



Getting Ready for Change



OVERVIEW

- Industrial obligations
- Restructure
- Building your communication strategy
- Consultation – the formal requirements
- Possible outcomes of restructure
- Transfer of business
- Obligations of Employees
- Severance payments and entitlements.

Industrial Risks



- **Cost of disputation**
 - Time and \$\$\$
 - Reputation
- **Demoralisation**
 - Loss of valued staff over an extended period
 - Undermines quality service delivery and business viability
- **Increased stress**
 - Effect on welfare of all stakeholders
 - Workers compensation costs

Obligations



- **NES requires**
 - notice of termination
 - severance pay for redundancy
- **Awards require consultation**

Is that all there is?

Case law - employer obligations



- Give reasonable **written** noticeincluding the details of changes and the possibility of redundancy.
- Consult on the impact of the proposed changes.
- Explore genuine alternative options for redundancy, such as redeployment or relocation. Ensure such options are fairly offered to the affected employees.
- Provide reasonable standards of redundancy benefits.
- Provide appropriate ancillary services, such as time off to seek alternative work, retraining opportunities, outplacement services or financial planning.
- Ensure employees nominated for redundancy are fairly selected on an objective and unbiased basis.

Employee obligations



Employees must:

- Being willing to participate in the consultation process.
- Participating in exploring alternatives to redundancy.
- Not being unreasonable about accepting retraining, alternative employment, redeployment or relocation.

Restructure Issues



- Restructure by necessity (eg reduction in funding).
- Strategic choice (eg increase in funding or need for new or varied programs).
- Restructure may mean changes to roles/hours/hierarchies, not just redundancy.

Downsizing – funding cuts



- Aim to hold on to engagement, performance if some programs are continuing or not ending for some time off.
- Consistent with values
 - Ethically important
 - Signal to survivors and other stakeholders
 - Reputation
- Organisational strategy
 - Redeployment or transfer opportunities?

Consultation



- Awards and enterprise agreements require consultation around change;
 - Especially potential redundancy, but also other restructuring such as growth
- Opportunity for employees to influence the outcome;
 - Not just one way information
- Agreement desirable but not necessary
 - No employee or union veto
- Requirements relating to written information;

Communication and consultation:



- Early and Systematic
 - Fairness
 - Minimise rumours and distraction
 - Improve chances of creative solutions emerging from employee discussions
 - Foster trust and cooperation ('buy in')
 - Reduce stress (which thrives in uncertainty)

Consultation: Award elements



- Provide staff with written advice of the proposed change.
- Advise of why restructure is necessary.
- Advise of the options to form the basis of discussions
 - Options available for redeployment.
 - Possible opportunities of redundancy.
- Explore ways to mitigate adverse effects on employees:
 - OK to put forward preferred outcome, or options, but be prepared to modify

Remember – our greatest assets are.....



'OUR PEOPLE'

Pay attention to the wellbeing of:

- Redundant Employees
- Their colleagues
- Managers implementing cuts
- Clients
- Third Party Stakeholders

REDUNDANCY



When the employer does not require anyone to do that job anymore....



Redundant positions



- Positions are made redundant, not people....
- **Not the employee's fault**
- Outcomes may include:
 - Redeployment
 - Retraining
 - Changes in hours
 - Termination (redundancy)

Disputes



- **Unfair dismissal**
 - Genuine redundancy defence
 - Valid reason and
 - Process
- **General protections**
 - For adverse action taken for a prohibited reason
 - Discrimination, temporary absence due to illness etc
 - Onus on employer to show real reason
 - Good process assists with defence

“Genuine Redundancy”



- **Funding cut/s usually a valid reason, however,**
- Consult as per the award and explore ways to *mitigate the adverse effects*
- **Explore redeployment**
 - Potentially redundant employees should be considered for vacancies before advertising;
 - If in a consortium, reasonable to consult with consortia members about redeployment/transfer opportunities
- Fair process for identifying redundant roles

Mitigating adverse affects



- Voluntary reductions in hours
- Job share
- Identifying other non-wage cost savings
- Redeployment or transfer
- Retraining
- Outplacement
- Voluntary redundancy
- Temporary changes

Redeployment



- Potentially redundant employees get first chance at any vacancies
 - Consider redeployment if the selection criteria is satisfied, or could be with reasonable training;
- ‘Acceptable Alternative Employment’
 - Job is at a comparable level and conditions
 - May exempt employer from severance pay
 - If the employer actively obtained the work
 - Need to apply to Fair Work Commission

Case study



- Coal mine – 6 employees found to not be genuinely redundant because it would have been reasonable to redeploy
- Essential aspect of redeployment is that it is an alternative to retrenchment
- Assess nature of positions, qualifications, skills, experience, location
- Requirement not met if employee made to compete with other applicants following advertisement

Ulan Coal Mines Ltd v Honeysett & Ors; Murray & Ors v Honeysett & Ors [2010] FWAFB 7578
 — FB of FWA (Giudice J, Hamberger SDP, Cambridge C) 12/11/10.

 Jobs Australia
 Community Sector Industrial Relations

Identifying Redundant positions



- Identify which jobs are affected
- Based on the position not the individual
- Usually straightforward if funding cut
- Can be more complex in restructuring
- Consider your redundancy strategy.

 Jobs Australia
 Community Sector Industrial Relations

Redundancy strategy



Call for voluntary redundancy?

- Voluntary retrenchment preferable to forced
- May need to restrict scope to avoid loss of key workers/skills
- Dismissal due to redundancy is not an “entitlement”. Manage expectations
 - Call for expressions of interest and reserve rights regarding final decisions

Redundancy strategy



- Spill & fill?
 - Limit to situation of a reduction in the number of similar roles if voluntary measures not enough;
 - Employees who miss out on “their own job” may have basis for unfair dismissal claim;
 - Often very disruptive and demoralising, particularly if used unnecessarily

Transfer of Employment



- Where the employer acquires existing business/assets and chooses to hire some or all of those employees;
- Employees retain enterprise agreement conditions;
- Recognition of prior service (options re annual leave and minimum employment period)

Transfer of Employment



1. Transferring employee,
and
2. A situation of
 - a) Connection or
 - b) Outsourcing or
 - c) Associated entity

Results in transfer of some entitlements

1. Transferring Employee



- Employment terminated, and
- Re-employed within 3 months by new employer, and
- Work is substantially the same

2. Transfer of business



Connection

- Use of assets (eg case records, leased assets, staff, transfer funds for accrued entitlements)
- Substantial identity between old & new activities
- By deliberate arrangement between the 2 employers

Or

- Where associated entities/outsourcing/ceasing outsourcing

Recognition of service



Recognition of Service	Where service counts (default)	Where 2 nd employer opts out of recognising service (if non-associated entities), in advance of transfer
Service for NES & LSL	Service counts for NES & LSL accruals (unless paid out), qualify for parental leave etc	Cannot opt out (except where certain unusual LSL provisions apply under an EBA)
Service for annual leave	Accruals retained (usually there would be an agreement to transfer funds for accruals)	Annual leave must be paid out by 1 st employer if 2 nd employer chooses to opt out
Redundancy severance	Not paid on transfer Service counts for future redundancy	Severance must be paid by 1 st employer if 2 nd employer opts out.
Minimum Employment Period (MEP) (6 or 12 months) under <i>Fair Work Act</i>	No MEP. This does not preclude a probation-style process to facilitate a successful settling in of the new employee.	New MEP starts at date of transfer

Transfer of employment?



This is may be a complex issue
 - Get individual advice about
 transfer of employment from
 Jobs Australia.

Notice Period entitlement



Notice Period:

- Minimum notice period set by the NES
 - From 1 to 5 weeks pay based on length of service and age
- Formal notice only after consultative process
- If not required to work the notice, can terminate early and pay in lieu of the balance of the notice.
- Check contract or HR Policy for contractual obligations.

Redundancy



- Redundancy payments are outlined in the NES.
 - Some redundancy entitlements are preserved from the pre-modern Award and these provisions will continue to apply until 31st of December 2014.
- An Employee's contract or Organisational policy may provide higher entitlements - ensure you check this.



Questions???