ALLEN & OVERY

Employment Reorganisation Roadmap

Australia

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

Trade union representatives are involved in some restructurings (where the employer is aware that its employees are members of the union).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation, unless an industrial award or workplace agreement provides otherwise, but this is rare. (Industrial awards and workplace agreements are legally enforceable instruments that set out the minimum wages and conditions of employees covered by them. These instruments include those made by agreement between an employer and a union or its employees, or those made by the relevant industrial relations body. Instruments made by agreement between an employer and a union or its employees since 1 July 2009 are called “enterprise agreements”.)

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

There is no automatic transfer of employees on a business sale. Employees will only transfer to a buyer (as part of a transfer of assets) if the buyer offers them employment and they accept the offer.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

There is no automatic transfer of employees on a business sale.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

There is no automatic transfer of employees on a business sale.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

There are no specific legislative requirements to inform/consult employee representatives in relation to a business sale. However, such obligations may arise under an industrial award or workplace agreement (or if the sale results in collective dismissals – see for further information).

Information and consultation obligations can occur in the context of a business sale if the employees are covered by an industrial award or workplace agreement. For example, industrial awards typically require consultation where decisions are taken that could have a "significant effect" on employees. A significant effect may include a termination of employees' employment by the seller.

Additionally, if a seller proposes to make 15 or more employees redundant as a result of the transfer of the business, statutory information and consultation obligations will apply.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

If an employer fails to comply with information and consultation obligations in an applicable industrial award or workplace agreement, affected employees (or their trade union) could apply for orders that include compensation, reinstatement or possibly an injunction. Penalties of up to AUD82,500 per breach for a corporate entity and of up to AUD16,500 per breach for an individual may also be imposed. These penalties increase to up to AUD165,000 per contravention for an individual and AUD825,000 per contravention for companies if it is considered to be a serious contravention.

If an employer fails to comply with information and consultation obligations under statute, orders may be made against the employer (see for further information).

If the seller or buyer does not obtain employee consent to the transfer of the employees' employment, or if the buyer does not wish to employ any or all of the seller's employees, the employees will not transfer with the business. In this case, information and consultation obligations and severance rights may be triggered if the seller has to terminate the employment of those employees (see and).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie, on the sale of the company itself)?

There is no obligation to inform/consult employee representatives in relation to a direct share sale, unless provided for in industrial awards or workplace agreements (but this is relatively rare). However, if the sale will trigger significant changes for employees (eg redundancies or significant changes to terms of employment), information and consultation obligations are likely to apply under an industrial award or workplace agreement.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employee representatives in relation to an indirect share sale, unless provided for in industrial awards or workplace agreements (but this is relatively rare). However, if the sale will trigger significant changes for employees (eg redundancies or significant changes to terms of employment), information and consultation obligations are likely to apply under an industrial award or workplace agreement.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are not transferred by operation of law, but these situations would be considered a "transfer of business". If employees are offered new employment but are essentially performing the same work, the Fair Work Act 2009 recognises that any collective industrial agreement will still apply to the employees. In some cases their prior service must be recognised.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

If employees are going to be terminated and then receive offers of new employment to perform the same work (as opposed to a transfer by operation of law), information and consultation obligations arise if the employees are covered by an industrial award or workplace agreement. For example, industrial awards typically require consultation where decisions are taken that could have a "significant effect" on employees. A significant effect may include a decision to terminate employees' employment so that services can be outsourced/insourced/changed as a result of a new supplier.

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A collective dismissal occurs where an employer decides to terminate 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including these.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

In effect, the Fair Work Act 2009 requires an employer proposing to dismiss 15 or more employees in the circumstances referred to in the answer to **5.1** (which includes redundancies) to notify and consult relevant trade unions if there are trade union members among the affected employees.

In these circumstances, an employer must also give the federal unemployment service, Centrelink, certain information concerning the dismissals (eg the reasons for the dismissals, number and categories of employees affected etc) in a prescribed form. This information must be given as soon as practicable after making the decision to collectively dismiss 15 or more employees.

Although there are no other specific statutory obligations to inform/consult employees or employee representatives about proposed dismissals, information and consultation obligations will almost certainly be imposed by industrial awards or workplace agreements, or possibly the employee's contract of employment, the employer's policies or past practice and industry practice (see).

Therefore, it is important to identify any industrial awards or workplace agreements that apply to affected employees when considering implementing economic, technological, structural or similar changes. Even if there is no specific consultation obligation, it is usually advisable to carry out at least some consultation to reduce the risks of findings of unfairness in any litigation, damage to industrial relations and adverse publicity.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

In these circumstances, an employer must also give the federal unemployment service certain information concerning the dismissals (eg the reasons for the dismissals, number and categories of employees affected etc) in a prescribed form. This information must be given as soon as practicable after making the decision to collectively dismiss 15 or more employees. It is an obligation to notify, not an obligation to consult.

5.4. When are these obligations triggered?

Centrelink must be advised as soon as practicable after making the decision to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature and before terminating the employee's employment accordingly.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

The orders that can be made for failure to inform and consult under the Fair Work Act 2009 are limited and cannot include reinstatement (or pay in lieu), severance pay, withdrawal of notice of termination etc. An order can be made requiring the employer not to dismiss the employees in accordance with the decision except as permitted by the order. However, failing to comply with information and consultation provisions in industrial awards or workplace agreements can result in orders for compensation, reinstatement or an injunction together with penalties of up to AUD82,500 per breach.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

As a collective dismissal occurs where an employer decides to terminate 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including these, almost any decision to terminate 15 or more employees will be covered.

Even if it was not such a collective dimissal, industrial awards or workplace agreements typically require consultation where decisions are taken that could have a "significant effect" on employees. A significant effect would include a termination of 15 or more employees for any reason.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

It is not a negotiation period, but a consultation period; no agreement has to be reached.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The minimum notice entitlement under federal legislation depends on length of service:

– less than 1 year's service – 1 week

– 1+ to 3 years' service – 2 weeks

– 3+ to 5 years' service – 3 weeks

– 5+ years' service – 4 weeks

– plus an additional 1 week's notice for employees aged 45+ with at least 2 years' continuous service

Notice is commonly enhanced by contract.

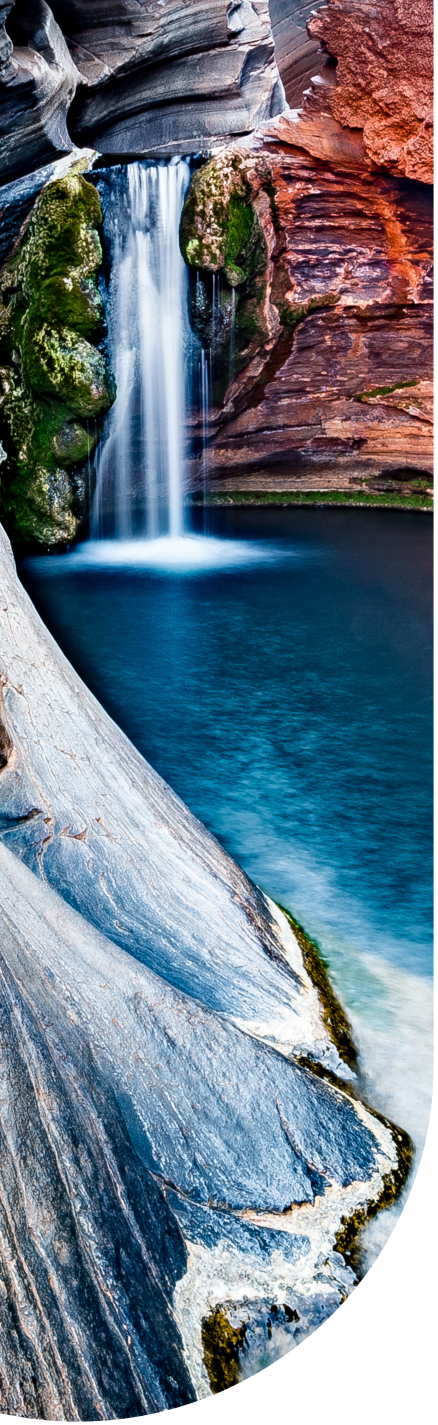
If no contractual provision expressly deals with notice of termination, the employee may be entitled to "reasonable" notice of termination. What is "reasonable" notice will depend upon all the circumstances of each individual case taking into account, and balancing against each other, a variety of factors including seniority, duties and responsibilities, remuneration, age, custom and practice in the company/industry and likely difficulties in obtaining alternative employment.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

No statutory procedures apply where individual dismissals occur on redundancy. However, the Fair Work Act 2009 contains information and consultation obligations that apply where 15 or more redundancies are proposed.

Regardless of the number of redundancies proposed, procedural information and consultation obligations are likely to arise under industrial awards or workplace agreements (or possibly from the employee's contract of employment, the employer's policies, past practice or industry practice).

Even if no industrial award or workplace agreement applies (so that no specific consultation requirements exist), it is usually advisable to carry out at least some consultation to reduce the risk of litigation (including possible unfair dismissal claims) or adverse industrial relations consequences.



6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

It is a defence to an unfair dismisal claim if there is a genuine redundancy. The genuineness of the redundancy may involve questions such as whether the position really was no longer required, and whether the particular employee was properly selected for redundancy.

Redundant employees will also be prevented from making an unfair dismissal claim if the employer:

– has consulted about the redundancy in accordance with any obligations in an applicable industrial award or workplace agreement, and

– can demonstrate that it would not have been reasonable to redeploy the employee within the employer's enterprise or that of an associated entity including overseas.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

A statutory entitlement to severance pay applies to employees with at least 12 months' employment. Additionally, employees covered by an industrial award or workplace agreement may be entitled to severance pay in accordance with those instruments.

The amount varies, but is usually linked to length of service. For example, state-based industrial awards provide for up to 20 weeks' pay in some cases. The amount prescribed by federal industrial awards (which is the same as the minimum statutory entitlement) ranges from four weeks' pay for those with one to two years' service to 16 weeks' pay for those with nine to ten years' service. It then decreases to 12 weeks' pay for those with more than 10 years' service.

Also, it is not uncommon for employers to offer severance pay in contracts of employment or as a matter of policy.
Severance entitlements on redundancy are additional to any payment in lieu of notice and other accrued outstanding entitlements.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

Employees who believe that their termination was unfair (harsh, unjust or unreasonable) may bring an unfair dismissal claim (subject to meeting certain jurisdictional criteria). There are a number of exclusions from the right to claim unfair dismissal – eg employees with short service, and some high income earners.

Employees may alternatively bring a claim for adverse action or (in limited cases) unlawful termination if they have been dismissed.

The remedies for unfair dismissal include reinstatement with back-pay or, if that is not practicable, compensation of up to six months' pay (capped at the relevant amount, indexed annually). There is no cap on compensation for adverse action or unlawful termination claims.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

No such special legal protection or special treatment applies.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Any change requires consent. If it is a change favourable to the employees, such as a pay rise, consent can be implied, but for any change that is not favourable to the employee, consent should be express.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

If the terms are in an enterprise agrement, variation will require consulation with any representatives of the employees and approval by the Fair Work Commission.

If the terms are in individual contracts, there is no requirement to consult, but there must be agreement with each individual employee, which would usually involve consultation of some kind.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

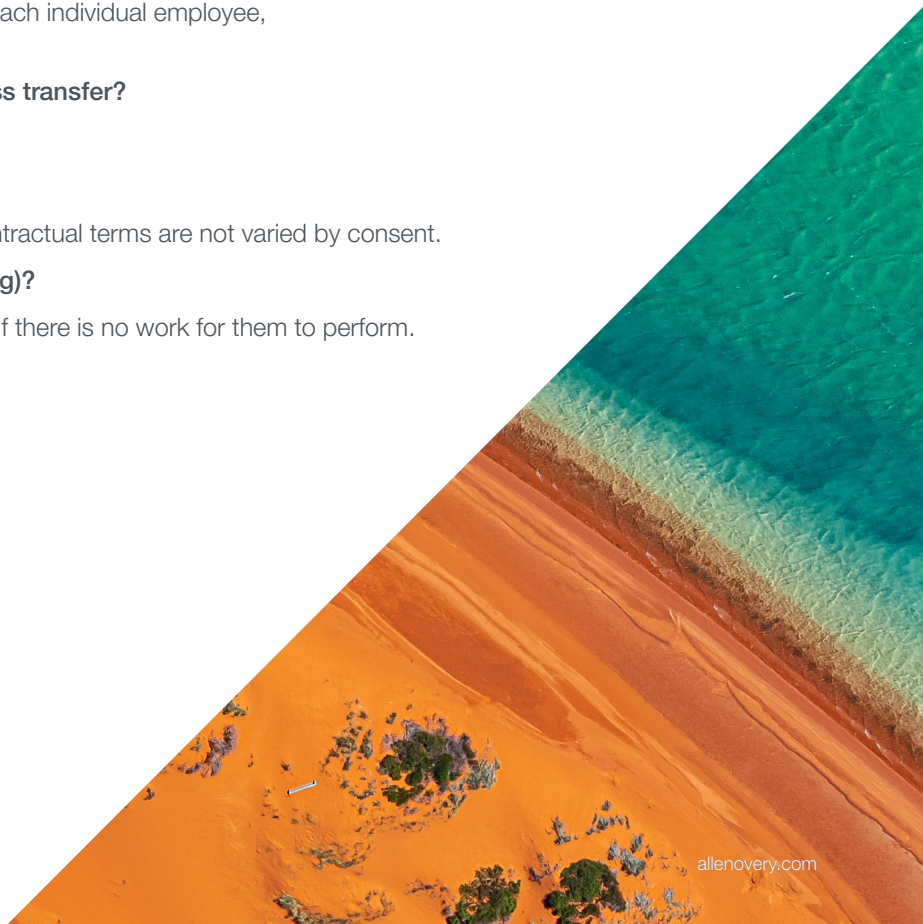
No additional restrictions apply.

7.4. What are the penalties for non-compliance with these procedures?

No specific penalties apply, but there may be a claim for breach of contract or reliance on original terms if contractual terms are not varied by consent.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

This depends on what is being proposed. The Fair Work Act does allow an employer to stand down workers if there is no work for them to perform. During a stand down the employees remain employed but are not entitled to be paid.



8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The same rules apply as in the case of the sale of a solvent business. There are no statutory information and consultation obligations triggered on the sale of a business, but such obligations may apply under an industrial award or workplace agreement. In addition, if an insolvent business is sold, employees are not automatically transferred by law, and they will only transfer to a buyer if the buyer offers them employment and they accept. See for further information.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

As on the sale of a solvent business, employees are not automatically transferred by law. They only transfer to the buyer if they are offered, and accept, employment. If employees accept employment, their period of employment with the seller will normally count as a period of employment with the buyer for most purposes (eg unfair dismissal, leave entitlements, statutory redundancy). However, the buyer can refuse to recognise their period of employment with the seller for some purposes: unfair dismissal, annual leave and statutory redundancy.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implementedin an insolvent business?

The same obligations apply as in the case of collective dismissals in a solvent business. Obligations are triggered under the Fair Work Act 2009 if 15 or more dismissals are proposed. Similar obligations can also arise under an industrial award or workplace agreement (regardless of the number of dismissals involved). See for further information.

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