Spill and Fill: a Fair Redundancy Process?[1]

PHILLIPA WELLS[*]

Abstract

In a world of growing job insecurity and uncertainty, the sceptre of redundancy looms large on the horizon of many work places, both private and public. In some western jurisdictions, although not all, the definition of redundancy and some degree of legal protection for employees facing it are enshrined in statute. However, the power to decide on redundancies lies with employers. In an attempt to minimise legal scrutiny and public challenges to the process, employers adopt a "spill and fill" process whereby employees are spilled from their positions that are then open for those employees plus others to apply. Although the Australian courts acknowledge the fairness of this process and its "fit" with the definition of redundancy as attached to the position rather than the person, there is evidence of growing unease on the part of unions as to the impact of this process. This paper examines two recent cases where unions have gained agreement from employers to use an alternative means of determining redundancies.

Key Words: Spill and Fill; Redundancy; Unions; Australian case law on redundancy; NTEU; CSIRO; Curtin University of Technology

Introduction

The catchy term "spill and fill" is used to refer to a process whereby all or selected roles in an organisation are declared vacant, at which point the said employees are technically dismissed and invited to apply for new or revised positions created out of this process. There is no guarantee that those (ex) employees will be reappointed to those newly formed positions, either because they no longer satisfy the position description, they are not considered the best applicant and/or because there are fewer positions available (a common result of such restructuring). There are also legal fish hooks in this process for employees with suggestions that where they are not eligible for redundancy and do not apply for those new positions, they can be deemed to have resigned. Using recent examples by way of illustration, this paper explores the legal implications of this spill and fill process as it is practised in Australia, from the perspectives of both employees and employers. The objectives are to describe why this process is used and how parties view it in terms of redundancy and dismissal rights and protection.

The paper is constructed as follows. First, the nature of redundancy and its legal definition(s) are explored, with reference to the jurisdictions in which this concept is recognised. Then the Australian legal framework for redundancy and dismissal is outlined, particularly in reference to the limitations to its scope and application. This is followed by a description of the spill and fill concept and process, with specific reference to two recent examples of where Australian employers (both in the

[1] This is a revised version of a paper delivered to the New Zealand Labour Law Conference, November 2013, AUT University, Auckland, by Philippa Wells. The paper was originally entitled "Spill and Fill: Redundancy through Restructuring or Dismissal by Subterfuge?"

[*] Associate Professor, The Business School, Faculty of Business, Federation University of Australia, Ballarat.

public sector) sought to pursue this process. This discussion will refer to some of the arguments presented as justification by the employers involved, the points raised in opposition to this process and the ultimate resolution that emerged.

Redundancy – a short background

With the strong growth in western labour markets from the end of World War Two through to the 1970s, and full or near full employment, job security was of little concern to most workers in western economies. However, by the late 1970s, things had changed dramatically. With the emergence of a neo-liberal agenda in countries such as the UK, USA, Australia and New Zealand, employees suffered a loss of power in the employment relationship,[2] institutional constraints impacted on both the membership and effectiveness of unions (and collective action more generally), and governments responded to employer demands to regulate for flexibility in the employment market.[3] All these developments dismantled much of the historical protections employees had enjoyed against the vagaries of the market. Now, the right to make decisions as to number and mix of employees was firmly in the hands of employers. Hence the interest in redundancy and its practice and process. It should be noted that, although the practice of making employees redundant is not new, it is probably only with the economic reforms of the latter part of the 20th century that it attracted much attention, either as an area of research interest,[4] focussing often on the impact on workers or their communities of redundancy) or of significant concern for employees and their representative unions.

One possible definition is that offered by Sebardt: "[when the employer] finds that the need for the services provided by some or all employees is diminishing or ending".[5] She also makes a distinction between different rationale/reasons for redundancy – those for strategic reasons (future-proofing, changes to direction of focus) and those from financial difficulties. This broad concept tends to underpin the definitions that are applied over a variety of jurisdictions. In the UK, for example, the Employment Rights Act 1996, s139 includes situations where the business and/or the work previously carried out by employees cease, while the American Fair Labor Standards Act states:

> an employee is dismissed by reason of redundancy if their dismissal is wholly or mainly attributable to the fact that their employer's requirements for employees to carry out work of a particular kind have ceased or diminished or are expected to do so.

[2] Bob Hepple "Back to the future: Employment law under the coalition government" (2013) 42(3) Industrial Law Journal 203.

[3] George Lafferty "In the wake of neo-liberalism: Deregulation, unionism and labour rights" (2010) 17(3) Review of International Political Economy 589.

[4] With outputs from: Alison L Booth and Andrew McCulloch "Redundancy pay, unions and employment" (1999) 67(3) The Manchester School 346; Mike Donnelly and Dora Scholarios "Workers' experiences of redundancy: Evidence from Scottish defence-dependent companies" (1998) 27(4) Personnel Review 325; David Leece "Redundancy, unemployment, and Self- employment" (1990) 11(4) International Journal of Manpower 35; Esther Stern "From 'valid reason' to 'genuine redundancy' redundancy selection: A question of (IM)balance?" (2012) 35(1) Univ of NSWLJ 70; Lea Waters "Experiential differences between voluntary and involuntary job redundancy on depression, job-search activity, affective employee outcomes and re- employment quality" (2007) 80(2) Journal of Occupational and Organizational Psychology 279.

[5] Gabriella Sebardt "Avoiding pitfalls and realizing potentials: Researching redundancy regulation in Sweden, the United Kingdom and Japan" 2004 15(3) IJHRM 441 at 445.

New Zealand is somewhat unusual in not including a statutory definition in its Employment Relations Act 2000, this, despite calls to change the law,[6] with parties to the relationship and courts relying instead on the repealed Labour Relations Act 1987, s184(5): A situation where…[a] worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer.

In Australia, the jurisdiction that provides the focus for the discussion that follows, s389 of the Fair Work Act 2009 (Cth) defines redundancy as follows:

1. A person's dismissal was a case of genuine redundancy if:
    a. the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
    b. the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

2. A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
    a. the employer's enterprise; or
    b. the enterprise of an associated entity of the employer.

There are some critical points that demonstrate the scope and the limitations of this provision, particularly as it applies to spill and fill.

First, ss1(a) refers specifically to the notion that redundancy only occurs where the person's job does not need to be performed by anyone (see also s119 that provides for situations where redundancy pay is to be provided). *Prima facie*, this seems to imply that where a person is made redundant, the tasks that make up their job cannot be undertaken by a fellow or new employee, nor by any other person (such as a contractor). This position seems to be confirmed by the Fair Work Ombudsman in information on the relevant National Employment Standard (NES) when referring to eligibility to redundancy pay – specifically, where "[the employer] no longer require[s] the job to be done by the employee or anyone". However, the following discussion indicates the position as not being that straightforward, comprehensive or clear.

First, this statutory provision draws on the definition of redundancy as applied in *The Queen v The Industrial Commission of South Australia*[7] – specifically the notion that it is only deemed to be so if the employer no longer requires the work to be done by anyone. However, there is one difference: while Bray refers to "job or work", ss1(a) refers only to "job", a term that has been applied in such cases as *Dibb v Commissioner of Taxation*[8] and *Quality Bakers of Australia Ltd v Goulding*,[9] *Jones v Department of Energy and Minerals*,[10] and *Foster's Group Limited v Wing*[11]. This is crucial as it opens the door to the possibility that, although the job might disappear, the tasks that make up that job continue to be done, either by other employees or contractors and raises the question of how much of the job can be undertaken elsewhere and still be considered redundancy. In *Rosenfeld v*

[6] Alan Geare, Fiona Edgar and Kelly Honey "The Employment Relations Act 2000: A brief overview and suggested changes" (2011) 36(2) NZJER 33.

[7] *The Queen v The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited and others* (1977) 44 SAIR 1202 at 1205 per Bray J.

[8] *Dibb v Commissioner of Taxation* [2004] FCACF 126.

[9] *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327.

[10] *Jones v Department of Energy and Minerals*[10] (1995) 60 IR 304.

[11] *Foster's Group Limited v Wing* [2005] VSCA 322.

United Petroleum Pty Ltd,[12] it was held by the Commission that a transfer of 90 per cent of an employee's duties to another did not constitute genuine redundancy, but in *Ulan Coal Mines Limited v Howarth and Ors*[13] and *Kerkeris A. Hartrodt Australia Pty Ltd*[14] and in guidelines,[15] it was recognised as such if the work is distributed among other employees (as opposed, it would appear, to one or two).
Secondly, and relatedly, the emphasis is on the job becoming redundant rather than the individual who occupies that role (as expounded in the leading Termination, Change and Redundancy Case).[16] The argument that is used to support this interpretation is that, where tasks are removed from a particular person's role and distributed to others, they are ultimately left with nothing to do. Hence, their role is duly redundant (although it could also be argued that this interpretation is disingenuous because, while the person is no longer employed (sometimes identified as retrenched in an attempt to make clear the distinction from redundancy), the work continues to be performed).

In light of this, it is informative to consider the outcome of *David James Miller v Central Gippsland Water Authority.*[17] Miller was the General Manager Human Resources for the Authority when consultants (Change Alliance Pty Ltd) were engaged to undertake a review of operations. Although this review was for an initial three weeks, their role and duties expanded, in particular involving their undertaking and facilitating a change management process. They also recommended that the position of HR Manager be downgraded in a new corporate structure. Since the consultants were being retained and were carrying out some aspects of Miller's duties, the Authority declared him redundant. The Federal Court held it to be unlawful termination (so not redundancy) due in part to the process, the considerable time lapse between the "redundancy" and the finalisation of the new structure and the fact that parts of his role were subsequently allocated to newly engaged employees. This decision further throws into doubt the treatment of redundancy as connected to the role not the person. His job was clearly being done – by consultants – without any consultation or discussion with Miller as to his potential involvement. The Authority made the person (Miller) redundant because of this assumption by the consultants, a situation recognised by the Court in its finding.

Thirdly, there are specific limitations to employees' eligibility for redundancy under the NES and, consequently, to its provisions for support and compensation. The main exclusions include employees working for the specific employer for less than 12 months, a casual, apprentice, trainee or on a fixed-term contract or where the employer is small (with less than 15 employees), or where an industry-specific redundancy scheme applies (pursuant to a collective agreement or a modern award). This raises the possibility that, in the interests of cost, decisions made as to how redundancy measures are going to be applied will take such exclusions into account (such as, for example, routinely making excluded individuals redundant while retaining those able to claim payouts).

Fourthly, an employee cannot claim redundancy compensation where the basis for their termination is serious misconduct or where reasonable redeployment in the organisation is offered by the employer. In addition, the Fair Work Commission (FWC) has discretion to reduce the amount otherwise payable where the employer proves incapacity to pay (in which case there may be potential for employees to recover under the General Employee Entitlements and Redundancy Scheme (GEERS)) or where the employer locates acceptable employment elsewhere for that employee. Acceptability in such cases will take into account location, conditions (such as span of

[12] *Rosenfeld v United Petroleum Pty Ltd t/a United Petroleum* [2012] FWA 2445.
[13] *Ulan Coal Mines Limited v Howarth and Ors* [2010] FWAFB 3488.
[14] *Kerkeris A. Hartrodt Australia Pty Ltd* [2010] FWA 674.
[15] See: Fair Work Ombudsman "Termination of employment fact sheet" (17 September 2010) <www.fairwork.gov.au
[16] (1984) 8 IR 34.
[17] *David James Miller v Central Gippsland Water Authority* [1997] FCA 1081.

hours, remuneration and conditions), as would reasonable redeployment. However, apart from that, the application of these provisos is largely subjective.

In summary, therefore, the redundancy situation under present law in Australia provides for employer-sourced compensation and support for most (eligible) employees with some recourse to a state fund should the employer be unable to provide such compensation to those employees made redundant. The right to make employees redundant is within the ambit of employer or management discretion. However, both the nature and process (the criteria and selection plus consultation and procedure) may be subject to scrutiny in the FWC to ensure it is a genuine redundancy. "Genuine" in this context implies also that the job is not to be undertaken by anyone else. Although the tasks that make up that job can be distributed amongst others, the way in which this is done may determine whether it is genuine redundancy or not.

It is appropriate now to turn to the particular issue of spill and fill processes being used as a means of pursuing a redundancy process. Description of this process and its implications, with particular reference to two recent examples of where it has been used, will constitute the discussion that follows.

Spill and Fill

As explained in the introduction, spill and fill is a colloquial term commonly used to describe the means whereby positions in an organisation are "spilled" then, once the new structure and positions are determined, vacant posts are "filled", with employees from the spill given the opportunity to apply but (normally) with no guarantee of success. The new positions may differ from the old in terms of scope or qualifications, be fewer in number and/or be at different levels, involve different conditions or lines of responsibility/authority, and/or involve different working hours and/or at different locations. Those employees who are unsuccessful in obtaining one of the new positions are then deemed redundant. The spill and fill process has been accepted by the courts as a fair and equitable means of managing redundancy where a significant restructuring or refocussing of an organisation is sought, (provided the employer can demonstrate it was not designed or intended to target individuals or groups, is discriminatory and that adequate consultation and discussions with affected staff had taken place) – see for example *National Union of Workers v Qenos Pty Ltd*,[18] *Roberts v University of New England*,[19] *Finance Sector Union v Commonwealth Bank of Australia*,[20] *Lindsay v Department of Finance and Deregulation*,[21] *Berice Anning v Batchelor Institute of Indigenous Tertiary Education*[22] and *Unsworth v Tristar Steering and Suspension Australia Limited*[23] (where selection of individuals to take the "fill" positions on the basis of relatively large compensation packages otherwise payable was deemed acceptable). Note that, although these cases have been decided under various statutes, both Commonwealth and State/territorial, this did not lead to differences in the basis or rationale for decisions.

However, judicial recognition of spill and fill as a fair approach to redundancy does not negate some troublesome issues. Although some of these are also associated with other redundancy processes, there is probably something about spill and fill, particularly where it involves a lot of people, that

[18] *National Union of Workers v Qenos Pty Ltd* [2001] FCA 178.
[19] *Roberts v University of New England* [2009] FMCA 964.
[20] *Finance Sector Union v Commonwealth Bank of Australia* [1997] HREOCA 12.
[21] *Lindsay v Department of Finance and Deregulation* [2011] FWA 4078.
[22] *Berice Anning v Batchelor Institute of Indigenous Tertiary Education* [2007] NTADComm 1.
[23] *Unsworth v Tristar Steering and Suspension Australia Limited* [2008] FCA 1224.

magnifies the implications. For employers, there is first is the potentially unwelcome publicity it attracts. Words like unemployment, body-blow, fight, job cuts, brutish and culls are commonly used in the media to report on such proposals, all implying heartlessness, inequality of power and significant ongoing financial and social implications for those affected. Secondly are the difficulties in reconciling two potentially contradictory objectives: cost control and performance. Where the main driver for spill and fill is the first of these, the employer runs the risk of reducing the organisation's ability to perform – either through the loss of organisational knowledge (particularly where those at higher levels are spilled), or via the reduction in numbers of staff in an area or overall. If it is the second, targeting poorer performers may effectively be reflected in a marked preference for younger, single and/or specific gender workforce – that, in turn, has the potential to attract accusations of discrimination. There is also, of course, the likelihood that the proposal will be scrutinised closely – if not in the courts then certainly in the media – and challenged, particularly where the relevant union identifies something in the proposal that is contrary to the words, focus or spirit of a relevant agreement or to law.

For employees and their union, the first implication is the uncertainty this approach engenders. Regardless of the degree of consultation with affected or potentially affected individuals and the relevant unions, and the publication of criteria, no one can be certain that they will be successful in their application for the new positions. This raises issues around morale, stability and relationships, both between peers and across levels. For example, where a "cascading" approach is used – involving high levels spilled and filled prior to others lower down in the organisation (as in *Finance Sector Union v Commonwealth Bank of Australia*) – it potentially raises unease and concern as to the impact of past history. For example, an employee may have been moved as a consequence of a difficult relationship with a manager and now may be faced with the prospect of having his or her career options decided again by that same manager.

Secondly, a spill and fill process can have implications for the rights of employees under other law or an award or agreement. One of the two grounds for action in *Finance Sector Union v Commonwealth Bank of Australia* was that anyone on extended leave (including maternity leave) were not eligible to apply for redundancy (called retrenchment here) although they could apply for one of the new positions (although unlikely to be able to comply with the conditions attached, particularly that requiring assumption of duties within four weeks, and faced difficulties in obtaining important information relevant to them). Their only real option was to return to work in accordance with the provisions of the relevant award, although at that stage it was unclear as to what that would entail. This was recognised by the Human Rights and Equal Opportunity Commission so:[24]

> The failure to permit expressions of interest in retrenchment denied [these] women the potential opportunity to leave the Bank before the CIP (Continuous Improvement Program) ushered in a 'new' Bank which would not necessarily have comparable positions available by the time they were due to return from extended leave. [These] women were hence faced with the very real threat that they would be returning to a poor choice of employment in a Bank for which they no longer wished to work.

The exclusion from the redundancy process for this group also closed down access to generous compensation, support, bank loans and other ongoing benefits that were part of the package. The FSU claimed this to be contrary to the Sex Discrimination Act 1984 (Cth); the bank argued (unsuccessfully) that it was not: for a person to be retrenched they must occupy a position made redundant. Since the relevant award provided for six weeks compulsory maternity leave, women on such leave could not be said to occupy any position, let alone one targeted for redundancy.

[24] *Finance Sector Union v Commonwealth Bank of Australia*, above n 20, at 7.4, per Wilson and Dean.

Thirdly, there may be suspicions that there may be an ulterior motive behind the selection of a spill and fill approach to redundancy, and that individuals will be made redundant in accordance with this motive: to remove an individual (without appropriate grounds or process of dismissal) or group from the organisation (for example, union members or activists), reduce the average status of employees or demote some, or to remove those with lower qualifications who, nevertheless, are perfectly capable of fulfilling the role. Such allegations were made (unsuccessfully) in *National Union of Workers v Qenos Pty Ltd*[25] (those targeted were members of an industrial association that had recently voted to take protected industrial action). However, unless such suspicions clearly translate to "adverse action" (under s340 Fair Work Act 2009) or dismissal on a prohibited ground (including discrimination), the courts and FWC show little inclination to second-guess the employer. In one of the few instances (*Lindsay v Department of Finance and Deregulation*[26]) where the Commission found against the employer on allegations of other purpose (and in this instance it was process rather than the decision to spill and fill that was the issue), the spill of Lindsay's position without offer of redeployment into the vacancy that was thereby created (albeit at a lower level) was deemed to be unfair dismissal.

There is also some concern around the approach that is being used in some recent situations that would appear to make it harder for employees to either challenge the process or to be confident as to the fairness of its outcome. By way of illustration, the next part of this paper describes two recent disputes/issues around spill and fill as applied in Australia, and the current/recent approaches that have been used in its implementation. The first involves Curtin University in Western Australia (in 2012-13) and the second the CSIRO (in 2010).

Curtin University

In 2012, Curtin University and the National Tertiary Education Industry Union (NTEU) finalised the first new enterprise agreement for the sector for 2012-16. Within nine months of this achievement, they were in dispute over Curtin's decision to spill and fill its academic staff, initially in four areas of Psychology, Built Environment, Science and Accounting, but potentially with an extension of this process to other areas of the University, possibly all. The University justified this decision on the need to reshape the academic workforce to meet the challenges of the future – to be "agile" and to boost its research performance and profile.[27] This agility, reportedly, included the creation of teaching focussed as well as research focussed and balanced positions. Existing staff members would be invited to apply for these new positions in accordance with their performance, record and interests. Appointment decisions would be on merit and fit.

Reaction to this proposal was swift. Criticisms in the media included the following. First, it was claimed that the expectations for the positions at different levels (particularly those involving or focussed on research) were unrealistic. Reportedly, someone applying for an entry level teaching and research position at Level B (the second level of appointment for academics in Australian universities) would, in addition to having a PhD, be expected to have an "established record of research outputs" in top journals (A and B) and "evidence of an established national reputation and growing international profile".[28] A senior (unnamed) staff member was quoted as saying "there is a

[25] *National Union of Workers v Qenos Pty Ltd*, above n 18.
[26] *Lindsay v Department of Finance and Deregulation*, above n 21.
[27] Catriona Menzies-Pike "Curtin Uni Spills Academie Jobs" (26 June 2013) New Matilda <www.newmatilda.com>.
[28] As above.

real fear…that this will lead to staff being demoted, with the resultant financial cost and public humiliation, or being shamed into resigning".[29]

Secondly, there were concerns that a significant reduction in numbers of positions available would undermine wages and conditions and "gravely diminish Curtin's capacity to operate as a university"[30] (Scott Ludlam, Green Party Senator), while the third main concern was that the action was inconsistent with the terms and intent of the collective agreement – which states "that all staff must act with integrity, respect, fairness and care"[31] (Tony Snow, NTEU Curtin Branch President). Thirdly, with estimates of around 45 staff members going from just the four schools identified in the first round, there was real potential for high levels of stress, worry and financial cost to impact on staff morale.[32]

Other implications were also identified, these largely arising from the fact that no individuals were to be declared redundant until after the positions were filled. First was a lack of opportunities for staff to know prior to applying for new positions whether their skill and discipline mix were still desired, and to understand the rationale for the change. For example, although the criteria for consideration for different levels were published, there was no indication as to whether an outcome of the process would be a change in the way courses were offered or the range/mix of such courses, whether the duties normally allocated to senior staff would be assigned to those at lower levels or whether the process would involve the dissolution or restructuring of particular schools or departments.

Secondly, the exercise had the potential to affect a broader group of staff than could objectively be justified. Many of the "core" activities in relation to teaching and research remained to be done. Declaring a blanket spill ignored this reality and had the implication that it was not the jobs but the individuals that had no place in the new structure – an implication contrary to the tenor of redundancy law.

NTEU notified a formal dispute and after negotiations (and with the assistance of the FWC)[33] reached agreement with the University whereby it abandoned the spill and fill process in favour of a more targeted, specific and fairer "Academic Reshaping" exercise. The implications of this shift were as follows. First, Curtin agreed to an improved consultation process before any decisions, and the dissemination of a detailed rationale for change. The principle aim here was to reduce conflict, engender confidence and give staff an informed choice on whether they should seek to remain under the new regime. Secondly, the University agreed to take all reasonable steps to prevent job losses and not to advertise externally for applications to newly created positions until departmental restructuring was complete and all reasonable efforts at redeployment had been made. As part of this, it undertook to ensure the dissemination and application of fair and objective position criteria for the different roles and levels. Staff without PhDs would not be excluded from low-level (A) teaching focussed positions for that reason alone (therefore, addressing the concern they would automatically be excluded even if they had been effective in that role up to the present) but could be from higher level positions.

[29] As above.
[30] As above.
[31] Carmel Shute "Outrage at Curtin University plan to spill all academic positions" (24 June 2013) National Tertiary Education Union <www.nteu.org.au>.
[32] As above.
[33] National Tertiary Education Industry Union "Academic Reshaping Fact Sheet" (14 October 2013) <www.nteu.org.au>.

This is not the end of this story. As recently reported, the impact even of this modified process is proving hard for employees at Curtin. The NTEU Curtin University Branch President is predicting the loss of over 130 academic jobs (with the implication that those in teaching focussed positions would bear the cost of increased research output from their colleagues via significant increases in workload, and around 75 per cent have their career prospects shut down due to their lacking a PhD). In addition, it is estimated that around 100 professional/general positions would also disappear.

Commonwealth Science and Industrial Research Organisation (CSIRO)

In May 2010, CSIRO staff in the Information Management and Technology area were informed by management that as the budget had been frozen and costs had increased, there would be a significant number of redundancies and that these would be handled via a spill and fill process. The staff association at CSIRO reported rumours that had been circulating for some time that a major restructure and redundancy process was planned. Concerns were that around 15 per cent of employees in this area (or 40-50 individuals) were potentially subject to redundancy.[34] The Community and Public Sector Union[35] suggested that the likely outcome of the process was a declassified structure – essentially meaning that instead of positions at CSOF levels 4 and 5, they were more likely to be filled at CSOF 2, with implications not only for the employees and their careers but also for the ability of the organisation to provide quality outcomes. In addition, it is arguable that, in a drive to economic efficiency the organisation would sacrifice effectiveness, demand impossible levels of accountability for individuals, impose high and unachievable workloads and thereby drive them to resign.

The process resulted in 35 staff being made redundant between 27 October 2010 and 30 June 2011, with another four redeployed elsewhere in the organisation. All four later left as a result of another redundancy process. Although the Union was unable to prevent this process, it took steps through the enterprise bargaining process to address what it described as the "brutish" process which allowed management to make easy culls at any time and force workers "constantly" to reapply for their jobs.[36] Further, it was reported that HR managers were telling people that if they failed to apply for one of the "spilled" positions they had effectively resigned, with implications for their legal and workplace-based rights to compensation and support.[37]

The outcome of the negotiations and new agreement was, to abolish this spill and fill process, an outcome similar to that achieved with the Curtin dispute (albeit via a different process). CSIRO instead agreed to adopt what was considered a fairer approach involving an initial step of skill and capability matching (voluntary redundancy substitution) to drive redeployment where possible, improved communication, consultation and information and an improvement in the process of identification of redundancies (targeted rather than wholesale).[38]

It is worth noting that, in subsequent announcements of redundancies (and non-renewal of contracts) for CSIRO staff (in 2012 and 2013), there was no mention of a spill and fill process.[39] Instead, those

[34] Renai LeMay "CSIRO IT staff face job cuts" (24 May 2010) Delimiter <www.delimiter.com.au>.
[35] Community and Public Sector Union "CSIRO information management and technology cuts – bad news all round" (2010) <www.cpsu.org.au>.

[36] The Australian "CSIRO Pay standoff over" (28 April 2011) <www.theaustralian.com.au>.
[37] CSIRO Staff Association "Kill the Spill and Fill" (2010) <www.cpsu-csiro.org.au>.
[38] CSIRO Staff Association "Improved redundancy rights making a difference" (26 July 2013) <www.cpsu.csiro.org.au>.
[39] ABC News "CSIRO to cut up to 600 jobs under hiring freeze" (8 November 2013) <www.abc.net.au>; Byron Connolly "Updated: CSIRO job cuts 'baffling' says union boss" (29 November 2012) <www.cio.com.au>.

identified as under threat included non-permanent, non-core (administration, management and support) and staff involved in "non-priority" or non-funded projects and positions. This implies that strategic and targeted redundancies remains the preferred approach but, again, it seems clear that adoption of this approach has not improved the attitude of the employees nor of the Union to redundancy in this context or the process. The consistent message conveyed in the media[40] is such moves in the interests of cost cutting damage the ability of the organisation to perform.

Review

These two examples reveal much about the spill and fill process and the way it is viewed by the parties concerned. Despite it being generally viewed by employers and the courts as an objectively fair way of managing redundancies in an organisation facing full or partial restructuring, some unions and others have the view that such a process, if not managed well, can be extremely difficult for an employee who may be forced to accept either unemployment or effective demotion (in itself an issue as it can lead such a person to resign). More generally, unions often see it as a blunt instrument to achieve something relatively simple, promoting divisiveness, uncertainty and reducing the opportunities for affected individuals to maintain their positions or assume new ones in the same organisation. There is also some concern around whether the newly designed positions are sufficiently different to the old, either in scope or expectation, as to make the current employees genuinely redundant or merely insecure.

The cases discussed above also suggest that the organisational culture and history may impact on strategies that are employed by unions in attempts to rein in their use. In this context, it is noticeable that in the university context, where job security has historically been high, the Union negotiated a settlement with Curtin that would minimise the impact of the process and provide some assurance of stability and career progression to those affected (it is also likely that the choice of this strategy had much to do with timing: there was already an enterprise agreement in place with over three years left to run). However, later experience also suggests that there is a more fundamental concern with redundancy in this context more generally, not just with the spill and fill process. Fundamentally, redundancy in this sector reiterates just how uncertainty and insecurity is shaping the employment relationship. The situation was somewhat different for the employees at the CSIRO where a history of instability, job uncertainty and non-consultation drove the Union to campaign successfully for a cessation to the spill and fill approach but not to the redundancy process.

Finally, to answer the question posed as the title to this paper, spill and fill is very clearly used as a means of achieving restructuring via redundancies. Whether it is perceived as fair is uncertain. It is also very clear that employers in Australia need to plan the process very clearly and be able to offer appropriate rationale for carrying it out: the unions are prepared to scrutinise both very carefully to ensure it is appropriate both in form and process. Provided this planning and process is carefully done, the courts and FWC are unwilling to revisit the decision. In addition, although there is some suspicion that it can and is used to dismiss, or force individuals to resign, there is not much evidence of this happening – or at least that the courts are willing to entertain.

[40] Connolly, as above.