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In reply please quote: *NB:gs*:

3 May 2017

Mr Martin Hoffman
Secretary
NSW Department of Finance, Services & Innovation
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: martin.hoffman@finance.nsw.gov.au

Dear Mr Hoffman,

RE: Clause 65 Crown Conditions Award – public sector obligations to consult with the PSA

Clause 65 of the *Crown Employees (Public Service Conditions of Employment) Award 2009* (the Conditions Award) makes specific reference to the *Consultative Arrangements: Policy and Guidelines* document as follows:

65.1 There shall be effective means of consultation, as set out in the Consultative Arrangements Policy and Guidelines, on matters of mutual interest and concern, both formal and informal, between management and Association.

The 1997 policy originally arose from negotiations between the PSA and the Government and reflected a strong commitment by both parties to appropriate consultation at both a peak level and at a departmental level.

Central to the 1997 policy was the definition of what consultation is.

As you are aware in 2014 the PSA successfully challenged the Government on the question of whether the 1997 Consultation Policy had been incorporated as a term of the Crown Employees (Public Service Conditions) Reviewed Award 2009: *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWIRComm 23.

In his decision Justice Walton found that [at 211] “The necessary implication must be that, if management and the PSA are to effectively consult on ‘matters of mutual interest and concern, both formal and informal’, they are required to do so in accordance with the 1997 Consultative Arrangements.”

Justice Walton further stated [at 240] “In my opinion, the language of cl.65.1, when read in context, confirms an intention that there be an effective means of consultation between

management and the PSA in the form of the 1997 Consultative Arrangements which carried with it a legal obligation to comply with those Arrangements... The parties will be required to act in accordance with those provisions by undertaking consultation within the framework of those Arrangements and, in the case of terms expressed as being obligatory, to act accordingly."

The 1997 policy states that 'consultation enables employees, through their union(s), to participate in and influence decisions which directly affect them', and it saw employees as participants in the decision making process. Implicit in this statement is the assumption that in order to participate in decisions the consultation had to take place prior to decisions being made or implemented.

The 1997 policy recognises that consultation had to be a joint process that involved unions in developing the appropriate consultative arrangements for the circumstance.

I draw your attention to the above ruling for the purpose of seeking a recognition from the Department that Justice Walton's decision represents the existing consultative framework, and for the purpose of thereafter affirming the strong commitment that exists between both parties to appropriate consultation, which includes the ability of the PSA to participate in and influence decisions prior to those decisions being made.

Re. obligation to consult per s49 (d) of the Work Health and Safety Act 2011 (NSW)

Moreover, PSA members and co-workers employed within the Department of Finance, Services and Innovation (DFSI) have in recent times have experienced ongoing concern, anxiety, loss of morale and loss of confidence in DFSI due to its failures to consult authentically on key decisions affecting their working conditions and their health, safety and wellbeing.

By way of example, I draw your attention to DFSI's decision in June 2015 to move to a single Flexible Working Hours Agreement (FWHA). The DFSI failed to consult on its initial proposals. At the time this led to undue stress and anxiety for many DFSI staff

Similarly, the Department's decisions to relocate various staff to new locations, as well as its implementation of a 'one-size-fits-all' DFSI "clean desk" policy, without allowing staff the opportunity of being heard or to have input on whether these decisions themselves are in the best interests of the business and its workforce, caused very significant stress to our members and co-workers.

With respect to these examples there appears to be a reluctance by DFSI to consult with workers and their union on initial proposals before they become actual decisions.

The practice, as evidenced by the way the FWHA and recent 'clean desk' decisions have been implemented, is that DFSI proposes to make a change, then decides to implement that change, then proceeds to consult on the implementation of that change. This, with the greatest respect, reflects little commitment by DFSI to authentically allowing workers to participate in the making of decisions which may significantly affect their health and wellbeing.

Moreover, the practice of only consulting on the implementation of decisions does not reflect best practice in terms of compliance with section 49(d) of the Work Health and Safety Act 2011 (WHS Act). That provision, as you are aware, requires consultation with workers when changes are proposed which may affect the health and wellbeing – including psychological health and wellbeing - of their workers. There is currently little judicial guidance that can assist in the interpretation of section 49(d) of the WHS Act. However, there is some assistance available on the broader question of consultation available from the decision in *QR Ltd v. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] 204 IR 142 (QR) where his Honour Judge Logan said:

"To elaborate 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 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"

In the current context of the aforementioned examples, the PSA is seeking a commitment from DFSI to follow best practice principles as laid out by Judge Logan, and consult before a definite decision has been made to implement a decision that may affect workers' health and safety.

This would not only lead to our members feeling more valued and involved, it would reduce the amount of stress and anxiety felt by our members, leading to more effective implementation of such changes.

I respectfully urge you to note these expressions of concern.

In order to address the above, the PSA now requests the establishment of a platform for the urgent and comprehensive review of the consultative policies and practices currently in place within DFSI and that this review be conducted in full consultation with the PSA.

Attached for your reference is the PSA's best practice process application of section 49(d) of the WHS Act for the Department's consideration and adoption.

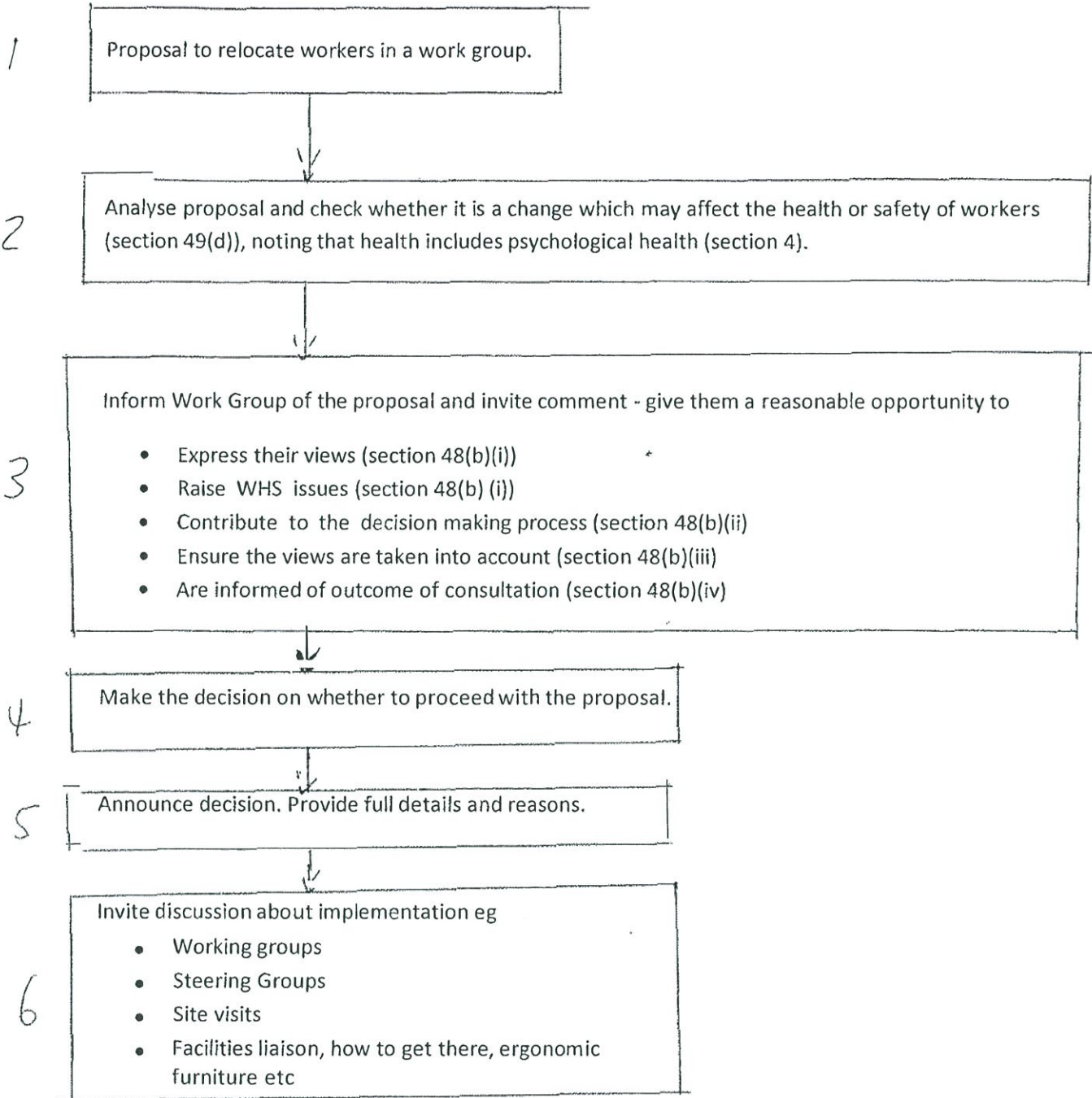
Yours sincerely,



Nathan Bradshaw
Industrial Manager
For General Secretary

Encl.

Suggested "Best Practice" process application of section 49(d) WHS Act



QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2010] FCAFC 150; (2010) 204 IR 142.

In that case, Logan J said:

“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 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”.