

A handbook for workplaces

Employee representation

A comprehensive guide to Part 7 of the Occupational Health and Safety Act 2004

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WORKSAFE VICTORIA / EMPLOYEE REPRESENTATION



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The information presented in *Employee Representation* is intended for general use only. It should not be viewed as a definitive guide to the law, and should be read in conjunction with the *Occupational Health and Safety Act 2004*.

Whilst every effort has been made to ensure the accuracy and completeness of this guide, the advice contained herein may not apply in every circumstance. Accordingly, the Victorian WorkCover Authority (VWA) cannot be held responsible, and extends no warranties as to:

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FOREWORD

Everyone in the workplace has a role to play in making Victorian workplaces safer and healthier.

The *Occupational Health and Safety Act 2004* (OHS Act) that came into effect on 1 July 2005 makes it easier for Victorian employers to understand how to meet their obligations in providing a safe and healthy place of work for their employees.

The new OHS Act is designed to meet the new challenges posed by changing work and employment conditions. It demands increased co-operation and consultation amongst all those at work – employers, workers and their representatives – and provides greater practical assistance for workplace parties in meeting their health and safety obligations.

All of these changes have been made with one overall objective in mind – to save lives and prevent workplace injuries and disease.

This publication has been produced to assist employees and employers understand the role and powers of health and safety representatives (HSRs) as well as providing an overview of the other various representative mechanisms, including health and safety committees and designated work groups.

Of all of the mechanisms, HSRs remain the crucial link between employees and their employers.

HSRs provide employees with a mechanism to have their views and concerns on health and safety in their workplace heard by their employer. HSRs facilitate communication and consultation. The OHS Act gives them a role in raising and resolving any OHS issues with their employer, and powers to take issues further if necessary.

HSRs contribute greatly to making Victorian workplaces safer. Employers should work together with them, and support and encourage them in their role.

We urge all involved in workplace safety to read this guide and get involved in making Victorian workplaces healthier and safer.

WorkSafe Victoria

INTRODUCTION

The OHS Act was passed by the Victorian Parliament in December 2004 and most parts of the revised legislation came into effect on 1 July 2005. The OHS Act retains the provisions contained in the *Occupational Health and Safety Act 1985* that are still relevant to the needs of Victorian workplaces, but also includes changes aimed at modernising and strengthening the existing legislation.

This reference guide is concerned with the representation of employees in the workplace. Research* shows that when employees have input before decisions are made about health and safety matters, workplaces have better health and safety outcomes. Employee representation provides a means for involving workers and giving them a voice in health and safety matters. One of the five principles of health and safety protection in the OHS Act states that 'employees are entitled, and should be encouraged, to be represented in relation to health and safety issues'.

The sections in the OHS Act regarding representation of employees are also designed to facilitate the new duty of employers to consult with their employees about health and safety issues. The duty to consult came into effect on 1 January 2006. Part 7 of the OHS Act provides for the following representation mechanisms:

- designated work groups (DWGs);
- health and safety representatives (HSRs) and their deputies; and
- health and safety committees (HSCs).

The provisions establishing the duty to consult are structured to recognise the key role that HSRs play in representation, communication and initiatives at the workplace regarding health and safety.

While maintaining the existing process for the establishment of DWGs and the election of HSRs, the OHS Act offers more options in representation arrangements than before. These include:

- the ability to elect more than one HSR per DWG;
- the ability to elect deputy HSRs;
- the representation of independent contractors engaged by an employer; and
- by agreement, enabling multiple employers to establish DWGs of all their employees and independent contractors.

* Summarised in Maxwell, C. (2003) *Occupational Health and Safety Act Review, Discussion Paper*.

The OHS Act also introduces some new and amended provisions in relation to representation. They are:

- prohibition on coercion in relation to DWG negotiations;
- a term of office for HSRs;
- new requirements in training HSRs; and
- improved protection for HSRs against discrimination, including the threat of discrimination as an offence.

These new provisions are designed to increase the options for workplace representation, and to provide protection for employees when establishing DWGs and for HSRs in the performance of their role. The new options are not intended to limit existing or future agreements between multiple employers and employees where health and safety representation arrangements are not established under the OHS Act, if this is preferred. However, in such situations, representatives will not have the powers conferred on HSRs by the OHS Act.

It is the intention of Parliament that WorkSafe Victoria ('WorkSafe') will administer the OHS Act in a manner that best advances the objects of the OHS Act, and in line with the principles of health and safety protection outlined in the OHS Act.*

In this light, WorkSafe will exercise its powers and perform its functions under the OHS Act to actively promote the representation of employees on health and safety matters.

HOW TO USE THIS GUIDE

This guide is a comprehensive resource to explain Part 7 of the OHS Act – Representation of employees. It also refers to other sections of the Act in providing a broad overview of representation of employees in the workplace.

To assist readers, cross-references to specific sections of the Act are provided in the right-hand margin.

** The objects and principles of the OHS Act can be found in the glossary of this publication.*

1

DESIGNATED WORK GROUPS (DWGs)

Division 1 of Part 7

A DWG is a grouping of employees who share similar workplace health and safety concerns and conditions. It may be made up of:

- employees in one or more workplaces operated by a **single employer**; or
- employees of **multiple employers** at one or more workplaces.

s.43

s.47

A DWG is established to form the 'electorate' that may elect HSRs. An HSR is a person who has been elected by his or her co-workers to represent them on OHS issues.

What happens to existing DWGs established under the 1985 OHS Act?

Any DWG established and existing under the *Occupational Health and Safety Act 1985* continued to be a DWG on and after the commencement of the new OHS Act. This ensured that existing DWGs in workplaces under a single employer could continue to operate and did not need to be renegotiated. However, the parties may negotiate new DWGs under the new OHS Act at any time if they wish (or they can seek to vary the existing DWGs).

s.163

2

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A *SINGLE* EMPLOYER

Division 1 of Part 7

DWGs may be established and negotiated in workplace(s) operated by a single employer at one location, or at multiple locations such as catering companies or businesses with branches.

s.43 to
s.46

Who can initiate negotiations for establishing single employer DWGs?

An employee or an employer.

s.43

Employee is defined in the OHS Act as 'a person employed under a contract of employment or contract of training'. As such, any employee working in a business, enterprise or undertaking, who is under a contract of employment or training, may ask their employer to start negotiations to establish DWGs.

s.5

Employer is defined in the OHS Act as 'a person who employs one or more persons under contracts of employment or contracts of training'.

After a request is made to establish DWGs, how long does an employer have to start negotiations?

An employer must do everything reasonable to ensure that negotiations start within 14 days of the request.*

s.43(3)

For example, this might mean organising a staff meeting (ensuring that all employees are informed of the purpose of the meeting, and setting a date and time in consultation with employees so that all employees are able to attend).

It is not necessary to wait 14 days – employers can start negotiations immediately upon request.

Who can negotiate a DWG?

A DWG can only be negotiated between the employer (or the employer's representative) and the employees (or the employees' representative).

s.43(2)

* Penalties apply to breaches of this provision.

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

Can anyone represent employee(s)?

In DWG negotiations, an employee or group of employees may be represented by any person authorised by them.

s.44(5)

Good communication is vital to ensuring that the views of the employees are represented accurately and employee OHS interests are protected. Workgroups that can't all come together to negotiate (e.g. workplaces of one employer in different locations or very large workgroups) present a particular challenge. In such cases, it may be wise for employees to authorise a representative(s) to engage in the negotiation process on their behalf.

An authorised person may be any individual, e.g. a member of an employee representative organisation such as a trade union official. In multi-union workplaces where several unions may be representing a number of employees at a single site, there could be a number of representatives, e.g. one from each union.

Who can represent an employer?

Any person who the employer authorises to do so. This could include an official from an industrial association or employer body.

What must be agreed in the negotiations for DWGs?

1. How best to group employees at one or more workplaces so that the employees' OHS interests are represented and secured.
2. How best to group employees at one or more workplaces so that the HSR will be accessible to each member of the group.
3. The number of HSRs (must be at least one) for each DWG.
4. The number of deputy HSRs (if any) for each DWG.
5. The term of office (not exceeding three years) of each HSR and deputy HSR.
6. Whether the HSRs are to be authorised to also represent independent contractors and their employees.

s.44(1)

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

Can other matters besides the points numbered one to six on the previous page form part of a DWG agreement?

No. These are the only matters that can be part of an agreement.

s.44(6)

What factors must be taken into account when grouping employees into DWGs?

In determining how best to group employees into DWGs, the most fundamental issue that must be considered is how the 'grouping' will affect the health and safety of the workers. An ideal grouping is one that assists in securing the health and safety of employees.

s.44(1)

The OHS Act specifies factors that must be taken into account in negotiations concerning groupings for DWGs. These are:

s.46

- the number of employees at the workplace(s);
- the nature of each type of work;
- the number and grouping of employees who perform similar types of work, such as doing the same tasks or working under the same or similar working arrangements (e.g. having the same shift arrangements; the same breaks; being part-time, casual or seasonal; working under the same contract or certified agreement; or having the same job grade);
- the areas at the workplace(s) where each type of work is performed;
- the nature of any hazards;
- overtime or shift work arrangements; and
- whether other languages are spoken by the employees.

Languages other than English

Languages spoken in the workplace must be considered when negotiating DWGs. This is to ensure that the interests of employees from culturally and linguistically diverse backgrounds (CALD) are properly represented. In a multilingual workplace, the parties involved in DWG negotiations should identify the language preferences of employees and endeavour to structure DWGs and the representation within them (multiple HSRs or deputies) to cater for their language needs.

The WorkSafe publication *Provision of occupational health and safety information in languages other than English* provides advice on providing health and safety information to employees in appropriate languages. Please refer to the 'Further information' section in this guide for details on how to obtain this publication.

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

Examples of DWG negotiations in different circumstances

- A large manufacturing plant operates three eight-hour shifts and employees and the employer are negotiating DWGs. As this is a multi-union workplace, the employees from each trade group authorise a union official to represent them. The negotiating parties take into account all the legal requirements, but place particular weight on the nature of the hazards and risks at the workplace, as well as the shift working arrangements in negotiating DWGs that best allow each DWG member access to an HSR.

The parties agree that separate DWGs for each shift are required, each represented by a single HSR and deputy HSR. Within each shift, the DWGs are arranged according to work area, as these are quite distinct both in their location and in the nature of potential health and safety risks involved.

- A multi-storey office block has been completed and employees have moved in and commenced work. The employees and the employer are negotiating about establishing DWGs. The parties consider how best to allow each DWG member access to an HSR, taking into account the fact that work is performed across a number of floors. The nature of the work and work environment is consistent across all floors except in the reception area, where delivery of stationery and other heavy items means that there are additional considerations in relation to manual handling.

The parties determine that an HSR and deputy HSR should represent a DWG for employees working on every two floors. In addition, it is agreed that the employees working in the reception area should form a DWG of their own due to the unique nature of their work.

Why do employees need ready access to an HSR?

Employees need ready access to an HSR so that they can raise any concerns regarding their health and safety and so that they can readily be consulted by the HSR in relation to health and safety matters in the workplace. WorkSafe considers accessibility to mean both direct contact (i.e. face-to-face) and indirect contact (via email or phone). It is, however, desirable that there be as much opportunity for face-to-face contact as possible.

s.44(1)

Can there be more than one HSR in a DWG?

If all involved in the negotiations agree (or if this is determined by an inspector in circumstances where agreement cannot be reached), more than one representative may be elected for each work group and they may perform their roles concurrently. This may be particularly beneficial where employees in a work group perform shift work or where there are large numbers of employees who are performing similar work.

s.44(1)

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

In what circumstances does a deputy HSR carry out the HSR's role?

It will not always be possible for the HSR who was elected for a particular work group to be present and available to represent their constituents when needed. For example, the representative may be away from work through illness, on leave or on call. In the HSR's absence, a deputy effectively becomes the HSR and has all the powers of that role.

s.57(2)

Who should employees speak to about a health and safety issue if the DWG has multiple HSRs and deputy HSRs and one of the HSRs is absent?

When there is more than one HSR and deputy HSR in a DWG, it is important that they jointly clarify the way their roles will work between them, including in situations when an HSR is absent. The outcome of such discussions must be communicated to everyone in the workplace. This information should be included in any issue resolution procedure.

What happens when the DWG(s) are agreed?

The employer must establish the DWG(s) by communicating to all employees in writing as soon as possible.*

s.44(2)

Can the agreed DWG(s) be changed at any time?

Yes, subject to negotiation and agreement.

Once DWGs are agreed, variations to the agreement might need to be made if circumstances change or if the existing arrangements – that is, the matters agreed to during the initial negotiation of the DWG – are found to be unsatisfactory. Employers (or their representative), HSRs, and employees (or their representative(s)) must be involved in the negotiations to modify a DWG agreement (see also pages 6 and 7).

s.44(3)

When modifying the agreement, it can be agreed that the remaining term of office of any existing HSR is unaffected.

s.55(2)

If a variation is agreed, the employer must vary the agreement by communicating the change to all employees in writing as soon as possible.*

s.44(4)

What happens if there isn't agreement on the DWG(s)?

Any of the parties involved in the negotiation may ask WorkSafe to arrange for an inspector to assist if agreement hasn't been reached within a reasonable time.

s.45(1)

What is considered 'reasonable time' will vary depending on the circumstances in the workplace. However, as a guide, WorkSafe considers that a period of two weeks from the time negotiations begin would be a reasonable period.

The inspector will determine the particulars that are unresolved (set out in section 44(1) of the OHS Act, described on page 6 of this guide). In doing this, the inspector will have regard to all the parties' views and take into account factors such as: workplace risks; the size of the work area; complexity of work processes; the size of the workforce; geographical location; employment arrangements; and languages spoken.

s.44(1)

s.46

* Penalties apply to breaches of this provision.

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

The inspector must also have regard to the advancement of the objects and principles of the OHS Act and any WorkSafe policies or procedures in relation to its implementation.

Once the inspector arrives at a decision about the unresolved particulars, written notice must be given by the inspector to the parties and they must give effect to the determination. In other words, the parties are bound by the decision.

s.45(2)

Example

In a 'whole of workplace' DWG comprising employees who frequently work off site, the employees seek to negotiate a variation to the DWG to enable the election of a deputy HSR because the HSR is not always accessible to all DWG members. After negotiations with the employer, no agreement is reached, so an inspector is asked to determine the matter.

The inspector assesses all the factors and determines that there should be a deputy HSR because any person elected as an HSR would only be present at the workplace irregularly.

Can the inspector's decision regarding DWGs be appealed?

Yes.

The OHS Act allows for an inspector's decision to be reviewed by the Internal Review Unit of WorkSafe Victoria. An employee or employer whose interests are affected by the inspector's decision may apply for review.

If one of the parties then seeks review of the outcome of the Internal Review process, they may take the matter to the Victorian Civil and Administrative Tribunal (VCAT).

s.127

Can DWGs stand alongside other workplace arrangements?

Yes.

DWGs can stand alongside other workplace structures, such as joint consultative committees, workplace advisory committees, enterprise consultative committees, HSCs, etc. However, under the OHS Act, only HSRs elected by members of the DWG can exercise the powers of an HSR.

INDEPENDENT CONTRACTORS

How can independent contractors be represented?

In modern work arrangements, employees often work side-by-side with independent contractors and employees of independent contractors. For example, a contractor may have its employees working alongside the employees of the principal employer – therefore, working in similar conditions, using similar work practices and being exposed to similar hazards and risks. Labour hire employees present another example.

The OHS Act allows for the principal employer and its employees to agree that an HSR for a DWG can represent contractors, or a class of them, on health and safety matters in that workplace.

s.44(1)

ESTABLISHING AND NEGOTIATING DWGs IN WORKPLACES OPERATED BY A SINGLE EMPLOYER

A class of contractors means a group, type or category of contractors, for example contractors who carry out the same type of work for the employer (such as all electrical, cleaning, administrative or information technology contractors). It might also be a category of contractors, for example those contractors who will be on site for more than six months.

In such a case, the most effective way to safeguard the OHS interests of everyone may be for the HSR to represent the contractors and their employees, as well as the direct employees of the employer in that DWG.

This is consistent with other sections of the OHS Act. An employer is obliged to ensure a safe working environment for independent contractors and their employees in relation to things the employer has control over; and the employer is required to consult with independent contractors and their employees. WorkSafe advises that the independent contractors and their employees who are to be represented by the HSR on health and safety matters should be consulted before it is agreed that they will be represented in that way while working in that workplace.

s.21(3)
s.35(2)

Can independent contractors or their employees be part of establishing DWGs or electing HSRs?

Not in relation to the workplace at which they are working as a contractor or subcontractor.

They may initiate the establishment of DWGs in relation to their direct employer if they wish, but they may also be represented at a host employer's workplace by the host employer's representative structure.

While it can be agreed that an HSR may represent independent contractors in a DWG, only the direct employees of the employer can be involved in establishing the DWG and electing HSRs. Similarly, only the direct employees are members of the DWG and able to vote for the HSR or be elected as the HSR.

Does this mean that an independent contractor (and their employees) can be represented by more than one HSR?

Yes.

The OHS Act provides the right for every Victorian employee to be represented on health and safety matters to their direct employer. This means that the employees of contractors may negotiate DWGs and elect HSRs in relation to their interactions on health and safety with their direct employer.

In addition, where contractors and their employees are working in other workplaces (such as the 'host' workplace for labour hire employees), if the workplace parties have agreed, they may also take concerns about health and safety matters to the HSRs in that workplace for representation to the host employer who has a duty to ensure the health and safety of every person at that workplace.

3

ESTABLISHING AND NEGOTIATING DWGs IN A *MULTIPLE EMPLOYER SITUATION*

Division 2 of Part 7

A DWG may be made up of employees of more than one employer, at one or more workplaces, if all the parties agree.

s.47 to s.52

This allows multiple employers and their employees, by agreement, to establish DWGs to cover employees who work for different employers.

Negotiations to establish DWGs for multiple employers must focus on the same factors previously specified for single employer DWGs. There are also some additional provisions in the OHS Act that deal specifically with multiple employer DWGs.

What is the purpose of the OHS Act introducing multiple employer DWGs?

To increase the options for workplace representation.

This opportunity does not limit existing or future arrangements between multiple employers and their employees where health and safety representation arrangements outside the OHS Act are preferred by the parties. However, only HSRs elected under the OHS Act can exercise the powers of an HSR.

s.52

The establishment of DWGs for multiple employers does not affect existing DWGs within the businesses of individual employers, and does not prevent the establishment of any other DWGs (single or multiple employer) of the employees concerned. However, to avoid confusion, there should be very clear agreements regarding the roles of HSRs in situations where DWGs overlap and cover the same employees.

What situations might multiple employer DWGs be suitable for?

Multiple employer DWGs may be suitable for situations like the following, where there are:

s.47

- many employers on a **single site**.

For example, construction sites and other temporary workplaces, such as major public events, where there are many different employers and different types of hazards and risks that may only exist for a defined period of time because of the dynamic nature of the work.

ESTABLISHING AND NEGOTIATING DWGs IN A MULTIPLE EMPLOYER SITUATION

- many employers on **multiple adjacent sites**.

For example, groups of small employers close together, such as in a shopping centre, small town or industrial estate. While it may not be practical for businesses with a small number of employees to form a DWG, it may be feasible that the employees of all employers on an industrial estate (with their employers' agreement) could together elect an HSR from amongst themselves. This arrangement enables the cost of training and the provision of facilities to support the HSR(s) in their role to be shared by the employers by agreement.

- many employers on **many diverse sites**.

For example, an industry – such as the clothing and textile industry – that has many employers in multiple small workplaces. The workplaces may also be remote, e.g. farms or shearing sheds.

Who can suggest that a multiple employer DWG be established?

The OHS Act does not limit who may suggest that a multiple employer DWG be formed.

However, the details of the DWG may only be negotiated between the employers concerned and their employees (or authorised representatives of either party).

s.47(2)

Do all the employees have to participate in the negotiations?

Each of the proposed employer parties and their employees must have the opportunity to participate in the negotiations.

s.47(2)

However, employees and employers (either individually or in a group) may choose to authorise a person to represent them in these negotiations, rather than be directly involved.

s.48(5)

What happens if there isn't agreement on the DWG(s)?

Multiple employer DWGs are to be established by agreement between the employers and their employees. If agreement cannot be reached, even after consulting this guide, a DWG covering multiple employers cannot be formed.

There is no provision for an inspector to determine unresolved particulars about the formation of multiple employer DWGs. However, WorkSafe will promote flexible arrangements for the election of HSRs covering multiple employers and workplaces where this may be appropriate, and be a constructive facilitator in their establishment when requested by any party.

'Constructive facilitation' in this context means that where parties request assistance in working through the detail involved in establishing a multiple employer DWG, WorkSafe will provide support and assistance in organising or implementing arrangements. This facilitation is not a function of the WorkSafe inspectorate – it is a support function managed by WorkSafe's Workplace Support and Education Division, with the initial request for facilitation to be made through WorkSafe's Advisory Service (contact details can be found on the back cover of this guide).

ESTABLISHING AND NEGOTIATING DWGs IN A MULTIPLE EMPLOYER SITUATION

What if one of the employers and/or their employees decide they no longer want to be part of the multiple employer DWG?

Any party may withdraw from negotiations or an agreement after giving reasonable notice (in writing) to the other parties. WorkSafe considers that reasonable notice in this situation would require giving at least one month's notice.

s.51(1)

To reduce uncertainty in such a case, the OHS Act allows the other parties to negotiate any necessary variation to their agreement, which remains valid in the meantime.

s.51(2)

INDEPENDENT CONTRACTORS IN MULTIPLE EMPLOYER DWGs

In line with the principle stated in the new OHS Act that representation is an entitlement and should be encouraged, the legislation provides for greater flexibility in representation arrangements. An independent contractor, who is also an employer, can participate with his or her direct employees in the negotiations for a multiple employer DWG, along with the principal employer, any other employers and their employees. In such a case, the employees of the independent contractor become members of the DWG and participate in an election of an HSR for that DWG.

This may be a very dynamic process. In the construction industry, for example, a large project may have a core of principal employers and contractors who have agreed on a multiple employer DWG and representation for that site, and a range of other contractors coming and going throughout the duration of the project to undertake specific parts of the construction.

ESTABLISHING AND NEGOTIATING DWGs IN A MULTIPLE EMPLOYER SITUATION

Example: Negotiating DWGs involving labour hire fixed contract workers

A labour hire company is contracted by a poultry processing plant to provide 15 boners for one year. The poultry processing plant employs 120 workers, who are currently divided into a number of DWGs with each group represented by one HSR.

The host employer and labour hire company both recognise they have duties under the OHS Act to provide a safe working environment for the 15 boners. (The host employer also has duties to provide a safe workplace for existing employees.) A meeting is arranged between the labour hire company, the poultry processing plant employer and its employees to review existing DWG arrangements. The employees of the poultry processing plant authorise their union to represent them at these negotiations. Of the 15 boners, who are Vietnamese speaking, only one speaks both English and Vietnamese, and so this person is authorised by the others to represent them.

Poultry processing is recognised as a high-risk industry. Manual handling injuries, cuts, and slips, trips and falls are prevalent. The following factors, relevant to securing a safe workplace, are considered in these negotiations:

- the major work areas within the plant;
- the hazards and the number of employees within each work area;
- the languages spoken; and
- shift work arrangements.

It is agreed that the load-out and boning areas are discrete with a set workforce, whereas the workers in the other areas are multi-skilled and mix freely between the work areas and tasks. Although the processing workers only work the day shift, the cleaning crew are night workers. Most of the existing workers at the processing plant speak English.

An agreement is made between the union delegate representing the employees, the labour hire employees' representative, the host employer and the labour hire company. A decision is made to establish separate DWGs for the load-out area, boning room and cleaning crew, and one for the remaining workers. This configuration is thought to be best in terms of ensuring that all the employees are represented and consulted on OHS, and issues can be raised and dealt with.

Given the larger number of multi-skilled employees, it is determined that two HSRs are necessary to ensure that all workers have access to an HSR at all times. It is also decided that a deputy HSR would be required for each DWG. It is agreed that the term of office for the HSRs and deputies will be three years, and that the HSRs (or their deputies in their absence) are authorised to represent independent contractors when on site.

4

PROHIBITION ON COERCION

Division 3 of Part 7

The prohibition on coercion in DWG negotiations is a newly introduced provision in the OHS Act. The intent is to ensure that negotiations and the resulting arrangements are consensual and that the OHS Act is not abused by any party to force or attempt to force a particular outcome.

The OHS Act prohibits coercion of workplace parties when they are attempting to establish or negotiate DWGs, vary DWG agreements, and in relation to representation in negotiations. Coercion is a serious offence – significant penalties apply to breaches of this provision.

It is an offence under the OHS Act to:

- pressure someone to withdraw a request for a DWG;
- intimidate someone into not being represented in DWG negotiations;
- intimidate someone into being represented by a particular person.

WorkSafe will treat any allegation of coercion seriously and, under its compliance and enforcement policy and general prosecution guidelines, will prioritise allegations of coercion for comprehensive investigation.

s.53

5

ELECTION OF HEALTH AND SAFETY REPRESENTATIVES (HSRs)

Division 4 of Part 7

The OHS Act provides for the election of HSRs and deputy HSRs to represent the employees in DWGs. Each DWG must have at least one HSR.

HSRs and deputy HSRs are elected by members of the DWG.

If there is more than one DWG, there needs to be a separate process to elect an HSR in each one.

ELECTION PROCESS

It is up to the members of the DWG to decide on the process for calling for nominations within the DWG, and on how an election is to be conducted (if one is required). In the event that the number of candidates nominated for election (as HSRs and deputy HSRs) equals the number of vacancies in the DWG, the candidates are deemed to be 'elected' and there is no need to proceed with an election as such.

The election process may be informal, e.g. with a show of hands. Alternatively, it may involve a more formal process, such as the use of ballots. Employees may also choose to ask their union to run the election for them. (If there is more than one union representing the members of the DWG(s), this can be done jointly, by agreement.)

What if someone is already elected as an HSR under the 1985 OHS Act?

That person continues to be an HSR under the OHS Act 2004.

A person who was an HSR before 1 July 2005 continues to be the HSR for the DWG for a period of up to three years from 1 July 2005, unless the person ceases to hold office, for example, by resigning as HSR. This provision is to ensure that current HSRs could continue to carry out their role after 1 July 2005 and that new elections are not required in the short term.

s.54 to
s.57

s.54(4)

s.54(6)

s.164(1)

s.55(2)

ELECTION OF HEALTH AND SAFETY REPRESENTATIVES (HSRs)

Who is eligible to stand for election?

To be eligible for election, a person must be a member of the DWG and must not be disqualified from acting as an HSR. DWG members may nominate themselves or another member of the DWG to stand for election as an HSR.

s.54(2)

Can a manager be an HSR?

Strictly speaking, the OHS Act allows any employee of the employer to nominate to be elected as the HSR of a DWG. However, consideration must be given as to whether line management (i.e. managers, supervisors, team leaders, etc.) **should or should not be** an HSR. The HSR role is one of representation – not one of responsibility for meeting workplace health and safety duties.

If a DWG is defined in such a way that a manager/supervisor (who is an employee) is a member, they can be nominated and elected as an HSR. For example in a larger workplace, people in managerial or supervisory roles are not the employer per se; they are still employees under the Act with the right to have their OHS interests represented.

However, in practice, managers/supervisors are designated people who usually have some level of control of the working environment. A person who has a line management role who is also an HSR may be placed in an awkward, and possibly inappropriate, position. For example, they may be the person with whom an OHS concern is raised (as the employee representative) and, at the same time, be the person who, at least initially, has the responsibility (on behalf of the employer) to respond to that concern. WorkSafe would, in general, counsel against such an arrangement.

The OHS Act states that, when negotiating a DWG, the DWG composition should be one that 'best and most conveniently enables the interests of those employees relating to OHS to be represented and safeguarded'. WorkSafe encourages workplaces to put in place meaningful representative and consultative arrangements that are consistent with the intent of the legislation.

s.44(1)

Note: A person nominated by the employer as their representative for the purposes of resolving health or safety issues must be appropriately senior and sufficiently competent to perform this function and **must not** be an HSR.

s.73(2)

Who can vote in an election?

All members of the DWG are entitled to vote in an election.

s.54(3)

Independent contractors and their employees are not deemed to be members of the DWG even though they may, by agreement, be represented to the principal employer by the HSR.

Are employers able to appoint an HSR?

No.

The role of an HSR is to represent employees, not the employer. Therefore, employees must be given the opportunity to determine who is going to represent their health and safety interests in the workplace.

The employees will determine how the election is to be conducted; the employer's role is to enable these elections to take place.

ELECTION OF HEALTH AND SAFETY REPRESENTATIVES (HSRs)

What if there isn't agreement on how to hold an election?

If the members of the DWG cannot agree on how to conduct the election within a reasonable time, an inspector can be asked to conduct the election.

s.54(4)

What is 'reasonable time' will vary depending on the circumstances in the workplace. However, as a guide, WorkSafe considers that two weeks would normally be a reasonable period.

When a DWG asks WorkSafe to conduct an election, WorkSafe will either appoint an inspector to conduct the election or, if it is more appropriate, the inspector may appoint an external body, e.g. the Victorian Electoral Commission. Should this need arise, WorkSafe will pay the costs of using an external body to conduct the election.

How long is the term of office for an HSR?

HSRs in place when the OHS Act took effect on 1 July 2005 have a term of office of three years (to 30 June 2008).

s.164(1)

In workplaces where DWGs were in place prior to when the OHS Act took effect, the employer and DWG members should negotiate a variation to their DWG to determine the term of office for HSRs, which may be up to three years.

s.44(3)

s.44(1)

In choosing the term of office in the DWG negotiations (or in any variation of an agreement), consideration should be given to the need for stability in the representation of the members of the DWG and any other reasons given by those involved in the negotiations.

s.55(1)

When their term of office expires, HSRs are eligible to be re-elected.

s.55(3)

Under what circumstances will an HSR cease to hold office?

An HSR will cease to hold office if:

s.55(2)

- they leave the DWG (e.g. the HSR moves to another section of the workplace covered by a different DWG or ceases to be employed in the workplace);
- they resign as HSR by giving written notice to the employer(s);
- the DWG is varied, unless it is agreed (or an inspector determines under section 45 of the OHS Act) that the change does not affect the remaining term of office of the HSR;*
- the majority of members of the DWG decide (and agree in writing) that the person should no longer represent the DWG (but only if the person has already held office for at least 12 months); or
- they are disqualified by a magistrate.

s.56

* An offence may be committed if such changes are made to an HSR's position in response to the HSR exercising their powers under the OHS Act. WorkSafe will treat cases of alleged discrimination against an employee seriously and under its compliance and enforcement policy and general prosecution guidelines, will prioritise allegations of discrimination for comprehensive investigation.

ELECTION OF HEALTH AND SAFETY REPRESENTATIVES (HSRs)

On what grounds can an HSR be disqualified?

An employer may seek to have an HSR disqualified through the Magistrates' Court on the grounds that they have done any of the following **with the intention of causing harm to the employer** ('harm' means some type of damage or hurt to either the employer or the enterprise):

s.56(1)

- issued a provisional improvement notice (PIN);
- issued a direction to cease work;
- exercised any other powers given to HSRs under the OHS Act; or
- used any information acquired from the employer.

An example in which employers' interests could be harmed may be if an HSR issues a direction to cease work without reasonable cause, impacting on the employer through a loss of production and loss of income.

If satisfied that grounds exist, a magistrate may disqualify an HSR for a specified time or permanently. In making this decision, the magistrate will take into account the harm (if any) caused to the employer or workplace and the past record of the HSR in exercising powers.

s.56(2)

s.56(3)

DEPUTY HSRs

Deputy HSRs are elected in the same way as HSRs.

Arrangements such as the term of office, grounds for disqualification and an entitlement to training, etc. apply equally to both HSRs and deputy HSRs.*

s.57(1)

When can a deputy HSR exercise the powers of an HSR?

If an HSR ceases to hold office or is unable to exercise the powers of an HSR because of absence or any other reason, the powers may be exercised by an elected deputy HSR for the relevant DWG. For example, the HSR may be away from work, on leave (due to illness or annual leave), on call, attending a course or working a different shift, etc.

s.57(2)

Under such circumstances, the deputy HSR is deemed to be the HSR and, therefore, may exercise the powers of the HSR accordingly.

* In relation to deputy HSRs, this only entitles them to the initial course of training and a refresher course at least once in each year. Training requirements for HSRs and deputies are the subject of a separate chapter in this guide.

6

POWERS OF HSRs

Division 5 of Part 7

The responsibility for providing a healthy and safe workplace rests with the employer. The HSR, however, has a major role to play in representing members of their DWG and bringing issues to the attention of employers. To assist the HSR, the OHS Act sets out specific HSR powers that may be exercised in the interests of the employees they represent. Although HSRs have certain powers, the OHS Act and regulations do not impose compulsory obligations or duties upon the HSR.

s.58(3)

The purpose of an HSR's powers is to:

s.58(2)

- represent members of the DWG concerning health or safety;
- monitor measures taken by the employer or employers in compliance with the OHS Act or regulations;
- enquire into anything that poses or may pose a risk to the health or safety of members of the DWG at the workplace(s); and
- attempt to resolve with the employer any issue concerning the health and safety of members of the DWG at the workplace(s).*

s.73

POWERS OF AN HSR

An HSR elected for a DWG may, under the OHS Act, do any of the following.

s.58(1)

- Inspect any part of a workplace in which a member of the DWG works after giving reasonable notice, or without delay in the event of an incident or immediate risk to health or safety.
- Accompany an inspector during a workplace inspection involving their DWG.
- Require the establishment of an HSC.
- If the member of the DWG consents, attend interviews on health or safety matters between that person and an inspector or employer.
- If the HSR is authorised to represent an independent contractor and that person consents, attend interviews on health or safety matters between that person and an inspector or employer.
- Seek the assistance of any person whenever necessary.

s.44(1)

s.48(1)

* The list above extends to independent contractors and their employees if the HSR is authorised to represent them.

Can an HSR inspect any part of the workplace where members of their DWG work at any time?

Yes, after giving reasonable notice to the employer.

s.58(1)

What is 'reasonable notice' will depend on the circumstances in any given case, and on what the employer and HSR jointly consider is reasonable. In any case, WorkSafe considers it should be within 24 hours. WorkSafe also recommends that the employer and the HSR agree on a planned program of inspections.

HSRs may choose to conduct inspections independently or jointly with the employer or their representative. The HSR is entitled during any inspection to discuss health and safety issues with the workers in the DWG. Where joint inspections are arranged, it may be appropriate for the employer's safety officer or relevant senior manager to be available during and after the inspection to discuss health and safety issues that have been raised in the inspection.

WORKPLACE INSPECTIONS

Inspections can take various forms, including:

- regular inspections of the workplace;
- regular inspections of particular activities, processes or areas;
- specific inspections arising from complaints or concerns by members of the DWG;
- inspections before and following substantial change to the workplace, e.g. to plant or work processes; and
- inspections after an incident or injury. (A procedure should be developed that ensures that the information obtained from such an inspection is entered into the injury register.)

The requirements of each particular workplace will determine what type of inspection(s) is most relevant for a specific circumstance. More frequent inspections may be needed in high-risk industries and workplaces subject to frequent change.

Health and safety matters identified during inspections may be resolved between the employer and the HSR (or the employees, if there is no HSR present). If this doesn't lead to a resolution, the issue should be addressed in accordance with the relevant agreed procedure; or if there is no agreed procedure, in accordance with the *Occupational Health and Safety (Issue Resolution) Regulations 1999*.* (See also Chapter 9 of this guide.)

* On 1 July 2007, the new consolidated regulations will come into effect. These will replace the current issue resolution regulations.

Actions available to the HSR where this does not lead to an issue being resolved include:

- issuing a PIN (refer to page 26 for more information); and **s.60**
- directing a work cessation (refer to Chapter 9 'Resolution of health and safety issues' for more information on work cessations). **s.74**

An HSR may also deal with health and safety matters identified during inspections by:

- seeking the assistance of another person; **s.58(1)**
- attempting to resolve the matter through an issue resolution procedure; or **s.73**
- calling in an inspector if the issue cannot be resolved through the issue resolution procedure. **s.75**

These actions do not require prior consultation with the employer.

Can an HSR immediately inspect any part of the workplace in the event of an incident or situation involving an immediate risk to health and safety?

Yes. **s.58(1)**

An HSR may immediately inspect the workplace in the event of a threat to health or safety in any part of the workplace where members of their DWG work. To enable an HSR to do this, the employer must inform any relevant HSRs of such an event.

The threat may be one that affects a member of the DWG or any other person in that part of the workplace. **s.74**

Such inspections may include a visual inspection of any process, equipment, machinery or substance involved. Depending on the nature of the threat and the degree of risk, a direction may be given by the HSR or the employer, after consultation between them, to cease work.

It is advisable to ensure that incidents or work practices that might have led to an injury or illness are reported, so that quick action can be taken to control the risk. The injury register records of incidents will also give an indication of immediate health and safety risks.

POWERS OF HSRs

Can an HSR accompany an inspector during an inspection?

Yes.

s.58(1)

Inspectors are required to take all reasonable steps to notify HSRs affected in any way by the inspection as soon as they arrive, unless this defeats the purpose of the visit or causes unreasonable delay, e.g. in an immediate risk situation or if the HSR already knows about the visit. However, it is expected that such circumstances would be the exception and that, as a rule, HSRs will be notified by the inspector upon entry to the workplace.

s.102(1)

Employers are required to display or make accessible to all employees an up-to-date list of HSRs and deputy HSRs for each DWG. This should assist the inspector in identifying the relevant HSRs.

s.71

An HSR must be permitted to leave their work in order to accompany the inspector. Following an inspection, the inspector must provide a written report (including information such as the purpose of the visit, a summary of observations, etc.) as soon as practicable to the occupier of the workplace and the relevant HSRs. Ideally, the inspector will deliver the report to the HSR personally or in accordance with a mutual arrangement between the HSR and the inspector.

s.69(1)

s.103

In what circumstances may an HSR be present at an interview involving a member of the DWG?

With the member's consent, an HSR may be present at an interview concerning health and safety between a DWG member and an inspector or a DWG member and the employer (or employer's representative).

s.58(1)

Interviews such as these may occur, for example, in the course of inspections, after incidents, for return-to-work purposes or as part of issue resolution processes. The employee is entitled to have their HSR present at an interview with an inspector or the employer. The employee may wish to consult with the HSR before and/or after an interview.

Who can the HSR turn to for assistance? How does this work?

An HSR has the power to seek assistance from any person with sufficient knowledge of OHS either within the workplace (e.g. another HSR) or outside the workplace. An individual assisting an HSR on this basis is entitled to have access to the workplace.

s.58(1)

The objective of this power is to enable HSRs to have access to independent advice if this is required to assist in carrying out their powers, e.g. inspections of the workplace, injury/illness/incident investigations, etc.

An employer is obligated to allow the HSR's assistant access to the workplace unless the employer considers that person unsuitable because of an insufficient knowledge of OHS.

s.70(1)

An HSR may choose the person who will provide assistance.

Assistance may be sought for:

- a general inspection/audit of the DWG;
- technical advice on ways of dealing with a particular hazard or issue; and
- for anything else, such as negotiating agreed procedures.

This assistance may be provided by an OHS consultant, a union officer (e.g. an authorised representative of a registered employee organisation (ARREO)) with expertise on the issue or any person having knowledge or skills relevant to the particular requirements of the HSR. A detailed description of what is required of a person to demonstrate sufficient knowledge of OHS is contained in the glossary of this publication.

The OHS Act makes no reference to payment of the person who may provide assistance. Where payment is likely to be an issue, WorkSafe advises the parties to reach agreement on payment before the person is engaged. If the employer does not agree to pay, the cost is the responsibility of the HSR.

If an employer does not allow a person assisting an HSR access to the workplace, then the HSR may apply to the Magistrates' Court for an order directing the employer to allow access and specifying the terms and conditions of that access.

Should an HSR need to make an application to the Magistrates' Court for an order, the HSR may seek a person from outside the workplace, including a representative of any trade union, to support them through this process.

s.70(2)

An inspector has no power to enforce access to the workplace of a person assisting an HSR, but will recommend that access be granted if they form the opinion that the person has 'sufficient knowledge of OHS'.

Are there any circumstances where an HSR may exercise their powers outside their DWG?

Yes, where:

- there is an immediate risk to health and safety that affects a member of another DWG; **or**
- a member of another DWG asks for the HSR's assistance

s.59

and it is not feasible to refer the matter to that DWG's HSR – for example, if the HSR for that DWG is absent or not appropriate in relation to the issue of concern.

PROVISIONAL IMPROVEMENT NOTICES (PINs)

When an OHS issue arises in a workplace, ideally the employer and HSR will negotiate a resolution in the first instance.* Where such negotiations are ineffective and the HSR believes on reasonable grounds that the issue involves a breach of the OHS Act or regulations, the HSR may issue a PIN.

What is a PIN?

A PIN is a written direction requiring a person to remedy the breach (or likely breach).

s.60

It is not compulsory to use a form to issue a PIN, but they may assist in ensuring that the required information is included.

PIN forms can be downloaded from the Victorian Trades Hall Council's website for HSRs and workers, which is funded by WorkSafe and can be found at www.ohsrep.org.au. Alternatively, PIN forms can be downloaded from the WorkSafe website www.worksafe.vic.gov.au

When can an HSR issue a PIN?

A PIN may be issued if the HSR believes, on reasonable grounds, that a person is breaching or has breached a provision of the OHS Act or regulations in circumstances that make it likely that the breach will continue or be repeated. However, the HSR may issue the PIN only after consulting with the person about remedying the breach (or likely breach).

s.60(1)

s.60(2)

Breaches that may continue or be repeated could include:

- excessive noise levels in the workplace;
- an ongoing requirement to manually lift heavy objects;
- personal exposure to chemicals used in the workplace on an ongoing basis;
- unguarded machines; and
- lack of consultation with employees (or HSRs where there is an HSR) on OHS matters.

Consultation prior to the issue of a PIN

Consultation prior to the issue of a PIN is considered by WorkSafe to have occurred if the HSR has:

- orally or in writing provided information to the duty holder (or management representative if the duty holder is an employer) about the provision of the OHS Act or regulations the HSR believes is being contravened or likely to be contravened, and how the HSR believes the contravention or matters or activities causing the contravention can be remedied;
- allowed the person the opportunity to express their views and to contribute in a timely fashion to remedy the alleged contravention or resolve matters or activities causing the alleged contravention; and
- taken into account the views of the person before issuing the PIN.

Consultation can still be said to have occurred even if the duty holder does not respond to the HSR in a reasonable time or at all. In this case, the HSR can take failure to respond into account before deciding to issue the PIN. There does not have to be a two-way exchange, only the opportunity for this to occur. The time period for consultation or degree

* *Negotiation is not a precondition to issuing a PIN.*

of consultation required will depend on the circumstances and must be reasonable for the relevant circumstances. Further, consultation can still be said to have occurred if there is no agreement between the HSR and the duty holder.

Who can an HSR issue a PIN to?

A PIN may be issued to any **person**.

This could be the employer (either an organisation or an individual person) or an individual, such as an employee.

'Person', as defined in the OHS Act, also includes, 'a body corporate, unincorporated body or association and a partnership'. Therefore, the person doesn't necessarily have to be in the workplace – it could also be a designer of plant, buildings or structures or a manufacturer or supplier of plant or substances.

Examples

- An employee finds that a valve from a steam line becomes displaced, allowing a jet of steam to escape. The employee refers the issue to the HSR who takes it up with the supervisor. The supervisor, after consulting with the HSR on how their issue can be resolved, may settle the matter on the spot by calling in maintenance staff immediately.

If the leak is not fixed, however, and the HSR believes that the leaking pipe poses a risk to people in the workplace (thereby breaching the OHS Act or regulations), the HSR may issue a PIN to the employer and serve it to the supervisor. The supervisor must bring the PIN to the attention of the employer, who has an obligation to fix the breach. (In this example, a PIN would state that the HSR believes there is a breach of sections 21(1) and 21(2)(a) of the OHS Act.)

- Cleaning staff are working in an office building after hours, using the stairwell to move between floors. Due to an electrical problem, the lights have recently gone out in the stairwell causing poor visibility. Despite repeated requests from the HSR to the building manager, the problem has not been fixed. The issue is unresolved so the HSR issues a PIN to the building manager.

(In this example, the HSR believes that the building manager has breached section 23 of the OHS Act.)

What must the HSR write on the PIN?

A PIN must:

- state the HSR's belief on which the issue of the notice is based and the grounds for that belief;
- specify the provision of the OHS Act or regulations that the HSR believes has been or is likely to be breached; and
- specify a day (at least eight days after the day the notice is issued) **before** which the person is required to remedy the breach or the activities causing it.

An HSR may also provide directions in the PIN about fixing the problem, but is not required to do so. Directions may refer to a compliance code and provide a number of options for correcting the breach, e.g. by the addition of a guard to a machine, increasing the distance between the machine and operators or replacing the machine.

s.60(3)

s.61(1)
s.61(2)

Can more than one contravention be put in a PIN?

No.

A separate PIN should be completed for each contravention of the OHS Act. This is because a number of interlinked elements must be set out for each contravention, including:

- the provision of the OHS Act or regulation being breached;
- the reasons for the belief about the contravention; and
- the time in which to comply with the PIN.

s.60(3)

The HSR may also note measures that may be taken to remedy the contravention in the PIN if they wish to do so.

s.61(1)

Putting more than one element in each box on a PIN form could make the PIN difficult, if not impossible, to understand. It would also leave the PIN open to being challenged because it may not be clear which reason, possible remedy and time limit applies to which contravention.

What must the person who is issued with the PIN do after receiving it?

If the person is an employee, they must bring the PIN to the attention of the employer. Employers are advised to develop procedures to ensure that any PIN issued to managers or supervisory staff is passed on promptly, as it is the employer's responsibility to deal with the PIN.

s.60(4)

Employers who are given a PIN by an employee and any other persons who were issued with a PIN (e.g. a manufacturer, a designer, a partner in a business) must bring the PIN to the attention of all other persons whose work is affected by the notice and display a copy of the notice prominently in that work area.* WorkSafe considers that 'prominent display' means open display in a place where the notice will be seen without prior knowledge that it is there and where the relevant people will come across it in the normal course of events and be able to examine it.

The intention here is to ensure that both the employer and employees affected by the PIN are aware that it has been issued. This supports an objective of the new OHS Act to improve workplace consultation processes, in that it ensures the sharing of vital information about workplace health and safety.

* Penalties apply to breaches of these provisions.

What choices does the recipient of a PIN have?

The recipient of a PIN must comply with it within the specified time frame. If they wish to dispute the PIN, they can call in an inspector within seven days of the PIN being issued. Should the person issued with a PIN fail to call in an inspector within seven days and fail to comply with the notice in the time specified, then that person is guilty of an offence under the OHS Act.

s.62
s.63

What happens when an inspector is called in?

Employers who are given a PIN by an employee and any other person issued with a PIN (e.g. a manufacturer, a designer, a partner in a business) may ask WorkSafe to arrange for an inspector to attend the workplace to inquire into the circumstances of the PIN.

s.63(1)

The inspector must come to the workplace as soon as possible and before the date set down in the PIN for the breach or likely breach to be remedied.

s.63(2)

The inspector may perform any functions or exercise powers under the OHS Act that they consider reasonably necessary in the circumstances.

s.63(4)

What will the inspector do?

The inspector must enquire into the circumstances relating to the issuing of the PIN with the HSR who issued it, and also make enquiries into why the PIN has been disputed. The inspector will determine the validity of the PIN and, if valid (in itself or because of the application of section 65 of the OHS Act), will do one of the following:

s.63(3)

- **affirm the PIN** if the inspector believes that the OHS Act or regulations have been breached or if there are circumstances that make it likely that the breach will continue or be repeated;
- **affirm the PIN with modifications** if it is necessary to correct defects and/or include more appropriate details or information; or
- **cancel the PIN** if the inspector believes that the recipient is not breaching or has not breached the OHS Act or regulations or if the PIN has been issued to the wrong duty holder.

In doing this, the inspector will give a written notice to the HSR who issued the PIN and to the person it was issued to. This **PIN enquiry outcome notice** must include the basis for the inspector's decision to either affirm or cancel the PIN and, if affirmed, the penalty for contravening the affirmed PIN* and how either person may seek a review of the inspector's decision.

s.63(5)

The recipient of a PIN affirmed by an inspector must comply with the PIN. Failure to do so is an indictable offence.

s.63(6)
s.63(7)

The issue of a PIN by an HSR or a decision by an inspector called out to review a PIN does not affect the ability of an inspector or WorkSafe to bring a prosecution in relation to the matters that are the subject of the notice.

s.66

* Penalties apply to contravention of a PIN.

How must a PIN or an inspector's PIN enquiry outcome notice be served?

This may be done by any of the following means.

s.64

- By delivering it personally to the recipient or sending it by post or fax to the person's usual or last known home or business address.
- By leaving it for the person at the person's usual or last known home or business address with a person who is apparently over 16 years old and who apparently works or resides there. (The conclusion that the person is apparently over 16 years old and apparently works or resides there will be based on factors such as the physical appearance of the person, the person's behaviour or the belief of others.)
- By leaving it for the person at the workplace to which the notice relates, with a person who is apparently over 16 years old and who is apparently the occupier for the time being of the workplace.

Will a mistake in a PIN or PIN enquiry outcome notice make it invalid?

This depends on the type of mistake.

A PIN must contain all of the three matters in section 60(3). That is, the PIN must contain:

s.60(3)

- the HSR's belief that there is a breach and the reason for that belief;
- the legislative provision that the HSR believes is being breached or has been breached; and
- the date before which it must be fixed (which must be at least eight days after the date the PIN is issued).

A PIN or PIN enquiry outcome notice will be invalid if it does not contain these three elements.

However, the OHS Act states that a PIN or a notice given by an inspector is not invalid merely because of:

s.65

- a formal defect or irregularity (e.g. the information in the PIN is inaccurate or incomplete in some way); or
- a failure to use the correct name of the person as long as the notice sufficiently identifies the person.

A formal defect or irregularity does not automatically invalidate the PIN. If the information given is not misleading, does not cause a substantial injustice and sufficiently identifies the person to whom the PIN is issued, then the PIN remains valid.

However, if the defect or irregularity, when viewed objectively, may mislead the person to whom it is issued, then the notice will be invalid.

Examples of a defect or irregularity that could mislead the person receiving the PIN and that could cause a substantial injustice might be where:

- the PIN states the wrong section of the Act or particular regulation (e.g. section 21(2)(a) rather than section 21(2)(e)) and the person receiving the PIN would be led into giving the plant extra maintenance rather than putting in place training and instruction for employees;
- the writing on the PIN is illegible or capable of multiple meanings; or
- the day (e.g. 'Wednesday 22 July 2005') by which the person must fix the breach does not accord with the date on the PIN (22 July 2005 is actually a Friday) leading to confusion as to whether the person receiving the notice must comply with one date or the other.

If an inspector has been called to a workplace on the basis of a PIN having been issued, they will still enquire into the issue that is the subject of the PIN and take whatever action they consider appropriate, regardless of the validity of the PIN.

7

OBLIGATIONS OF AN EMPLOYER TO HSRs

Division 6 of Part 7

Under the OHS Act, employers have a number of specific obligations to HSRs. These are outlined below.

- An employer must allow an HSR to have access to information that the employer has relating to: *
 - actual or potential hazards arising from the conduct of the business or plant and substances used in the workplace; or
 - the health and safety of DWG members that the HSR is authorised to represent, which may include independent contractors and their employees.
- An employer must allow an HSR, with the consent of a DWG member, to be present at an interview concerning health and safety between: *
 - the DWG member and an inspector; or
 - the DWG member and the employer (or employer’s representative).
- An employer must allow an HSR – if authorised to represent independent contractors and their employees, and with the person’s consent – to be present at an interview concerning health and safety between: *
 - the independent contractor (or its employee) and an inspector; or
 - the independent contractor (or its employee) and the employer (or employer’s representative).
- An employer must allow an HSR to take time off work with pay as is necessary for: *
 - exercising their powers under Part 7 of the OHS Act; or
 - taking part in health and safety training approved or conducted by WorkSafe (see also pages 35–40).
- An employer must provide such other facilities and assistance as are necessary to enable the HSR to exercise their powers under Part 7 of the OHS Act.*
- An employer must allow a person assisting an HSR access to the workplace unless the employer considers that the person is not suitable to assist the HSR because of insufficient knowledge of OHS.
- An employer must ensure that a written list of HSRs (including deputy HSRs) is prepared, kept up-to-date and displayed at the workplace or otherwise be readily accessible to all employees.

In addition, an HSR is given powers under the OHS Act (to inspect the workplace, to be present at an interview on OHS, etc.) and each of these powers creates a corresponding obligation on the employer.

* Penalties apply to contraventions of these provisions.

s.67 to
s.71

s.69(1)

s.70

s.71

s.58

OBLIGATIONS OF AN EMPLOYER TO HSRs

ACCESS TO INFORMATION

In general, an employer must allow an HSR access to information.*

s.69(1)

'Access' for these purposes may include receiving a copy of written information or it may involve the HSR studying reports and taking notes as required.

In view of the range of information that may be involved, it is advisable for the employer to consult with the HSR on the type of information required and the procedures for ensuring proper access. It may be more efficient to agree to provide the HSR with some information as it becomes available or enters the workplace as a matter of routine. While information required will differ between workplaces, examples of what can be asked for include:

- information relating to any incident or occupational disease, including any statistical records, e.g. the injury register;
- Material Safety Data Sheets (MSDS) relating to chemicals used in the workplace;
- technical specifications of processes giving out noise, vibration or radiation emission characteristics;
- results of occupational hygiene measurements taken in the workplace, such as dust levels, noise levels or chemical fumes (e.g. the asbestos register);
- reports on health and safety matters written by consultants engaged by the employer;
- minutes of HSC meetings;
- information provided by manufacturers relating to personal protective equipment;
- specifications by manufacturers for safe working procedures for plant and equipment;
- information passed to the employer by manufacturers and/or suppliers of plant, equipment and substances;
- information on articles or substances that are stored or issued at the workplace; and
- information on health monitoring of employees and conditions at the workplace.

* As described in S69(1)(a) – this relates to information the employer has about relevant hazards and the health or safety of people the HSR represents. However, this does not include access to medical information where the employee's identity can be ascertained – refer to page 33.

OBLIGATIONS OF AN EMPLOYER TO HSRs

Can an HSR have access to an employee's medical information?

An employer must not allow HSRs to have access to any medical information concerning an employee without the employee's consent, unless the information*:

- does not identify the employee; or
- does not allow the employee's identity to be reasonably established.

This provision is to ensure that medical information is presented in a manner that does not disclose the identity of any employee without that employee's consent.

'Medical information' could include information regarding an illness or condition or details of conditions treated by a medical practitioner.

Please note that the HSR **does** have a right to access the injury register.

s.69(2)

Can an HSR be present in meetings between a DWG member and an inspector or an employer?

Yes.

Where an employee consents to the presence of an HSR at an interview, the employer cannot prevent the representative from being present. The HSR should be informed of any such interview and the HSR and employee may wish to consult before and/or after the interview.

s.69(1)

An employer has to allow an HSR to take time off work with pay as necessary for exercising their powers under the OHS Act. What does this mean in practice?

The guiding principle is for the HSR not to be disadvantaged in any way for taking on the role of HSR. WorkSafe's position on payment is that the HSR, when exercising their powers as an HSR or performing any of the functions the OHS Act gives them, must be paid as if at work, including shift or other allowances to which an employee is entitled.

The amount of time necessary for HSRs to perform their role will vary between workplaces and across situations. HSRs must have ready access to the employer (or their representative) and the employees of the DWG to discuss OHS matters as they arise. Matters that may be relevant to the employer and HSR in determining how much time is required for the HSR to fulfil their role include:

- the type of work or proposed work in the workplace;
- the level of risk involved in the work;
- the effectiveness of risk controls;
- the individual needs of employees in the DWG relevant to their health and safety, e.g. disabilities or the need to communicate in different languages;
- attendance at meetings, e.g. HSC meetings, meetings of DWGs and meetings with other HSRs;
- the size and complexity of the DWG;
- the size and complexity of the workplace; and
- the number of HSRs in the workplace and in the DWG.

s.69(1)

* Penalties apply to contraventions of these provisions.

OBLIGATIONS OF AN EMPLOYER TO HSRs

Who is responsible for costs if the DWG covers more than one employer?

If the HSR represents a DWG involving the employees of more than one employer, then the costs of the HSR exercising their powers under Part 7 of the OHS Act and the costs associated with training (e.g. training course fees, time-off costs, transport, accommodation, etc.) must be equally divided between each of the employers, unless agreed otherwise.

s.68(1)

Any agreement to divide costs in another way may be varied at any time by negotiation between employers.

s.68(2)

What facilities and assistance is the employer required to provide to the HSR?

The employer is required to provide necessary facilities and assistance to enable the HSR to exercise their powers under the OHS Act. What is reasonable in the particular circumstances will depend on a range of factors, including the nature of the work and the working environment, hazards present and the composition of the DWG. Such facilities may include:

s.69(1)

- access to a private room, desk and chair for discussions or interviews;
- facilities for filing, such as a lock-up filing cabinet and shelves;
- ready access to a telephone and internet/email;
- access to word processing and photocopying facilities;
- access to meeting rooms for meetings of HSRs and meetings of the DWG;
- access to relevant technical equipment, such as a camera or noise meter, etc.;
- use of noticeboards; and
- transport or travel expenses to commute between workplaces, if required.

Does the employer have to keep a list of HSRs?

Yes.*

The purpose of such a list is to enable all employees within the workplace to know who the HSRs are. It is therefore expected that this list be displayed in either a central location, such as a noticeboard within the workplace, or be kept in a place known and accessible to all employees. For very large enterprises, a number of notices may be required in strategic locations.

s.71

This list must be updated whenever required to reflect any changes in HSRs or deputy HSRs.

* Penalties apply to contraventions of these provisions.

OBLIGATIONS OF AN EMPLOYER TO HSRs

HSR TRAINING

HSRs are the elected representatives of employees in a DWG. The HSR has the dual role of performing the work for which they were employed, as well as representing the health and safety interests of the employees in the DWG. To do this effectively, it is essential that HSRs (and their deputies) receive training that provides them with the appropriate skills and knowledge.

WorkSafe recommends that the costs associated with HSR training be integrated into the overall training budget of the organisation. It is desirable that the training chosen by the HSR be agreed to by the employer to ensure that all training needs as well as the operating needs of the organisation can be met.

Is an employer required to allow HSRs to attend training?

An employer must, if requested by an HSR*, allow that HSR time off work, with pay to:

- attend an initial course of training in OHS after being elected;
- undertake refresher training at least once in each year that they hold office after completing the initial training course; and
- attend other approved training.

It is not compulsory for HSRs to be trained; however, WorkSafe actively encourages HSRs to take up their training entitlement.

Is an employer required to allow deputy HSRs to attend training?

Yes.

Deputy HSRs are entitled to time off work with pay to attend initial and refresher training. However, they are not entitled to time off work with pay to attend other approved training.

s.67(4)

s.67(1)

s.69(1)

s.57(3)

* The HSR's request to the employer must be given with at least 14 days notice – refer to page 37.

OBLIGATIONS OF AN EMPLOYER TO HSRs

Is an HSR (or deputy HSR) entitled to attend another initial training course after being re-elected in the same DWG?

No, not generally.

s.67

Every HSR (and every deputy HSR) has only one entitlement for initial training.

If the HSR (or deputy) is re-elected in the same DWG and has already participated in an initial training course, they do not generally have an entitlement to time off work with pay to attend a further initial training course. However, in a situation where the nature of an HSR's role or workplace changes substantially, there may be an entitlement to attend another initial training course.

The absence of an entitlement does not prevent an employer who recognises the benefits of HSRs receiving training from allowing them to attend additional courses.

If an HSR (or deputy HSR) had initial training under the 1985 OHS Act, are they entitled to another initial training course under the new OHS Act?

No, unless they have been elected under the new OHS Act in a different DWG.

s.67

This does not prevent an employer agreeing with an HSR trained under the 1985 OHS Act that they may attend another initial training course.

Are there circumstances in which an HSR (or deputy HSR) can attend initial training a second time?

Yes.

s.67

An HSR who is elected in another DWG (e.g. an HSR who changes employer and is then elected HSR by a new DWG) is entitled to time off work with pay to attend a further initial training course.

OBLIGATIONS OF AN EMPLOYER TO HSRs

When can refresher training be taken?

Refresher training may be taken any time after 12 months has elapsed from the initial training and again at least every 12 months after that.

s.67

This entitlement to time off work with pay to attend refresher training only applies to those HSRs (and deputies) who have completed an initial training course.

HSRs who were elected and have already completed a training course under the 1985 OHS Act are also entitled to time off work with pay to attend the refresher training under the OHS Act for each year in office that finishes on or after 1 July 2005.

How much notice must an HSR (or deputy) give to the employer prior to attending a health and safety training course?

At least 14 days' notice.

s.67(2)

This is to ensure that the training provisions are workable and do not cause unnecessary inconvenience to the workplace and the employer. Employers may need time to make alternative arrangements to meet their business requirements.

However, it is not acceptable for business requirements to be used repeatedly as a reason by an employer for delaying attendance.

Health and safety courses

Training courses must be:

s.67(3)

- approved or conducted by WorkSafe.

WorkSafe has approved a number of courses, including courses conducted by trade unions, employer associations, TAFE colleges and others. A list of course providers can be found on the WorkSafe website at www.worksafe.vic.gov.au.

- relevant to the HSR's role or the work of the DWG.

The courses must be either relevant to the work of the members of the DWG in terms of dealing with hazards or risks found in the DWG's workplace or to the role of the HSR, e.g. issuing PINs, injury inquiry procedures, etc.

- selected by the HSR in consultation with the employer.

The OHS Act requires training courses for HSRs under this section to be chosen by the HSR in consultation with the employer.

Consultation means that the HSR must:

- inform the employer of the proposed course;
- give the employer the opportunity to present views about the suitability of the proposed course and suggest alternatives; and
- take those views and suggested alternatives into account when deciding which course to attend.

OBLIGATIONS OF AN EMPLOYER TO HSRs

It is desirable for HSRs and employers to agree on which course the HSR should attend. Issues that might be considered include:

- timing of attendance – the sooner HSRs attend training after being elected, the more effective they will be in performing their role;
- cost of courses, where prices differ substantially;
- costs of attendance for remotely located workplaces including travel and accommodation expenses (in such circumstances, the arrangements that would apply for any other work-related professional development courses will determine what is reasonable);
- the relevance of any hazard-specific course to the DWG; and
- the total number of employees requiring training.

Must the employer pay the HSR (and deputy) their normal salary for the days they attend training?

Yes.

An employer must allow each HSR (and deputy HSR) paid time off to attend training, equivalent to what they would otherwise be entitled to receive for working during that period. HSRs should not be disadvantaged in any way as a result of accessing the training that the OHS Act entitles them to.

HSR training is part of normal work-related activity. HSRs are entitled to receive their normal/expected earnings during course attendance. Normal/expected earnings include pay entitlements relating to shift work, regular overtime, higher duties, allowances or penalty rates that would have applied had the HSR been at work.

There are circumstances in which HSRs may need to attend a course that is being conducted outside their normal working hours. For example, this might apply when an HSR:

- normally works two days a week and attends a five-day course run on consecutive days;
- has a rostered day off during the course; or
- has a shift that does not overlap or overlaps only marginally with the course's hours.

All time spent at a course by an HSR (including casual employees) must be treated by the employer as time at work. HSRs must be paid as if they had been at work for the relevant time.

It is advised that employers alter rosters or shifts to accommodate any HSR who attends training. If it is necessary for the HSR to work hours in excess of the normal weekly hours, additional hours must be compensated in the same manner as other additional hours are treated. When the HSR and the employer agree, time off work may be taken in lieu of payment.

s.67(4)

OBLIGATIONS OF AN EMPLOYER TO HSRs

Who pays for the costs associated with attendance at training?

The employer.

HSR training is a work activity. Employers must pay course fees and any other expenses associated with attendance at a course, including:

- travel to and from the approved course (where it is greater than travel to the normal workplace); and
- accommodation, meals and incidental expenses where an approved course is remote from the workplace.

If, when establishing a DWG, the employer and employees agreed to the election of multiple HSRs and deputy HSRs, the employer will need to cover the costs outlined above for all HSRs and deputies to ensure they can all effectively undertake their functions.

s.67(4)

Are HSRs entitled to any other health and safety training?

In addition to the initial and refresher training, an employer must allow an HSR time off with pay to attend other WorkSafe-approved training. The HSR must give the employer at least 14 days' notice.

Section 69(1) of the OHS Act does not oblige the employer to pay for the cost of the training as is required for training under section 67. However, the employer may choose to pay the costs.

Deputy HSRs do not have an entitlement to the other additional training provided for under this provision. But again, the employer may choose to make this training available to deputy HSRs.

s.69(1)

What if there are multiple employers?

If the HSR or deputy HSR represents a DWG involving multiple employers, the costs of the HSR (and deputy, if any) exercising their powers under Part 7 of the OHS Act, and the costs associated with training outlined previously, must be equally divided between each of the employers, unless agreed otherwise.

Any agreement to divide costs in another way may be varied at any time by negotiation between each employer.

If any one of those employers fulfils the obligations in section 67 concerning the training of HSRs (and deputies, if any), then each of the other employers will be deemed to have fulfilled this obligation.

s.68(1)

s.68(2)

s.67(8)

OBLIGATIONS OF AN EMPLOYER TO HSRs

What happens if an employer refuses to allow an HSR (or deputy HSR) to attend training?

If an employer refuses to allow an HSR to attend an approved initial or refresher training course, or they cannot agree on which course to attend, the HSR may ask WorkSafe to determine an appropriate course. This determination will be handled by WorkSafe's Workplace Support and Education Division, with initial contact to be made through WorkSafe's Advisory Service (contact details can be found on the back cover of this guide).

s.67(5)

If WorkSafe is asked to determine a specified course that an HSR may attend, it will first seek to gain agreement between the employer and the HSR about which course the HSR may attend. Reasons for disagreement may include: the HSR giving insufficient notice; choosing a training course not approved by WorkSafe; or choosing a course not relevant to the role of the HSR or the work of the DWG.

In such circumstances, the following actions can be taken.

- If the HSR has given less than 14 days' notice, WorkSafe will determine a course that is to be held more than 14 days from that date.
- If the HSR proposes a course that has not been approved by WorkSafe, WorkSafe will nominate an approved course to be held more than 14 days from that date.
- If the issue relates to the relevance of the particular course to the work of the DWG or to the role of HSRs, a relevant course will be selected.

However, if the HSR did give 14 days' notice, the course is approved by WorkSafe, and the course is relevant; then it is highly likely that WorkSafe will affirm the course as chosen by the HSR.

Any determination made by WorkSafe must be made in writing and WorkSafe must ensure that it is made more than 14 days before the course is about to start.

s.67(6)

It is an offence under the OHS Act for an employer to refuse, without a reasonable excuse, to allow an HSR to attend a course determined by WorkSafe.*

s.67(7)

* Penalties apply to contraventions of this provision.

8

HEALTH AND SAFETY COMMITTEES (HSCs)

Division 7 of Part 7

The responsibility for dealing with health and safety issues at the workplace rests with the employer. The HSC, however, has a major consultative role to play on an ongoing basis.

HSCs are a way for employers and employees to meet regularly and work co-operatively to plan and develop policies and procedures that improve health and safety outcomes. Committees bring together employees' knowledge and experience of jobs and tasks and the employer's perspective of the workplace and business requirements.

What happens if there is an HSC in place that was established under the old OHS Act?

Any HSC established before 1 July 2005 under the 1985 OHS Act continues as a committee after 1 July 2005 under the new OHS Act, provided it was properly established under the 1985 OHS Act.*

s.165

This ensures that current HSCs can continue to operate and do not need to be re-established.

Please note, however, that committees not formally established under the 1985 OHS Act will not have formal status under the new OHS Act.

When must an employer establish an HSC?

Employers must establish an HSC within three months after being requested to do so by an HSR.#

s.72(1)

In workplaces where there is more than one HSR, a representative who desires to have a committee established may wish to consult with other HSRs before approaching the employer.

* Only those committees established at the request of an HSR – as per section 37 of the 1985 OHS Act – can be said to have been 'properly established'.

Penalties apply to contraventions of this provision.

HEALTH AND SAFETY COMMITTEES (HSCs)

Who should be on an HSC?

Employees must make up at least half the membership of an HSC and, as far as practicable*, these employee members should be HSRs or deputy HSRs. For example, if the number of employee positions on an HSC is less than the number of willing and available HSRs, then all the employee positions should be HSRs. The HSRs should decide jointly which of them will join the HSC.

s.72(2)

Employers must consult with employees on determining the remaining membership of any HSC.# The employer must take into account the views of the employees in these discussions. If employees are represented by an HSR, the consultation must involve that HSR, with or without the direct involvement of the employees.

s.35(1)

s.35(2)

Employer representatives on the HSC should be persons involved at senior management levels in the organisation who are able to make decisions about health and safety.

Employer representatives should be drawn from senior managers, line managers, supervisors, safety officers, technical experts and personnel officers. This ensures that the committee is provided with the necessary knowledge and expertise regarding company policy, production needs and technical matters concerning premises, processes, plant, machinery and equipment and systems of work.

Where specialist health and safety personnel are not members of the committee, the HSC may consider co-opting them in an advisory capacity. In other words, the employer representation on the committee should be such that the committee has all the information, experience and skills it needs to deal with health and safety issues in the workplace.

What are the functions of an HSC?

The functions of an HSC as set out in the OHS Act are very broad and aimed at creating an environment of co-operation between employer and employees. The functions include:

s.72(3)

- facilitating co-operation between employers and employees in instigating, developing and carrying out measures designed to secure the health and safety of employees in the workplace; and
- formulating and reviewing the health and safety standards, rules and procedures that are to be carried out or complied with at the workplace, and making them known to employees. (These should be in other languages, where appropriate.)

In addition, other functions may be determined and agreed on by the committee and the employer, provided they are consistent with the OHS Act.

* WorkSafe interprets the term 'so far as practicable' in this section of the OHS Act according to its dictionary definition meaning 'that which is feasible and which can be done'.

Penalties apply to contraventions of these provisions.

HEALTH AND SAFETY COMMITTEES (HSCs)

It is recommended that HSC members clearly define and document agreed objectives. In general, HSCs should give consideration to broad concerns, such as health and safety issues that are common to the workplace at large, and to planning, implementing and monitoring programs to address these issues. In this way, the activities of the HSC will be complementary to the role of the HSRs, whose powers are generally limited to issues affecting their particular DWG unless there is an immediate risk, or another HSR is absent.

Within the agreed objectives, certain specific functions are likely to be defined. For example:

- formulation of agreed procedures, such as issue resolution procedures and the committee's own procedures;
- the study of incident and notifiable disease statistics (where available) and trends, so that reports can be made to management on unsafe/unhealthy conditions and practices, together with recommendations for corrective action;
- examination of health and safety audit or monitoring reports as above;
- consideration of reports and information provided by inspectors;
- consideration of reports that HSRs may wish to submit;
- the development of systems to ensure that health and safety issues are considered during the selection of new plant and processes;
- assistance in the development of safe working procedures and healthy and safe systems of work;
- linking with workers' compensation and return to work programs; and
- selection of consultants.

How often must an HSC meet?

HSCs must meet at least every three months and at any other time if at least half of the members request it. However, the committee members may decide that more frequent regular meetings are necessary. Issues that may be relevant when determining the frequency of meetings include:

- the likely volume of work to be handled by the committee;
- the size of the workplace or area covered by the committee;
- the number of employees and DWGs covered;
- the kind of work carried out; and
- the nature and degree of risk across the workplace or area covered by the committee.

Reasonable time should be allowed during each meeting to ensure discussion of all business. Importantly, the employer should ensure that work arrangements are such that all employee members of the HSC are able to attend, during paid time.

s.72(4)

HEALTH AND SAFETY COMMITTEES (HSCs)

Can an HSC determine its own procedures?

An HSC may determine its own procedures for organising and conducting meetings, subject to the OHS Act.

s.72(5)

It is recommended that the dates of the meetings, as far as possible, be arranged well in advance, even to the extent of planning a program six months or a year ahead. In these circumstances, all members of the committee and all HSRs and deputies in the workplace (not all may be members of the HSC) should be given a personal copy of the program listing the dates of the meetings. Notices of the dates of meetings should also be published where all employees can see them.

All HSC members should get a copy of the agenda and accompanying papers at least one week before each meeting. Every effort should be made to ensure scheduled meetings take place. Where postponement cannot be avoided, an agreed date for an alternative meeting should be made and announced as soon as possible.

The HSC may need to develop procedures and rules for the planning and conduct of meetings. Issues the committee needs to consider include:

- who will chair the meeting;
- whether there will be a quorum for meetings;
- who will take the notes or minutes of the meetings;
- who will issue the notes or minutes;
- who will draw up and issue the agenda;
- how long items will remain on the agenda; and
- processes by which decisions will be made.

In certain workplaces, it might be useful for the HSC to appoint sub-committees to study and report on particular health and safety issues.

The HSC should decide whether to record full and detailed minutes of meetings or simply to keep summary notes. Where notes are preferred to minutes, these should include details of decisions made, who is responsible for carrying out these decisions, and the timetable for action.

A copy of agreed minutes or notes of each meeting should be supplied as soon as possible after the meeting to each member of the HSC and a copy sent to each HSR for the DWGs covered by the committee. A copy of the minutes or notes should also be sent to the most senior executive responsible for OHS, and arrangements should be made to ensure that senior management is kept informed generally of the work of the committee. Enough copies of the notes or minutes should be displayed or made available by other means for the information of employees.

HEALTH AND SAFETY COMMITTEES (HSCs)

Does membership of an HSC impose legal duties on the employee members?

There are no duties imposed by the OHS Act on employee members (including HSRs) of the HSC other than those imposed on all employees in the workplace under section 25 of the OHS Act.

How large should an HSC be?

The overall aim, while keeping the size manageable, should be to ensure that the HSC is representative of the workplace. In large workplaces, a single committee may be too large and unwieldy or too small to reflect adequately the needs of the workplace. In these circumstances, it may be necessary to set up several committees with communication links for co-ordination between them. Criteria that may be relevant when determining whether more than one committee needs to be established include:

- the size and complexity of the workplace;
- the nature and degree of risk involved in the workplace;
- the structure of the DWGs; and
- the optimum size of committees.

What applies in a small workplace?

Although there is nothing to prevent a small business from establishing an HSC, such committees are more common to medium-to-large workplaces. Because large workplaces tend to involve more complex management structures, HSCs are often an effective means of co-ordinating a systematic approach to health and safety across the organisation.

However, small workplaces that do not have an HSC should nevertheless involve staff in developing policies and procedures and in periodically reviewing their effectiveness in line with the employers' duty to consult with employees on OHS matters. In workplaces with HSRs, this can be done through the HSR.

s.35

HEALTH AND SAFETY COMMITTEES (HSCs)

Should an HSC be used for resolving health and safety disputes?

No. Health and safety dispute resolution is not an appropriate function for HSCs. Dispute resolution requires specific procedures and the nature of committees makes them unsuitable for resolving issues. The OHS Act makes provision for this under section 73 Resolution of health and safety issues (see also page 47 of this guide).

What factors will contribute to making the HSC more effective?

The effectiveness of an HSC will depend on a number of factors. Significant among these will be the degree of co-operation the committee has been able to develop and the respect with which the workplace parties, especially the CEO and management team, view the committee's work. The following activities could assist in maintaining the impetus of a committee's work:

- regular meetings with effective publicity of the committee's discussions and recommendations;
- speedy decisions by management on the HSC's recommendations and, where necessary and appropriate, prompt action with effective publicity;
- mechanisms for ensuring all employees are informed about and support the committee; and
- setting of priorities and monitoring of results.

Good communication between the committee, management and employees will also contribute to the effectiveness of the HSC. For example, outcomes of the meetings might be placed on prominent noticeboards and verbal briefings or emails organised by the HSRs to update employees. In addition, there should be a genuine desire on the part of management to draw on the knowledge and experience of employees and to improve the standards of health and safety at the workplace.

Information on the committee's functions and HSC decisions relating to agreed procedures should be provided to HSRs and all employees. Committee members are advised to consider appropriate ways of communicating such information. If appropriate, the committee will need to determine what languages are spoken in the workplace to ensure that information is provided in multilingual form where necessary.

Employee representatives and/or HSRs should be given time (during work hours) to prepare for and attend committee meetings and for reporting the outcomes to other HSRs and employees in the workplace.

9

RESOLUTION OF HEALTH AND SAFETY ISSUES

Division 8 of Part 7

The OHS Act seeks to facilitate the resolution of health and safety issues as they arise. Health and safety 'issues' may include any number of concerns – for example, the detection of a potential workplace hazard, the desire to establish a DWG, the identification of a health and safety breach, the proposed introduction of new plant/equipment or work processes, etc. A health and safety issue does not necessarily imply the existence of a dispute.

s.73

Please refer to Appendix B for an issue resolution procedure flow chart.

What must the parties do if a health and safety issue arises in the workplace?

The employer or their representative and the employees who are affected by the issue or, if the issue relates to a DWG, their HSRs must attempt to resolve the issue in accordance with a procedure agreed to in the workplace. If there is no such procedure, the procedure prescribed by the *Occupational Health and Safety (Issue Resolution) Regulations 1999** must be used.

s.73(1)

Other provisions in the OHS Act also relate to resolving issues. As indicated previously, HSRs have the power to seek assistance from any person for health and safety advice and to issue PINs. (Refer to Chapter 6 'Powers of HSRs' for more information.)

s.58(1)

s.60

If the issue is not resolved within a reasonable time[#], any of the parties attempting to resolve the issue may request an inspector to attend the workplace.

s.75

* On 1 July 2007, the new consolidated regulations will come into effect. These will replace the current issue resolution regulations.

[#] In this context, a reasonable time is what parties believe is reasonable in the circumstances.

RESOLUTION OF HEALTH AND SAFETY ISSUES

What is an 'agreed procedure'?

An 'agreed procedure' is an agreed process or outline of the steps involved in resolving health and safety issues in a workplace. It must contain the following four elements.

- The procedure must have been **agreed**. This means that it is consensual and there has been genuine consultation and agreement between the employer, and the HSRs and employees. The procedure must not be imposed by one party or the other or arise out of a flawed process for reaching agreement. A flawed process for reaching agreement may be one:
 - where only a select group of employees participated and agreed with the employer; or
 - where agreement is reached through an unrepresentative process, e.g. not all HSRs or all HSC members or all relevant employee representatives, as the case may be, were able to participate in the agreement process.
- The agreed procedure must outline a process or steps for resolving issues. It is not something that sets out what the outcome would be in specified circumstances.
- The agreed procedure **must be able to be used to resolve issues** and not merely state, for example, that employees should raise issues with their supervisor or HSR.
- The agreed procedure **must relate to health and safety issues**. It must not be a procedure that exists solely for other purposes such as a grievance or complaint procedure, unless such a procedure is agreed to be utilised for health and safety issues.

s.35(1)
s.36(2)

In addition, an agreed procedure must be consistent with the OHS Act – e.g. it cannot be agreed to remove the power of an HSR to issue a PIN or to exercise any other power that the OHS Act gives them.

If a procedure does not meet these criteria it is not considered by WorkSafe to be an agreed procedure.

If an inspector forms the view that a procedure thought to be agreed does not meet one or more of the above criteria, the inspector will advise the relevant parties that the purported agreed procedure is **not** an agreed procedure and reflect this in their Entry Report for the visit. The inspector will also advise that the *OHS (Issue Resolution) Regulations 1999* will apply until or unless the workplace parties reach agreement on a procedure to follow.

The inspector will provide guidance to the relevant workplace parties on what new 'agreed procedures' could look like or how the existing but flawed procedures could be improved.

If either the employer or a majority of employees have concerns about an agreed procedure, they are entitled to withdraw their agreement and, unless or until a new one is developed that meets the four criteria mentioned above, the *OHS (Issue Resolution) Regulations 1999* will apply.

RESOLUTION OF HEALTH AND SAFETY ISSUES

What might an agreed procedure look like?

Given that work situations differ vastly from one industry or workplace to another, there may be advantages for employers and employees in negotiating a formal agreement for dealing with health and safety issues. The objective of an agreed procedure should be the most speedy and effective resolution of all health and safety issues. As far as possible, they should be resolved as and when they arise.

The development of an issue resolution procedure must involve employees and, where they exist, HSRs. Employers must consult (so far as is reasonably practicable) with employees and their HSRs when making decisions about OHS issue resolution procedures. In consulting with employees, an employer must:

- share information with employees regarding issue resolution procedures;
- give the employees a reasonable opportunity to express their views about the issue resolution procedure; and
- take into account those views.

If there is an HSC, it may be the forum used to develop an issue resolution procedure. One of the functions of an HSC is to formulate, review and disseminate standards, rules and procedures relating to OHS. Even if the HSC is not used to develop the procedure, it should be presented to the HSC for consultation and endorsement and then to the HSRs and the rest of the employees.

It is recommended that a procedure provides a description of the steps to be taken and who is to be involved once an issue arises. For example, a procedure might include the following elements.

- Identification of the roles of various persons, including HSRs, employees, managers and supervisors in this process.

The names of all HSRs and employer representatives and their particular DWG or workplace areas of responsibility should be listed in the issue resolution procedures. This list should be kept up-to-date. Employees should be notified of the names of the employer representatives and HSRs. If there are employees who would not understand such a notice in English in the workplace, they should be notified in a language they understand. In any case, employers are obligated to ensure that a written list of HSRs (including deputy HSRs) is prepared, kept up-to-date and displayed at the workplace or otherwise be readily accessible to all employees.*

The number and status of persons who may be nominated as employer representatives will depend on a variety of factors, such as the size of the workplace and the number and types of hazards present. It is strongly suggested that employers nominate one employer representative for each DWG. This will allow employer representatives and HSRs to work together to resolve issues as they arise. It may also be appropriate to nominate employer representatives for specific issues that affect the whole workplace, such as emergency procedures or individual hazards.

* Penalties apply to contraventions of these provisions.

s.35(1)

s.72(3)

s.71

RESOLUTION OF HEALTH AND SAFETY ISSUES

- A procedure for reporting issues.

This should be clearly defined. Some examples of procedures are set out below. They can be adapted or combined with each other or workplace-specific procedures to create a procedure that is suitable for the workplace.

Procedure 1: Where there are HSRs, employees must raise any health and safety issues with the HSR of their DWG. The HSR must then raise the issue with the relevant employer representative.

Procedure 2: Where there are HSRs, employees must raise issues either with the HSR of their DWG or the relevant employer representative. Whichever person is notified will then raise the issue with the other.

Procedure 3: If there are no HSRs, employees must raise a health and safety issue directly with the employer or their representative.

Procedure 4: If an employer (or employer representative) identifies a health and safety issue, he or she must raise it with the HSR in the relevant part of the workplace. If there is no HSR, the employer must raise the matter directly with the affected employees.

- An opportunity for the parties to meet and to attempt to resolve the issue.

The procedure might state that the employer or employer representative and the HSR or employees affected by the health and safety issue must meet as soon as possible after an issue has been reported.

- An identification of factors that may be relevant to resolving the issue. These factors may include any of the following:
 - consideration of any legislative requirements relevant to the issue;
 - whether the hazard or risk can be eliminated;
 - whether the hazard or risk can be isolated or whether it is likely to affect wider areas of the workplace;
 - the number and location of employees affected by the issue;
 - how long it will take to correct the risk permanently (this may include elimination, modification of equipment or systems of work or substitution of one chemical for another that is less hazardous. In the interim, short-term measures may need to be implemented where possible, e.g. the use of personal protective equipment);
 - whether environmental monitoring of the hazard should be undertaken;
 - who is responsible for performing and overseeing the removal of the hazard or risk; and
 - availability of appropriate risk controls.
- A method for communicating the results of any agreement reached to employees and any HSCs.

At all stages of an issue resolution process, particularly where issues are unable to be resolved immediately or there has been a direction to cease work, the progress of the issue should be regularly reported back to the employees affected, as should the outcome. The procedure might state that this is to be done via written communication on a noticeboard or via verbal briefings.

RESOLUTION OF HEALTH AND SAFETY ISSUES

- Review by the HSC.

In workplaces where an HSC has been established, all health and safety issues dealt with should be reported to the next meeting of the committee. As HSCs are centralised bodies representing the workplace as a whole, raising awareness of health and safety issues dealt with in various areas of the workplace is important for the members of the committee. However, as set out above, the HSC is not a suitable venue for resolving the issue.

The agreed procedure should be detailed in writing and made available to all employees. It may, for example, be posted on a noticeboard in the workplace. Where there are employees who do not read English, details of the procedure should be posted in languages that are understood by the employees.

What is meant by a prescribed procedure?

The objective of the *Occupational Health and Safety (Issue Resolution) Regulations 1999* is to prescribe a procedure for the effective resolution of health and safety issues as they arise at workplaces where there is no workplace agreed procedure for resolution.

These regulations identify the parties to the resolution of issues and provide a procedure for reporting and resolving issues.

Refer to the 'Further information' section of this guide for details on where these regulations may be found.

Can anyone be an employer representative in a health and safety issue resolution process?

If the employer appoints its own representative for the purpose of issue resolution, the employer must ensure the person is not an HSR. The employer representative must also have an appropriate level of seniority and must be sufficiently competent to act as the employer's representative.*

s.73(2)

For effective issue resolution to occur, an employer representative should have the necessary authority to resolve any OHS issues on behalf of the employer. This should be reflected in the employer representative's position in the organisational hierarchy and position description so as to avoid any confusion.

'Sufficiently competent' for the purpose of health and safety issue resolution means that the employer representative has an understanding of how the OHS Act and regulations apply to their workplace and is knowledgeable in relation to the operations of the workplace for which the employer representative has responsibility. These elements are explained in more detail below.

WorkSafe considers the following range of competencies is required of an employer representative in order to carry out their role under the OHS Act:

- a general knowledge of the OHS Act;
- understanding of the health and safety issue resolution process and the role of agreed procedures and regulations;
- understanding of the employer duties under OHS legislation and the concept of reasonable practicability;
- understanding of the role and functions of HSRs and authorised representatives of registered employee organisations;
- understanding of the role of inspectors, their powers and issue resolution functions;

s.73 to
s.75

* Penalties apply to contraventions of this provision.

RESOLUTION OF HEALTH AND SAFETY ISSUES

- understanding of how the workplace operates;
- communication, consultation and negotiation skills;
- understanding of the process of resolution when an inspector arrives on site;
- general understanding of OHS issues and systems specific to that workplace;
- understanding of the hazard identification and risk assessment processes and, in particular, the ability to identify appropriate risk control measures available to the employer; and
- ability to get access (within the organisation and externally) to expert technical information and advice in relation to specific hazards.

There are many ways in which employer representatives can attain these competencies. These include OHS training, general management training, work experience and mentoring programs. WorkSafe is assisting training providers who wish to offer training programs for employer representatives by providing them with recommended learning outcomes for training courses.

It is the employer's responsibility to determine the competence of the employer representative prior to the appointment of that person. It is advisable that the employer representative's OHS performance be incorporated into performance appraisal systems.

In line with its functions under section 7 of the OHS Act, WorkSafe will promote education and training to support section 73 as one option for employers to improve the skills of their representatives. However, as noted above, the competencies may be achieved by other means.

DIRECTION TO CEASE WORK

What if there is an immediate threat to health or safety?

If a health or safety issue arises at the workplace:

- that involves an immediate threat to anyone's health or safety; and
 - where it is not appropriate to implement issue resolution procedures under section 73 given the nature of the threat and degree of risk,
- a direction to cease work may be made by an employer, its representative or the HSR following consultation between them.

WorkSafe interprets 'immediate threat' in this context to mean 'immediate in time and direct'. Although it is not possible to be specific about what might be an immediate threat, as this will vary between workplaces, if the issue concerns work that is likely to lead immediately to injury or harmful exposure, then a direction to cease work is an appropriate response.

When an immediate threat occurs, prompt consultation must take place. Consultation in this context takes on the same meaning as in Part 4 of the OHS Act – Duty of employers to consult. Either the HSR or the employer must:

- inform the other of the issue and proposed course of action;
- give the other the opportunity to present views about the appropriateness of the proposed course of action and to suggest alternatives; and
- take those views and suggested alternatives into account when making a final decision.

s.74(1)

RESOLUTION OF HEALTH AND SAFETY ISSUES

This consultation may result in immediate resolution of the issue or a joint direction for work to cease in that area.

Where consultation does not lead to agreement, either the HSR or the employer (or employer representative) may direct that the work must cease. Employees may also exercise their common law right to stop performing any dangerous work.

An employer may assign employees affected by the direction to cease work to suitable alternative work. Such alternative work must not expose employees to the risk and must be suitable to those employees' skills and job classifications.

s.74(2)

Where relevant, there should be consultation with the HSR and union representatives before the commencement of any alternative work to avoid or minimise the possibility of demarcation disputes. Should the alternative work be paid at a lower rate, the employees are entitled to receive their normal/expected earnings for the period of the 'cease work'.

Should there be no appropriate alternative work for employees in a 'cease work' situation, employees are entitled to receive their normal/expected earnings during this time.

Any of the parties attempting to resolve the issue may request an inspector to attend the workplace.

s.75

Can an inspector be called in to assist in the resolution of a health and safety issue?

Yes, if:

- the issue resolution process does not result in agreement within a reasonable time (what is 'reasonable time' will vary depending on the circumstances in the workplace and the immediacy of the risk, but should not normally be longer than a period of one week for relatively minor matters and two to three weeks for more complex concerns);

s.75(1)

or

- an issue is the subject of a direction to cease work.

In these circumstances, any of the parties attempting to resolve the issue may ask WorkSafe to arrange for an inspector to attend the workplace. WorkSafe must ensure that this occurs as soon as possible after the request is made. WorkSafe has a policy that places a priority on responding to calls where there is an immediate threat.

s.75(2)

For unresolved issues, the inspector will:

s.75(3)

- talk with both parties and identify how to effectively resolve the issue (e.g. by setting out time frames) without seeking to remove or override the statutory roles, powers and rights of HSRs; and
- promote co-operation between the parties.

The inspector may issue a prohibition notice or an improvement notice or take any other action that the inspector considers reasonably necessary under the OHS Act. A copy of a report on the attendance and a copy of any notice(s) issued must be provided to the employer and the HSR.

Normally, if an inspector reasonably believes that an immediate threat or risk exists, a prohibition notice will be issued. If the inspector determines (and expresses in writing) that employees had reasonable cause to be concerned about their health and safety as a result of the issue at the workplace, those employees are entitled to be paid for the period not worked.

s.75(4)

RESOLUTION OF HEALTH AND SAFETY ISSUES

If a dispute about wages to be paid in these circumstances arises, its resolution will depend on a range of factors. If the process of resolving a wage dispute is not clear, the worker(s) affected should contact Wageline on 1300 363 264 or their union or seek legal advice. A dispute concerning an entitlement to payment under these circumstances may be referred to the Magistrates' Court or to any other court or tribunal that has jurisdiction in relation to the matter.

s.75(5)

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DISCRIMINATION

Division 9 of Part 7

The OHS Act prohibits an employer from dismissing an employee, discriminating against an employee or treating an employee less favourably because that employee is or has been an HSR.

It is important to note that an employer or prospective employer is guilty of an indictable offence if the dominant reason for:

s.76(1)

- dismissing an employee, injuring an employee or altering the employee's position to the detriment of the employee;
- threatening to do any of the above things to an employee;
- refusing or failing to offer employment to a prospective employee or discriminating between prospective employees in offering terms of employment;

is because the employee or prospective employee:

s.76(2)

- is or has been an HSR or a member of an HSC;
- exercises or has exercised power as an HSR or as a member of an HSC;
- assists or has assisted or gives or has given any information to an inspector, an HSR or a member of an HSC; or
- raises or has raised an issue or concern about health and safety to the employer, an inspector, an HSR, a member of an HSC or another employee.

This includes deputy HSRs. WorkSafe will treat any cases of alleged discrimination seriously and, under its compliance and enforcement policy and general prosecution guidelines, prioritise allegations of discrimination for comprehensive investigation.

If charges are laid in relation to this section of the OHS Act, the burden is on the employer to prove that the dominant reason for their action was not any of the matters outlined above.

s.77

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APPENDICES

A. Case studies

B. Issue resolution procedure flow chart

APPENDIX A

Case study 1

A public sector health and safety committee (HSC) in action

The 'A Team' HSC was established within a large public sector agency and represents workers from various offices in a regional area. The work has a strong client focus.

The DWGs have recently been renegotiated and HSRs elected by the members in their DWGs. Shortly after the elections, the HSRs attended an initial health and safety training course and now have the information they need to represent the health and safety interests of the employees in their DWGs. The HSRs meet on a regular basis with the members of their DWGs to report on the activities and recommendations of the HSC and enable any health and safety issues to be raised.

Being a large public sector agency, there is an agreed procedure for resolving health and safety issues, which has been negotiated centrally with the appropriate unions. The agreed resolution procedure contains a negotiated escalation process identifying levels of responsibility when issues are not able to be dealt with locally.

The HSC is made up of 60% HSRs, who represent the DWGs established in offices across the region, and 40% management staff. One management representative on the committee is in a senior decision-making position within the region and is also able to represent the region within the organisation's executive structure.

The 'A Team' HSC has an agenda for each meeting containing fixed items. Information is analysed by the committee from incident reports, sick leave records and workers' compensation claims, always making sure that individual employees' personal details are not identified in the material. Results of any audits and inspections are reported, as are circumstances in which PINs were lodged or inspectors called in.

HSC meetings normally occur on a monthly basis, but currently the meetings are occurring twice-monthly as there have been a number of issues reported that require the development of a local regional policy. The issues relate to a number of reported incidents of occupational violence. Upon analysing the incidents, the HSC finds that the violent and threatening behaviours mostly occur during the night shift in which staff members are employed singly in units accommodating clients.

Of particular concern is one area in which 52 clients with a potential for violent behaviour are housed with only one staff member to supervise them during the night. There have been a number of troubling occurrences in this area. Staff members are very concerned about the potential for a serious incident resulting in life-threatening injury and, as a consequence, stress and anxiety levels are elevated among these employees.

The HSC, after some deliberation, decides to recommend that management implements a trial by placing two staff members in each unit at night, with back-up at short notice in case of an emergency. Management agrees to a trial. Procedures for passing on information regarding the clients at the end of each shift are also improved. Those clients who have shown violent behaviour have alerts placed on their files and staff members at hand-over of the shift are informed of the potential risks. All the staff members in the region are notified of the pilot and the change to procedures and additional training is provided. The committee establishes a process to monitor and review the pilot.

After reviewing the pilot program some months later, management decides (on the committee's recommendations) to formally adopt the proposed changes as the number of incidents declined during the night shift. This outcome results in a lift in the morale of the affected staff in the region.

Case study 2

A meat industry health and safety committee (HSC) in action

An HSC was established for the purpose of designing a new boning room for an existing meat works. The meat works employs approximately 60 people and, to date, has functioned exclusively as an abattoir, i.e. as a slaughterhouse for beef and small-stock. Boning is not yet carried out there.

Boning operations may involve substantial health and safety risks, especially in relation to manual handling. These risks are exacerbated by the work being performed in a moderately cold environment. The employer, aware of these risks, wanted to design a boning room that would control these health and safety risks effectively.

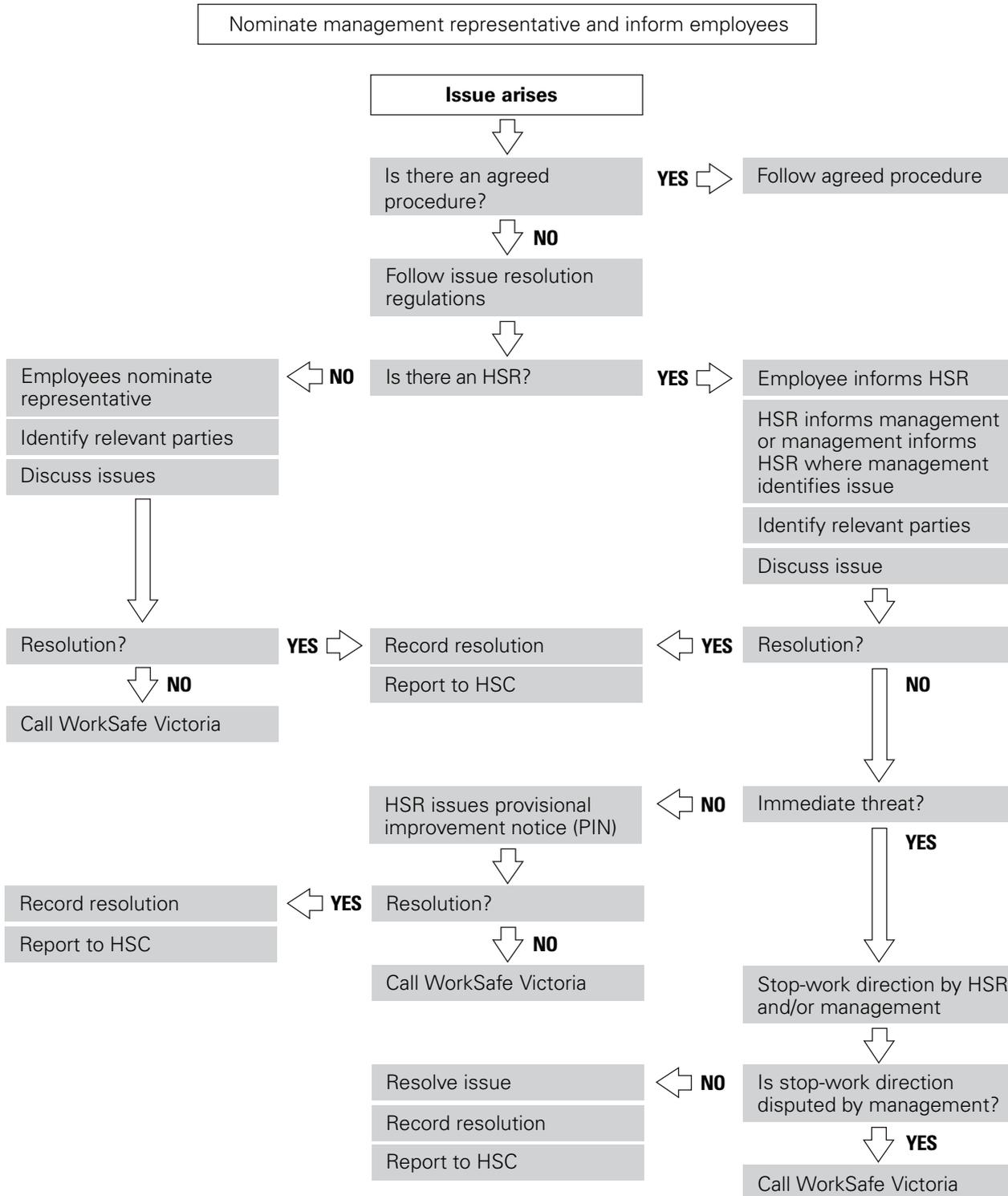
The employer consulted the workers' HSRs and job delegates with regard to the development of the proposed boning room. A specific purpose HSC was established for the project. It consisted of: the employer; the quality assurance/health and safety officer; two HSRs from the kill floor; the building/maintenance worker; the proposed boning room supervisor; two boning room labourers from another boning room; a meat industry consultant; the contract engineer; the union organiser (an experienced slicer); and a consultant facilitator/researcher.

The boning room HSC met regularly. Not all members were required for every meeting. There was a core of members, at least half of whom were employee representatives, who attended all meetings. The project was undertaken in stages, which included: determining the scope of the project; an examination of innovative and effective alternative designs; the development of a basic design proposal; a simulation of the design proposal; and testing, refining and validation of the design. The members of the committee agreed that consensus on key features of the design and layout had to be achieved.

At all stages of the process, consideration was given to both operational and health and safety requirements. For example, in terms of operations, the boning room would have to achieve a certain volume of carcasses per day, a meat surface temperature of no more than 10°C, Ausmeat accreditation, and flexibility in numbers and species. From a health and safety perspective, the design sought to eliminate or reduce lifting, throwing, twisting, double handling, bending the back at 45 degrees, the need to reach too high or low and the exertion of excessive force.

Consensus was reached, the design was finalised and construction of the boning room was started. The originally conceived design of the boning room was changed significantly, reducing risks to health and safety by the consultative process. Overall, the committee was satisfied with the process. The establishment and involvement of the boning room HSC resulted in a design that met production needs and reduced risks to workers' health and safety.

APPENDIX B ISSUE RESOLUTION PROCEDURE FLOW CHART



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ABBREVIATIONS AND GLOSSARY OF TERMS

ABBREVIATIONS

DWG	Designated work group
HSR	Health and safety representative
HSC	Health and safety committee
OHS	Occupational health and safety
PIN	Provisional improvement notice

GLOSSARY OF TERMS

Access to information – an employer must allow an HSR access to information that concerns actual or potential hazards arising from the conduct of the business or the health and safety of workers (see page 32 for more details).

Agreed procedure – the implementation of procedures for making decisions for any of the following:

1. resolving health and safety issues at a workplace under the employer's management and control or arising from the conduct of the undertaking of the employer;
2. consulting with employees of the employer on the above;
3. monitoring the health of employees, of the employer and the conditions at any workplace under the employer's management and control; and
4. providing information and training to employees of the employer.

Breach – breaking a law or failing to observe a law.

Ceasing work – work that is 'ceased' is specifically when there is a concern in relation to an immediate threat to health or safety. Employees affected by the direction to cease work should be assigned to suitable alternative work – it does not automatically mean that employees will no longer undertake work in the workplace.

Class of contractors – a group, type or category of contractors who carry out the same type of work for the employer (such as electrical, cleaning, administrative or information technology contractors). It might also be a category of contractors who will be on site for a set time, for example more than six months.

Coercion – the use of express or implied threats of reprisal or other intimidating behaviour in order to compel that person to act against his or her will that puts a person in immediate fear of the consequences.

Communication to all employees in writing (by the employer in relation to the establishment or variation of a DWG) – a formal statement in writing by the employer setting out all the particulars that have been agreed (or determined by an inspector) in relation to DWGs at the workplace(s) of the employer. This statement is provided to all employees either by letter or in some workplaces if all employees have access to and routinely use email, by that means. WorkSafe does not consider that posting a written document on a noticeboard would meet this duty.

ABBREVIATIONS AND GLOSSARY OF TERMS

Contravention – a breach of a duty provision in the OHS Act or regulations, whether or not the provision is an offence provision (that is, one with a penalty attached).

Cultural and linguistically diverse (CALD) background – is about those employees working together or sharing the same work environment who may either be born in another country or be part of a family from a country other than Australia, which has diverse value systems, religious beliefs and languages consistent with their country of origin.

Deputy health and safety representative – a person elected to be a deputy to an elected health and safety representative (where deputy HSRs for a DWG have been agreed to or determined by an inspector). The deputy HSR has the same initial and refresher training entitlement as the HSR and becomes the HSR and able to exercise all the powers of an HSR, when the HSR is unavailable due to absence or any other reason.

Designated work group (DWG) – a grouping of employees who share similar workplace health and safety concerns and conditions.

Election (in relation to HSRs or their deputies) – the process by which a DWG (the 'electorate') determines who will represent them on OHS matters.

Employee – a person employed under a contract of employment or contract of training.

- Direct employee – a person directly employed under a contract of employment or training by an employer.
- Deemed employee – a person who is an independent contractor or the employee of an independent contractor engaged at a workplace who is owed the same duties by the employer at that workplace in relation to a safe and healthy work environment as direct employees of the employer.

Employer – a person who employs one or more persons under contracts of employment or contracts of training whether or not they are themselves 'self-employed'.

Health and safety representative (HSR) – a health and safety representative for a DWG who has been elected and holds office in accordance with Part 7 of the OHS Act.

Immediate threat – a situation that is likely to lead immediately or directly to injury or harmful exposure.

Independent contractor – a person who is not directly employed under a contract of employment or training by the principal employer at a workplace, but engaged to provide particular services in return for a fee.

Indictable offence – a serious offence able to be tried before a judge and jury.

Inspector – an inspector appointed under section 95(1) of the OHS Act.

Internal review of inspector decisions – most inspectors' decisions (or non-decisions) can be reviewed and either affirmed, varied or set aside and substituted with another more appropriate decision. An inspector's decision can also be stayed (suspended) while the review is taking place.

For example, an inspector may form an opinion that an activity in a workplace involves a risk to health and safety and issue an improvement notice. The employer may wish to contest the decision and ask for an independent internal review because they believe the activity is safe. Alternatively, an inspector may form an opinion that an activity is safe and take no action. An employee affected by the decision (and in some cases an HSR) may wish to contest the decision and ask for an independent internal review because they believe the activity to be unsafe.

The internal review is done by the Internal Review Unit (IRU). The IRU is separate from WorkSafe and decisions made by an Internal Review Officer (IRO) become decisions of WorkSafe Victoria.

The review process is speedy and transparent. Most internal review decisions have to be made within 14 days; some have to be made within seven days after the application is made or in the case of a stay of an inspector's decision, within 24 hours.

The decisions of the IRO must be in writing and set out the reasons, findings and evidence used to make the decision. If an eligible person is dissatisfied with the decision, they can then ask the Victorian Civil and Administrative Tribunal (VCAT) to review it.

Further information about internal review is available on the WorkSafe website www.worksafe.vic.gov.au or by contacting WorkSafe's Advisory Service.

Negotiation – a discussion intended to produce an agreement or the activity or business of negotiating an agreement. This means that a position put to one party to elicit comment or feedback would not be a 'negotiation' within the meaning of the OHS Act.

Objects and principles of the OHS Act – the OHS Act contains a statement of its objects; i.e., the fundamental matters that the OHS Act seeks to achieve. When seeking to understand the primary outcome a particular section of the OHS Act is intended to deliver, one should have regard to the stated objects of the legislation.

The objects of the OHS Act are to:

- secure the health, safety and welfare of employees and other persons at work;
- eliminate at the source risks to the health, safety or welfare of employees and other persons at work;
- ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
- provide for the involvement of employees, employers and organisations representing those persons in the formulation and implementation of health, safety and welfare standards.

These objects have regard to the principles of health and safety protection as set out in section 4 of the OHS Act (see also below).

It is the intention of the Parliament that in the administration of the OHS Act regard should be had to the principles of health and safety protection. This means that WorkSafe and its inspectors must consider what most effectively advances the achievement of the principles in the OHS Act when making decisions about the application of the law to particular circumstances.

The principles of health and safety protection are:

- the importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances;
- persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable;
- employers and self-employed persons should be proactive and take all reasonably practicable measures to ensure health and safety at workplaces and in the conduct of undertakings;
- employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks; and
- employees are entitled and should be encouraged to be represented in relation to health and safety issues.

ABBREVIATIONS AND GLOSSARY OF TERMS

OHS Act – the *Occupational Health and Safety Act 2004* unless otherwise specified.

PIN compliance time frame – is a specified period (at least eight days after the day on which the notice is issued) **before which** the person is required to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention (see S60(3) of the OHS Act).

Plant includes:

- any machinery, equipment, appliance, implement and tool;
- any component of any of those things; and
- anything fitted, connected or related to any of those things.

Provision – a clause in the OHS Act providing for a particular matter.

Reasonable grounds – is based on the principle that a person making the decision possesses a suitable knowledge of OHS and is aware of the inherent safety requirements within their work environments, which:

- were either negotiated and agreed upon by a DWG and the employer(s); or
- involve a contravention of the OHS Act or regulations; or
- are a statutory OHS requirement.

Reasonable notice – is considered a period of time within which all stakeholders are provided with sufficient time to receive, examine, understand and be capable of either seeking appropriate counsel and/or providing informed comment. For example:

- if any party wishes to withdraw from negotiations or an agreement in writing to the other parties, then WorkSafe considers that reasonable notice would require giving at least one month's notice;
- in relation to the powers of an HSR to inspect any part of the workplace (at any time), then reasonable notice will depend upon the circumstances in any given case and on what the employer and HSR jointly consider is reasonable. In any case, WorkSafe considers it should be within 24 hours.

Reasonable time – reasonable time will vary dependent upon the circumstances, the issue in the workplace and/or the immediacy of risk, but should not normally be longer than a period of one week for relatively minor matters and two to three weeks for more complex concerns. For example:

- if there is no agreement on the establishment of a DWG, then two weeks is considered reasonable from the time negotiations commence to reaching an agreement; or
- if a health and safety issue arises in the workplace and is not resolved in accordance with the relevant agreed procedure(s), or if there is no such procedure the relevant procedure prescribed by the regulations, the reasonable time would be limited to a period that ensures the prevention of injury or further injury, illness or incident.

Reliable access – that employees have both direct contact (face-to-face) and indirect contact (via email or phone) to an HSR in order to raise any concerns regarding their health and safety, and that they can readily be consulted by the HSR in relation to health and safety matters in the workplace.

Self-employed person – a person, other than an employer, who works for gain or reward other than under a contract of employment or training.

Sufficient knowledge of OHS – is determined by a person's capacity and ability to:

- apply health and safety legislation having been given an understanding of the legislative framework for workplace health and safety in Victoria and the application of its elements;
- identify hazards, assess risks and contribute to the design of risk controls in the workplace. (Whilst WorkSafe acknowledges that this skill can only be developed incrementally, based on experience, all HSRs will be provided with information on any relevant standards and codes that may relate to specific risk control requirements.);
- participate effectively in the investigation of injuries, illnesses and incidents and contribute constructively to these processes when they are undertaken by the employer; and
- communicate effectively on health and safety issues with a range of colleagues, employer representatives and external specialists, including inspectors.

The definition of the standard for which 'sufficient knowledge' applies is, at best, subjective. But for the purposes above, WorkSafe considers that the person is deemed to possess 'sufficient knowledge' if they:

- have attended an approved initial course of training for HSRs and their deputies; or
- is the holder of an entry permit pursuant to Part 8 of the OHS Act (an authorised representative of a registered employee organisation who has therefore completed a course of training approved by WorkSafe and has been issued an entry permit by the Magistrates' Court).

Sufficiently competent – the employer representative has an understanding of the role and powers of HSRs, how the OHS Act and regulations apply to her/his workplace and is knowledgeable in relation to the operations of the workplace for which the employer representative has responsibility.

Time allowed for HSRs to perform their role – HSRs must have ready access to the employer (or their representative) and the employees of the DWG to discuss OHS matters as they arise. This time will vary between workplaces and across situations (see page 33 for more details).

Workplace – a place, whether or not in a building or structure, where employees or self-employed persons work.

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FURTHER INFORMATION

ACTS AND REGULATIONS

- *Occupational Health and Safety Act 2004*
- *Occupational Health and Safety (Issue Resolution) Regulations 1999*

OHS Acts and regulations are available from Information Victoria on 1300 366 356 or can be ordered online at www.bookshop.vic.gov.au.

Legislation may be viewed on the Parliament of Victoria website at www.dms.dpc.vic.gov.au by clicking on 'Victorian Law Today' and scrolling down to the 'Search' window.

More information on OHS legislation can be found on the Victorian Trades Hall Council's website for HSRs and workers, funded by WorkSafe at www.ohsrep.org.au.

WORKSAFE VICTORIA

WorkSafe Victoria offers a complete range of OHS services including: emergency response, advice, information and education, inspections and audits, licensing and certification, publications, and online guidance.

WorkSafe Victoria publications can be downloaded from the WorkSafe Victoria website at www.worksafe.vic.gov.au