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DECISION MAKING & KEY GOVERNANCE CONSIDERATIONS IN TIMES OF CHANGE

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The Plans of "Seeds" - Directing by Du Feichen

KING & WOOD
MALLESONS
金杜律师事务所

AGENDA

1

SETTING THE
SCENE

2

CONSIDERING
OPTIONS FOR
CHANGE

3

MAKING A
DECISION

4

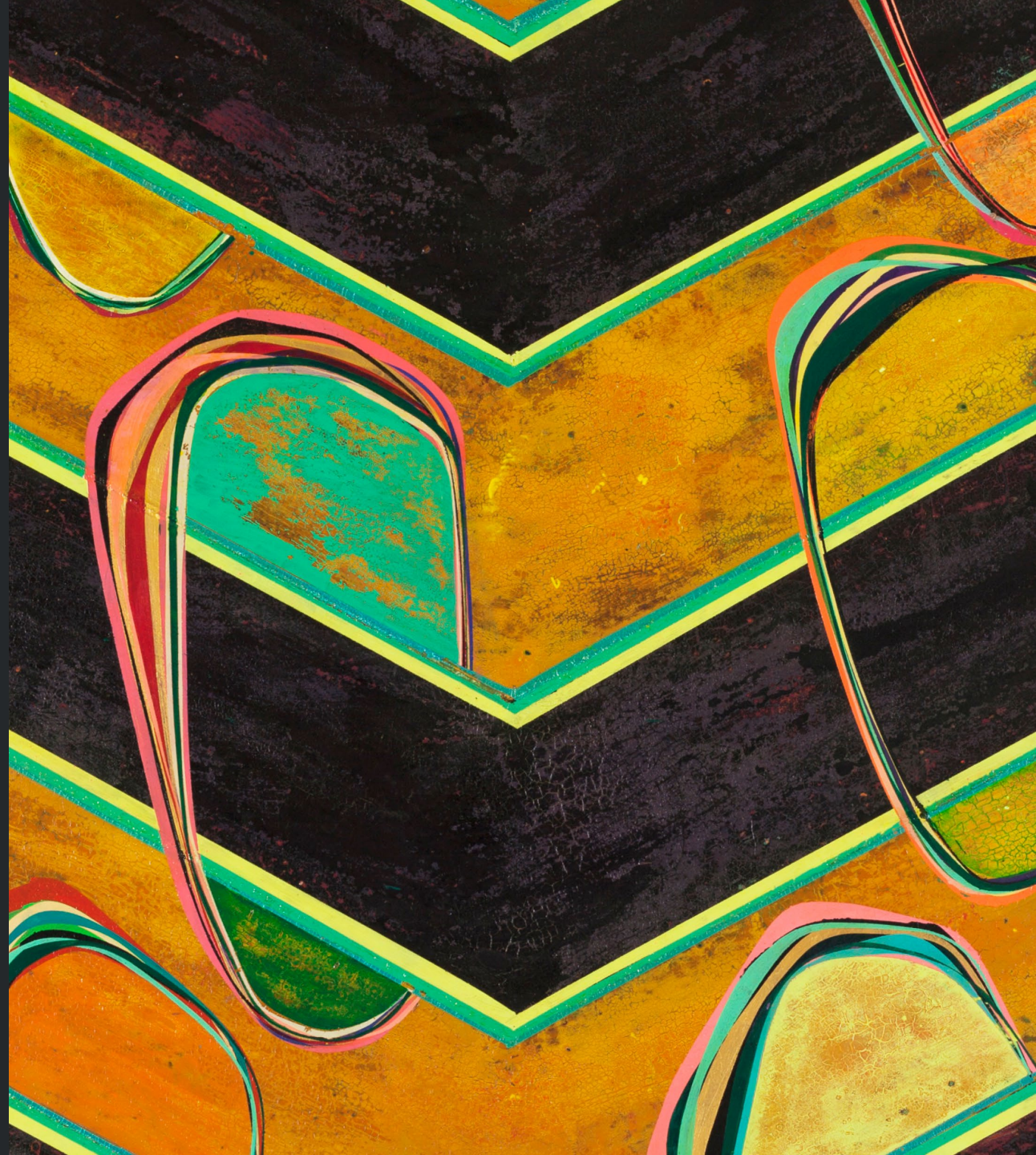
IMPLEMENTING
THE DECISION

5

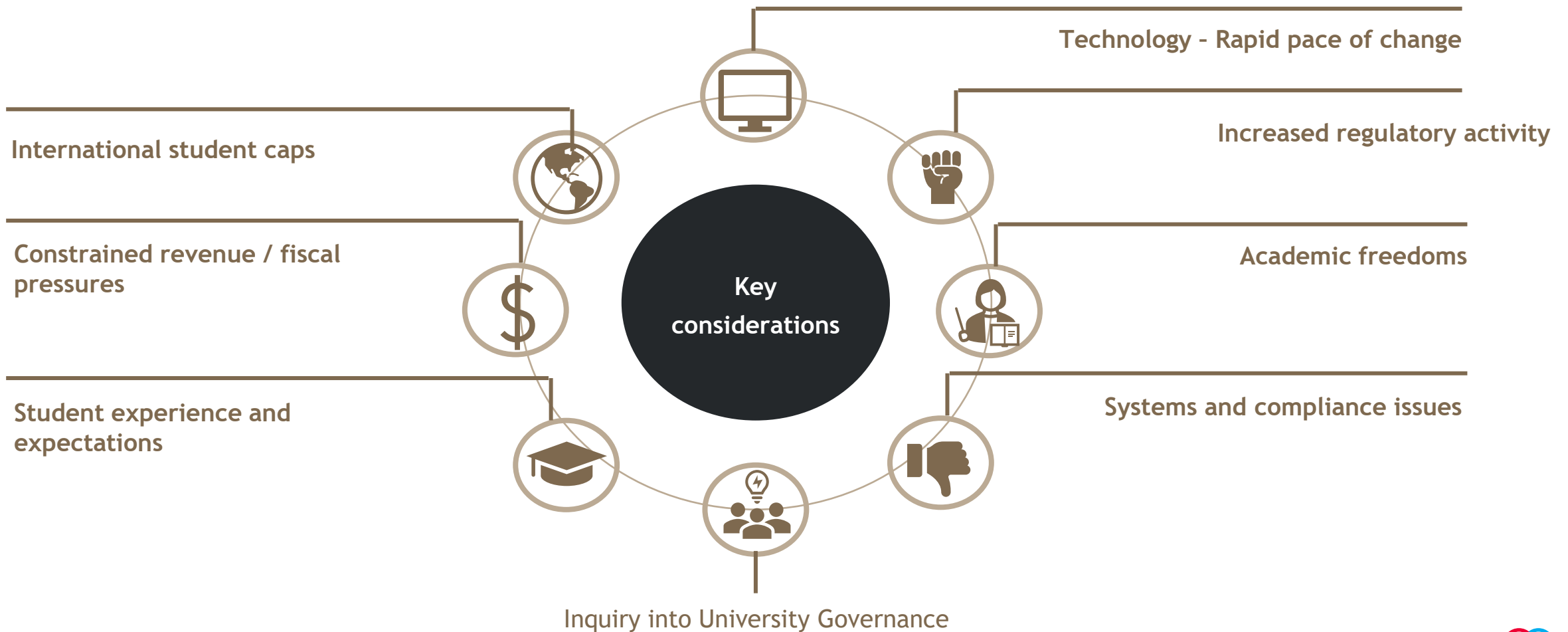
FINAL
THOUGHTS



SETTING THE SCENE



CURRENT ENVIRONMENT



SETTING THE SCENE

CONSEQUENCES WHEN THINGS DON'T GO TO PLAN



Higher **statutory penalties**, including the prospect of awards to unions



Liability for individuals found to be **associated with** the contravention



Expanding categories of **representative proceedings** for underpayments, discrimination and compliance matters



Active regulators who are showing increasing interest in change programs

Employment law compliance needs to be on the Council agenda as a key area of risk.



BACKGROUND

- Kings Park University, a mid-sized Australian public university with campuses in Dalkeith and Joondalup, faces a sustained financial deficit after international student commencements lagged projections and domestic enrolments flattened in several humanities disciplines.
- KPU is considering making changes to the Arts Faculty in response to the difficulties.

CONSIDERING OPTIONS FOR CHANGE

Options Paper

Rationale for Change

- ‘As part of the proposed School merger, consideration should be given to how KPU can use the restructure to address **ongoing performance management issues** in the School of English.’

Proposed timeframe

- ‘KPU Academic Staff Agreement due to **expire 30 June 2026**. Vanishing window of opportunity to avoid protected industrial action impacts’.

CONSIDERING OPTIONS FOR CHANGE

*It may be that a **substantial and operative reason** for Mr David making the outsourcing decision was not the Relevant Prohibited Reason, but by reference to all the evidence, **I am not reasonably satisfied on the preponderance of probabilities that this fact has been proved by Qantas.** In these circumstances, and in this respect, Qantas has not discharged its onus.*

CONSIDER:

- What are the **real or actual reasons** for change?
- How do we manage having **multiple reasons for change**?
- Who is the ultimate **decision maker**?
- What **information** should be before the decision maker?
- How do we **document** reasons for change?

CONSIDERING OPTIONS FOR CHANGE

1

Avoiding the risk

From an early point, consideration should be given to the actual drivers/reasons for change.

2

Documenting the operative reason

The rationale for change should be supported by neutral documentation with options assessments

3

Supporting the decision maker

Decision-makers should be chosen carefully and must be able to explain the entire rationale for change.

MAKING THE DECISION

Decision Making

After considering options for change, the KPU Dean of the Faculty of Arts settles on the following proposal:

- *KPU proposes to merge the School of Anthropology and the School of Linguistics into a single 'School of Social Sciences'.*
- *This will lead to the discontinuance of a number of courses, and 20 full-time academic positions are proposed to be cut.*

The School of Linguistics employs a significant number of casual teaching staff. The proposal does not consider any change to casual employment.

MAKING THE DECISION

A ‘**genuine redundancy**’ is when:

- the employee’s job doesn’t need to be done by anyone; and
- the employer followed **consultation requirements** in the relevant enterprise agreement.

However, a dismissal will not be a case of genuine redundancy if it would have been **reasonable in all the circumstances for the person to be redeployed** within the employer’s enterprise.

HELENSBURGH

- Helensburgh decided to reduce productivity and restructure its operations as a result of economic downturn during COVID-19.
- The restructure resulted in a decrease in **contractors of 40%** and **90 employees being made redundant**.
- 22 employees subsequently brought **unfair dismissal proceedings** against Helensburgh.

MAKING THE DECISION

TAKEAWAYS FROM *HELENSBURGH*



Fair Work Commission **powers of inquiry expanded** to consider employer's operations



Redeployment must be a **design criterion** not an afterthought



Employers must have **reasoned explanations** for why redeployment was not reasonable

IMPLEMENTING THE DECISION

Townhall Meetings

KPU sends an email to its employees arranging a series of one-hour long townhall meetings with its employees to discuss the proposal. The email is sent to employees during peak assignment season, when workloads are high. It doesn't contain any reference to the EAP or other supports.

The following week, SafeWork issues a Prohibition Notice requiring KPU to immediately halt the process on the basis it posed an 'immediate and imminent risk of psychological harm to staff'.

SOURCES OF CONSULTATION OBLIGATIONS

1

WHS Laws

PCBUs must consult, as far as is reasonably practicable, with workers who are, or are likely to be, directly affected by a WHS matter, and with any health and safety representatives.

2

Enterprise Agreements

At minimum, under the model consultation clause, employers must consult with employees where they propose to introduce a 'major change'.

3

Policy

Internal WHS policies and risk assessments may deal with redundancy scenarios.

IMPLEMENTING THE DECISION

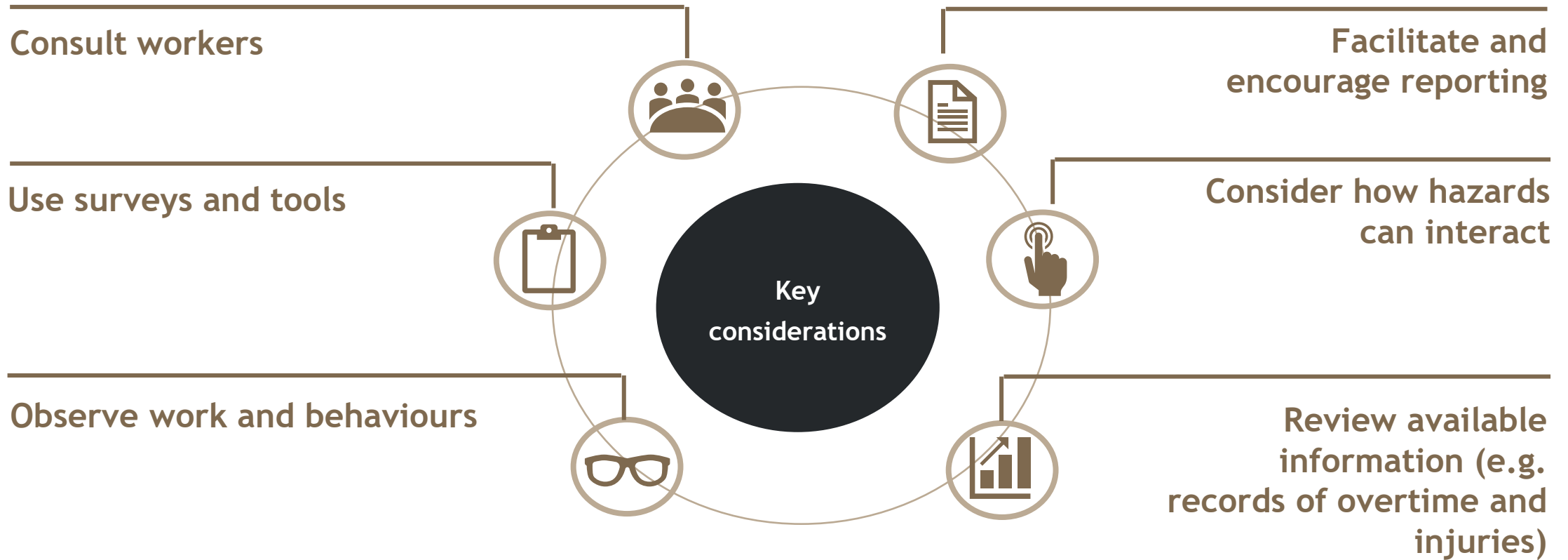
THE RISKS OF POOR ORGANISATIONAL CHANGE MANAGEMENT

Poor organisational change management is recognised as a psychosocial hazard by Safe Work Australia

Poor organisational change management may include:

- **not consulting on changes** (e.g. not talking to workers or genuinely considering their views);
- not thinking about how a change may **impact WHS risks or workers' performance**;
- **poorly planned** changes (e.g. changes are disorganised or do not have a clear goal);
- changes are **poorly communicated** (e.g. information about the changes isn't provided or is unclear); or
- **not enough support** for the changes.

IDENTIFYING PSYCHOSOCIAL RISKS



KEY RECOMMENDATIONS



PLANNING FOR CHANGE

Planning should start early and address each stage of the process, including the management of risks post-implementation.



CONDUCT THOROUGH RISK ASSESSMENTS

For major change processes, documenting hazards and controls. Risk assessments should ensure changes are reasonable and fair.



CONSIDER THE UNIVERSITY CONTEXT

Additional stressors including:

- Workloads
- Safety issues
- Bullying and interpersonal conflict
- Academic freedom
- Heavy bureaucracy



STRENGTHEN CONSULTATION PROTOCOLS

Provide clear, authoritative information about upcoming changes as soon as possible and keep workers up to date. Avoid using “finalistic” language in communications.



PROVIDE TAILORED STAFF SUPPORT

Beyond EAPs, including workload management, education and training for leaders, practical support where an employee is required to take on new tasks and mental health resources.

THE INTERSECTION BETWEEN EA CONSULTATION AND WHS OBLIGATIONS

- WHS laws require **early, genuine consultation on risks** when change is contemplated, whereas many EAs trigger consultation once a definite decision to introduce change has been made.
- Employers should **move promptly to EA consultation** once a decision gate is crossed.
- WHS risk assessments should address **risks created by consultation itself**.

IN SHORT:

- Careful consideration of the interaction of the two obligations is required and awareness of timing implications

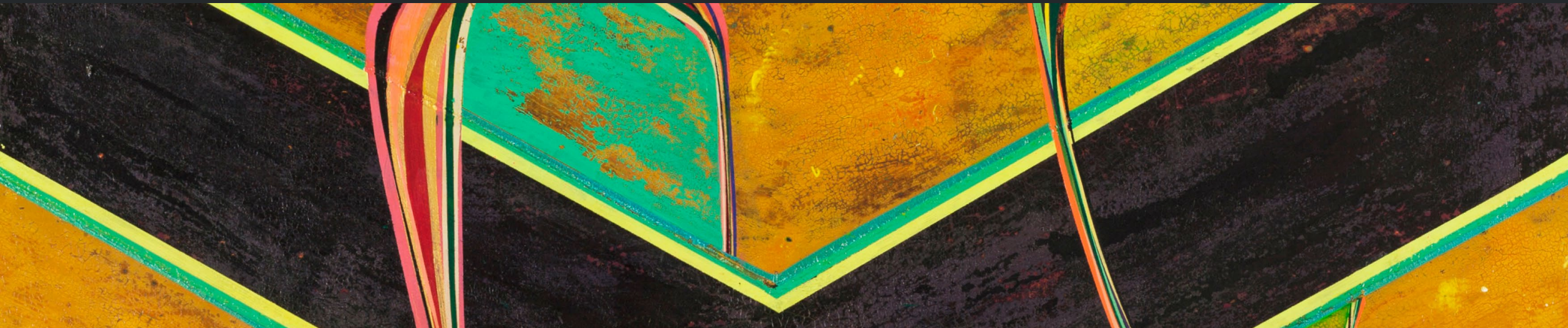
REGULATOR POWERS

- Under health and safety laws across Australia, regulators and inspectors have **wide ranging powers**.
- This includes the power to:
 - **enter workplaces** without a search warrant;
 - **access documents** (such as incident reports, risk assessments, personnel files and meeting minutes); and
 - require persons to submit to interviews. Unlike police interviews, a person **cannot refuse to participate or answer any questions** that may be self-incriminating.

NOTICES

The regulator is also empowered to issue **Prohibition Notices** where the Inspector reasonably believes an activity is occurring, or may occur, which involves a **serious risk to health or safety** of a person emanating from an **immediate or imminent exposure to a hazard**.

QUESTIONS



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THANK YOU
