

WORKPLACE CONSULTATION

- NEED TO KNOW AND WHAT TO DO



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'Consultation' is a topical issue which is likely to gain increasing prominence in the realm of workplace health and safety and more generally in employment relations as the introduction of the harmonised legislation looms ever closer and transitional legislation is enacted across the nation. In order to satisfy legislative requirements, organisations must actively consult with their employees and be able to demonstrate this has occurred.

This article discusses the issue of workplace consultation in health and safety and introduces the concept in regards to workplace relations more broadly. It is intended to be a high level introduction to the concept of consultation and the reasoning behind it - as consultation may potentially be a complex area for some organisations there may be times when it is beneficial for external advice to be sought. Although the article is by no means exhaustive, it is intended to give a good outline of key requirements under the incoming *Model Work Health and Safety Act* which also align with requirements currently in force across the Country. It is noted that specific information pertaining to stakeholders (such as Health and Safety Representatives and Inspectors) is outside the scope of this article and will be broached at a later time.

WHY YOU SHOULD CONSULT WITH YOUR WORKFORCE

Aside from being required by law, consultation delivers many benefits through employee engagement which is integral to change management. This is because employee awareness of, and involvement in, decision-making regularly leads to:

- greater cooperation and collaboration leading to more productive workplaces
- the successful implementation of ideas and better and more informed decision making
- better attracting and retention of skilled and positive staff
- improved ability to cope with change across a workforce
- minimisation of employer/employee disputes and employee claims against their employer

(Fair Work Ombudsman, 2010)

Further benefits of consultation that are specific to health and safety include:

- Better employer awareness of hazards and health and safety issues affecting workers and subsequently improved management decisions
- Increased employee commitment to health and safety due to employees having a greater understanding of OHS decisions and ownership of consultation outcomes
- Improved openness, respect and trust between management and workers by developing an understanding of each others' view points
- Improved worker morale and productivity by the employer demonstrating genuine care for the welfare of staff
- Healthier working environments leading to increased productivity
- Improved opportunities for learning via sharing of information, concepts and ideas
- Reduced injury and disease rates leading to cost savings to the employer, workers and the wider community (University of Canberra, 2011)

It is notable that, aside from consultation provisions in health and safety legislation, all modern awards (which commenced operating on 1 January 2010) contain consultation provisions. In addition, the *Fair Work Act 2009* (FW Act) requires consultation provisions to be set out in all enterprise agreements, and employers must consult with employees in other situations - whether or not an award or enterprise agreement applies. (Fair Work Ombudsman, 2010)

EFFECTIVE VERSUS INEFFECTIVE CONSULTATION

For consultation to be add value and achieve desired outcomes, it is important to understand what characterises effective and ineffective consultation.

According to the table below, adapted from WorkCover New South Wales (n.d.), effective and ineffective consultation possess a number of characteristics:

	EFFECTIVE CONSULTATION	INEFFECTIVE CONSULTATION
Consultation timing	Early, prior to agenda and decision making	After agenda setting and decision making
Employer role	Genuine interest in and valuing of employees' ideas	No recognition of consultation benefits
Required Employer skills	Interpersonal, facilitative, listening	None
Employee role	Pro-active. Encourage employees to suggest ideas	Reactive. Employees have no role in improving OHS
Employee skills	Provision of training in communication skills and risk	No training provided to facilitate

	assessment	effective participation
Interaction style	Planned, genuine and collaborative	Directionless, tokenistic or sporadic
Approach toward each other	Trust, mutual respect	Mistrust, lack of respect for differing view points
Process	Open and receptive to employee participation	Invisible, barriers to employee participation
Information	Relevant information provided	Limited access to information
Communication	Opportunities for one-to-one communication with employees, clear and ongoing feedback	No direct communication with employees, no feedback
Outcomes	Outcomes result in improvements to the systems for managing safety	There is no improvement in how safety is managed

By adopting the characteristics of 'effective consultation' within an organisation, that organisation is well positioned to achieve positive consultation outcomes.

WHO IS A 'WORKER'?

Traditionally, organisations have held the view that they are required to consult with their own staff, including their full-time, part-time and casual workers. Where other workers such as contractors have been engaged to perform work, these workers may not have been recognised by established consultation procedures and consultation undertaken may therefore have neglected them.

At the current time there is a range in the type and flexibility of working arrangements. This is recognised by the Model Work Health and Safety Act - in particular s.7 which defines a worker (as follows) in order to facilitate appropriate consultation required to protect the health and safety of all workers:

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Meaning of *worker*

- (1) A person is a **worker** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
 - (a) an employee; or
 - (b) a contractor or subcontractor; or
 - (c) an employee of a contractor or subcontractor; or
 - (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
 - (e) an outworker; or
 - (f) an apprentice or trainee; or

- (g) a student gaining work experience; or
 - (h) a volunteer; or
 - (i) a person of a prescribed class.
- (2) For the purposes of this Act, a police officer is:
- (a) a worker; and
 - (b) at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer, but not otherwise.
- (3) The person conducting the business or undertaking is also a **worker** if the person is an individual who carries out work in that business or undertaking."

Essentially, the *Model Work Health and Safety Act* recognises the changed nature of many employment relationships and therefore defines the 'worker' to ensure that organisations are appropriately consulting with all workers.

WHEN SHOULD I CONSULT WITH WORKERS?

Under the *Work Health and Safety Act* (2011), consultation requirements for health and safety matters are set out in s.49 which states that consultation should occur:

- "(a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;
- (b) when making decisions about ways to eliminate or minimise those risks;
- (c) when making decisions about the adequacy of facilities for the welfare of workers;
- (d) when proposing changes that may affect the health or safety of workers;
- (e) when making decisions about the procedures for:
 - (i) consulting with workers; or
 - (ii) resolving work health or safety issues at the workplace; or
 - (iii) monitoring the health of workers; or
 - (iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or
 - (v) providing information and training for workers; or
- (f) when carrying out any other activity prescribed by the regulations for the purposes of this section."

Organisations also need to be aware that consultation requirements are not limited to health and safety, and are also set out in the *Fair Work Act* which indicates that consultation between an employer and its employees or their representatives must occur:

- when significant changes at the workplace are intended to be made by the employer
- when an employer intends to dismiss 15 or more employees at one time as a consequence of structural, economic, technological (or other similar) reasons
- when undertaking good faith bargaining in the context of enterprise agreement terms negotiations
- where flexible working conditions are requested by an employee in relation to their Carer's responsibilities under the National Employment Standards
- under provisions flexible working arrangement provisions specified in a relevant modern award
- when negotiating individual flexibility arrangements under an enterprise agreement.

(Fair Work Ombudsman, 2010)

HOW CONSULTATION SHOULD OCCUR GENERALLY

Generally, under the *Fair Work Act*, consultation with workers can occur via a number of channels including:

- establishment of committees involving the employer, employees and employee representatives
- the holding of regular staff meetings and providing regular communications with employees
- holding regular performance and training reviews
- providing regular written communications including newsletters, and
- encouraging employee feedback on business and administrative decisions.

(Fair Work Ombudsman, 2010)

Administrative structures, company policies, enterprise agreements or contracts of employment should set out how consultation should occur in the workplace. Demographic issues should also be taken into account - such as differences in culture and language - to ensure that everybody understands the consultation process. (Fair Work Ombudsman, 2010)

HOW CONSULTATION SHOULD OCCUR FOR HEALTH AND SAFETY

s.48 of the *Model Work Health and Safety Act* specifies in general terms how consultation should occur and states that this requires:

- the sharing of relevant information on a matter with workers
- giving workers reasonable opportunity to express their views and flag related work health and safety issues and contribute to the related decision-making process

- the organisation (including the person conducting the business or undertaking) considering worker views
- advising workers of consultation outcomes in a timely manner
- involving the health and safety representative in the consultation process where these representatives exist

This is not to say that consultation means that workers must approve a decision; simply that - so far as is reasonably practicable - they and their representatives must have input into a health and safety issue and related decisions and be advised of outcomes accordingly.

ABOUT HEALTH AND SAFETY COMMITTEES

S.75(1) of the Model Work Health and Safety Act relates to the establishment of health and safety committees and states that the person conducting a business or undertaking at a workplace must establish a health and safety committee for the business or undertaking or part of the business or undertaking:

- "(a) within 2 months after being requested to do so by:
- (i) a health and safety representative for a work group of workers carrying out work at that workplace; or
 - (ii) 5 or more workers at that workplace; or
- (b) if required by the regulations to do so, within the time prescribed by the regulations"

S.75(2) of the *Model Work Health and Safety Act* also advises that a person conducting a business or undertaking at a workplace may establish a health and safety committee for the workplace or part of the workplace on their own initiative.

Under the *Model Work Health and Safety Act*, Health and Safety Representatives (HSRs) should be elected upon the request of 1 or more workers (s.50); after which time determination of work groups should be facilitated in order to allow for worker representation by HSRs (s.51) and negotiations should commence regarding these work groups within 14 days (s.52).

In terms of the committee constitution, according to S.76 of the *Model Work Health and Safety Act* this should be:

- as agreed between workers and the person conducting the business or undertaking; includes HSRs who consent to being a member of the committee;
- where 2 or more HSRs exist at a workplace, those HSRs may choose 1 or more HSRs who may consent to being on the committee;
- that at least half of the committee members should be workers not nominated by the person conducting the business or undertaking
- the regulator may be asked by any party to appoint an inspector to decide the matter where agreement is not reached within a reasonable timeframe

- the appointed inspector may decide the health and safety committee constitution or whether one should not be established - and this is taken to be an agreement between the parties

As it currently stands, the consultation regulations are currently under review and are yet to be finalised. Whether this impacts on when and how committees should be set up are obviously yet to be seen and will become clear in the later part of this year.

OTHER CONSULTATION ARRANGEMENTS

For some organisations, a health and safety committee may not need to be established. Examples of when this is the case include:

- HSRs do not request a committee be established
- the consultation regulations do not require a committee to be established
- workers do not request the establishment of a committee
- the person conducting the business or undertaking and their workers and the HSRs agree on alternative means of consultation and associated procedures are agreed upon (s.47(2)) - however this consultation must not be inconsistent with s.48 which is discussed in the previous section 'How consultation should occur for health and safety'.

It is noted that not having a committee does not mean that consultation is not required and the duty to consult workers remains as stated in s.47(1) of the *Model Work Health and Safety Act*, that is:

"The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety."

CONCLUSION

Consultation holds an important place in workplaces and is protected by various legal instruments (and sizeable penalties apply for non-conformance). It is critical to risk management for both organisations and staff and is necessary to due diligence and duty of care. Beyond legislative compliance, when undertaken well consultation is an important vehicle for change management and its value is often underestimated. Through consultation opportunities may be identified, decision making is assisted and new ideas are supported to ensure they work effectively in practice (Fair Work Australia).

In undertaking consultation within your organisation key points to remember are:

1. Consultation is required under health and safety legislation as well as employee relations legislation
2. Consultation does not mean that agreement must be reached on all issues. Workers and their Representatives need to be meaningfully involved in the decision-making process and advised of associated outcomes

3. The Employer, Employees and their Representatives should actively participate in consultation in order for this to operate smoothly
4. Consultation processes should be established following consultation with, and agreement of, interested parties (in particular the Employer and Employees). These processes should be documented and available to all participants in the consultation process
5. Health and safety committees may need to be established although the opposite may also be the case (for example if other arrangements are agreed upon). It is important the organisations monitor this issue as requirements may change, such as on request of Worker Representatives or upon modifications to legislative and regulatory requirements
6. Employers must be proactive at looking specifically at the nature and demographics of their workforce and must consult with all workers regardless of their employment classification - this can be logistically challenging and external advice may need to be sought on how this should occur
7. Consultation is valuable when managed well and is important in facilitating change. Many benefits flow from consultation and commitment to consultation, particularly in a best practice manner, allow these benefits to flow to stakeholders

By following these pointers you should be well on the way to meeting consultation requirements. This allows for the mitigating of both individual and organisational risks; and more importantly, the prevention of accidents and workplace injury (the ultimate aim of all health and safety legislation) through the driving of increasingly proactive safety behaviours and management.

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