FACT SHEET
Consultation Provisions under the HIGA and RIA

Updated: June 2016
Replaces: February 2014

The information contained in this Fact Sheet applies to employers with employees employed in accordance with the *Hospitality Industry (General) Award 2010* (the 'HIGA') and the *Restaurant Industry Award 2010* (the 'RIA') only.

Under both the HIGA and RIA, there is an obligation for employers to consult with their employees in relation to:

1. Major workplace change; and
2. Changes to an employee's regular roster or ordinary hours of work.

This Fact Sheet will explore the meaning of consultation and situations where consultation is required, with a focus on the requirement to consult with employees regarding changes to their regular roster or ordinary hours of work.

BACKGROUND

With respect to point two above, the *Fair Work Amendment Act 2013* inserted new provision, Section 145A, into the *Fair Work Act 2009* (the 'Act') effective from 1 January 2014. Section 145(A) of the Act requires that from 1 January 2014 all modern awards must include a term requiring employers to consult with employees regarding changes to their regular roster or ordinary hours of work. These amendments were brought about by the Government (at the time) to ensure that employers do not unilaterally make changes that adversely impact upon their employees without consulting on the change and considering the impact of those changes on those employee family and caring responsibilities.

In consideration of the impending amendment to the Act, the Fair Work Commission ('FWC') released a draft consultation term in November 2013. Various industry stakeholders, which included employer associations such as the Australian Hotels Association ('AHA'), and employee associations were provided with an opportunity to make submissions in respect of the draft consultation term, in relation to any modern award. On 13 December 2013, an oral Hearing was also conducted with interested parties given the opportunity to make formal submissions before a Full Bench of the FWC.

On 23 December 2013, the Fair Work Commission handed down its decision with respect to the model consultation term for modern awards. The consultation term, which is included within this Fact Sheet, became a term of all modern awards effective from 1 January 2014.

FROM 1 JANUARY 2014

Effective from 1 January 2014, the HIGA and RIA both contain a consultation term requiring employers to consult with employees about changes to their regular roster or ordinary hours of work. This is in addition to the existing requirement that employers consult with their employees regarding major change.

The obligation to consult regarding major change will be discussed further within this Fact Sheet.

The new consultation term allows employees to be represented during the consultation process. The new consultation term also requires employers:

- To provide information to the employees about the change; and
- To invite employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
- To consider any views about the impact of the change may have on the employee.

The new award clause, as it appears at clause 8.2 in both the HIGA and RIA, is reproduced below. To assist members with the practical application of this clause, guidance notes have also been provided.

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.

QHA GUIDANCE NOTES ON 8.2(a)
'Regular roster' is not defined; however, the Revised Explanatory Memorandum provides some clarification. It states that regardless of whether an employee is permanent or casual, where the employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award. The requirement to consult is not triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours.

Consultation must take place prior to a definite decision being made to change an employee's regular roster or ordinary hours of work. Further information regarding consultation can be found within this Fact Sheet under the heading 'What is consultation?'

(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.*

QHA GUIDANCE NOTES ON 8.2(b)
Employees are entitled to be represented throughout the consultation process. An employee representative could be an elected employee or a representative from an employee organisation (i.e. union).

There is no requirement for any part of the consultation process to take place in writing. Employees may be consulted with verbally. With that being said, at the very least, the QHA recommends that its members document the details of any consultation discussions that take place with employees to mitigate against claims that the consultation process was not followed.

(c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

QHA GUIDANCE NOTES ON 8.2 (C)
The QHA recommends that employers review the working patterns of their casual employees and make sure that their working patterns truly reflect the nature of casual employment i.e. work that is irregular, sporadic and unpredictable.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

QHA GUIDANCE NOTES ON 8.2 (D)
Under Clause 30.2 of the HIGA and Clause 31.6(b) of the RIA, rosters for full-time and part-time employees are alterable by mutual consent at any time or by amendment of the roster on seven days' notice. These provisions are unchanged however, through the introduction of the model term regarding consultation about changes to regular rosters and ordinary hours of work, the seven day notice period, or a time agreed to by mutual consent, can only commence after the consultation process is complete and definite decisions have been made.

WHAT IS CONSULTATION?

Case law informs that in order for consultation to be considered meaningful, employees need to be given a real opportunity to change the mind of the employer. Consultation is not taken to have occurred if irrevocable decisions have already been made prior to discussions being held with employees.

In its decision of 23 December 2013, the FWC cited the following case law in illustration of the meaning of 'consult'. Specifically;

- "The word 'consult' means more than one party telling another party what it is that he or she is going to do. It 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" (*Dixon v Roy (1991) 5 BPR 11*).

- "Inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action" *(Port Louis Corporation v Attorney-General of Mauritis (1965) AC 1111; TVW Enterprises Ltd v Duffy and Others (1985) 60 ALR 687)*.

- "…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 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. …" (*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited [2010] FCA 591*)

- "Consultation does not amount to joint decision making" (*CPSU v Vodafone Network Pty Ltd [2001] AIRC 1374*)

It is important to note that at the conclusion of the consultation process, the employer is entitled to make the final decision regarding the matter that has been the subject of consultation, that is, whether changes to the roster/ordinary hours of work will have effect.

WHEN ELSE IS CONSULTATION REQUIRED?

Consultation is also required in circumstances of major workplace change. The obligation to consult with employees under these circumstances is not new and has been required under the HIGA and the RIA since they came into operation as modern awards on 1 January 2010. As a consequence of the insertion of the new consultation term, Clause 8 in both awards was renumbered as clause 8.1 on 1 January 2014 and appears as follows:

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, 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.

(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.

The key difference between the obligation to consult regarding major workplace change and the obligation to consult regarding changes to regular rosters or ordinary working hours is that for the purposes of discussions regarding major workplace change, the employer must provide information in writing to the affected employees (as per Clause 8.1(b)(iii)). In relation to changes to regular rosters or ordinary hours of work, there is no requirement for any part of the consultation process to take place in writing.

DISPUTE RESOLUTION

Employees covered by the HIGA or RIA who are in dispute with their employer regarding a matter contained within the award (such as whether or not the consultation process has been adhered to) may instigate the Dispute Resolution process under Clause 9 of their respective award.

ENTERPRISE AGREEMENTS

Enterprise Agreements made after 1 January 2014 are now required to contain a term that requires employers to consult with employees about changes to rosters or hours of work.

Prior to 1 January 2014 it was mandatory for enterprise agreements made under the *Fair Work Act 2009* to contain a term requiring employers to consult with employees regarding major workplace change. Where an enterprise agreement does not contain such a term, the model consultation term contained within the *Fair Work Regulations 2009* is taken to be a term of the agreement. These requirements continue to apply and are unchanged by the FWC's recent decision.

Further Assistance
Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.