

LEGAL PARAMETERS OF THE EMPLOYER'S DUTY TO CONSULT

GIUSEPPE CARABETTA* AND PAUL LORRAINE†

Significant workplace change requires consultation, and standard consultation obligations exist under legislation and statutory instruments. However, those provisions offer minimal guidance on how to approach consultation. The consultation cases tend to focus on compliance, adding little beyond saying consultation needs to be meaningful. Building on the foundation laid by the 2021 decision in Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd, this article considers what the parameters of the obligation to consult might — or should — be. It shows that there is an over emphasis in the authorities on timing, as a compliance trigger, rather than the substance of the obligation, and major decisions continue to show the obligation is poorly understood. It argues that clear parameters are needed on how to implement the duty to consult, and that these parameters need to come from statute or clear authority of the courts. Without restricting the inherent flexibility that is needed for consultation to work, or impeding the employer's prerogative to make decisions, it asserts that there is a need for a deeper legal underpinning, and more active obligations, to shift the concept away from the conflictual paradigm of consultation being 'triggered' towards a more collaborative and productive approach.

I INTRODUCTION

Employers will always need to adjust their workplaces to address new economic challenges and conditions. They are entitled to make those changes, which will necessarily affect employees, whether the changes are wide-ranging restructures or narrow policy adjustments. But the 'humane way' to achieve this is by consulting with employees before any final decision is made. When the changes are significant, it is not simply an expectation to consult. Employers are made to do so by industrial instruments and statutes. However, until now there has typically been little detail given by those instruments that might allow employers and employees to understand what the obligation to consult entails. It was only in the recent 2021 decision in *Construction, Forestry, Maritime, Mining and Energy Union, v Mt Arthur Coal Pty Ltd* ('BHP Mt Arthur')¹ that an opportunity was taken to

* Associate Professor, University of Technology, Sydney.

† Executive Counsel, Harmers Workplace Lawyers, Sydney.

The authors are grateful to *the Journal's* anonymous referees and editorial staff for their helpful suggestions, to Ryan Hunter for his research assistance and to Alex Hammond for checking references. Of course, responsibility for any remaining errors is ours alone.

¹ [2021] FWCFB 6059 ('BHP Mt Arthur').

bring together the scattered authorities on the meaning of workplace consultation into a single set of general principles.

This article aims to build on the foundation laid in *BHP Mt Arthur* by considering what the parameters of the obligation to consult might — or should — be. It does so by first considering the *BHP Mt Arthur* decision. That case was concerned with consultation under the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*')² as a new COVID-19 vaccination policy was announced. The issue was whether the mandate fell within the employer's general power at common law to issue 'lawful and reasonable' directions. As discussed below, the five-member Full Bench of the Fair Work Commission took that opportunity to consider what general principles should have informed BHP's consultation rather than what did occur, which was found to be a mere perfunctory exercise.

Next, in Part III, the article sets out the sources of the obligation to consult in industrial instruments and statute. Employers need to be aware that their obligation to consult might be found in modern awards, enterprise agreements, the *WHS Act* and the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').³ These obligations might overlap in any given workplace, and it is important to appreciate the different consultation 'trigger points'.

Those instruments do not, generally, give detailed principles on what might be involved in a consultation. In Part IV, the article expounds on what the general principles are that (absent express changes) apply to consultations whether under industrial instruments or statute. The key authorities that preceded *BHP Mt Arthur* are also developed. Ultimately, as the authorities discuss, consultation requires a 'genuine opportunity to be heard', which must occur before the final decision is made.

In Parts V and VI, the article looks beyond *BHP Mt Arthur* to why the authorities to date (including *BHP Mt Arthur* itself) might be of limited use in determining the parameters of the obligation to consult. The reasons for this are that (i) the authorities to date have focused on describing what is *not* genuine consultation, rather than taking a positive approach to defining consultation or offering precise guidelines; (ii) in most cases the employer made no attempt to consult at all, rather than offering Courts and Tribunals the opportunity to consider consultation that merely fell short of what is required; and (iii) the cases have focused on *when* consultation should take place — ie before a decision is made — rather than the content of the consultation.

The article concludes that clear parameters are needed on the obligation to consult, and that these parameters need to come from statute or clear authority of the Courts or Full Bench. This is because adjustments will always need to occur as workplaces evolve. Consultation should not be used to restrict the freedom of employers to make such changes, but rather should be used to define precisely

² *Work Health and Safety Act 2011* (NSW) ('*WHS Act*').

³ *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

what is expected from a process that good managers should be embarking on anyway. Discussing changes *before* decisions are made allows employees to offer their input, but also to ‘buy in’ to changes, offering their views to improve workplace adjustments and to facilitate smooth transitions from one structure, policy or approach to the next. In the future, there should be further careful thought given to what positive limits can be set on consultation, particularly in cases where redundancies are being made. However, changes to the current system will also need to be mindful of the flexibility offered by avoiding minimum parameters. Above all, the right of employers to refine their processes and change their workplaces will continue, but those who bring their employees along with them on such changes will be the most likely to succeed.

II THE *BHP Mt ARTHUR* DECISION

In *BHP Mt Arthur*, Mt Arthur, a member of the BHP group of companies, had announced in October 2021 that it would require all workers at its Mt Arthur Mine to be vaccinated against COVID-19 as a condition of site entry (‘Site Access Requirement’). The Construction, Forestry, Maritime, Mining and Energy Union (‘CFMMEU’) and Mr Matthew Howard filed an industrial dispute in the Fair Work Commission arguing that the requirement was not a ‘lawful and reasonable’ direction because, inter alia, Mt Arthur had not, in introducing the requirement, complied with the consultation requirements of the *WHS Act*.⁴

The *WHS Act* imposes a duty on employers, where reasonably practicable, to consult with workers who are, or are likely to be, affected by a workplace health or safety matter. That duty requires, among other things, that:

- ‘relevant information’ about the matter is shared with workers;
- the workers be afforded ‘a reasonable opportunity’ to ‘express their views’, ‘to contribute to the decision-making process relating to the matter’, that their views be ‘taken into account’; and that they be ‘advised of the outcome ... in a timely manner’; and
- ‘if the workers are represented by a health and safety representative [‘HSR’], the consultation must involve that representative’.⁵

The consultation is required in relation to a number of defined circumstances including ‘when identifying hazards and assessing risks to health and safety arising from the work to be carried out’, ‘when making decisions about ways to

⁴ *WHS Act* (n 2). For additional background and comment on the decision, see Giuseppe Carabetta, ‘Vaccination Mandates and the Employee’s Duty to Obey Lawful and Reasonable Directions’ (2022) 50(3) *Australian Business Law Review* 226.

⁵ *WHS Act* (n 2) ss 47–9.

eliminate or minimise those risks', and 'when proposing changes that may affect the health or safety of workers'.⁶

Mt Arthur argued that it had met these requirements because, prior to the date on which the Site Access Requirement was announced, it had, *inter alia*, submitted an 'Options Analysis' to its senior leadership, which led to a recommendation that COVID-19 vaccination be a condition of entry to all BHP workplaces (though subject to preliminary steps including a risk assessment and additional consultation). It submitted further that it then engaged in a process of consultation and engagement with workers under the *WHS Act*, including setting up a 'Vaccine Mailbox' inviting questions regarding the proposed Site Access Requirement and responding to and meeting with the unions where requested.⁷

The Full Bench of the Fair Work Commission disagreed, finding that Mr Arthur had failed to consult appropriately prior to implementing the Site Access Requirement.⁸ Despite communications promising ongoing engagement with the employees, no genuine attempt was made to consult with the unions, HSRs were not involved in consultations, and the employees were not invited to contribute ideas about the decision-making process or the rationale behind the Site Access Requirement.⁹ The Full Bench further noted that, while substantial information had been provided about COVID-19, little if any information was provided about any risk assessment that was undertaken.¹⁰

Notably, in addressing the consultation issue, the Full Bench had regard to a number of 'general propositions' from earlier cases on the meaning of consultation.¹¹ In doing so, it reaffirmed that consultation must be 'meaningful', but that the content of any requirement to consult is determined by the terms of the requirement and the factual context. Importantly however, the Full Bench avoided expressing final conclusions on the content of the *WHS Act* consultation obligations. This was unnecessary given the finding that the employer had largely failed to directly engage at all in implementing the Site Access Requirement. Nor, having considered the general principles from the authorities, did the Full Bench give detailed consideration as to whether or to what extent those principles could inform the duty to consult. These and related questions concerning the nature and scope of the obligation to consult are taken up in Parts V and VI.

⁶ *Ibid* s 49.

⁷ *BHP Mt Arthur* (n 1) [139]–[140]. These respective actions were taken during an 'options phase' and 'assessment phase', which preceded the announcement and implementation of the Site Access Requirement.

⁸ While the *WHS Act* requires that employees be afforded an opportunity to express their views and have them considered before the employer makes a definite decision, the opposite was true of the *Mt Arthur Coal Enterprise Agreement 2019*, where the employer was only required to consult over a new 'major change' policy *after* its introduction: see further, the discussion on consultation 'trigger points' in Part III C.

⁹ *BHP Mt Arthur* (n 1) [150]–[157], [162], [172]–[176].

¹⁰ *Ibid* [150].

¹¹ As noted in Part IV, where these principles are examined, it did so having noted that there was no direct authority on the *WHS Act* consultation provisions.

III CONSULTATION PROVISIONS IN INDUSTRIAL INSTRUMENTS AND UNDER STATUTE

The starting point in any exposition of the legal obligation to consult must be the express consultation provisions found in industrial instruments and under statute. The purpose of such clauses 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’.¹² A further aim is to assist management by providing access to employees’ know-how knowledge, and potentially minimise or alleviate risks associated with a proposal for change.¹³

To advance these aims, during the 1980s and 1990s, there was a period of interest in developing guidelines about information sharing and workplace democracy¹⁴. In 1994, in his decision in the long running Vista Paper Products dispute, Chief Justice Wilcox of the former Industrial Relations Court of Australia, described ‘an industrial trench-war’ and ‘an orgy of litigation’, and stated that ‘in a time of widespread work place change ... structural workplace reform and elimination of undesirable work processes can be achieved only by cooperation: not by confrontation’.¹⁵

The business case for consultation could not be more clear, and yet legal instruments are needed to force basic consultation.

A Modern Award Provisions

Modern awards contain standard consultation provisions dealing with the requirement for employers to consult with employees and their representatives

¹² *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited [No 2]* [2010] FCA 652, [49] (Logan J), in the context of a consultation clause under an enterprise agreement. See also Mark Perica, ‘A Fair Say All Round’, in James Fleming (ed), *A New Work Relations Architecture: The AIER Model for the Future of Work* (Hardie Grant Publishing, 2022) 139. As well as industrial instruments and statute, consultation provisions may at times also be found in individual employment contracts.

¹³ *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81] (Gray J) (*QR Ltd v CEPU*), noting that ‘[m]anagement has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it.’ See also, *CPSU and Allied Services Union of Australia v Vodafone Network Pty Ltd* [2001] AIRC 1189, [25] (*CPSU v Vodafone*’).

¹⁴ See, eg, National Labour Consultative Council, *Guidelines on Information Sharing*, (Australian Government Publishing Service, 1984); Department of Employment and Industrial Relations, *Corporate Accountability and Access to Information by Shop Stewards: Employee Participation Research Report No 10* (Australian Government Publishing Service, 1986); Department of Employment and Industrial Relations, Working Environment Branch, *Industrial Democracy and Employee Participation: A Policy Discussion Paper* (Australian Government Publishing Service, 1986); a 1988 joint statement on participative practices published by the Confederation of Australian Industry and the ACTU; and the Evatt Foundation in 1995.

¹⁵ *Printing and Kindred Industries Union v Vista Paper Products Pty Ltd* [1994] 127 ALR 673, 674 (Wilcox CJ).

when the employer intends to implement significant changes. The origin of such provisions is *Amalgamated Metals, Foundry & Shipwrights' Union v Broken Hill Pty Co Ltd*,¹⁶ which was decided in the early 1980s, concerning a log of claims by the Australian Council of Trade Unions, the aim of which was to achieve job security in federal awards. The provisions require employers to consult with their employees when they make a 'definite decision' to introduce a 'major workplace changes' in production, program, organisation, structure or technology 'that are likely to have significant effects' on employees; or where an employer proposes to change an employee's regular roster or ordinary hours of work.¹⁷ 'Significant effects' on employees include any of the following:

- termination of employment;
- major changes in the composition, operation or size of the employer's workforce or in the skills required;
- loss of, or reduction in, job or promotion opportunities;
- loss of, or reduction in, job tenure;
- alteration of hours of work;
- the need for employees to be retrained or transferred to other work or locations; or
- job restructuring.¹⁸

In the course of a consultation, the employer's initial obligation is to notify affected employees and their representatives (if any) in writing of any such decision and discuss with them 'as soon as practicable after a definite decision has been made':

- (i) the introduction of the changes;
- (ii) their likely effect on employees; and
- (iii) measures to avoid or reduce the adverse effects of the changes on employees.¹⁹

For the purposes of the discussion the employer must also provide 'all relevant information about the changes' including: (a) their nature; (b) their expected

¹⁶ (1984) 8 IR 34. See further, Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (The Federation Press, 6th ed, 2016) [22.69], [14.56].

¹⁷ See, eg, the General Retail Industry Award 2020, cls 34–35 in relation to consultation over major workplace changes. The discussion on modern awards that follows draws on this modern award as an example. In respect of changes to an employee's regular roster or ordinary hours of work, see the discussion on s 145A of the *Fair Work Act* (n 3) below.

¹⁸ General Retail Industry Award 2020, cls 34.1, 34.5. Where the award makes provision for alteration of any of these matters; however, such alteration is taken not to have significant effect: cl 34.6.

¹⁹ *Ibid* cls 34.1(c), 34.1(b).

effect on employees; and (c) ‘any other matters likely to affect employees’.²⁰ This does not, however, require the employer to disclose any confidential information if such disclosure would be contrary to their interests.²¹

Significantly, employers have a duty to ‘promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion.’²² However, as will be noted in Part IV, there is no obligation to accept any counter proposals.

B Provisions in Enterprise Agreements

Section 205 of the *Fair Work Act* provides that enterprise agreements must contain a provision requiring employers to consult with their employees over any ‘major workplace change that is likely to have a significant effect on the employees’; or any ‘change to [the employees’] regular roster or ordinary hours of work’. The consultation term must allow for employees to appoint a representative for the purposes of the consultation.²³ If the agreement does not include such a provision (or includes an inadequate one), the model consultation term set out in the *Fair Work Regulations 2009* (Cth) (*‘Fair Work Regulations’*) applies as a term of the agreement.²⁴ The parties are able to agree to a different formulation, but only if the term agreed upon complies with the requirements of s 205.

The model consultation term is similar to the standard clause in modern awards. Employers have a duty to consult after making a definite decision to introduce a ‘major change’ to production, program, organisation (etc) ‘likely to have a significant effect on employees’ — that is, proposals relating to such issues as terminations or restructuring of positions, retraining, alteration of work hours and transfers.²⁵ The remaining requirements of the model term to notify and consult mirror those of the standard modern award clause, above.²⁶ This includes the requirement to give prompt and genuine consideration to matters raised about the change by the affected employees.²⁷

The requirements for a change to regular roster or ordinary work hours are in the same terms,²⁸ save that, in the course of the consultation, the employer is required to provide:

²⁰ Ibid cl 34.2.

²¹ Ibid cl 34.3.

²² Ibid cl 34.4.

²³ *Fair Work Act* (n 3) s 205(1)(b); *Fair Work Regulations 2009* (Cth) reg 2.09(3)–(4) (*‘Fair Work Regulations’*).

²⁴ *Fair Work Act* (n 3) s 205(2); *Fair Work Regulations* (n 23) reg 2.09, sch 2.3

²⁵ *Fair Work Regulations* (n 23) reg 2.09(1)–(2), (9).

²⁶ See Ibid reg 2.09 (3)–(9).

²⁷ Ibid reg 2.09(7).

²⁸ Ibid reg 2.09 (10)–(11).

- (ii) all relevant information about the change, including the nature of the change;
- (iii) information about what the employer reasonably believes will be the effects of the change on the employees; and
- (iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and
- (iv) ... invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).²⁹

Once again, as with the standard award provisions, consultation terms under enterprise agreements generally do not interfere with the employer's right to make a final decision on any proposal.³⁰

Examples of consultation provisions based on the model term are contained in Appendix A.

C Provisions under Statute

The requirement to consult is not confined to industrial instruments. As Logan J noted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* ('*CEPU v QR Ltd*'):³¹

The imposition of a requirement for one party to consult with another is hardly unique to industrial instruments. I have already made passing reference to coincidental examples of requirements to 'consult' in the course of setting out the history of legislative provision in Queensland with respect to railways. A search of current Commonwealth legislation discloses no less than 572 provisions imposing a requirement on a Minister or other official or agency to 'consult'. In turn, as a study of reported cases discloses, these are but Australian exemplars of a requirement widely employed in a range of public administration applications by the parliaments of the United Kingdom and elsewhere in the Commonwealth of Nations.³²

An example in the employment context is the *WHS Act* consultation provisions discussed in Part II in relation to *BHP Mt Arthur*. At the federal level, in the redundancy context, the *Fair Work Act* requires employers to notify and consult with a relevant trade union(s) if:

- 'the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons'; and

²⁹ Ibid reg 2.09(13)(b)(c).

³⁰ See the discussion in Part IV.

³¹ (2010) 198 IR 382 ('*CEPU v QR Ltd*').

³² Ibid 394 [42].

- ‘the employer could reasonably be expected to have known’, when making the decision, ‘that one or more of the employees were members of’ a trade union.³³

In the course of the consultation, the employer is required, as soon as practicable after making the decision and before dismissing an employee,³⁴ to notify each relevant union of: (i) the proposed dismissals and the reasons for them; (ii) the number and categories of employees likely to be affected; and (iii) the time when, or the period over which, the employer intends to carry out the dismissals.³⁵ Significantly, the employer must also give the union(s) an opportunity to consult the employer regarding ‘measures to avert or minimise the proposed dismissals’; and ‘measures (such as alternative employment) to mitigate the adverse affects’.³⁶

The Fair Work Commission is empowered to make ‘whatever orders it considers appropriate, in the public interest’ to put the employees and their union(s) in the same position, as reasonably can be done, as if the employer had complied with these obligations.³⁷ The Commission’s powers are subject to significant limitations; this includes not being permitted to make orders for reinstatement of a dismissed employee.³⁸ However, provided an application is made speedily enough, it may at least be able to stall any redundancies, to ensure that the consultation process is properly followed.³⁹

D Consultation ‘Trigger Points’

While most consultation provisions mirror the standard award and agreement clauses discussed above, an important distinction between provisions is whether they obligate an employer to consult employees about a proposed change or whether the requirement to consult is enlivened only *after* a definite decision to implement change.⁴⁰ Some consultation provisions and the model consultation term under the *Fair Work Regulations* provide that the ‘trigger point’ is the making of a definitive decision, such as a significant organisational or structural change;⁴¹

³³ *Fair Work Act* (n 3) s 531(1).

³⁴ *Ibid* s 532.

³⁵ *Ibid* s 531(2).

³⁶ *Ibid* ss 531, 786.

³⁷ *Ibid* ss 531(1), 786.

³⁸ *Ibid* s 532(2). The same provision provides that the Fair Work Commission must not order, inter alia, withdrawal of notice of a dismissal if the notice period has not expired; payment of moneys in lieu of reinstatement; and, outside certain exceptions, disclosure of confidential or commercially sensitive information relating to the employer or personal information relating to the particular employee.

³⁹ Stewart et al (n 16) [22.67], citing, inter alia, *CPSU v Vodafone* (n 13) and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431. These decisions are examined in Part IV in the context of general propositions highlighting that consultation must be ‘real’ and include a genuine opportunity to influence the final outcome by having the employees’ views considered.

⁴⁰ See, eg, *Consultation Clause in Modern Awards* [2013] FWCB 1065, [34].

⁴¹ See Part III B above. Compare also, the sample provisions contained in the Appendix.

others, however, provide that the obligation to consult is enlivened at the proposal stage.

In *BHP Mt Arthur*, the Full Bench found (as noted in Part II) that BHP had failed to comply with its consultation obligations under the *WHS Act*, because it had failed to adequately consult *prior to* implementing its new mandatory vaccination policy. However, under the applicable 'organisational change' clause in the BHP enterprise agreement (which clause was based on the model consultation term), the employer was only required to consult over the introduction of its new policy after the policy was implemented — a requirement it appeared to have in fact satisfied.⁴²

Section 145A of the *Fair Work Act* provides that modern awards must include a term requiring employers to consult employees and afford them an opportunity to give their views about a change to 'their regular or ordinary hours of work'.⁴³ A Full Bench of the Commission has held that it is implicit in the obligation to consult under s 145A that the consultation must occur prior to any proposed change. This is to ensure — consistently with the legislative purpose of s 145A — that employers cannot unilaterally make changes without giving employees sufficient time to raise any concerns prior to any proposed change.⁴⁴

Similar reasoning was applied to the predecessor provision to s 531 of the *Fair Work Act*, which required consultation before a decision to terminate 15 or more employees for economic, technological (etc) reasons.⁴⁵ As noted, s 531 requires the employer, before terminating an employee's employment on such grounds, to consult over measures to avert, minimise or mitigate the adverse effects of the proposed dismissals. As these steps are required as soon as practicable after so deciding, and before terminating an employee's employment, the employer is required to provide the opportunity to consult before making or implementing such a decision.⁴⁶

IV GENERAL PRINCIPLES

Beyond express provisions regarding the requirement to consult are general principles derived from decisions regarding the scope of the obligation under industrial instruments and statute. These cases arose in the context of

⁴² *BHP Mt Arthur* (n 1) [106]–[113]. The Fair Work Commission did not consider it necessary to express a concluded view on this issue, given its holding that the employer had failed to meet its *WHS Act* consultation obligations.

⁴³ This provision was introduced in 2013 and applies to all modern awards made since 1 January 2014. See also, *Consultation Clause in Modern Awards* [2013] FWCB 1065.

⁴⁴ *Ibid* [37]–[38], [45].

⁴⁵ *Workplace Relations Act 1996* (Cth) s 170GB.

⁴⁶ *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Co Ltd* (1998) 88 IR 202, 217 (Ross VP, MacBean SDP and Deegan C) ('*CFMEU v Newcastle Wallsend Coal Co Ltd*').

consultation obligations of the type discussed in Part III.⁴⁷ In *BHP Mt Arthur*, the Full Bench (having noted that there was limited authority regarding the *WHS Act*'s consultation provisions)⁴⁸ turned to a number of 'general propositions' from these cases.⁴⁹ This was despite emphasising that, ultimately, the 'metes and bounds' of the obligation to consult are delineated by the terms of the relevant statutory provisions, and the factual and legal context in which the obligation is enlivened.⁵⁰

According to the authorities, the right of employees to be consulted is a 'real, substantive' right; it is 'never to be treated perfunctorily or as a mere formality.'⁵¹ Inherent in the obligation is the requirement to provide affected parties, or their representatives, with a genuine opportunity to present their views about a proposed change in order to try and persuade the decision maker to decide on a different course of action.⁵² In *CEPU v QR Ltd*,⁵³ Logan J observed:

[The authorities] serve to confirm an impression as to the content of an obligation to 'consult' evident from the dictionary meaning of the word. A key element of that content is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility ...

To elaborate further on the ordinary meaning and import of a requirement to 'consult' may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this

⁴⁷ Though all the authorities dealt with the obligation to consult, as will be seen, some of the leading cases deal with non-employment contexts.

⁴⁸ *BHP Mt Arthur* (n 1) [105] n 98. The Bench noted, as an aside, that there were two recent Australian decisions where the provisions were discussed including another vaccination policy decision: *Brasell-Dellow v Queensland (Queensland Police Service)* [2021] QIRC 356 ('*Brasell-Dellow v QPS*').

⁴⁹ See *BHP Mt Arthur* (n 1) [106]–[108], providing a summary of general propositions drawn from a range of authorities. As will be seen in Part V, having considered a number of these general propositions, the Fair Work Commission went on to question the extent to which such principles should inform its interpretation of the consultation provisions under the Act.

⁵⁰ *BHP Mt Arthur* (n 1) [113], drawing on a line of authority. This point is further highlighted below: see text accompanying nn 56–58.

⁵¹ *TWV Enterprises Ltd v Duffy* [No 2] (1985) 7 FCR 172, 178–9 (Toohey J) ('*TWV Enterprises*'), citing *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 311, *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 and *Sinfield v London Transport Executive* [1970] 1 Ch 550 ('*Sinfield*'). See further, *Kutlu v Director of Professional Services Review* [2011] FCAFC 94, [71] (Flick J) and the authorities cited below in n 52.

⁵² See *CEPU v QR Ltd* (n 31) 394–5 [44]; *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208, [211]–[212] ('*Tomvald v Toll*'); and *TWV Enterprises* (n 51). The value in enabling differing points of view to be put forward is that at times this may even result in an outright withdrawal of proposed changes: *Sinfield* (n 51).

⁵³ *CEPU v QR Ltd* (n 31).

is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?' Only in the latter case is there 'consultation'.⁵⁴

As reflected in this passage by Logan J, the content of any specific requirement to consult will vary depending on the context. This includes three elements: i) the precise terms in which the requirement is expressed in the applicable instrument;⁵⁵ ii) the factual context in which the obligation arises, including the nature or size of the business, the nature of the change and the impact of the change on affected persons; and iii) whether the factual circumstances might dictate a speedier response.⁵⁶ Thus, in terms of the information provided to affected employees, in some contexts it may involve disclosing information without which no meaningful input from the employees is possible; in others, it 'may merely involve the identification of an issue upon which input is then sought'.⁵⁷

That said, the requirement to afford affected workers with an opportunity to voice their views before a final decision is made or course of action is embarked upon is not satisfied merely by providing them with an opportunity to be heard; the requirement extends to affording workers with an opportunity to present their views or state their objections and a genuine opportunity to influence the final outcome by having their views considered.⁵⁸ However, having duly provided this opportunity to the affected employees, 'the consultation obligation is not concerned with a likelihood of success of the process', only that the process is genuine.⁵⁹

It is also implicit in the obligation to consult that, for a consultation to be meaningful, it cannot be a mere 'afterthought'.⁶⁰ Consultation after an irrevocable decision has been held not to amount to meaningful consultation.⁶¹ If a change has already been implemented, or the employer has already made a definite or irrevocable decision to implement a change, then any subsequent 'consultation' is robbed of its essential characteristic.⁶² Furthermore, genuine

⁵⁴ Ibid 394–5, [44]–[45]. An appeal in this case was allowed; however, there was no departure from his Honour's holdings on the contents of the obligation to consult: *QR Ltd v CEPU* (n 13).

⁵⁵ For example, as noted in Part III, under some consultation clauses and the model term under the *Fair Work Regulations*, the 'trigger' for an obligation to consult is the making of a definite decision. In other cases, it might include the requirement for a consultation committee, and the like.

⁵⁶ *BHP Mt Arthur* (n 1) [113], upon reviewing several authorities. See also, *Tomvald v Toll* (n 52) [212] (Flick J). The process will take on particular significance in the context of proposals that may result in potential redundancies: see, *CPSU v Vodafone* (n 13) [25] (Commissioner Smith).

⁵⁷ *Tomvald v Toll* (n 52) [212] (Flick J). The process takes on particular significance in the context of proposals that may result in potential redundancies: see, *CPSU v Vodafone* (n 13) [25]–[26] (Commissioner Smith).

⁵⁸ *Tomvald v Toll* (n 52) [211] (Flick J); *QR Ltd v CEPU* (n 13) [80] (Gray J).

⁵⁹ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431, [60] (Logan J).

⁶⁰ *CFMEU v Newcastle Wallsend Coal Co Ltd* (n 46) 217.

⁶¹ Ibid. See also, *Maswan v Escada Textilvertrieb* [2011] FWA 4239 (Watson VP).

⁶² *Consultation Clause in Modern Awards* [2013] FWCB 1065, [35].

consultation ‘would generally take place where a process of decision-making is still at a formative stage’.⁶³

Whether the consultation process needs to take place on an individual or collective basis will also depend on the terms of the obligation and the nature and circumstances of the case. To ensure compliance the consultation should take place with individual employees and their representatives, to ensure that every employee understands the consultation process. However, in the case of larger organisations such as multi-nationals, or where the employer is required to consult with large cohorts of workers, the process can generally be applied collectively (or via a mix of collective and other processes).⁶⁴

Finally, while an employee’s right to be consulted is a fundamental and substantive right, the views expressed by affected employees need not prevail; that is, the right does not confer any veto power on the affected workers and management retains the right to make the final decision.⁶⁵ Nor, as confirmed by numerous authorities, is consultation an exercise in collaborative decision-making: ‘All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted *before any final decision is made*’.⁶⁶

V DETERMINING THE CONTENT OF THE DUTY

It will be noted that many of the general propositions examined above are reflected in the express provisions that were outlined in Part III. Examples include providing affected employees and other relevant persons with information about a significant workplace change proposal and providing them with an opportunity to voice their views before a final decision is made or course of action is embarked upon. The same is true of the principle that — regardless of the employer’s consultation obligations — it remains the employer’s prerogative to make the final decision.

However, an issue of contention in *BHP Mt Arthur* was the extent to which the general propositions from the cases may inform the consultation requirements under the *WHS Act*.⁶⁷ The same issue has arisen in the context of consultation provisions in industrial awards and agreements.⁶⁸ In *BHP Mt Arthur*, some of the employer groups who intervened in the case expressed the concern that, although some of the general elements of the requirement are reflected in the *Act*, applying

⁶³ *Tomvald v Toll* (n 52) [211] (Flick J).

⁶⁴ See, eg, *Brasell-Dellow v QPS* (n 48), where prior to issuing a direction to mandate vaccination against COVID-19, the Queensland police service used various collective means to consult with its workforce of over 17,200. See further, *Ulan Coal Mines Ltd v Howarth and Ors* [2010] FWAFB 3488.

⁶⁵ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 1009 [60] (Logan J) (*‘CFMEU v BHP Coal’*); *QR v CEPU* (n 13) [81] (Gray J).

⁶⁶ *CFMEU v BHP Coal* (n 65) (original emphasis).

⁶⁷ See especially *BHP Mt Arthur* (n 1) [109]–[113].

⁶⁸ See, eg, *CFMEU v BHP Coal* (n 65).

the propositions from the authorities may be inconsistent with, and expand upon, the consultation requirements under the *Act*.⁶⁹ In the circumstances, and as *Mt Arthur* had barely consulted at all before introducing its vaccination policy, the Full Bench was not finally required to engage this issue. It did note, however, that the authorities 'contain contextual material that is relevant to an understanding of [the obligation provisions] of the *WHS Act*'.⁷⁰

Beyond applying (to the extent relevant) the general principles from the authorities, however, there may be a limited basis for looking to the authorities to determine the parameters of an obligation to consult. For one thing, while highlighting that consultation must be genuine, many of the authorities tend to focus only on what the requirement does *not* entail. Thus, we know that the duty is no 'empty term' or 'mere formality'. It also (on the other hand) does not involve joint decision making or a right of veto.⁷¹ In a relatively recent case, *Williams v Staples Australia Pty Ltd*,⁷² concerning an obligation to consult over redundancy, the employees were informed one day and selected for redundancy the next. The Fair Work Commission found that this 'expedited process', as the employer itself described it, was 'unduly hasty ... largely tokenistic' and 'astonishingly fast', involving disingenuous gestures disguised as consultation.⁷³ In line with previous authority, there was no attempt to 'define' consultation or offer more precise guidelines, beyond saying that it needed to be meaningful.

Similarly, much like in *BHP Mt Arthur*, in a number of the consultation cases the employer made no real attempt to consult with the affected employees or their representatives.⁷⁴ In many of these cases, it was therefore unnecessary to determine the content of the requirement to consult, including what information was needed to be disclosed to the affected workers. It was unnecessary to determine such issues because the evidence did not disclose any real form of consultation, or, as in *BHP Mt Arthur*, the employer's attempts at consultation fell significantly short of its (express) obligations to consult under the applicable industrial instrument or statute.⁷⁵

Lastly, many of the cases are more about *when* the mandated consultation must take place, rather than its content. For example, *CFMEU v Newcastle Wallsend Coal Co Ltd*⁷⁶ concerned a statutory obligation requiring the employer to provide

⁶⁹ *BHP Mt Arthur* (n 1) [112].

⁷⁰ *BHP Mt Arthur* (n 1) [113]. See also [134]–[157].

⁷¹ *CFMEU v BHP Coal* (n 65); *Tomvald v Toll* (n 52).

⁷² [2017] FWC 607 ('*Williams v Staples Australia Pty Ltd*').

⁷³ *Ibid* [57]–[58]. It also found the employer had breached its express obligations under its enterprise agreement including, *inter alia*, affording the employees with an opportunity to raise concerns about the impact of the final decision. See further, n 73 below.

⁷⁴ See, eg, *Felton v BHP Billiton Pty Ltd* [2015] FWC 1838; *Marafioti v Gonzalez Pty Ltd* (2017) FWC 5484; *Williams v Staples Australia Pty Ltd* (n 72).

⁷⁵ See, eg, in *Williams v Staples Australia Pty Ltd* (n 72), contrary to the requirements of the applicable enterprise agreement, the employer failed to even involve a joint consultative committee provision in the decision-making process.

⁷⁶ (1998) 88 IR 202 (Ross VP, MacBean SDP, Deegan C).

the union with an ‘opportunity to consult before terminating 15 or more employees for economic, technological or structural reasons.’⁷⁷ The focus was the meaning of ‘termination’ and, specifically, whether it occurred when the employees were given notice (meaning opportunities for consultation had lapsed at this point), or at expiration of the notice (meaning opportunities for consultation remained open). The same kinds of issues — regarding the timing of or legal ‘cut off’ point for consultation — have been the focus of a range of cases.⁷⁸

VI CONCLUSIONS

As disputes and major cases continue to show, the obligation to consult is not well understood or implemented at all. The consequences of this are important for employers and employees. The consultation requirement is not just a narrow legal compliance obligation. Good leadership involves consultation and consensus building. Consultation is basic good management practice.

A lack of workplace consultation is significant for both sides when changes are being made. For employees and their representatives — ie unions — this is important because the timely provision of information and the opportunity to have a say constitute important safeguards when significant workplace changes are being made. For employers, there are the obvious risks which come with non-compliance with statutory obligations, including civil penalties, damages and even reinstatement for redundancy-based dismissals. But there is also an important positive reason for employers to pay attention to the obligation to consult: consultation creates the opportunity to help employees ‘buy in’ to changes being made. When that opportunity is ignored, it can cause cultural damage in a workplace, leading to delays while disputes are drawn out, lost efficiency and poor employee retention.

BHP Mt Arthur offers the chance to take stock on whether consultation is neglected because employers do not appreciate those benefits, or simply do not understand the requirements imposed on them by industrial instruments and statute. Refreshingly, the decision confirms the broad principles underpinning consultation and will give guidance to employers about what it expected of them. Consultation requires not merely ‘going through the motions’, but rather giving employees a genuine chance to understand and comment on changes.

The decision also demonstrates that the Fair Work Commission is willing to take a strict or interventionist approach to consultation questions. For example, the decision carefully analysed the actions of BHP and determined the ‘cut off point’ for when the consultation needed to take place to be valid under the *WHS Act*, as opposed to the enterprise agreement.

⁷⁷ *Workplace Relations Act 1996* (Cth) s 170GA.

⁷⁸ *CFMEU v Newcastle Wallsend Coal Co Ltd* (n 46); *CFMEU v BHP Coal* (n 65); *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93; *BHP Mt Arthur* (n 1).

But the decision does not go far enough. As discussed in Part V, the authorities still fail to clearly set out the parameters of the duty to consult. This is due to a lack of certainty about both the scope of 'meaningful consultation' and the extent to which the general principles might inform a particular duty to consult in a single industrial instrument. *BHP Mt Arthur*, like the decisions that preceded it, made little attempt to explain what meaningful consultation would involve, or whether there was any legal underpinning for the requirement, other than the existence of statutory obligations.

It is not enough to say that consultation must be genuine and meaningful without positive guidance about what this means. It is clear that the actions of BHP were not sufficient in that case, but an employer in the same position today looking to avoid those errors would not know how much further they need to go to ensure that their consultation meets their legal obligations, without straying too far to the point of inefficiency. Courts and Tribunals explain their reticence to stray into this debate by saying that consultation must be determined 'case by case' and is an 'inherently flexible' concept.⁷⁹

As long ago as 2002, Forsyth argued that more 'teeth' should be given to the statutory obligation to consult over redundancies by imposing more extensive *positive* obligations on employers.⁸⁰ This included requirements for ongoing provision of information about a company's financial status, and additional consultation over restructuring proposals that may threaten jobs, as well as enhanced remedies.⁸¹ In the two decades since, that call to action has not been taken up despite the opportunity to do so in revisions to the *Fair Work Act* in 2009 and revised *Work Health and Safety Acts* across the states in 2011. Forsyth's proposal would involve positive obligations to give employees a voice in major workplace decisions, particularly those that involve workers being made redundant.

The cases and existing provisions focus on when a consultation obligation is triggered, or how to rectify the failure to consult, and to some degree the subject matter (such as workplace health and safety, or redundancy), but there is little if any guidance on *how* to conduct consultation.

Mechanisms such as European-style works councils still have their advocates,⁸² but after two recent tranches of amendments to the *Fair Work Act*, the reality is that no legislative response is likely, and it is perhaps still true that 'workplace democracy remains one of the great unfulfilled promises of Australian labour law'.⁸³

⁷⁹ *CEPU v QR Ltd* (n 31) 394–5.

⁸⁰ Anthony Forsyth, 'Giving Teeth to the Statutory Obligation to Consult over Redundancies' (2002) 15(2) *Australian Journal of Labour Law* 177.

⁸¹ *Ibid* 177, 181–2. A clear example of limitations on remedies are those relating to the current obligation to consult over redundancies under the *Fair Work Act*, discussed in Part III.

⁸² See, eg, Perica (n 12).

⁸³ Paul J Gollan and Glenn Patmore, 'Transporting the European Social Partnership Model to Australia' (2006) 48(2) *Journal of Industrial Relations* 217, 217.

Alternatively, if neither parliament nor Courts and Tribunals take up the offer to create such express, positive obligations, there might be room to develop those parameters using existing principles. The authors have elsewhere suggested that,⁸⁴ since the authorities on consultation ‘stop short’ of explaining what the obligation to consult might entail, we ought to look to established legal concepts (for example good faith and cooperation) as a potential alternative framework.

The *CPSU v Vodafone* case referred to ‘bona fide’ consultation without expanding on what that involved.⁸⁵ While good faith is a human virtue that cannot be ordered, good faith conduct guidelines, such as the *Fair Work Act* good faith bargaining requirements,⁸⁶ are a familiar legal concept. Of its own motion, the Fair Work Commission could develop good faith consultation guidelines,⁸⁷ in a manner similar to its recent decision to review other dispute resolution processes under the Act.⁸⁸

There is a need for this type of guidance, because of the cases, the increase in individualised employment rights, the diversification of the nature and patterns of work post COVID19, and, as noted by Bray and Stewart in 2013, the diminishing legislative support for union forms of employee voice.⁸⁹

It would also be constructive to move consultation away from the conflictual idea of needing a ‘trigger’ towards a more cooperative approach. It could be said that good faith creates a guiding ideal for cooperation, and therefore consultation. Good faith at least creates a framework for rational discussion.⁹⁰ Further, a deeper legal foundation for meaningful consultation may exist in the common law implied duties of good faith and cooperation.⁹¹

However, while the imposition of more extensive obligations on employers may be warranted from an employee protection perspective, there may be positives in the ‘inherent flexibility’ that exists under the current approach. Without a positive minimum limit to consultation, there is the opportunity for employers to decide what best suits each given change in a workplace. It is in employers’ interests to offer consultation, and to do so genuinely and meaningfully. Employers and managers who fail to do so, will find that their

⁸⁴ Paul Lorraine and Giuseppe Carabetta, ‘Good Faith and Cooperation as a Framework For Consultation’ (Conference Paper, Australian Labour Law Association Annual Conference, 11 November 2022).

⁸⁵ *CPSU v Vodafone* (n 13).

⁸⁶ *Fair Work Act* (n 3) s 228.

⁸⁷ Gollan and Patmore identified relevant features of ‘good practice’ consultation: Gollan and Patmore (n 83) 234–7.

⁸⁸ For example, the Fair Work Commission proposed to amend model award terms to highlight the dispute processes for flexible work and unpaid parental leave: *Variation on the Commission's Own Motion – Flexible Work Amendments and Unpaid Parental Leave* [2023] FWCFB 76 (26 May 2023).

⁸⁹ Mark Bray and Andrew Stewart, ‘From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work’ (2013) 34(1) *Adelaide Law Review* 21.

⁹⁰ Lorraine and Carabetta (n 84).

⁹¹ *Ibid.*

employees do not join them in embracing workplace changes. They will also find themselves caught up in legal disputes, bringing lengthy negotiations, reputational damage and occasionally a trip to the Fair Work Commission. The current system serves to ensure that employers cannot force unpopular decisions onto employees without any consultation, while maintaining scope for managers to determine for themselves the appropriate level of consultation on a case-by-case basis.

APPENDIX – SAMPLE CONSULTATION PROVISIONS

A Port Kembla Coal Terminal Limited Enterprise Agreement 2012-2015, Clauses 7 & 13.5

7. Workplace Change and Consultation

- 7.1 Consultation over significant change or effect will occur where:
- a. the Company is considering introducing a major change to production, program, organisation, structure, technology, shift arrangements, work organisation or the level of outsourcing in relation to its enterprise; and
 - b. the change, if implemented, is likely to have a detrimental or significant effect on employees.
- 7.2. The purpose of consultation is to:
- a. Resolve issues, where possible, at the workplace and avoid unnecessary problems by identifying and discussing matters of actual or potential concern as close to the workplace as possible;
 - b. Improve the level of understanding between management, Employees and Employee Representatives by exchanging relevant information on a timely basis; and
 - c. Deliver an efficient decision-making process by ensuring Employees are aware of a review of their work area that could lead to significant change or effect on working arrangements and allowing Employees and Employee Representatives inputs to be taken into consideration through a process of consultation, prior to a final decision being taken by management.
- 7.3. The Company will give prompt and genuine consideration to matters raised by the relevant Employees and their Employee Representatives.
- 7.4. The Company will notify the relevant Employees and their Employee Representatives of the proposed change as soon as a decision has been made.
- 7.5. The consultation process may be modified by agreement between the parties.
- 7.6. Significant change or effect may include but is not limited to:

- a. major changes in the composition, operation or size of the Company's workforce; or
- b. the skills required; or
- c. the significant restructuring of work organisation; or
- d. proposals by the Company to outsource services or contract out services currently provided by Company Employees.

13.5 Redundancy

- 13.5.1. The Company undertakes that in managing manning levels to suit the business needs it will make use of redeployment and voluntary redundancy prior to implementing any forced redundancies.
- 13.5.2. If workforce reductions for Employees bound by this Agreement were to become necessary, they will be undertaken through the consultative process described in this Agreement.
- 13.5.3. The Company shall investigate all avenues to avoid forced redundancies, including the reduction of contractors, where the work performed by contractors can be performed by Employees of the Company, having regard to the skills and competencies of Employees and the nature of the work in question.
- 13.5.4. If a redundancy situation still exists after the above steps have been taken, the process for determining required compulsory redundancies within a classification will be through consultation, including taking length of service into account.
- 13.5.5. Should the need for redundancy arise, the PKCT standard severance package of four weeks pay in lieu of notice and three weeks pay per each year of service paid at the Special Purpose Rate shall apply, unless otherwise agreed or determined.

B QR Limited Traincrew Union Collective Workplace Agreement 2009, Clause 36

36 Consultation

- 36.1 For the purposes of this Agreement, consultation is a process:
 - Aimed at getting individuals or groups to suggest or respond to proposals to be implemented without at the same time giving up management's rights to make the final decision in these matters. It provides an opportunity to present a point of view or state an objection; and

- Involves the timely exchange of relevant information so that the parties have the actual and genuine opportunity to influence the outcome.

The Company will not be obliged to disclose confidential information if that disclosure is contrary to the Company's interests.

36.2 The Company will consult with affected employees and, at the employees' election, their nominated representatives, over any proposed changes that will have an impact on employees' terms and conditions of employment. The matters over which the Company will consult include, but are not limited to:

- termination of employment
- changes in the composition, operation or size of the Company's workforce, or in the skills required
- the elimination or reduction of promotion opportunities, job opportunity or job tenure
- the alteration of hours of work
- the need for retraining or transfer of employees to other work or locations
- the restructuring of jobs.

36.4 The Company will consult:

- At the local level, if the proposed change is not expected to affect any other part of the Company
- At the business group or Company level where the change is expected to impact on employees more broadly.

36.5 The process of consultation will include:

- The timely provision in writing of all relevant information, including details of the change, the likely effects on employees, the reasons for the proposed change and, where relevant, a proposed implementation date
- Discussion on measures to avert or mitigate any adverse effects on employees
- Provision of reasonable resources, including work time, for employees to fully participate in the consultation process

- Genuine consideration of employees', and at the employee's election, their representatives' suggestions, ideas and contributions
- Genuine opportunity for employees and, at the employee's election, their representatives to affect the outcome.

36.6 Where the Company makes a final decision in relation to the matter subject to consultation, the Company will notify the affected employees and, at the employee's election, their representatives in writing. This notification will include final details of the proposed change and an implementation date. The implementation date will not be earlier than 5 working days from the date of the notification, unless safety concerns demand otherwise. In such cases, the notification will be signed by senior Company management.

C Toll Group – TWU Enterprise Agreement 2013-2017, Clause 14

14. Consultation on workplace change

- (a) If Toll is considering workplace changes that are likely to have a significant effect on Transport Workers, it will consult with the Union and any Transport Workers who will be affected by any proposal.
- (b) As soon as practicable Toll must discuss with the Union and relevant Transport Workers the introduction of the change, the effect the change is likely to have on the Transport Workers, the number of any redundancies, the persons or class of persons likely to be affected and any reasonable alternatives to the change or redundancy. Toll must discuss measures to avert or mitigate the adverse effect of the change on the Transport Workers.
- (c) Toll will give prompt and genuine consideration to matters raised about the change by the affected Transport Workers and the Union.
- (d) As soon as a final decision has been made, Toll must notify the Union and the Transport Workers affected, in writing, and explain the effects of the decision.
- (e) In the event that a Dispute arises in respect to any decision, proposal or consideration to effect any change, the parties agree to follow the disputes procedure in clause 15, and until the Dispute is resolved in accordance with that procedure the status quo before the Dispute arose will be maintained and work will continue without disruption.
- (f) A reference to a change that is 'likely to have a significant effect on Transport Workers' includes but is not limited to:

- (i) the termination of the employment of Transport Workers; or
 - (ii) major change to the composition, operation or size of Toll's workforce or to the skills required of Transport Workers; or
 - (iii) the elimination or diminution of a significant number of job opportunities (including opportunities for promotion or tenure);
or
 - (iv) the significant alteration of hours of work; or
 - (v) the need to retrain Transport Workers; or
 - (vi) the need to relocate Transport Workers to another workplace; or
 - (vii) the restructuring of jobs.
- (g) With the prior approval of Toll and subject to clause 39, the Union may enter Toll's premises in order to consult with Transport Workers regarding a workplace change.

D BMA Enterprise Agreement 2012 Clauses 32, 15

32 Redundancy

- 32.1 Where a surplus of permanent Employees arises at a Mine during the life of the Agreement that cannot be addressed through natural attrition, the Company will consult with Employees and their Employee Representatives, about the possible need for redundancies, and if so:
- (a) the means of minimising the number of redundancies; and
 - (b) the means of minimising the effect of the redundancies on Employees.
- 32.2 Any surplus will be addressed in one or more of the following ways:
- (a) By voluntary redundancy, at the rate specified in clause 32.9; or
 - (b) By redeployment to another task within the Mine, which is appropriate to the skills and competencies of the Employees concerned, or through retraining; or
 - (c) Transfer of Employees who have the appropriate skills and competencies or who can be retrained within a reasonable period of time to:
 - (1) another position or other duties (which may be temporary) at a Mine which is within reasonable distance from the Employee's residence;

- (2) a vacancy created by an Employee taking voluntary redundancy at a Mine which is within reasonable distance from the Employee's residence;
- (3) another position or other duties (which may be temporary) at a Mine outside reasonable distance from the Employee's residence; or
- (4) a vacancy created by an Employee taking voluntary redundancy at a Mine outside reasonable distance from the Employee's residence. ...

32.3 Where the surplus cannot be adequately addressed through 32.2(a), 32.2(b) or 32.2(c), then the Company may consider forced redundancies. In such a case, it shall investigate and consider all reasonable avenues to avoid such forced redundancies. This will include removal of contractors and labour hire, except where:

- (a) There are contractual commitments that prevent this;
- (b) The work performed by contractors or labour hire is considered to be specialist work of a non-permanent nature; or
- (c) Employees are not readily able to perform the work.

32.4 Where voluntary redundancy is offered, the Company will have regard to its requirement to retain an appropriate mix of skills and competencies. Accordingly, not all applicants will necessarily be accepted for voluntary redundancy.

32.5 Where forced redundancies are necessary:

- (a) The Company will determine the number of Employees to be made redundant and the spread of skills required for the efficient and effective operation of the relevant Mine; and
- (b) To ensure that a Mine can be operated in the most productive and efficient manner, all Employees from within the Functional Work Area (as listed at clause 41) where a surplus exists will be interviewed to determine the Employees to be retained or retrenched.

32.6 The selection method for forced redundancies will involve a selection process that will be conducted by a panel trained in behavioural interviewing. The panel will include:

- (a) An independent member agreed between the Company and the Unions; and
- (b) A representative selected by the workforce.

- 32.7 A merit-based selection process will be undertaken by the panel which will take into consideration the following:
- (a) Necessary skills mix required by the business;
 - (b) Individual skills and proficiency in those skills;
 - (c) Employment record/length of service ...

32.9 Redundancy Pay

Redundancy payments will be calculated at the rate of 13 weeks' base salary plus 2½ weeks' base salary per year of continuous service for the first 26 years of service, plus ...

For the purpose of this clause:

- (a) One week's base salary will be equal to \$1742 subject to clause 32.9(b) and clause 9 of Schedule 5; or
 - (b) In the case of Crinum Employees, one week's base salary will be as follows:
 - (1) Mine worker 7 Day Roster 12 Hour Shifts = \$1997
 - (2) Section &/or Engineering Co-ordinators, 7 day roster 12 Hour Shifts = \$22233.
- 32.10 Any payment under clause 32.9 is inclusive of any statutory entitlement an Employee may have to severance or redundancy or retrenchment pay.

32.11 Redundancy Relocation Assistance

15 Consultation on major workplace change

- 15.1 For the purposes of section 205 of the Act, the model consultation clause, as defined in the Fair Work Regulations 2009 (Cth), as amended from time to time, applies to any 'major workplace changes that are likely to have a significant effect on Employees'.
- 15.2 The model consultation clause does not apply to any major workplace changes implemented under this Agreement for which other consultation obligations are prescribed in this Agreement. In all circumstances, only a single consultation process will apply.

MODEL CONSULTATION CLAUSE:

(1) *This term applies if:*

- (a) *the Company has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise; and*
- (b) *the change is likely to have a significant effect on Employees.*

(2) *The Company must notify the relevant Employees of the decision to introduce the major change.*

(3) *The relevant Employees may appoint a representative for the purposes of the procedures in this term.*

(4) *If:*

- (a) *a relevant Employee appoints, or relevant Employees appoint, a representative for the purposes of consultation; and*
- (b) *the Employee or Employees advise the Company of the identity of the representative;*
the Company must recognise the representative.

(5) *As soon as practicable after making its decision, the Company must:*

- (a) *discuss with the relevant Employees:*
 - (i) *the introduction of the change; and*
 - (ii) *the effect the change is likely to have on the Employees; and*
 - (iii) *measures the Company is taking to avert or mitigate the adverse effect of the change on the employees; and*
- (b) *for the purposes of the discussion — provide, in writing, to the relevant Employees:*
 - (i) *all relevant information about the change including the nature of the change proposed; and*
 - (ii) *information about the expected effects of the change on the Employees; and*
 - (iii) *any other matters likely to affect the Employees.*

- (6) *However, the Company is not required to disclose confidential or commercially sensitive information to the relevant Employees.*
- (7) *The Company must give prompt and genuine consideration to matters raised about the major change by the relevant Employees.*
- (8) *If a term in this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the Company, the requirements set out in subclauses (2), (3) and (5) are taken not to apply.*
- (9) *In this term, a major change is likely to have a significant effect on Employees if it results in:*
- (a) the termination of the employment of Employees; or*
 - (b) major change to the composition, operation or size of the Company's workforce or to the skills required of Employees; or*
 - (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or*
 - (d) the alteration of hours of work; or*
 - (e) the need to retrain Employees; or*
 - (f) the need to relocate Employees to another workplace; or*
 - (g) the restructuring of jobs.*
- (10) *In this term, relevant Employees means the Employees who may be affected by the major change.*