

Exposure Draft
Model Act
for Occupational Health and Safety

Discussion Paper

September 2009

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Glossary of acronyms

COAG	Council of Australian Governments
HSC	Health and Safety Committee
HSR	Health and Safety Representative
IGA	Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
NSW	New South Wales
NT	Northern Territory
OHS	Occupational health and safety
PIN	Provisional Improvement Notice
RIS	Regulation Impact Statement
SA	South Australia
WA	Western Australia
WRMC	Workplace Relations Ministers' Council

INTRODUCTION

In July 2008, the Council of Australian Governments (COAG) formally committed to the harmonisation of OHS legislation by signing an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA).

The IGA outlines the commitment of all states and territories and the Commonwealth to work together to develop and implement model Occupational Health and Safety (OHS) legislation as the most effective way to achieve harmonisation of OHS laws in Australia, and commits each government to pass their own laws that mirror the model OHS laws by December 2011.

An independent panel has reviewed OHS laws in each state, territory and the Commonwealth and made recommendations to the Workplace Relations Ministers' Council (WRMC) on the optimal structure and content of a Model OHS Act that can be adopted in all jurisdictions. This review (National OHS Review) was completed in January 2009, resulting in two reports available at: www.nationalohsreview.gov.au

On 18 May 2009, WRMC responded to the National OHS Review recommendations, taking into account public submissions, and requested that Safe Work Australia commence development of the model legislation based on the WRMC decisions.

Safe Work Australia is an independent body established on 1 July 2009. Its primary function is to progress harmonisation of OHS laws in partnership with governments, employers and workers, who are represented on the Safe Work Australia Council. On 7 September 2009 the Senate passed without amendments the Safe Work Australia Bill 2008 [No. 2] which will enable Safe Work Australia to be established as an independent statutory agency.

On 25 September 2009, WRMC agreed to release an exposure draft of the model OHS Act for public comment.

WHAT IS THE PURPOSE OF THIS DISCUSSION PAPER?

This document outlines the provisions contained in the exposure draft of the model Act and aims to elicit public comment on specific areas of the model Act where WRMC did not provide a policy position or where there is a need to resolve practical implementation issues identified during the drafting process.

This paper is not intended to seek public comment in relation to policy decisions that have been made by WRMC in their response to the National OHS Review recommendations. It is also not intended to seek public comment on hazard or industry specific regulations and codes of practice that will support the model Act, as these are still under development. An opportunity to comment on these will be provided in 2010 when stakeholder views will be sought on exposure drafts of model regulations and codes of practice.

Written submissions are encouraged to address the questions raised in this discussion paper as well as to provide comment on the Regulatory Impact Statement (RIS) which is part of this consultation process.

WHAT IS CONTAINED IN THIS PACKAGE?

This discussion paper is accompanied by three documents:

- **Model Act Exposure Draft (Attachment A)**

The model Act is based on the policy decisions made by WRMC on the National OHS Review recommendations, which are available at: www.safeworkaustralia.gov.au/swa/modelLegislation/Background/.

The Parliamentary Counsel's Committee has responsibility for drafting the model Act. This is a committee that represents the drafting offices of all Australian jurisdictions and New Zealand.

▪ **First stage of model regulations (Attachment B)**

A set of key model regulations includes administrative regulations dealing with matters such as health and safety representatives, incident notification and notice requirements for authorised entry. These regulations also address a number of recommendations from the National OHS Review.

▪ **Consultation Regulatory Impact Statement (Attachment C)**

The COAG requires Ministerial Councils and national standard setting bodies to establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition. As part of this process, a Consultation RIS has been prepared by Access Economics for Safe Work Australia to canvass potential costs, benefits and impacts associated with the implementation of the model Act. A decision-making RIS to accompany the final draft of the model Act will be developed taking into account the results of the Consultation RIS.

HOW CAN YOU CONTRIBUTE?

This exposure draft provides all members of the Australian community – particularly workers, employers, their respective organisations and regulators – with an opportunity to contribute to creating a model Act that will be used to harmonise OHS laws across Australia and improve occupational health and safety.

Your views on the issues raised in this paper are important to ensure that the model Act is effective and responsive to the needs and working arrangements of Australian workplaces.

You can provide your comments as an individual or you may wish to contribute to a joint submission through your union or industry association, professional association, safety group or community forum. Please provide reasons or explanations in your submission, where possible, to assist us in understanding your views.

A Public Comment Submission Cover Sheet and the Public Comment Response Form are provided for making written submissions, available at www.safeworkaustralia.gov.au.

The closing date for written submissions is 9 November 2009. Submissions must be lodged via email to: submissions@safeworkaustralia.gov.au.

Once your submission is received, an acknowledgement will be sent to confirm receipt. Each submission will normally be treated as a public document and placed on the Safe Work Australia website. If any information in the submission is provided on a confidential basis, it should be clearly marked 'IN CONFIDENCE' and it will not be made publicly available.

If you wish to submit hand written submissions, or have any other enquiries about the public comment process, please contact Safe Work Australia on (02) 6121 5317.

WHAT HAPPENS AFTER THE PUBLIC COMMENT PERIOD CLOSSES?

Safe Work Australia will review and analyse all written submissions. Following its analysis of submissions, Safe Work Australia will produce a final version of the model Act and supporting material for WRMC consideration in December 2009 and recommend its adoption into law by all states, territories and the Commonwealth by the end of 2011.

Draft model OHS regulations to support the model Act will be developed progressively, subject to finalising the final version of the model Act. Compliance and enforcement protocols will also be developed to ensure a nationally consistent regulatory approach.

MODEL ACT EXPOSURE DRAFT

The purpose of the model Act is to develop a clear and stable legislative framework of OHS rights and obligations that will endure over time and be capable of application in all jurisdictions.

Some aspects of the legislation will impose duties, rights and obligations on various persons, with significant sanctions available for non-compliance. It is important that these duties, rights and obligations are clear and can be understood by those to whom they apply.

The model Act is structured to reflect Recommendation 79 of the National OHS Review, so that important provisions directly relevant to persons who have duties and rights are prominently located in the first parts of the Act.

The following discussion gives a broad overview of each Part, with a more detailed explanation of those provisions where specific comment is sought.

PART 1: PRELIMINARY

Part 1 of the model Act contains provisions that are fundamental to the operation of the model Act:

- the objectives of the model Act
- definitions of key terms, and
- the scope and application of the model Act.

1.1 TITLE

The title of the model Act is the *Safe Work Act 2009* and the intention is that this title be adopted by each jurisdiction. The titles of OHS laws in Australia vary, with 'Occupational Health and Safety Act' being the most common. Other titles include the words 'work safety', 'workplace health and safety' or 'occupational health, safety and welfare'.

The term 'work' is proposed in the title instead of 'occupational' to reflect that the model Act applies broadly to work, not just occupations. An alternative would be to also include the word 'health' in the title, e.g. 'Work Health and Safety Act'.

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

The intention is for the model Act to commence operation on the same date in each jurisdiction being 1 January 2012.

1.2 OBJECTS

The objects of the model Act describe what the Act aims to achieve, including the important principle that workers and other persons should be given the highest level of protection from hazards and risks as is reasonably practicable. These provisions reflect WRMC decisions in relation to Recommendations 77, 80, 85 and 151.

1.3 INTERPRETATION

The model Act includes a set of definitions at the beginning of the Act that apply throughout the model Act and regulations.

For example the definition of '*health*' clarifies that the term covers both physical and psychological health (Recommendation 85).

Officer

The model Act places certain duties on ‘*officers*’ of bodies such as corporations, unincorporated associations and partnerships. Although three OHS Acts currently apply the definition of ‘*officer*’ in the *Corporations Act 2001* (Cth) (Corporations Act), WRMC did not agree to adopting this definition as recommended, but requested that the definition include those persons who influence or make decisions that affect the whole, or a substantial part of the body and should include equivalent persons representing the Crown. A modified version of the Corporations Act definition is included to reflect the WRMC decision in relation to Recommendations 41, 42 and 86.

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

Plant and Structure

The model Act places certain duties on persons who design, manufacture, import and supply plant, substances and structures. These things are defined in the model Act. The definition of ‘*plant*’ reflects the WRMC decision at recommendation 90. No definitions were recommended for ‘*substance*’ or ‘*structure*’, but definitions for these terms have been included in the model Act to provide greater clarity and certainty.

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?

Other important terms

Person conducting a business or undertaking

The model Act places the primary duty of care on persons who conduct a business or undertaking. A ‘*person*’ includes an individual, and the definition also covers body corporates, unincorporated bodies or associations and partnerships. Clause 5 clarifies that a person conducts a business or undertaking whether it is conducted alone or together with others and whether or not it is conducted for profit or gain.

WRMC recognised that there are some types of undertakings and activities that should not be captured by the duties under the model Act, and specifically excluded persons who engage workers solely for their own private or domestic purposes (such as a home owner who engages a contractor to mow their lawn). WRMC also requested that further consideration be given to the treatment of volunteers under the Act, to ensure the Act does not place inappropriate duties on volunteers.

Appendix 1 explains the concept in more detail. The model Act also allows other types of activities or circumstances to be excluded by regulation to avoid unintended consequences. Clause 5 reflects WRMC decisions in relation to Recommendations 12 and 81-83.

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?

Supply

The definition of 'supply' is relevant to the duties of suppliers.

WRMC agreed to vary its decision in relation to recommendations 35 and 91, noting that the definition in Recommendation 91 limits supply to 'physical possession' and that this would create confusion for suppliers who never physically possess an item but still have legal control of it.

The model Act excludes from the supplier duty persons whose only role is to finance the acquisition of the plant, substance or a structure..

There are other kinds of suppliers e.g. some auctioneers, who facilitate the sale of an item but never take possession or control of it. They could be excluded from the supplier duties under the model regulations.

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

Worker

A 'worker' is a person who carries out work for a person conducting a business or undertaking in any capacity (Recommendations 16, 45 and 93).

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

Workplace

A 'workplace' is any place where work is carried out for a business or undertaking, and includes any place where a worker goes, or is likely to go, while at work (Recommendations 28 and 94). This means that a place becomes a workplace once work has been undertaken at that place and does not stop being a workplace simply because there is no work occurring there at a particular time e.g. break or recess, over the weekend.

Q7. Is the definition of 'workplace' appropriate?

1.4 APPLICATION OF THE ACT

The model Act binds the Crown, consistent with Recommendation 65.

The model Act allows jurisdictions to insert a local provision relating to extra-territorial application of the model Act in relation to their jurisdiction to address the WRMC decision at Recommendation 17. Although most jurisdictions do not currently provide for extra-territorial application there are some exceptions e.g. the Commonwealth makes provision for embassies and South Australia makes provision for South Australian-registered ships.

Jurisdictions may insert local provisions to establish the relationship between the model Act and other safety-related Acts in their jurisdiction. This arrangement is subject to the agreement that separate and specific safety-related laws should only continue where they have been objectively justified (Recommendation 76).

The model Act also allows jurisdictions to include model provisions dealing with 'dangerous goods' and 'high risk plant', whether or not used at a workplace.

PART 2: SAFETY DUTIES

Part 2 of the model Act contains the overarching OHS responsibilities of key persons. It specifies who owes duties of care, who is to be protected by the duties and the content of the duties.

2.1 PRINCIPLES THAT APPLY TO SAFETY DUTIES OF CARE

The model Act co-locates all relevant principles that apply to the duties of care under the Act, including that a duty is non-delegable, that persons may hold more than one duty, and that more than one person can hold a duty (Recommendation 2).

Clause 16 sets out the principle of risk management, consistent with the WRMC decision in relation to Recommendation 9. General risk assessment and risk control processes are not specified in the model Act consistent with Recommendation 136, although the intention is for the model regulations to deal with risk management in relation to specific hazards or risks.

Clause 17 describes what is meant by the concept of '*reasonably practicable*' which is the standard used to qualify the primary duty of care, as well as the duties related to specific activities (Recommendations 5, 6 and 8). [Appendix 2](#) explains the concept in more detail.

- Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?
- Q9. Is the definition of '*reasonably practicable*' appropriate in this context?
- Q10. Should the definition of '*reasonably practicable*' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?

2.2 PRIMARY DUTY OF CARE

The model Act provides that persons conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of: workers who are engaged, or caused to be engaged, by the person; workers whose activities in carrying out work are influenced or directed by the person; and workers of a class prescribed in the regulations.

If the person is self-employed, then that person must ensure, so far as is reasonably practicable, his or her own health and safety while engaged in work for their business or undertaking.

A person conducting a business or undertaking also must ensure, so far as is reasonably practicable, that the health and safety of other persons e.g. customers, visitors, is not put at risk from work carried out as part of the conduct of the business or undertaking.

The model Act also sets out key elements of those duties e.g. providing and maintaining a safe and healthy work environment.

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

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)?

2.3 DUTIES RELATED TO SPECIFIC ACTIVITIES

The model Act places certain duties on persons with management or control of:

- workplaces, or the means of entering or exiting workplaces, and
- fixtures, fittings or plant in workplaces,

to ensure, so far as is reasonably practicable, that those things are safe and without risks to the health of any person.

These duties only apply to the relevant business or undertaking, not to mid-level employees or supervisors. Additionally these duties do not apply to the occupier of domestic premises.

Specific duties of care are also owed by the following persons whose businesses or undertakings influence the way work is carried out:

- persons who design, manufacture, import or supply plant, structures and substances, and
- persons who erect, install or commission plant or structures.

These provisions reflect WRMC decisions in relation to recommendations 23-27 and 29-34.

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

2.4 OFFICERS, WORKERS AND OTHER PERSONS

Officers of bodies that have duties under the model Act must exercise due diligence to ensure that the entity complies with its duty (Recommendation 40).

Workers must take reasonable care for their own health and safety and that of other persons and must cooperate with any reasonable instruction given by the person conducting the business or undertaking to comply with the Act (Recommendations 44-47).

Other persons at the workplace e.g. customers, visitors, owe similar duties to those owed by workers (Recommendation 48 and 49).

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

2.5 VOLUNTEERS

The model Act defines a '*volunteer*' as a person acting on a voluntary basis irrespective of whether the person receives out-of-pocket expenses.

The model Act protects volunteers in their capacity as workers, but ensures that volunteers are not discouraged from participating in community-based activities. For example, wholly volunteer associations that have been formed for one or more community purposes are not treated as businesses or undertakings for the purposes of the Act. Furthermore, while officers of organisations and workers who are volunteers have duties

of care under the model Act, they cannot be prosecuted for contravening those duties under the Act.

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

2.6 OFFENCES AND PENALTIES

The model Act applies three categories of penalties for a failure to comply with a duty of care, depending on the degree of seriousness or culpability involved. The intention is for these offences to be 'absolute liability' offences (Recommendation 52). However, the offences themselves are generally qualified e.g. by reasonable practicability, due diligence or reasonable care.

The following penalty levels apply under the model Act for duty of care offences as agreed by the WRMC (Recommendations 55 to 60):

	Nature of Offences	Maximum Penalty – corporation	Maximum Penalty – individual
Category 1	The most serious offences – causing death, or serious injury or high risk of death or serious injury involving recklessness.	\$3 million	\$600,000 and/or 5 yrs imprisonment for officers \$300,000 and/or 5yrs imprisonment for workers or other persons
Category 2	Offences involving a high risk of death or serious injury without recklessness	\$1.5 million	\$300,000 for officers \$150,000 for workers or other persons
Category 3	Less serious offences placing persons at risk of injury or illness	\$500,000	\$100,000 for officers \$50,000 for workers or other persons

The WRMC also agreed to Recommendations 200 and 201 which set out penalties related to breaches against an inspector and to Recommendation 129, setting out that offences for 'proscribed conduct' (discrimination, victimisation, coercion, etc) should be Category 3 offences. No further recommendations were made regarding penalties for other types of offences.

For the purposes of discussion, the following table sets out four additional categories or levels of penalties which take account of existing penalty structures in jurisdictions and are proportionally commensurate with the penalties agreed by the WRMC for duty of care and other offences.

	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
Category 4	\$250,000	\$50,000 and/or 2yr imprisonment
Category 5	\$100,000	\$20,000
Category 6	\$50,000	\$10,000
Category 7	\$25,000	\$5,000

Proposed penalty levels have been mapped to specific offences in Appendix 3

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

PART 3: OTHER OBLIGATIONS

Part 3 of the model Act covers:

- incident notification including the duty to preserve incident sites, and
- requirements for authorisations.

3.1 INCIDENT NOTIFICATION

Incident notification provisions under the model Act are necessary to ensure that regulators are aware of serious OHS incidents, and are also able to effectively investigate them in a timely manner. The duty to notify incidents in clause 37 is linked to the requirement to preserve the site where the incident occurred until an inspector arrives or directs otherwise (clause 38). Consistent with Recommendation 142, only the most serious incidents are to be notified. Clauses 35 and 36 propose the types of injuries, illnesses and dangerous incidents that must be notified.

Notification of diseases of long latency such as zoonoses or chronic effects of exposure to hazardous substances is not required under these provisions, but could be provided for under the model regulations.

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

The regulations require records of incident notification to be kept (Recommendation 141).

3.2 REQUIREMENTS FOR AUTHORISATIONS

The model Act includes offence provisions relating to authorisations to use or do certain things at workplaces, e.g. licences, permits or registrations.

However, the intention is for the model regulations to establish the schemes for authorisations, e.g. licensing scheme for '*high risk work*'.

It is also intended that the model regulations will establish a scheme for the mutual recognition of authorisations.

PART 4: CONSULTATION, PARTICIPATION AND REPRESENTATION

Part 4 of the model Act covers:

- duty to consult

- Health and Safety Representatives (HSRs)
- Health and Safety Committees (HSCs)
- issue resolution, and
- Provisional Improvement Notices (PINs).

4.1 CONSULTATION

A person conducting a business or undertaking must, so far as is reasonably practicable, consult with workers who carry out work for their business or undertaking about matters affecting, or likely to affect, their health and safety (clause 45). The model Act describes what consultation involves, as well as how and when it should be undertaken.

This duty extends beyond the duty of employers to consult their employees, as it also covers consultation with other kinds of workers e.g. contractors.

The scope of this duty depends on the circumstances of each case, such as the impact of the safety matter in question, and the nature of the relationship between the relevant persons. For example, the amount of consultation required depends on the importance of the OHS decision being made. The more important the OHS decision, the more consultation is required.

This approach also recognises there may be exceptional circumstances in which the usual consultation procedures cannot apply, e.g. during an emergency, or because a person who must be consulted is on extended leave.

These provisions reflect WRMC decisions in relation to Recommendations 96, 97 and 99. Recommendation 98 requires the sharing of information with 'other persons'. The sharing of information with other duty holders is captured in the principles applying to all duties of care in clause 15(3)(c) of the model Act.

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

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

4.2 HEALTH AND SAFETY REPRESENTATIVES

The model Act encourages and facilitates the participation of workers in health and safety by providing for the election of health and safety representatives (HSRs) and prescribing the functions and entitlements of HSRs.

The model Act includes the process for negotiating and determining work groups to facilitate the representation of workers in the work group by one or more HSRs. If negotiations fail, any party to the negotiations may refer the issue to the regulator for determination. These provisions reflect the WRMC decision in relation to Recommendations 102 and 103.

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?

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?

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?

Clauses 53 to 57 prescribe the election procedure and eligibility to be elected and to vote (Recommendation 104).

The model Act prescribes the HSR's term of office, consistent with Recommendation 105, and provides a basis for a Court or Tribunal upon application to disqualify a HSR (Recommendation 113). An application can be made by the regulator or a person who has been detrimentally affected by the actions of the health and safety representative. An application can only be made in relation to circumstances where the health and safety representative has performed a function for improper purpose or has disclosed information they have acquired as a health and safety representative for a purpose other than one connected with that role.

Clause 60 ensures that a health and safety representative is not personally liable for anything done or omitted to be done in good faith (Recommendation 112).

The model Act provides for deputy health and safety representatives if elected to hold office and be afforded the same training and perform the same functions as health and safety representatives.

Further provisions outline the functions of health and safety representatives (Recommendation 106) and the obligations of a person conducting a business or undertaking to health and safety representatives (Recommendations 107, 110 and 111). A key obligation relates to a health and safety representative's entitlement, on request, to attend an approved course of training.

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?

4.3 HEALTH AND SAFETY COMMITTEES

The model Act provides for the establishment of health and safety committees at workplaces. It also prescribes the membership, functions, frequency of meetings, and the duties of the person conducting the business or undertaking to the committee (Recommendation 114 and 115).

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?

4.4 ISSUE RESOLUTION

The model Act requires that health and safety issues be resolved at the workplace through an agreed procedure or (if none) the default procedure prescribed in the model regulations. If an issue cannot be resolved after reasonable efforts have been taken to do so, the issue may be referred to the regulator to arrange for an inspector to attend the workplace to assist in resolving the issue.

The regulations include minimum requirements for agreed procedures. These provisions reflect WRMC decisions in relation to recommendations 116-119 and 120.

4.5 RIGHT TO CEASE OR DIRECT CESSATION OF UNSAFE WORK

Under the model Act, a worker may cease work without loss of entitlements if he or she believes on reasonable grounds that to continue work would expose him or her to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard (Recommendation 121).

A health and safety representative who has undertaken approved training may direct a worker in their work group to cease work if they believe, on reasonable grounds, that to continue work would expose the worker to a serious risk to his or her health or safety, emanating from an immediate or imminent exposure to a hazard (Recommendation 122).

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?

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

The relevant person conducting a relevant business or undertaking may direct a worker who has ceased work under these provisions to undertake suitable alternative work.

4.6 PROVISIONAL IMPROVEMENT NOTICES

The model Act allows a health and safety representative who has undertaken approved training to issue a provisional improvement notice (PIN) where he or she reasonably believes that the Act is being contravened, or has been contravened in circumstances where it is likely that the contravention is likely to continue (Recommendation 108).

The model Act covers the details that must be included in a PIN and related procedural matters e.g. serving a PIN. These provisions reflect WRMC decisions in relation to Recommendations 109 and 165.

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

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

PART 5: PROTECTION FROM DISCRIMINATION

Part 5 of the model Act confers protections against discrimination of workers or prospective workers who engage in certain OHS-related activities.

These provisions are designed to ensure that persons are not deterred from being involved in activities or exercising rights that are important to OHS. That conduct may take various forms e.g. injuring an employee in his or her employment, or altering the position of a worker to the worker's detriment.

It is an offence to engage in the discriminatory conduct, and the offence attracts a 'Category 3' penalty.

The model Act also provides for civil actions to be brought in relation to proscribed discriminatory conduct.

Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?

PART 6: WORKPLACE ENTRY BY OHS ENTRY PERMIT HOLDERS

This Part confers powers on properly authorised union officials ('OHS entry permit holders') to enter workplaces for specific OHS purposes. In accordance with the policy decisions of WRMC regarding recommendation 204, this Part has been drafted so it is generally consistent with the right of entry provisions under the Fair Work Act.

6.1 ENTRY TO INQUIRE INTO SUSPECTED CONTRAVENTION

The model Act sets out the right that an OHS entry permit holder has to enter a workplace to inquire into suspected contraventions affecting '*relevant workers*'. A permit holder must give notice of the suspected contravention, as soon as practicable after entering the workplace, to the person conducting the business or undertaking and to the person with management or control of the workplace. The requirement to give notice to these persons is consistent with requirements under the Fair Work Act.

24 hours' notice must be given for the purpose of inspecting employee records or records relating to a suspected contravention that are not held on the premises.

Q33. Are the notification requirements appropriate?

6.2 ENTRY TO CONSULT AND ADVISE WORKERS

The model Act allows an OHS entry permit holder to enter a workplace to consult and advise workers on OHS matters, if they have given the person conducting the relevant business or undertaking 24 hours' notice of the proposed entry (Recommendations 211, 214 and 215).

6.3 REQUIREMENTS FOR OHS ENTRY PERMIT HOLDERS

An OHS entry permit holder must not contravene a condition imposed on the OHS entry permit. The model Act places a range of other requirements and restrictions on permit holders including when, where and how a right of entry may be exercised (Recommendations 205 and 212).

6.4 OHS ENTRY PERMITS

The model Act sets out the requirements for making an application for an OHS entry permit, including the eligibility criteria. It also prescribes the processes for the issue, duration, expiry and revocation of an OHS entry permit.

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?

6.5 DEALING WITH DISPUTES

The model Act allows the authorising authority which in some jurisdictions is the regulator, to deal with disputes relating to the exercise of right of entry powers, consistent with Recommendation 216.

6.6 PROHIBITIONS

Under the model Act, an OHS entry permit holder must not delay, hinder or obstruct any person in the exercise of their powers. It is also an offence for a person to refuse or delay entry to an OHS entry permit holder, or to hinder or obstruct an OHS entry permit holder who is exercising a right of entry.

Other offences relate to misrepresentations e.g. in relation to entry rights and the unauthorised use or disclosure of information or documents obtained by an OHS entry permit holder during entry to a workplace.

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?

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?

6.7 GENERAL

The model Act requires the return of an OHS entry permit to the authorising authority in the event it is revoked, suspended or expires. Unions must provide certain information to the regulator and the authorising authority must keep a publicly accessible register of OHS permit holders (Recommendation 210).

6.8 REGULATIONS

The model regulations may prescribe requirements for entry notices, information that must be recorded on an OHS entry permit and training requirements for OHS entry permit holders.

PART 7: THE REGULATOR

Part 7 covers matters relating to the powers and functions of the regulator. Model provisions establishing the regulator are not included, as regulators may be constituted in different ways, and may even be constituted under other legislation. Schedule 1 has been set aside to allow each jurisdiction to include provisions establishing the regulator, if necessary.

7.1 POWER TO MAKE GUIDELINES

The model Act allows the regulator to make guidelines on the way a provision would, in the regulator's opinion, apply to a class of persons or to a set of circumstances, or the way in which a discretion under the Act would be exercised (Recommendation 151).

These guidelines are made under the Act, and (unlike fact sheets or other explanatory material) are a formal statement of the way the regulator believes certain provisions operate, and also how the regulator would exercise its discretionary powers under the Act.

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

PART 8: ENFORCEMENT POWERS

Part 8 of the model Act deals with enforcement matters including:

- the appointment of inspectors including identity card requirements, and accountability provisions
- functions and powers of inspectors, and
- offences relating to inspectors.

Inspectors are central to the successful operation of the OHS legislation, and their skills, knowledge, expertise and judgment are critical factors in securing compliance.

The model Act confers the functions and powers on inspectors that are necessary to achieve that object, based on current best practice (Recommendation 170).

8.1 APPOINTMENT OF INSPECTORS

A person may be appointed as an inspector if they are a public servant, a statutory office holder or an OHS inspector in another jurisdiction (Recommendation 154-157). The model Act includes requirements for inspector identity cards (Recommendations 160 and 169), a procedure for declaring conflicts of interest (Recommendation 203) and provides for the termination of appointments (Recommendation 202).

8.2 FUNCTIONS AND POWERS

The model Act includes the following powers:

- inspectors' powers that are exercisable only upon entry to a workplace
- inspectors' powers that are only exercisable if certain pre-requisites are met e.g. requiring production of documents, or answers to be provided, and
- powers that are only exercisable by the regulator e.g. requiring production of documents, or answers to be provided at a place other than the person's workplace.

8.3 POWERS RELATING TO ENTRY

An inspector may at any time enter a place that is, or that the inspector reasonably believes is, a workplace (Recommendation 167). Entry to places used only for residential purposes is not permitted unless the inspector has either the consent of the person with management or control of the place, a search warrant or access is reasonably required for the sole purposes of gaining access to part of the premises used as a workplace.

As soon as practicable after entry, inspectors must take all reasonable steps to notify the person who is apparently in charge of the workplace, as well as the person conducting the relevant business or undertaking, and any relevant HSR, of the entry and the reason for it (Recommendation 169).

The model Act provides inspectors with general powers on entry (Recommendation 170). Specific provisions are also included allowing inspectors to:

- use assistants, such as interpreters or engineers
- obtain and execute search warrants (Recommendation 168)
- require the production of documents and answers to questions
- copy and retain records and documents, and

- seize things which are needed as evidence or for further examination or testing.

These powers are carefully circumscribed to ensure proper and fair procedures are followed.

8.4 OTHER POWERS

Subject to certain requirements, the model Act allows an inspector to require a person to provide their name and residential address if the inspector finds the person committing an offence, or reasonably believes the person has committed an offence against the Act.

8.5 OTHER MATTERS

The model Act provides that a person is not excused from answering a question or providing or document or information under the relevant provisions on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose them to a penalty. However, the answer to a question or information or a document provided by an individual is not admissible in evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

The model Act requires an inspector to give certain warnings before requiring a person to produce a record or document or answer a question, including a statement about the effect of rules about self-incrimination.

These provisions reflect WRMC decisions on Recommendations 179-198.

8.6 OFFENCES IN RELATION TO INSPECTORS

Under the model Act it is an offence to hinder, obstruct, impersonate, assault, threaten or intimidate an inspector (Recommendations 200 and 201). It is also an offence to alter or deface an inspector's identity card (Recommendation 161), and to conceal a person, document or thing from an inspector.

PART 9: COMPLIANCE MEASURES

Part 9 includes key compliance measures of the regulator and inspectors under the model Act, including:

- non-disturbance, improvement and prohibition notices (which are issued by inspectors)
- remedial action (undertaken by the regulator)
- injunctions
- power of the regulator to obtain information, and
- enforceable OHS undertakings.

9.1 POWER TO ISSUE NOTICES

The model Act confers powers on inspectors to issue non-disturbance notices, improvement notices and prohibition notices. The proposed kinds of notices are already generally well-established in all jurisdictions.

9.2 REMEDIAL ACTION AND INJUNCTIONS

The model Act allows the regulator to take reasonable '*remedial action*' to remedy certain unsafe situations at workplaces which, if left alone, would be likely to result in serious injury or illness to a person.. Such action can only be taken after certain prerequisites have been met including intervention by an inspector to attempt to remedy the situation.

Subject to notice requirements, the model Act allows the regulator to recover the costs of the action from relevant persons as a debt due to the regulator (Recommendation 178).

The model Act allows a regulator to seek an injunction for non-compliance with notices, which reflects the WRMC decision for Recommendation 177.

9.3 POWER OF THE REGULATOR TO OBTAIN INFORMATION

The model Act allows the regulator to obtain information from a person if the regulator has reasonable grounds to believe that the person is capable of giving information, producing documents or giving evidence in relation to a possible contravention of the Act.

These powers are carefully circumscribed to ensure proper and fair procedures are followed. Like similar provisions proposed for inspectors, this requires certain warnings to be given.

9.4 ENFORCEABLE OHS UNDERTAKINGS

The model Act allows the regulator to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution except in relation to a 'Category 1' offence. It includes a number of safeguards, relating to process, transparency of decision making, reviewability of decisions and enforcement.

PART 10: REVIEW OF DECISIONS

Part 10 sets out the processes for reviewing certain decisions made under the model Act. It specifies the kinds of decisions made under the Act that are reviewable, and the persons who are eligible to apply for a review. The intention is for review processes under the model Act to involve a full merits review of the relevant decisions.

The model Act provides for a two-stage review process, starting with internal review, followed by external review. However, reviewable decisions made by the regulator at first instance will go straight to external review.

Internal review decisions must be made as soon as reasonably practicable, but within 14 days after the application for internal review is received.

Q38. Is the list of reviewable decisions appropriate?

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

In general, an application for review of a reviewable decision does not affect the operation of the decision or prevent the taking of any action to implement it unless the decision is stayed pending determination of the review. An application for review of a decision to issue an improvement notice, however, stays the operation of the notice.

The reviewer must make a decision on an application for a stay within 1 working day after the making of the application. If a decision is not made within that time, then the reviewer is taken to have made a decision to grant the stay.

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

PART 11: LEGAL PROCEEDINGS

Part 11 includes the provisions that are necessary for legal proceedings to be brought under the model Act, including provisions that specify:

- who may bring proceedings under the Act
- what happens if prosecutions are not brought
- limitation periods for prosecutions
- sentencing for offences
- infringement notices, and
- proceedings against bodies including the Crown.

11.1 GENERAL MATTERS

The model Act provides that prosecutions for an offence may only be brought by the regulator or an inspector with the written authorisation of the regulator. It also sets out a procedure if a prosecution is not brought. (Recommendation 223).

The model Act requires that prosecutions must be brought within a specified time limit (Recommendation 66).

11.2 SENTENCES FOR OFFENCES

The model Act includes a range of sentencing options (Recommendation 61).

11.3 INFRINGEMENT NOTICES

The model Act enables each jurisdiction to establish an infringement notice scheme in relation to the Act. The intention is for the same offences to be subject to infringement notices in each jurisdiction.

11.4 PROCEEDINGS AGAINST CORPORATIONS ETC.

The model Act enables proceedings to be brought against all relevant persons, including corporations and the Crown (Recommendation 231).

PART 12: GENERAL

Part 12 covers matters of general application, including:

- offences of general application such as the offence of giving false or misleading information (Recommendation 201)
- immunity from liability for persons who exercise powers and functions under the Act
- confidentiality of information (Recommendation 203)
- a 'no contracting out' provision
- a provision that prohibits the imposition of levies or charges on workers for anything done, or provided, to ensure work safety
- provisions for the making of codes of practice, and the use of those codes in proceedings (Recommendation 228-230), and
- regulation-making powers (Recommendations 136 and 224-227).

EXPOSURE DRAFT OF KEY ADMINISTRATIVE REGULATIONS

The exposure draft of key administrative model regulations is at **Attachment B**. These regulations address a number of recommendations from the National OHS Review and cover the following matters:

HEALTH AND SAFETY REPRESENTATIVES

The regulations prescribe matters that must be taken into account during the negotiations for determination, and varying of work groups (Recommendation 103).

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 model regulations establish minimum requirements for conducting an election to elect HSRs as well as special provisions for conducting an election process if elections are to be held for multiple-business work groups (Recommendation 104).

The model regulations allow a health and safety representative to attend, on request, an approved training course of five days duration followed by one day of refresher training at yearly intervals chosen by the health and safety representative in consultation with the person conducting the business or undertaking (Recommendations 110 and 111).

ISSUE RESOLUTION

The model regulations establish a default issue resolution procedure, and also minimum requirements that will underpin any agreed procedure (Recommendations 119 and 120).

INCIDENT NOTIFICATION

The model regulations specify that the notification of incidents under the model Act be made by telephone or by written methods (i.e. facsimile, email, online form etc.). Certain details required by the regulator must be provided. In addition, the regulations require the notifier to keep a record of the written incident notification (or acknowledgement of receiving the notification provided by the regulator) for no less than 5 years from the date of notification. (Recommendations 140 and 141).

AUTHORISED RIGHT OF ENTRY

The model regulations include the following administrative matters associated with authorised right of entry:

- training requirements for OHS permit holders (Recommendation 209)
- contents of OHS entry permits (Recommendations 208 and 209)
- requirements for entry notification (Recommendations 211, 214 and 215), and
- entry to domestic premises (Recommendation 213).

CONSULTATION REGULATION IMPACT STATEMENT

The Consultation Regulatory Impact Statement (RIS) prepared by Access Economics aims to inform business, governments and worker groups about proposed harmonisation of Australian occupational health and safety (OHS) laws – and to obtain their views about

the potential costs and benefits of any changes. The analysis and conclusions in this document are still preliminary, and comments about any aspect of this report are welcome.

As part of the consultation process, Access Economics is surveying businesses across a range of sizes, industries and regions in an effort to obtain primary data on compliance costs and safety benefits. This survey can be found at http://www.surveymonkey.com/s.aspx?sm=iWhTuG6v1DyxIJZPshT3fA_3d_3d.

The Consultation RIS is at **Attachment C**.

The meaning of a ‘person conducting a business or undertaking’

Note: While this information is provided as guidance for the purposes of the exposure draft of the model Act, it is intended that it would form the basis of a future interpretative document under Part 7 of the model Act.

The model Act applies the primary duty of care to a ‘person conducting a business or undertaking’ which is a broad concept used to cover the complex array of modern working arrangements.

1. Who is a ‘person’ conducting a business or undertaking?

A ‘person’ includes an individual, and is also defined to include a body corporate, unincorporated body or association and a partnership. It also includes the Crown for purposes of the model Act.

2. What is a ‘business’ or ‘undertaking’?

The model Act does not define what a ‘business’ or ‘undertaking’ is, so the ordinary meaning of those terms applies.

Whether a person conducts a business or undertaking is a question of fact to be determined in the circumstances of each case. Businesses are generally enterprises conducted with a view to making a profit that have a degree of organisation, system and continuity. Undertakings may have elements of organisation, systems, and possibly continuity, but are not profit-making or commercial in nature.

A person conducts a business or undertaking whether it is conducted alone or together with others, and whether or not it is conducted for profit or gain.

Some examples of businesses or undertakings are:

- A retailer.
- A wholesaler.
- A manufacturer.
- An importer that is on-selling the imported goods
- An owner-driver of their own transport or courier business.
- The owner of a multi-tenanted shopping centre, the manager of the shopping centre, each of the businesses operating from shops in the shopping centre and other ancillary activities such as the cleaning company, security company and the shopping trolley collection business.
- The principal contractor of a construction site, sub-contractors engaged by the principal contractor, sub-contractors engaged by the sub-contractors, (including self employed contractors), along with the client engaging the principal contractor.
- A service station owner, the service station operator (if different from the owner), the mechanics business, the owner of the gas cylinder providing auto-gas, the operator of an attached fast-food outlet are all businesses or undertakings.

- A fast food franchisor and the operator of the fast food outlet (the franchisee)
- A self employed person operating their own business.
- A government department or government agency.
- A local council.
- A not-for-profit aid organisation.
- A sporting club that employs bar and restaurant staff.
- A private school.
- A clothing manufacturer employing outworkers.
- An owner-builder who engages one or more persons to undertake work on the building.

3. What is *not* a 'business' or 'undertaking'

The model Act provides that a person does *not* conduct a business or undertaking if:

- workers are engaged solely for that person's own private or domestic purposes, or
- the person is a 'volunteer association' (as defined).

The model Act allows future exclusions to be made by regulation.

A 'volunteer association' is defined as a group of volunteers who work together for one or more community purposes, where none of the volunteers employs any person to carry out work for the association.

Some examples of activities that are not businesses or undertakings are:

- A householder hiring an electrician to repair a faulty electrical socket in their home (however the electrician will either be a worker for a business or undertaking or a business or undertaking in their own right if they are self employed).
- A person carrying out maintenance work on their own home.
- The local woodwork club that meets once a month as a collection of volunteer members and volunteer office bearers.
- A senior citizens group set up for the purposes of encouraging social interaction and arranging social activities for members of the group, where the members and officer bearers are all volunteers.
- A junior sports club in which the office bearers are volunteers, and all fund raising and other activities of the club are all carried out by volunteers (such as the parents of the children playing the sport).

The meaning of ‘reasonably practicable’

Note: While this information is provided as guidance for the purposes of the exposure draft of the model Act, it is intended that it would form the basis of a future interpretative document under Part 7 of the model Act.

In determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety, duty holders must have regard and give appropriate weight to all relevant matters, including:

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what the person concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising that hazard or the risk
- the availability and suitability of ways to eliminate or minimise the hazard or the risk, and
- the cost of eliminating or minimising the hazard or the risk.

What is ‘reasonably practicable’ is an objective test

What is ‘reasonably practicable’ is determined objectively. This means that a duty holder must meet the standard of behaviour expected of a reasonable person in the duty-holder’s position who is required to comply with the same duty and is:

- committed to providing the highest level of protection for people against risks to their health and safety
- proactive in taking measures to protect the health and safety of people.

No single matter determines what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety. The test involves a careful weighing up of each of the matters in the context of the circumstances and facts of the particular case with a clear presumption in favour of safety. This should be done with regard to the following:

(a) The likelihood of the hazard or the risk concerned occurring

The greater the likelihood of a risk eventuating, the greater the significance this will play when weighing up all matters to be taken into account in determining what is reasonably practicable.

(b) Degree of harm that may result if the hazard or risk eventuated

The greater the degree of harm that could result if the hazard or risk eventuated, the greater the significance this factor will play when weighing up all matters to be taken into account in determining what is reasonably practicable.

(c) What the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or minimising the hazard or risk

Knowledge about the hazard or risk, or any ways of eliminating or minimising the hazard or risk, must be determined objectively by reference to what the duty holder actually knows, and what a reasonable person in the duty-holder’s position would reasonably be expected to know.

To comply, a duty-holder must:

- identify known occupational hazards within their business or undertaking before they cause an incident, injury or illness (e.g. through a hazard identification process), and

- understand the nature and degree of harm that an identified hazard may cause; how the harm can eventuate and the likelihood of that harm occurring. A duty-holder may be required to conduct investigations or analyses to gain this understanding (i.e. through a process of risk assessment).

It is also reasonably practicable for a duty-holder to consider and understand within the available state of knowledge how the following impact on hazards and risks:

- potential failure of plant, equipment, systems of work or safety measures
- human error or misuse, spontaneity, panic, fatigue or stress, and
- potential interaction between multiple hazards that may, together, cause different risks.

Reasonable standard of knowledge

Duty holders must, as a minimum, know and comply with relevant OHS standards established under the Act, regulations, Codes of Practice and guidelines made under the Act as well as any other relevant legislation.

Other sources of information include:

- reputable technical standards, such as those published by Standards Australia
- industry practice and publications, and
- published scientific and technical literature.

(d) Availability and suitability of ways to eliminate or minimise hazards or risks

There are three broad ways of eliminating or minimising risks. These are ranked from most effective and reliable to the least effective and reliable:

1. Eliminate the hazard or risk.

This involves taking action to eliminate a hazard (which eliminates all of its associated risks) or the elimination of the risks associated with the hazard if it cannot be eliminated.

2. If the hazards or risks cannot be eliminated, risks may be minimised by taking action to change the level of risk.

This can involve substituting the risk with a lesser one, engineering measures or changes to systems of work to achieve reductions, or isolating the hazard or risk from people.

3. If hazards or risks cannot be eliminated or minimised, action can be taken to reduce people's exposure to the hazard or risk.

This can involve administrative actions, provision of instruction and procedures, or the use of personal protective equipment.

This ranking is known as the hierarchy of control. Duty holders are expected to find ways to eliminate or minimise risks in this order. The state of knowledge may provide a number of different ways to control a hazard or risk, and these should be considered when determining what is reasonably practicable in the circumstances.

If there are no available or suitable ways to *eliminate* a hazard or risk, then it is necessary to consider all available and suitable ways of *reducing* the risk, so far as is reasonably practicable.

A way of eliminating or minimising a hazard or risk is regarded as suitable if it:

- is feasible to implement in the circumstances

- is effective in eliminating or reducing the likelihood or degree of harm from a hazard or risk
- does not introduce new and higher risks, having regard to all of the circumstances, and
- is a practical measure given the circumstances in which the hazard or risk exists.

For example:

- equipment to eliminate or minimise a hazard or risk is regarded as being available if it is provided on the open market, or if its manufacture is feasible, or
- a work process (or change to a work process) to eliminate or minimise a hazard or risk is regarded as being available if it is feasible to implement.

(e) Cost of eliminating or minimising the hazard or risk

Although the cost of eliminating or minimising a hazard or risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety.

The greater the likelihood of the hazard or risk eventuating, and/or the greater the degree of harm that would result if the hazard or risk eventuated, the less weight should be given to the cost of eliminating the hazard or risk.

In determining whether a particular level of expenditure is reasonable in the circumstances, the duty-holder must consider:

- the likelihood and degree of harm of the hazard or risk; and
- the reduction of the likelihood and/or degree of harm that will result if the safety measure is adopted.

If the degree of harm is significant (e.g. death or serious injury is highly likely) then it is extremely unlikely that the cost of eliminating or reducing the risk would ever be so disproportionate to the risk to justify a decision not to implement an available and suitable safety measure.

Capacity to pay

The question of what is 'reasonably practicable' is to be determined objectively, and not by reference to the duty-holder's capacity to pay or other particular circumstances. If two duty-holders are faced with the same risk in similar situations, one duty-holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty-holder.

If a particular duty-holder cannot afford to implement a control that is not disproportionate to the risk as to be clearly unreasonable, the duty-holder should not engage in the activity that gives rise to that risk.

If there are options available for eliminating or reducing a risk that achieve the same level of reduction in likelihood or degree of harm, a duty-holder may choose the least costly option. However, choosing a low cost option that provides less protection simply because it is cheaper is unlikely to be considered a reasonably practicable means of eliminating or reducing risk.

The costs of implementing a particular control may include costs of purchase, installation, maintenance, operation of the control measure and any impact on productivity as a result of the introduction of the control measure.

A calculation of the costs of implementing a control measure must also take into account savings from fewer incidents, injuries and illnesses, potentially improved productivity and reduced turnover of staff.

Proposed penalties under the Model OHS Act

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
30 – Failure to comply with safety duty – Category 1	\$3,000,000 (WRMC Rec 57)	\$600,000 and/or 5 yrs imprisonment Or, breach s.27, s.28 \$300,000 and/or 5yrs imprisonment (WRMC Rec 57, 59)
31 – Failure to comply with safety duty – Category 2	\$1,500,000 (WRMC Rec 57)	\$300,000 Or, breach s.27, s.28 \$150,000 (WRMC Rec 57)
32 – Failure to comply with safety duty – Category 3	\$500,000 (WRMC Rec 57)	\$100,000 Or breach s.27, s.28 \$50,000 (WRMC Rec 57)
37 – Duty to notify of notifiable incidents	\$50,000	\$10,000
38(1) – Duty to preserve incident sites	\$50,000	\$10,000
39– Requirements for authorisation of workplaces	\$250,000	\$50,000
40(1) – Person must not use unauthorised plant or substances	\$100,000	\$20,000
40(2) – PCBU must not direct/allow use of unauthorised plant or substances	\$100,000	\$20,000
41(1) – Person must not carry out unauthorised work or activities	\$100,000	\$20,000
41(2) – PCBU must not direct/allow worker to carry out unauthorised work or activities	\$100,000	\$20,000
42(1) – Unqualified person must not carry out work or activity	\$100,000	\$20,000
42(2) – PCBU must not direct/allow worker to carry out work without prescribed qualifications or experience	\$100,000	\$20,000
43(1) – Unauthorised person must not carry out work or activity	\$100,000	\$20,000

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
43(2) – PCBU must not direct/allow unauthorised person to carry out work or activity	\$100,000	\$20,000
44 – Requirement for comply with conditions of authorisation	\$100,000	\$20,000
45 – Duty to consult	\$100,000	\$20,000
51 – Notice to workers	\$25,000	\$5,000
53 – Election of HSRs to be held	\$50,000	\$10,000
64(1) – General obligations of PCBU to HSRs	\$25,000	\$5,000
64(2) – PCBU not to allow HSR access to medical info	\$50,000	\$10,000
65(7) – Obligation to train HSR	\$50,000	\$10,000
67 – List of HSRs	\$25,000	\$5,000
68(1) – PCBU must establish Health and Safety Committee	\$25,000	\$5,000
72 (2) – Duties of PCBU (HSC must not have access to medical records)	\$50,000	\$10,000
87(1) – Display of PIN	\$25,000	\$5,000
87(2) – Destroy or deface notice	\$25,000	\$5,000
89 – Offence to contravene an PIN	\$250,000	\$50,000
97(1) – Person must not engage in discriminatory conduct	\$500,000 (WRMC Rec 129)	\$100,000 (WRMC Rec 129)
105(3) – Rights that may be exercised at a workplace (by person with right of entry)	\$50,000	\$10,000
107(1) – Notice of entry required for requests for information	N/A	\$10,000
110 – Contravening OHS entry permit conditions	N/A	\$10,000
111 – OHS permit holder must hold permit under other law	N/A	\$10,000
112 – Producing OHS entry permit	N/A	\$10,000
113 – When right may be exercised	N/A	\$10,000
116 – OHS requirements and right of entry	N/A	\$10,000
117 – Residential premises and right of entry	N/A	\$10,000
131 – Contravening an order made to deal with a dispute	\$50,000	\$10,000

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
132 – OHS entry permit holder must not delay, hinder or obstruct	N/A	\$10,000
133 – Person must not refuse or delay entry of OHS entry permit holder	\$50,000	\$10,000
134 – Person must not hinder or obstruct OHS entry permit holder	\$50,000	\$10,000
135– Misrepresentation about things authorised by this Part	\$50,000	\$10,000
136 – Unauthorised use or disclosure of information or documents	\$50,000	\$10,000
137(1) – Return of OHS entry permits	N/A	\$5,000
138– Union to provide information to regulator	\$25,000	\$5,000
154(2) – General powers on entry (giving help)	\$50,000	\$10,000
160(6) – Person must produce documents and answer questions	\$50,000	\$10,000
164(2) and (5) – Person must comply with requirement of inspector in relation to seizure	\$50,000	\$10,000
172(6) – Person to provide name and address to inspector	\$50,000	\$10,000
177– Offence to hinder or obstruct inspector	\$50,000 (WRMC Rec 201)	\$10,000 (WRMC Rec 201)
178 – Offence to impersonate inspector	\$50,000 (WRMC Rec 201)	\$10,000 (WRMC Rec 201)
179 – Offence to alter or deface identity card	\$50,000	\$10,000
180 – Offence to conceal person, document or thing from an inspector	\$50,000 (WRMC Rec 201)	\$10,000 (WRMC Rec 201)
181 – Offence to prevent a person from assisting inspector	\$50,000	\$10,000
182 – Offence to assault, threaten or intimidate inspector	\$250,000 (WRMC Rec 200)	\$50,000 and/or 2yr imprisonment (WRMC Rec 200)
185 – Compliance with non-disturbance notice	\$250,000	\$50,000
189 – Compliance with improvement notice	\$250,000	\$50,000

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
193– Compliance with direction and prohibition notice	\$500,000	\$100,000
200(1) – Display of notice	\$25,000	\$5,000
200(2) – Not deface, etc. notice	\$25,000	\$5,000
202 – Remedial action - workplace, plant or substance that is a serious risk to health and safety	\$250,000	\$50,000
207 (5)– Power of regulator to obtain information	\$50,000	\$10,000
211 – Compliance with OHS undertaking	\$250,000	\$50,000
234(1) – Offence to fail to comply with order	\$250,000	\$50,000
239(1) – Offence to give false or misleading information	\$50,000 (WRMC Rec 201)	\$10,000 (WRMC Rec 201)
239(2) – Offence to produce false or misleading document	\$50,000 (WRMC Rec 201)	\$10,000 (WRMC Rec 201)
242(3) – Confidentiality of information	\$50,000	\$10,000
242(4) – Disclosure of name of person making complaint	\$50,000	\$10,000
244 – PCBU not to levy workers	\$25,000	\$5,000