

Business
Council of
Australia



Business Council of Australia

Submission to the Taskforce on Reducing the Regulatory Burden on Business

Attachment A – Specific Regulatory Issues

December 2005

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1. Introduction

In response to the Commonwealth Government's announcement of the Taskforce on Reducing the Regulatory Burden on Business, the BCA has sought the views of its Member companies on the regulatory issues of most concern to them. This information has been used to identify the general contributors to high compliance costs, and possible remedial measures, that have been discussed in the body of this submission.

The BCA notes that the Regulation Taskforce's *Issues Paper* states that part of its brief is to¹:

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

Attachment A of the BCA submission sets out the list of such areas as identified by BCA Member companies.

Attachment A reflects the responses directly received from Members and may not reflect the collective view of all of the Member companies. In the limited amount of time available, the BCA has not been able to rank these examples in order of priority or obtain a collective view from Member companies about these issues. The various levels of detail provided should not be seen as an indication of the level of importance of the issues raised. Instead, the examples demonstrate the breadth of business concern about regulation, and the plethora of areas that should be considered when reviewing regulations that effect business.

These examples are mostly of regulations that apply commonly to BCA Member companies. Many Members will have their own regulatory concerns, relating to regulations that apply specifically to their industry or to them. Accordingly, these examples do not cover the field in terms of regulatory concerns of BCA Member companies.

Many BCA Member companies provided examples of workplace relations laws which were providing unnecessary compliance burdens either through poor drafting of the legislation or duplication and overlap between the Commonwealth and State laws. Due to the current efforts to reform this area, we have not included those examples in this document. This should not be taken as an indication that employment laws are not imposing compliance burdens².

¹ Regulation Taskforce, *Taskforce Issues Paper* (25 October 2005) p. 4.

² For example, one energy company highlights that The Coal Miners Welfare Act 1947, the Coal Industry Tribunal of Western Australia Act (for Industrial Relations) 1992 and the Coal Industry Superannuation Act 1989 all apply and overlap with other relevant regulation in State and Commonwealth areas. Further, some BCA Member companies highlighted that in NSW, the Unfair Contracts jurisdiction (Section 106) has substantially affected the rights of employers when engaging and managing personnel. Under this provision the Commission has the power to set aside or vary a legally binding contract on the grounds that it is harsh, unfair or unreasonable. Compensation can be awarded if the Commission considers that an employer acted unfairly at any time during the employment relationship or in the termination of employment. Substantial compensation has been awarded against employers in respect of contracts found to be unfair. (*This is likely to be resolved by the new WorkChoices Bill.*)

2. Costly Regulations

2.1 Financial Services Reform Act (FSRA)

The guiding principles of the Wallis reforms included a “functional” reorganisation of regulatory responsibilities to address the piecemeal approach based on industry that had developed previously. These reforms have failed to reduce complexity, however, due to regulators, unwilling to rely on broad principles, issuing substantial and detailed regulation and guidance, intended to aid certainty but often with the opposite effect. While it is acknowledged that some degree of guidance is necessary, and that the objectives of simplicity and certainty are to a degree contradictory, it is submitted that the pendulum has swung too far from the need for clear and simple rules capable of common-sense implementation. For example, to fully investigate a question under Ch 7 of the *Corporations Act 2001*, it is necessary to research not just the Act and regulations, but ASIC class orders, guides, policy statements, and FAQs.

Some aspects of the FSRA legislation are extremely difficult to apply and are often open to interpretation, leading to potential ‘accidental breaches’. Further, a number of structural issues have become evident in implementation of the reforms and need to be rectified. Some of the problems with the FSRA are due to:

- inflexibility and unnecessary bureaucracy by the regulator;
- absence of timely policy guidelines; and
- insufficient timeframes to comply.

In many cases the level of disclosure and training required in the sale of financial products is disproportionate and excessive. Continual changes makes compliance extremely costly and time consuming.

From a banking perspective, the current FSRA licensing provisions are adversely affecting Australian banks’ ability to innovate and introduce new products, which has serious implications for Australia’s development as a regional financial centre. For example, one BCA Member company highlights that before a bank can proceed to discuss aspects of a new customer’s banking requirements, FSRA must be considered. This costly process may discourage financial institutions from considering implementation of new products.

The new customer is presented with a Financial Services Guide (FSG) to read and understand (2 pages) or they may receive a General Advice Warning.

The amount of information and documentation that must be given to a customer under FSRA and other regulatory regimes are onerous. For example, if a customer visits a financial institution to open a new business cheque account for a business overdraft with internet access, FSRA requirements need to be complied with. At account opening, the client would be likely to be provided with the following information:

- General information terms and conditions - 41 pages

- Interest rates on transactional account - six pages
- Business Cheque Account - 26 pages
- Electronic Banking terms and conditions - 64 pages
- Privacy Policy

The client has received in excess of 139 pages of documentation, most of which is driven by the need to comply with relevant laws, in particular, FSRA.

The Commonwealth Government has recently consulted with industry on a number of FSRA refinements. Further improvements could be made in a number of areas, including:

- **Disclosure Documents:** Further refinements are required to the *Corporations Act* to ensure that disclosure documents (Financial Services Guides (FSGs), Product Disclosure Statements (PDSs) and Statements of Advice (SOAs)), which are required to be provided to customers for certain financial products and services, can be reduced in length, whilst still providing appropriate disclosure and protection to consumers. This would lead to disclosure documents which are clearer and better understood and utilised by customers. Included in the review of disclosure documents could be the trade confirmations regime, such that clients are made aware of the type of advice and disclosure they have been given, and why. The proposed FSRA refinements have gone some way to addressing disclosure requirements, and this is to be welcomed.
- **Financial Product Advice Definition:** The definition of “financial product advice” is too broad and a clear distinction between general advice and personal advice is still being sought by industry in order to reduce the unintended compliance burden of the existing definition. Further, definitions such as retail and wholesale clients might be reviewed, to ensure tests such as assets based tests are not overly complex. Such definitions should be clear and concise.
- **Online Calculators:** Basic online calculators are an effective educative tool that can assist customers to make informed decisions about financial products and services. Currently, calculators are considered to provide “personal advice”, which makes it difficult for product providers to provide them for use by consumers, due to the regulatory requirements associated with the provision of “personal advice”. Accordingly, amendments are required to ensure that basic online calculators are not treated as providing “personal advice”. ASIC are currently in the process of reviewing this issue (ASIC media announcement 23 August 2005).
- **Simplify licensing:** Further refinements are required to streamline the types of financial product and financial service authorisations that need to be sought under an AFS licence.
- **Authorised representatives:** Consideration may be given to the creation of a centralised register or database of ‘authorised persons’ who provide financial services. This may improve the ability for organisations to conduct due diligence when making potential acquisitions of other licensees or to verifying a potential new employee’s history of employment.

- **Verbal disclosures:** The number of verbal disclosures that a representative is required to make needs to be reviewed because disclosures have become repetitive and meaningless to consumers. More relevant disclosures need to be encouraged. Further, any review of verbal disclosures should also take into account those required by the ASX Market Rules. A view as to whether the particular transaction is a 'fee for service' transaction or involves a 'trail' commission may be an additional consideration when reviewing disclosures.

The FSRA component of the Corporations Act should be modified to exclude the electricity/gas industries. The legislation was not intended to cover energy companies trading electricity/gas with each other. The broad scope of the legislation as currently drafted covers organisations not intended to be covered by the legislation.

One financial service provider has estimated the FSRA licensing requirement imposed an initial cost of \$30 million and an ongoing cost of \$10 million a year on the company. The financial service provider estimates that the financial services licensing requirement involved five staff full time for several months to prepare and provide necessary documentation. They have seen no evidence of other licensing requirements having been streamlined³.

The FSRA regime needs to be reviewed, with various considerations taken into account, such as whether the more commoditised financial service products (home, contents, motor, personal lines of general insurance) warrant being subject to the full gamut of FSRA. Like basic deposit products, these are reasonably well understood by consumers, low cost, renewable at least annually, and may not need 100 per cent compliance with PDS requirements and the like. The current requirements create extra disclosure burdens for business and extra administrative costs. They may also discourage consumers from taking out these types of cover, or sufficient cover, which has adverse public policy consequences.

There have been some positive developments in this regard. On Thursday 24 November 2005, the Australian Securities and Investment Commission (ASIC) issued a media release announcing the introduction of changes which will reduce the amount of paperwork required to be submitted as part of an application for an Australian Financial Services Licence (AFSL) by over 50 per cent. ASIC says it has reduced the documents that must accompany an initial application for a licence to a maximum of four documentary 'proofs'.

Another issue arises because of the breadth of the definitions of financial product advice and dealing in a financial product, which means that telecommunications providers who are merely conduits for access to financial products and services that may be covered by FSRA obligations, even where the actual issuer of the underlying financial product or service is themselves regulated. Telecommunications carriers are increasingly offering means by which customers may access services from financial institutions (such as electronic banking), or bundling products (eg a phone handset with insurance) and co-branding of products provided on a bundled or packaged basis. Informing customers of such services, or co-branding, or bundling, or even advertising such services, may trigger onerous FSRA obligations, even though the risk to customers may be low⁴.

³ Business Council of Australia, *Business Regulation Action Plan for Future Prosperity* (23 May 2005) Appendix 2, p. 55.

⁴ Where carriers are carrying on a financial services business, section 911A

Another issue highlighted by BCA Member companies is the appointment of Responsible Officers in financial services licenses. Regulatory problems arise as a result of a tendency by ASIC to be inconsistent and often inflexible with their interpretation and implementation of the responsible officer requirements for licensees. Lack of consistency in applying the responsible officer regime causes some difficulties in choosing suitable nominees and in some cases causes needless appointment of underutilised staff solely because they meet educational standards that are largely irrelevant. There is greater benefit to investors if directors are required to nominate those directly responsible for management of financial services business who are overall most competent, not restricted to management who meet limited utility standards.

Another issue highlighted by BCA Member companies is the initial and continuing training requirements for staff providing advice to retail clients within the finance sector, under ASIC Policy Statement 146. It requires all advisers to ensure that they had undertaken training that had been mapped to the nature of the advice given and was recognised by ASIC in its ASIC Training register. The consequence of this was that in some instances highly qualified individuals (i.e. those with several undergraduate and post graduate degrees) were required to undertake further study (at a diploma level) purely to meet the requirements of this policy statement. This resulted in a substantial and "unintended" compliance cost to industry. The nature of the accreditation process within the policy statement meant substantial costs have been imposed on business. PS 146 also requires advisers to undertake continuing training each year normally in the order of 20 - 30 hours. The need to meet this requirement has resulted in the use of an increasing number of off the shelf training solutions that are undertaken purely to meet a compliance obligation.

Further, there seems to be duplication of the FSR requirements with other areas, for example:

- banking license and superannuation license (under APRA) and AFSL (under ASIC); and
- regulated entities are required to comply with minimum capital/reserve requirements which vary depending on the regulator eg capital requirements in relation to superannuation licence (APRA) and AFSL licence (ASIC) and reserve requirements under the Trustee Companies Acts (Vic).

In relation to the licensing requirements for example, there appears to be duplication of regulation in the funds management area. In particular in relation to the regulation of Managed Investment Schemes by ASIC and public offer superannuation funds by APRA. The nature of public offer funds (which are accumulation funds with member choice) and managed investment schemes are very similar. The need to hold licences from both APRA (RSE licences) and ASIC (AFS licences) results in significant duplication in the area of risk and compliance management. 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. Therefore, a review of the duplication to determine where appropriate areas of overlap might be removed, should be conducted (for example, public offer superannuation funds could be regulated by ASIC as managed investment schemes).

One BCA Member company highlights that preliminary data from a recent Financial Services Education Agency of Australia survey of Australian Financial Services License holders, conducted by the Victoria University indicated that in order to meet the initial licensee education and training requirements of FSRA resulted in a total

transition cost of about \$200 million for the 4,200 AFSL holders at that time. The research also showed that licensees expect the ongoing educational cost of staying current with AFSL requirements will be more than \$100 million per annum, across the industry.

We recommend the Commonwealth Government continue to work with industry and ASIC to refine further the *Corporations Act* to take into account these issues. The issues are broad and complex and accordingly it is very difficult to estimate this cost, however companies foresee significant cost savings that could be passed on to consumers, with no diminution in customer protection.

2.2 Product Rationalisation

The Corporations Act is the primary cause for concern in this area, but amendments to income tax law and consequential amendments to other relevant legislation are also needed.

Product rationalisation is the process of enabling customers to be moved from out of date products (legacy products) to more suitable products with similar or improved benefits, without financial detriment to the customer. The aim of a financial product provider in rationalising financial products is to remove economically inefficient financial products and to provide customers with the opportunity to roll-over their investment in to another more efficient product or be compensated for the termination of an economically inefficient product. It is also a response to addressing risks, especially operational risks, in continuing to maintain and service outdated systems. Product rationalisation can provide a range of benefits to both financial product providers and customers.

The current financial services laws make the rationalisation of financial products both difficult and expensive. As a result they lock industry participants and consumers in to outdated technology systems that are increasingly difficult to support. The issue is broadly recognised by industry, ASIC and APRA, who are understood to support reform in this area.

Consideration should be given to amending the Corporations Act, relevant income tax legislation and other legislation as necessary to simplify the process by which providers of financial products can close a product or part of a product.

One confidential industry survey has estimated the annual economic benefits resulting from the removal of existing legal barriers at between \$120 million – \$350 million.

2.3 Corporations Act 2001

There are a number of required amendments to the *Corporations Act 2001* (Cth). A review of the legislation is required, with a view to harmonisation with other regimes, as well as reducing unnecessary costs and burdens to business.

Business notes, that the Corporate Law Economic Reform Program (CLERP) has served to increase the size of the Corporations Act. Rather than simplifying the Act, the program has continued to add to its complexity. CLERP 9 in particular represented a significant addition to its complexity which is at odds with the original objective of a “simplification program”.

Just some of the examples of the issues associated with the Corporations Act are highlighted below:

- Scope of licensing requirements, such as breaches or potential breaches under the Corporations Act, impose compliance burdens on business. Under Section 912D, Australian financial services licensees are required to notify ASIC in writing of any significant breaches or likely breaches of their obligations, as soon as practicable and, in any event, within five business days of becoming aware of the breach or likely breach. The requirement to notify “significant breaches or likely breaches” now means that an important part of the regulator’s functions has been ‘outsourced’ to its regulatees. Monitoring and notification costs are to be met by licensees. In judging whether a breach or likely breach is “significant”, licensees “must have regard to factors set out in ASIC Guidance IR 04-53”, including:
 - the number or frequency of similar previous breaches;
 - the impact of the breach or likely breach on the licensee’s ability to provide the financial services covered by the licence;
 - the extent to which the breach or likely breach indicates that the licensee’s compliance arrangements are inadequate; and
 - the actual or potential financial loss to clients of the licensee arising from the breach or likely breach.
- The issue of shareholder advocacy is an area where controls may be needed to prevent actions by single interest groups which have potential to harm the business and its shareholders generally. There needs to be a balance between legitimate shareholders’ rights, and the potential use of those rights at what could be a substantial cost to the company. The threshold of 100 shareholders for calling an extra-ordinary meeting is inadequate because of large share registers and the ease with which the internet may be used to obtain this small number. It is understood that the Commonwealth Government is currently considering reform in this area.

The requirement for the inclusion of a “Remuneration Report” in the directors’ report for a financial year and the requirement for a non-binding vote by shareholders on the adoption of the Remuneration Report⁵ has been identified as an area of concern. The requirements for disclosure of remuneration policy and details in s300A have been confusing and unnecessarily onerous. Much of the information is not material to the performance of the company and is duplicative. One BCA Member company estimates the cost of producing the remuneration report requirements at \$50,000 -100,000 per annum. For example:

- S300A(1)(e)(i)-(iv) requires the aggregate of value of options granted, lapsed and exercised to the five highest paid executives;
- S300A requires the “prescribed details” (which includes the value of options granted in current and past years) of the remuneration of the five highest paid executives.

⁵ Section 300A and 250R(2) Corporations Act

- There is also conflict with the requirements of the accounting standard that relates to remuneration which are required by law to be included in the annual report. For example:
 - Section 300A requires disclosure of the remuneration of the five highest paid executives; and
 - AASB 1046 requires the disclosure of the remuneration of the executives with the “highest authority”.
- Another area of concern raised is the requirement to maintain a public register of information about relevant interests⁶. The requirement to maintain this register was imposed by changes to the Corporations Act introduced in 2004. The amendment was counter to the Corporate Law Economic Reform Program (CLERP) simplification process which had previously seen the deletion of requirements for the maintenance of unnecessary registers.

Experience is showing that the registers are not being accessed by shareholders with legitimate enquiries but rather commercial information aggregators and vendors. The requirement for the maintenance of these public registers has seen companies assume costs that would otherwise be met by commercial information providers.

The requirement for the publication of the register of relevant interests has also created a disincentive for compliance by shareholders with s672A Disclosure Notices or the creation of more complex ownership structures that reduce the likelihood of publication. The requirement of s672DA for the publication of a register of relevant interests is another example of how the Corporations Act has become complex, counter to the objective of simplification that was part of the CLERP.

Section 672DA should be repealed. One BCA Member company estimates the cost of this section is approximately \$50,000 per annum.

- Another area of concern raised is in relation to section 251A3 of the Corporations Act. In 1998, the Corporations Act was amended so that a company must ensure that minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed (section 251A(3)).

The practical effect of this section is that where a company passes a resolution of:

- the directors by circular resolution signed by some or all of the directors (in accordance with the company’s constitution) the company is also required to prepare a separate minute repeating the same resolution wording and arrange for this minute to also be signed by one of the directors. This minute is then kept in the minute book together with the signed circular resolution;
- a sole shareholder or multiple shareholders in writing, the company must include the wording “Signed as a minute in accordance with section 251A(3) Corporations Act 2001 (Cwth)” on the bottom of the written resolution and arrange for it to be signed by a director.

⁶ The Corporations Act s 672DA

The introduction of s251A(3) in 1998 is simply an additional administrative step that adds no value to the process of passing or recording a written resolution and is not seen to have any practical benefit, especially as most written resolutions are in respect of wholly-owned subsidiaries within a corporate group.

2.4 Banking Transactions in General

There are excessive requirements for documentation in simple matters, because of the plethora of overlapping and excessive legislation.

For example, one BCA Member company highlights that around 227 pages may be given to a client for a simple cheque account with overdraft limit and home loan:

- 139 pages of documentation for the cheque account with electronic access (*FSRA*)
- 46 or more pages of documentation to consider for acceptance of his overdraft facility (*Various Acts*)
- 17 pages (including our pre-offer letter) for consideration of our Housing loan offer (*CCC*)
- 9 pages of documentation to perfect the Banks security position overdraft
- 14 pages of documentation to perfect the security position for housing finance
- 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. A similar level of documentation was also required for a home loan.

Business clients generally cannot afford to employ a financial controller, accountant or solicitor to provide a detailed analysis of the information being made available to them every time they deal with their bank or financial institution nor should that be necessary. The impact of the legislation governing how business communicates with clients does not provide the clarity or protection through the provision of information that was intended. Most importantly rather than being precise, clear and effective clients are being overloaded with information leading them to seek confirmation from their banker on key points within the documentation. Documentation has become overwhelming, creating the very confusion it was designed to avoid.

2.5 Corporate Governance Requirements

Australian companies have become subject to increasingly complex regulation governing their internal affairs and financial reporting. Key changes have:

- imposed significant additional disclosure and reporting obligations;
- imposed additional certification processes on both management and auditors;

- imposed committee structures and board independence requirements;
- further regulated auditors and audit and non-audit services; and
- required the implementation of codes of conduct.

Further regulation and complexity is imposed on those Australian companies with US reporting obligations pursuant to the US Sarbanes-Oxley Act of 2002 (SOX). While SOX in some instances complements the Australian regulatory regime, in a number of areas it also conflicts with the Australian regime. For example, in relation to auditor independence.

The Australian reforms largely came about as a result of a number of high profile corporate collapses, such as One.Tel and HIH and the enactment of SOX which, in turn, was introduced in response to the high profile collapse of US companies such as Enron and WorldCom, together with other accounting scandals.

Corporate accountability and, accordingly, increased shareholder protection is offered as the key to detecting fraud in companies, enhancing investor confidence and, therefore, delivering better company performance as well as promoting efficient markets and, in the end, a healthier economy.

However, over-regulation could prove in time to have the opposite of each of these desired outcomes. Companies with a policy of best practice in corporate governance will always strive for full compliance with all regulations. When the regulations are excessive and conflicting, significant time, cost and other resources are required to navigate and achieve compliance. The requirement for board oversight of many of these compliance activities also means that directors and other senior management spend time focussing on the company's compliance systems rather than on the company's strategy and performance. That result is not necessarily favourable to investors.

Furthermore, for those companies which do not have a policy of best practice in corporate governance, commentators have argued that their empirical evidence shows fraud is not likely to be detected by requiring a high level of diligence on compliance and control systems but, instead, is more likely to be detected through tip-offs, internal audits or by accident. Accordingly, even for those "bad corporate citizens", detailed regulation will not necessarily prevent the kind of behaviour it is aimed at preventing.

Since the enactment of SOX, the US has witnessed a number of companies terminating their registration under the Securities Exchange Act of 1934 in order to avoid the excessive and costly compliance requirements of SOX. That result arguably runs counter to the intended benefit of more efficient capital markets and a healthier economy.

Professional services firms spend inordinate amounts of time, cost and effort in complying with global audit and professional services regulations.

As Prime Minister Blair said recently:

"The point about Sarbanes-Oxley was not that the underlying problems it was addressing were not real. It was quite right to put some distance between a company's auditors and its managers, between whom a severe conflict of

interest had arisen. The problem was that the Act was not limited to the remedy of that specific defect."

and

"There is a delicious irony in this which illustrates the unintended consequences of regulation. Sarbanes-Oxley has provided a bonanza for accountants and auditors, the very professions thought to be at fault in the original scandals."

The compliance burden of corporate governance requirements is very large for business. For example, business representatives from the financial services sector indicate that the cost of meeting financial sector regulatory requirements had increased 'three or four times over the past five years'⁷. And, according to some estimates, the combined annual costs to the top 50 listed companies of compliance with CLERP 9, the Financial Services Reform Act and the Australian Stock Exchange's corporate governance guidelines is as high as \$375 million⁸.

One method of addressing this issue is by: (a) taking a complete stock count of current regulations; and (b) perhaps implementing the best of each of those regulations from around the world in a consistent and clear manner.

Any reforms of the corporate governance requirements or the Corporations Act need to be treated with caution. We do not need any further amendments that will enhance red-tape for business. Some examples of reforms that may add to the existing red-tape burden for business would include moves:

- to enhance 'shareholder democracy';
- to erode concepts of limited liability, for example by legislating for the concept of 'groups';
- to impose additional duties on directors (social/environmental/employee related);
- to introduce a US style bankruptcy law regime.

2.6 Inconsistency between Regulations and Guidance/Codes etc

Judicial interpretation of legislation and regulation adds inconsistency and uncertainty. For example, there have been a number of trade practices matters considered in Australian Courts during the six years from 1999 to 2004, involving the application or potential application of the Australian Standard on Compliance Programs AS3806-1998 ('Standard').

Depending on the circumstances, judicial decisions have variously adopted, varied or rejected submissions by the ACCC to adopt the Standard.

In the period 1999 to 2001, judges such as French, Heerey and Finkelstein have expected respondents to ACCC applications to use "best endeavours" (in *REIWA*

7 Treasury (2004) *Key themes*.

8 Nicholas, N & Buffini, F, *Backlash against regulation costs*, Australian Financial Review (5 July 2004) pp. 1, 60.

and *ABB*) or “reasonable endeavours” (in *Simsmetal*) to implement compliance programs in accordance with the Standard. From 2002 onwards, judges such as French (in *Virgin Mobile*), Gray (in *AFMEPKI*) and Lee (in *Midland Brick*) have been more willing to order compliance programs consistent with AS3806-1998.

However, the views of other judges such as Mansfield (in *Rural Press*) seem to persist. In *Rural Press*, Mansfield J. found that AS3806-1998 does not have statutory recognition. “It is a guide only, so that individual corporations should use the system best suited to their operations”.

The various attitudes of the courts highlights the uncertainty around the status of Australian standards and similar guidance material.

2.7 Reporting Requirements

Reporting requirements across various pieces of legislation and industries can impose unnecessary and onerous cost burdens on business, where the requirements are for example excessive, overlapping or required too frequently. Mandatory reporting systems that are inconsistent in their methodologies introduce confusion in the reported numbers and add a burden to companies’ reporting processes. Some examples of reporting requirements of concern to BCA Member companies are as follows:

- **Corporations Act 2001 and interaction with accounting standards:** The Corporations Act requires certain disclosure to be reported in the full year accounts, such as the director’s report requiring a disclosure of director fees. To comply with accounting standards, the financial accounts then require the same disclosure. This results in double reporting. Provisions need to be created that state that once you have complied with one requirement you have satisfied the other. For example, section 300A of the Corporations Act governs the disclosure of executive remuneration in annual reports. Accounting standards (AASB1046) also govern reporting of executive remuneration, and the two are not consistent. The Corporations Act requires the five highest remunerated officers to be disclosed whilst the accounting standard requires those with the most influence to be reported.
- **Corporations Act and interaction with other requirements:** Different provisions of the Corporations Act currently require multiple statutory accounts and other financial reports to be lodged with ASIC by the same entity – for example, where a company is a public company and also holds an Australian financial services licence.
- **Section 105 reporting - Telecommunications Act 1997:** The objective of section 105 reporting is to report on quality of service, for a range of customer service and network performance measures. The ACMA Section 105 Annual Report contains 13 modules (collectively containing 34 sub modules). These modules contain quantitative and qualitative data. One BCA Member company highlights that this report consumes about 20,000 hours each year, which is equivalent to about 10 full time staff. That BCA Member company considers that the extent of section 105 reporting is excessive in relation to the objectives. This diversion of resources makes it harder to focus on improving customer service. There is also a need for better communication from regulators of the purpose, use, and data classifications (eg data on quarterly, seasonally adjusted annualised average) of the information sought. *Ad hoc* requests from regulators

for further information outside of the annual section 105 report should be carefully assessed by the regulators to determine whether the benefits will outweigh the costs. For instance, regulatory bodies should develop and follow processes to ensure their data requests are necessary, properly formulated, and not duplicating information previously provided.

- **Fortnightly reporting of GST is excessive:** An option of quarterly reporting should be available, with a single date for payment of GST part way through a quarter coupled with a quarterly 'true up' (this option should be available particularly for large businesses). This option for reporting would also be consistent with accounting reporting. Quarterly payment of income tax instalments is an example of how this currently works for payment of income tax. Compliance costs would be decreased by decreasing the frequency of lodgement of returns. Greater streamlining, consistency and cost savings could be achieved by requiring the payment of various taxes, such as GST and income tax, at standard intervals such as quarterly.
- **Excessive Reporting Requirements:** One BCA Member company highlights that the *Economic Regulation Authority* (ERA) of Western Australia requires the preparation of "statutory" style accounts for each of the three license areas within its legal entities. The reporting date of the license accounts prepared do not align with their statutory year end of 31 December. The BCA Member company is also required to prepare three sets of license accounts for the two legal entities. This causes more work internally and for the auditors as six additional sets of accounts must be prepared and audited at extra cost. A method of dealing with this would be to align the reporting dates for the license accounts and the statutory financial statements. Also instead of preparing three sets of accounts per entity (one for each license area within the legal entity) perhaps the preparation of one set of accounts per legal entity and split out the license areas within the notes to the accounts (similar to segment reporting in the statutory accounts). By aligning the year end dates and reducing the number of additional accounts prepared the BCA Member company estimates this could save the business approximately \$30,000 in additional audit fees per year.
- **ABS Surveys:** One BCA Member company highlights that the *Australian Bureau of Statistics* (ABS) requires that different "reporting units" within the group prepare and submit a number of different surveys each quarter. Currently they are required to prepare a large number of surveys each quarter. The ABS also needs to ensure that surveys are only sent out to the reporting units in the business that have significant activity. The dollar cost of preparing all these surveys cannot be accurately measured, however, there are significant time savings that can be made by reducing inefficiencies and reporting requirements as well as benefits from having more time to focus on other tasks.
- **Overlap between the Corporations Act sections relating to FSR:** specifically section 990k and its contradictory affect on section 912D. Section 990k requires auditors to report any breach of which it becomes aware to ASIC, when auditing an AFSL for issue of an FS71 certificate. This contradicts section 912D, which requires the AFSL holder to report any material breach to ASIC. This also has the potential to penalise AFSL holders who have robust, transparent FSR breach reporting processes. A solution may be to align section 990k with section 912D, so the same materiality test applies to both, plus amend the law so the auditor does not need to report any material breach already reported to ASIC by the AFSL holder. ASIC could issue a policy statement to this effect pending legislative change. One BCA Member company estimates it spent approximately

\$90,000 (being one week's time for two senior managers and support team) to liaise with their auditors, digging up old data, and meeting to resolve an issue arising under this area. This didn't include auditors' fees nor the time spent preparing for and meeting with ASIC to seek a resolution (this was also discussed previously).

- **APRA GPS 431:** prescribes that "all effected policyholders" must be notified where a General Insurer licence or liabilities are being transferred to another general insurer (GI). APRA asserts this means that all insureds for both the outgoing company and the incoming company must be notified. APRA also asserts the notification must be done by post. While acknowledging these transfers require Federal Court approval and one or two Court orders have reduced the requirement to notify only the insureds of the outgoing GI, the posting requirements still apply. One solution may be to alter GPS 410 to allow for notification by national newspaper advertisement, supported by an 1800 customer helpline for enquiries, and for the formal individual notification to accompany the next renewal notice. GPS 410 inhibits / fetters GI's, especially conglomerates, from rationalising licences as part of sound business strategies, including saving on regulatory and administrative overheads. If the outgoing GI has 500,000 affected policyholders for example, the postage and administrative overhead to specially notify each customer is \$325,000. In one example identified by a BCA Member company the postage costs were approximately \$1.5 million. The cost is greater if the Court decrees all insureds need to be notified.
- **Greenhouse Challenge Plus and National Greenhouse Gas Inventory:** each have their own methodologies so that the reported numbers are incompatible. National Pollutant Inventory Dioxin and Furan reporting methodologies are inconsistent with conventions on I-TEQ. However, any reform in this area should be exercised with some caution because putting site data into a "black box" as a most convenient means for Government to collect data at anytime also has the danger of creating data out of context which may be misleading and the "black box" doesn't encourage dialog between business and Government. Any reporting system should have minimal data reporting of parameters best suited to describing the business position, common data collection boundaries, financial year alignment and discretionary commentary to meet mandatory reporting requirements. This would ensure best data quality, verifiable records, consistent reporting and understanding and reduced obligations on business. For example, energy efficiency reporting and greenhouse reporting have synergies in annual inventory and project deliverables that should be developed.

2.8 Accounting Standards

There are large costs associated with complying with new Australian Accounting Standards which are compliant with International Financial Reporting Standards. 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 companies which they don't control or exert significant influence over. This results from the requirement of AASB 139 to classify investments in equity instruments as "Available-for-sale financial assets", 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 for their investments in companies over which they don't control or exert a significant influence. This is a huge and costly exercise. There may be no

benefit in revaluing these investments every year, particularly when there is no intention or likelihood that such investments will be sold. 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 investments if the carrying book value is above the recoverable amount.

Another area of concern is the proposal contained within an exposure draft (ED143) to amend the related party disclosure requirements contained within Australian accounting standard AASB 124 "Related Party Transactions". The draft proposals will require the inclusion within the accounts of a managed investment scheme/fund (MIS), the remuneration of the key management personnel of the fund even though they are employed by the manager or the parent of the manager. This disclosure may be inappropriate because the key matter for the investors in the MIS/fund is the fee paid to the manager rather than what is paid up the chain to the fund CEO, CFO, COO. In addition to the disclosure of remuneration, it would also be necessary to disclose other transactions including equity holdings in the MIS, loans and other transactions with the fund. The Australian proposals are inconsistent with international practice in the UK, Europe and the US.

2.9 Innovative Tier 1 Capital Instruments

One issue raised is the treatment of Innovative Capital Instruments under the APRA discussion paper, 'Adoption of International Financial Reporting Standards, Prudential Approach, 2. Tier 1 Capital and Securitisation', released on 31 August 2005.

This is a discussion paper issued by APRA and relevant to authorised deposit-taking institutions (ADIs). If introduced as law, they would form part of Prudential Standards that would be enforced under the *Banking Act 1959*.

APRA is making use of more restrictive limits and restricting the form of instruments that can comprise 'Residual Tier 1' capital instruments compared with other major OECD jurisdictions. APRA has proposed that ADIs be allowed to issue 'pure' preference shares equal to 10 per cent of Tier 1 capital net of deductions. This, together with 15 per cent allowable 'Innovative Tier 1', makes up 'Residual Tier 1'. Under the current definition, if an Australian bank issues 'pure' preference shares they must be franked. Investors in the offshore capital markets are unable to make use of and therefore place no value on franking credits. Consequently, any franking credits will be wasted, making it uneconomic for such banks to raise this form of capital in the offshore capital markets.

Some BCA Member companies highlight that here is a very limited market for franked instruments issued to Australian investors. This is partially driven by the fact that institutional investors place little value on franking credits. Other OECD countries allow banks to issue preference shares to international investors on a tax efficient basis, creating a cost advantage relative to Australian banks, particularly where the foreign bank is operating in the Australian market but with access to a wider range of eligible capital. This increases the cost of servicing the bank's capital base, impacting the prices charged to the bank's customer base. It also increases the bank's reliance on the local wholesale market.

One BCA Member company highlights that investors would require a return of approximately 7.5 per cent on a 'pure' preference share. Assuming the distributions are 80 per cent franked, equal to the current level of franking on ordinary dividends,

this suggests a franking credit of 2.5 per cent. The total cost is therefore 10 per cent, close to a bank's cost of ordinary equity and making it uneconomic for such a bank to issue this form of capital. It is the value of the franking credits that would be lost to an international investor. For example, if the bank were to issue A\$1 billion in 'pure' preferences shares it would equate to A\$25 million cost of the regulatory problem.

One possible solution would be the alignment with major OECD jurisdictions so that Australian banks can have full access to the innovative capital instruments of their peer OECD banks. This would primarily require freedom to issue non-Innovative Tier 1 capital via simple structures that do not need to be franked.

Another issue relates to the excess of market value over net assets (EMVONA) in the wealth management business. One BCA Member highlights that it is currently allowed to include the acquired value of in-force business (VIF) and net tangible assets in Tier 1, only deducting them from Total Capital. Following implementation of AIFRS, the VIF asset will be reclassified as goodwill and deducted in full from Tier 1 capital, reducing Tier 1 by A\$1.5bn. This is inconsistent with the UK FSA, which is allowing UK banks to continue to include VIF in Tier 1 capital following implementation of IFRS. While the issue has a significant effect on the particular BCA company's regulatory Tier 1 capital position and reduces its ability to compete with international peers, APRA hasn't shown willingness to-date to reconsider this issue.

2.10 Trade Practices Act

Consideration should be given to reforming the third-line forcing provisions in the Trade Practices Act. One possible amendment could be the replacement of the *per se* third line force offence in the Trade Practices Act with a substantial lessening of competition test. Cost and time is spent by business preparing third line force notifications to the ACCC in relation to conduct that is ultimately approved by the Commission because it involves a public benefit. If the Act were amended to include a substantial lessening of competition test, the need for business to attend to such notifications would be reduced, resulting in valuable cost and time savings. Businesses are currently required to complete a notification form and pay a fee of \$1,000 for each event of third line forcing conduct, and to wait 14 days for immunity. This must be done even in cases where the conduct is clearly pro-competitive.

It is acknowledged that the Government has recently decided not to change the current third line forcing legislation. The unnecessary compliance costs, however, remain.

2.11 Component Pricing

There is concern that the proposed amendments to the TPA in relation to component pricing could create further unnecessary complexities and compliance costs for suppliers, without delivering consumer benefits.

The *Trade Practices Amendment (Component Pricing) Bill* will require that businesses must advertise or quote a single-figure price at which a good or service can be obtained. This may make it very hard for suppliers to offer package deals and complex services with any optional extras, as this will require advertising to include explanation of pricing of all the optional extras, even though these may not be of interest to the majority of prospective customers and will only serve to confuse them

about the baseline prices. GST inclusive pricing may also not be appropriate for businesses who are entitled to input tax credits, and may actually cause more harm than good as businesses are left to calculate their own GST exclusive prices. Any new laws that make pricing and advertising more prescriptive and complex are not in the best interests of consumers or businesses.

2.12 Liability of Company Executives

Section 77A of the Trade Practices Act (to be enacted shortly) prohibits a company from indemnifying a person against pecuniary penalties under the TPA incurred as an officer of that company. Given the uncertainty in the application of some elements of competition law (eg, the existence and use of market power), this prohibition should be amended so that:

- an exception applies 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; and
- it is clear that the prohibition does not prevent companies from paying insurance premiums for its officers in respect of civil penalties under the TPA.

2.13 Non-cash payment systems

The interaction of the liability rules under the Electronic Funds Transfer Code (which has no limit on when a claim must be made), and the rules of card schemes (which set out time limits within which a chargeback request must be made) mean that the issuing bank bears the loss when the request is made out of time to chargeback the transaction to the acquiring bank. This policy outcome should be reviewed, and means of effecting change considered.

The FSRA's current coverage of non-cash payment facilities does not take into account the value of amounts held in, and payments made through, a non-cash payment facility. The same potentially onerous obligations apply regardless of the level of risks faced by a customer in using such facilities. While ASIC is formulating some relief in relation to low value non-cash payment facilities, there is uncertainty as to how effective or useful this will be (given that ASIC may take a conservative approach to ensure it does not overstep its boundaries).

The FSRA's current coverage of non-cash payment facilities, and the FSRA obligations that may apply arise in relation to them, do not adequately take into account the context in which non-cash payment facilities may be offered. For example, the ability to pay for certain goods and services may only be a convenient add-on to a "core" service provided by the business. Current exceptions from the FSRA do not cover such a scenario very effectively. Further, disclosure obligations are not compatible with the manner in which consumers expect these services to be delivered.

2.14 Income Tax Assessment Act 1936 (Cth), section 25(2)

Some BCA Member companies have highlighted that section 25(2) of the Income Tax Assessment Act 1936 (Cth) may act as a practical impediment in global

corporate financings where a small part of the global security comprises property in Australia.

In that situation, the section deems the whole of the interest payable under the global financing to have a source in Australia, and so to be taxable in the hands of the lender(s), even where the borrower and lender(s) have no connection with Australia, unless the financing can be structured to involve the issue of debentures.

It brings the Australian financial markets into ridicule, and serves as a disincentive to the development of Australia as a regional financial centre.

One BCA Member estimates that the incremental cost of legal and tax advice in Australia and elsewhere for a major global financing, flowing from the existence of section 25(2), could be (depending on the complexity of the financing) in the range of \$50,000 to \$500,000.

A possible solution is the repeal of the sub-section. The Law Council of Australia, through the Financial Services Committee and Taxation Committee of its Business Law Section, formally advocated the repeal of the sub-section in 1993 in a submission to the Attorney-General, arguing that the sub-section served no useful purpose. The Law Council lodged a further submission with the Attorney-General in 2005, again advocating the repeal of the sub-section, following the passing of amendments to other parts of the Income Tax Assessment Act (notably the section 128F exemption from interest withholding tax) to broaden the reference to "debentures" to cover "debt interests". As noted in that further submission, an alternative to repealing the sub-section (but more cumbersome and less efficient) would be to extend the "debenture" exception in the sub-section to cover other "debt interests".

2.15 Income Tax Assessment Act 1936 (Cth), controlled foreign companies

- One BCA Member highlights that the amount taxed under the controlled foreign company provisions is generally determined on an Australian controller's ownership interest. The proportion of the profits that are attributed to the Australian controller is the higher of the percentage interest in capital or voting power or rights to distribution or capital (on winding up or otherwise) (section 356 of the Income Tax Assessment Act 1936). However, where the Australian controller is treated as exercising "control" over the foreign company (e.g. control over decision making) then the Australian controller could be taxed on an amount greater than the ownership interest. Therefore, even if the Australian controller only has a minority economic interest, the Australian controller could be exposed to attribution of up to 100 per cent of the controlled foreign company's profits.

One possible solution is to limit the amount to be attributed to an Australian controller to the Australian's controller's economic interest in the foreign company.

- Another issue raised is that under the controlled foreign company rules, Australian controllers of foreign companies may be attributed their share of the foreign company's annual profit. In broad terms the foreign company's profits are allocated to the Australian controller on the last day of the foreign company's accounting period (per section 456 of the Income Tax Assessment Act 1936). Where such attribution arises the amount attributed is based on the whole year's

profits of the foreign company without any reference to the ownership period of the Australian controller. Thus, even if the Australian controller acquired the foreign company near its year end, the amount on which the Australian controller will be taxed is calculated by reference to the whole year's profits of the foreign company. (N.B. Not all income is subject to such attribution. Income that is subject to such attribution is mainly passive income such as rent, royalties or interest income, and certain income from related parties.)

One possible solution might be to permit Australian controllers of foreign companies to adopt some form of apportionment of the foreign companies profits in the year of acquisition.

- Income that is subject to attribution under the controlled foreign company rules includes passive income such as rent, royalties and interest income, and also the buying and selling of "tainted assets". The definition of "tainted assets" (in section 317) contains an extensive list of items, but specifically excludes trading stock. However the trading stock exclusion does not extend to trading of shares in a company and units in a trust. Therefore the profits/losses arising for controlled entities offshore conducting a business of trading equities and equity derivatives are attributable to an Australian controller.

One possible solution is to redraft the legislation to extend the trading stock exemption included in the definition of tainted assets to cover trading in shares in companies and units in trusts (and related equity derivatives).

2.16 Promoter penalties

Some BCA Member companies highlight that following the cancellation of tax deductions for various mass marketed schemes, a proposal was developed to impose a penalty on promoters of mass marketed schemes which failed to provide the purported tax benefits. Under this proposal, individuals who promote tax schemes will be exposed to a penalty of at least \$550,000. Another remedy proposed is for the ATO to seek an injunction on a company to prevent it from continuing to promote the transaction. Although the policy was initially thought to have been formulated in the context of consumer protection it has now developed into a policy of business regulation. As currently drafted, the proposed legislation (Exposure Draft Bill "Framework to Deter Promotion of Tax Exploitation Schemes" released on 10 August 2005) is not confined to retail investment products but extends to business-to-business transactions. Further, the range of individuals potentially exposed to penalty is not only those involved in marketing the transaction but could extend to anyone in an organisation involved in the development or approval of the transaction. To mitigate this risk there will be an incentive to seek rulings from the ATO which would be time consuming and expensive and might result in delays to business transactions.

2.17 Other Tax Issues

A number of potential reforms to the taxation system were suggested in the Ralph Review of Business Taxation in 1998. Some potential reforms identified in this review have not yet progressed due to concerns that they were not affordable or not possible. Given the strength of the corporate tax revenue collections, coupled with the Howard Government's control of the Senate from 1 July 2005, the Government

should reconsider a number of these key issues. Some suggested amendments to the taxation regime include:

- abolition of the state-based payroll tax and stamp duties on insurance;
- further amendment to the definition or practical mechanics of tainted services income;
- remedial action for share tainting;
- deduction for share based payments expensed due to IFRS;
- clarification/amendment or repeal of the proposed Division 250;
- review of the blackhole expenditure provisions;
- reintroduction of balancing charge roll-over and investment allowance;
- increase of the threshold, from \$300,000, that provides a practical GST concession to the requirement for amending BAS returns;
- clarification/amendment to non-resident construction withholding requirements;
- review of Div 13A given Nelson Report findings;
- review of FBT and entertainment;
- removal of the contractor “employee obligation” onus on employers;
- review of benefits that are reportable;
- ensure time to put systems in place and test them before implementing stage 3 and four of TOFA;
- extension of ATO Practice Statement re Directors’ tax risk management materials;
- reconsider the benefits and risks of principle based drafting; and
- review of the ATO Rulings process.

Some discussion on some of these proposed areas for review are as follows:

- **Division 250 transactions:** Clarification of various rules and reforms that are currently underway may be required. For example, the Ralph report recommended that the former Section 51AD and Division 16E be abolished. Complexities currently exist with the proposed Division 250 and the various safe harbours currently embedded in the draft rules may be unworkable. The rules might undermine commercial objectives of the legislation if practical solutions to avoiding the measures in the legislation means that businesses are forced to make decisions which are not in their best interests.

- **Blackhole expenditure:** The Government announced in 2003 that a comprehensive review of blackhole expenditure was to be undertaken. This measure is important because the tax law contains various categories of blackhole expenditure not included in capital gains tax (CGT) cost base, or which might be counted for CGT purposes but provides no amortisation or depreciation deduction relief. The Capital Allowance amortisation rules need to be extended to include project development expenditure and some relief should be given for intangibles not currently able to be written-off in Australia, although available in many other jurisdictions. One BCA Member company has suggested that legitimate business expenses associated with demolition of facilities are an example of valid business expenses which should qualify for an appropriate tax deduction in this area.

The scope of the current deduction regime for “blackhole expenditure” is too narrow. The scope of the blackhole expenditure regime announced by the Treasurer in May 2005 should be expanded. It should not be a provision of last resort, particularly where the expenditure ultimately gives rise to only a capital loss. For example, rights and intangible property should be considered within the ambit of the blackhole expenditure even if they give rise to capital loss on their expiry or loss. The current regime creates inappropriate artificial distinctions depending on the circumstances in which the relevant rights cease. This results in an inappropriate tax treatment in relation to the expenditure and an administrative burden to distinguish between the relevant rights.

A more appropriate tax treatment would be the establishment of a general amortisation regime for wasting intangible assets. Such a regime would mirror the current capital allowance write-off provisions for wasting tangible assets.

- **Non-resident withholding tax:** Recently legislated measures now require taxpayers to withhold 5 per cent from payments to foreign residents for the construction, installation and upgrading of buildings, plant and fixtures (including related activities) regardless of where the services are performed. One BCA Member company believes that the legislation and regulations were not introduced to tax payments of this nature where all the services will be made outside of Australia. However, the black letter law suggests that such payments are caught from a strict literal interpretation. Where services are performed overseas, this withholding is clearly not appropriate and the rules should be amended.
- **Employee share plans (The Nelson Report findings):** The Senate Report titled *Shared Endeavours: Inquiry into employee share ownership in Australian enterprises*, introduced to Parliament 9 October 2000 by Hon Dr Nelson, made a number of recommendations including, *inter alia*:
 - the threshold for eligible employee share plan tax concessional treatment be increased from \$1,000;
 - the relaxing of the more than 5 per cent employee ownership stake threshold (important for start-ups or small businesses);
 - roll-over of shares into an employee’s superannuation fund; and
 - taxation only on disposal not on 10 years.

Also, various disposal restrictions on employees, due to insider trading rules, are a very real problem often requiring employees to pay tax when they do not have the funds to do so.

- **Taxation of Financial Arrangements (TOFA):** Sufficient time should be allowed for system changes supporting implementation and deferral to be in line with the implementation of IFRS. The move to better align the rules to financial accounting is to be commended. Until the recently announced Practice Statement and subsequent Amended Regulations with respect to the Realisation of Foreign Exchange Gains and Losses, Stages 1 and 2 of the TOFA reforms were largely unmanageable for most large companies with the exception of financial institutions. Stages 3 and 4 of the TOFA reforms should be deferred to have a commencement date that better aligns with the commencement of IFRS. Consultation should be sought and time provided to allow systems to be put in place and tested. Further time to review and digest any elections required to be made would also be welcomed.
- **Directors' tax risk management materials and access restrictions:** There is some concern about the extent to which reports produced for Board Risk and Audit Committees are confidential and whether these will be able to be sought by the ATO, providing 'roadmaps' to sensitive risk issues. Whilst the ATO has proposed a Practice Statement limiting its rights over material created "solely" for the Board consideration of tax risk, the "sole purpose test" may effectively render this limitation inoperative. To ensure that Boards appropriately consider tax risks, the limitation should extend to primary advice about a transaction contemporaneously obtained.

In addition, other issues that have been raised are the constant changes to the taxation laws, which has required the extensive engagement of taxation consultants even for the most minor of issues. Further, the 125 per cent tax concession for R&D has such onerous requirements to be able to make a claim, that businesses are unlikely to be able to take the benefit of the concession.

2.18 Fringe Benefits Tax

There are a number of concerns that have been raised by BCA Member companies regarding the application of the Fringe Benefits Tax (FBT) regimes.

The Government needs to undertake a review of the FBT laws, in particular the reportable fringe benefits regime, which creates a compliance nightmare for employers as there is a requirement to trace every item of expenditure for each employee and the minor benefits rule. With respect to the \$100 threshold for minor benefits, to allow real compliance savings this threshold needs to be increased and indexed each year.

In addition, since its introduction, the 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, which promote work / life balance via health related benefits and there is an increasing requirement for employees to be flexible with respect to travel. In recognition of the changing nature of today's employment, the above should be treated as exempt benefits.

For example, it has been stated that the current compliance burden placed on employers in the area of employee entertainment are unworkable and is presumably not worth the revenue that it provides. The various concessions, such as the so called 50/50 rule, do not provide a concession to the majority of large companies, in particular where they have a large employee base, as to follow them would result in additional FBT payable.

Another area of concern is in the area of remote housing. Since 1 April 2000, the FBT exemption for remote area housing (which previously only applied to primary producers) was extended to all employers. However, the application of the housing exemption remains limited and accordingly there are many exceptions to the exemption. Also, the exemption does not extend to related services (eg power and water). In the Second Reading Speech for *A New Tax System (Fringe Benefits) Act 2000*, it was stated that the “bill should make it easier for employers to attract and retain staff in remote areas because it will extend the fringe benefits tax exemption for remote area housing to all employers”. However, in practice this outcome has not yet been achieved due to the limited application of the exemption. Examples of remote area housing benefits that are currently taxable are:

- reimbursement/payment of remote area home loan interest or rent (a 50 per cent reduction applies);
- certain housing ownership schemes & other housing benefits not meeting the exempt housing definition;
- electricity, gas or other residential fuel (a 50 per cent reduction applies);
- remote area holiday transport (as is customary in the mining industry an employee working in a remote area may be reimbursed for the costs of travelling from, or provided with transport from the area for the purpose of having a holiday) (a 50 per cent reduction applies); and
- water (the 50 per cent reduction does not apply to water as it is not a ‘residential fuel’)

This limited application of the exemption has created an inequity for companies operating in remote areas (eg mining companies) depending on which type of housing they provide to their employees. More importantly, it has created a difficult and uncertain environment.

In light of the above some recommendations expressed by BCA Member companies are to:

- Extend the application of the remote area housing exemption. This would correct the current inconsistencies between the FBT treatments on different arrangements for the provision of remote area housing.
- Exempt other housing related remote area benefits (eg power, water). As remote area housing is intended to be exempt it would be consistent that services provided in relation to the housing itself should also be exempt.
- Exempt remote area holiday travel allowance.

- Car parking: An optional standard valuation for car parking benefits could be provided in the legislation.
- Travel costs for employees working in one city and living in another: These should be exempt from FBT altogether as they are not remuneration related but a business cost of getting the right employees in the right place.
- Optional 50/50 split for recreational expenditure: Employers should have the option to adopt the 50/50 split method in respect of all recreation expenditure, as is the case for meal Reportable Benefits confined to Remuneration Benefits only. Only benefits that are part of a remuneration package or award should be reported on payment summaries. The excluded benefits would include the travel costs referred to above. In addition, the law should be amended to provide for an exception from the usual reporting rules where it is impossible to fairly allocate the value of a fringe benefit to individual employees. At a bare minimum, a short term solution would be to provide clearer guidance as to an acceptable set of rules for the valuation and attribution of shared cars between employees.
- Where a car is used by more than one employee, the employer be given the option to calculate the statutory formula for the car separately for each employee based on the annualised kilometres for the period of use by each employee.
- The work related exemption for utilities and panel vans be extended to all cars. Note that the above two recommendations are for fringe benefits tax generally and not just for reportable benefits.
- Reportable Fringe Benefits and Recreation: All recreation expenditure should be excluded from the FBT reporting requirements, as is currently the case for meal entertainment expenditure and entertainment facility leasing expenses.
- Reportable Fringe Benefits Threshold: The threshold should be increased from \$1,000 to \$2,000.
- Interaction of GST and FBT and Financial Supplies: The provisions of Division 71 of the GST Act should be reviewed and overhauled.
- Reconciliation Difficulties: Difficulties in accounting for fringe benefits would be reduced if taxpayers could record the GST-exclusive value of benefits in the FBT return.
- Capping Thresholds: This area requires re-visiting with the view of re-writing these provisions.
- Road Tolls: The accounting for road toll fringe benefits is cumbersome and costly. It is suggested that amendments to Section 136(1) of the FBTAA 1986 be made to include 'bridge and road tolls' within the definition of a 'car expense'.
- Minor and infrequent rule: The \$100 threshold for minor and infrequent exempt benefits is too low. To allow real compliance savings this threshold should be increased to at least \$200. This threshold should also be indexed each year.
- Election to group: Companies should be able to have the option to elect to group their FBT obligations and thus only lodge one FBT return.

- Contractors: The distinction between contractors and employees places significant risks on employers with respect to employer obligations. This risk would be better placed on contractors and not employers, particularly where the rules are often subjective.

2.19 FBT Reportable Benefits

Fringe benefits taken by staff are required to be disclosed on employee group certificates for the determination of various Government income threshold calculations including: Medicare levy, superannuation guarantee surcharge, superannuation co-contribution eligibility, child support obligations, HECS repayments and other entitlements to Government benefits and concessions.

The compliance burden that this places on large employers is overwhelming, and it would be welcomed if this could be reviewed. So much valuable time is wasted each year in allocating various 'benefits' (in itself very arguable) to individual employees, and again in arguing the allocations with disgruntled staff members. The suggestion here could be to either remove the regulation entirely or to significantly narrow its scope to true 'remunerative' benefits, such as cars, loans, property and expense payment benefits that are provided exclusively to individual employees. The burden is in maintaining systems and other methods to allocate benefits to individual employees; recording individual values on PAYG summaries; and subsequently responding to the inevitable employee queries.

2.20 Business Activity Statements

The GST \$300,000 threshold for net BAS adjustments in a three month period following the lodgement of a BAS should increase to avoid the ongoing compliance costs associated with amending BAS returns.

2.21 GST

There are unnecessary areas of uncertainty regarding the application of the GST regime to a number of basic transactions. These include, for example, the treatment of vouchers and cross border transactions.

The going concern exemption also needs clarification so that businesses do not have to obtain a binding private ruling, except in unusual circumstances, to remove the risk of post settlement GST liabilities arising for vendors. This risk arises in practice even where parties clearly document the sale as being on a going concern basis.

The GST legislation contains a specific entitlement to claim input tax credits in relation to debt raising costs provided that the debtor engages in taxable activities. There is no similar entitlement in relation to equity raising costs in circumstances where there is no clear policy reason for differentiating between debt and equity capital. One option might be to expand the provision entitling taxpayers to claim input tax credits on debt raising costs to include equity.

The ATO policy on remitting the general interest charge (GIC) should take more account of whether it has been actually been deprived of the use of funds. In many transactions the correct amount of GST will have been paid / claimed on both sides

of a transaction although those amounts may have been paid / claimed in the wrong entity. Taxpayers are still required to go through a formal request for remission of GIC and, in some circumstances, will be charged GIC even though there is no detriment to the revenue. One possible solution is for the ATO to recognise that, given the nature of GST, GIC should not be levied if, from an overall perspective, the correct amount of tax has been paid within the required timeframe.

More generally, the Commonwealth Government and the ATO should undertake a consultative review of the Goods and Services Tax regime. The GST Regime was introduced over five years ago and it is seen as an opportune time to make amendments to address those areas of uncertainty in the GST regime and compliance costs (eg costs for B2B transactions).

2.22 Reform of International Tax Arrangements (RITA)

Further definition and extension is needed of the tainted services income provisions of the *International Tax Arrangement (Participation Exemption and Other Measures) Act 2004* to exclude services to Australian residents.

The *New International Tax Arrangements (Participation Exemption and Other Measures) Act 2004* is commendable. Specifically, the amendment to Tainted Services Income that now excludes the provision of services to associated non-resident companies and branches is a positive reform step. However, the reforms should be extended to also exclude services to Australian residents, or to at least provide a practical compliance solution.

Some companies are required to determine ticket sales and/or holiday bookings referable to Australian residents in order to determine Controlled Foreign Corporation income attribution. We understand the intent of the rules is to both ensure Australia is able to tax revenue derived in foreign jurisdictions where that revenue provides a tax deduction to a resident in Australia, and also to prevent jobs being lost overseas. This policy objective doesn't appear to be achieved where a company is required to attribute this income and pay tax on it in Australia.

Thought could be given to changing the rule such that it applies only to Australian resident associates and not all Australian residents. Alternatively, a *de minimus* exemption per transaction or an industry exemption could be made available.

We also seek consideration of a domestic exemption or rebate for Australian shareholders where exempt income is received and then repatriated by way of dividend.

2.23 IFRS and Tax Impact

ASIC requires all large proprietary companies to prepare annual financial statements in accordance with AASB accounting standards. There has also been a significant change in these accounting standards with the adoption of Australian equivalents to International Financial Reporting Standards (IFRS).

Many major companies are sensitive to the large array of unresolved tax effects arising from IFRS, because of their potential impact on key tax issues, financial statements and the conduct and operation of tax effect accounting.

For example, one problem identified is the need for remedial action on share tainting associated with a requirement to debit amounts against share capital, for instance due to providing shares to employees under Div 13A.

Furthermore, whilst the Commonwealth Treasurer announced, prior to the Federal election, that no income tax deduction is available for expensing options outside of Div 13A, the recent IFRS changes requiring companies to now expense share based payments would suggest that a permanent tax difference is not appropriate. This position may not have been fully tested by the Australian courts. Nevertheless, Australia should reconsider this position having regard to the tax-deductible treatment provided, by statute, to companies in other jurisdictions, including the US (and more recently the UK as a direct result of IFRS).

Currently, business is required to prepare a significant number of financial statements at each annual reporting date. With the introduction of IFRS the amount of time and resources required to prepare these accounts is extremely significant. Some BCA Member companies are currently looking into applying for class orders to reduce the number of financial statements that they have to prepare. This will require cross guarantees and there is still some uncertainty as to how many sets of accounts this will allow them to stop preparing. The large number of financial statements required, the changes in standards and the increased levels of disclosure result in more time and resources required internally but also increased audit fees. Reduction in the number of accounts required will result in significant internal cost savings but also a possible saving of thousands in audit fees each year.

International standards should not be introduced and adopted in Australia until our major trading partners have also done so. For example, the Australian equivalents of IFRS were recently introduced into Australia before other countries such as the US or NZ adopted the standards.

2.24 Superannuation Guarantee Act

The nature of the problem this Act poses is in the complexity of the legislation, having been amended on an *ad hoc* basis.

One BCA Member company highlights that as a business that operates a legacy Defined Benefit (DB) fund, interpreting the legislation cannot be done without receiving legal opinion for the company's particular circumstance. A simple question, such as "Are meal allowances superable for defined benefit members?" may cost large amounts (eg \$11,000) in legal fees for an answer. Further, every time there is a claim by unions, it costs at least this much to obtain an answer that is defensible. When you combine this with the costs of assessing the DB fund from an IFRS standpoint the costs become significant. Each time an IFRS valuation of the DB fund is prepared by the actuary, the cost is around \$10,000. The BCA Member company needed two of these in the last six months. Every time there is a forecast change in one of its inputs, such as salaries or investment returns, a new valuation is required.

2.25 APRA Superannuation Circular

APRA has released for consultation a draft Circular titled "*Superannuation Circular No II.D.1., Managing Investment and Investment Choice*". BCA Member companies have raised a concern with the Circular regarding member investment choice (paragraphs 29-41). The purpose of the draft Circular is to provide general guidance

on how APRA interprets the provisions of the *Superannuation Industry Supervision Act 1993* (SIS Act) concerning the rules governing trustee responsibilities for investment, particularly with regard to member directed investment choice in superannuation.

Under “investment choice”, superannuation fund trustees are able to offer fund members a diverse range of investment options and strategies. In the draft Circular, APRA is seeking to have trustees monitor individual investments under “investment choice”. We think that this may go beyond the trustee’s role to determine the suitability of an investment at the fund level.

APRA’s approach will mean that trustees will have to monitor individual investment holdings and activities. Given the high compliance and systems costs associated with this it is likely that trustees will not offer as broad a range of investment options. This is likely to lead to a reduction in superannuation savings and members redirecting their savings elsewhere, or will lead to investors investing in Self Managed Superannuation Funds to retain investment choice and avoid the limitations of the APRA requirements.

The availability of investment choice recognises that there is no single investment strategy that is best or appropriate for each and every member of a fund. There is no obligation in the SIS Act on a trustee to ascertain whether the strategy and level of risk chosen by a member is appropriate.

The focus of the Circular should be on the need for Trustees to ensure that there are:

- Robust systems to manage the investment options offered;
- A sufficient array of choice to enable the member to diversify risk;
- Sufficient information provided to members about the investment choices and their related risks; and
- Appropriate reporting to members.

BCA Members have not undertaken a robust assessment of the likely cost, however substantial resources would be required to review all investor directed investment decisions.

2.26 Foreign Acquisitions and Takeovers Act (FATA) matters

- Due to the way the Foreign Investment Review Board implements the Foreign Investment Policy on Urban Land, land acquisition by particular Member companies (that are global) in Australia essentially requires compulsory notification because of the very broad policy application of the definition of urban land. For example, any acquisition made of housing for employees or executive housing in a capital city for an expatriate senior executive, or acquisition of real estate for a mine development, requires notification. Providing a blanket approval for a real estate acquisition that is ‘necessarily incidental’ to a mining company’s operations, with, say, an annual notification requirement, could reform this area.
- Further, some BCA Members who are global companies have identified that the definition of “substantial and controlling interests” in section 9 could be reformed.

One BCA Member suggests increasing the 15 per cent / 40 per cent thresholds set out in section 9 to approximately 20 per cent / 50 per cent as this will more accurately resemble the level of share ownership that is required by an individual/company before they actually have control or significance over a company. However, even these levels of foreign shareholding may unnecessarily lead to Australian companies being classed as foreign. For example, an ASX listed company may have 51 per cent of its shares held by foreigners all of whom are portfolio investors and none of whom individually exert any influence over the company. The company may also have all of its Board members, management, employees and operations in Australia. It is debatable whether such a company should be regarded as foreign. The more desirable reform would be to replace section 9 with a more flexible test which only treats a company as “foreign” if the ultimate control of the company is in foreign hands as determined by consideration of all the relevant circumstances including the actual voting rights of shareholders, the distribution of share ownership, the residence/citizenship of the Board and senior managers and any other arrangements or agreements that may be in place with the shareholders and the company.

- The FATA definition of foreign person includes:
 - A corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a *controlling interest*; or
 - A corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an *aggregate controlling interest*.

Under section 9 of the FATA,

- if a person holds a *substantial interest* of 15 per cent or more shares in a company, or
- if or more persons hold an *aggregate substantial interest* of 40 per cent or more shares in a company,

then they will be taken to hold a *controlling interest* or an *aggregate controlling interest* in the company.

FATA looks not only at beneficial shareholdings but also at “legal” shareholdings (i.e. the registered shareholder) when determining if a substantial or an aggregate substantial foreign interest is held. The implications of this include that all shares in a company held by a custodian which itself is a foreign person are treated as foreign, even if the underlying shares are held by Australians. As a result, companies where control is clearly not held by foreigners may be required to notify the Foreign Investment Review Board (**FIRB**) of certain acquisitions set out in FATA. This result is contrary to both the true intention of FATA as well as the Government’s approach to Australia’s foreign investment policy, being to encourage foreign investment which is consistent with community interest.

FIRB has provided a partial solution by introducing regulations effective June 2004 which allows for foreign custodians with Australian Financial Services licenses to apply for a certificate of exemption, which would allow companies to “see through” the custodian to the underlying holders of the shares. However, to date, we understand that only one custodian has been issued a certificate of exemption.

Reform is suggested to bring FATA into line with current commercial practice and community values. Amendment of certain provisions of FATA so that only the beneficial owner of a share, and not the legal owner, is treated as holding the

share is recommended to obtain a truer picture of the “foreignness” of a corporation.

2.27 Heritage Protection

Amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* are expected to come before the Commonwealth Parliament next year. Concern has been expressed by particular Member companies regarding the low threshold for applications for Long-term Protection Orders to be adjudged “non vexatious or frivolous” and there remains in the Bill the risk of uncertainty created by emergency protection order applications (currently known as section 9 applications) which have the potential to delay developments.

Under various cultural heritage protection acts (Commonwealth and State), the broad ranging prohibition of disturbing aboriginal cultural heritage, combined with allowing any local community representatives to exercise the very strong powers of the Act, results in developers of large infrastructure projects being entirely dependant on the goodwill and commitment of many groups and individuals who have no responsibility or motivation to act in the community’s interest.

Major costs from the resulting project delays are high. It is not uncommon for expensive plant and highly skilled staff to sit idle for significant periods during major infrastructure projects, waiting for nominated cultural heritage monitors to attend the work site at previously agreed times. Often no earthwork can occur in their absence, which can cost tens of thousands of dollars per hour. The cost of employing monitors is high relative to normal wages costs, due to their strong bargaining power resulting from the inability to work without them, however it is the cost of delays that is most significant.

2.28 Clearing of Native Vegetation

The Act prohibits clearing of native vegetation without a permit or regulatory exemption (includes re-clearing areas previously cleared). Arguably, the Act was intended to limit broad scale clearing, however, the prohibition is creating unnecessary uncertainty and delays for existing and proposed infrastructure. While a potential exemption exists for maintaining existing infrastructure, this does not apply in designated sensitive areas. Much existing linear infrastructure is in such areas, and due to careful rehabilitation requires ongoing management of native vegetation. The Act should clearly exempt vegetation maintenance for the protection of infrastructure existing at the time that the provisions were introduced, including those within defined sensitive areas. The permitting timeframes are open ended, and the guidelines not appropriate for linear infrastructure. Clear maximum timeframes (say 60 days) and sensible guidelines for linear infrastructure are required. The main cost is uncertainty and delays. One BCA Member company highlights that over a year after applying for a permit for the purpose of maintaining existing infrastructure, a permit has not been obtained, despite active negotiations. The timeframes associated with obtaining permits are incompatible with the expected service requirements for new connections of basic energy infrastructure.

2.29 Ports/Shipping

Some BCA Member companies recommend that regulation could be streamlined by:

- the removal of Cabotage (Aust crews) on coastal shipping (appears to lie under the Coastal Navigation Act); and
- through Commonwealth regulation of ports (to drive consistent investment and port charges - see under Maritime in the State/State overlap section)

Another issue highlighted by BCA Member companies is private sector port facility operation under the *Maritime Transport Security Act 2003* (Cth) and its regulations. The area of maritime transport security provides an example of the sudden impact and cost of a new form of regulatory compliance. The law 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.

2.30 National Industrial Chemicals Notification and Assessment Scheme

The objectives of the National Industrial Chemical Notification and Assessment Scheme have not been clearly communicated to business but the impacts are wide ranging. At this point, business is being levied a charge that it appears will be used to establish an added layer of reporting and regulatory burden without any specific value for business.

2.31 Petroleum Legislation

Some BCA Member companies recommend the repeal of the following Acts:

- Petroleum Retail Market Franchise Act
- Petroleum Retail Market Site Act
- Victoria's Petroleum Products (Terminal Gate Pricing) Act (once Commonwealth reform occurs)
- WA TGP legislation

Petroleum pricing legislation (WA & Victoria) should be reviewed, particularly if the new Oilcode is introduced as it proposes to include pricing transparency provisions and also consistency with the TPA ensured.

2.32 Energy White Paper Policy

One BCA Member company highlights that the Fuel Tax Act has the greatest implications for the alternative gaseous fuels market including Liquefied Natural Gas (LNG) and Liquefied Petroleum Gas (LPG). The Commonwealth Government coordinated the policy document "Securing Australia's Energy Future" (the Energy White Paper) in 2004 to address major energy reforms and it is currently being introduced into legislation. Proposed changes to the levels of fuel taxation (Energy Taxation) significantly reduce the anticipated returns from investment in alternative fuel technologies (notably LNG as a substitute for diesel in heavy duty vehicles).

The Fuel Tax Credit System could be reviewed as it may restrict both the economic investment in and consumer adoption of, indigenous and greener fuels. Environmental regulations for road transport focus heavily on greenhouse gas emissions and one BCA Member company has highlighted a need for consideration of air quality. Perhaps the Government should consider the Australian Liquefied Petroleum Gas Association's (ALPGA) call to establish a joint industry/Government-working group to develop mitigation strategies for the impact of the Energy White Paper policy.

2.33 Electricity

The Electricity Industry Act 2004 (WA) requires electricity generators, distributors and retailers to be licensed. The Act is appropriate for electricity suppliers supplying into the "grid" (i.e. the main electricity networks such as in Perth and surrounding areas). However, for independent power producers specialising in power generation for the resources industry and regional towns, the Act is unnecessary red tape because supply is to individual customers. Therefore, consideration of the scope of this Act may be required.

2.34 Energy in General

With the introduction of new technology into the market there are situations where the existing regulatory framework is inadequate. Clarification of standards between US and Europe and how these relate to Australian standards may assist.

2.35 Energy Efficiency Opportunities Bill 2005 (Cth)

This Act will force companies with large energy use to follow a mandated and intrusive process to identify and consolidate all energy use, undertake energy auditing, report the results of audits/assessments both publicly and in more detail to the Government. This requirement will include energy use in subsidiaries that would otherwise not be significant users, and force covered companies to devote significant resources (particularly human resources) to the process regardless of whether they see this as the best use of their people.

Consolidating energy use within 'controlling entities' and forcing the same process on all parts of a company seems artificial given the highly diversified activities undertaken by many companies. It is particularly problematic for energy companies where all individual assets tend to trigger the most stringent requirements.

Regulations to exempt all sectors of the energy supply industry should be introduced as foreshadowed in the Bill. This exemption should be permanent and comprehensive.

One BCA Member company estimates that if applied to its business, compliance with this Bill will require at least 1-2 full time resources to administer the program across the company and other entities that the company provides technical support services for. Additionally, thousands of person hours will likely be required across the organisation to participate in the mandatory processes to comply with the program.

2.36 Intellectual Property (IP)

There is too much legislation dealing with IP issues, particularly in the area of copyright. Reviews of this legislation generally result in more legislation, which merely adds further complexity to this area.

Currently, there is no single Government department responsible for administering 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.

Presently there is a wide variety of government departments and filter organisations which propose the introduction of new intellectual property legislation. This leads to the possibility of inconsistency and conflict between proposals and requires significant time to be spent by companies and their advisors assessing any changes. One Government committee should be established through which all IP law reform proposals are channelled and assessed.

2.37 Direct Marketing

Of concern are the overlap, as well as limitations to marketing, caused by the following legislation:

- Spam Act 2003, Parts 2 and 3;
- National Privacy Principles (NPP) 1 and 2; and
- Corporations Act 2001, section 992A.

Included in any review to remove duplication and overlap between these regulations should also be the Telecommunications (Inception) Act and the Spyware Act.

The Privacy Act prohibits direct marketing to individuals without consent. The Corporations Act s. 992A prohibits the hawking of financial products to retail customers because of an unsolicited meeting or an unsolicited telephone call, except in prescribed circumstances. The Spam Act prohibits the sending of unsolicited commercial electronic messages. Spam Act requirements reduce companies' ability

to use electronic means to notify customers rapidly in response to commercial or other needs and to use technology to streamline customer communications generally. Rationalisation of the various requirements and removal of unintended consequences is need.

Further harmonisation with telemarketing laws may also be required (see section 3.22 of this Attachment A).

2.38 Occupational Health and Safety (Workplace Deaths) (NSW)

Amendments to the Occupational Health and Safety Amendment Act 2004 were passed in 2005. The Act imposes serious personal criminal sanctions on Directors and Managers in the event of a workplace death. This is a source of serious concern, especially given the fact that duties in NSW are not qualified as in other States.

Additionally, in current legislation mitigation principles allow up to 25 per cent reduction in sentence if an employer pleads guilty. This system structurally encourages employers to plead guilty however many guilty pleas may have been reconsidered if an employer was aware that subsequent offence would likely lead to personal custodial sentencing. For this reason it is vital that this Bill is not retrospective and should only be applied to workplace deaths post the Bill's inception date.

2.39 Equal Opportunity for Women in the Workplace Act 1999

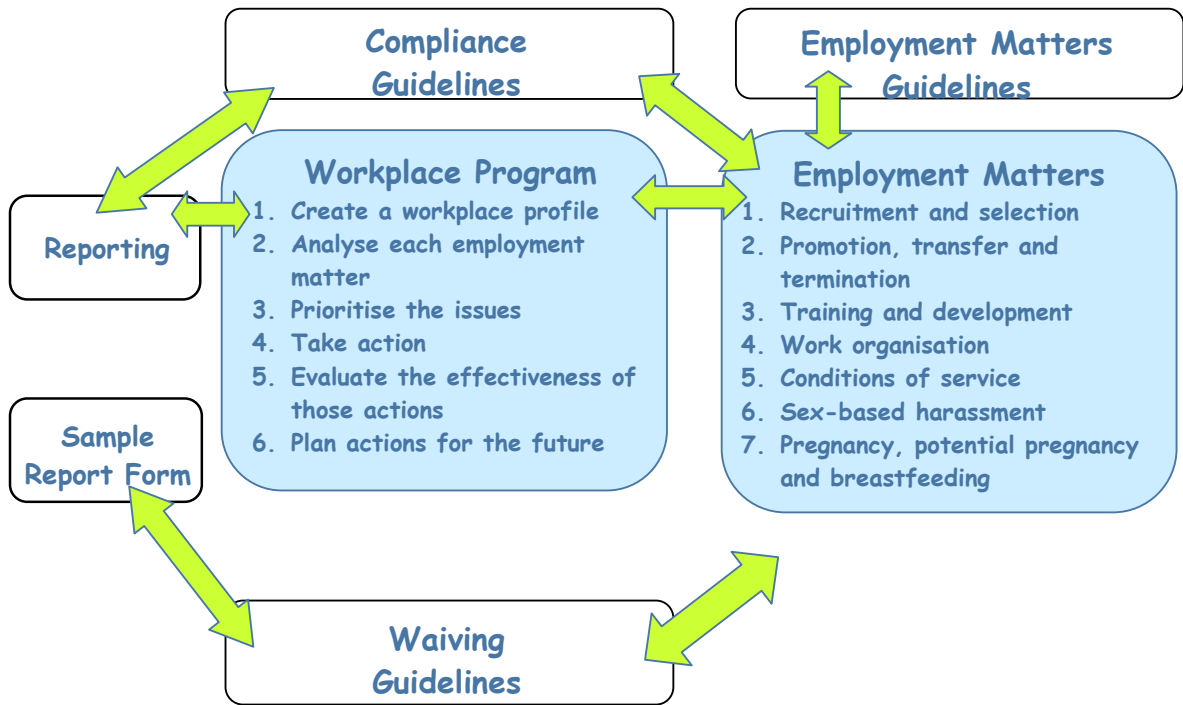
One BCA Member highlights the *Equal Opportunity for Women in the Workplace Act 1999* (EOWA Act) as a regulation of concern. The Act states that Employers with 100 or more employees must produce an annual report. The relevant section of the Act is detailed below:

Part IV—Reports by relevant employers

13 Contents of public report

- (1) A relevant employer must prepare, in respect of each reporting period (see section 13A), a public report in writing about the outcomes of the employer’s workplace program.
- (2) The public report must:
 - (a) set out the workplace profile; and
 - (b) describe the employer’s analysis of the issues in the employer’s workplace relating to equal opportunity for women; and
 - (c) describe the actions taken by the employer during the reporting period to address the priority issues identified in the analysis; and
 - (d) describe the actions that the employer plans to take in the next reporting period to address issues in the employer’s workplace relating to employment matters that the employer would need to address to achieve equal opportunity for women in the employer’s workplace.
- (3) The report may contain an evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer’s workplace. If the public report does not contain such an evaluation, the evaluation must be submitted in a confidential report under section 14.

The BCA Member highlights that such annual reporting that is required under the EOWA Act 1999 takes up time to complete. The Act requires organisations to report on the following:



As part of the reporting process companies are required to complete the actions above, and in doing so need to seek feedback from a cross section of employees on

EEO related matters in the workplace on an annual basis via surveys or focus groups.

The BCA member believes that this process is perhaps becoming less relevant in a modern society (cf 5-10 years ago) and today companies should be focusing broadly on diversity issues in the workplace which would include matters relating to gender, EEO, age, disability, Indigenous employment etc (which should already be covered by general reporting requirements of companies). The BCA Member believes that this could be best resolved by removing the requirement to report as this costs approximately \$16,000 per annum (to complete the report and conduct surveying or focus groups).

2.40 Accident Compensation Act 1985 (Vic)

The main issue is the size of the Act; some 653 pages of it. It can be a difficult task when attempting to work with the different parties involved in a matter whilst attempting to comply with the law. A brief decisive synopsis of the Act for businesses would be beneficial.

2.41 Workers Compensation (NSW)

The provisional liability system under the Workers Compensation legislation in NSW enables an employee to receive up to 12 weeks of weekly benefits:

- without lodging a claim form; and
- in circumstances where the claim has not been investigated.

If the claim is then declined, they do not have to pay it back and the employer may wear the cost.

2.42 Expatriate Workers and Visa Requirements

Many BCA Member companies are global and employ people from overseas. The employment of people from overseas is often required by those companies for language, cultural and business experience reasons.

Whilst BCA Member companies acknowledge that Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has worked to reduce the bureaucratic and time consuming process of obtaining a visa for Australia by streamlining the application process with the introduction of on-line applications and notification, further improvements to the system could be made and DIMIA should work with companies to achieve a mutually beneficial outcome in this area.

However, it appears that there is a "tightening" of visa legislation as DIMIA is now enforcing existing legislation, introducing updated legislation and reducing periods of grace for employers.

The major difference we see is the added requirement to ensure the position could not be filled by a "local" staff person, and for the visa holder to "train" local staff in the specialist skills they hold. This is sometimes difficult to categorically show.

The retail adviser competency requirements also impede licensees' ability to hire foreign labour⁹. Under ASIC PS146.73, advisers from foreign jurisdictions who wish to work in Australia need to obtain evidence that their qualifications have been recognised by a relevant overseas regulatory body. Once the evidence is obtained, the qualifications need to be assessed to determine which knowledge and skills requirements are satisfied. The time and expense taken to obtain the evidence and assess the qualifications slows down the process of hiring foreign labour. It may also prove to be a prohibitive burden on small businesses. One BCA Member company in the finance industry estimates that the cost of this per dealer is around \$1,500 in hard cost, but lost revenue of not being able to deal for up to six months can be many multiples of this. Given that the majority of foreign labour is sourced from the UK, the US, Hong Kong, Singapore and New Zealand, it would assist the mobility of labour if the ASIC Training Register listed courses that are facilitated by the relevant regulatory bodies (i.e. Financial Services Authority (UK), National Association of Securities Dealers (US), Securities and Futures Commission (Hong Kong), Monetary Authority of Singapore and the New Zealand Securities Commission).

More recently, the Government has modified the regulations to payout superannuation contributions to 'non-executive' expatriates at the time they leave Australia.

The policy reason behind this modification is understood, however, some BCA Member companies believe that all expatriates with business work visas should be made exempt as they are here for limited time only and it is time consuming to administer such payments for that limited time, for no practical purpose.

Also expatriate staff already have superannuation built into their package being paid in their home country. As such, if businesses have to pay the SGL then this is a doubling up and makes the remuneration system even more complicated for the business.

DIMIA have also introduced the requirement that international transferees to Australia need to obtain work permits from their home country prior to travel. In the past it has been fairly standard practice for overseas transferees to enter Australia on a business visa and then convert to a work permit from within Australia. DIMIA have recently tightened up on this so that assignees need to obtain their work permit from their home country prior to travel. This creates delays in transfers, particularly for those of greater than 12 months duration where medical checks need to be conducted and processed through Australia before the work permit can be approved. Some countries have the ability to file the results electronically but this is not widespread and causes hold ups in the process. A solution may be to enable foreign employees to enter Australia on business visa whilst the work permit application process is pending.

The statutory minimum salaries that must be paid to transferees entering Australia on work permits do not take into account any additional / fringe benefits provided to the individual. This has a potential cost impact in the case of non permanent transfers where the employee remains on their home country compensation structure and has additional allowances / benefits paid under our transfer policies. A solution may be to broaden the definition of compensation / benefits that can be included as part of the minimum salary threshold for international transfers.

⁹ Corporations Act s912A and ASIC Policy Statement 146

2.43 Annual leave and long service leave

The legislation involving Accrued Leave Entitlements may be outdated and restrictive. The Annual Leave Act provides that annual leave can only be paid on termination of employment, regardless of what the employer and the employee want to do. This means the employer must enter into separate AWAs with employees to be cashed out of annual leave. Similar provisions apply in respect of the cashing out of long service leave. This potentially creates unnecessary legal complications for employers, particularly for large employers who send staff on international assignments. A review of the annual leave and long service leave legislation may be required, to take into account a modern workforce.

2.44 Terrorism and Anti-Money Laundering

BCA Member companies have expressed concern with the proposed Anti-Money Laundering Bill, Regulations and Rules (AML regime). The Minister for Justice and Customs has announced that a draft Bill is due to be released for public consultation in November 2005. To date, the draft has not been released.

The new AML regime will impose a new layer of regulation on the financial services industry (and other industries). The new regime has the potential to impose a significant regulatory burden and additional cost on the financial services industry. The Government must continue to work with industry to ensure that the new regime is practical, efficient and effective for businesses and customers.

Some of the AML requirements were brought forward in the *Anti Terrorism Bill 2005*. Despite the fact that there was overlap with the AML regime, the decision was made to limit implementation of the relevant provisions within twelve months.

Principles based legislation that permits individual financial services providers to implement anti-money laundering programs that best manage the risk of money laundering for their particular customers, products, distribution channels and business model are required. A one-size-fits-all approach will not work. Government should draw on the experience and approach of other jurisdictions where industry guidelines and codes have been developed.

Electronic solutions should be considered where possible to ensure that costs are reduced. In particular, electronic identification systems can overcome many of the industry and customer concerns with non face-to-face identification. Government should continue to work with industry to refine an electronic identification system proposal based on current technology and processes around the current use of Tax File Numbers where the ATO crossmatches against its data and sends the institution a "red flag" if there is an anomaly.

The original draft anti-money laundering legislation required customer identification for all customers. One BCA Member estimates the implementation cost of that original proposal at \$100 million, for its customer base alone, demonstrating the failure of those developing the legislation to appreciate its impact. Fortunately, the original proposal was dropped following intense pressure from industry.

2.45 Proceeds of Crime

Where definitions or the scope of legislation is unclear, it can add additional time for businesses to interpret the legislation. For example, the Proceeds of Crime legislation is difficult to apply as it is uncertain as to when funds are within the scope of the legislation.

3. State/State Overlap

3.1 Stamp Duty

There is a strong case for the harmonisation / abolition of stamp duty laws throughout the Australian States and Territories. Indirect tax, such as State and Territory stamp duty, which was meant to disappear with the transfer of GST funds to the States, is often the greatest cash costs involved in undertaking transactions, particularly the rules on 'land rich' stamp duty.

Harmonisation was attempted through the rewrite of State-based Duties Acts to incorporate the previous uniform provisions. However, only Victoria, Tasmania, New South Wales and the Australian Capital Territory adopted a common rewrite model (although a number of initial differences were retained and there have been subsequent amendments resulting in further differences).

Queensland undertook its own rewrite, which is not entirely consistent with the other rewrite jurisdictions. Additionally, Western Australia has adopted some aspects of the rewrite, for example the mortgage duty and hire of goods duty provisions, but remains different in many other respects. A number of taxes, such as Financial Institutions Duty and Bank Account Debits Tax have now been abolished, or are scheduled for abolition in the near future, eliminating or reducing some areas where different provisions and interpretations have previously caused difficulties.

However, significant differences can still be seen, for example, in the way the 'land rich' rules apply in each State (such as different thresholds for land holdings and acquisitions, and in relation to the entities to which the rules apply), and in the way each State calculates its proportion for the purposes of multijurisdictional mortgage stamping (i.e. with five States imposing mortgage duty, four different methods are used to calculate the appropriate proportion). Even where the legislation is the same, differences in interpretation/application arise between revenue authorities. These differences make it difficult to operate a business on a national basis.

There are numerous different State stamp duties imposed by the States and Territories, and this adds a very large layer of complexity for companies. Just some examples include:

- Deed Duty is payable only in South Australia, Western Australia and the Northern Territory and even then, the amount payable differs among these States and Territories;
- both Corporate Trustee Duty and Credit Business Duty are payable in Queensland but not in any other State or Territory; and
- the time for payment of duty varies markedly across the States and Territories, ranging from 30 days from liability arising in Queensland, to three months after liability in NSW and Victoria; and
- stamp duties on insurance are costly and inconsistent.

3.2 Payroll Tax (and Workers' Compensation)

Prior to 1971, payroll tax was a tax imposed by the Commonwealth uniformly across the States and Territories. Since payroll tax became controlled by the States and Territories in 1971, the amendments made by individual States and Territories have resulted in significant differences in the application and operation of payroll tax between jurisdictions.

Differences include exemptions and exemptions thresholds, the rates at which payroll tax is imposed, the amounts included in calculating taxable wages and differing treatment of contractors and employment agencies. These differences cause significant compliance difficulties for employers employing staff on a national basis or staff who move around the country.

It would be beneficial if there were to be one common "salary" base upon which payroll tax and workers compensation is calculated for all States. Currently, the definition of salary and wage items included or excluded for payroll tax and workers' compensation purposes differs on a State by State basis, including fringe benefits, living away from home allowances, equity awards etc. This effectively results in any business operating nationally being required to monitor and calculate eight separate payroll bases. Further, the tax free thresholds vary among States and also differ from those published by the ATO for income tax reporting. For example, paying a kilometre allowance to employees in accordance with ATO published rates has differing payroll tax consequences across States.

For example, the rates vary from 4.75 per cent to 6 per cent depending on location, with WA also including certain benefits paid to staff over and above base salary. This is rather time consuming to calculate in the case of a "trainee" who usually travels around the country during their stay in Australia.

In addition to differences between States and Territories, within an individual State or Territory there are also commonly differences between remuneration as calculated for workers' compensation purposes and taxable wages calculated for payroll tax purposes. This creates complexity not only for national employers, but also smaller individual State based employers.

Even where the law is expressed in identical terms, different revenue authorities may interpret the law in different ways. This is another source of differences between States and Territories and therefore additional complexity.

Although the possibility of a payroll tax rewrite was raised several years ago, nothing further has been proposed to date and differences continue to arise.

A review is required. State imposition and collection should be assessed and a uniform definition of salary and wages with inclusions and exclusions and thresholds aligned to ATO published kilometre and travel allowances would significantly reduce workload and system complexity.

3.3 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 differing ways.

Consequently, for any national employer the payroll department is obliged to maintain different data to comply with each particular requirement.

In addition, for some large organisations, no sooner does one jurisdiction complete a payroll tax audit/review than the next one commences. Each jurisdiction therefore has duplicated regulatory agencies to carry out these functions. Costs of regulation include compliance with each of the relevant Acts, maintaining systems and reporting to each Office of State Revenue, and attending to audits carried out by each jurisdiction.

A set of consistent legislation is required. A 'shared service' could be the answer to the duplication of infrastructures.

3.4 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;
- 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/incidents varies greatly between jurisdictions, with some States only require workers' injuries to be reported, while others also require injuries of contractors, customers and visitors to be reported, creating 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, with national employers required to interpret wage definitions in each State to enable renewal of insurance (a particularly complex area in relation to wages declarations is the determination of a non-direct employee).

A national employer may be required to pay workers' compensation premium installments in different months of the year (eg 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 one time.

Variations in reporting and documentation required to support return to work continually need modification as legislation changes, which in turn makes national coordination of workers' compensation claims complex. The preferred approach to achieving consistency in return to work is to agree a best practice model and amend legislation which in turn will enable the best possible outcome for injured employees.

3.5 Employment Related Regulations

Businesses are required to comply with legislation at both the State and Commonwealth level in relation to equal opportunity and anti-discrimination. Further, all States have different provisions with respect to the quantum of long service leave and when it applies. It is difficult for business conducted across borders to keep abreast of requirements. Quite often action can be a breach in one jurisdiction whilst being in compliance in another.

There are various overlapping and inconsistent employment regulations, 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);
- Surveillance Act (NSW);
- OH&S Acts & Regulations;
- Workers' Compensation Acts and Regulations

3.6 Statutory Trusts

Various legislation in each State and Territory regulates the conduct of solicitors and real estate agents. One of the common obligations imposed on real estate agents and solicitors under these laws is the requirement to pay client money and other funds into trust accounts. These trust accounts must commonly be maintained with a financial institution authorised to accept deposits of statutory trust funds under the relevant legislation.

The calculation and treatment of interest earned on statutory trust funds is not uniform across these pieces of legislation. The interest rates required to be paid on accounts can also differ across jurisdictions. As a result, for example, a financial institution like a bank that is authorised to receive these deposits must ensure its accounting and IT systems across the country adequately differentiate the calculation and treatment of interest on these accounts depending on the State or Territory in which the deposit was received – or risk (in some cases) breaching the law. The cost imposed on financial institutions is considerable – costs that are more likely than not recovered from account holders. These costs could be significantly reduced if a uniform regime imposing one standard treatment of statutory trust interest was implemented.

One BCA Member company highlights that State Trustee laws impose significant additional costs on business. Operating under six State trustee laws overseen by six separate Attorneys-General results in significant duplication and lack of consistency, estimated to cost \$200,000 per annum.

3.7 Trade Promotions Legislation

Each State and Territory has its own lotteries legislation which regulates trade promotions (or competitions). Currently, lotteries legislation in each State and Territory and the *Trade Practices Act 1974* (Cth) regulate trade promotions. The legislation differs in many respects, most significantly in the circumstances in which a business requires a permit to conduct a competition. A permit is not required in Queensland, Tasmania and Western Australia. A permit is required in South Australia if the total prize pool exceeds \$500 and in Victoria if the prize value exceeds \$5000. A permit is required in NSW and ACT regardless of the total prize pool value. The various State and Territory laws also impose varying requirements in relation to:

- the fees payable for the issue of permits;
- treatment of unclaimed prizes;

- the level of information required on material advertising the competition;
- the requirement for a scrutineer at the draw and procedures around the authorisation of a person to draw the winner(s);
- the location of the draw (the NSW legislation requires the draw of any competition open to NSW residents to take place in NSW);
- the form, content and disclosure of competition terms and conditions.

These differences add unnecessary complexity to the conduct of national competitions and increase the risk of technical non-compliance with the requirement of one or more jurisdictions.

3.8 Third Party Trading Stamps Legislation

Third party trading stamps are vouchers supplied in connection with the sale or promotion of goods and services.

In Western Australia and the Australian Capital Territory, there is a prohibition on supplying, redeeming or publishing third party trading stamps. We understand that this legislation was not intended to prevent legitimate business activity, but this has been the practical effect.

For example, if a company wished to offer bonus movie tickets to a customer in connection with a purchase, they are not able to offer this to Western Australian or Australian Capital Territory customers. For national promotions, this means that exceptions to the bonus must be advertised, and it can leave customers in these affected areas questioning why they are not permitted to receive the bonus, or are being treated differently.

3.9 Consumer Protection Regulation

In 1983, the Commonwealth, State and Territory consumer affairs Ministers agreed to adopt a uniform scheme of consumer protection legislation. The uniform State and Territory legislation was modeled on the consumer protection provisions of Part V of the *Trade Practices Act 1974* (Cth). The result of this agreement was a fair trading Act in each State and Territory.

This scheme arose out of the constitutional limitations of the Trade Practices Act, which largely applies to corporations only, and the need for State and Territory legislation to provide consumer protection provisions applicable to individuals.

It is not just limited to those pieces of legislation though. For example, in telecommunications at the Commonwealth level, in addition to the consumer protection provisions of the Trade Practices Act, all telecommunications carriers and carriage service providers must also comply with an Australian Communications Industry Forum. This Forum has developed an industry code on Consumer Contracts which has been registered by the Australian Communications and Media Authority (**ACMA**) under the *Telecommunications Act 1997* (Cth).

Despite the intention for a uniform set of Fair Trading Acts across the country, there have been several legislative developments in various States and Territories in recent years that have created inconsistencies in consumer protection laws across the country. It appears State and Territory Governments are increasingly using fair trading legislation as a means of driving consumer protection initiatives which do not necessarily have national support. This has resulted in uplication of the provisions of the Trade Practices Act in the jurisdictional Acts, Regulations and Codes (eg. Retail Code/Marketing Code) and guidelines.

The inconsistencies are highlighted by the fact that NSW has general unfair contract terms legislation, Victoria has amended its Fair Trading Act to deal with “unfair” contract terms, and specific legislation (eg the Uniform Consumer Credit Code, **UCCC**) contains provision for setting aside unfair contracts¹⁰.

Tasmania and WA implement changes to their Codes under the uniform scheme by separate legislative or executive processes relative to other jurisdictions.

A number of States have made changes to the UCCC by amendments to their legislation outside the UCCC uniform scheme. Amendments to the UCCC should always be made through the Standing Committee of Officials of Consumer Affairs and the UCCC Management Committee rather than by *ad hoc* State amendments as has occurred in the ACT and is proposed in NSW regarding the “responsible credit” amendments to the Fair Trading Act.

Although the Trade Practices Act and the State and Territory Fair Trading Acts are generally very similar (with the State Acts mirroring the Trade Practices Act) there are some differences of significance:

- The exclusion of transactions involving certain goods or services from the protections afforded by the Trade Practices Act. That is, goods acquired for the purposes of re-supply or transformations are not considered to be consumer transactions. However, the scope of the exclusion is not consistent across the jurisdictions.
- Acquisitions of goods and services by businesses are also treated differently under the various pieces of legislation. The Trade Practices Act approach is that acquisitions by businesses (for purposes other than resupply and transformation) should be included as consumer transactions, where the transaction is worth less than \$40K or the goods or services are of a kind ordinarily acquired for personal, domestic or household use. This approach is the same as taken in Victoria, SA and Tasmania. NSW takes a broader approach, including acquisitions by businesses for other purposes, irrespective of the value or nature of the goods. Queensland includes business acquisitions for certain purposes provided the value is less than \$40K. WA excludes acquisitions by business.
- Another requirement is to label certain imported items with their country of origin pursuant to the Commerce Act Import Regulations. This dated legislation mandates that certain imported products be labelled as to their country of origin, while the Trade Practices Act does not require goods to be so labeled (only that when they are that the labeling be accurate). A consistent national approach would be helpful, though it is not necessarily an area the States have direct involvement in.

10 *Industrial Relations Amendment (Unfair Contracts) Act 2002* (NSW), *Fair Trading Act 1990* (Vic), *Uniform Consumer Credit Code*.

These are just a couple of examples of the differences in approaches to consumer protection and fair trading between the Trade Practices Act and the State legislation. The laws are mostly very similar, but small differences and variations make it time consuming to ensure compliance with all Acts. National companies are therefore required to watch for developments and ensure compliance in all jurisdictions

An example of inconsistency occurred last year when NSW and Victoria both introduced similar, but in part inconsistent, Fair Trading Act amendments in relation to unsolicited marketing¹¹. The regimes shared a common objective to impose standards of conduct and disclosure requirements on marketers who attempt to sell products and services during unsolicited customer contact. Major inconsistencies between the regimes were addressed by late amendments, however the residual inconsistencies which cause concern are summarised below:

Provision	NSW	Victoria
Scope	<p>Applies to a 'direct commerce contract' defined as supply of goods or services, the negotiations for which take place during:</p> <ul style="list-style-type: none"> • a meeting at a location other than the supplier's business premises • over the telephone where the consumer did not invite the meeting or telephone call 	<p>Applies to a 'telephone marketing agreement' (TMA) defined as a supply of goods and services, the negotiations for which take place over the telephone, where:</p> <ul style="list-style-type: none"> • the supplier made the call and • the consumer did not invite the call
Exclusions	<p>Exclusions apply to agreements:</p> <ul style="list-style-type: none"> • for 'financial products' • for UCCC-regulated credit (but only from requirement to provide customer a cooling off period) <p>Legislation does not apply to contracts for the supply of goods and services for business purposes</p>	<p>Exclusions apply to agreements:</p> <ul style="list-style-type: none"> • for 'financial products' • solely for the provision of credit <p>Legislation confined to the supply of goods and services of a kind ordinarily used for personal, household or domestic use</p>

¹¹ In Victoria: Fair Trading (Further Amendment) Act 2003; Fair Trading (Consumer Contracts) Act 2004 and Fair Trading (Amendment) Regulations 2004. In NSW: Fair Trading Amendment Act 2003 and Fair Trading (General) Amendment (Direct Commerce) Regulation 2004

Provision	NSW	Victoria
Cooling off period	<p>Consumer has five days after a direct commerce contract is made to cancel the agreement</p> <p>Supplier must provide consumer a written information of consumer's right to cancel the contract. There is no required format for this information</p>	<p>Supplier must within five days of a TMA, provide consumer with a prescribed document summarising the agreement and a prescribed cancellation notice. Consumer can cancel contract by returning notice within 10 days of receiving documentation.</p>
Specific consent before contract	No equivalent provision	<p>A consumer must provide explicit informed consent before a TMA can be made.</p> <p>Consent must be recorded in writing or by means of a recording device</p>

Any national organisation undertaking direct marketing that falls within these regimes would need to maintain different compliance arrangements and apply different rules and standards depending on whether the customer resides in NSW or Victoria. If the customer is in Victoria, the caller must ensure prescribed documentation is sent after the agreement is made and must obtain and record the consent of the customer before any sale is complete. The same call to a NSW resident does not require the prescribed documentation or consent. However, the NSW requirements will apply to conduct not covered by the Victorian regime, that is, to contracts negotiated at an unsolicited meeting held at a venue other than the supplier's business premises.

There has been some positive initiatives in this area. A recent announcement by the Parliamentary Secretary to the Commonwealth Treasurer, the Hon Chris Pearce MP, outlines the Government's commitment to work with the Ministerial Council on Consumer Affairs to achieve a nationally consistent consumer policy framework.

The Productivity Commission in its recent Inquiry Report, *Review of National Competition Policy Reforms*, 28 February 2005, recommended that the Australian Government, in consultation with the States and Territories, should establish a national review into consumer protection policy and administration in Australia focusing on, among other things, mechanisms for coordinating policy development and application across jurisdictions and for avoiding regulatory duplication.

One such mechanism could be to revisit the 1983 agreement between the Commonwealth and the States and Territories to include some positive obligations on the State and Territory fair trading departments to ensure consistency in consumer protection laws. A possible model is the 'template model', reflected in the Australian Uniform Credit Laws Agreement 1993, which if adopted for consumer protection laws, would require State and Territories to enact laws to adopt a template Fair Trading Act (along with any amendments) and for any changes to this template legislation to be approved by a majority of the Ministerial Council of Consumer Affairs.

Finally, other fair trading issues that need to be considered include:

- Management of identified breaches of the UCCC, including the negotiation of strategies to address those breaches with State regulators, is required on a co-ordinated national basis, rather than the current parochial State basis. At present, it can take over 12 months to address a simple admitted breach and there is no formal mechanism for national solutions, and it is very difficult to get all State regulators to sign off on a strategy negotiated with any one particular State agency.
- The policy behind the unfair contracts provisions of the Fair Trading Act (Vic) (Part 2B) is flawed, and these provisions should be repealed. Proposals to extend this legislation nationally should be dropped. If the legislation remains, separate suggestions that the present exemption for credit contracts be removed should not proceed.
- In addition, the UCCC and Australian Financial Services Licence (AFSL) disclosure requirements need to be reviewed, especially where there are products that include components covered by both the UCCC and AFSL obligations.
- Trade measurement regulations differ between States; for example, Queensland requires that broken or damaged packages, sold as a markdown must also have the reduced volume or weight of the package visible on the packaging.

3.10 Debt Collection

Different States and Territories have different debt collection laws. This can make compliance a difficult task for a business (especially a national business which has customers all over Australia and uses the same processes to bill each customer). The application of any debt collection regulation should be limited to those actively collecting third party debts which are actually in default rather than simple third party billing activities, such as where one supplier may bill for bundled products that include goods and services supplied by a third party (for example, billing for a telephone handset and access or for a handset and content provided to it). Parties should not be restricted from recovering reasonable debt collection costs from debtors, particularly where the possibility that such costs and an indication of the amount that may be incurred is made clear to customers with reasonable notice to enable them to pay before such action commences.

3.11 Unclaimed Monies

Unclaimed monies legislation impacts on businesses where a customer overpays a bill at the end of a contract and the business is then unable to locate that customer. Inconsistencies in State laws in this area increase compliance costs. Harmonising these laws would simplify systems requirements. In addition, it would be helpful to establish a minimum threshold amount that must be reached before these laws are triggered.

3.12 Finance Broker Regulation

The regulation of finance brokers varies markedly across States and Territories. Western Australia, Victoria, New South Wales and the ACT have passed legislation

specifically regulating finance brokers. South Australia, Tasmania, the Northern Territory and Queensland are yet to legislate specifically on the topic. The regimes of NSW, Victoria and the ACT are similar and focus primarily on the disclosure requirements for brokers. They apply only to brokers dealing in consumer credit. The regime in Western Australia goes further by also establishing a licensing regime, code of conduct and functions for a 'regulator' which has an ongoing industry oversight role. The Western Australian legislation also has a wider scope, applying to intermediaries who deal in commercial as well as consumer credit.

This patchwork of legislation presents difficulties for national brokers or national financiers with a network of finance brokers. It may require compliance training and support for many brokers. It is much easier for such entities to set standards for the good character and conduct of its brokers if those standards can be based on one nationally uniform legislative regime with one set of licensing, conduct and disclosure requirements.

The Western Australia Broker Licensing regulations are restrictive and difficult to deal with outside WA. WA is the only jurisdiction that requires licensing of financial planners and finance brokers. This is in addition to the requirements under Australian Financial Services Licences and creates duplication. The NSW Brokers Act is badly drafted and forces brokers to contract with clients.

Any moves to develop nationally uniform finance broker legislation should be supported, such as proposed in the discussion paper on this issue¹². We understand that draft provisions may be released by the New South Wales Office of Fair Trading in the near future for wide consultation.

3.13 Conveyancing Laws

There is a patchwork of State and Territory laws in this area. These laws contain different requirements relating to:

- the calculation of stamp duty;
- the registration of mortgages; and
- the form of documents that require filing/registration with the relevant State or Territory Government agency.

For example, in Queensland and the Northern Territory, a registration of a mortgage must be witnessed by a Justice of the Peace or legal practitioner. In all other States and Territories, the document need only be witnessed by a person over 18 years of age.

The rules around the lapsing of caveats and the documentary requirements around notification and withdrawal of caveats also differ according to the home jurisdiction of the transaction.

These complexities are compounded for multi-jurisdictional transactions (for example, where a Victorian purchases property in Queensland) which require

¹² Office of Fair Trading (NSW), *National Finance Broking Regulation – Discussion Paper* (2004)

employees of the company involved to be familiar not only with the documentation and processes required of the purchaser's jurisdiction, but also those of the jurisdiction of the purchase property. The inconsistency in requirements across States and Territories adds significant complexity to staff compliance training as well as a substantial risk of non-compliance with largely technical requirements.

There have been recent developments in Victoria to establish a national e-conveyancing system, which if successful, will rationalise into one form the information a user of the system must provide to State and Territory authorities, even where the transaction occurs across jurisdictions. It would be positive if this project acts as a driver for more national uniformity in conveyancing laws.

3.14 Energy Market Inconsistencies

There are retail energy market inconsistencies across areas including notification of a variation in charges in market contracts, regulation of fees and charges, contracting procedure variation, safety net threshold rules, marketing codes of conduct and meter reading requirements.

Energy Infrastructure, both for electricity and gas, is frequently bottlenecked at State boundaries by physical limits (absence of interconnection capacity) and often also by different State regulatory regimes. Sometimes these regulatory regimes are dysfunctional economically and based on 'protecting' consumers for political gain where privatisation of State monopolies has occurred.

Infrastructure, such as gas pipelines, commonly cross jurisdictions. For instance, the Moomba to Sydney pipeline crosses SA, Queensland, NSW and the ACT. There are separate/different Acts, regulations and licensing arrangements in each. These in turn invoke, for example, different environmental, safety and reporting requirements.

3.15 Essential Services Acts

Reform of the Essential Services Acts is needed to remove the ability to enforce social objectives in licence conditions. Ideally, this would involve removing licences at a State level for all National Energy Market participants. Regulators should be limited to issuing genuine guidelines on how to enforce rules and technical requirements, with the power of creating new obligations or rules being given to a separate body (for example, the Australian Energy Regulator or the Australian Energy Market Commission). An example of guidelines that create new obligations and rules are the Victorian Essential Services Commission's Accounting Guidelines.

3.16 State Plumbing Regulations

Definitions of "unregulated works" differs markedly between jurisdictions. The most stringent in Victoria prohibits householders from undertaking basic repairs or maintenance, such as fitting a screw on shower head or replacing a toilet cistern valve. This conflicts with the Government's water-wise rebate system, and limits some companies' promotion of DIY water conservation projects.

3.17 State Gas Safety Regulations

Safety instructions or orders relating to gas handling or storage vary across States. One order from the Department of Natural Resources and Mines in Queensland (“instruction 81”), for example, requires the retailer who fills LP gas cylinders to make available for purchase a screw-in safety plug to prevent leaking gas during transit. It is not mandatory for the plugs to be used or purchased by the customer. As a result they are not effectively used. This should be re-evaluated and become a national mandatory measure or be removed as a requirement.

3.18 State Plant Health Restrictions in Victoria

The Department of Primary Industries in Victoria regulates the movement of plant material into the State by the *Plant Health and Plant Products Act 1995*. Under this Act, plant products moving out of Queensland under a certified fire plant management system, must be re-certified on arrival into Victoria. This may require a company to have plants re-certified at a contractor’s depot before shipments can be sent to stores, creating additional logistics and compliance cost and delays in receiving stock. Other States, such as NSW, accept the Queensland certification for the purposes of local regulations.

3.19 Approval Standards for Fire Safety Design in New Developments

The Building Code of Australia requires fire safety approval by the State fire brigade. State fire brigade assessments can be inconsistent across jurisdictions, adding substantial costs. There should be a single chain of command for fire brigade approvals nationally, for transparency and accountability of process.

3.20 Installation of Metal Roofing

Licensing requirements for those permitted to install steel roofs are controlled by the States. In Victoria, unlike virtually 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 in Victoria. 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 some products against 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.

One BCA Member company has made a submission to the Victorian Competition and Efficiency Commission (VCEC) on this matter. In their draft report they recommended this restriction be removed and we understand that the final report is with Ministers awaiting an outcome.

3.21 Road Transport

There is inconsistency between States in road transport weight limits, the execution of mass management and road transport vehicle lengths.

There are inconsistent laws across Australia for the transportation of dangerous goods. For a national company, this requires compliance with a variety of laws. The risks that the laws are aimed at preventing may not be alleviated if people are unsure of the laws because of the duplication and overlap.

A recent example is the model Road Transport Reform (Compliance and Enforcement) Bill 2003 which creates obligation for those involved in consigning, loading, packing and receiving of goods that are transported in vehicles. Often a company does not have control over all or any of the logistics chain yet still has responsibility. Therefore they need to be prepared with a reasonable steps defence based on performance based assessment and compliance with a code of practice. This is just an example of a new requirement which may be relatively inconsequential by itself, but which adds to the burden of compliance and regulations.

Harmonisation in other forms of transport such as rail and sea are equally important.

3.22 Telemarketing

There needs to be greater harmonisation of telephone marketing laws in Australia. For example, legislation regulating telephone marketing includes:

- *Financial Services Reform Act 2001* (Cth);
- Amendments to the Victorian Fair Trading Act;
- New South Wales *Fair Trading Amendment Act 2003*;
- *Telecommunications Act 1997* (Cth);
- Ministerial Counsel for consumer affairs modified practices for direct marketing;
- The Australian Direct Marketing Code of Practice; and
- The Australian Communications Industry Forum (ACIF) Customer Transfer Industry Code.

In particular, the new legislation enacted by the Victorian and New South Wales Governments has created a disparate regulatory approach toward telephone marketing nationally. For example, NSW and Victoria have different requirements on hours of calling¹³.

For a national organisation, the differences between the State and Territory laws, in addition to Commonwealth regulation (including in consumer protection and privacy legislation) can be difficult and costly to implement.

For example, while there are similarities between the New South Wales and Victorian legislation, key differences exist that have proven to be complex and costly for telephone marketing firms to implement. This has been compounded by the fact that although the amendments were introduced in Victoria and New South Wales, they also impact operations in other States. To illustrate:

¹³ *Fair Trading Act 1987* (NSW), *Fair Trading Act 1999* (Vic)

- A telephone marketing call centre based in one State, which makes outbound calls to customers in Victoria and New South Wales, is required to apply different administrative rules depending upon the regulatory regimes that exist in the State where the customer they are calling resides.
- Another important difference concerns the type of contracts to which the respective regime applies. The telemarketing legislation in New South Wales applies to direct commerce contracts, which include door to door sales. However, in Victoria, the telephone marketing legislation only applies to telephone marketing agreements. Door-to-door sales and other non-contact sales agreements are subject to a separate regime with different obligations. Furthermore, the New South Wales legislation applies to the supply of goods and services to a consumer who is an individual. In comparison, the Victorian legislation applies to contracts for products and services of a kind ordinarily acquired for personal, household or domestic use.

In addition to the legislative framework, there are currently a number of bodies that oversee and regulate telephone marketing including: the Office of the Commonwealth Privacy Commissioner, the Australian Communications and Media Authority, various State based departments and the Department of Communications, Information Technology and the Arts.

Given the operational complexities and costs associated with ensuring compliance with differing regimes for companies that trade nationally, the telephone marketing laws in Australia should be harmonised.

The regulation of direct marketing is also piecemeal and inconsistent across prospective consumer groups. This makes it difficult for a financial institution to implement a uniform business development marketing programme and to track the approaches to, and responses from, prospective customers.

Case Study:

To illustrate, a financial institution may:

- *send direct marketing letters to;*
- *telemarket; and*
- *door knock*

prospective wholesale business customers without restriction. It may:

- *telemarket; and*
- *door knock*

prospective wholesale individual customers without restriction. It may also:

- *send direct marketing letters to*

prospective retail business customers without restriction.

Furthermore, a financial institution may:

- *send direct marketing letters to*

prospective wholesale individual customers where it is impracticable to seek the individual's consent to send the letter beforehand and where the individual may elect not to receive further direct marketing letters. A financial institution may also:

- *send direct marketing letters to; and*
- *telemarket*

prospective retail individual customers where it is impracticable to seek the individual's consent to send a direct marketing letter beforehand, where the telemarketing call is made within prescribed times on prescribed days and where the individual may elect not to receive further direct marketing letters or telephone calls.

A financial institution may not send an unsolicited direct marketing e-mail to anyone under any circumstances and must provide an unsubscribe facility for any solicited direct marketing emails.

It would be administratively easier to merge the provisions of all three relevant Acts into one comprehensive and consistent framework. This would allow financial institutions to direct contact market prospective customers by any medium in the first instance, with the provision that the customers may elect via which medium they may be contacted in future or elect a blanket “Do not contact” option. This would also simplify monitoring of the Government’s proposed “No contact” register.

3.23 “Door to Door” Sales Legislation

There needs to be greater harmonisation of “door to door sales” laws in Australia. The differences (although they are minor in some cases) in each State and Territory law add to the complexity and costs of ensuring compliance for organisations that conduct business nationally. Particular difficulties arise where marketing activities are conducted in areas that border two different States or Territories. Whilst in most cases it is practical to train staff on the legal requirements in their State and Territory, from a process perspective, the need for different forms and training increases the complexity and cost of compliance. It also reduces flexibility for national sales organisations to relocate resources or staff as demand requires, given the differing legislative requirements.

3.24 Shop Trading Hours

There are no inconsistencies between the States in relation to shop trading hours.

Despite significant reforms in most States over the last decade, Western Australia still prohibits Sunday trading by shops employing more than 10 people. That State still has a patchwork of rules that are difficult for consumers and retailers to understand. For example they:

- prohibit trade after 6pm on all but one weeknight for shops employing more than 10 people;
- prohibit Sunday trade in metropolitan Perth by shops employing more than 10 people; but
- permit Sunday trade in the Perth CBD and Fremantle;

- permit Sunday trade above the 26th parallel and in some country towns;
- prohibit Sunday trade for liquor stores; but
- allow hotel bottle shops to trade on Sundays.

In NSW, which was the first State to permit Sunday trading, there are still 50 regions that require permission to trade on public holidays and on Sundays, necessitating an annual ritual of the State Government deciding who can trade on which public holiday.

In Queensland, trading hours are determined by the Queensland Industrial Relations Commission (**QIRC**), which holds legalistic, extensive hearings often necessitating interstate or international trips by the Commissioners and their entourage to view Sunday trading activity. That the South East of Queensland now enjoys widespread Sunday trade was only possible because the State Government overrode a much more limiting decision by the QIRC. There are still numerous regions that do not yet permit Sunday trading, such as Toowoomba and Ipswich.

In Victoria, Tasmania, ACT and the NT, where the opening hours have largely been deregulated, shops open according to customer demand and local need rather than according to rules determined by legislators.

Constant changes to the regulations make business planning difficult (for example, last minute changes in relation to Christmas 2004 in Victoria added significant costs to business and inconvenience to employees and customers).

3.25 Retail Leasing

There is currently an Act and/or regulation covering retail leasing in each State and Territory in Australia:

- *Leases (Commercial and Retail) Act 2001* (ACT)
- *Retail Leases Act 1994* (NSW)
- *Business Tenancies (Fair Dealings) Act 2003* (NT)
- *Retail Shop Leases Act 1994 and Retail Shop Leases Regulation 1994* (Qld)
- *Retail and Commercial Leases Act 1995, Retail Shop Leases Amendment Act 1997, Retail and Commercial Leases (Miscellaneous) Amended Act 2001, Retail and Commercial Leases (Casual Mall Licenses) Amendment Act 2001* (all SA)
- *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas)
- *Retail Leases ACT 2003, Retail Tenancies Reform Act 1998, Retail Tenancies Act 1996* (Vic)
- *Commercial Tenancies (Retail Shops) Agreement Act 1995* (WA)

For retailers with operations in more than one State or Territory, the application of the various Acts and regulations can have an impact on the following aspects of their tenancies:

- whether the Act applies to that tenant in that State (the thresholds and criteria are different for each State);
- how outgoings are to be calculated, including whether land tax is payable;
- the extent of the landlord's responsibility in keeping the premises structurally sound and waterproof;
- whether a release is granted to the assigning tenant upon assignment;
- when disclosure statements must be given to prospective tenants, the form in which the disclosure statement must be given and the issues that arise if none is given;
- whether the landlord's legal cost are payable for the drafting of the lease;
- whether the tenant must be granted a guaranteed minimum term (usually of five years);
- whether there are limits placed on the tenant's liability when in possession of the premises;
- how turnover rent is calculated and how sales figures are dealt with in the landlord's hands;
- the type and frequency of rent reviews;
- whether contributions to sinking funds are necessary;
- whether payment of key money is illegal;
- whether there is statutory protection when the tenant has not exercised its option to renew the lease correctly;
- for how long and on which days the tenant must trade;
- how security deposits and bank guarantees are to be held by the landlord;
- whether rights of the tenant (including tenure) are protected upon the premises being damaged; and
- how the tenant is protected in the case of relocation in a shopping centre.

One BCA Member company highlights that its business and some of its subsidiaries come within the ambit of retail tenancies legislation in some States but not in others. Although there is no uncertainty over whether that BCA Member company and its subsidiaries are or are not a retail tenant as defined in law, it would be preferable for consistency in the definition and treatment of retail tenant throughout the States.

Uniform legislation covering all of the issues listed above is most desirable. For example, if a company chooses to sell its business with retail outlets in various States and part of this transaction is to assign its leaseholds, it must deal with each tenancy and the requirements of the Act applicable in that State separately.

The variances in retail tenancy legislation across Australia causes national companies to incur the following costs:

- sizeable legal costs in engaging external consultants in each jurisdiction as well as internal legal costs;
- occasional payments to landlords to obtain releases upon assignment of the lease when the business or its subsidiary is not a retail tenant;
- penalties incurred for failure to provide adequate disclosure statements to sub-tenants and assignees;
- costs in calculating outgoings in accordance with retail tenancies laws as well as clarifying calculations of outgoings with landlords who need not make full disclosure of those calculations; and
- payment of outgoings which are not payable by other retailers.

3.26 Retailing Products Laws

WA restrictive trading laws prohibit a certain range of products from being sold in WA stores that are available in all other States. One BCA Member company highlights the difficulty in managing a nationally consistent inventory or providing a consistent offer to all Australian consumers.

3.27 Transfer of Title

Victoria has passed legislation to enable electronic transfer of real property titles. NSW has developed a different model. It is highly desirable that there be a uniform system.¹⁴

3.28 Trust Accounts

In each jurisdiction, different requirements are prescribed for trust accounts maintained by solicitors, real estate agents, auctioneers, travel agents, etc¹⁵, adding to the complexity of regulation and costs of compliance for companies that operate across borders.

3.29 Garnishee orders

Each jurisdiction provides for garnishment of debts (including bank debts). The requirements vary from court to court, and there are procedures resembling

¹⁴ *Transfer of Land Act 1958* (Vic).

¹⁵ Legislation includes, for example: *Agents Act 2003* (ACT), *Property, Stock and Business Agents Act 2002* (NSW), *Settlement Agents Act 1981* (WA).

garnishee proceedings for the collection of some statutory debts, for example traffic fines, creating a mass of complex legislation¹⁶.

3.30 Powers of Attorney/Guardianship Orders

Requirements vary considerably between jurisdictions, resulting in a mass of complex and overlapping legislation¹⁷.

3.31 Deceased Estates

Each State makes provision for deceased estates which is similar in substance but different in detail¹⁸, adding to compliance costs.

3.32 Maritime

There is considerable overlap between Commonwealth, State and Local Government regulation of ports. State Government Port Authorities remain responsible for port access and safety, however, differing Commonwealth and State views on the appropriate level of security arrangements for port user berths create business uncertainty. Local Governments also have responsibilities, such as road user restrictions when security alerts are in place. All of this directly impacts on business disaster recovery and continuity planning.

3.33 Names and Places Regulations in Queensland

Queensland is the only State that regulates the use of correct geographical suburban descriptions for listing localities of business operation. This has a large impact on some retail stores, in that store locality names should relate to a known region or area that best describes the location for our customers, rather than a strict geographical classification.

3.34 Business Names Act

Uniformity of legislation across States with respect to the registration of business names would reduce the administration and cost burden for both business and Government. Business name registration must currently be done on a State-by-State basis which increases costs to business. In addition, different criteria apply in each jurisdiction which can prevent a name being registered in all the required States. One business name facility should be introduced by the Commonwealth and State Governments which applies the same criteria and requirements to all registration applications.

16 Legislation includes, for example: *State Penalties Act 1999* (Qld), *Enforcement of Judgments Act 1991* (SA), *Magistrates Court Act 1958* (Vic).

17 Legislation includes, for example: *Powers of Attorney Act 2003* (NSW), *Instruments Act 1958* (Vic), *Guardianship and Administration Act 1995* (Tas), *Powers of Attorney and Agency Act 1984* (SA)

18 *Administration and Probate Act 1929* (ACT), *Administration and Probate Act 1919* (SA), *Administration and Probate Act 1935* (Tas), *Administration and Probate Act 1958* (Tas), *Administration Act 1903* (WA), *Wills, Probate and Administration Act 1898* (NSW), *Administration and Probate Act* (NT)

3.35 Other Areas of Overlap

Other legislated areas identified by BCA Member companies where overlap, duplication and inconsistencies exist across jurisdictions include:

- State and Territory Criminal Codes;
- personal properties securities legislation;
- real property legislation;
- credit reporting legislation;
- franchising legislation;
- mine safety inspection legislation;
- fatigue management legislation;
- dangerous goods handling and transport legislation; and
- trade measurements legislation.

4. Commonwealth/State Overlap

4.1 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. Coverage under the applicable Commonwealth legislation is limited to Commonwealth Government departments, agencies and a limited number of private organisations. The majority of organisations are covered by State and Territory Acts and Regulations. While these laws are broadly similar in scope, there are several differences which cause costs to companies' business.

Each jurisdiction has different system frame works, regimes, requirements and methods of operation. For example, with respect to workers' compensation, in each jurisdiction there are different injury reporting requirements and processes, access and coverage, statutory and common law benefits, premium setting methods and self-insurance frameworks, to name a few.

For instance, the Queensland law requires each workplace with 20 or more employees to have a trained Work Health and Safety Officer¹⁹. As another example, 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 Australia²⁰. These requirements are particular to the regimes in Queensland and South Australia,

¹⁹ *Workplace Health and Safety Act 1995* (QLD), sections 93-97.

²⁰ *Occupational Health, Safety and Welfare Act 1986* (SA), section 61.

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. Concern has also been raised that State occupational health and safety legislation (specifically NSW legislation) provides unions with a broad right of entry that may be used in relation to specious occupational health and safety issues. The legislation also differs across jurisdictions. Another example is the need for one system to address the proper storage, use and disposal of radiation sources for coal processing and geology.

In the mining industry, the current inconsistent occupational health and safety legislation across all of the Australian States is further complicated by having a set of Mining Safety Acts and a set of General Workplace Health and Safety Acts.

A national company is also subject to different occupational health and safety standards in each jurisdiction related to auditing for licence renewals. The costs of audit preparation, the audits themselves and post audit action planning are a substantial burden including indirect costs, time and resources. One national standard and auditing regime for self-insurers would be of greater benefit.

Then there is a need to comply with a wide range of (voluntary) Australian Standards and Ministerial orders, which combined with legislative obligations, creates an unnecessarily complex network of obligations.

Added to these burdens are compliance issues associated with uncertainties from Federal Court decisions on compliance, such as whether adoption of the Australian Standard on Compliance Programs AS3806-1998 is really necessary.

This variance of legislation presents obvious difficulties to an Australia-wide employer. It does not allow a national organisation to adopt consistent occupational health and safety measures and practices across its whole employee population and may require inefficient allocation of resources. The risks which should be addressed by the regulation may not be met if there is confusion about the varying requirements.

A well-designed and administered national system for occupational health and safety and workers' compensation would deliver fairer support for injured workers, by eliminating arbitrary differences in entitlements for the same injuries, and better social and health outcomes through better performance measures and targeting of services. A competitive national market would reward good employment practices with affordable premiums and create real incentives to reduce risks and prevent accidents.

The 2003 Commonwealth Productivity Commission inquiry into National Workers Compensation and Occupational Health and Safety Frameworks provides a comprehensive report (final report handed down June 2004) on the lack of national consistency in the areas of workers compensation and occupational health and safety and the differences between the various State and Territory systems.

Some BCA Member companies have expressed support in general terms for the broad direction of the Commission's recommendations, particularly the need for nationally consistent workers' compensation and occupational health and safety

arrangements, whether this is by way of a national scheme or a system of mutual recognition within the State/Territory based legislative frameworks. However, this is a complex matter with numerous specific issues which would need to be pursued in greater detail.

4.2 Privacy Act and Workplace Surveillance

State and Commonwealth legislation touching upon privacy issues (privacy, direct marketing, anti-money-laundering, workplace surveillance and anti-terrorism) should be uniform and express an appropriate balance between employer/business interests and employee/customer interests. Further, it should provide clear protections where an organisation 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 fragmented²¹.

Using workplace surveillance as an example, there appear to be recent developments in workplace surveillance at the State level. Current Commonwealth privacy laws deal mainly with protection of personal information (data protection) rather than any statutory right to privacy.

Recent reform proposals in Victoria extend the concept of privacy to address the autonomy and dignity of employees at work. The concerns about privacy invasions that are addressed in the legislation, include video and audio surveillance, email and Internet surveillance and tracking surveillance. In Victoria the Victorian Law Reform Commission 'Workplace Privacy Issues' Paper was released. In NSW, the *Workplace Surveillance Act 2005* was passed in July 2005. Both of these cover the regulation of an employer's ability to monitor certain activities at work. Of particular concern is the ability to monitor email and Internet use on computers belonging to the employer and provided for the purposes of employment. The risk for employers is that this will impede the ability to monitor performance and detect misconduct in the workplace.

These State Governments 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 a number of laws that already furnish aggrieved employees with remedies if there is improper surveillance, for example, unfair dismissal laws.

The proposed heavy-handed approach to employee protection may have the opposite effect of putting some employees at risk to the behaviour of others. A measured approach should be taken to privacy regulation by all the States, which balances an employer's needs and responsibilities in the workplace with the legitimate concerns of employees.

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, and the detection of fraud and other criminal activities. 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

21 *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).

those of its employees) is essential to the prudent management of risks such as technological risk, reputation risk, fraud, compliance risk, legal risk, outsourcing risk, business continuity planning and key person risk.

The administratively burdensome and costly obligations in obtaining a warrant to undertake covert surveillance in NSW for fraud prevention cost one BCA Member company in excess of \$1 million per annum compared to other States.

The 2001 private sector amendments to the *Privacy Act 1988* (Cth) were introduced for a number of reasons, one being because individual States were proposing to enact their own legislation. The States agreed at the time that acceptable national legislation governing the private sector was the preferred alternative and the Privacy Act amendments were the result.

A move toward State-based workplace privacy regulation would reopen the prospect of non-uniform laws throughout Australia. NSW is currently the only State with legislation specifically targeted at workplace privacy. If other States and Territories followed this lead by introducing non-uniform workplace surveillance legislation, nationally operating entities could be subjected to contradictory laws affecting their national workforces. This would be likely to create significant additional compliance costs due to systems modifications, altered practices and staff training in order to manage the differences and ensure compliance. A State-by-State approach also fails to recognise that technology does not recognise borders, and the provisions in these developments ignore the technologically neutral objective of the Commonwealth Privacy Act. Technology neutrality is an essential principle of the Act and assists organisations to comply with the Act. It also maintains the Act's relevance regardless of technology developments. Specifically requiring privacy requirements on systems could destroy this principle and result in a difficult to administer compliance framework for organisations.

This inconsistency was raised in a number of submissions to the Commonwealth Privacy Commissioner's review of the private sector provisions of the Privacy Act. The Privacy Commissioner made a recommendation that the Government consider mechanisms to address inconsistencies that have come about, and will come about, in the area of workplace surveillance. The report also recommends that the Government review the Act to ensure it remains technology neutral and is therefore able to cover issues such as workplace surveillance under the nationally consistent National Privacy Principles.

The Office of the Federal Privacy Commissioner (OFPC) could develop national guidelines for workplace surveillance practices. The OFPC has the power under the Privacy Act to develop guidelines on activities of organisations that may impact on the privacy of an individual.

Further, one BCA Member company recommends that Information Privacy Principles and National Privacy Principles within the Privacy Act should be merged so that private sector companies dealing with Government agencies don't become subject to both sets of principles.

Health information is considered to be sensitive information and is therefore covered by the Commonwealth Privacy Act. The ACT, Victorian and NSW Governments have not interpreted the Privacy Act in this way and have passed their own Health Records legislation that basically deals with the same thing. As such, the Privacy Act should specifically say that Health Records are considered 'sensitive' information and covered under the Act, paving the way for the following legislation to be repealed:

- *Health Records (Privacy and Access) Act 1997* (ACT);
- *Health Records Act 2001* (Vic); and
- *Health Records and Information Act 2002* (NSW).

There is also over-regulation of privacy and information handling practices. For example, in the telecommunications sector, privacy is regulated by

- the Privacy Act;
- Part 13 of the Telecommunications Act;
- the Spam Act 2003;
- the Australian Communications Industry Forum SMS Issues Industry Code (2002); and
- the Australian Communications Industry Forum Protection of Personal Information of Customers of Telecommunications Providers Industry Code (2003).

4.3 Food Laws and Regulation

The Constitution of Australia gives the Commonwealth Parliament powers to legislate on various aspects of food law concurrently with all the States. This division of power between the States and the Commonwealth leads to a variety of confusing laws and regulations. To alleviate the regulatory burden on the parties involved in food trade, the Australian States and the Northern Territory, with the encouragement of the Commonwealth, enacted what is essentially uniform food legislation by adopting the Food Standards Code (now called the Food Standards Australia & New Zealand Code). The Code prescribes compositional, chemical, microbiological, labelling and other standards for all food offered for sale in Australia.

While most of the specific standards for food packaging, labelling and advertising are contained in the Code, there are many State Acts and Regulations that express further requirements. This creates confusion for retailers and enforcement agencies alike. Given that each State and Territory has its own regulatory system for enforcing laws, codes, regulations, by-laws and ordinances, this can result in confusion about interpretation about the laws and regulations and result in additional compliance costs.

A further area of possible reform relates to misleading and deceptive labelling of food products. This is not only prohibited under the Commonwealth *Trade Practices Act 1974*, but also under the State Fair Trading Acts and the Food Act and Regulations of each State and Territory.

Under the Trade Practices Act, labels must identify the origin of food by either 'Product of' a particular country or being 'Made in' a particular country. 'Product of' claims are deemed to be 99 per cent from that country, a straightforward compliance issue for whole foods but a complex and difficult compliance problem for packaged foods manufacturers using multiple ingredients from numerous sources.

This encourages the use of 'Made in Australia' by manufacturers for anything less than 99 per cent to ensure they comply, as there is a relatively low threshold of 50 plus per cent (in transformation costs, not simply ingredient content) of value. This threshold is not widely understood by consumers (who are often surprised that food content is often imported or blended with imports). It also disadvantages Australian food processors using higher Australian content.

The gap between the two labeling requirements has recently resulted in industry groups and consumers expressing their concern via the media to Commonwealth and State Governments (including New Zealand) who have proposed regulatory responses, via Food Standards Australia New Zealand (FSANZ).

As a result, a new FSANZ standard has been declared for packaged and unpackaged food. In this regard, the regulatory response appears to have become *de facto* industry protection under the guise of increased consumer information.

Ironically, the Food Ministerial Council has further directed FSANZ to examine the feasibility of including the origin of two whole food ingredients on packaged products. This would not only further complicate consumer information, but add significant compliance costs to industry.

4.4 Trade Practices Act

Legislation substantially overlaps in a number of areas, such as unconscionable conduct. If the States will not cede powers to the Commonwealth to enable one regime to apply, the State fair trading legislation should be completely consistent with the Trade Practices Act in overlapping areas so that a corporation that complies with the Trade Practices Act can be confident that it also complies with State legislation²².

For example, people can still bring a civil action for liability under the Trade Practices Act without having to meet the higher standards of proof that now are law in the States and Territories. This has flow on effects on insurance premiums.

4.5 Terrorism

While currently not a large problem, as more and more anti-terrorism legislation is passed, it should be kept uniform and consistent with similar legislation, for example, anti-money laundering legislation. Preferably, the States should cede powers to the Commonwealth in this area²³.

4.6 Electronic Communications

Legislation dealing with electronic communications varies across jurisdictions, adding to compliance costs. The legislation should be made uniform²⁴.

22 Legislation: *Trade Practices Act 1974* (Cth), *Fair Trading Act 1992* (ACT), *Fair Trading Act 1987* (NSW), *Consumer Affairs and Fair Trading Act 1999* (NT), *Fair Trading Act 1989* (Qld), *Fair Trading Act 1987* (SA), *Fair Trading Act 1990* (Tas), *Fair Trading Act 1999* (Vic), *Fair Trading Act 1987* (WA).

23 For example, the *Suppression of Financing of Terrorism Act 2002* (Cth), *Terrorism (Community Protection) Act 2003* (Vic).

24 *Electronic Transactions Act 1999* (Cth), *Electronic Transactions Act 2001* (ACT), *Electronic Transactions Act 2000* (NSW), *Electronic Transactions Act 2000* (NT), *Electronic Transactions Act*

4.7 Computer Generated Documents - Evidence

Legislation dealing with documents generated from a computer archive varies across jurisdictions, adding to compliance costs. The legislation should be made uniform²⁵.

The Commonwealth and NSW have amended their Evidence Acts to repeal the 'best evidence rule' (requiring the retention of the original document) and other States have issued practice notes taking a range of approaches to the status and use of electronic copies of documents. A national policy on the status of electronic records providing consistent principles across all jurisdictions as to the ability to rely on electronically stored copies of documents is urgently required.

4.8 Tax and Insurance

The Australian insurance industry bears a disproportionate share of the tax burden through Government taxes and charges – stamp duty, fire services levies, insurance protection tax, terrorism insurance levy and GST. For example, some States still require payment of a fire service levy which, combined with other taxes paid by clients including GST, substantially escalates premiums.

Some BCA Member companies argue that there is an economic case for reducing State insurance taxes and charges ahead of many other taxes in order to reduce the taxation impost on insurance premiums to businesses and households.

4.9 Environmental Laws

Legislation on environmental issues, while improving in consistency, 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, measurement/management of emissions (for example, for vapour recovery systems). For companies operating across State boundaries it adds costs to business where there are significant variations in the regulation even though the objectives are fundamentally the same in all jurisdictions.

Local Government regulatory requirements are also imposing costs. The variation between Local Government bodies in their application of national or State guidelines, codes of practice, etc. results in significant variations in the requirements on businesses operating across these intrastate boundaries. This is particularly apparent in NSW and Queensland where there is significant difference in the level of attention some councils place on environmental management (either via compliance to environment protection legislation (for operating facilities) or under planning legislation (for new or modified facilities)).

One BCA Member company documents that, as at June 2001, the list of Australian legislation having an impact on "environment" covered approximately 1500 pieces of

2001 (Qld), Electronic Transactions Act 2000 (SA), Electronic Transactions Act 2000 (Tas), Electronic Transactions (Victoria) Act 2000 (Vic), Electronic Transactions Act 2003 (WA)

²⁵ *Evidence Act 1995 (Cth), Evidence Act 1971 (ACT), Evidence Act 1995 (NSW), Evidence Act 1939 (NT), Evidence Act 1977 (Qld), Evidence Act 1929 (SA), Evidence Act 2001 (Tas), Evidence Act 1958 (Vic), Evidence Act 1906 (WA)*

legislation. This does not include Codes of Practice, Australian Standards, or Local Government by-laws covering environmental issues. Adopting a process similar to New Zealand, where a series of acts & regulations (some 150) were collapsed into one to establish national environmental legislation should be considered. If this were to be considered, significant effort would need to be put into supporting guidelines to ensure a nationally fair and consistent implementation.

4.10 Environmental Approvals Processes

Approvals processes are one area of concern that has been raised. Under the *Environmental Protection and Biodiversity Conservation Act 1999*, actions that are likely to have significant impact on a matter of national environmental significance are subject to a Commonwealth referral, assessment, and approval process. An action includes a project, development, undertaking, activity, or series of activities. Currently seven matters of national environmental significance are identified. Due to a broad interpretation by the Commonwealth Department of Environment and Heritage, some specific Member companies have found that separate assessment as to whether these triggers apply needs to take place for much of their activities, whether major projects or otherwise. In most cases they are activities which will be appropriately regulated by relevant State or Territory legislation.

Another BCA Member company highlights that when a new facility is built (or, in many cases, an existing facility modified) planning approval is required. The approval required may be from Local Government. This authority will require the facility to include in its features compliance with codes of practice or other guidelines for compliance with environmental protection legislation. The significant issue with this is the inconsistent application or expectations of different councils. This increases costs where particular councils place greater requirements on the operation of a facility.

One BCA Member was attempting to implement a new project and found that notwithstanding the project was determined to be of State Significance by the relevant NSW State Government department, other obstacles were faced from Local Government and by several State Government Statutory Authorities. Inconsistency in regulation and the apparent absence of a clear hierarchy of regulation was estimated to have cost shareholders millions of dollars in additional capital expenditure and further millions of dollars in lost earnings resulting from the delay of the project.

A bilateral agreement between the Commonwealth and a State or Territory may be entered into to minimise duplication in the environmental assessment and approval process. The Commonwealth Government has what are termed 'assessment' bilateral agreements in place with Tasmania, Northern Territory and Western Australia (we understand that recently Queensland has signed one) and is negotiating assessment bilateral agreements with the other States and Territories.

The real benefit is in those bilateral agreements which enable the Commonwealth to recognise the approvals processes of a State or Territory, for a certain class of actions. This means an action in a class of actions that would otherwise require approval under the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) can be assessed and approved using a State or Territory approvals process – the approval does not need to be duplicated by the Commonwealth. However it appears that the Commonwealth Government has been reluctant to enter

into such '*approvals*' bilateral agreements, despite this being one of the fundamental intentions of the EPBC Act.

Where there is no assessment bilateral agreement, let alone an approval bilateral agreement, this creates uncertainty, and unnecessary duplication in a proponent's environmental assessment procedures. Even if there is an assessment bilateral agreement, there will still be duplication (and some uncertainty) for a proponent who often has to prepare separately a submission for the Commonwealth Department of Environment and Heritage and wait for a decision of the Commonwealth Environment Minister, notwithstanding that it has received approval from the relevant State or Territory.

4.11 Greenhouse Gas and Other Emissions Reporting

There is no national approach to greenhouse policy and greenhouse gas regulation. For example, NSW has the Greenhouse Gas Abatement Scheme and similar schemes exist in Queensland and at the Commonwealth level.

Some BCA Member companies are required to report emissions of the six greenhouse gases, and other "noxious" emissions to multiple State and Commonwealth agencies. For example, one BCA Member reports that it currently reports virtually all emissions to State EPAs for the purposes of the National Pollutant Inventory (NPI) as well as providing separate reports on energy intensity for EPA annual reporting purposes. That Member also reports energy intensity to the Australian Bureau of Agricultural and Resource Economics.

In relation to such reporting, the information needed and work (based on one person's time) involved can be as follows:

- *Annual EPA report*: mainly environmental performance data (energy, water use and waste water and solid waste generation) and emissions data as well as the reporting on miscellaneous improvements. Included in the annual 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 NPI report*: mainly to do with resource usage and emissions data. Probably about two weeks' work putting this together;
- *ABARE Report*: Fuel intensity for all fuels used and prediction about the next four years. Probably three or four days' work in this report.

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.

One possible solution is to simplify into one standardised reporting form or process, with information then shared between Commonwealth and State agencies as required.

4.12 Greenhouse Trigger

Another area of concern that has been raised is the status of greenhouse trigger as a matter of national environmental significance. As noted above, the EPBC Act currently identifies seven matters of national environmental significance. The issue of whether the Commonwealth will apply a greenhouse trigger as a matter of national environmental significance has been outstanding for some time. This raises some uncertainty and perhaps some misconceptions regarding the detail of the trigger by State and Territory authorities when making decisions regarding environment and planning approvals for projects.

Under a draft regulation released for comment to the State and Territory Environment Ministers in November 2000, the EPBC Act would be triggered by major new developments likely to result in greenhouse gas emissions of more than 0.5 million tonnes of carbon dioxide equivalent in any 12 month period. This threshold has been noted by the Commonwealth Government to be equivalent to approximately 10 per cent of the average annual increase in Australia's total greenhouse emissions, and would therefore apply to projects that can properly be regarded as of national environmental significance, such as the building of a new coal-fired power plant. Any project exceeding the trigger threshold would require approval under the EPBC Act and be subject to an environmental impact assessment process.

It would be helpful to determine the status of the trigger, given that some four years have passed since its release in draft form.

4.13 Contaminated Sites Legislation

In respect of contaminated sites, there is the National Environment Protection (Contaminated Site Assessment) Measure (NEPM) that is produced at a national level and all States are required to adopt. However, most States develop individual technical guidelines that overlap and can appear contradictory to the NEPM. This results in a divergence between the national standard and the practical application of this standard by individual State based regulators.

Some States manage contaminated sites under legislation designed for environment protection (that is, regulation to prevent environmental contamination and prosecute for causing environmental impact as a result of current operations). Contaminated land is most often the result of past practices and no definable pollution incident. As a result, the requirements for notifying contaminated sites are different and often vague in every State. Even where there is specific contaminated land legislation (for example, in NSW) the trigger for notification is vague and subject to much interpretation. The result is differing levels of engagement with regulators regarding contaminated sites in different States. The resultant cost of management of these issues consequently varies from State to State both in terms of internal compliance management and external consultant and contractor costs. The most significant cost resulting from the management of contaminated sites are as a result of delays due to the uncertainties of attaining defined practical end points where regulators or their accredited auditors (independent environmental consultants accredited by the regulator) can and will sign off on completion of remediation.

The regulation of contaminated sites (where triggers to notify the State regulator have not been met) is often taken up under planning legislation and then falls under the jurisdiction of Local Government as the relevant planning authority. The Local

Government may then refer to the State regulator for advice or require the engagement of an accredited auditor whose duty is to act for and on behalf of the authority but is to be engaged by the proponent.

4.14 Energy Efficiency Regulation

NSW requires large energy (and water) users to prepare mandatory energy (and water) efficiency plans. At the same time, the Commonwealth Government is proposing to require mandatory energy efficiency plans through the Energy Efficiency Opportunities Bill. From a business perspective, it does not make sense, and costs money, to have to comply with multiple sets of energy efficiency regulations.

4.15 Safety and Performance Standards for Electricity Infrastructure

Regulations in this area are State, Commonwealth and electricity authority specific, and in many areas either overlapping or inconsistent.

To provide just one simple example, some regulations prescribe say a 12-metre power pole as standard, while others prescribe 13 metres. There doesn't seem to be any rational reason for this, apart from history. For a business that manufactures steel power poles, the production of the product cannot be standardised. If safety and performance regulations were standardised, the product could be standardised, providing scale economies in production, and for the purchasing electricity distributors. For example, rather than manufacturing poles to meet each different tender requirement, a standardised product or products could be manufactured, which all authorities could purchase from a single pool or inventory.

In addition to the plethora of technical and safety standards, there is also the issue of each electricity authority undertaking its own tendering processes, which of itself makes provision of poles into a single pool more difficult. Given the constant pressure from regulators to reduce regulated returns (effectively capping infrastructure investment), electricity distributors need to look continually at ways of taking costs out of their businesses. The ability to take costs out of the supply chain, through greater scale economies and more efficient inventory practices, is one important factor.

4.16 Tobacco Legislation

There is currently no uniformity or consistency in terms of tobacco legislation and regulation in Australia. The implication is that national retailers have to implement a myriad of complex requirements at a significant capital expense. For example, different education and training programs need to be developed in each State and Territory and new dispensing units or kiosks have to be designed to accommodate different display restrictions. For example, in Queensland, the area for display of tobacco products is restricted to one square metre and in the NT the display area cannot exceed four square metres.

Each State and Territory also has different Health Warning signage requirements. In the ACT, for example, the Tobacco Act & Regulations even go so far as requiring the signage to be one metre off the ground.

Some of the other impacts include:

- different levels of enforcement standards and penalties across jurisdictions;
- different point of sale information;
- different definitions of tobacco and tobacco related products ;
- different treatment of competitions and prizes associated with tobacco sales;
- different customer service standards; and
- continuously changing regulations as a result of rivalry between states to introduce “tougher” new regulations.

The optimal approach would be for the Ministerial Council on Drug Strategy to agree to a nationally consistent and uniform approach to tobacco legislation.

4.17 Liquor Legislation

Each State and Territory has its own liquor licensing laws; some more restrictive than others. For example, in Queensland, retailers cannot own a bottle shop unless they purchase a hotel. However, the liquor laws allow the hotel licensee to have up to three associated bottle shops within a 10km radius of the hotel.

Each State and Territory also employs different tests to assess and determine whether an application for a new liquor licence should be granted. In NSW a detailed social impact assessment test is required, which is expensive and time consuming (town planners are required to collect the required information and there is a detailed consultation process with a number of community stakeholders).

One BCA Member company has suggested there should be a common public interest test across all States and Territories, similar to that introduced in Victoria.

Each State and Territory also has different training requirements in relation to the responsible sale of alcohol. For example, in Queensland, team members must undertake face-to-face training, whilst in Victoria online learning is available. One BCA Member company has suggested there should be one uniform training module that could be adopted nationally. This would be particularly useful where companies have some staff that travel between locations, for example between NSW and QLD, to work. An online module would be ideal so that team members could complete the training as part of the induction process before commencing work.

4.18 Trust Laws

The legislation governing trustee’s duties is conflicting and overlapping. For example, a superannuation trustee must comply with obligations under the Financial Services Reform Act, but must also comply with State law²⁶.

²⁶ Legislation includes: *Superannuation Industry (Supervision) Act 1993* (Cth), *Trusts Act 1973* (Qld), *Trustee Companies Act 1968* (Qld), *Trustee Act 1925* (ACT), *Trustee Companies Act 1947* (ACT), *Trustee Act 1925* (NSW), *Trustee Companies Act 1964* (NSW), *Trustee Act 1893* (NT), *Trustee Act*

5. Duplication and Overlap

5.1 Lack of International Recognition

Increased costs of compliance result from International Accounting Standards, Financial Services Reform legislation, Sarbanes Oxley Act, Basle II, Know-Your-Client requirements, Corporate Governance and so on. Compliance costs have grown substantially in the past few years, particularly in staff costs. Currently there is a market shortage of compliance personnel with sufficient skill and experience to deal with the new regulatory requirements and to train operational staff.

For example, section 404 of the US *Sarbanes-Oxley Act 2002 (SOX)* requires senior executives of US registered corporations to certify as to the veracity of their internal control systems and to have independent external audit to verify this position. Major Australian business entities that rely on US markets for capital raisings must comply with SOX provisions if they are to continue to participate. Such provisions require costly rules-based compliance processes.

SOX provisions also affect entities which do business with other entities that are directly affected. For instance, independence provisions mean that unrelated entities or individuals exceeding ownership or prior involvement thresholds are unable to audit affected Australian business entities. Irrespective of Australian Government support for principles-based provisions (such as those contained in CLERP 9), affected Australian business entities are bound to give priority to rules-based US SOX requirements.

There is scope for increased harmonisation or mutual recognition of product and technology standards between Australia and the US and Europe. Of note, the *Privacy Act 1988* has still not received an adequacy rating from the European Union. This has increased the administrative and risk profile for Australian companies trading personal information to EU member states.

5.2 Investment Advisors – registration in the US

The US Securities and Investments Commission ('SEC') has introduced a requirement for managers of US sourced investor money to register as an 'Investment Advisor.' The requirement to register extends to Australian banks which source investor funds from the US.

1936 (SA), Trustee Companies Act 1898 (SA), Trustee Act 1898 (Tas), Trustee Act 1958 (Vic), Trustee Companies Act 1984 (Vic), Trustee Ordinance 1894 (WA), Trustee Companies Act 1987 (WA).

The Investment Advisors Act 1940 was amended in December 2004. New regulations have been introduced requiring all managers of US sourced investor money to register as an 'Investment Advisor' with the SEC from February 2006. Registration as an investment adviser results in ongoing compliance requirements, as set out in the SEC Rules, including:

- A compliance plan (extensive document referencing SEC rules to policies and procedures detailing internal controls, including filing/updating of SEC forms).
- Regular reviews of compliance plan.
- A designated compliance officer.
- A Code of Ethics (that meets the requirements of the SEC rules and includes, conflicts of interest and policies regarding personal trading in securities, "soft dollar" arrangements, reporting to SEC of personal security trading, code violations, disclosure code to all employees).
- Proxy voting policies and procedures.
- Books and records with respect to U.S clients, and in some cases, for non-U.S. clients.
- Ongoing SEC examinations.

There are no rules which allow foreign companies to be exempted from the requirement to register as an Investment Advisor.

Some Australian banks and funds managers asked that ASIC approach the SEC to get relief from the requirement for Australian banks and funds managers. However, ASIC's response was that they were unable to assist.

The requirement to register will affect a number of Australian banks and fund managers. One possible solution might be recognition by the SEC of Australia's own corporate governance regime, which is similar to the US regime.

Work is needed by Government and its agencies towards a more harmonised approach to cross-jurisdiction regulation.

6. Regulators

BCA Member companies are experiencing a greater level of intrusion by regulators in day to day management and continual requests for information and reviews. This is coming from the ATO, ASIC, ACCC, APRA and EPAs. There is also an overlap of interest between the regulators, for example, with many companies reporting instances of queries from both APRA and ASIC on similar issues.

6.1 Rigid Application of the Laws

There has been concern expressed that regulators may be exercising their powers more broadly and more vigorously than was intended when they were created. For example, the increased focus on risk by Commonwealth regulators, post HIH, has resulted in some behavioural changes by some regulators.

Some BCA Member companies have highlighted that ASIC is applying the Financial Services Reform Act provisions so rigidly that some businesses are experiencing negative impacts on, for example, their telephone sales.

Further, there are some regulators that are not willing to engage with business through dialogue about proposed new laws or guidelines. Some BCA Member companies have highlighted, for example, that APRA is likely to only use the written submission model for input by business on new regulation development and, in general, has demonstrated little appetite for dialogue.

One example highlighted by a BCA Member company, where consultation with business may be useful to the regulator, is the compliance burden of captive insurer's which are no longer a going concern or are in run-off. Where such a captive insurer has not underwritten a new insurance policy, the captive insurer must still comply with all the new Prudential Standards and Guidance Notes issued by APRA as though it is a General Insurer (general insurers generally take on new underwriting risks on a daily basis). The BCA Member estimates the cost of compliance is approximately \$60-75k per annum. In addition, at least 30 full time equivalent days are required to satisfy regulatory requirements. These are days that could otherwise be utilised to manage the risk of the company which is the core concern for the risk and insurance department. The BCA Member company highlights that this problem could be fixed by APRA ceasing or relaxing the need to comply for any captive insurer that is not underwriting new risks. APRA put out a discussion paper to exempt captive insurers on 23 February 2005, however the definition of a captive insurer was quite narrow. We understand that APRA is now reviewing this proposal with the view of broadening the definition of a captive insurer.

6.2 ASX and Corporations Act

ASX Listing Rules and the Corporations Act have some overlapping requirements that impose costs on listed companies. For example, Listing Rule 3.19A (3X, 3Y and 3Z notices) concerning the disclosure of Directors' security transactions overlaps with Section 205G of the Corporations Act requiring Directors to notify the market operator (ASX) of variations in their shareholdings.

6.3 APRA and ASIC Overlap

An example of overlap is the current superannuation licensing exercise whereby the operator of a public offer superannuation fund may be the subject of two similar but separate licensing regimes. Other than for defined benefit schemes, public offer superannuation funds are managed investment schemes subject to statutory preservation requirements and are operationally little different from managed investment schemes operated under the Corporations Act. The lack of uniform licensing requirements is a problem.

A review is required to determine whether APRA and ASIC are both needed to regulate corporate governance.

6.4 RBA and ACCC Overlap

Another problem is the division of payments system regulation between the Reserve Bank of Australia and the ACCC, which has led to inefficiency and is not a success. Business questions whether competition aspects of payments systems are sufficiently different from other networks that they require regulation outside the auspices of the ACCC.

6.5 Environmental Protection Agencies

BCA Member companies have highlighted the operations of the Environmental Protection Agency (EPA) as a concern. Direct compliance costs are increased due in part to lack of commercial understanding and a risk averse approach on the part of regulatory bodies. The fact that the EPAs “outsource” a lot of technical expertise to consultants, through the use of auditor schemes, remains of concern and is seen by companies to drive up costs. The auditors are subject to both regulatory and commercial pressures to adopt a “conservative” approach to the issues they deal with and this is having an adverse effect on costs of dealing with contaminated land. There are concerns that such schemes serve the interests of the environmental industry, to the detriment of both the land holder and broader community.

Further, there appears to be a lack of consistent enforcement by regulators. In the environmental sphere in relation to management of underground fuel storage systems, there is concern that in Victoria, two years after the implementation of new guidelines for management of these systems, very few independent operators had assessed sites, as required, for sensitivity or installed required leak detection, whereas major oil companies had complied.

Other issues associated with environmental regulators are the knowledge gaps in regulator understanding of specific contaminated land issues and the resultant gaps in regulation. These gaps result in inconsistency, delays, or even reluctance on the part of regulators or their accredited auditors to document agreed completion of a contaminated site (especially where groundwater is involved). This then results in properties not being divested to realise a return on a redundant asset or closing out of lease or other property related contracts. There is also poor definition of roles for environmental regulation between State and Local Government. This has resulted in duplication of regulatory involvement in relation to contaminated sites in NSW and conflicts between the requirements placed on businesses to adopt environmental

controls at a Local Government level that are not consistent with State requirements, such as in the case of vapour recovery in Queensland.

6.6 Therapeutic Goods Administration

The Therapeutic Goods Administration's procedures are complex and time consuming for businesses in the pharmaceutical, bio-pharmaceutical and medical device industries. There is ample scope for reducing compliance costs through reforming these processes.

6.7 Anti-Dumping Legislation

This policy area is one where different BCA Member companies have conflicting views on the application of the laws, however, there is a shared view that the administration of the anti-dumping legislation needs to be reviewed.

Some BCA Member companies argue that the application of the anti-dumping laws to particular products (such as the imposition of dumping duties) has affected their cost competitiveness.

For example, one BCA Member is currently responding to an application which has been made for dumping duties to be payable on silicon. Duties in the range of 34 per cent - 116 per cent for five years from May 2001 apply to ammonium nitrate imported by that Member from Russia, and duties of 65 per cent-87 per cent for five years from last year are imposed on imports by that Member of grinding mill liners from Canada. One subsidiary of the company imports silicon from China for use in aluminium alloys. Under the *Customs Act 1901* and *Customs Tariff (Anti-Dumping) Act 1975* – Dumping Duty provisions, Australian Customs recently made an interim determination that China is dumping silicon in Australia and that dumping duty should apply. We understand Customs was to make a final recommendation to Minister Ellison on 20 November.

What is of concern to some BCA Member companies is that the anti-dumping investigation process used by Customs does not require Customs to carry out a cost-benefit analysis of allegedly 'dumped' imports. One solution could be a Productivity Commission Inquiry into Australia's anti-dumping process so that the issue of whether anti-dumping claims should be subject to a national interest, economy wide, transparent, cost benefit analysis could be debated.

Alternatively, other BCA Member companies have issue with the length of time taken by Customs in relation to anti-dumping issues. For example, Australian steel pipe and tube manufacturers decided to lodge an anti-dumping application against a number of manufacturers located in a number of different countries. In the interest of minimising any delays, the applicants consulted with Customs for approximately six months prior to lodgment in order to ascertain precisely what sort of information Customs would require to make a *prima facie* decision on the application.

Once lodged, an application must receive a *prima facie* determination within 20 days. Notwithstanding the prior consultation, Customs contacted the applicants just prior to the end of the initial 20-day period to indicate that they would reject the application unless further information was provided. To comply with the suggestion, the

applicants withdrew the application, amended it as suggested and re-lodged it (with the 20-day clock being reset to zero).

So began an extended process. In total, the application was withdrawn and re-lodged five times before it was ultimately rejected by Customs, who finally decided not to initiate an investigation (with that rejection then being appealed by the companies). Prior to the final re-lodgment, a face-to-face meeting was held with Customs to ensure there was a clear understanding of what was required.

The companies' appeal to the Trade Measures Review Officer (TMRO) was successful, with the TMRO finding in the companies' favour. Customs were directed to initiate the investigation, which they did but subsequently terminated early – without establishing the size of any dumping margins – on the grounds that, even if dumping was happening (which they didn't dispute), the local industry wasn't being materially injured. The companies again appealed to the TMRO and, again, were successful. The investigation was resumed. The matter has since been appealed by the other side and is back with the TMRO for further consideration.

Anti-dumping legislation is a contentious issue with clear problems and its administration should be subject to a public review, for example, by the Productivity Commission. Any such review should examine:

- the introduction of public interest considerations into decision making under the legislation;
- the practice of issuing Ministerial Directions to Customs as to how the anti-dumping rules should be applied – Ministerial Directions are applied cumulatively rather than on the basis of new Directions replacing old ones, with the effect of merging past and present (and potentially conflicting) policy thinking, producing an inefficient environment for claimants, defendants and Customs alike; and
- the timeliness with which the rules are applied.