WORK SAFETY REGULATION 2009

REGULATORY IMPACT STATEMENT

A. Background to this Statement

Regulatory Impact Statements in the Territory

The *Legislation Act 2001* is the source of the legal requirement to produce a regulatory impact statement for subordinate laws and disallowable instruments in the Territory. The principal purpose of a regulatory impact statement is to ensure that the costs and benefits of a proposed law are examined fully so that Ministers proposing the regulations and members of the community can be satisfied that the benefits of the regulations exceed the costs. The Work Safety Regulation 2009 is a proposed subordinate law for these purposes.

Section 34(1) states the general proposition that, if a proposed law or disallowable instrument is "*likely to impose appreciable costs on the community, or a part of the community… [emphasis added]*, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement to be prepared for the proposed law."

Section 31 of the Legislation Act defines 'cost' as including burdens, disadvantages and direct and indirect economic, environmental and social costs. While Section 33 then allows the Minister to issue guidelines to be applied in deciding whether a proposed subordinate law or disallowable instrument is, or is not, likely to impose appreciable costs on the community or a part of the community, such a guidelines has not been issued.

Application of Part 5 of the Legislation Act

The Work Safety Regulation imposes occupational health and safety duties on particular duty holders in the *Work Safety Act 2008* (the authorising law), and, sets out related offences where particular duty holders do not comply with required standards in respect of particular areas of occupational health and safety law. It also provides further detail in respect of the general occupational health and safety duties set out in the authorising law. As such, it falls within the scope of Section 34(1) in that it is likely to impose appreciable costs on the community, or a part of the community, overall.

As the Work Safety Regulation falls within the scope of section 34(1), a regulatory impact statement is generally required to be prepared for that law. Additional sections in Part 5 of the Legislation Act then outline a range of exceptions to this general requirement.

Is a Regulatory Impact Statement required?

The Minister for Industrial Relations has not exempted the Work Safety Regulation from the effect of the general requirement under Section 34(2) of the Legislation Act. As such, a regulatory impact statement is required for the Work Safety Regulation 2009 unless, and to the extent that, it does not fall within the scope of Section 36 of the Legislation Act.

Section 36(1) sets out a number of instances in which a regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument. Specifically, it need not be prepared "if the proposed law only provides for, *or to the extent it only provides for… [our emphasis]…*"

- a matter that is not of a legislative nature, including, for example, a matter of a machinery, administrative, drafting or formal nature;

- a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by— adversely affecting the person's rights, or, imposing liabilities on the person;
- an amendment of a territory law to take account of current legislative drafting practice;
- the commencement of an Act or statutory instrument;
- an amendment of a territory law that does not fundamentally affect the law's application or operation;
- a matter of a transitional character;
- a matter arising under a territory law that is part of a uniform scheme of legislation or complementary with legislation of the Commonwealth, a State or New Zealand;
- a matter involving the adoption of an Australian or international protocol, standard, code, or intergovernmental agreement or instrument, if an assessment of the benefits and costs has already been made and the assessment was made for, or is relevant to, the ACT;
- a proposal to make, amend or repeal rules of court;
- a matter advance notice of which would enable someone to gain unfair advantage; or
- an amendment of a fee, charge or tax consistent with announced government policy.

Further, section 36 (2) states that a regulatory impact statement also need not be prepared for the proposed law if, or to the extent that, it would be against the public interest because of the nature of the proposed law or the circumstances in which it is made.

Section 36(2) does not apply to the Work Safety Regulation 2009 in any respect as it is not against the public interest, in this instance, to prepare a regulatory impact statement because of its nature.

The Work Safety Regulation, in its entirety, does not fall within the scope of section 36 of the Legislation Act. However, particular, individual Parts within the Regulation are exceptions to the requirement to prepare a regulatory impact statement.

Administrative and Machinery Matters

Parts 1 (Preliminary), 11 (Incorporated Documents and 12 (Reviewable Decisions) of the Work Safety Regulation does not require a regulatory impact statement as it only provides for administrative and machinery matters that are not of a legislative nature.

Implementing National Standards

Part 8 of the Work Safety Regulation, which concerns the licensing of high risk work, does not require a regulatory impact statement as it is a matter involving the adoption of an Australian standard, an assessment of the benefits and costs of that standard have already been made, and that assessment is relevant to the Territory.

The National Standard for Licensing Persons performing High Risk Work was issued in April 2006 by the Australian Safety and Compensation Council. This National Standard aims to facilitate the operation of a nationally uniform, competency based licensing system for persons performing certain types of high risk work in terms of the training and assessment of persons seeking to use and operate high risk plant, so that qualifications obtained in one State or Territory are recognised across all jurisdictions.

Similarly, Part 10 of the Work Safety Regulation, which concerns the regulation of the performance of manual tasks, does not require a regulatory impact statement. This is a matter involving the adoption of an Australian standard, an assessment of the benefits and costs of that standard have already been made, and that assessment is relevant to the Territory.

In August 2007, the Australian Safety and Compensation Council declared the National Standard for Manual Tasks. This National Standard sets out the principles for effective management of hazardous manual tasks to avert musculoskeletal disorders arising from manual tasks in the workplace. It is an advisory document agreed to across jurisdictions, which prescribes preventative action to eliminate, reduce and manage the performance of manual tasks as a specific workplace hazard. The adoption of the standard is aimed at increasing uniformity in the regulation of occupational health and safety throughout Australia and contributing to the enhanced efficiency of the Australian economy overall.

Parts 8 and 10 of the Work Safety Regulation implement the above National Standards into the Territory. The National Regulatory Impact Statement was prepared each National Standard is relevant to all Australian jurisdictions, including the Australian Capital Territory.

Implementing a National Code of Practice

Part 9 of the Work Safety Regulation, which concerns the introduction of a new requirement to complete construction induction in the Territory, does not require a regulatory impact statement. It is a matter involving the adoption of an Australian Code of Practice, an assessment of the benefits and costs of that standard have already been made, and that assessment is relevant to the Territory.

In May 2007, the Australian Safety and Compensation Council declared the National Code of Practice for Induction for Construction Work. The aim of mandatory construction induction training is to provide persons working in the construction industry with a basic knowledge of occupational health and safety legislative requirements, the principles of risk management and the prevention of injury and illness in the construction industry. It is an advisory document agreed to across jurisdictions, which prescribes some of the initial training to safely enter a construction site. It is aimed at increasing uniformity in the regulation of occupational health and safety throughout Australia and contributing to the enhanced efficiency of the Australian economy overall. Part 9 of the Work Safety Regulation implements this Code of Practice into the Territory.

A National Regulatory Impact Statement was prepared for the National Code of Practice. This Statement is relevant to all Australian jurisdictions, including the Australian Capital Territory.

Matters of a Transitional Character

Part 13 of the Work Safety Regulation (Transitional) does not require a regulatory impact statement as it inherently of a transitional character.

Incorporation of existing Regulatory Impact Statements

Part 2 (Injury and dangerous occurrence reporting and records), Part 3 (Facilities) and Part 7 (Particular Safety Measures) have been transitioned from the previous Part 2 and Part 3 of the Occupational Health and Safety (General) Regulation. The provisions within these Parts do not fundamentally affect the existing content of the existing law in this regard. On that basis, the existing Regulatory Impact Statement that was prepared in relation to the Occupational

Health and Safety (General) Regulation, have been appended to this Regulatory Impact Statement for completeness.

Scope of this Regulatory Impact Statement

Given that the above Parts of the Work Safety Regulation do not require a Regulatory Impact Statement the following Regulatory Impact Statement deals only with Part 4 – 6 of the Work Safety Regulation 2009. These Parts deal with Work Safety Representatives, Work Safety Committees and Authorised Representatives.

Part 4 of the authorising law sets out how employers and workers should consult each other about work safety. It explains what consultation means, and sets out new, flexible options for establishing consultation arrangements, including work safety representatives and work safety committees. It also sets out penalties for failing to consult. The Work Safety Regulation supplements Part 4 by providing further detail in relation to these workplace arrangements.

This regulatory impact statement will address the operation of Part 4 of the authorising law and Parts 4-6 of the Work Safety Regulation as a whole. This will provide a complete assessment of the costs and benefits of the workplace arrangements set up under the work safety regime. It is these combined provisions which are referred to as 'the proposed law' for the purposes of the remainder of this document.

Under section 37, where a regulatory impact statement has been prepared for a proposed subordinate law and the proposed law is made, the statement must be presented to the Legislative Assembly with the subordinate law.

Content of Regulatory Impact Statements

To the extent that a regulatory impact statement must be prepared for this proposed law, section 35 of the Legislation Act states that it must include, in clear and precise language:

- the authorising law;
- a brief statement of the policy objectives of the proposed law and the reasons for them;
- a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
- a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
- if the proposed law is inconsistent with the policy objectives of another territory law— a brief explanation of the relationship with the other law, and, a brief explanation for the inconsistency;
- if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
- a brief assessment of the benefits and costs of implementing the proposed law that— if practicable and appropriate, quantifies the benefits and costs, and, includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the stated policy objectives; and
- a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, reasons for the inconsistency.

B. The Proposed Law

The proposed law forms part of the ongoing work to develop and implement new legislation to repeal and replace the *Occupational Health and Safety Act 1989* (OHS Act). This new legislation, the *Work Safety Act 2008,* was passed by the Legislative Assembly in August 2008 and will come into effect on 1 October 2009. The proposed law deals with workplace arrangements (consultation and representation) for the *Work Safety Act 2008* and Work Safety Regulation 2009.

For further information on the legislative proposal please refer to:

- The Allen Consulting Group Pty Ltd, *Report to the ACT Department of Urban Services: Occupational Health and Safety Legislation in the ACT: Regulatory Impact Statement,* November 2000;
- Australian Safety and Compensation Council, *Interim Common Elements Document General Duties Of Care For Occupational Health And Safety,* August 2007 (outlines the common elements in the majority of OHS legislation across Australia);
- Australian Safety and Compensation Council, *Draft Core Elements: The Core Elements of a Nationally Harmonised Approach to the Objects, Principles and General Duties of Care for Occupational Health and Safety* (control versions 4 and 5); and
- Occupational Health and Safety Council *Occupational Health and Safety Act 1989: Scope and Structure Review, Final Report,* September 2005.

Background

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

The OHS Council made a wide range of recommendations relating to the OHS Act, including the repeal of the existing OHS Act and the development of new legislation. These recommendations have provided the foundation for the development of the new *Work Safety Act 2008* and Work Safety Regulation 2009. This RIS deals with the workplace arrangements for consultation and representation.

Of all the jurisdictions, the ACT has the most modern OHS legislation already in place, through the development of the *Work Safety Act 2008* and continuing work in respect of the Work Safety Regulation 2009. Ongoing national work towards consistency has been addressed in the proposed law as the outcomes of the national work become available.

Problems with the Occupational Health and Safety Act 1989

The reviews undertaken by the OHS Council and the ASCC were conducted for related, but slightly different, purposes. The OHS Council's review focussed specifically on the Territory's *Occupational Health and Safety Act 1989* (OHS Act), while the ASCC's work examined the basis of OHS regimes across all Australian jurisdictions.

Both reviews identified a number of similar deficiencies within the current OHS regulatory scheme. In the ACT there is ongoing dissatisfaction with the operation of the current

legislation and regulations addressing workplace safety issues. Though concerns vary with the particular interests of stakeholders, the OHS Act is not always user-friendly and, for the ACT Public Service, requires the reader to refer to two pieces of primary legislation (the OHS ACT and the *Public Sector Management Act 1994*).

The OHS Act also has an over-elaborate and inflexible approach to areas like worker arrangements (particularly in the public sector). It has inappropriate provisions especially in the decision review area and is lacking in other features (such as the breadth of safety duties). Further, the OHS Act fails to deal with the changing nature of the workplace and evolving work arrangements.

The Proposed Workplace Arrangements

All changes in regulation have a regulatory impact in one way or another. However this RIS focuses on six main proposals concerning the proposed workplace arrangements in the legislation development process that have been identified as having an appreciable impact on regulation.

The new workplace arrangements ensure that consultation remains at the heart of the legislation. It is proposed to remove unnecessary prescription and increase the flexibility in the provisions. This can be achieved through:

a. drafting a provision that places on all employers/principals a general duty to consult workers;

b. allowing flexible consultative arrangements that are non-prescriptive;

c. enabling all workers to be consulted and represented;

d. maintaining key consultative tools such as Health and Safety Representatives and Health and Safety Committees;

e. supporting unions' legitimate and important role in promoting effective consultation and achieving good OHS outcomes;

f. removing the separate ACT public service arrangements; and

g. strengthening protection from discrimination.

The proposed workplace arrangements are designed to provide for consultation and cooperation in the workplace to help everyone achieve the objects of the Work Safety legislation.

Many of these principles are consistent with the OHS Council recommendations, the general approach of recent reviews into other state OHS regimes (for example, the recent Victorian review conducted by Chris Maxwell QC) and the work of the ASCC to harmonise national OHS standards and principles.

C. National Developments and the Move Toward Consistency

The principles set out in the ASCC core elements are largely consistent with the OHS Council's 2005 report. Australian jurisdictions have varying degrees of regulatory consistency with the principles and as such there is no existing jurisdictional legislation which wholly meets the requirements. However, it should be noted that all of the core elements exists within one, or a number of, jurisdictional legislative schemes.

Specifically in relation to worker consultation, representation and participation the core elements set out the following principles:

a. participatory frameworks create positive occupational health and safety cultures and practices, and improve health and safety outcomes;

b. people who own, manage, influence, are employed by, engaged through, or supply to business are best placed to influence outcomes;

c. all persons who work at a workplace—not just the "employees" of the "employer"—should be able to participate in and be consulted about health and safety matters at that workplace;

d. all parties at the workplace should exchange information and ideas about health and safety risks and measures that can be taken to eliminate or reduce those risks;

e. health and safety representatives and health and safety committees remain the principal mechanism for consultation and participation; and

f. beyond the capacity to elect health and representatives and form health and safety committees, the form and manner of such consultation and participation should not be specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances.

In relation to worker rights and responsibilities the core elements recognise that a nationally consistent regulatory regime must be guided by the following principles:

a. workers must be empowered to identify and report potential hazards without discrimination or retaliation;

b. workers are entitled to refuse work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a risk of imminent and serious injury or imminent and serious harm to health;

c. workers have responsibilities to avoid causing injury or harm to themselves and others and to obey reasonable instructions regarding safety and health; and

d. the right to a healthy and safe workplace or level of protection afforded should not in any way be contingent on the nature of the working arrangement entered into.

The core elements have formed the basis for the ongoing national harmonisation of OHS legislation.

D. Consistency with the Commonwealth and New South Wales

Options for regulatory reform in the ACT, are often assessed in the context of the Commonwealth and NSW approaches. This is particularly the case in the context of regulation that has a direct impact on business operations. Regard is had to the Commonwealth given that it often takes a 'national' approach and its rules and regulations can apply to corporations that operate across borders.

Regard is had to NSW given that the ACT is effectively an island within NSW and business can easily be set up in both or the more attractive of the jurisdictions.

However, in an OHS context these jurisdictions do not have model legislation and their regimes should not always be drawn on when considering options for reform. The Commonwealth's OHS legislation is drafted to apply to 'white-collar' public servants – it was not designed for a private sector profile. It is not an appropriate model to apply to the broad business operations that exist in the Territory. While NSW's OHS legislation does encompass some modern elements, it has been under review since 2000 and is considered by business (notably the Australian Chamber of Commerce) to be the most onerous OHS legislation for business in the country (particularly the reverse onus of proof concept that exists in the NSW general duty provisions).

E. Relevant stakeholders

Due to the widespread applicability of OHS, there are a range of stakeholders that may be impacted upon by the adoption of the proposed workplace arrangements. For the purpose of this RIS stakeholders have been categorised into three groups as follows:

Group No.	Stakeholder Group Name	Stakeholders included
1	Business	Large business Medium Small business Self employed
2	Workers	Employees Contractors Franchisees Employee representatives (unions) Volunteers
3	Government	The Territory All Australian Jurisdictions COAG WRMC Safe Work Australia The Office of Industrial Relations The Office of Regulatory Services

F. Costs to business - general

Any regulation inevitably has some impact on business. The actual costs of the proposals on business are difficult to quantify. However, it should be noted that the new legislation will provide an optimal framework for work safety in the Territory – this could offset any costs to business through reduced injury rates and increased productivity, it could also see the Territory better placed as an attractive jurisdiction to work.

A comprehensive cost/benefit analysis of the proposed workplace arrangements prepared by ACT Treasury is provided at Attachment A.

Those organisations who already have sound OHS policies and practices in place would incur little or no implementation costs in relation to the proposed workplace arrangements. These proposed arrangements would also involve increased flexibility in applying previously prescriptive standards, in the context of worker consultation – this will assist business and potentially reduce compliance costs. Some studies have also shown that implementing worker consultation can be cost neutral when offset against cost reductions of averted injuries – see Attachment B for further details on specific studies.

G. Implementation

The Work Safety Act 2008 will come into effect on 1 October 2009. Implementation of the legislation will be shared between the Chief Minister's Department and the Department of Justice and Community Safety. The ACT Work Safety Commissioner (previously called the ACT Occupational Health and Safety Commissioner) also plays an important role in the educational aspects of implementing all occupational health and safety legislation.

Over the past year, a range of strategies have been employed to begin to engage and educate the community about the new Work Safety Act regime. The ACT Work Safety Commissioner has conducted a series of public seminars introducing the new legislation and has targeted several of these seminars to the particular needs of small business. This program of public education forums and seminars will continue until after the Work Safety regime commences.

A range of educational guidance material has also been produced by the Chief Minister's Department and the Office of Regulatory Services (Workcover) to provide clear information to interested stakeholders and members of the public. The development of these guides has particularly focused on the proposed workplace arrangements, and has been developed in a way that will meet the needs of small business in the Territory.

Going forward, the Office of Regulatory Services (Workcover) will apply an ongoing strategy to achieve maximum compliance with occupational health and safety laws in the Territory by engaging duty holders, seeking to educate about OHS responsibilities and, finally, enforcing the Work Safety Act and Regulations. This represents a continuation of their current overall regulatory approach and, where appropriate, will take into account the need for stakeholders to apprise themselves of any changes to OHS regulation and implement resultant changes within their lives and businesses to meet their obligations.

G. Specific Impacts of the Proposed Law

1 General Duty to Consult

1.1 Background

An object of the *Occupational Health and Safety Act 1989* (the OHS Act) (and that of all other jurisdictions) is to foster a cooperative consultative relationship between employers and employees on the health, safety and welfare of employees at work. The proposed law will retain this general principle but broaden its application to encompass contemporary work arrangements (i.e. that go beyond the traditional employer/employee relationship) see discussion at *Section 3: General Duty to Consult – Coverage*.

Section 37 (2) (e) of the OHS Act provides that an employer has a duty to develop and maintain a policy relating to OHS that 'enables effective cooperation between the employer and employees'. Despite the objects clause, there is limited guidance on when and how this can be achieved.

Provisions dealing with consultation are built on the central premise that "…[e]mployee participation plays an important role in achieving workplace solutions to occupational health and safety problems". Many research projects have concluded that there is a strong link between greater worker participation in workplace health and safety matters and improved safety performance. Attachment B lists some of the relevant research in this area.

Unlike many other jurisdictions, the OHS Act does not contain an express general 'duty to consult' all workers/employees on matters that may effect their health and safety.

1.2 The Problem

While one of the objects of the OHS Act is to foster a cooperative and consultative relationship between employers and employees about health, safety and welfare at work, the Act itself provides only limited guidance on what constitutes 'consultation' and when consultation is required.

Further, there is a level of confusion about what consultation is required under the current OHS Act. As noted, section 37 (2) (e) of the Act provides that an employer has a duty to develop and maintain a policy relating to OHS that 'enables effective cooperation between the employer and employees'. Subsection (3) goes on to provide that the policy must be developed and maintained in consultation with any health and safety committee (note that it is not mandatory to have a committee) or in consultation with the employees or their union.

This provision does not explicitly require meaningful consultation to take place and it is possible that meaningful consultation and worker participation is viewed as optional in many workplaces (particularly those with 10 or less workers).

1.3 Objective of Government Intervention

Given the significant benefits that consultation and worker participation has in decreasing workplace injury and disease, the objective of Government intervention is to provide for an optimal consultation framework in which every worker has an opportunity to be involved in meaningful consultation about work safety issues without imposing unnecessary burden on business (i.e. to require consultation to occur within a flexible framework).

1.4 Mutual Recognition

The ASCC core elements provide that "…all persons who work at a workplace…should be able to participate in and be consulted about health and safety matters at that workplace and that all parties at the workplace should exchange information and ideas about health and safety risks and measures that can be taken to eliminate or reduce those risks."

Both the Victorian *Occupational Health and Safety Act 2004* and the NSW *Occupational Health and Safety Act 2000* contain a general duty to consult workers on matters that may affect their health and welfare (consistent with Option 3 below).

1.5 The Options

OPTION 1 – maintain the status quo (i.e no express duty to consult)

OPTION 2 – the status quo plus education campaign

OPTION 3 – general duty to consult

1.6 Impact Analysis

OPTION 1 – MAINTAIN THE STATUS QUO

Under this option there would be no general duty to consult.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements ▪ some businesses may continue to engage employees in consultation as part of best practice management systems	▪ lost opportunity to reduce risk of accidents in workplaces (particularly those with less than 10 workers) ▪ potential lost opportunities for innovative safety improvements ▪ some businesses will not engage in worker consultation as it is perceived as optional (particularly those with less than 10 workers) ▪ continuing lack of clarity over application of legislation
Workers	▪ the majority of employees in the Territory would still be owed some sort of duty to be consulted	▪ some workers would not be consulted meaningfully about workplace safety issues ▪ some workers would not have the opportunity to influence the direction of health and safety management ▪ if not taken up voluntarily, many employees would not have the option of workplace representation
Government	▪ no implementation costs	▪ does not achieve mutual recognition with other jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC ▪ possible adverse comment from the OHS Council ▪ government doesn't reap benefits of consultation due to accident prevention

OPTION 2 – THE STATUS QUO PLUS EDUCATION CAMPAIGN

This option is the same as option one with the added requirement for the Office of Regulatory Services to conduct an education and awareness raising campaign to encourage employers and principals (see *Section 3: General Duty to Consult – Coverage*) to implement consultation mechanisms in the workplace in order to meet the requirements in section 37 and the objects of the OHS Act. The campaign could focus on the benefits of worker consultation particularly in reducing workplace accidents. The growth of voluntary consultation arrangements could be a positive aspect in OHS regulation, given that arrangements entered into willingly (as opposed to those entered into on threat of sanction for non-compliance) are more likely to be based on trust and goodwill – two important characteristics of meaningful consultation.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements ▪ some business will continue to engage workers in consultation as part of best practice management systems ▪ some businesses will introduce consultation arrangements with workers and reap advantages such as fewer accidents and increased productivity	▪ if not taken up voluntarily, there is a lost opportunity to reduce accidents in workplaces ▪ if not taken up voluntarily lost opportunities for innovative safety improvements ▪ some business will not engage in worker consultation as it is perceived as optional ▪ possible continuing lack of clarity over application of legislation
Workers	▪ the majority of employees (not workers) in the Territory would still be owed an some sort of duty to be consulted ▪ more businesses may voluntarily consult workers and these workers would reap safety benefits	▪ if not taken up voluntarily, employees would not be consulted meaningfully about workplace safety issues ▪ if not taken up voluntarily, employees would not have the opportunity to influence the direction of health and safety management ▪ if not taken up voluntarily, many employees would not have the option of workplace representation

	ADVANTAGES	DISADVANTAGES
Government	▪ the government would reap the safety benefits of more worker consultation such as fewer accident investigations and complaints	▪ appreciable implementation costs for education campaign which would need to be ongoing in order to ensure awareness is maintained ▪ implementation costs may not produce effective outcomes ▪ no enforcement mechanism to ensure meaningful consultation ▪ does not achieve mutual recognition with the majority of jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC ▪ possible adverse comment from the OHS Council

OPTION 3 – GENERAL DUTY TO CONSULT

Under this option an express duty for employers/principals to consult with all persons on matters that affect the health and safety of workers would be included. The legislation would be framed to ensure that an appropriate level of control exists between the employer/principal and worker for these requirements to apply. The duty would require a genuine effort on the part of relevant employers to consult workers and the legislation would establish principles about: what constitutes meaningful consultation; when to consult; and how to consult. (Note that these principles would be non-prescriptive – see discussion at *Section 2 – General Duty to Consult – How?*).

	ADVANTAGES	DISADVANTAGES
Business	▪ clarity of legislative obligations and how to meet them (coupled with flexibility in how to achieve compliance) ▪ potential to reduce injuries which could positively impact workers compensation premiums, productivity and their attractiveness as an employer of choice ▪ effective consultation contributes to overall quality management and staff satisfaction and retention ▪ assists the employer/principal to comply with other OHS duties/objectives	▪ compliance requirements for new provisions, although businesses that already have sound consultation arrangements should already comply ▪ the upfront cost of involving workers in resource and productivity terms ▪ penalties for non-compliance

	ADVANTAGES	DISADVANTAGES
Workers	▪ potential to reduce ill health, injuries and deaths among all workers ▪ avenue to ensure OHS concerns are discussed and addressed ▪ potential to raise innovative solutions to safety issues ▪ increased commitment and awareness of health and safety issues ▪ overall work satisfaction	▪ ignorance of the benefits of consultation can lead to OHS issues/involvement being viewed as tiresome
Government	▪ mutual recognition with other jurisdictions ▪ mutual recognition with the draft work of the ASCC ▪ consistent with the OHS Council recommendations ▪ potential to prevent accidents and incidents therefore investigation load reduced ▪ potential for fewer complaints as workplaces will develop their own mechanisms for dealing with OHS issues ▪ provides enforcement mechanism, eg sanctions available to ensure compliance with general consultation duty	▪ implementation costs for regulatory preparedness, including associated education campaign to encourage compliance ▪ implementation costs in relation to reviewing regulations, codes of practice etc

1.7 Conclusions and Recommended Option

PREFERRED OPTION:	**Option 3 – General Duty to Consult**

Option 3 is preferred over the other options because it:

a. removes the ambiguity about whether worker consultation is optional; and

b. places a general duty to consult at all workplaces which ensures worker consultation and participation occurs – this option is likely to produce the highest reduction in injury and illness.

Workers who contribute to health and safety at work are safer and healthier than those who do not. Involving worker consultation improves health and safety performance which in turn increases productivity and reduces costs associated with lost time and injury.

1.8 Implementation

See discussion at *G. Implementation* (above).

2 General Duty to Consult – How?

2.1 Background

The object to 'foster a cooperative consultative relationship between employers and employees on the health, safety and welfare of employees at work' is currently supported by fairly prescriptive requirements for consultative mechanisms (despite the legislation being unclear on how the consultation should be undertaken and when).

The OHS Act contains provisions for the election of employee representatives ('health and safety representatives' or HSRs) through the establishment of 'designated work groups' (DWGs) in workplaces with 10 or more employees. HSRs currently have powers to represent the DWG, to investigate OHS matters, and to issue provisional improvement notices (PINs) in relation to a contravention or likely contravention which could affect the safety of employees in the group.

The OHS Act also makes provision for the functions of 'health and safety committees' (although there is no mandatory requirement for their establishment with the exception of certain circumstances in the ACT Public Service). Health and safety committees can have both employee and management members (although this is not explicitly set out in the provisions). Their functions include assisting employers to develop, implement and monitor measures to protect the health and safety of employees, to facilitate cooperation, and to assist in the dissemination of information on health and safety at work.

Consistent with the move to adopting broad duties to consult, Australian jurisdictions have been moving away from prescriptive requirements for worker consultation arrangements and developing regimes that provide greater scope and flexibility. In part, this is to enable all workers to be engaged in consultation through participatory processes and all employers to implement work safety solutions that take into account the nature and size of their undertakings.

2.2. The Problem

The current workplace consultation arrangements are overly prescriptive. They do not leave any room for flexibility or innovation and may be counterproductive to achieving an environment whereby principals/employers and employees discuss and agree on an appropriate model for consultation. The prescriptive provisions impose unnecessary compliance burdens on corporations and business that operate across boarders (who may have sound consultation arrangements that do not necessarily meet the requirements under the Act). Further, the overly prescriptive provisions are likely to be costly and onerous for smaller businesses to implement.

2.3 Objective of Government Intervention

To provide an optional framework for worker consultation which is not overly prescriptive, and, can be adapted to suit the particular needs of a business.

2.4 Mutual Recognition

The Council recommended flexible work arrangements in its report and many jurisdictions have moved away from prescription.

2.5 The Options

OPTION 1 – an express duty to consult supported by mandatory consultation arrangements (i.e designated work groups, health and safety representatives and health and safety committees)

OPTION 2 – an express duty to consult supported by flexible consultation arrangements

2.6 Impact Analysis

OPTION 1 – AN EXPRESS DUTY TO CONSULT SUPPORTED BY MANDATORY CONSULTATION ARRANGEMENTS

Under this option, there would be an express duty to consult supported by mandatory provisions that set out what consultation arrangements must be established by the principal/employer. Consistent with the current provisions this could include a mandatory requirement to establish a designated work group to elect a health and safety representative to represent workers. It could also include the establishment of health and safety committees to serve as the primary consultative body for the employer/principal.

	ADVANTAGES	DISADVANTAGES
Business	▪ potential to reduce injuries which could positively impact workers compensation premiums, productivity and their attractiveness as an employer of choice ▪ no change for larger businesses that have already introduced consultation and participatory mechanisms ▪ development of a positive health and safety culture across all business ▪ assists all businesses to meet the objectives and duties of work safety legislation ▪ clear compliance requirements for small business (ie no guess work)	▪ increased compliance requirements for those newly covered ▪ costs to business to fulfil mandatory participation requirements (i.e. HSRs) regardless of best fit participation ▪ lack of flexibility and innovation to implement arrangements that suit individual business size and environment ▪ lack of flexibility to share costs across small businesses ▪ penalties for non-compliance
Workers	▪ all workers may be engaged in workplace participation ▪ all workers may be represented ▪ no need to 'negotiate' arrangements with employers (negotiation may be perceived as undesirable for some workers) ▪ avenue to discuss OHS issues	▪ some workers may not wish to be involved in the prescribed participatory mechanisms ▪ no flexibility, may decrease level of participation ▪ imposition of framework counterproductive to goals of worker participation and meaningful consultation
Government	▪ provides enforcement mechanism to ensure all businesses are required to consult eg sanctions available to ensure compliance with general duty to consult (and easier to enforce) ▪ potential to improve the Territory's private sector OHS performance	▪ appreciable implementation costs for regulatory preparedness, including associated education campaign to encourage small business compliance ▪ not in line with other jurisdictions' move to flexible consultation arrangements ▪ does not achieve mutual recognition with the majority of jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC ▪ possible adverse comment from the OHS Council

OPTION 2 – AN EXPRESS DUTY TO CONSULT SUPPORTED BY FLEXIBLE CONSULTATION ARRANGEMENTS

Under this option the application of the general duty to consult and flexible consultation arrangements would apply to all employers and workers. This option proposes that all employers *must* meaningfully consult with their workers but *how* that consultation is arranged and undertaken is flexible. This will assist employers/principals and workers to establish arrangements that can cater for the interests of a small number of workers or manage the complexity of multi-faceted workplaces.

	ADVANTAGES	DISADVANTAGES
Business	▪ potential to reduce injuries in all workplaces which could positively impact workers compensation premiums, productivity and their attractiveness as an employer of choice ▪ ability to implement innovative and flexible arrangements that suit individual business size and environment ▪ ability for national firms to adopt consistent mechanisms across jurisdictions ▪ choice for business as to how they spend on OHS consultation ▪ development of a positive health and safety culture across all business ▪ assists all businesses to meet the objectives and duties of work safety legislation ▪ reprieve for those business that do consult but not according to the current prescription	▪ compliance requirements for new legislative requirements ▪ costs to business to develop appropriate and best fit consultation arrangements ▪ ignorance of the many possibilities available to meet the general duty ▪ penalties for non-compliance
Workers	▪ all workers may be engaged in workplace participation ▪ all workers may be represented ▪ potential to reduce injuries among all workers ▪ avenue to discuss OHS issues ▪ ability to negotiate flexible arrangements that suit the workplace	▪ some workers may not wish to be involved participatory mechanisms ▪ ignorance of the value of worker involvement ▪ outcomes somewhat dependent on worker skill and participation

	ADVANTAGES	DISADVANTAGES
Government	▪ provides enforcement mechanism to ensure all businesses are required to consult eg sanctions available to ensure compliance with general duty to consult ▪ provides a proactive approach to the prevention of work place illness and injury ▪ potential to improve the Territory's private sector OHS performance ▪ achieves mutual recognition with the majority of jurisdictions ▪ achieves mutual recognition with the draft work of the ASCC	▪ appreciable implementation costs for regulatory preparedness, including associated education campaign to encourage small business compliance, and guidance material on how to consult ▪ requires skilled evaluation and enforcement given the range of possible outcomes

2.7 Conclusions and Recommended Option

PREFERRED OPTION:	**OPTION 2 – AN EXPRESS DUTY TO CONSULT SUPPORTED BY FLEXIBLE CONSULTATION ARRANGEMENTS**

Option 2 is preferred over the other options because it creates a foundation upon which a genuine partnership between employers/principals and workers, for managing health and safety risks, can be established. Removing prescriptive provisions and providing greater scope and flexibility will enable all workers to be engaged in consultation through participatory processes and all employers/principals to implement work safety solutions that take into account the nature and size of their undertakings. This is consistent with the OHS Council's review recommendations.

Under the flexible arrangements, employers/principals would be required to meaningfully consult their workers but how that consultation is arranged and undertaken is flexible. This will assist employers/principals and workers to establish arrangements that can cater for the interests of a small number of workers or manage the complexity of multi-faceted workplaces.

If small business, at the moment, does not consult there may be costs involved (but arguably – the fewer workers, the easier it is to consult). However, rather than the previously mandated costs, there will be choice as to what the OHS 'dollar' is spent on. For those who have developed simple effective consultative arrangements suitable for the workplace, these can continue. Guidance material on how to consult, including example (or template) consultation arrangement for small business, could be developed.

Businesses that currently have consultation and participation arrangements in place would most likely already be complying with the general duty to consult. However, with the removal of the prescriptive participation arrangements, these businesses will be able to review

their systems and in collaboration with workers, implement arrangements that better suit their individual needs, or simply preserve the status quo.

2.8 Implementation

See discussion at *G. Implementation* (above).

3 General Duty to Consult – Coverage

3.1 Background

With the exception of provisions for the establishment of work groups on construction sites, the Act is currently drafted in terms of the traditional employer-employee relationship. Combined with the current legislative threshold of 10 employees for the formation of a 'designated work group', a considerable proportion of the ACT's workforce is excluded from formal participation in OHS consultation. The need to encompass a broader group of workers and work relationships in regulating OHS in the Territory is already reflected in the general duties set out in the *Work Safety Act 2008*.

The OHS Council considers that 'just as duties of care are owed to all workers when it comes to health and safety, the duty to consult should be extended to all workers.'

3.2 The Problem

If the general duty to consult is implemented there is a need to examine to whom the general duty should apply.

3.3 Objective of Government Intervention

To ensure appropriate coverage for the general duty to consult, in relation to who must consult, and, who must be consulted.

3.4 Mutual Recognition

The Council recommended that the drafting of new provisions for consultation and participation in the Act extend beyond employees to all workers. The Victorian Act retains a primary focus on employees, but deems an independent contractor engaged by an employer and any employees of the independent contractor to be 'employees'—thus including them in the Act's consultation provisions.

Similarly, amendments to the Western Australian Act enabled consultation schemes to include contactors and employees of a contractor to participate in the election of HSRs: "…[t]his allows the consultative arrangements that centre on representatives and committees to apply more widely in industries and workplaces where there is a significant reliance on contract labour."

The ASCC core elements provide that all persons who work at a workplace—not just the "employees" of the "employer"—should be able to participate in and be consulted about health and safety matters at that workplace and that all parties at the workplace should exchange information and ideas about health and safety risks and measures that can be taken to eliminate or reduce those risks.

3.5 The Options

OPTION 1 – employers to employees only

OPTION 2 – people who "engage" workers to workers

OPTION 3 – people conducting a business or undertaking to workers

3.6 Impact Analysis

OPTION 1 – EMPLOYERS TO EMPLOYEES

Under this option the application of the consultation arrangements would continue to apply between employers and employees only.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements	▪ does not capture all contemporary relationships and leads to discrimination ▪ lost potential to reduce injuries as not all workers are engaged in consultation
Workers	▪ the majority of workers in larger businesses in the Territory would still be consulted ▪ employees in larger businesses may continue to reap current consultation benefits ie HSRs and HSCs	▪ some workers would continue to not be afforded full coverage under the Act, i.e. workers who are not employees would not be owed a duty to be consulted so that they receive a limited safety message ▪ creates inequity of coverage among different classification of workers (depending on the business structure entered into)
Government	▪ minimal implementation costs	▪ does not achieve mutual recognition with the draft work of the ASCC ▪ does not place the Territory in a better position to adopt model law ▪ possible adverse comment from the OHS Council

OPTION 2 – PEOPLE WHO ENGAGE WORKERS TO WORKERS

Under this option the general duty to consult would be drafted to apply to people who are in an employer/employee or principal/worker relationship only i.e. to people who engage workers and where there is real and direct control over the workers. This would include consultation between:

- host employers to labour-hire workers
- franchisees to their workers
- employers to workers

- principals to contractors (including contractor to sub-contractor)

It would not include:

- labour-hire firms to labour-hire workers
- franchisors to franchisees

These duty holders would still owe a general safety duty which may be satisfied through consultative methods, however the express duty to consult (and statutory requirements for a consultation framework) would not apply. Worker consultation arrangements traditionally apply between persons who have real and direct control over work in a primary work relationship for example, employers to employees and principals to contractors, rather than commercial arrangements such as head franchisor to franchisees. Previously this was achieved through restricting the arrangements to workplaces, however this is not appropriate given the possibility that the scope of the legislation beyond the boundary of a workplace.

	ADVANTAGES	DISADVANTAGES
Business	▪ potential to reduce injuries in all workplaces which could positively impact workers' compensation premiums, productivity and their attractiveness as an employer of choice ▪ flexible consultation system to apply equally to all workers	▪ increased compliance requirements for new legislative requirements ▪ penalties for non-compliance ▪ cost of including all workers at the workplace not just employees
Workers	▪ all workers may be engaged in workplace participation ▪ all workers may be represented ▪ potential to reduce injuries among all workers ▪ avenue to discuss OHS issues ▪ ability to negotiate flexible arrangements that suit the workplace	▪ some workers may not wish to be involved participatory mechanisms ▪ some workers involved in multiple workplaces may view consultation as tedious (should be negated by flexible arrangements)
Government	▪ provides enforcement mechanism to ensure all businesses are required to consult all workers ▪ provides a proactive approach to the prevention of work place illness and injury ▪ potential to improve the Territory's private sector OHS performance ▪ achieves mutual recognition with the majority of jurisdictions ▪ achieves mutual recognition with the draft work of the ASCC	▪ possible adverse comment from business for broad mandatory application of provisions ▪ appreciable implementation costs for regulatory preparedness, including associated education campaign to encourage small business compliance ▪ requires skilled evaluation and enforcement

OPTION 3 – PEOPLE CONDUCTING A BUSINESS OR UNDERTAKING TO WORKERS

Under this option the general duty to consult would be drafted consistent with the central duty of care in Section 21 of the Work Safety Act 2008. The general duty to consult would apply to all persons who have control and influence over work in relation to those workers. This would include consultation between:

- labour-hire firms to labour-hire workers
- host employers to labour-hire workers
- franchisors to franchisees
- franchisees to their workers
- employers to workers
- principals to contractors
- contractors and their workers.

	ADVANTAGES	DISADVANTAGES
Business	▪ potential to reduce injuries which could positively impact workers compensation premiums, productivity and their attractiveness as an employer of choice	▪ breath of consultation requirement is potentially excessive ▪ compliance costs – these could be large where duty applies beyond 'workers' ie franchisors to franchisees
Workers	▪ all workers are consulted	▪ an overly broad consultation requirement may result in reduced quality of consultation
Government		▪ possible adverse comment from business

3.7 Conclusions and Recommended Option

PREFERRED OPTION:	**OPTION 2 – PEOPLE WHO ENGAGE WORKERS TO WORKERS**

Option 2 is the preferred option as it enables all 'workers' to be consulted without delving into 'commercial' relationships that go beyond contemporary employer/employee like relationships.

3.8 Implementation

See discussion at *G. Implementation* (above).

4 The Threshold for Consultation - Small Employers

4.1 Background

As mentioned previously, there is a current legislative threshold of 10 employees for the formation of a 'designated workgroup' (DWG), and because of this a portion of the ACT's workforce is excluded from formal participation in OHS consultation.

In its 2005 report the OHS Council stated "just as duties of care are owed to all workers when it comes to health and safety, the duty to consult should be extended to all workers."

4.2 The Problem

There are currently two classes of 'employee' in the ACT - those who are able to participate in worker consultation arrangements and those whose workplaces are exempt from participation arrangements because they work for a small employer. The threshold for consultation could be seen as anomalous given that the size of a business alone does not limit exposure to health and safety hazards.

4.3 Objective of Government Intervention

The objective of Government intervention is to ensure that all workers, regardless of the size of the business or undertaking, are able to participate in and be consulted about health and safety matters. However, Government intervention also aims to establish flexible arrangements so that fulfilling the general duty to consult and implementing participation arrangements will not be onerous for small employers. The flexible arrangements should assist all employers (regardless of size) and workers to establish arrangements that can cater for the interests of a small number of workers or manage the complexity of multi-faceted workplaces.

4.4 Mutual Recognition

No other jurisdiction provides an exemption for small employers from consultation and participation arrangements. In every other jurisdiction an employer has a duty to consult with employees and/or the health and safety representative of the employees on matters that directly affect the health and safety of those employees.

The ASCC core elements provide that all persons who work at a workplace—not just the "employees" of the "employer"—should be able to participate in and be consulted about health and safety matters at that workplace and that all parties at the workplace should exchange information and ideas about health and safety risks and measures that can be taken to eliminate or reduce those risks.

4.5 The Options

OPTION 1 – maintain the status quo (the 10 employee/worker threshold)

OPTION 2 – the status quo plus voluntary best practice campaign

OPTION 3 – apply the general duty to consult to all employers/principals regardless of business size

4.6 Impact Analysis

OPTION 1 – MAINTAIN THE STATUS QUO

Under this option the application of any consultation arrangements would be limited to undertakings with 10 or more employees (or workers).

	ADVANTAGES	DISADVANTAGES
Business	▪ minimal new requirements ▪ some small businesses may already engage employees in consultation as part of best practice management and to fulfil other OHS duties	▪ lost potential to reduce injuries as not all workers are engaged in consultation ▪ lost opportunities for innovative safety improvements ▪ discrimination against workers in small workplaces ▪ overly prescriptive consultation requirements stifle business innovation ▪ continuing lack of clarity over application of legislation
Workers	▪ employees in larger businesses continue to reap current consultation benefits i.e. HSRs and HSCs	▪ no requirement for workers in small businesses to be consulted meaningfully about workplace safety issues ▪ no requirement for workers in small businesses to have the opportunity to influence the direction of health and safety management ▪ no requirement for workers in small businesses to have the opportunity to be represented
Government	▪ limited implementation costs	▪ does not achieve mutual recognition with some jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC ▪ government retains a reactive enforcement role in OHS investigation rather that a proactive prevention role ▪ possible adverse comment from the OHS Council

OPTION 2 – THE STATUS QUO PLUS EDUCATION CAMPAIGN

Again, under this option the application of the consultation arrangements would continue to be limited to an undertaking with 10 or more employees/workers. However an extensive education and awareness campaign would be conducted to ensure employers of small businesses, although exempt, are aware and understand the benefits of worker consultation arrangements. The Office of Regulatory Services could conduct the education and awareness raising campaign. The campaign could focus on the benefits of engaging in worker consultation and worker participation.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements ▪ some exempt businesses may voluntarily introduce worker consultation and participation arrangements and reap advantages such as fewer accidents and increased productivity	▪ for those businesses voluntarily implementing consultation there will be an upfront cost of involving workers in resource and productivity terms ▪ if not taken up voluntarily, lost potential to reduce injuries as not all workers are engaged in consultation ▪ some small businesses will not engage in worker consultation ▪ if not taken up voluntarily lost opportunities for innovative safety improvements ▪ if not taken up voluntarily continued discrimination against workers in small workplaces
Workers	▪ may be increased meaningful consultation about workplace safety issues and reap associated safety benefits ▪ some workers in small business may have the opportunity to influence the direction of health and safety management ▪ some workers in small business may be afforded representation	▪ if not taken up voluntarily, some workers in small businesses would not be consulted meaningfully about workplace safety issues ▪ if not taken up voluntarily, some workers in small businesses would not have the opportunity to influence the direction of health and safety management ▪ if not taken up voluntarily, some workers in small businesses would not be able to access representation

	ADVANTAGES	DISADVANTAGES
Government	▪ a proactive approach to the reduction of workplace illness, injuries and deaths ▪ if voluntarily adopted by small business, a reduction in complaints and investigations	▪ no enforcement mechanism to ensure compliance by small business ▪ appreciable implementation costs for education campaign which would need to be ongoing in order to ensure awareness is maintained ▪ does not achieve mutual recognition with the majority of jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC ▪ possible adverse comment from the OHS Council

OPTION 3 – APPLY THE GENERAL DUTY TO CONSULT TO ALL WORKERS REGARDLESS OF BUSINESS SIZE

Under this option the application of the general duty to consult and arrangements for consultation would apply to all workplaces regardless of size.

	ADVANTAGES	DISADVANTAGES
Business	▪ potential to reduce injuries in all businesses which could positively impact workers compensation premiums, productivity and their attractiveness as an employer of choice ▪ no change for larger businesses that have already introduced consultation and participatory mechanisms ▪ development of a positive health and safety culture across all business ▪ assists all businesses to meet the objectives and duties of work safety legislation	▪ increased compliance requirements under the new legislation – although these will be minimal for small business in terms of increased flexibility (see discussion at Section 2) ▪ penalties for non-compliance ▪ small businesses can no longer choose not to consult
Workers	▪ all workers may be engaged in workplace participation ▪ all workers may be represented ▪ potential to reduce injuries among all workers ▪ avenue to discuss OHS issues	▪ some workers do not want to be involved in consultation

	ADVANTAGES	DISADVANTAGES
Government	▪ provides enforcement mechanism to ensure all businesses are required to consult e.g. sanctions available to ensure compliance with general duty to consult ▪ potential to improve the Territory's private sector OHS performance ▪ mutual recognition with jurisdictions and the ASCC	▪ appreciable implementation costs for regulatory preparedness, including associated education campaign to encourage small business compliance.

4.7 Conclusions and Recommended Option

4.8

PREFERRED OPTION:	**Option 3 – APPLY THE GENERAL DUTY TO CONSULT TO ALL WORKERS REGARDLESS OF BUSINESS SIZE**

Option 3 is preferred over the other options because it creates a foundation upon which a genuine partnership between employers/principals and workers, for managing health and safety risks, can be established. The proposed legislation would not discriminate on the basis of business size. The rights to representation and worker consultation would (and should) apply to all workers.

Expressing clearly the general duty to consult and removing the size exemption provides a clear statement of the requirement to consult (note that the introduction of flexible consultation mechanisms would minimise any burden on business, particularly small business). It should be noted with the proposal for more flexibility in the worker arrangements (see Section 2), the continuing exclusion of businesses on the basis of size is less justifiable.

If small business, at the moment, does not consult, despite the employer obligations mentioned above, there may be costs involved. However, rather than the previously mandated costs, there will be choice as to what the OHS 'dollar' is spent on. For those who have developed simple consultative arrangements suitable for the workplace, these can continue.

Businesses that currently have consultation and participation arrangements in place would most likely already be complying with the general duty to consult. However, with the removal of the prescriptive participation arrangements these businesses will be able to review their systems and in collaboration with workers, implement arrangements that suit their individual needs.

All workers have a right to work in places where risks to their health and safety are properly controlled. Workers who contribute to health and safety at work are safer and healthier than those who do not. Worker consultation is a means to an end. There is no one, definitively best system for worker involvement. Every work place is different and it is important that

managers and workers develop a best fit for their own organisations. Involving workers improves health and safety performance, which increases productivity and reduces costs.

The OHS Council endorsed the preferred option through its 2005 report. The ASCC has also adopted these principles of worker consultation and representation in its core elements.

4.8 Implementation

See discussion at *G. Implementation* (above).

5. Broadened Health and Safety Representative Eligibility

5.1 Background

Health and Safety Representatives (HSRs) play an important role in work safety. The main role of an HSR is to ensure that the views of workers are effectively reflected to the employer before decisions on health and safety matters are taken. The research at Attachment B reveals that those workplaces with some form of HSR incur fewer injuries.

5.2 The Problem

Employers and workers should be able to negotiate appropriate consultation and participation mechanisms that best serve their organisation – this may include an HSR. Workers in small businesses may not have the same access to representation due to availability (the pool of people maybe too small), time and general economies of scale when compared to workers in larger organisations. In some organisations workers, for various reasons, are unwilling to take on an HSR role, but still want to be represented in relation to OHS issues.

5.3 Objective of Government Intervention

Given that HSRs enhance workplace safety, the objective of government intervention is to allow workers maximum choice for representation. It is proposed to broaden HSR eligibility to include not just workers, but any suitably qualified person that workers believe will represent their interests (and employers agree to). This will provide a level of flexibility to facilitate the option of 'roving HSRs' and to provide avenues for workers in small businesses to be represented and consulted. This broadened eligibility would only ever apply where a relevant worker is not available to take on the role.

It will also provide a mechanism for different workplaces to share the costs of representation and develop innovative ways of providing representation. Under this proposal it is possible that workers could elect a suitably qualified union representative or OHS consultant, as an HSR (for example).

5.4 Mutual Recognition

No other jurisdiction has implemented broadened HSR eligibility.

5.5 The Options

OPTION 1 – maintain the status quo (i.e only workers would be eligible)

OPTION 2 – expand the eligibility of health and safety representatives

5.6 Impact Analysis

OPTION 1 – MAINTAIN THE STATUS QUO

Under this option only workers would be eligible to be elected as HSRs.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements	▪ no flexibility for innovation and cost sharing ▪ overly prescriptive consultation requirements stifle business innovation ▪ cost imposition on small business who haven't previously elected HSRs
Workers	▪ no new requirements	▪ some workers in small businesses may not have the opportunity or skill to represent themselves due to staff numbers ▪ some workers will remain unrepresented due to unwillingness to take on the role eg fear of retribution or lack of availability or interest
Government	▪ no implementation costs ▪ achieves mutual recognition with the majority of jurisdictions ▪ achieves mutual recognition with the draft work of the ASCC	▪ doesn't provide options for all workers to be represented and reap the subsequent safety benefits

OPTION 2 – EXPAND THE ELIGIBILITY OF HSRS

Under this option, where no worker is available to become a health and safety representative, workers could elect an HSR from:

- the workers in the established consultation unit (similar to a DWG); or
- suitably qualified union representatives; or
- another suitably qualified person that the workers believe will represent their interests in relation to OHS to the employer.

	ADVANTAGES	DISADVANTAGES
Business	▪ provides flexibility for innovation and cost sharing ▪ possible for all workers to be represented and provide important feedback to management on safety issues ▪ provides alternatives for meeting consultation requirements, particularly if workers are disengaged from the issues	▪ flexibility means that businesses can not just follow a set procedure
Workers	▪ provides avenues for all workers to be represented and therefore reap safety benefits ▪ provides alternative representation in an adversarial consultation atmosphere ▪ provides expert representation for high risk industries	▪ External representation may undermine workers interests
Government	▪ provides greater possibilities for representation and therefore the reduction of workplace illness, injuries	▪ costs for guidance material on new arrangements

5.7 Conclusions and Recommended Option

PREFERRED OPTION:	**OPTION 2 – EXPAND THE ELIGIBILITY OF HSRS**

Options 2 is preferred over Option 1 as it increases flexibility for businesses to establish consultation arrangements that suit their needs and provides maximum representation options for workers.

Option 2 would:

1. facilitate the use of roving HSRs;
2. provide avenues for all workers to be represented;
3. facilitate innovation and cost sharing among businesses, big or small;
4. enable workers in high risk industries to be represented by experts; and
5. enable workers who fear recrimination to be represented.

5.8 Implementation

See discussion at *G. Implementation* (above).

6 Union Representation

6.1 Background

The 1995 Industry Commission 'Work, Health and Safety' report stated, "the full participation of an informed workforce is fundamental – employees usually know most about how to manage better the risks in their own work. The trade union movement has shown that its cooperation in this process can enhance OHS outcomes."

The Act currently provides for the involvement of unions in a variety of contexts, including: consultation in relation to the development of an OHS policy where there is no health and safety committee; consultation on the establishment of a designated workgroup; notification of health and safety representatives; the ability to apply for disqualification of an HSR; and, along with employer organisations, the exercise of right-of-entry powers.

Unions have a role in supporting HSRs and OHS Committees, and in promoting their importance in achieving good OHS outcomes in Territory workplaces. This role is shared with others, in particular, ORS, employers and their representative associations, and OHS professionals.

6.2 The Problem

The current OHS provides a mandatory role for unions in certain circumstances. This is not in keeping with the flexible arrangements proposed under the new legislation and does not allow workers or employers to choose the support that best fits their workplace.

6.3 Objective of Government Intervention

The objective of Government intervention is to acknowledge the legitimate role that various organisations including trade unions, have in supporting OHS in the workplace by allowing unions to participate generally in OHS discussions and outcomes as requested by workers.

Given the flexibility of the new consultation arrangements the potential involvement of a union will only be limited by the ability of the union to provide an innovative service that represents and promotes workers' interests in OHS.

6.4 Mutual Recognition

Removing the mandatory requirements for union involvement in worker arrangements is consistent with other jurisdictions where workers may request union involvement. It is also consistent with the ASCC core elements to provide a form and manner of consultation that is "not specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances."

6.5 The Options

OPTION 1 – maintain the status quo

OPTION 2 – expand and support the non-mandatory role of unions.

6.6 Impact Analysis

OPTION 1 – MAINTAIN THE STATUS QUO

Under this option unions would continue with a mandated role in worker arrangements.

	ADVANTAGES	DISADVANTAGES
Business	▪ no new requirements	▪ overly prescriptive consultation requirements do not provide flexibility and choice for business in developing consultation arrangements ▪ union involvement may not reflect union membership
Workers	▪ no new requirements	▪ union involvement limited to certain situations and arrangements ▪ doesn't reflect workers' union membership ▪ a mandatory role doesn't provide choice for workers
Government	▪ no implementation costs	▪ does not achieve mutual recognition with some jurisdictions ▪ does not achieve mutual recognition with the draft work of the ASCC
Unions	▪ maintains mandatory involvement regardless of membership numbers	▪ does not provide a flexible role for unions

OPTION 2 – EXPAND AND SUPPORT THE NON-MANDATORY ROLE OF UNIONS

Under this option the unions' legitimate and important role would be acknowledged in legislation and workers provided with opportunities to request union involvement in the establishment and running of worker arrangements generally.

	ADVANTAGES	DISADVANTAGES
Business	▪ flexible union involvement may provide for increased opportunities for feedback and the potential to reduce injuries which could positively impact workers' compensation premiums, and productivity and business's attractiveness as an employer of choice ▪ able to develop systems that best serve individual business size and environment ▪ no longer an enforceable mandatory role for unions	▪ broadened union role at the request of workers may result in unnecessary scrutiny of consultation arrangements ▪ costs to business to fulfil flexible participation requirements and union involvement at the request of workers
Workers	▪ facilitates workers being engaged in workplace participation ▪ provides workers with a choice about union involvement ▪ provides workers with more avenues for union involvement in worker consultation ▪ facilitates more workers being represented ▪ potential to reduce injuries among all workers ▪ avenue to discuss OHS issues	▪ no longer an enforceable mandatory role for unions, this may be problematic in workplaces where worker wants union representation but employer/principal does not
Government	▪ in line with other jurisdictions' move to flexible consultation arrangements ▪ achieves mutual recognition with the majority of jurisdictions ▪ achieves mutual recognition with the draft work of the ASCC	▪ appreciable implementation costs for regulatory preparedness, including associated education campaign to raise awareness of new union role
Union	▪ able to be involved in many aspects of worker arrangements	▪ cost of development and innovation to meet the changing requirements of worker consultation and workers representation needs ▪ may not have the resources to meet demand for support

6.7 Conclusions and Recommended Option

PREFERRED OPTION:	**OPTION 2 - EXPAND AND SUPPORT THE NON-MANDATORY ROLE OF UNIONS.**

Option 2 is the preferred option because it offers flexibility for unions to provide support to all workplaces now and into the future regardless of the worker arrangements that are developed. This enables unions to be involved in many aspects of worker consultation at the request of workers rather than serving in a mandatory outdated role.

6.8 Implementation

See discussion at *G. Implementation* (above).

Attachment A

Cost-Benefit Analysis

New Work Safety Legislation – Worker Consultation –
The Impact on Small Businesses in the ACT

Background

On 2 July 2007, Cabinet agreed in-principle to the staged development of legislation to repeal the *Occupational Health and Safety Act 1989* and to provide a legislative framework for work safety in the Territory. The third of four stages specifically deals with worker consultation arrangements proposed in the new work safety legislation.

The key objectives of the new worker consultation arrangements are to:

- Provide a general duty on employers to **consult all workers** on matters that may affect their health and safety, **regardless of the number of workers**;
- Provide legislative guidance on what **meaningful consultation** is, when to consult and how to consult;
- Provide **choice and flexibility** on how consultation can occur, includes the use of traditional consultation tools including, health and safety committees (HSC); health and safety representative (HSR); and other methods such as direct consultation and external OH&S consultants;
- Provide that HSCs may be mandated in '**high risk**' industries where the work is hazardous and the establishment of a Committee will improve work safety.
- Under the proposed legislation, if the employer and employees cannot agree on the most appropriate form of consultation, the employer will have to adopt the preferred arrangement by the majority of employees.

The proposed legislation is flexible about how "meaningful consultation" may occur. The draft Work Safety Bill describes meaningful consultation as being achieved when employers consult with workers through sharing of information and giving workers a reasonable opportunity to contribute and express opinions on work safety issues.

As part of the Submission process Treasury officers were involved in assessing the regulatory impact of the proposed consultation changes to key stakeholders. As a result of the preliminary analysis, Treasury had concerns regarding the potential regulatory impact of the duty to consult on the thousands of small businesses in the ACT. As a result, when Cabinet considered the Submission, they requested that the Department of Treasury undertake a Cost-Benefit Analysis (CBA) on the impact on small business.

Analysis

Under the current legislation, businesses with less than 10 people are exempt from the requirement to directly consult with employees about their health and safety at work. Stage 3 of the new legislation proposes to make consultation compulsory for all businesses regardless of size and has provided a number of options for employers to consult with workers on health and safety issues.

Treasury conducted five cost-benefit analyses based on each consultation arrangement applicable to the level of risk by industry. The CBAs conducted include small businesses in:

1. 'High Risk' industries e.g. construction - requires a HSR;
2. 'Medium/Low Risk' industries (all other industries excluding construction)
    a. Direct consultation – i) face-to-face; and ii) written advice;
    b. Internal HSR; or
    c. External consultant.

Treasury applied the following key costs and benefits to the analysis in order to determine whether the proposed changes to legislation will benefit small businesses.

Costs
The main costs attributable to small business are mainly related to training for internal HSRs, costs of external consultants and lost productivity in terms of time required for consultation (see Note 1). These costs will vary considerably depending on what method is adopted and the current work practices of each individual small business. The actual cost to a small business to consult might be negligible if they already have consultation mechanisms in place such as regular all staff meetings or effective email communications systems. This is particularly effective in work settings where employees often work at external locations or different shifts.

Benefits
As a result of meaningful consultation with workers in relation to OHS matters, a number of wide-ranging benefits can be derived by employees and the ACT community as a whole. Such benefits include:

- Reduced compensation claims as a result of lower injury rates;
- Greater OHS education and awareness – may lead to increased productivity and employee wellbeing from reduced injuries;
- OHS trained staff – education and dissemination of OHS issues which in turn leads to increased productivity and employee wellbeing from reduced injuries;
- Reduced absenteeism (in terms of lost days from work) – may be from a safer work environment and more educated workforce;
- Increased gross state product – as a result of more productive and safe workplaces; and
- Change in work culture towards a more safety focused business – may attract more employees to safer workplaces and reduce turnover.

There are a number of limitations that have restricted Treasury in obtaining quantifiable evidence for the purposes of this CBA. The two quantifiable benefits are reduced injury compensation claims and reduced absenteeism. It is important to note that these benefits will vary by the nature of the small business.

a) Reduced injury compensation claims

Treasury has applied the benefit of reduced injury compensation claims from analysis conducted by the Victorian Government Regulatory Impact Statement on OH&S Worker Consultation (2007) and NSW Review of OH&S Legislation (2006). The Victorian analysis applied 10 per cent reduction in injuries as a result of the legislation changes (4 per cent in NSW). As this is non-specific to how consultation influences workplace injury rate, Treasury has distinguished between the rate of major and minor injuries and what proportion consultation may influence the incidence of such claims.

Treasury used 2006-07 NSW workers compensation statistics as a proxy for ACT Workcover data to estimate the proportion of minor and major workplace injuries. Across all industries in NSW 24 per cent of workplace injuries were major (e.g. falls, and hitting objects with part of body) and 76 per cent were minor (e.g. sprains and body stressing). For purposes of this analysis Treasury considers that the rate at which injuries are preventable depends on the workplace consultation arrangement. For example, a HSR would pass on greater information resulting in greater awareness of OH&S matter in the workplace.

For 'high' risk industries a HSR may be required. Treasury has assumed that a quarter (0.25 of 24 per cent) of all major injuries and three-quarters (0.75 of 76 per cent) of all minor injuries could be prevented by consultation. The potential for major workplace injuries are lower in 'medium to low' risk industries compared to 'high' risk industries, as such only 15 per cent of all injuries are considered as major. Treasury has applied a depreciating rate that major and minor injuries may be prevented, depending on the consultation option. For example, external consultation and internal HSR are given a 0.25 and 0.75 reduced injury claim rate, while for direct consultation (both written and oral) had lower reductions in claims, a tenth of major injuries and half of minor injuries.

The coverage and rate of small business injury claims are largely unknown because ACT Workcover data does not distinguish the data by business size. As a result industry advice was sought by Treasury, which indicates that only a third of small businesses claim any form of injury compensation.

b) Absenteeism

Treasury has adopted the general assumptions of the UK Health and Safety Commission (HSC) in regards to how consultation improves absenteeism in the workplace. The main assumption was that on average 3 days per employee are lost due to workplace injuries (minor in nature), and as a result of effective consultation, these days would be recovered in terms of reduced absenteeism. However, in most small businesses the cost of absenteeism could be minor given the nature of the business. Often small businesses require a mix of full-time, part-time and casual employees. As such the 3 days lost from absenteeism may be overstated and could be zero. Treasury's analysis reflects this by producing a range of possible net economic outcomes.

Summary of Findings

Table 1 illustrates the economic costs and benefits of OH&S consultation to small businesses with an average of five employees for each consultation option and industry level of risk. Net present value (NPV) principles have been used to derive a range of the net economic outcome for each scenario over a 5-year period. The first year costs and benefits are also given to gauge the initial outcome from setting up the different consultation arrangements.

Depending on the nature of the business and which work consultation arrangement is chosen there can be a net economic benefit or a net economic cost to small businesses. Often small businesses have a mix of full-time, part-time and casual employees, as a result absenteeism may not be a business cost and therefore not accrue a benefit from introducing OH&S consultation to the workplace. To reflect this assumption Treasury has developed a range of what the net economic outcome could be given the relative costs and benefits.

Small businesses in a 'high risk' industry may experience a loss of $1,770 (if they are largely made up of casual employees) to a benefit of $1,501 in the first year of implementing the new work consultation arrangements. Over 5 years, the range varies between a loss of $1,249 to a benefit of $28,523.

For those small businesses in 'medium to low risk' industries the net economic outcome varies depending on the work consultation arrangement adopted and whether the majority of employees are casual.

If direct consultation – face-to-face is adopted, a small business could experience a net economic benefit of between $425 and $3,920 in the first year and between $3,874 and $35,694 over a five year period.

If direct consultation – written is chosen, a small business may experience a net economic benefit of between $1,882 to $5,377 in the first year and between $17,132 and $48,953 over five years.

A small business that elects to have an internal HSR could experience a net economic loss of $546 to a net economic benefit of $2,949 in the first year and a net economic benefit between $10,498 and $42,317 over five years.

In cases where a small business chooses to employee an external OH&S consultant a net economic loss of $1,414 to a net economic benefit of $2,081 may be experienced in the first year. Over five years the business may experience a net economic benefit between $6,573 and $38,393.

Table 1: Summary of Cost and Benefit Analysis by OH&S consultation arrangement for the first year of implementation and over a 5-year period

	$ Year 1 NPV range	$ 5-year NPV range
1. 'High risk' industry – mandatory HSR		
Total Costs	5,592	36,047
Total Benefits (dependent on absenteeism)	3,822 to 7,092	34,798 to 64,570
Net Economic Outcome	*($1,770) to $1,501*	*($1,249) to $28,523*
2. 'Medium/Low Risk' industry – direct consultation		
i) Face-to-face		
Total Costs	1,748	15,910
Total Benefits (dependent on absenteeism)	2,173 to 5,668	19,784 to 51,605
Net Economic Outcome	*$425 to $3,920*	*$3,874 to $35,694*
ii) Written		
Total Costs	291	2,652
Total Benefits (dependent on absenteeism)	2,173 to 5,668	19,784 to 51,605
Net Economic Outcome	*$1,882 to $5,377*	*$17,132 to $48,953*
3. 'Medium/Low Risk' industry – Internal HSR		
Total Costs	3,879	19,849
Total Benefits (dependent on absenteeism)	3,333 to 6,828	30,045 to 62,166
Net Economic Outcome	*($546) to $2,949*	*$10,498 to $42,317*
4. 'Medium/Low Risk' industry – External consultant		
Total Costs	4,748	23,773
Total Benefits (dependent on absenteeism)	3,333 to 6,828	30,045 to 62,166
Net Economic Outcome	*($1,414) to $2,081*	*$6,573 to $38,393*

Basic Assumptions of CBAs

Similar assumptions are applied throughout the four different CBAs, including:

- An average small business has 5 full-time employees;
- One employee attends HSR training for 4 days (as advised by OIR) at a cost of $550 (provided by the lowest cost provider WorkWatch);
- HSR refresher training is required every two years at a cost of $300 for 1 day (provided by WorkWatch);
- A 1.5 person factor is applied to HSR refresher training to account for staff turnover;
- The employer pays for training and continues to pay the employee at their average daily wage. ABS Average Weekly Earnings data was used to estimate the daily wage for construction workers, $218 (per hour $27) and all other workers, $233 (per hour $29);
- Based on OIR and industry advice, the average time spent on OH&S consultation is assumed to be 26 hours per year for 'high risk' industries and 12 hours per year for 'medium to low risk';

- A discount rate of 12.05 per cent (equal to Small business overdraft variable rate) has been used for all cost and benefit components;
- Injury claim data is based on the assumption only 1 in 3 small businesses claim compensation. ACT Workcover data was used, for the construction industry the average yearly claim is $18,200 and for all other industries $14,816;
- The proportion by which injury claims are reduced differ between each CBA. For high risk industries, it is assumed that 0.25 of major injuries and 0.75 of minor injuries are reduced – this equates to a benefit of $3,822 in the first year. For medium to low risk industries, under the internal HSR and external consultation options, it is assumed that 0.25 of major injuries and 0.75 of minor injuries are reduced – equates to a benefit of $3,333 in the first year. For direct consultation (written and oral), it is assumed that consultation would have less of an influence on reducing injury claims, as such a tenth of major injuries and half of minor injuries is applied – this equates to a benefit of $2,173 in the first year.
- Reduced absenteeism is based on 3 days per employee per year for all industries However, not all small businesses will automatically achieve this level of improvement or necessarily reap the financial benefit directly. Therefore, Treasury has adopted a range of potential benefits based on no reduction in absenteeism to full financial benefit of a three day reduction.

1. 'High Risk' industries (including construction) - requires a HSR

Under this scenario, high risk industries must have a HSR, no other OH&S consultation arrangement is applicable. Table 2 shows average small businesses in the 'high risk' industries could experience a net economic loss of $1,249 to a net economic benefit of $28,523, over five years, from the proposed changes in legislation. The net economic loss is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Table 2: Cost-Benefit for High Risk industries over a 5-year period

	$ (NPV range estimate)	
Costs		
Initial Costs		
Cost of HSR training (1 persons)	550	550
Employee earnings (2.5 days)	872	872
Ongoing Costs		
OH&S consultation time (1 hour per fortnight)	32,253	32,253
HSR refresher training (1.5 persons every 2 years)	2,372	2,372
Total Costs	***$36,047***	***$36,047***
Benefits		
Reduced injury claims	*34,798*	*34,798*
Improved absenteeism (3 days)	*0*	*29,772*
Total Benefits	***$34,798***	***$64,570***
Net economic outcome	***($1,249)***	***$28,523***

The following **costs** have been applied to derive the various components in Table 2:

- Employee Earnings dedicated to OH&S consultation time: Based on advice, the average time spent on OH&S issues in high risk industries is 26 hours a year. Using the estimated average daily wage for construction workers of $218, an hourly rate of $27, if each employee spends 26 hours a year on OH&S consultation, then the consultation time will cost $3,543 for five employees in the first year and $32,253 over a 5 year period.
- HSR training is mandatory: One employee must attend training for 4 days at a cost of $550. As this is an initial cost, there are no forward costs to the employer, in economic terms it is a 'sunk cost' and only included in the first year of legislation implementation.
- Employee earnings forgone to training: The total initial training cost will be the average daily wage, estimated to be $218 multiplied by 4 days equal to $872. As this is an initial cost, there are no forward costs to the employer, in economic terms it is a 'sunk cost' and only included in the first year of legislation implementation.
- Refresher training: In order to satisfy the HSR training requirements a two yearly refresher course must be attended. The total cost would be $300 plus the average daily wage of $218 for 1.5 persons; this equals $627 for every two years and $2,372 over a 5 year period.

The following **benefits** have been applied to derive the various components in Table 2:

- Reduced injury claims: Based on ACT Workcover data, an average claim for the construction industry was $18,200 in 2006-07. From industry advice, it has been assumed only one in three small businesses file a claim for compensation, this equates to a benefit of $6,067 in the first year from reduced claims. For high risk industries, it is assumed that 0.25 of major injuries and 0.75 of minor injuries are reduced – this equates to a benefit of $3,822 in the first year and over 5 years this benefit increases to an estimated $34,798.
- Improved absenteeism: Based on a UK Health and Safety Commission study, improved OH&S practices resulted in a reduction of 3 days per employee per year. Using the $218 daily wage for 5 persons, this benefit could range from $3,270 in the first year and $29,772 over 5 years to no reduction at all.

2. 'Medium/Low Risk' industries (all other industries excluding construction)

The following cost-benefit analyses estimate the impact of the four proposed consultation arrangements for small businesses in a medium to low risk industry such as retail and education.

a. Direct consultation – i) face-to-face

This scenario assumes that a small business will discuss OH&S as part of their regular team meetings and no OH&S training is required (see Note 2).

Table 3 shows that under the direct consultation – face-to-face, small businesses may experience a net economic benefit of between $3,874 and $35,694 over 5 years, based on the below costs and benefits. The lower net economic benefit is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Table 3: Cost-Benefit for Medium to Low risk industries – Direct Consultation – face-to-face, over a 5-year period

	$ (NPV range estimate)	
Costs		
Ongoing Costs		
OH&S consultation time (1 hour per month)	15,910	15,910
Total Costs	***$15,910***	***$15,910***
Benefits		
Reduced injury claims	*19,798*	*19,798*
Improved absenteeism (3 days)	*0*	*31,820*
Total Benefits	***$19,798***	***$51,605***
Net economic benefit	***$3,874***	***$35,694***

The only **cost** component depicted in Table 3 is:

- Employee Earnings dedicated to OH&S consultation time: Based on advice, the average time spent on consulting employees about OH&S in medium to low risk industries is 12 hours per year. Using the average daily wage for all workers (excluding the construction industry) of $233, and the hourly rate of $29, if each employee spends 12 hours a year on OH&S consultation, then the consultation time will cost $1,748 for five employees in the first year and $15,910 over 5 years.

The following **benefits** have been applied to derive the various components in Table 3:

- Reduced injury claims: Based on ACT Workcover data, an average claim for all other industries was $14,816 in 2006-07. From industry advice, it has been assumed only one in three small businesses file a claim for compensation, this equates to a benefit of $4,938 in the first year from reduced claims. For medium to low risk industries, it is assumed that 0.10 of major injuries and 0.50 of minor injuries are reduced – this equates to a benefit of $2,173 in the first year and over 5 years this benefit increases to an estimated $19,798.
- Improved absenteeism: Based on a UK Health and Safety Commission study, improved OH&S practices resulted in a reduction of 3 days per employee per year. Using the $233 daily wage for 5 persons, this benefit may range from $3,495 in the first year and $31,820 over 5 years, to no reduction at all.

b. Direct consultation – ii) written

This scenario assumes that a small business will only provide written forms of OH&S advice, through email, written notices and policy documents, and no OH&S training is required (see Note 2).

Table 4 shows that under the direct consultation – written, small businesses may experience a net economic benefit between $17,132 and $48,953 over five years. The lower net economic benefit is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Table 4: Cost-Benefit for Medium to Low risk industries – Direct Consultation – writing, over a 5-year period

	$ (NPV range estimate)	
Costs		
Ongoing Costs		
OH&S consultation time (2 hours per year)	2,652	2,652
Total Costs	***$2,652***	***$2,652***
Benefits		
Reduced injury claims	*19,784*	*19,784*
Improved absenteeism (3 days)	*0*	*31,820*
Total Benefits	***$19,784***	***$51,605***
Net economic benefit	***$17,132***	***$48,953***

The only **cost** component applied in Table 4 is:

- Employee Earnings dedicated to OH&S consultation time: Based on advice, the average time spent on consulting employees about OH&S in medium to low risk industries is 2 hours per year. Using the average daily wage for all workers (excluding the construction industry) of $233, and the hourly rate of $29, if each employee spends 2 hours a year on OH&S consultation, then the consultation time will cost $291 for five employees in the first year and $2,652 over 5 years.

The following **benefits** have been applied to derive the various components in Table 4:

- Reduced injury claims: Based on ACT Workcover data, an average claim for all other industries was $14,816 in 2006-07. From industry advice, it has been assumed only one in three small businesses file a claim for compensation, this equates to a benefit of $4,938 in the first year from reduced claims. For medium to low risk industries, it is assumed that 0.10 of major injuries and 0.50 of minor injuries are reduced – this equates to a benefit of $2,173 in the first year and over 5 years this benefit increases to an estimated $19,784.
- Improved absenteeism: Based on a UK Health and Safety Commission study, improved OH&S practices resulted in a reduction of 3 days per employee per year. Using the $233 daily wage for 5 persons, this benefit may range from $3,495 in the first year and $31,820 over 5 years to no reduction at all.

c. Internal HSR

Under this scenario, the majority of small business employees have elected to have an internal HSR, who then must attend the required training. Table 5 shows that under the internal HSR option, small businesses could experience a net economic benefit of between $10,498 and $42,317 over a five year period. The lower net economic benefit is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Table 5: Cost-Benefit for Medium to Low risk industries – internal HSR, over a 5-year period

	$ (NPV range estimate)	
Costs		
Initial Costs		
Cost of HSR training (1 persons)	550	550
Employee earnings (4 days)	932	932
Ongoing Costs		
Consultation time (12 hours a year)	15,910	15,910
HSR refresher training (1.5 persons every 2 years)	2,457	2,457
Total Costs	***$19,849***	***$19,849***
Benefits		
Reduced injury claims	*30,345*	30,345
Improved absenteeism (3 days)	*0*	31,820
Total Benefits	***$30,345***	***$62,166***
Net economic benefit	***$10,498***	***$42,317***

The following **costs** have been applied in Table 5:

- Employee Earnings dedicated to OH&S consultation time: If each employee spends 12 hours a year on OH&S consultation, then the consultation time will cost $1,748 for five employees (based on a hourly rate of $29) and $15,910 over a 5 year period.
- HSR training: One employee must attend training for 4 days at a cost of $550. As this is an initial cost, there are no forward costs to the employer, in economic terms it is a 'sunk cost' and only included in the first year of legislation implementation.
- Employee earnings forgone to training: The total initial training cost will be the average daily wage, estimated to be $233 multiplied by 2.5 days equal to $583. As this is an initial cost, there are no forward costs to the employer, in economic terms it is a 'sunk cost' and only included in the first year of legislation implementation.
- Refresher training: In order to satisfy the HSR training requirements a two yearly refresher course must be attended. The total cost would be $300 plus the average daily wage of $233 for 1.5 persons; this equals $649.5 for every two years and $2,457 over a 5 year period.

The following **benefits** have been applied to derive the various components in Table 5:

- Reduced injury claims: Based on ACT Workcover data, an average claim for all other industries was $14,816 in 2006-07. From industry advice, it has been assumed only one in three small businesses file a claim for compensation, this equates to a benefit of $4,938 in the first year from reduced claims. For medium to low risk industries with an internal HSR, it is assumed that 0.25 of major injuries and 0.75 of minor injuries are reduced – this equates to a benefit of $3,333 in the first year and over 5 years this benefit increases to an estimated $30,345.
- Improved absenteeism: Based on a UK Health and Safety Commission study, improved OH&S practices resulted in a reduction of 3 days per employee per year. Using the $233 daily wage for 5 persons, this benefit may range from $3,495 in the first year and $31,820 over 5 years to no reduction at all.

d. External consultation

Under this scenario, the majority of small business workers have elected to employ an external OH&S consultant (see Note 4). This is likely to occur in industries where there are considerable risks and there would be benefit in employing a person with industry specific OH&S expertise.

Table 6 shows that under the external consultant option, small businesses may experience a net economic benefit between $6,573 and $38,393 over five years. The lower net economic benefit is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Table 6: Cost-Benefit for Medium to Low risk industries – external consultant, over a 5-year period

	$ (NPV range estimate)	
Costs		
Initial Costs		
External consultant (20 hours for initial year)	2,400	2,400
Ongoing Costs		
Consultation time (12 hours a year)	15,910	15,910
External consultant fee (5 hours per year)	5,463	5,643
Total Costs	***$23,773***	***$23,773***
Benefits		
Reduced injury claims	*30,345*	*30,345*
Improved absenteeism (3 days)	*0*	*31,820*
Total Benefits	***$30,345***	***$62,166***
Net economic benefit	***$6,573***	***$38,393***

The following **cost** components as shown in Table 6 are:

- External Consultant initial fee: Based on industry advice, external consultants charge an estimated hourly rate of $120 (see Note 3). It has been assumed that an average small business with no OH&S policy will require 20 hours initial consultation in the first year, this includes basic risk assessment of the premises, seminar on safety, and ongoing OH&S management plans and advice – this equates to a $2,400 in consultant fees for the first year of implementation. As this is an initial cost, there are no forward costs to the employer, in economic terms it is a 'sunk cost' and only included in the first year of legislation implementation.
- Employee Earnings dedicated to OH&S consultation time: If each employee spends 12 hours a year on OH&S consultation, then the consultation time will cost $1,748 for five employees (based on a hourly rate of $29) and $15,910 over a 5 year period.
- Ongoing consultant charges: Based on industry advice a medium to low risk business may require an external consultant 5 times throughout the year. Using the $120 hourly charge, Treasury assumes that the cost of ongoing fees is $600 per annum. Over a 5 year period the estimated total cost of consultant charges is $5,463.

The following **benefits** have been applied to derive the various components in Table 6:

- Reduced injury claims: Based on ACT Workcover data, an average claim for all other industries was $14,816 in 2006-07. From industry advice, it has been assumed only one in three small businesses file a claim for compensation, this equates to a benefit of $4,938 in the first year from reduced claims. For medium to low risk industries with an external HSR consultant, it is assumed that 0.25 of major injuries and 0.75 of minor injuries are reduced – this equates to a benefit of $3,333 in the first year and over 5 years this benefit increases to an estimated $30,345.
- Improved absenteeism: Based on a UK Health and Safety Commission study, improved OH&S practices resulted in a reduction of 3 days per employee per year. Using the $233 daily wage for 5 persons, this benefit may range from $3,495 in the first year and $31,820 over 5 years to no reduction at all.

Conclusion

It can be seen that the method of consultation selected will have a significant and varied impact on the costs of consultation. With that said, regardless of the consultation option any small business that consults with employees regarding OH&S matters will produce a net economic benefit.

Overall, for 'medium to low' risk small businesses the direct consultation – written option produces the highest net economic benefit, with a range between $17,132 to $48,953 over five years. In the first year of implementation, the costs have the potential to outweigh the benefits depending on the businesses mix of full-time, part-time and casual employees. However, over a five year period, all 'medium to low' risk small business has the potential to yield a net economic benefit. The benefits are highly sensitive to any change in the rate of absenteeism as opposed to the relative proportion that injury claims are reduced as a result of consultation.

Treasury considers that while the external consultation option is more costly to implement, overall there is a higher net economic benefit compared to the direct consultation –face-to-face method. This reflects the higher benefits realised from employing an external consultant with greater OH&S knowledge.

'High' risk small businesses must bear higher associated costs to train an employee to become a HSR, and there are greater ongoing consultation requirements which reduce the overall benefit of consultation. However, depending on the nature of the business and number of casual/contract employees a net economic loss of $1,249 to a $28,523 net economic benefit can be experienced from consulting with employees on OH&S matters. The net economic loss is derived when there is no improvement in absenteeism or if absenteeism is not a cost to the business.

Notes to assumptions

Note 1
Based on advice from OIR, no administration costs have been factored into the OH&S consultation arrangements as they are not requiring small businesses to keep a detailed record of their consultation. If any small business was to record their OH&S consultation meetings this would be at little additional cost to current administration costs.

Note 2
No HSR training is required under the direct consultation method for medium to low risk industry: OIR have advised that if the direct consultation method was adopted then no training is required by any employee. Therefore there are no initial costs applied to this analysis in terms of training or time spent on training courses.

Note 3
External consultants spoken with - Jenny Goodwin from GoodWin Solutions and David McCooey from Ablaze Total Solutions.

Note 4
Under the legislation Union Representation is another consultation arrangement available to small businesses with medium to low risk. If the majority of employees chose this option it would involve a certified HSR Union Representative to give advise on OH&S issues – as if they were an external consultant. While the OIR advise that the unions would be reluctant to charge a fee, under the proposed legislation there is no clause which restricts unions wishing to charge any amount for their services. As such, Treasury has assumed that the union representative option would be the same as if an external consultant was employed.

Reference List

ABS data request - Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007.

ABS data request - Businesses by Industry Division by Statistical Local Area by Employment Size Ranges, 2007.

ABS (2008) *Average Weekly Earnings*, Catalogue Number 6302.0, February 2008.

ACT Occupation Health and Safety Council (2005), *Occupational Health and Safety Act 1989: Scope and Structure Review*, Final Report, September 2005.

ACT WorkCover data (2008), *ACT's Private Sector at a Glance – 2006-07*, http://www.workcover.act.gov.au/pdfs/statsbulletins/WC_Stats_2006-07/SB08_PrivSect_Glance_2006-07.pdf

HSR training data - *WorkWatch ACT Ltd*.

NSW WorkCover (2006), *Report on the Review of the Occupation Health and Safety Act 2000*, http://www.workcover.nsw.gov.au/NR/rdonlyres/1D75B8BB-7A4E-4DA4-86B1-0344F5CBAFD6/0/report_on_the_review_of_the_occupational_health_and_safety_2006_4859.pdf

NSW WorkCover (2008), *Statistical Bulletin 2006-07*, www.workcover.nsw.gov.au

UK Health and Safety Commission (2006), *Improving worker involvement – Improving health and safety*, www.hse.gov.uk/consult/condocs/cd207.htm

WorkSafe Victoria (2007), *Regulatory Impact Statement Occupation Health and Safety Regulations 2007, Equipment (Public Safety) Regulations 2007*, Report and Technical Appendix, The Allen Consulting Group, http://www.workcover.vic.gov.au/wps/wcm/resources/file/eb78cf036f40d8c/vol_1_regulatory_impact_statement.pdf

Attachment B

Literature supporting the effectiveness of workplace health and safety representatives [1]

The research shows that organisations that have engaged in workplace consultation and have systems of worker participation (such as HSRs and union support) can bring about positive changes in health and safety.

The move towards greater worker participation in workplace health and safety matters including training for HSRs and HSCs is supported by a number of research projects and pilot schemes, all of which conclude that there is a strong link between improved safety performance and worker participation.

The Health and Safety Council's *Strategy for workplace health and Safety in Great Britain to 2010 and Beyond* includes as an essential element "a workforce fully involved in health and safety management and a vibrant system of workplace health and safety representatives operating in partnership with management" *("A Collective Declaration on Worker Involvement" 2004; HSC).*

The Australian Safety and Compensation Council's 'Core Elements Documents' set out the following principles in relation to workplace consultation, representation and participation:

a) participatory frameworks create positive occupational health and safety cultures and practices, and improve health and safety outcomes;

b) people who own, manage, influence, are employed by, engaged through, or supply to business are best placed to influence outcomes;

c) all persons who work at a workplace—not just the "employees" of the "employer"—should be able to participate in and be consulted about health and safety matters at that workplace;

d) all parties at the workplace should exchange information and ideas about health and safety risks and measures that can be taken to eliminate or reduce those risks;

e) health and safety representatives and health and safety committees remain the principal mechanism for consultation and participation; and

f) beyond the capacity to elect health and safety representatives and form health and safety committees, the form and manner of such consultation and participation should not be specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances.

The international studies undertaken supporting these elements include the following:

[1] Adapted from Appendix 2 of *Workplace Health and Safety Act 1995* Regulatory Impact Statement: Prescribed training for workplace health and safety representatives.

- Worker Participation and the Management of Occupational Health and Safety: Reinforcing or Conflicting Strategies? Walters, D.R. and Frick, K. (2000) in Systematic Occupational Health and Safety Management: Perspectives on an International Development. Frick, K., Jensen, P.L., Quinlan, M. & Wilthagen, T. (eds):

  > "That the participation of workers in the organisation of workplace health and safety improves OHSM is widely recognised. Support for this notion is evident in a variety of studies from a range of industrial countries (Walters, 1996a). Evaluation findings show that when employers manage health and safety without consultation, performance (as measured by objective indices such as injury rates) is considerably worse than when they consult with their workers on health and safety management."

- Safety Behaviour in the Construction Sector, HAS/HSE Northern Ireland by Nick McDonald and Victor Hrymak:

  > "The goal of the research was to investigate the factors that influence safety behaviour and compliance with safety requirements on construction sites. The presence of a safety representative on site shows the strongest relationship with safety compliance. It appears that safety representatives influence safety compliance through their influence on responses to audits and hazards, encouraging the reporting of hazards and help ensure these reports lead to better safety. This study demonstrates the potentially strong role which safety representatives can play in influencing both behaviour and compliance with safety requirements. All sites should have safety representatives and their role and functions should be reinforced as part of the safety management system."

- Safety Cultures: Giving Staff a Clear Role. HSE, CRR 214/1999:

  > "Employees tend to report concerns via the route that they perceive as being most effective. There is a far greater willingness to report concerns over equipment, procedures etc. than over the behaviour of an individual. In organisations with poorer safety cultures, the union and safety rep. are seen as being highly effective routes for raising health and safety concerns. Personnel are not."

- Unions, Safety Committees and Workplace Injuries, No 31. Dept of Economics and Applied Econometrics Research Unit. Paci, Reilly and Holl:

  > "The paper exploits the Workplace Industrial Survey form 1990 (WIRS3) to examine the determinants of workplace injuries for a sample of manufacturing establishments in Great Britain:
  >
  > - organisations with union safety committees have 50% lower injury rate per 1000 than average
  > - organisations with non-union safety committees have 40% lower injury rate per 1000

- the weakest reducing effects on injury rates are when management deals with health and safety without any form of worker consultation."

- The Healthy Workplace? A Robinson and C Smallman. The Judge Institute of Management Studies, 3 March 2000:

  "The proportion of employees who are trade union members has a positive and significant association with both injury and illness rates. The arrangements associated with trade unions —formal OHS arrangements of committees and representatives —shows these lower the odds of injury and illness when compared with arrangements that merely inform employees of OHS issues.

  The odds of illness seem to be more conditioned by the presence of more formal committees (general and specific) which deal with health and safety matters. Lower injury rates, on the other hand, are more likely to occur in the presence of OHS representative."

- Safety Cultures: Giving Staff a clear role. HSE, CRR 214/1999:

  "The first people to realise something may be going seriously wrong in an organisation are usually those who work there. Yet employees often do not voice such concerns or they voice them in the wrong way. Where staff concerns about health and safety are not raised the implications can be disastrous—Clapham Rail Crash, Piper Alpha Explosion (this killed 167 people and cost an estimated £2 billion).

  Employees tend to report concerns via the route that they perceive as being most effective. There is a far greater willingness to report concerns over equipment, procedures etc. than over the behaviour of an individual. In organisations with poorer safety cultures, the union and safety rep. are seen as being highly effective routes for raising health and safety concerns. Personnel are not."

- The effectiveness and impact of the Paper and Board Industry Advisory Committee (PABIAC) initiative in reducing accidents in the paper industry. Greenstreet Berman Ltd, HSE, CRR 452/2002:

  "In three years the cost of the PABIAC initiative was cost neutral. That is the initiatives cost £21.6 million and in three years the cost reductions of averted injuries and other costs was about £20 million. Major and fatal injury rates have reduced by about a quarter across the entire industry in three years.

  What were the initiatives?

  In 1996 the Graphical, Paper and Media Union prompted the Paper and Board Industry Advisory Committee (PABIAC) to find ways to improve safety culture and safety. A key element of safety culture concerns workforce involvement and consultation. Poorer mills failed to recognise the importance of workforce involvement in terms of developing accepted safety measures, which led to increased enforcement and also resulted in a failure to modify the

failing systems. PABIAC initiative was cited as the reason underlying the massively improved cooperation between management, safety representatives and employees in the development of appropriate risk controls."

Australian studies mirror this same conclusion:

- Systematic management of Occupational Health and Safety; National Research Centre for OHS Regulation; ANU by Liz Bluff[2]; September 2003.

  "In summary there is evidence to suggest that participation and establishing an effective dialogue between management and workers on OHS issues contributes to improved OHS performance. However the active, local involvement of workers requires adequate training and information, opportunities to investigate issues and communicate with other workers, and channels for dialogue with management. These conditions for effective worker participation are more likely to be met where there is support from within and outside the workplace…This support must be provided by committed management, OHS specialists, by OHS inspectors, unions or by providers of OHS representative training."

[2] Ms Liz Bluff was appointed to a previous ACT OHS Council and provided valuable input into the 2005 Council Report.