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Comcare

OHS workplace consultative arrangements

A Guide to Commonwealth legislative provisions

OHS workplace consultative arrangements - A guide to Commonwealth legislative provisions ●

Health and Safety Representatives Handbook ○

Safety at Work - Your Responsibilities as an Employer ○

Health and Safety Management Arrangements - A guide to developing HSMAs ○

Participating in Effective Health and Safety Committees ○

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Introduction to the guide

This guide provides information on workplace consultative arrangements under the *Occupational Health and Safety Act 1991* (the Act). Employers can use this as a guide to developing their health and safety management arrangements (HSMAs) and setting up their consultative and representational structures, including designated work groups (DWGs), health and safety representatives (HSRs) and health and safety committees (HSCs).

The guide is focused on the legislative provisions. It can be utilised in conjunction with other guides which provide practical advice on implementing the legislative provisions at the workplace. These guides are often targeted to specific groups eg: *Health and Safety Representatives Handbook – A guide for health and safety representatives in the Commonwealth jurisdiction*. The key guides are listed on the front cover of this publication.

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Definitions

'Association' means:

- an association of employees, a principal purpose of which is the protection and promotion of employee's interests in matters concerning their employment.

'Employee representative' means:

- in relation to an employee, a registered organisation or an association of which:
 - the employee is a member; or
 - another employee in the DWG to which the employee belongs, is a member.

The employees who are members of the employee representative organisation or association must be qualified to be members of that organisation or association, by virtue of the work those employees do.

'Registered organisation' means:

- an organisation within the meaning of the *Workplace Relations Act 1996*; or
- a body that is declared by the regulations to be a registered organisation for the purposes of the Act.

Workplace safety consultative arrangements framework

One of the objectives of the Act is *"to foster a cooperative, consultative relationship between employers and employees on the health, safety and welfare of such employees at work"*. The Act emphasises consultation and cooperation between employers and employees in regard to OHS issues by requiring the establishment of a framework incorporating:

- health and safety management arrangements (HSMAs);
- designated work groups (DWGs);
- health and safety representatives (HSRs); and
- health and safety committees (HSCs).

The framework is summarised in the figure on page 18.

Health and safety management arrangements

Employers have a general duty of care to their employees at work, as well as to contractors and third parties in certain circumstances.

To discharge this duty of care, employers must develop written health and safety management arrangements (HSMAs) in consultation with their employees. Employees can be represented by another employee, or by an employee representative.

The amendments to the Act that commenced on 15 March 2007 require all employers covered by the Act to establish health and safety management arrangements (HSMAs) by 15 September 2008.

Sections 16, 16A and 16B of the Act outline the provisions in relation to HSMAs.

Contents of HSMAs

HSMAs concern the management of OHS in an organisation. They can be tailored to individual workplaces to provide a flexible and efficient way of providing arrangements to manage health and safety risks.

HSMAs must:

- enable effective co-operation between an employer and their employees in promoting and developing measures to ensure the health, safety and welfare of employees at work;
- provide for how health and safety committees (HSCs) are constituted and operate (where an employer is required to have HSCs);
- provide adequate mechanisms for:
 - informing employees about the arrangements;
 - reviewing the effectiveness of the arrangements; and
 - varying the arrangements in consultation with employees; and
- provide a dispute resolution mechanism to deal with disputes that may arise in the course of consultations under the Act (other than those concerning DWGs).

HSMAs may include a range of other arrangements, as determined by the needs of the organisation. There is no limit to the matters that can be covered by HSMAs. The HSMAs can be tailored to the needs of the organisation, reflecting the particular circumstances of the organisation, such as hazard profile, organisation culture and employee profile.

The Act provides some guidance on other matters that HSMAs may include (but are not limited to):

- a written OHS policy;
- risk management arrangements;
- the making of agreements between the employer, their employees, and their employee representatives regarding:
 - continuing consultation on OHS matters; or
 - other matters as agreed between the parties; and
- training in relation to OHS.

When establishing or varying HSMAs, employers must take into account advice provided by the Safety, Rehabilitation and Compensation Commission (the Commission). Comcare may provide information on these matters on behalf of the Commission.

Employee representation

During consultations with the employer on establishing or varying HSMAs, employees may choose to be represented by another employee, or by an employee representative.

Electing to be represented in consultations does not exclude the employee from being involved in those consultations themselves.

If an employee chooses to be represented by an employee representative in HSMA consultations, and wants to remain anonymous, the employee representative can apply to the CEO of Comcare for a certificate (see below).

Employee representatives are able to represent employees in consultations without a certificate.

Certificate of employee representation

The CEO of Comcare may issue a certificate allowing an employee representative to represent an employee in HSMA consultations, if the CEO is satisfied on application by the employee representative that the employee has requested:

- representation by the employee representative; and
- that their identity not be revealed.

The application for a CEO certificate must be in 'the prescribed form'. This form is provided for in the Occupational Health and Safety (Safety Arrangements) Regulations 1991 (the Regulations) and is available on the Comcare website: www.comcare.gov.au

The employee representation certificate issued by Comcare will not reveal the identity of the employee. However, it will identify the:

- employee representative;
- employer; and
- proposed consultations.

An employee representative in relation to whom a certificate has been issued must not reveal the identity of the employee(s) he/she is representing.

The certificate will cease to have effect at the earlier of:

- the time when all of the employees covered by the certificate have requested that the certificate cease to have effect; or
- twelve months after the certificate was issued.

Designated work groups

Designated work groups (DWGs) are groups of employees of the same employer who can be represented by health and safety representatives in relation to health and safety matters affecting employees at work. Where reasonably practicable DWGs should be organised in such a way that allows all employees in an organisation to be a member of a DWG. All the employees of an organisation can be in one DWG. Section 24 of the Act outlines the provisions concerning DWGs.

Requesting establishment or variation of DWGs

An employee or an employee representative (if requested to do so by an employee), may request their employer to establish a new DWG, or vary an existing DWG.

Within fourteen days of receiving such a request from either an employee or an employee representative, the employer must enter into consultations with the employees, or the employee representative (where an employee requests to be represented in these consultations).

If an employer believes that a DWG should be varied, the employer may enter into consultations with the relevant HSR and an employee representative (where an employee requests that they be consulted about a variation).

Note that these consultations are part of the broader consultations regarding the development of HSMAs, however they are not sufficient on their own to be considered adequate consultation for the HSMAs.

Consultation – considerations

Consultations on the establishment or variation of existing DWGs must be principally directed at how employees are grouped. This should enable the employee's OHS interests to be represented and safeguarded in the best and most convenient manner. It should also take into account the need for health and safety representatives to be accessible to the employees they represent. To achieve this, consultations must have regard to the:

- number of employees;
- nature of the work performed by the employees;
- numbers and groupings of employees who perform the same or similar work;
- workplaces, and the areas within workplaces, where each type of work is performed;
- nature of the risks to health and safety at the workplaces; and
- overtime or shift work arrangements, if any, at the workplaces.

If, during the consultations on establishing or varying DWGs, there is disagreement between the parties on the manner of establishing or varying the DWGs then any of the parties may refer the matter to the reviewing authority (the Australian Industrial Relations Commission). The consultation must then be completed in accordance with the resolution of the matter by the reviewing authority.

Establishing/varying a DWG

Fourteen days after consultations are completed, the employer must establish or vary the DWG(s) in line with the outcomes of the consultations, and notify its employees.

DWG lists

Employers are required to prepare and keep up to date written lists of all DWGs which must describe the categories of employees in each DWG. These lists need to be available for inspection by Comcare and the employees at all reasonable times.

Health and safety representatives and deputy health and safety representatives

Health and safety representatives (HSRs) represent the OHS interests of employees in the DWGs. HSRs perform an important role in the Commonwealth jurisdiction in facilitating communication/consultation between employers and employees. Sections 25 – 33 of the Act outline the key provisions of relevance to the operation of HSRs. There are also some powers provided for elsewhere in the Act, as indicated below.

Deputy HSRs (DHSRs) can also be selected for DWGs, although a DHSR is optional. DHSRs are useful for ensuring that the role of the HSR is performed in the HSRs absence. Most, but not all, provisions relating to HSRs apply to DHSRs. In the following sections, where provisions relate to the DHSR, this is indicated.

Role and powers

The powers of HSRs are provided for by sections 28, 29, 37, 48 and 77 of the Act. The powers of the HSR only apply to the DWG which they represent. The DHSR has the same powers as the HSR, when the HSR is unable to exercise these powers due to absence or some other reason.

HSRs have broad powers under the legislation to promote the health and safety at work of employees in the DWG. HSRs can:

- inspect the workplace of members of the DWG if;

- there has been a recent accident or dangerous occurrence;
- there is an immediate threat of an accident or dangerous occurrence; or
- the HSR has given the employer reasonable notice of the inspection;
- make a request to an investigator, to Comcare, or to the Commission, that an investigation be conducted at the workplace (by contacting the relevant Comcare state/territory office);
- accompany an investigator during an investigation at the workplace;
- represent the members of the DWG in health and safety consultations with the employer if there is no HSC;
- examine the records of the HSC;
- investigate employee health and safety complaints;
- with the consent of the employee, attend any interview concerning health and safety at work between the employee and an investigator or the employer;
- be assisted by a consultant at a workplace or provide a consultant with information, provided the employer or Commission has agreed in writing to the provision of that assistance or information. It should be noted that an employer is not liable for expenses or remuneration incurred in connection with the consultant's activities;
- when being assisted by a consultant, request consent from an employee that the consultant be present at an interview with the HSR, between the employee and an investigator or the employer (or a person representing the employer).

- access employer’s information relating to any health and safety risk to any employee at any workplace under the employer’s control. It should be noted that an employer can claim legal professional privilege on health and safety information they have. A HSR cannot gain access to confidential information or information protected by legal professional privilege;
- issue a provisional improvement notice (PIN);
- request Comcare, or an investigator, to investigate a matter that is the subject of a PIN if the notice has not been complied with within the specified period and an investigation has not been requested by the employer;
- initiate emergency stop-work procedures where there is an immediate threat to the health and safety of employees and the supervisor is unavailable;
- request Comcare to conduct an investigation if the HSR cannot agree with the supervisor on an appropriate course of action to remove an immediate threat to the health and safety of employees performing work;
- appeal to the Australian Industrial Relations Commission (AIRC) against an investigator’s decision to vary or cancel the PIN; and
- ask Comcare to institute proceedings for offences against the legislation where proceedings have not been commenced within six months of the alleged breach of the legislation.

Note that when an investigator enters a workplace, they must take all reasonably practicable steps to notify the relevant HSR.

The legislation does not impose any obligations on HSRs to exercise any of these powers. HSRs are not liable under civil proceedings for exercising or not exercising any of the powers outlined in the legislation.

Refer to the *Health and Safety Representatives Handbook (OHS 4)* for more information on how a HSR can fulfil their role.

Selection/election of HSRs and DHSRs

There can be one HSR and one DHSR for each DWG. Only employees in the DWG who are not disqualified under s.32 of the Act are eligible to be HSRs or DHSRs. The Act provides a process for selecting a HSR that must be followed. However, the HSR position may not be filled if there are no nominations for the position.

If there is a HSR vacancy, the employer must notify the employees in the relevant DWG in writing.

If all the employees in a DWG unanimously agree, a HSR can be selected by the DWG. The HSR must inform their employer in writing as soon as practicable after the selection.

If there is a vacancy for a HSR in a DWG and a HSR has not been selected unanimously by the employees within a reasonable time, the employer must invite nominations from all employees in the DWG. If the position is vacant for more than six months and nominations have not been sought, the Commission may direct the employer, in writing, to call for nominations.

If there is only one nomination received, then that person is the HSR.

If there is more than one eligible candidate nominated at the end of the nomination period, the employer must conduct, or arrange for the conduct of, an election at the employer's expense. All employees within the DWG are entitled to vote in the election process.

An election for the position of HSR must be conducted in accordance with the Regulations if either 100 employees in a DWG or a majority of employees normally in the DWG (whichever is less) requests it. Part 3 of the Regulations provides for:

- returning officers;
- ballots;
- the count; and
- results of elections.

The Commission is also able to issue directions about the conduct of HSR elections which employers must follow.

The process outlined above for the selection/election of HSRs is the same as for DHSRs with the following exceptions:

- there is no requirement to advise the employees of a vacancy for a DHSR;
- there is no restriction on the timeframe for an employer to call for nominations when there is a vacancy for a DHSR and there has been no selection of the DHSR under Section 25(3)(a);
- the Commission is unable to direct the employer to call for nominations for a DHSR if the position has been vacant for more than six months and no selection has been made under Section 25(3)(a); and
- there is no provision concerning the Commission issuing directions about the conduct of elections for DHSRs.

After a HSR is selected or elected, the employer must, within a reasonable time, notify employees of the DWG in writing of the name of the new HSR.

Employers must prepare and keep up to date a written list of all HSRs and make this list available for investigators and employees.

Term of office/resignation

The term of office of a HSR and deputy HSR is as specified in the HSMAs. If it is not specified in the HSMAs, it is two years by default.

Both the HSR and deputy HSR may be reselected for a further term of office. A person ceases to be a HSR or deputy HSR if the term of office expires or the person:

- resigns by notice in writing as the representative or deputy; or
- ceases to be an employee in the DWG; or
- is disqualified under Section 32 of the Act; or
- the DWG is varied under section 24(6) and the variation results in a change to the membership of the group.

Where the HSR resigns they must notify the employees of the DWG they were representing.

Casual vacancies

If a HSR ceases to hold office before the end of their term (the retiring HSR), then the person selected to replace them will hold office for either:

- the remainder of the retiring HSRs term, where that term had more than six months to run; or
- the remainder of that term plus the next term of office, where the retiring HSRs term had less than six months to run.

Disqualification

Employees may be disqualified as HSRs or DHSRs on application to the Commission (under s.32 of the Act). Applications to have a HSR or DHSR disqualified can be made to the Commission by the employer of the employees in the DWG, or by an employee representative (if requested to do so by an employee in the DWG).

HSRs can be disqualified on the grounds that, whilst undertaking the role of the HSR, they:

- acted with the intention of causing harm to the employer or an employer's undertaking;
- acted unreasonably or capriciously; or
- intentionally used or disclosed information acquired from the employer in a way that is not connected with their role as HSR.

When considering an application by an employer, the Commission may disqualify the HSR from being a HSR for up to five years and will take into consideration:

- the harm, if any to the employer or their undertaking caused by the HSRs action;
- the past record of the HSR;

- the effect (if any) on the public interest of the action of the HSR; and
- any other matters which the Commission thinks relevant.

Training for HSRs

HSRs must receive training through a HSR course which has been accredited by the Commission. The employer must permit HSRs to take time off work, without loss of remuneration or other entitlements, to undertake the HSR training. There are no provisions in the Act for training of DHSRs. However, an organisation's HSMAs may provide for such training and if the DHSR is likely to be exercising the powers of the HSR, it may be desirable to ensure they have received training.

Employer duties towards HSRs

Employers have certain duties towards HSRs to allow them to perform their function effectively. These include consulting the HSR, when requested by the HSR:

- on the implementation of changes that may affect the health and safety at work of employees; and
- concerning the development, implementation and review of measures to ensure the health and safety at work of employees.

Employers should also permit the HSR in their DWG to:

- take paid time off work to undertake an accredited HSR training course;
- undertake workplace inspections;
- accompany an investigator during an investigation at the workplace;

- be present at an interview about the safety of employees between an employee and the employer or an investigator; and
- take necessary paid time off work to exercise their powers as a HSR.

The employer must provide the HSR with adequate resources to perform their role. Employers must provide the HSR in their DWG with access to:

- available information about risks to the health and safety of employees (other than confidential information or if an employer claims legal professional privilege for that information); and
- facilities necessary to exercise their powers as a HSR.

The HSR Handbook provides additional guidance on what these requirements mean in practice.

Health and safety committees

Health and Safety Committees (HSCs) are committees comprised of both employer representatives and members representing employees. Employers must establish HSCs by written instrument.

Role and set-up

HSCs have the power to do all things which are necessary for the performance of their functions. The broad functions of HSCs are to assist employers with health and safety and facilitate cooperation between employer and employees regarding OHS.

Specific functions of the committee are to:

- help the employer to develop, implement, review and update measures to protect the health and safety of employees at work;
- facilitate cooperation between the employer and employees on OHS matters; and
- help the employer to distribute OHS information in appropriate languages.

HSCs operate and are constituted in the manner specified in an organisation's HSMAs. However, some matters are prescribed in the Act.

Regardless of the HSMAs, the number of members of a HSC representing the employer must not exceed the number of members selected by the employees to represent the employees' interests.

Employers must establish a HSC for their organisation when the number of employer's employees is normally not less than fifty.

Where a specific workplace normally has not less than fifty employees, an employer must also establish a HSC for that workplace when they are requested in writing to do so by either a HSR or the majority of employees within that workplace.

Employers may establish, in consultation with their employees or any other persons, other OHS committees or HSC sub-committees.

Duties of employers to committees

Employers have certain duties towards HSCs to enable them to function effectively. Employers have a responsibility to allow members of the committee adequate paid time off work to perform the functions of the committee.

Information which the employer has relating to risks to health and safety at any workplace under the employer's control or regarding plant/substances used at the workplace must be made available to the committee.

Exceptions to this are any information for which the employer claims legal professional privilege, or information of a confidential medical nature relating to an employee, unless the affected employee has given permission for the information to be given to the committee, or the information is provided in a form which prevents identification of the affected employee.

Consultation

Consultation is an important feature of workplace arrangements under the Act.

Employers are required to consult in relation to:

- the establishment or variation of HSMA's - with employees, who may choose to be represented by another employee or an employee representative;
- the establishment or variation of DWGs - with employees, who may choose to be represented by an employee representative;
- the variation of a DWG at the employer's initiative – the HSR of that DWG and an employee representative (if an employee asks for them to be consulted); and
- any changes which may affect the health and safety of employees in the workplace – with a HSR when requested.

Employers are required to make available to the HSC any information (subject to certain exceptions) relating to the risks of health and safety at any workplace under the employer's control.

HSMA's may also provide for agreements regarding ongoing consultation on OHS matters.

Employers need processes to ensure that adequate consultation takes place where it is required by legislation. Insufficient consultation may be a breach of the Act, and inadequate HSMA's, which may arise from insufficient consultation, may constitute a breach of the employer's duty of care.

The legislation does not stipulate how consultation should take place.

Consultation processes should be developed by the employer to best suit the needs of the particular workplace. For example, all employees may wish to be directly involved in consultation, but this may not be feasible in a large organisation. Agreement should be sought between relevant parties regarding how consultations should take place.

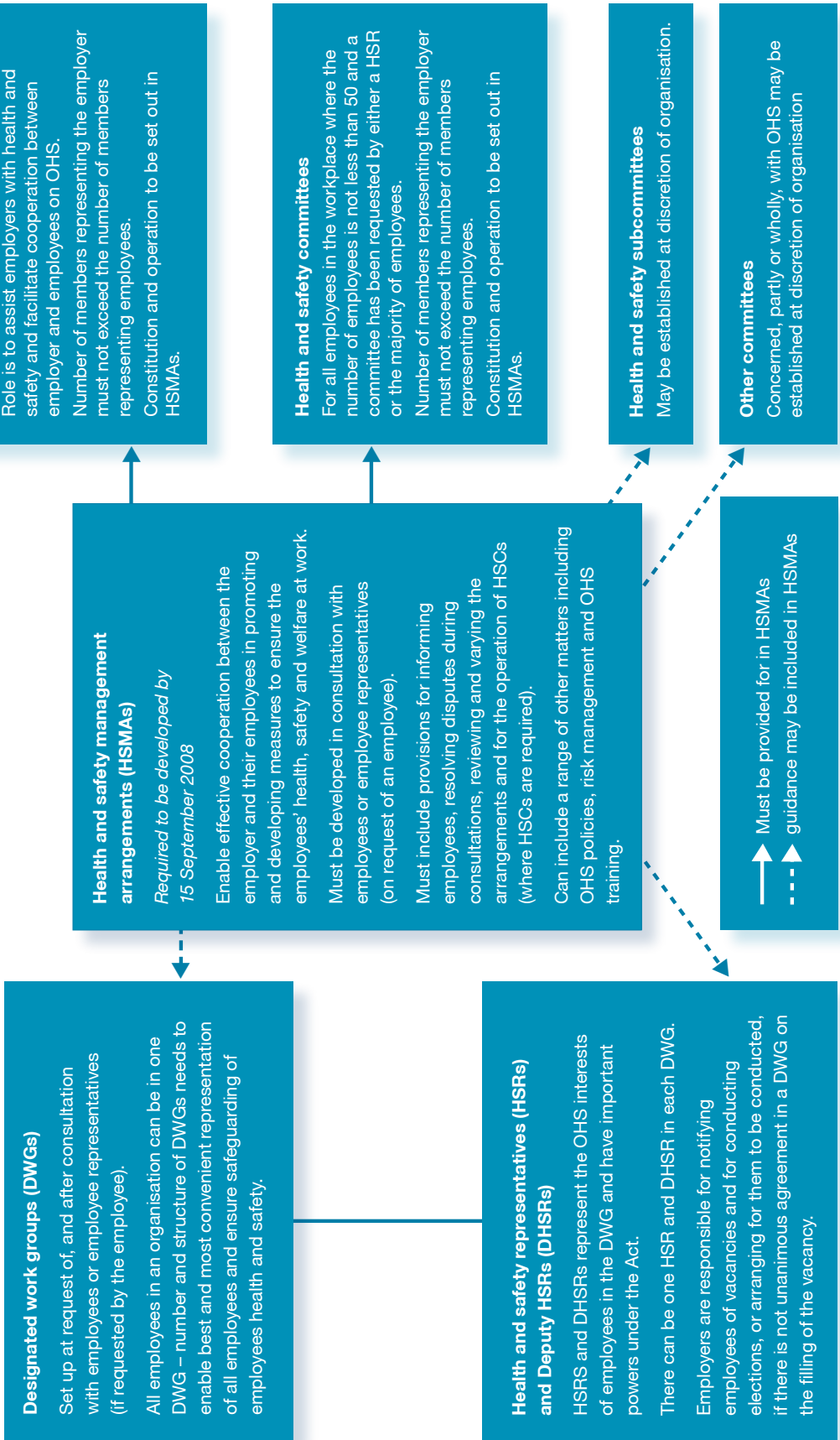
The Australian Industrial Relations Commission defines consultation as meaning to *“appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employee’s responses and give the employees’ views proper attention. Consultation requires more than a mere exchange of information. Employees must be contributing to the decision-making process.”*

(Australian Workers Union v Campbell Mushrooms Pty Ltd 1183/96 Print N4852 (1996)).

Transitional arrangements at 15 March 2007.

There are transitional arrangements to allow smooth transition of the amended requirements of the Act. Refer to the Comcare website for details: www.comcare.gov.au

FRAMEWORK FOR OHS WORKPLACE CONSULTATIVE ARRANGEMENTS



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