Office use only
Registration number:
Received by:

Submission from Chartered Secretaries Australia

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

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Members of CSA have a thorough working knowledge of directors' and officers' duties and the Corporations Act 2001 (Commonwealth) (the Corporations Act), and many are themselves officers as defined in the Corporations Act. Our members are all involved in corporate administration, governance and compliance with corporate obligations under the Corporations Act and the Australian Securities Exchange (ASX) Listing Rules, with substantial knowledge of a great variety of legislative frameworks.

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer*' duties under the model Act?
CSA commends Work Safe Australia for including the definition of 'officer' to include those persons who influence or make decisions that affect the whole, or a substantial part of the body. This definition clearly captures those individuals who should have duties under the model Act and will apply to those with direct accountability for OH&S matters. CSA believes that the guiding principle for the 'chain of responsibility' should be that all those who exercise control over conduct affecting

compliance have responsibility and are made accountable for failing to discharge their responsibility, subject to those persons having accepted their responsibilities and been given the necessary delegated authority, and adequate budgetary and other resources.

In 2005, CSA responded to an inquiry conducted by the Corporations and Markets Advisory Committee (CAMAC) on extending corporate duties below board level. At that time, CSA noted that, in principle, it supports extending the personal duties and liabilities under the Corporations Act beyond directors and other officers. CSA continues to hold the view that there is a gap in liability below board level. The current law on the liability of senior managers that are not classified as officers is unclear. Any legal regime for the enforcement of corporate governance standards that does not include the acts or omissions of at least some categories of senior managers that are not classified as officers will not be as effective as it should be.

CSA recognises that extending corporate duties below board level should bring about better accountability in relation to OH&S matters. CSA believes that an exposure to liability based on a functional model which extends the category of persons facing the liability into the senior management range could produce an enhanced sense of responsibility and accountability in corporate decision making. CSA is of the view that the definition used in the model Act will enhance the effectiveness of OH&S programs. Risk management and compliance systems introduced by companies are likely to be more meaningfully executed if some degree of direct liability rests with those persons responsible for their design, implementation and ongoing management. It will also give more meaning to the law's move towards effective protection for whistleblowers.

CSA strongly believes that directors should continue to be responsible for the oversight of corporations. In other words, they are responsible for the strategy and objectives of a corporation and for monitoring the activities of management in pursuit of those objectives. Notwithstanding this, CSA notes the desirability of extending certain liabilities so that they attach to executives with corporate functional responsibility. This is a cornerstone of good governance, with responsibility and accountability aligned.

However, CSA also notes that an extension of liability to include those persons who influence or make decisions that affect the whole, or a substantial part of the body, will not eliminate the board's responsibility to set appropriate policies and review their effectiveness regularly. Indeed, it is important that individuals have authority to make decisions in local settings and the budget to sustain those decisions so that individuals will not be liable simply because they are carrying out functions nominated by senior managers, but without either the authority or resources to do so. Notwithstanding this, if individuals are carrying out functions that are not authorised, then they should be held liable.

CSA believes that personal liability for any breach of OH&S legislation should attach to the person whose acts or omissions caused the breach, rather than to directors only. Limiting the scope of derivative liability to directors may thwart safety efforts in corporations, as those responsible for particular worksites or groups of employees do not necessarily take 'ownership' of the safety obligations. Those managers charged and

authorised with particular OH&S responsibility (for example, mine managers, ship captains) are in a far better position than directors to have an understanding of the hazards and risks associated with those operations. They should be accountable for the effective management of the site-based hazards and risks. Accountability for systemic or policy failures should rest with those responsible for oversight of the effectiveness of the systems: directors and executives. Indeed, this reflects the position under most current state OH&S legislation.

CSA notes that officers as defined in the Corporations Act does not capture all those with delegated authority and adequate resources who may hold responsibility and agrees that this was not the appropriate definition of 'officer' to use. For example, the Corporations Act definition of officers would have extended personal liability for breaches of OH&S laws to company secretaries, who are also 'officers' as defined in the Corporations Act. Under current OH&S legislation, at both state and federal levels, company secretaries are not personally liable for breaches of OH&S legislation. This is because, in many companies, company secretaries do not have the same oversight role as directors, nor any authority over OH&S matters. In large listed public companies the responsibilities of company secretaries often include driving and advising on best practice in corporate governance and appropriate governance frameworks; and bridging the interests of the board or governing body, management and stakeholders, such as shareholders. However, company secretaries in large listed public companies usually have no direct operational responsibility and, therefore, no authority to implement or monitor OH&S standards or practices. In smaller companies (listed, unlisted, private and not-for-profit), company secretaries may hold additional responsibilities to those outlined above. These may include responsibility for a range of operational issues, such as finance, general insurance, superannuation, taxation and OH&S. However, of itself, the role of company secretary as an officer under the Corporations Act is not a guide to whether the company secretary has additional operational responsibilities, or commensurate authority for OH&S matters in relation to those responsibilities.

Q3.	There is some overlap between the definitions of 'plant' and 'structure', as many types of plant have structural attributes, and vice versa. Should 'plant' and 'structure' be defined in a way that removes this overlap?
Q4.	Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?

Office use only
Registration number:
Received by:

Q5.	Is the scope of the suppliers' duty appropriate?
Q6.	Is the scope of the '*worker*' definition appropriate? Should it cover students gaining work experience?
Q7.	Is the definition of '*workplace*' appropriate?
Part 2 – Safety Duties	
Q8.	Do the principles that apply to the duties of care give clear guidance on what is expected?
Q9.	Is the definition of '*reasonably practicable*' appropriate in this context?

CSA believes that OH&S protection is an essential component of a risk management system. Organisations should develop and implement a risk management system that is:

- fit for purpose (as the requirements of particular organisations and particular industries will differ)
- documented
- regularly reviewed.

Organisations need to ensure that they diligently assess and monitor OH&S risks. The concept of 'reasonably practicable' is important in giving regard to the type and appropriateness of a risk management system that any particular organisation has put in place, that is, its fitness for purpose.

CSA notes that 'reasonably practicable' is a well understood concept in common law countries and has been the subject of considerable guidance and case law. It embodies an objective standard which has broad community acceptance. General duties that are limited by what is 'reasonably practicable' make it clear to duty holders about the extent of their duties and what is expected of them.

CSA supports the definition contained in the Exposure Draft of the model OH&S Act, in determining what is 'reasonably practicable' in ensuring health and safety:

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what the person knows, or ought reasonably to know about the hazard and the risk and ways of eliminating or minimising the hazard or the risk
- the availability and suitability of ways to eliminate or minimise the hazard or the risk
- the cost of eliminating or minimising the hazard or the risk.

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

CSA strongly opposes providing an exhaustive definition of reasonably practical, as what is reasonable and practicable will vary from organisation to organisation and industry to industry. For example, the hazards and risks a company such as BHP Billiton faces will be substantially different from those faced by a solicitor's office.

CSA does not believe that it is feasible to define in black-letter law a risk management system that is applicable to all organisations and strongly opposes the inclusion of any definition of risk management in the model OH&S Act. CSA supports the approach taken in the Exposure Draft.

Organisations need to be able to show that they have undertaken a risk assessment process that has regard to these determinants, and also undertaken reasonable precautions and due diligence. A smaller organisation may not have implemented a full risk management framework but could still have risk management processes in place and regard needs to be had to such processes and their applicability to the circumstances of the organisation.

CSA also notes that having in place a fit-for-purpose risk management system that is documented and regularly reviewed should be able to be

used as a defence if an accident or injury occurs. In such circumstances, being able to set out the risk management system in place will also assist insurers in deciding if an OH&S policy applies.	
Q11.	Is the proposed scope of the primary duty appropriate?
Q12.	The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?
Q13.	The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (Clause 18(4)(e)). Should this provision be drafted to require 'access to' such facilities (e.g. to take account of requirements for mobile workplaces)?
Q14.	Is the scope of the duties related to specific activities appropriate?
Q15.	In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?

Office use only
Registration number:
Received by:

Q16.	Is the treatment of volunteers under the model Act appropriate?
Q17.	Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?
Q18.	What should the maximum penalty be for a contravention of the model regulations?
Q19.	The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?

CSA strongly believes that criminal consequences should only flow from egregious behaviour, that is, behaviour which meets the elements of intentionality, recklessness or fraudulence.

On this basis, CSA recommends that criminal liability should only apply where recklessness or intentionality as to the likelihood of the company's contravening conduct occurring can be proved, and where the officer failed to take reasonable steps to prevent the conduct. CSA opposes having all contraventions of the model Act be criminal offences.

Our recommendations relate to the fact that, while still placing a significant burden on directors and executives to do the right thing, a framework as recommended by CSA would provide more certainty for those individuals subject to derivative liability than the tenuous link

between 'crime' and punishment that exists currently. For example, a failure to display a list of the health and safety representatives at the workplace should not attract the same liability as an act of reckless and intentional failure to provide adequate protective clothing or infrastructure on a dangerous work site. CSA recommends that some non-duty of care offences should be subject to civil sanctions.

Moreover, extending liability beyond directors to those persons who influence or make decisions that affect the whole, or a substantial part of the body, clarifies why it is important not to have all contraventions attract criminal offences, as only persons who have acted criminally should be held criminally liable.

Part 3 – Other Obligations

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

Part 4 – Consultation, participation and representation

Q21. Is the proposed scope of duty to consult workers appropriate?

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

Q23. Clause 49 allows work groups to be determined for workers engaged in 2 or more businesses or undertakings. Should such arrangements be by agreement only, i.e.with no prescribed procedure if negotiations fail?

Office use only
Registration number:
Received by:

Q24.	Negotiations for work groups must be commenced within a '*reasonable time*'. Should a time limit be prescribed e.g. 14, 21 or 28 days?
Q25.	Elections for HSRs and possibly deputy HSRs must be conducted '*as soon as reasonably practicable*' after the relevant work groups are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?
Q26.	The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?
Q27.	The model Act requires that a health and safety committee be established within 2 months of the request being made. Six of the current OHS Acts include such a timeframe, which varies across jurisdictions from 3 weeks to 3 months. Is the proposed time limit of 2 months appropriate?
Q28.	The *Fair Work Act 2009* (Cth) (Fair Work Act) refers to ceasing work on the basis of a 'reasonable concern' of the employee about an imminent risk to his or her health and safety, while the model Act refers to 'reasonable grounds'. Should the terminology in clauses 75 and 76 be aligned with the Fair Work Act?

Office use only
Registration number:
Received by:

Q29.	Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?
Q30.	Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?
Q31.	A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?
Part 5 – Protection from Discrimination	
Q32.	Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?
Part 6 – Workplace entry by OHS entry permit holders	
Q33.	Are the notification requirements appropriate?

Office use only
Registration number:
Received by:

Q34.	Should the model Act contain a specific authorisation process for an OHS entry permit or can it rely on authorisation obtained under other Acts such as the Fair Work Act?
Q35.	Should contraventions of this Part attract criminal or civil sanctions? If civil sanctions are considered appropriate, should penalty levels reflect those that apply under the Fair Work Act?
Q36.	The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS, rather than in relation to workplace relations?
Part 7 – The Regulator	
Q37.	Should guidelines have any other particular legal status under the Act?
Part 10 – Review of Decisions	
Q38.	Is the list of reviewable decisions appropriate?

Office use only
Registration number:
Received by:

Q39.	Are the processes and timeframes prescribed for the internal review of decisions appropriate?
Q40.	Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?
Exposure Draft of Key Administrative Regulations	
Q41.	Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
Do you have any other comments?	