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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:

<b>Questions</b>
<b>Part 1 – Preliminary Matters</b>
<p><b>Q1.</b> What is the best title for the model Act?</p> <p>Occupational Health, Safety and Welfare Act</p>
<p><b>Q2.</b> Does the definition of ‘<i>officer</i>’ clearly capture those individuals who should have ‘<i>officer</i>’ duties under the model Act?</p> <p>No. The definition is too imprecise. For example, a venture capitalist company which invests in an enterprise will often appoint a director to that enterprise to ensure that the enterprise looks after its affairs. The appointed director is rarely a director of the venture capitalist and is subject to the directions of the Board of the venture capitalist. The Board of the venture capitalist through its appointed director has very significant influence over the enterprise. As the definition of OFFICER currently stands the Board of the venture capitalist would appear to escape any responsibility for the acts or omissions of the enterprise.</p> <p>A similar example involves the influence exerted by a large shareholder (institutional) or conglomeration of large shareholders of an enterprise. They may have no direct Board membership of the enterprise in which they have made an investment but are able to significantly influence the conduct of the enterprise. These shareholders are not caught in the definition of officer.</p> <p>Another example which has been identified and dealt with in another jurisdiction i.e. chain of responsibility principles in the transport industry, involves the influence that a single large customer or supplier of goods or services can exert on an enterprise. It is common practice for large supermarket chains to insist that certain food quality standards be met by their suppliers and they regularly audit compliance with those standards. These supermarket chains can exert very significant influence over their suppliers and yet they are not caught by the definition of officer.</p> <p><i>Comments: Whether it was the draftsman’s intention to capture these persons of influence elsewhere i.e. s.15, is unclear. It does in my opinion require a more precise set of terms.</i></p>



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*I also note that a Minister of State or Territory is not included in the definition of officer and wondered if this was deliberate. For instance the employees of parliaments are generally responsible to either the Speaker of the Lower House or the President of the Upper House. Are these positions excluded from the definition in which case who owes parliamentary employees an obligation to ensure their OH&S?*

*I am also concerned that there may be other classes of workers who may not be caught by the provisions of the model act for example Ministers of Religion.*

**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?

I see no need at present, although if case laws alter the effect of the definitions then an amending act might be required.

**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?

There does not appear to be any special consideration to mining operations in the Scope of the Model Act. There needs to be a recognition that the application in mines may be limited.

**Q5.** Is the scope of the suppliers' duty appropriate?

There does not appear to be a duty owed to a volunteer organisation. For example; an equipment hire company might hire a scissor lift to a volunteer organisation. It would appear that there is no duty owed by the hire company to the volunteer.

**Q6.** Is the scope of the 'worker' definition appropriate? Should it cover students gaining work experience?

Yes and Yes.

**Q7.** Is the definition of 'workplace' appropriate?

Yes

*Comment: I note that the term WORK is not defined and should be.*



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Part 2 – Safety Duties	
<b>Q8.</b> Do the principles that apply to the duties of care give clear guidance on what is expected?	They appear to
<b>Q9.</b> Is the definition of ‘ <i>reasonably practicable</i> ’ appropriate in this context?	Appears to be
<b>Q10.</b> Should the definition of ‘ <i>reasonably practicable</i> ’ be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?	No. The Regulator and Courts should be given flexibility.
<b>Q11.</b> Is the proposed scope of the primary duty appropriate?	Yes
<b>Q12.</b> 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?	No. The primary duty is sufficient.
<b>Q13.</b> 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)?	No.



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<b>Q14.</b> Is the scope of the duties related to specific activities appropriate?
Yes
<b>Q15.</b> In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
Yes, but in the context of “ought reasonably to have known”.
<b>Q16.</b> Is the treatment of volunteers under the model Act appropriate?
No. Volunteers should have the same obligations as other workers
<b>Q17.</b> 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?
<p>Absolutely not. It is a great shame that the WRMC has sanctioned penalties in these ranges – they are obviously out of touch with the consequences of breaches of OH&amp;S legislation in their own jurisdictions. It should be noted that the prosecution of a Director of a large listed company or a Director General of a Government department is a rarity, if it has in fact ever happened. The vast majority of prosecutions for breaches of OH&amp;S Acts involve small to medium enterprises and their directors. Imposing penalties at the levels suggested completely destroys the lives of those affected. Usually an enterprise is prosecuted along with its directors who are more often than not the owners of the enterprise and when found guilty, the financial penalties often bankrupt the individuals concerned and causes the deregistration of the enterprise. This has ramifications for any other workers employed by the enterprise.</p> <p>There need to be sanctions available to the Courts (I agree that penal sanctions should be imposed) but the financial penalties are too high to act as a deterrent to any enterprise other than the very very large ones.</p> <p><i>Comment: Section 206B of the Corporations Act 2001 should be more vigorously applied. The Court jurisdiction in which these matters are tried should not be an Industrial Court.</i></p>
<b>Q18.</b> What should the maximum penalty be for a contravention of the model regulations?



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Corporation - \$50,000 Individual - \$10,000
<b>Q19.</b> 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?
Non duty of care offences should not be criminal offences
<b>Part 3 – Other Obligations</b>
<b>Q20.</b> Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?
It is clear but makes no reference to psychological injuries.
<b>Part 4 – Consultation, participation and representation</b>
<b>Q21.</b> Is the proposed scope of duty to consult workers appropriate?
Yes but ought to be limited by the size of the enterprise – for example family companies and those employers who employ less than 5 workers
<b>Q22.</b> Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?
Yes
<b>Q23.</b> 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
<b>Q24.</b> 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 time limit should be prescribed.
<b>Q25.</b> Elections for HSRs and possibly deputy HSRs must be conducted 'as soon as reasonably practicable' after the relevant work groups



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are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?
No time limit should be prescribed.
<b>Q26.</b> 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?
No time limit should be prescribed. <i>Comment: SMEs should not be subject to the requirement to elect/appoint and train an HSR. The costs of training are onerous and the turnover in labour is high and likely to increase</i>
<b>Q27.</b> 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?
Yes
<b>Q28.</b> 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?
Yes
<b>Q29.</b> Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?
Yes
<b>Q30.</b> Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?



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Yes
<b>Q31.</b> A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?
No – it should be 14 days
<b>Part 5 – Protection from Discrimination</b>
<b>Q32.</b> Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?
Yes
<b>Part 6 – Workplace entry by OHS entry permit holders</b>
<b>Q33.</b> Are the notification requirements appropriate?
Yes
<b>Q34.</b> 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 authorisation process should be specific and the training provided as a part of the process should be comprehensive (to a standard which would permit Certified Practitioner Membership of the Safety Institute of Australia). There should also be a requirement to keep the training and skills levels current.
<b>Q35.</b> 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 which reflect those which apply under FWA.
<b>Q36.</b> 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?
Yes



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**Part 7 – The Regulator**

**Q37.** Should guidelines have any other particular legal status under the Act?

No

**Part 10 – Review of Decisions**

**Q38.** Is the list of reviewable decisions appropriate?

Yes

**Q39.** Are the processes and timeframes prescribed for the internal review of decisions appropriate?

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

**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?

It would be preferable

**Do you have any other comments?**

A major concern is that each jurisdiction, as it adopts the model Act, will use an existing enforcement mechanism. In NSW, the Industrial Court has been the place where prosecutions have been decided. The Model Act introduces concepts with which this Court is unfamiliar, for example the “reasonably practicable” concept and as such the Industrial Court judges may not be competent to decide cases brought under the new legislation.



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Currently there is a limited right of appeal in the NSW Industrial Court and with the levels of sanction proposed in the Model Act, a different Court process should be considered which allows a full right of appeal of its decisions.