

CHIEF MINISTER'S DEPARTMENT



Work Safety Bill 2008

EXPOSURE DRAFT

Consultation Arrangements and Guide

6 June 2008

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ACT Government Homepage: <http://www.act.gov.au>

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

FOREWORD

In September 2005, the Occupational Health and Safety Council (OHS Council), at the request of the (then) Minister for Industrial Relations, undertook a review of the scope and structure of the *Occupational Health and Safety Act 1989* (the OHS Act). The OHS Council is a tripartite body, which consists of representatives from employee groups, employer groups and individuals.

The OHS Council made a wide range of recommendations relating to the OHS Act, including the repeal of the existing OHS Act and the development of new legislation.

This exposure draft of the Work Safety Bill 2008 (the exposure draft) proposes an optimal framework for today's work and employment arrangements including:

- the expansion of duties and obligations to apply to contemporary work and employment arrangements that go beyond the bounds of the traditional employment relationship;
- the addition of “upstream” duty holders, including designers, manufactures, importers and suppliers of workplaces and products used at work to ensure responsibility attaches to those who control the generation of risks and who are in a position to eliminate or minimise the risks; and
- an express duty for all employers to consult workers about work safety and the provision of flexible consultation arrangements.

A number of factors have guided the development of the exposure draft including:

- the OHS Council's review of the scope and structure of the OHS Act (www.psm.act.gov.au/ohscouncil.htm);
- national work to date (through the Australian Safety and Compensation Council and the Council of Australian Governments) to harmonise and develop nationally consistent OHS principles (www.ascc.gov.au/ascc/HealthSafety/OHSstrategy/); and
- the new governance arrangements for the delivery of OHS regulatory functions through the Office of Regulatory Services.

This consultation guide is intended to assist individuals and organisations understand the purpose of the exposure draft and outlines the key differences between the OHS Act and the exposure draft. It invites those who have an interest to make submissions.

Your views on the exposure draft are important to ensure the new work safety legislation is effective, and responsive to the needs of the ACT workforce and business.

I encourage you to attend the community briefing on the exposure draft and make a submission.

Andrew Barr
Minister for Industrial Relations
6 June 2008

COMMUNITY BRIEFING

Monday 16 June 10:00 am to 12:00 noon, Legislative Assembly Exhibition Room

The Office of Industrial Relations and the OHS Commissioner will provide background information on the process for developing the exposure draft and the major changes proposed followed by a question and answer session. Copies of the exposure draft will be available and morning tea provided. To register for the briefing please phone 62075583.

HOW TO MAKE A SUBMISSION

In formulating your submission you are encouraged to refer to the issues and questions that are raised in this guide. However submissions are not limited to the questions and comments on any aspect of the exposure draft are most appreciated.

Submissions may be made in three ways:

1. Written submissions using the template

The attached template may assist in preparing your submission. It covers all major issues. You are welcome to answer all questions or just the parts that interest you.

2. Written submissions in any form

Please provide reasons or explanations in your submission to assist in understand the nature of your views. Again, you are welcome to express views on the entire exposure draft, or just parts.

3. Face to face submissions

Once you have had an opportunity to review the exposure draft and this guide you are welcome to book a session with the Office of Industrial Relations to ask questions and provide oral feedback. To book a session please phone 62075583.

All submissions will be made publicly available.

The closing date for submissions is close of business **Monday 21 July 2008**.

Submissions may be lodged by:

Email: worksafety@act.gov.au

Mail: Work Safety Bill 2008: Consultation
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Inquiries about the exposure draft can be made –

by email to worksafety@act.gov.au or by telephone on 62079944 or 62076197.

OVERVIEW

The Work Safety Bill 2008 is proposed to repeal and replace the *Occupational Health and Safety Act 1989* (the OHS Act).

All Governments have committed to work cooperatively to harmonise OHS laws across Australia. In February 2008, the Workplace Relations Ministers' Council (WRMC) agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. WRMC is supporting a Commonwealth review to develop model legislation. Terms of reference have been set and a review panel has been convened to make recommendations on the content of model national legislation by the end of the year.

The ACT Government is strongly committed to this work. However, the OHS Act was enacted in 1989 and is becoming increasingly outdated. This exposure draft is intended to inform and complement the national work. It is proposed as an interim measure to see the Territory better placed to implement the model national legislation planned for implementation in 2012.

The following is an overview of the key changes proposed in the exposure draft.

Safety duties, scope and coverage

- *Coverage:* The exposure draft proposes extended scope and coverage for the legislation to better capture contemporary work and employment arrangements that go beyond the bounds of the traditional employment relationship. This includes coverage of all people who have a worker-like relationship, by replacing the outdated concept of 'employee' with a broad definition of 'worker' which includes employees, independent contractors, outworkers, apprentices, trainees and volunteers who work in employment-like settings.
- *Expanded safety duties:* The safety duties are extended and clarified to ensure responsibility attaches to those who control the generation of risks and who are in a position to eliminate or minimise the risks. This will ensure that duty holders are only responsible for matters over which they have control, and that duty holders only owe a duty to the extent of that control. The intended effect is that there will be no gaps in the coverage of safety duties but that responsibility is not assigned to anybody in a way that is disproportionate to their actual level of control.

The principal duty holder is a "person conducting a business or undertaking" this includes employers, principals, head contractors and franchisees. Additional upstream duty holders such as building designers, designers, manufacturers, importers and suppliers of products used in the course of work are also covered.

- *Risk management principles and systematic safety management requirements:* Systematic risk management principles have been integrated into the exposure draft. These principles require duty holders to eliminate or reduce risk as far as reasonably practicable, and to afford the highest level of protection that is appropriate. Priority is also afforded to the elimination of hazards and control of risk at the source through safe design of workplaces, systems and items used for work.

Worker Consultation

- The exposure draft places a general duty on all employers (broadly defined) to consult all workers on matters that may affect their health and safety – the duty to consult is based on a recognition and growing body of international evidence which demonstrates that worker input and participation improves decision-making about work safety matters. The duty to consult is proposed to apply to all employers regardless of the number of workers they have.
- Legislative guidance is provided on what meaningful consultation is; when employers should consult; and how employers can consult.
- The exposure draft provides choice and flexibility on how consultation can occur to enable the employer and their workers to adopt the consultative arrangement which they believe will best ensure effective and meaningful consultation without being too onerous.
- Within the flexible framework, the exposure draft allows for use of the traditional workplace consultative tools such as:
 - a. health and safety committees (HSC): where there is a desire for a representative group to come together in a cooperative way to improve the employer's systems for managing work safety
 - b. health and safety representatives (HSR): where there would be a benefit from having an individual worker represent a group of workers

The exposure draft also allows organisations to instead adopt any other arrangements where the employer and the workers agree on a consultative framework.

- Information will be provided to industry, through codes of practice or other guidance material, on:
 - their roles and obligations under the legislation
 - tools to assist industry implement and maintain meaningful consultation
 - a generic (optional) consultation policy for small business
 - a generic (optional) consultation policy for medium/large business
 - the benefits of consultation and case studies highlighting how various employers undertake consultation.

Other matters

- *Union Right to Prosecute*: An express right of private prosecutions for unions along the lines of the common law position is proposed that: enables a prosecution to be commenced with the written consent of the secretary of a registered union; extends the authority to prosecute safety duty offences in the Bill (with the ability to proscribe other offences – this will not include the industrial manslaughter offences in the *Crimes Act 1900*); and reserves the right of the Director of Public Prosecutions to intervene and take over or discontinue a private prosecution at any time. A broad discretion on the courts is also proposed to make any order in relation to the payment of penalty.
- *Enforcement and Compliance – General*: Provisions have been updated to ensure application to contemporary work practices and arrangements. The exposure draft enables

the production of documents or information held at locations other than those on which an alleged offence occurred (necessary in multi-site work arrangements such as those in the construction industry and franchisor and franchisee arrangements).

- *Enforcement and Compliance – the Public Sector:* The exposure draft strengthens the compliance focus on rectifying the situation quickly, then to ‘name and shame’ those agencies who fail to comply. This ensures application of all enforcement and compliance tools (such as prohibition notices and improvement notices). The exposure draft also toughens reporting requirements and introduces appropriate review mechanisms.
- *Information Sharing:* The exposure draft facilitates the reasonable exchange of information obtained by inspectors with other law enforcement agencies for the purpose of ensuring worker or public safety.
- *Notification of Events/ Preservation of Site:* Notification of accidents and events requirements are streamlined and provision included to ensure the preservation of sites following serious events or accidents.
- *Review Mechanism:* The specialist Review Authority (which has never been convened) is replaced with a two tiered review mechanism, with the chief executive or minister as the initial reviewer and the Civil and Administrative Tribunal fulfilling the function of the external reviewer (the Civil and Administrative Tribunal will replace the Administrative Appeals Tribunal in 2009).
- *Codes of Practice:* Codes of practice are given formal evidentiary status. This will enable courts to consider compliance with a code in order to establish whether a safety duty has been met.
- *Right to Refuse Dangerous Work:* Workers are granted a specific right to refuse work if they reasonably believe that there is a significant risk to their health or safety.
- *Corporate Officer Liability:* Directors and senior officers of corporations who breach the legislation will be liable for their actions. For liability to attach to individual officers the prosecution must prove that the officer was reckless as to whether the breach would occur; was in a position to influence the conduct of the corporation; and failed to take reasonable steps to influence the conduct of the corporation.
- *Work Safety Council and Work Safety Commissioner:* The current provisions are largely reproduced with modifications necessary to address the revised scope and structure of the exposure draft, and to changes references to ‘OHS’ to ‘work safety’.

THE WORK SAFETY BILL 2008

The short title of the Bill is the ‘Work Safety Bill 2008’. This title has been chosen to reflect the modern nature of the legislation. The long title for the Bill is ‘to secure and promote work safety by encouraging the appropriate management of risk, and for other purposes’.

Question 1: Are the short and long titles for the Bill appropriate? If not, why not, and what title would you prefer?

PART 1 PRELIMINARY

Part 1 sets out the preliminary matters for the exposure draft, it contains provisions that are standard across all ACT legislation. The commencement day for the new legislation is on a day set by the Minister. As the Bill is on release for consultation purposes only, a commencement date has not been considered. However, your views on a period of lead time for implementation (to give individuals and business time to comply) for the new legislation are welcome.

Question 2: What lead time is preferred for implementation of the legislation, for example, six months, 12 months, and why?

PART 2 OPERATION OF ACT

Division 2.1 Objects, principle and important concepts.

Division 2.1 sets out the objects, principles and important concepts for the exposure draft. Section 6 outlines the objects for the legislation. The objects serve to describe the aims of the legislation for the Courts to take into account when interpreting the provisions. Subsection 6 (1) sets out the five general objects for the legislation and subsection 6 (2) sets out a general principle for how the legislation should be implemented and understood.

Question 3: Are the objects and principles for the legislation appropriate?

Sections 7 to 14 set out the meaning of critical terms for the exposure draft.

Section 7 sets out the meaning of ‘work safety’. This is a central term that underlines the operation of the exposure draft. Work safety means the health, safety and wellbeing of people in relation to work. Consistent with the current OHS Act it includes the physical and psychological wellbeing of workers. This ensures that the exposure draft provides coverage for new and emerging risks such as occupational violence and bullying, stress and fatigue. It

will also create an authority for developing specific regulations and codes of practice to deal with these matters.

It ensures that the general duties of care are tied to the conduct of work and not limited to the confines of an actual workplace.

The new term modernises the coverage of the exposure draft and uses a contemporary phrase and meaning to ensure optimal application now and into the future. As there are a number of ways to describe ‘wellbeing’ such as ‘welfare’, ‘psychological health’ or ‘environment’, views on this definition, and in particular the ‘wellbeing’ aspect of the definition are sought.

Question 4: Is the definition of work safety appropriate, and in particular, the use of the term ‘wellbeing’?

Section 8 sets out the meaning of ‘risk’. The purpose of the exposure draft is to secure and promote work safety by the appropriate management of risk. Underpinning the work safety duties in Part 3 is the requirement for the duty holders to ensure work safety by managing risk.

Risk takes on its ordinary meaning of ‘exposure to the chance of injury or loss’. Risk can arise in two ways, the first is the nature of work itself, for example, unsafe work practice, the use of plant, and through design of plant and structures. The second is in the non-provision of, for example, amenities, facilities, training and personal protective equipment, or from lack of consultation.

Risk to health includes injury, illness or death.

Risk to safety includes danger or hazard.

Risk to wellbeing includes include undue stress, anxiety and discomfort.

Two examples are provided in relation to risk. The first focuses on risk in relation to wellbeing, the second is in relation to health and safety.

Question 5: is the definition of risk appropriate, if not, why not?

Section 9 sets out the meaning of ‘worker’. The meaning of worker is central to the exposure draft; it defines the broadened coverage of the exposure draft and scope and application of the duties contained in it.

Currently, in general terms the OHS Act applies to employees. Contractors and other non-employee workers are only captured as third parties at or near a workplace. In contrast, the exposure draft applies even coverage to all types of workers. Worker is defined to mean an individual who carries out work, whether for reward or otherwise. It does not matter whether the individual gets paid for the work and as such includes volunteers. The definition intends only to capture those categories of volunteers who work in an employment-type setting.

For the legislation to apply the individual must carry out work under an arrangement and for someone conducting a business or undertaking. The arrangement might consist of a written or oral contract. It is not sufficient that a person merely performs work for the legislation to apply to them in their capacity as a worker. There must be a mutual arrangement in place for the individual to carry out the work. For example, volunteers in 'Clean-up Australia Day' would not be considered a worker, whereas a volunteer who has entered into an agreement to perform work for a charity organisation would fall into the category of worker.

The meaning of a business or undertaking is provided for in section 11 and includes a not-for-profit business and an activity conducted by a local, stage or territory government.

Examples of workers are provided and include: employees, independent contractors, outworkers, work experience students and volunteers.

Unlike the current OHS Act, the exposure draft does not provide any discretion for the Minister to exempt any category of workers under the legislation.

Question 6: Is the definition of worker appropriate?

Question 7: Is the coverage of volunteers appropriate? Are there types of volunteers that should not be covered?

Question 8: Would the proposed coverage of volunteers impose any undue burden on the operation of any organisations in the Territory?

Section 10 sets out the meaning of 'employer'. The definition is relevant to Part 4 in relation to worker arrangements and will be relied on throughout the regulations when an obligation is placed on an employer. The meaning of employer is broader than the common law meaning of employer which is normally a person who engages an individual under a contract of service. Employer is defined in relation to workers, rather than employees. An employer includes a person who engages a worker to carry out work in the person's business or undertaking. Employer would include an employer in relation to an employee; a principal in relation to a contractor; a head contractor in relation to a subcontractor and a person who engages a volunteer or work experience student to carry out work.

Question 9: Is the definition of employer appropriate?

Section 11 sets out the meaning of ‘business or undertaking’. This definition is relevant to the principal safety duty in section 21 that applies to a person conducting a business or undertaking and also defines the application of obligations throughout the exposure draft.

The meaning of business or undertaking is very broad and includes a not-for-profit business and an activity conducted by a local, state or territory government.

People conducting a business or undertaking would include employers, the self-employed, principal contractors, sub-contractors, franchisors and labour-hire firms.

The concept of business or undertaking captures all *activities* that are carried out in the course of conducting a business or enterprise, and is not confined to the physical boundary of a ‘workplace’.

Question 10: Is the concept of business or undertaking appropriate?

Section 13 sets out the meaning of ‘person in control’. The definitions are relevant to the work safety duties contained in Part 3 and will also be relied on throughout regulations that will set out obligations for certain persons in control.

The definition gives effect to an important principle underpinning duties of care in that responsibility should lie with those who control the generation of risks—through initiating and/or managing activities—and who are in a position to eliminate or minimise risks. The responsibilities of duty holders are tied to matters over which they have control, and are owed to the extent that they have control. The section sets out the meaning of person in control of premises, for plant and systems and for design, manufacture, import or supply of plant and systems.

Section 14 sets out how duty holders must manage risk. Duty holders are required to ensure work safety by managing risk. This requires a positive, proactive and systematic effort. People who manage risk are responsible for eliminating or reducing risks so far as is reasonably practicable.

The concept of managing risk requires the duty holder to take all reasonably practicable steps:

- to eliminate risks;

- if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable, and
- to inform other duty holders about possible risks.

Duty holders must provide the highest level of protection that is reasonably practicable. Priority is to be given to the elimination of hazards and control of risks at the source through safe design of workplaces, systems and items used for work. Risks to work safety should be eliminated or, if it is not reasonably practicable to do so, people must implement a systematic hierarchy-of-control approach to minimise as far as reasonably practicable the risks to health and safety.

Question 11: Is the concept of risk management appropriate for inclusion in the legislation, and is the concept sound?

Diversion from hierarchy of control

Consultations undertaken on the exposure draft to date have uncovered the need to consider a diversion from the hierarchy of control. It may be necessary to consider the inclusion of a provision to modify the hierarchy of control requirement to allow a departure if it is reasonable to do so in the circumstances. For instance, the hierarchy of control sets out the steps to take to minimise risks, and mandates the order in which the steps should be followed until the risk is reduced as far as reasonably practicable.

For example, the hierarchy of control requires, first, that the thing giving rise to the risk is substituted with something that gives rise to a lesser risk. Second, that the risk is isolated, third, that the risk is minimised by engineering means and so on. It could be that the first option is possible, and therefore would be compulsory under the hierarchy of control to be implemented first. However another option, such as option three might provide for much better protection, yet conflict with the first option. Diversion from the prescriptive order in reasonable circumstances would allow the duty holder to implement the best strategies having regard to the particular case. In a prosecution the court would be required to assess the reasonableness of the duty holders actions in minimising the risks.

Provision could be included to require a duty holder who diverts from the hierarchy-of-control to maintain appropriate documentation to support his or her actions.

Question 12: Should provision be included to modify the hierarchy of control requirement to allow a departure if it is reasonable to do so in the circumstances? If so, what precautions should be put in place, for example, additional record keeping?

Section 15 provides meaning and guidance about what are ‘reasonably practicable steps’ to eliminate or minimise a risk. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, the following considerations apply:

- the seriousness of the risk which would include the likelihood of the risk eventuating and the degree of injury or loss that would result;
- any ways of eliminating or reducing the hazard or risk;
- what the person concerned knows, or ought reasonably to know, about the hazard or risk,
- the availability and suitability of ways to eliminate or reduce the hazard or risk, and
- the cost of eliminating or reducing the hazard or risk.

A regulation may also prescribe what are, or are not, reasonably practicable steps to eliminate or minimise a risk.

Question 13: Is this guidance on reasonably practicable sufficient?

Division 2.2 Complying with the Act

Division 2.2 sets out some important principles for complying with the legislation.

Section 16 provides that work safety duties are subject to fundamental principles of law that a person (both legal and natural) may have more than one duty.

Similarly, section 17 provides that a person is not relieved of a duty because someone else has the same duty. Each person must comply with their duties whether or not someone else may also be required to comply with the duty.

Where more than one person has a duty for a matter, then each person:

- retains responsibility for the duty for the matter
- must discharge the duty to the extent the matter is within their control, and
- must consult and cooperate with all other persons who have a duty for the matter, to the extent that it does not limit their ability to discharge their own duty.

However if one person performs the whole duty, all comply.

Question 14: Is the explanation of overlapping duties clear enough?

Section 18 provides for the approval of codes of practice under the exposure draft. Codes of practice provide practical guidance for the legislation. They do not have the same force of

law as legislation or regulations but section 19 provides that in deciding whether a person has complied with a duty, a decision maker (inspector, chief executive, Minister, tribunal or court) may consider whether a person has complied with a relevant approved code of practice in relation to the duty. As such the provision gives codes of practice evidentiary status under the exposure draft.

As is the case under the OHS Act, the minister must consult the Work Safety Council before approving a code of practice to become a disallowable instrument. The Legislative Assembly then has a power to move a motion to amend or disallow a code of practice.

Section 20 clarifies the relationship of regulations to approved codes of practice.

Section 215 requires the chief executive to publish information about the approval of codes of practice such as the date the approval takes effect and the location where copies may be purchased or inspected.

Question 15: Is the reach/extent of a duty clear enough? If not, how could they be made clearer?

Question 16: Are the principles for complying with the legislation sound?

Question 17: Is the process in the exposure draft to approve codes of practice sufficient?

Question 18: Is the proposed evidentiary status for codes of practice appropriate?

PART 3 WORK SAFETY DUTIES

Division 3.1 Duties to manage risk

Division 3.1 comprises the work safety duties for the legislation. The provisions have been drafted consistent with other jurisdictions legislation. Generally the provisions outline who is a duty holder, what is the duty and how the duty is complied with. The exposure draft has been developed with a view to ensure that a duty is placed on everyone who has an influence on work safety including designers, manufacturers, importers and suppliers of plant, work systems and buildings intended to be used as workplaces.

The duties have been drafted to ensure responsibility attaches to those who control the generation of risks and who are in a position to eliminate or minimise risks. This is intended to ensure that duty holders are only responsible for matters over which they have control, and that duty holders only owe a duty to the extent of that control. The intended effect is that there are no gaps in the coverage of safety duties and that responsibility is not assigned to anybody in a way that is disproportionate to their actual level of control.

Section 21 sets out the principal work safety duty. The duty applies to a person conducting a business or undertaking. This includes employers, self-employed, municipal corporations,

subcontractors and franchisors. The person has a duty to ensure work safety by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, a person operating a supermarket has a duty to ensure the health, safety and wellbeing of all of its workers by taking all reasonably practicable steps to manage risk. This would involve developing a work safety policy and identifying and addressing risks such as manual handling and slips, trips and falls.

Subsection 21 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 19: Is the general safety duty for a person in control of a business or undertaking appropriate?

Section 22 sets out the safety duty for a person in control of premises. Premises is defined very broadly in the Dictionary to include the whole or part of:

- a structure, building, aircraft, vehicle or vessel
- a place (whether enclosed or built on or not).

Structure is also defined in the Dictionary to include the whole or part of a building, whether permanent or temporary.

A person in control of premises is defined in section 13 to mean anyone who has control of the premises, including anyone with authority to make decisions about the management of the premises.

The person has a duty to ensure work safety in relation to the premises by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, the owner of a shopping mall has a duty to ensure the health, safety and wellbeing of workers and patrons at the mall by taking all reasonably practicable steps to manage risk. This would involve ensuring safe entry and exit routes within the complex. Concurrently, the person in control of an individual store in the mall has a duty to ensure safe entry and exit routes for those parts of the premises that they have control, for example, entry into the staff tearoom and amenities.

Subsection 22 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 20: Is the general safety duty for a person in control of premises appropriate?

Section 23 sets out the safety duty for a person in control of plant or system etc. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. A system is not defined but would take on its ordinary meaning and include a process, procedure, or method for undertaking work.

A person in control of plant or a system is defined in section 13 to mean anyone who has control of the plant or system or the operation of the plant or system, including anyone with authority to make decisions about the plant or system or the operation of the plant or system.

The person has a duty to ensure work safety in relation to the plant or system by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

For example, a person operating a mechanic business has a duty to ensure the health, safety and wellbeing of workers in relation to machines and systems of work over which it has control. This would involve maintaining equipment in good working order and repair and having a system for reporting faulty equipment and reviewing this system.

The head franchisor of a hotdog chain mandates a system for cleaning hotdog machines in each franchise. The head franchisor has a duty to ensure the health, safety and wellbeing of workers who carry out the cleaning of the machines. This would involve ensuring the system is safe, providing guidance and training to those that use it and reviewing it for its effectiveness and safety. The franchisee would also owe safety duties to its workers as the person conducting the business.

Subsection 23 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 21: Is the general safety duty for a person in control of plant or systems appropriate?

Section 24 sets out the safety duty for a person in control of design. This is the first of the new ‘upstream’ duty holders reflecting the principle that responsibilities for work safety should also be allocated ‘upstream’ to those who design, produce and supply plant, workplaces and systems of work, in order to ensure that the risks emanating from these products are eliminated or controlled at the source.

The safety duty applies to a person in control of the design of plant or a structure that is used or could reasonably be expected to be used at work, as a workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

For example, the designer of a meat slicer has a duty to ensure the health, safety and wellbeing of workers who might operate the machine by taking all reasonably practicable steps to manage risk. This would involve ensuring the machine has safety guards to prevent injury and that guidance on how to safely operate the machine with the guarding is provided. The designer of an office building also has a duty to ensure the health, safety and wellbeing of workers and other patrons in relation to the design. This would involve ensuring the design of the office building encompasses safe entry and exit, adequate facilities and adequate environmental controls.

A person in control of the design of plant or a structure is defined in section 13 to mean anyone who has control of the design of the plant or system, including anyone with authority to make decisions about the design.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

Subsection 24 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 22: Is the general safety duty for a person in control of design of plant or structures appropriate?

Section 25 sets out the safety duty for a person in control of manufacture, construction or commission of plant or a structure that is used or could be reasonably be expected to be used at work, as a workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

A person in control of manufacture is defined in section 13 to mean anyone who has control of the manufacture of the plant or structure, including anyone with authority to make decisions about manufacture. Commission in relation to plant is defined in subsection 25 (4) to include the performance of any necessary adjustment, test and inspection before the plant starts or restarts operation.

For example, the manufacturer of a photocopier has a duty to ensure the health, safety and wellbeing of workers who might operate the machine by taking all reasonably practicable steps to manage risk. This would involve ensuring the photocopier is built to specification and using appropriate materials.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management.

Subsection 25 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 23: Is the general safety duty for a person in control of manufacture, construction or commission of plant or structures appropriate?

Section 26 sets out the safety duty for a person in control of import and supply of a plant or structure that is used or could be reasonably be expected to be used at work, as a workplace or at a workplace. Plant is defined in the Dictionary to include machinery, equipment or a tool, or a component of, or accessory to machinery, equipment or a tool. Structure is also defined to include the whole or part of a building, whether permanent or temporary.

A person in control of import and supply is defined in section 13 to mean anyone who has control of the import or supply of the plant or structure, including anyone with authority to make decisions about the import or supply. Subsection 26 (4) clarifies when a person is not in control of supply. For instance, when a person only has a financial interest in the item or has not taken actual possession of the item. This could include an auctioneer.

For example, a hire company that supplies compactors to a construction site has a duty to ensure the health, safety and wellbeing of workers who might operate the crane, or third parties that might be effected by its use, by taking all reasonably practicable steps to manage risk. This would involve ensuring the compactor is provided in a safe working condition and that regular maintenance has been carried out.

The person has a duty to ensure work safety in relation to the plant or structure by managing risk. This requires the duty holder to take all reasonably practicable steps to eliminate risks, or if it is not reasonably practicable to eliminate risks, to reduce those risks so far as is

reasonably practicable by implementing a systematic hierarchy-of-control approach to risk management. Subsection 26 (3) outlines the matters a person must comply with in order to satisfy the safety duty. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Question 24: Is the general safety duty for a person in control of import or supply of plant or structures appropriate?

Section 27 sets out the safety duty for workers. Workers have a duty not to expose themselves and others at the workplace to risk and to cooperate and obey instructions regarding work safety.

Question 25: Is the general safety duty for workers appropriate?

Section 28 sets out the safety duty for all people at a workplace. All people at a workplace have a duty not to expose others at the workplace to risk.

Question 26: Is the general safety duty for other people at a workplace appropriate?

Division 3.2 Work safety duties – failure to comply with duties

Division 3.2 sets out the offences that apply for failing to comply with the safety duties in Division 3.1. The structure of the offences and penalties are the same as the current OHS Act.

The prosecution must prove that a person has a safety duty, that the person failed to comply with the safety duty and the relevant fault element (if any) for the breach. In proving to the court that a person failed to comply with the safety duty, the prosecution must prove beyond all reasonable doubt that the duty holder failed to ensure work safety by failing to manage risk. This include failing to take all reasonably practicable steps to eliminate or, where appropriate, to minimise the risk.

The exposure draft does not propose absolute duties and does not reverse the onus of proof in relation to the safety duty offences.

Question 27: Are the offences and penalties for breaches of the safety duties appropriate. If not, what changes should be made?

Division 3.3 Work safety risks – serious events

Division 3.3 sets out the notification and site preservation requirements for serious events and dangerous occurrences. The provisions draw on the current requirements in the Occupational Health and Safety (General) Regulation 2007 (the General Regulation) and refine the requirements for notification and site preservation where there are injuries to third parties that are attributable to the business or undertaking. Currently, under the General Regulation all injuries to people other than workers must be notified and site preservation arrangements put in place. The exposure draft limits this to death or serious injury only. Serious injury includes injuries resulting in amputation, burns, loss of consciousness or that requires immediate medical treatment (as opposed to first aid).

Section 38 sets out the record keeping requirements for notifications of serious events and section 39 eliminates the need for duplicated reporting under the legislation where a report has been made in relation to the same event under the *Dangerous Substances Act 2004*.

Question 28: Are the notification of serious events provisions appropriate? Can they be streamlined further or should they cover more situations?

Question 29: Are the preservation of site provisions appropriate? What further improvements could be made?

Division 3.4 Work safety risk – other matters

Section 41 grants a right to workers to refuse work if they reasonably believe that there is a significant risk to their health or safety. It is fundamental that all workers be able to exercise this right without being penalised by their employer in any way, including through pay reductions, termination of employment or contract, bullying, harassment, discrimination or being otherwise treated less favourably than other workers. Most other jurisdictions have included similar provisions in their OHS legislation as a response to the roll back of the unfair dismissal provisions by Work Choices.

Section 42 provides protection to employees and workers from discrimination if they complain or propose to complain about a work safety matter, assist or propose to assist an investigation or have exercised their right to refuse dangerous work.

The section includes an offence against a person in control of the relevant workplace if they prejudicially alter the worker's conditions of employment or engagement. The offence contains a reverse onus of proof provision whereby the defendant is required to prove that their decision to alter the worker's employment or engagement was not motivated by the workers actions (in relation to the work safety complaint, assistance in the investigation or the exercise of the right to refuse dangerous work).

In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. The onus of proof should only be placed on the defendant when the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult

and costly for the prosecution to disprove than for the defendant to establish. The provision fits this exception to the general rule, in that only the defendant is in a position to prove to the Court the reasons behind their actions. The standard of proof on the defendant is a legal burden. The defendant bears the burden of establishing the defence on the balance of probabilities. If this is done the prosecution must refute the defence beyond all reasonable doubt.

Question 30: Are the additional protections for workers appropriately framed?

Question 31: Does the inclusion of the reverse onus of proof impose an unreasonable burden on people in control of workplaces? If so how, and what options are there to address this?

Section 43 reproduces the current offence for interfering with safety equipment and section 44 reproduces the prohibition on levying charges to employees in relation to work safety. Note that this prohibition has not been extended to all workers.

PART 4 WORKPLACE ARRANGEMENTS

Division 4.1 Duty of employer to consult

Section 46 places a duty on employers to consult, if reasonably practicable, all workers to allow workers to contribute to matters affecting their work safety.

Employer is defined in section 10 (outlined above) broader than the common law meaning of employer which is normally a person who engages an individual under a contract of service. Employer is defined to include a person who engages a worker to carry out work in the person's business or undertaking. Employer would include an employer in relation to an employee; a principal in relation to a contractor; a head contractor in relation to a subcontractor and a person who engages a volunteer or work experience student to carry out work.

Subsection 46 (2) outlines the matters an employer must consult workers about in order to satisfy the duty to consult. The list is not exhaustive. Further guidance will be provided through regulations, codes of practice and other guidance materials.

Failure to satisfy the duty to consult is an offence.

Section 47 requires an employer to establish a worker consultation unit for the purpose of consultation. The worker consultation unit replaces the current concept of designated work group (DWG) and is no longer limited to employers who employ 10 or more employees. All employers must establish a worker consultation unit. All workers must have the opportunity to be part of a unit so that all have the opportunity to be consulted about work safety. However, it is envisaged in small workplaces that the consultation unit will comprise all members of the workforce.

The worker consultation unit is a more flexible version of the DWG and can be formed with workers from one or more workplaces or workers from one or more employers.

Examples of worker consultation units include:

- the four employees at the local hairdresser – comprising the total workforce who then talk about work safety issues at a regular staff meeting;
- all the different sub-contractors working at the same construction site – who then have a morning tool box meeting;
- all the workers from the different retail shops in the west wing of the Canberra Centre – who then share a roving health and safety representative.

Failure to establish a worker consultation unit is an offence.

Section 48 sets out the requirements for establishing a worker consultation unit that best and most conveniently allows the work safety interests of workers to be represented and safeguarded.

Subsection 48 (3) allows both the employer and workers to seek help to establish the worker consultation unit.

Question 32: Is the concept of a worker consultation unit relevant or appropriate? Is it an effective way of ensuring consultation? If not, what do you suggest as an alternative?

Question 33: Do the parameters for the worker consultation units have enough flexibility?

Question 34: Does the inclusion of businesses with under 10 employees in the duty to consult and the establishment of a worker consultation unit, impose an unreasonable burden on small business? If so how? What other options are there to ensure all workers are consulted on work safety matters in small business?

Section 49 requires the employer to consult workers about any changes to the worker consultation unit.

Section 50 requires the employer to review a worker consultation unit to consider the effectiveness of its operation, if there are workplace changes or if requested by a worker or health and safety representative or health and safety committee.

Section 51 requires the employer to keep adequate records in relation to the worker consultation unit.

Section 52 requires the employer and the worker consultation unit to determine what forms of participation will be used for consulting. Through collaboration the employer and workers can come to agreement on the best means of participation. Together they may decide use one or more of the following methods:

- elect a health and safety representation (HSR); or
- establish a health and safety committee (HSC); or
- another agreed method of consultation.

In some cases, a HSC may be appropriate in others an HSR. Often both could operate performing different but complementary roles. Or there may be some other means of participation that fulfils the employer's duty to consult. The exposure draft is intended to provide that employers *must* meaningfully consult with their workers but *how* that consultation is arranged and undertaken is flexible.

Subsection 52 (3) allows a majority of workers in a consultation unit to require that the employer must arrange for an HSR or HSC. These are long held devices in OHS and business and it is expected that they will remain a principal mechanism for consultation in most organisations.

Section 53 gives the chief executive the power to require an employer to establish a HSC where the work being performed is hazardous.

Question 35: Is the range of choice for consultation appropriate? Should particular sectors be more directed?

Question 36: Are the requirements of subsection 52 (3) too onerous for small business? Should the subsection be restricted to businesses that meet prescribed thresholds, for example, more than 20 workers or worker consultation units with more than 20 workers?

Section 54 establishes what constitutes meaningful consultation. The duty to consult will require a genuine effort from employers to consult workers. Employers must consult by sharing information and giving workers a reasonable opportunity to contribute and express opinions on work safety issues.

Question 37: Are the provisions on what constitutes meaningful consultation appropriate? If not, how could they be made clearer or more effective?

Subsection 54 (2) requires the employer to use the agreed upon consultation method (HSR, HSC etc) when consulting workers.

Section 55 provides a mechanism to resolve disputes if they arise in relation to the establishment of worker consultation units and consultation methods.

Division 4.2 Health and safety representative

Section 56 sets out the role of a health and safety representative.

Question 38: Is the role of an HSR appropriate? If not, what should it be?

Section 56 (3) clarifies the need for an HSR to consult with the employer in an effort to resolve a work safety matter before exercising his or her powers.

New regulations for health and safety representatives (HSRs)

The powers and access to information given to HSRs will not change but will be included in new regulations (rather than primary legislation) to be released for a period of consultation at a later stage.

The new regulations will include a provision to broaden the eligibility of HSRs to include workers as well as any suitably qualified person that workers believe will best represent their interests in relation to work safety. This will:

- facilitate ‘roving HSRs’;
- provide options for businesses to share HSR costs;
- provide solutions where workers cannot represent themselves; and
- facilitate expert representation particularly on hazardous worksites.

The regulations will make it clear that it is mandatory for all HSRs to be trained and that an employer is only responsible for providing training for a *worker* elected as an HSR. To be eligible for election, a non-worker HSR must hold a Certificate IV in OHS. It is possible that workers could elect a suitably qualified union representative or OHS consultant as an HSR. This may have a cost impact for business.

The regulations will allow the employer and the worker consultation unit to determine the appropriate number of HSRs to suit the needs of each unit.

Workers will be able to seek assistance in negotiations for an HSR and the administering of an HSR election.

Question 39: The regulations for HSRs will be released at a later stage for consultation. However, in the interim, feedback on the proposed regulations as outlined above is welcome.

Division 4.2 Health and safety committee

Section 57 sets out the role of a health and safety committee

Question 40: Is the role of an HSC appropriate? If not, what should it be?

New regulations for health and safety committees (HSCs)

The new regulations for HSCs will be released at a later stage for a period of consultation and will include:

- a mandatory requirement for employers to establish an HSC in high risk industries including commercial construction and other prescribed industries;
- provision for HSC members to participate in approved HSC training during work hours at the employer's expense. While training will not be mandatory for HSC members, if it is requested the employer must support it. (Given the flexible consultation arrangements insisting that HSC training is mandatory may act as a deterrent to the establishment of an HSC.);
- mandatory training for members on mandatory HSCs; and
- a requirement that at least half of the members of an HSC are workers and automatic membership for any HSRs.

The duties of employers in relation to HSCs will not change.

An HSC member will not be liable for acts done in good faith in carrying out his or her functions under the Act.

Question 41: The regulations for HSCs will be released at a later stage for consultation. However, in the interim, feedback on the proposed regulations as outlined above is welcome.

Division 4.4 Authorised representative – entry to workplace

Division 4.4 reproduces the existing right of entry provisions for authorised representatives. The provisions ensure that representatives of employee and employer organisations with members or potential members in a workplace can enter work premises where there are reasonable grounds to suspect that a contravention of the legislation has happened, is happening or is likely to happen.

Subsection 64 (d) allows an Authorised Representative to require the production for inspection of documents relating to work safety at the premises. There is no time frame within which the documents must be produced.

Question 42: Should a timeframe for the production of documents be included? If so, what is an appropriate timeframe?

PART 5 ENFORCEMENT POWERS

The OHS Act was amended in 2004 to include a revised enforcement regime. Part 5 reproduces these provisions with minor modifications necessary to ensure application to contemporary work practices and arrangements. Some provisions, such as those relating to search warrants in Division 5.3 and return and forfeiture of things seized in Division 5.4, have been streamlined and brought into line with standard provisions contained in other ACT legislation.

The inspector powers in subsection 78 (i) have been strengthened to enable the production of documents or information held at locations other than those on which an alleged offence occurred. The intended effect is to ensure inspectors are given reasonable access to information to aid investigations, particularly in multi-site work arrangements such as those in the construction industry and franchisor and franchisee arrangements.

Question 43: Do the enforcement powers remain relevant?

Question 44: Are any further improvements required to the enforcement powers?

Question 45: Do the enforcement powers unduly trespass on rights or business operations in the Territory?

PART 6 COMPLIANCE MEASURES

Similarly, Part 6 reproduces the compliance provisions introduced into the OHS Act in 2004 with minor modifications necessary to ensure application to contemporary work practices and arrangements.

Part 6 provides for the following compliance measures:

- Division 6.3: compliance agreements – agreements entered into between an inspector and a responsible person to fix a situation where an inspector has reasonable grounds to believe that a contravention of the legislation has occurred, is occurring or may occur. A compliance agreement is a useful measure to rectify unsafe situations and practices in a cooperative fashion without resorting to enforcement action.

- Division 6.4: improvement notices – an inspector may issue an improvement notice to require a responsible person to rectify a matter or to ensure compliance with the legislation.
- Division 6.5: prohibition notices – an inspector may issue a prohibition notice to prohibit the use of premises, plant or systems or to ensure an item or premises is not disturbed.
- Division 6.6: enforceable undertakings – a measure for ensuring compliance with the legislation without resorting to prosecution for criminal offences. Where it is alleged that there has been a contravention of the legislation, a person may give a written undertaking that they will comply with the Act. Safety undertakings oblige a person to fulfill any assurances made and are enforceable through the Courts.
- Division 6.7: injunctions – an interested person may apply to the Magistrates Court for an injunction to restrain a person from contravening the legislation (this can include an injunction that stops a person from doing something or an injunction that requires a person to do something). This is a quick, legally enforceable measure to prevent a breach of the legislation.

Question 46: Do the compliance measures remain relevant?

Question 47: Are any further improvements required to the compliance measures, including additional measures?

Question 48: Do the enforcement powers unduly trespass on rights or business operations in the Territory?

Division 6.8 Public sector workplace compliance measures

The purpose of the public sector compliance measure is to focus compliance on rectifying the situation quickly. This is because the Government is expected to set a high standard and be a model employer. Agencies that fail to comply would be ‘named and shamed’. With the exception of prosecution, all other enforcement and compliance tools outlined above (such as prohibition notices and improvement notices) apply to the public sector.

In addition, public sector agencies would be required to report on compliance action through annual reports. Failure to comply with the more serious offences may also require tabling of reports in the Legislative Assembly.

Question 49: Are the public sector workplace compliance measures appropriate?

Question 50: Should the public sector workplace compliance measures be further strengthened? If so, how?

PART 7 ADMINISTRATIVE REVIEW OF DECISIONS

The OHS Act establishes a specialist Review Authority to conduct external reviews of certain decisions. The Review Authority has never been convened. Part 7 replaces the Review Authority with a standardised two tiered review mechanism. Depending on the decision, the chief executive or minister is the initial reviewer and the Civil and Administrative Tribunal will fulfil the function of the external reviewer (the Civil and Administrative Tribunal will replace the Administrative Appeals Tribunal in 2009).

The exposure draft does not contain a schedule of reviewable decisions. An assessment of each decision will be made during the consultation period to allow a schedule to be included in the final Bill. In the interim views are welcome in relation to the proposed review arrangements and on any decision, or types of decisions, that should be made reviewable.

PART 8 ADMINISTRATION

Part 8 sets out the administrative matters for the exposure draft. These matters are generally standardised across ACT legislation.

Section 179 provides for the appointment of inspectors and section 180 provides that the chief executive must give each inspector an identity card that must be returned when the person ceases to be an inspector.

Section 181 protects officials from civil liability under the common law when they do something, or fail to do something, honestly and without negligence. In these circumstances the civil liability that would have attached to the individual officer will attach to the Territory.

PART 9 WORK SAFETY COUNCIL

Part 9 establishes the Work Safety Council. Currently, the OHS Act establishes the Occupational Health and Safety Council. The Work Safety Council is essentially the same body with a new name. The provisions have largely been reproduced.

Sections 189 and 190 in relation to disclosure of interest has been included to bring the Council provisions into line with other ACT legislation.

Question 51: Is the name of the Work Safety Council appropriate and are the provisions adequate?

PART 10 WORK SAFETY COMMISSIONER

Part 10 establishes the Work Safety Commissioner. Currently, the OHS Act establishes the Occupational Health and Safety Commissioner. The Work Safety Commissioner is essentially the same position with a new name and streamlined functions. The provisions have largely been reproduced.

Question 52: Is the name of the Work Safety Commissioner appropriate and are the provisions adequate?

PART 11 CHIEF EXECUTIVE AND COMMISSIONERS REPORTS

Part 11 reproduces provisions from the OHS Act in relation to the chief executive and commissioner reporting requirements to the Legislative Assembly.

The chief executive and commissioner must each produce two reports to the Legislative Assembly each year.

PART 12 INFORMATION AND EVIDENCE

Part 12 deals with matters including the protection of information obtained under the legislation and evidentiary presumptions in proceedings for offences against the Act.

Section 210 reproduces the current secrecy provision in the OHS Act but enables the sharing of information between inspectors who exercise functions under different Acts, for example the *Workers Compensation Act 1951* and the *Dangerous Substances Act 2004*. Relevant acts will be prescribed by regulation.

Section 215 requires the chief executive to publish information about the approval of codes of practice such as the date the approval takes effect and the location where copies may be purchased or inspected.

PART 13 PROCEEDINGS AND LIABILITY

Part 13 deals with proceeding and liability matters for offences against the legislation.

Section 216 deals with the acts and omission of representatives.

Sections 217 and 218 create a statutory right to registered unions to prosecute offences under the legislation. Section 217 provides that a prosecution for a safety duty offence or any other offence prescribed by regulation may be begun by the secretary of a registered union.

In the ACT the decision to prosecute ordinarily rests with the Director of Public Prosecutions, on advice from the regulator. However, under the common law citizens are able to commence prosecutions in the ACT. A citizen is able to prosecute a summary offence (i.e. an offence punishable by imprisonment for one year or less) until completion. However, a citizen may only prosecute an indictable offence during the committal stage and if the matter is referred to trial the Director of Public Prosecutions must elect to take over or the matter is discontinued.

The statutory right proposed by the exposure draft will be in addition to the common law right that currently allows a union and anyone else to commence prosecutions on these terms.

Subsection 217 (3) provides that the Director of Public Prosecutions may take over a union initiated prosecution at any time, with or without the consent of the union. If the Director of Public Prosecutions takes over the proceeding, the Director may continue to conduct the proceeding on behalf of his or her own office or continue on behalf of the union or stop the proceedings altogether.

If the Director of Public Prosecutions is considering, or takes over a proceeding the union is required to hand over all information they have in relation to the proceedings such as witness statements and any other information the Director requires.

Section 218 gives the Court a very broad discretion in relation to the payment of penalties in a successful union initiated prosecution. The Court may order the person to pay all or part of the penalty to a person other than the Territory. This could include the union that initiated the prosecution, or it could be another body such as the Work Safety Commissioner. In making this order, the court may also impose conditions in relation to the penalty, for example, if the penalty is provided to the Work Safety Commissioner the Court may order the Commissioner to use the funds for a specific work safety education campaign.

Question 53: What other offences, if any, should the union right to prosecute apply to?

Question 54: Is the statutory union right to prosecute offences under the Bill appropriate?

Question 55: What changes, if any, should be made to the provisions?

Section 219 deals with criminal liability of corporation officers. The proposed officer liability provision exists in other ACT (e.g. the *Dangerous Substances Act 2004*) and interstate legislation. It is an extension of the corporate criminal responsibility provisions in the *Criminal Code 2002* and only applies in specific circumstances, where the officer:

- a) was reckless as to whether the breach would occur;
- b) was in a position to influence the conduct of the corporation; and
- c) failed to take reasonable steps to influence the conduct of the corporation.

All elements of the offence must be proved beyond all reasonable doubt. For recklessness, the officer must have been aware of a substantial risk that the breach would occur and having regard to the circumstances known to the officer, it was unjustifiable to take the risk.

Subsection 219 (4) also provides additional requirements for the Court to consider in deciding whether the officer took (or failed to take) reasonable steps to prevent the contravention.

Sections 220 and 221 reproduce the current OHS Act provisions in relation to the publication of convictions, otherwise known as ‘naming and shaming’ provisions. These provisions enable the chief executive to publish details of convictions and findings of guilt for breaches of the legislation, and the courts to order persons convicted or found guilty to publish a statement in relation to the offence. These measures are designed to provide a further disincentive to commit an offence against the Act.

Question 56: Do the naming and shaming provisions remain relevant? Do they unduly trespass on rights or business operations in the Territory? And, if so, how can the provisions be improved?

Section 223 contains a standard provision about the order of costs and expenses in proceedings against the legislation.

PART 14 MISCELLANEOUS

Part 14 deals with some standard miscellaneous matters for the exposure draft.

Section 226 provides that a notice under the legislation may be made via email. However people are encouraged to request receipts for any notices made in electronic form.

Section 227 reproduces the current prohibition on contracted out obligations under the legislation. A fundamental principle in work safety law is that duties of care and obligations cannot be delegated. Further, agreements cannot purport to limit or remove a duty held in relation to work safety matters.

Section 228 enables the Minister to determine fees for the Act and section 229 enables the Minister to approve forms. Section 230 is the regulation making power. The maximum penalty for offences contained in the regulations has been increased from 10 penalty units to 30 penalty units in recognition of the serious nature of work safety breaches (note that a penalty unit is \$100 for an individual and \$500 for a corporation). The Minister is still required to consult the Work Safety Council on the content of regulations before they are made.

Question 57: Is the maximum penalty for offences in the regulations adequate?

DICTIONARY

The dictionary contains the meaning of terms used throughout the exposure draft.

Work Safety Bill 2008: Exposure Draft

SUBMISSION

**All submissions will be made publicly available.
Submissions must be received by close of business Monday 21 July 2008.**

Email: worksafety@act.gov.au

Mail: Work Safety Bill 2008: Consultation
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Name:

Organisation:

Postal Address:

Contact (phone/email):

OPENING COMMENTS:

Question 1: Are the short and long titles for the Bill appropriate? If not, why not, and what title would you prefer?

PART 1 PRELIMINARY

General comments on Part 1:

Question 2: What lead time is preferred for implementation of the legislation, for example, six months, 12 months, and why?

PART 2 OPERATION OF ACT

General comments on Part 2:

Question 3: Are the objects and principles for the legislation appropriate?

Question 4: Is the definition of work safety appropriate, and in particular, the use of the term 'wellbeing'?

Question 5: is the definition of risk appropriate, if not, why not?

Question 6: Is the definition of worker appropriate?

Question 7: Is the coverage of volunteers appropriate? Are there types of volunteers that should not be covered?

Question 8: Would the proposed coverage of volunteers impose any undue burden on the operation of any organisations in the Territory?

Question 9: Is the definition of employer appropriate?

Question 10: Is the concept of business or undertaking appropriate?

Question 11: Is the concept of risk management appropriate for inclusion in the legislation, and is the concept sound?

Question 12: Should provision be included to modify the hierarchy of control requirement to allow a departure if it is reasonable to do so in the circumstances? If so, what precautions should be put in place, for example, additional record keeping?

Question 13: Is this guidance on reasonably practicable sufficient?

Question 14: Is the explanation of overlapping duties clear enough?

Question 15: Is the reach/extent of a duty clear enough? If not, how could they be made clearer?

Question 16: Are the principles for complying with the legislation sound?

Question 17: Is the process in the exposure draft to approve codes of practice sufficient?

Question 18: Is the proposed evidentiary status for codes of practice appropriate?

PART 3 WORK SAFETY DUTIES

General comments on Part 3:

Question 19: Is the general safety duty for a person in control of a business or undertaking appropriate?

Question 20: Is the general safety duty for a person in control of premises appropriate?

Question 21: Is the general safety duty for a person in control of plant or systems appropriate?

Question 22: Is the general safety duty for a person in control of design of plant or structures appropriate?

Question 23: Is the general safety duty for a person in control of manufacture, construction or commission of plant or structures appropriate?

Question 24: Is the general safety duty for a person in control of import or supply of plant or structures appropriate?

Question 25: Is the general safety duty for workers appropriate?

Question 26: Is the general safety duty for other people at a workplace appropriate?

Question 27: Are the offences and penalties for breaches of the safety duties appropriate. If not, what changes should be made?

Question 28: Are the notification of serious events provisions appropriate? Can they be streamlined further or should they cover more situations?

Question 29: Are the preservation of site provisions appropriate? What further improvements could be made?

Question 30: Are the additional protections for workers appropriately framed?

Question 31: Does the inclusion of the reverse onus of proof impose an unreasonable burden on people in control of workplaces? If so how, and what options are there to address this?

PART 4 WORKPLACE ARRANGEMENTS

General comments on Part 4:

Question 32: Is the concept of a worker consultation unit relevant or appropriate? Is it an effective way of ensuring consultation? If not, what do you suggest as an alternative?

Question 33: Do the parameters for the worker consultation units have enough flexibility?

Question 34: Does the inclusion of businesses with under 10 employees in the duty to consult and the establishment of a worker consultation unit, impose an unreasonable burden on small business? If so how? What other options are there to ensure all workers are consulted on work safety matters in small business?

Question 35: Is the range of choice for consultation appropriate? Should particular sectors be more directed?

Question 36: Are the requirements of subsection 52 (3) too onerous for small business? Should the subsection be restricted to businesses that meet prescribed thresholds, for example, more than 20 workers or worker consultation units with more than 20 workers?

Question 37: Are the provisions on what constitutes meaningful consultation appropriate? If not, how could they be made clearer or more effective?

Question 38: Is the role of an HSR appropriate? If not, what should it be?

Question 39: The regulations for HSRs will be released at a later stage for consultation. However, in the interim, feedback on the proposed regulations as outlined above is welcome.

Question 40: Is the role of an HSC appropriate? If not, what should it be?

Question 41: The regulations for HSCs will be released at a later stage for consultation. However, in the interim, feedback on the proposed regulations as outlined above is welcome.

Question 42: Should a timeframe for the production of documents be included? If so, what is an appropriate timeframe?

PART 5 ENFORCEMENT POWERS

General comments on Part 5:

Question 43: Do the enforcement powers remain relevant?

Question 44: Are any further improvements required to the enforcement powers?

Question 45: Do the enforcement powers unduly trespass on rights or business operations in the Territory?

PART 6 COMPLIANCE MEASURES

General comments on Part 6:

Question 46: Do the compliance measures remain relevant?

Question 47: Are any further improvements required to the compliance measures, including additional measures?

Question 48: Do the enforcement powers unduly trespass on rights or business operations in the Territory?

Question 49: Are the public sector workplace compliance measures appropriate?

Question 50: Should the public sector workplace compliance measures be further strengthened? If so, how?

PART 7 ADMINISTRATIVE REVIEW OF DECISIONS

General comments on Part 7:

PART 8 ADMINISTRATION

General comments on Part 8:

PART 9 WORK SAFETY COUNCIL

General comments on Part 9:

Question 51: Is the name of the Work Safety Council appropriate and are the provisions adequate?

PART 10 WORK SAFETY COMMISSIONER

General comments on Part 10:

Question 52: Is the name of the Work Safety Commissioner appropriate and are the provisions adequate?

PART 11 CHIEF EXECUTIVE AND COMMISSIONERS REPORTS

General comments on Part 11:

PART 12 INFORMATION AND EVIDENCE

General comments on Part 12:

PART 13 PROCEEDINGS AND LIABILITY

General comments on Part 13:

Question 53: What other offences, if any, should the union right to prosecute apply to?

Question 54: Is the statutory union right to prosecute offences under the Bill appropriate?

Question 55: What changes, if any, should be made to the provisions?

Question 56: Do the naming and shaming provisions remain relevant? Do they unduly trespass on rights or business operations in the Territory? And, if so, how can the provisions be improved?

PART 14 MISCELLANEOUS

General comments on Part 14:

Question 57: Is the maximum penalty for offences in the regulations adequate?

OTHER COMMENTS: