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Public Comment Response Form Exposure Draft for Model Act and Stage 1 Model Regulations

You are invited to answer any and all of the questions listed below which have been taken from the Exposure Draft Discussion Paper:

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
Model Act for Occupational Health and Safety
Q2. Does the definition of ‘ <i>officer</i> ’ clearly capture those individuals who should have ‘ <i>officer</i> ’ duties under the model Act?
No. Apparently absent from the definition is a linkage to ‘control’ by an officer. An officer may make a decision but then attempt to distance from a negative outcome due to lack of control.
Q3. There is some overlap between the definitions of ‘plant’ and ‘structure’, as many types of plant have structural attributes, and vice versa. Should ‘plant’ and ‘structure’ be defined in a way that removes this overlap?
Yes. In a non-technical sense and in some circumstances plant and structure may seem the same. However to reduce confusion at the higher technical and legal level, the two should be clearly defined separately. A definition could say incorporate a statement that an item of plant can be an integral component of a structure. This approach will help regulatees and regulators to clarify responsibilities.
Q4. Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?
No, give the broad environment that work takes place all work related activities including volunteer work must be captured in the Act. Leaving definitional holes in the Act does not serve the higher level object of ensuring entities take responsibility for a work related system of work and



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meet the intent of Objective (1)(a) of the Act.
Q5. Is the scope of the suppliers' duty appropriate?
The definition is a bit long winded. Why not state that the duties of a supplier are the same as the manufacturer and add a qualification for contextual differences? Also the both definitions need to include 'transport' as an action of manufacture or supply of plant and substances.
Q6. Is the scope of the 'worker' definition appropriate? Should it cover students gaining work experience?
Yes students and other persons conducting any work related activity should be included, as should volunteers.
Q7. Is the definition of 'workplace' appropriate?
See comments in <i>Do you have any other comments?</i> At end of this document in relation to use of conjunctions 'and - or' to link; i.e in the definition: (2) <i>In this section, place includes:</i> (a) <i>vehicle, ship, boat, aircraft or other mobile structure; <u>and</u></i> (b) <i>any installation on land, on the bed of any waters or floating on any waters</i>
Part 2 – Safety Duties
Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?
(i) See my comments on mutable duty holders at end of document in <i>Do you have any other comments?</i> (ii) Consideration should be given to 'succession or transition' of a duty of care. For example should a duty in relation to the on-selling or disposal of an item of plant be articulated as a principle? A duty of care would not be extinguished when an item of plant is sold for scrap and say contains a hazardous substance (e.g asbestos) and the purchaser is unaware until after exposure? The duty to clearly inform others of a hazard is a basic step to controlling the hazard.
Q9. Is the definition of 'reasonably practicable' appropriate in this context?



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<p>In reference to <i>Subdivision 2 What is reasonably practicable</i> subclause; (e) <i>the cost of eliminating or minimising the hazard or the risk</i>. Further articulation or example of what this means in a practical sense should be included as in this authors experience as a former regulator, the cost of risk mitigation is often the first reason eagerly seized upon to justify an unsafe system. Providing clarity will reduce uncertainty and make responsibilities very transparent.</p>	
<p>Q10. Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?</p>	
<p>No, with technological change, what may not be <i>reasonably practicable</i> currently may become <i>reasonably practicable</i>. Corraling or limiting the definition may exclude future risk mitigation innovations.</p>	
<p>Q11. Is the proposed scope of the primary duty appropriate?</p>	
<p>Consideration of incorporation of the definition of 'safe systems of work' which is silent in the Draft, see 18 Primary duty of care (4)(c). A possible definition from common law could be; '<i>provision of methods, systems and organisation of work (including hazard recognition and control procedures, the appropriate training, tools and equipment etc) to ensure the safety of all persons involved in doing the work</i>'</p>	
<p>Q12. The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?</p>	
<p>Yes – appropriate languages & understood by all workers. Some reference should also be made to an obligation to take reasonably practicable steps to document a workers competency and understanding of the information and instruction.</p>	
<p>Q13. The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (Clause 18(4)(e)). Should this provision be drafted to require 'access to' such facilities (e.g. to take account of requirements for mobile workplaces)?</p>	
<p>Yes</p>	



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Q14. Is the scope of the duties related to specific activities appropriate?
Yes.
Q15. In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
Why is ' adversely ' included; <i>(b) take reasonable care that his or her acts or omissions do not <u>adversely</u> affect the health and safety of other persons; and</i> This introduces a subjective defence of degree of affect? This means that what may be a severe 'adverse' affect on a person (e.g psychological injury) may seem trivial to another or a group of others. Recommend deletion of the word adversely.
Q16. Is the treatment of volunteers under the model Act appropriate?
No. Political sensitivity of volunteer organisations should be ignored. Volunteer organisations are and have been guilty of injury their workers (volunteer or paid) and therefore should be expected to provide the same standard of OHS to their members as any other entity. The community expects the same safety standards to apply to say a football carnival as to any other event or activity as after all the cost of a failure (injuries etc) are ultimately born by the community. Including volunteer organisations will not mean an increase in costs to the organisation but will result and contribute to a reduction in work related cost to Australians, as evidenced by ASCC (Worksafe) research over the years.
Q17. Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?
No, however the overriding principle in a national regulatory approach should be two pronged; the provision of sound and skilled advice by the regulator; but where advice and lower level persuasion fails then a strong message should be sent through strong and deterrent penalties. As such: <ul style="list-style-type: none"> (i) The penalties should at a minimum align with the Corporations Act penalties or exceed them for duty of care failures. Corporate manslaughter could be open to life in prison penalties; and (ii) I support John Braithwaite's view (2003, Working Paper 13, National Research Centre for Occupational Health and Safety Regulation), that, '...very high maximum financial and other penalties are needed for OHS offences. These need only be used



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<p>rarely but they need to be large enough to allow big penalty discounts for good OHS management and to pay for large bounties to workers or unions who launch successful private prosecutions'.</p>
<p>Q18. What should the maximum penalty be for a contravention of the model regulations?</p>
<ul style="list-style-type: none"> (i) A ceiling of two thirds of the Act penalties and; (ii) regulatory breaches associated with a duty of care omission should be a breach of the Act.
<p>Q19. The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?</p>
<ul style="list-style-type: none"> (i) Enforcement and contraventions are more manageable if the lower end and administrative offences are dealt with in the civil realm similar to the commonwealth OHS Act approach. The experience of this author is that magistrates have difficulty in gauging OHS offences, particularly those that are of an administrative nature, e.g non display of notices. (ii) Offences relating to entry by OHS entry permit holders should be civil not criminal as these are administrative omissions not duty of care obligations.
<p>Part 3 – Other Obligations</p>
<p>Q20. Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?</p>
<p>The term 'dangerous incident' does not nearly as familiar or identifiable as a 'dangerous occurrence'. Consider revising the terminology. Historically dangerous incidents or dangerous occurrences are underreported. Having an extensive list of what is considered an occurrence will not assist in reporting and more importantly the development of mitigation strategies. The list could be relocated to the underpinning regulations and more emphasise placed on encouraging reporting and rectification of such incidents.</p>
<p>Part 4 – Consultation, participation and representation</p>
<p>Q21. Is the proposed scope of duty to consult workers appropriate?</p>
<p>Yes</p>



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Q22. Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?
No
Q23. Clause 49 allows work groups to be determined for workers engaged in 2 or more businesses or undertakings. Should such arrangements be by agreement only, i.e. with no prescribed procedure if negotiations fail?
By agreement only.
Q24. Negotiations for work groups must be commenced within a ' <i>reasonable time</i> '. Should a time limit be prescribed e.g. 14, 21 or 28 days?
Yes, to remove uncertainty. 21 days would be appropriate.
Q25. Elections for HSRs and possibly deputy HSRs must be conducted ' <i>as soon as reasonably practicable</i> ' after the relevant work groups are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?
Yes and linked to time frame set in negotiations process of say 21 days for consistency.
Q26. The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?
Yes, but within 3 months from HSR becoming elected.



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<p>Q27. The model Act requires that a health and safety committee be established within 2 months of the request being made. Six of the current OHS Acts include such a timeframe, which varies across jurisdictions from 3 weeks to 3 months. Is the proposed time limit of 2 months appropriate?</p>
<p>One month is appropriate.</p>
<p>Q28. The <i>Fair Work Act 2009</i> (Cth) (Fair Work Act) refers to ceasing work on the basis of a 'reasonable concern' of the employee about an imminent risk to his or her health and safety, while the model Act refers to 'reasonable grounds'. Should the terminology in clauses 75 and 76 be aligned with the Fair Work Act?</p>
<p>Possibly 'reasonable concern' is a more relevant industry appropriate term. 'Reasonable grounds' implies that a number of objective risks (grounds) must be identified, therefore the Model Act should define these 'grounds'. 'Reasonable concern' is subjective and doesn't require a test or criteria. However the risky assumption made by the Model Act is that the employee has some detailed knowledge of the risk and consequence and therefore to know that there is an imminent risk of injury.</p>
<p>Q29. Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?</p>
<p>Yes, absolutely as a trained HSR may be able to make a more objective determination of a risk.</p>
<p>Q30. Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?</p>
<p>Yes as per Q29.</p>
<p>Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?</p>



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The timeframe should make allowances for the perceived gravity of the alleged contravention. That is where high risk work, hazardous substance exposure etc are the subject of the PIN a shorter time frame should be prescribed similar to time differentials in former ACT OHS Act where construction differed from the rest of industry in recognition of potential higher risk involved. However rather than industry based the differential should be based on the risk type.

Part 5 – Protection from Discrimination

Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?

There doesn't appear to be much evidence of persons, say HSRs being coerced into issuing compliance notices. If this is incorrect and there is evidence to support incorrect use of powers then there may be a need to incorporate a protective clause. However the legislation should be kept lean and not incorporate unnecessary law.

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

Reference to '*relevant workers*' should be removed. While not sure what a relevant worker is; I presume it is a relevant union member? If so then a hazard that is identified by the union official that involves non-relevant workers and any subsequent action may be left open to legal challenge? There is something fundamentally wrong when a union can get financially penalised for seeking to go onto a worksite to protect its members or members of the public?

Q34. Should the model Act contain a specific authorisation process for an OHS entry permit or can it rely on authorisation obtained under other Acts such as the Fair Work Act?

The objectives and the intent of the draft Act is about **safety**. I am not sure why there is this hysterical fixation about right of entry that seems to overpower the safety intent of the Act;

- (i) Right of entry like failure to display a list of HSRs is a Penny-Andy issue in the scheme of things. As OHS enforcement agencies are inevitably under-resourced, the more 'eyes' (union, competitors, general public etc) on safety in a workplace the better. If there are good safety systems in place at a worksite, within a sound self-regulatory environment at the worksite



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	<p>then there will be no issue or concern from an IR perspective. An external agent pointing out a safety issue (or management system failures) that was missed should be encouraged and celebrated, not feared?</p> <p>(ii) To save confusion, uncertainty and unnecessary duplication a permit issued under the Fair Work Act should cover both Acts.</p>
Q35.	Should contraventions of this Part attract criminal or civil sanctions? If civil sanctions are considered appropriate, should penalty levels reflect those that apply under the Fair Work Act?
	Civil sanctions. No comment on penalty levels.
Q36.	The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS, rather than in relation to workplace relations?
	<p>Once again the fixation in the model Act with union involvement is astounding. Boys and girls, the Act is about safety not industrial relations.</p> <p>(i) This is a fundamental error in safety regulation within Australian in that there is a cultural belief that OHS must sit under the wing of industrial relations when it involves the science of safety, and therefore, if anything, should sit within a health discipline.</p> <p>(ii) Does a union representative also include an OHS expert assisting the union and therefore does the Fair Work Act provisions make reference for union procured OHS consultants to have right of entry?</p>
Part 7 – The Regulator	
Q37.	Should guidelines have any other particular legal status under the Act?
	No comment
Part 10 – Review of Decisions	
Q38.	Is the list of reviewable decisions appropriate?
	No comment



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Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?
Yes, would appear to be.
Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?
No comment
Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
Code of practice.
Do you have any other comments?
<p>(i) Consider revising the use of conjunctions: The Model Act (like a lot of legislation) uses conjunction to link a clause; i.e 'and - or'. In ordinary grammatical use this is appropriate, however in application when seeking legal guidance the use may create uncertainty for regulatees and other stakeholders. To illustrate this dilemma I have included an example below from the Model Act. <i>Division 4 Definitions: demolish includes deconstruct, decommission and dismantle.</i> In this example I believe the drafters intended 'decommission' to be distinct from 'dismantle', that is demolish can involve either; deconstruction, decommissioning or dismantling. In construction of other regulatory instruments the use of the conjunction 'or' is used to inform that each activity is exclusive and an alternative to the next. However in this example decommission and dismantle from the Model Act it would appear the use of 'and' is used to connect each activity? So to satisfy the definition, the demolition of a building must include decommission and dismantling of the structure (also as a side point construction terminology usually does not consider 'deconstructing' a building). In reference the Macquarie Dictionary supports the use of 'and' to connect (or insert an</p>



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additional consideration), whereas 'or' provides a choice. To reduce uncertainty I would recommend reconsideration with the drafters the intended purpose of the conjunctions 'and – or' through out the draft document.

(ii) Multiple duty holders

Although the draft Act is a tremendous forward step there is a looming operational problem with the number of duty holders. Part 2 of the model Act allocates duties to multiple workplace entities 'in that persons may hold more than one duty, and that more than one person can hold a duty'.

The wording of the section is an opening for ambiguous interpretation for the purpose of evading a duty of care obligation, for example in following draft clause;

15 More than one person can have a duty

(3) If more than one person has a duty for the same matter, each person:

*(a) retains responsibility for the person's duty in relation to the matter; **and***

*(b) must discharge the person's duty to the extent that the matter is within the person's capacity to influence and control; **and***

(c) must consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

This creates uncertainty and will assist duty holders at a workplace to claim that they thought a particular duty was not theirs but another party. For example a principle contractor at a construction site may seek to distance themselves from any responsibility for the actions of a sub-contractor's subcontracted rigger who was only on the site for a day or so. In that circumstance and others the accepted definition applied in the construction industry is most appropriate, that is a person with 'control' to any extent.

(iii) Risk management

Out of all of the elements of the draft model Act worth identifying is risk management. Risk management is single most important strategic tool that must be included in the model Act.

Most workplaces and organisations lack a fundamental understanding of OHS risk management principles, but most organisations would benefit from embedded OHS risk management knowledge. In practice, duty holders need guidance on how to comply, and various quite prescriptive codes of practice and standards have been developed in state/territory legislation to meet this need. The draft model Act is letting a huge opportunity escape by not providing clear guidance on expected performance standards and systematic approaches to OHS hazard identification and risk assessment. The only reference to risk control is a mis-worded and



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unsophisticated brief statement at section 16;

16 The principle of risk management

A duty imposed on a person to ensure health or safety requires the person:

- (a) to eliminate hazards, and risks to health and safety, so far as is reasonably practicable; and*
- (b) if it is not reasonably practicable to eliminate hazards and risks to health and safety, to **minimise** those **hazards** and risks so far as is reasonably practicable.*

In relation to section 16 this writer disagrees with wording; i.e how do you *minimise* a hazard? In a systematic approach to safety and in practice a risk or set of risks which are derived from a hazard can be eliminated or minimised through appropriate and systematic control mechanisms. A hazard cannot be minimised, only the risks from the hazard can be minimised through controls or treatments. I would recommend removing the word hazard from '*...minimise those **hazards** and risks*'.

In relation to risk management, the model Act should not maintain silence on the universally accepted steps to OHS risk management through identifying the degree of risk associated with identified hazards, then designing appropriate risk controls based on the Hierarchy of Control approach which is enshrined in most OHS legislation in Australia. This hierarchical approach to OHS risk management has been embedded in Australian safety science and culture for the past 30 years. Elimination, isolation, substitution, engineering action, administrative action and personal protective equipment in that order should be set into section 16 as an example of trans-scientific OHS risk management control.

In addition Section 16 should also include risk management supporting performance standards to ensure the establishment of safe work procedures based on the hierarchal approach and which set out mandatory requirements for adequate risk management training of staff and particularly 'officers' with prescribed duties under the model Act. To simply leave risk management open to interpretation as the draft section 16 does is to ensure that workplace obligation holders will construe risk management and its systematic steps to mean what ever they want and usually take the lowest common denominator approach such as starting and ending with personal protective equipment. Embedding risk management steps at a lower lever in say the draft regulations will only serve to reduce the potential of a national agreed and common understanding of contemporary and systematic OHS risk management continuum permeating down through all levels of workplace activity for the benefit of current and future working generations. The overall subliminal intent of the draft Act is to make risk management and workplace safety something that is habitual and doesn't need to be thought about.



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(iv) Sections 135 and 136 differences

Why are the words 'intentionally and unreasonably delay, hinder or obstruct any person, or otherwise act in an improper manner' removed from Section 136? It would appear to be a bias against a permit holder? Should the same explicit requirements be placed on a person who does not delay, but does hinder or obstructs a permit holder at a workplace?

(v) Committee competencies

The expectations placed on the workplace OHS committees in the draft model Act are very frightening and peppered with high risk.

70 Functions of committee

The functions of a health and safety committee are:

(b) to formulate, review and disseminate (in other languages if appropriate) to the workers the standards, rules and procedures relating to health and safety that are to be carried out or complied with at the workplace; and...

Section 70 is requiring the workplace safety committee with only a cursory knowledge (or unknown state of knowledge) and training in OHS to prescribe the safety agenda! The model Act sets out the safety duties of obligation holders which would require for example an employer to obtain expertise to repair a pressure vessel control valve at a petrochemical plant, but then allow members of the safety committee to set the start up and shut down rules, the operating pressure, the maintenance procedures or the emergency services needed for the workplace? Based on what expert knowledge or skill would the committee have to make such life and death decisions? Well the committee members may be required to attend a 5 day training course on the mechanisms of the Act and consultative processes!

The model Act is prescribing an absurdly dangerous and frightening but open-ended possibility.

Section 70 is elevating the skill and competencies (including roles and responsibilities) of the committee to the level of industry safety experts without any ability to limit the extent of the committee's safety critical decisions or to ensure that there is recognised evidence of any minimum appropriate safety competencies of committee members?