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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?
Safework Act 2009 – framed in contemporary terms adequately describes the act , encompassing Safety & Health in the work place and distinguishing it from all previous State Acts
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer'* duties under the model Act?
YES- the definition is wide enough to capture persons who influence decisions, specifically managers & receivers and liquidators.
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?
The overlap in the definitions of Plant and structure will strengthen the scope of interpolation between them in practical terms.
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 corporate be excluded?
Business and undertaking are not defined in the model Act causing major change in most Jurisdictions- least number of nominated inclusions or exclusions the better , I agree that volunteers should be excluded – the activity that has a volunteer employing a person should be more

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specific , i.e. where a volunteer organization permanently employs people.
Q5. Is the scope of the suppliers' duty appropriate?
Yes- this has expectation for improved standards of Goods manufactured overseas that should comply with Australian Standards and risk measures eg. machine guarding ,
Q6. Is the scope of the '*worker*' definition appropriate? Should it cover students gaining work experience?
Yes-This broader definition is appropriate and gives clarity of the single primary duty , students doing work experience should rightfully be protected, the definition needs to include workers 'working in kind' – Farmers , self employed builders often assist each other working in kind to be repaid in kind . i.e. farmers assisting each other at harvest / planting ; builders assisting each other when needed on site
Q7. Is the definition of '*workplace*' appropriate?
Yes
Part 2 – Safety Duties
Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?
Yes – the impact of officers to consult, co-ordinate with piers clearly identifies multiple/ joint responsibility.
Q9. Is the definition of '*reasonably practicable*' appropriate in this context?
No – the interpretation of "a person ought to know" is potentially too encompassing, it is up to subjective opinion. Managers have different levels of experience and competencies and the concept of "ought to know" penalises them for ignorance outside of their control.

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Q10. Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?
No – a broad definition is fine as long as it is exclusive of the " ought to know" provision
Q11. Is the proposed scope of the primary duty appropriate?
Yes , however the obligation to provide refresher training (information) is not addressed
Q12. The model Act requires the provision of, as 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?
This answer has 2 sections 1. No – language obligation should only be in English – other language signs confuse – Australia's principal language is still English, any other legislated obligation would be onerous. 2. Yes – Language should be appropriate for the workplace literacy and numeracy level.
Q13. The model Act requires, as 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)?
Within the section there is no need to refer to 'mobile' the term is unnecessary and addressed in the term "reasonably practical"

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I challenge the term " Welfare" as being a vague term in the reference to Amenities – what level of support to employees is this term legislating	
Q14.	Is the scope of the duties related to specific activities appropriate?
Yes – very clear commercial definitions	
Q15.	In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
This should go without saying; why penalise a worker for what he Didn't know, or more to the point had conveniently forgotten. On the other hand if evidence of training is available that he was informed- he must have known. This begs the point how often should employees receive refresher training? Ref Q11	
Q16.	Is the treatment of volunteers under the model Act appropriate?
yes	
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?
Penalties are awarded subjectively, however the levels in all categories if applied to the maximum would shut down 80%-90% of all business in Australia. It will depend on the commitment of the judicial system in each state / region as to the application of the penalty. There is a facility to Insure these penalties and the level then becomes irrelevant as long as the business can afford to pay the premium	
Q18.	What should the maximum penalty be for a contravention of the model regulations?

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A level that is painful but affordable.
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?
Maybe Category 1 should be a criminal offence; other contraventions should definitely not be criminal. A criminal conviction can have far reaching implications to a business – restrictions in licensing abilities i.e. hotel licensees cannot have a criminal conviction, may other examples exist. The concept of proof beyond reasonable doubt that exists in a criminal conviction, may limit court outcomes for cat 1& 2 offences so making prosecutor s reluctant to act on, this would water down the effect of the Act.
Part 3 – Other Obligations
Q20. Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?
'Loss of Body function 'requires clarity it may be better described as "temporary or permanent loss of use of a sensory organ.
Part 4 – Consultation, participation and representation
Q21. Is the proposed scope of duty to consult workers appropriate?
Consultation with employees is essential but decision making MUST remain with the person conducting the business or under taking because of their duty under Sect 18. We have concern as to the expectation to consult with contractors & visitors this is impractical in many instances, the obligation here should be to communicate not necessarily consult.

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Q22. Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?
No-Consultation with employees is essential but decision making MUST remain with the person conducting the business or under taking because of their duty under Sect 18.
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?
Yes by agreement
Q24. Negotiations for work groups must be commenced within a '*reasonable time*'. Should a time limit be prescribed e.g. 14, 21 or 28 days?
No – reasonable time should remain subjective
Q25. Elections for HSRs and possibly deputy HSRs must be conducted '*as soon as reasonably practicable*' 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?
No – reasonable time should remain subjective
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?

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No – reasonable time should remain subjective
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?
Potentially the process will involve nominations , elections , re-elections a process that may result excess of 8 weeks – suggest 3 months maximum .
Q28. The *Fair Work Act 2009* (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?
It makes common sense that the intent of both acts be aligned so there is no conflict between the acts.
Q29. Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?
Yes – it is essential that competencies be established before actions are instigated that may affect the business.
Q30. Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?
Yes – it is essential that competencies be established before actions are instigated that may affect the business but with legal complications

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Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?

Yes- an appropriate time on the basis that clauses 76 +79 provide direction for more urgent / high risk issues.

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?

Part 5 Division 1 sections seem appropriate - suggest apply separate levels of fines to this section as cat 3 levels are excessive in this instance , and coercion can be misinterpreted or misrepresented resulting in substantive legal actions

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

If a serious contravention exists then the OHS entry permit holder should report to the regulator, who is capable of conducting an unbiased and competent investigation.

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?

Yes – the OHS entry permit holder should be trained , competent and authorized in OHS issues – separate from Fair work Act

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?

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Definitely not - contraventions should definitely not be criminal. A criminal conviction can have far reaching implications to a business – restrictions in licensing abilities i.e. hotel licensees cannot have a criminal conviction, may other examples exist. The concept of proof beyond reasonable doubt that exists in a criminal conviction, may limit court outcomes for cat 1& 2 offences so making prosecutor s reluctant to act on, this would water down the effect of the Act. It makes common sense to reflect the penalty levels under the Fair Work Act, as long as they do not apply in addition to.
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?
No – Access to employee records should be limited to those record that relate to the contravention.
Part 7 – The Regulator
Q37. Should guidelines have any other particular legal status under the Act?
No Guide lines are Advisory. leave them that way
Part 10 – Review of Decisions
Q38. Is the list of reviewable decisions appropriate?
Yes – but in practical terms minor issues may clog up a review system
Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?

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Yes

Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?

Yes – however we are concerned that the resources of review to comply with a 1 working day expectation, with the exhaustive list as proposed will not perform to the expectation.
Suggest – consideration only to serious matters , then for a minor matter an interim decision to automatically release the stay, subject to a final decision at a reasonable time

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?

Yes – we prefer to see the matters provided under a Code of Practice to allow for flexibility in specific industry sectors, where differences may be catered for.

Do you have any other comments?

Remove reverse onus of proof for discriminatory conduct

I have read legal transcripts stating the Model Act has no reverse onus of proof, however Section 99 of the Model Act seems to create a reverse onus of proof for discrimination .That is, a person charged with discriminatory behavior must prove they did not discriminate. reverse onus of proof is not part of our general legal tradition, I object to this concept and ask why it only applies to this contravention
We suggest **Delete** section 99.

self-incrimination
Section 178 'Abrogation of privilege against self-incrimination' seems an unnecessary provision all people should have the right not to self

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incriminate, in fact the information should be construed as tainted evidence not admissible in court.

Tony Dundon / Warren Knight 21st October 2009