



Construction, Forestry, Mining and Energy Union

Submission on

**THE EXPOSURE DRAFT FOR A
MODEL (OCCUPATIONAL HEALTH & SAFETY) ACT
AND
STAGE 1 MODEL REGULATIONS**

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PREAMBLE:

For the purposes of this submission:

'CFMEU' means the Construction, Forestry, Mining and Energy Union.

'ACTU' means Australian Council of Trade Unions.

'Model Act' means the Exposure Draft for a Model Occupational Health and Safety Act and shall be referred to as the 'Model Act'.

'Model Regulations' means the Exposure Draft for Stage 1 Model Regulations.

'OHS' means occupational health & safety.

'HSR' means a health and safety representative, except when quoting a section of the Model Act or Regulation with the latter term.

'Review' refers to the consultative processes that led to the publication of the National Review Reports No.1 & No.2 into Model Occupational Health and Safety (OHS) Laws.

'WRMC' means Workplace Relations Ministers' Council.

Introduction

This submission of the CFMEU is made on behalf of all three divisions of the CFMEU namely the Mining and Energy (M&E) Division, Forestry and Furnishing Products Division (FFPD) and the Construction and General Division (C&G). The CFMEU represents approximately 110,000 members in our industries.

We support the M&E Division in making a more detailed submission with respect to the operation and harmonisation of the existing mining specific OHS laws, under the aegis of the National Mine Safety Framework Steering Group and the submission of the C&G Division Victorian Branch.

Our members work in four of the five most hazardous industries and these industries have fatality rates that are at least twice as high as those applying to the defence forces. Our members and their families have a great deal at stake physically and psychologically in the framing of the Model Act. We consider that the current toll of death, disease and injury in our industries is unacceptable. New measures are needed based on the highest standards of harmonised OHS laws.

We call, therefore, for the Model Act to be based around raising standards for all workers, with best practice provisions applied from all existing jurisdictions' OHS laws, using a highest common denominator approach and where this is still deficient new provisions should be introduced.

Before responding to the specific questions relating to the Model Act, the following key issues section sets out the arguments in favour of the CFMEU's view that the Review and the WRMC fell well short in applying the COAG directive that established the harmonisation process and the key terms of reference of the Review itself. Namely the terms of reference for the Review included at (d);

...the observance of the directive of the Council of Australian Governments that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.

Additionally the Review scope part (a) was to;

examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency;

With regard to 'best practice' page 6 of the Review Report No.1 states the following;

We identified areas of best practice, common practice and inconsistency in legislation, and considered how model legislation could be adopted without compromising safety standards, and with the most effective use of resources.

Disappointingly, the following 175 pages of Review Report No.1 do not contain the term 'best practice'. In addition the 470 pages of Review Report No.2 contained only three references to this term, none in actual reference to provisions that provide best practice occupational health and safety for workers.

Finally the CFMEU draws attention to the Regulatory Impact Statement ("RIS") issued with the Exposure Draft. The RIS concluded that;

*...there are unlikely to be any significant benefits to workers from the changes proposed under the model Act...**it is unlikely to change safety outcomes substantially** (our emphasis) and would not be practicable to model.*

The CFMEU endorses this analysis and views the Model Act as a missed opportunity to raise standards to bring about a significant reduction in work related death, injury and disease.

SCOPE OF THE SUBMISSION:

The CFMEU fully endorse and adopts as part of its submission the submission of Unions NSW, save for the following additional comments:

1. Key issues commentary on duties of care and onus of proof, explaining the CFMEU's view that the framing of the Model Act breaches the COAG directive that initiated the OHS harmonisation process and the key terms of reference of the Review.
2. In response to Q.12 on the issue of health monitoring.
3. In response to Q.17 -19 on the issue of the adequacy of penalties and the nature of offences.
4. In response to Q.25 on the issue of HSR elections at temporary workplaces and HSR disqualification.
5. In response to Q.31 on timeframes for Provisional Improvement Notice implementation.
6. In response to Q.33-36 on Union OHS Right of Entry provisions.

Executive Summary

The proposed new 'harmonised' laws must raise occupational health and safety standards to world's best practice. The Model Act must facilitate the prevention of injury, physical and psychological disease and also facilitate improvements in job content, the aim being for the working environment to yield a positive return in the form of job diversity, job satisfaction, social participation and personal development.

As currently formulated, the Model Act will not only fall far short of these objectives, but compromises the higher standards existing in the various jurisdictions, especially those in the Australian Capital Territory, Queensland and New South Wales.

In particular the following key provisions of the NSW OHS Act will be abolished or undermined if the Model Act proceeds in its current form:

- The unrestricted duty of employers to consult workers over OHS matters.
- The highest duty of care provisions applying to employers.
- The onus of proof on employers to prove they did all that was reasonably practical in occupational health and safety prosecutions. These provisions do not presume guilt as many employers argue.
- Union right of entry provisions that facilitate immediate access to comprehensively investigate suspected breaches,
- Union rights to prosecute for alleged OHS breaches.

The evidence submitted in relation to these issues, by amongst others, the ACTU, Unions NSW, CFMEU, CPSU-SPSF, and the FSU, to the Review, demonstrated conclusively that these provisions have led to improved standards of occupational health and safety. The CFMEU considers the Model Act as framed falls seriously short in applying the COAG directive that established the harmonisation process and the key terms of reference of the Review itself.

To remedy these deficiencies, the new OHS laws must ensure as a minimum:

Absolute right to OHS consultation

As currently exists for the majority of the Australian workforce, the Model Act should stipulate that workers have the right to be fully and genuinely consulted by their employer and principal contractor over all matters that potentially affect their health and safety and welfare.

The Model Act should ensure that workers have the unfettered right to refuse work they consider unsafe without loss of pay.

Make employers and principal contractors responsible

As currently exists for the majority of the Australian workforce, the Model Act should stipulate an unqualified obligation on employers and principal contractors to provide a safe and healthy workplace and when alleged breaches occur, employers and principal contractors must prove to the ‘reasonably practicable’ standard that they did not break the law. This does not presume guilt as many commentators¹ assert, but is the logical application of the view of the current Commonwealth Attorney-General and the Heads of Workers’ Compensation Authorities.

Election and powers of health and safety representatives

As currently exists for the majority of the Australian workforce, the Model Act should stipulate that only workers can directly elect and dismiss health and safety representatives (HSRs) without management interference.

The Model Act should ensure that HSRs have the highest standards of rights, powers and protections to do their job, including the right to issue provisional improvement notices (PINs).

In addition it should ensure that rectifications demanded by any HSR PIN are not thwarted by employer or regulator appeal processes.

¹ See for instance Ken Phillips, The Unsafe Option, The Australian 06/09/09.

“A safety incident causes guilt to be applied automatically, without consideration of what a person could reasonably or practically do. However, this applies only to employers.”

The Model Act should stipulate that all HSR powers are available on election, and HSRs can access the training of their choice on paid time.

The role of unions

As currently exists for nearly one third of the Australian workforce, the Model Act should stipulate that unions have unrestricted right of entry powers to consult workers over OHS issues and inspect suspected breaches.

The Model Act should also stipulate, as also currently exists for nearly one third of the Australian workforce, that authorised union officials have the power to immediately copy all available relevant documents, take photographs and make audio and video recordings of incidents and take samples and witness statements in connection with suspected breaches.

The Model Act should ensure that upon application by a union, OHS right of entry permits are issued in all jurisdictions in a quick and uncomplicated manner.

Enable workers and unions to take court action

As currently exists for nearly one third of the Australian workforce, the Model Act should stipulate that workers and their unions have the right to take court action against employers and principal contractors for breaching health and safety laws.

Also to prevent breaches, the Model Act should ensure the union right to notify OHS disputes to state industrial relations commissions (or where not available other tribunals with OHS powers) for conciliation and if necessary arbitration.

Employer and principal contractor penalties & prosecutions

With regard to penalties for incidents that negligently expose workers, to the risk of (or actual) fatality, serious injury or disease, the Model Act should include the option of lengthy gaol sentences for those in the management and control of a company. The Model Act should ensure corporate fines are based on a significant percentage of turnover or profit, with compulsory victim compensation and corporate rehabilitation orders.

The Model Act's proposed penalties are substantially lower than those that apply to financial crimes prosecuted by ASIC both in terms of fines and gaol terms.

The CFMEU opposes the introduction of enforceable undertakings in the Model Act on the grounds that these will inevitably lead to fewer occupational health and safety prosecutions thus lowering the deterrent effect of the Model Act.

Transferring Best Practice Aspects of Mining OHS Law into the Model Act

The CFMEU submits that given the statistically confirmed improvements in mining industry OHS performance in New South Wales and Queensland, the Model Act should incorporate the key concepts of mining Industry Safety and Health Representatives (as in Queensland) and Industry Check Inspectors (as in New South Wales) and the industry specific safety OHS incident data recording and collection requirements of the Queensland mining legislation.

Key Issues

1. Employer Duty of Care

In this respect we note the following recent comments from the Master Builders Association of New South Wales' (NSW MBA) OHS risk management officer, Tim Stootman². The CFMEU believe that these comments demonstrate the manner in which the Review and the WRMC decisions in framing the Model Act breached the overriding COAG directive and the Review's key terms of reference;

Master Builders supports the review of OHS laws and believes that this is an opportunity for better, rather than greater, OHS regulation. Better, rather than greater, regulation will assist to improve OHS performance in the construction sector. Master Builders supports the rejection of what could be called a 'highest common denominator' approach to OHS duties. Essentially, this approach would have seen an absolute duty of care on employers to ensure the health and safety of their employees and provides unions with the right to bring a prosecution for a breach of the OHS law, the latter a provision adopted in recent changes to the law in the ACT. The Draft National Model OHS Act is a positive step towards harmonisation of OHS laws in this country."

As can be seen from this statement employers in one of our deadliest industries support the lowering of the employer duty of care. The Review Report No.1 supported by the WRMC endorsed the NSW MBA's approach by recommending moving 'reasonably practicable' from the employer's defence of a prosecution into the general duty of care. New South Wales and Queensland are the two states that will be impacted by this change, as it is in these two jurisdictions that the Review/WRMC lowest common denominator approach to duty of care will reduce standards.

² 02/11/09 - Source

http://www.safetysolutions.net.au/articles/36778?utm_medium=email&utm_source=Emailmarketingsoftware&utm_content=424922920&utm_campaign=ss_0911a+ +u_yijk&utm_term=readmoreonthisArticle

If we look at the employment numbers contained below in the latest Australian Bureau of Statistics Labour Force report³, NSW and Qld with 5,685,900 workers make up 52.2% of the Australian workforce.

New South Wales	2 431.1	1 008.5	3 439.7
Victoria	1 873.2	814.9	2 688.2
Queensland	1 618.7	627.5	2 246.2
South Australia	540.2	263.3	803.5
Western Australia	822.3	334.1	1 156.4
Tasmania	159.1	76.5	235.7
Northern Territory	94.9	24.6	119.6
Australian Capital Territory	147.4	48.7	196.1
Australia	7 687.1	3 198.1	10 885.2

The highest standard employer duty of care that currently applies to the majority of Australian workers will be reduced by the Review/WRMC lowest common denominator approach to duty of care, in clear breach of the Council of Australian Governments' directive.

Crucially when considering the key issue of the existing employer duties of care, the Review, subsequently endorsed by the WRMC, failed to have regard to what is best practice, or '*how model legislation could be adopted without compromising safety standards*', as the following excerpt from the Review Report No.1 shows;

5.23 The defence provisions in NSW and in Qld place a qualifier on the duties of care. Submissions from a number of stakeholders, including peak organisations, suggested that the approach to the duties of care in the NSW Act should be adopted, but accept that there would continue to be a qualifier contained in the defence provisions, rather than in the duties of care. Other submissions expressly proposed or accepted that the duties of care should be subject to a qualifier.

5.24 The standard of 'reasonably practicable' has been generally accepted for many decades as an appropriate qualifier of the duties of care in all Australian jurisdictions other than Qld (which has a similar qualifier of 'taking reasonable precautions'). This qualifier is well known and has been consistently defined and interpreted by the courts.²¹

5.25 The submissions and comments made during consultation and in learned articles, support this qualifier as appropriate for inclusion in the model Act.

³ ABS Cat No. 6202.0 ,Labour Force Survey, September 2009.

5.26 We recommend that the duties of care continue to be subject to a qualifier and we consider that the standard of reasonably practicable is an appropriate qualifier.

The NSW MBA's view that to, '*improve OHS performance in the construction sector*', one must reduce the duty of care placed on employers flows well from the logic of the Review/WRMC. This is unacceptable. The Model Act will clearly compromise safety standards for the majority of Australian workers. The Model Act should adopt the highest standard employer duty of care as operates in New South Wales and Queensland.

2. Onus of Proof

The Review and subsequent WRMC consideration of the issue of onus of proof pitted the current rights of the 52.2% of the Australian workforce (and hopes of raising standards for the rest), where the employers must prove on the balance of probabilities that they discharged their duty of care to a reasonably practicable standard, against what appears to be a crude numbers game, as the following excerpt from the Review Report No.1 demonstrates;

13.5 Strong, conflicting views have been expressed to us. Broadly, three governments have expressly proposed that the onus of proof should rest entirely with the prosecution (as it currently does in their jurisdictions) while the Queensland Government has stated that that State's current statutory arrangement, which has a reverse onus, is suitable for the model Act. The other five governments expressed no view. Almost all industry bodies and individual employers who expressed a view on the issue strongly opposed a reverse onus. Unions and their peak bodies strongly support a reverse onus. Academic and legal views were divided.

The view of unions is consistent with the approach expressed by the Commonwealth Attorney General⁴. The Commonwealth Attorney General stated;

*However, **where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence.** Placing of an evidential burden on the defendant (or the further step of casting a matter as a legal burden) is more readily justified if:*

- *the matter in question is not 'central' to the question of culpability for the offence,*
- *the offence carries a relatively low penalty, or*
- ***the conduct proscribed by the offence poses a grave danger to public health or safety.** (emphasis added)*

Employers are always keen to claim management prerogative in respect to relations with their workforce and this axiomatically produces decision making and systems that are

⁴ The Australian Government Attorney-General's Department (AGD) *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)* page 29, March 2009.

'peculiarly within the defendant's knowledge' and not available to the union or regulator as the prosecutor.

The most recent endorsement of the management prerogative concept in respect to OHS, occurred on August 3rd 2009, when the Heads of Workers' Compensation Authorities approved the *National Self-Insurer OHS Audit Tool User Guide & Workbook*, page 243 states that;

Senior management have a responsibility to ensure that the systems in place within an organisation continue to meet the needs of that organisation. This can only be successful if the management system is reviewed on an ongoing basis like other aspects of the business. While senior management may not conduct the review themselves, they should closely manage the process and be accountable for the results.

*The review should use what is known about the current health and safety performance of the organisation to set future direction. **Senior management are also in a position to foresee or plan any other issues which may impact on the health and safety management system**, such as changing suppliers, opening new outlets, setting up new production lines, or decommissioning older areas. Any upcoming legal and industry requirements also need consideration.*

*The organisation's health and safety policy and objectives provide the framework for the system. **It is the senior management's prerogative and responsibility to alter that policy and the associated objectives where necessary**, to better match the health and safety needs of the organisation. (emphasis added)*

What should be considered is not a crude numbers game but a question of effective law making. The implementation of occupational health and safety management systems is the prerogative of senior management in that senior management are in a position to foresee what may impact on their health and safety management system. These are matters peculiarly within the defendant's knowledge and not available to the prosecutor. In addition the deliberations of senior management are routinely regarded as 'commercial in confidence' and intentionally withheld from the scrutiny of their workforce and the community at large.

Hence the CFMEU sees inexorable logic in adopting the reverse onus of proof that currently applies to the majority of the Australian workforce, to be extended to the other 47.8%.

3. Union Prosecutions

The CFMEU strongly supports the right for unions to commence proceedings against employers for contraventions of OHS legislation. This is in addition to the powers vested in an Inspector acting for the Regulator, the Regulator in its own right or, when it is directed by the Minister. The CFMEU supports S.106 of the NSW Act as the template for union prosecution provisions that should be included in the Model Act. In this regard we support the submission of Unions NSW.

CFMEU Responses to Model Act Exposure Draft Questions

In the interest of brevity, the CFMEU has not responded to all the Model Act exposure draft questions, in respect to those questions not addressed in this submission, we support and adopt the submissions of Unions NSW.

Q.12 The model Act requires the provision of, as far as 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 (Section 18 (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 worker?

With respect to clause 18 (g), the CFMEU insists that the provision of health monitoring should not be used to introduce unwarranted invasive tests for which there is no work related reason, such as urine based drug testing or DNA testing.

Q.17 Is the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care set by the WRMC?

Q.18 What should be the maximum penalty be for a contravention of the model Regulations?

Q.19 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?

In response to Q. 17, the CFMEU has several comments to make, namely:

The range and levels of penalties proposed are inadequate when considered in the context of the levels of turnover and profit accruing to large corporations. The CFMEU and ACTU submitted extensive evidence to the Review on the average statistical value of a human life and argued this should be set at an average of six million dollars (and this view was

subsequently endorsed by an extensive ASCC report⁵). This value when set against the turnover and profits accruing to large corporations, in the CFMEU's view, requires the application of turnover or profit fines for the most serious OHS crimes, to ensure fines act as a deterrent. We note that this evidence in the submissions of the CFMEU and the ACTU was simply ignored by the Review/WRMC. The CFMEU further notes that the *Trade Practices Act 1974* (Cth) allows for up to a ten per cent turnover fine for business related crimes.

The CFMEU and ACTU showed conclusively that money crimes prosecuted by ASIC to the value of a human life resulted in gaol terms of an average of thirteen years and called for OHS gaol sentences to be based on this standard. Again we note that the extensive evidence of this in the submissions of CFMEU and the ACTU was simply ignored by the Review/WRMC.

It is inconceivable as a matter of public policy that the WRMC representing Labor Governments in all bar one jurisdiction would value human life substantially less than offences under the *Trade Practices Act 1974* (Cth).

It is incongruous that persons committing tax fraud regularly face gaol penalties but not employers who cause the death or injury of workers, as this latest examples shows⁶:

ATO Media Release 20/10/09

Man jailed after stealing family members' identities in tax fraud

Brett William Bransby, 36, was today sentenced to four years and six months jail in the Perth District Court for GST fraud of \$446,867.

Despite the ongoing workplace carnage that claims over 8000 lives per year, 690,000 sufferers of injury and disease and 1.5 million exposed to carcinogens⁷, no employer has

⁵ The Health of Nations: The Value of a Statistical Life, ASCC, 2009.

⁶ Source <http://www.ato.gov.au/corporate/content.asp?doc=/content/00217474.htm>

⁷ NOHSC, Occupational Cancer in Australia, April 2006, p.5 & Access Economics Pty Limited, Review Of Methodology And Estimates Of Workplace Fatalities For The National Occupational Health And Safety Commission September 2003, page 8.

served gaol time for any of these crimes and under the Model Act there is no change to this situation.

The CFMEU and the ACTU argue for parity between financial crimes and OHS crimes. The maximum fines in the Model Act are 30% of those possible under the *Trade Practices Act 1974* (Cth) and do not provide for the option of turnover fines. This is unacceptable.

Q.25 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?

The Model Act and Cl.7 of the Model Regulation are silent on the issue of high risk temporary work sites (or workplaces) and any arrangements covering these workplaces.

The Model Act and Regulation should include arrangements for such workplaces. Workplaces such as logging and construction sites can exist for short periods of time, the Model Act needs to contain provisions that ensure that any time limits imposed on the HSR election process with respect to temporary work sites facilitate work group formation and HSR elections as soon as possible.

The evidence on OHS improvements in high risk temporary work sites, where formal HSR structures exist supported by trade unions, was presented in a highly robust form in the CFMEU submission to the Review. That this submission was ignored, and no special provisions included, is of great concern to the CFMEU.

In addition the CFMEU calls for the Model Act to incorporate the concepts of mining industry Safety and Health Representatives (as in Queensland) and Industry Check Inspectors (as in New South Wales) as was detailed in our original submission to the Review. The CFMEU believes that such provisions will greatly assist in improving occupational health and safety in temporary workplaces as they have done in the mining industry. We note in this respect that the submissions of the National Mine Safety Group Steering Committee will detail the provisions and supporting arguments in greater detail.

- **S. 59**

The CFMEU position is that S.59 should be deleted in its entirety, it should be for the designated work group only to elect and remove their HSR. The retention of this provision would allow for employers to threaten and harass active HSRs with only deleterious effects on occupational health and safety.

Q.31 A PIN cannot require compliance before 7 days from the date the PIN is issued. Is this time frame appropriate?

In response to Q.31, the CFMEU believes that, particularly in high risk CFMEU workplaces, compliance with a PIN should be required within 24 hours of its issuance. To require otherwise could:

- unreasonably expose workers and other persons to a serious OHS risk or,
- cause a HSR (or a union) to direct a cessation of work or,
- workers to exercise their rights under s.19 of the Fair Work Act, as a means of quickly resolving an OHS matter at the workplace.

To insist on a 7 day period for compliance for all PINs, in the opinion of the CFMEU, suggests a misunderstanding on the nature of OHS hazards and risks in CFMEU workplaces.

Part 6: Workplace Entry by OHS Permit Holders.

Q.33 Are the notification requirements appropriate?

Q. 34 Should the Model Act contain a specific authorisation process for an OHS entry permit or can it rely on authorisation under other acts such as the Fair Work Act?

Q.35 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?

Q.36 The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS, rather than in relation to workplace relations?

The proposed regime for Right Of Entry under the Model Act 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. In CFMEU industries this will cost lives.

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

OHS Permit Holders should not have to comply with a regime of laws that are complex and difficult to understand. Such a system as proposed may result in OHS permit holders more easily breaching the requirements of the legislation leading to their right of entry permits being revoked, suspended or subject to conditions. The regime as proposed is unnecessarily onerous. It will operate as a disincentive for everyday workers to become active in their union as union officials and OHS permit holders to be active in preventing workplace injuries, diseases and deaths.

The CFMEU considers the current provisions of the NSW OHS Act (*Division 3 - Entry and inspection powers of authorised employees' representatives, sections 76 – 85*) as best practice union right of entry provisions, with the addition of union OHS consultation rights the only change required. Therefore the CFMEU calls for the Model Act and Model Regulation provisions to be rewritten accordingly.

The Proposed Model Act

Section 105

The definition of “relevant worker” in s105 is unnecessarily prescriptive and will only serve to create disputation. The definition of relevant worker should simply be:

“a member of that organisation or person who is eligible to be a member of that organisation”.

Section 108 Notice of Entry

There should be an absolute right to enter work premises without giving prior notice in respect of investigating a suspected breach of OHS laws.

The legislation should clearly provide (as in s78 of the *Occupational Health and Safety Act 2000 (NSW)*):

1. *An OHS permit holder is authorised to enter premises under this Division without notice.*
2. *An OHS permit holder must, as soon as is practicable after entering a workplace under this Division notify the occupier of the OHS Permit Holder's presence on the premises.*
3. *Subsection (1) does not apply if to give notice would*
 - (a) defeat the purpose of the entry to the workplace; or*
 - (b) unreasonably delay the OHS Permit Holder in an urgent case.*

The words in the Model Act “in accordance with regulations” should be omitted. To be forced to comply with Regulation 15 and/or 16 of the Model Regulations in exercising right of entry under this part, is to defeat the clear intent of the legislation that entry to investigate a suspected breach can be effected without notice.

Section 108 of the Model Act and the Model Regulations 15 and 16 will arm employers with a capacity to delay entry by arguing of over the minutiae of compliance with the provisions of the Act and the Regulations, in the meantime serious safety breaches may go on unchecked. Unlike matters arising under the Fair Work Act, matters arising under OHS laws may place lives at risk. The regime should be as simple to understand as possible to facilitate entry and the addressing of safety concerns not perpetuate “red tape” that defeats the Model Act’s clear purpose to reduce occupational health and safety hazards.

Section 109 and Regulation 17

Similarly, s109, and Regulation 17, are overly bureaucratic and unnecessary. Upon entry to a workplace, authorised representatives should be able to require the necessary material to effectively investigate the suspected contravention without further “paperwork”. The requirement to give 24 hours notice only means that an OHS issue requiring the provision of documentation delays the production of such documents, may encourage the destruction of necessary documentation and means that OHS permit holders cannot on their first entry seek relevant documentation, but will have to come back. Such a delay may again result in

workers being placed at risk of an unsafe situation whilst the permit holder attempts to comply with the provisions of the Act and Regulations.

This is potentially dangerous. For example, an OHS permit holder may suspect that workers are being exposed to asbestos. The permit holder enters the site and confirms that indeed workers are being exposed. Instead of the permit holder then being able to request from the employer, documents such as a copy of the relevant safe work method statement, training records or national certificates of competency in order to verify whether workers had been made aware of, trained and/or qualified to work with asbestos, the permit holder would be required to issue a notice giving at least 24 hours notice that the permit holder intends to come back and inspect a copy of the documentation, rather than being able to inspect those documents there and then and work with the employer to address the safety hazard. In the mean time workers are left exposed to a deadly substance. Further, the employer could take action to defeat further investigation of the breach, making it impossible for the permit holder to establish the facts of a suspected contravention. Such a scenario is not uncommon in the construction industry and many other industries and workplaces.

Section 114

In Section 114 the words “and photographic identification” should be removed. An OHS Right of Entry permit should have a photograph on it. Otherwise permit holders would need to have in their possession a driver’s licence, passport or other photo identification as well as their permit. A failure to have such additional identification could be used to unduly delay entry.

Section 116

Section 116 is vague and ambiguous and therefore difficult to comply with. What is meant by “no undue disruption”? Is entering and asking a project manager about a suspected breach and disturbing that person in their activities “undue disruption”? Such a clause only serves to invite disputation and spurious prosecution of right of entry permit holders. Section 116 should be deleted and replaced with the following, consistent with s82 of the New South Wales OHS Act:

“In the exercise of a function under this Division, an authorised representative must do as little damage as possible”

Section 117

Section 117 may be interpreted to unnecessarily curtail the right of permit holders, particularly in industries such as forestry and the construction industry, where workers can work in many different sites. As was stated by the Chief Industrial Magistrate in *Ferguson v Dalzell* (Decision of CIM Case No:20367862/06, on 21 May 2008);

“an authorised official may become aware that a particular employer in an industry is using unsafe work practices on a particular site. Knowing that the employer has a number of other similar sites carrying out similar industrial pursuits, the authorised union official might take the view that an employer who is content to disregard their statutory obligations at one site is likely to adopt the same approach at other sites and might act on that suspicion by carrying out s77 inspections at all of the employer’s sites in the industry. In my view such a suspicion would be a genuine and reasonable one”.

Such an investigation by WorkCover after the fatality of Joel Exner further reinforces the needs for Right of Entry Permit Holders to be able to follow up on suspected safety hazards and contraventions across multiple sites and not be constrained by the limitation that s117 appears to contain. Joel Exner was sixteen years old and killed due to the unsafe installation of roofing mesh. Joel Exner fell to his death as a result. In the decision of the NSW Industrial Relations Commission of *WorkCover Authority of New South Wales (Inspector Dubois) v Australand Holdings Limited* [2007] NSWIRComm 156 (5 July 2007), the Court found;

“After the incident, WorkCover conducted many inspections of building sites around New South Wales. WorkCover found that the deficiencies in the laying of the safety mesh at the site were indicative of the deficiencies in the laying of the safety mesh at the other sites. WorkCover published a safety alert about the installation of safety mesh on its website to direct attention to the problem of incorrectly installed safety mesh” (at paragraph 49)

The manner in which s117 is currently drafted would mean that OHS permit holders may not be able to further investigate a suspected breach across multiple sites, if it was suspected that an identified hazard posed a much wider risk.

Sections 118 and 119

The provisions of s118 and 119 also unnecessarily constrain the powers of OHS permit holders and will be used by employers to delay investigations of contraventions of safety and may put in danger workers at the site or workplace. Such provisions have no place in the Model Act. The lack of such provisions in New South Wales occupational health and safety laws has not caused any difficulty, nor has any evidence been brought to that effect. In the event that there may be a dispute about such a matter, the parties have recourse to the relevant authority to resolve any such dispute without the need for such prescription in the legislation.

Sections 122 to 125

In respect of s122, 124 and 124 there should not be a fit and proper person test. It should be sufficient that an OHS Permit Holder has been granted a federal permit by Fair Work Australia. The duplication of this in OHS is unnecessary “red tape” for industrial organisations and unnecessary duplication of an assessment undertaken by Fair Work Australia. Therefore, at the very least s122 (c), 124(c) and 125 should be deleted. Reference to “fit and proper” person in other sections should also be deleted.

Given the academic evidence, submitted to the Review by the CFMEU, ACTU and many other unions, as to the improved OHS outcomes associated with full time union officials’ OHS inspection and enforcement activity, these Model Act provisions will most likely lead to sub optimal OHS outcomes for workers. The CFMEU calls instead for the Model Act to incorporate s299 of the New South Wales Industrial Relations Act 1996 (appropriately modified) as the operative provisions for the issuance of OHS Permits. These provisions have been in operation for 13 years and have operated efficiently to facilitate the issuance of OHS Permits.

Section 130

Applications should only be made by the regulator for the revocation, suspension or placing of conditions on a permit.

In respect of s130(2)(a), it should not be a grounds for revocation of an OHS permit that a permit holder ceased to satisfy the requirements of other entry permits under another OHS Law, or the Fair Work Act or a State or Territory Industrial law. This is unfair. The grounds of revocation of a permit should be confined to the conduct of a permit holder in respect of their

OHS Permit only. Matters relating to other legislation should be dealt with under that other legislation.

Section 131

Section 131 should be deleted. It is essentially a “reverse onus” clause requiring an OHS Permit Holder to justify why their permit should not be revoked or suspended rather than for an applicant to justify why it should. This is manifestly unfair. The suspension, revocation and/or placing of conditions on a permit will have serious consequences for the permit holder and potentially their employment. Natural justice dictates that it should be for an Applicant, in seeking the revocation or suspension of an OHS Permit Holder’s permit, to make out their case in full.

Section 132

The CFMEU does not support the inclusion in the Model Laws of s132(1) that provides for the standard of proof required for an authority to be satisfied that there are grounds to revoke, suspend or impose conditions on a permit be the “balance of probabilities”. Given the consequence of having a permit suspended, revoked or subject to conditions, which may include a permit holder losing their job, the standard of proof should be, at the very least, the *Briginshaw* standard that derives from *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938). In all applications for the revocation of permits dealt with by the Australia Industrial Relations Commission, or the Australian Industrial Registry, this has been accepted standard. There is no reason to depart from this.

Section 133

Section 133(3) does not give an authorising authority, in dealing with disputes, power to make orders that facilitate right of entry by an OHS Permit Holder. It is confined only to the revocation, suspension or placing of conditions on permits. This needs to be rectified so that an authorising authority can make orders to assist an OHS Permit holder in the exercise of the powers under the Division.

Section 135

This prohibition is too broad and such words as “*otherwise act in an improper manner*” are vague and ambiguous. Such a prohibition may be applicable under industrial relations legislation, but in a context of dealing with a safety issue at the workplace, which may by its

very nature result in delay to an employer or occupier, or be considered by an employer or occupier to be a hindrance or obstruction of work being undertaken, will only empower employers who want to defeat the power of an OHS permit holder to take legal action under these sections. If such a prohibition is needed it should simply say:

“An OHS entry permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally and unreasonably delay, hinder or obstruct any person”.

Conclusion

The CFMEU has prepared this submission on a ‘without prejudice’ basis and believes that the deficiencies identified in this submission should be the subject of urgent discussions between the WRMC, the CFMEU and other ACTU affiliated unions prior to the WRMC meeting planned for December 4 2009.

Finally, the CFMEU reiterates the view that the Model Act as framed is inconsistent with the COAG directive that established the harmonisation process and the key terms of reference of the Review itself.
