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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
<b>Part 1 – Preliminary Matters</b>
<b>Q1.</b> What is the best title for the model Act?
<p>The title of the Act should reflect its key objective which is to ensure the health and safety of persons at work, or at a workplace. Health must be included in the title to highlight that health is just as important as safety.</p> <p>Therefore I recommend two alternative titles:</p> <ol style="list-style-type: none"> <li>1. Safe and Healthy Work Act 2009</li> <li>2. Safe and Healthy Workplace Act 2009</li> </ol> <p>I prefer alternative 2 because “work” only refers to when work is being undertaken, whereas “workplace” refers to the workplace, which could be at a time when work is being carried out, or a time when work is not being carried out such as during a break or the weekend.</p> <p>This would help highlight the fact that the health and safety of visitors and other persons at a workplace must be ensured, as well as ensuring the health and safety of workers.</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>I feel that part (a)(ii) of the definition could be improved. I am concerned that ‘substantial part’ may not cover persons who are in charge of a division of an organisation but do not or are not involved in making decisions that affect the whole or a substantial part of the organisation. Can the words along the lines of ‘or a significant component of’ be added after ‘substantial part’?</p>



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I am concerned about (a)(iii) – it could cover shareholders and lenders who do not have a say in the management of the organisation. Is this part superfluous considering how (a)(ii) is drafted?

**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?

If the structure definition is amended as per my recommendation 4 in the other comments section, then I fell the definitions are OK and don’t need changing. My recommendation 4 is: Structure’ – should include ‘anything fitted to or connected to a structure’.

**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?

Residential strata title body corporates should be excluded.

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

Yes.

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

The definition needs careful consideration. For example, if I have a business that owns a vehicle, and I engage a sole contractor to service my vehicle (either at the contractors premises or my premises), is that contractor a worker and do I have a primary duty of care for his safety? My reading of the model Act is that I do have a primary duty of care, but I believe that I should not have one since I do not provide instruction on how to do the work or provide any tools or equipment.

The definition should cover students gaining work experience.



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Received by:

<b>Q7.</b> Is the definition of <i>'workplace'</i> appropriate?
<p>The definition is broader than need be, and potentially covers places that aren't technically a workplace. What does "or is likely to be" mean? I recommend replacing 8(1) with:</p> <p>"A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes to carry out work."                  Or "A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes as part of work."</p>
<b>Part 2 – Safety Duties</b>
<b>Q8.</b> Do the principles that apply to the duties of care give clear guidance on what is expected?
Yes.
<b>Q9.</b> Is the definition of <i>'reasonably practicable'</i> appropriate in this context?
<p>Yes, but I believe that some wording changes are needed for it to be technically correct.</p> <p>I believe that 17(c)(ii) and 17(d) and (e) are not technically correct by combining hazard and risk with eliminate and minimise, such as 17(d) – to eliminate or minimise the hazard or risk.</p> <p>I understand that a hazard can be eliminated, but it cannot be minimised. A risk can be eliminated or minimised. I believe that the technically correct wording for 17(d) would be 'the availability and suitability of ways to eliminate the hazard or minimise the risk'.</p> <p>The remainder of 17 and 16(b) should be amended so that the wording is technically correct.</p>
<b>Q10.</b> Should the definition of <i>'reasonably practicable'</i> be exhaustive i.e. so only matters listed may be considered in determining



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compliance with the duty?
No, there may be other matters that should be considered in addition to those set out in 17(a) to (e).
<b>Q11.</b> Is the proposed scope of the primary duty appropriate?
Yes, however in 18(4)(a) 'work environment' should be changed to 'workplace'. This was considered in the First Report (6.109 to 6.112) and it was considered that by casting the duty of care as recommended, the term 'working environment' was redundant. If it is desired to continue to use 'working environment', then the term should be defined in the model Act so people understand the intent of the sub-section.
<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?
You could argue that 'so far as is reasonably practicable' would involve providing information in a language and at a level that can be understood by the workers. However it would enhance the model Act and people's understanding of it if this was explicitly stated.
<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)?
Yes, in many occupations it is not possible to always provide such facilities, eg truck drivers. The subsection should be changed to – provide or provide access to adequate facilities .....



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**Q14. Is the scope of the duties related to specific activities appropriate?**

In the sections on duties related to specific activities, I have a concern regarding the use of the words 'are safe and without risks to the health of any person'. This appears to be an absolute level of safety which is a higher level than that in 16(b) which is to 'minimise those hazards and risks so far as is reasonably practicable'.

Sections such as 19(2) should be drafted more along the lines of 16(b) such as:

"The person who has management or control of a workplace must ensure that risks to the health and safety of any person from the workplace, the means of entering and exiting the workplace, and anything from the workplace, are minimised so far as is reasonably practicable."

**Q15. In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?**

No

**Q16. Is the treatment of volunteers under the model Act appropriate?**

See my comment 5 in the other comments section.

**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?**

Yes



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Received by:

**Q18.** What should the maximum penalty be for a contravention of the model regulations?

No comment.

**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?

Non duty of care offences should not be criminal offences.

**Part 3 – Other Obligations**

**Q20.** Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?

No. "Serious" must be defined – what is a serious head or eye injury or laceration? What is a loss of bodily function?  
 This list is not clear. Definitions are needed in either the Model Act or regulation.  
 Section 35(d) should be redrafted as 'any injury or illness prescribed by the regulations' to give the regulator future flexibility for injury reporting.

**Part 4 – Consultation, participation and representation**

**Q21.** Is the proposed scope of duty to consult workers appropriate?

Yes, but section 47(e)(iv) should be a separate point such as 47(h) because of the importance of the provision of information and training.

**Q22.** Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?



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Registration number:
Received by:

No.
<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 ' <i>reasonable time</i> '. Should a time limit be prescribed e.g. 14, 21 or 28 days?
Yes, 1 month.
<b>Q25.</b> 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?
No.
<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?
Yes, otherwise there may be a temptation to delay training excessively.
<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



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Received by:

<p>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>Yes.</p>
<p><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?</p>
<p>Yes, but the meaning of reasonable concern should be defined to provide guidance. Legislation should use common terminology.</p>
<p><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?</p>
<p>Yes. Being able to direct that work cease is an important power and obligation and HSR's need to be informed and trained in how to issue cease work directions. Untrained and inappropriately motivated HSR's could create havoc in a workplace.</p>
<p><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?</p>
<p>Yes, for the same reasons above.</p>
<p><b>Q31.</b> A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?</p>
<p>No, especially in the case of a worker undertaking unsafe practices. A trained HSR should be able to determine the appropriate time frame. Regulations could provide guidance.</p>



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Received by:

<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?
No. Subsection 108(2) should not apply. I cannot think of any reason why an OHS entry permit holder should not have to give notice of entry. All businesses have an obligation of the safety of all persons on their workplace, and many businesses have specific safety induction and/or escorting requirements for entry to the workplace. OHS entry permit holders must be required to comply with these requirements at all times. Subsection 108(1) should be amended so that entry is only permitted after giving notice of entry and complying with OHS requirements (section 119). The requirements of 119 should be incorporated into 108.
<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?
Yes. Specific authorisation should be required.
<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?
Breaches should attract criminal sanctions because an incorrectly applied permit can result in safety issues.



Office use only
Registration number:
Received by:

**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?

Yes. The provisions must only permit entry for OHS reasons

**Part 7 – The Regulator**

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

No, a guideline should be nothing more than an advisory document.

**Part 10 – Review of Decisions**

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

No comment.

**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.



Office use only
Registration number:
Received by:

**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?

No comment. I don't know the legal impact of each alternative. Does it matter?

**Do you have any other comments?**

1. Objects - subsection 3(1)(a)

The term 'harm' is a trendy term that is used by some organisations to describe their health and safety vision eg zero harm. It is not a term that is in common use in safety. It is also not a commonly used term in the Australian language.

I believe that 'harm' it should not be used in the objects of the Model Act. I note that 'harm' is only used in three locations in sections 3 and 17. It is not used anywhere else in the Model Act.

I also believe that the term 'welfare' should not be used in this section. In the Australian language welfare has many meanings, ranging from the provision of amenities to the provision of social support. As noted in the Second Report, in relation to Objects, (section 22.26) "care needs to be taken in their development. Their purpose must be kept in mind.", and they must not "relate to matters that are outside the scope, content and actual effect of the substantive provisions." I note that the six recommended objects in the Second Report (22.31) did not refer to welfare.

If there is a requirement to include welfare as an object, it should specifically refer to its intent. Schedule 2, section 4 of the Model Act refers to the provision of prescribed facilities for the welfare of workers at the workplace. I believe that this is what is meant by welfare. Is amenity a more appropriate term than welfare?

The key objective of the Model Act is to prevent injury and illness to workers, and the objects should clearly reflect this

Taking these comments into account, I recommend that 3(1)(a) be redrafted along the following lines – "to protect workers and other persons from work-related injury and illness through the elimination of hazards or minimisation of risks arising from work", or



Office use only
Registration number:
Received by:

“to protect the health and safety of workers and other persons through the elimination of hazards or minimisation of risks arising from work”.

Following on from this change, the term ‘harm’ should be removed from sections 3(2) and 17, and the term ‘welfare’ should only be used in a context that is relevant to its intent.

## 2. Objects - subsection 3(1)(b)

The term ‘occupational health and safety’ is used in the Model Act, together with the term ‘health and safety at work’. The discussion paper noted that “the term ‘work’ is proposed in the title instead of ‘occupational’ to reflect that the model Act applies broadly to work, not just occupations. This makes sense because the model Act is intended to cover more than just occupations.

I recommend that the term ‘occupational health and safety’ not be used in the model Act, and it be replaced by ‘health and safety at work’ or ‘workplace health and safety’.

Terminology should be used consistently throughout the Act. An example of how the use of terms is mixed up is in section 62, which uses ‘health and safety at work’ in 62(1)(a) and ‘occupational health and safety’ in 62(1)(c).

If the term ‘occupational health and safety’ is to continue to be used, then it should be defined in section 4.

## 3. Objects – subsection 3(1)(g)

This object should be deleted – this is the only reference to ‘continuous improvement and progressively higher standards’. There are no sections in the model Act to provide for/facilitate or promote “continuous improvement and progressively higher standards’.

## 4. Section 4 – definitions

‘Construct’ - the word ‘build’ should be included in the definition.

‘Structure’ – should include ‘anything fitted to or connected to a structure’

## 5. Section 5(5) – volunteer associations



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Registration number:
Received by:

If a volunteer (such as a Scout leader) employs a person to carry out work (such as repairing a Scout hall) for the volunteer association (Scouts Australia), does this mean that the volunteer association is no longer regarded as a volunteer association?

6. Sections 6(1) and (2)

Are these contradictory? If a thing is leased and is returned to the owner of the thing at the end of the lease, is this still 'supply of a thing'? These sections are confusing and need to be redrafted in plain English.

7. Section 11(3) – high risk plant

The term 'high risk plant' needs to be defined.

8. Part 2 – Title

Change the title from "Safety duties" to "Safety and health duties" to make it clear this section includes health.

9. Section 20

This section should include structures. Management and control of a workplace frequently includes management and control of structures within the workplace, or that contain the workplace.

If the definition of structures (see comment 4) is amended then it would not be necessary to include fittings and fixtures in this section.

10. Section 26

The term 'due diligence' MUST be defined to provide guidance as to what is expected. This was discussed in the Second Report which stated:



“Have your say on workplace safety laws.”



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Registration number:
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23.169 We are not confident that the case law regarding due diligence in OHS is sufficiently clear to provide consistent and fair outcomes, or to assist officers to understand what they must do to comply with their duty of care. As an officer will have a positive duty of care to exercise due diligence, it is important that the officer be aware of what that requires them to do.

It is unfair to have a person liable to fines of \$600,000 and/or 5 years imprisonment without providing guidance on what the person is expected to do.

Recommendation 88 in the second report includes a definition of due diligence.

11. Section 27

Reasonable care should be defined.

Duties of workers should include an obligation to promptly report hazards, unsafe conditions, injuries, illnesses; an obligation to undertake safety and health training; and an obligation to report to work fit for duty without impairment from alcohol, drugs, medications or fatigue.

12. Section 39

The requirements of this section should also apply to persons with management or control of a workplace. The same applies to sections 40(2) and 41(2).

13. Section 40

The requirements of this sections should also apply to structures.

14. Section 48

The person conducting the business or undertaking should also have the ability to request the election of a HSR.



Office use only
Registration number:
Received by:

15. Section 65

This section needs to include the requirements for the course of training to have the objective of training HSR's in how to effectively and objectively carry out their duties as an HSR, and for the regulator to prescribe the content of the training.

16. Section 69(4)

The words 'at the workplace' should be inserted after 'workers'.

17. Section 70

Subsection 70(a) should include consultation as well as co-operation.

I am concerned that the word 'formulate' in subsection 70(b) is too strong, it could be taken to mean that the committee is the determiner of safety standards, rules etc which takes authority away from the person conducting the business or undertaking. Also the committee should not have the responsibility to disseminate the standards, rules etc. This is the responsibility of the person conducting the business or undertaking. The thrust of this subsection should be to review and recommend.

This section should be based on those listed in 26.21 in the second report.

18. Section 75

The term 'serious risk' should be defined.

Subsection 75(2) should include the requirement for the worker to inform that he or she has ceased work and the reason why.

19. Section 85

A PIN could be served on a worker to cease a contravention, so this section needs to include provision for such.



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Registration number:
Received by:

20. Section 87

If a PIN is issued to a worker then the requirement to display a copy of the notice should not apply.

21. Section 90

In subsection 90(1)(b) the worker should be able to apply to the regulator if the notice was issued as per comment 20.

22. Part 6

For clarity and ease of understanding, Division 5 should be located before Division 2, so readers know what an OHS permit is before they read details of how it is to be used.

An OHS entry permit should be defined in section 105.

23. Section 155

This section should contain the provision that inspectors can only enter for the purposes of enforcing this Act.

24. Section 156

An inspector should be required to comply with all reasonable safety requirements of the person in control of the workplace or undertaking.

25. Section 211

An OHS undertaking should be defined.

Consideration should be given to not using the term 'OHS' in the Act if the term 'occupational health and safety' is not used as I recommended earlier. It could be replaced with 'health and safety'. For example, a health and safety entry permit, a health and safety undertaking.