ACTU

MODEL OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

EXPOSURE DRAFTS FOR MODEL ACT AND KEY ADMINISTRATIVE REGULATIONS

SUBMISSION OF

AUSTRALIAN COUNCIL OF TRADE UNIONS

NOVEMBER 2009

"Let this be a warning to all in corporate Australia - that when it comes to your responsibilities for the safety of your workers, nothing, nothing should ever allow that to occupy a second place. It should be the first responsibility of every company. Companies cannot ignore their duty of care to their workers. The Government that I lead … will do everything within our physical power to ensure that that is the case in the future."

Prime Minister Kevin Rudd, 7 November 2009

ACTU D No. 20/2009

Introduction and Executive Summary

Workplace related deaths and injuries are a scourge upon Australian society and cause untold misery, suffering and hardship to hundreds of thousands in our community; not to mention the damage done to our economy and productivity. The COAG decision to proceed with the harmonisation of the nation's OHS laws presents us with an historic opportunity. OHS harmonization is not just about macroeconomic reform; it impacts upon the lives of real people - our sons, daughters, partners, neighbors and loved ones. That's why Australian unions are so passionate that we do not miss the opportunity to enact the highest possible standards of workplace rights and protections that our nation deserves. All of us – legislators, regulators and social partners – have at this point in time a very special obligation to the memory of those working Australians who have died or who have been maimed, and to those who will be in future, to ensure that we have decided wisely and compassionately to minimize the possibility of others being subjected to avoidable tragedy.

The Australian Council of Trade Unions (ACTU) is the peak representative body for Australian trade unions. It represents forty-seven affiliated trade unions and represents some two million working Australians and their families.

The ACTU has in good faith fully participated in the processes that have lead to the development of the Model Occupational Health and Safety Legislation. The ACTU is represented on Safe Work Australia. The ACTU is also represented on the Significant Issues Group – OHS, the Safe Work Australia sub-committee that has developed the draft model act and key administrative regulations.

The ACTU supports the establishment of harmonised national OHS laws. However, we do not resile from our stated position that the establishment of national OHS laws should not result in a compromise or reduction of protections or standards for workers in any existing jurisdiction. We note and believe we are entitled to rely upon the integrity of repeated assurances that COAG meetings dating back to 2006 have given in this regard.

Having carefully considered the exposure drafts for the Model Act and key Administrative Regulations and the associated supporting documents - the Discussion Paper and the Consultation Regulatory Impact Statement - it is our position that, in a number of areas, they fall short of what the Australian community is entitled to expect.

Our primary concerns relate to six key areas:

- The obligation for employers to consult with their workers regarding OHS

  The draft Model Act will oblige employers to consult with workers about OHS matters "as far as is reasonably practicable". An employer's obligation to consult about OHS matters should be unconditional (paragraphs 4.1 – 4.3). Further, the hierarchy of controls and risk assessment should be prescribed in the principle Act, not in regulation. These concepts – that duties imposed on a person to ensure health and safety requires the person to identify and eliminate hazards, to assess risks and then control and monitor those risks are fundamental principles to manage safety. These basic concepts should not be pushed down the legislative hierarchy (paragraph 2.1).

- The role, function and powers of democratically elected workplace Health and Safety Representatives

  The importance of having effective, democratically elected, Health and Safety Representatives (HSRs) must not be underestimated. HSRs play a critical role in improving OHS outcomes and the model Act must operate to support their role. The draft Model Act places a range of barriers, some of which are undemocratic, in the way of HSRs effectively performing their role. Parts 4 and 5 of the ACTU submission deal with these issues in detail.

- Victims' ability to initiate litigation

  Unions believe that private prosecutions provide a safeguard where the regulator is either conflicted or fails to investigate or enforce penalties for clear and persistent breaches of OHS laws. Our experience is that Australian OHS regulators do not prosecute "near misses" or breaches that result in non-catastrophic injuries. The draft Model Laws say that the power to prosecute breaches of the law rests solely with the regulator. This is not only inconsistent with the current provisions in NSW and the ACT, which provide expressly for union prosecutions, it is also inconsistent with the criminal law in most jurisdictions where citizens can prosecute criminal offences and with the role that unions play in bringing proceedings for breaches under workplace laws.

  The experience in jurisdictions where such a capacity exists is that it is used very sparingly, has always been successful – and has often resulted in nationwide improvements in safety standards. Unions believe that, where the regulator has failed to prosecute, and has confirmed that they do not intend to prosecute within a reasonable period that private prosecutions should be available (paragraph 11.3).

- Burden of proof

  Unions remain concerned that the model laws place the onus on the prosecutor to prove that a duty holder did not, as far as reasonably practicable, provide a safe workplace. Our preference is that the prosecutor show that the duty holder – at least where the duty holder is a corporation and not a natural person - failed to provide a safe workplace, leaving the defendant to rely on a defence of reasonable practicability. This is consistent with the approach both in discrimination law, and the Fair Work Act General Protections, in which it is acknowledged that the operator of a business has better access to information about the operational needs of the business (paragraph 11.3).

- Respect for the role of unions

  Unions play a crucial role in securing safer, healthier workplaces. Yet the proposed regime for Right of Entry under the Model OHS Laws is overly complicated and heavily process driven, which will undermine the capacity for permit holders to address OHS concerns in a timely fashion and in high-risk industries this will undoubtedly cost lives. Part 6 of the ACTU submission addresses issues relating to Right of Entry in detail.

- Adequate and equitable opportunity for independent input from employers and employees

  There has been more than three decades worldwide experience that demonstrates that the best OHS outcomes for workers are achieved through an approach that genuinely involves representatives of employers and workers, and is independent of the bureaucracy. Unions welcome the draft Objects that "encourage unions and employers organisations to take a constructive role in promoting improvements in OHS standards and achieve healthier and safer workplaces". However unions believe that, to be consistent with the Safe Work Australia legislation and ensure Australia's compliance with ILO Convention 155, the objects should also include *involvement* by unions and employers in setting standards, monitoring the effectiveness of the laws and so forth (paragraphs 1.3 and 1.5).

This submission elaborates upon these areas, as well as others where the ACTU is concerned that the operation of the model OHS laws will not deliver working Australians the highest possible OHS standards that they deserve.

Our submission is segmented into the Parts of the Model Act and the Administrative Regulations, and we respond to each question of the Discussion Paper in its relevant Part. Comments regarding sections of the Model Act not directly related to a question in the Discussion Paper are then raised in sequence to align with the Model Act.

The ACTU also refers to and supports the submissions of the peak union bodies in the States/Territories and the submissions of our affiliated unions that should be considered in conjunction with this submission.

1. Part 1: Preliminary

Discussion Paper

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

1.1. As previously submitted[1] it is important a modern OHS law provides appropriate coverage for all the issues involved in the contemporary Australian workplace. Therefore the title of the new Act should include the words "Occupational Health, and Safety".

1.2. We submit that the Act should be titled 'Occupational Health and Safety Act'.

1.3. We submit that the Objects of the Model Act at draft s.3 are not consistent with Australia's obligations under the International Labor Organisation Occupational Safety and Health Convention 1981, Convention 155.

ILO Convention 155 at Article 4 and Article 15 requires that the Government and the *'most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment'*.

1.4. Draft s.3(1)(a) should include the words *'at the source'* after *'elimination'*. Consistent with the ranking in the hierarchy of control it is crucial that it is established that hazards or risks are to be eliminated at the source.

1.5. While it is encouraging that unions are mentioned in draft s.3(1)(c) we are unsure how this will be facilitated as there are currently no other provisions in the draft Act that allow for this to occur. This draft section should be amended to add the words *'and be involved in the development of policies and standards'* after *'environment'*. The draft Act also needs to be amended to enable this to occur.

Discussion Paper

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

1.6. It seems clear to us that the definition of officer appropriately captures all persons who are directors of companies and those who in the traditional sense form part of controlling mind of a business or undertaking. We are concerned however that this definition potentially also applies a more stringent duty than is appropriate upon workers. This is an important issue as draft s.14 makes it clear that a person can have more than one duty as result of being in more than one class of duty holder.

1.7. We submit that the following be added to the definition of *'officer'* as new (c):

"(c) A person is not to be regarded as a person who makes, or participates in making, decisions that affect a substantial part of the business or undertaking of a body for the purposes of (a)(ii) above only because that person:

(i) has authority to make; or

(ii) does make

decisions about the directions that person gives to the workers that person immediately or directly supervises at a workplace in relation to an item of work or specific activity."

[1] Submission by the ACTU for the National Review into Model Occupational Health and Safety Laws, 11 July 2008

1.8. Further to avoid any doubt the definition of *'officer'* should at (a)(iv) be amended to *' . . . is a receiver or receiver and manager of any property of the body; or . . . '*

Discussion Paper

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?

1.9. We submit that any overlap contained in the definitions for 'plant' and 'structure' in draft s.4 of the draft Model Act could be addressed in the following manner:

- After the word '*plant'* includes, add the words '*but is not limited to'.*
- Following the word 'tool' in draft s.4(a) add the words '*which is fixed or moveable'*

1.10. Additionally the draft sub-section dealing with 'structure' should be re-drafted along the following lines:

' . . . structure means anything that is constructed and any arrangement of elements, whether fixed or moveable, temporary or permanent and includes, but may not be limited to:

(a) a workplace

(b) any mast, tower, framework, pipeline, transport infrastructure and underground works (shafts and tunnels) and any confined space; and

(c) any component of a structure; and

(d) *part of a structure'*

Discussion Paper

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?

1.11. We do not consider that there is any basis to exclude residential strata title body corporates from application of the Model laws.

1.12. We note the draft s.5(5) where it proposed that '.. . . ***volunteer association*** *means a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association'*. While we agree with the broad policy position that excludes volunteer organisations from the meaning of a person that conducts a business or undertaking as written the draft model Act may lead to unfair results in particular circumstances.

For example, the Country Fire Authority Act 1958 in Victoria provides for the registration of volunteer fire brigades which at least to an extent are self governing[2] and are able to carry out some activities with little direction from the Authority itself[3], including activities that may place other persons in danger[4]. In this example, the person who conducts the Brigade might be in a better position to eliminate or control

[2] See for example section 17A of the *Country Fire Authority Act* 1958 (VIC) and regulations 32, 58-62 and Schedule 5 of the *Country Fire Authority Regulations* 2004.

[3] See for example sections 20A and 42 of the *Country Fire Authority Act* 1958 (VIC)

[4] See for example section 48(1)(d) and (e) of the *Country Fire Authority Act* 1958.

certain risks at the source than the Authority. Given such persons would expected to be trained officers, it does not seem unreasonable for them to be subject to a duty to ensure, so far as is reasonably practicable, the health & safety of a worker whose activities are directed by them or a person who is put at risk from work carried out by their Brigade.

1.13. We submit that consideration be given to allowing Regulations to modify or confine the definition with respect to particular volunteer associations where appropriate.

1.14. While not directly associated with the meaning of a person who conducts a business or undertaking we are concerned that in terms of the validity of actions taken by persons whose rights depend on and who are required to interact with a PCBU are called into question if they reasonably believe the person they are interacting with is the PCBU. For example, the matters in draft s.6, s.13, s.14, s.16, s.17 and s.18 (and s.11 to the extent it deals with to whom a request for establishment of a HSC should be directed).

We submit that a complimentary provision requiring the person who receives a misdirected request to pass it on to a person they reasonably believe is the relevant person is included in the Model Laws.

Discussion Paper

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

1.15. We are comfortable with the scope of the suppliers duty.

1.16. We are unsure what a 'thing', as referred to in draft s.6, is. We seek clarification of what constitutes a 'thing' for the purposes of the draft Model Act.

Discussion Paper

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

1.17. For the avoidance of doubt, the definition of work should cover persons gaining work experience and additionally persons who are members of the Australian Army Cadets, Australian Navy Cadets and the Australian Air Force Cadets.

Discussion Paper

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

1.18. We submit that the definition of workplace is generally appropriate however we suggest that the words *'while at work'* are removed from draft s.8(1). When read in conjunction with draft s.7 *Meaning of worker,* the words *'while at work'* are redundant.

A workplace is a place a worker goes, or is likely to be, while carrying out work in any capacity.

2. Part 2: Safety Duties

Discussion Paper

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?

2.1. We submit that draft s.16 should be re-worded to the following:

'A duty imposed on a person to ensure health or safety requires the person to:

(a) To eliminate hazards, to health and safety, so far as is reasonably practicable; and

(b) If it is not reasonably practicable to eliminate hazards to health and safety, to eliminate the risks to health and safety which arise from those hazards so far as is reasonably practicable; and

(c) If it is not reasonably practicable to eliminate the risks to health and safety which arise from those hazards, to minimize those risks so far as is reasonably practicable'

2.2. We submit that the definition of *'reasonably practicable'* is generally suitable. However we summit that the words '*appropriate weight given to all relevant matters including'* are replaced with the word *'to'.*

2.3. Consistent with the above we submit that the definition of *'reasonably practicable'* should be an exhaustive list.

It is also important to note that the definition of *'reasonably practicable'* at draft s.17 only has application to duties of care. In any other context reasonably practicable must be defined by the common usage meaning.

Discussion Paper

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

2.4. For consistency with the current standard in New South Wales (OHS Act s.8(c)), draft s.18 (4)(c) should be amended to add the words *'and working environment'* after the word *'work'*.

2.5. We note that Recommendation 20 of the Workplace Relations Ministers Council Communiqué of 18 May 2009 details that the model Act should extend the primary duty of care to circumstances where the primary duty holder provides accommodation to a worker. We consider it appropriate to include in draft s. 18 references to the provision of healthy and safe accommodation, where the primary duty holder provides accommodation.

2.6. We submit that the words *'and without risks to health'* need to be added to draft s.18(4)(b), draft s.18(4)(c) and draft s.18(4)(d) after the word *'safe'.*

Discussion Paper

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?

2.7. We submit that it is vital that occupational health and safety information is provided to all workers in appropriate languages. Draft s.18 should be amended to reflect the Victorian OHS Act at s.22 whereby the PCBU must provide information to workers of the PCBU (in such other languages as appropriate) concerning health and safety at the workplace, including the names of persons to whom an worker may make an enquiry or complaint about health and safety.

2.8. Further in line with Victorian OHS Act at s.22 a PCBU must, keep information and records relating to the health and safety of workers of the PCBU and employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the PCBU concerning the health and safety of workers of the PCBU.

Discussion Paper

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)?

2.9. We do not believe it is necessary to add the word 'access to' in draft s.18(4)(e).

2.10. We are concerned that the monitoring of the health of workers, at draft s.18(4)(g) may breach privacy and/or health records legislation in some jurisdictions. We can provide detailed examples if required.

Discussion Paper

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

2.11. The current Commonwealth legislation includes *'In case of substances the first aid and medical procedures that would be followed in the event of the condition of the substance causing injury to an employee'*. We submit that these words should be added as a new sub-section (d) to draft s.22(4).

Discussion Paper

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

2.12. It is important that regard should be had to what the worker knew about the relevant circumstances. We note that this draft clause is similar to the first part of s.25 of the Victorian OHS Act. We note that the Victorian provision goes on to detail that in determining whether an employee failed to take reasonable care, regard should be had to what the employee knew about the relevant circumstances. A similar clause must be added to the draft Model Act.

Discussion Paper

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

2.13. We submit that the treatment of volunteers is appropriate, however we refer to our responses to Question 4 above regarding volunteer associations.

Discussion Paper

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?

2.14. Despite our best efforts to understand the application of the breaches provisions of the draft Model Law to the proposed Categories, we find the entire penalty regime confusing.

2.15. We submit that the penalty regime requires further consideration. For example, we do not consider it appropriate that the maximum penalty for general obligations of PCBU to HSRs is $25,000 for a Corporation while the maximum penalty of a PCBU allowing a HSR access to medical information is $50,000.

2.16. Further input from Government and Regulators on the maximum penalties for Category 4-7 offences is warranted.

2.17. The Deputy Prime Minster in correspondence to the ACTU undated but received 17 September 2009, and in a speech to the ALLIANZ Workers' Compensation National Client Seminar in Sydney on 24th September 2009[5], detailed the Commonwealth's view that Category 1 offences have application where there was a high level of risk and the duty holder was reckless or grossly negligent . We note that draft s. 30 does not conform with the position of the Deputy Prime Minister as it does not include gross negligence. We support the position of the Deputy Prime Minister in this matter.

2.18. We also query if a prosecution sought, for example, Category 1 is found not to meet the minimum thresholds of draft s.30, if the prosecution then automatically defaults into a lesser Category?

2.19. We submit that the maximum penalties for contravention of the model Regulations should be consistent with the maximum penalties set out in the Model Act.

2.20. We submit that some contraventions of the draft Model law could be treated as civil rather than criminal matters. Further discussion on which matters should not be criminal matters is required, however the draft Model act should reflect the approach of the *Fair Work Act* with regard to right of entry breaches.

[5] http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_090924_131629.aspx

3. Part 3: Other Obligations

Discussion Paper

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

3.1. We are concerned that draft s.35 does not consider all medical treatment that could occur (draft s.35(b)) if a serious injury or illness does not result in immediate treatment as an in-patient in a hospital. For example, while serious lacerations are contemplated, serious burns are not.. Draft s.35 should be amended to include burns. Further electric shock should be included in this list of *'what is a serious injury or illness'.*

3.2. We are concerned that draft s. 36 does not consider acts of direct violence directed towards workers, such as threat with a weapon such as a knife, club or gun, as a dangerous incident. Draft s.36 needs to be amended to take account of such incidents.

3.3. Draft s.36 should also include *'transmission of infected body matter or fluids'* as a dangerous incident.

3.4. Draft s.37 must clearly set out the obligations for the PCBU to give notice of an incident. The detail currently in the draft regulations at draft Reg. 11 and 12 should be brought forward to this section of the Act.

4. Part 4: Consultation, Participation and Representation

Discussion Paper

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?

4.1. We submit that the words '(*with or without the direct involvement of the workers)'* are deleted from draft s. 46(2).

4.2. We submit that the words *'so far as is reasonably practicable'* should be removed from draft s.45. The current NSW legislation at s.13 details that *'an employer must consult, in accordance with this Division, with the employees of the employer to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work.'* The draft s.45 is less than the standard currently applying to over 31% of Australia's labour force[6] and should therefore be amended.

4.3. We submit that consultation under draft s.46 must include, similar to the current South Australian legislation at s.20, that consultation must involve-on the application of an employee—a registered association of which that employee is a member. The draft s.46 is s less than the standard currently applying in South Australia and should therefore be amended

4.4. As submitted previously it is vital that occupational health and safety information is provided to all workers in appropriate languages. The words *'in appropriate languages'* should be added after *'information'* in draft 46(1)(d).

[6] Australian Bureau of Statistics October 2009, **Labour Force Australia**, Cat. no. 6202.0, ABS, Canberra.

4.5. For consistency the word *'workers'* should replace the word *'persons'* in draft s.46(1)(d).

Discussion Paper

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?

4.6. We submit that a time limit should be prescribed at draft s.50(2). Draft s.50(2) should be amended to provide that negotiations for a worker group must be completed within 14 days of a request is made under draft s.48 – or such other time as the parties mutually agree. This will require a subsequent amendment to draft s.52(1)

4.7. We submit at draft s.50(5) be amended to the following, 'The regulations may prescribe the matters that must be taken into account in negotiations for and determination of work groups and *that the parties to the agreed determination of work groups may at any time negotiate to vary the agreement'*.

4.8. Further we submit that draft s.50(5) be amended to facilitate the current Queensland provision at s.76(2) that, *'An employer must not exclude from the negotiations a union that has members who are workers at the workplace if the workers have told the employer that they want to be represented by the union'.*

4.9. The current Queensland legislation at s.73 provides time limits on the facilitation of elections for health and safety representatives. Draft s.53 should be amended to provide that :

- The PCBU must advise all workers at the workplace of the pending election within 28 days after being asked to facilitate it, and
- The PCBU must facilitate the election within 2 months after being asked to do so,

as currently applies in Queensland.

4.10. Draft s.55(1) and draft s.55(2) are contradictory. We do not agree with the a prescriptive election process proposed in the draft Regulations.

4.11. It is a matter for the workers in a work group to determine if they need the assistance of a union in the conduct of an election for health and safety representatives. In line with the current provisions in the Queensland legislation at s.74, draft s.55(3) should be amended as follows: 'The workers in a work group may ask a union with members at the workplace to assist in the conduct of an election. However, if a union agrees to conduct the election, it must conduct it for all workers at the workplace'.

4.12. Draft s.56 refers to *'a health and safety representative'*. To avoid confusion and possible dispute, and to ensure a link with draft s.49(2), we submit that *'a health and safety representative'* should be replaced with *'health and safety representatives'* in draft s.56(1).

4.13. As we have previously submitted[7], HSRs must have clearly defined rights and powers. As such HSRs do not have 'functions'. All references to *'functions of health and safety representatives'* should be replaced by *'powers of a health and safety* representative' and all references to *'in performing a function the health and safety representative'* to '*in using their powers the health and safety representative'*.

4.14. Draft s.59(1)(a) should be replaced with: *'used a power as a health and safety representative with the intention to cause harm'*. Further we are unaware of any jurisdiction that allows the regulator to make application for the disqualification of a HSR. Therefore we submit that draft s.59(2)(b) is deleted.

4.15. The draft Act at draft s.59(3) provides that the Tribunal may disqualify a HSR for a specified period or permanently. The Commonwealth Act at s.32 provides that a HSR can be disqualified for a specified period not exceeding 5 years. Draft s.59(3) should be amended to conform with the maximum 5 year disqualification period detailed in the Commonwealth Act.

4.16. The Queensland legislation at s.55 allows for the establishment of industry sector standing committees. The draft Model Law should replicate this Queensland provision and allow for industry sector standing committees to be established.

4.17. The provision at draft s.62(2)(c)(ii) would seem to limit the power of a HSR to represent a work group that may be across a number of workplaces. The words *'at that workplace'* should be deleted from this draft section.

4.18. We submit that the word *'request'* should be replaced with the word *'seek'* at draft s.62(2)(f)

4.19. We note the Queensland legislation currently, at s.81(1)(f), obliges a PCBU to consult with HSRs and/or Deputy HSRs regarding *'any proposed change to the workplace, or plant or substances used at the workplace, that affects, or may affect, the workplace health and safety of persons at the workplace'*. We note a similar provision in the current Commonwealth legislation at s.30(1)(a). A provision that obliges a PCBU to consult with HSRs on the implementation of changes at the workplace that may affect the health and safety of workers' must be included in the draft Model laws.

4.20. The current Victorian legislation at s.58(2)(c) details that in the exercise of their powers a HSR may enquire into anything that poses or may pose a threat to the health and safety of the workers they represent. A similar power must be included in the draft Model laws.

4.21. The current Queensland legislation a s.81(1)(j), the current Victorian legislation at s.58(2)(d) and the current New South Wales legislation at s.18(c) involve the HSR in the resolution of any matters that may be a risk to the health and safety of workers. A similar provision, which currently applies to more than 75% of Australia's work force[8] must be included in the draft Model laws.

4.22. The words '*and allow the health and safety representative to keep copies of that information'* should be added following the word *'information'* in draft s.64(1)(b).

4.23. Draft s.64(1)(d) should make it explicit that the PCBU is responsible for reimbursing the reasonable costs to a health and safety representative associated with the performance of their role (i.e. travel, meals).

4.24. We note that provisions for workplace entry by OHS entry permit holders are contained in Part 6 for the draft Model laws. Draft s.64(4) is dealt with in Part 6 of the draft Model laws and should be deleted from this draft section.

Discussion Paper

[7] Submission by the ACTU for the National Review into Model Occupational Health and Safety Laws, 11 July 2008

[8] Australian Bureau of Statistics October 2009, **Labour Force Australia**, Cat. no. 6202.0, ABS, Canberra.

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?

4.25. If the three requirements of HSR courses as set out at s.65(2) are met, that is:

- the regulator has approved a course,
- the HSR is entitled to attend that course and
- the HSR has chosen the course after consultation with the PCBU,

then a HSR has a right to attend that course.

Therefore *'reasonable time'* at draft s.65(2)(a) should be replaced by *'14 days or such other time as the parties mutually agreed'*. Further *'reasonable'* should be removed from draft s.65(2)(b) and '*reasonable time'* should be replaced by *'14 days'* in draft s.65(6).

It should also be made clear that the PCBU must provide time off for training without loss of pay and that all training costs will be met by the PCBU.

4.26. We note the current minimum standard in the South Australian legislation whereby '*a health and safety representative is entitled to take at least five days per year off work, without loss of income, for the purposes of taking part in courses of training'* (s. 34, Reg 6.1.11). We submit that the draft Model Law should be amended to provide this currently applicable right.

4.27. Further this provision should be moved to the draft Model Act rather than be located in the draft Administrative Regulations.

Discussion Paper

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?

4.28. We submit that the timeframe to establish a health and safety committee at draft s.68(1)(a)(i) should be 3 weeks. We are not aware of this timeframe being an issue where it is currently applicable.

4.29. We note the additional Committee function at s.35(2) of the current Commonwealth legislation whereby, *'A health and safety committee has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions'* We submit a similar function should be added to the functions of a Committee under the draft Model laws.

Discussion Paper

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?

4.30. We submit that draft s.75 and s.76 of the draft Model laws should be consistent with the *Fair Work Act 2009* (Cth) whereby the words *'reasonable grounds'* should be replaced by the words *'reasonable concern'*.

4.31. We submit that a draft 75(1) should make it clear that a worker may cease work if he or she has reasonable concern to believe that to continue to work would expose him or her or '*any other person'* to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

4.32. We note in draft s.76 references to 'a worker' and 'the worker'. Specific circumstances may require a HSR to direct a group of workers to cease unsafe work, we submit that draft s.76 should be amended to make this clear.

4.33. Further, a direction that unsafe work should cease should be available where a HSR has a reasonable concern that to ensure that there exists a serious risk to the health or safety of any person worker emanating from an immediate or imminent exposure to a hazard. Draft s.76 should be amended to reflect this general protection for the public.

4.34. On election HSRs have certain rights and powers. We submit that on election a HSR has the power to direct that unsafe work is ceased. This power should not be diluted with a requirement that before exercising this power a HSR has attended training (attendance at which is a matter for consultation and agreement with the PCBU).

The ACTU has not been provided with any evidence that HSRs directing that unsafe work cease has been falsely or recklessly used. In any event the provisions of he draft model laws in relation to the Disqualification of HSRs can suitably deal with a suspected abuse of this power.

We submit that draft s.76(5) should be deleted.

4.35. We query at draft s.78:

- What are the "prescribed" purposes relating to continuity of employment?
- What is the effect if a purpose is not prescribed?
- Who determines what refusal of alternate work is reasonable?

Discussion Paper

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?

4.36. Similar to our response to Question 29, on election HSRs have certain rights and powers. We submit that on election a HSR has the power to issue Provisional Improvement Notices. This power should not be diluted with a requirement that before exercising this power a HSR has attended training (attendance at which is a matter for consultation and agreement with the PCBU).

Further we note that in some jurisdictions, HSRs have issued Provisional Improvement Notices in instances where their employer has denied the HSR access to training.

We submit that draft s.80(3) should be deleted.

4.37. We are generally comfortable with the PIN compliance timeframe however we note that in some high risk industries a shorter timeframe may be appropriate. We note that the construction industry in the ACT currently has a compliance period of 24 hours.

4.38. At draft s.86 a provision needs to added which states that a PCBU cannot coerce a HSR into cancelling a PIN and, with reference to the above regarding the penalty regime, an appropriate penalty if this occurs.

4.39. The words '*to appoint'* need to be deleted in draft s.90(1) and replaced with the word *'for'*.

4.40. We submit that draft s.91(2) is contrary to draft s.89 and draft s.90. Unless the PCBU 'disputes' the PIN within 7 days by requesting an inspector, the PCBU is required to comply with the PIN.

5. Part 5: Protection from Discrimination

Discussion Paper

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

5.1. Yes, workers who put themselves forward to be voluntary HSRs must be given the highest level of protection when exercising their powers or when choosing not to exercise their powers.

5.2. We submit that drat s.93 offers less protection for HSRs than that currently applicable under the New South Wales legislation (s.24).

5.3. We query at draft s.102(3), what are the circumstances that a "substantial" reason for discrimination would be to comply with the Act?

5.4. We submit that draft 104(c) is harsh in the absence of knowing the grounds for which an application under another law failed

6. Part 6: Workplace Entry by OHS Entry Permit Holders

Discussion Paper

Q33. Are the notification requirements appropriate?

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?

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?

6.1. The proposed regime for Right Of Entry under the Model Laws is overly complicated and heavily process driven which will work to undermine the capacity for permit holders to address occupational health and safety concerns in a timely fashion and in high risk industries this will cost lives.

OHS permit holders are generally not lawyers, they are union officials who have mostly come up from the workplace level to be union officials or they are rank and file workers who are officers in their organisations.

They should not have to comply with a regime of laws that are complex and difficult to understand. They should not have to face the consequence of such a complicated regime and the possibility that they would, in exercising their rights, inadvertently breach the conditions and potentially have their right of entry permits revoked, suspended or subject to restrictions. The regime as proposed is unnecessarily onerous. It serves as a disincentive for everyday workers to become involved in their union as officials and OHS permit holders and to be active in preventing workplace injuries and deaths.

6.2. We question if the intent of the Workplace Relations Ministers Council, via Recommendation 204 of the WRMC 18 May 2009 Communiqué *'Any provisions around right of entry should be consistent with the Fair Work Act 2009'*, means that the provisions of the Fair Work Act be fully replicated in the draft Model Act or that simply consistent with the relevant provisions of the federal industrial legislation.

6.3. Notwithstanding the above, we consider it appropriate that sanctions for breaches of draft Part 6 of the Model Act should be the same as sanctions for breaches of Right of Entry under the *Fair Work Act*.

6.4. We therefore submit that the draft Part 6 of the Model law needs substantial re-writing.

6.5. We will not attempt to re-write draft Part 6 here but it is appropriate to repeat some of our submission on right of entry to the National Review into Model Occupational Health and Safety Laws[9]:

- *The ILO highlights the crucial role of unions in securing safer, healthier work and "argues strongly for a strengthening of collective voice as the primary means of improving working conditions, and protecting workers' health."*[10] *Unions provide critical logistical support (training, information and protection from victimisation) to formal representative structures in the workplace, especially HSRs.*[11] *Indeed, it is exceptional to find HSRs in non-unionised workplaces.*

[9] Submission by the ACTU for the National Review into Model Occupational Health and Safety Laws, 11 July 2008

[10] Economic Security for a better world, ILO Socio-Economic Security Programme, International Labour Office, 2004. 50 Swiss francs. ISBN 92-2-115611-7.

[11] Biggins, D. and Holland, T. (1995), 'The Training and Effectiveness of Health and Safety Representatives' in Eddington, I. ed. *Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety*, Brisbane, 75-9.Biggins, D., Phillips, M. and O'Sullivan, P. (1991), 'Benefits of worker participation in health and safety', *Labour and Industry*, 4(1): 138-159; Biggins, D and Phillips, M (1991) A survey of health and safety representatives in Queensland Part 1: Activities, issues, information sources, *Journal of Occupational health and Safety — Australia and New Zealand*, 7 (3): 195-202

- *Right of entry also performs a critical role in monitoring compliance with OHS legislation. At present, no state or territory inspectorate in Australia has the capacity to visit more than a tiny fraction of the total workplaces it covers in any given year. Unions report issues to inspectors but even so the 'reach' of inspectorates remains limited. In this regard union OHS activities enhance monitoring and compliance with the legislation. Unions perform a critical role in monitoring compliance, providing an avenue for workers to report problems anonymously, resolve OHS problems with management and identify serious breaches of OHS legislation requiring intervention. Without right of entry union officers would be unable to access workplaces and evidence of what has been found during such visits on occasion indicates that serious breaches would go undetected (resulting in injury and even death).*
- *A London School of Economics study showed that where there is a union presence, the workplace injury rate is 24 per cent lower than where there is no union presence.*[12]
- *The ACTU supports union right of entry for OHS matters, at all work sites, irrespective of union membership - not just for suspected breaches. (e.g. NSW OHSA 2000 – s.76-85)*

6.6. We provide the following not exhaustive observations on draft Part 6.

6.7. Draft s.106-draft s.108 are ridiculous provisions in that they would require permit holders to give detailed written notices for entry to investigate suspected breaches.

6.8. The word 'investigate' should replace with the words 'inquire into' in draft s.106(1) as currently applies in the New South Wales legislation (s.77).

6.9. Draft s.107 should facilitate the ability of permit holders to take measurements, sketch any part of the workplace, take samples, photographs, video recordings or other electronic recordings of consultations with workers the PCBU or any other person.

6.10. The words 'and photographic identification' should be removed from draft s.114. The OHS Right of entry Permit documentation should have a photograph of the permit holder on it.

6.11. We seek clarification as to the meaning of the words 'undue disruption' in draft s.116.

6.12. Draft s.118 allows the PCBU to determine the place a permit holder may consult with and advise workers and to determine the route the permit holder must take to get to that place. There is no rationale for a provision of this type in OHS legislation and we submit that it should be deleted.

6.13. Consistent with our comments in 6.1 and 6.2 above, the duplication of the *Fair Work Act 'fit and proper'* test in draft s.122 to s.125 is unnecessary. All references to '*fit and proper'* should be deleted for the draft Model Act.

6.14. Only the relevant regulator, at draft s.130, should have the ability to seek the revocation, suspension or the imposition of conditions on a permit.

6.15. The revocation or suspension of a permit will have serious implications for a permit holder. We submit that the Applicant (who we have submitted should be the relevant regulator) should bear the onus of proving why a permit should be revoked or suspended rather than the permit holder having to prove why these things should not occur as draft s.131 currently requires.

6.16. We submit that further discussion by on draft Part 6 of the Model Act is urgently required.

7. Part 7: The Regulator

[12] Litwin, A., *Trade unions and industrial injury in Great Britain*, LSE discussion paper DP0468, August 2000

Discussion Paper

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

7.1. We seek clarification of the meaning of '*Guidelines'* in this context. It is not appropriate that guidance developed solely by a regulator is given any formal legal status. It may be appropriate that guidance developed with the input of the social partners and only promulgated after a period of general public comment (i.e. Victorian WorkSafe Positions) has some more formal status. We are unsure what type of guidance is completed in the draft Model Laws.

7.2. We submit that for consistency with the Objects of the Model Act, at draft s.3, draft s.143(e) should require the regulator to consult with unions. In the phrases *'the persons to whom they owe duties and their representatives'*, 'representatives' could be replaced by *'unions'*.

7.3. We submit that, to avoid any doubt, draft s.146 must make it clear that a regulator can only delegate a function or power to an appropriate person who is also considered to be part of the public service for the particular jurisdiction in which the delegation is to have affect.

8. Part 8 Enforcement Powers

8.1. We seek clarification of the meaning of the words '*prescribed class of persons'* used in draft 147(1)(e)

8.2. Public servants (however described in particular jurisdictions) are covered by separate and comprehensive public sector management legislation. Draft s.150 should be amended to make it clear that despite draft s.150, Regulators are still liable to comply with the applicable public sector management legislation.

8.3. We seek clarification of an inspector's obligation to immediately leave a place that is not a workplace, draft s.155(4) and draft s.162 where that place is a also residence; for example a supported home.

8.4. We submit that for clarity, draft s.163(3) should make it explicit that the person being interviewed has at all times the right to be represented and to be accompanied by a representative. An inspector should also be required to inform a person to be interviewed of this right.

9. Part 9: Compliance Measures

9.1. As we have previously submitted the ACTU does not support that enforceable undertakings be used as an alternative to prosecutions. The use of enforceable undertakings must not limit the right to pursue a prosecution. An enforceable undertaking should only be considered where a defendant admits guilt and consultations have been held with the workforce and relevant unions.[13]

9.2. Draft Division 8, Part 9 of the Model Laws should include provisions that detail that the acceptance by a regulator of an enforceable undertaking, or the withdrawal or variation of an enforceable undertaking, must take into consideration the views of effected workers and their unions.

[13] Submission by the ACTU for the National Review into Model Occupational Health and Safety Laws, 11 July 2008

9.3. Noting our earlier comments regarding the further consideration of the penalty regime we submit that it is totally inappropriate for enforceable undertakings to be available for Category 2 offences as provided for at draft s.211(2).

10. Part 10: Review of Decisions

Discussion Paper

Q38. Is the list of reviewable decisions appropriate?

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

10.1. While generally comfortable with the list of reviewable decisions, we submit that decisions under draft s74 (decisions by Regulator to resolve issues in dispute) should be included in the list.

10.2. Notwithstanding our previous submission that draft Part 6 of the Model law needs substantial re-writing we submit that draft s126, draft s.127 and draft s.128 (decisions by the Authorising Authority to not issue, to impose conditions on or to revoke an OHS Entry permit) should also be in the list.

10.3. We submit that a health and safety representative who represents a worker whose interests are affected by the decision should be considered an '*eligible person'* for the purposes of draft s.218 in relation to decisions taken at draft s.205,s.207, s.211 and s.216.

Discussion Paper

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?

10.4. We are comfortable with the stay arrangements for a prohibition or non-disturbance notice.

11. Part 11: Legal Proceedings

Discussion Paper

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?

11.1. We submit that the list of matters to be considered in negotiations for work groups be provided for in the draft Model Act.

11.2. We seek clarification of the of the limit to which jurisdictions may include local provisions to enable an infringement scheme to be established in relation to the draft Model Act and to prescribe the offences for which infringement notices may be issued at draft Division 3, Part 11.

11.3. The ACTU strongly reasserts its support for the existence of an unqualified obligation on employers to prove to a tribunal that they have discharged their obligation to maintain a safe and healthy workplace and the right of injured workers through their unions to be able to initiate legal proceedings in the event of an alleged breach of the model laws. We support the position and options that have been put forward by Unions NSW in this regard.

12. Part 12: General

12.1. Draft s.245 requires confidentiality of information obtained about someone else's affairs while exercising a function under the draft Model Act. We submit that it needs to be made explicit that information obtained by a union about work practices or systems through a HSR, or by the union in any representative capacity, is not included in this confidentiality provision if it is about work systems or processes, and the union uses any such material in support of alterations to work agreements to improve OHS practices.

13. Administrative Regulations

13.1. All of the matters currently at Part 2 Consultation in the draft Administrative Regulations: Negotiation of agreement for work groups, Matters to be taken into account in negotiations variation of work groups, Procedures for election of health and safety representatives, Training for health and safety representatives, Default procedure for issue resolution, and Minimum requirements for issue resolution, are important matters that go to the effective operation of the draft model act. For complete clarity and to avoid unnecessary disputation we submit that these matters should be brought forward into the draft model act.

13.2. We submit that some of the matters in draft Reg 5 are repetitive and support re-wording of this list.

13.3. We submit that more detail on the determination of workgroups across multiple PCBUs is required in draft Reg 5.

13.4. The draft Model Act provides, at draft s.48, that a worker may ask a PCBU to facilitate the conduct of an election for HSRs. There is no requirement for workers to 'consult' with the PCBU about the election of HSRs under the duty to consult or the nature of consultation provisions of the draft Model Act. We submit that those conducting the election need only inform the PCBU that an election is to take place and discuss necessary administration arrangements etc.

13.5. There are instances where worksites may be established for periods of less than 2 weeks. We submit that the words *'or such a lesser period as agreed between the parties'* be added after the word '*weeks*' in draft Reg. 7(1)(c).

13.6. We submit that as well as notify workers of an election result at draft Reg 7(2), the PCBU should also advise the regulator of the result. – providing details of the workplace and the names of the elected HSRs /Deputy HSRs.

13.7. We note the current minimum standard in the South Australian legislation whereby '*a health and safety representative is entitled to take at least five days per year off work, without loss of income, for the purposes of taking part in courses of training'* (s. 34, Reg 6.1.11). We submit that the draft Regulations should be amended to provide this currently applicable right. Further this provision should be moved forward to draft model Act rather than be located in the draft Administrative Regulations.

13.8. We query why the training requirements for OHS entry permits includes training in the application of risk management at draft Reg 13(d) when risk management is not a requirement of primary duty holders.

13.9. With regard to draft Regs 16, 17, 18 we refer to our comments above that draft Part 6 of the Model law needs substantial re-writing. The content in draft Regs 16, 17, 18 should be considered during the consideration of the re-wording of draft Part 6.