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## 9 Worker consultation, participation and representation

### Key points

- In 2008-09, differences in requirements for electing health and safety representatives (HSRs) which made a difference in regulatory burdens across jurisdictions included:
  - Tasmania provided for one HSR per workplace, whereas all other jurisdictions (without necessarily precluding one HSR per workplace) provided for multiple HSRs in a workplace, thereby potentially imposing higher burdens
  - in Tasmania, the Northern Territory and the ACT, businesses with less than 10 employees were exempt from the HSR requirements.
- All jurisdictions required employers to be responsible for the costs of training HSRs, although the Commonwealth, New South Wales and Tasmania were the only jurisdictions where the training was compulsory in 2008-09.
  - Based on a limited sample, the costs of initial HSR training courses were found to range from \$495–615 (New South Wales) to \$550–1340 (Western Australia). The estimated average cost of providing paid leave to HSRs who attend such training ranged from \$710 (Queensland) to \$1183 (the Commonwealth, Victoria, South Australia and Western Australia).
- Employers with less than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory were exempt from the duties relating to health and safety committees (HSCs) and so did not face any regulatory burden from HSC requirements. Employers with less than 50 employees under the Commonwealth regime were also exempt.
- New South Wales and the Northern Territory placed the highest number of duties on employers in relation to HSCs. The single duty of employers in Queensland, Victoria and Western Australia, not to discriminate against HSC members, was unlikely to create a material burden for business.
- As at June 2009, the Commonwealth, South Australia, and Tasmania were the only jurisdictions not to provide union right of entry to workplaces to investigate possible breaches of occupational health and safety (OHS) regulations.
- Union right of entry can impose a burden on business where it results in a duplication of inspections (duplicating those of the relevant regulator), lost worker time arising from the discussion of OHS issues with union representatives and misuse of powers. However the presence of authorised union representatives in workplaces can provide a means of monitoring OHS compliance in circumstances where the capacity and resources of regulators are limited. Studies have shown that union presence can lead to improved OHS performance.

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The participation of workers, and the representation of their interests, in matters of occupational health and safety (OHS) are an important driver of OHS outcomes (Stewart-Crompton, Mayman and Sherriff 2009). In Australia, this participation and representation is promoted by provisions relating to health and safety representatives (HSRs — box 9.1), health and safety committees (HSCs) and employee representative organisations (trade unions) within the OHS laws of the Commonwealth, states and territories. However, the Commonwealth, states and territories differ in their OHS provisions regarding HSRs (sections 9.1 and 9.3), HSCs (section 9.2 and 9.3) and trade unions (section 9.4).

**Box 9.1 What are HSRs?**

HSRs are elected by their co-workers to represent them on OHS issues in the workplace. HSRs have varying powers depending upon the jurisdiction in which they are acting as an HSR.

Once elected, an HSR continues to perform his/her normal duties as an employee and typically receives no additional remuneration for the HSR role. HSRs are not paid OHS officers or advisers of the employer. In the normal course of business, the principal cost to the employer of an HSR is the time spent away from their regular duties for HSR training and for fulfilling their responsibilities as an HSR.

HSRs, HSCs and trade unions were considered in the *National Review into Model Occupational Health and Safety Laws: Second Report* (Stewart-Crompton, Mayman and Sherriff 2009). Where relevant, the details of the recommendations of that review, along with the response of the Workplace Relations Ministerial Council (WRMC) and details of the relevant model work health and safety provisions (as amended in December 2009), have been included throughout this chapter to provide context to the benchmarking results.

A significant portion of the workforce is directly engaged as either an HSR or HSC member — a survey of Victorian employees showed that six per cent were HSRs and eight per cent were sitting on an HSC (Keegel 2009). Given this level of participation, the burdens faced by businesses as a result of HSR and HSC requirements are likely to be material in aggregate. However, as HSRs and HSCs are not automatically mandatory requirements in any jurisdiction, not all businesses are subject to such burdens.<sup>1</sup> For those businesses where HSR and/or HSC provisions have been activated, the resultant burdens should be considered in light

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<sup>1</sup> Based on a survey of 1802 small and medium enterprises across Australia (Sensis Survey of SMEs 2009, unpublished), 82 per cent of small and medium enterprises did not incur any costs in relation to HSRs and/or HSCs for the 12 months to May 2009. The survey did not, however, capture any information on the proportion of SMEs that had HSRs or HSCs in their workplaces.

of the widely accepted importance of worker consultation and participation as a ‘necessary condition of the effective regulation of health and safety at the workplace’ (Maxwell 2004, p. 9).

Queensland employers in prescribed industries must appoint an officer (referred to as a workplace health and safety officer (WHSO)) for each of its workplaces with 30 or more employees. While these WHSOs may be used as a conduit for worker consultation (in a similar manner to HSRs), this is not their primary purpose. The role and regulatory burden associated with WHSOs is discussed in chapter 7.

## 9.1 Health and safety representatives

### Initiating the election process

In all jurisdictions, it is only once the HSR election process has been initiated that the obligation to have an HSR for a workplace arises. The process of electing an HSR can be initiated in three ways: the employee’s initiative; the employer’s initiative; or, a direction from a regulator (table 9.1).

**Table 9.1 Initiation of HSR election process**  
2008-09

	<i>Cwlth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Employee’s initiative	✓ <sup>a</sup>	✓	✓	✓	✓	✓	✓ <sup>b</sup>	✓ <sup>b</sup>	✓ <sup>b,c</sup>
Employer’s initiative		✓	✓	✓ <sup>d</sup>				✓	
Direction from regulator	✓ <sup>e</sup>	✓							

<sup>a</sup> An employee representative may initiate the request on behalf of ‘workers’ following the request of the workers. <sup>b</sup> Only for workplaces where there are 10 or more employees. <sup>c</sup> The exemption for workplaces with less than 10 employees ceased from 1 October 2009 with the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008. <sup>d</sup> ‘[W]orkers may elect a [HSR]... at their employer’s suggestion’ (*Workplace Health and Safety Act 1995* (Qld), s. 71). <sup>e</sup> The Safety, Rehabilitation and Compensation Commission can initiate the election of an HSR in certain circumstances.

Sources: Department of Education, Employment and Workplace Relations (Cwlth) (pers. comm., 7 January 2010); OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001).

In 2008-09, HSR requirements placed no burden on businesses with less than 10 employees in Tasmania, the Northern Territory and the ACT, as these businesses were exempt from the requirements. Aside from the Commonwealth and New South Wales, where the possibility of a regulator initiating an HSR election may create some uncertainty for business, there would be no differences in the burdens across the other jurisdictions.

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The National Review into Model OHS Laws recommended the model Act provide for the election of HSRs to be initiated by workers (Stewart-Crompton, Mayman and Sherriff 2009). This recommendation was accepted, in principle, by the WRMC (2009a) — there are no material differences between the WRMC’s response and the model work health and safety provisions (as amended in December 2009).

### **The area of representation and number of HSRs for a workplace**

After the process for electing an HSR has been initiated, the area of representation for the proposed HSR needs to be determined. In most jurisdictions, this area of representation is defined as a ‘work group’.<sup>2</sup> Work groups are typically established to allow HSRs to represent workers with similar functions within a workplace.<sup>3</sup> For example, in a manufacturing business, one work group may be comprised of secretarial and office staff, while another may be comprised of machine operators. As a workplace can be categorised into multiple work groups, those jurisdictions allowing for work groups (table 9.2) are, in effect, allowing for more than one HSR per workplace.

Victoria, South Australia, Western Australia and the ACT allow for the possibility of having more than one HSR per work group (table 9.2) — albeit in the form of deputy HSRs in Victoria, South Australia and the ACT. Where multiple HSRs are elected for a work group, the employer faces the cost of training and work time lost to HSR duties for each HSR — this is a potential burden that is not faced by businesses operating in jurisdictions that do not provide for multiple HSRs (per work group).

The Tasmanian regime for determining an HSR’s area of representation should place the smallest burden on business as it limits the number of HSRs to one per workplace (compared to other jurisdictions where there may be multiple work groups per workplace and/or multiple HSRs per work group).<sup>4</sup>

Delegate structures for consultation on work groups, such as that employed in Western Australia, might reduce the burden for employers as it reduces the number of contact points in the consultation process — especially compared to regimes that

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<sup>2</sup> Depending on the jurisdiction, work groups are also referred to as ‘worker consultation units’ and ‘areas of representation’. ‘Work groups’ is used throughout this chapter to collectively refer to HSRs’ areas of representation.

<sup>3</sup> If agreed by the employer and employees, a work group can be designated to cover all employees, thereby resulting in one HSR for the workplace.

<sup>4</sup> While there is no statutory provision for doing so, Tasmanian employers can voluntarily allow more than one HSR per workplace (WorkCover Tasmania 2004).

require consultation with workers/employees in general. The Victorian approach of negotiating over the consultation process could add a layer of bureaucracy (and cost) to the consultation process — however, an effective negotiation process might reduce the overall costs of consulting on the nature of work groups.

**Table 9.2 Determining an HSR's area of representation**  
2008-09

	<i>Provision for a work group (or equivalent)</i>	<i>Provision for more than one HSR per work group (or equivalent)</i>	<i>Parties/conditions for discussions about election of HSRs and formation of work groups</i>
Cwth	✓ <sup>a</sup>	x	Employer and employees or, at the employees' request, an employee representative
NSW	✓	np	Employer and employees <sup>b</sup>
Vic	✓	✓ <sup>c</sup>	To be determined by negotiation between the employer and workers
Qld	✓ <sup>d</sup>	np	Workers may request discussions with the employer
SA	✓	✓ <sup>c</sup>	Employer and any interested employees (or person appointed by those employees)
WA	✓ <sup>e</sup>	✓	Employer and the delegate(s) appointed by the workers
Tas	x	na	na
NT	✓	np	Employer(s) and workers who are to be members of the proposed group. Where the employer fails to commence consultation, the regulator may decide how the work group is to be constituted and establish the work group
ACT	✓	✓ <sup>c</sup>	Each union representing employees and, if there is no such union, as many employees as the employer considers appropriate <sup>f</sup>

na not applicable. np no provision. <sup>a</sup> The *Occupational Health and Safety Act 1991* (Cwth) provides that all employees may be included in one work group. <sup>b</sup> Under the *Occupational Health and Safety Regulation 2001* (NSW), an industrial employee organisation may, at the request of employees, represent those employees for the purposes of consultation on OHS consultative arrangements. <sup>c</sup> HSR and deputy HSR. <sup>d</sup> Employees may negotiate with their employer to elect more than one HSR for a workplace. <sup>e</sup> An election scheme may provide for the election of HSR(s) for any group of employees that constitute a distinct unit of the workforce. <sup>f</sup> This requirement changed to a duty to consult 'workers' from 1 October 2009 (the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008).

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001); WorkCover Tasmania (2004); WorkCover Tasmania (2009b).

The National Review into Model OHS Laws considered HSRs' areas of representation and the number of HSRs in workplaces — its recommendations, the WRMC's response and the relevant model work health and safety provisions are outlined in box 9.2.

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**Box 9.2 Areas of representation for HSRs and the number of HSRs in a workplace — recommendations from the National Review into Model OHS Laws**

In summary, recommendations 102 and 103 of the **National Review** were that workers should be grouped into work groups for the purposes of representation by HSRs. The nature and number of work groups should be determined by discussion between the workers (and any person authorised to represent them) and the person conducting the business or undertaking most directly engaged with the work group.

It also recommended that no limit should be placed on the number of HSRs that could be elected for a workplace and that such matters should be determined through discussions between the workers and the person conducting the business or undertaking most directly engaged with the workers (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed, in principle, with these recommendations.

The **model work health and safety provisions** (as amended in December 2009) provide that the person conducting the business or undertaking must ‘take all reasonable steps to commence negotiations with the workers within 14 days after a request is made’ for the election of an HSR.

## **Election requirements**

There are differences in the OHS laws of the jurisdictions relating to the election of HSRs. Some of the differences affecting the burden on business include:

- the Commonwealth’s *Occupational Health and Safety Act 1991* is the only OHS Act to explicitly require employers to bear the cost of running the HSR elections
- the Commonwealth, New South Wales, Queensland, Western Australia and Tasmania all provide for unions and/or industrial organisations having a role in running an HSR election. In contrast, the OHS inspector can be called upon to run an HSR election in Victoria
- the Commonwealth, Victorian and South Australian regimes do not require an election to be held where the number of candidates equals the number of vacancies (the legislation of other jurisdictions are silent on this point)
- the Tasmanian regime requires more than 50 per cent of employees to cast a vote in order for an HSR election result to be valid.

How HSR elections are run in practice may differ from the minimum requirements specified in legislation — for example, some employers may well cover the cost of an HSR election even though they are not bound to do so. While such arrangements

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may pose a cost to business, they are not costs that arise due to OHS regulation, but rather they arise due to the voluntary actions of business.

The National Review into Model OHS Laws considered the requirements for HSR elections — its recommendations, and the WRMC’s response, are outlined in box 9.3 (there are no material differences between the WRMC’s response and the model work health and safety provisions (as amended in December 2009)).

**Box 9.3 HSR elections — recommendations from the National Review into Model OHS Laws**

In summary, recommendation 104 of the **National Review** was that:

- HSRs should be elected by the members of the work group they will represent
- the members of the work group should determine how the election is conducted and they may request a union or other organisation assist in conducting the election
- no election should be required where the number of HSR candidates equals the number of HSR vacancies (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed, in principle, with these recommendations.

### **Term of appointment**

All jurisdictions prescribe a maximum term for HSR appointments. At the conclusion of an HSR’s term, an election is conducted to either reappoint the HSR or appoint a replacement. The shorter the HSR’s term of appointment, the more frequent are HSR elections and the associated potential disruption to the workplace (and lost output). When a new HSR is elected, the employer will also incur costs for the training of the replacement HSR (see below) and in building an effective working relationship with that HSR. On the other hand, more frequent elections allow ineffective HSRs to be replaced sooner, thereby potentially improving the effectiveness of the worker consultation and participation process.

Despite the differing merits of longer and shorter HSR terms, all jurisdictions, in 2008-09, had maximum terms of either two years (the Commonwealth,<sup>5</sup> New South Wales,<sup>6</sup> Queensland, Western Australia, the Northern Territory and the ACT) or three years (Victoria, South Australia and Tasmania). A three year term was recommended by the National Review into Model OHS Laws (Stewart-Crompton,

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<sup>5</sup> Under the Commonwealth regime, if a term of office is not specified in the arrangements of a designated work group, the term of office is two years.

<sup>6</sup> In New South Wales, an HSR is to be elected for a maximum period of two years (but the term of office may be shortened in connection with a change in OHS consultation arrangements).

Mayman and Sherriff 2009), agreed by the WRMC (2009a) and included in the model work health and safety provisions (as amended in December 2009).

## Powers

Each jurisdiction provides HSRs with certain powers to allow them to fulfil their role — table 9.3 outlines some of the key powers. Except in emergency circumstances, HSRs are typically able to exercise their powers only in relation to the work group they represent.

**Table 9.3 Selected powers of health and safety representatives**  
2008-09

	<i>Cwllth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Issue provisional improvement notices (PIN — box 9.4) or equivalent	✓	np	✓ <sup>a</sup>	✓ <sup>a,b</sup>	✓ <sup>c</sup>	✓ <sup>b</sup>	✓	✓	✓ <sup>d</sup>
Direct the cessation of work where it is unsafe	✓	np	✓	np	✓	np	✓	✓	✓ <sup>d</sup>
Request an inspector conduct an inspection	✓	✓	np	np	np	np	✓ <sup>e</sup>	np	np
Inspect a workplace	✓	np <sup>f</sup>	✓	✓	✓	✓	✓	np	✓
Accompany an inspector during an inspection	✓	✓	✓	np	✓	np	✓	np	✓
Accompany a worker during an OHS interview	✓	✓	✓	✓ <sup>g</sup>	✓	✓ <sup>h</sup>	✓	np	✓
Investigate/review an accident or dangerous occurrence (or inspect the workplace after such an occurrence)	✓	np <sup>f,i</sup>	✓	✓	✓	✓	✓	np	✓

**np** no provision. <sup>a</sup> An HSR may only issue the direction/PIN after consulting with the employer. <sup>b</sup> Exercisable by 'trained'/'qualified' HSRs only. <sup>c</sup> Can only be issued if the matter cannot be resolved by the HSC. <sup>d</sup> From 1 October 2009, an HSR may only exercise this power if they have completed the relevant training. <sup>e</sup> Only after consultation with the employer. <sup>f</sup> HSRs have the power to 'investigate any matter that may be a risk to health and safety' at the workplace. <sup>g</sup> Only for interviews related to workplace incidents. <sup>h</sup> Obligation on employers to allow the HSR to be present. <sup>i</sup> An HSR may be an observer at investigations related to an accident or dangerous occurrence.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001); WorkCover Tasmania (2009b).

The powers of HSRs have the potential to create a burden on business because of the things business must do to facilitate the exercise of a power and the consequences of exercising of a power. For example, with respect to an HSR's power to attend an OHS interview with an employee/worker, an employer may need to make all employees/workers aware that they can call on an HSR for this purpose and also, where such an interview is to take place, ensure it is undertaken at a time at which the HSR can attend.

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#### **Box 9.4 Provisional improvement notices (PINs)**

While a number of jurisdictions refer to PINs, the equivalent instruments are 'default notices' in South Australia, 'written directions' in Tasmania and a 'notice of safety hazard' in the Northern Territory.

Where they have the power, an HSR may issue a PIN where they believe a person at the workplace is breaching, or has breached and is likely to again breach, the relevant OHS Act or regulations. Before issuing a PIN, the HSR must first consult with the person(s) involved in the breach and attempt to rectify the problem (for those operating under the Commonwealth regime, the HSR must first consult with the supervisor of the person(s) involved in the breach).

The person to whom a PIN is issued may request an inspector review the circumstances surrounding the issue of the PIN and the inspector may either cancel or affirm (with or without modifications) the PIN. It is an offence not to comply with a PIN that has not been the subject of review by an inspector or that has been affirmed by an inspector.

*Sources: Occupational Health and Safety Act 1991 (Cwlth); Stewart-Crompton, Mayman and Sherriff (2009).*

HSRs have comparatively minor powers in New South Wales, the least of any jurisdiction, and so are likely to pose the lowest direct costs for business. These comparatively minor powers may be due, at least in part, to the primacy of HSCs over HSRs as the consultation mechanism for New South Wales workplaces.<sup>7</sup>

The cost to business of an HSR using his/her powers needs to be offset against the benefits such an exercise of powers creates. For example, where an HSR directs a cessation of work due to an unsafe environment, a business may benefit from the prevention of workplace injuries and the associated costs of: further workplace disruptions; possible regulatory investigations; and increases in workers' compensation premiums (to list but a few possible costs).

Similarly, the power of HSRs to issue a PIN (box 9.4) or equivalent notice potentially poses a significant burden for business — particularly should the power be abused.<sup>8</sup> However, the actions of a prudent HSR in issuing a PIN, or raising an OHS issue as a precursor to issuing a PIN, can result in OHS issues being addressed in a timely manner without the involvement of the regulator — an outcome that benefits both workers and employers. An Australian Council of Trade Unions'

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<sup>7</sup> Regulation 23 of the *Occupational Health and Safety Regulation 2001* (NSW) provides that 'OHS consultation arrangements that include both an [HSC] and an [HSR] for a work group must ensure that the [HSC] is the principal mechanism for consultation for that work group'.

<sup>8</sup> The ability of employers to remove an HSR from office (discussed below) is an important means by which they can protect themselves from the costs of HSRs that abuse their power.

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(ACTU) survey of HSRs found that while only 10 per cent of HSRs had issued a PIN, 95 per cent of those issuing a PIN said it was effective in addressing the underlying OHS issue (ACTU 2002).

The recommendations of the National Review into Model OHS Laws on the powers that should be provided to HSRs in the model Act are outlined in box 9.5. There are no material differences between those recommendations and the model work health and safety provisions (as amended in December 2009)).

**Box 9.5 HSR powers — recommendations from the National Review into Model OHS Laws**

In summary, recommendations 106 and 109 the **National Review** were that HSRs should have the rights and powers to:

- inspect the workplace (either after giving reasonable notice or immediately after a workplace incident or situation involving an OHS risk), investigate OHS complaints, accompany an inspector during an inspection and request an inspector's assistance
- be present with a member of their work group during an OHS interview
- receive information affecting the OHS of workers and enquire into anything that appears to be an OHS risk to their work group
- request the establishment of an HSC, represent the members of the work group on OHS matters and monitor the OHS measures implemented in the workplace
- issue a PIN and direct that work cease where there is an immediate OHS threat.

It also recommended that HSRs' rights, powers and functions be limited to the work group they represent, unless: under certain conditions, a member of another work group requests an HSR's assistance; or, there is an immediate risk to health or safety that affects or may affect another work group and the HSR (and any deputy HSR) for that other work group is not available (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed, in principle, with these recommendations.

## Training requirements

The OHS laws of all jurisdictions include provisions for HSR training. However, the training is compulsory only under the Commonwealth, New South Wales and Tasmanian regimes.<sup>9</sup> In the other jurisdictions, an employer is to arrange training if it is requested by the HSR. Table 9.4 compares the obligations of employers and estimates of some of the costs they incur in respect to HSR training.

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<sup>9</sup> From 1 October 2009, training was also compulsory in the ACT under the *Work Safety Regulation 2009* (ACT).

**Table 9.4 HSR training — employer obligations and cost estimates**  
30 June 2009

	<i>Cwlth</i> <sup>a</sup>	<i>NSW</i>	<i>Vic</i> <sup>b</sup>	<i>Qld</i>	<i>SA</i> <sup>b</sup>	<i>WA</i>	<i>Tas</i>	<i>NT</i> <sup>b</sup>	<i>ACT</i>
Training to be provided	✓	✓	✓ <sup>c</sup>	✓ <sup>c</sup>	✓ <sup>c</sup>	✓ <sup>c</sup>	✓	✓ <sup>c</sup>	✓ <sup>c,d</sup>
Refresher training to be provided	np	np	✓ <sup>c</sup>	✓ <sup>c</sup>	✓ <sup>c</sup>	np	✓ <sup>e</sup>	✓ <sup>c</sup>	np <sup>d</sup>
Employer to meet course costs	✓ <sup>f</sup>	✓	✓	✓	✓	✓	✓ <sup>f</sup>	✓	np <sup>d</sup>
Lowest estimated course cost (per employee including GST)	\$690	\$495	\$715	\$500	\$580	\$550	\$770	ul	\$550
Highest estimated course cost (per employee including GST)	\$879	\$615	\$1 250	\$645	\$820	\$1 340			\$593
Paid leave to attend training	✓	✓	✓	✓	✓	✓	✓ <sup>g</sup>	✓	✓
Number of days training	5 <sup>h</sup>	4	5	3	5	5	4	ul	4
Time cost <sup>i</sup>	\$1 183	\$946	\$1 183	\$710	\$1 183	\$1 183	\$946	ul	\$946

**np** no provision. **ul** unable to locate. **a** Training must be accredited by the regulator. **b** Training course must be approved (or conducted) by the regulator. **c** Only if requested by the HSR / is an HSR entitlement. **d** From 1 October 2009, this training was compulsory in the ACT under the *Work Safety Regulation 2009* (ACT) and employers were obligated to meet the cost of the training course. **e** Only if elected to a second term as an HSR. **f** While not contained in legislation, the regulator's guidance material indicates that, because the training is compulsory, the costs of that training are the employer's responsibility. **g** Training is to take place during normal work hours. **h** One provider offers a 3½ day course. **i** Based on full-time adult ordinary time earnings (ABS 2009) for February 2009.

*Sources:* AES (2009); AIM (2009); AITT (2009); ASLS (2009b); ACHS (2009); Business SA (2009); CCIQ (2009); Easy HR (2009); IPM (2009); Job Safety Assistance (2009); Stewart-Crompton, Mayman and Sherriff (2009); NSCA (2009a, 2009b and 2009c); Recovre (2009); SA Unions (2009); SDA Training Centre (2009); SIAG (2009); SRCC (2008); VECCI (2009); WorkCover Tasmania (2009b); Workwatch (2009).

The costs in table 9.4 relate to the costs of the training course and lost work time only, and do not include costs such as travel, accommodation and incidental expenses (such as meal allowances). These costs were excluded as it is problematic to determine typical costs for a business. For example, travel and accommodation costs will vary based on factors such as a business' distance from training centres and internal policies on travel and accommodation — a business located in a capital city may incur nominal travel and accommodation costs in having their HSRs trained, whereas the travel and accommodation costs for a rural business may be quite high, especially if training is only available in the state/territory capital.

The course costs in table 9.4:

- are premised on the assumptions that:
  - the training is for newly elected HSRs in their first year of office
  - the employer is not a member of any group (such as a Chamber of Commerce and Industry) and so is not entitled to any discounts on training fees<sup>10</sup>

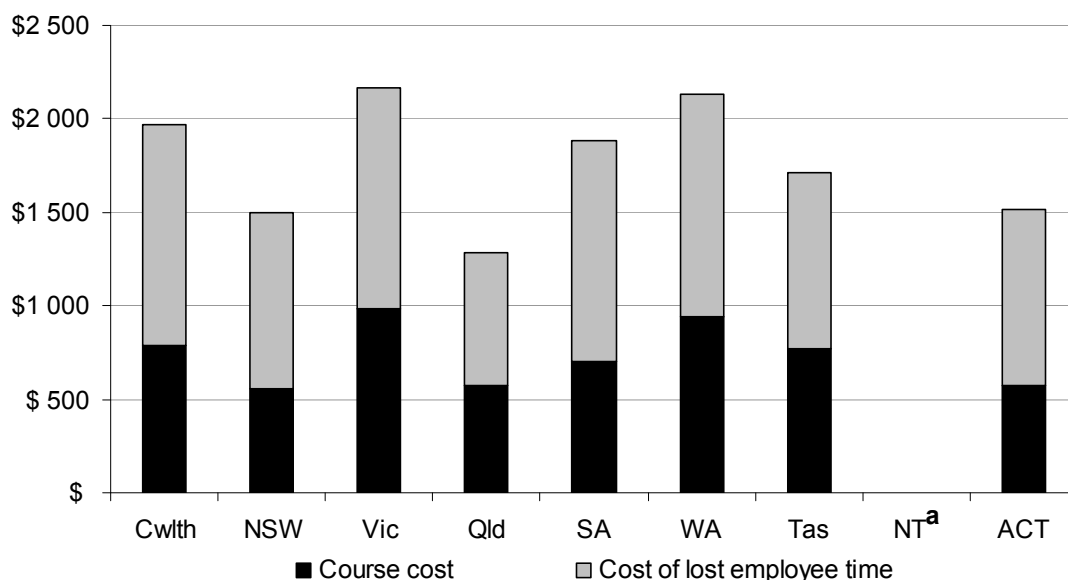
<sup>10</sup> Depending upon the organisation of which they are a member, employers can obtain discounts of up to 18 per cent of the cost of a training course by virtue of their membership.

- were those that could be obtained from the websites of OHS training providers. As such, they may not represent the full range of course costs — that is, there may be higher and lower course costs applicable in each jurisdiction.

Queensland employers potentially face the least cost (per HSR) from HSR training requirements and Victorian employers face the highest cost (figure 9.1). The difference in cost between the two is less than \$1000 per HSR and the costs are contingent on training being requested by an HSR.

**Figure 9.1 Estimates of the cost of HSR training — course costs and paid leave**

Based on mid-point of minimum and maximum course costs (table 9.4)



<sup>a</sup> No data available to support estimates for the Northern Territory.

Data source: Table 9.4.

South Australia is unique among the jurisdictions in placing a specific obligation on employers to reimburse HSRs for any reasonable expenses incurred in attending HSR training, including the costs associated with travel, meals, accommodation and parking fees. However, SafeWork SA subsidises HSR training (as well as training for HSC members) for certain employers. For example, employers (except self-insured employers) within specific high risk industries, specific high risk occupations and small businesses may be eligible for subsidies of up to \$100 per HSR per day of training. Subsidies are assessed on a case by case basis for new and expanding industries, as well as those located wholly or predominantly in non-metropolitan areas (South Australian Government, pers. comm., 9 December 2009).

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While business may face a burden from the requirements to provide HSR training, it also benefits from having trained HSRs. For example, a number of studies (Johnstone, Quinlan and Walters 2004; Walters 1997; Walters, Kirby and Daly 2001) show that well-trained HSRs (or equivalent) are effective in improving OHS outcomes, including a reduction in injuries and the economic costs associated with those injuries (James and Walters 2002).

The number of days required for HSR training in each jurisdiction (table 9.4) appear unrelated to the powers of HSRs (table 9.3). For example, Tasmanian HSRs have the most powers yet require four days training, whereas Western Australian HSRs have fewer powers but require five days training. Some of the differences in the length of training courses may be due to the complexity of the broader OHS system in which the HSRs are required to operate. For example, while HSRs in New South Wales have few and comparatively minor powers, they still require four days training — indicating there may be aspects of the New South Wales regime that take longer to train HSRs in compared to a jurisdiction, such as Tasmania, where the HSRs have greater powers but also require four days training. Finally, some of the differences in course lengths may be due to training content prescribed by the jurisdictions and/or their OHS regulators (box 9.6).

#### **Box 9.6 HSR training course requirements**

The Commonwealth has set four objectives for its HSR training courses: to understand the structure, purpose and key provisions of the OHS Act; to understand the role, function and powers of an HSR; to develop the knowledge and skills necessary to carry out the role of an HSR; and to gain practical skills for implementing the HSR role in the workplace.

While the Commonwealth does not set requirements for length of the training course, it notes that, '[i]n the past, full courses have been run over five consecutive days in a classroom setting'. (SRCC 2007, p. 8)

ACT guidance material provides that the training course should,

[h]ave a minimum duration of 28 hours in order to ensure sufficient time to adequately cover the course content. The course should be delivered over a period of no more than eight (8) weeks to ensure maximum effectiveness. (Chief Minister's Department (ACT Government) 2006, p. 6)

A Western Australian facilitator's guide for HSR training (Commission for Occupation Safety and Health (Western Australia) 2009) includes the following topics among those to be covered in the training: the OHS legislative framework (including the duty of care and the roles and responsibilities of the key duty holders); the functions of HSRs, and resources and tools to help HSRs in their roles; and the use of PINs.

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The different training requirements of the jurisdictions (for example, box 9.6) create a cost for national training providers as they need to devise separate courses for each jurisdiction. A common set of training requirements would allow these providers to create a single training program, thereby eliminating the costs of creating and maintaining up to nine separate programs on a common matter (such as HSR training). If these reduced costs were reflected in lower prices for training courses, those businesses seeking training would also benefit from decreased costs.

The National Review into Model OHS Laws considered the training requirements for HSRs — its recommendations, the WRMC’s response and the relevant model work health and safety provisions, are outlined in box 9.7.

**Box 9.7 HSR training — recommendations from the National Review into Model OHS Laws**

The **National Review** addressed HSR training in recommendations 110 and 111. In summary, it recommended:

- that an HSR attend training as soon as is reasonable after his/her election and that the training should: comprise a regulator-approved, five day competency-based training course; and be either of the HSR’s choice or as directed by an inspector
- the HSR be entitled to paid leave in order to attend the training
- the training should be undertaken at a time agreed between the HSR and the person conducting the business or undertaking.

It also made recommendations on ‘refresher training’, including that an HSR may attend and receive paid leave for:

- one day’s regulator approved refresher training per year (after the first year)
- other training as agreed between the HSR and the person conducting the business or undertaking, or as directed by an inspector (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** agreed in principle with these recommendations, noting that:

- the model Act should not specify the nature or duration of the training
- the training should not be mandatory, but HSRs should be unable to exercise their power to issue PINs or stop work directions unless they have completed the training
- the cost of the training falls to the person conducting the business or undertaking
- in addition to paid leave to attend training, HSRs should also be reimbursed any costs associated with attending the training (WRMC 2009a).

The **model work health and safety provisions** (as amended in December 2009) provide that the employer must, ‘as soon as practicable within the period of 3 months after the request is made, allow the HSR time off work to attend the course of training’.

## Provisions for an employer to initiate the disqualification or removal of an HSR from office

The ability to remove an HSR from office in a timely manner is an important means by which employers can protect themselves from the costs of HSRs that abuse their power or in some other way fail to fulfil their responsibilities. New South Wales provides no means for employers to seek the removal of an HSR from office, while the Queensland provisions amount to a limitation of an HSR's powers rather than the HSR's removal from office (table 9.5).

**Table 9.5 Provision for the disqualification of HSRs**  
2008-09

<i>Provision for the disqualification of HSRs</i>	
Cwth	The regulator may disqualify an HSR, for a specified period not exceeding five years for acting with the intention of causing harm to the employer or their undertaking, or acting unreasonably, capriciously or otherwise than for the purpose for which the power was conferred, including the disclosure of information
NSW	No provision
Vic	The Magistrates Court may disqualify an HSR for a specified period or permanently, if the HSR has misused powers, intending to cause harm to the employer or their undertaking
Qld	An application can be made to the Industrial Commission to suspend or cancel an HSR's entitlement to issue a provisional improvement notice
SA	A review committee of the Industrial Court (comprising a judge or industrial magistrate, an employee representative and an employer representative) can review an application for the disqualification of an HSR. The disqualification can be for a specified period and may proceed where an HSR: repeatedly neglects their HSR functions; or, exercises powers or functions for an improper purpose (including the inappropriate disclosure of information)
WA	The Industrial Relations Commission (sitting as the Occupational Health and Safety Tribunal) may disqualify an HSR, for a specified period or permanently, for having done anything with the intention only of causing harm to the employer or their undertaking, including the use or disclosure of information, or for failure to adequately perform functions under the OHS Act
Tas	The regulator may cancel an appointment and may prohibit a person from being appointed as an HSR for any period up to five years, for acting with the intention of causing harm to the employer or the employer's work activities or for acting unreasonably, capriciously or otherwise than for the purpose for which he or she was appointed
NT	The regulator may disqualify an HSR for misusing the powers of an HSR
ACT <sup>a</sup>	<b>Disqualification:</b> The regulator may cancel an HSR appointment and may prohibit a person from being appointed as an HSR for any period up to five years, for: acting with the intention of causing harm to the employer or the employer's work activities; for acting unreasonably, capriciously or otherwise than for the purpose for which a power was given to the HSR; or, for intentionally using or disclosing information obtained from the employer for a purpose not connected with being an HSR <b>Objection to selection<sup>b</sup>:</b> If a notice of objection to the selection of the current representative, signed by the employer of all the employees included in the designated work group is lodged with the regulator, the regulator shall conduct an election of an HSR to replace the current HSR

<sup>a</sup> These provisions were amended from 1 October 2009 (the commencement of the *Work Safety Act 2008* (ACT) which was passed into law on 28 August 2008). <sup>b</sup> Provision does not apply to HSRs elected under this process (i.e. following a election arising from a notice of objection).

Source: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); South Australian Government, pers. comm., 15 December 2009; WorkCover NSW (2001).

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Of those jurisdictions providing for the removal of an HSR,<sup>11</sup> those where the regulator administers the process (the Commonwealth, Tasmania, the Northern Territory and the ACT) are likely to impose a lower burden on business compared to the jurisdictions that direct the process through the courts (Victoria, Queensland and Western Australia) or a review committee of the court (South Australia).

The National Review into Model OHS Laws considered the disqualification of HSRs — its recommendations, and the WRMC’s response, are outlined in box 9.8 (there are no material differences between the WRMC’s response and the model work health and safety provisions (as amended in December 2009)).

**Box 9.8 Disqualifying HSRs — recommendations from the National Review into Model OHS Laws**

Recommendation 113 of the **National Review** was that applications to disqualify an HSR should be able to be made to the relevant court/tribunal by the regulator, a member of the HSR’s work group or any person detrimentally affected by an HSR’s performance (or non-performance) of their duties. Following such an application, the relevant court or tribunal may disqualify or suspend an HSR, or suspend the right of the HSR to exercise a power for a specified period, for:

- repeatedly neglecting their HSR functions; or
- exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or
- acting unreasonably in the performance of their functions and exercise of their powers as an HSR (Stewart-Crompton, Mayman and Sherriff 2009).

The **WRMC** (2009a) agreed in principle with the recommendation, but noted that the involvement of a court/tribunal was not appropriate in cases of poor performance of an HSR and, as such, ‘repeatedly neglecting HSR functions’ and ‘acting unreasonably in the performance of their functions and exercise of their powers as an HSR’ should not be grounds for disqualification or suspension.

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<sup>11</sup> In 2008-09, in most jurisdictions (the Commonwealth, Victoria, South Australia, Western Australia, the Northern Territory and the ACT) the employees represented by HSRs could also initiate some form of action for the removal of that HSR from office. While in Tasmania, situations where the HSR did not have the support of the majority of the employees they represented were grounds for the employer or regulator seeking the HSR’s removal from office.

## 9.2 Health and safety committees

HSCs are not automatically mandatory in any jurisdiction. However, in 2008-09, all jurisdictions (except the ACT)<sup>12</sup> had OHS provisions either requiring an employer to establish an HSC when requested to do so by employees or by an HSR (depending on the jurisdiction — table 9.6).

**Table 9.6 Forming HSCs**  
2008-09

	<i>Cwth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT<sup>a</sup></i>
HSC provisions apply when employee numbers exceed	50	20	np	np	20	np	20	20	np
Establishment of HSCs required:									
On request of HSR	✓ <sup>b</sup>	np	✓	✓	✓	np	np	✓	np
On request of employees	✓	✓	np	np	✓	✓	✓	✓	np
Direction of the regulator	np	✓	np	✓	np	✓	np	np	np
Restriction on composition of members	np	✓ <sup>c,d</sup>	✓ <sup>c,e</sup>	✓ <sup>f</sup>	✓ <sup>c</sup>	✓ <sup>c</sup>	✓ <sup>g</sup>	✓ <sup>c,h</sup>	np
Prescribed frequency of HSC meetings (months)	np	np	3	3	3	np	3	3	np

**np** no provision. <sup>a</sup> From 1 October 2009 and the commencement of the *Work Safety Regulation 2009* (ACT), there are requirements for the formation of HSCs in the ACT. <sup>b</sup> An 'involved union' for a workgroup may also request the formation of an HSC. <sup>c</sup> The number of employer representatives on the HSC should not exceed the number of elected employee representatives. <sup>d</sup> The chairperson must be one of the employee representatives. <sup>e</sup> As far as practicable, the employee representatives on the HSC should be HSRs or deputy HSRs. <sup>f</sup> See box 9.9. <sup>g</sup> The HSC must be comprised of a majority of employees unless otherwise agreed between the employer and employees. <sup>h</sup> The HSC must include the HSR (if there is one).

Source: OHS Acts and regulations; Stewart-Crompton, Mayman and Sherriff (2009); WorkCover NSW (2001).

The obligation of an employer to grant an employee's request to form an HSC is subject to varying thresholds. An HSC need only be formed where:

- a single employee makes the request in Western Australia
- a minimum of five employees make the request in South Australia
- over 50 per cent of employees make the request in New South Wales, Tasmania and the Northern Territory.

Of those employers in jurisdictions where employees can request the formation of an HSC, Western Australian employers would be most likely to be obliged to form an HSC (and bear the associated burdens) given the obligation arises with the

<sup>12</sup> The *Work Safety Regulation 2009* (ACT), which came into effect from 1 October 2009, provides for the formation of an HSC following the request of a majority of employees or agreement between the employer and worker consultation unit (i.e. the work group).

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request of a single employee or the direction of the regulator. Employers with less than 20 employees in New South Wales, South Australia, Tasmania and the Northern Territory, were exempt from the duties relating to HSCs and so did not face any burden from these requirements. Commonwealth employers with less than 50 employees were also exempt.

#### **Box 9.9 Requirements for HSCs in Queensland**

In Queensland, the membership of the HSC is subject to a number of requirements:

- a HSC member must be an employer, principal contractor or an employee at the workplace
- the workplace health and safety officer (see chapter 7) and HSR for the workplace are to be members
- at least half the HSC members must be employees other than those nominated by the employer or principal contractor
- other HSC members are determined by negotiation between the employer/principal contractor and employees
  - employees may be represented during negotiations by the union of which they are members if they have told the employer or principal contractor that they want to be represented by their union (if the workers are members of more than one union, each of the unions may be involved in the negotiations).

In New South Wales and South Australia, the OHS laws allow for more than one HSC per workplace, while the Commonwealth holds that the creation of an HSC does not preclude the creation of other committees dealing with OHS matters. The existence of multiple HSCs for a workplace could compound the burden of HSC requirements on business. In contrast, Western Australia allows for an HSC to cover more than one workplace, thereby potentially reducing the aggregate burden of HSCs for Western Australian businesses operating more than one workplace.

The National Review into Model OHS Laws considered the requirements that should apply in relation to the formation of HSCs and HSC meetings — its recommendations and the WRMC's response are outlined in box 9.10, along with relevant model work health and safety provisions (as amended in December 2009).

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### Box 9.10 **Forming HSCs and HSC meetings — recommendations from the National Review into Model OHS Laws**

Recommendation 114 of the **National Review** was that an HSC:

- a) must be established:
  - i) where requested by an HSR; or
  - ii) where requested by 5 or more workers; or
  - iii) if initiated by one or more persons conducting businesses or undertakings; or
  - iv) if specified by regulation; or
  - v) in workplaces with 20 or more workers; or
- b) may be established in any business or undertaking; and
- c) must include equal membership of workers (excluding managers or supervisors) and managers. (Stewart-Crompton, Mayman and Sherriff 2009, p. 126)

The **WRMC** agreed in principle with this recommendation, but noted:

Mandatory establishment of HSCs where there are 20 or more workers is not supported, and paragraph (a)(v) should be deleted. There should also be provision for “other agreed arrangements”. Paragraph (c) should be amended to provide only that at least half the members of an HSC should be workers, noting the practical difficulties which would be faced in many workplaces if there had to be equal numbers of management and worker representatives. (WRMC 2009a, p. 29)

Recommendation 115 of the **National Review** was that the operational matters relating to HSCs, such as structure and meeting frequencies, should be provided for in the regulations of the model Act (Stewart-Crompton, Mayman and Sherriff (2009).

The **WRMC** (2009a) agreed with this recommendation.

The **model work health and safety provisions** (as amended in December 2009) provide that an HSC must meet at least every three months and at any time upon the request of at least half of its members.

## **Functions**

All jurisdictions require HSCs to assist in the development, implementation, review and updating of OHS measures, while most jurisdictions require HSCs to keep themselves informed on OHS matters. Aside from the functions listed in table 9.7, there are some unique provisions related to HSCs:

- in New South Wales, an HSC is to attempt to resolve OHS issues and can request an investigation by an inspector if it is unable to do so
- in Queensland, while not prescribed as duties, an HSC may seek to discharge its functions by:
  - helping in the resolution of OHS issues in the workplace

- reviewing the circumstances of an incident (where that incident has been referred to the HSC) and advising the employer (or principal contractor) of the results of the review and making recommendations based on the review
- encouraging and maintaining an interest in OHS matters in the workplace and informing workers on OHS matters
- considering measures for training the workplace on OHS matters
- in South Australia, an HSC is to:
  - keep under review developments in the field of rehabilitation of employees who suffer work-related injuries and the employment of those who suffer from any form of disability
  - assist in the return to work of employees who have suffered work-related injuries and the employment of those who suffer from any form of disability
- in the Northern Territory, an HSC is to consider, and make recommendations on, changes in the workplace following an accident or reportable incident.

**Table 9.7 Selected functions of HSCs**  
2008-09

	<i>Cwth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT<sup>a</sup></i>
Assist and/or facilitate cooperation in the development, implementation, review and updating of OHS measures	✓	✓ <sup>b</sup>	✓	✓	✓	✓	✓	✓	✓
Assist the employer disseminate OHS information to employees	✓		✓		✓				
Investigate and attempt to resolve OHS issues		✓			✓				
Provide advice/recommendations to the employer on OHS matters		✓		✓		✓	✓	✓	
To keep, in an accessible place and form, information about the hazards workers may face in the workplace						✓	✓	✓	

<sup>a</sup> From 1 October 2009 and the commencement of the *Work Safety Act 2008* (ACT), these functions were expanded to also include: assisting the employer resolve work safety matters; and establishing, reviewing and publishing procedures in relation to work safety. <sup>b</sup> Review only.

Source: OHS Acts and regulations; WorkCover NSW (2001).

Given the functions assigned to HSCs in some jurisdictions, well functioning HSCs can reduce the regulatory burden on business in those jurisdictions by supporting the maintenance of a safe workplace. For example, such functions include to:

- assist the employer disseminate OHS information to employees (the Commonwealth, Victoria and South Australia)

- keep and make available to workers information about the hazards they may face in the workplace (Western Australia, Tasmania and the Northern Territory).

While not covered in the National Review into OHS Laws, the model work health and safety provisions (as amended in December 2009) prescribe the following functions for HSCs:

- assist in developing standards, rules and procedures relating to OHS that are to be followed or complied with at the workplace
- facilitate cooperation between the person conducting a business or undertaking and workers in instigating, developing and carrying out measures designed to ensure the health and safety at work of the workers
- such other functions as are prescribed by the regulations or agreed between the person conducting the business or undertaking and the HSC.

## Duties of employers

No two jurisdictions place the same obligations on employers in relation to HSCs (table 9.8). New South Wales and the Northern Territory place the highest number of duties on employers. The single duty of employers in Queensland, Victoria and Western Australia, not to discriminate against HSC members, would seem unlikely to create a material burden for business. The duty to provide adequate facilities to the HSC (applicable in New South Wales, Tasmania and the Northern Territory) may create a material burden on business, depending upon what level of facilities is considered to be ‘adequate’.

**Table 9.8 Selected duties of employers in relation to HSCs**  
2008-09

	<i>Cwlth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Make relevant information on OHS matters available to the HSC	✓	✓					✓	✓	✓
Permit the HSC to undertake its functions	✓	✓					✓	✓	✓
Permit the HSC, or HSC member, to inspect the workplace		<b>a</b>						✓	
Provide adequate facilities to the HSC		✓					✓	✓	
Must not act to the detriment of a HSC member because they are a HSC member		✓	✓	✓	✓	✓			
Consult with the HSC on OHS matters		✓			✓		✓	✓	
Advise the HSC of any workplace accident							✓	✓	

<sup>a</sup> HSCs have the power to ‘investigate’ OHS risks (which may entail an inspection of the workplace).

Source: OHS Acts and regulations; WorkCover NSW (2001).

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While not covered in the National Review into OHS Laws, the model work health and safety provisions (as amended in December 2009) prescribe the following duties for a person conducting a business or undertaking:

- they must allow each member of the HSC such time as is reasonably necessary to attend HSC meetings and carry out their duties as an HSC member
- allow the HSC to have access to information on OHS hazards and the health safety of workers
- pay HSC members for the time spent performing their duties as an HSC member. Payment should be made according to what they would be entitled to in performing their normal duties.

### **9.3 The overall costs of HSR and HSC requirements**

In a survey of 1802 small and medium enterprises (SMEs) (see appendix B for details), 18 per cent reported they had incurred a cost from implementing an HSR, HSC or both (Sensis Survey of SMEs 2009, unpublished). The survey sought responses from business on the approximate costs they incurred in the process of ‘developing’ an HSC and/or ‘appointing’ an HSR — table 9.9 reports the average of these costs for each jurisdiction.

While the costs in table 9.9 are only indicative and not necessarily representative of all SMEs, they are consistent with some of the qualitative assessments of regulatory costs associated with HSR and HSC requirements discussed in this chapter (table 9.9 also summarises these qualitative assessments). For example, Tasmania was assessed to be least burdensome jurisdiction for a number of HSR and HSC requirements and it also had the lowest costs reported in the SME survey.

Aside from the nature of the regulations, part of the reason for the variation in costs reported by SMEs (table 9.9) may be the differing industry composition of the jurisdictions. For example, the Manufacturing and Building and construction sectors reported the highest average costs — \$6292 and \$3716, respectively. In contrast, the health and community services sector reported the lowest average cost of \$827 (Sensis Survey of SMEs 2009, unpublished). These differences may reflect the differing inherent OHS risks of these sectors and that, in light of these risks, HSRs and HSCs are more/less likely to be requested by the employees.

**Table 9.9 Cost of HSRs and HSCs<sup>a</sup>**  
12 months to May 2009

	<i>Cwlth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
<b>HSRs</b>									
Initiating election	H	H					L	L	L
Areas of representation			H				L		H
HSRs per workplace			H		H	H	L		H
Election requirements			L		L				
Training	H		H	L		H			
Powers <sup>b</sup>	H	L							
Disqualification	L	H					L	L	L
<b>HSCs</b>									
Forming	L					H			
Duties of employers		H	L	L		L		H	
<b>Estimated average cost to SMEs of HSRs and HSCs<sup>c</sup> (\$)</b>	<b>np</b>	<b>1 798</b>	<b>4 010</b>	<b>3 169</b>	<b>1 213</b>	<b>4 421</b>	<b>958</b>	<b>3 741</b>	<b>1 338</b>
Relative standard error <sup>d</sup> (%)	np	46	23	68	48	40	55	121	57
Number of observations	np	85	59	56	53	25	23	15	30

**H** highest (or equal highest) cost (subjective assessment). **L** lowest (or equal lowest) cost (subjective assessment). **np** not provided. <sup>a</sup> Of the matters covered in the preceding sections, it was not possible to make a subjective assessment of the burdens arising a result of a HSR's 'term of appointment' and the functions of HSCs. <sup>b</sup> HSR powers potentially create a burden on business through the things business must do to facilitate the exercise of a power and the consequences of the exercise of a power — as such, it is unlikely these costs were included in the cost estimates provided by SMEs. <sup>c</sup> Reported costs relate to the 12 months to May 2009. The observations have been weighted to ensure the sample reflected the actual small and medium business population distribution in each state/territory. <sup>d</sup> A measure of a statistical estimate's reliability obtained by dividing the standard error by the estimate (and multiplying the result by 100 to express it as a percentage).

*Sources:* OHS Acts and regulations; Sensis Survey of SMEs (2009 unpublished); Stewart-Crompton, Mayman and Sherriff (2009).

## 9.4 Trade union involvement in the workplace on OHS matters

This section examines the impact of union presence in the workplace related to OHS matters and examines differences across the jurisdictions in both the nature of union rights in relation to OHS issues and in the constraints on any misuse of such powers.

In consultations with the Commission, a number of participants expressed concern about the potential disruption to workplaces where unions are given rights of access to investigate suspected breaches of OHS regulations and consult on OHS issues. Some participants were also concerned about the different penalties or actions available in jurisdictions which can be used in circumstances where unions have

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failed to comply with conditions attached to rights of entry. In contrast, union organisations supported the positive impact that union presence and entry rights have on OHS outcomes.

In their submission to the National Review into Model OHS Laws, the ACTU gave strong support for the statutory right of entry for OHS matters at all workplaces (irrespective of union membership) (ACTU 2008). The ACTU stated that the potential benefits of union right of entry provisions include: enabling education of workers on OHS matters; extending the reach of inspectorates by monitoring compliance and identifying serious breaches; providing an avenue for workers to report problems anonymously; and enabling resolution of OHS problems with management, with all these factors contributing to reduced incidence of workplace injury.

The Public Sector Union Group of the Community and Public Sector Union (2008) also gave strong support for union right of entry provisions in their submission to the National Review into Model OHS Laws. The submission highlighted the inability of the union to support and assist HSRs and members working at Centrelink offices in South Australia after a number of employees had been subjected to serious incidents of customer aggression and verbal abuse and, it was claimed, Centrelink took no action to address these concerns. South Australia currently does not provide right of entry to authorised union representatives.

These opinions contrast with the views of some employer groups which give greater emphasis to the costs of union involvement. For example, the Master Builders Association (MBA) (sub. 1) cites examples of union entry rights and union presence in workplaces leading to duplication of inspections (on top of inspections carried out by regulators), as well as the need to shut down business operations to facilitate union inspections resulting in reduced output and productivity.

Given the history and ongoing occurrence of abuse of right of entry for OH&S purposes in the building and construction industry, any right of entry for union officials should be subject to their being accompanied by an authorised inspector from the relevant regulatory body (sub. 1, attachment 1, p. 11).

The MBA also cited a number of examples of unions using entry powers available under OHS legislation to pursue other industrial agendas which were unrelated to health and safety issues. These are discussed later in the chapter.

John Holland also recommended specific restrictions be placed on persons given rights of entry apart from inspectors from the regulator in the model OHS laws.

The right of entry for persons other than inspectors and investigators should only be exercisable after detailing a specific workplace OHS issue and registering it with the regulator. This measure aims to reduce industrial interference and seek to legitimise

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apparent OHS issues. In the event that the model Act includes a right of entry for non-regulators, there needs to be a mandated provision that any site entry is to be only when accompanied by a regulator's representative such as an inspector or investigator. An alternative to that is for a right of entry for a non-inspector to have powers of referral only, either to site management or the regulator. (John Holland 2008, p. 5)

Johnstone, Quinlan and Walters (2004) and Stewart-Crompton, Mayman Sherriff (2009) have also reviewed a number of Australian and international studies into the potential benefits from union presence in the workplace which are facilitated by rights of entry, a summary of which is provided in box 9.11.

#### **Box 9.11 Benefits from union presence in the workplace**

- Hawke and Wooden (1997) found that unionised workplaces in Australia were three times more likely to have a HSC and twice as likely to have undergone a management health and safety audit in the previous 12 months.
- In an international context, a comparison of unionised and non-unionised construction workers in the United States (Dedobbelear, Champagne and German 1990) and health and safety in the manufacturing industry in Britain and France (Grunberg 1983) shows evidence of higher standards of health and safety in unionised workplaces than non-unionised.
- In the United Kingdom a number of studies were conducted using information from the Workplace Industrial Relations Survey (1990) which linked lower injury rates to workplaces with joint consultation arrangements, particularly where trade union involvement existed, and higher rates of injuries where management failed to consult over OHS (Reilly, Paci and Holl 1995).
  - Researchers using more recent 1998 data from the same survey found that where there was a union presence workplace injury rates were 24 per cent lower than where there was no union presence (Litwin 2000).
- A Canadian study by Shannon, Mayr and Haines (1997) showed that empowerment of the workforce — which included unions, shop stewards, union support for HSCs and general worker participation and decision-making — contributed to lower injury rates.
- Another Canadian study (O'Neill 2002) found that 78–79 per cent of unionised workplaces reported high compliance with health and safety legislation with only 54–61 per cent of non-unionised workplaces reporting such compliance.
- Evidence from Norway, Italy and Spain cited in Walters (2001) indicates that the engagement of trade unions and mobile workers' representatives are influential in raising awareness and contributing to the establishment of better OHS arrangements in small firms.

*Sources:* Johnstone, Quinlan and Walters (2004); Stewart-Crompton, Mayman Sherriff (2009).

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While there is some variation in the findings, in aggregate they provide support to the proposition that joint arrangements, trade unions and trade union representation on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation (Johnstone, Quinlan and Walters 2004, p. 4).

### **Union right of entry for OHS matters**

The right for authorised union representatives to enter workplaces to investigate possible breaches of OHS regulations and consult with workers on OHS matters exists in all jurisdictions apart from the Commonwealth, South Australia and Tasmania. Tasmania passed legislation providing for union right of entry in November 2009 and the legislation was proclaimed on 24 February 2010. South Australia has released a Bill on right of entry which was released for public comment until 13 March 2009.

One justification for providing unions with entry rights is that they provide additional scrutiny of duty holders and their compliance with OHS regulations, thereby contributing to improved OHS outcomes (including reduced incidence of accidents in the workplace). The rights of unions to enter workplaces also provide workers with a separate source of information on OHS matters (particularly in relation to their own workplace) and a channel through which they can report instances of non-compliance.

#### *Differences in union rights to enter workplaces*

There are a number of differences across the jurisdictions in the rights unions have to enter workplaces in respect to OHS matters (table 9.10). Of the six jurisdictions (those other than the Commonwealth, South Australia and Tasmania) that provide for the right of unions to enter a workplace:

- all include the right to investigate breaches
- three jurisdictions (Queensland, Western Australia and the Northern Territory) provide the right to enter workplaces to consult and discuss OHS issues and three do not (New South Wales, Victoria and the ACT)
- of the three jurisdictions which provide entry for OHS consultation purposes, Queensland and Western Australia require a minimum of 24 hours notice before entry, while the Northern Territory does not explicitly require notice to be provided

- it is not made explicit in the wording of the OHS legislation in Queensland that union right of entry is restricted to working hours.

There are a number of jurisdictional differences in conditions attached to the right to investigate suspected breaches listed in table 9.10.

**Table 9.10 Differences in union rights of entry – purpose of entry, and rights and conditions upon entry<sup>a</sup>**  
2008-09

	NSW	Vic	Qld	WA	NT	ACT
Enter to investigate breach	✓ <sup>b</sup>	✓	✓	✓ <sup>c</sup>	✓	✓
Notice needed before investigating suspected breach	x	x	x	x	x	x
Enter to consult and discuss OHS issues	x	x	✓	✓	✓	x
Notice needed to conduct OHS consultation	na	na	24 hrs	24 hrs	x	na
Observe or inspect systems of work, plant, equipment, materials and substances	✓	✓ <sup>d</sup>	✓	✓	✓	✓
Interview members or eligible persons of the employee organisation <sup>e</sup>	x	✓	✓	x	✓	✓
Speak with occupier or employer	x	✓	✓	x	x	x
Take measurements and make records	✓	x	x	x	✓	✓
Examine, copy, or take extracts from any document produced	✓	x	✓	✓	✓	✓
Entry only to workplaces of a member or eligible member	✓	✓	✓	✓	✓	✓
Authorised representative to show permit upon request	✓	✓	✓	✓	✓	✓
Entry only during working hours	✓	✓	x	✓	✓	✓

na not applicable — the relevant as entry power is not available. <sup>a</sup> As the right of entry does not exist in South Australia and Tasmania, these jurisdictions are excluded from the table. <sup>b</sup> Allows for entry to investigate breaches of the *Coal Mine Health and Safety Act 2002* (NSW) and the *Mines Health and Safety Act 2004* (NSW). <sup>c</sup> The *Industrial Relations Act 1979* (WA) provides for investigating breaches of that act, the *Long Service Leave Act 1958* (WA), the *Minimum Conditions of Employment Act 1993* (WA), the *Occupational Health and Safety Act 1984* (WA), the *Mines Safety and Inspection Act 1994* (WA) or an award. <sup>d</sup> Must not be exercised if it will cause work to cease (unless with permission of employer). <sup>e</sup> Interviews with workers must have the worker's consent.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

New South Wales, Victoria, Queensland and the ACT impose conditions on powers of entry to investigate possible breaches, including:

- in New South Wales and the ACT, authorised representatives must notify the occupier immediately after entry. However, they do not need to do so if such a notification would defeat the purpose of the visit or cause delay
- in Victoria, authorised representatives need to provide notice immediately after entry, with the notice to include a description of the suspected breach
- in Queensland, authorised representatives need to provide written notice of the entry to the occupier, and the reasons for the entry, as soon as is practicable

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- the ACT legislation does not include a requirement for authorised representatives to notify the occupier upon entry if they have already been notified in writing. An authorised representative needs to provide the occupier and the regulator written notice if they consider there has been a breach of the *Work Safety Act 2008* (ACT) within two days of entering the premises.

Further features of entry provisions include:

- all jurisdictions that have right of entry provisions require authorised representatives to show the appropriate permit to enter on request
- in Victoria a person may hold an entry permit as an authorised representative employee organisation if they: are a permanent employee or officer of that organisation (working on a full-time or part-time basis); have completed a course of training approved by the regulator; and have not been disqualified from holding an entry permit
- authorised representatives need to have completed a course of training prescribed in regulations before they may hold an entry permit in Victoria, Queensland, the Northern Territory and the ACT
- Victoria is the only jurisdiction not to confer rights to authorised representatives to examine, copy or take extracts from any document produced
- only in Victoria and Queensland do authorised representatives have the right to speak with the occupier or employer
- in New South Wales and Western Australia no provision exists for representatives to interview members or eligible members of the employee organisation (Stewart Crompton, Mayman and Sherriff 2009, pp. 304–305).

#### *Provisions under Commonwealth legislation which relate to OHS*

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* does not include union right of entry provisions. Further, employees of the 29 self-insurers who are registered with the Comcare scheme are not covered by union right of entry provisions.

While the Commonwealth OHS Act does not provide any union right of entry powers, provisions exist in the *Fair Work Act 2009* (Cwlth) which relate to OHS matters. Under section 494 of the Act authorised union representatives need a federal permit to gain access to a workplace which is controlled by the

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Commonwealth, a Commonwealth authority, a constitutional corporation,<sup>13</sup> a body corporate incorporated in a Territory or premises located in a Commonwealth place.

The right to enter and investigate is only available where such rights of entry currently exist under either a State or Territory OHS Act (in New South Wales, Victoria, Queensland, the Northern Territory and the ACT) or the *Industrial Relations Act 1979* (WA). Section 494 of the Fair Work Act also applies to persons employed by, or who are, independent contractors.

Under the *Fair Work Act 2009* (Cwlth) conditions apply when exercising State or Territory OHS rights. A permit holder must not exercise a State or Territory right to inspect unless they have given the occupier of the premises, and any affected employer, a written notice setting out the intention to enter and the reasons for doing so. Notice needs to be given at least 24 hours before inspecting an employee record of an employer, and a permit holder may only exercise a State or Territory OHS right during working hours. Permit holders are required to produce their entry permit upon request.

#### *Burdens on business arising from union rights of entry*

There are potential costs to business if union representatives: misuse entry provisions by hindering or obstructing employers and workers; use OHS entry powers to discuss non-OHS matters or undertake unlawful industrial action unrelated to OHS matters; duplicate the role of regulators when investigating potential breaches of OHS regulations; or undertake workplace inspections outside of working hours.

The misuse of entry provisions to discuss industrial matters, instead of OHS matters, highlighted by some industry and employer groups, have the potential to occur for businesses operating under Queensland, Western Australian and the Northern Territory regimes, as these are the jurisdictions which provide the power to authorised union representatives to consult with workers on OHS matters.

The MBA cited a number of examples where, in its view, union entry powers to investigate suspected breaches of OHS regulations were used excessively or to pursue other industrial agendas. These examples range across a number of jurisdictions and are mainly concentrated in Mining and the Building and construction industry. For example, in the case of *Cruse vs CFMEU and Stewart*,

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<sup>13</sup> A constitutional corporation is defined as a foreign corporation, or a trading or financial corporation formed within Australia. Corporations include proprietary companies, not-for-profit associations incorporated under State or Territory legislation, and statutory authorities incorporated under special legislation.

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workers had voted to go on strike at a mine site in Hamilton (Victoria) for 10 days after a bus had almost been involved in an accident on a train level crossing. This was despite the site OHS representative agreeing that it was safe for workers to return to work following the repainting of lines on the road, the installation of electronic signs and the erection of a stop sign. In making his decision, the Federal Magistrate found that there could be no basis for justifying such unlawful industrial actions on the basis of health and safety concerns (sub. DR20).

In another case, powers available under OHS legislation were used by union officials as a defence for influencing the termination of a contract of a sub-contractor. In *Draffin vs CFMEU, Allen, Benstead, Oliver and Walton Constructions* the union claimed that a decision by a head contractor to terminate the contract of a subcontractor was based on the subcontractor's inadequate qualifications to undertake traffic management services (which is essentially an OHS issue) for a construction site. However, the union officials subsequently admitted that their motivation was to terminate the subcontractor's contract because their employees were covered by Australian Workplace Agreements (AWAs) rather than a certified agreement (sub. DR20).

It is possible that businesses covered by OHS legislation in Western Australia and Northern Territory could face higher costs from potential misuse of entry provisions as there is no requirement for unions to provide notice of entry to investigate a breach. For example, unions could visit worksites for less serious matters resulting in more delays/interruptions to business operations than in other jurisdictions. On the other hand, the lack of notification requirements allows much quicker access to workplaces where a suspected breach is taking place. Additional costs could also be imposed on businesses in Queensland because it appears that they are not restricted to working hours to investigate suspected breaches. In the Northern Territory additional costs could arise for businesses because unions are not required to provide notice of entry to consult on OHS issues or investigate a breach.

Employers operating in multiple jurisdictions incur additional information costs in determining the nature of union rights to enter their premises to investigate a breach of OHS regulations or discuss OHS matters and the nature of any conditions attached, such as different notification requirements. Employers would also need to cooperate in making documents available for inspection, as well as make copies of documents available that are related to a suspected contravention.

## Safeguards against misuse of entry powers

All statutes providing a right of entry for OHS purposes include safeguards against the misuse of entry powers, which may reduce the incidence of misuse and their associated costs (table 9.11).

**Table 9.11 Differences in grounds for actions for activating safeguards against misuse of union entry rights<sup>a</sup>**  
2008-09

	<i>Act/Section</i>	<i>Grounds for action</i>
NSW	<i>Industrial Relations Act 1996</i> s. 299 (4)	<ul style="list-style-type: none"> <li>• Intentionally hindered or obstructed employers or employees during their working time</li> <li>• Otherwise acted in an improper manner</li> </ul>
Vic	<i>Occupational Health and Safety Act 2004</i> s. 85	<ul style="list-style-type: none"> <li>• Intentionally hindered or obstructed an employer or employee</li> <li>• Acted unreasonably or otherwise for the purposes of exercising a power under this Part; or</li> <li>• Intentionally used or disclosed, for a purpose not reasonably connected with the exercise of a power under this Part, information that was acquired from any employer or employee</li> </ul>
Qld	<i>Workplace Health and Safety Act 1995</i> ss. 90O and 90Q	<ul style="list-style-type: none"> <li>• Unreasonably hinder or obstruct a worker or other person at the workplace</li> <li>• Intimidate or threaten a worker or other person at the workplace</li> <li>• Contravention of a provision of the Part (7a Authorised representatives)</li> <li>• Contravention of a condition of employment</li> </ul>
WA	<i>Industrial Relations Act 1979</i> s. 49J	<ul style="list-style-type: none"> <li>• Act in an improper manner</li> <li>• Intentionally and unduly hindered an employer or employees during their working time</li> </ul>
NT	<i>Workplace Health and Safety Act 2007</i> s. 52	<ul style="list-style-type: none"> <li>• Contravene a condition of appointment, which includes:</li> <li>• Entering a workplace other than in accordance with this Division</li> <li>• Non-compliance with any relevant law of the Commonwealth</li> <li>• Intentionally hinder or obstruct an employer or worker</li> <li>• Misrepresent the extent of the representative's authority</li> <li>• Use of disclosure or information acquired at the workplace for a purpose not reasonably connected with the health and safety of a worker</li> </ul>
ACT <sup>c</sup>	<i>Occupational Health and Safety Act 1989</i> s. 76	<ul style="list-style-type: none"> <li>• Contravention of the division or likelihood of contravention of the division</li> <li>• Intentionally hindered or obstructed an employer or employee or otherwise acted improperly</li> </ul>

<sup>a</sup> As the right of entry does not exist in the Commonwealth, South Australia and Tasmania, these jurisdictions are excluded from the table. <sup>b</sup> Applies where employers and their employees are covered by the federal or national industrial relations system. <sup>c</sup> In the ACT, from 1 October 2009 authorised representatives may be disqualified under Reg. 65 of the *Work Safety Regulation 2009* (ACT).

Sources: OHS and IR Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

All of the safeguards (table 9.11) have provisions that apply to the hindering or obstructing of employers, employees and other persons at the workplace. There is some variation in other grounds which may activate safeguards against misuse, including: acting in an improper manner (available in five jurisdictions); using

intimidatory or threatening behaviour (Queensland); and unauthorised disclosure of information acquired during consultations (Victoria and the Northern Territory).

### *Actions available to punish misuse of entry powers*

The actions that are available to be taken against misuse of powers vary considerably (table 9.12).

**Table 9.12 Different actions available to punish misuse of union entry rights<sup>a</sup>**

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>NT</i>	<i>ACT</i>
Impose conditions on entry permits	x	x	✓	x	x	x
Subject future entry permits to specified conditions	x	x	x	x	x	x
Suspend	x	x	✓	✓	x	x
Revoke	✓	✓	✓	✓	x	x
Ban use of entry permits to organisation	x	x	x	x	x	x
Disqualify from holding office	x	✓	x	x	✓	✓
Remove from office	x	x	x	x	✓	x

<sup>a</sup> As the right of entry does not exist in the Commonwealth, South Australia and Tasmania, these jurisdictions are excluded from the table.

Sources: OHS Acts and regulations; Stewart-Crompton, Mayman Sherriff (2009).

Three jurisdictions provide the power to disqualify authorised representatives from holding office and only the Northern Territory and the ACT do not provide the power to revoke.

Fair Work Australia has the power to revoke or suspend entry permits under section 510 (f) of the *Fair Work Act 2009* (Cwlth) in circumstances where it can be demonstrated that the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law.

As evidenced in the examples provided above, opinions vary as to how effective these safeguards are in limiting abuse of the union right to enter.

### *How will union right of entry be covered in the model work health and safety provisions?*

The model work health and safety provisions (as amended in December 2009) related to union right of entry are outlined in box 9.12.

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## **Box 9.12 Union right of entry provisions included in the model work, health and safety provisions**

### **Right of entry to inquire into suspected contraventions**

- A Work Health and Safety (WHS) entry permit holder may enter a workplace to inquire into a suspected contravention of the Act that relates to or affects a relevant worker
- The WHS entry permit holder must reasonably suspect before entering that the contravention has occurred or is occurring

### **Rights that may be exercised**

- Inspect and work system, plant, substance, structure or other thing relevant to the suspected contravention
- Consult with the relevant workers in relation to the suspected contravention
- Consult with the person conducting the relevant business or undertaking about the suspected contravention
- Inspect and make copies of any record or document that is directly related to the suspected contravention
- Consult and advise workers on OHS matters

### **Notice of entry**

- A WHS entry permit holder must as soon as is reasonably practicable after entering a workplace give notice of entry and the suspected contravention to the person conducting the relevant business or undertaking and the person with management or control of the workplace
- The above does not apply if it would either defeat the purpose of the entry or unreasonably delay the permit holder in an urgent case
- At least 24 hours but no more than 14 days notice must be given before entry to inspect employee records, inspect information held by another person and consult and advise workers

### **When rights may be exercised**

- Usual working hours at the workplace

### **Dealing with disputes**

- The authorising authority may deal with a dispute about the exercise or purported exercise by a WHS permit holder through means of mediation, conciliation or arbitration.
- The authorising authority has the power to impose conditions on a WHS entry permit, and suspend or revoke an WHS entry permit, and make decisions about the future issue of WHS entry permits.

*Source:* Model Work Health and Safety Provisions, December 2009.