Public Comment Response Form
Exposure Draft for Model Act and Stage 1 Model Regulations

Background

The meat industry has been built over many years and has continued from generation to generation. Work in meatworks and associated workplaces, has always been physically hard, dangerous and skilful. Without the strength of organised labour, the AMIEU, it would undoubtedly be more dangerous.

Workers' compensation is a dramatic understatement of the level of work related injuries and illnesses, but they are the only statistics available. The number of workers' compensation claims reported by NOHSC in 1994/5 implies that a worker in the Meat Processing Industry has almost 1 chance in 5 of experiencing a serious (that is, entailing a fatality, permanent disability, or temporary disability resulting in 10 days or more time lost from work), compensated, work-related injury/disease over the course of a working year.

Assuming a worker spends his/her whole working life in this industry, on the basis of probability, he/she is almost certain (99.96%) to experience a serious, compensated work-related injury/disease over the course of his/her working life. (Probability will depend on the occupation and age of a worker and while some workers will actually avoid an injury/disease over the course of their working lives, others will experience more than one).

AMIEU Commitment to Health and Safety

Occupational health and safety (OH&S) is a fundamental and longstanding pursuit of the AMIEU on behalf of its members. For example:

- There has been a full time health and safety/compensation officer for more than 40 years.
- The Victorian Branch of the AMIEU established a medical centre in the 1960s because of the need for medical practitioners who were capable of recognising and providing proper treatment for zoonotic infections and other work related conditions suffered by workers in the meat industry.
- The AMIEU has been actively involved in debating and developing the legislation for health and safety in every State.
- The AMIEU was pleased when the Victorian Occupational Health and Safety Commission (VOHSC) initiated work on the development of industry based Codes of Practice, particularly a Code for the Meat Industry. When, in 1992 the Kennett Government abolished VOHSC and scrapped the work that had been done on industry based Codes of Practice, the AMIEU continued nationally to work on industry specific guidelines and eventually negotiated guidelines with the industry employer association.
- The AMIEU has provided training on health and safety for representatives in our industry for more than 20 years.

- Representatives of the AMIEU are regular participants in tripartite and government bodies associated with workers' compensation and health and safety in all States.

AMIEU members, their families and their communities are extremely concerned that the process pf harmonisation must not reduce the standards and protections for workers nor reduce the rights of meat workers or their union.

Outline of AMIEU submission

The AMIEU submission answers the questions raised in the Discussion Paper and extra comments are provided at the end of the Discussion Paper. A preamble is included which outlines some of the major shortcomings in the current Exposure Draft.

Preamble

The harmonisation of OHS laws process began in 2006 with the aim to reduce the regulatory burden on business. The AMIEU is not opposed to removing this regulatory burden for employers; however, this must not occur at the expense of standards and protections for workers. Indeed, this is the AMIEU's understanding of the Federal government policy commitments. **Unfortunately, the Exposure Draft of the Safe Work Act 2009 does reduce the standards and protections for workers**.

Safe Work Australia shows that those who bear the burden of costs are workers and the community, not employers. SWA publications

- estimate that employers bear only 3% of the costs of this disease and injury burden (43% by workers themselves and 47% by the community);
- estimate that nearly 7,000 die annually as a result of work exposures;
- estimate the overall costs to be around 6% of GDP; and
- the National Hazard Exposure Worker Surveillance (conducted by SWA) showed that for the majority of hazards surveyed, the top 3 preventative measures are an over-reliance on administrative controls, particularly Personal Protective Equipment or ' nothing'.

International & Australian research concludes that good workplace health and safety is dependant upon:

1. Managerial commitment;
2. Active and continuous process of identification, assessment and control of risks;
3. Active and resourced independent inspectorate;
4. Trained workforce;
5. Active and participating workforce assisted by health and safety representatives;
6. HSRs trained and supported by unions.

Points 1&3 are dependant on forces outside of the law. However, for points 2, 4, 5 & 6, the OHS law is the foundation upon which to build.

As currently written the Exposure Draft proposes to:

- **Diminish the rights of all Australian workers to cease immediately unsafe work by narrowing the common law rights and protections under the Fair Work Act (section 19)**; and

- Introduce Health and Safety Rep **disqualification procedures never used before, in any jurisdiction;** and
- Introduce union right of entry provisions which are a "mess", creating undue red tape and restriction of union officials ability to protect workers from unhealthy and unsafe environments.

There are many areas of OHS laws which have performed extremely well but, if the Exposure draft is adopted, these will be diminished eg HSR powers and rights which have existed, without difficulties in Victoria (for 24 years), in Commonwealth (for 18 years), South Australia (23 years) and so on.

It is important to understand that establishing these new legal barriers will have the effect of decreasing the numbers of effective HSRs and the quantity and quality of the consultation that occurs between employers, workers and HSRs. This will have a detrimental effect on overall health and safety performance (currently Australia ranks about 7th in the "industrialised" economies and the WRMC has committed to improving our ranking).

These losses are not limited to workers. Employer associations, along with unions, will have a diminished role in health & safety and employers will no longer have their obligations made clear regarding risk management or the need to access expert OHS assistance.

In addition to the three issues highlighted above which affect everyone, the Exposure Draft contains many short comings which are easily fixed. These include:

1. HSR election processes, with right to assistance from unions for work group negotiations and elections of HSRs;
2. HSR right to choice of training provider and easy access to that training to ensure employers cannot block access to training;
3. HSR powers and rights to be conferred as soon as they are elected;
4. Risk management obligations;
5. Effective Tripartite arrangements;
6. Employer obligation to engage a suitably qualified person to assist in H&S.

As a national union the AMIEU has assessed most of the OHS laws around the country and notes that there will be a reduction in protections for around 90% of Australian workers.

An indicative but not an expansive list::

1. **Commonwealth**: loss of obligation on employers for a systematic approach to risk management; loss of democratic processes for the election of HSRs, including access to support from unions, loss of rights for HSR training, powers of Provisional Improvement Notices and cease work (since 1991), reduction of the role of OHS committees ;
2. **Victoria**: loss of obligation on employers for a systematic approach to risk management; loss of employer obligation for suitably qualified person to assist in H&S; loss of democratic processes for the election of HSRs, including access to support from unions, loss of rights for HSR training, powers of Provisional Improvement Notices and cease work which have existed since 1985;

3. **South Australia:** loss of democratic processes for the election of HSRs, including access to support from unions; significant loss of rights for HSR training, powers of Default Notices and cease work since 1986;
4. **New South Wales**: loss of obligation on employers for a systematic risk management approach; loss of union right to prosecute; loss of Union Rights of Entry since 1984; partial loss of consultation rights held since 2000;
5. **Queensland:** loss of obligation on employers for a systematic risk management approach; loss of position for WHO, the draft does not require employers to employ or engage suitably qualified persons; loss of democratic processes for the election of HSRs and establishment of H&S committees, including access to support from unions; loss of very useful clear obligations regarding principal contractor and H&S committees; loss of tripartite consultative forums since 1999;
6. **ACT:** loss of democratic processes for the election of HSRs, including access to support from unions; loss of rights for HSR training, powers of Provisional Improvement Notices and cease work and loss of PINs in the construction industry, loss of union right to prosecute etc. Protections that have existed for decades;
7. **Tasmania:** limitation of workers rights to cease work for immediate risks; ESR only able to exercise some of their powers after training.

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
The AMIEU strongly supports the title **'Occupational Health and Safety Act'** as the most appropriate title for the Model Act - ➢ the term 'occupational health and safety' is widely used and accepted throughout Australia and internationally; ➢ the Act must encompass much more than 'safety' which should be reflected in the title. In the Meat Industry we face many hazards to health such as biological hazards, zoonotic diseases, as well as risks to safety; ➢ the Act is not simply about 'safe work' which is what the title suggests; ➢ Naming the Act the Safe Work Act may lead to confusion, as there is already a government body called "SafeWork Australia" with its own Act **Recommendation: That the Act be named the Occupational Health and Safety Act.**
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer'* duties under the model Act?
The AMIEU notes that the definition of an 'officer' is extremely unclear; there are two brackets, one after another. There is lack of clarity regarding the duty of an officer and the Offences and Penalties provisions. What is required of an officer to ensure compliance? It must be clear in the Model Law that officers are required to take proactive steps to ensure compliance with the Act. Making risk management more explicit than is currently in the Exposure Draft would assist in such an outcome (see comment later). The Victorian 2004 OHS Act s143, s144 and s145 provide further detail and similar

provisions needs to be included. The AMIEU supports the insertion of a definition of due diligence. The AMIEU considers that the relationship between this duty and the Offences and Penalties provisions is not sufficiently clear for an officer to know or understand what the duty is and what the officer must do to ensure compliance. Have the current provisions from the Victorian Act which relate to Offences by bodies corporate etc, namely ➢ s143 Imputing conduct to bodies corporate; ➢ s144 Liability of officers of bodies corporate; and ➢ s145 Liability of officers of partnerships and unincorporated bodies or associations; been omitted unintentionally? The AMIEU requires clarification that the s26 duty and the accompanying offence provisions are sufficient and workable to give effect to intent of the recommendation that officers be required to take proactive steps to ensure that their business or undertaking has systems etc to achieve compliance with the requirements of the Act; and that the test of whether the officer has met their duty is one of due diligence. In the absence of a definition of due diligence, the AMIEU recommends that a guideline on due diligence be released with the new Act.
Q3. There is some overlap between the definitions of 'plant' and 'structure', as many types of plant have structural attributes, and vice versa. Should 'plant' and 'structure' be defined in a way that removes this overlap?
The AMIEU does not consider that the proposed definitions will create any problems.
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?
The AMIEU supports the VTHC comment.
Q5. Is the scope of the suppliers' duty appropriate?
The scope (Section 6) appears to be appropriate.
Q6. Is the scope of the '*worker*' definition appropriate? Should it cover students gaining work experience?
The AMIEU does not consider that the current definition of 'worker' is appropriate. It is too broad and leads to the inclusion in provisions, such as the negotiation of work groups and election of health and safety representatives. It makes no sense to have the students who are gaining work experience in a workplace for 2 weeks, and have no experience, being the 'workers' who elect health and safety representatives and are consulted by management (when there are no HSRs) about risk assessments; changes to the workplace or work processes. All persons affected by the actions of a PCBU should be afforded protections – that is, the PCBU must have a duty of care towards all such persons. However, only paid workers should be able to exercise rights to negotiations for work groups and election of HSRs,

etc. The Queensland Act (on which the PCBU concept is based) does not extend the PCBU concept to other than the duties of care and for all other provisions reverts to the employer/employee relationship. The AMIEU supports the Queensland approach as being appropriate and workable.

Recommendations:

- The definition of 'worker' must exclude volunteers and students gaining work experience.
- The PCBU duty must be separated into the duty owed to workers and that owed to others. This is well covered by the current Section 26 in the Victorian Act (duties of persons who manage or control workplaces to other people). This provision is now at s18(3) of the model Act.

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

The AMIEU considers that 'workplace' must be defined broadly to include any place where work is done. We consider that attempts to add details of particular places or circumstances should be avoided.

Our suggestion is that the definition be:
***'A workplace is any place where workers work'*.**

Part 2 – Safety Duties

Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?

The AMIEU considers that these provisions should be renamed "Duties of care", and that whenever the term 'safety' is used in the duties, it MUST be replaced with 'health and safety'.

The 'Principles that apply to duties of care' do not give clear guidance on what is expected. The Principles at 12, 13, 14 and 15 merely confirm what is currently understood and enforced i.e. that the duties are shared, overlapping and non-delegable.

But, it is not at all clear how the principle at s 15 (3) (c) will operate. The AMIEU seeks clarification about how various duties holders will 'consult, co-operate and co-ordinate activities with all persons who have a duty in relation to the same matter'.

It is logical to assume that a PCBU who is a primary duty holder (i.e. 'host' employer) should consult and co-ordinate activities with other PCBUs (i.e. contractors or labour hire providers). It is also reasonable therefore to assume that those PCBUs would co-operate with the primary duty holder. However, the principle is extremely broad and with the proposed definition of worker (including work experience students, volunteers etc) and the new duty imposed on other persons the scope of this principle is potentially unworkable.

The AMIEU considers that s16 – 'The principle of risk management' is totally insufficient. We also support the VTHC submission that the inclusion of risk management just as a 'principle' does not give effect to the Panel's recommendations on the matter. The First Report recommended that risk management process should be recognised and reinforced by addressing risk management in a set of principles. The Second Report recommended that requirements for risk management should be placed in the model

regulations, with further guidance in a code of practice.

It has been argued that as risk management is implicit in the definition of 'reasonably practicable' there is no need for a specific provision. The AMIEU does not agree with this assertion.

We consider that it is essential for this implicit approach to OHS management to be explicit in the Model Act.

Our experience is that the silence on the hierarchy of controls in the Victorian Act has also led to the WorkSafe Inspectorate allowing Administrative Controls to be used to reduce risk when elimination cannot be achieved, despite the practicability of redesign or engineering controls.

The explicit approach is supported by the analysis done by Bluff & Johnstone (2005) who looked at how the courts have interpreted the general duties and the extent to which they have required the proactive management of risk and stated that

> *the courts' interpretation of the general duties qualified by (reasonably) practicable does incorporate a risk management approach, or at least the proactive and systematic assessment of risks.*

Rather than arising implicitly as a result of interpretation by the courts, OHS legislation should **explicitly** require systematic and proactive identification and control of workplace hazards and risks. This is a provision in Queensland, Commonwealth, NT and new ACT OHS Acts.

The AMIEU supports the inclusion of Qld HSWA s 27A which provides that 'to manage exposure to risks' in the workplace, a duty holder 'must identify hazards, assess risks that may result because of the hazards'; and an obligation on the PCBU to use the hierarchy of controls when choosing the appropriate risk control measures.

The AMIEU has also made comment that 'at the source' be added to the Objects and logically 'at the source' should also be added here.

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

Reasonably practicable should be an exhaustive list and can only apply to duties of care, i.e. if used in a context outside of duties of care "reasonably practicable" the dictionary/everyday meaning MUST be used.

In some jurisdictions, e.g. SA, the duties are not modified by reference to reasonably practicable. The lack of a definition, according to those who have worked within that jurisdiction, has allowed more room for discussion of reasonably practicable, involving employees in what they determine as reasonable and practicable in regards to their safety. This also supports the AMIEU position of preference for the approach in the UK, Qld and NSW of so called "reverse onus of proof".

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

The issue of cost is often used in workplace discussions and the AMIEU agrees with expert legal opinion that there should be a clearer requirement to weigh up risk (likelihood

and gravity of harm) versus the feasibility and cost of measures in the definition, i.e. cost should only be taken into account in determining whether the measures are grossly disproportionate to the extent of the risk.

Comments on Appendix 2 – The meaning of 'reasonably practicable'. The AMIEU refers to the Victorian Trades Hall submission for comments on the Appendix as it is based upon a Victorian document which had considerable stakeholder input. We consider that it would be prudent to more accurately reflect the Victorian document.

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

The AMIEU considers that there are considerable difficulties and inoperable proposals in the proposed primary duties which need to be rectified for workability and ensuring that existing laws are harmonised in the National Model Law.

The AMIEU is concerned that the scope of the proposed duty is more limited than current provisions and there are fundamental problems with:

- the definitions of 'worker' and 'person conducting a business or undertaking' and the implications of duties owed, etc
- the attempt to combine several duties
- the concept/term of 'engaged at work'

The extension of the primary duty of care to volunteers and students on work experience as 'workers' is too broad and unworkable.

- There must be a separate provision to cover the protection of these groups of people, and 'others';
- The general duty of care should be limited to employment relationships;
- Include a separate provision for the protection of others.

The primary duty of care is missing very significant provisions which already exist in current OHS laws.

- Information in languages other than English, or appropriate languages;
- Keep information and records;
- Provisions to engage suitably qualified persons as is provided in a number of jurisdictions (in different forms but with the same intent) e.g. SA, Vic, Tasmania, Qld.

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?

See comment to Q11. The AMIEU believes that this provision should be covered separately i.e. the PCBU's duty to workers (our proposed definition) is the provision of information, training, instruction or supervision. The duty of the PCBU to other persons will necessarily be limited to information and instruction.

The AMIEU does not believe it practicable for a PCBU (or employer) to provide such information, training and instruction and supervision *to all persons.* This would include not only volunteers, students, etc, but members of the public, visitors to the workplace, etc. It does not seem appropriate to suggest that the manager of a Butcher shop (or a Supermarket) should have to train and supervise the customers.

The PCBU's duty to provide information, training and instruction or supervision should be to *workers* – not to *all persons.*

Provision of information in appropriate languages MUST be included in the Model Act, as it is in many existing OHS Acts e.g. Commonwealth, Vic, SA etc. With a large number of Australians whose main language is other than English and the low level of basic literacy amongst Australian born, it is a dereliction of duty holders NOT to provide information *that is both understandable and in an understandable form*.

We have experience of Sudanese cleaners suffering burns to their eyes because they have no understanding of the risks of the hazardous substances that they are using because information, instructions and training are only available in English not Dinka.

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)?

Absolutely not, the Act should not be drafted in such a way as requiring *'access to'* such facilities. These facilities must be *provided.* As all the duties are qualified by *'so far as reasonably practicable'* the reality is that if these facilities cannot be *provided* or if there are difficulties in providing them, then the fall-back will ensuring that workers at least have *'access to'* them.

However, drafting the provision in the Act in terms of '*access to'* will to lead to disputes in some workplaces, where PCBUs with the ability to *provide* such facilities will try to reduce this to providing *'access to'* other facilities. In one boning room in a country town the employer did not even provide chairs to sit on in a 'lunch room' until he was served with a PIN, such an employer would be likely to suggest that access to the park benches half a kilometre down the road would be sufficient, leading to unnecessary disputes.

Further, we have a concern with the wording at 18 (e): '*in carrying out work for the business or undertaking'*

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

The AMIEU considers that specific activity duties are essential to be included in the Model Act. This will address some gaps in current legislation where those who design workplaces and things for use in workplaces must have a duty to ensure that they are healthy and safe.

However the detail of the provisions and the amalgamation of some duties eg 'designer of a substance' with the 'designer of plant and structures' is so confusing as to be almost unworkable. The AMIEU believes that detailed assessment of these provisions necessary to ensure that the intent of their inclusion is achieved.

The AMIEU also considers there should be duties on those who design work environments and work systems as these also impact on the health and safety of workers.

Q15. In determining whether a worker failed to take reasonable care, should regard be

had to what the worker knew about the relevant circumstances?
The AMIEU agrees that the workers duty should be limited to what the worker knew about the relevant circumstances. It should also take account of the power imbalance in the workplace i.e." the workers should take the care of which the worker is capable". In determining whether a *worker* failed to take reasonable care, regard must be had to what the worker knew about the relevant circumstances. The issue of reasonable care to 'not adversely to affect the health or safety of other persons' should be covered by stating that: **"A worker shall not wilfully place at risk the health or safety of any person at the workplace."**
Q16. Is the treatment of volunteers under the model Act appropriate?
The Exposure Draft has unfortunately created complications by the inclusion of volunteers in the definition of worker. The ACTU and VTHC submissions provide detail on the unions concerns.
Q17. Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?

The AMIEU is not convinced that the proposed Category of Offences is at all workable, creating significant anomalies without any clear policy rationale for the proposals.
 	
Issues include but are not limited to:
 	
There is a conflict between the Exposure Draft and correspondence from the DPM regarding Category 1. A letter to the ACTU (undated but received 17 September 2009) details that Category 1 offences have application where there was a high level of risk and the duty holder was reckless or grossly negligent:
 	
• Three categories of offences will be created;
  ○ A high level of risk and the duty holder was reckless or grossly negligent,
  ○ A high level of risk but without recklessness or gross negligence, and
  ○ A breach of duty without the factors present in category 1 or 2.
 	
The Exposure Draft refers to recklessness and serious illness/injury. The AMIEU supports a provision for *Duty not to recklessly endanger persons at the workplace.*
 	
Serious illness or injury is defined for the purposes of Part 3. Can it be inferred that this definition applies to Part 2 or is that a matter for the courts, as that definition is very limiting? It in fact seems highly probable that the bulk of offences will be a category 3 type offence which contradicts any supposed increase in penalties.
 	
The inclusion of further categories without any accompanying policy statement is questioned. The proposed penalties contain considerable inconsistencies and, in regards to the relative weighting of penalties, reveal an opaque decision-making process. For example it is proposed that a PCBU be fined $25,000 for failure to display a list of HSRs as well as for a breach of obligations to HSRs. The former is clearly absurdly high and the later makes a mockery of the objects of the Act. Additionally a fine of $50,000 is proposed for contravening an order to deal with a dispute over OHS permit holder. This would mean that a union official can be fined more than a PCBU which denies workers rights to representation! The latter is clearly much more important for health and safety outcomes (see the objects of the Exposure Draft and the preamble to this submission).

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

regulations?
The AMIEU considers that the maximum penalties for contravention of the model Regulations should be consistent with the maximum penalties set out in the Model Act.
Q19. The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?
The AMIEU agrees that all contraventions should be criminal offences. However given our comments on the proposed Cat 4 - 7 and the unsuitability of the size of the fines to the nature of the breach, the VTHC recommends that consideration be given to an additional Category 8 which could be used for administrative breaches eg failure to keep a list of HSRs or failure of union to provide information. Several OHS Acts have had provisions for Infringement Notices, recently introduced in some jurisdictions. The VTHC considers that it would be more workable and extremely appropriate to deal with some of these 'administrative' breaches could also be more relevant and workable as through issuing Infringement Notices.
Part 3 – Other Obligations
Q20. Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?
The AMIEU has some concern that the list does not adequately cover incidents that may lead to potentially serious illnesses and/or injuries. These include: ➢ Exposure to non-substances – e.g. biological contaminants (for example through needlestick injuries or contact between workers' membranes and foetal fluids or urine from animals); radiation etc ➢ Incidents of violence ➢ S36(f) – this fails to cover a number of very large pieces of equipment, for example excavators, which do not require either registration or a licence. The AMIEU also believes that the duty to keep records of all incidents notified should be in the Act, and not the Regulations and that a provision similar to Victorian Act s 38 (4), which provides for copies of the record of the incident to be available to specific people. The equivalent of s 38 (4) of the Victorian Occupational Health and Safety Act 2004 must be added.
Part 4 – Consultation, participation and representation
Q21. Is the proposed scope of duty to consult workers appropriate?
The proposed duty to consult is based largely on the current Victorian provisions which continue to cause difficulties at the workplace. To remove this confusion s 46 (2) should be amended to remove the words in brackets. HSRs are the recognised mechanism for consultation, there is no need for procedures to be agreed where there are HSRs, therefore s 46 (3) should be amended as follows: *If workers are not represented by a health and safety representative, the workers and the PCBU may agree to procedures for undertaking consultation under this Section.* The AMIEU supports the inclusion of a provision to ensure that workers are able to authorise someone to represent them in these negotiations. This currently exists in

existing legislation eg Qld, Vic, SA and the AMIEU sees no reason why such an option should not be included in the Exposure Draft.

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

The AMIEU does not support the inclusion of a consultation procedure. It has been our experience that employers exploit such an option with the intent of decreasing the consultation rights of workers and their representatives.
However there may be benefit in providing advice to PCBUs about what would be regarded as compliance for circumstances where there are no HSRs.

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?

The AMIEU is concerned that the provision at s 49 (4) is insufficient to provide for the determination of work groups at sites where there are multiple PCBUs in a workplace.

In fact it is unclear how, let alone who would determine a work group for 'workers engaged in 2 or more business or undertakings.'
This is a serious omission which needs urgent review. The establishment of work groups is fundamental to the Act and must include clear provisions for the establishment of work groups and therefore the election of HSRs in multi PCBU sites.

The Victorian Act includes provisions for the grouping of employees of multiple employers (s47, 48, 49, 50, 51 and 54) which should form the basis of consideration.

There is also an additional provision in Victoria s 44(e) which allows for a HSR to represent independent contractors.

In our view there are other omissions in the determination of work groups which need to be rectified.

1. The Model Regulations propose at Regulation 6 (1) that parties to an agreement may at any time negotiate a variation of the agreement. It is the view of the AMIEU that this provision must be in the Act not in the Regulations.
2. The Model Act also must include a provision, similar to that in the Victorian Act which allows for a worker or group of workers to be represented in negotiations of work groups by any person authorised by the worker or group. (s44(5) and 48(5))
3. That the detail of Negotiation of agreement for work groups (Regulation 4) and Matters to be taken into account in negotiations (Regulation 5) of the Model Regulations should be in the Act.

Q24. Negotiations for work groups must be commenced within a '*reasonable time*'. Should a time limit be prescribed e.g. 14, 21 or 28 days?

The lack of a time limit is opposed by the AMIEU. It is critical that PCBU are not able to "drag out" negotiations for work groups. So much of the Act depends upon the establishment of work groups. Without these workers are denied representation i.e. without a time limit a PCBU can deny workers access to a basic health and safety entitlement, one which is referenced in the objects of the Act. This is therefore not acceptable. The AMIEU supports a time limit of 7 days.

Further, there are many situations in which even the 14 day time-frame is ineffective, for example for large events (e.g. Grand Prix, etc). The AMIEU would like to see a provision included whereby the regulator could, on request of workers, their representative/s or PCBUs, reduce the time-frame to accommodate such circumstances.
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?
No, it is not necessary to prescribe a time limit. However, the provisions in the Act must be clarified so that there is no doubt that the processes for the election and the election itself of HSRs be left to the members of the DWG to determine and implement. The AMIEU considers the provisions of the current s 55 to be contradictory. S 55 (1) provides, rightfully, that workers determine how an election is conducted. S 55 (2) then proposes a mandatory and highly prescriptive process in the Regulations The AMIEU does not support the provisions set out in Regulation 7. Our view is that the s 55 should provide that: 1. The workers in a work group may determine how an election of a health and safety representative for the work group is to be conducted 2. If workers in a work group so determine, the election may be conducted with the assistance of a union or other person 3. If the workers in a work group cannot reach agreement within a reasonable time, any member may ask the Authority to arrange for an inspector to- (a) conduct the election; or (b) if the inspector considers it appropriate, appoint another person to conduct the election.
Q26. The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?
The AMIEU believes that the intent of establishing a time frame for training to occur i.e. that HSRs are not delayed in attending is best served, not by the setting of a time frame, but by the inclusion of provisions from the Victorian Act. These provisions provide: ➢ A right for HSRs to attend any course that is approved or conducted by the Authority; ➢ That the HSR must make a request to attend training at least 14 days before the course is to commence; ➢ That the course is chosen by the HSR; ➢ The Authority can determine disputes; ➢ An employer who refused to allow attendance is guilty of an offence; ➢ If the HSR represents workers for multiple employers the costs are shared equally. See AMIEU further comment on training. **The AMIEU considers that the detail of Regulation 8 should be in the Act.**
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?
We would prefer a timeframe of 4 to 6 weeks.

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?

Yes. These provisions must be aligned with the Fair Work Act. **There is no justifiable reason why the Model OHS Act should act as a limiter of workers common law rights and rights conferred under the FWA. The objective of the harmonisation of OHS laws included no diminution of current protections. The proposed clauses 75 and 76 are a CLEAR diminution of workers rights.**

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

The AMIEU **is totally opposed to this provision**. The operation of HSRs in Victoria since 1985 recognises that HSRs on election have rights and powers which they can exercise regardless of whether they have been trained or not. As the Model Act and the Fair Work Act codifies a workers right to cease unsafe work it is inconsistent to insist that HSRs have training before they can issue a cease work when a HSR as a worker does not have to undertake training.

The requirement to attend training prior before a HSR is conferred with a power undermines the current arrangements for HSRs in SA, Victoria, Commonwealth, ACT, NT. The AMIEU has many examples of cease work action taken by HSR, prior to their attendance at training**. Protection of other workers must not be dependant upon the ability to negotiate access to training.**

- s.76 refers to 'a worker' and 'the worker', the wording needs to ensure that HSR can direct 'workers'
- Cl 75 reasonable grounds must be replaced by concerns (as in common law rights and section 19 of FWA)
- **Cl 76.5 This is considerably lower than the provisions under Vic OHSA s74, C'wth Act and SA and must be deleted**
- Does not provide protection to general public: amend to 'risk of imminent and serious injury to or imminent and serious harm to the health of **any person'**.

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

The AMIEU strongly opposes the requirement to attend training prior before a HSR is conferred with a power. This is less than current Vic, Commonwealth (in HSR opinion), SA, Tasmania, ACT and NT provisions.

On first reading the clause appears to be in line with Qld provisions, but this is not accurate. In Qld the HSR after training is not required to have *reasonable grounds*, rather reasonably believes. **So the proposals are, in total, less than is current in all jurisdictions that have PIN/default/Safety or Written notices**.

The union experience with recalcitrant employers is that HSR will be DENIED training as the employer says why *train when they will learn how to put on a PIN* i.e. HSR and workers will lose ALL their rights, not just some! Also many HSRs have needed to issue a PIN to get access to training. With up to twenty five years of experience in some jurisdictions there is no evidence that could support the curtailment of this right of HSRs. It is an evidence free policy change.

The AMIEU opposes s 80 (3). During discussions with HSRs we have received a strong message that s 80 (3) must be deleted.
Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?
The AMIEU draws the attention of SWA to the inclusion of minimum of eight days (EXCEPT in construction in the ACT) for Provisional Improvement Notices, Written Notices, Safety Notices & Default Notices (dependant upon jurisdiction). Therefore the proposed time limit is supported except for construction workplaces where the time limit should be 24 hours, given the nature of that industry and its risks. S 80 (4) It is unclear what this provision is about. What is covered by 'matter'? What happens if inspector has issued an Improvement Notice, not returned and the employer has failed to abide by the notice?
Part 5 – Protection from Discrimination
Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?
Yes, the AMIEU believes that HSRs and deputies, who take on this role voluntarily, and with no DUTIES as HSRs and deputies, must be afforded the highest level of protection, not only when they DO exercise their powers, but also if for any reason they choose not to do so in a particular way. The AMIEU notes that HSRs/deputies are not professional OHS professionals and must not be induced or coerced. ➢ S 93 Discrimination, these clauses are based on the Victorian provisions but appear to be less than NSW OHSA s 23. ➢ Note there is also nothing about hindering persons giving assistance to injured workers as in NSW OHSA s 24 ➢ 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? ➢ S 104 (c) seems harsh without knowledge of the grounds for which an application under another law failed.
Part 6 – Workplace entry by OHS entry permit holders
Q33. Are the notification requirements appropriate?
The AMIEU considers that the provisions of Part 6 require substantial re-writing, as it is a “mess”. If the intent is to make the provisions consistent with the Fair Work Act does not mean that those provisions are duplicated in the OHS Act. There is a broad range of inconsistencies, the introduction of unnecessary red tape and the creation of a system that has the potential for an overwhelming number of technical hitches, reinforced by criminal sanctions!
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?
The AMIEU believes that there should be one authorisation process i.e. to be given an

OHS entry permit, the applicant meets the criteria for the issue of a Fair Work permit and completes the training for OHS permit.
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?
See comment from the ACTU.
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?
Entry into a workplace for Health and Safety reasons is separate from rights exercised under the FWA. For example the provisions in the NSW OHS Act have existed for decades, and have worked well. Any alignment with FWA relegates the protection of "life, safety and health" to being of lesser importance to society than industrial law. This does not reflect social or ethical position of Australian society or the AMIEU. The AMIEU's concerns around the Right of Entry provisions are extensive. We have not attempted to rewrite the provisions but provide comment on the confusion and difficulties that have been created in drafting. Note of course, most of these could be circumvented if the approach was one of: 1. FWA permit; 2. training on the OHS Act; 3. right of entry to investigate suspected OHS breach, without notice, including powers as per the NSW provisions; 4. right of entry for consultation and advising of workers left within the FWA, as this arguably covers OHS issues; 5. right to seek assistance from inspector as in NSW s 84; 6. accompany an inspector on a workplace inspection in NSW s 69 (1) (a) (b). Permit holders must be: ➢ able to advise workers of their rights, especially in circumstances of immediate risk to health and safety ➢ able to take photos, etc, and view relevant documents when investigating a suspected breach Such an approach would remove any need for reference to ➢ Fit and proper person ➢ Right of entry breaches would be civil penalties as in the FWA ➢ Enquiry into breaches (cf FWA investigate) The exposure draft of the model OHS laws gives the PCBU the right to dictate where discussions take place and what route the official takes to get to those discussions. The AMIEU opposes this provision. It again aligns health and safety (the protection of life and limb) with industrial relations peculiarities.
Part 7 – The Regulator
Q37. Should guidelines have any other particular legal status under the Act?
It is unclear from the Exposure Draft Discussion Paper what the issue is behind this question. It appears that there may be some misunderstanding of the purpose of

guidelines as proposed and 'guidance' more broadly.

It would appear there is a lack of understanding about the nature of Guidelines under the Victorian system. Please find below an explanation from the Victorian Trades Hall Council Submission.

In Victoria guidelines are developed with employer and union stakeholders (in a tripartite process) and are subject to public comment.
Current Victorian WorkSafe Positions include:

- How WorkSafe applies the law in relation to Reasonably Practicable
- How WorkSafe applies the law in relation to identifying and understanding hazards and risks
- How WorkSafe applies the law to: Employing or engaging suitably qualified persons to provide health and safety advice

Two further guidelines are subject to public comment:
How WorkSafe applies the law in relation to:

- Discrimination on health and safety grounds and
- The requirement to answer questions

These documents are important in holding the Authority to account in decisions made by inspectors, in the development of guidance and in making it clear to duty holders, and those to whom duties are owed, what the Authority considers is compliance. The Act should therefore have provisions for similar 'guidelines' or 'positions' to be made.

Part 10 – Review of Decisions

Q38. Is the list of reviewable decisions appropriate?

The HSR of worker affected should also be included in these: 205, 207, 211 and 216.

A major omission is that a **representative** (as defined) has not been reflected in the list of eligible persons. For example, the **representative** as defined in the Model has a role eg in Issue Resolution s 73 or should be included in other provisions where we have suggested that workers have the right to nominate a representative eg determination of work groups. These representatives are eligible person for the review of decisions and should be added to those decisions made or not made by an inspector.

S 73 should also be able to go to internal review

Need to add in S 221.3

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

The AMIEU has had some difficulty in aligning the review decision process in the Victorian Act with the proposed provisions in the Model. For example, s 222 of the Model does not include timeframes for the internal reviewer to advise the applicant rather referring to 'as soon as practicable'.

The AMIEU is also concerned about the potential impact of s 221 (3) of the Model which proposes that the time frame ceases to run if the reviewer seeks further information. While it is logical that the time taken to provide the information should not be included on the 14 days without any requirements on the applicant to provide the information is it possible that a decision could be delayed indefinitely?

Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or

nondisturbance notices, having regard to the purposes of those notices?
The details of the stay arrangements appear appropriate. However, the AMIEU is unsure of the effect of the location of this provision after the provisions on External Review. Is this to be taken that only External Review can determine stays of these notices? If so, it is not appropriate.
Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
No, see comment at Q23. These matters should be in the Act. Any proposal to downgrade them to a Code of Practice is strongly opposed. This would be contrary to the objectives of harmonisation ……i.e. take from current laws and create a new law.
Do you have any other comments?

PART 1 ADDITIONAL COMMENTS

S 3 Objects The objects do not, in our opinion, comply with ILO Convention 155 to which Australia is a signatory.

- i.e.ILO Convention 15 Part 2 Article 4.1.

S 3.1(a) 'at the source' must be added after elimination – these are crucial provisions which are relevant to the hierarchy of control which should be referred to in the Act under the heading of Risk management i.e. Cl. 16

S 3.1. (f) is very broad – it is assumed that this clause relates to review of decisions, i.e. accountability and transparency of inspectors and regulators. However others have powers and functions and it is unclear how such a clause relates to those.

PART 2 ADDITIONAL COMMENTS

<u>Specific omissions from the proposed primary duties</u>
The AMIEU is very concerned that particular duties found in current legislation are not replicated in the Exposure Draft e.g.

1. employees performing work of hazardous nature are to receive training and instruction prior to commencing work;
2. inexperienced employees performing work of hazardous nature will receive supervision while working;
3. employees performing new or changed work of will receive supervision, training, information, instruction while working;
4. manager or supervisory positions not specified in regards to instruction and training to ensure employees are safe from injury and risk to health; and
5. an employer's responsibility in regards to accommodation, recreation or other facility in connection with the performance of work.

Additionally the current provisions in Clause 18 are lacking
1. onus on employer to prepare and maintain statement for health & safety at work (i.e. OHSW Policy, Procedures)
2. onus on employer to consult with union, employees etc regarding policy, procedures

3. onus on employer to bring policy & procedures to the notice of employees.

Specific comments on the provision, as drafted:
S 18(1) remove 'while the workers are engaged in the business or undertaking'

S 18(2) delete - if a provision for the self employed is necessary then it should be a separate provision. It is illogical that a self-employed person would be required to provide these specific duties for themselves. However a self employed person should have a duty to other persons similar to Victorian s 24 'A self-employed person must ensure, so far as reasonably practicable, that persons are not exposed to risks to their health or safety from the conduct of the undertaking of the self-employed person'.

S 18(3) delete and make into a separate provision - duty to other persons

S 18. 4. subclause (a) needs to be inserted into the introductory sentence
"ie without limiting subsections (1) to (3), to provide and maintain a safe and healthy work environment; a person conducting a business or undertaking must, so far as is reasonably practicable'.

S 18. 4

a. use words "working environment" (as per NSW OHSA 8.c.);
Health is missing from (b) and (c)
Absence of risks is missing from (d)
(f) it is unclear how this provision will work - *provide to all persons* does this mean beyond workers? This could be rectified by a provision that the PCBU should *provide necessary information to other persons* in the duty to other persons
(g) wording lacks clarity - add 'work related'; after 'preventing'.

PART 4: ADDITIONAL COMMENTS

Division 1 (Sections 45-47)

S 46

- Needs addition of recording of consultation and reviewing of consultation procedures
- s 46 (2) needs to link s.45 with s.46
- s 46 (1)(d) workers needs to replace persons
- s 46.1.a. needs to include *in appropriate languages* as in the Commonwealth 1991
- Allow Union to assist in consultation arrangements as per NSW OHSA 17.3

S 47. The provisions in this clause again highlight the inadequacies of the Exposure Drafts approach to risk management. AMIEU strongly supports this provision that requires the PCBU to consult when identifying hazards, assessing risks. However there is NO provision in the Part 2 Safety Duties (or, as should be reworded, Duties of Care) for anyone with a primary duty to do this! Again, an inconsistency and a lack of appreciation of why risk management is included in existing laws e.g. Qld 27A.

Division 2 (S 48-67)

Determination of Work Groups

- The Model Regulations propose at Reg 6 (1) that parties to an agreement may at any time negotiate a variation of the agreement. This provision should be in the Act not in

the Regulations.

- The Model Act also must include a provision which allows for a worker or group of workers to be represented in negotiations of work groups by any person authorised by the worker or group.
- That the detail of Negotiation of agreement for work groups (Regulation 4) and Matters to be taken into account in negotiations (Regulation 5) of the Model Regulations should be in the Act.

Reasonable Time

Throughout this Part whenever there is reference to reasonable time, this must be replaced with reference to a short prescribed time frame to cover the agreement for elections and negotiations for work groups etc to occur. This needs to be worded in such a way that flexibility for the finalisation of the election processes, etc, allows for diverse workplaces, e.g. with variable shifts etc but does not disenfranchise temporary and consistently changing workplaces e.g. construction. As an example the Model SA law notes that an employer must respond in 14 days after request for negotiations for work groups.

Options include

1. Adoption of the SA OHSWA provisions.

2. The use expansive language which is inclusive in the Model Act, but with detail and meaning of the words in an explanatory memorandum.

Assistance

Throughout the Part workers must be able to ask for the assistance in the negotiation and establishment of work groups and the election of HSRs. That assistance may come from a union. This exists in various forms in current laws and there is no evidence or reason to change the provision e.g. Vic, SA, Commonwealth, Qld.

The AMIEU reiterates that the principle that needs to be reflected in the Act i.e. that when determining work groups or arranging or conducting elections, any worker or group of workers has the right to union representation.

General comments

S 48 The AMIEU notes that this Clause is misplaced. The request for elections comes after the negotiation and agreement on work groups. Therefore the architecture of this Part needs revision to reflect the logic: i.e. decisions re work groups, decisions regarding conduct of the elections, decisions re the elections.

S. 49 (3) and s 49 (4) need more detail, as it is very unclear how any of this would work. Guidance can be found in the Vic OHSA 2004. The AMIEU strongly supports this provision but believes more assistance to the parties in required in the Act.

The Exposure Draft is silent in regard to varying work groups, this must be rectified.

The Exposure Draft lacks any provision like that found in the SA Act which specifies need for DWG's to be manageable for HSR's & Employers.

Nothing in the Exposure Draft is preventing management from being HSR!

The Exposure Draft is silent on where there is a substantial change to work group and agreed by at least half of DWG members HSR must be re-elected.

S 50 (4) This provision intends to provide for work groups across multiple PCBUs, e.g. a construction site, however the use of the word 'engaged' is limiting to those who work

say as a maintenance contractor who works for a number of businesses.

S 50 (5) refers to negotiations for variations of work groups and the proposed provisions in the Act should include a specific provision similar to 'the parties to an agreement . . . may at any time negotiate a variation to the agreement.'

S 50.5 Insert section 76.2. Qld WHSA on role of union in elections.

S 53 Person Conducting business or undertaking "must facilitate the conduct of an election" – at the workplace there is likely to be considerable difficulties, if the Exposure Draft does not specify workers ability to run own election, with or without the assistance of others including a union. Such a clarification would make the rights of workers clear and make it clear that the PCBU task is to allow the election to take place with ease, not to conduct or arrange the election.

S 53 Uses both as 'soon as practicable' (a) and as 'soon as reasonably practicable' (b) and a penalty is included. Is the intent to ensure that the PCBU does not prevent an election from occurring - is this what the proposed wording delivers? This is very confusing and requires clarification.

S 55.3 Reword to read:

> The workers in a work group may ask any union with members at the workplace to assist in the conduct of the election. The union must conduct for all workers. (as currently worded the provision is less than s 74/76. Qld WHSA).

S 55 (1) and S 55 (2) are contradictory. We do not agree to the proposed prescriptive Regulations which prescribe the election process.

S 55. Need to include that the election of HSRs is conducted in a democratic manner.

S 56 refers to 'a' HSR - we understand that singular includes plural but to avoid confusion/dispute and to ensure link with 49(2) - suggest removal of 'a' and refer to health and safety representative(s).

S 58 The term of office provision has to be amended to reflect democratic principles, i.e. only a majority of members of a work group can determine that a HSR no longer represents them.

<u>S 59 Disqualification of HSRs</u>

The AMIEU draws to the attention of SWA that as currently written, **this draft provision undermines ALL** current state/territory laws. This is not acceptable in the OHS law harmonisation process. When read by existing HSRs their response is *"why would I even consider being a HSR?".*

Is this the intent of the harmonisation process? Whilst appearing justifiable to a corporate lawyer, this provision's real aim and effect will be to diminish the activity and numbers of HSRs in our workplaces.

When initiated the OHS law harmonisation process was not intended to lower protections. This proposal does that and is very strongly opposed by the AMIEU, particularly our HSRs.

S 59 The proposed provisions are too broad and need amendment to ensure:

Lack of intent to cause harm must be included
'persons' must be limited
Inspectors have no role in the disqualification of HSRs and must be removed.

i.e. should read *HSR used a power as a health and safety representative with the intention to cause harm;*

S 59.3 (3)

If the Tribunal is satisfied that a ground in subsection (1) is made out, the Tribunal may disqualify the health and safety representative for a specified period or permanently. This provision needs to be amended to reflect, at a minimum, the C'wth 1991 period of not exceeding five years.

S 60 Immunity of HSRs

A health and safety representative is not personally liable for anything done or omitted to be done in good faith:
(a) in performing a function under this Act; or
(b) in the reasonable belief that the act or omission was in the performance of a function under this Act.

We submit that the inclusion of this clause untenable and must be excluded.

The role of Health and Safety Representative is a voluntary one and, practically speaking, it is often hard to encourage workers to take on the role. In its present form, with the vagueness of the wording around legal liability and the inclusion of the words "*in good faith*" the AMIEU will find it difficult to recommend or encourage our members to nominate as a health and safety representative. **The inference of potential liability implies an HSR has a duty under the Act other than those of a normal worker which they do not.**

There is no rationale or precedent that has been offered during the process of developing the Model Law for having HSR held liable for fulfilling a statutory role.

The current wording opens a Pandora's box of future scenarios:

- Will an error of judgment lead to liability?
- Will failing to act because the worker is also far too busy to be vigilant lead to liability?
- Will failing to act because the worker is intimidated by management lead to liability?
- Is an omission or failing to act when others might possibly have done so "liable"?
- Is it an objective or subjective test?
- Irrespective of the success or otherwise of training, will the prosecutors take into account the intelligence, age, knowledge, experience, status and general capacity of the safety rep when he or she makes or fails to make relevant decisions?

The AMIEU supports the removal of Section 60 in its entirety and a new clause inserted that *HSR should not incur any civil or criminal liability in exercise their powers.*

Health and Safety Representatives
Throughout the part relating to HSRs the words "powers" and "rights" are to be used. The reference to function needs to be deleted.

For example 62.1. Should read "*the rights of a health and safety representative include"* and 62.2 "*when exercising a power, a health and safety representative may……*

This is also relevant for S 62.2 & 2.

S 62 the current provisions are missing (exist in current laws)
- enquiring into anything that poses or may pose a risk
- HSR role in Issue resolution
- An explicit right to request an investigator for investigation to take place as in C'wth 1991
- an onus on employer to immediately notify HSR of occurrence, accident

S 62 (2) (c) (ii) - power limited to 'at that workplace' appears limiting - should be removed - the Act allows for HSRs to represent different workplaces

S 62 (2) (f) replace 'request' with 'seek'

S 64 (3) the use of the term 'normal duties' would lead to unnecessary dispute – prefer 'such pay as he or she would otherwise be entitled to receive for working during that period'.

S 64.3 Remuneration for HSR while performing HSR function (section 64 (3)) would be better expressed as that which he or she would have received for the work " he or she would have performed but for the time taken acting as a HSR" i.e. so as to remove doubt as what constitutes "normal duties". Same argument applies to remuneration during training (see section 65)

S 64 There is no obligation on the PCBU (note previous comments regarding the PCBU and employment relationship)
- to consult on proposed change (with HSR) as in Qld WHSA 81.1.f and CW 1991 ;
- the provision for enquiring into h&s matters as in Vic OHSA;
- involvement in Issue resolution as in Qld WHSA 81.1.j and Vic OHSA 58.2.d. and NSW OHSA 18.c

S 64.4. The reference to OHS Entry Permit here is not necessary, as the right to seek assistance is **not** related to Union Right of Entry. It is not correct to confuse the two provisions.

Exposure Draft not as specific in onus on employer to give required time away from work to perform HSR functions and to cover costs.

<u>HSR Training</u>

The Exposure Draft must establish the principle underpinning these provisions that if the regulator approves a course then a HSR has a right to attend. The Exposure Draft requires that HSR has to negotiate with the PCBU - timing 65 (3) (a) or costs 3 (b) . The AMIEU opposes such a provision as it disadvantages those HSRs who work for employers who are not willing to facilitate access to training, or HSRs who are not good at negotiating with their employer. **The fundamental right of HSR of access to training CANNOT be dependant upon the employer- employee relationship.**

S 65

The AMIEU supports the SA provisions for HSR training day entitlements i.e. 5 days then 5 days and then additional days as approved by the regulator.

The entitlement to days of training should be in the Act not in the regulations and, as

currently written, Draft Reg 8. b limits the eligibility of training for HSRs.

Specific provisions must include

- HSRs' rights to attend initial course,
- Refresher at least once a year and any other course approved or conducted by the regulator,
- Training course is chosen in consultation with the PCBU and provide for the HSR to give 14 days notice - ie as per Victorian Act
- S 65 (3) (b) remove 'reasonable'
- S 65 (5) remove 'normal duties'
- S 65 (6) must be amended to include '. . . or they cannot agree on a particular course the HSR may apply to the regulator to determine' …with the 14 day as per (3)
- S 65(6) refers to s.65 (3) and will lead to unnecessary argument regarding timing and cost

Division 3 (Sections 68-72)

The functions of "Health and Safety Committees" have been greatly truncated in this draft. See section 33 SA OHS Act for comparison e.g. "consult on any proposed changes to practices, procedures etc."; "review rehabilitation and return to work.

The SA Act gives HSRs broad powers under S32 to "discuss any matter affecting health and safety with any employee at the workplace".

Under the Exposure Draft this power is limited to the workgroup not the workplace. The AMIEU supports the SA provision.

Functions of Committee: the functions are narrower than in current laws e.g. Qld WHSA s 90 and Commonwealth 1991 which include that HSC has the power to do all things necessary or convenient to be done, in connection with the performance of its function)

Similar to the ability to have HSR with multiple employers, the same should apply to HSC (e.g. as in S 50.4)

The Exposure Draft fails to include specific provision for "industry sector" standing committees (s 55 Qld. OHS Act). This needs to be rectified. (see discussion on Tripartism in additional comment section)

Division 4 (Sections 73 – 74)
S 73 (1) Resolution of health and safety issues

This clause is less than current provisions in NSW, Vic and Qld. It should be deleted.

- S 73 The provisions as proposed undermine the HSRs rights and powers. HSRs have the power to be involved in resolving issues and to represent their co-workers and issue resolution is not just a process that follows failed consultation
- S 73 (1) …'and the issue is not resolved after consultation between the parties' must be removed
- S 73 (2) (c) and s 73 (2) (d) confusion re 'representative' - need to ensure that there is a provision similar to Reg 2.2.2(5), and the established practice, that employer associations and unions can provide assistance
- S 73 (4) would be clearer if the provisions said *PCBU must ensure that their rep etc*….not 'the person's rep'
- S 74 must include that the inspector must attend as soon as possible, must include provisions regarding reasonable cause and payment

Division 5(Sections 75-79)

S 75: A worker may cease work if he or she has reasonable grounds to believe that to continue to work would expose him or her to a serious risk to his or her health or safety, emanating from an immediate or imminent exposure to a hazard.

This clause only gives a worker the right to stop work or to refuse work if they believe that they would expose themselves to serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard**. It does not provide protection to other workers or the general public if the work carried may expose them to serious risk or injury.**

The AMIEU believes that this clause should not be just about a worker being able to protect him or herself but should also be available to protect others who maybe at risk because of an unsafe work practise or situation. It is possible that there are other people in a workplace who are not employees (ie salespeople, residents or patients) and who would not know that they are in an unsafe situation and therefore not able to take action themselves.

Our view is strengthened by Sections 27 (b) and 28 (a), (b) which requires that

> **27 Duties of workers**
> While at work, a worker must:
> (a) take reasonable care for his or her own health and safety; and
> (b) **take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons**; and
> (c) co-operate with any reasonable instruction given by the person conducting the business or undertaking to comply with this Act
> And
> **28 Duties of other persons at the workplace**
> A person at a workplace (other than a person who has another duty under this Part) must—
> (a) take reasonable care for his or her own health and safety; and
> (b) **take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons**; and
> (c) co-operate with any reasonable instruction given by the person conducting the business or undertaking to comply with this Act.

The AMIEU proposes the wording in the Model Act be amended to:

> *An employee may cease work if he or she has reasonable grounds to believe that as a result of work being carried on at a workplace there is risk of imminent and serious injury to or imminent and serious harm to the health of **any person**.*

Examples:

- Improper technique being used to lift large heavy object that may fall from a building site and injure a member of the public.
- Work being carried out in a roof space using tools that may crash through the ceiling and injure people below.
- S 78 , the C'wth Act 1991 maybe better wording, ie under terms and conditions of the employee's employment

Division 6 (Sections 80-92)

- S 86 a provision needs to be added which states that a PCBU cannot coerce a HSR into cancelling a PIN and needs to be accompanied by an appropriate penalty

- S 90 (1) delete 'to appoint' and add 'for'
- S 91 (2). This provision is contrary to s 89 and s 90. Unless the PCBU 'disputes' the PIN within 7 days by requesting an inspector, the PCBU is required to comply with the PIN.

PART 6: ADDITIONAL COMMENTS
Additional concerns around the Right of Entry provisions are extensive.

Specific Comments (this list is not exhaustive)

Clause 118 is from the FWA and does not need to be replicated in the Model OHS Act.

This section is not required as the FWA already has the requirement for Fit and Proper person, so the test will be met.

The terms of section 107 (2) allows any jurisdiction to limit union access to documents by the passage of a jurisdiction-specific law denying access to the union rep. How is this justified and on what principle in a seamless national system?

S 109.1.a. Employee records; (the definition refers to the Privacy Act does this mean that could get access to records under this that
is different from the FWA definitions of employee records?)

S 104 to s 107 – ridiculous provision for officials having to give detailed written notices for suspected breach prior to entry. If the notice must include a description of the suspected contravention it often means that the workers who requested the permit holder to attend are identified. This contradicts s 118. For example, if we identify the contravention of the Act being with the unguarded brisket saw it is obvious that the operator of the brisket saw is the worker concerned. What this requirement does is to effectively provide many employers with adequate information to be able to identify the worker/s who have raised the issue. This has led to a number of unions reporting that these workers have then been intimidated, harassed, and even had their employment harmed or terminated. **The requirement to give details of the suspected contravention must be removed,**

S 105 no right to audio and video recording and photos when on site - silly subclause 2 allowing employers to use spurious privacy grounds to delay record access.

S 115 unnecessarily allows the PCBU to choose the meeting place for consultation and the route in.

S 118 A permit holder must not be required to disclose the name of any worker that the permit holder represents i.e. remove 'who is a member of the union'

The Exposure draft has created a problem unions whose members work in residential premises e.g. supported homes for people with disabilities. S 120 appears to prohibit entry for OHS purposes for these places of work

Extraordinarily broad to include in the "fit and proper person" test for fitness to have an entry permit (Cl 125) a question as to whether an applicant has "ever" been convicted of an offence in relation to entry onto premises, fraud, dishonesty etc. Isn't it fairer to include a time limit, for instance of 10 years.

S 129 should include 'the extent (if any) of harm, loss or damage'

S 131, 132 and 133 provides for the means by which entry permits may be revoked or suspended. A permit holder must be allowed to "show cause" why a permit should not be

revoked or suspended and then disputes may be dealt with by the authorising authority "in any manner it thinks fit, including by means of mediation, conciliation or arbitration". It seems grossly improper to allow such an open ended and potentially unfair procedure to apply to the revocation of a permit. "Show cause" does not allow for the testing of evidence on oath or affirmation – with a dispute then being determined "by any manner".

PART 7 ADDITIONAL COMMENTS

S 143 In relation to the role of the regulator it would be consistent with the Act's 'Objects' and international law if "tripartism" (government, employers, unions) was properly reflected in the section by requiring the regulator to foster co-operative relationships with "unions" rather than the persons to whom safety duties are owed "and their representatives".

What is the "prescribed class of persons" provided for in section 147 (1) (e)?

It is uncertain what the effect of S 150, which allows for the termination of the "appointment" of an inspector, by the regulator is, if, as expected, inspectors should normally be public servants. Public servants are covered by separate and comprehensive public sector management laws that cover behaviour, discipline etc. The section should be amended to provide that nothing alters the application of the relevant public sector legislation to ensure inspectors have no lesser "protection" than other public service employees.

S 155 (4) that requires an inspector to leave a place that is not a workplace; what is the position if a workplace is also a residence e.g. supported home?

S 163. 3.b.
Person must have right to be represented; unfair that the inspector can dictate whether the person should be interviewed alone.

PART 8 ADDITIONAL COMMENTS

Enforcement Powers

The AMIEU notes that there is no obligation on Inspectors to issue a WRITTEN REPORT, whenever they visit a workplace, to both the PCBU and any HSRs. This is absolutely necessary for any review processes. For example, how can an application for internal review be made for Sections 52, 69, 92 if there is no written record of the inspectorates' decision?

PART 9 ADDITIONAL COMMENTS

Compliance Measures

<u>Enforceable Undertakings</u>

It appears that Enforceable undertakings will be available for Category 2 offences. Is this correct? The AMIEU would strongly oppose such a proposition.

Note: there is no ability for review or questioning of an undertaking. There is no independent body overseeing or any requirement on the Regulator to have discussions with those affected by the offence or the enforceable undertaking.

The AMIEU strongly opposes enforceable undertakings that can be entered into by a regulator with a duty holder, without any requirement to take into account the views of the workers harmed, or of their unions. Much has been made by those who oppose union prosecutions because OHS offences against safety duties are "criminal" and therefore criminal standards should apply. In other criminal matters that involve serious harm to a person, victim statements are heard before sentencing. Yet this proposal would allow the offender to make arrangements about the punishment behind closed doors without any scrutiny, transparency or input form the victims/victim families!

PART 10 ADDITIONAL COMMENTS

General principles for the matters to be considered must be in the Regulation however, industry-specific information should be included in Codes of Practice.

The AMIEU believes it is not acceptable that DPP review is only available for Category 1 and 2 offences. This provision is NO substitute for the right of third party prosecution. The AMIEU supports the right of third party prosecution and notes that the failure to support this by governments is a clear example of the harmonisation process taking away protections that apply to about one third of Australia's work force, i.e. NSW/ACT.

There is considerable lack of clarity and problems on the interaction of State Based IRC and the Model OHS law.

PART 11 ADDITIONAL COMMENTS

Legal Proceedings

Those who have opposed the extension of union right to prosecute to all workers have maintained that an application to the DPP for a review of the regulators decision is an option that has the ability to challenge a possibility compromised regulator. The AMIEU notes that the procedure, if a prosecution is not bought (S 226) is limited to Category 1 and 2 offences. Given that we predict that the bulk of offences will be category 3 this provision is grossly inadequate.