INTRODUCTION TO NEW SOUTH WALES NURSES’ ASSOCIATION SUBMISSION

New South Wales Nurses’ Association (NSWNA) represents over 52,000 nurses and midwives in NSW working in a range of health, aged care, disability, and corrective services, and organisations in public and private sectors. In 2006/07, the health and community services industry was second only to manufacturing in the number of lost time injuries and had the sixth highest lost time injury frequency rate in NSW\(^1\).

With an ageing workforce (the average age of nurses is now over 45), it is vitally important for industry to retain skilled employees. It is unreasonable that employers, at a time of economic prosperity and record profits, shoulder only 3\(^2\)% of the cost burden from work-related injuries and disease, while workers and the community bear 44\(^2\)% and 53\(^2\)% respectively.

NSWNA supports the harmonisation of occupational health and safety (OHS) legislation in Australia. The decision to reduce unnecessary legislative complexity cannot be condemned. However, it should not be at the expense of standards that have contributed to improved OHS and economic outcomes. Expedient changes to the OHS legislative framework have the potential to reverse the hard-earned gains achieved and to reverse the downward trend in injuries and fatalities.

Commitments have been given at the highest levels of government to maintain and improve OHS standards nationally in development of the Model OHS Act. NSWNA, however, is of the view that many aspects in the model Act do not maintain current NSW (or other jurisdictions’) OHS standards. In fact, some sections (e.g. those relating to consultation) actively downgrade and undermine protections for more than 50% of Australian workers, including nurses and midwives.

NSWNA is strongly committed to protecting the OHS of workers through:
- Making employers responsible through unqualified obligations to provide a safe and healthy workplace
- Empowering OHS representatives without qualification
- Having legislation acknowledge the role of unions in representing their membership on OHS matters, including the right to act on their behalf in prosecuting serious breaches of OHS legislation.

NSWNA’s submission provides comment according to the public comment response form provided. Additional comments on sections of the model Act not directly related to the questions, and our perception of drafting anomalies are listed in the comments section at the end of the document.

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### Acronyms and Definitions

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<td>ACTU</td>
<td>Australian Council of Trade Unions</td>
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<td>ASCC</td>
<td>Australian Safety and Compensation Council</td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>COP</td>
<td>Code of practice</td>
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<td>DPP</td>
<td>Department of Public Prosecutions</td>
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<tr>
<td>HSC</td>
<td>Occupational health and safety committee</td>
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<td>HSR</td>
<td>Health and safety representative or similar title as used in various jurisdictions to describe employee representatives elected for the purposes of consultation on OHS matters</td>
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<td>HWSA</td>
<td>Heads of Workplace Safety Authorities</td>
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<td>NGO</td>
<td>Non government organisation</td>
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<td>NOHSC</td>
<td>National Occupational Health and Safety Commission (replaced by the Australian Safety and Compensation Council and more recently, Safe Work Australia)</td>
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<td>OHS</td>
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<td>PCBU</td>
<td>Person/s conducting a business or undertaking</td>
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<td>PIN</td>
<td>Prohibition and/or improvement notice or provisional improvement notice depending on the context and jurisdiction</td>
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<td>ROE</td>
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### Questions

#### Part 1 – Preliminary Matters

**Q1.** What is the best title for the model Act?

NSWNA is of the view that title should reflect the purpose and subject matter of the Act. To that end, the words ‘health’, ‘safety’ and ‘occupational’ or ‘work’ should be included in the title.

A title along the lines of *Australian Work Health and Safety Act* would be acceptable and appropriate.

**Q2.** Does the definition of ‘officer’ clearly capture those individuals who should have ‘officer’ duties under the model Act?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the definition of officer is not clearly articulated. NSWNA is concerned that the wording as it appears in the model Act could inadvertently capture people such as employees involved in consultation for example, or employees/ supervisors who may be involved to the extent of preparing, or participating in preparing, business cases, budgets etc. This is particularly the case in small and medium enterprises. It has been suggested that the wording could even implicate shareholders and other unintended groups who may influence or whose decisions may affect the whole or a substantial part of a corporation/organisation.

**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?

NSWNA supports ACTU submission in this regard. In addition:

No, there is not need to separate the definitions so that they do not overlap. An overlap between definitions should not be problematic in the same way that the overlap between the definitions of ‘dangerous goods’ and ‘hazardous substances’ is not problematic, and in the same way that a person can be a multiple duty holder. There is no reason why some things should not fall into both categories.

However, the definition of structure is inadequate in that it does not clearly capture structures such as embankments, levees, trenches and confined spaces.
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?

NSWNA supports the ACTU submission in this regard. In addition:

With respect to a residential strata title body corporates, only a volunteer body corporate comprised of residents should be exempt. Body corporate members who are commercial entities should not be exempt.

Q5. Is the scope of the suppliers’ duty appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the scope is not entirely appropriate. The drafting of the section is not clear, what is meant by the term ‘thing’?

It is also not clear as to the implications with exempting financiers, particularly in situations such as public private partnerships. We agree that an organisation that provides finance for a specific purpose should be exempt where it has no control or influence on how the thing it finances is used, managed etc.

However, where the financier maintains some control over the thing it finances, or how the funds are spent, e.g. through loan conditions or requirements, then in such cases the financer should have OHS responsibilities. Such financing arrangements may also apply to government and other bodies which finance programs run by volunteers, e.g. non-government organisations (NGOs) or special funding grants for projects. Examples of such a situation are where there are terms or conditions of lending that may impact on the health and safety of persons working in or otherwise using the building/plant; or where government funding places certain requirements on funding thereby creating competition between fulfilling service provision requirements and meeting OHS obligations.

Q6. Is the scope of the ‘worker’ definition appropriate? Should it cover students gaining work experience?

NSWNA is of the view that the definition is broadly appropriate. However, it needs to be refined to improve clarity and to reduce unintended ‘loopholes’.

Yes, NSWNA agreed that persons gaining work experience should be covered. It is particularly important in situations where persons undergoing professional training are routinely placed in workplaces in order to gain and practice skills related to their professions, e.g. student nurses on placement. During these placements the persons/students work under the supervision of qualified personnel. They are exposed to the same risks as employees and should be offered the same level of protection to their health and safety (e.g. provision of equipment, OHS training etc). These placements are integral to their professional training and they can’t gain a
qualification otherwise.

In drafting the legislation, it would be more in keeping with the intent of the Panel’s and WRMC’s recommendations if the term ‘person’ was used rather than ‘student’ as non-students also undertake work experience programs, e.g. cadets, people undergoing post-injury rehabilitation/retraining and people on unemployment programs who are not ‘students’ in the strict sense of the word.

Q7. Is the definition of ‘workplace’ appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the definition of ‘workplace’ is not entirely suitable. The drafting of the term is broadly appropriate but the nature of the drafting leaves some areas of confusion.

We make the following recommendations –

• Section 8(1) should make it clear that work places may be temporary or permanent, and mobile or fixed.

• We support ACTU’s submission that ‘while at work’ should be removed from s 8(1) as the words are redundant given the definition of ‘worker’ (s 7).

• Section 8(2) needs further examples of workplaces such as levees, confined spaces, road construction sites, trenches, embankments, and farmland.

• In s 8(2)(a), to make wording tidier and broader, we suggest replacing the words ‘ship, boat’ with ‘vessel’ which will also capture other watercraft such as submarines, rafts, diving bells etc.

Part 2 – Safety Duties

Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the principles and expectations are not clear. Our reasons for this are as follows:

• It is not clear whether the term ‘work environment’ includes premises, layout, fixtures, fittings, furniture, air quality, and access/egress. We are of the view that a non-limiting definition of the term ‘work environment’ would greatly assist interpretation of the general duties.

• Section 16 on risk management needs to make it clear that hazards should be eliminated or controlled ‘at the source’ as this is the most effective means of risk management.
Q9. Is the definition of ‘reasonably practicable’ appropriate in this context?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

- Qualification of the duties by addition of the words ‘Reasonably practicable’ is a lesser standard than exists in NSW, ACT, Queensland, Tasmania and South Australia. **Effectively, this means that approximately 62%, the majority of the Australian workforce, will be adversely affected by the imposition of the new limitation of ‘reasonably practicable’ on the duties of care**. This is contrary to COAG’s intentions.

- ‘Reasonably practicable’ has also been applied to other absolutes such as the word ‘ensure’. PCBUs now only have to ‘ensure as far as reasonably practicable’. This is a significantly watered down meaning for a word used commonly to denote ‘guarantee’ or ‘make certain’.

- The extent of application of section 17 is confusing and needs to be made clear in the drafting. It is unclear whether s 17 applies to s 18 only, to s 18-25, or more broadly to wherever the term ‘reasonably practicable’ occurs. The criteria are largely irrelevant to some situations such as the setting up and implementation of the consultation process (negotiating consultation arrangements, holding HSR elections, training, holding and documenting meetings, publicising outcomes of consultation, etc).

  Section 17 should therefore be amended to make it clear that it only applies to general duty clauses.

- Inclusion of ‘cost’ in the definition is potentially detrimental as it could be misinterpreted by employers to mean inconvenient or unwelcome cost, rather than grossly disproportionate cost relative to risk. As outlined in the Panel’s first report, although the application of ‘reasonably practicable’ has been defined in case law, such information is not readily available to duty holders. For clarity, the relevance of ‘cost’ should be included in the definition. The term ‘grossly disproportionate cost’ may be more meaningful.

- Considerable education of employers would be needed with respect to the high uninsured costs resulting from injuries, and the business efficiency and profitability benefits from good OHS performance as consistently shown in research - ACIL Tasman\(^3\), Ian Rumney\(^5\), ACSI\(^6\), Goldman Sachs JBWere\(^7\), De Greef and Van den Broek\(^8\). Page viii of the ACIL Tasman Report (2006)

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\(^3\) ABS Labour Force Status (aged 15 years and over), States and Territories, September 2009 – 6202.0
\(^6\) Australian Council of Super Investors (ACSI), (2007), Corporate Citizenship Newsletter, November 2007, Issue 33, p 5-6
\(^8\) De Greef Marc and Van den Broek Karla, (2004), Quality of the working environment and productivity. Research findings and case studies, European Agency for Safety and Health at Work, 2004
estimated that ‘OHS reform induced workplace injury and disease cost savings of at least $5.58 billion per annum. Further the economic modelling by ACIL Tasman suggested that OHS reforms induced a 19 248 annual reduction in workplace injury and disease (p vii), and increased NSW gross state product, employment and consumption (p ix).

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

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

In the interests of clarity and certainty, it is important that the definition of ‘reasonably practicable’ is exhaustive.

However, we have some further comment on wording. The issue of cost needs to be clarified so that it is understood that cost only applies in the context of disproportionate cost. See also, our comments on Q9.

Q11. Is the proposed scope of the primary duty appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the scope of the primary duty of care is not appropriate. It is unclear since it excludes some significant matters (due to possible drafting errors) and has potential for unintended consequences, including:

- It is unclear whether the term ‘work environment’ is interpreted as including premises. In the NSW OHS Act, provision of safe and healthy working environment [s 8(c)] and provision of safe and healthy premises [s 8(a)] are included as separate items. To provide some clarity around this requirement, we suggest a definition of ‘work environment’ that includes for the purposes of illustration (list not to be exhaustive) – premises, entrances/exits, fixtures and fittings, layout, lighting, furnishings, floors, stairs and passageways, air quality and temperature, workplace culture.

- ‘Health’ has been excluded from some requirements under s 18(4) – all should include ‘safe and healthy’, not just ‘safe’.

- The duty of care should be extended to circumstances where the primary duty holder provides accommodation to a worker, as outlined in the WRMC Communiqué (18 May 2009)9. This is particularly important to nurses working in remote areas, where accommodation is provided in order to attract and retain staff. We note the OHS consequences of failure to provide safe accommodation in relation to the assault of a nurse in far northern

9 Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers’ Council, 18 May 2009.
Queensland in 2008, and can provide examples in NSW remote high risk communities.

- The wording of s 18(4)(g) is confusing as it is not always appropriate to monitor health or work environment, e.g. there are not always suitable tests available, or there may not be any monitorable exposures. Given it is a provision that does not apply to all circumstances, it is probably best placed elsewhere, e.g. in the regulations. Otherwise it needs to be qualified with something like ‘where relevant tests that can effectively monitor the specific exposure risk exist’. As it stands, the requirement could be interpreted as mandating general health checks for all employees in all workplaces – this would create an unreasonable cost burden on employers, particularly small and medium enterprises, and create an unnecessary privacy invasion on employees. Any health monitoring should pertain to the risks related to the business or undertaking.

**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 (section 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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

To be protective of health and safety, information, training etc needs to be in a form that is understood by the workers, only one being language. The reasons for this are varied. For example, if the information is in a written form, a person may not be literate, may be visually impaired or the information could be too technical, even if in the right language. If the information is provided verbally, some workers may be hearing impaired.

We therefore suggest that the legislation include a requirement for the employer to provide information and training in a form that is understood. How this will be achieved, including whether it should be provided in relevant languages, should be determined in consultation with employees and their representatives.

**Q13.** The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (s 18(4)(e)). Should this provision be drafted to require ‘access to’ such facilities (e.g. to take account of requirements for mobile workplaces)?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

- Section 18(4)(e) needs to cover both provision of and access to adequate facilities for the welfare of workers. Access should be implicit in the duty of the PCBU to provide adequate facilities. However, because it is not stated,
PCBU’s may take this literally to mean that the facilities are to be provided but access by workers is not mandated. A recent example can be noted at the Medicare call centre in Parramatta NSW (Daily Telegraph, 14 October 2009), where workers were required to limit their toilet breaks to three minutes and to keep a diary entry of each break, even though toilets had been provided by the PCBU. A further suspected case was headlined in the Daily Examiner (22 May 2009), where an abattoir owner restricted workers’ access to toilets to during their breaks which were about 4 hours apart – once again the facilities were provided but access was denied.

- Care also needs to be taken in drafting to ensure that that PCBU’s do not interpret ‘access’ to mean that there is no need to provide welfare facilities, e.g. ‘you can buy water down the road or use the local garage toilet, so I don’t need to provide a kitchen or toilets’. We recommend that either the model Act or model Regulation should stipulate, not only a requirement to provide facilities, but also a maximum distance that staff should have to walk to toilets, water and kitchen facilities in fixed workplaces. For mobile workplaces, such as vehicles, ‘access to’ would be applicable.

Q14. Is the scope of the duties related to specific activities appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

- The scope of the duties is neither appropriate nor adequate.

- Designers, manufacturers, and suppliers need to also be responsible for the health and safety of systems of work and work premises, not just plant, structures and substances.

- The definition of structures does not provide assistance in full as it includes buildings (that could be work premises) but does not include other potential work premises such as road construction sites, tents, embankments, levees, trenches and vehicles. We are unclear as to whether scaffolds are included in the term ‘framework’? If the definition of ‘structure’ is clarified as per our comments in Q3, then this would improve clarity and better define the scope of the duties.

- Provision of information by designers, manufacturers, suppliers etc – these duty holders should also be required to provide information on request to people other than those to whom they supply the design, plant, substance, system, premises etc. The receiver is not the only person who legitimately requires information about plant, substances, structures, and systems of work. Persons to whom information should be provided on request include users (including those who erect, use, maintain, dispose of, dismantle), workers, workers’ representatives, first aiders, nursing and medical personnel, authorised right of entry holders, inspectors, and OHS/risk management personnel and emergency services.

- In addition to the above – manufacturers, designers and suppliers/importers.
should be required to provide information as a matter of course on first supply to another person, and the information must be provided in a form that can be understood by the recipient. See also our response to Q12 for rationale.

- In relation to designers, it is particularly important that the list of ‘residual risks’ is provided to employers and others who may be exposed where such risks have not been eliminated.

**Q15.** In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?

**NSWNA supports** Unions NSW and ACTU submissions in this regard. In addition:

- Yes, what the worker knew should be taken into account. However, what the worker knows does not necessarily impact on the worker’s capacity to protect their own health and safety as they seldom have the authority to remedy risks. If the worker is aware of a risk, the only recourses available are to approach their HSR (if there is one), to call the regulator, or to refuse to carry out the work. For a number of reasons, e.g. fear of job loss, the above may not be utilised in all instances putting the employees at jeopardy of prosecution if they are injured.

- We offer an example from a nursing perspective - nurses are often placed in a position of short-staffing leading to a number of risks, e.g. higher risk of assault, no available assistance with manual handling, and fatigue. The conflict arises because nurses have a duty of care to their patients/clients which is fundamental to nursing practice – ceasing or refusing work is seldom an option, and regulators generally refuse to address risk situations arising from staffing and skill-mix. In this situation, in order to fulfil their nursing responsibilities, nurses may have no choice but to accept the risk, and be unable to take reasonable care of their own health and safety. This type of conflict is applicable to other frontline areas of work including emergency and residential care services.

- The duty not to interfere with anything provided for health and safety needs to be included as an offence that applies to all individuals. NSW OHS Act 2000, s 21 as an example of how it can be drafted.

**Q16.** Is the treatment of volunteers under the model Act appropriate?

In part – the treatment of volunteers under the model Act is inconsistent and unclear.

**NSWNA supports** the inclusion of volunteers in the definitions of ‘worker’, ‘officer’ and PCBU. However, while volunteers are given responsibilities under the model Act, they are effectively absolved of those responsibilities by the provisions of s 33.

The exemption provided by s 33 appears to go so far as to absolve volunteers of the
same level of responsibility as those that apply to other people in the workplace such as the general public/visitors (s 28).

The lack of penalties makes a mockery of provisions and discourages compliance with duty of care requirements. There are many people in volunteer director’s positions who make decisions about the running of businesses and undertakings. These decisions can have a profound effect on the health and safety of workers and others.

People who are responsible for making decisions that may impact on the health and safety of workers or others need to be held accountable for those decisions, whether they are in paid positions or not. NSWNA has had the experience where volunteer directors on boards running non-government organisations (NGOs) have made decisions that put staff at considerable risk, e.g. at Matthew Talbot Hostel (Sydney), the president of the management committee regularly used his powers to veto recommendations of the OHS Committee and managers, despite employees and volunteers being regularly assaulted.

Volunteers working as employees should also be held accountable for their actions / omissions and should be required to comply with provisions for safety, in the same way that other workers and the general public (i.e. others in the workplace) are expected to comply.

It is risible that an officer or PCBU could escape liability for putting workers at risk, and there is no penalty for volunteer workers who refuse to comply with provisions for the safety of themselves and others. The latter situation could leave a PCBU in the situation where they cannot comply with their own responsibilities and could potentially be prosecuted because volunteer workers did not comply with safety directives as they had no incentive (threat of penalty) to do so.

The objects of the model Act cannot be met if sections of the population with significant impact on workplace health and safety are exempted from legislation or reasonable responsibility. Some organisations have raised fears that volunteers will not put themselves forward if they have responsibilities under OHS legislation. However, as members of the community, they are bound by a myriad of legislative requirements. The provisions of the model Act reinforce what is required of any reasonable person rather than adding to responsibilities. If the requirements of the model Act prevent irresponsible people from stepping up to volunteer positions, then that can only be to the benefit of the community as a whole.

In addition, it seems anomalous that volunteers are exempt from penalty for breaches of duties under division 2-4, but not for other types of breaches.

NSWNA, however, supports exemptions for volunteer situations such as residential strata management boards comprised of residents (in a non-paid capacity), or organisations consisting wholly of volunteers in pursuit of mutual interests e.g. book/photographic clubs or bush walking clubs etc.
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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No - the range and level of penalties are not appropriate.

Fines for employees are excessive, inequitable and disproportionate compared with the maximum fines proposed for officers/non-corporate offenders and corporations. This becomes very evident when fines for (1) corporations are compared against potential annual profit, (2) officers and non-corporate PCBU’s are compared with income, and (3) fines for employees are compared against annual incomes.

Corporations earn much more than 10 times the average wage of workers. For example, a $300,000 fine could represent more than 5 years income for an employee, whereas a $600,000 fine may represent less than 1 month’s income for a corporate CEO, and a $3 million fine is trivial for large corporations such as BHP, John Holland or Commonwealth Bank.

The proposed fines structure, therefore, appears to have inbuilt inequities and fails to act as an effective deterrent for large organisations and highly paid CEOs. According to a Productivity Commission report, the amount of money earned by chief executives was 50 times that of an average worker in 2008. CEOs of the top 20 companies earned an average $10 million. That is 150 times what the average wage earner makes. To give one example, former Macquarie Bank CEO Mr Allan Moss was reportedly on a salary of $25 million per year.

Given the above, NSWNA therefore contends that the differential between corporate, officer/non-corporate and worker penalties must be evidence-based (e.g. as per the abovementioned Productivity Commission report).

- Officer penalties should be set at 50 times that of worker penalties. On that basis, the maximum worker fine for a category 1 breach would become $12,000.
- The most equitable approach would be to set maximum penalties as a percentage of turnover or income.

The proposed fines do not take repeat offenders into account.

The model Regulations should better define categories 1-3, since it appears from the information provided, that the vast majority of offences will fall into category 3, which is less than the current corporate fines set down in NSW. This will create a lesser standard.

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Q18. What should the maximum penalty be for a contravention of the model regulations?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

See our response to Q17. NSWNA is of the view that in order to be an effective deterrent and to be relatively equitable, penalties should be tied to a percentage of income in the case of natural persons, or a percentage of turnover in the case of business entities.

Penalties for breaches should be relative to the seriousness and nature of the breach. Sentencing guidelines should be developed to assist the courts to apply nationally consistent penalties.

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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

All offences should come under the same system. However, some more minor offences (e.g. administrative matters) could attract a set fine that can be paid, for example, through the jurisdiction’s fines processing bureau (in the same way that traffic infringement fines are paid) without necessitating court proceedings.

Part 3 – Other Obligations

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

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

- The list of notifiable incidents fails to capture many aspects currently enshrined in NSW legislation. This represents a reduction in the current standards and is therefore contrary to COAG directives and federal government assurances.

- Some terminology is very unclear – e.g. what is meant by treatment as an ‘in-patient’. How long does a person need to be in hospital to qualify as an ‘inpatient’? There is no nationally (or internationally) standard definition of what constitutes an inpatient.

- Section 35 uses criteria based on severity of the outcome of an incident to qualify what should be reported under the Act, rather than focusing on the seriousness of the breach. This is inconsistent with the Panel’s view that ‘offences will continue to take an inchoate form, i.e. constituted by the culpability and risk created by a breach of a duty, rather than the
The current drafting fails to require notification of:

- Exposure to substances with long-latency health effects, e.g. silica and silicosis
- The diagnosis of a serious disease (e.g. a disease that is debilitating or life threatening)
- Violence, e.g. violence involving weapons or serious injuries
- Exposure to carcinogens
- Infectious exposures (e.g. blood borne viruses)
- Serious psychological trauma
- Serious injury or illness as defined in NSW legislation – that is, an injury or illness that prevents a person from undertaking their normal work or, in the case of a non-employee, normal activities for 7 or more days.

Part 4 – Consultation, participation and representation

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

In part, the duty to consult is appropriate in principle, but the provisions in the model Act do not support the objects of the Act and effective implementation.

Consultation is one of the most proactive and productive mechanisms available to employers to assist them in meeting their OHS obligations. It is therefore vital that this opportunity to create a high national (and international) standard for consultation not be missed.

Consultation provisions must incorporate a greater role for unions. This is supported by Australian and overseas research which shows that representative employee participation via an active trade union, far outweighs in terms of effectiveness, that of direct employee participation and consultation. (WorkSafe Victoria 2005, Johnstone 2005, Butler 2005, Wilkinson et al 2004, HSE 2000).

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It is not sufficient for consultation to occur only in the context of an organisation’s safety management systems. Employees need to be involved in informing the decision making on OHS related matters on an ongoing basis including things such as design of premises, selection of plant and equipment, development of procedures etc. As stated so eloquently in ACCI’s Modern Workplace: Safer Workplace (2005), “Involving employees…. encourages commitment to the achievement of business OHS goals …..Employees can provide some of the most practical and constructive suggestions on OHS risks and the management of those risks.”

The model Act supports local level consultation but does not embrace a holistic approach to mechanisms that impact on whole-of-industry performance such as tripartite development of standards. Consultation should therefore occur on two levels and support an industry-wide tripartite approach – (1) workplace/employer as currently proposed in the model Act, and (2) industry level which has not been incorporated in the model Act. Consultation at industry and corporate levels are essential as they are appropriate places to incorporate a role for unions on behalf of their members and prospective members.

NSWNA consistently finds when investigating OHS matters raised by members that the lack of consultation by employers has often contributed to the existence of the risk in the first instance (e.g. risks arising from the design of a workplace or work environment, or choice of equipment), the persistence of existing risks, and the subsequent failure to eliminate or control them at a local level. It is therefore vitally important that the scope of duty be mandatory, comprehensive and enforceable.

The scope of duty as it appears in the model Act is inadequate – it is not sufficiently comprehensive in the following areas -

- **Consultation statement** – there is no requirement to document the negotiated consultation arrangements (other than to list the HSRs within the organisation) and formalise them into an agreement/statement signed off by the PCBU/s, employee representatives and relevant unions. The written consultation statement forms evidence that the PCBU has complied with the legislation with respect to the formation of consultation arrangements. The advantage of written consultation statements is that they can be made accessible and available to all current and new workers, they leave no doubts as to what was agreed, and they can be evaluated to ensure continuous improvement. Such agreements should be mandatory and enforceable, and there should be requirements as to the types of matters that they should cover, e.g., dispute resolution procedures, nature of workgroups, number and role of HSRs, number and role of deputy HSRs, structure and role of OHSCs, how elections are to be carried out, training of HSRs and OHSC members (including HSRs’ right to request training), frequency and method of review. Consultation statements should be made available to union officers and regulators on request and be published in annual reports.

- **Unqualified duty to consult** - the duty of care should not be qualified by

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‘reasonably practicable’, it should be mandatory. The only exemption allowed should be in emergencies. Qualifying the duty to consult with ‘reasonably practicable’ will reduce standards for more than 50% of Australian workers.

The definition of ‘reasonably practicable’ as it appears in s 17 is not relevant to the provisions for negotiating and setting up the consultation process. Section 17 needs to be clarified as to the extent of its application.

The duty to consult should make it mandatory for the PCBU to develop consultation arrangements on the request of workers, unions, or the regulator. Consultation arrangements can also, of course, be initiated by the PCBU.

• **Training not mandatory** – Training of HSRs and OHSC members should be mandatory. This is also a notable reduction in standards from those which currently exist in NSW and other jurisdictions affecting more than 50% of the Australian workforce. This is contrary to the intentions of COAG’s recommendations. Our view is that this is an unintended consequence of the drafting.

As the proposed legislation stands, HSRs must request training. For OHSC members (appointed and elected) there is no training requirement at all. This is particularly relevant where previously trained HSRs are not part of an OHSC, leaving an organisation’s major consultation forum and injury/illness prevention mechanism, without any common learning to guide them in their role. This will significantly reduce the effectiveness of HSRs and OHSCs.

− The requirements of Division 5, s 76(5) which restricts a HSR from issuing notices or stopping work unless trained, is inconsistent with the requirements relating to inspector training. That is, inspectors are able to exercise a wide range of powers e.g. issuing notices, taking statements etc, without completing minimum training for their role.

− If a HSR cannot issue notices or stop work without training, then some employers may see it as advantageous to ensure that HSRs are not trained in order to deliberately limit their power.

− A failure to provide training puts the HSR at greater risk of being removed from the position due to failure to fulfil their legislated role correctly and effectively.

• **Industry level consultation** – the model Act does not include consultation at industry level. The Model Act should include provisions that require regulators to convene, resource and facilitate industry forums and the development of industry guidance materials. Industry level consultation fosters cooperation and collaboration on a range of issues.

Industry level consultation should be funded and facilitated by regulators using nationally consistent structures. These consultation forums allow frank discussion of OHS matters in a non-adversarial environment and there is no other forum where workers can have direct input into bureaucratic structures such as the OHS regulator.
Industry level consultation forums have the following advantages:

- Ability to advise regulators on practical, achievable industry strategies
- Advise the regulator on how to be more responsive to industry needs and effective in achieving national and state OHS targets
- Identify emerging OHS issues in sub-sectors that could be relevant to the industry as a whole
- Foster cooperation
- Provide a coordinated approach to industry activities and interventions
- Provide a consultative forum for the development of industry codes of practice and guidelines
- Provide a platform for the conduct of industry-wide projects
- Provide an effective means of delivering and distributing information on a wider scale
- Provide a feedback mechanism for the operation of the new legislation.

- **Bipartite collaboration** – a greater role for unions would be beneficial given that many unions employ qualified OHS professionals, and union officers are dealing with consultation and other OHS issues on a daily basis. Unions should be involved at enterprise and industry levels in representing their members/potential members. They should be involved whenever even one member/potential member requests their assistance, e.g. in conducting HSR elections, providing information to members/prospective members, in resolving OHS issues at the workplace, in investigating potential breaches, developing industry codes of practice or guidance materials, participating in the setting up and monitoring of enforceable undertakings. This will be particularly important given the expanded role for HSRs in most jurisdictions and the added support that will be required for them in their role.

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

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

Yes, a procedure for resolution of disputes on consultation procedures must be included in the Act. Given that consultation requirements are included in the model Act, including the formation of workgroups and election of HSRs and resolution of OHS disputes generally, it would seem logical to also include the resolution of disputes over OHS consultation arrangements in the Act.
We recommend that consultation under s 46 must include provisions along the lines of the current South Australian legislation at s 20, that consultation must involve on the application of an employee—a registered association of which that employee is a member. The draft s 46 is less than the standard currently applying in South Australia and should therefore be amended.

**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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

The need for consultative arrangements where two or more PCBUs work together or share a workplace is vital if a coordinated approach to managing risks is to be developed. Therefore, there should be a prescribed procedure in the eventuality that negotiations fail, e.g. intervention by the regulator or a tribunal that can issue enforceable orders. It should be the same procedure as for any other workplace where negotiations fail to reach agreement.

One clear example of a situation where multi-employer consultation agreements are needed is where one organisation provides a service to another and premises are shared as occurs in the case of Justice Health and the NSW Department of Corrective Services. [Matter No. 265 of 2009 NSW Industrial Relations Commission (NSWIRC) - NSWNA v Department of Corrective Services – see Appendix 1]. The issues related to repeated failure of NSW Department of Corrective Services (as controller of the workplace), to consult with Justice Health (the controller of work) on matters which placed nurses and midwives at risk. Subsequent directions by the NSWIRC, required the parties to confer and to embark on a process of consultation. The result was a written, signed consultation framework which will guide future OHS communications between the two departments.

**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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

Yes, a time frame should be prescribed. We suggest ‘14 days or as agreed’ in order to allow for longer time frames where needed for staff who work shift-work or who may be on leave to participate. The time limits are essential to ensure that the new arrangements are adopted promptly in 2012.
**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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

Yes, we suggest 21 days to allow the maximum number of employees to participate.

**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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

It must be mandatory to provide HSRs and OHS Committee members with training. To make training conditional on the request of a HSR, is a lower standard than currently exists in NSW. If such a requirement is not included in the legislation, then the requirement to provide HSR training ‘if requested’ should be accompanied by a requirement on PCBUs to inform newly elected HSRs, within 48 hours of their election, of their right to request training and the consequences of not having training.

There is no reason, given the advancement in technology such as on-line learning and the proliferation of Registered Training Organisations, for HSRs/OHSC members not to commence the training as soon as possible (ie within 14 days), no matter where they are located. If HSRs/OHS Committee members are not given training they will be unable to perform their roles leaving them open to complaints about poor performance from their employer or constituents. The purpose of implementing the harmonised HSR role is to improve OHS nationally. This cannot be achieved unless all efforts are made to equip HSRs to competently perform their role.

Training for the HSR role, including training in hazards specific to the workplace, should be mandatory with annual refresher training. The training requirements should be nationally consistent and reflect the highest current standards in Australia. A maximum time frame for provision of training should be included, e.g. as soon as practicable but must be completed within 2 months after election. Training must be provided at the employer’s expense and be in paid time.

The drafting of the legislation appears to undermine the intent of consultation and its enormous potential for positive outcomes because:

- Consultation is not mandatory (qualified)
- Training of HSRs and all OHS committee members is not mandatory (must be
requested by HSRs, and not required at all for Committees)

- PCBU nominees on safety committees do not have to be ‘officers’ of the business or undertaking.
- If not trained HSRs cannot exercise their role to stop work when imminent risks to health and safety arise, but workers who are not HSRs can do so. This is inconsistent and an apparent unintended consequence of the drafting.

Although transitional arrangements for the change from the current to new provisions are not yet available, in NSW, the majority of consultation mechanisms are OHSCs. Should PCBUs and workers choose to continue with this option, the bulk of consultation and OHS prevention activities, after the model Act commences, will be undertaken by appointed and elected representatives with no training to assist them to perform in their role. Transitional arrangements should therefore make elected OHS Committee members automatically become HSRs for the remainder of their term.

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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

Time limits of 2 months may be appropriate if workgroups are still to be determined and HSRs elected. However, if workgroups have been determined and HSRs elected, then there is no need for such a long time frame.

We are of the view that each stage of implementing consultation arrangements should have its own time frame, e.g. 14 days to determine workgroups, a further 14 days to elect HSRs, then perhaps a further 14 days to constitute the OHS Committee.

The legislation should stipulate the shortest time frame which can then be varied by agreement with employees and their representatives (unions) as appropriate to the particular industry or workplace. Longer time frames should not be required once the consultation system has been established and implemented.

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 sections 75 and 76 be aligned with the Fair Work Act?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

The draft model OHS laws should be aligned for consistency with the Fair Work Act – i.e. the words ‘reasonable grounds’ should be replaced with ‘reasonable concern’.
Q29. Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, exercise of powers should not be dependent on whether the HSR has attended training, particularly since training is not mandatory. A representative of a workgroup should have sufficient knowledge of the work to be able to make that determination appropriately in consultation with the workgroup members. In any event, under this legislation, any employee can cease work if they are at imminent risk from exposure to a hazard. Also, it is not allowed under common law to compel a person to do anything that puts them at risk.

In saying this however, we bring to your attention NSWNA’s strong view that all HSRs and OHS committee members (including management appointees) must receive mandatory approved training in order to fulfil their roles with the greatest possible effectiveness and competence (see answer to Q21). A PCBU’s failure to provide training could be interpreted as a malicious act that serves to circumvent the legislation and undermine the potential beneficial outcomes of consultation including OHS performance generally.

If a HSR cannot issue notices or stop work without training, then some employers may see it as advantageous to ensure that HSRs are not trained in order to deliberately limit their power. A failure to provide training puts the HSR at greater risk of being removed from the position due to failure to fulfil their legislated role correctly and effectively.

In summary, if the legislation fails to make HSR and OHS Committee member training mandatory, it could potentially be used to undermine and evade OHS and consultation responsibilities. NSWNA is of the view that this must be an unfortunate and unintended consequence of the drafting.

Division 5, s 76(5) shows inconsistency in that inspectors, who have significantly more powers than entry permit holders are able to exercise a wide range or powers e.g. issuing notices, taking statements etc, without completing minimum prescribed training for their role. There is also nothing in the Act which requires inspectors to be ‘fit and proper persons’.

Training for their (HSR and OHSC) role, including training in hazards specific to the workplace, should be mandatory with annual refresher training. The training requirements should be nationally consistent and reflect the highest current standards in Australia. A maximum time frame for provision of training should be included, e.g. as soon as practicable but to be completed within 2 months of election. Training must be provided at the employer’s expense and be in paid time.
Q30. Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, exercise of powers should not be dependent of whether the HSR has attended training, particularly since training is not mandatory, and since to prevent HSRs from issuing notices would prevent them from carrying out their role. In saying this however, we bring to your attention our strong view that all HSRs and OHS committee members (including management appointees) must receive mandatory approved training in order to fulfil their roles with the greatest possible effectiveness and competence (see answer to Q21). A PCBU’s failure to provide training could be interpreted as a malicious act that serves to undermine the potential beneficial outcomes of consultation including OHS performance generally and the spirit of the legislation. If a HSR cannot issue notices or stop work without training, then some employers may see it as advantageous to ensure that HSRs are not trained in order to deliberately limit their power. A failure to provide training puts the HSR at greater risk of being removed from the position due to failure to fulfil their legislated role correctly and effectively. In summary, if the legislation fails to make HSR and OHS Committee member training mandatory, it could potentially be used to undermine and evade OHS and consultation responsibilities – we feel that this must be an unfortunate and unintended consequence of the drafting.

Division 5, s 76(5) shows inconsistency in that inspectors, who have significantly more powers than entry permit holders, are able to exercise a wide range of powers e.g. issuing notices, taking statements etc, without completing the minimum prescribed training for their role. There is also nothing in the model Act which requires inspectors to be ‘fit and proper persons’.

Training for their role, including training in hazards specific to the workplace, should be mandatory with annual refresher training. The training requirements should be nationally consistent and reflect the highest current standards in Australia. A maximum time frame for provision of training should be included, e.g. as soon as practicable but to be completed within 2 months of election. Training must be provided at the employer’s expense and be in paid time.

Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, the time frame may not be appropriate in some circumstances, e.g. where the level of risk is high, including where the risk is sufficient to warrant cessation of work. Requiring compliance as soon as possible, rather than limiting it to one week minimum, is more sensible than having workers cease work while the PIN is being actioned or where the PCBU has to find alternate duties for workers.

Section 47(a) should read ‘when identifying hazards and assessing risks arising from the work carried out and to be carried out’. The requirement is somewhat ambiguous.
and unclear. To have ‘or’ rather than ‘and’ means that an employer can choose to consult on current work only for example, and not work that may be planned for the future.

### 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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

Yes. They should also be protected from being coerced into not exercising their rights, e.g. the right to ask for training.

The model legislation must further similarly protect union right of entry permit holders from coercion or intimidation. Currently, the model Act allows employers to coerce or intimidate by making unwarranted complaints about OHS entry permit holders thus threatening their powers.

The model legislation therefore must not only contain provisions to prevent coercion or intimidation of HSRs and OHS right of entry holders, it must make it an offence to bring vexatious or generally unsubstantiated complaints against HSRs and OHS entry permit holders in order to prevent abuses.

### Part 6 – Workplace entry by OHS entry permit holders

#### Q33. Are the notification requirements appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

NSWNA believes that the notification requirements for workplace entry by OHS entry permit holders are inappropriate. The proposed Part 6 is a lesser standard than currently exists in NSW and is contrary to COAG recommendations and federal government assurances.

The wording of s 106 is inappropriate. The term ‘inquiring’ is restrictive compared to ‘investigating’ any suspected breach (as exists as current wording in the NSW OHS Act 2000). ‘Inquire’ denotes verbal interaction by asking questions. The restriction is further compounded by s 107 which also limits the investigation process by denying permit holders the right to take measurements, photographs, recordings or samples or otherwise obtain enough information to support an objective assessment of risks to members or potential members in a workplace.

Section 107(d) does seem to allow inspection of some aspects of the workplace. It does not however, provide for inspection of work premises or work environments. For NSWNA members, the design of premises, fixtures, fittings and furniture, are a significant source of risk for manual handling and violence related incidents. Failure to include ‘premises’ in other sections of the model Act, e.g. failure to include ‘premises’ in ‘work environment’ or ‘structure’ is a serious oversight which may result
in PCBUs prohibiting inspection of premises.

The terms of notification to request documentation also fall short of current standards. Section 107(d) restricts documents only to those kept, or accessible from a computer kept at the workplace.

Section 108(1)(a) may be difficult to comply with as it is not always evident who the relevant PCBU or their most appropriate representative (officer) is. Inability to comply with this section could prevent a right of entry holder from exercising their powers. The section could also be effectively used by PCBUs to obstruct OHS entry permit holders. The word ‘or’ needs to be inserted between s 108(1)(a) and 108(1)(b). In addition, the option of notifying the person believed to be most senior representative of the PCBU on site at the time of the inspection should be inserted.

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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

In order to avoid onerous duplication of processes and over-bureaucratisation, a single authorisation for the purposes of OHS right of entry should be sufficient, with mutual recognition between jurisdictions (state/territory and federal).

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?

NSWNA supports Unions NSW and ACTU submissions in this regard.

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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

The ROE provisions have been poorly drafted in that they do not allow right of entry holders to investigate/inquire about all types of work-related risks and potential OHS breaches.

We note that the right of entry holder is limited by s 107(1)(a) to only examining systems of work, plant and substances. ROE holders are therefore effectively prevented from examining the work environment and premises for example. When this was raised with Robin Stewart-Crompton at the 2009 ACTU OHS Conference in February 2009, Mr Stewart-Crompton admitted that this was an oversight that would
be corrected.

The ROE provisions should therefore be worded more broadly to allow all aspects of work contributing to the risk/potential breach to be examined. We suggest that draft s 107(1)(a) be redrafted along the lines of ‘inspect any aspect of work, work environment or workplace that is relevant to the suspected breach or that gives rise to the risk’.

The list of items under s 107(1) should include the ability to take photographs, recordings etc as per the NSW OHS Act 2000 in order to allow for more accurate information gathering and report writing. Examples of the types of inspection reports NSWNA authorised officers provide to employers can be provided on request.

Part 7 – The Regulator

Q37. Should guidelines have any other particular legal status under the Act?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

No, guidelines should not become quasi legislation, but, they could be used to show what ought reasonably to be known by a PCBU in the event of a prosecution. That is, guidelines could have evidentiary status, but must not be given ‘deemed to comply’ status.

Compliance with a guideline or code of practice should not be ‘deemed to comply’ with duties of care since the broad advice in guidelines or codes of practice may not be the most appropriate approach for all workplaces and their specific situations; and because technology and knowledge advances at a much faster pace than the review of guidelines and codes of practice leading to the likelihood that outdated and less satisfactory methods of risk control will continue to be used in order to be ‘deemed to comply’.

Because guidelines will be written by the regulator in each jurisdiction, the likelihood that they are different could be a confounding point in a prosecution and a source of ‘disharmony’ between jurisdictions.(s 145).

Part 10 – Review of Decisions

Q38. Is the list of reviewable decisions appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard.

Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?

NSWNA supports Unions NSW and ACTU submissions in this regard.
### Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or non-disturbance notices, having regard to the purposes of those notices?

NSWNA supports Unions NSW and ACTU submissions in this regard.

### 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?

NSWNA supports Unions NSW and ACTU submissions in this regard. In addition:

- No, it needs to be stated in regulation.
- Codes of practice can be used to provide further advice, elaboration, case studies and templates.

### Do you have any other comments?

**Terminology – ‘safety’ v ‘health and safety’**
Wherever it appears, the term ‘safety’ should be replaced by ‘health and safety’ to prevent unintended limitation of the application of the model Act.

**Section 3(a)** – should read ‘....arising from work (and from specific types of substances and plant)’. The word ‘or’ takes away from the generality of the object to ensure workers health and safety.

**Section 3(c)** – unions and employer groups have a broader role than promoting improvements in health, safety and welfare practices. We recommend that s 3(c) be worded more generally as follows – ‘to encourage unions and employer organisations to take a constructive role in securing improvements in health, safety and welfare’.

**Section 3(g)** – include the objective to raise national OHS performance to equal that of top performing OECD countries. Currently Australia lags behind other OECD countries.

**Section 3(h)** – NSWNA objects to the ‘strengthening of harmonisation’ being included as an object. It should be about improving OHS performance, not about improving harmonisation.
Section 3(2) – the wording of this objective is inappropriate in that the word ‘should’ is used in relation to providing workers and others with the highest levels of protection to their health and safety thus making it optional. The object also allows for the general requirements to secure health and safety to be limited to specified plant and substances by use of the word ‘or’.

Given the use of the qualifier ‘as is reasonably practicable’ at the end of the object, the word ‘should’ needs to be replaced with ‘must’ so that it reads – ‘…workers and other persons must be given the highest……from work [and from specified…].

Section 4 – Definitions
Some definitions need clarification as follows:

**Design** – should read ‘includes redesign or modification of design’

**Officer** – this definition is unclear in some aspects. Part (a)(ii) may have implications for persons who participate in consultation or who participate in the conduct of risk assessments, risk control plans etc. Part (a)(iii) has implications for persons such as the media and financial advisors for example. Part (a)(iv) has implications for any workers who may manage or receive any property including personal protective equipment, or who may manage a storage area for example. Does the word ‘property’ refer to substantial real estate or funds?

**Person** – in some sections, the word ‘person’ refers to a business entity while in other instances it refers to a natural person. These instances need to be clarified and differentiated. In the context of a PCBU, it should be clear that the word ‘person’ refers to an entity and not to a natural person.

Section 5 –
**Person conducting a business or undertaking** – the definition needs to make it clear that the term ‘person’ refers to entities, not to natural persons.

**Representative** – (a) and (b) should be followed by the words ‘and/or’ to make clear that they are not mutually exclusive.

**Work environment** – the term ‘work environment’ should be defined in a non-limiting way to ensure that the extent of duties is clearly understood. The definition should make it evident that ‘work environment’ includes such things as premises, entries and exits, layout, fixtures, fittings, furniture, air quality, lighting, temperature, and workplace culture.

Section 7 – Meaning of worker
Section 7(1)(g) needs to be reworded to include all persons undertaking work experience, not just students. Examples include cadets, persons undertaking rehabilitation after an injury, unemployed persons undertaking retraining/training.
Part 2, Division 3 – Duties related to specific activities

- Section 21 needs to include designers of systems of work
- Section 22 needs to include manufacturers of systems of work
- Section 23 should include the importation of systems of work
- Section 24 should include the supply of systems of work
- The above sections should require the provision of information, on request, to prospective users or purchasers, users and their representatives (including HSRs, unions and lawyers), regulators, and medical/clinical personnel providing first aid or treatment.

Part 2, Division 4 – Officers, workers and other persons

We note the omission of a provision making it an offence to interfere with anything provided in the interests of health and safety. Such a provision should be included.

Section 37 – Duty to notify of notifiable incidents

NSWNA is concerned that the jurisdictional note will create unnecessary complications and reduce harmony between jurisdictions.

Part 4 – Consultation, participation and representation

(general comment on this part)

Consultation is one of the most proactive and productive mechanisms available to employers to assist them in meeting their OHS obligations. It is therefore vital that this opportunity to create a high national (and international) standard for consultation not be missed.

Consultation provisions must incorporate a greater role for unions. This is supported by the stated objects of the model Act (s 3(1)(b) and 3(1)(c)) and Australian and overseas research which shows that representative employee participation via an active trade union, far outweighs in terms of effectiveness, that of direct employee participation and consultation. (WorkSafe Victoria 2005, Johnstone 2005, Butler 2005, Wilkinson et al 2004, HSE 2000).

It is not sufficient for consultation to occur only in the context of an organisation’s

Employees need to be involved in informing the decision making on OHS related matters on an ongoing basis including things such as design of premises, selection of plant and equipment, development of procedures etc. As stated so eloquently in ACCI’s Modern Workplace: Safer Workplace (2005), “Involving employees…. encourages commitment to the achievement of business OHS goals …..Employees can provide some of the most practical and constructive suggestions on OHS risks and the management of those risks.”

The model Act supports local level consultation but does not embrace a holistic approach to mechanisms that impact on whole-of-industry performance such as tripartite development of standards. Consultation should therefore occur on two levels and support an industry-wide tripartite approach – Workplace/employer as currently proposed in the model Act, and industry level which has not been incorporated in the model Act. Consultation at industry and corporate levels are essential as they are appropriate places to incorporate a role for unions on behalf of their members and prospective members.

NSWNA consistently finds when investigating OHS matters raised by members that the lack of consultation by employers has often contributed to the existence of the risk in the first instance (e.g. risks arising from the design of a workplace or work environment, or choice of equipment), the persistence of existing risks and the subsequent failure to eliminate or control them at a local level. It is therefore vitally important that the scope of duty be mandatory, comprehensive and enforceable.

The scope of duty as it appears in the model Act is inadequate – it is not sufficiently comprehensive in the listed areas. NSWNA requests that consultation provisions be amended to encompass the comments as expressed below and in response to questions posed above.

- **Consultation statement** - there is no requirement to document the negotiated consultation arrangements (other than to list the HSRs within the organisation) and formalise them into an agreement/statement signed off by the PCBU/s, employee representatives and relevant unions. The written consultation statement forms evidence that the PCBU has complied with the legislation with respect to the formation of consultation arrangements. The advantage of written consultation statements is that they can be made accessible and available to all current and new workers, they leave no doubts as to what was agreed, and they can be evaluated to ensure continuous improvement. Such agreements should be mandatory and enforceable, and there should be requirements as to the types of matters that they should cover, e.g., dispute resolution procedures, nature of workgroups, number and role of HSRs, number and role of deputy HSRs, structure and role of OHSCs, how elections are to be carried out, training of HSRs and OHSC members (including HSRs’ right to request training), frequency and method of review. Consultation statements should be made available to union officers and regulators on request and be published in annual reports.

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The definition of ‘reasonably practicable’ as it appears in section 17 is not relevant to the provisions for negotiating and setting up the consultation process. Section 17 needs to be clarified as to the extent of its application.

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- **Training not mandatory** – Training of HSRs and OHSC members should be mandatory. This is also a notable reduction in standards from those which currently exist in NSW and other jurisdictions affecting more than 50% of the Australian workforce. This is contrary to the intentions of COAG’s recommendations. Our view is that this is an unintended consequence of the drafting.

As the proposed legislation stands, HSRs must request training if it is to occur. For OHS Committee members (appointed and elected) there is no training requirement at all. This is particularly relevant where previously trained HSRs are not part of an OHSC, leaving an organisation’s major consultation forum and injury/illness prevention mechanism, without any common learning to guide them in their role. This will significantly reduce the effectiveness of HSRs and OHS Committees.

- The requirements of Division 5, s 76(5) which restricts a HSR from issuing notices or stopping work, is inconsistent with the requirements placed on inspectors, who have significantly more powers than entry permit holders. Inspectors are able to exercise a wide range or powers e.g. issuing notices, taking statements etc, without completing the minimum prescribed training for their role.
- If a HSR cannot issue notices or stop work without training, then some employers may see it as advantageous to ensure that HSRs are not trained in order to deliberately limit their power.
- A failure to provide training puts the HSR at greater risk of being removed from the position due to failure to fulfil their legislated role correctly and effectively.

- **Industry level consultation** – the model Act does not include consultation at industry level. The Model Act should include provisions that require regulators to convene, resource and facilitate industry forums and the development of industry guidance materials. Industry level consultation fosters cooperation and collaboration on a range of issues.

Industry level consultation should be funded and facilitated by regulators using nationally consistent structures. These consultation forums allow frank discussion of OHS matters in a non-adversarial environment and there is no other forum where workers can have direct input into bureaucratic structures such as the OHS regulator.

Industry level consultation forums have the following advantages –
− Ability to advise regulators on practical, achievable industry strategies
− Advise the regulator on how to be more responsive to industry needs and effective in achieving national and state OHS targets
− Identifying emerging OHS issues in sub-sectors that could be relevant to the industry as a whole
− Fostering cooperation
− Coordinated approach to industry activities and interventions
− Provide a consultative forum for the development of industry codes of practice and guidelines
− Provide a platform for the conduct of industry-wide projects
− An effective means of delivering and distributing information on a wider scale
− Feedback mechanism for the operation of the new legislation.

• Bipartite collaboration – a greater role for unions would be beneficial given that many unions employ qualified OHS professionals and unions organisers are dealing with consultation and other OHS issues on a daily basis. Unions should be involved at enterprise and industry levels in representing their members/potential members. They should be involved whenever even one member/potential member requests their assistance, e.g. in conducting HSR elections, providing information to members/prospective members, in resolving OHS issues at the workplace, in investigating potential breaches, developing industry codes of practice or guidance materials, participating in the setting up and monitoring of enforceable undertakings. This will be particularly important given the expanded role for HSRs in most jurisdictions and the added support that will be required for them in their new role.

• Limited powers of OHS entry permit holders – see comments below regarding sections 106 and 107. The limiting of powers prevents unions from effectively assisting workers and PCBUs to maximise the effectiveness of OHS risk management as outlines in the objects of the model Act (s 3(1)(c)).

• HSR and OHSC member’s roles not recognised as normal work – a number of sections refer to ‘time off work’ with respect to HSRs (e.g. s 65). This is not appropriate as it suggests that the HSR’s role is not part of the HSR’s normal work duties and normal business practice. Wording along the lines of that used in the NSW OHS Act 2000 would be more appropriate, e.g. something along the lines of: ‘the conduct of the HSR’s and OHSC member’s role and any related training is to be regarded as part of the HSR’s/OHSC member’s normal work and are to be paid as such including any reasonably incurred expenses’.

Section 45 – Duty to consult
The duty to consult has been qualified with the term ‘so far as is reasonably practicable’. This goes against the objects of the model Act as stated in s 3(1)(b). It is a significant reduction in current standards for works in NSW and Northern Territory who represent approximately 31% of the Australian workforce.

The duty to consult should be made mandatory. The only exception should be
emergency situations that do not allow time for consultation.

The consultation arrangements must be documented in a consultation agreement and be enforceable. A copy of the consultation agreement must be posted in a prominent place in the workplace and a copy must be provided to all employees, and, be provided on request, to unions, OHS entry permit holders and the regulator.

Section 48 – Request for election of health and safety representative
We recommend three changes to this section as follows:

- The request for election of health and safety representative/s should be in writing so that the request cannot be denied by the PCBU.

- A union representing one or more workers must be able to make the request for election of a health and safety representative.

- A regulator must be able to direct a PCBU to set up consultative arrangements.

Section 50(2) – Negotiations for agreement for work group
A maximum time of 14 days should be specified.

Section 51 – Notice to workers
As stated above, notice should be in the form of a formal, written consultation agreement which is prominently displayed in the workplace and a copy of which is provided to all employees. This should be supplied to all employees when the document is developed, to new employees at induction and to all workers whenever the document is updated.

Section 55 – Procedure for election of health and safety representatives
We request amendments as follows –

- The model Act must require the election of HSRs to take place in accordance with democratic principles.

- The model Act must make it an offence to interfere in the election process, e.g. including through coercion or intimidation, in order to influence the outcome. It has been brought to our attention that Victorian WorkSafe was not able to intervene in an instance where an employer destroyed a ballot box and its contents, as the legislation did not make it an offence to interfere in the election process.

- It should be possible for one person to request the assistance of the union in the election process. This is particularly important for jurisdictions which do not currently have these provisions in place. HSRs will need support and advice to embrace this new role.
Section 59 – Disqualification of health and safety representatives
The provisions should be amended to discourage them being used to intimidate or coerce HSRs. To this end the following changes must be made:

- The person seeking to disqualify the HSR must provide evidence of failure to comply with legislation or incompetence
- Only the members of the workgroup who elected the HSR should be able to judge the HSR’s performance
- Make it an offence to make application to disqualify a HSR for improper reasons or without adequate and proper evidence.

Section 62 – Functions of health and safety representatives
This section must be re-titled ‘Powers of health and safety representatives’ to make the purpose of the section clear and unambiguous.

Section 62 also needs to be amended to allow HSRs to issue PINs and to stop work.

Section 63 – Functions generally limited to the particular work group
The provisions of this section are unnecessarily limiting and are in conflict with the provisions of s 62(2)(f) which allows an HSR to ask any person for assistance.

Section 63 needs to therefore be redrafted to remove any conflict with s 62(2)(f).

Section 64 – General obligations of person conducting business or undertaking
There are some omissions that need to be addressed in order for these requirements to be consistent with s 47:

- To s 64(1)(b) – add a part (iii) as follows ‘proposed changes that may impact on OHS’
- To s 64(1)(c) – at the end of part (i), change ‘and’ to read ‘and/or’. Also add a part (iii) as follows: ‘PCBU and inspector’.
- To s 64(1)(e) – add a reference to access to information as follows: ‘…to have access to the workplace and information that is necessary to enable…’
- Section 64(1)(f) is unnecessarily limiting in that the health and safety of workers in one part of the workplace can be affected by the actions or omissions of the officers or workers in another. In order to fix this unintended consequence of drafting, we suggest an amendment as follows: ‘permit a HSR for the work group to accompany an inspector during the investigation of any risks to any worker from the work group’.
- Section 64(3) does not make it clear that performance of HSR duties includes attendance at training. The wording needs to be amended as follows:
‘…..performing his or her functions under this Act including attendance at training…..’.

Section 65 – Obligation to train health and safety representatives
It is objectionable, contrary to the objects of the model Act, and a reduction of standards from those that exist in some jurisdictions (e.g. NSW) that training of HSRs is dependent on the HSR asking for training, and that there is no training requirement for OHSC members. We therefore suggest the following amendments in order to avoid unintended consequences and a reduction of standards:

- Reword s 65(1) along the following lines: ‘A person conducting a business or undertaking must provide any HSRs and OHSC members with training in accordance with subsection (2)’.

- Amend s 65(2)(c) so that the HSR or OHSC member has a choice of course. Given all courses must be approved by the regulator, there is no reason for debate as to the appropriateness or relative merits of different courses/providers.

- Amend s 65(5) to clearly recognise the performance of the HSR role as being part of normal duties. The reference to ‘time off work’ is not consistent with consultation on OHS matters being seen as normal business practice or with the objects of the model Act. Suggest rewording along the following lines: ‘Attendance at training is to be regarded as part of the HSR’s normal duties and is to be paid accordingly for the time and other related reasonable expenses.

Section 69 – Constitution of committee
Section 69 has two glaring omissions that make this section inconsistent with the spirit of the objects of the model Act and that work against the functionality of OHSC. These are:

- A requirement must be inserted as follows: ‘at least one PCBU appointee to the committee must be an officer with sufficient authority to implement OHSC recommendations’

- The OHSC chairperson must be chosen by the employee elected representatives from amongst themselves.

Section 70 – Functions of committee
The functions of the committee should include the broad function of consulting on occupational health, safety and welfare matters that affect the business or undertaking including those that could not be resolved at the work group level.

Section 72 – Duties of person conducting business or undertaking
For consistency with the objects of the model Act and s 47, we suggest that addition of a subsection 72(1)(c) along the following lines: ‘proposed changes to the workplace, work environment, plant or substances.'
Section 73 – Resolution of health and safety issues

- Section 73 does not allow for PCBU’s to determine their own issue resolution procedure in consultation with employees and their representatives (including unions) on condition that the dispute resolution procedure is broadly consistent with the requirements of the model Act and with accepted principles of dispute resolution and procedural fairness generally.

- Subsection 73(2) is poorly worded in that it appears to preclude a worker from attending with their representative. To remedy this situation, We recommend replacing the word ‘or’ with ‘and/or’, e.g. ‘the person conducting the business or undertaking and/or the person’s representative.

Section 79 – Referral to regulator for resolution

The role of unions has been omitted. The model Act must make it clear that any person can refer an unresolved OHS matter to the regulator. This includes unions referring OHS matters on behalf of their members.

Section 92 – Review of provisional improvement notice

Subsection 92(2) should include the option of the inspector issuing a replacement prohibition or improvement notice.

Part 6 – Workplace entry by OHS entry permit holders

Many provisions under this part of the model Act fail to support the object as stated in s 3(c). To date, the work of NSWNA authorised officers has contributed significantly to assisting employers to comply with their obligations under OHS legislation, particularly since a number of our members are in senior management positions (and are therefore ‘officers’). A number of specific concerns are set out below.

Section 106(2) and 160(3) – Right of entry to inquire into suspected contraventions

Guidance should be provided as to the meaning of ‘reasonably suspect’. The meaning of ‘reasonably suspect’ should clearly include union member/s reports of the existence of risks that have not been eliminated or minimised.

The type of proofs that are regarded as reasonable for the purposes of s 160(3) also need to be clarified. To whom does the OHS permit holder have to provide these proofs and when do they have to be provided?

Section 107 – Rights that may be exercised while at workplace

We note that the right of entry holder is limited by s 107(1)(a) to only examining systems of work, plant and substances. ROE holders are therefore effectively prevented from examining the work environment and premises for example. When this matter was raised with Robin Stewart-Crompton at the 2009 ACTU OHS Conference in February 2009, Mr Stewart-Crompton admitted that this was an
oversight that would be corrected. This does not appear to have been attended to in the drafting.

The ROE provisions should therefore be worded more broadly to allow all aspects of work contributing to the risk/potential breach to be examined. We suggest that s 107(1)(a) be redrafted along the lines of ‘inspect any aspect of work, work environment or workplace that is relevant to the suspected breach or that gives rise to the risk’.

The list of items under s 107(1) should include the ability to take photographs, recordings etc as per the NSW OHS Act 2000 in order to allow for more accurate information gathering and report writing, and to allow unions to put a reasoned and substantiated request for prosecution to the DPP where the regulator has failed to prosecute a breach of legislation.

Examples of the types of inspection reports NSWNA authorised officers provide to employers can be provided on request.

Section 115 – When right may be exercised
The drafting needs to make it clear that ‘only during work hours’ refers to the work hours for that particular workplace.

Section 118 – Conduct of discussions in a particular room etc
Section 118(2) should include an additional proviso along the following lines – ‘(c) the route is generally available to the public or visitors to the workplace’.

Section 118(2)(b) should include an additional subsection along the following lines – ‘(iv) preventing the OHS entry permit holder from witnessing potential breaches of the legislation or risks to which workers are exposed’.

Section 121 – OHS entry permit holder not to disclose names of workers who are union members
This requirement should also allow an OHS entry permit holder to keep confidential the name of any person providing information about potential contraventions of the legislation.

Section 125 – Fit and proper person
It is inequitable and contrary to all principles of justice that OHS entry permit holders appear to be able to be disqualified for life for administrative errors that do not put individuals’ health or safety at risk, whereas PCBU’s and officers can continue to operate despite conviction of serious offences under the legislation.

A maximum period of disqualification from holding an OHS entry permit needs to be inserted.

We note that inspectors do not need to be ‘fit and proper persons’.
Section 130 – Application for revocation of OHS entry permit AND
Section 131 – Authorising authority must permit OHS entry permit holder to show cause
NSWNA brings the following inequities encapsulated in the drafting of sections 130 and 131 to your attention:

- It is not an offence to make unsubstantiated complaints against OHS right of entry holders.
- There is a presumption of guilt (as per s 131) once an accusation is made.
- The onus of proof is on the OHS entry permit holder to prove that they are innocent of the accusation rather than the accuser having to provide evidence that the OHS entry permit holder breached the legislation.

This approach is contrary to other provisions within the model Act. It does not provide for procedural fairness and is inconsistent with the principles of natural justice.

The above two deficits in drafting could encourage unscrupulous PCBUs to make unsubstantiated complaints in order to prevent inquiry into potential OHS breaches.

NSWNA strongly recommends a review of this section to ensure that OHS entry permit holders are protected from unsubstantiated and vexatious complaints. The revised section should –

- Require the accuser to provide evidence of breach of conditions of entry.
- Make it an offence to make false or unsubstantiated accusations against OHS entry permit holders.

Section 133 – Authorising authority may deal with a dispute about right of entry under this Act
This section presumes that all disputes about entry relate to breaches on the part of the OHS entry permit holder. They do not provide for dealing with disputes that may result from the employer refusing to allow entry to the permit holder.

Section 133(3) needs to include the following options –

- Dismissal of the complaint.
- Ordering the PCBU to allow entry.

Part 8 – Enforcement powers
We note that, despite inspectors having the greatest powers, there is no requirement for them to undergo training with respect to their powers, the requirements of the model Act or with respect to the management of OHS risks.
This is inconsistent with requirements placed on HSRs and OHS entry permit holders who have lesser powers.

Section 151 – Functions and powers of inspectors
It is not clear whether this section includes the ability to investigate complaints about risks to health and safety and other alleged breaches of the legislation.

It is not clear whether 151(d) includes the issue of penalty notices.

General
- The ‘time off work’ phraseology used throughout the consultation provisions is unacceptable. HSR duties are not ‘time off work’, they are integral to a HSR’s or OHSC member’s normal work and need to be recognised as such by the legislation.

- Notes related to prescription of individual jurisdictions’ legal mechanisms will result in lack of harmonisation. In some jurisdictions, prosecutions may be heard by a magistrate, in others a Commissioner with equivalent legal status to a high court judge and in others a judge and jury. This will result in significant differences in cost, briefings of counsel, status of prosecutions and, we are advised, may even result in the DPP refusing to accept a recommendation for prosecution because of the differences in judicial standards between the jurisdictions.
APPENDIX 1 – NSW INDUSTRIAL RELATIONS COMMISSION DECISION:
MATTER No. IRC 265 of 2009
IN THE MATTER of a Notification under section 130 by the New South Wales Nurses' Association of a dispute with the Department of Corrective Services and another re: change of work practices.

___________________________________________________________

DECISION

This matter concerns a notification made pursuant to section 130 of the Act by the New South Wales Nurses' Association (the Association) of a dispute with the NSW Department of Corrective Services and Justice Health, NSW Department of Health.

The dispute was notified to the Industrial Registrar on the 3 March 2009, and was in the following terms:

"The question, dispute or difficulty concerns the following industrial matters:

The Department of Corrective Services (DCS) has repeatedly failed to properly consult with regard to changed work practices in various correction centres. This is causing a significant occupational health and safety risk for nurses employed by Justice Health.

In 2006, DCS announced at very short notice to Justice Health the opening of a section at Long Bay Corrective Centre known as the Mental Health Rehabilitation Unit. As a result of that issue the NSW Nurses' Association wrote to DCS outlining that DCS were in breach of the Occupational Health and Safety Act 2000 (NSW) and Regulations by failing to properly consult with regard to changed work practices. Attached herein and marked Annexure A is a copy of this letter.

The Association, DCS, and Justice Health met as a result of the 2006 letter and a proposed agreement was drafted to help facilitate consultation in the future. The DCS never formally accepted the proposed agreement. Attached herein and marked Annexure B is a copy of the draft agreement as at 1 April 2007.

On Saturday 31 of January 2009, DCS advised Justice Health that they would be transferring a large number of inmates from Metropolitan Special Purposes Centre (MSPC) at Long Bay to 13 Wing (also at Long Bay) and that the transfer would commence on the following Monday. Justice Health had to respond by getting staff in the from the Cessnock region but could not immediately staff the afternoon shift. This resulted in staffing levels for 13 Wing being inadequate. Justice Health also found
the clinic at 13 Wing to be inadequate. On 5 February 2009, the NSWNA conducted an OH&S inspection of the 13 Wing clinic and a number of safety risks were identified. Since then, nurses have had to provide service at a different clinic within the facility.

On the afternoon of Friday 27 February 2009, DCS advised Justice Health that they were moving around forty inmates from the Parklea Correctional Centre into the MSPC4 at Long Bay and the move was effective immediately. Again there was no consultation with Justice Health, nor did Justice Health have time to consult with its employees. The NSWNA was advised on Monday 2 March 2009 that two events had occurred at Parklea over the weekend. The first resulted in 2 DCS officers being injured; allegedly inmates were angered over their loss of visits as a result of the transfer to the Long Bay MSPC4. The second incident resulted in three nurses being locked in an area with inmates but no prison officers. Justice Health have advised that they have referred the matter as a SAC2 (significant reportable incident).

In around May 2008, DCS were going to open John Moroney II at the Windsor complex. At the time it was to house the female population from Emu Plains Correctional Centre. The NSWNA expressed concerns with regard to OH&S matters and conducted a site inspection on 30 May 2008. This inspection identified a number of safety issues. In December 2008, the NSWNA was again advised by members that the opening of John Moroney II was imminent. The NSWNA again indicated that the OH&S issues raised previously still needed to be addressed. A response was subsequently provided on Wednesday 25 February 2009 which, in the NSWNA’s view, was inadequate. The NSWNA then indicated to Justice Health that the opening of the clinic should not occur without another safety inspection.

On the 2 March 2009, the NSWNA was advised by a member that John Moroney II would be opened overnight. Justice Health later indicated to the NSWNA that they were advised of this in the afternoon of 2 March 2009. The NSWNA immediately wrote to Justice Health advising that

a. DCS had again failed to engage in consultation,

b. Justice Health had an obligation to ensure the safety of employees, and

c. that staff should not be directed to work at the John Moroney II site because the safety issues identified previously had not been addressed.

Justice Health contacted the NSWNA on receipt of this letter and undertook to address these safety issues within a week of the clinic opening at John Moroney II. The NSWNA indicated that this was inadequate and agreed to the subsequent proposition that emergency response would be provided by nurses in John Moroney I.”
The matter was listed for compulsory conference before each on 5 March 2009 at which time conciliation took place. As a result of that conciliation Directions were issued by the Commission. The parties were directed to confer and the matter set down for a report back on the 23 March 2009. However the matter was re-listed at urgent short notice on 17 March 2009 at which time the commission issued further Directions to the parties.

The parties then embarked on a process of consultation with report backs to the Commission on the following occasions, 30 March, 11 June, 9 and 21 July 2009.

At today's report back Mr Hurley-Smith of the NSWNA has advised the Commission that as a result of that consultative process, Terms of Settlement have now been reached between the parties in terms of MFI 9 - Schedule A - Justice Health and Department of Corrective Services Consultation Framework Protocol. The agreement reached has been confirmed by Ms Neville of Justice Health and Ms Fitzgerald of DCS.

The parties are to be congratulated on reaching a mutually agreeable settlement and establishing a consultation framework for the future.

Mr Hurley-Smith now seeks to discontinue this dispute. That course of action is not opposed by either Ms Neville or Ms Fitzgerald. Leave to discontinue is granted. This matter is now terminated.

Elizabeth Bishop
Commissioner