CHIEF MINISTER'S DEPARTMENT

EXPOSURE DRAFT

Work Safety Regulation 2009

WORKPLACE ARRANGEMENTS GUIDE

June 2009

Introduction

The *Occupational Health and Safety Act 1989* currently provides for the health and safety of people at work in the Territory. From 1 October 2009, this will be replaced by the *Work Safety Act 2008* (the Act), a modern law that reflects best practice in work safety and addresses emerging health, safety and wellbeing issues at work.

An exposure draft of the Work Safety Regulation 2009, which will underpin the Act, has been released for public consultation. Several documents have been prepared to inform the community about the proposed Regulation including:

- the exposure draft of the Work Safety Regulation 2009 (the proposed Regulation);
- a discussion paper explaining each part of the proposed Regulation; and
- this guide, explaining how the workplace arrangements in the Act and the proposed Regulation operate together.

These documents can be accessed at www.legislation.act.gov.au/ed/default.asp. You are invited to submit your views on any aspect of the proposed Regulation. A template has been attached to the discussion paper which covers the major issues and may assist you in preparing a submission.

Submissions will close on Monday, 20 July 2009. They may be lodged by:

Post: Work Safety Policy
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Email: worksafetypolicy@act.gov.au

Following this period of consultation, all submissions will be considered. The Minister for Industrial Relations will then consult with the Occupational Health and Safety Council and endorse any necessary changes prior to the final Regulation being issued. We will inform you of the outcomes of the consultation process.

Please make any inquiries about this workplace arrangements guide or about making a submission by calling Canberra Connect on 13 22 81 or by emailing worksafetypolicy@act.gov.au

.

Overview

The commencement of the *Work Safety Act 2008* (the Act) signals a new era for workplace arrangements in the Territory. The Act places a duty on all employers, irrespective of size, to consult workers on matters that directly affect work safety. Work safety means the health, safety and wellbeing of people in relation to work.

How consultation is arranged and undertaken is flexible. Together employers and workers can establish arrangements that will cater for the interests of a small number of workers or manage the complexity of multi-faceted workplaces.

Part 4 of the Act 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 such as work safety representatives and committees. It also sets out penalties for failing to consult.

The proposed Work Safety Regulation 2009 (the proposed Regulation) provides further detail in relation to workplace arrangements including:

- who can be a representative or a member of a work safety committee;
- how elections of representatives and members are conducted;
- the powers, duties and roles of representatives and members;
- what training must be provided and how employers are involved;
- how work safety representatives can be disqualified;
- how Provisional Improvement Notices should work; and
- how Emergency Procedures can be used at a workplace.

Workplace Arrangements: The main changes

Combining together the Act and the proposed Regulation, the most significant changes to workplace arrangements are:

- **all employers must consult with their workers.** This is regardless of the number of workers they engage for their business or undertaking;
- **employers must consult with all workers, not just employees.** This includes independent contractors, outworkers, apprentices, labour hire workers, trainees, students and volunteers who work in employment-like settings;
- **some people are considered to be 'employers' who were not before and therefore have a duty to consult.** An employer for consultation purposes is the person most directly involved in engaging or directing a worker to carry out work for a business or undertaking.

Section 10 of the Act defines 'employer' specifically for the workplace arrangements;

- **there are new, more flexible options available for consulting with workers.** There are still health and safety representatives and committees (now called work safety representatives and work safety committees) but employers and workers can agree on alternative ways to consult;
- **what was called a designated work group has been replaced by a worker consultation unit.** This is more flexible and practical for employers and workers;
- **a health and safety representative (work safety representative) can still be a worker, but can also be an outside person chosen by the workers**. This could be someone like a health and safety expert or union organiser;
- **a health and safety representative (work safety representative) must undertake approved training.** They cannot issue provisional improvement notices or exercise emergency powers until they are trained; and
- **employers and their workers can ask for help to set up workplace arrangements.** Organisations representing workers, or employers, and OHS consultants can assist organisations to establish workplace arrangements.

The duty to consult

A key duty imposed by the Act is the duty to consult. All employers must consult with their workers to allow them to contribute to matters which directly affect their health, safety and wellbeing in relation to work. This includes:

- identifying and assessing risks to work safety;
- measures to manage those risks;
- the adequacy of facilities;
- proposed changes that may directly affect work safety; and

Failing to consult with a worker is an offence under the Act. The maximum penalty which can apply is $10,000 for an individual or $50,000 for a corporation.

An employer (for the duty to consult) is the person most directly involved in engaging or directing a worker to carry out work for a business or undertaking. It does not matter whether the worker is paid so long as there is a mutual arrangement for that person to work. This includes employees, contractors, outworkers, labour hire workers, students and some volunteers.

It remains the employer's responsibility to make decisions about work safety issues, but worker's views must be taken into account.

What consultation means

Work safety consultation is how employers and workers and/or their representatives jointly consider and discuss work safety matters. It involves seeking solutions through a genuine exchange of views and information.

To consult workers about a work safety issue, an employer must:

1. **share information with the workers about that matter;**
2. **give the workers a reasonable opportunity to contribute information;**
3. **allow workers a reasonable opportunity to express their views; and**
4. **consider the workers' views.**

Consultation is not negotiation, but neither is it just giving information or telling workers what management has already decided to do. Consultation does not remove the right of managers to manage and does not require managers and workers to agree. It involves seeking and listening to workers' views before making a decision.

When consultation is most developed and effective it creates a genuine partnership between employers and workers (either directly or through their representatives) for managing work safety risks.

When must an employer consult?

The Act places broad duties on employers, workers and other people involved in work to ensure health, safety and wellbeing at work by managing risk. Risk management is one important way of ensuring work safety. It helps employers focus on risks that have the potential to cause harm and to put measures in place to protect workers and other people at or near the workplace

Consultation is an essential part of every step in the risk management process. A proactive approach to risk management that integrates meaningful consultation decreases the likelihood of injury and disease.

Some risks are well known and the necessary control measures are easy to apply. Workers are often aware of workplace risks and hazards and consulting is a valuable way of identifying any risk and the measures to control it. Involving workers in risk management isn't hard.

> **Think** about what may affect workers' health, safety or wellbeing (hazards) and assess the risks they pose to those workers.
>
> **Talk** with workers (consult about matters that may affect work safety).
>
> **Do** what is necessary to make the workplace safe (implement risk controls).
>
> **Review** and monitor measures you have taken to ensure they are effective.

Consultation is not a one-off activity, or something that an employer must only do at set intervals. It is important that consultation between employers and workers happens on a regular basis as part of a risk management process.

All workers (including managers) need to know how they can raise issues which arise from time to time, and how they can tell their employer if control measures are not working or about 'near misses'.

Establishing the framework for consultation

The framework for consultation has two parts:

1. the worker consultation unit; and
2. the consultation method, such as work safety representatives or committees, that the unit agrees to use.

Worker consultation unit

A worker consultation unit (unit) is the group of the employer's workers with whom the consultation arrangements will be agreed and to whom they will be applied. The unit may include all the employer's workers, or the workers may be arranged into multiple units.

The unit is the area of representation or the electorate for the consultation methods. It is similar to a designated work group in the *Occupational Health and Safety Act 1989.* However, it provides unlimited possibilities for the ways in which workers can be grouped. Together, employers and workers can decide the composition and number of units that will suit the needs of their workplace.

All workers must be part of a consultation unit. The Act provides that all of the employer's workers will constitute the unit unless:

- it is not reasonably practicable for consultation to occur with the group of all the employer's workers; or
- a worker asks that 2 or more units be established in the interests of work safety.

It may be sufficient to have a unit made up of all of the employer's workers. For example, in a small business with only six staff, it is quite practical for all the workers to be in one unit. If, however, there are large numbers of workers with varied patterns of work, it would not be considered appropriate to have only one unit. In that case, an employer must set up multiple units.

Failing to establish multiple units, where necessary, is an offence with a maximum penalty of $5,000 for an individual or $25,000 for a corporation.

Workers within a unit can be at more than one workplace and/or be engaged by more than one employer. For example, several employers on a large construction site may form one unit with all the workers on the site. One employer with three different sites might establish three units. Before deciding how many units to form, consideration must be given to:

- the number of workers;
- the workers' working hours (including any shift workers);

- patterns of work (part-time, casual, seasonal or short-term workers);
- the location of workplaces, including multiple sites, home-based work and vehicles;
- the nature of work carried out, work arrangements and levels of responsibility;
- workers' characteristics (gender, ethnicity, age and special needs);
- the hazards or risks to work safety at the workplace; and
- the interaction of workers with the workers of other employers.

The ideal size and number of units will depend on the particular circumstances of the business or undertaking. The diversity of workers and work may make the establishment of more that one unit appropriate to ensure meaningful consultation. Where there are multiple units consideration should be given to how the units will function together.

Consultation methods

Once a unit is established a consultation method can be chosen. The Act requires employers to talk to their workers, and decide together the method of consultation. The Act provides the following consultation methods:

- a work safety representative (representative) elected by the workers in the unit;
- a work safety committee (committee) elected by the workers in the unit; or
- another stated method of consultation.

It is possible to use more than one method of consultation. Together, employers and workers can establish arrangements that will cater for:

- a small business with very few workers; or
- a large organisation with several sites; or
- people who work together but for different employers.

Every employer must meaningfully consult with their workers. How that consultation is arranged and undertaken is flexible.

Keep in mind that straightforward consultation arrangements are often very effective. The simplest way to consult workers is to talk and listen. This could be done directly with workers or indirectly through a representative or committee. If there is more than one method chosen for a unit, consideration should be given to how the methods will function together.

Once an employer has created one or more units, and has agreed with the workers on a method of consultation for each unit, they must consult using the agreed method.

Failing to do so is an offence with a maximum penalty of $5,000 for an individual or $25,000 for a corporation.

Another method of consultation

Another method of consultation such as a combination of regular visits, risk assessments, training and advice provided by an OHS consultant, may be the preferred method of consultation. An employer and their workers might choose alternative methods for consultation, such as:

- holding regular in-depth forums to discuss work safety issues;
- using a third party to facilitate effective consultation across worksites;
- having work safety as a standing agenda item at staff meetings; and/or
- discussing issues by email or video-link across work sites.

Other methods of consultation are most likely to suit a small business environment and a combination of several methods may suit larger workplaces.

Consultation methods and multiple units

If there are multiple units, care must be taken to make sure there are effective ways to communicate between the employer/s and all of the units. This could be facilitated by creating a 'roving' representative and a committee with workers from each unit.

Example: AFP Construction asked Canberra Labour Hire to provide additional staff. Canberra Labour Hire already had a representative to consult with workers based at AFP. AFP consulted their workers about how their committee should work with the representative. They agreed to invite the representative to their committee meetings and to regular management meetings.

There may also be different units for different consultation arrangements. If an employer and workers decide to have a committee and a representative, the unit attached to the committee may be different to the unit for the representative.

Example: A private hospital consults its workers and they decide together to have a committee and two representatives. Two units are established - one for day workers and one for night workers. Each unit has a representative. The two units form a combined committee with the representatives as members.

Whichever option is chosen, it is more likely to be successful if it is agreed to by the employer and their workers.

When is a consultation method mandatory

In the following circumstances an employer **must** arrange for the election of a representative or committee:

- more than half of workers in a unit ask for a representative and/or committee; or

- the Chief Executive of the Office of Regulatory Services (WorkCover) directs the employer to hold an election for a committee; or
- the Chief Executive of the Office of Regulatory Services (WorkCover) requires all employers in an industry to have an elected committee.

Failing to establish a committee when directed to do so is an offence with a maximum penalty of $10,000 for an individual or $50,000 for a corporation.

Review and record keeping

To ensure consultation remains effective, employers must conduct a review of the consultation arrangements every two years. This may happen earlier if there are workplace changes or if a worker, representative or committee asks for a review. If a review shows that a change is necessary in the interests of work safety it must occur.

An employer must keep records of the following activities in relation to a Unit:

- the unit's establishment;
- the unit's activities and agreed consultation methods;
- any change to the unit; and
- each review of the unit.

The records must be available upon request to workers in the unit, any representative, or a WorkCover inspector.

Failing to keep records and make them available are offences with a maximum penalty of $3000 for an individual or $15,000 for a corporation.

Dispute resolution mechanism

The Act provides that, if a dispute arises between an employer and a worker in relation to the workplace arrangements, the dispute may be referred to the Chief Executive of the Office of Regulatory Services (WorkCover) for arbitration.

Work safety representatives

The role of a representative has not changed. In the Act the role of a representative is to:

- represent the workers in the unit in relation to work safety issues;
- tell the employer about potential risks and dangerous occurrences at any workplace where workers in the unit work; and
- tell the employer about work safety matters affecting workers.

The proposed Regulation provides further detail on the role and functions of a representative, including:

- inspecting the workplace at any time, provided that, the employer has been given reasonable notice of the inspection;
- inspecting workplaces without prior notification following an accident or dangerous occurrence or if the representative believes on reasonable grounds that there is an immediate threat of an accident or dangerous occurrence;
- accessing work safety information under the employer's control (except for personal health information that allows a worker to be identified);
- investigating workers' work safety complaints;
- asking a WorkCover inspector to carry out an inspection at the workplace and accompanying them on the inspection;
- representing workers in consultation with the employer in respect of a work safety matter; and
- being present at an interview about work safety, between a worker, an inspector and/or an employer, where requested by that worker.

Once approved training has been completed a representative may:

- issue a Provisional Improvement Notice; and/or
- exercise emergency powers.

Who can be a work safety representative?

The proposed Regulation provides that a person is eligible to be a representative for a unit if the person is:

- a worker in the unit; or
- a person who at least has a certificate IV in occupational health and safety.

This will change the existing arrangements where only workers are eligible to be representatives. Broadened eligibility gives workers the option of selecting an external 'expert' representative and will facilitate the concept of 'roving' representatives across work sites or multiple employers.

A unit may elect more than one representative and may also elect deputy representatives. Each representative is elected for up to two years and may be re-elected.

Electing a work safety representative

Workers in a unit can ask anyone to conduct an election for a representative, including an employer or registered organisation. If asked, an employer must conduct the election within forty two days. Failing to do so is an offence. This is to make sure that a long period of time does not elapse without a representative being elected.

Failing to facilitate an election within 42 days of being asked by the Unit is an offence under the proposed Regulation. The maximum penalty which can apply is $1000 for an individual or $5000 for a corporation.

The person who conducts the election must tell the employer/s and any existing representative the result. The employer must then tell the workers. Once the existing representative is told, they are no longer the unit's representative unless they have been re-elected.

Before the representative can begin the role, the employer must be notified of the election. A representative cannot issue a Provisional Improvement Notice (PIN) or exercise emergency powers until he/she has undertaken approved training.

Training and protecting representatives

All representatives must complete approved training. Refresher training is required every two years that the representative holds office. The employer must take all reasonable steps to make sure that the relevant training is undertaken within three months of the representative being elected or re-elected. Once the training is completed representatives can issue a PIN or initiate emergency procedures.

Employers must allow representatives time off work that is reasonably necessary to exercise their functions or to undertake training (without loss of pay or other entitlements) and must pay the fees for the training course and reimburse the representative's reasonable expenses. This does not apply to external representatives.

Failing to do so is an offence under the proposed Regulation with a maximum penalty of $3,000 for an individual or $15,000 for a corporation.

A proposed amendment to the Act will insert two offences. It will be an offence to obstruct a representative in carrying out his/her functions and an employer will commit an offence if inappropriate access to a worker's personal health information is given to a representative.

Each of these offences will attract a maximum penalty of $5,000 for an individual or $25,000 for a corporation. Providing inappropriate access to personal health information may also result in six months imprisonment.

Provisional improvement notices (PINS)

The proposed Regulation does not change the current operation of PINS.

If consultation fails to resolve a work safety issue, and the representative has taken all reasonable steps to resolve the issue, the representative has the power to issue a PIN.

A Provisional Improvement Notice is a formal notice that requires a specific work safety matter to be rectified within a certain time. The PIN is given by the Representative to the person responsible for the relevant workplace.

As is the case now, representatives will be able to issue a PIN requiring a person to rectify a matter where there is an actual or likely breach of the Act. A PIN must state the circumstances, the reasons and the action requested to address the issue. Action must occur within at least 7 days, or 24 hours in limited circumstances.

A person who receives a PIN must ensure that the notice is complied with to the extent of their control and must take reasonable steps to inform the representative of their actions.

A PIN must be revoked if the representative believes that the person has complied. A person who receives a PIN has the right to ask for ORS (WorkCover) to review the PIN within 7 days. An inspector must revoke the PIN if it should not have been given, has been complied with, or should not remain in force.

Emergency procedures

The proposed Regulation does not change the current operation of emergency procedures. A representative can initiate emergency procedures if he/she believes on reasonable grounds there is an immediate threat to a worker unless particular work is stopped.

A representative can start emergency procedures if there is an emergency or an immediate threat to work safety. If there is no supervisor to remove the risk or stop all work, a representative can direct work to stop safely and then inform the supervisor.

The representative would first tell the workers' supervisor, who would then be required to do what he/she considers appropriate to remove the threat. This might include directing the worker/s to safely stop work. If the supervisor cannot be contacted immediately, the representative can direct the worker to safely stop work. An employer can still require the worker to carry out alternative work.

An inspection may be by ORS (WorkCover) requested if there is disagreement about the operation of the emergency procedures. An inspector would then exercise his/her powers as necessary.

Disqualification

Under the proposed regulation a representative's term ceases if:

- a new person is elected and they are given notice;
- he/she resigns by giving notice to the employer;
- he/she is no longer eligible (for example, he/she is no longer a worker); or

- if the representative is disqualified in accordance with the proposed Regulation.

An employer, a worker or a registered organisation can apply to the Chief Executive of the ORS (WorkCover) to have a representative disqualified or suspended. The application must be in writing and must state that the representative either:

- did something, or is doing something, in the exercise or purported exercise of their functions with the intention of causing harm to the employer or undertaking, or for a purpose not connected with their functions;
- intentionally used, or disclosed to someone else, information obtained from an employer for a purpose not connected with their functions; and/or
- failed to reasonably exercise the representative's functions.

If a ground **may** exist to disqualify a representative, the Chief Executive must give the representative written notice with the reasons for the application. The Chief Executive may also suspend the representative until the application is decided. The representative then has fourteen days to give written reasons why he/she should not be disqualified.

In deciding whether or not to disqualify a representative, the Chief Executive **must** consider:

- the harm caused (or likely to be caused) as a result and any effect on the public interest if the claimed grounds for disqualification is that the representative did or is doing something, with the intention to cause harm to an employer;
- the representative's past record in exercising their functions; and
- any response by the representative; and **may** consider
- anything else that the Chief Executive considers relevant.

If the Chief Executive decides to disqualify the representative, the representative must be informed of the decision in writing.

Work safety committees

Work Safety Committees (committees) are designed to bring workers and management together in a cooperative environment to promote work safety. Under the Act the functions of a committee are:

- to facilitate cooperation between an employer and the employer's workers in relation to work safety;
- to assist the employer to consult workers on proposing and developing changes to work or other policies, practices or procedures that may directly affect work safety;
- to assist the employer to resolve work safety matters; and

- to establish, review and publish procedures in relation to work safety.

The proposed Regulation states that in exercising a function a committee may:

- give information, ideas and feedback to the employer and managers about how to implement work safety best practice;
- provide a forum for the employer to raise work safety concerns;
- encourage workers to take an interest in work safety issues in their workplace;
- review the circumstances of injuries, diseases and serious incidents in the workplace, and make recommendations to the employer; and
- undertake other activities agreed between the employer and the committee and that the committee members have suitable qualifications and training to deal with.

These functions underpin the role of a committee, which is to oversight the improvement of work safety at a high level, particularly for large employers.

Each employer would be required to give the committee any information about risks to work safety for the workers in the unit. Each committee member's employer must allow them time off that is reasonably necessary to attend committee meetings and exercise approved committee functions (without loss of pay or entitlement).

Failing to do so is an offence under the proposed Regulation with a maximum penalty of $2,000 for an individual or $10,000 for a corporation.

Who can be a work safety committee member?

Workers, representatives, management and officials of registered organisations are eligible committee members provide that at least half of the members of the committee are workers from the unit that the committee represents.

If a unit has a representative and a committee, the representative should also be on the committee. Committee members representing the employer should have the authority to make work safety decisions on behalf of that employer.

The proposed Regulation does not require committee members to undertake training. However, a committee may decide that a member should undertake training. In this case the employer would be required to allow the member time off work to undertake an approved work safety course as determined by the committee (without loss of pay or entitlements).

Committee governance

The proposed Regulation allows committees to conduct their proceedings (including meetings) as appropriate.

Electing a work safety committee

Under the proposed Regulation workers in a unit can ask anyone to conduct an election for a committee, including, an employer or registered organisation. If asked, an employer must conduct the election within forty two days. Failing to do so is an offence. This is to make sure that a long period of time does not elapse without a committee being elected.

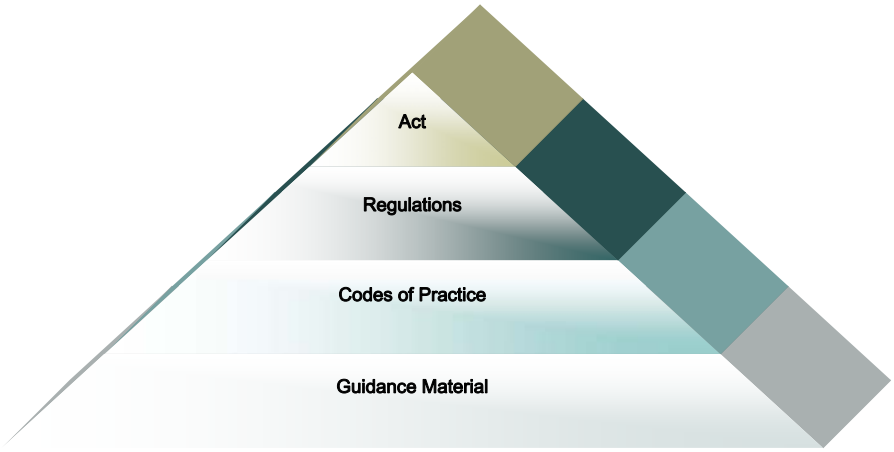
Failing to facilitate an election within 42 days of being asked by the Unit is an offence under the proposed Regulation. The maximum penalty which can apply is $1000 for an individual or $5000 for a corporation.

The person who conducts the election must tell the employer/s the result. The employer/s must then tell the workers.

Attachment 1

How Work Safety Laws Operate in the ACT

The *Work Safety Act 2008* will set out the overall framework for work safety and a range of duties designed to ensure work safety, health and wellbeing. The Act is supported by Regulations, Codes of Practice, and a variety of guidance material.



Work Safety Regulations

The finalised Work Safety Regulation 2009 will spell out minimum standards for the duty holders to ensure work safety in specific hazards and risks (such as the performance of manual tasks). Regulations have the force of law and must be adhered to. Failure to comply may result in a criminal penalty or an infringement notice.

Codes of Practice and Other Guidance

Codes of Practice provide practical guidance on how to comply with legal duties. Codes have formal status, allowing courts to consider whether a Code has been complied with in deciding whether legal duties have been met. The steps set out in a Code are not compulsory but you should follow the Code or an equivalent alternative. Other guides have no formal legal status and do not establish compulsory duties. They are designed to assist people to comply with the Act and Regulation. They can sometimes be used in court as evidence.

National Standards and Australian Standards

National Standards and National Codes of Practice are developed by Safe Work Australia and its predecessors. These, as well as ACT developed Codes of Practice are often declared to apply in the ACT. They are then legally enforceable. Australian Standards are separate, technical guides which may also assist a person to comply with a particular work safety duty.