

# CONSULTATION IN THE WORKPLACE

## Industrial obligations + what good consultation looks like

During periods of major change in the workplace, such as we are seeing during the Covid-19 pandemic, consultation between employers and their employees regarding proposed changes is essential.

There are two broad reasons for devoting serious attention to the consultative process in these circumstances:

1. A good consultative process greatly improves the likelihood of making good, evidence-based decisions, and emerging from a period of major change with a workforce that is engaged and committed. This in turn improves the likelihood of being able to deliver high quality services after the disruption. A key characteristic of failed restructures is poor communication and consultation; and
2. Employers have industrial obligations to consult in relation to a range of matters under industrial law in Australia.

This guidance note sets out a summary of the industrial obligations, and of how to undertake a good consultative process.

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## What is consultation

A couple of quotes from decisions of the Fair Work Commission illustrate what is meant by consultation regarding change in an industrial sense:

‘Consultation is not perfunctory advice on what is about to happen ... [c]onsultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker.’<sup>1</sup>

And

‘The purpose of a consultation clause is to facilitate change where that is necessary, but to do that in a humane way which also takes into account and derives benefit from an interchange between worker and manager.’<sup>2</sup>

**From an industrial relations perspective, consultation goes beyond simply providing information.**

**It requires a genuine interaction and evidence that the employer might decide to modify the original proposal in light of feedback from staff and their representatives.**

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## The practical steps of a consultative process

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Inform the affected staff and any relevant union about the need for change, the proposal or options being put forward, and the potential effect on employees and their working arrangements.

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Discuss with staff and any relevant union, seek input and feedback, consider and provide responses to issues raised.

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Modify the proposed change if appropriate in light of the discussions.

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Finalise the decision and communicate clearly, including specifying whether or not the change is temporary, and what is intended to occur after the COVID-19 crisis passes.

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Key objectives of the consultative process include: -

- exploring ways to minimise any adverse effects on employees;
- getting feedback from workers about the practical aspects of the proposal to help inform decision making; and
- building trust and good working relationships.

As a practical matter, **genuine consultation involves a range of different communications and discussions:** -

- It will be necessary to identify which employees are affected;
- The relevant union should be notified that a significant change process due to COVID-19 is commencing;
- The information provided needs to be detailed enough for staff to be able to understand the potential impact of the proposed change in practical terms, this includes acknowledging aspects that might not yet be known;
- The process will often involve meetings to facilitate discussion, and may require time to be set aside to allow for the consultation to proceed effectively, including time to meet with union representatives where they are involved; and
- Where specific feedback is provided or issues raised by staff, management will need to take these into account and provide a response with reasons for whether or not the proposed changes will be modified in light of the issues raised.

It is a good objective to aim to get agreement on proposed change and avoid unnecessary and time-consuming disputes. **However, while agreement is desirable it is not ultimately required.** Once the discussions have covered all the issues raised, it is not necessary to go around in circles trying to reach agreement. What matters is that the process has **provided a genuine opportunity for staff to influence the outcome, and to help management make good decisions.**

**In a crisis situation, like COVID-19, employers will often be under pressure to implement change quickly. That does not remove the need and obligation to consult.** However, consultation does not necessarily have to drag on forever. A well managed process should be able to identify and address issues quickly.

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## When is consultation around change required?

From a people management perspective, consultation should be business as usual for any significant change proposal.

Common **types of change requiring consultation** includes: -

**Major change in the workplace** that is likely to have effects on employees such as

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

### **Changes to hours of work or rostering.**

Modern awards such as the SCHADS Award specifically require consultation in relation to roster changes, as do most enterprise agreements.

### **Workplace health and safety.**

Employers have general statutory obligations to consult with workers and their representatives around workplace health and safety and in particular in the context of the COVID-19 this would include consultation around

- the safety issues associated with COVID-19 and
- continuity of business plans

**Under the COVID-19 Jobkeeper package**, eligible employers are required to consult when: -

- standing down an employee
- directing an employee to perform different duties
- directing an employee to work at a different location

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## Checklist of practical issues to consider:

- Have all the relevant people been consulted?
- In the case of significant change, has the relevant union been notified, or have staff at least been informed of their right to union representation if they are members?
- Has adequate time been allowed for effective discussions?
- Have employees been given enough time to digest the information, and to meet with relevant managers?
- Have employees been provided with reasonable time to meet with their union representatives?
- Have union delegates had a reasonable opportunity to talk with members and be involved in discussions with management?
- Has time been allowed for staff to digest the information and get advice if necessary?
- If staff will be working differently, have WHS, induction and training needs been considered?
- In considering ways to minimise adverse effects on staff in the current COVID-19 context, have options been considered around
  - Voluntary options before directing staff (eg for taking leave or changing hours of work)?
  - Redeployment?
  - Modifying duties?
  - Working from home or delivering supports remotely?
  - Taking the opportunity for staff to complete relevant training?