

MODEL OPERATING PROCEDURE

Dealing with requests for assistance relating to determination of workgroups

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1. DEFINITIONS

Assist	Means the inspector provides support, help and aid to the parties to encourage them to reach agreement.
Decide	Means the inspector makes a decision after consideration of the issues in dispute.
HSR	Means a valid and duly elected health and safety representative or a deputy HSR
PCBU	Means person conducting a business or undertaking as described in s.5 of the <i>Work Health & Safety Act 2012 (SA)</i>
Person	Means either a natural person or an incorporated entity recognised by the law as having the rights to hold property, to enter into legal contracts, and to sue and be sued in his, her or its own name
Regulator	Means the Executive Director SafeWork SA
Other Regulators	Means the persons performing, in other Australian jurisdictions or for the Commonwealth, a role similar to that of the Regulator
SWSA	Means SafeWork SA
WHS Act	Means <i>Work Health & Safety Act 2012 (SA)</i>
WHS Regulations	Means <i>Work Health & Safety Regulations 2012 (SA)</i>

2. PURPOSE

To provide guidance to inspectors when dealing with unresolved issues in relation to the determination of work groups under *Part 5* of the *WHS Act* and *Division 1* of *Part 2.1* of *Chapter 2* of the *WHS Regulations*.

3. BACKGROUND

The *WHS Act* provides for inspectors to have two distinct roles in dealing with unresolved issues in relation to determining work groups:

1. **To decide the matter(s) in dispute.** This role applies to resolving matter(s) regarding determining (or varying) workgroups for a single business or undertaking (PCBU); and
2. **To assist the negotiations.** In these cases the inspector is not empowered by legislation to make a decision. This role applies to determining (or varying) workgroups for multiple businesses or undertakings.

Regulations 16 and 17 of the *Work Health and Safety Regulations 2012 (SA)* prescribe the matters that must be taken into account in negotiations for and determination of workgroups and variations to agreements. Inspectors will ensure any actions taken pursuant to this procedure are congruent with those regulatory requirements.

3.1 Determining (or varying) workgroups for a single PCBU

Sections 51 - 53 of the WHS Act set out the requirements for determining work groups for a person conducting a business or undertaking (PCBU). In summary:

- PCBUs must facilitate the determination of one or more work groups at one or more workplaces if a worker has asked the PCBU (under s.50 of the WHS Act) to facilitate the conduct of an election for one or more HSRs to represent them;
- work groups, including number, composition and the number of HSRs and deputy HSRs to be elected for each group, are to be determined by negotiation and agreement between the PCBU and the workers who will form the work groups or – if a worker requests - their representatives (e.g. union representatives); and
- variations to work groups can be negotiated at any time, and the outcome of negotiations and the agreed work groups (or agreed variations) must be notified to workers by the PCBU as soon as practicable.

Regulation 16 of the WHS Regulations provides that negotiations for and determination of work groups, and variations of work groups, must be directed at ensuring that the workers are grouped in a way that:

- (a) most effectively and conveniently enables the interests of the workers in relation to work health and safety to be represented; and
- (b) has regard to the need for a health and safety representative for the work group to be readily accessible to each worker in the work group.

Regulation 17 of the WHS Regulations outlines matters that must be taken into consideration during negotiations (please refer to the Guidance section at the back of this procedure for more information).

If negotiations fail, any person who is a party to the negotiations may make a request to the regulator to appoint an inspector to make decisions [s.54(1)]. Section 54(3) of the WHS Act sets out when the negotiations are considered to have failed:

- where the PCBU did not take all reasonable steps to commence negotiations with the PCBU's workers within **14 days** of the request from workers under s.50 of the WHS Act, or within **14 days** after a party to the agreement requests the variation of the current work groups agreement: or
- where agreement cannot be reached on a matter relating to the determination of a work group or the variation of an agreement concerning a work group within a reasonable time after negotiations commenced.

The role of the inspector is to make a decision. Section 54(2) of the WHS Act provides that an inspector in this situation can decide:

- any of the matters referred to in s.52(3)* having regard to r.16 and r.17; or
- any matters the subject of the proposed variation; or
- that workgroups (or a variation to the current workgroups) should not be determined.

*The matters referred to in s.52(3) of the WHS Act are:

- (a) *the number and composition of work groups to be represented by health and safety representatives; and*
- (b) *the number of health and safety representatives and deputy health and safety representatives (if any) to be elected; and*
- (c) *the workplace or workplaces to which the work groups will apply.*

Section 54(4) of the WHS Act provides that an inspector's decision regarding work groups is taken to be an agreement between the parties under s.52.

3.2 Internal Review

Decisions made by an inspector under s.54(2) of the WHS Act - decision following failure to commence negotiations - are reviewable decisions under s.223.

Regulators' policy

Inspectors will advise a person affected by a reviewable decision of their right to seek a review of the inspector's decision and how they may make such application

- See MOP SAFE 11/0638 Reviewable Decisions

3.3 Determining (or varying) workgroups for multiple PCBU's

Sections 55 - 59 of the WHS Act set out the requirements for determining work groups for workers carrying out work for two or more persons conducting businesses or undertakings at one or more workplaces. Nothing in these sections prevents a PCBU and that PCBU's workers from determining workgroups under ss51 – 54 or affects any work groups that have already been determined under those sections.

Sections 55 – 59 of the WHS Act allow for workplaces, such as construction workplaces, to form workgroups across several PCBU's.

If agreement cannot be reached on a matter relating to the determination of a work group, or the variation of an agreement, within a reasonable time after negotiations have commenced, any party to the negotiations may ask the regulator to appoint an inspector to assist negotiations [s.56(3)].

Regulator's policy

An inspector appointed by the regulator under s56(3) to assist the parties with their negotiations, will use their persuasive skills to assist the parties resolve the issue in one of two ways:

1. Agreement is met; or
2. One or more of the parties withdraws from the negotiations pursuant to s58 of the Act.

In assisting negotiations, inspectors should also have regard to any other regulators who may also have jurisdiction due to the nature of PCBUs involved. For example, in a state or territory jurisdiction, negotiations for multiple businesses/undertakings work groups may also involve businesses or undertakings and their workers that are subject to the Commonwealth WHS Act.

If agreement cannot be reached between all parties, there is nothing stopping those PCBUs and their workers who wish to determine workgroups for multiple businesses or undertakings from doing so amongst the group who are in agreement.

Those PCBUs who do not wish to form workgroups for multiple businesses or undertakings may negotiate with their own workers to determine single PCBU workgroups.

4. PROCEDURE

Requests for inspector's assistance may be received via:

- telephone; or
- email or other written correspondence; or
- conversations; or
- personal attendance by a workplace party at an SWSA office.

Responsibility	Description
Help Centre	<ul style="list-style-type: none"> • Facilitate creation of InfoNET file if not already in place • Forward the notification to the relevant line manager
Line Manager	<p>Appoint an inspector who shall commence relevant inquiries:</p> <ul style="list-style-type: none"> • where the workplace is within the metropolitan area – within 1 business day • where the workplace is outside the metropolitan area – within 2 business days
Line Manager	<p>Request</p> <p>You receive a request due to a failure of negotiations between the relevant parties for an inspector to decide the matters for single PCBU work groups or assist negotiations for multiple PCBU work groups.</p> <p>Upon receipt of a request allocate the request to an appropriate inspector to make relevant enquiries.</p>
Inspector	<p>Assessment</p> <p>Discuss the matter with SWSA Principal Liaison Officer(s), and ascertain their availability to assist you with your inquiries as necessary.</p> <p>Within the timeframes specified above, contact the relevant parties by telephone, other means of communication, or by attending the workplace.</p> <p>Contact the person making the request within the timeframe specified in your jurisdiction's local service delivery standards.</p> <p>During this first contact:</p> <ul style="list-style-type: none"> • If the request has been made by a person authorised to represent a worker, or a group of workers, seek verbal or written confirmation of the authorisation • Identify all relevant parties • Obtain preliminary information about the issue(s) in dispute. <p>Contact other relevant parties including the PCBU(s) [or their management representative(s)] involved and clarify the issue(s) in contention.</p> <p>Consider the issues in accordance with box A below (if the matter relates to a single PCBU) or box B below (if the matter relates to multiple PCBUs).</p>

<p>Inspector</p>	<p>A: Failure of negotiations to determine workgroups – single PCBU</p> <p>Your role in this matter is to decide workgroups on behalf of the parties. You can only make a decision on matters identified in s.54(2) having regard to r.16 and r17.</p> <p>In this circumstance you should:</p> <ul style="list-style-type: none"> • make the inquiries necessary to identify the specific matter(s) in dispute; • check the matter(s) are matter(s) that an inspector is empowered to decide upon – s.54(2); • check that negotiations have failed as per s.54(3); • find out why the matters are in dispute and why agreement was not able to be achieved; • make inquiries as necessary to enable you to form an opinion on the matter; and • discuss your opinion with the parties. <p>If possible help the parties reach consensus.</p> <p>If consensus is unable to be reached:</p> <ul style="list-style-type: none"> • decide the matter; or • if you are unable to make a decision due to insufficient information, advise the parties of the actions you intend to carry out to address the deficiency and when you anticipate being able to make a decision. <p>Outcomes</p> <ol style="list-style-type: none"> 1. The parties reach agreement between themselves. In this case, confirm with the person who requested the attendance of the inspector that the issue(s) has been resolved. (This may mean agreement in principle has been reached even though fine details are still to be negotiated); or 2. The parties fail to reach agreement between them. You make a decision in relation to the determination of workgroups for a single business or undertaking. In this case, advise the parties of this decision and ensure the parties understand this decision is taken to be an agreement under s.52 of the WHS Act.
<p>Inspector</p>	<p>B: Failure of work group negotiations – multiple PCBU's</p> <p>Your role in this matter is to assist the negotiations between the parties to help them reach agreement on the determination of workgroups for multiple businesses.</p> <p>In this circumstance you should:</p> <ol style="list-style-type: none"> 1. advise the parties that your role is to assist the negotiations; 2. make the inquiries necessary to identify the specific matter(s) in dispute; 3. find out why this issue(s) is a concern for some of the parties; 4. identify any common ground that could be used to help the parties reach agreement; and 5. provide your opinion regarding reasonable solution(s), which may include: <ul style="list-style-type: none"> • advice that if the parties cannot reach agreement, workgroups for all the multiple businesses or undertakings cannot be established; or • as individual PCBUs, each PCBU, through negotiation with the PCBU's workers, can determine their own workgroups; or

	<ul style="list-style-type: none"> • one or more of the parties can withdraw from the negotiations pursuant to s58 of the Act; or • any subset of PCBUs in agreement with the formation of workgroups for multiple businesses or undertakings can determine workgroups for this subset.
Inspector	<p>Outcomes regarding negotiations – multiple PCBU's</p> <ol style="list-style-type: none"> 1. The parties, with your assistance, reach agreement between themselves. In this case, confirm with the person who requested the attendance of the inspector that the issue(s) has been resolved. (This may mean agreement in principle has been reached even though fine details are still to be negotiated); or 2. The parties fail to reach agreement. In this case, remind the parties: <ul style="list-style-type: none"> • the inspector's role is to assist the parties resolve the matter but not to make a decision on their behalf; and • if the parties cannot reach agreement, workgroups for all the multiple businesses or undertakings cannot be established; or • as individual PCBUs, each PCBU, through negotiation with the PCBU's workers, can determine their own workgroups; or • one or more of the parties can withdraw from the negotiations pursuant to s58 of the Act; or • any subset of PCBUs in agreement with the formation of workgroups for multiple businesses or undertakings can determine workgroups for this subset.
Inspector	<p>Communicate your decision</p> <p>Communicate the outcome of your intervention in writing to the parties. If you have attended the workplace, this should be by way of an Inspection Report.</p>
Inspector	<p>Review of Decisions</p> <p>If you have made a decision in relation to determining workgroups for a single business or undertaking, advise the parties they may seek review of your decision (refer to Item 1 of s.223 of the WHS Act) and how they can go about it.</p> <p>No review is available in relation to your role in assisting negotiations for workgroups for multiple businesses or undertakings, as you have no power to make a decision in this situation.</p> <ul style="list-style-type: none"> • See MOP SAFE 11/0638 Reviewable Decisions
Inspector	<p>Communicate the outcome of the negotiations</p> <p>Record the outcome of negotiations on an inspection report.</p> <p>Where workgroups are formed, remind the HSR and PCBU of the obligation to inform the workers about the workgroups, and to advise SWSA of the election of the HSR. Notification forms are available on www.safework.sa.gov.au or the SWSA Principal Liaison Officer(s) (Workplace Consultation).</p> <p>Ensure the reminder is recorded on the inspection report, and that a copy of the inspection report is left at the place for the HSR if the HSR is not available.</p>
Inspector	<p>File management</p> <p>Enclose copies of all information obtained and provided, the Inspection Report (or other written decision) and other file closure documents in the relevant InfoNET file.</p>

5. FURTHER INFORMATION

- Compliance & Enforcement Policy
- Principles of Operation
- Framework For a Common Approach to Inspection Work
- Other procedures as referenced in the body of this procedure

6. REVIEW

This procedure must be reviewed 2 years after the last issue date and must be immediately modified if practices and/or procedures change.

7. Guidance Note - Matters to be taken into account in negotiations

Division 1 of Part 2.1 of Chapter 2 of the WHS Regulations deals with work groups.

Regulation 17 provides that relevant matters be taken into account in the negotiations, determinations and variations of work groups, include the following:

- (a) the number of workers;
- (b) the views of workers in relation to the determination and variation of work groups;
- (c) the nature of each type of work carried out by the workers;
- (d) the number and grouping of workers who carry out the same or similar types of work;
- (e) the areas or places where each type of work is carried out;
- (f) the extent to which any worker must move from place to place while at work;
- (g) the diversity of workers and their work;
- (h) the nature of any hazards at the workplace or workplaces;
- (i) the nature of any risks to health and safety at the workplace or workplaces;
- (j) the nature of the engagement of each worker, for example as an employee or as a contractor;
- (k) the pattern of work carried out by workers, for example whether the work is full-time, part-time, casual or short-term;
- (l) the times at which work is carried out;
- (m) any arrangements at the workplace or workplaces relating to overtime or shift work.

Document Owner: Liaison Officer (Workplace Consultation) Help & Response Team

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