

# **Amendments to the Occupational Health and Safety (Commonwealth Employment) Act 1991**

*- Information on the OHS(CE) Amendment Act 2006*

## *Consultation on workplace OHS arrangements*

### **Purpose**

To advise employers, employees and employee representatives of amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the Act) providing for consultation on the development and variation of HSMAs.

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### **Overview**

Amendments to section 16 of the Act require the development of HSMAs [see information sheet *Health and safety management arrangements HSMAs*]. They also seek to enhance the consultation process between employers and employees on the development of HSMAs.

Employees can be represented by another employee, or by an employee representative.

The amendments do not eliminate the role of unions in the consultation process. They provide employees with a wider choice as to how they can be represented in consultations with their employer.

### **Requirements for consultation**

The amendments to paragraph 16(2)(d) require an employer to consult with its employees and their representatives in relation to HSMAs. Specifically consultation must take place in relation to:

- the development of HSMAs
- mechanisms for informing staff about the HSMAs
- variation of HSMAs
- review of HSMAs
- mechanisms for dealing with disputes that may arise in the course of consultations and
- the manner in which health and safety committees (where required under section 34) are established and operated.

An employer will be in breach of the Act if they do not consult with their employees on all of these issues. Similarly, if an employer does not conduct genuine consultations with their employees and the result is ineffective HSMAs, the employer will be in breach of their duty of care.

Amended subsection 16(3) provides guidance on the range of matters that the HSMAs may cover. This includes provisions for continuing consultation between an employer, their employees and their representatives.

New section 24A recognises consultation in relation to DWGs as being part of the consultations on the development of HSMAs. However such consultation is not, in itself, sufficient to comply with the requirement to consult on the development and variation of HSMAs.

New subsection 24(3) states that if an employer believes that a DWG should be varied that this may be done by entering into consultations with the relevant HSRs, and with an employee representative who has been nominated by an employee of that DWG.

## **Employee representation**

New subsection 16A(2) allows employees to choose to be represented during consultations on HSMAs. They may do so because they prefer someone else take the active role of participating in discussions and negotiations with the employer or because they wish to remain anonymous. Subsection 16A(2) specifies that representation may be by another employee or by an employee representative.

A new definition of ‘employee representative’ for this purpose has been inserted at subsection 5(1). It is either:

- a registered organisation of employees or
- an association of employees in which the employee qualifies for membership by virtue of his/her employment.

‘Registered organisation’ is defined at subsection 5(1) as:

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

‘Association’ is also defined at subsection 5(1) as an association of employees, a principal purpose of which is the protection and promotion of the employees’ interests in matters concerning their employment.

Where an employee chooses to be represented in consultations, new subsection 16A(3) specifically provides that this does not prevent him or her from being involved in those consultations.

The effect of these provisions is to broaden the range of representation available to employees during consultation and to remove the mandated role of unions. Unions may

still represent employees, but only where invited to do so by an employee or group of employees.

### **Anonymity during consultations**

A new provision has been inserted allowing an employee or group of employees to be represented by another party during consultations on HSMAs to remain anonymous. The process is detailed in section 16B [see information sheet on *Certification of employee representatives*].

### **Consultation process**

The amendments do not stipulate how consultation on HSMAs should be undertaken. However, the purpose of the amendments is to enable an employer and its employees to undertake consultation in a way that best suits the needs of the workplace. For example, all employees may wish to be directly involved in consultations but this may not be feasible in a large organisation. Agreement will need to be reached about the form the consultation process will take.

Employers are required to consult about the provision of adequate mechanisms to inform employees about the HSMAs. This could be interpreted as requiring an employer to provide information to its employees and their representatives both during development of the HSMAs and about the agreed HSMAs:

- in a manner that is easily understood and readily accessible
- within a reasonable timeframe so that employee representatives can consult with employees and obtain their views
- to enable employee suggestions to be considered.

HSMAs should facilitate employee discussion of any concerns about the consultative processes, either directly with supervisors or managers or through employee representatives or health and safety representatives. Employee input and participation improves decision making about health and safety matters. This view of the importance of the role of employee consultation has been confirmed by the Australian Industrial Relations Commission:

*Consultation means to appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employees' 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 N4825 (1996))*

If employees are unhappy about the adequacy of consultations with their employer they can seek advice from Comcare to help resolve matters. An employees' health and safety representative can also request Comcare to investigate the matter.

## **Compliance**

Amendments to section 41 now provide Comcare, in addition to the Safety, Rehabilitation and Compensation Commission, with the power to conduct an investigation at any time into the OHS practices and policies of employers. One of the issues that may be investigated is an employer's compliance with the requirement to develop HSMA's in consultation with its employees and their representatives.

Following such an investigation, a copy of the report will be provided to the employer containing recommendations for improvement. Subsection 53(4) requires employers to respond to the recommendations and to provide an action plan, including timeframes, for implementing the recommendations.

## **Further Information**

2006 Amendments Information Sheet Series:

- Health and safety management arrangements (HSMA's)
- Certification of employee representatives
- Operation of workplace consultative arrangements
- Administrative and technical amendments

## **References**

*Occupational Health and Safety (Commonwealth Employment) Act 1991*

*Occupational Health and Safety (Commonwealth Employment) Regulations 1994*

## **Contacts**

For further information contact:

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