

PART 5 — CONSULTATION, REPRESENTATION AND PARTICIPATION

DIVISION 1 — CONSULTATION, CO-OPERATION AND CO-ORDINATION BETWEEN DUTY HOLDERS

**[20,225] Duty to consult with other duty holders**

**46** If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

Maximum penalty:

- In the case of an individual — \$20 000.
- In the case of a body corporate — \$100 000.

**Editor’s note:** For variations to the Model legislation for each jurisdiction refer to the entries as set out below.

- Federal — s 46 of the Federal WHS legislation.
- NSW — s 46 of the NSW WHS legislation.
- QLD — s 46 of the QLD WHS legislation.
- SA — s 46 of the SA WHS legislation.
- TAS — s 46 of the TAS WHS legislation.
- ACT — s 46 of the ACT WHS legislation.

COMMENTARY TO SECTION 46

Purpose .....	[20,225.5]
Person .....	[20,225.10]
More than one person can have a duty in relation to the same matter .	[20,225.15]
Duties are not transferrable .....	[20,225.20]
Matter .....	[20,225.25]
This Act .....	[20,225.30]
Reasonably practicable .....	[20,225.35]
Consult, co-operate and co-ordinate activities .....	[20,225.40]
Criminal offence .....	[20,225.45]

**[20,225.5] Purpose** This provision stems from one of a series of recommendations made in the First Report of the *National Review into Model Occupational Health and Safety Laws* directed towards clarifying obligations in circumstances where there are multiple or concurrent duty holders: at [4.6]–[4.12], Recommendation 2. The Explanatory Memorandum (EM) provides that “[m]anaging work health and safety risks is more effective if duty holders exchange information on how the work should be done so that it is without risk to health and safety. Co-operating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs”: EM at [194].

**[20,225.10] Person** Includes a corporation: see, eg, Acts Interpretation Act 1901 (Cth) s 22(1)(a); Acts Interpretation Act 1915 (SA) s 4; Interpretation Act 1984 (WA) s 5. Use of “person” in this context indicates that all duty-holders under the Act are subject to this obligation.

**[20,225.15] More than one person can have a duty in relation to the same matter** Section 46 makes provision for what should occur in circumstances where more than one person holds a duty under the Act. Section 16 of the Act expressly provides that more than one person can concurrently have the same duty. The First Report of the *National Review into Model Occupational Health and Safety Laws* recommended at [4.7] that the “model Act must make clear that all duty holders must at all times accept their responsibility for health or safety and ensure that the duties of care are met. The provisions of the Act should not permit or encourage, directly or indirectly, any duty holders to

avoid their health and safety responsibilities”. Section 16 gives effect to this recommendation by requiring each duty holder to comply with its duty “even if another duty holder has the same duty”.

An example of the application of s 16(1) is a circumstance where a labour hire employer places one of its employees to work with a host employer. The labour hire employer and the host employer will each owe a duty to the employee pursuant to s 19(1)(a) of the Act because the employee will be a “worker” engaged by each of them. Each must comply with its duty: s 16(2). What will be “reasonably practicable” for each of them to do in the circumstances will be “a question of fact and degree”: *Baiada Poultry Pty Ltd v R* (2011) 203 IR 396; [2011] VSCA 23; BC201100511 at [19].

Section 16(3)(b) provides that in circumstances where more than one person has a duty, each must discharge the duty “to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity”. The Explanatory Memorandum makes clear that the Act is concerned with “both ‘actual’ or ‘practical’ control” at [66]. This is consistent with existing case law: *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; 173 IR 307; [2008] WASCA 84; BC200802582 at [34]–[35]; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; 142 IR 157; [2004] VSCA 215; BC200408208 at [68]; *Baiada Poultry Pty Ltd v R* (2011) 203 IR 396; [2011] VSCA 23; BC201100511 at [17]–[19]; *McMillan Britton & Kell Pty Ltd v WorkCover Authority of New South Wales (Inspector Blake)* (1999) 89 IR 464 at 480–1.

**[20,225.20] Duties are not transferrable** Section 46 also implicitly recognises the principle made explicit in s 14 that duties are not transferrable. At common law and under existing occupational health and safety laws, it is accepted that an employer’s duties to its employees are non-delegable: *Kondis v State Transport Authority* (1984) 154 CLR 672; 55 ALR 225; 58 ALJR 531; BC8400477 at 237; *Kirk v IRC (NSW)* (2010) 239 CLR 531; 113 ALD 1; 262 ALR 569; [2010] HCA 1; BC201000230 at [10] and [18]. A similar approach has been taken in New Zealand (*Linework Ltd v Department of Labour* [2001] 2 NZLR 639) and the United Kingdom (*R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; *R v Associated Octel Co Ltd* [1996] 4 All ER 846).

As Mason J explained in *Kondis*, the non-delegable nature of an employer’s duty to its employees results from the special relationship between the two under which “[t]he employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer’s provision and judgment in relation to these matters”: *Kondis v State Transport Authority* (1984) 154 CLR 672; 55 ALR 225 at 235; 58 ALJR 531; BC8400477.

The First Report of the *National Review into Model Occupational Health and Safety Laws* at [6.88] recommended that this approach be extended to all duties under the model laws:

*... Our recommended approach to the duty of care would not permit a delegation of the duty of care. Each duty holder would retain the non-delegable duty of care at all times. Arranging for another person to undertake activities necessary for compliance with the duty of care owed by the duty holder would not be sufficient to meet the duty so far as is reasonably practicable, unless the duty holder took steps necessary to confirm the relevant matters were appropriately attended to, and the required health and safety standards were maintained.*

The recommendation finds expression in s 14. It is supported by s 272 which prohibits “contracting out” of legal obligations. The principle of “non-transferability” is likely to be interpreted consistently with the case law concerning “non-delegability”.

**[20,225.25] Matter** The term “matter” is well known in occupational health and safety law. For example, in construing “matter” in s 21(3)(a) of the former Occupational Health and Safety Act 1985 (Vic), the Supreme Court of Victoria (Byrne J) held that it is “wide enough to cover any activity or thing in the working environment which might involve risk to the safety and health of a worker.”: *Stratton v Van Driel Ltd* (1998) 87 IR 151; [1998] VSC 75; BC9805001 at [16].

**[20,225.30] This Act** includes the Regulations: s 4.

**[20,225.35] Reasonably practicable** This term does not have the meaning ascribed to the term in s 18, which applies only in respect of a duty to ensure health and safety under the Act. Instead

the term should be given its ordinary meaning: see Explanatory Memorandum at [195]. See also *Slivak v Lurgi* (2001) 205 CLR 304; 177 ALR 585; [2001] HCA 6; BC200100264 at [53].

**[20,225.40] Consult, co-operate and co-ordinate activities** These terms are not defined. Whilst there is an extensive description of the nature of consultation in s 48, it expressly applies only to Div 2 of this Part.

**[20,225.45] Criminal offence** Contravention of this provision is an offence.

## DIVISION 2 — CONSULTATION WITH WORKERS

### **[20,230] Duty to consult workers**

**47** (1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.

Maximum penalty:

In the case of an individual — \$20 000.

In the case of a body corporate — \$100 000.

(2) If the person conducting the business or undertaking and the workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures.

(3) The agreed procedures must not be inconsistent with section 48.

**Editor's note:** For variations to the Model legislation for each jurisdiction refer to the entries as set out below.

Federal — s 47 of the Federal WHS legislation.

NSW — s 47 of the NSW WHS legislation.

QLD — s 47 of the QLD WHS legislation.

SA — s 47 of the SA WHS legislation.

TAS — s 47 of the TAS WHS legislation.

ACT — s 47 of the ACT WHS legislation.

#### COMMENTARY TO SECTION 47

Derivation .....	[20,230.5]
Person conducting a business or undertaking .....	[20,230.10]
Reasonably practicable .....	[20,230.15]
Consult .....	[20,230.20]
Worker .....	[20,230.25]
Directly affected .....	[20,230.30]
Matter .....	[20,230.35]
Agreed procedures .....	[20,230.40]
Criminal offence .....	[20,230.45]

**[20,230.5] Derivation** Some state Acts impose duties upon employers to consult with employees about OHS matters: see NSW Act ss 13–19; Vic Act ss 35–36; NT Act ss 29–32; and ACT Act ss 47–57. Others impose consultation obligations in the context of the general duty: see Cth Act ss 16, 16A and 16B; WA Act s 19(1)(c).

**[20,230.10] Person conducting a business or undertaking** See s 5.

**[20,230.15] Reasonably practicable** This term does not have the meaning ascribed in s 18, which applies only in respect of a duty to ensure health and safety under the Act. The effect of the term “reasonably practicable” in the current context, according to the Explanatory Memorandum (EM), is to require “the level of consultation to be proportionate to the circumstances, including the

significance of the workplace health or safety issue in question. What is reasonably practicable will depend on the circumstances surrounding each situation. A PCBU may need to take into account the urgency of the requirement to change the work environment, plant or systems etc, and the availability of the workers most directly affected or their representatives. The extent of consultation that is reasonably practicable must be that which will ensure that the relevant PCBU has all relevant available information, including the views of workers and can therefore make a properly informed decision. More serious health or safety matters will generally attract more extensive consultation requirements”: EM at [197]–[199].

[20,230.20] **Consult** See s 48.

[20,230.25] **Worker** See s 7. In the context of this provision, the relevant workers are those which “carry out work for the business or undertaking”. This is a different description to the workers to whom a Person Conducting a Business or Undertaking (PCBU) owes the primary duty of care pursuant to s 19 of the Act. In the case of s 19, the relevant workers are those who are “engaged, or caused to be engaged” by the PCBU or “whose activities in carrying out work are influenced or directed” by the PCBU whilst the workers are “at work in” the business or undertaking. It is unclear what relationship these two different classes of workers have with each other.

[20,230.30] **Directly affected** A PCBU is only required to consult with workers who are or are likely to be “directly affected” by the relevant matter. The term “will directly affect” was considered by the South Australian Supreme Court in a different statutory context to require an “immediate influence”; a “causal relationship” which is “direct or immediate”; and “exclude[s] that which is indirect or remote”: *Adelaide Development Co Pty Ltd v Corporation of the City of Adelaide* (1991) 56 SASR 497; [1991] SASC 3057 at [45]; see also *Hayward v Forest Practices Tribunal* [2003] TASSC 60; BC200304415 at [42]. Creighton and Rozen have observed, that “[t]he requirement for [workers] to be directly affected may go some way to reducing the obligation to consult.”: Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, (Federation Press, 3rd Edition, 2007) at p 658.

[20,230.35] **Matter** The term “matter” is well known in occupational health and safety law. For example, in construing “matter” in s 21(3)(a) of the former Occupational Health and Safety Act 1985 (Vic), the Supreme Court of Victoria (Byrne J) held that it is “wide enough to cover any activity or thing in the working environment which might involve risk to the safety and health of a worker.”: *Stratton v Van Driel Ltd* (1998) 87 IR 151; [1998] VSC 75; BC9805001 at [16].

[20,230.40] **Agreed procedures** It is likely that any agreed procedure for consultation would need to be clearly applicable to work, health and safety matters in order to satisfy the requirements of s 47(2): see *Gilbertson-Greenham Pty Ltd v Australian Meat Industry Employees Union* (1990) 5 VIR 189. Further, it must “not be inconsistent” with the statutory prescription in s 48.

[20,230.45] **Criminal offence** Contravention of this provision is an offence.

## [20,235] Nature of consultation

- 48** (1) Consultation under this Division requires:
- (a) that relevant information about the matter is shared with workers; and
  - (b) that workers be given a reasonable opportunity:
    - (i) to express their views and to raise work health or safety issues in relation to the matter; and
    - (ii) to contribute to the decision-making process relating to the matter; and
  - (c) that the views of workers are taken into account by the person conducting the business or undertaking; and
  - (d) that the workers consulted are advised of the outcome of the consultation in a timely manner.

(2) If the workers are represented by a health and safety representative, the consultation must involve that representative.

COMMENTARY TO SECTION 48

Matter .....	[20,235.5]
Worker .....	[20,235.10]
Person conducting a business or undertaking .....	[20,235.15]
Meaningful consultation .....	[20,235.20]
Involvement of health and safety representative .....	[20,235.25]
Involvement of union representative .....	[20,235.30]

**[20,235.5] Matter** The term “matter” is well known in occupational health and safety law. For example, in construing “matter” in s 21(3)(a) of the former Occupational Health and Safety Act 1985 (Vic), the Supreme Court of Victoria (Byrne J) held that it is “wide enough to cover any activity or thing in the working environment which might involve risk to the safety and health of a worker.”: *Stratton v Van Driel Ltd* (1998) 87 IR 151; [1998] VSC 75; BC9805001 at [16].

**[20,235.10] Worker** See s 7. In the context of this provision, the relevant workers are those which “carry out work for the business or undertaking”. This is a different description to the workers to whom a Person Conducting a Business or Undertaking (PCBU) owes the primary duty of care pursuant to s 19 of the Act. In the case of s 19, the relevant workers are those who are “engaged or caused to be engaged” by the PCBU or “whose activities in carrying out work are influenced or directed” by the PCBU whilst the workers are “at work in” the business or undertaking. It is unclear what relationship these two different classes of workers have with each other.

**[20,235.15] Person conducting a business or undertaking** See s 5.

**[20,235.20] Meaningful consultation** According to the Explanatory Memorandum (EM), s 48(1) establishes the requirements for “meaningful consultation”: EM at [201]. Whilst s 48(1)(d) provides only that the relevant workers be “advised of the outcome” of the consultation, the EM provides that “[t]he consultation should also ensure that workers are aware of the reasons for decisions made by the PCBU — and even if they do not agree with the decisions — can understand them.”: EM at [200].

Albeit in a different context, Gray J made some apposite observations about the nature and purpose of an obligation on an employer to consult with employees. “To comply with its obligations to consult, management needed to make it clear that there would be real opportunities for employees, individually or collectively, to suggest proposals for the implementation of [the relevant decision]. Opportunities for employees to present their points of view or state their objections were necessary. So was a genuine opportunity to influence the outcome, so that even though management was not giving up its right to make a final decision, it was prepared to do so only after hearing and considering the suggestions of employees, their responses to management proposals, their points of view and their objections. Even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences.”: *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150; BC201009583 at [80]–[81] per Gray J.

**[20,235.25] Involvement of health and safety representative** It is mandatory to involve any relevant health and safety representative (HSR) in consultation pursuant to s 48(2). Section 70(1)(a) also provides that the PCBU must consult, so far as is reasonably practicable, on work health and safety matters with any health and safety representative for a work group of workers carrying out work for the business or undertaking. The Explanatory Memorandum (EM) provides further that in

some circumstances, a PCBU may meet its consultation obligations in respect of workers by consulting *only* the HSR “depending on the work health and safety issue in question”: EM at [203]. In respect of this issue, the National Review into Model Occupational Health and Safety Laws, Second Report observed that “the PCBU might, however, find it necessary to consult other workers if the HSR lacks skill or knowledge relevant to the issue, or does not have the confidence of a significant proportion of the workers in the work group”: at [24.24]. An example of such a case was *Eso Australia Pty Ltd v VWA* (2006) 156 IR 409; [2006] VCAT 1557 at [44] where a health and safety representative was found to be “relatively inexperienced”.

**[20,235.30] Involvement of union representative** Section 48 is silent regarding the right of a worker to involve his or her union representative in consultation. However, s 68(2)(g) provides that a health and safety representative (HSR) may request the assistance of any person whenever necessary in exercising a power or performing a function under the Act. This may extend to the representation of workers in the workgroup (see s 68(1)(a)) in consultations pursuant to s 47.

## **[20,240] When consultation is required**

**49** Consultation under this Division is required in relation to the following health and safety matters:

- (a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;
- (b) when making decisions about ways to eliminate or minimise those risks;
- (c) when making decisions about the adequacy of facilities for the welfare of workers;
- (d) when proposing changes that may affect the health or safety of workers;
- (e) when making decisions about the procedures for:
  - (i) consulting with workers; or
  - (ii) resolving work health or safety issues at the workplace; or
  - (iii) monitoring the health of workers; or
  - (iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or
  - (v) providing information and training for workers; or
- (f) when carrying out any other activity prescribed by the regulations for the purposes of this section.

**Editor’s note:** For variations to the Model legislation for each jurisdiction refer to the entries as set out below.  
QLD — s 49 of the QLD WHS legislation.

### COMMENTARY TO SECTION 49

Purpose .....	[20,240.5]
Identify hazards and assessing, eliminating or minimising risks ....	[20,240.10]
Facilities for the welfare of workers .....	[20,240.15]
At what point in the decision-making process is consultation required .....	[20,240.20]
Regulations .....	[20,240.25]

**[20,240.5] Purpose** This provision “sets out the kinds of work health and safety matters that must be consulted on under this Division, including at each stage of the risk management process.”: Explanatory Memorandum (EM) at [204].

**[20,240.10] Identify hazards and assessing, eliminating or minimising risks** Section 17 of the Act provides that a duty imposed on a person to ensure health and safety requires the person to eliminate risks so far as is reasonably practicable, and otherwise to minimise risks so far as is reasonably practicable. Part 3.1 of the Regulations also imposes duties upon a Person Conducting

a Business or Undertaking (PCBU) in respect of risk management.

**[20,240.15] Facilities for the welfare of workers** Part 3.2 Div 2 of the Regulations imposes duties upon PCBUs in respect of general workplace management, including maintenance of adequate and accessible facilities for workers.

**[20,240.20] At what point in the decision-making process is consultation required** Creighton and Rozen have observed, in respect of a similar obligation, that “the duty to consult does not arise prior to an employer doing one or more of the things mentioned”: Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, (Federation Press, 3rd Edition, 2007) at p 657. Under s 49, consultation is required “when” identifying hazards and assessing risks and “when” making decisions about risk management, the adequacy of facilities and the procedures specified in s 49(e). Whilst this suggests that consultation could occur concurrently with that decision-making process, “for consultation to be meaningful, it must occur at a point in time before the implementation of the proposed change”: Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, (Federation Press, 3rd Edition, 2007) at p 657. Further, in order for the views of workers to be “taken into account by the PCBU” as required by s 48(c), consultation must necessarily precede decision-making.

In addition, the obligation to consult in respect of change that may affect the health or safety of workers arises in respect of changes which the PCBU is “proposing” (s 49(d)). Creighton and Rozen have further observed that a similar provision constitutes “a potentially significant encroachment on traditional managerial prerogatives. As such, it clearly has the potential to promote a measure of ‘participative democracy’ at the workplace”: Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, (Federation Press, 3rd Edition, 2007) at [663].

**[20,240.25] Regulations** There are a small number of Regulations requiring a PCBU to consult with a worker. These include when selecting a medical practitioner to conduct health monitoring (see regs 371, 408 and 437) and by the operator of a major hazard facility in respect of a range of matters relating to safety at the facility (see Pt 9.5, in particular reg 575).

### DIVISION 3 — HEALTH AND SAFETY REPRESENTATIVES

#### *Subdivision 1 — Request for election of health and safety representatives*

### **[20,245] Request for election of health and safety representative**

**50** A worker who carries out work for a business or undertaking may ask the person conducting the business or undertaking to facilitate the conduct of an election for 1 or more health and safety representatives to represent workers who carry out work for the business or undertaking.

#### COMMENTARY TO SECTION 50

Purpose and Derivation .....	[20,245.5]
Worker .....	[20,245.10]
Person conducting a business or undertaking .....	[20,245.15]
Requirement to facilitate the conduct of an election .....	[20,245.20]
Process must be initiated by a worker .....	[20,245.25]

**[20,245.5] Purpose and Derivation** The Explanatory Memorandum (EM) notes that “[t]here is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Bill this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work”: EM at [205]. Section 50 provides for the commencement of the process which should ultimately lead to the election of one or more Health and Safety Representatives (HSRs).

Elected HSRs, in one form or another, are a feature of all State Acts: NSW Act s 17; ACT Act s 50; Vic Act s 44; Tas Act s 32; NT Act s 36; SA Act s 27; WA Act s 29; Cth Act s 25.

**[20,245.10] Worker** The meaning of “worker” is set out in s 7. In the context of this provision, the relevant workers are those which “carry out work for the business or undertaking” of the person to whom a request under this section is made. This is a different description to the workers to whom a Person Conducting a Business or Undertaking (PCBU) owes the primary duty of care pursuant to s 19 of the Act. In the case of s 19, the relevant workers are those who are “engaged or caused to be engaged” by the PCBU or “whose activities in carrying out work are influenced or directed” by the PCBU while the workers are “at work in” the business or undertaking. It is unclear what relationship these two different classes of workers have with each other.

**[20,245.15] Person conducting a business or undertaking** The general meaning of “PCBU” is addressed at s 5. The reference to a PCBU in s 50 refers to a person conducting a business or undertaking “for” whom a worker making a request under s 50 “carries out work”. There may be a number of PCBUs which fit this description in respect of any given worker. Accordingly, implicit in the provision is that the worker may select, from the available PCBUs, which PCBU the worker makes the request to. In contrast, the Second Report of the *National Review into Model Occupational Health and Safety Laws* (Second Report) recommended that the Act prescribe that a request be made to a PCBU “most directly involved in the engagement or direction of the workers”: Recommendation 101. The decision regarding which PCBU a worker should make a request to is significant, as the identity of the PCBU will determine which workers may be potential members of the relevant work groups (see s 51).

**[20,245.20] Requirement to facilitate the conduct of an election** See ss 51–54 for determination of work groups and ss 60–63 for the election of HSRs. However, the Explanatory Memorandum (EM) suggests that this requirement has a qualitative aspect, providing that “[f]acilitating the election process requires a PCBU to adopt a supportive role during the election process rather than a directive one”: at [211].

**[20,245.25] Process must be initiated by a worker** “The process for electing HSRs is initiated by a worker’s request”: EM at [208]. There is no provision for a PCBU to initiate the process for electing HSRs in the Act.

This is in contrast to s 75(2) which allows a PCBU to establish a health and safety committee. It is also in contrast to the recommendation of the *National Review into Model Occupational Health and Safety Laws*, which proposed allowing a concurrent right for a PCBU to “initiate, of their own accord” the process, on the basis that the PCBU “may consider it convenient and beneficial to the interests of health and safety for consultation with the workers to be organised through a representative. The workers may not be aware of their entitlement to initiate this process, or the benefits of it. This option allows this to occur in such circumstances”: [25.27]. Notwithstanding the absence of this express provision, “[t]he legislation does not otherwise limit the determination of work groups, although the Regulations may prescribe the matters that must be taken into account”: Explanatory Memorandum at [215].

A request by a worker need not be in writing. “[The] clause does not require the request to be in any particular form . . . providing the worker’s request is sufficiently clear”: EM at [210].

---

### *Subdivision 2 — Determination of work groups*

## **[20,250] Determination of work groups**

**51** (1) If a request is made under section 50, the person conducting the business or undertaking must facilitate the determination of 1 or more work groups of workers.

(2) The purpose of determining a work group is to facilitate the representation of workers in the work group by 1 or more health and safety representatives.

(3) A work group may be determined for workers at 1 or more workplaces.



## COMMENTARY TO SECTION 51

Person conducting a business or undertaking .....	[20,250.5]
Work groups .....	[20,250.10]
Worker .....	[20,250.15]
Health and safety representative .....	[20,250.20]
Workplace .....	[20,250.25]

**[20,250.5] Person conducting a business or undertaking** See s 5. The PCBU referred to in s 51 is the PCBU to whom a request has been made pursuant to s 50.

**[20,250.10] Work groups** “Work group” means a work group determined under Pt 5: s 4.

The formation of work groups is a significant step in shaping the representative structure within a workplace or workplaces. A work group is both the group of workers who may elect the HSR (see s 62(1)) and the group of workers in respect of which the HSR may (overwhelmingly) exercise powers and perform functions in respect of once elected (see s 69). The significance of a work group is therefore that it amounts to the both the ‘electorate’ and the ‘jurisdiction’ of the HSR: Chris Maxwell, *Occupational Health and Safety Act Review*, March 2004, at 207 (in respect of designated work groups under the Occupational Health and Safety Act 1985 (Vic)).

The Explanatory Memorandum (EM) provides that “the purpose of dividing workers into work groups is to facilitate representation by HSRs in relation to work health and safety matters”: at [214]. Each work group may elect one or more HSRs (see s 51(2)) and deputy HSRs (see ss 52(3)(b) and 67).

**[20,250.15] Worker** See s 7. In the context of this provision, the relevant workers are those which “carry out work for the business or undertaking” of the person to whom a request under s 50 has been made.

**[20,250.20] Health and safety representative** Health and safety representative is defined in s 4 to mean, in relation to a worker, “the health and safety representative elected under Part 5 for the work group of which the worker is a member”.

**[20,250.25] Workplace** See s 8. The Act adopts a broad definition. The EM makes clear (at [49]) that there is no requirement for work to be performed at a place at a particular time for it to be considered a workplace. Specific reference is made to the case of *Telstra Corp v Smith* (2009) 177 FCR 577; 111 ALD 272; [2009] FCAFC 103; BC200907946 where the Federal Court held that a Telstra pit was a “workplace” at all times. The Federal Court at first instance ((2008) 178 IR 430) distinguished a line of New South Wales cases that had adopted a narrower approach: see the discussion at (2008) 178 IR 430 at [21]–[35].

“Clause 51(3) clarifies that a work group may span one or more physical workplaces.”: EM at [216].

## [20,255] Negotiations for agreement for work group

**52** (1) A work group is to be determined by negotiation and agreement between:

- (a) the person conducting the business or undertaking; and
- (b) the workers who will form the work group or their representatives.

(2) The person conducting the business or undertaking must take all reasonable steps to commence negotiations with the workers within 14 days after a request is made under section 50.

(3) The purpose of the negotiations is to determine:

- (a) the number and composition of work groups to be represented by health and safety representatives; and
- (b) the number of health and safety representatives and deputy health and safety representatives (if any) to be elected; and

(c) the workplace or workplaces to which the work groups will apply.

(4) The parties to an agreement concerning the determination of a work group or groups may, at any time, negotiate a variation of the agreement.

(5) The person conducting the business or undertaking must, if asked by a worker, negotiate with the worker's representative in negotiations under this section (including negotiations for a variation of an agreement) and must not exclude the representative from those negotiations.

Maximum penalty:

In the case of an individual — \$10 000.

In the case of a body corporate — \$50 000.

(6) The regulations may prescribe the matters that must be taken into account in negotiations for and determination of work groups and variations of agreements concerning work groups.

**Editor's note:** For variations to the Model legislation for each jurisdiction refer to the entries as set out below.

Federal — s 52 of the Federal WHS legislation.

NSW — s 52 of the NSW WHS legislation.

QLD — s 52 of the QLD WHS legislation.

SA — s 52 of the SA WHS legislation.

TAS — s 52 of the TAS WHS legislation.

ACT — s 52 of the ACT WHS legislation.

#### COMMENTARY TO SECTION 52

Work group .....	[20,255.5]
Person conducting a business or undertaking .....	[20,255.10]
Worker .....	[20,255.15]
Who "will" form the work group .....	[20,255.20]
Representatives .....	[20,255.25]
Health and safety representative .....	[20,255.30]
Deputy health and safety representative .....	[20,255.35]
Workplace .....	[20,255.40]
Regulations .....	[20,255.45]
Variation .....	[20,255.50]

**[20,255.5] Work group** "Work group" means a work group determined under Pt 5: see s 4.

**[20,255.10] Person conducting a business or undertaking** See s 5. The Person Conducting a Business or Undertaking (PCBU) referred to in s 52 is the PCBU to whom a request has been made pursuant to s 50.

**[20,255.15] Worker** See s 7. In the context of this provision, the relevant workers are those which "carry out work for the business or undertaking" of the person to whom a request under s 50 has been made.

**[20,255.20] Who "will" form the work group** Whilst s 52(1)(b) provides that the relevant workers who may participate in negotiations for the formation of a work group are those that "will" form the work group, it will not be possible to know who such workers are given the work groups have not, at the point of negotiations, been formed. In contrast to the language of the provision, the Explanatory Memorandum (EM) provides that the relevant workers are "the workers who are proposed to form the work group": at [218]. The EM does not clarify whether the workers are those who are proposed to form the work group by the workers, or by the PCBU (noting that the two classes may differ). See, for consideration of the meaning of the phrase "will be covered" by a proposed agreement, *Construction, Forestry, Mining & Energy Union v Deputy President Hamberger* (2011) 282 ALR 1; [2011] FCA 719; BC201104664.

**[20,255.25] Representatives** "Representative" is defined in s 4 to mean, in relation to a worker, the health and safety representative for the worker, a union representing the worker or any other