GENERAL GUIDANCE NOTES

CONSULTATION

These notes are general in nature, designed to bring to your attention matters that you may not have considered before and/or are outside of the scope of advice you requested from us. As such they provide a general overview of the relevant issues that may be applicable to your situation but do not constitute specific advice.

The purpose of the Guidance Notes is to provide you with an overview of the key steps and industrial relations risks that need to be managed for effective and compliant consultation process. They are provided as general information that you can then research and apply to your situation, or alternatively, use to determine if you need to seek specific advice on the matter.

WHAT IS "CONSULTATION"?

The word *consultation* can have different meanings for various situations. It has been a hotly-contested term in Australian industrial relations since at least the 1980s.

Various pieces of legislation contain different obligations for consultation on prescribed topics – either before a decision is made, or about the implementation of a decision once made by the employer.

These *Guidance Notes* provide an overview of the minimum requirements in various settings, to assist employers to plan their projects for minimum disruption.

Whatever the setting, *consultation* is not just a matter of *informing*. This has been neatly expressed by Fair Work Commissioner Smith as follows:

> In deciding whether or not to make the orders sought I have considered the importance of consultation. Consultation is not perfunctory advice on what is about to happen. This is common misconception. Consultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker.[1]

On the other hand, consultation does not mean *negotiation* or *agreement*. The employer is entitled to run its business as it sees fit, provided it acts lawfully. Extensive case law reinforces that provided good faith consultation occurs, an unpopular but lawful proposal can go ahead. A Fair Work Commission Full Bench has observed:

> It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.[2]

Why is it important to properly understand and implement the consultation process?

Effective consultation can be a way for the employer to discover unforeseen problems with its proposals and provide an avenue for constructive input from employees.

The obligation to consult is not universal. Not every management action requires it. However, where it is mandated, if the process does not provide a *bona fide* opportunity it will generally be ruled invalid by tribunals. This will usually result in delays when orders are issued to conduct a proper process. In some cases (especially redundancy-related terminations) it can render the entire process void and the action of the employer can be overturned.

[1] *CPSU v Vodafone Network Pty Ltd* AIRC PR911257 at para 25
[2] *Consultation clause in modern awards*, [2013] FWCFB 10165

Additionally, a breach of consultation obligations in legislation or awards and agreements could constitute a breach resulting in a pecuniary penalty (a fine).

Common consultation requirements, and what goes wrong for employers

Following is a summary of what kind of consultation obligations commonly apply. These are the minimum requirements in standard legislative or award provisions – your enterprise agreement might have more onerous obligations.

RESTRUCTURES AND OTHER MAJOR WORKPLACE CHANGES

The standard consultation provisions in all modern awards – and the model consultation clause for enterprise agreements in the *Fair Work Regulations 2009* – derived from the principles set in the landmark 1984 *Termination, Change and Redundancy Case*.

Under these clauses the employer must:

- as soon as practicable after it makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, give written notice of the changes to all employees who may be affected by them;
- provide all relevant information about the changes in writing;
- promptly discuss with affected employees and their representatives the changes, their likely effect on employees, and measures to avoid or reduce the adverse effects of the changes;
- recognise, provide information to and consult with any employee representatives; and
- promptly consider any matters raised by the employees or their representatives about the changes.

Employers are not required to disclose any confidential information if its disclosure would be contrary to the employer's interests. This is an objective test, not merely an employer's preference not to disclose.

"Significant effects" on employees usually include:

- termination of employment; or
- major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- loss of, or reduction in, job or promotion opportunities; or
- loss of, or reduction in, job tenure; or
- alteration of hours of work; or
- the need for employees to be retrained or transferred to other work or locations; or
- job restructuring.

An example from the *Clerks – Private Sector Award 2020* is included in these *Guidance Notes*, with commentary.

REDUNDANCY

Redundancies will clearly fall into several categories of significant effect described above, invoking the obligation to consult.

Section 385 of the *Fair Work Act 2009* (Cth) excludes an employee from unfair dismissal remedies if they were terminated for genuine redundancy. The criteria for *genuine redundancy* include that the employer has complied with any obligation in a modern award or enterprise agreement to consult about the redundancy.[3]

Disputes about technical compliance with consultation obligations on redundancies and restructures are common. Orders are often obtained for additional consultation or provision of more information, slowing the process down.

[3] *FW Act s 389*

The best defence against this is to prepare thoroughly and release all relevant information, and to conduct meetings proactively and promptly.

CHANGES TO REGULAR ROSTERS

The standard consultation provisions in all modern awards, and the model consultation clause for enterprise agreements include obligations to consult about changes to regular rosters or ordinary hours of work (other than for an employee whose working hours are irregular, sporadic or unpredictable).

For the consultation, the employer must:

(a) provide to the employees and representatives information about the proposed change (for example, information about the nature of the change and when it is to begin); and
(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.
(c) consider any views given under (b) before implementing the change.

Even where an enterprise agreement contains provisions which allow for changes to regular rosters or ordinary hours of work, consultation obligations may still apply.

WHS CONSULTATION

Each State and Territory within Australia has various requirements for employers to consult with employees and/or health and safety representatives about health and safety matters.

For example in South Australia, the specific provisions in its harmonised Work Health and Safety legislation require the person conducting a business or undertaking to:

> 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.[4]

This specifically requires that relevant information about the matter is shared with workers, and that workers be given a reasonable opportunity to express their views and to raise work health or safety issues to contribute to the decision-making process. The views of workers must be taken into account by the person conducting the business or undertaking and workers must be advised of the outcome of the consultation in a timely manner. Any health and safety representative must be involved in the consultation.

There is a wide range of circumstances in which this formal consultation is obligatory. These include when identifying hazards and assessing risks, making decisions about ways to eliminate or minimise them, proposing changes that may affect the health or safety of workers, monitoring worker health or workplace conditions, or providing WHS information and training. There are even requirements to consult about the mechanisms for consulting.

There are extensive resources available from the state and national regulatory bodies, for example on the consultation webpage from SafeWork SA.

Given workplace health and safety is regulated by each respective State and Territory, it is critical that employers refer to the relevant regulatory body to determine its obligations in respect of consultation in relation workplace health and safety.

What can be done if consultation is inadequate?

Safety regulators or safety tribunals can issue orders for consultation to be undertaken or redone if considered inadequate, and penalties can be imposed for failing to consult workers. Similarly, the dispute

[4] *Work Health and Safety Act 2012 (SA)*

powers under awards and enterprise agreements give the Fair Work Commission the ability to make orders about consultation. The courts can impose pecuniary penalties for breaching award or agreement consultation obligations.

So, at best the tribunals can slow the change process down considerably; at worst there will be a financial impact.

Enterprise Agreements

Enterprise agreements often contain more onerous consultation obligations than the minimum requirements in awards. Employers should be aware of these because they must be complied with. They could include significant limitation on an employer's right to take certain actions. It is best not to permit these to be included in the first place, but once they exist, they must be respected. In many cases, expert advice might be needed to interpret complex consultation provisions in the planning stages.

Disputes over the consultation obligations of enterprise agreements are common, particularly around workplace changes and restructures.

When consultation seems endless

From the employer's perspective, consultation processes can seem drawn out. Unions are accused of having the view that consultation does not end until they are content with the outcome. Fresh questions and demands for more information can seem to stall a genuine employer's efforts to make changes that it is lawfully allowed to make.

In fact, the process is objective and finite, provided the employer makes a genuine effort and meets the terms of the enterprise agreement or award.

In *Australian Nursing and Midwifery Federation v Barwon Health*, the union appealed a decision of Vice President Watson who had determined that consultation in good faith as required by clause 42 of the relevant enterprise agreement had occurred in respect to the employer's proposal to reduce the nursing hours in two of its aged care facilities. The case was complex and highly technical arguments were advanced at hearing and on appeal. The Full Bench summed up that the obligation is to comply in good faith with the requirements of the consultation clause, not to defend every subsequent matter raised:

> **[87]** We have already indicated that, in our view, the 9 October 2013 proposal was sufficiently detailed to meet the requirements of clause 42.3 of the Agreement. As such, we consider Barwon Health's provision of the 9 October 2013 proposal was sufficient to commence the up to one month period of consultation provided for in clause 42.3(b)(ii) of the Agreement, and met at least the initial requirements for the "consultation in good faith" provided for in clause 42.5 of the Agreement.
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> **[88]** Given the actions leading up to the 9 October 2013 proposal, the budgetary motivation behind it should have been well known to those affected. There was no requirement in clause 42 for the 9 October 2013 proposal to adequately address the budgetary motivation or budgetary matters. We also think the 9 October 2013 proposal adequately addresses the matters raised in the evidence referred to by the ANMF in support of its insufficient detail basis.
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> **[89]** In the circumstances, we consider consultation in good faith has occurred having regard to the considerations in clauses 42.1(b) and 42.1(c) in respect of Barwon Health's proposal to reduce nursing hours at WL and ADL as set out in the 9 October 2013 proposal.

In one of the first tests of the limits for consultation on a change to regular rosters, the Fair Work Commission ruled on whether an employer "had regard" to relevant family and carer responsibilities when consulting, as required by the terms of the enterprise agreement. In *Melanie Farnden v Coles Supermarkets Australia Pty Ltd* there were some relevant personal circumstances present and the employer had regard to these in proposing a series of rosters that were all declined by the employee. There was an absence of detail and evidence about certain responsibilities and the Fair Work Commission found that employer had met the agreement consultation terms and was thus able to apply proposed roster.

The best mechanism for ensuring the consultation process is as efficient as it can be is to provide as much relevant information as is reasonably possible from the outset.

EXAMPLE PROCESS – CLERKS AWARD

Following is an example of the kind of information and process an employer might use to follow a compliant consultation process for a restructure of jobs under the *Clerks – Private Sector Award 2020*. This is a hypothetical example for illustrative purposes because the depth of information and the length of process will depend substantially on the facts of the case.

38. Consultation about major workplace change

Award clause	Recommendation
38.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:	Ensure the decision point is documented to avoid argument over when the definite decision was made. When is that point? Approval by the board / decision of CEO?
(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and	Prepare an "initial notification" letter spelling out the changes (refer below).
(b) discuss with affected employees and their representatives (if any):	Ensure a timeframe and method for discussions is proposed – do not leave this open ended.
(i) the introduction of the changes; and	What is proposed? Why is it being proposed? When will it occur? When will the process be completed?
(ii) their likely effect on employees; and	Who will be affected? Is it limited to job roles or departments? How will they be affected – eg hours of work, financial impact, required tasks, training, potential redundancy?
(iii) measures to avoid or reduce the adverse effects of the changes on employees; and	eg Voluntary redundancy, redeployment opportunities, retraining, financial packages.
(c) commence discussions as soon as practicable after a definite decision has been made.	See above – set an assertive but fair timetable. Employees and representatives must have enough time to adequately consider the material provided.
38.2 For the purposes of the discussion under clause 38.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including: (a) their nature; and (b) their expected effect on employees; and (c) any other matters likely to affect employees.	Include all these in the letter above, to the fullest extent known or proposed.
38.3 Clause 38.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.	Limit what you hold back to genuine commercial-in-confidence material.
38.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 38.1(b).	*If the consultation results in alternative proposals, or relevant questions, or reasonable requests for more information that is relevant – consider and respond to them promptly and adequately.*

Specific Advice and Best Practice Procedures, Tools and Templates

EMA Consulting can provide you with assistance, advice, appropriate framework letters and representation specific to your business objectives and in relation to any of the above issues.

We can provide a variety of services, tools, procedures and templates that may assist your management of this process in the future. This will depend on your business situation. Your EMA Consultant can provide further information about these. They include:

- customised Restructure/Redundancy Project Planning services;
- presentations for management outlining the key industrial relations steps and employer obligations;
- presentation outlines for communication with various stakeholders; and
- templates for letters to employees and their representatives.

Require further information/assistance?

If you require further information or advice, please contact your Consultant.

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