



Key elements of the Work Health and Safety Bill

The final version of the model national OHS legislation is called the 'Work Health and Safety Bill', representing a move away from the more traditional use of the term 'occupational health and safety'. This change in terminology appears throughout the Model Bill.

Changes to the concept of 'person conducting a business or undertaking'

The Model Bill adjusts the concept of a 'person conducting a business or undertaking' (PCBU), on whom the primary duty of care rests with regard to health and safety.

Importantly, those engaging workers solely for private or domestic purposes are not excluded from the definition of a PCBU. However, the operation of the model laws in relation to private or domestic workers will be explained in yet-to-be-produced guidance material and possibly regulations, which will exclude particular working situations from a PCBU's duty of care.

In refining the legislation, Safe Work Australia said it was impossible to properly target the types of workers it sought to exclude in the Model Bill itself. For instance, it felt an employer should owe a duty of care to a full-time nanny but not to a once-a-month lawnmower. As the Model Bill stands, a person employing a full-time nanny would fall within the definition of a PCBU because the concept of 'undertaking' encompasses a wider array of situations than does 'business'.

A self-employed person is also a PCBU for the purposes of the Model Bill and owes a duty of care to him or herself.

Duty of care based on what is 'reasonably practicable'

The Model Bill imposes a primary duty of care on PCBUs according to what is 'reasonably practicable' in ensuring health and safety. This is in line with AMMA's submission to the National OHS Review which argued the duty of care should be qualified in this way.

The Model Bill defines 'reasonably practicable' as what, at a particular time, was reasonably able to be done in relation to ensuring health and safety.

The concept of 'reasonably practicable' takes into account: the likelihood of the hazard or risk occurring; the degree of harm that might result from the hazard or risk; what the person concerned knew or ought reasonably to know about the hazard or risk and ways of eliminating or minimising it; the availability and sustainability of ways to eliminate or minimise the risk; and, after assessing the extent of the risk and the available ways of eliminating or minimising it, the cost associated with eliminating or minimising that risk, including whether the cost is 'grossly disproportionate' to the risk.

AMMA's submission argued the notion of what was 'reasonably practicable' should take into account the degree of 'control' that a PCBU exercised.

While the primary duty of care does not include the concept of control, PCBUs who do manage or control workplaces have extra duties to ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health or safety of any person, not just their employees.

The obligation to consult with other duty holders

Under the Model Bill, PCBUs have an obligation to consult not only with workers directly affected by a particular work health and safety matter but also with other duty holders who have a duty in relation to that same matter.

This provision accords with the recommendations of the original OHS Review Panel and the WRMC.

Discriminatory conduct

The Model Bill includes maximum fines of \$500,000 for corporations and \$100,000 for individuals who engage in discriminatory conduct for a prohibited reason.

Discriminatory conduct includes but is not limited to: dismissing a worker; terminating their contract for services; altering their position to their detriment; refusing or failing to offer to engage a prospective worker; and treating a prospective worker less favourably than another prospective worker would be treated in offering terms of engagement.

Breaches arise if the dominant reason for the conduct is prohibited under the Model Bill, including because a worker has been or proposes to be a HSR or a health and safety committee representative.

A PCBU is also prohibited from coercing or threatening to take action if a worker exercises his or her powers under the model laws in a particular way.

Defendants bear the onus of proof for showing the alleged reason for the discriminatory conduct was not the dominant one.

Both criminal and civil proceedings can be brought over alleged discriminatory conduct.

Right of entry notice requirements

The Model Bill does not require permit holders to give advanced notice of entry when enquiring into a suspected health and safety breach.

It only requires a permit holder 'as soon as is reasonably practicable after entering a workplace' to notify his or her entry and the suspected breach to the PCBU or person with management or control of the workplace. However, the permit holder is not required to do that if, according to the Model Bill, it would 'defeat the purpose of the entry to the workplace' or 'unreasonably delay' the permit holder in an urgent case.

AMMA's submission to the exposure draft of the Model Bill argued against union permit holders having the ability to wander the workplace without immediately notifying the PCBU of their presence.

AMMA's first preference was for there to be no right of entry regime for anyone other than independent government regulators and inspectors. It argued that union representatives who reasonably suspected a health and safety breach could notify the employer and/or the regulator without entering the site themselves and still not compromise employee health and safety.

Alternatively, AMMA argued permit holders should be required to leave the workplace after gaining entry in circumstances where it was clear the suspected breach had not occurred. It also argued employers should have an explicit right to accompany a permit holder while they were on the premises to keep the appropriate checks and balances on their conduct.

The final Model Bill's lack of any strict notice requirements or checks and balances will have major implications for resource industry employers, particularly given the potential for the provisions to be misused.

Mine sites and resource sector workplaces generally have strict health and safety procedures that extend to all external visitors. Visitors are generally required to sign in, complete a site safety induction and participate in safety processes such as drug and alcohol testing before entering a worksite.

AMMA believes the standard of safety in resource sector workplaces will be undermined if union officials are able to enter a workplace without immediately notifying the employer or complying with induction requirements, and this will also put at risk the health and safety of others.

AMMA will continue to lobby the government on this and other issues of importance.

Right of entry for consultation purposes

The Model Bill gives permit holders the right to enter workplaces to consult on work health and safety matters and to provide advice on those matters to one or more relevant workers who wish to participate in discussions.

To exercise this right, permit holders are required to give between 24 hours and 14 days' notice to the PCBU of their intended visit.

During consultation visits, permit holders are also able to warn any person whom they reasonably believe is exposed to a serious risk to health or safety from an immediate or imminent exposure to a hazard.

AMMA's submission to the exposure draft of the Model Bill argued against allowing unions access to hold discussions with workers about health and safety issues. It argued there should be a strict requirement that permit holders have a reasonable suspicion of a breach or other tangible reason for entering.

Allowing unions right of entry for consultation purposes fails to draw an adequate distinction between industrial relations and health and safety issues, and provides an opportunity under work health and safety laws for unions to pursue industrial agendas.

For example, AMMA members with operations in Queensland where entry for consultation purposes is allowed under state OHS laws have experienced unions misusing these provisions, particularly in the construction sector. Unions have demonstrated an unwillingness to abide by entry requirements under the *Fair Work Act 2009* and have shown a willingness to exploit work health and safety laws for purposes that do not enhance health and safety.

The right to inspect records

The Model Bill requires a PCBU to allow a permit holder to inspect and make copies of any records or documents that are 'directly relevant' to a suspected breach, as long as those records are kept at the workplace or are accessible from a workplace computer.

It only requires the permit holder to give at least 24 hours' notice of entry to inspect employee records or documents if they are held by someone other than the PCBU.

AMMA's submission argued 24 hours' notice should be required for accessing all records, not just those not held by a PCBU.

In the final version of the Model Bill, a PCBU is not required to allow the permit holder to inspect a record or document if doing so would breach a state or federal law. However, while the *Privacy Act 1988* covers records for the purposes of permit holders' disclosure of them, it does not prevent permit holders accessing those records for their own purposes.

Nor is union officials' access to records limited to those of their members.

AMMA will continue to lobby the government against allowing unions to inspect non-member records on the grounds it creates the opportunity for unions to overcome restrictions on accessing non-member records under the *Fair Work Act*.

The Federal Government has recognised the inappropriateness of unions accessing non-member records for industrial purposes by introducing amendments to the *Fair Work Act* that only allow such access with the consent of the employee or by order of Fair Work Australia.

Given that the Model Bill does not grant unions the power to conduct workplace health and safety investigations, it is out of step with their limited enforcement role to give them the power to inspect records.

Under the Model Bill's provisions, PCBUs who fail to produce requested documents without a reasonable excuse face maximum fines of \$50,000 for corporations and \$10,000 for individuals.

The 'fit and proper person' test

The Model Bill has streamlined authorisation requirements for permit holders in response to union calls that their authorisation as 'fit and proper persons' under the *Fair Work Act* should satisfy the fit and proper person test under work health and safety laws.

Given that union officials would have already satisfied the fit and proper person test for entry permits under the *Fair Work Act*, Safe Work Australia decided it would be a duplication to have that requirement included again in the Model Work Health & Safety Bill.

The Model Bill does, however, require workplace health and safety permit holders to undertake extra training to be eligible for an OHS permit.

Functions and powers of HSRs

i) The power to order work to cease

The initial exposure draft of the Model Bill referred only to 'functions' of health and safety representatives (HSRs). Following public consultation, Safe Work Australia decided HSRs' ability to order work to cease was more correctly referred to as a 'power', so the final version of the Model Bill refers to both 'functions' and 'powers'.

AMMA had previously argued HSRs' ability to order work to cease should be based on 'reasonable grounds' of believing there had been a safety breach rather than adopting the exposure draft's requirement of a 'reasonable concern', which was far too subjective.

The final version of the Model Bill uses new wording again, empowering HSRs to order work to cease where they 'reasonably believe' a person is breaching a provision of the legislation, but only after undergoing specific training.

ii) The power to request assistance from any person

Another HSR power under the Model Bill is that of being able to request the assistance of any person to help them with a workplace health and safety matter.

The Bill clarifies HSRs can seek the assistance of 'any person' in regard to that matter, but a PCBU can refuse access if it believes that person is not capable of providing the necessary assistance.

If any party disputes the refusal of access, they can ask an authorised inspector to resolve the dispute via a determination.

It appears from the Model Bill that a PCBU who refuses access to an assistant would not be considered to have breached the legislation until after an inspector had made a determination. However, PCBUs need to ensure they have reasonable grounds for not allowing people in.

The Model Bill did not adopt the Victorian jurisdiction's requirement that any such assistant possess relevant OHS knowledge. Safe Work Australia decided this would have the unintended consequence of, for example, prohibiting a HSR from requesting the assistance of an interpreter, purely because they had no relevant OHS knowledge.

PCBUs should ensure they know what each particular safety issue is about, particularly if a HSR calls in a union official to assist. PCBUs need to be able to properly assess whether that person can provide the necessary assistance and/or whether they possess the relevant knowledge that the HSR lacks if they want to dispute access.

According to Safe Work Australia, in state jurisdictions where HSRs have had the power to request assistance from any person, that right has not been abused.

iii) **The power to issue provisional improvement notices**

The Model Bill also gives HSRs the power to issue provisional improvement notices (PINs) if they 'reasonably believe' a person has breached a provision of the legislation.

Again, the Model Bill's wording has changed from that of the exposure draft which required a HSR to 'believe on reasonable grounds' a person had breached a provision before issuing a PIN. In the final legislation, a HSR has to 'reasonably believe' such a breach has occurred.

The Model Bill also introduces the power for HSRs to offer the person to whom a PIN is issued a choice of ways in which to remedy it.

HSRs are required to undertake specific training before they are authorised to issue PINs, which as previously mentioned is something unions will continue to campaign against.

Timeframes for negotiations and training

The Model Bill includes a 14-day timeframe within which PCBUs are required to commence negotiations with workgroups. Many submissions to the exposure draft supported the inclusion of timeframes given there were penalties attached for non-compliance. Most supported a timeframe of between 14 and 28 days.

The Model Bill also includes a time limit within which a PCBU has to provide training to a HSR – within three months of the HSR making the request.

Penalty units replaced with dollar amounts

The Model Bill abandons the use of 'penalty units' for each category of offence, instead specifying maximum penalties in dollar amounts. Each state jurisdiction that enacts mirror legislation will have to ensure they can accommodate the move away from a scheme based on penalty units.

Maximum penalties for a 'category one' offence of 'reckless conduct' are \$3 million for corporations.

A person commits a category one offence if they engage in conduct that, 'without reasonable excuse', exposes an individual to whom they owe a duty to a risk of death or serious injury or illness and the person is 'reckless' as to the risk of death or serious injury or illness to that individual.

Individuals found guilty of a category one offence face a maximum \$300,000 fine or five years' jail or both. Individual PCBUs face \$600,000 maximum fines or five years' jail or both.

The prosecution bears the burden of proving the conduct was engaged in without reasonable excuse.

AMMA maintains the \$3 million maximum fine for a category one offence is excessive and neither the OHS Review Panel nor the WRMC justified an increase above what currently exists nor provided any evidence that improved safety outcomes would result.

AMMA also argued breaches of the model laws should be subject to civil rather than criminal penalties, with criminal punishment a 'last resort mechanism for only the most serious and culpable offences'.

In the final version of the Model Bill, offences are subject to a criminal as well as civil penalty regime, except for right of entry offences which are subject to civil penalties consistent with the *Fair Work Act*.

A framework for civil penalties under the Model Bill is yet to be established.

Only the regulator has the power to prosecute

The Model Bill has not adopted *NSW Occupational Health & Safety Act 2000* provisions allowing unions to prosecute safety breaches. Consistent with AMMA's submission to the National OHS Review, only the regulator or an inspector with the regulator's written authorisation can launch a prosecution.

While the regulator is the only one with the power to prosecute, if it does not do so within six to 12 months of a breach, an applicant can write to the regulator requesting it to prosecute and the regulator must respond in writing within three months.

What happens next?

The WRMC has agreed that Safe Work Australia and the Parliamentary Counsel's Committee will make further technical and drafting amendments prior to implementing the Model Act, including a mechanism for maintaining the real value of penalty levels.

With the Model Bill and Administrative Regulations now all but finalised, Regulations covering all other matters including matters in existing national OHS standards will be developed by September this year.

The further Regulations will be released for public comment between November 2010 and January 2011 and submitted to the WRMC for agreement by June 2011.

By December 2011, all participating state jurisdictions will enact the model Work Health & Safety Act and Regulations and complete all required transitional arrangements for a harmonised national workplace health and safety system.

Members are invited to comment on the Work Health and Safety Bill's provisions in order to further assist AMMA in its workplace policy strategy. Please contact Senior Workplace Policy Adviser Lisa Matthews on (02) 9211 3566 or at lisa.matthews@amma.org.au