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## Public Comment Response Form

### Exposure Draft for Model Act and Stage 1 Model Regulations

#### Introduction and Overview

##### **Introduction**

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a submission regarding the Exposure Draft of the Model Occupational Health and Safety (OHS) Act.

Harmonisation of Australia's OHS legislation is a very significant reform for all Australians including employers, employees, governments and regulators. ACCI has long supported, in principle, OHS harmonisation in order to eliminate the inconsistencies and overlap in OHS legislation across Australia. These inconsistencies have resulted in unnecessarily higher compliance and operating costs for businesses operating in more than one state or territory whilst providing for no additional workplace safety benefit. However, ACCI does not support harmonisation at any cost; and this reform will only deliver productivity and safety benefits to Australians if the laws are:

- Fair;
- Balanced;
- Clear;
- Reasonable;
- User-friendly;
- Practical;
- Uniform; and
- Enforced consistently and fairly in each jurisdiction.

ACCI's public comment submission identifies several aspects of concern regarding the content of the Exposure Draft of the Model OHS Act while also proposing solutions, which if adopted, would ensure that the model Act meets the criteria listed above.



“Have your say on workplace safety laws.”



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### About ACCI

ACCI has been the peak council of Australian business associations for 105 years. Our motto is “Leading Australian Business”.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations. For a list of ACCI members please view: <http://www.acci.asn.au/MembersMain.htm>

Through our membership ACCI represents over 350,000 businesses nation-wide including over 280,000 enterprises employing less than 20 people. Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

ACCI represents employers on national bodies such as Safe Work Australia and in international fora such as the International Labour Organisation, and convenes the National Employers’ OHS Consultative Forum.

### Development of the ACCI Submission

ACCI has developed its public comment submission through extensive consultation with industry through the ACCI member network. The submission was developed in consultation with ACCI’s member organisations, which in turn, consulted directly with their member businesses. Therefore this submission reflects the views and feedback of employers across all Australian states and territories and almost every industry sector and employer size. Many of ACCI’s member organisations have also made submissions to the public comment process and we commend those submissions to Safe Work Australia.

### Format for the ACCI Submission

The ACCI submission commences with an introduction and overview that provides context. The submission then provides ACCI’s responses to the Exposure Draft Discussion Paper questions. The ‘other comments’ field in the table is then used to provide comments about key issues not addressed in the Discussion Paper questions, followed by a brief conclusion.



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## Response to Exposure Draft Discussion Paper Questions

### Questions

#### Part 1 – Preliminary Matters

**Q1.** What is the best title for the model Act?

The most appropriate title for the model Act is the *Occupational Health and Safety Act 2009*. This largely reflects the titles of relevant Acts in each jurisdiction and the term ‘occupational health and safety’ is commonly used and understood across Australia. The proposed title *Safe Work Act 2009* could be easily confused with the *Safe Work Australia Act 2008* which establishes Safe Work Australia.

**Q2.** Does the definition of ‘*officer*’ clearly capture those individuals who should have ‘*officer*’ duties under the model Act?

The definition of ‘*officer*’ does largely capture those individuals who should have ‘*officer*’ duties under the model Act.

However, ACCI would like to see greater clarity about the coverage of ‘*officer*’, via guidance material, that would help ensure that those persons with an ‘*officer*’ duty are aware of their duty and to allay some concerns within the employer community that the definition may inappropriately capture mid-level managers and other staff who do not have the authority or influence of an ‘*officer*’.

Also, the definition of ‘*officer*’ should not exclude a Minister of a State or Territory or the Commonwealth. A Minister is equivalent to an ‘*officer*’ of any large organisation and therefore should have the same positive due diligence duties, setting an appropriate example for the wider community.

Please also see the ‘other comments’ field of this submission for ACCI’s related comments regarding the need for a definition of due diligence.



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**Q3.** There is some overlap between the definitions of ‘plant’ and ‘structure’, as many types of plant have structural attributes, and vice versa. Should ‘plant’ and ‘structure’ be defined in a way that removes this overlap?

The overlap between the definition of ‘plant’ and ‘structure’ should be removed to provide for greater clarity and certainty for duty holders. This clarity will be particularly important once the model OHS regulations are developed and implemented.

**Q4.** Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?

Residential strata title bodies corporate should be specifically excluded from the definition of ‘business or undertaking’. The situation whereby a residential strata title body corporate engages, for example, a person on a limited basis to maintain the gardens or mow the lawns is no different to a householder doing the same thing – a residential strata title body corporate is simply a group of individual householders who must act as one body with respect to issues of common property. To include residential strata title bodies corporate as a ‘business or undertaking’ is inconsistent with the treatment of individual householders, it would be burdensome to the individuals of the body corporate and would unnecessarily take up the scarce time and resources of regulators on issues that clearly do not pertain to occupational health and safety.

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

Only where a supplier has legal control of an item should they hold a supplier duty. Therefore it is appropriate to exclude from the supplier duty persons whose only role is to finance the acquisition of the plant, substance or structure and auctioneers who merely facilitate the sale of an item but who never take possession or control of it.

ACCI is concerned that there could be some unintended consequences for industry arising from the supplier duty as drafted. For example, would a real estate agent selling a house owe a supplier duty under the model OHS Act? Such a duty would be entirely inappropriate and not in accordance with the objects of the Act.

Also, given that the definition of ‘plant’ includes any ‘implement and tool’ a supplier would include any retail outlet that sells plant, substances or structures which could reasonably be used at a workplace and therefore supplier duties would apply to hardware stores, office suppliers, supermarkets etc. The duty to conduct analysis, testing etc and to provide such information to the end user would be absurd in many instances.



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

Prima facie the scope of the definition of ‘worker’ is appropriate. However please see ACCI’s Q21 response for further information about how the use of the broader term of ‘workers’ (as opposed to ‘employees’) may have some unintended consequences in application of some aspects of the model Act, such as the duty to consult. This opens up the reach and powers of a HSR to a large range of workers beyond the employer-employee relationship and ACCI has serious concerns about how the HSR powers could be misused without appropriate measures in the Act to prevent such occurrences.

One such way to address the issue would be to define two types of ‘workers’ – ‘direct workers’ such as employees of a business and ‘indirect workers’ which would include most other types of workers (e.g. sub-contractors, contractors etc), with a less onerous requirement to consult with ‘indirect workers’ (with the principle being that the more direct the connection between the PCBU and the worker the greater the requirement to consult, and vice versa).

A student gaining work experience should be covered by the definition of ‘worker’ given that they are carrying out work in some capacity for the PCBU.

**Q7.** Is the definition of ‘workplace’ appropriate?

ACCI is concerned that the definition of ‘workplace’ will unintentionally and inappropriately extend OHS laws into domestic premises. Domestic premises need to be specifically excluded from the meaning of ‘workplace’ to the extent that they are being used as domestic premises, in accordance with WRMC’s response to National OHS Review recommendation 28.

The definition at clause 8 also deviates from WRMC’s recommendation 94 which is as follows:

“The model Act should define a ‘workplace’ to 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.

For avoidance of doubt, workplace should specifically include a vehicle, ship, aircraft and other mobile structures when used for work”.

The deviation in the definition has the effect of inappropriately broadening the scope of a ‘workplace’. ACCI recommends that at clause 8 (1) the words “while at work” be replaced with “while undertaking work”, to ensure better alignment with the intent of WRMC recommendation.



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**Part 2 – Safety Duties****Q8.** Do the principles that apply to the duties of care give clear guidance on what is expected?

The principles that apply to the safety duties are that they are non-delegable, a person may have more than one duty and more than one person can have a duty. Clause 15 (3) (b) requires a duty holder to discharge the duty “to the extent that the matter is within the person’s capacity to influence and control”. However, in accordance with WRMC recommendation 84 ‘control’ is not defined and it is also important to note that the NSW IRC has established that ‘control’ means “to any extent” – which is a totally inappropriate and unreasonable interpretation.

ACCI recommends that guidance material be developed to ensure a clear and shared understanding of an appropriate meaning and application of ‘control’.

ACCI also asserts that the model Act should provide that if a worker is trained and skilled then a PCBU has a right to expect them to perform work accordingly to that standard and that if a PCBU engages an expert then they should be able to rely upon that person’s knowledge – these are essential to a fair application of control with respect to the model Act.

The draft model OHS Act also appears to not give proper effect to the National OHS Review Panel’s recommendation 98 which provided that: “The model Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary”. WRMC agreed in principle with the recommendation. The requirement for duty holders to consult with each other is fundamental to making the Act work with respect to clarity for duty holders and ensuring workplace safety.

Clause 15 (3) (b) has also left out a key part of the National OHS Review Panel’s recommendation 2 (e). The following text should be added to the end of the sentence “or would have had control if not for an agreement or arrangement purporting to limit or remove that control”.

If ACCI’s above proposals are adopted then the principles applying to duties would be considered reasonable.

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

The definition of ‘reasonably practicable’ is appropriate as currently drafted.



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

The definition of ‘reasonably practicable’ should remain inclusive as drafted, and should not be exhaustive. The list of matters which may be considered in determining compliance with the duty should not be limited to a defined list, especially as the list makes no mention of ‘control’, which is an essential factor to be considered in many circumstances when determining what is or was reasonably practicable. Accordingly, it would make sense to add ‘control’ to the list of matters to be considered in determining what is reasonably practicable.

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

There are several aspects of the primary duty that appear to be unintentionally too broad.

Under clause 18 (4) (f) the requirement to “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” is unclear in intent and likely unintentionally too far reaching as an aspect of the primary duty. The word “all” should be deleted to at least somewhat appropriately constrain the reach of this provision.

Also, the linking of the above provision (i.e. with respect to ‘all persons’) with risks “arising from work” results in the potential for the primary duty to be very broadly applied into aspects such as public safety and product liability. This contravenes WRMC’s response to the National OHS Review Panel recommendation 11 which states “... in particular, 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)”.

Clause 18 (4) (g) may result in a more onerous duty than intended given that a primary duty holder must “ensure that the health of workers ... are monitored”. There is no reference to such a provision in the response of WRMC to the National OHS Review so it is unclear as to the justification for its inclusion in the model Act. This should be tightened to a clearer, more specific and more practicable duty – ACCI suggests the addition of the word “occupational” before the word “health” in this clause.



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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?

Having as part of the primary duty the express requirement that information, training etc be provided in an appropriate language or at a level that can be understood by the workers is inappropriate as it is prescribing an unnecessary level of detail for what is supposed to be a high level duty. Given that the duty requires the provision of information by duty holders there would be an implied need for the information to be in a format that is understandable to those for whom the information is intended and therefore it is not necessary to prescribe it as such.

Please also note ACCI's comments at Q11 regarding concerns with clause 18 (4) (f).

**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)?

Specifically referring to provision of 'access to' facilities would make this duty clearer and more practicable for primary duty holders. The primary duty holder may not always provide the facilities as such – however as long as they ensure that workers have access to the facilities they should be in compliance with this duty (e.g. an interstate bus driver would not expect to have a shower actually as part of the facilities on the coach however the employer is accountable for ensuring access to a shower at roadhouse stops along the bus route).

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

ACCI is concerned about the scope, appropriateness and practicability of the manufacturer and designer duties, particularly in a building and construction industry context. It is critical to note that in the building and construction industry there are usually multiple project participants involved at a variety of stages, at different times and with differing levels of control and influence over safety outcomes. The duties related to specific activities must reflect and accommodate this reality.



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As currently drafted, the manufacturer duties would impose virtually identical duties on builders as those applying to designers, and fails to take into account which party has the capacity to address risks when they occur. The proposed duty is very open-ended - for example, a builder could be liable for an incident arising from the demolition of a building without any statute of limitations many years after the building was completed.

ACCI also believes that the scope of the designer duties is unreasonable and problematic. Designers are rarely involved during the construction phase of a project and therefore it is difficult to envisage how the architect or designer could be expected to engage in consultation with the person who would ultimately be accountable for the demolition of a building. Designer duties should be limited to ensuring the safe design of the building for the purpose for which it is intended to be used.

Account also needs to be taken of the influence that parties other than the designer have over the design process. Parties such as the project owner, the builder and other professionals and sub-contractors involved in the project delivery often participate in design decisions and the designer should not be held solely accountable for all design decisions where other parties had significant influence over the decisions.

There are also practical problems arising from the obligations in clause 21 (4) and (5) regarding the supply of relevant information. The problems arise because the potential life span of the plant, substance or structure could possibly extend over many years (possibly hundreds of years), after which time the business or undertaking may no longer be in operation.

Please refer to the public comment submissions from ACCI member organisations Master Builders Australia and the Association of Consulting Engineers Australia for a more detailed description of issues and concerns regarding duties related to specific activities.

With respect to clauses 19 and 20 it is not clear from the current drafting that these duties apply to a PCBU and not to an individual – this needs to be better clarified in these clauses.



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

In determining whether a worker failed to take reasonable care, regard should not be limited to what the worker knew about the relevant circumstances. The concept of ‘reasonable care’ is sufficient to deal with any concerns about this duty and it would be in practice very difficult and subjective to establish what a worker did or did not know in any given situation.

ACCI is also of the view that the duties of workers need to be expanded in line with section 20 of the Western Australian Occupational Safety and Health Act to capture other aspects such as a duty to report a hazard and to not misuse or damage equipment provided. This reinforces the important principle that all workplace parties have both OHS rights and obligations.

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

The model Act strikes a fair balance in providing, where appropriate, OHS protections to volunteer workers while avoiding discouraging volunteer-based participation, by, for example, ensuring that officers of volunteer organisations cannot be prosecuted for contravening their duties.

**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?

ACCI does not support the WRMC decision to increase the maximum penalty for a corporation to \$3 million. This is a massive increase in penalty levels for each jurisdiction and neither the OHS Review Panel nor WRMC has provided any justification for such an increase, let alone provided any evidence of expected improved safety outcomes.

ACCI believes that such a large increase in penalties fuels an adversarial and litigious system which drives employers to merely comply with OHS legislation to avoid prosecution rather than having an OHS legislative framework which drives proactive, co-operative actions over and above minimum legislative requirements, which is what ultimately delivers safer workplaces.

ACCI proposes that the maximum penalty for a corporation under the model Act should be set to the current maximum penalty level across



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Australia of \$1.65 million (in New South Wales) which would serve as an effective deterrent to employers for serious breaches of the Act without generating a culture of fear and distrust between employers and regulators. Accordingly, ACCI argues that each of the proposed penalties for corporations for category 1 to 4 offences be reduced by the same proportion as ACCI's proposed reduction to the category 1 penalty from \$3 million to \$1.65 million (a 45% reduction).

ACCI is also unclear as to why a category 4 offence would provide for 2 years imprisonment while categories 2 and 3 do not provide for imprisonment. Given the lesser seriousness of category 4 offences there should not be prison terms available as part of the penalty structure.

Also, category 7 penalties are too high in comparison with the level of the offence, e.g. a possible \$25,000 fine for a failure to display a PIN. There should be a category 8 created with a maximum penalty of \$10,000 for corporations and \$2,000 for individuals.

In order to maintain the uniformity of OHS systems around the country there should also be a mechanism in place to ensure that any increases in penalties take place at the same time in each jurisdiction to avoid unequal penalty amounts in different states and territories at any one time.

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

A breach of model regulations would be at the less serious end of the scale for a breach and therefore should be akin to a category 7 offence. ACCI will provide further comment on this issue once the detail of the model regulations is known.

**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?

The Commonwealth's Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers states:

“A civil penalty provision is set out in a similar way to an offence and is subject to proceedings in court. However, it is enforced by civil proceedings that are subject to the procedures and rules of evidence in civil cases. Proof is on the balance of probabilities. A civil penalty provision only carries a financial penalty, not an imprisonment penalty. The imposition of a civil penalty does not constitute a criminal conviction.”

It is ACCI's view that OHS breaches should generally be subject to civil rather than criminal penalties.



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Some organisations or individuals may consider civil penalty provisions to be a lesser sanction for breaches of OHS duties. However, this ignores the reality that they are punitive in nature nonetheless. Enforcement of civil penalty proceedings is still action carried out on behalf of the Crown (with its moral and legal weight) against a citizen (be it an individual or corporation). Criminal punishment should be considered to be a last resort mechanism which Parliament has at its legislative disposal.

### Part 3 – Other Obligations

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

The criteria for a ‘serious injury or illness’ (clause 35) and ‘dangerous incident’ (clause 36) must provide for clarity and certainty for PCBUs. ACCI acknowledges that compiling a list that meets these criteria is problematic. ACCI proposes that further guidance material be produced to help provide clarity and perhaps a level of detail that is not appropriate for the model Act.

At clause 35 ACCI is concerned that (a) “immediate treatment as an in-patient in a hospital” will capture many instances where the injury is of insufficient seriousness to warrant being in this category. For example, in a small country town a person with a relatively minor injury may be admitted as an inpatient to a hospital. ACCI suggests the deletion of clause 35 (a) and the addition of “as an in-patient in a hospital” to 35 (b) (ii) and (iii).

The jurisdictional note at clause 35 is totally inappropriate. In a uniform OHS system jurisdictions must not be able to define what is meant by medical treatment – this will lead to reporting requirement differences in each jurisdiction which is counter to the principles of OHS harmonisation.

Clause 37 should require that a PCBU *ensures* that the regulator is notified immediately to eliminate unnecessary multiple reporting of incidents involving more than one PCBU.

### Part 4 – Consultation, participation and representation

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

It is ACCI’s view that effective and open communication and consultation in the workplace is an important component of a strategy for making workplaces safe. We also believe that this is best achieved via discussions between employers and workers to develop consultative



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arrangements that best meet the needs of each unique workplace. Excessive or inappropriate prescription of consultative mechanisms within OHS legislation can often undermine effective consultation by imposing procedures that do not best facilitate consultation and communication in a particular workplace.

As noted by the OHS Review Panel at recommendation 99 it must be recognised that consultation does not imply agreement. ACCI is of the view that this concept is not explicitly or implicitly captured in the drafting of Part 4.

The proposed scope of the duty to consult with workers will, in practice, be very much broadened and complicated by the introduction of the terms of ‘person conducting a business or undertaking’ and ‘worker’. This will potentially result in confusion over who should consult with whom, and when and how, and will cover a much wider class of workers than under current OHS Acts. This duty may be onerous and resource intensive for some PCBUs.

ACCI reiterates its comments from Q6 “...the use of the broader term of ‘workers’ (as opposed to ‘employees’) may have some unintended consequences in application of some aspects of the model Act, such as the duty to consult. This opens up the reach and powers of a HSR to a large range of workers beyond the employer-employee relationship and ACCI has serious concerns about how the HSR powers could be misused without appropriate measures in the Act to prevent such occurrences.

One such way to address the issue would be to define two types of ‘workers’ – ‘direct workers’ such as employees of a business and ‘indirect workers’ which would include most other types of workers (e.g. sub-contractors, contractors etc), with a less onerous requirement to consult with ‘indirect workers’ (with the principle being that the more direct the connection between the PCBU and the worker the greater the requirement to consult, and vice versa)”.

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

The model Act should not include a procedure to follow if agreement on a consultation procedure cannot be reached. Such a procedure could discourage parties from genuinely working towards a consultation procedure that will best suit the particular workplace needs. Consultation procedures are best developed and agreed by the relevant parties at the particular workplace.



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**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?

ACCI is of the strong view that arrangements allowing for work groups to be determined for workers engaged in two or more businesses or undertakings should be by agreement only and must not be imposed unilaterally. ACCI agrees that there will be certain instances where the formation of a multi-PCBU work group would be of value but there may also be instances where such a provision is used inappropriately, such as to provide roving representatives with unprecedented access to other businesses, sites and workers to which they have little or no connection.

Clause 50 (4) provides that “If a request is made for a work group to be determined for workers engaged in 2 or more businesses or undertakings, each of the persons conducting the businesses or undertakings *must* comply with this section”.

This is not in accordance with WRMC’s response to the recommendations of the National OHS Review. The Panel’s recommendation at 103 (a), which was agreed to in principle by WRMC, was as follows:

“The model Act should provide that workers be grouped in work groups for the purposes of representation by one or more HSRs and that work groups *may* include workers engaged at more than one workplace and the workers engaged by more than one business or undertaking”.

Clause 50 should be amended to align with the Panel’s recommendation.

The model Act also provides that where negotiations cannot resolve discussions about work groups that the authority may be involved and that the authority’s decision will be taken to be the agreement. Such action should be subject to review and therefore should be added to the list of reviewable decisions under section 218.

**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?

Prescribing time limits for negotiations would add an unnecessary level of prescription to the process for determining work groups. In some workplaces there will be complexities due to the size, location or nature of a business (e.g. multiple PCBUs) that would make it difficult to conclude negotiations within the timeframes suggested above. The WRMC response to the National OHS Review Panel’s recommendation 101 should be noted: “The principles underlying recommendations 101 to 104 are supported, however, much of the detail should be dealt with by a head of power in the Act with detail to be covered in regulations”. Therefore the level of prescription associated with a time limit should not



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be part of the model Act.

**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?

A prescribed time limit for election of HSRs and/or deputy HSRs is not necessary given the requirement that they must be conducted ‘as soon as reasonably practicable’. As per ACCI’s response at Q24, the WRMC response to the National OHS Review Panel’s recommendation 101 should be noted: “The principles underlying recommendations 101 to 104 are supported, however, much of the detail should be dealt with by a head of power in the Act with detail to be covered in regulations”.

**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 requirement under clause 65 (3) (a) that the person conducting the business or undertaking must within a reasonable time after the request is made, allow the health and safety representative time off work to attend the course of training is appropriate. Mandating a time limit within which the training is to be undertaken would be impractical for the reasons highlighted above such as HSRs working in rural or remote regions where approved training programs may be held less frequently. ‘Reasonable time’ will vary depending on each individual circumstance and therefore ‘reasonable time’ is the most appropriate timeframe within which a PCBU must allow a HSR time off work to attend the training.

**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 accordance with ACCI’s answers above there is no need to mandate a timeframe in which a health and safety committee must be established. The time required to establish a HSC will vary from PCBU to PCBU depending upon the circumstances.



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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?

ACCI believes that ‘reasonable grounds’ should be used rather than ‘reasonable concerns’. ‘Reasonable grounds’ implies that a person had some basis of fact or evidence before ceasing work whereas ‘reasonable concern’ has a more subjective connotation.

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

The power of a health and safety representative to direct that work cease, if used inappropriately, can have major implications for businesses and undertakings given that the power can lead to cessation of business operations and production and therefore result in economic loss (which can be substantial in industries such as construction, manufacturing and resources). Such powers should be accompanied by appropriate checks and balances and therefore a health and safety representative should only be able to direct other workers to cease work once they have completed approved training. One would not expect an untrained inspector to exercise their powers and accordingly neither should a HSR be able to exercise their powers before having completed their training. Furthermore, ACCI believes that a HSR should be assessed as ‘competent’ before being permitted to direct other workers to cease work – therefore our view is that HSR training must be competency based.

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

For similar reasons as outlined in ACCI’s response to Q29, a health and safety representative must be required to complete approved training before being able to issue a provisional improvement notice (PIN). Under clause 89 (2) a PIN must be complied with within the timeframe specified in the notice – therefore this power should only be used by a person who has been adequately trained to perform health and safety representative duties and who is also assessed as ‘competent’.



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

ACCI considers 14 days to be a more appropriate timeframe for requiring compliance due to the complexities associated with resolving some issues identified in PINs.

### **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?

ACCI is of the view that the framing of Part 5 around ‘discrimination’ in relation to workers with respect to their OHS role or functions is sufficient and that there is not a need to extend it explicitly to coercion or being induced to exercise one’s powers in a particular way.

ACCI is also very concerned about the reversal of the onus of proof under clause 99 whereby the defendant bears the onus of proving, on the balance of probabilities, that the reason alleged in the charge was not the dominant reason for the conduct. In line with accepted legal principles the onus of proof should rest with the prosecution.

### **Part 6 – Workplace entry by OHS entry permit holders**

**Q33.** Are the notification requirements appropriate?

The notification requirements have major implications for employers, particularly with respect to the potential for such provisions to be misused.

ACCI is of the view that union right of entry should be used for genuine OHS purposes only, lawfully and with recognition that those rights must be used responsibly. There must be some checks and balances to ensure that provisions which do not require 24 hours notice for entry of an OHS permit holder are not misused.

An OHS entry permit holder should always be required to give notice of entry immediately after entering a workplace when entering to inquire into suspected contraventions. Therefore ACCI proposes that clause 108 (2) should be deleted and that 108 (1) should be amended to require that “An OHS entry permit holder must, immediately upon entering a workplace under this Division, give notice of entry ...”. This amendment would provide a safeguard to employers with respect to potential misuse of right of entry provisions.



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There should also be a provision that provides for the OHS permit holder having to leave the site if upon entry it is determined that the suspected contravention of the Act has not occurred.

ACCI also contends that Part 6 of the model OHS Act should prohibit entry of permit holders under division 2 for frivolous, mischievous or vexatious reasons with penalties attached for such behaviour.

**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?

ACCI supports the dual authorisation systems, given the very different nature and purpose of entries under the model OHS Act as compared with the Fair Work Act. For example, an authorised person entering a workplace for OHS purposes should have specific knowledge of the model OHS Act and they should possess OHS expertise, which are aspects not required under the Fair Work Act. This is also important in ensuring that workplace relations and OHS issues are kept separate so that employers, employees and unions can work together effectively and cooperatively on workplace safety matters.

**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?

As outlined at Q19 it is ACCI's view that OHS breaches should generally be subject to civil rather than criminal penalties. Such an approach should be taken for the entire model OHS Act and not just selectively applied to aspects such as breaches in relation to union right of entry.

**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?

ACCI supports, where practicable, alignment of union right of entry provisions between the model OHS Act and the Fair Work Act – this provides for consistency, transparency and more workable legislation. However, as noted in our response to Q34, due to the different nature of right entry for OHS reasons as compared with workplace relations reasons there will be aspects of right of entry where alignment of the Fair Work Act and model OHS Act is simply not appropriate.



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It is important to note that when the National OHS Review Panel made its recommendations the Fair Work Act had not yet been finalised and enacted. A key area where the draft of the model OHS Act is not consistent with the Fair Work Act is with respect to the capacity for authorised union representatives to hold discussions on OHS issues in a workplace at any time. This significantly extends union consultation rights in the majority of jurisdictions under current OHS legislation.

ACCI is concerned that union representatives having the right to enter a site at any time for OHS discussions creates significant scope for misuse of such provisions and that clause 116 pertaining to “no undue disruption to work at the workplace” is not strong enough and will lead to a high number of disputes about whether or not an entry is causing undue disruption.

It should be noted that there are a number of other aspects of the draft right of entry provisions about which ACCI is very concerned.

Under clause 107 (1) (d), the rights that may be exercised while at the workplace go too far. OHS entry permit holders should not be able to “make copies of any record or document that is directly relevant to the suspected contravention” – this has the potential for abuse and there are privacy concerns for both individuals and businesses. OHS entry permit holders should also not be granted access to a workplace’s computers which would amount to a serious breach of both privacy and security. Unions do not have the power to conduct OHS investigations and therefore these powers are excessive and undermine confidence in OHS Permit Holder provisions in the model OHS Act.

The OHS training requirements for union officials provided for in the Model Administrative Regulations are not as rigorous as currently in place in the ACT, Northern Territory, Queensland and Victoria and are even less comprehensive than the requirements for training of a health and safety representative. Given the extensive rights of an OHS entry permit holder – the training requirements should also be extensive and should also include training to ensure that a permit holder is competent and knowledgeable in key aspects of OHS and a particular industry.

ACCI also proposes that the model Act should explicitly provide PCBUs with the right to accompany an OHS entry permit holder who exercises a right of entry within their workplace. Again this is an appropriate check and balance on the overall union right of entry system.



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**Part 7 – The Regulator****Q37.** Should guidelines have any other particular legal status under the Act?

Guidelines should not have any other particular legal status under the Act. By conferring a legal status on such a document it can then become a de facto legal document that in turn adds to the level of prescription and compliance for duty holders. Guidelines should provide information in clear and simple terms to duty holders about key provisions of the model Act and they should play a key role in helping employers both comply with the Act and, most importantly, provide for safer workplaces. Therefore industry should have extensive input into any guidance material that is developed to ensure that it is practical, relevant and informative.

**Part 10 – Review of Decisions****Q38.** Is the list of reviewable decisions appropriate?

ACCI believes that all decisions made under the model Act should be subject to review in order to ensure the fairness and integrity of the operation of the Act.

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

The processes and timeframes prescribed for the internal review of decisions are generally appropriate.

**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 stay arrangements in relation to the issue of a prohibition or nondisturbance notice are appropriate.



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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 high level of detail provided for under clause 5 of the Model Safe Work Regulations in relation to matters to be taken into account in negotiations for work groups more appropriately belongs in a code of practice rather than regulation.

**Do you have any other comments?**

ACCI provides the following comments about aspects of the model OHS Act, not covered directly by the Discussion Paper questions, where drafting may result in unintended consequences or where problems arise from particular clauses. They are listed in the approximate order of the model OHS Act, although first commencing with any overarching comments. Where appropriate, the specific clause being referred to is listed.

Jurisdictional Notes – Uniform model OHS legislation

Various parts of the model Act.

ACCI is concerned about the large number and inappropriate use of jurisdictional notes throughout the draft model Act. Specific jurisdictional notes about which ACCI is concerned include:

- The jurisdictional note at clause 4 under the definition of ‘tribunal’ specifies that each jurisdiction will specify the relevant court or tribunal for its jurisdiction – this will reinforce the status quo of jurisdictional variations in the application and interpretation of key concepts under the model OHS Act, despite the adoption of ‘harmonised’ legislation.
- The first jurisdictional note at clause 11 provides that a jurisdiction may use its own definitions of dangerous goods and high risk plant, leading to differences across jurisdictions.
- The jurisdictional note at clause 35 provides that jurisdictions may define what is meant by ‘medical treatment’ – this will lead to reporting requirement differences in each jurisdiction which is counter to the principles of OHS harmonisation.
- The jurisdictional note at clause 102 provides that a jurisdiction may include other relevant local laws in paragraph (b) – it is unclear why this jurisdictional note exists and what type of other laws jurisdictions may include.
- The jurisdictional note at clause 143 provides that jurisdictions may add to the list of functions of the regulator – ACCI’s view is that



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regulator functions should be consistent across the country.

- Regarding the first jurisdictional note at clause 147 – ACCI is concerned that this could be used to inappropriately empower union appointed inspectors such as in New South Wales and Tasmania.
- The jurisdictional note at clause 223 states that “A jurisdiction may amend this section to accommodate local requirements and policy in relation to the appropriate external review body” – ACCI sees no reason why a jurisdiction would need to amend this clause.
- Regarding the jurisdictional note at clause 225 (1) – it is entirely inappropriate that a jurisdiction may add other officials who hold a relevant public office or administer the Act to bring proceedings for an offence against the Act.
- The second jurisdictional note at clause 227 permitting a jurisdiction to include a local provision allowing proceedings to be brought at any time with the authorisation of the Director of Public Prosecutions will completely undermine the limitation period for prosecutions and therefore creates unnecessary uncertainty for duty holders.
- The jurisdictional note at Part 11 Division 3 provides that “Jurisdictions may include local provisions to enable an infringement scheme to be established in relation to this Act ...” – this is not in accordance with the principles of a best practice harmonised OHS system.

Jurisdictional differences in regulator behaviour and culture, court systems and interpretations of the model Act will result in diverging application and interpretation of the model OHS Act across the country. This will lead to increased compliance costs and uncertainty for businesses and will drive inconsistent outcomes under model legislation. Minimising jurisdictional notes will require changes to some existing legislation but that is appropriate and necessary if Australia is to achieve the goal of a nationally uniform OHS legislative system.

As a priority, each jurisdiction should also work towards transitioning to a national court system for the hearing of cases for breaches of the model OHS Act. There also should be a strategy for each of Australia’s OHS regulators to transition to a culture more closely aligned with Work Safe Victoria’s focus of being a constructive, accountable, transparent and effective OHS regulator. Without such actions and changes, a truly uniform national OHS system will not be delivered, even if model legislation is in place in each jurisdiction.

### Objects

At clause 3 ACCI is of the view there are too many objects, several of which are not central to what the Act is trying to achieve which may then lead to interpretations by the courts of individual clauses which do not necessarily reflect common sense and/or the actual purpose of the Act.

Clause 3 (1) (c) should be deleted – encouraging union involvement in assisting PCBUs to achieve a healthier and safer working environment should not be an express object of an OHS Act, it is merely a by-product of achieving the pertinent objects of the Act, i.e. to protect workers against harm to their occupational health and safety.



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Clause 3 (1) (d) should have added to it “by the authorities” to entrench the role of OHS authorities in providing advice, information, education and training to duty holders and therefore to ultimately produce better OHS outcomes.

Clause 3 (2) should be deleted as protecting workers and other persons against harm is already covered under clause 3 (1) (a).

### Due Diligence

#### Clause 4 - definitions

WRMC did not agree with the National OHS Review Panel’s recommendation 88 that “The model Act should define ‘due diligence’ for the purposes of the duty of care of officers, to provide direction as to the appropriate role of an officer in OHS and how compliance may be achieved”. No explanation or rationale for this decision was provided by WRMC.

ACCI is extremely concerned that by relying on case law to define ‘due diligence’ many officers will not be clear about their appropriate duty as an officer and how compliance may be achieved. Relying on case law to define such a key concept is neither an effective nor efficient approach to this issue and will draw due diligence issues into the legal arena for many years to come. ACCI strongly recommends that ‘due diligence’ must be defined in the model Act to provide clarity and certainty for duty holders and therefore better OHS outcomes.

### Meaning of Person Conducting a Business or Undertaking (PCBU)

Under clause 5 (2) which specifies when a person does not conduct a business or undertaking, there should be an addition (c) “if only conducts PCBU as an officer or worker and not in their own right”. This will add further clarity and ensure that natural persons are not inappropriately captured under the meaning of PCBU.

While ACCI understands the reasons for moving away from the narrower terms ‘employer’ and ‘employee’ we are concerned about the appropriateness of the term ‘person conducting a business or undertaking’ (PCBU). The term is essentially a new one that is not used or easily recognised by those who are captured by the definition. The use of the phrase is also problematic in drafting of the model Act and leads to various complexities throughout. ACCI proposes that a one word term be developed to replace PCBU – perhaps ‘entity’ would suffice. This would also help eliminate confusion caused by the use of the term ‘person’ in two very different ways – one referring to an entity and the other to an individual.



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### Scope - Public Safety

Clause 11 extends the model OHS Act coverage into non-occupational health and safety aspects including dangerous goods and high risk plant not in the workplace and not for use at work. This contravenes the WRMC response to OHS Review Panel recommendations 11, 77 and 78 (see recommendation 11 below). It is entirely inappropriate for an Occupational Health and Safety Act to encroach beyond OHS matters into aspects such as public safety. Jurisdictions should find other more appropriate means by which they can regulate dangerous goods and high risk plant beyond the workplace or work use.

### “WRMC Recommendation 11

... In particular, 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)”.

### Duties of Workers

Clause 27 (c) requiring that workers must “co-operate with any reasonable instruction” is an insufficient duty to ensure the safety of workers and others at a workplace. The clause should include “co-operate with any reasonable instructions, policies and requirements of the PCBU”.

### Two or more contraventions of the duty of care

The drafters have not given effect to WRMC recommendation 69: “The model Act should provide that two or more contraventions of duties of care may be charged as a single offence if they arise out of the same factual circumstances”. This needs to be addressed.

### Exception for members of local authorities and volunteers

At clause 33 it should be made clear that the exception for members of local authorities and volunteers is only for when they are acting in that capacity.

### Disqualification of health and safety representatives

Clause 59 (1) (a) should also include where a health and safety representative has performed a function ‘recklessly’, which is a more objective term than ‘improper purpose’.

### Functions of health and safety representatives

Clause 62 (1) (c) should provide for a HSR to ‘inquire into’ complaints from members of the workgroup rather than ‘investigate’. Investigative powers are solely for inspectors.



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At clause 62 (2) (a) (i) the provision for a HSR to inspect the workplace at any time should be limited to within the PCBU's usual business hours.

#### Persons Assisting – undermining OHS entry permit provisions

Clause 62 (2) (f) provides that in performing a function the health and safety representative may “whenever necessary, request the assistance of *any* person”. This provision is unreasonably broad and can be used as a means of by-passing OHS Entry Permit requirements. The provision should be amended to add “agreed to by the person conducting the business or undertaking” or should contain a provision such as that in Victoria that provides that an employer may refuse entry to a person assisting a HSR where the employer believes that the person assisting does not have sufficient OHS knowledge.

Clause 64 (1) (e) states that the PCBU must “allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided”. ACCI recognises there would be certain instances where a HSR would legitimately require the assistance of a person to have access to the workplace however the current open-ended nature of this clause has great potential for misuse. For example, it could be used to circumvent union right of entry requirements under the model Act. There needs to be some limitations to this provision and ACCI recommends that a person assisting a HSR must be chosen from a specified list of particular persons/consultants such as is currently used in South Australia. Alternatively there could be a requirement that the person must be capable of assisting the HSR and have knowledge, expertise, skills or qualifications that the HSR does not possess.

Clause 73 (2) (d) specifies that a party to an ‘issue’ includes “if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative” and clause 73 (5) provides that “A representative of a party to an issue may enter the workplace for the purpose of resolving the issue”. This provides yet another avenue for workplace entry in a way that circumvents and undermines the provisions of ‘Part 6 Workplace entry by OHS entry permit holders’. These loopholes must be closed in order to protect the integrity and effective operation of the model OHS Act.

#### General obligations of PCBU – to consult on OHS matters

Clause 64 (1) (a) is appropriate but should be qualified with “so far as is reasonably practicable”.

#### General obligations of PCBU - HSR access to employer information

Clause 64 (1) (b) (i) & (ii) allow any HSR for the work group to have access to information that the PCBU has relating to actual or potential hazards at the workplace and the health and safety of workers in the work group. There needs to be safeguards attached to such provisions to ensure that employer or employee information is not misused. ACCI suggests a provision that states “a health and safety representative must



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not disclose or use for non-OHS related purposes any information about the PCBU or its employees that is of a confidential or sensitive nature”.

#### General obligations of PCBU – to pay HSR for performance of functions

Clause 64 (3) – payment should be provided for HSRs for performance of their functions but it should be limited to “time reasonably spent”.

#### Functions of committee

Clause 70 (b) provides that a function of the health and safety committee is “to formulate, review and disseminate ... 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”. ACCI is of the view that this clause inappropriately provides too much power to a HSC in aspects that should ultimately remain functions and accountabilities of management, such as formulating rules and procedures.

#### Issue Resolution

Clause 73 (2) (c) stipulates that a HSR will become a party to an ‘issue’ automatically – ACCI argues that should only occur with the consent of the person raising the issue. For example, if the supervisor is being bullied by the work group it would be untenable to have the HSR for that work group as an automatic party to the issue. The clause should have added to it “only with the consent of the worker affected by the issue”.

#### Health and Safety Representative may direct that unsafe work cease

Clause 76 (2) (b) needs the following words added at the end of the sentence “with the PCBU in accordance with the issue resolution procedures required by the model Act”, as per WRMC recommendation 122 (a) (ii). In its current form the clause does not give affect to the recommendation.

#### Order for damages

Clauses 100 and 101 provide for orders for damages with no limit. There should be an appropriate limit placed on such orders.

#### Workplace entry by OHS entry permit holders – rights that may be exercised while at workplace

Clause 107 (1) (d) inappropriately provides OHS entry permit holders rights equivalent to those of inspectors. The right of OHS entry permit holders to make copies of any record or document must be deleted from this provision and it must also be made clear that a permit does not provide for access to a workplace’s computer systems; the powers should be limited to inspection only of non-commercial-in-confidence documents only.



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Authorising authority may deal with a dispute about a right of entry under this Act

Clause 133 does not adequately provide for resolution of issues arising at the ‘factory gate’ with respect to a right of entry under the Act. In order to ensure that OHS entry permit provisions work in a fair and balanced manner there must be provision for an inspector to be called in to resolve such disputes, rather than the authorising authority (e.g. how does one contact the appropriate person at the authorising authority and get access to immediate assistance?). The fast resolution of such issues is vital, hence the need to refer to an inspector rather than an authorising authority.

Person must not refuse or delay entry of OHS entry permit holder

Clause 136 provides 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”, but it should also provide in addition “without reasonable excuse”. A reasonable excuse may be a situation, for example, where after a workplace incident it would be unsafe for a person to enter the workplace.

Part 7 – The Regulator

As a check and balance and accountability mechanism for the inspector power there should be a formal process by which a person or organisation may make a complaint to the regulator about the actions of an inspector.

Identity Cards

At clause 148 (2) an inspector should be required to produce his or her identity card when ever exercising compliance powers – not only when asked to do so. This will ensure a professional approach by inspectors and would leave no doubt as to the authenticity of the person purporting to be an inspector.

Inspector may give advice about compliance

Clause 154 provides that “An inspector may give advice to a person about compliance with this Act”. This clause should be strengthened to require that inspectors “must give advice to a person about compliance with this Act where practicable”. The inspector immunity provision at clause 244 should then be moved to directly before clause 154 so that inspectors are absolutely clear that their advice is provided under the protection from immunity.

Persons assisting inspectors

At clause 158 a person should only be able to assist an inspector if the inspector reasonably considers the assistance necessary and at a place and in such a manner as the inspector reasonably requires.



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### Removal of Right to Silence – Power to require production of documents and answers to questions

Clause 163 (1) (c) provides that an inspector who enters a place may “require a person at the place to answer any questions put by the inspector”. This effectively removes an individual’s right to silence and goes too far in denying individuals a generally accepted legal right. Under this clause a person should only be compelled to answer questions that pertain to relevant documents.

ACCI also has serious concerns about clause 163 (3) which provides inspectors with the power to conduct an interview in private if the inspector considers it appropriate. This would effectively take away a person’s right to legal representation.

Section 210 also provides strong coercive powers to the regulator to obtain information. Such powers in this context are of concern to ACCI.

In general, the provisions relating to questioning and privilege are complex and ACCI has concerns about the average employer or employee’s ability to understand and uphold their legal rights, which are fundamental to the fairness and integrity of the model Act. ACCI would like to see additional checks and balances attached to this part of the model Act including specific policies and procedures from Workplace Safety Authorities as to how inspectors will exercise their powers in relation to privilege and questioning and how they will ensure that individuals will be made aware of their rights when questioned.

In addition, ACCI contends that the model Act should contain a clause that provides for the inadmissibility as evidence of any intra or inter-company safety alerts issued after the occurrence of an incident. Communication of safety alerts can be important in ensuring that there is no reoccurrence of an incident and is also a valuable learning tool for other organisations which may be confronted with a similar hazard.

### Return of seized things

Clause 170 provides for return of a seized thing at the end of six months or immediately if continued retention is not necessary. Seizure of particular items may result in significant hardship for an employer; therefore there should be provision for an employer to apply to the regulator for the return of a seized item. Perhaps this could be covered by being listed as a reviewable decision.

### Service and communication of notice

The provisions for serving a notice at clause 202 (1) (b) and (c) are inadequate in that they provide for serving on a person “who is apparently over 16 years” and “who apparently resides or works there” or “who apparently is the person with management or control”. The provisions should reference either a ‘responsible adult’, or at a minimum, the age reference should be 18 years as per other legal rights such as voting and consumption of alcohol.



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Procedure if prosecution is not brought

Clause 226 (5) should also provide that the person whom the applicant believes committed the offence should also receive a copy of the advice from the regulator outlining reasons for its decision. This will ensure that the feedback loop is closed properly.

Orders generally

Clause 229 effectively provides that a person may be penalised twice for the same offence. This is inappropriate.

Adverse publicity orders

Clause 230. Defendants should be informed of any adverse publicity orders being made and should be able to make a submission regarding the proposed order prior to it being issued.

Compensation orders

Compensation orders provided for at clause 236 are entirely inappropriate as a sentencing option under the model OHS Act, as State and Territory Workers' Compensation Acts already provide for compensation for injuries.

Person not to levy employees

Clause 247 was not recommended by WRMC and should not be included in the model OHS Act. This has the potential for misuse.

Use of codes of practice in proceedings

Clause 249 (2) (a) should be amended to read “have regard to an approved code of practice as evidence of the state of knowledge at the time it was issued about a particular hazard or risk ...” – this better reflects the legal status that a code of practice should have under the Act.

Model Safe Work Regulations

Clause 7 (1) (a) – it is not clear who must consult with the PCBU regarding HSR elections.

Clause 18 (a) – there should also be a requirement to state the specific reason for entry, not just the section under the Act which the entry is authorised.



“Have your say on workplace safety laws.”



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**Conclusion**

ACCI is pleased to provide the preceding feedback on the Exposure Draft of the Model OHS Act as part of Safe Work Australia’s public comment process. Our comment is based on extensive consultation with a substantial proportion of Australia’s employers and is designed to ensure that the model Act is fair, balanced, clear, reasonable, user-friendly, practical, uniform, and consistently and fairly enforced in each jurisdiction. The quality of the model legislation as well as the consistency of its enforcement will ultimately determine the success of this important reform. We encourage Safe Work Australia to carefully consider each of ACCI’s proposals and to adopt changes that will help ensure that effective, high quality, uniform OHS legislation will be in place across Australia by the end of 2011.