

Summary of Key Issues from National OHS Review as at May 2009

The tables below provide a summary of key issues arising from the *National Review into Model Occupational Health and Safety Laws*, taking into account the Panel's recommendations and the Workplace Relations Ministers' Council's response.

The first table lists key positives arising from the proposed model OHS Act that are likely to be positive overall for employers, while the second table lists key concerns. The issues are in approximate rank order of strength of concern (e.g. listed by issues of most concern down to issues of less concern), therefore the most significant positives or concerns should be found towards the top of each table.

Key Positives

Issue	Description	Relevant Recommendations	Comments
Unions' power to prosecute	Unions will not have the power to prosecute for an OHS offence, as they currently do in NSW.	N/A	
Onus of proof	The prosecution will bear the onus of proving beyond all reasonable doubt all elements of an offence relating to non-compliance with a duty of care (i.e. there will not be a reverse onus).	62	
Qualifier of 'reasonably practicable'	'Reasonably practicable' will be used to qualify most duties of care.	4-7	
Union power of 'investigation'	The panel recommended that authorised union officers have the power to 'investigate' an OHS breach but WRMC has replaced that power with 'inquire into'	212, 216	
Requirement to engage OHS qualified persons	The Panel originally recommended that businesses must where reasonably practicable engage a suitably qualified person to provide advice on OHS matters, but this was not agreed to by WRMC.	139	
HSR training duration	While WRMC supported in principle the requirement for HSRs to attend training, the length of the training (originally mandated as 5 days) will now not be specified in the Act.	110	

Issue	Description	Relevant Recommendations	Comments
Mandatory HSCs for 20+ workers	The Panel's recommendation for mandatory establishment of HSCs in workplaces where there are 20 or more workers was not supported by WRMC.	114	
OHS service providers	There will now not be a specific duty of care placed on OHS service providers, with WRMC dismissing the Panel's recommendation relating to this.	3, 37-39, 89	While this is generally a positive, a specific duty for an OHS service provider may have helped remove unprofessional providers from the industry.
Enforceable undertakings	The model Act will authorise a regulator to be able to accept, at the regulator's discretion, a written enforceable undertaking as an alternative to prosecution	152	This is a positive however we are concerned about WRMC's rejection of the Panel recommendation for the use of a tripartite panel as part of that process.
Codes of practice	Codes of Practice are to be developed under a tripartite process with expert involvement	229	
Education and training	Regulators will have a role promoting and supporting education, training and information for duty holders.	151	This is a positive although we would have liked to have seen an 'obligation' rather than an 'authority'

Key Concerns

Issue	Description	Relevant Recommendations	Comments
Conciliation for issue resolution	The Panel and WRMC recommendation call for the introduction of a conciliation process into the OHS realm.	120	Further to ACCI concerns about the potential for conciliation and arbitration processes to industrialise OHS issues, WRMC recommended that these processes be dealt with in regulations, which is another major concern
HSR power to cease work	An HSR will have rights and powers to, where an issue involves an immediate threat to the health and safety of any person, to direct that work to cease.	106, 122	This has real potential to be used as an industrial tool by unions and to impact major projects.
Union right of entry	Union right of entry rules will be aligned with relevant provisions of the <i>Fair Work Act 2009</i> .	205-223	Myriad concerns regarding right of entry including definition of 'union', removal of requirement for union officials to be competent, possible future mutual right of entry authorisations, and right of entry in relation to both workers who are members of the union or <i>eligible</i> to be union members.
Penalties	The recommended sentencing and penalties are severe.	57-58	There is no sound research basis for the significant increases proposed, for example, how is an increase to \$3 million justified?
Due diligence	WRMC disregarded the Panel's recommendation to provide a definition of 'due diligence' and instead case law will be relied upon.	88	This will create uncertainty regarding officers' due diligence requirements.
Matters to be in regulations rather than the Act	There are many issues that the Panel recommended should be included in the Act that WRMC recommends instead be in the regulations, such as consultation, election of HSRs, rights and powers of HSRs, provisions relating to PINs, paid leave for HSRs, and issue resolution.	99, 101-104, 106, 109, 111, 120	The trend for WRMC to shift matters from the Act to the regulations is a concern as it could result in adverse outcomes for industry.

Issue	Description	Relevant Recommendations	Comments
Disqualification of a HSR	WRMC has rejected the Panel's recommendation that HSRs can be disqualified or suspended for repeatedly neglecting their HSR functions or acting unreasonably in the performance of their functions and exercise of their powers.	113	This decision should be strongly challenged.
Business or undertaking	The model Act will define a 'business or undertaking' in broad terms.	11, 13, 15, 81-83	The concept of 'business or undertaking' is too broad although it is a positive that WRMC stated that the scope should not extend to public safety or to activities carried out by some volunteers.
Control definition	The concept of control will not be defined in the model Act.	84	This is an opportunity missed to provide further clarity to employers.
Reverse onus of proof - discrimination	A person alleged to have engaged in proscribed discriminatory conduct will bear the onus in civil proceedings of proving, on the balance of probabilities, that the reason alleged was not one of the operative reasons for the conduct.	128, 131	The Prosecutor should bear the burden of proof in such cases
Defence of reasonable precautions	The Panel recommended that the model Act provide that it would be a defence to a prosecution or civil action against a person relating to proscribed conduct engaged in by another person, to prove, on the balance of probabilities, that they had taken reasonable precautions to prevent that other person from engaging in the proscribed conduct. WRMC has recommended deleting the 'reasonable precautions' defence.	135	The reasonable precautions defence is required and therefore WRMC's decision should be reversed.
Imputation to a corporation of conduct of officers and employees	The Panel recommended imputing to a corporation the conduct and state of mind of officers, employees and agents of the corporation but also provided for a defence if the corporation took all reasonable and practicable measures to prevent the offence. WRMC has removed the defence.	232	The imputation to a corporation of the conduct and state of mind of employees etc without providing for a defence is a major concern.

Issue	Description	Relevant Recommendations	Comments
Privilege and questioning	Recommendations 179 to 199 also incorporating the WRMC response collectively forms a very complex range of powers and procedures with respect to questioning and related privileges and rights.	179-199	This area is too complex and will need further discussion and refinement. ACCI should have input to this in relation to drafting instructions and the exposure draft.
Obligation to consult with workers	The Panel's recommended broad obligation for the person conducting the business or undertaking to consult with workers as far as is 'reasonably necessary' has been substituted by WRMC with the term 'reasonably practicable'	96-97	The move to 'reasonably practicable' could impact on employers' ability to make timely decisions when they are needed.
Prosecutions	WRMC has ruled that prosecutions to be dealt with outside the model Act by jurisdictions as the Review Panel recommendation "would cause unwarranted and in a few cases irreconcilable conflicts with existing criminal and procedural laws in the jurisdictions".	53, 67, 70	The WRMC response means that the criminal code and prosecutions would be left to the states – this is a concern in some jurisdictions.
Duty of care	The duty of care provisions are complex and do not provide clarity or certainty for duty holders.	2, 21, 25, 98	The duty of care recommendations create greater opportunity for multiple duty holders and layers of complex responsibility, making safety harder to manage and enforcement more complex. Industry has concerns with the imposition of overlapping and multiple duties.
Union definition	The Panel recommended a definition for 'union' within the model Act, however WRMC disagreed and asserted that the definition should be consistent with the <i>Fair Work Act 2009</i>	92	The Fair Work Act definition of 'union' does not mandate that a union need be registered and this potentially opens up scope for unregistered unions to be recognised under the OHS Act.
Person assisting a HSR	Recommendation 107 (f) allows for a person 'assisting' HSRs to have access to the workplace where that is necessary to enable the assistance to be provided.	107	It is unclear as to why the Act would provide for allowing a person 'assisting' a HSR to have access to a workplace.

Issue	Description	Relevant Recommendations	Comments
Management or control of a workplace	The Panel recommended the Act define a person with management or control of a workplace but WRMC disagreed.	95	This is another opportunity missed for further certainty regarding control.
HSRs and PINS	Health and safety representatives will be provided with the power to issue Provisional Improvement Notices.	108	This power will be new to New South Wales and Tasmania.
Workers' obligation to report hazards etc	The Panel recommended that the Act place an obligation on workers to report any injury, accident, hazard etc, however WRMC disagreed.	146	ACCI supports the Panel's recommendation and is concerned about the WRMC decision to water down workers' obligations to report hazards, incidents etc.
HSR training – competence	There will be no requirement for HSR training to be competency based, which was originally proposed by the Panel.	110	HSRs should be competent – their roles are important.
Designer duties	There are a range of specific duties outlined in the model Act relevant to design, construction, project management etc.	30, 32	ACEA have concerns about some aspects of duties of care including the requirement that designers must be responsible for the OHS of a building/structure throughout its lifecycle.
Workplace and primary duty	The primary duty of care will not be limited to the workplace, but will apply to any work activity and work consequences, resulting from the conduct of the business or undertaking.	17	This will give the primary duty a reach beyond work.
Positive duties for officers	There will be an unambiguous positive obligation on officers to implement a due diligence framework in their company.	40-43	The Panel contend that this duty makes explicit a duty that existed under most jurisdictions' Acts currently. Many companies would already be meeting this duty while others will need to make some changes to their corporate governance practices.
Duties of care owed by workers	Workers will owe a duty of care to themselves and others through their conduct at work, including at 46 (c) to “co-operate with any reasonable action being taken by the person conducting the business or undertaking”.	44-46	The WRMC comment that 46 (c) be examined further during drafting is a concern.