would dramatically increase, particularly into export markets. Too many of our managers are spending time distracted by regulatory complexities. Our company has expanded at a rate of 15 per cent per annum for the last four years. Given simple, consistent and sensible regulation we would have been able to increase that growth rate by at least 50 per cent. Apart from the benefits to employment and our balance of trade, it would also have put an additional \$8-10 million into the Treasurer's coffers over that period of time and produced an additional \$24-30 million for further investment."

Example 23: Workers' Compensation

National employers are required to comply with a variety of State and Territory workers' compensation laws. These laws differ according to:

- the calculation of weekly benefits and step down rates for eligible employees;

²³ Further examples are provided in Business Council of Australia, *Business Regulation Action Plan for Future Prosperity* (23 May 2005) pp. 51-52.

- the documentation required to be provided to employees outlining mutual rights and responsibilities;
- the financial and prudential requirements required by employers by each State authority to safeguard obligations;
- the reporting requirements of employers (eg. headcount information, remuneration levels, workers' compensation claims and other statistical data);
- the audit requirements of each state authority, requiring multiple jurisdiction specific process manuals, information collection protocols and documentation;
- the definition of a worker for the purposes of workers' compensation;
- access to common law thresholds vary and, within some jurisdictions, different access rules apply depending on date of injury, assessment of impairment and proof of negligence;
- quantum for damages varies widely between jurisdictions;
- access to recess and journey claims vary in each jurisdiction;
- the principle of early Return to Work following workplace injury is widely endorsed, however, variations between jurisdictions in relation to employer and worker responsibilities result in the inability to set a national best practice model across national companies;
- mandatory reporting of accidents and incidents varies greatly between jurisdictions; some States only require workers' injuries to be reported, while others also require injuries of contractors, customers and visitors to be reported, resulting in confusion over what is a 'reportable incident' and delays in the reporting process; and
- the definition of wages for renewal of workers' compensation insurance varies widely between jurisdictions; national employers are required to interpret wage definitions in each State to enable renewal of insurance.

A national employer may be required to pay workers' compensation premium installments in different months of the year (for example, in each State, the date of payment is different), to maintain valid insurance across the country. This creates an enormous administrative burden for a company.

This patchwork of State-based legislation means companies are often unable to centralise their management of workers' compensation issues and benefit from a more efficient allocation of resources. Instead, they may be required to retain staff in a number of States in Australia to ensure compliance with the State-specific reporting and financial obligations, even where the company may only employ a relatively small number of staff in those States and even though the workers' compensation claims may also only number as few as one or two at any given time.

Variations in reporting and the documentation required to support return to work continually need modification as legislation changes, which in turn makes national co-ordination of workers' compensation claims complex. The preferred approach to

achieving consistency is to agree a best practice model and amend legislation accordingly, delivering the best possible outcome for injured employees.

Example 24: Equal Opportunity and Anti-Discrimination

Businesses are required to comply with legislation at both the State and Commonwealth level in relation to equal opportunity and anti-discrimination. It is difficult for business conducted across borders to keep abreast of the various requirements. Quite often, action can be a breach in one jurisdiction whilst being in compliance in another.

There are various overlapping and inconsistent laws, including:

- *Anti-Discrimination Act 1977*(NSW)
- *Equal Opportunity Act 1995* (Vic)
- *Racial and Religious Tolerance Act 2001* (Vic)
- *Anti-Discrimination Act 1991* (Qld)
- *Equal Opportunity Act 1984* (SA)
- *Racial Vilification Act 1996* (SA)
- *Equal Opportunity Act 1984* (WA)
- *Anti-Discrimination Act 1998* (Tas)
- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1992* (NT)

Example 25: Occupational Health and Safety

The Commonwealth and each State and Territory have separate and distinct legislation setting out minimum standards for employers in relation to occupational health and safety. While these laws are broadly similar in scope, there are several differences which add to the costs of companies. For instance, the Queensland law requires each workplace with 20 or more employees to have a trained Work Health and Safety Officer²⁴. The legislation in South Australia requires the appointment of senior executive officers as 'responsible officers' who must reside in South Australia and take reasonable steps to ensure the employer organisation complies with the law in South Australia²⁵. These requirements are particular to the regimes in Queensland and South Australia, meaning that a national organisation must make special arrangements in those States.

Other areas that have been identified as problematic are the variations in the classification and labeling of hazardous substances and dangerous goods, standards for major hazard facilities and plant standards.

24 Workplace Health and Safety Act 1995 (QLD), sections 93-97

25 Occupational Health, Safety and Welfare Act 1986 (SA), section 61

7. Conclusion

There are no quick fixes to the regulatory problems facing Australian business. The only solutions lie in understanding the drivers behind over-regulation and high compliance costs, and putting in place systemic reforms that will overcome those drivers.

There are, however, steps that can be taken in the short term that offer some relief from high compliance costs. This submission has identified a range of those steps and the BCA looks forward to Commonwealth Government action in these areas.

Australia's regulatory issues cannot be solved by one Government alone. Particularly for larger corporations, a major source of regulatory frustration and cost stems from the multiple, overlapping and conflicting regulatory regimes that have evolved under our Federal system. This is further compounded when the role of Local Government is taken in to account. Concerted and co-ordinated effort is required from all levels of Government to overcome these unproductive additions to the cost of regulation. Regulatory reform must therefore be a prominent priority for the Council of Australian Governments' agenda.

Along with others, the BCA has highlighted the costs of regulation to Australia. Excessive and poorly executed regulation adds a significant deadweight to the economy, sapping the strength of Australian businesses and undermining their competitiveness. To remain competitive, Australia must remove this unnecessary burden on the economy.

The BCA sees the work of the Regulation Taskforce as an essential first step in the right direction.