

## MANAGING A RESTRUCTURE (NSE)

## Managing a Restructure (National System Employers)

As you have made an inquiry about business restructure, we refer you to the following Guidance Notes. These notes are general in nature, and are designed to bring to your attention matters that you may not have considered before and/or are outside of the scope of advice you requested from us. As such they provide a general overview of the relevant issues that may be applicable to your situation but do not constitute specific advice.

The purpose of the Guidance Notes is to provide you with an overview of the key steps and industrial relations risks that need to be managed for a potential restructure. These guidance notes are provided as general information that you can then research and apply to your situation, or alternatively, use to determine if you need to seek specific advice on the matter.

The Guidance Notes also refer you to templates or tools that you may find useful in management of your particular business situation.

### Things to consider

Employers should note that to complete a restructure which is compliant with industrial relations legislation will require realistic timeframes to be set, because of the consultation requirements and the potential for selections between employees for available positions.

The key steps in compliance and the key industrial relations risk areas for such a potential restructure are set out in these guidance notes

If an employer proceeds with a consideration of restructure, a detailed project implementation plan should be developed with all risk mitigation strategies identified and the necessary supporting documentation prepared.

### The obligation to consult

As soon as practicable after the decision to restructure has been made, the employer must notify and consult with any potentially affected employees (and their unions, if any). In order to carry out the consultation it must comply with any specific requirements in the award or enterprise agreements. It must set out in writing 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. It must give genuine and prompt consideration to any matters raised.

### Consideration of Methods to Mitigate any Adverse Effects on Employees

An employer must communicate any such measures that are planned. It should therefore identify how it will mitigate the adverse effects of the redundancies on a specific and individual basis, so that decisions are not made in haste or under pressure. Such measures could include (for example) voluntary separations, additional payments, outplacement services, the ability to work some or all of a notice period and other measures. Where possible, the timeframes for the restructure should provide time for the direct input from affected or potentially affected employees.

### Selection Processes

Selection into remaining or modified roles must be on lawful and objective criteria to protect the employer from an unfair dismissal risk, and also to ensure that the employer is able to demonstrate that the selection of any employees to be made redundant was for lawful reasons and not for prohibited reasons that may give rise to a claim of adverse action under the General Protections section of the *Fair Work Act 2009* ("Act") or under anti-discrimination legislation. The relevant enterprise agreement might specify mandatory selection processes. If so, these must be strictly followed.

The employer must build in time for the selection processes to be carried out and for consultation with employees about the results of the employer's assessment.

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### Redeployment

If the employer identifies a redundant position(s) it is obliged to look for suitable opportunities for redeployment for the employees affected. This will require the broad consideration of positions, including those available at associated entities of the employer (see section 389(2)(b) of the Act). Positions at a lower level must not be discounted and, if the employee has the skills, knowledge and experience required for such a role, the position must be offered to the employee for consideration. Whether voluntary separations are a reasonable mechanism to open up redeployments will depend on the circumstances.

If the new role is substantially different from the employee's previous (redundant) role, the employee may be entitled to redundancy pay.

### Notice of Termination

Written notice of termination must be provided, complying as a minimum with the relevant award, enterprise agreement or contract of employment of any displaced employees, and with the minimum periods in the National Employment Standards ("NES") of the Act. Notice does not commence until it is given specifically in writing, though in most (but not all) cases it can be paid in lieu. Documents will need to be reviewed to ascertain the employer's obligations. If more than 15 employees are to be made redundant, relevant unions and Centrelink must be notified.

### Redundancy Pay

Redundant employees must be paid redundancy pay (in addition to the notice). As a minimum this must be the higher of their award, contract of employment, enterprise agreement, or the NES provisions.

### Unfair Dismissal Claims

Unfair dismissal claims are a key risk involved in any potential restructure. These may arise from a claim that any dismissals were not "genuine redundancies" because the consultation was inadequate, or the employer still requires the role to be done (i.e. the restructure is a sham), or that the employer did not comply with its obligations to reasonably redeploy. If successful, such claims can result in reinstatement or compensation.

### General Protections Claims or Disputes

Chapter 3 of the Act provides a general protection from "adverse action" (e.g. proposed or actual dismissal or transfer) on certain grounds - based on protection of workplace rights and against discrimination. These claims are a significant risk for the employer when considering a potential restructure because if an employee makes an allegation of adverse action the onus falls on the employer to prove that the reason for dismissal or transfer did not include a prohibited reason. This is, in effect, a reverse onus of proof for the employer. Decisions must be able to be proven to have been made for lawful reasons.

The maximum penalty for an adverse action under the Act is \$12,600 in the case of an individual and \$63,000 in the case of a corporate entity, but the Court has scope to make any order that it considers appropriate, including reinstatement and/or compensation. In this jurisdiction, there is no maximum financial compensation that may be imposed; i.e. the financial penalty is uncapped.

These claims can arise where an employee believes their selection is not justified and the restructure/redundancy is not genuine and is being used by an employer as a mechanism for termination with (jurisdictional) impunity. For example, if poor performance or misconduct has been at issue and the employee is terminated for redundancy. They can also arise because the employee asserts that the reason for their selection is one of the prohibited reasons (for example, the exercise of a workplace right to lodge a complaint or grievance).

### Trainees and Apprentices

Apprentices and trainees have special arrangements under their Training Contracts. These arrangements mean that they can only be made redundant in unusual circumstances, and only with the approval of a tribunal. The precise rules vary in each state, but employers should not consider the redundancy of a trainee or apprentice without taking specific advice about it.

If an employer has no option but to make an apprentice or trainee redundant it will still have to demonstrate to the training authority exactly how and why it came to its decision before the authority will approve the termination. If there are a number of employees performing the same position the inability to terminate a training contract unilaterally should be considered as part of the selection criteria for redundancy.

When there is a transfer of business, employees covered by a Training Contract will transfer automatically as do the rights and obligations attached to the Training Contract. Both the new and old employers are required in this instance to notify the SAIRC of the transfer or again may face financial penalties.

### **Workers Compensation**

There are restrictions on the right to terminate the employment of an employee with an open claim, even for redundancy. Additionally, if the process is not carried out in compliance with the legislation, or in a reasonable manner, it might itself result in a 'stress' claim.

### **Disputation**

Unions and/or individuals might invoke disputes settlement process of the awards or the Act to challenge an employer's compliance with award or enterprise agreement obligations. This is most likely especially around consultation (e.g. claiming that insufficient material has been provided or there has been no genuine consideration). These dispute processes add time to the restructure because until it is settled (if necessary by an order of the Fair Work Commission), the status quo remains and the restructure can be put on hold. If the consultation process is found flawed, it is possible that the Fair Work Commission would order it invalid, meaning it would need to start again.

### **Penalties for Non-compliance with Statutory Obligations**

If an employer breaches specific award or enterprise agreement obligations, or does not comply with mandatory provisions of the Act, it might be exposed to prosecution and penalties for such breaches.

### **Best Practice Procedures, tools, services and templates that may assist employers in the discharge of their industrial obligations**

We have designed a variety of tools, procedures or templates that may assist your management of this process or processes in the future. This will depend on your business situation. Your EMA consultant can provide further information about these.

- Restructure/Redundancy Project Plan
- Presentation for management outlining the key industrial relations steps and employer obligations
- Presentation outlines for communication with various stakeholders
- Template Letters to employees and their representatives

### **Require further information/assistance?**

If you require further information or advice, please contact your local Consultant at either our Adelaide or Melbourne offices.