

## **Submission**

**To**

**Safe Work Australia  
on**

***Exposure Draft: Model Act for Occupational  
Health and Safety***

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## Electrical and Communications Association

### **BACKGROUND**

The Electrical and Communications Association (ECA) is the peak industry body for contractors who operate in the electrical, data, communications and fire sector of the Building and Construction and domestic services industry in Queensland.

ECA has liaised with Government in the State and Federal jurisdictions on a number of industry issues, including health and safety. In particular ECA has assisted the Queensland State Government in the successful implementation of the Electrical Safety Standards. Due to this success, ECA considers itself to be the leading Queensland electrical and communication industry association.

ECA recently introduced the Master Electricians Australia (MEA) brand to the Australian public, which in the short period since inception has developed considerable public acceptance and approval. Master Electricians are experienced electrical contractors who have passed a stringent annual safety and quality audit, and are able through formal qualifications in energy efficiency, to provide energy efficient options to customers.

## **RIGHT OF ENTRY**

The provisions regarding right of entry under the draft model Safe Work Act (the 'Model Act') closely follow those in the *Fair Work Act 2009* (Cth), however there was some major inconsistencies which may cause issue.

Under the *Fair Work Act 2009* (Cth) a union official has right of entry to:

- Hold discussions;
- Investigate possible breaches to the *Fair Work Act 2009* (Cth); or
- For health and safety purposes.

The union official must provide 24 hours written notice of entry when entering to investigate suspected IR breaches. The entry notice has to contain:

- The premises that the union intends to enter
- The day of entry
- The name of the union
- A declaration that the union can represent the affected employees (including a reference to the union's rules)
- Purpose of the visit
- If the notice is to investigate a suspected breach, then the details of the breach

The union official may also be able to inspect or copy non-union member's records. This can be done if the non-member gives written consent or if Fair Work Australia gives consent. The union official must comply with all reasonable requests that discussions or interviews take place in a particular part of the premises.

The Model Act provides that union officials may enter the workplace to:

- Investigate a suspected contravention; and
- To hold discussions with workers and advise on health and safety matters.

While these laws currently exist in most States and Territories, ECA does not support the inclusive of these provisions in the Model Act. The *Fair Work Act 2009* (Cth) provides right of entry to union officials, including for health and safety purposes, these laws provide the union with sufficient access to workers and the workplace.

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Right of entry provisions for health and safety issues should be reserved only for relevant Government inspectors as they have the appropriate training and qualifications to make determinations on alleged safety breaches.

When entering on the basis of a suspected contravention the Model Act extends the union officials powers to:

- Inspect any work system, plant, substance or thing;
- Consult with persons conducting the business and relevant workers;
- Inspect documents relating to the suspected contravention;
- And 'warn' any person of a serious risk.

The power to 'warn' any person is based on the union officials' reasonable belief that a person is exposed to a serious risk emanating from an immediate or imminent exposure to that risk.

While ECA supports the view that health and safety is everyone's responsibility, however there have been several instances where Members believe they have been 'targeted' by particular unions for 'alleged' breaches of health and safety. Upon investigation into these matters ECA has found that, on occasion, the union have been 'industrially motivated' instead of being 'genuinely' concerned with the health and safety of workers on site.

Further ECA is concerned that the Model Act makes no reference to privacy legislation and there is no expressed requirement for the union official to obtain consent from the employee's to inspect their personal employment information. The lack of privacy protections is inconsistent with the provisions of the *Fair Work Act 2009* (Cth) with respect to the protection of employee privacy.

If the Model Act permits union right of entry ECA submits that it must be consistent with the current provisions under the *Fair Work Act 2009* (Cth). Further, if a union official's permit is suspended or withdrawn under either legislation then their right of entry permit under any other laws should be suspended or withdrawn. ECA believes any contravention of the right of entry provisions by a union official, under any law, would provide sufficient evidence that illustrates the official is not a fit and proper person to hold a permit.

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ECA believes significant penalties should be given to persons, including union officials, workers and other duty holders under the Model Act, who contravene the right of entry provisions. A penalty is defined as a “punishment or sanction imposed for unlawful conduct for example, imprisonment or a punditry penalty”.<sup>1</sup>

ECA believes that the significance of the penalty should be based on the nature and severity of the contravention. Specifically the harshness of the penalties should be linked to the significant costs to industry participants affected by the contravention.

In the recent case of *Alfred v Wakelin, O'Connor, CFMEU, AWU and AWU (NSW)*<sup>2</sup> the Federal Court found that the AWU and one of its delegates took unlawful industrial action at the Lake Cowal gold mine site in October and November 2005. The Court handed down a total of \$55 000 in penalties to the AWU and its delegate. Acting Australian Building and Construction Commissioner Ross Dalgeish stated “*These strikes involved nearly 300 workers on each occasion and caused estimated losses of \$200 000*”.<sup>3</sup>

In *Cruse v CFMEU & Anor*,<sup>4</sup> the Court ordered the CFMEU and its official to pay penalties for engaging in strike action. While the company Roche Mining (JR) Pty Ltd stated that the costs incurred as a result of the strike was \$330 000.

Although these cases reflect the implications on a business industrial action is taken by a union official that is unlawful under industrial relations laws. The case illustrates the significant cost to a business, and the industry, when persons abuse their powers under the law.

### *Jurisdictional matters regarding Disputes*

Under the Model Act disputes concerning right of entry will be dealt with by the relevant State regulator, Industrial Relations Commissioners, Courts and Tribunals. If a dispute has allegations of unlawful industrial relations activity as well as alleged contravention of health and safety this may limit the abilities of the particular body determining the matter, as the State bodies will not have jurisdiction to hear such industrial relations issues. The likely outcome of a matter is that proceedings in the State body may be stayed as Fair Work Australia makes a determination on an

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<sup>1</sup> Butterworths Concise Legal Dictionary 3<sup>rd</sup> Edition.

<sup>2</sup> [2009] FCA 267 (26 March 2009).

<sup>3</sup> ABCC Media Statement “\$55 000 penalties for AWU unlawful industrial action”, March 2009.

<sup>4</sup> [2007] FMCA 1873 (14 November 2007).

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allegation of contraventions under the *Fair Work Act 2009* (Cth). ECA would then be concerned that a determination in one jurisdiction may affect the proceedings in the other jurisdiction.

The most equitable and efficient method in determining disputes is for one Federal body to be involved in the matter from the application process to the final determination.

### **DUTY HOLDERS AND DUTY OF CARE**

#### *Persons conducting a business or undertaking*

Under the Model Act the primary duty of care is imposed on a person conducting a business or undertaking. Currently OHS legislation states that the primary duty of care is placed on the employer. The definition under the Model Act seems to extend who may be liable as the primary duty holders.

This person is required to ensure, as far as reasonably practicable, the health and safety of workers. When determining what is deemed 'reasonably practicable' the Model Act requires that all relevant matters including the costs associated with eliminating or minimizing the hazard, harm or risk, are considered.

ECA supports the inclusion of the term 'reasonably practicable' regarding the duty of care obligations for persons conducting a business or undertaking. Currently Queensland and New South Wales has an absolute duty of care. Defences are available to the duty holder if they have complied with the relevant Regulations or Code of Practice or, if not applicable, the duty holder has taken reasonable precautions and exercised due diligence to prevent the contravention.

This absolute obligation on duty holders, such as employers, means that many prosecutions are near impossible to successfully defend. As a consequence many primary duty holders have little incentive to 'want' to comply with the health and safety legislation, instead they may choose to retain the funds for the likelihood of a prosecution.

ECA believes that this is a positive step towards assisting primary duty holders in proactively implementing health and safety strategies into their businesses.

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### *Officers*

The Model Act provides that officers will have a positive duty to exercise 'due diligence' to ensure their business complies with its obligations under the legislation. The definition of officer includes directors or those persons who make or participate in the making of decisions for the business, e.g. executive managers.

The Model Act does not define what constitutes 'due diligence'.

Recent case law illustrates how the Courts are considering whether due diligence had been exercised by the relevant duty holder, for example whether appropriate safety systems were operating in the business and how the systems were managed, directors understanding of their businesses health and safety obligations and the relevant legislations and codes of practice.

### *Workers*

The term 'worker' under the Model Act includes contractors, sub-contractors, an employee of a sub-contractor, an employee of a labour hire company and a volunteer. Workers must take reasonable care for their own health and safety, and take reasonable care that their acts or omissions do not adversely affect the health and safety of others. Workers also have a duty to cooperate with any reasonable lawful instruction.

ECA supports a health and safety law that holds all duty holders, including workers, accountable to the level of their control.

## **HEALTH AND SAFETY REPRESENTATIVES**

The Model Act provides for the establishment of work groups and for the election of a health and safety representative ('HSR') for each group. Under some State and Territory health and safety laws there are thresholds for determining when a work group or committee needs to be established, e.g. when there are at least 30 employees employed by the employer. The Model Act appears to be silent on any mandatory threshold rather there is a requirement to establish a group only on the request of a worker.

ECA strongly supports the use of a threshold of employees to determine if a work group and HSR is required. This may mean that on a building and construction site there may be requests for a number of work groups to be established and HSR's elected to one contractor, who is deemed the

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persons conducting a business or undertaking. Other contractors on the same site may not be obligated to establish any groups. Based on this example, there would be a lack of consistency and possible abuse of the intent of the Model Act.

ECA is also concerned that one of the functions of a HSR includes requesting any other person provide assistance. This may allow persons, such as union officials, to bypass the right of entry provisions under the Model Act to enter the business. This could potentially cause major disruption to workers and the business as health and safety issues may be overridden by industrially motivated actions. This would be an abuse of the power by the HSR and contrary to the intention of the Model Act. ECA submits that if this provision was to be included in the Model Act, the persons to assist should be limited to industry expertise that can provide genuine independent advice to the work group and the business.

HSR's will also be able to issue provisional improvement notices ('PINs') where they have reasonable grounds to believe that a person is contravening or has contravened the Model Act. Although consultation is required prior to any PIN being issued and the HSR must have had the appropriate training, ECA believes that problems may exist under these provisions as similar laws have been established in other jurisdictions. For example, Victorian employers commonly report of the misuse of PINs or PINs being used for minor issues that have been raised by health and safety representatives. This results in less time and resources available to focus on safety initiatives.

It is ECA's belief that all enforcement measures shall remain as graduated enforcement and specified hierarchy controlled by the regulator.

ECA further submits that if a HSR is found to be abusing their powers under the Model Act, e.g. issuing unreasonable PINs, issuing PINs under the umbrella of health and safety however the underlying intention is industrially motivated, the HSR powers should be withdrawn by the regulator and penalties applied.

## **WORKERS POWERS**

The Model Act permits a worker to cease work if they believe, on reasonable grounds that by continuing to work would expose the worker to serious risk to their safety, emanating from an immediate or imminent exposure to a hazard.

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If work is ceased the worker/s are entitled to the same pay and entitlements they would have received if they were continued to work. The worker is also required to inform the person conducting the business or undertaking, as soon as practicable, of the issue. The person conducting the business or undertaking has the right to direct workers to alternate duties until the work can re-commence.

ECA strongly supports a workers right to cease work if they believe there is a serious risk to their health and safety emanating from an immediate or imminent exposure to a hazard. However, ECA submits the Model Act should include a provision that allows for consultative steps to be taken with the person conducting the business or undertaking, where possible, prior to ceasing work. This will minimize the risk of such a provision being open to abuse.

### **DISCRIMINATION PROVISIONS**

The Model Act prohibits discriminatory for prohibited reasons. Under the Model Act 'discriminatory conduct' against a worker includes:

- Dismissal or termination;
- Injury to the employment or engagement of a worker;
- Detrimentally alternating a workers position;
- Threatening to do any of the above.

This term also extends to prospective workers.

'Prohibited reasons' has been defined to include any conduct engaged in because the worker or prospective worker:

- Is a HSR or member of a work group;
- Has assisted or provided information to a HSR, inspector or permit holder (union official); or
- Has raised concerns regarding health and safety to a person conducting a business or undertaking, an inspector, HSR or permit holder, work group or another worker.

ECA does not support the inclusion of such provisions in the Model Act as these laws as entrenched in the relevant Federal and State industrial relations and anti-discrimination laws.

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These provisions also give rise to both criminal and civil proceedings by the regulator and affected person respectively. A defendant can raise a defence to the civil action that the conduct was reasonable in the circumstances and the substantial reason for the conduct was to comply with health and safety laws. ECA submits that this defence is quite subjective.

The Model Act also states that there is a reverse onus of proof, and the civil action can be taken in the absence of any criminal proceeding. ECA believes that this provision can be open to abuse and may be used contrary to the intention of the Act, as the ‘discriminatory conduct’ and ‘prohibited reasons’ are very expansive and open to wide and subjective interpretation.

### **INCIDENT NOTIFICATION AND DEFINITION OF MEDICAL TREATMENT**

ECA believes that incident notification provisions under the Model Act are necessary to ensure that the regulators are aware of serious OHS incidents, and are also able to effectively investigate them in a timely manner. Sections 37 and 38 of the Model Act link the duty to notify incidents to the requirement to preserve the site where the incident occurred until an inspector arrives or directs otherwise. Sections 35 and 36 of the Model Act propose the types of injuries, illnesses and dangerous incidents that must be notified, they are:

1. The death of a person; or
2. A serious injury or illness of a person; or
3. A dangerous incident.

While definitions in relation to ‘serious injury or illness’ and ‘dangerous incident’, have been provided, other definitions of equal importance have been omitted. ECA strongly believes that to maintain clear and objective obligations the following be included as definitions with relation to incident reporting:

1. “**medical treatment**” means the treatment that is administered by a registered medical practitioner as defined in the *Medical Practice Act 1994* (VIC) – The carrying out of:
  - a. An operation or
  - b. The administration of a drug or other like substance or
  - c. Any other medical procedure (but does not include palliative care)

2. “**drug**” means any substance used as a medicine or in the composition or preparation of medicines whether for external or internal use and includes a drug listed or registered as a therapeutic good in the *Therapeutic Goods (Victoria) Act 1994* or the *Therapeutic Goods Act 1989 (Cth)*.
3. “**loss of bodily function**” means the loss of a bodily function, i.e. loss of any normal bodily function including internal functions/organs
4. “**immediate risk**” means a risk is the likelihood of injury or illness arising from exposure to any hazard. Immediate risk is where that likelihood is present at the time, and could occur without warning. It includes any situation which seriously endangers or threatens the health or safety of a worker or person
5. “**immediate vicinity**” includes the area in the workplace where the incident occurred. It may also extend to an area beyond that workplace if the nature and extent of the incident exposes a person in that area to a health or safety risk as soon as the incident occurs. For example:
  - a heavy object dropped from a height will be closer than the ‘immediate vicinity’ of a quantity of boiling liquid dropped from the same height
  - a collapsed crane will be all areas where any part of the crane could have fallen on a person.
  - a large quantity of hazardous material dropped from height, the ‘immediate vicinity’ will include any area where a person could have been struck or splashed by the material
6. “**substance**” means any natural or artificial substance. This includes a form of a solid, liquid, gas or vapor and materials such as radioisotopes, biological agents, electromagnetic radiation and chemicals.