

The Employment Lawyer's Role in Mergers and Acquisitions

20 August 2007

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LAWYERS

Agenda

- Due diligence – quantifying purchase price and assessing risk
- Vulnerable and all other employees
- Technical redundancy issues
- Consultation obligations
- Implementation issues

Due Diligence (1)

- Nature of transaction has significant impact on employment issues
- Asset sale amounts to cessation of vendor's business, and commencement of purchaser's business
 - employees' employment terminated by redundancy
 - vendor employer obligations, including consultation, are significant
 - due diligence should be comprehensive, given risks
- In a share sale, the employing entity does not change
 - no redundancies are triggered
 - vendor employer obligations are less onerous than in asset sales
 - risks not as significant as potential risks in asset sales

Due Diligence (2)

- Obligations and benefits of contracts of merging entities remain in force
 - redundancies are not triggered
 - vendor employer obligations and risks are similar to share sales
- A due diligence is an important information gathering exercise for prospective purchasers to ascertain the assets and liabilities of the target business and the risks associated with the transaction

Due Diligence (3)

- Relevant information to be reviewed includes:
 - number of employees and key employees
 - status of employment
 - employment and independent contractor agreements
 - total annual cost of employees' salary/wages, benefits, bonuses, and incentives
 - total liability for accrued annual leave and long service leave
 - special termination, retention and/or redundancy arrangements
 - total estimated redundancy costs
 - details of non-salary benefits
 - ACC levies and claims history
 - pending and current litigation
 - union membership and activity
 - health and safety prosecutions and audits

Due Diligence (4)

- Scope of relevant information for review for mergers and share transactions:
 - onerous or unusual terms and/or conditions
 - change of control or assignment restrictions
 - costs associated with the transactions

Due Diligence (5)

- Key areas of potential risk:
 - whether employees are contractually entitled to redundancy compensation, and the total estimated redundancy costs
 - terms of technical redundancy provisions, and the nature of offers of employment required to be made by the purchaser in order to comply with such provisions
 - details and allocation of costs for incentive plans and bonus schemes, and whether such schemes are discretionary or contractual
 - total annual cost of employees' salaries/wages, and details of benefits including the total annual cost of benefits
 - total liability for accrued annual leave and alternative holidays

Due Diligence (6)

- accrued sick leave liability should be quantified where employees' employment is treated as continuous
- any special termination and retention payments/arrangements which may affect the goodwill of the business
- details of ACC levies and claims history
- details of pending or current employment related litigation and health and safety prosecutions
- union activity and industrial action, and the date on which any collective agreements expire
- vulnerable employees should be identified

Due Diligence (7)

- Quantifying the purchase price
 - quantify employee entitlements to assess employee costs relative to the value of the transaction
 - parties may negotiate for entitlements to be credited in favour of the purchaser, discounted against purchase price, or paid out prior to completion
 - where employee entitlements are not negotiated in this way, then they represent an additional cost to the purchaser

Due Diligence (8)

- Warranties and indemnities
 - the purchaser should obtain warranties from the vendor with regard to all areas of potential risk, particularly in the absence of full disclosure by the vendor
 - appropriate indemnities should be included in the acquisition agreement
 - vendor's indemnities generally relate to the period up to completion, whereas purchaser's indemnities cover the post-completion period

Vulnerable and All Other Employees (1)

- Part 6A creates a two-tiered scheme for “vulnerable” employees and all other employees
- Definition of “vulnerable” employee:
 - an employee who provides cleaning and food catering services in any place of work, and those who provide orderly, laundry and caretaking in specified industries
 - Definition of restructuring for “vulnerable” employees includes contracting out, contracting in, subsequent contracting and selling or transferring an employees business or part of it

Vulnerable and All Other Employees (2)

- Vulnerable employees have the right to elect to transfer on the same terms and conditions of employment, and have service treated as continuous where:
 - the situation falls within the definition of restructuring
 - as a result of the restructuring, the employee is no longer required to perform the work for the vendor previously performed by them; and
 - where the work performed by the employee, is similar or substantially similar to, work to be performed by or on behalf of another person
- Where part of a vulnerable employee's work is to be transferred, the vulnerable employee is entitled to remain with his/her current employer for the part of the work that is not being performed by the new employer

Vulnerable and All Other Employees (3)

- Before the restructuring takes effect, the vendor employer must:
 - inform the affected vulnerable employees that they have the right to elect to transfer on the same terms and conditions
 - advise the employee of the date by which the election must be made, and provide a reasonable opportunity to exercise the right to make an election
 - provide the vulnerable employee with sufficient information to allow the employee to make an informed decision as to whether or not to elect to transfer
- A vulnerable employee can also bargain for alternative arrangements, and if they do so, cannot elect to transfer

Vulnerable and All Other Employees (4)

- Where a vulnerable employee exercises his or her right to transfer to the purchaser that employee is not entitled to contractual redundancy entitlements from the vendor
- If the employee elects not to transfer to the purchaser, then the vendor employer may have to pay redundancy compensation where the employee has a contractual entitlement to the same
- If the employee elects not to transfer, and they have a technical redundancy clause in their employment agreement, then no compensation will be payable

Vulnerable and All Other Employees (5)

- If a vulnerable employee elects to transfer to the purchaser, and subsequently the purchaser proposes to make them redundant for reasons relating to the transaction giving rise to the transfer:
 - the employee will be entitled to any contractual redundancy entitlements
 - if the employee's agreement is silent, or does not expressly exclude redundancy entitlements, the employee is entitled to redundancy entitlements
 - in such circumstances, the appropriate entitlements are to be agreed between the purchaser and the employee
 - if the parties cannot agree, the Employment Relations Authority may determine the redundancy entitlements

Vulnerable and All Other Employees (6)

- Potential purchasers can obtain information from a vendor in relation to costs associated with vulnerable employees
 - a purchaser is entitled to “employee transfer costs information” which is information about employment-related entitlements of vulnerable employees
 - the vendor must provide the information in sufficient time to enable the purchaser to consider the same
 - the vendor must update any information provided to the purchaser if it changes

Vulnerable and All Other Employees (7)

- Employees who are not “vulnerable” employees (i.e. all other employees) do not receive the special statutory protections that vulnerable employees receive
- However, employers are required to include an Employment Protection Provision (EPP) in all employment agreements for such employees
- An EPP outlines the process that the employer must follow in restructuring situations

Technical Redundancy Issues

- At the time of sale all employees are either redundant, or technically redundant, vis a vis the vendor
 - technical redundancy arises where an employee is offered employment by the purchaser, on terms consistent with the technical redundancy clause in their employment agreement
 - if the technical redundancy clause is not complied with, then the employee is redundant, even if they transfer to the purchaser
 - if the employee is redundant, they are entitled to their contractual redundancy entitlements
 - if the employee does not accept the offer (which complies with the technical redundancy clause) then no redundancy entitlements arise

Consultation Obligations (1)

- Nature of transaction affects the level of consultation
 - share sales require less detailed consultation than asset sales
 - in share sales principal issues to consult on will primarily relate to the culture and strategic direction of new owners
- Statutory consultation obligations
 - good faith obligation to consult on proposals which may affect employees' employment

Consultation Obligations (2)

- Contractual consultation obligations
 - there may be contractual consultation obligations which the vendor is required to follow, which are set out in employment documentation
 - documentation may outline processes to be followed in terms of a particular time frame to follow in relation to consultation, or the manner in which employees are to be informed or the provision of certain information to employees in such situations
 - where processes are documented, employer is bound to follow the prescribed process
 - prescribed processes are not determinative of the employer's obligations, as an employer cannot contract out of its statutory obligations
 - remember to check the EPP provisions of employees' agreements and ensure compliance with those provisions

Consultation Obligations (3)

- Consultation obligations arising under the acquisition agreement
 - the parties may agree a consultation process in the acquisition agreement that is different to that provided for in employees' employment documentation
 - where the process is inconsistent, this must be identified, and corrected
 - where this is additional to any other obligations, then such an agreement is okay
 - rare for this to occur, however two occasions where it might:
 - where there is a special relationship between the vendor and employees that the vendor wishes to protect
 - where there are difficulties with consultation that are particular to the transaction, and the parties agree a mechanism to resolve those difficulties

Consultation Obligations (4)

- To meet consultation obligations employers should:
 - provide potentially affected employees with information regarding the proposed sale and how it might affect their employment
 - give employees an opportunity to respond to the proposal
 - consider employees' feedback before a final decision is made
 - discuss the nature of the offers which may be made by the purchaser
 - outline employees' redundancy entitlements (if any)
 - outline any other payments which the employee may receive upon completion, such as annual leave payments
- Intention behind consultation is that employees and union are not “left in the dark” on matters which may affect them
- Remember though, that any consultation process must be tailored to all of the parties consultation obligations

Consultation Obligations (5)

- Timing of consultation
 - consultation should occur as soon as the vendor has a proposal to sell the business
 - if consultation occurs after acquisition agreement is signed, this may be too late, and vendor is at risk of a claim
 - the Act does not require an employer to provide access to confidential information where there is a good reason to maintain confidentiality, which includes protecting the commercial position of an employer from being unreasonably prejudiced
 - common for consultation to occur post-signing in commercially sensitive deals, although the validity of this approach is untested

Implementation Issues (1)

- Termination letters
 - once consultation is completed and the acquisition agreement is signed, the vendor is to provide letters of conditional termination of employment to the affected employees
 - notice of termination is required to be given pursuant to the employees' employment agreements
 - content of termination letters should include:
 - purchaser has agreed to buy the business on completion date
 - employees' employment with vendor will terminate by way of redundancy
 - termination is conditional upon completion
 - background to the transaction
 - indicate purchaser's intentions

Implementation Issues (2)

- Offers of employment from purchaser
 - purchaser is not required to offer employment to employees other than to vulnerable employees, unless required under the acquisition agreement
 - offers of employment should be made prior to the completion of the proposed transaction, and are usually conditional in nature
 - content of offer letters should include:
 - date of commencement of employment
 - terms and conditions of employment
 - date by which employees should confirm acceptance
 - right to seek independent advice
 - acknowledgement and waiver section

Implementation Issues (3)

- Employees who do not transfer
 - a purchaser may not wish to employ all of the vendor's employees:
 - where an employee does not receive an offer of employment, they remain an employee of the vendor, and are entitled to any contractual redundancy entitlements from the vendor
 - employees who receive offers from the purchaser may elect not to transfer
 - provided the offers of employment comply with the technical redundancy provisions in the employees' employment agreements, the employees will not receive redundancy entitlements
 - in both cases, the vendor has an obligation to consider redeployment opportunities
 - vendor employers should consider providing outplacement counselling to redundant employees as this goes towards the vendor employer's obligation of procedural fairness

Questions



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