National Model OHS Laws – Public Comment

November 2009

Submission by the Australian Industry Group

AUSTRALIAN INDUSTRY GROUP

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DRAFT NATIONAL MODEL OHS LAWS

PUBLIC COMMENT SUBMISSION

AUSTRALIAN INDUSTRY GROUP

NOVEMBER 2009

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This submission is made on behalf of the Australian Industry Group (Ai Group)

Ai Group is a national industry organisation representing 10,000 employers. Our members operate in manufacturing, construction, automotive, telecommunications, IT & call centres, transport, labour hire and related sectors. Our members operate businesses of all sizes throughout Australia and represent a broad and expanding range of sectors. We provide policy representation as well as comprehensive advice and assistance to help members run their businesses more effectively and to become more competitive on a domestic and international level, in areas of employee relations, OHS and workers compensation, vocational education and training, environment and energy management, trade and export and general business and economic conditions.

We are represented in ongoing tripartite consultative forums with state governments and occupational health and safety regulators in Queensland, New South Wales, Victoria and South Australia.

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Introduction

Ai Group greatly appreciates the opportunity to submit comments on the daft model national OHS laws.

Since 28 September, we have had the opportunity to canvass our members' views on the draft Model OHS laws at a series of consultation meetings in metropolitan and regional NSW, Victoria, Queensland and South Australia, and at meetings of our Councils (boards) in those states. In all, approximately 300 companies have participated. Those meetings were attended by a mix of large and small companies, senior executives, line managers and safety and human resource specialists.

All members were advised, in circulars and newsletters, of the release of the draft Model OHS laws and supporting documentation. All were invited to participate in the consultation sessions.

Our formal responses to the questions raised in the Exposure Draft Discussion Paper, and other detailed submissions, are set out below. However we would like to make a few general comments that reflect the overall response of members to the draft laws.

1 Generally members received the proposed laws favourably, and feel the overall balance of responsibilities and rights will enhance the safety performance of Australian industry in a workable and efficient manner.

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2 There is overwhelming support for a harmonised set of national OHS laws. Companies consistently identified this as the major benefit of the proposals, which is welcomed very strongly. On the other hand, members expressed understandable scepticism on the level of consistency that will be achieved in practice under a regime where individual states will still be able to:

- Amend some parts of the legislation in accordance with the many jurisdictional notes in the draft law;
- Operate independent regulators and OHS court systems; and
- Over time find reasons and ways to vary state laws other than in accordance with the Inter Governmental Agreement (IGA).

We note that for companies currently self insuring under Comcare, the proposal that regulation revert to the states, albeit under harmonised laws, represents a backward step from the single national regulation they operate under now. Whilst not strictly a matter being considered in this public comment period, we would urge that consideration be given to continuing the "one stop shop" model for these companies under harmonised laws and would be pleased to make separate submissions on how that might be achieved.

3 Companies generally understand and accept the necessity and sense of moving the primary duty from employers to persons conducting a business or undertaking. There are concerns about where this liability ends as it extends towards concepts of public safety.

4 The expression of officers' duty of due diligence as a positive duty is likewise understood and generally accepted. However, there are questions related to the circumstances under which an officer might be found to have breached their duty when the organisation has not breached its duty. There is also a strong desire for guidance on what due diligence looks like.

5 The move away from the employer - employee concept to the relationship between the person conducting a business or undertaking and workers for the primary duty creates challenges for the expression of the duty to consult (with your workers and with other duty holders related to your workers). Consultation with people who are not your direct employees may raise practical and commercial difficulties that members trust will be acknowledged in the expression, interpretation and enforcement of the law.

6 On consultation more generally, there is unease at the focus on the role of health and safety representatives at the expense of other effective and practical consultation pathways. Health and safety representatives are a legitimate and proper consultation methodology, but they are not the only one. They have not been universally effective, and rely disproportionately on the communication skills and competence of selected individuals. We share our members concerns that their ability to meet their obligations under the law may be frustrated by the parallel requirement to adopt a narrow range of consultation options.

7 In several areas, particularly right of entry, discrimination, and ceasing unsafe work, there are practical problems that may arise from differences between the draft Model OHS laws and relevant provisions of the Fair Work Act. On right of entry, the law needs to be drafted in a way that acknowledges the reality that unions have other agendas in their dealings with employers, and however legitimate those other agendas may be, mixing them up with OHS can affect the focus on safety.

8 Certainty should be improved in relation to notification of serious incidents and non-disturbance of sites.

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9 We believe that sound Model OHS laws combined with effective and innovative enforcement protocols can deliver outcomes that would work in every industry. Looking at mining, rail safety or aviation, for example, there is a clear imperative to avoid state based differences, either jurisdictionally or by co-operative efforts. There is currently significant variation between the jurisdictions regarding industry specific safety legislation. Model OHS legislation cannot be achieved if status quo is maintained. We believe that this could be addressed by the model OHS Act replacing existing industry specific legislation, with industry specifications being covered in regulations.

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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?
The model Act should be called the Australian Occupational Health and Safety (Model) Act. When adopted in each jurisdiction it should be called the Australian (name of jurisdiction) Occupational Health and Safety Act
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer'* duties under the model Act?
Ai Group supported recommendation 86 of the review panel which stated the model Act should define an "officer for the purposes of the duty of care of an officer of a body corporate, partnership or unincorporated association: (a) to have the meaning given by s.9 of the Corporations Act 2001 (Cwth); and (b) to include directors and senior managers of the Crown, public sector agencies and statutory authorise". ***The definition*** It is not clear why WRMC rejected this recommendation, but we note the expectation that officers should include: • those who influence or make decisions that affect the whole or a substantial part of the entity; • equivalent persons representing the Crown; • and volunteers and local government councillors, who should have a positive duty, but not be liable to prosecution.

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The definition provided in the draft Model OHS Act appears to be based on the definition in the Corporations Act 2001, but it excludes a number of categories that are included in that definition. The most significant of these exclusions appears to be "a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)".

We are concerned that this narrower definition may reduce the ability of a regulator to appropriately enforce the requirement to exercise due diligence in the circumstances where a person whose instructions or wishes significantly influence the decision and actions taken by the directors and senior management of the organisation. This may result in an unintended consequence that an officer is found wanting in the exercise of due diligence because they are unable to make the required decisions, due to some level of external direction or control, and yet the person exerting that control would be exempt from scrutiny.

The descriptor

Ai Group accepted that, if the Corporations Act definition *in toto* was to be used, the reference must be to an *officer*, although we would have preferred the use of the term *senior officer*. If the definition is not going to fully reflect the definition within the Corporations Act, it will not be necessary to use the term *officer* to create a relevant nexus with that law.

During consultation with members, significant confusion was raised about this terminology. In workplaces the term "officer" (as in safety officer, quality officer, payroll officer etc) is generally utilised to describe a role which has less seniority than a manager. Hence, when considered by the typical workplace, the terminology of "officer" stretches a long way down into the organisation and thereby does not have a common usage that is consistent with the definition. This is already a difficulty in a number of Australian jurisdictions under current OHS statutes, but the location of the current references means that the average reader of a state Act does not look at the provisions that refer to officers. The important relocation of this provision in the model law to a more visible part of the legislation means that it is important that the descriptor clearly indicates that the role is a senior one, or at least would not ordinarily include staff at the level discussed above. For this reason it would be beneficial to use the descriptor *senior officer*.

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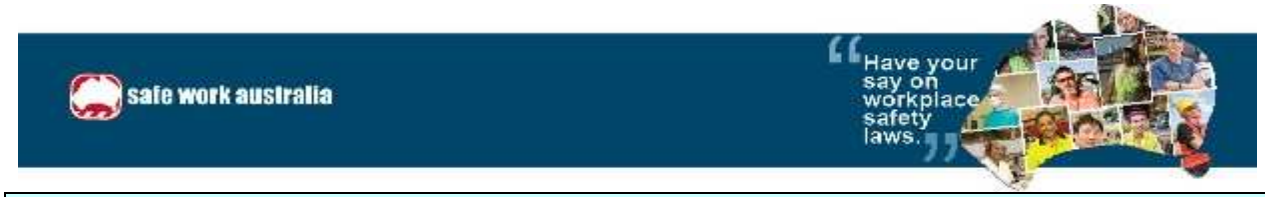
Current wording of definition

Finally, the definition as currently worded is awkward and introduces a concept that is not referred to anywhere else in the draft Model OHS Act, namely *(the body)* – "***officer*** of a person (other than an individual) (the body) means:". Subclause (ii) is particularly problematic as it refers to a person "who makes … decisions that affect … the business or undertaking of the body"

The following rewording of the current definition is utilised to illustrate how the definition could become more readable. This approach could be utilised if the definition stays in its current version or is redefined as suggested above.

[senior] officer of a person conducting a business or undertaking means:

(i) in cases other than the Crown, a public authority or a local authority, an individual:
  (i) who is a director of the person conducting the business or undertaking; or
  (ii) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the person conducting the business or undertaking
  (iii) who has the capacity to significantly affect the financial standing of the person conducting the business or undertaking; or
  (iv) who is a receiver or manager of any property of the person conducting the business or undertaking; or
  (v) who is a liquidator of the person conducting a business or undertaking



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Other matters related to Officer duties

Definition of Due Diligence

Recommendation 88 of the report proposed a definition of due diligence be included in the Model OHS Act. WRMC rejected the recommendation to include the definition in the Act, stating that "case law should be relied upon to define 'due diligence'". Ai Group was very disappointed with this response, for the following reasons:

- a relatively small number of cases of this nature will be prosecuted, limiting the amount of case law that can be established;
- given the small number of cases that are prosecuted, the majority of cases that get to court are very likely to succeed; hence many defendants plead guilty and the facts are not tested in court; and
- the outcomes of any trial and/or testimony for mitigation generally focus on what the person did not do, rather than a full inquiry into what would have demonstrated due diligence.

During our consultation with members we have noted a strong desire on behalf of company representatives to understand what an officer will need to do to demonstrate that they have exercised due diligence. This request has come from both "officers" who want to understand their responsibilities, and from OHS Managers and HR Managers who want to be able to appropriately advise their management colleagues on what needs to be done.

On a related matter, concerns have been raised that there will no longer be a requirement for Workplace Health and Safety Officers (QLD), Responsible Officers (SA and TAS) and "persons who are suitably qualified" (VIC) or to provide training for committee members (NSW). A major concern is that employers will no longer be required to offer training to anyone other than health and safety representatives, who will be the only people entitled to training under the proposed laws.

The officers engaged by persons conducting a business or undertaking will need to recognise that the removal of these roles and/or training obligations does not diminish the need to have the appropriate resources, knowledge and skills to help them to meet their obligations to exercise due diligence.

Ai Group expects that the expressly stated positive duty that an officer must exercise due diligence will in most jurisdictions be one of the most significant changes to the OHS laws, and will subsequently have the capacity to significantly improve OHS performance across all industries within Australia.

However, we can only get the full benefit of this significant change if officers understand and accept what it means to exercise due diligence, just as the Act outlines what will be taken into account to determine if a person conducting a business or undertaking has done all that is reasonably practicable.

Ai Group strongly urges WRMC to rethink their decision to exclude a definition of due diligence from the Act, and to include a definition similar to that proposed by the review panel.

Alternatively, the development and publication of interpretive guidelines and guidance material must be given the utmost priority to enable the groundswell of interest that is being created by the new laws to be captured and capitalised whilst public focus is high.

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. The definition of structure should specifically exclude plant and any part of plant.

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?

Recommendation 13, which was accepted by WRMC, stated "the primary duty of care should exclude workers and officers to the extent that they are not conducting a business or undertaking in their own right". This is not explicitly addressed in the draft Model OHS Act, and this lack of clarity may lead to significant confusion for the reader. It is recommended that clause 5 be amended by adding to the exclusions in sub-clause 5(2): (2)(c) – the person conducts the business or undertaking, in whole or in part, only as an officer or worker and not in their own right.

The inclusion or exclusion of residential strata title body corporates is a difficult question. The Act recognises the circumstances associated with hiring someone to mow your lawn as an individual home owner, with the exclusion at 5(2)(a) – which determines that a person is not conducting a business or undertaking if workers are engaged by the person solely for that person's private or domestic purposes. Logically, this exclusion should also apply if a strata title body corporate is managed solely by a collective of owners who are the residents of a small domestic property.

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It is clear that once the strata title body corporate is managed by either an organisation which is in the business of managing a range of body corporates, or a business entity engages a full time manager to manage a large residential complex, they would more likely be a person conducting a business or undertaking.

It may be appropriate that the Model OHS Act has an exclusion such as the one for domestic premises, with a related provision such as that in clause 5(4) which enables the regulations to specify the circumstances in which strata title body corporates would be a person conducting a business or undertaking.

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

The scope of the suppliers' duty appears to be appropriate.

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

As an "inclusive" definition, worker is sufficiently broad to capture current, and any future work arrangements.

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

The definition of workplace is not consistent with the recommendations of the review panel, as accepted by WRMC.

Recommendation 94 stated that a workplace should be "any place at or in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work" It is our understanding that this approach was specifically designed to address the problems highlighted in paragraph 23.269 of the report which raised concerns regarding a legal decision which determined that "a pit and pit lid, in and on which work had not been undertaken for a lengthy period of time, was found to have remained a workplace at all times."

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As an Act focused on protecting people at work (and having serious consequences for breach), it would be inappropriate to have a definition which had the effect that once work had taken place in any location, it would remain for all times a workplace. Ultimately, every part of the built environment would forever be a workplace. There must be a temporal connection between the workplace and the matter in question; all other matters should remain the domain of public safety.

Accordingly, the definition proposed by the review panel in Recommendation 94 would be more appropriate. Alternatively, the draft clause 8 could be modified to include the words "is being undertaken" in lieu of "is carried out". The definition should also exclude domestic premises, in accordance with the amended Recommendation 28, at least to the extent they are used as domestic premises.

Part 2 – Safety Duties

Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?

The principles outlined in clauses 12 to 17 provide clear guidance on what is expected of duty holders. Of particular importance are the requirements in:

- 15(3)(b) related to the capacity to influence and control; and
- 15(3)(c) related to the obligation to consult, cooperate and coordinate activities with other duty holders.

In relation to 15(3)(c), the principle should be limited to other duty holders that the primary duty holder "knows or ought to know hold such duties". Otherwise a primary duty holder could be offending the principle by not consulting with another duty holder in circumstances where they genuinely did not know the other duty holder existed. This could arise in a complex commercial arrangement or, for example, where subcontracted work, has been sub-subcontracted to others without the knowledge of the principal (or the principal is mislead as to that fact).

Further, due to the physical locations of the provisions in the Act (separate from the duties) we are concerned that readers of the Act may not place the necessary level of importance on these principles. It may be appropriate to insert a note or cross reference within the duties which highlight the interaction with the principles.

It will require an education process to ensure that all duty holders understand the relationship between the duties and the principles.

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Q9. Is the definition of '*reasonably practicable*' appropriate in this context?

The definition of "reasonably practicable" included in the draft Model OHS Act is appropriate when it is used in the context of the primary duties and the upstream duty holders. We recognise this is how and where it is intended to be applied, and this is reinforced by its location within the division entitled "principles that apply to safety duties."

However, the use of the term "reasonably practicable" in relation to consultation creates some confusion as duty holders seek to clarify the extent of their duty.

We note that the review panel recommended that consultation should be required "as far as reasonably necessary" (recommendation 96) and that it should be made clear in the Act that "reasonably necessary is that which enables the person conducting the business or undertaking to make timely, informed decisions about matters affecting, or likely to affect, the health and safety of their workers". WRMC rejected this proposal, stating that the term "reasonably practicable" should be utilised. As WRMC did not explain this decision we can only assume that it was to deal with concerns raised by some stakeholders that "reasonably necessary" was a lower obligation than "reasonably practicable"

We do not wish to diminish the employer's obligation to consult with workers, particularly as effective consultation improves the safety outcomes for all. However, we do believe that two different terminologies, appropriately defined, would assist to aid clarity and subsequently achieve compliance.

Q10. Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?

It is always difficult for laws to anticipate the full range of matters that may need to be considered in relation to a particular set of circumstances. Whilst the proposed definition is robust, it is appropriate to allow other considerations to be taken into account if they are relevant, given the application of the legislation to a wide range of workplaces and businesses.

Hence, the definition should not be exhaustive.

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Q11. Is the proposed scope of the primary duty appropriate?

In their response to recommendation 11, WRMC stated "drafting will need to ensure that the coverage of the model Act is confined to *occupational* health and safety and does not extend into areas more appropriately classified as public safety (see also recommendations 77 and 78)".

Ai Group believes that, in general, the proposed scope of the primary duty is appropriate. However, we are concerned about the way(s) in which the duty could be expanded to encompass a range of circumstances which do not fit within the realms of occupational health and safety, particularly the obligations created by:

- 18(3) – "must ensure….that the health and safety of ***other persons*** is not put at risk from work carried out as part of the conduct of the business or undertaking"; and
- 18(4)(f) – "provide any information, training, instruction or supervision that is necessary to protect ***all persons*** from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking"

We understand that it is not the intention of the current governments or regulators for these laws to extend beyond the logical confines of occupational health and safety. However, these laws are intended to be in place for a long time and will be the subject of scrutiny by the parliaments, courts, public prosecutors and plaintiff lawyers. Even when the regulator determines that a matter is not within the range of duties they think are covered by the Act, any person will be able to make an application to the regulator which requires them to investigate an incident for the purposes of prosecution; at which point the public prosecutor may become involved.

The Model OHS Act should specifically state that the Model OHS laws do not encompass matters that would more appropriately be considered to be related to public or product safety.

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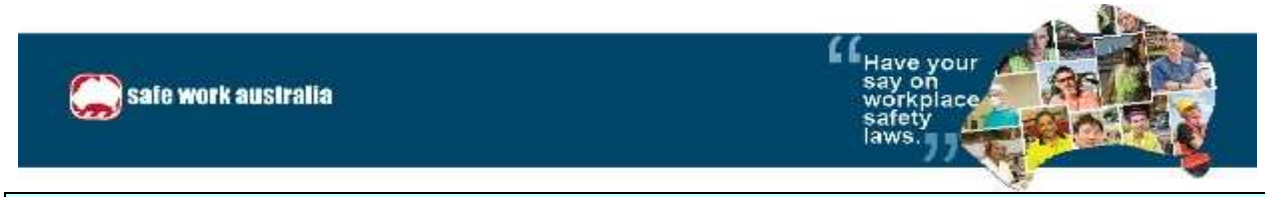
Q12. The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?

The current provision is appropriate as currently drafted. A person conducting a business or undertaking will fail to meet their obligation to provide information, training, instruction or supervision if it is done in such a way that people do not comprehend the messages and/or the person conducting a business or undertaking does not test for understanding. This failure could occur for a range of reasons other than language or "level", such as relying on lingual communication where other options are more appropriate, inappropriate scheduling to deliver training, insufficient time allocated to training and lack of skills of trainers.

Subsequently, it is not appropriate to single out language and "level" in the Act. These matters would be better dealt with in guidance material which considers the full range of factors that may influence the effectiveness of the provision of information, training, instruction or supervision.

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)?

It is important that the legislation is written in such a way that all parties can comply with the spirit, and the letter of the law. It is not possible for a person conducting a business or undertaking to directly provide adequate facilities in all circumstances. Recognising the broad range of work situations that workers may be involved in, including mobile workplaces and others where the worker's employer is not the controller of the workplace or its facilities, the clause should specifically state the obligation as ensuring "access to" adequate facilities.



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Other matters related to the primary duty

Recommendation 19 is worded as "the primary duty of care should include specific obligations, namely ensuring so far as reasonably practicable: (a) the *provision and maintenance* of plant ……."

Clause 18(4) of the draft Model OHS Act currently states: "a person conducting a business or undertaking must, so far as is reasonably practicable: (a) *provide and maintain* a safe and healthy work environment……."

As the primary duty of care is now allocated to a person conducting a business or undertaking where more than one person can have a duty for the same matter, it is important that the words presented in Recommendation 19 of the report are adopted, rather than the clause currently in the Act. This will enable duty holders to consult, cooperate and coordinate (as required in clause 15(3)(c)) as to how they will meet these obligations. If the obligation is worded as a requirement to provide and maintain, each of the duty holders may be technically required to individually meet this duty, which would lead to a duplication of effort and a reduction in credibility of the requirements.

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

It is important that each of the duties in clauses 18 through to 25 is clearly linked to the concept of a person conducting a business or undertaking. There should be no confusion for workplace parties, regulators or the courts when it comes to undertaking activities in the workplace, assigning responsibilities, enforcing the laws or prosecuting parties in relation to these duties.

This is particularly important in relation to the duty of persons with management or control of a workplace (clause 19) and fixtures, fittings or plant (clause 20). These duties are expressed as "a person (the person who has management or control) whose business or undertaking involved the management or control of a workplace". It is not clear from this definition whether the duty rests with the individual who has control, or the business or undertaking that has control; it is our understanding that the intent is for the duty to rest with the person conducting a business or undertaking, not an individual. An alternate wording which would ensure clarity for duty holders and the courts would be:

This section applies to a person conducting a business or undertaking which involves the management or control of a workplace [fixtures, fittings or plant]

Further, throughout clauses 21 to 25 there is an introductory statement that defines the duty holder, e.g. at clause 21 it states "this section applies to a person (the designer) who conducts a business or undertaking that designs". The heading of each clause however is "Duties of a person who designs/manufactures/supplies etc. Whilst it is understood that the courts will not consider the headings when interpreting the law, duty holders will be guided by the headings and may misread the detailed content based on that heading. For this reason, to aid clarity of the definitions and headings it is recommended that each of these clauses be modified in a similar way to the following changes to clause 21 –

21 Duties of persons conducting a business or undertaking who design plant, substances or structures
(1) This section applies to a person conducting a business or undertaking who designs (the designer):

A further drafting concern has been identified in relation to these headings. Clauses 19 and 20 refer to "duty of person"; subsequent clauses refer to "duties of persons". These differences imply a variation in the duty(ies) which may not be a real difference.

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

The concept of "reasonable care" must be interpreted in a logical and fair manner to ensure that people are not held accountable for things which they could not possibly have anticipated. This should be addressed in interpretive guidelines or guidance material. If the concept is narrowed in the Act to what the worker knew about the relevant circumstances, many of the more obvious things that could be classified as what the worker "ought to have known" would be excluded. This might include such things as interfering with a fire extinguisher because no one specifically told them in the workplace that this would put others at risk; operating large plant or equipment which one could reasonably expect might need specific training and/or licensing to safely operate.

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Other matters related to the worker obligations

Recommendation 46(c) of the report proposed that workers should have an obligation, amongst other things, to "cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act"

This is consistent with provisions that currently exist in a number of jurisdictions, including:

- Victoria - co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations
- New South Wales - An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.
- Western Australia - An employee shall cooperate with the employee's employer in the carrying out by the employer of the obligations imposed on the employer under this Act.

In their response to the recommendations, WRMC stated "the meaning of cooperate with any reasonable action … should be examined further during drafting." However, there was no indication of which specific things needed to be examined, or what concerns WRMC had about this recommendation.

We believe that the resultant provision "to cooperate with any reasonable instruction" is far too narrow and should be broadened to reflect an approach similar to one of the examples above.

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

WRMC decided that volunteer officers should be excluded from prosecution for all offences under the OHS laws (the review panel had recommended that the exclusion should not apply to a category 1 offence). Applying the rationale that a volunteer worker should not be subject to prosecution under OHS laws if a volunteer officer is not, means that the current exclusion from prosecution of all volunteers could be appropriate.

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However, the exclusion as written, also excludes volunteer workers from prosecution for failing to take reasonable care as "other persons" and seems to go too far. It should be possible to exclude volunteer officers from a prosecution for failing to exercise "due diligence" whilst still holding them accountable for failing to take reasonable care as a worker or other person. If this approach was applied, volunteer workers could have the same level of liability as officers, determined of course by what they know or ought to know.

The definition of volunteer association at clause 5(5) requires some attention. The definition states that a volunteer organisation is one that does not "employ any person to carry out work for the volunteer association". This definition would allow organisations to set up complex arrangements with labour hire companies and contractors to quarantine the volunteer activities from the more business oriented activities. The definition should be modified to say that the organisation does not "employ or engage persons, other than as volunteers, to carry out work for the volunteer association".

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?

The jurisdictional note which relates to breaches of the safety duty states "A jurisdiction will adjust the penalty provisions to fit the manner of creating offences in their jurisdiction e.g. use of 'maximum penalty' rather than 'penalty'". The exact purpose of this note is unclear and it has created significant concern amongst stakeholders and commentators that jurisdictions will be free to set their own penalty levels and/or that penalty levels may become unharmonised over time. It is essential that there be a consistent level of fines, with no uncontrolled movements that may be created if penalties were established as penalty units which are subject to changes over which WRMC has no control.

With these concerns in mind, Ai Group supports the level of penalties outlined in the discussion paper, as they relate to the safety duties (category 1 to 3). These penalty levels need to be clearly reflected in the model Act to ensure consistency across jurisdictions.

However, we believe that the penalty levels outlined for category 4 to 7 breaches need further analysis and attention, as there appear to be some inconsistencies. For example:

- clause 53 establishes an obligation on a person conducting a business or undertaking to facilitate an election as soon as reasonably practicable; however clause 55 establishes that workers determine how an election is to be conducted and they can ask for assistance from a range of people or organisations. It is proposed that a breach of clause 53 should carry a maximum penalty for a corporation of $50,000. Conversely, it is proposed that failing to establish a committee under clause 68(1), over which the person conducting a business or undertaking has much more control, will carry a maximum penalty of $25,000.

Further, the provisions for offences under clause 97(1) do not fall into any of the prescribed categories, as the maximum penalties match that of a category 3 offence, but they are not a breach of the safety duty. Hence an additional category needs to be inserted between category 3 and 4.

It would be beneficial if the relevant categories had an explanatory statement which helps to classify and explain each of the categories.

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

It has been our experience that prosecutions are generally initiated as a breach of the Act, with the regulations being utilised as points of proof. Regulation breaches tend to be at the lower end of the scale, encompassing failure to comply with specific administrative or 'process" requirements as opposed to duties directly related to safe outcomes. The Act offences classified as category 7 breaches appear to be largely administrative in nature. As they attract a maximum fine of $25,000 for a corporation and $5,000 for an individual, this would appear to be an appropriate level of maximum fines for a breach of the regulations.

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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?

Ai Group submits that criminal offences are definitely appropriate for breaches of safety duties, categories 1, 2 and 3 and the category 4 offence which includes a possible penalty of imprisonment. Further, based on the current categorisation, it would appear inappropriate for the category 7 offences to be criminal in nature. This then raises questions related to category 5 and 6, and the discrimination provisions that are not currently allocated to a category. It is our view, as outlined in our response to question 17, that these areas may need to be recategorised. A logical basis on which to do so might be related to whether or not the offences should be civil or criminal in nature.

Part 3 – Other Obligations

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

WRMC accepted recommendation 142 of the review panel without modification; this recommendation stated that "definitions … for incident notification should reflect the principle that only the most serious events are to be captured…" This is an important consideration as the reason for notification should be to "allow the regulators to conduct investigations in a timely manner". It is also important to recognise that the requirement to notify an incident is linked to the requirement to preserve an incident site. These combined, and significant obligations (with a potential of $100,000 fines - $50,000 for breaching each requirement) mean that the circumstances in which there is a requirement to notify, and preserve the site, must be very clear and achievable. Three key concerns arise in relation to notification in the current provisions of the draft Model OHS Act (which are based on the current Victorian provisions).

- Two of the circumstances currently listed are: 35(1)(a) immediate treatment as an in-patient in a hospital; and 35(1)(c) medical treatment within 48 hours of exposure to a substance. The delay which will inevitably be involved in determining whether an injury is notifiable in these two circumstances will result in an employer being in breach of their obligations to preserve an incident site.

- Further 35(1)(b) includes serious head injury, serious eye injury and serious lacerations. It is often difficult for a person conducting a business or undertaking to determine what the regulator would determine to be serious; additionally, this information may not be available until after work has recommenced. What appeared to be a minor laceration may ultimately turn out to be deemed as serious once the person returns with a quantity of stitches.

- Victorian guidance material in relation to the notification of incidents defines "loss of bodily function" to include "loss of movement of a limb". This is generally interpreted by WorkSafe Victoria to include a fractured arm or leg; yet this is not clear in the Victorian Act as it is written.

It is important that the incident notification provisions, and associated site preservation obligations are written in a manner which are clear and able to be complied with. They should excuse a defendant who was subject to genuine mistake of fact.

In relation to the requirement to preserve the incident site, it is also important to recognise that the "person with management or control of a workplace" does not always have complete control of that workplace, or the people undertaking activities within that workplace. During consultation with our members we were provided with examples of times when it is impossible for the person with management or control to ensure the work site is preserved.

One example involved a situation where maintenance work was being undertaken on a truck; as the work was completed, the truck fell off the hoist; the person with management and control of the workplace recognised their obligation to preserve the incident site, but the burly truck driver was having nothing of it. Keen to resume his business immediately, he demanded his keys and drove the truck away. In another situation, a serious incident occurred whilst work was being undertaken in domestic premises; the worker was injured and taken to hospital by ambulance; by the time the employer arrived at the scene the householder had cleaned everything up.

The model OHS laws should be worded to reflect that the person with management or control of a workplace must do all that is reasonable to ensure that the incident site is preserved.

Other matters related to incident notification

The jurisdictional note at clause 36 states "jurisdictions may define what is meant by medical treatment". Further, the jurisdictional note at clause 37 states "a jurisdiction may amend this reporting requirement (if necessary) to remove duplicate reporting arrangements under local laws".

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Incident notification is one of the key areas that multi-state employers struggle with the most. The requirement to notify is rare, and when it occurs the need to make the decision is urgent. We expect that jurisdiction level modifications to clause 37 could be broader than merely when to notify or not. Further, a variation on what is medical treatment between jurisdictions is not workable.

We are likely to encounter the same broad range of differences if the provisions are adapted to meet local requirements to report other incidents / injuries and notify of WorkCover claims. Businesses want to ensure that they have exactly the same obligations to notify the safety regulator in all jurisdictions.

We strongly oppose the insertion of the jurisdictional notes at clauses 36 and 37.

Part 4 – Consultation, participation and representation

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

For the purposes of drafting an Act, the provisions are appropriately general and broad in nature. However, there are some specific details of the drafting which cause concerns.

Recommendation 96 of the review panel identifies the need to consult with workers "about matters affecting, or likely to affect, their health and safety." This wording creates a logical nexus between specific workers and the matters that are likely to affect them. However, the current drafting of clauses 45 and 46 could be interpreted as requiring a person conducting a business or undertaking to consult with <u>all workers</u> about matters likely to affect <u>any workers</u>. The wording in recommendation 99 deals with this difficulty by clearly connecting the requirement to share information and seek feedback with "workers [and other persons] directly affected by the health and safety matter"; these words should be inserted into the Act.

The specific wording utilised to describe the nature of consultation at clause 46(1)(b) states that:

(b) Workers be given a reasonable opportunity:
  (i) to express their views and to raise occupational health and safety issues in relation to the matter; and
  (ii) to contribute to the resolution of the matter

This construct implies that every time consultation is undertaken there will be a need to "resolve a matter". Issue resolution is covered by a separate division of the draft Model OHS Act and should not be confused with the important obligation to consult and seek views from the relevant workers, and their representatives.

An adaptation of the recommended wording in the report (at recommendation 99) would be an improvement – "providing workers … directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues."

However, we believe that the best approach would be "providing workers … directly affected by the health and safety matter with a reasonable opportunity to express their views about the matter".

In recommendation 99 it is highlighted that "consultation is not agreement". This is consistent with our submission in response to the Issues Paper (Ai Group, page 40) where we stated "It must be clear that consultation is not about agreement. Duty holders have an obligation to make decisions and minimise risk. Attempts to reach agreement may unduly delay decisions and could result in a lower level of risk control than would otherwise be implemented". It is essential that this point is made clear in the Act by being included in the "nature of consultation" or as a note directly following that clause.

The overlapping consultation responsibilities of a range of persons conducting a business or undertaking, have the potential to create confusion and step into areas associated with contracts of employment and contractual arrangements between contractors, clients and suppliers. It will be important to provide guidance material which helps to clarify how these difficulties might be addressed in practical terms.

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

Clause 46(3) and (4) refer to an "agreed procedure" for consultation that may be determined in the workplace.

Ai Group believes that it may be appropriate for an organisation to establish an agreed procedure about how consultation will be commenced. For example – the person conducting the business or undertaking may utilise tool box or start of shift meetings to initiate consultation on OHS matters; dependant on the nature of the matter the process for further consultation will be discussed with the team and a plan and timetable for consultation will be established following those discussions.

However, no organisation could develop an "agreed procedure" for consultation that would cover every foreseeable set of circumstances from relocating the water cooler to a full relayout of a workplace.

With this in mind, we can not see how a "default procedure" could provide any further assistance to workplaces than that which is included in the draft Model OHS Act.

Clause 46 – Nature of Consultation – should be the reference point for persons conducting a business or undertaking, and their workers, to determine the appropriate approach to consultation in each set of circumstances.

Effective consultation relies on everyone in the workplace accepting that the processes for consultation are appropriate to their organisation and that the person conducting a business or undertaking is genuinely engaging in the process. In addition, as acknowledged within the Discussion Paper "the scope of this duty depends on the circumstances of each case" (p.13). Hence, it is not possible or appropriate to attempt to design a "default" procedure which would need to be applied in all circumstances where agreement has not been reached on an internal consultation procedure.

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?

The establishment of work groups, and the subsequent election of health and safety representatives, create a range of obligations on employers and rights and powers for health and safety representatives. In some circumstances, it will be appropriate to establish work groups covering 2 or more businesses or undertakings. However, even on a construction site (where multi-employer work groups are most often in place) the nature of work and the geographical spread of the operations on a large civil and mechanical engineering project may mean that multi-employer work groups are not universally appropriate.

Further, there could be conflicts of interest if the elected health and safety representatives is intervening in the affairs of a person conducting a business or undertaking (especially issuing a PIN or directing a cessation of work) who is not their employer. They may even be a competitor, co-incidentally on the same site.

There are also circumstances where it would be inappropriate to establish such arrangements which may create unnatural relationships between organisations that just happen to be located in the one geographical location, such as an industrial estate.

The majority of circumstances in which multi-employer workgroups are currently established are appropriate and logical.

However, the current drafting of the provisions for multi-employer work groups may lead to some unintended circumstances where a person conducting a business or undertaking may be required to allow one of their workers to be the elected health and safety representatives for a number of unrelated businesses, or have the worker of a competitor, customer, client or unrelated business able to exercise powers in relation to their activities.

Our strong submission is for the establishment of multi-employer workplaces to be only by agreement, utilising an "opt out" clause such as that found at section 51 of the Victorian Act; and protecting the person conducting a business or undertaking from coercion as provided for in section 53 of the Victorian Act.

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?

Ai Group believes that a "reasonable time" is an appropriate approach. If it is believed that the employer has not acted within a reasonable time, it is possible for an inspector to be asked to attend and determine the matter. If a timeframe was to be prescribed, we would favour 28 days.

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?

Clause 53 of the draft Model OHS Act requires a person conducting a business or undertaking to "facilitate an election … as soon as practicable … after work groups have been established …" and "as soon as reasonably practicable" after a request is received if work groups are already established; it is not clear why there would be a different timing requirement for these two similar sub clauses.

Clause 55 enables the workers in a work group to "determine how an election … is to be conducted … [and] the election may be conducted with the assistance of a union or other person or organisations"

These provisions may not always work well together, and the operation of clause 55 may interfere with the ability of the person conducting a business or undertaking to meet their obligations under clause 53. Therefore, it is not appropriate to establish a time limit, nor to hold the person conducting a business or undertaking accountable if there are delays outside their control in holding the election.

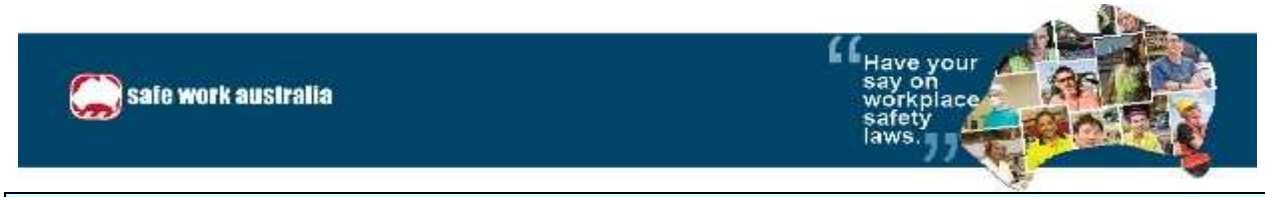
Further information about elections is outlined in Regulation 7. However, there is no reference to the regulations within the related clauses of the Model OHS Act. To ensure that everyone understands the full requirements related to elections, it is important that the Act includes a reference to the regulations.

Other matters related to elections of health and safety representatives

In a small number of cases, the person conducting a business or undertaking (and/or some workers) may be concerned about the efficacy of an election. In such circumstances, the person conducting the business or undertaking should have the ability to request that the regulator administer the election, as a secret ballot.

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?

The discussion paper recognises that a range of circumstances may influence the ability of the person conducting a business or undertaking to facilitate attendance at training. A “reasonable time” is an appropriate timeframe to include in the Act. If it is believed that the employer has not acted within a reasonable time, it is possible for an inspector to be asked to attend and determine the matter.



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Other matters related to health and safety representatives

Potential for multiple health and safety representatives in a work group

The combined recommendations of the review panel from 100 through to 104 outline the process of establishing work groups and electing health and safety representatives and deputy health and safety representatives. It is our understanding of these recommendations that it was intended that one health and safety representative be elected for each work group and possibly a deputy health and safety representative. However, clause 50(3)(b) of the draft Model OHS Act specifies that the purpose of negotiations regarding work groups includes at (b) "the number of health and safety representatives and deputy health and safety representatives (if any) to be elected."

If work groups are established appropriately there should only be a need for one health and safety representatives and possibly a deputy health and safety representative to be elected for each work group. A work group which is represented by more than one health and safety representative can lead to confusion amongst members of the work group and/or the person conducting a business or undertaking about who should be representing the views of the work group. This would be particularly difficult if more than one health and safety representative issued a PIN relating to the same concern with different requirements for rectification.

The provisions should clearly identify that each work group has the ability to have one health and safety representative and one deputy elected to represent that group.

When a deputy health and safety representative has the right to exercise powers

Clause 61(2) should be modified to make it clear that the deputy health and safety representative can perform the duties of the health and safety representative **only if** the health and safety representative ceases to hold office or is unable to perform the functions.

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Training of health and safety representatives

The review panel recommended at 110 that health and safety representatives must attend training – "an initial five day, competency based course approved by the regulator". In their response, WRMC stated that health and safety representatives are "entitled to training"; it should be approved by the regulator "but the Act should not specify the length of the training or whether it is competency based". It is not clear from these words whether there was a subsequent intention to specify the length of the course or whether it is competency based in the Regulations. The draft Model OHS Act and Regulations indicated that the decision has been interpreted to mean that the course will not be competency based but it will be five days (specified in the Regulations). It is not clear how this interpretation can be arrived at, as the question of length and competency were both specified in the same sentence. Either both are rejected or both are covered in the Regulations.

There has been significant discussion amongst stakeholders about whether training for health and safety representatives should be mandatory and whether it should be competency based. The arguments against mandatory competency based training seem to focus on two key concerns:

- the fact that health and safety representatives do not have functions (only rights and powers) and therefore they do not need to be competent; and
- a concern that people will be discouraged from volunteering to be a health and safety representative if they have to participate in training and be subject to assessment which may carry with it a "pass" or "fail" result.

These arguments seem to overlook that whether we are talking about functions or rights and powers, health and safety representatives are being asked to do something about which they may have no knowledge, including exercising a power to issue PINs and directing a cessation of work. It is incumbent on persons conducting a business or undertaking, and unions, to ensure that the health and safety representative is given a level of skill and knowledge that will enable them to confidently and properly exercise these rights and powers. When considering competency based training, it is the responsibility of the trainer to ensure competency is achieved; if this does not occur in the context of the standard training program, the trainer initiates further discussion and interaction to ensure that competency is achieved.

To do anything other than provide access to training which ensures the health and safety representatives are equipped to exercise their powers and functions if doing them a disservice.

Ai Group believes that it is appropriate to specify that the initial course should be of five days duration and that it should be competency based. If there is a policy decision that the course does not need to be competency based, then a shorter period of training would be justified.

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Approval of training

Approved training courses for health and safety representatives, and others, are currently approved by each regulator. The content and focus of the training varies from state to state, and the processes and requirements for approval of organisations and individuals to deliver the training also vary widely. This results in significant resources being expended by national training organisations to achieve approval in each jurisdiction. As we move to one set of national OHS laws, it would seem that a nationally agreed process of approval, supported by mutual recognition, should be adopted by the regulators. As education and training will be a major focus for all stakeholders, particularly during 2010 and 2011 as we prepare for implementation of the laws, it is essential that there is an early focus on when and how training requirements, and approval processes will be established. It may be appropriate to set up a temporary advisory group within SIG-OHS to ensure that decisions related to the content of approved training and processes for approval of courses and providers is addressed as a matter of urgency.

We submit that approval of training should be subject to the course being open to participants who are not health and safety representatives This will enable others in a workplace, including the management representatives who will be consulting with health and safety representatives, to undertake the same training to enable them to understand the rights and powers of the health and safety representative role, and thereby greatly facilitate consultation.

Payment for time spent by health and safety representatives performing their functions and attending training

Clause 64(3) states that any time "… spent for the purposes of performing their functions must be with such pay as they would otherwise receive". Ai Group supports this approach in principle, but believes that the provision should be reworded to state "any reasonable time…"

Further, there should be provisions in either the Model OHS Act or Regulations which ensure that the scheduling of training does not unnecessarily or unreasonably impose overtime payment obligations on the person conducting a business or undertaking, i.e. by attending training on days when overtime would normally be worked without the ability to reschedule the overtime to another day as a means of achieving the expected outcome of income maintenance during training.

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Removal of health and safety representatives

Clause 58(d) states that a person ceases to be a health and safety representative "if the person is removed from that position by a majority of the members of the work group in accordance with the regulations". However, the current draft Model OHS Regulations do not appear to cover the processes for a work group to remove a health and safety representative. This needs to be addressed, and should take a form similar to that currently in the Victorian Act.

Limiting functions and obligations to the specific work group

The functions of a health and safety representative and the obligations of the person conducting a business or undertaking in relation to that health and safety representative should all be specifically limited to matters that relate to the members of the work group.

Clauses of the draft Model OHS Act which do not clearly do this at present are 62(b) and 64(b)(i).

Transitional arrangements

The Act and regulations do not currently specify any transitional arrangements associated with health and safety representatives. There should be transitional arrangements which specify:

- whether health and safety representatives elected under previous Acts continue to hold their position;
- whether the pre-existing terms of office will continue to apply for those elected under previous Acts; and
- the status of training provided to health and safety representatives that has been provided under previous Acts.

It is our view that existing health and safety representatives should continue to hold office until their previous term of office expires. If a health and safety representative (or committee member in NSW) has undertaken approved training under previous laws, this should be seen to be the equivalent of the initial course of training. The first refresher course offered to health and safety representatives should be a course which updates their knowledge in line with the new laws; this may need to have some specific variations between states, to highlight what has changed.

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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?

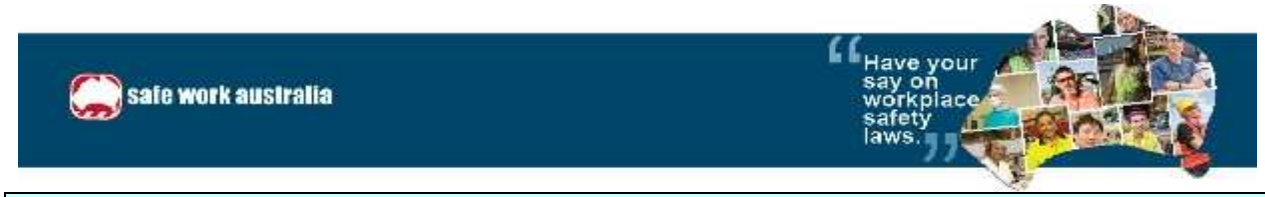
In line with related provisions in the draft Model OHS Act, a "reasonable time" would be an appropriate timeframe to include in the Model OHS Act. If it is believed that the employer has not acted within a reasonable time, it is possible for an inspector to be asked to attend and determine the matter.

Other matters related to health and safety committees

The recommendations of the model OHS Act were not specific about the structure and functions of the committee. Clause 70 of the Model OHS Act outlines the role of the committee to include at (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".

This function does not appear to be an appropriate construction as it implies that the role of the committee is to undertake tasks for which responsibility ultimately rests with the person conducting a business or undertaking, in consultation with workers and/or health and safety representatives. Further, it is not appropriate to specify "other languages if appropriate" within this provision.

It would be more appropriate to modify this sub clause to read "to provide a forum for the person conducting a business or undertaking to consult on the formulation, review and dissemination of standards, rules and procedures and to facilitate the communication of these matters to the workplace"



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Other matters related to consultation, participation and representation

Issue Resolution

Recommendation 120 outlined a proposed process for the resolution of issues. In response WRMC stated "It was agreed there should be a process for the resolution of issues but the detail should be dealt with in regulations or codes of practice…" In spite of this decision, the issue resolution provisions are currently covered by clauses 73 to 74 of the draft Model OHS Act and Regulation 9 of the draft Model OHS Regulations. The provisions in the Act attempt to develop a broad obligation to resolve issues, whilst the regulations provide a "default procedure" that must be followed if there is no "agreed procedure" for the workplace.

The construction of clause 73, at subclauses (2)(4)&(5) appears to be focused on who the parties are, and who might get involved in the issue resolution process. The obligation to attempt to resolve the issue is hidden in sub clause (3) which is relatively small and also includes reference to an agreed procedure and a default procedure.

It is Ai Group's view that a more workable solution would be to have a general statement encompassing the general requirement that "the parties must make reasonable efforts to achieve a timely, final and effective resolution to the issue". A separate division could then refer to the agreed and/or default procedures and refer the reader to the regulations for the detail of the manner in which issues could and should be resolved.

In order to support the flexible approach that should be available to resolve issues in a timely manner, an appropriate statement might be one that mirrors regulation 29 of the NSW OHS Regulations:

For the purpose of resolving the matter [issue]:
(a) the applicable OHS consultative arrangements are to be used; and
(b) the matter must be formally referred to the employer [relevant person conducting a business or undertaking], and
(c) the employer [person conducting a business or undertaking] is to consider the matter and respond in a timely manner.

If the matter is not resolved after the employer [person conducting a business or undertaking] has been given a reasonable opportunity to consider and respond to the matter, there may be a request for an investigation of the matter by the inspector

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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?

Ai Group strongly advocates that the provisions of the Model OHS Act in this regard should reflect the provisions of the Fair Work Act, (although we prefer the words currently in the draft Model OHS Act to the Fair Work Act provision). The Fair Work Act provisions are directly related to a determination on whether the cessation of work is industrial action, or not.

It would be very disruptive for consideration of that matter to be on a different basis to the statutory right to cease work (without breaching one's employment contract) under the OHS law.

The words should be consistent and the terminology should therefore be "reasonable concern".

Q29.	Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?

See answer to Q30 below.

Q30.	Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?

The powers to direct a cessation of work or issue a provisional improvement notices (PIN) are significant powers which must be accompanied by appropriate safeguards for both the person conducting the business or undertaking and the elected health and safety representative. For these reasons it is important that the health and safety representative has received appropriate training which enables them to understand key OHS principles and, more importantly, the extent and context of their powers.

It is our understanding that there are some concerns that persons conducting a business or undertaking may inappropriately delay access to training in order to delay the ability of these powers to be exercised.

Given that inspectors can attend the workplace to determine whether the employer is being reasonable in relation to access for training, Ai Group believes it is possible for an inspector to deal with the small number of circumstances where an employer may be behaving inappropriately.

See also the views outlined above in relation to training under the heading "other matters related to health and safety representatives"

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

It is not appropriate for the minimum compliance date for a PIN to be less than the minimum compliance date for an Improvement Notice issued by an inspector. Whilst the provisions related to compliance dates for improvement notices are currently unclear (see our comments on this point below) it is our understanding that the minimum compliance date for an Improvement Notice will be 14 days; the same timeframe should be applied to a PIN.

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?

The discrimination provisions are important to ensuring that workers and, particularly health and safety representatives, are protected when exercising powers or taking actions related to OHS; they are necessary to ensure that the small number of unscrupulous employers who may behave inappropriately will be dealt with. It is also important to protect workers and health and safety representatives from any action that might be taken by a small number of other interested parties, including unions, to coerce or induce them to exercise their powers for purposes ultimately other than OHS.

When exercising powers or making decisions about their role in OHS workers and health and safety representatives may be unsure of what the appropriate steps are and may be concerned about the impact their decision will have on themselves, their colleagues and the person conducting a business or undertaking. When the powers relate to ceasing work or issuing a PIN, they may be vulnerable to pressures from the person conducting a business or undertaking, fellow workers, contractors, shop stewards or union organisers.

There must be a protection from any undue pressure that may be placed on a worker or health and safety representative to exercise their powers in a particular way, e.g. issue a PIN or direct a cessation of work during an industrial dispute.

Ultimately, such action could result in an inappropriate souring of the relationship between the workers and the person conducting a business or undertaking, which is more detrimental than any action taken by the person conducting a business or undertaking. There must be prohibitions on such action so that those who may be tempted to coerce or induce will understand the potential liability that they might incur. The penalties for coercion or inducement should be the same as those for discrimination.

Other matters related to discrimination

Orders for damages and civil remedies

Clauses 100 and 101 do not provide for any limit to the damages available to a claimant in civil proceedings for discrimination. This clause should be made consistent with the Fair Work Act provisions that provide remedies for adverse action.

Part 6 – Workplace entry by OHS entry permit holders

General comments regarding Right of Entry

In our response to the questions raised in the Issues Paper Ai Group supported the role of union right of entry to inquire into a suspected breach of OHS laws. We did not support a broader right of access to advise and consult on OHS generally, noting that the right to access to consult and advise on OHS is currently only available in the minority of jurisdictions. The review panel recommendation (211) that union right of entry should also be provided to advise and consult has been accepted by WRMC. Our comments are made in the light of this decision, whilst noting that we do not believe it is necessary to provide such a right under these laws, given that a right to enter the site to "hold discussions" on matters that would normally include OHS, is included in the Fair Work Act.

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We acknowledge the review panel recommendations at 212 through to 216 and the WRMC decision to accept these recommendations with some qualifications. Specifically, the qualification at recommendation 214 that "these provisions, especially in relation to whether or not 24 hours notice of entry is required, and in relation to giving notice after entry to the person conducting the business or undertaking, should be consistent with the Fair Work Act 2009." We note that there are some significant variations from the Fair Work Act; we also note that where the provisions are mirrored, they are not always relevant to the OHS powers.

Ai Group is also concerned about the additional provisions in the draft Model OHS Act which enable the union to access a workplace, without the constraints applied by the right of entry provisions. These provisions are outlined below:

Clause 62 – Functions and powers of health and safety representatives
(f) [a health and safety representative can] whenever necessary, request the assistance of any person

Clause 64 – General obligations [in relation to health and safety representatives] of person conducting business or undertaking
(1) [a person conducting a business or undertaking must] (e) allow a person assisting a health and safety representative to have access to the workplace if that is necessary to enable the assistance to be provided. (4) despite subclause (1), the person conducting a business or undertaking is not required to allow a person assisting … access … if the assistant has had his or her OHS entry permit revoked or suspended or is disqualified from holding an OHS entry permit

Clause 50 – Negotiations for agreement for work group
(1) A work group is to be determined by negotiation and agreement between: (a) a person conducting the business or undertaking; and (b) the workers who will form the work group or their representatives.

Clause 55 – Procedure for election of health and safety representatives
(3) If the majority of workers in a work group determine, the election may be conducted with the assistance of a union or other person or organisation.

Clause 73 – Resolution of health and safety issues
(2) The parties to the issue are (d) if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative.
(5) A representative of a party to an issue may enter the workplace for the purposes of resolving the issue.

Definitions (applicable to potential union access)
Representative, in relation to a worker, means:
(a) the health and safety representative for the worker; or
(b) a union representing the worker; or
(c) any other person the worker authorises to represent him or her.

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As union right of entry is now available to consult and advise on OHS generally it is our view that, whenever the union enters the site under clauses 62, 64, 50, 55 or 73 they must be bound by the right of entry provisions established in Part 6, including provisions regarding 24 hours notice.

Q33. Are the notification requirements appropriate?

The notice requirements related to entry to "consult and advise" must be consistent with the Fair Work ability to enter to "hold discussions", i.e. 24 hours. If the period of notice were to be less, we would create a risk that OHS entry powers would be misused, discrediting the law in this regard.

Clause 108 of the draft Model OHS Act states that, in relation to an entry to inquire into a suspected contravention, the OHS entry permit holder must "as soon as reasonably practicable after entering a workplace under this Division, give notice of the entry and the suspected contravention…" Some employers are concerned that this enables the OHS entry permit holder to enter their site without permission and to bypass the normal processes of induction and site safety and security requirements.

The best possible outcome of an entry to inquire into a suspected contravention is for the person conducting a business or undertaking to acknowledge the safety concerns raised and initiate corrective actions during the visit of the OHS entry permit holder. This is more likely to be achieved if the OHS entry permit holder is able to establish an appropriate relationship with the person conducting a business or undertaking and this can best be achieved if some level of notice is provided.

To alleviate the fears of some employers, and create an expectation of a positive approach to addressing safety concerns, it would be beneficial to reword the clause 108(1) to state: "The OHS entry permit holder must, unless it is not reasonably practicable to do so, advise the person conducting the business or undertaking of their intention to enter to inquire into a suspected contravention prior to arriving at the site. If it is not reasonably practicable to provide prior notice, the OHS entry permit holder must, unless it is not reasonably practicable to do so, advise the person conducting the business or undertaking when they arrive at the site.

The practical impact of this change will be negligible, but it will serve to address the legitimate concerns of employers in relation to people accessing their workplaces, and potentially putting themselves and/or others at risk, without the knowledge of the person conducting a business or undertaking.

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When comparing the similar provisions in the Fair Work Act we note that:

- The equivalent provision in the Fair Work Act – limits access to a member of the permit holder's organisation s.481(1)…whilst the draft model OHS Act applies to persons eligible to be members.
- The Fair Work Act s.481(3) states the "burden of proving that the suspicion is reasonable lies on the person asserting that fact". The draft model OHS Act is silent on this matter.
- The legislative note in the Fair Work Act s.481(3) refers people to s 503(1) which deals with penalties for misrepresentation. Misrepresentation provisions are in the draft Model OHS Act, but they are not cross-referenced at this point.

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?

We do not believe that the additional bureaucracy, that would be associated with a specific authorisation process for an OHS entry permit holder, is warranted. The activities undertaken by a permit holder when they enter a site will predominantly be associated with communication and discussion with their members. Any entry by a union official, whether under workplace relations laws or OHS laws, may lead to discussions with their members about OHS matters. Accordingly, it is in the interests of all union officials to have a working knowledge of OHS laws, and of course, their powers on entry.

The authorisation obtained under the Fair Work Act or state based workplace relations laws should be sufficient authorisation for entry under OHS laws.

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 are appropriate for contraventions of this part. The penalty levels should be consistent with those that apply under the Fair Work Act?

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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?

As outlined above, WRMC qualified their support of recommendations relating to right of entry stating at recommendation 214 that "these provisions, especially in relation to whether or not 24 hours notice of entry is required, and in relation to giving notice after entry to the person conducting the business or undertaking, should be consistent with the Fair Work Act 2009". We note that there are some significant variations from the Fair Work Act; we also note that where the provisions are mirrored, they are not always relevant to the OHS powers. We have addressed some of these concerns in response to the questions above. Further important matters are highlighted below:

Undue Disruption

The overarching acknowledgment at s480 of the Fair Work Act that employers have the right to go about their business without undue inconvenience is not present in the draft Model OHS Act; and the requirement at section 490 of the Fair Work Act that discussions can only be held during mealtime or other breaks, is absent from the draft Model OHS Act. In the draft Model OHS Act, the only restriction placed on the exercise of their powers is in an obscure location (in a separate division from the specific right of entry provisions) at clause 116 that states "an OHS entry permit holder must ensure that the entry causes no undue disruption to the work at the workplace".

Ai Group is seeking the following:

- That the provisions relating to "undue disruption" be clearly and transparently located within ***Division 2 – Entry to inquire into suspected contravention***; and
- That entry under ***Division 3 – Entry to consult and advise workers***, should have the same requirements as those in the Fair Work Act

If these modifications are not made, we expect that:

- Persons conducting a business or undertaking will be unaware of the limitations relating to "undue disruption" and
- the OHS provisions to consult and advise will be utilised for many of the entries that should be more properly undertaken to "hold discussions" under the Fair Work Act

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Power to inspect and make copies of any record or document

Clause 107(1)(d) of the draft Model OHS Act allows the OHS entry permit holder to "inspect, and make copies of, any record or document that is directly relevant to the suspected contravention…" These provisions are the same as those in the Fair Work Act, however the range of documents that might be directly relevant to a suspected contravention of the OHS Act are far broader than those related to a breach of the Fair Work Act. It is not appropriate for the OHS entry permit holder to be able to copy this broad range of documents. Further it should be recognised that the powers under the Fair Work Act are investigative powers and the union has a right to initiate action for breaches of the Fair Work Act. As there is no power to initiate action under the draft Model OHS Act, this power is not necessary.

Ai Group is seeking the following:

- That powers in relation to documents be limited to "inspect", not to copy.

Requirements for OHS entry permit holders

Clause 112 of the draft Model OHS Act states that the OHS entry permit holder must not contravene a condition imposed on the OHS entry permit. The comparative section of the Fair Work Act (at section 486) states that the permit holder must not contravene this subdivision; and they cannot enter or remain on the premises, or exercise any other right, if he or she contravenes this Subdivision or regulations.

A similar provision should be added to the Model OHS Act.

A person must not hinder or obstruct.

Clause 135 states that "an OHS entry permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally and unreasonably delay, hinder or obstruct any person, or otherwise act in an improper manner". Clause 136 states that "a person must not refuse or unduly delay entry into a workplace by an OHS entry permit holder who is entitled to enter the workplace under this Part". Clause 137 states that "a person must not hinder or obstruct an OHS entry permit holder in entering a workplace or in exercising any rights at a workplace in accordance with this Part".

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It is not appropriate that the test placed on the OHS entry permit holder relates to "intentionally or unreasonably", whilst the person required to allow permit holder access to the workplace has a stricter obligation to not refuse, delay, hinder or obstruct, without the same qualification regarding intentional or unreasonable. This is also inconsistent with the Fair Work Act which states that a person must not intentionally hinder or obstruct a permit holder.

The Model OHS Act should be modified to address this.

Part 7 – The Regulator

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

The recommendations related to the establishment of guidelines were preceded in the discussion within the second report including reference at paragraph 35.6 that "Only the Victorian Act specifically provides the regulator with the power to make guidelines on the application of the legislative provisions (from the Act or regulations). Hence, the recommendation should be interpreted to mean that the Victorian provision should be adopted. The provisions relating to guidelines (at clause 145) are largely consistent with section 12 of the Victorian Act. However, in order for the provisions to work as anticipated, the provisions should include the additional Victorian provisions covered as follows –

- Section 13 – How guidelines are made;
- Section 14 – Withdrawal of guidelines; and
- Section 15 – Guidelines do not affect rights and duties.

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Part 10 – Review of Decisions

Q38. Is the list of reviewable decisions appropriate?

The current list of reviewable decisions is incomplete. It should include all decisions made by an inspector. Specifically, the following decisions should be added to the list:

- the issuing of an infringement notice (Part 11, Division 3)
- requesting documents (clause 163)
- that a reasonable excuse does not exist for a refusal to answer questions (clause 163)
- a requirement that an interview be held in private (clause 163(3))
- to retain documents (clause 164)
- to seize dangerous things and deal with them (clauses 166 and 167)
- a requirement for the provision of information, documents and evidence (clause 210)
- decisions in relation to licensing, authorisations etc

As well as ensuring that the list is complete, it will be necessary to undertake further analysis of which parties can initiate a review of which decisions. The current list provides some unexplained variations between similar provisions. We expect these are attributable to drafting errors, rather than specific decisions about the relevant parties.

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

The processes and timeframes (14 days for a decision to be made) for internal review are generally appropriate, as they apply to improvement notices. However, prohibition notices, non-disturbance notices and decisions to seize or forfeit a thing require a quicker response and should have a 72 hour turnaround

The provisions associated with stays are not appropriate.

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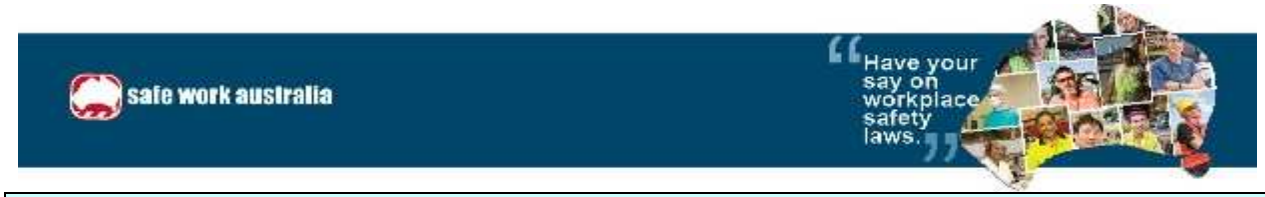
We believe that, in the case of decisions that do not require immediate action (i.e. those that do not relate to prohibition notices or non-disturbance notices), an application for internal review should automatically stay the notice. This will reduce the amount of time that those managing the internal review process will need to utilise to determine the inevitable applications for a stay that will accompany the application for internal review.

In relation to notices that are not automatically stayed, the current provisions do not appear to be appropriate. However this is dependant on how the current provisions would be interpreted. Clause 224(2) states that "the reviewer must make a decision on an application for a stay within 1 working day after the making of an application". If this is 1 working day, based on a Monday to Friday week of the regulator, this time is inappropriate. However, if it takes into account the work arrangements of the person conducting a business or undertaking, the provision would be acceptable. It is essential that, if the business or undertaking operates 24/7, a request for a stay of a prohibition notice issued at 5pm on Friday afternoon is addressed well and truly before 5pm on Monday. For the purpose of clarity, we believe the timeframe should be worded as "within 24 hours".

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

The existence of Internal Review recognises that inspectors sometimes make mistakes of judgment and their notice should be reviewable. Hence, given that prohibition and non disturbance notices can cause part or all of a workplace to cease operation, it is essential that a person conducting a business or undertaking can apply for a stay of that notice.

The stay provisions should be amended to allow for automatic stay of all decisions other than a prohibition notice or a non-disturbance notice.



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Other matters related to review of decisions

Internal Review – Merits review

The Model OHS Act should clearly provide that the internal and external review is a merits review of the decision, taking into account what is known at the time of the review, not limited to knowledge at the time the decision was made. The whole concept of review of decisions is based on the recognition that the inspectors may make decisions in the interests of safety based on limited knowledge, and because of that the decisions may not be the most appropriate. A merits review allows the right approach to be adopted based on more complete and better quality information.

Provisions for external review are inadequate

We understand that each jurisdiction has its own tribunal system for dealing with administrative decision reviews. The Model OHS Act will need to have some jurisdictional differences in that respect. The Model OHS Act should, however, state clearly the fundamental principles and requirements for external review of decisions, subject to such modification or supplementation and the operation of the rules of the relevant tribunal. This may include details of the time within which an external review may be brought; that the review must be a merits review; clarification that the stay provisions in clause 224 apply to external review, as well as internal review. There may be other matters that are appropriately provided for in the Model OHS Act, rather than relying upon the provisions of the legislation and rules relating to the relevant tribunal.

How this can be achieved should be reviewed by Safe Work Australia.

The aim of the external review provisions in the model Act will be to ensure as much consistency as possible in the approach in all jurisdictions as can be achieved given the operation of legislation and rules of the relevant tribunals.

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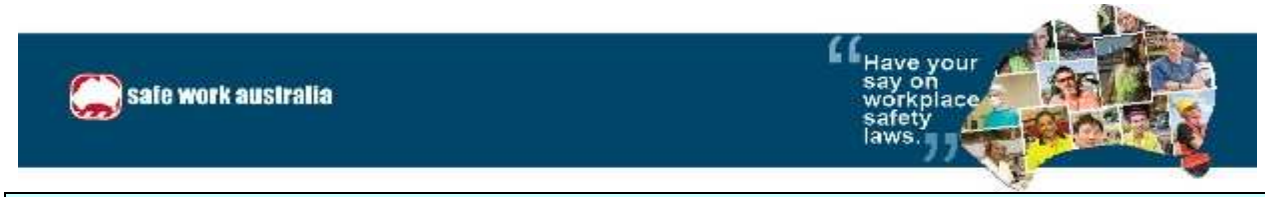
Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
The matters to be considered when determining work groups are going to vary across a range of workplaces. It would be more appropriate to provide the matters to be considered within a Code of Practice where their specific application can be investigated more fully than as a list of items in the regulations.
Do you have any other comments?
Objects
The Objects in clause 8 include at (c) the following object: (c) to encourage unions and employer organisations to take a constructive role in promoting improvements in occupational health, safety and welfare practices and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; We believe this object is superfluous, and we can find no specific provisions of the Act that further the cause it pronounces. Safe Work Australia, or individual regulators, may pursue this function, but the draft Model OHS Act does not. The majority of the workplaces covered by the law are likely to have no union or employer association membership. To the extent it makes a point about co-operative relationships, then subclause (b) and (d) cover that objective.



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Other matters related to PINs and work cessations

The draft Model OHS Act (at clause 86) provides that a health and safety representative may at any time cancel a provisional improvement notice issued to a person by written notice given to that person. However, there are no provisions that enable a health and safety representative to confirm compliance with a PIN or to "cease" a cessation of work. These administrative provisions should be included within each of the relevant divisions of the Model OHS Act.

Service of notices

Clause 202 outlines the process for "service and communication of notice" by an inspector. These provisions should be reordered to provide a logical "hierarchy" which clearly identifies the preference that a notice should (a) be handed to an individual who is the person to whom the notice applies (officer, worker or other person) or the individual who is apparently representing the person conducting the business or undertaking which must comply with the notice. If this is not possible, by sending the notice as outlined in the second half of 202(1)(a), which would become (b). The current Sub-clause (c) would remain as (c) and (b) would become (d).

Clause 85 outlines how a health and safety representative must service a provisional improvement notice. Sub-clauses (a) and (b) should be reordered to require the health and safety representative to firstly attempt to issue the notice to the individual who appears to be representing the person conducting a business or undertaking which is required to comply with the notice.

Jurisdictional Notes

Some jurisdictional notes are necessary, and will not modify how an employer sees the Act operating on a day to day basis

Many of the jurisdictional notes relate to administrative matters which, within the current constraints of state/territory laws, are necessary to be inserted into the Act. We ask the jurisdictions to ensure that, when they make the necessary insertions, this is done without distorting the overall numbering system of the Acts. For ease of identification and comparison, especially for organisations operating across more than one jurisdiction, it would also be valuable to have a schedule within each Act, or established and maintained by Safe Work Australia, which provides comparative data which enables, at a single glance, to identify which parts of each Act need to be read to ensure a complete understanding of all the laws.

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Some of the jurisdictional notes are not appropriate; our views are presented below

Clause 35 and 37 – Incident notification – we have commented on this in our response to question 20

Clause 11 – Scope (and related notes such as that which appears in relation to clause 3 – objects"): These clauses allow jurisdictions to broaden the scope of their OHS Act to include at (1) "the storage and handling of dangerous goods even if the dangerous goods are not at a workplace or for use in carrying out work", and at (3) "the operation or use of high risk plant, affecting public safety, even if the plant is not situated, operated or used at a workplace or for carrying out work"

It is our understanding that some of the jurisdictions believe these provisions are necessary to enable them to continue to regulate matters which are currently regulated under their OHS laws; if the scope was not able to be extended, an area currently regulated will become unable to be regulated. In other jurisdictions these matters are either regulated by separate departments or authorities, or the OHS regulator is enabled to regulate these risks under separate laws. We understand the importance of this matter, but believe that it could be addressed by writing separate laws which can be administered by the OHS regulator, rather than creating unnecessary differences between jurisdictions when adopting the Model OHS laws.

Clause 145 – Power to make guidelines – we have made comment on this clause in our response to question 37. If the recommendations we make are adopted, there should not be any need for jurisdictions to insert their own specific provisions. If it is necessary to insert varying provisions, the jurisdictional notes should be modified to ensure that they clearly articulate the intent of the guidelines and give scope for each jurisdiction to determine how they achieve this intent.

Clause 146, 147 and 225 each refer to a jurisdictional ability for variations to be made to the manner in which, respectively: delegations are made; inspectors are appointed; and proceedings are brought. We are concerned that these provisions which appear to be of an administrative nature may allow jurisdictions to give additional roles and powers to unions, which are beyond the accepted recommendations, but currently subject to much political pressure.

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Division 3 – Infringement notices – the only reference to Infringement notices in the Act is the jurisdictional notes which state "jurisdictions may include local provisions to: enable an infringement scheme to be established in relation to this Act; and prescribe the offences for which infringement notices may be issued. We note that, whilst the review panel recommended that infringement notices should be included in the OHS enforcement regime, no guidance was provided on what this should look like. Hence, we cannot rely on the report or the WRMC acceptance of the recommendation to give us any clear guidance about what jurisdictions should be doing to adopt infringement notices in their jurisdiction.

We understand that the matter of infringement notices has been approached in this manner due to the varying way in which infringement notice regimes have been, or could be, implemented in each jurisdiction. This is not an appropriate approach to such a significant part of the model OHS laws, particularly as consistent compliance and enforcement approaches are such a crucial part of the acceptance of model laws.

As outlined in our submission in relation to the Issues Paper (pp.62-63), Ai Group does not support the concept of Infringement Notices as we believe that they do not have a logical role in the structure of law enforcement tools:

> Most people understand the concept of infringement notices in relation to breaching road laws. In those circumstances, a minor infringement will attract a fine and demerit points, more significant breaches will attract higher fines and more demerit points, the most significant breaches will result in a loss of license etc. It is recognised that there is an escalating scale of penalties as the breach becomes more significant. In the safety arena, this does not always occur. As highlighted above, improvement and prohibition notices are not seen by the regulator as imposing a "punishment"; they simply require the employer to meet their OHS obligations. Hence, there is a significant "gap" between infringement notices as one level of punishment, and prosecution as the next level of punishment.
>
> It is our view that infringement notices can only really be used in circumstances where the breach is black and white in nature, i.e. failure to have a license, failure to have plant registered; failure to display signage. Most of these breaches are relatively minor in nature. Breaches of the general duties, which are more significant, can only be addressed by improvement or prohibition notices, not summary action. Prosecutions are very rare, as they should be, in the overall scheme of the enforcement process for general duties.
>
> Therefore, having infringement notices in the enforcement system gives an employer the impression that not having signage displayed is a more important breach than not controlling a significant risk of a manual handling injury. For these reasons, Ai Group does not generally support the use of infringement notices. It may be appropriate to have a system of "fines", escalating to prosecution, for failing to comply with an improvement or prohibition notice. This is consistent with a more balanced and graduated enforcement regime.

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However, if infringement notices are to be included in the regime, it is essential that they are consistent across all jurisdictions, and that the principles we have highlighted above are considered in their establishment.

Recognising the jurisdictional difficulties, the following options should be explored:

- Establish, in the Model OHS Act (possibly through a more detailed jurisdictional note), an expectation that the jurisdictions will establish an agreed range of offences, with associated penalties, that will be adopted in each jurisdiction; or
- Establish an enabling provision in the Model OHS Act, with the detail of infringement notices being addressed during the development of the Regulations.

The Regulator / Enforcement Powers / Compliance Measures / Legal Proceedings

With the exception of one question related to the making of guidelines, the discussion paper does not pose any questions related to the important matters of the Regulator, enforcement powers, compliance measures or legal proceedings. Ai Group wishes to raise a number of concerns that relate to these parts of the Act.

Enforcement Powers and Compliance Powers – general matters re construct of the Parts

It is not clear why the two "types" of powers have been separated into two separate parts of the Act. Nor does the artificial split seem to follow any logic

Part 8 – Enforcement powers includes
Division 1 – Appointment of inspectors
Division 2 – Functions and powers of inspectors
Division 3 – Powers relating to entry (including general powers; search warrants; power to require production of documents and answering of questions; seizure of things)
Division 4 – Other matters (including affidavits; self-incrimination; warnings; offences against inspectors)

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Part 9 – Compliance measures includes
Division 1 – Non-disturbance notices
Division 2 – Improvement notices
Division 3 – Prohibition notices
Division 4 – General provisions applying to notices
Division 5 – Remedial action
Division 6 – Injunctions
Division 7 – Powers of regulator to obtain information
Division 8 – Enforceable OHS undertakings

It is recommended that the two parts are collapsed into one, and that the provisions are ordered in such a way to establish a logical flow of provisions. Appointment of inspectors logically comes first; followed by the right to enter (preferably under normal circumstances); a requirement to provide a written record of their entry (not currently present in the draft Act) should follow; and then the issuing of notices – improvement notices, followed by prohibition notices.

The more unusual approaches to compliance and enforcement such as warrants, seizure, remedial actions, and injunctions should be grouped together. All of the provisions relating to the requirement to produce documents, answer questions should be collocated, along with the provisions that relate to self-incrimination.

Such an approach would provide a more logical flow and the duty holders would get a better picture of the relative importance, and the application of various provisions

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Appointment of inspectors

Clause 147(1)(e) allows a regulator to appoint a person in a prescribed class of persons to be an inspector. Subsequent provisions allow for the limitation of the powers of an inspector, by the instrument of appointment. A similar provision has previously been used in Tasmania to appoint union officials to enter workplaces and exercise very limited powers as a means of piloting union right of entry provisions in that state. The right of entry provisions included in the draft Model OHS Act would make such a use redundant. However, we are concerned that there may be other ways that such an appointment could be used in an inappropriate manner in the future.

This provision should be deleted, or more clearly identify the classes of persons and intended powers.

Notification on entry

Clause 156 (2)(c) requires the inspector to advise, on entry "any health and safety representative for workers carrying out work for that business or undertaking in the workplace". This could be interpreted to mean that the inspector has to notify every health and safety representative in the workplace, or working for the person conducting a business or undertaking. This is not appropriate. The provision should require the inspector to advise the relevant health and safety representative for the work group(s) affected by the matter(s) to which the visit relates.

Persons assisting an inspector

Clause 158 establishes the role of a person assisting an inspector. Three modifications should be made to this subclause, as outlined below:

In 158(1) the ability to have a person accompanying an inspector should be qualified by "if the inspector **reasonably** considers the assistance necessary". The word reasonably is not currently present.

In 158(2) the relationship between the inspector and the assistant should be qualified to say "Anything done lawfully by the assistant is taken for all purposes to have been done by the inspector, **if the inspector had the power to do so.**"

A subsequent amendment should be made to 158(2)(a) as: The assistant may do such things at the place **and in such a manner** as the inspector **reasonably** requires …"

Power to require production of documents

Clause 163 relates to the production of documents and the requirement to answer questions. The construct of this provision has caused difficulties in Victoria where application of section 100 of the Victorian Act to matters not related to documents has been widely disputed. Given that clauses 178 and 179 give detailed information about the requirement for persons to answer questions it would seem appropriate that this clause should only address the requirement to produce documents.

Sub clause 163 (1)(b) should be amended to limit the requirement to produce documents to those that are at the workplace, which is the case in current legislation.

In relation to the requirement to produce documents, it should only be possible for the inspector to require the "owner" of the documents, or a person determined by the inspector to be properly authorised by the owner, to provide the documents. This would ensure that the owner of the documents would be able to determine whether legal professional privilege may apply to the documents. It will also ensure that the owner is aware that the documents have been provided to the inspector, and for what reason.

Sub clause 163(3) states that an inspector can require an interview to take place in private. This could be interpreted to mean in the absence of any other person, including a lawyer, health and safety representative, union representative etc. The holding of an interview in private should only occur if the person being interviewed requests or agrees to this occurring.

Sub clause 163 (6) refers to "reasonable excuse", however, this is not defined. It should be clearly stated, either here or elsewhere in the Act, that legal privilege and seeking legal advice are included in reasonable excuse.

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Power to copy and retain documents

Once again clause 164 fails to recognise that the person who has the documents and provides them to the inspector may not be the owner of the documents. Sub clause 164(2) should require the inspector to advise the person conducting a business or undertaking that they have taken the documents, and allow them to copy the documents. Preferably, the request for documents should be in writing, enabling appropriate consideration to be given prior to providing the documents.

The abrogation of privilege against self-incrimination

Clause 178 and 179 establish the manner in which the privilege against self-incrimination will be established.

The requirement in clause 179 for an inspector to give a warning should include a reference to the opportunity to obtain legal advice.

Sub-clause 179(2) provides that it is not an offence to refuse to answer a question on the grounds of the privilege against self-incrimination unless the inspector has first warned that the privilege cannot be relied upon. That is appropriate and presumably such a refusal would immediately be followed by the warning and the re-statement of the question.

Sub-clause 179(3), however, appears to allow the use in evidence of information obtained *voluntarily* from a person, even if the warning has not been given. This may produce the peculiar outcome where the inspector can use information that is provided because the warning was not given – providing a strong disincentive against giving the warning. That is, the lack of a warning only provides protection to the witness against prosecution for not answering the question, it does not provide the use immunity.

What is meant by the expression voluntarily in clause 179(3)? The common definition of this term means that something is done without compulsion or coercion. It could be argued that providing information or evidence only because clause 178(1) requires it to be given, is not doing so voluntarily. An alternative interpretation may be that information is voluntarily given if it is unprompted by a question. The Model OHS Act should therefore make clear what is meant by *voluntarily*.

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The ability to use information *voluntarily* given, also raises another concern – will the person being interviewed have to raise the privilege against self-incrimination, to be able to avail themselves of the use immunity? The practice in the New South Wales Industrial Relations Court is that if the privilege has not been asserted by the witness, the evidence will be admitted. If the privilege is asserted, then any evidence obtained from the person (incriminating or not) will not be admitted as evidence against that person. That, however, requires the person to know what the law provides, even where the inspector has failed to give the warning informing them of the law.

Depending on the wording of specific legislation, courts may have a discretion whether or not to admit information into evidence. The failure of the inspector to give a warning should be a significant factor in the exercise of the discretion. This matter may also be affected by the provisions of the Evidence Act in the relevant jurisdiction.

The answer to the concerns raised above may lie in

- providing clearly for a use immunity in relation to any information given by an individual when the warning is not given as required by clause 179;
- providing that the use immunity applies, whether or not the privilege has been asserted by the person before or at the time of giving the information; and
- unless there is a clear reason for its inclusion, sub-clause 179(3) be deleted.

An inspector is not required to certify notice compliance

The draft Model OHS Act does not explicitly require an inspector to certify that a notice has been complied with – either that the action has been satisfactorily taken under an improvement notice, or that the risk referred to in a prohibition notice has been remedied. The Model OHS Act should require an inspector to attend the workplace at the request of the person to whom a notice has been issued, to determine whether compliance has been achieved or the risk remedied (as the case may be), and to certify this in writing if so satisfied. This provides the person given the notice with the comfort that they will not be in breach of the notice (in the belief that compliance has been achieved).

A similar requirement should be included in relation to provisional improvement notices – that is, inspector attendance and certification.

A difficulty with such a provision may be the timing of the attendance, given that the time for compliance with a PIN or improvement notice will vary markedly. An answer may be to simply provide that the inspector must attend upon request made before the date for compliance with an improvement notice or PIN, and if compliance cannot be certified at that time to allow a reasonable period of time for compliance.

Remedial actions

Sub-clause 205(2) provides for the inspector to issue a remedial action notice to the owner or person with the management or control of the workplace, to make the workplace safe. This clause, however, relates to not only the workplace but also to plant and substances, which should also be referred to in sub-clause (2). The owner or person with management or control of the workplace may not be the person with ownership or management or control of plant or substances within it. The notice should therefore be issued to the person conducting a business or undertaking with the management or control of the workplace or plant or substance

Sub-clause (2) should not be more onerous than the relevant duties of care. The requirement should therefore be to require the person to do what is reasonably practicable to make the workplace, plant or substance safe. The notice should not direct the person as to how this is to occur. As the remedial action notice is akin to an improvement notice, it should be required to include all of the requirements for an improvement notice. Importantly, there is no requirement in clause 205 for the inspector to specify a time for compliance with the notice. This is important when one considers the provisions of clause 206 and the question of when the regulator may step in and take action. Clause 206 does not provide for the time when the regulator may issue the notice of intended action, or that the notice must provide for a period for compliance by the person to whom the notice has been issued, to avoid the regulator taking action.

The regulator should only be able, under sub-clause 206(3) to recover *reasonable* costs of *reasonable* action taken by it. Expensive measures may be unnecessary. Numerous affected persons are given the entitlement under clause 218 to seek a review of a remedial action notice, but there is nothing to require the notice to be brought to their attention.

Comments made above are also relevant in relation to matters under clause 207, including:

- the person whom the inspector must seek out; and
- the reasonableness of the action taken by the regulator.

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Powers to seek an injunction

Clause 209 should only apply where the time for compliance with a notice has elapsed. This limitation on the operation of the clause is not necessary for a prohibition notice or a nondisturbance notice, as they must be complied with immediately. It is appropriate for improvement and remedial action notices. Allowing significant costs to be incurred at a time at which non-compliance has not occurred (there still being time left to comply) is inappropriate.

The clause should also provide that an application for an injunction cannot be made until the time for making an application for internal review has expired. The notice may be inappropriate and the person to whom it has been issued should not be subject to an injunction enforcing the notice until having had the opportunity to have the notice reviewed. Further, if a request to Internal Review is currently being considered, an injunction would not be appropriate.

The power to require provision of information is too broad

Clause 210 appears to be modeled on section 9 of the Victorian Act. It allows the regulator by written notice to require a person to provide information and documents, and to attend to give evidence. The clause is very broad, and far broader than section 9 of the Victorian Act. We note the following:

- The notice may be given to any person the regulator believes has information. That may even be a visitor or passer-by, or an expert in the field who may then be compelled to assist the regulator. This is not appropriate and should be limited to those with duties. ;
- Sub-clause 210(2)(a) should be limited to facts and not opinions, and not require written admissions (although it may require the provision of incriminating evidence – appropriate given clause 178);
- The documents to be provided under sub-clause (2)(b) should be those owned by the person or those that the person is authorised to provide; and
- The requirement in sub-clause (2)(c) for the person to attend at a place designated by the regulator is akin to a summons to appear, or an arrest. It is a violation of individual rights, not afforded to the police. While the Rules of courts in the jurisdictions allow a person to be summonsed to appear to be examined, that is issued by the court, upon being satisfied that it is appropriate, and in relation to specific proceedings. The court process is not a broad fishing expedition. Sub-clause (2)(c) should be deleted.

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Enforceable OHS Undertaking – requirement to admit guilt

We note the vexed question whether or not a person must admit guilt before an enforceable undertaking will be agreed by the regulator is not dealt with in the draft Model OHS Act. It is an important enough factor to be dealt with in the draft Model OHS Act rather than in guidance material, and it is our view that it should be possible to enter into an enforceable OHS undertaking without the need to admit guilt.

Sub-clause 212(2) does not indicate the level of detail that is required to be published by the regulator. Again, this is important to the acceptance of enforceable undertakings. A duty holder may wish to enter into an undertaking to avoid the costs of a prosecution, even if they believe they can successfully defend it. They may not wish to enter into an undertaking, however, if the regulator publishes details which identify them and allege an offence.

Clause 216 allows for the withdrawal of an undertaking with the written agreement of the regulator. There may be circumstances where the undertaking becomes impracticable, but the regulator does not agree to withdraw it. Therefore, we believe it is appropriate that a duty holder be able to unilaterally withdraw from an enforceable undertaking. If a person is permitted to withdraw from an enforceable undertaking, either by the regulator or by the court or unilaterally, it would be appropriate to make provision for the extension of the limitation period within which a prosecution may be brought by the period in which the undertaking was in place. That provides protection against the misuse of an undertaking to avoid a prosecution.

This may be conveniently provided by amending clause 227. An alternative to not counting the period the undertaking was in place in the 2 year limitation period, may be to simply amend clause 227(c) to provide for proceedings to be brought within 6 months after withdrawal of an undertaking.

Who may bring proceedings

The jurisdictional note under sub-clause 225(1) should be clarified to ensure this means only public officials holding office for the Crown, and not e.g. public officials of a union.

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Alternative sentencing options, should not, together with a fine, exceed the maximum penalty

The various sentencing options under Part 11, Division 2, may be in addition to any penalty imposed or other action taken (clause 229). The various clauses note that the particular option should not cost more than the maximum penalty for the offence. This could mean the offender is sentenced to incur costs by way of penalty and otherwise that in total exceed the maximum penalty.

Clause 229 should be amended to make clear that while the various orders may be in addition to the imposition of a penalty or other action, that the offender must not be sentenced to incur cumulative costs that exceed the maximum penalty for the offence. This would then allow the cost limitation provisions in each of the clauses (e.g. clause 230(6)) to be deleted.

Compensation orders

Various legislation around the country provides for compensation orders in favour of victims of crime. The amounts ordered under such legislation have been quite high, and the orders have been made on the basis of limited information, with the offender at a considerable disadvantage in responding to the position, compared to what they would be if the offender was responding to personal injury actions.

While the policy decision has been made to allow the court to make orders for compensation, this power should be carefully drafted to ensure that it is just and equitable and does not allow over-compensation. Clause 236 is inadequate for this purpose. The following matters should be provided for in the Model OHS Act relating to compensation orders:

- the award of compensation must clearly be subject equitable;
- the court must take into account monies already received by the person who has suffered the loss or damage, by way of workers' compensation for loss of income or damages or insurance;
- payments of compensation ordered by the court must be deducted from any damages or workers' compensation weekly payments received by the person ;
- a compensation order may only be made upon the application of the person who has suffered the loss or damage and the regulations should make provision for the process and evidentiary requirements for seeking a compensation order; and
- the ordering of compensation under the Model OHS Act, although following a finding of guilt of an offence under the Act, should be clearly stated to be civil in nature, and not in the nature of a fine or a penalty, to ensure that the offender is able to obtain insurance indemnity in relation to such compensation (as the offender could if the amount was ordered in civil litigation to address the same loss).

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Imputation of conduct and intent

The imputation of the conduct and intent of an individual to a body corporate, partnership or association has been in place in OHS legislation for some time.

The review panel recognised the potential unfair operation of this provision and also the need to encourage bodies to take reasonable measures. It was recommended (Recommendation 231(b)) that the Model OHS Act provide for a defence where the corporation etc took all reasonable and practicable measures. This was not agreed by WRMC, considering the qualifier of 'reasonably practicable' has the same effect. Where the imputation of conduct or intent is potentially most unfair, is where the person is acting within the scope of their *apparent* authority, rather than their real authority. The duty holder may have clearly instructed the person not to act as they did, directly or in relevant policies. The conduct would therefore not be within the actual scope of their authority. It could, however, be within the apparent scope.

Accordingly it is inappropriate to include a reference to 'apparent' authority in s.238 (2)(a).

OHS Prosecutions – outstanding matters requiring attention

There are two key aspects associated with the process of OHS prosecutions which are still unaddressed, due to the possible conflicts that may be created by the interaction of OHS laws and the general legal and procedural processes in various jurisdictions. Whilst we recognise that the model OHS laws cannot override local jurisprudence in each jurisdiction, we seek a commitment from WRMC that these important commitments will be pursued as part of the ongoing harmonisation process of OHS laws. To ensure fair and consistent operation of the laws across the nation, it is essential that these matters are addressed in each jurisdiction prior to the implementation of the Model OHS laws on 1 January 2012.

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Trial by Jury

In their discussion regarding the manner in which OHS prosecutions should be made and heard, the review panel stated at 11.2:

Breaches of duties of care under most Australian OHS laws are summary offences. In such cases, prosecutions are heard by a magistrate or a judge without a jury. Victoria provides for more serious offences (measured by the size of the penalty) to be indictable offences (heard by a judge and jury) and all OHS duty of care breaches are stipulated to be indictable. It is possible for such indictable offences to be heard as a summary proceeding". This commentary is important in understanding the significance of recommendations 53 and 54. These recommendations, together with the WRMC response are reproduced below

Recommendation 53 – Prosecutions for the most serious breaches (i.e. category 1 offences, see recommendation 55)should be brought on indictment, with other offences dealt with summarily	WRMC responded: This issue should be dealt with outside the model OHS laws on the basis that the recommendation would cause unwarranted and in a few cases irreconcilable conflicts with existing criminal and procedural laws in jurisdictions.
Recommendation 54 – There should be provision for indictable offences to be dealt with summarily where the Court decides that it is appropriate and the defendant agrees	WRMC responded: The comments at recommendation 53 also apply here.

Further, it should be noted that the proposed category 4 breach to assault, threaten or intimidate an inspector also carries a possible term of imprisonment of up to 2 years. For this reason the category 4 breach should also be an indictable offence and subject to the same approach as that outlined in recommendation 53.

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Right of Appeal

Recommendation 63 – The model Act should provide for a system of appeals against a finding of guilty in a prosecution, ultimately to the High Court of Australia, commencing with an application for leave of appeal to the Supreme Court	WRMC responded: The principle of a system of appeals is supported, however, this issue should be dealt with outside the model laws on the basis that it would require consequential amendments to non-OHS laws which govern the procedures and appeal rights in the various courts and tribunals which hear OHS matters in the jurisdictions.
Recommendation 64 – the model Act should not provide for appeals form acquittals	WRMC responded: Agreed.

Ai Group seeks the development of a strategic document which outlines what each jurisdiction needs to do to implement these changes, how this can be achieved within the required timeframe, and what binds the jurisdictions to deliver on these matters. This should be endorsed by WRMC, the implementation of the changes should be monitored in line with those of the Act and Regulations and the resolution of these matters should be part of the WRMC and COAG agreement to harmonise OHS laws by the end of 2011.

Drafting Concerns

Location of definitions

The majority of terms are defined in either clause 4 as "definitions" or within the various parts of the Act. However, a small number of terms have been singled out for inclusion in clauses 5 to 8. These are: 5 – meaning of person conducting a business or undertaking; 6 – meaning of supply; 7 – meaning of worker; 8 – meaning of workplace

It is not clear why these definitions are being treated separately in the draft Model OHS Act. At first glance one might think that, in spite of the title of the subdivision "other important terms", that these are the most important definitions. However, they do not include one of the most important definitions of senior officer. The separate location of these definitions is likely to make it difficult for readers to find all the definitions they need. It is recommended that these four definitions be put back into the definitions clause of the Model OHS Act.

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Serious incidents – immediate or imminent threat etc.

Throughout the model OHS Act there are various obligations and powers associated with serious risks; the various "definitions" are not consistent and, due to the manner of the variations, they do not appear to have been for a specific reason.

The provisions relating to: the rights of workers to cease unsafe work; the power of health and safety representatives to direct a cessation of work; and the right of an OHS entry permit holder, are appropriately worded with reference to "a **serious risk** … emanating from an **immediate or imminent exposure to a hazard**

Clause 36 describes a dangerous incident as "an incident that exposes a worker or any other person in the **immediate vicinity** of a workplace to an **immediate or imminent risk** to health or safety. Whilst the list of occurrences that may be reportable under this heading indicate a serious risk, those words are not included in the overall descriptor. This should be modified to read "an incident that exposes a worker or any other person in the immediate vicinity of a workplace to a serious risk to health and safety emanating from an immediate or imminent exposure to a hazard".

Provisions relating to remedial action that can be taken by an inspector (s.205) have reference to something that is "… likely to cause a serious injury or illness or a dangerous incident". Whilst clause 207, which relates to "other remedial action" that can be taken by the regulator refers to "circumstances causing, or likely to cause, a risk of serious injury or illness or a dangerous incident have arisen, or are likely to arise, in relation to a workplace, plant or substance." These two provisions should be consistent, and include referent to serious risk.

Clause 194 establishes that prohibition notices can be issued if "an activity is occurring, or may occur that … involves or will involve an **immediate or imminent risk** to the health and safety of a person". As with the recommendations above, reference must be made to a "serious risk", or any breach could lead to a prohibition notice being issued

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Inappropriate abbreviations

Throughout the Act there is a tendency to abbreviate person conducting a business or undertaking to "person", and health and safety representatives to "representatives". Largely this occurs where there is a need to refer to the role more than once in the one sentence. Whilst we recognise the "grammatical" rationale for this, it is important that wherever the terms are used, they are used in full.

For example:

18 Primary duty of care
(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
(a) workers engaged, or caused to be engaged by the person; and
(b) workers whose activities in carrying out work are influenced or directed by the person;

62 Functions of health and safety representatives
(c) if a worker or workers in the work group consent, be present at an interview concerning occupational health and safety between:
(i) the worker or workers in the work group and an inspector; or
(ii) the worker or workers in the work group and the person conducting the business or undertaking at that workplace or the person's representative;

73 Resolution of health and safety issues
(1) This section applies if an issue about occupational health and safety arises at a workplace or from the conduct of a business or undertaking and the issue is not resolved after consultation between the parties.
(2) The parties to the issue are:
(a) the person conducting the business or undertaking or the person's representative

76 Health and safety representative may direct that unsafe work cease
(5) A health and safety representative may not give a direction under this section unless the representative has undertaken the training referred to in section 65.

82 Contents of provisional improvement notice
A provisional improvement notice must include the following in relation to a contravention of this Act:
(a) that the health and safety representative believes that the person:
(i) is contravening a provision of this Act; or
(ii) has contravened this Act in circumstances that make it likely that the contravention will continue or be repeated;
(b) the provision the representative believes is being, or has been, contravened;

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Compliance with Improvement Notices and Internal Review – circular provisions

Clause 191(3) states that "the day stated for compliance … must not be before the end of the period for seeking review of the notice under clause 219. Clause 219(3)(b) states that the period for lodging an internal review application for an improvement is "the period specified in the notice for compliance with the notice or 14 days whichever is the lesser". These related provisions indicate a problem with the interaction of provisions related to the compliance dates for improvement notices as a "circular reference" is created.

Functions of the regulator

It is our understanding that Clause 143(b) is intended to ensure that the regulator engages with the "social partners" when developing policy, determining enforcement activities and developing guidance material. We do not believe that this has been achieved with this provision. An alternative wording is proposed below:

"to foster a co-operative, consultative relationship between the regulator and the organisations that represent persons conducting a business or undertaking and workers."

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