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The Times, They Are a-Changin'

Effective Workplace Consultation in the Aged Care Sector

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Today's presentation

- Why consult?
- A brief history on workplace consultation
- What are your obligations?
- Unpacking main consultation requirements
- Dealing with tricky situations



Why consult?

- Employers are in the business of people management
- Engaged, motivated, loyal workforce is a competitive advantage
- Link between collaborative workplace relationships and:
 - Improved business performance
 - More productive employees
 - More creative employees
 - Less workplace conflict
 - More loyal workforce



Why consult?

- Study of nearly 30,000 workers - 1998 British Workplace Employment Relations Survey
- Examined link between employee consultation and improved productivity
- “Little support for a direct positive relationship between threat and productivity”
- “Strong support ... for the notion that worker participation can enhance productivity”
- Forde, C., Slater, G. and Spencer, D. (2006) ‘Fearing the Worst? Threat, Participation and Workplace Productivity’, *Economic and Industrial Democracy*, 27 (3), 369-398



Brief History on workplace consultation

- First Century AD: Columella
- 1897: Webbs concept of industrial democracy
- Early 20th Century: Theory X (shirking model)
- Late 20th Century: Theory Y (participative model)



Brief History on workplace consultation

- 1984: TCR cases
- 1996: Award Simplification process
- 2008-2009: Award Modernisation process
- 2010: Introduction of model clause regarding “major workplace change”
- 2010: Section 205 FW Act (Enterprise Agreements)
- 2010: Section 83 (Parental leave)
- 2012: Section 46 WHS Act 2011 (NSW)
- 2013: Section 145A FW Amendment Act 2013



What are your obligations?

- There is no 'absolute' obligation to consult
- Sources of obligations arise from:
 - Legislation (FW Act, WHS Act)
 - Modern award
 - Enterprise Agreement
 - Employment contract
 - Policy or procedure
- The obligation is not to 'consult' *per se*, it is to meet the requirements of the specific applicable provision
- Always refer to relevant industrial instrument - be cautious with authorities relating to EAs which have different clauses!



Meaning of 'consult'

- The word 'consult' means more than the mere exchange of information.
- As Young J said in *Dixon v Roy*:
 - "The word 'consult' means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response." [citations omitted]
 - The right to be consulted is a substantive right, it is not to be treated perfunctorily or as a mere formality.



Key consultation obligations

1. Major workplace change
2. Proposed changes to regular rosters /
working hours
3. Parental leave
4. Work health and safety



Common consultation scenarios

- Outsourcing non-core functions
- Redundancies due to loss of funding
- Roster changes due to:
 - Client cancellation
 - Client wants different staff member
 - Client changes service provider



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Major Workplace Change

- 8.1 Consultation regarding major workplace change
- (a) Employer to notify
- (i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
- (ii) Significant effects include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.
- (b) Employer to discuss change
- (i) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1(a) the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.
- (ii) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1(a)
- (iii) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.



When does the obligation apply?

- Applies where an employer has:
 - made a definite decision...
 - to introduce major changes in production, program, organisation, structure or technology...
 - that are likely to have significant effects on employees



Definite decision

- No consultation is required until a definite decision has been made.
- No consultation obligation in relation to 'mere proposals' that have not been decided upon by the employer.
- If the only relevant definite decision is a decision to terminate employment of an employee or employees the obligations will not arise prior to that decision.
- In contrast, if the employer engages in a two-step decision-making process, the obligation will arise when the initial "definite decision" to introduce major change is made by the employer.

- *Ingersole v Castle Hill Country Club Limited* [2014] FCCA 450
- *Ventyx Pty Ltd v Murray* [2014] FWCFB 2143



Opportunity to convince employer to change the decision?

- “There is no obligation whatsoever in the award to consult over whether the decision made by the employer should be changed”.
- No obligation to justify decision.
- No obligation to demonstrate that the employer has excluded possible alternatives to the decision which has been made
- *Tino v Regis Resources Ltd* [2014] FWC 8475 per DP McCarthy at [17]



Major changes and significant effects

- Major changes in production, program, organisation, structure or technology
- Significant effects include:
 - termination of employment (e.g. redundancy)
 - major changes in the composition, operation or size of the employer's workforce or in the skills required (e.g. restructure / outsourcing)
 - the elimination or diminution of job opportunities, promotion opportunities or job tenure
 - the alteration of hours of work (query how this interacts with cl. 8.2)
 - the need for retraining or transfer of employees to other work or locations
 - the restructuring of jobs



Significant effects on employees?

- There appears to be a difference of opinion in the case law
- See *Millen v Electrix Pty Ltd* [2014] FWC 6912 (Cloghan C), *Salisbury v McKay Drilling* [2014] FWC 5275 (Williams C)
 - “The abolition of one position is not major workplace change as set out in Clause 8”.
- But see *Priest v HFB Pty Ltd* [2016] FWC 802 (Johns C), *Bassanese v HPS Transport Pty Ltd* [2015] FWC 1222 (Bartel DP), *Leef v Riordan Group Pty Ltd* [2015] FWC 1209 (Smith DP)
 - “A range of decisions of the Commission have applied the consultation provisions of awards ... to the termination of one employee”.
 - “The use of the plural is to be taken to be inclusive of the singular”.
 - “This is beneficial legislation 2 and should not be read narrowly”.



4 Requirements

- Notify the employees who may be affected by the proposed changes and their representatives, if any.
- Provide all relevant information in writing to the employees concerned and their representatives, if any.
- As soon as reasonably practicable discuss with the employees affected and their representatives, if any:
 - the introduction of the changes
 - the effects the changes are likely to have on employees
 - measures to avert or mitigate the adverse effects of such changes on employees
- Give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.



Example process

- Letter/Email to employees affected:
 - Notification; and
 - Provide all information in writing
- Group meeting to discuss changes
- Provide avenue for employee feedback
 - Could be one-on-one meetings by request
- Genuinely consider all feedback promptly
- Implement change



Coll v Foresite Training [2016] FWC 2520

- Decision to make one trainer position redundant.
- Employer selected employee having regard to experience, unavailability to work weekends/nights etc.
- Meeting with employee 2 days later and notified his position was redundant.
- Obligation to consult arose when decision made to reduce no of trainers. Should have advised all trainers of that decision as they were 'affected'.
- Because employee only notified after being selected, proper consultation not able to occur.
- Compensation of one week's pay.



Ball v Metro Trains [2012] FWA 8384

- Although decision relates to EA provision, note the penalty.
- Function proposed to be outsourced
- Decision found that *had* consultation taken place prior to the retrenchment, there was a real or significant possibility that an alternative to retrenchment may have resulted.
- Awarded \$39,000



CEPU v QR Limited [2010] FCAFC 150

- EA consultation provisions broader than Award provisions
- Premier announced proposal for partial privatisation of rail services
- Mgmt determined which employees should be transferred to different entity
- 6 weeks later, 3,000 employees received letter offering redeployment
- No consultation until after offer was made
- EA entitled employees to “urge a different approach”
- Federal Court judge awarded maximum penalty of \$650,000
- Full Court reduced penalty to a mere \$480,000!



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Consultation about roster changes

8.2 Consultation about changes to rosters or hours of work

- (a)** Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.
- (b)** The employer must:
 - (i)** provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);
 - (ii)** invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and
 - (iii)** give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.
- (c)** The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.
- (d)** These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.



3 Requirements

- Provide to the employee or employees affected and their representatives, if any, information about the proposed change
- Invite employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities)
- Give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives



Key differences

- Obligation is triggered when an employer proposes to change an employee's regular roster or ordinary hours of work
- Consultation must occur *before* a decision is made
- Information need not be given in writing
- Does not apply where an employee has irregular, sporadic or unpredictable working hours.



Judicial consideration

- Limited case law on how provision will be applied, but:
 - Applies to all changes (one-off, temporary and permanent changes)
 - “The precise content of an obligation to consult will depend on the context”
 - The extent and significance of a proposed change will have a bearing on the extent of the opportunity to be provided.
 - “A change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in circumstances where the proposed change is significant and permanent”.



Example process

- Talk to employee about proposed change, including:
 - nature of the change; and
 - when that change is proposed to commence
- Ask employee what they think
- Consider employee's feedback
- Make decision
- Involve union or other employee rep if one is appointed



Interaction with other award provisions

- Aged Care Award has a number of apparent inconsistencies:
 - Cl 22.6(c): Seven days' notice will be given of a change in a roster.
 - Cl 10.3(b) and (c): Agreed hours for part-time employees, with variation by agreement.
 - Cl 8.2: Consultation about proposed roster changes.
- Consultation provisions must be read in conjunction with other award provisions concerning the scheduling of work and notice requirements!
- See *Leading Age Services Australia NSW-ACT* [2014] FWCFB 129



Consultation during Parental leave

- Section 83 FW Act
- Where employee is on unpaid parental leave and employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.



FWO v A Dalley Holdings [2013] FCA 509

- Employee worked fortnightly roster of 6 afternoon shifts and 1 sleepover
- Transfer of business during parental leave – new employer
- Employer restructured and reallocated shifts without consultation
- Employee sought to return but requested flexible hours
- Employer constructively dismissed employee
- Found to have contravened section 83 by not taking reasonable steps to provide employee with information about, and an opportunity to discuss the effect of, decisions made while on maternity leave.
- Penalty of \$30,000



Consultation in WHS context

- A PCBU must consult, so far as is reasonably practicable, with workers who carry out work for the business and who are (or are likely to be) directly affected by a health and safety matter
- Workers are entitled to take part in consultation arrangements and to be represented by a HSR.



Dealing with tricky situations

- Requests for more time
- Angry employees
- Employees taking leave
- Workers compensation claims



Employee representatives

- Employees must consult with an employee's "representative"
- Does an employee have to specifically appoint their union?
- Should you involve the union in all occasions of consultation?
- Should you involve the union where:
 - you know the employee is a union member?
 - The employee has been represented by the union in a previous workplace matter?



Conclusion

- Consultation is a common requirement in workplaces where:
 - Making major changes which have significant effects on employees
 - Proposing to change regular rosters or working hours
 - Employees are on parental leave
 - In the WHS context
- It is a substantive right, and courts/tribunals will treat it that way!
- Specific requirements will depend on relevant provision in industrial instrument
- There is no 'one size fits all' approach – the extent of consultation will also depend on the circumstances



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Questions?

