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AMMA Public Comment Response

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:

AMMA the National Resources Employer Association

AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. It is the sole national employer association representing the interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies include all the major producers in the metalliferous, coal and hydrocarbons sectors. Member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport



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- Support and seismic vessels
- General aviation (helicopters)
- Catering
- Bulk handling of shipping cargo

AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector.

Overview

The move towards harmonising state and territory occupational health and safety laws (OHS) recognises the significant compliance and cost burdens on businesses that operate across state and territory borders and different standards of health and safety for employees across Australia.

AMMA has given its support to harmonising state and territory OHS laws and the Government's objective to "*cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties*"¹. This includes AMMA's support for model laws drafted with sufficient broadness to enable it to apply to all industries, including the resource sector, which is subject to mine specific health and safety legislation in some states and territories. This is the best means for ensuring that the resources sector does not continue to operate under inconsistent health and safety legislation to the detriment of the industry and improved health and safety outcomes.

¹ Australian Government, National Review into Model Occupational Health and Safety Laws, *Terms of Reference*, Commonwealth of Australia, Canberra.



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The Workplace Relations Ministers' Council (WRMC) has agreed that the development of the model OHS Act should presume that separate and specific OHS laws (which include resource specific laws) should only continue where objectively justified. This is a positive and welcome move towards true harmonisation of OHS laws.

The WRMC also agreed to a number of recommendations of the National OHS Review that accord with the position put forward by AMMA in its submission to the National OHS Review:

- That "reasonably practicable" should be used to qualify the duties of care;
- That the principles of risk management should apply;
- That the prosecution should bear the onus of proof; and
- That only an official acting in the course of a public office or duty may bring a prosecution for a breach.

However, a number of issues identified by AMMA in its submission to the National OHS Review remain unresolved and new issues have arisen following the development of the model laws that are of significant concern to resources sector employers. These issues go beyond those contained with the discussion paper accompanying the exposure draft model Act and are considered crucial to the achievement of improved safety and improved business efficiency under the new laws.

The issues arise in provisions of the exposure draft *Safe Work Act 2009* (the model Act) that have a clear overlap with industrial relations, such as the right to cease work, the right to require a worker to cease work, workplace entry and rights on entering the workplace. The model Act in its current form is at risk of being manipulated and used for industrial purposes by:

- allowing largely unrestricted and unregulated entry to union officials providing assistance to employee health and safety



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representatives, which can lead to such entry being used to sidestep normal right of entry requirements in the model Act and *Fair Work Act 2009*;

- allowing employee health and safety representatives to direct a worker to cease work or issue provisional improvement notices, which can be used to influence industrial agendas at the workplace;
- allowing unions to inspect non-member records, creating an opportunity for the right to be misused in order to overcome the restriction on such records imposed by the *Fair Work Act 2009*; and
- allowing union officials inquiring into a suspected breach to enter and wander the workplace without an immediate requirement to notify the person conducting the business or undertaking/in control of the premises.

Too often, rights under OHS laws have been abused and used as a means to achieve industrial relations objectives, undermining industrial relations legislation and genuine safety issues at the workplace. Union officials abusing their entry rights under OHS laws for industrial purposes, for example, is an ongoing concern for resources sector employers.

The resources sector is committed to improving health and safety and many resources sector employers have committed to achieve a target of zero harm to their employees. This commitment and focus on improving health and safety must not be undermined and side-tracked by significantly blurring the lines between safety and industrial issues.

Questions

Part 1 – Preliminary Matters

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



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The most appropriate title for the model Act is the *Occupational Health and Safety Act 2009* the term ‘occupational health and safety’ is used and understood across Australia. The proposed title *Safe Work Act 2009* is not supported.

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

The definition of “officer” should ensure that staff with such duties are aware of their duties and the definition should clearly exclude those staff who do not have the authority of an “officer”.

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 overlap between the definition of “plant” and “structure” should be removed with more precise definitions inserted.

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

Residential strata title body corporates should be excluded from the model Act, they are simply individual householders who act as one body with respect to issues of common property.

To include such bodies would be a complete over regulation and inconsistent with the treatment of non body corporate householders. Such an inclusion would deter persons from becoming members of a body corporate and would increase the model Act coverage beyond what is reasonable. Residential strata title body corporates should be excluded from the definition of “business or undertaking”. A residential strata title body corporate that arranges for general handyman tasks to be performed is no different to an individual resident performing those same tasks.

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



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No; only a supplier who has legal control and possession of plant, substances and structures should have a supplier duty. The scope of supplier duty persons whose role is to assist in the purchase and acquisition of the plant, substance or structures who never takes possession or control should be excluded. For example a real estate agent or auctioneer should not owe a supplier duty under the model Act.

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

The definition of “worker” needs to be considered in relation to the consultation provisions. The use of the broader term “workers” as opposed to “employee” impacts on the duty to consult. The existing definition extends the powers of a HSR to “workers” beyond the traditional employer-employee relationship. Non “employees” need to be referenced in the definition of “workers” with no or limited consultation obligations.

A student gaining work experience should be covered by the definition of “worker”.

Q7. Is the definition of ‘workplace’ appropriate?

Domestic premises need to be excluded from the meaning of “workplace” to the extent that they are being used as domestic premises. This approach is consistent with the WRMC response to National OHS Review (see recommendation 28).

The definition of “workplace” is also different from recommendation 94 of the WRMC.

:

“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”.

The definition of “workplace” may extend OHS laws into domestic premises by broadening the definition. The words “while at work” should be replaced with “while undertaking work”, to ensure consistency 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 safety duties under the model Act are non-delegable, and require a duty holder to discharge the duty:

“to the extent that the matter is within the person’s capacity to influence and “control”.

“Control” is not defined and there needs to be an understanding of an appropriate meaning and application of the word “control”.

If a ‘worker’ is trained and skilled then a person conducting a business or undertaking can expect them to perform work accordingly. Where a person conducting a business or undertaking engages another for their skill they should be able to rely upon that person’s knowledge without having to assume the control themselves.

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

The definition of “reasonably practicable” should include the “degree of control” exercised by the person conducting a business or undertaking.

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

No; the list of matters should not be exhaustive; the definition should include that appropriate weight be given to all relevant matters.

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

The WRMC’s response to the National OHS Review Panel recommendation 11 stated :



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“... 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.”

The proposed scope of the primary duty is 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 excessive as a primary duty. The word “*all*” should be removed to restrict the application as it has the potential to link into public safety and product liability.

The requirement at 18 (4) (g) to “ensure that the health of workers ... are monitored” is also excessive, at the very least the inclusion of the word “occupational” is imperative. AMMA notes there is no reference to the health of workers in the response of WRMC to the National OHS Review

- 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?

This would be over prescription and doesn't add anything to the obligation. The duty requires provision of information by duty holders which by implication must be in a format that is understandable to those for whom the information is intended.

- 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



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workplaces)?

The primary duty holder will not always be in a position to provide the facilities required this is particularly the case for the transport industry, as such the requirement “*so far as is reasonably practicable*” is essential if extending the requirement to “access to” such facilities.

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

The scope, appropriateness and practicability of the manufacturer and designer duties, context as currently drafted fails to take into account which party has the capacity to address risks when they occur.

The overlapping of responsibilities becomes even more challenging given that each of the subsequent duty holders is required to produce coordination plans and safe work method statements articulating how they will conduct their work in a safe manner. AMMA supports the public comment submissions from the Master Builders Australia and the Association of Consulting Engineers Australia regarding their issues and concerns on duties related to specific activities.

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*” is sufficient to deal with concerns about this duty and it would in our view be difficult and subjective to establish what a worker’s knowledge was at a particular point in time.

All workplace parties have both OHS rights and obligations. The duties of employees under the model Act should incorporate reciprocal obligations such as a duty to report a hazard and to not misuse or damage equipment. {see s.20 of the *Occupational Safety and Health Act 1984 (WA)*}.

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



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The model Act volunteer provisions are appropriate, by providing, where appropriate protections to volunteer workers while avoiding not discouraging volunteer-based participation.

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 maximum penalties for a corporation should be set having regard to the existing maximum penalty levels across Australia. The proposed increase to \$3m for a Category 1 offence is excessive, neither the OHS Review Panel nor WRMC provided any justification for such an increase, nor any evidence of expected improved safety outcomes as the result of such a massive increase.

All maximum penalties should reflect only 50% of what is proposed, the model Act should encourage proactive and co-operative actions over and above the minimum legislative requirements, which is at the end of the day what delivers safer workplaces not hefty fines which encourage a litigious system and misses the point of the legislation.

Category 4 offences should not provide for two years imprisonment while categories two and three do not. Given the lesser seriousness of Category 4 offences, Category 4 should not carry prison terms as part of the penalty structure.

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

A breach of the model Regulations should be aligned with a Category 7 offence. As the detail of the model Regulations is unknown at this time it is difficult to comment further.

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?

Breaches of the model Act should generally be subject to civil rather than criminal penalties.

Criminal punishment should be considered to be a last resort mechanism for only the most serious and culpable offences.



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Part 3 – Other Obligations

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

Notifiable incidents must be sufficiently clear and objective so duty holders easily understand their obligations. Additional guidance material should be produced to help provide clarity and a level of detail that is not appropriate for the model Act.

"Immediate treatment as an in-patient in a hospital" may include situations of insufficient seriousness to warrant being in this category and this reference should be removed.

Further the Jurisdictional note at clause 35 should not be included to allow various jurisdictions to define what is meant by medical treatment when the model Act is seeking a uniform system.

Part 4 – Consultation, participation and representation

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

AMMA acknowledges that consultation regarding OHS between duty holders and employees is to be encouraged in assisting to make workplaces safe. This cannot be achieved with prescriptive obligations that don't take into account individual workplaces.

The OHS Review Panel recommendation 99 recognised that consultation does not imply agreement has to be reached, yet the model Act does not reflect this important understanding; the consultation provisions should be amended to state this principle

The definition of "worker" as opposed to "employees" if unchanged will broaden the consultation obligations and rights (see comments at Q 6). Without limiting the definition of "worker" who should consult with whom, when and how is unclear and will cover a much wider class of workers than under any of the existing State acts.

The reach and powers of a HSR beyond the employer-employee relationship needs to be restricted.



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The consultation provisions do not protect commercial-in-confidence documents. Under sub s.46(1) (a) a person conducting a business or undertaking is required to, so far as “reasonably practicable”, to share “relevant information” with workers about matters affecting or likely to affect their health and safety.

“*Relevant information*” is not defined in the model Act and would therefore include information that is commercial-in-confidence, disclosure of which would cause detriment to the person conducting the business or undertaking.

AMMA submits that commercial-in-confidence information must be excluded from the obligation to share under sub s.46(1) (a) of the model Act.

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

No; any such model procedure has the potential to discourage parties from working towards a consultation procedure that will best suit their individual workplace needs. Consultation procedures are best developed and agreed by the relevant parties at the particular workplace.

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?

AMMA believe that arrangements allowing for work groups to be determined for workers engaged in two or more businesses or undertakings should be by agreement. There will be limited occasions where the formation of a multi-person work group may be of value but the provision could be used improperly by providing HSR's with access to businesses, sites and workers unrelated to their own employer.

The National OHS Review's recommendation at 103 (a), which was agreed to in principle by WRMC, stated:

“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”



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The model Act at 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".

Subclause 50 (4) does not reflect the WRMC's response to the Review recommendations, the subclause should be amended to reflect the Review response.

Where negotiations cannot resolve discussions about work groups The model Act provides that that the regulator may be involved and that the regulator's decision will be taken to be the agreement. Where a regulator becomes involved any decision of the regulator should be a reviewable decision for the purposes of s.218 of the model 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?

The National OHS Review Panel's recommendation 101 and the WRMC response 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"

Prescribing time limits should be limited to within a reasonable time simply to cater for the various nuances at each workplace taking into account the size, location or nature of a business

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?

As for Q23 above, the words "*reasonably practicable*" speak for themselves there is no need to further prescribe time limits for election of HSRs and/or Deputy HSRs.



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- 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?

Consistent with our response to Q25 and Q26 the words “*within a reasonable time*” are sufficient without further prescription. Stipulating a time limit would be counter productive “*a reasonable time*” will vary depending on each individual circumstance and should not be prescriptive.

- 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?

Three months would be an appropriate time frame which allows for health and safety committees to be formed within that time frame where possible.

- 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?

No, the model Act use of the words “*reasonable grounds*” should be used rather than “*reasonable concerns*”. “*Reasonable concern*” is too subjective whereas “*reasonable grounds*” requires a person to have some basis of fact or evidence before ceasing work which is a significant course of action.

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



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Yes, it is incongruous to allow an untrained health and safety representative to direct that others cease work without appropriate training in OHS. Such training needs to be comprehensive. Where used without appropriate training the consequences on employers particularly in the resource section can be dramatic, leading to unnecessary stopping of operations and production with severe economic loss because of the direction of an untrained HSR.

The HSR training should be competency based with penalties for the abuse of this power by HSR's.

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

As with Q 29 above, this power should only be used by a HSR who has been sufficiently trained and assessed as competent to perform health and safety representative duties. A Provisional Improvement Notice has legal and economic ramifications for employers, the authority to issue such a notice must be accompanied with appropriate training and assessment .Penalties should apply for the abuse of this power.

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

A period of 14 days would be more appropriate in requiring compliance under a PIN due to the potential difficulties that can arise in any given case.

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 anti-discriminatory provisions in Part 5 of the model Act contain sufficient prohibition against all forms of discrimination against HSR's in relation to their OHS role without the requirement to further proscribe coercive behaviour or being induced to exercise the HSR's powers in a particular way.



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The reversal of the traditional onus of proof in clause 99 is not justified. The onus of proof should rest with the prosecution. There is no good reason why the defendant should bear the onus of proof that the reason alleged in the offence was not the dominant reason for the conduct.

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

The model Act allows a permit holder to enter the workplace to inquire into a suspected contravention without providing prior adequate notice of their intention to enter. Sub s.108(1) requires the permit holder to provide notice of the entry “*as soon as reasonably practicable after entering the workplace*”.

Sub s. 108(2) then states that the notice requirement does not apply if it would:

- “(a) defeat the purpose of the entry to the workplace’ or
- “(b) unreasonably delay the OHS permit holder in an urgent case.”

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

Part 6 of the model Act proposes to provide workplace entry rights to a union official holding an OHS permit. There are two proposed entry rights:

- entry to inquire into suspected contraventions; and
- entry to consult and advise workers.



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Most Australian states and territories (except South Australia and Tasmania)², provide for some form of union right of entry under occupational health and safety legislation, with differing rights and obligations in respect to the entry. Significant differences arise with respect to the purpose for which a union representative can enter the workplace, with only the Northern Territory and Queensland specifically allowing unions to enter the workplace to hold discussions on health and safety matters.

The OHS training requirements for union officials provided for in the model Administrative Regulations are exceptionally basic and don't reflect those in place in the ACT, Northern Territory, Queensland or Victoria and are even less comprehensive than the requirements for training of a HSR. Given the extensive rights of an OHS entry permit holder, the training requirements for union representative should be extensive and include training to ensure that a permit holder is knowledgeable in the key aspects of the model Act and in particular the industry they seek to exercise their entry.

AMMA's submission to the National OHS Review argued that there should be no union right of entry provisions under the model Act and that third party entry to the workplace should be limited to independent government regulators and inspectors.³ A union representative that reasonably suspects a contravention of the model Act can notify the employer without entering the site and/or the regulator, in order to seek resolution of the safety issue. This poses no increased safety risks to workers.

The South Australian Government, earlier this year released a consultation Bill and proposed to insert right of entry provisions to its OHS law; it refrained from including a right to enter for investigation purposes. This exclusion was expressly noted in the Minister's letter seeking consultation on the proposed changes. The exclusion of such a right acknowledges that investigation is more appropriately undertaken by qualified and independent inspectors with the responsibility for administering and enforcing OHS law and that such rights are not necessary for improved enforcement of OHS law.

In respect to entry to consult with employees, a right of entry under an OHS law that requires no reasonable suspicion of a breach or other tangible reason for entry, but merely allows entry where the union wishes to discuss health and safety, offers easy access to workplaces for reasons not necessarily related to safety. Entry for the purposes of engaging in consultation with employees under OHS law does not adequately draw a distinction between industrial issues and health and safety issues, providing the opportunity for entry under OHS law to be

² Both South Australia and Tasmanian governments have engaged in a consultation process in respect to inserting rights of entry for unions in their respective OHS laws. AMMA participated in the consultation process for both – submissions can be located at www.amma.org.au

³ AMMA, *Submission to the National OHS Review into Model OHS laws*, 2008, AMMA, 14-15.



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abused by unions seeking to pursue industrial agendas which frequently occurs.

AMMA has been advised by its members of numerous examples of unions abusing entry under OHS law. AMMA members with operations in Queensland, where entry for consultation purposes is allowed have experienced the misuse of entry for consultation purposes, particularly in the construction sector. This abuse is considered to be driven by the unwillingness on the part of unions to abide by the requirements for entry under the *Fair Work Act 2009*, and is testimony to the extent to which right of entry provisions are exploited for purposes that do not further the safety and health of workers.

AMMA maintains its strongly held view that Part 6 *Workplace entry by OHS entry permit holders* should be removed from the model Act.

Alternatively, if the right of entry provisions are retained in the model Act, AMMA makes the following additional comments:

The WRMC response to the recommendation of the National Review into OHS laws required that the notice provisions be consistent with the *Fair Work Act 2009*.

Section 108 of the model Act is not consistent with the *Fair Work Act 2009*. When entering the workplace to investigate a suspected contravention under the *Fair Work Act 2009*, a permit holder must provide a minimum 24 hours notice {s.487 (3)}. This notice requirement is excluded only where the permit holder has obtained an exemption certificate from Fair Work Australia which is issued where it is considered that advance notice might result in destruction, concealment or alteration of relevant evidence (s.519).

A requirement to provide notice as soon as reasonably practicable after entering the workplace, under clause 108(1), is not consistent with the advance notice requirements contained within the *Fair Work Act 2009*. Likewise, the exceptions in s.108 (2) are not worded consistently with the *Fair Work Act 2009* and are ambiguous and likely to lead to disputes between the parties.

Union right of entry should be used for genuine OHS purposes only. 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. Section 108 (2) should be removed and s.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 ..."

The OHS permit holder should be required to leave the workplace where after entry it is clear that the suspected contravention has not



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occurred.

Part 6 should prohibit entry of permit holders under Division 2 for frivolous, mischievous or vexatious reasons with penalties applying.

The notice requirements in the model Act are also contrary to the standards and contemporary practice of health and safety in the resource sector and does not give proper attention to the operation of s.119, which states that a permit holder must not exercise a right of entry unless they comply with a reasonable request to comply with an occupational health and safety requirement that applies to the workplace.

Mine sites and resource workplaces generally have strict occupational health and safety procedures that extend to all external visitors. Visitors are required to sign in, complete a site safety induction and participate in safety processes such as drug and alcohol testing prior to entering a work site. This standard of occupational health and safety would be undermined if an authorised official is able to enter a workplace without immediately notifying the employer that they have done so and comply with the induction requirements-, and would put at risk the health and safety of others.

In order to achieve consistency with the *Fair Work Act 2009*, and achieve the objective to protect workers and other persons against harm to their health, safety and welfare, s.108 should state:

- *require at least 24 hours and not more than seven days notice;*
- *allow a permit holder to provide notice as soon as reasonably practicable after entering the workplace where:*
 - 1) *the permit holder has obtained an exemption certificate on the basis that advance notice might result in destruction, concealment or alteration of relevant evidence; or*
 - 2) *there is a reasonably held belief of an immediate risk to the health and safety of workers and others.*

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?

With the different nature and purpose of entries under the model Act as compared with the *Fair Work Act 2009* only the model Act should



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provide for right of entry on the grounds of OHS .An authorised person entering a workplace for OHS purposes should have specific knowledge of the model Act and possess OHS expertise, which are aspects not required under the *Fair Work Ac 2009*. Such a separation will assist in keeping industrial relations and OHS issues apart.

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 stated in Q19 breaches of the model Act should generally be subject to civil rather than criminal penalties. Criminal punishment should be considered to be a last resort mechanism for only the most serious and culpable offences. Such an approach should be taken for the whole model Act.

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?

The alignment of union right of entry provisions between the model Act and the *Fair Work Act 2009* will provide for consistency, but 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 2009* and the model Act will not be suitable.

A permit holder that has entered the workplace to inquire into a suspected contravention is provided with a right under sub s.107 (1) (d) to inspect and to make copies of, any record or document that is directly relevant to the suspected breach.

One important point not to be lost is that Unions do not have the power to conduct OHS investigations and powers to inspect records etc are out of keeping with the limited role in enforcement unions have.

There are four issues in respect to access to records under the right of entry provisions of the model Act:

- 1) the notice requirement;
- 2) allowing records to be copied;
- 3) allowing access to non-member records; and



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4) access to confidential and trade secret information.

The notice requirement

Section 108(3) requires at least 24 hours notice in respect to inspecting, or taking copies of employee records and those records that are not held by the relevant person. The notice must comply with the regulations.

Section 495(3) of the *Fair Work Act 2009* regulates access to records for entry for OHS purposes. Section 495(3) requires the permit holder to give at least 24 hours “*written notice of setting out his or her intention to exercise the right*” and ‘*reasons for doing so*’. These are key elements of the written notice ensuring that the person in receipt of the notice knows that the permit holder intends to access records and how they are relevant to the suspected breach. These notice requirements should therefore be contained in the model Act as opposed to regulations.

Section 109 should be amended to reflect s.495 (3) of the *Fair Work Act 2009* to require the written notice to set out the intention to access records and the reasons for doing so.

Making copies of records

Section 109(1) allows a permit holder to inspect and take copies of certain records. This right, which is more in line with the rights of inspectors under the model Act, is broader than recommendation 216(e) of the National Review. This recommendation refers only to the inspection of documents and does not extend the access right to taking copies of such records.

Section 109(1) should be amended to remove reference to taking copies of records.

Access to employee records

Under the model Act, no distinction has been made in respect to member and non-member records for the purposes of right of entry. This means that a permit holder can access non-member records under the model Act.

Access to non-member records by permit holders under the model Act is not supported. The inappropriateness of unions accessing records of non-members was recognised by the Federal Government and led to amendment to the *Fair Work Bill* to allow access to such records only where an order has been obtained by Fair Work Australia.



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To allow automatic access to non-member records under the model Act could lead to this right being used to side-step the limitation imposed under the *Fair Work Act 2009*.

Section 109 should be amended to exclude non-member records. Non-member records should only be accessed with the permission of the relevant employee or by order of the appropriate regulator.

Access to confidential and trade secret information

The right of entry provisions in Part 6 of model Act provide limited protection to commercial-in-confidence documents. It does not allow the person conducting a business or undertaking to refuse to disclose these documents on the grounds that they are commercial-in-confidence. A prohibition and penalty against unauthorised use or disclosure of information or documents does not adequately address any damage to an employer's business where unauthorised use or disclosure occurs. An ability to refuse to disclose such information to a permit holder is required.

Section 107 should be amended to exclude a permit holder from inspecting commercial-in-confidence documents.

AMMA also proposes that the model Act should explicitly provide employers 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

Part 7 – The Regulator

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

No; guidelines are simply that; for the guidance of the concerned parties, they should not have any legal status under the Act. Employers should have input to any guidelines to ensure that the information is in terms easy to understand for duty holders.

Part 10 – Review of Decisions



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Q38. Is the list of reviewable decisions appropriate?

All decisions made under the model Act should be subject to review in order to provide transparency and fairness.

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

Yes.

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

Yes

Exposure Draft of Key Administrative Regulations**Q41.** Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?

Yes

Do you have any other comments?Health and Safety Representatives

HSRs' play an important role in the workplace and it is acknowledged and accepted that in performing this role, that the HSR may require assistance.



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This assistance is facilitated in the model Act under sub s. 62(2) (f), which states that in performing a function, the HSR may whenever necessary, request the assistance of any person. This person must be allowed to enter the workplace if necessary to enable assistance to be provided.

“Any person” under sub s. 62(2) is unreasonably broad and undermines both the right of entry provisions of the model Act and the *Fair Work Act 2009*. “Any person” can include a union official, as is recognised in sub s. 64(4) which allows entry to be refused if the assistant has had their OHS entry permit revoked or suspended or is disqualified from holding an OHS entry permit. By providing assistance to the HSR a union official gains entry to the workplace and avoids the important obligations and prohibitions under the right of entry provisions that limit unfettered access and provide protection from undue disruption.

Further, while sub s.64(4) restricts an assistant from entering the workplace if they have had an OHS permit revoked etc, it is not clear whether sub s. 62(2)(f) actually requires an assistant that is a union official to hold an OHS permit in the first place. This means that a union that is not a permit holder and has not undergone the necessary training or met the “*fit and proper person*” test could gain access to the workplace as an assistant to an HSR.

Such entry by unions could be used for inappropriate purposes, with little repercussion.

The model Act also fails to ensure that the person assisting the HSR has an appropriate level of understanding and training in OHS. Without any parameters on who can assist the HSR and minimum requirements, the assistance provided could end up being counterproductive.

AMMA submits that the person conducting business/undertaking and the HSR must agree on the person who is to provide assistance.

AMMA further submits that the person assisting the HSR must be required to have a minimum level of knowledge and training in OHS. This is consistent with s. 70 of the Victorian OHS Act.