TERMINATION, CHANGE AND REDUNDANCY CASE

MOORE (President), MADDEN J., BROWN (Commissioner)

2 August 1984

EMPLOYMENT PROTECTION — Test case in federal jurisdiction — Unfair Dismissal — Notice of termination of employment — Consultation by employers of technological change — Redundancy — Standards set for such provisions in federal awards.

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DECISION

Background to proceeding

This case has been of monumental proportion. Not only did the hearing cover a considerable period of time but the Commission had to render it to a wide array of material both Australian and international for its consideration.

The Commission has had to apply its mind to complex overseas examples as well as to local examples. In its deliberations we have not overlooked any of this material but because of its volume we have not found it possible to include a discussion of it all in our reasons. We have by necessity had to be selective but for those who wish to consider all the material we appeal to our decision a list of the publications to which we were referred [Appendix A].

On 14 October 1982 the Commission published reasons for decision on various jurisdictional arguments relating to claims made by the Australian Metallurgical, Foundry Industry and Shipbuilding Union (AMFSU) and the Electrical Trades Union of Australia (ETU) (Prior F2080). In that decision the Commission found that an industrial dispute existed "to the valid parts of the claim" between the parties on three issues: the nature of the notice, the adequacy of consultation and the adequacy of redundancy notices.

The Victorian Chamber of Manufactures (VCM) and, except in the case of the ETU, the Victorian Employers Federation (VEF) and Bakers Hill Proprietary Co Ltd, Wytaliba (BHP) were granted leave to cross-examine as amici curiae.

The Commission referred the parties to conference to see what course they could take to resolve the problems between them. A conference for this purpose was held by Mr Commissioner Brown on 28 November 1982 and further discussions took place between the Australian Council of Trade Unions (ACTU) representing the unions and the Confederation of Australian Industry (CAI) representing the employers. On 2 March 1983, as a result of the conference and the discussions between the parties, the unions sought leave to amend their claim in various respects to accord with the Commission's decision of 14 October 1982.

On 8 March 1983 the Commission, as presently constituted, found the existence of a dispute between the Transport Workers' Union of Australia (TWU) on the one hand and Ampco Transport Industries (Kynoch) Pty Limited (Amco), Australian National Airways Commissions (TAA), East-West Airlines Limited (East-West) and Qatar Airways Limited (Qantas) on the other hand and joined all three matters for hearing. On that day the ACTU took behalf of the unions outlined to the Commission the submissions that it would be making and indicated the reasons why it considered that there was a need for a national test case to bring about improvements with respect to job security. As indicated on that day the claims sought "substantial improvements in three main situations: firstly, on termination of employment, secondly, on the introduction of change by an enterprise; and thirdly, in the event of redundancy". On that same day the ACTU sought an adjournment of the proceeding to allow it to consult with the union elected Federal Government about the test case. That application was granted by the Commission.

On 24 May 1983 the ACTU commenced its detailed submissions.

The details of the claim made by the ACTU were amended in a number of respects during the proceedings. They are included in their final form in Appendix B to this decision, but in general terms the claim seeks to establish in federal award a right for individual employees not to be unfairly dismissed, a right for individual employees in ordinary termination of employment situations to an increased period of notice based on length of service, obligations on employers to notify and consult with employees about the introduction of new technology and redundancy situations, increased notice and a right to compensation and assistance for employees dismissed due to redundancy.

The ACTU made a detailed examination of the present position in Australia, particularly in relation to employees covered by federal awards, and claimed that "the present lack of job security does not meet the reasonable
expectations of workers and does not reflect standards appropriate in an advanced nation like Australia. It is also clear that if fundamental and technical changes are not made to the present situation in all areas covered by the claim.

In support of its general position the ACTU relied heavily on the consequences of unemploynent for individual employees and, in particular, referred to the Commission in the Report of the Donovan Royal Commission on Trade Unions and Employers' Associations 165658 (UK). In that Report, in Chapter IX (141) dealing with "Workers for Employers Against Unfair Dismissals", the Royal Commission commented on the consequences of dismissal from employment in the following terms:

"In many people build much of their lives around their job. Their income and prospects for the future are largely decided at the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may well dictate the breaking up of a community and the breaking up of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all."

16 The Food Workers' Union v. Warrigal Pte Limited (the Warrigal Pte case) (1972) 272 C.A. 272, Justice Wilcox said:

"Primarily employment is the chief source of income for Australian families. Its interruption must be attended either by financial hardship or the loss of employment is also part of a worker's daily routine and society;

duration of that routine and social contact necessitates a reorganization of an important aspect of many of the employees, and others may find themselves with a competitive disability as a result of the opportunity for the occasion of their union membership."

Numerous other authorities and sources to which we were referred contained similar comments on the consequences of termination of employment for employees.

The claim was made at a time when there have been a large number of retrenchments in industry due to a variety of reasons, such as economic downturn, the rationalization of enterprises, mergers and takeovers, the introduction of new technology and so on. What is a high level of unemployment and when there have been a significant number of disputes relating to the termination of employment. It was contended that, in the present circumstances of high unemployment and retrenchments, the consequences than in the past for individual workers because of the great difficulties for workers in finding new employment. Material was also tendered to the Commission which indicated that "a steady increase in the number of weeks a person who has lost his job may spend on the unemployment queue and that "persons in older age groups tend to experience longer than average periods of unemployment."

The ACTU relied on a number of general developments in support of its submission that a standard of fair standards with respect to job security was required. In addition to "the growing concern among workers about job security" the ACTU relied on the results of a number of inquiries, including: the Report on the Inquiry by Mr Justice Richards of the New South Wales Industrial Commission into Recent Mechanisation and other Technological Change 1963, the tripartite National Labour Advisory Council Guidelines (NLAC) entitled "Adjusting to Technological Change" (1966) and "Planning for Technological Change" (1965). The Report on Policy for Development of Manufacturing Industry 1973 (Hackett Committee), the Study Group on Structural Adjustment Programs of Australian Manufacturing Industries 1979 (Crowder Committee), the Report of the Committee of Inquiry into "technological Change in Australia 1988 (CTIVA Report) and the Committee of the
employees and their unions on production, technology and other changes likely to have significant effects on employees including proposed redundancy. The Australian Government also supported the principle of minimum periods of notice and consultation and the principle of remuneration compensation.

Four State Governments, namely, New South Wales, Victoria, South Australia and Western Australia, interpreted in support of the principal clauses made by the ACTU. The States of Queensland and Tasmania opposed the ACTU claim although, in some limited respects, they did agree that there was a need for improvements in job protection standards for employees under federal awards.

Unfair dismissals

Details of claim

As previously indicated, the details of the ACTU claim, after amendment as a number of respects during the proceedings, are included as Appendix "B". However, to deal adequately with the application, it is necessary to attempt to neutralize the claim and deal with it in a manner consistent, inter alia, with the principles concerning the conduct of the dispute which was outlined in the remarks made by the Court of Claims A. Which are consistent with the principles governing the conduct of the dispute which was outlined in the remarks made by the Court of Claims A of 'Unfair Dismissal' and "Procedural Fairness".

The basic provision in clause A of the claim is that an employer is prohibited from dismissing an employee on the basis of a reason which is harsh, unjust or unreasonable. Associated with that basic provision are a number of other clauses which provide as follows:

(i) Dismissals are defined to include:
- the termination of an employee on or without notice;
- the expiry of a fixed term contract without renewal for the same or similar terms;
- and to include:
- the termination by an employee where the termination results from conduct, unjust or unreasonable conduct or action by the employer.
- Dismissal will be unfair unless a valid reason connected to the employee's conduct or capacity or the operational requirements of an employer's business can be shown.
- Certain reasons shall not constitute valid reasons for dismissal;
- The burden of proving the existence of a valid reason for the termination shall lie on the employer.
- A Board of Reference will be appointed and a review of the decisions or actions of a Board of Reference by the Commission to be available so that the parties and the Commission will be involved in the conciliation proceedings before there is recourse to the courts.
- If the various courts would act in relation to breaches of an award forecast to s 110 of the Act.
- Any party may still appeal to the Federal Court for an interpretation of an award.
- Any Federal award provision in this area will not null the operation of State anti-discrimination legislation.
- Standards of procedural fairness to be followed in dismissal situations would include:
- (i) dismissal procedures involving a number of stages including verbal and written warnings and the disregarding of previous warnings after six months satisfactory performance;
- (ii) opportunity for an employee to answer allegations made against him before dismissal action is taken; and
- (iii) the right for an employee to be notified in writing and receive, on request, a written statement of reasons for dismissal.

Present position in Australia

The standard contract of employment clause in federal awards allows an employer to dismiss an employee for any reason whatsoever, giving one week's notice. The standard clause does not provide unfair dismissal and does not provide any procedural safeguards for employees in dismissed situations.

In addition, the employer generally have a power of summary dismissal in cases where misconduct, which would justify instant dismissal, occurs.

However, as in all states there is establishment in the industrial tribunals to deal with unfair dismissal of employees whose employment has been unfairly terminated. We see our below a summary of the position which exists in the various State jurisdictions. In New South Wales the Industrial Commission has a well-established jurisdiction to deal with complaints of unfair dismissal and to provide effective redress Reimbursement of lost wages is based on the power of the Commission to hear and determine industrial matters. Section 3 of the Industrial Arbitration Act 1940 (N.S.W.) defines industrial matters to include:

"... the right to dismiss or refuse to employ or reinstatement of any particular person or class of persons..."

Section 20a of the Act confers on the New South Wales Industrial Tribunal award-making power, which includes the power to direct reinstatement of dismissed employees, to order that a reinstated employee be reinstated at the same wages and to direct an employer to refrain from dismissing an employee.

In Queensland the Industrial Conciliation and Arbitration Commission has the jurisdiction to hear and determine all questions whether at law or fact, which may be brought before it, including:

"... the right to claim to dismiss or to refuse to employ any particular person or persons or class of persons, or any question whether any particular person or persons or class of persons ought (having regard to public interests, and notwithstanding the common law rights of employees or employers to be continued or terminated in the employment of any particular employer...

The jurisdiction of the Western Australian Industrial Commission to deal with unfair dismissals is similar to that in New South Wales in that the jurisdiction flows from that Commission's jurisdiction to deal with industrial matters generally. In particular, s 203 of the Industrial Arbitration Act 1979 (W.A.) provides that any individual may bring an action before the Industrial Commission alleging unfair dismissal and, in many cases referred to by the Western Australian Industrial Commission, that Commission has strongly endorsed its right to reinstate employees who it concludes have been unfairly dismissed.

However, unlike the position in New South Wales, Queensland and Western Australia, the jurisdiction in South Australia does not operate through the definition of industrial matter in the legislation. At the same time, the jurisdiction in South Australia was vested in the Industrial Court and identified
from s 15(f) of the South Australian Industrial Conciliation and Arbitration Act 1971-1961. These provisions confer on the Industrial Court and Industrial Magistrates a power to hear and determine any question as to whether the dismissal of an employee was unreasonable. The Act also empowered the Industrial Court and Industrial Magistrates to order the re-employment of a person who had been dismissed, and order the payment of lost wages for the period between the dismissal and the re-employment. Applications invoking the jurisdiction had to be made within twenty-one days from the date of the dismissal.

However, since the passing of the Industrial Conciliation and Arbitration Act 1972-1982 (SA) it has been held that under s 15(f) of the Act has been rendered by s 31 and proceedings alleging that a decision of an employer to dismiss was "harsh, unjust or unreasonable" are now to be dealt with by the Industrial Commission. The amendments also provide that an application under s 31 shall not be available if the dismissal is subject to appeal or review under some other Act or law, and, among other things, it provides for conferences to be held to explore the possibility of resolving the matter by conciliation. Remedies available in cases of unfair dismissal have also been extended.

The Victorian situation which was the subject of much discussion before the Commission has recently been altered. On 14 December 1983 amendments were made to the Victorian Industrial Relations Act 1979 which conferred on employers or their representatives, a right to make application to a Conciliation and Arbitration Board (bus) that employee's dismissal was harsh, unjust or unreasonable. If a Board so finds, it may order a re-employment. Similar procedures in respect of threatened dismissals where a Board may direct that an employer continue to employ the employee. The recent amendments to the Victorian legislation contain certain preconditions to the exercisability of the Board's jurisdiction to hear a dispute concerning harsh, unjust or unreasonable dismissal. There must be other right of appeal available to the complainant, and the application for or on behalf of the complainant in the case of a dismissal must be made to the Registrar within four business days after the day on which the employment was terminated. In many respects the scheme adopted in the Industrial Relations Act 1979 (Vic) is similar to that adopted under the recent amendments to the legislation in South Australia.

In Tasmania the person pending at a compulsory conference can order the reinstatement of an employee under an Industrial Relations Act 1975 which provides that the person pending may direct that "any things should be . . . done, or that any action be taken or omitted in relation to the industrial dispute. . . ." As a result, disputes about allegedly unfair dismissals are dealt with effectively through the compulsory conference procedure. It has also been determined that the normal contract of employment seen in most industrial courts is subject to the provisions in the Act which provide for reinstatement of an employee dismissed with a dismissal. Unlike, therefore, a federal award contains a clause giving the jurisdiction of the State industrial authorities, employers covered by federal awards have no access to State industrial authorities. Moreover, the Commission has only been prepared to assert savings clauses against federal awards in special circumstances.

Further, in contrast to the position in the State jurisdictions, there are constitutional questions relating to this Commission's power to deal with disputes about unfair dismissal. Even though some awards do provide for the Commission and/or Boards of Reference to deal with disputes about dismissals, the Commission has consistently held the power to deal with these types of disputes. In the

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employer objected to any change in the present position under federal awards. They contended that the power of the Commission in relation to dismissals is limited, that the Commission should recognize these terms and conditions, and that the Commission should not, by means of decrees, seek to circumvent the established terms on its jurisdiction. They also contended that employers were not to be subjected to the terms and conditions for which the

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Commissioner's de facto jurisdiction the provision claimed is unnecessary because the matters can be conveniently and competently handled, as it is presently, by way of a s. 25 notification. In particular, in relation to the State jurisdictions the CAJ examined that pursuant by State jurisdictions of reinstatement powers does not mean that this Commissioner should seek to cumulate the limin on its jurisdiction, nor should it automatically mean the grant of similar remedies to employees under federal awards. Having regard to the practice in State tribunals and our experience of the de facto jurisdiction of this Commission, we are prepared to give employees covered by federal awards a right to seek and obtain an examination by an independent tribunal as to whether a contract of employment has been unfairly terminated. However, we are not prepared to grant the union's claim in full.

The claim by the ACTU would give the employee a right to have his/her allegations heard by a Board of Reference appointed by the President of the Union under s. 23 of the Act to be responsible for the award concerned. The Board of Reference is intended to inquire into allegations of unfair dismissal, and, if possible, settle by conciliation the differences between the parties. Under existing legislation there is a limited number of cases falling within s. 5 of the Act, the remedy for an unfair dismissal would be limited to a penalty for breach of the Act with a 119 of the Act. For instance, under the existing legislation no power would exist to order that an employee be reinstated for unfair dismissal or that an employee be reinstated. The scheme put forward by the ACTU was, as it saw it, restricted by the Commonwealth and in our opinion it is not consistent with the fact that the Federal Commission should have effective power to deal with matters of "unfair dismissal" in essence, the ACTU indicated that it was restrained in its approach by the jurisdictional limitations referred to, and relied on, by the CAJ. There was no suggestion by any party that the scheme put forward by the union to deal with allegations of unfair dismissal was outside the Commission's power. However, the limitation on the remedies available under the ACTU's proposal and the existence of specialist industrial tribunals with extensive powers to deal with unfair dismissal was the basis of argument by the New South Wales and South Australian Governments that the Commission should limit its powers to deal with a savings clause of the kind awarded by Mr Commissioner Clarke in Re The General Motors Holdens Pty Limited (Part I) General Award 1974 (Canterno's case) 1975 167 C.A.R. 369. It was argued that in all States this would make one tribunal to deal with all aspects of cases involving allegations of unfair dismissal, whereas the ACTU proposal would provide for the possible involvement of Boards of Reference, members of the Commission and the Federal Court.

We acknowledge the desirability of a single federal tribunal being vested with all the powers to deal with complaints about unfair dismissal relating to employees under federal awards. We are of the view that the remedy of reinstatement should be an industrial tribunal similar to that which exists in the various States, or similar to the Industrial Court in South Australia. Nevertheless, we agree with the CAJ and the ACTU, who both argue that nothing should be done in this area for federal award employees that it should be done by, and conferred to, federal tribunals. If it is a question when the general terms and conditions of employment of a particular industry, including termination, is covered by a federal award it is preferable to deal with problems of unfair dismissal of those employees also by a federal award. Further, although we are of the opinion that the present type of clauses would not create the Commission to some extent, we deem it appropriate to discuss that aspect when we examine that part of the claim referred to "Procedure prior to or at the time of termination".

8 IR] TERMINATION, CHANGE AND REDUNDANCY CASE (The Contour) appropriate tribunal jurisdiction to award compensation to, or order reinstatement of, employees dismissed in breach of an award.

In these circumstances, we reject the proposition by the New South Wales and South Australian Governments that a savings clause should be inserted in federal awards. As stated earlier, however, we are prepared to give employees covered by federal awards a right to seek and obtain an examination as to whether the contract of employment has been unfairly terminated.

Nature of provisions

We now turn to examine the nature of the provisions we should award.

9 Text of unfair dismissal

The ACTU has submitted that this Commission should provide "that an employee shall not dismiss an employee in a manner or for a reason which is "hard, unjust or unreasonable". However, this test is not universally applied in dismissal cases. For instance, in the New South Wales Commission, which has over the years adopted a comprehensive set of principles to be applied in reinstatement cases, it has been suggested that the Commission should be bound by the statutory framework of the express purpose used in the older cases, such as "hard", "unjust" and "unreasonable" and that the objective of an industrial tribunal in reinstatement cases should be "industrial justice". Reference is often made to the New South Wales Commission, and in other tribunals, to the decisions of Mr Justice Sheppard in the Boys and Holloway and The Australian Workers Union (1971) A.R. (N.S.W) 83, and, in particular, to the message where his Honour said: "The less fatter there are on the discretion the better tone appear in the Act but it is all important that it should be examined soundly. The objective in these cases is always industrial justice and so this role ought must be given in varying degrees according to the requirements of each case to the inspector but not the impossibility of the right of the employer to dismiss his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome of any order of reinstatement made.

In the decisions of other State industrial authorities reference has been made to both tests of "industrial fairness" and tests which relate to the views "hard, unjust or unreasonable". However, from our examination of the decisions of various State industrial authorities we have concluded that, in the result, there is no significant difference in the approach adopted, or the results achieved, under either test. Further, our examination of the decisions and recommendations of members of this Commission indicates that in matters where reinstatement or other relief for employees dismissed, summarily or with notice, has been sought the Commission has generally considered whether the decision to dismiss the employee was "hard, unjust or unreasonable". The legislation in both South Australia and Victoria also requires the relevant tribunal to consider whether the decision to dismiss the employee was "hard, unjust or unreasonable". In these circumstances, we are prepared to grant the ACTU claim in so far as it provides that no dismissal by an employer of an employee should be "hard, unjust or unreasonable".

As already indicated, the introductory words in the ACTU's claim also refer to the manner of the dismissal but we consider it appropriate to discuss that aspect when we examine that part of the claim referred to "Procedure prior to or at the time of termination".
09 Definition of dismissal

The claim by the ACTU seeks to define dismissal for the purposes of the prohibition against "harsh, unjust or unreasonable" dismissal to include:

(a) termination by the employer with or without notice;

(b) expiry of a contract of employment for a specified period of time without renewal; and

(c) situation by the employer in circumstances where the termination results from harsh, unreasonable or unjust action by the employer.

All State jurisdictions, and the de facto jurisdiction of the Commission, apply to termination by notice that notice and we have, therefore, no hesitation in deciding that for this purpose termination shall include termination with or without notice.

However, the legislation in South Australia and Victoria, which has adopted a similar approach to provisions of dismissal, but not dismissal, is necessary to specify in detail the criteria of contracts of employment made for a specified period or other questions of contractual discharge.

In their circumstances, we are not prepared to include the additional parts of the expanded definition of "dismissal" at this stage.

10 Definition of unjust

The ACTU also seeks to include a clause which provides that a dismissal is unjust in the absence of a valid reason for disconnection with the capacity or conduct of the employee or based on the operational requirements of the employer.

The proposed clause refers to the word "use" to express the justification for termination in Article 4 of ILO Convention 115 and we have some difficulty in determining what, if anything, the expression adds to the test of "harsh, unjust or unreasonable" which we have adopted. It seems to us that the two expressions are more properly regarded as alternatives. Furthermore, there is no similar provision in either the Victorian or South Australias legislation, and there does not appear to have been the need for any similar law to be established in any other State jurisdiction. In these circumstances, we are not prepared to add such a provision to federal awards.

11 Discriminatory opportunity

There is also a claim that the following, among others, shall not constitute valid reasons for dismissal: sex, marital status, race, colour, sexual preference, marital status, family responsibilities, pregnancy, handicap, religion, political opinion, national extraction or social origin.

The ACTU suggested that the insertion of this clause was consistent with, and its terms were based on, ILO Convention 111 concerning discrimination in respect of employment and occupation, and the provisions in the Commonwealth and State anti-discrimination legislation.

Related to this provision was the claim that Commonwealth and, to the extent permitted by legislation, State anti-discrimination, equal opportunity and other similar laws should continue to apply.

The CAl opposed the inclusion of a list of reasons which would not constitute valid reasons for dismissal being included in an award. Whilst emphasising its recognition in respect to matters unrelated to the requirements of the job to be performed, it submitted that the proposed clause had a number of serious defects. In particular, the CAl submitted that the requirements of the employer and the conditions of the nature of employment continued. In this, the CAl was supported by the Queensland Ur- wort who connected the words together but submitted that if it should, 'in them it
for an exception where a distinction, exclusion or preference is based on the inherent requirements of a particular job.

We are also of the opinion that in view of the special expertise of the Committee on Discrimination in Employment and Occupation, it would be desirable that in the event of a dispute arising as to whether or not a termination offends the provision to be inserted in the award, such dispute be referred in accordance with the procedures of those Committees to the State Committees and, if necessary to the National Arbitrators.

Leave will be reserved for any party to re-argue that a savings provision for State legislation should be included in any award made.

(b) Bases of proof

The ACTU also claims that the burden of proving the existence of a valid reason for termination shall rest on the employer. The ACTU contended that the insertion of a provision that the burden of proof is consistent with ILO Convention 158, Article 2(a) which indicates that "the burden of proving the existence of a valid reason for termination as defined in Article 4 of this Convention shall rest on the employer." It also submitted that the claim was consistent with the position under s.5 of the Conciliation and Arbitration Act 1924.

The NSW Government contended, in accordance with normal practice the employer should carry the burden of proof and that this claim is inconsistent with the obligation of the State Commission to ensure that the provision only operates after the employee relationship has terminated. However, it is not necessary for us to determine this jurisdictional question as we are not prepared to award this part of the claim. The claim receives only limited support from Article 9 of the ILO Convention which provides, as an alternative to placing the onus of proof on the employer, that a tribunal may be "empowered to reach a conclusion on the question of the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice." The provision is consistent with the practice in State jurisdiction which places the onus on the employer and, in particular, it is inconsistent with the obligations imposed in the South Australian legislation, and presumably, the Victorian legislation which appears to have expressly done so in the South Australian legislation as a model. Furthermore, as the legislation named the provision would appear to have the effect of altering the onus of proof in proceedings before the Federal Court which we see as more properly a role for the legislature, not this Commission.

(c) Procedure prior to or at time of termination

In addition to the foregoing, the ACTU also argued that award provisions should be made as to the procedure to be followed prior to or at the time of termination. The ACTU claimed that these standards of procedural fairness to be followed in dismissal situations were already secured by good management practices by a significant number of employers. It was argued that the principles are embodied in ILO Convention 158 and Recommendation 160 and, as stated earlier include:

(a) opportunity for an employee to answer allegations made against him before dismissal actions are taken;
(b) dismissal procedures involving a number of stages including verbal and written warnings; and
(c) the right for an employee to be notified in writing and receive, on request, a written statement of reasons for dismissal.

The Queensland Government contended that a failure to follow the procedural practices which the tribunals in the United Kingdom have taken into account in determining whether an employer has acted unreasonably in dismissing an employee would not (in the circumstances) be an infringement of the principle that plain and adequate notice of dismissal, including reasons for dismissal, is essential.
the State legislation nor award provisions require an employer to give a dismissed employee the reasons for dismissal and we are not prepared, at this stage, without further debate, to grant the ACTU relief.

The ACTU also advanced that we are prepared to provide, that an employee whose employment has been terminated should receive, on request, a written statement specifying the period of his/her employment and the classification or type of work performed by the employee. This requirement should not impose any further burden on employers and we fail to see how the employer could be prejudiced by such a requirement. On the other hand, such a statement may assist an employee to find other employment.

b) Settlement of complaints

As stated earlier, the ACTU procedure for dealing with cases of bad, unjust or unreasonable dismissals involves a review of the decision of the employer by a Board of Reference under the Commission. The intention of the procedure suggested is to ensure that formal conciliation proceedings take place before recourse is had to the Board of Reference under s.119.

We are strongly in favour of conciliation in such matters as we are aware that in the State jurisdictions and in this tribunal conciliation has resulted in the settlement of a good proportion of such disputes, substantially reducing the number of cases which have to be heard and determined by tribunal members.

As stated in the ILO Report (iv)66, Termination of Employment at the Initiative of the Employer when dealing with procedural safeguards and remedies:

"Conciliation offers the parties an opportunity to review, with an impartial third party, the question of the justification of dismissal in the light of the legal standards applicable, the likelihood of winning or losing the case before the competent court or tribunal and the possibilities of reaching an agreed solution which may involve a withdrawal of the complaint, reimbursement in the job or agreement on compensation."

"However, we do not believe that the award provision should involve recourse to a Board of Reference unless that is the wish of the parties. In an attempt to provide an effective conciliation procedure for handling disputes or claims where "hard, unjust or unreasonable" dismissal is alleged we are prepared to consider a settlement of disputes clause.

We have considered whether it is necessary and/or desirable to include in our settlement of disputes clause also a provision on the time period following a dismissal within which an application must be made. However, because of the nature of our settlement of disputes clause we think it inappropriate. We do, however, reserve for the matter to be raised by the employers at some subsequent stage of this is considered desirable. We would indicate that we are prepared to hear debate on the form that such a clause should take and we recognize that the terms of any such clause will need to be adjusted to meet the requirements of the parties to particular awards.

Period of notice of termination of employment

One week's period of notice of termination of employment has been the standard in federal awards for a long time. The ACTU described this position as archaic and claimed four weeks' notice of termination should be given by an employer if the period of employment is less than one year, with an additional two weeks' notice for each year of service up to a maximum period if the period of employment is more than one year.

It is recognized, however, that there may be a need to move to this standard over a period of time and stated that a basic period of one week would be acceptable for the first year.
small firms of a loss of employees with long service and the requirement for such
employees to find another employee. We have decided that an employee should
be required to give the additional notice based on years of service but that it
would not be appropriate to require increased notice from the employer based on
age.

We are, however, prepared to grant employers up to six day's time off
without loss of pay for the purposes of seeking other employment. The time
shall be taken at a time that is convenient to the employer and notice given
with the employer. We take this step for reasons discussed later in this decision
under the heading 'Redundancy - Assistance in seeking alternative employ-
ment'. That reasoning is, in our opinion, applicable to all terminations of
employment at the initiative of the employee.

Introduction of change

In Part B of its claim the ACTU seeks to ensure that employees and their
unions are advised, provided with information, and consulted about changes
that are likely to have significant effects on workers. The proposed clause
seeks to ensure that employers provide appropriate information about
changes and, in particular, outlines measures to deal with adverse effects of
the changes on employees. The clause also seeks to ensure that employers
are accountable in their consultation which is to commence at an early stage and at least six
months before the change, except in exceptional circumstances. In addition, the proposed
clause seeks to ensure that employers provide adequate information about
the union. The union covers only technological change, but any change in an enterprise which is likely to significantly affect employment, irrespective of the cause of that change.

It was considered that the need for consultation was not unreasonably
the need was widely recognized by Governments, employees and unions. Further-
more, the need for consultation is supported by:
(a) the Committee of Enquiry into Technological Change in Australia
(CITCA Committee);
(b) the National Labour Advisory Council Guidelines; and
(c) the extensive and comprehensive procedures in the Federal public service
and
(d) the collective agreement clauses in all the award agreements in the
Television Industry.

In order to provide for consultation the ACTU argues that employees
shall be advised, provided with information, and consulted for periods of
notice equal to that required to give notice of termination of employment
in the workplace. The ACTU argues that the same periods of notice should apply
in all workplaces.

A modern industrial wage and working conditions are more than just
written agreements. The introduction of change can have significant effects on
workers and their families. It is important to ensure that these effects are
acknowledged and considered by employers.

The ACTU argues that there should be an extension of the notice period
for employees who are on extended notice of other employees. The extended
notice is to be equal to that required to give notice of termination of employment
in the workplace.

The ACTU argues that employees who are on extended notice of other
employees, and

in most Western European countries protective legislation with respect to
dismissal which contains extended notice periods only applies to termination
by the employer and not by the employee.

However, notwithstanding the ACTU arguments we are not prepared,
except to a limited extent, to provide for different periods of notice by
employee and employer. In particular, we are concerned at the possible consequences for

which is at the heart of the ACTU claims but the CAT, in particular, strongly
supported the voluntary approach to consultation, as enunciated in the NLAC
Guidelines. It did see on the ground that this approach enables management
to take the necessary responsibility for the decisions it makes while allowing
the appropriate flexibility to be retained, consistent and implementation of change.
The CAT also objected to the widespread nature of the changes covered by the claim
and the delay that would be caused to an employee seeking to implement change.
It suggested that the provision could be made to those who have a fundamental
and long-standing interest in technological change to frustrate the implementa-
tion of the change. The CAT also stressed, however, that the clause does
not relate to terms and conditions of employment but to the role and function
of the management of an enterprise and that for this reason the claim did not relate
to an industrial matter.

We have previously stated that, in our opinion, there is need to improve
slowly the setting of new standards and we are particularly concerned with the
possible ramifications of the ACTU's proposals in relation to introduction of
change.

The NLAC Guidelines stress the desirability of consultation during which
an exchange of views could take place. They state that:

"Employees and their representatives should be informed as soon as a firm
decision has been taken about the proposed introduction of a technological
cchange, consistent with the employer's need to protect the integrity of his
business. Consultation with the union officials and other recognized
employees' representatives on the consequences of the proposed change
should then take place."

and further that:

"The aim of employers should be to provide employees and their
associations with information on the nature of the technological change
proposed, the likely date of implementation of the change, how they expect
the change to be implemented, the expected effects on employees, prospects
for retaining and reemploying them if they are likely to arise, the possibility
of vacation and any other matters likely to significantly affect em-
ployees.

As to consultation, these same Guidelines state:

"The arrangements for consultation may vary with respect to the type and
eight of change being made, or the needs of particular situations, but
the employer should always seek to assure the appropriate trade union
officials and other recognized employees' representatives an opportunity
to express their views on the employment effects associated with a
 technological change.

These consultations might include proposals for the possible transfer of
employees, training and retraining arrangements, employer and conditions of
retraining jobs. It will also be necessary to discuss the best methods of
informing employees of the results of the discussions."

We are aware that procedures for notification, consultation and provision of
information have generally been found by industrial relations and, as we
are prepared to include in an award a requirement that consultation take
place with employees and their representatives as soon as a firm decision has
been taken about major changes in production, programme, organization, structure
or technology which are likely to have significant effects on employees. We have
decided also that the employer shall provide, in writing to the employees
concerned and their representatives, all relevant information about
the changes concerned, the expected effect of the changes on em-
ployee and any

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employees with a reasonable expectation of continued employment but it would not apply to seasonal employees engaged as such or to employees under fixed term contracts. It also proposed special provisions which would apply when there was a termination of a business or the winding-up of an enterprise. The provision that redundancy has become a major industrial issue in countries, that there has been an increase in the number of disputes over redundancy, and that because of the high level of unemployment many workers who have lost their jobs find it extremely difficult to find new jobs within a reasonable period. The greatest hardship is suffered by those workers who would receive inadequate or no compensation assistance from their employers. It submitted that it had an ongoing long-term engagement of employers to provide assistance. It acknowledged that broadly speaking there had been a preference for establishing redundancy protection through collective agreements and an ad hoc approach to redundancy protection. The ACTU claimed that this approach in the case involved only the best approach from the beginning which would undermine the existing laws as to be followed, which would bring the parties affected together to discuss the manner in which redundancies might best be managed and to agree in good faith with dealing with redundancy problems was preferable to the establishment of different standards from State to State through either State legislation or awards. The ACTU contended that there was no guidance as to what are acceptable and reasonable procedures for dealing with redundancies that workers dismissed due to redundancy may, for a variety of reasons, receive very different levels of protection or no protection for reasons unrelated to the hardship suffered or the needs of the worker concerned. It also contended that redundancy should be the subject of federal regulation in the same way as other major employment matters such as annual leave, public holidays, hours of work and maternity leave. The ACTU also claimed that the standard fixed should not be one which is intended to be a base from which negotiations will proceed but that it should be a reasonable standard which is set having regard to the issues and hardship caused to employees on redundancy, a standard that is applied in the vast majority of redundancies. In addition, the ACTU claimed that the procedures had developed for dealings with redundancies would, if implemented, facilitate the resolution of problems associated with redundancy and ensure fair treatment for workers affected by redundancy. This would remove industrial discussion about this subject.

In support of its general approach to redundancy, the ACTU relied on ILO Convention 158 which had given notice of reconsideration attained due to redundancy to workers' representatives and to consult on measures to avoid or minimize terminations and measures to mitigate the adverse effects of such terminations. It also relied on ILO Recommendation 156 which identifies some of the measures to be considered to avoid or minimize dismissals in redundancy situations. The ACTU was also pleased to see the ILO standards regarding severance allowances which are not restricted to redundancy situations but apply to all dismissals with the exceptions of dismissals for serious misconduct. It was also pleased that prior consultation with unions is now considered redundancy and service payments were an essential feature of Western European countries. In addition, the ACTU contended that the Western workers were closer to that of European countries and Japan than it is to the United States or Canadian position. In the former, contracts are of indefinite duration, for a fixed duration or for a specific task, in the latter, contracts are generally deemed to be day to day or hour to hour and terminations at will. Considerable reliance was also placed on the United Kingdom position, in particular, the terms of the Employment Protection Acts previously referred to.

The ACTU concluded that its examination showed that redundancy protection was more advanced in many comparable countries than it is in Australia. Mention was also made of the fact that in almost every country to which the ACTU is referred to contact to that the private sector there was comprehensive protection provided to employees across the federal public sector and that the Commission has been prepared to extend the protection into this area in two main respects, namely, to consultative arrangements and by granting a limited form of preference.

Release was also placed on the conclusion of the CTICA Committee on technological change which was critical of the present act and suggests an effort to strongly in favour of the establishment of general standards of redundancy protection through a unionized form. In particular, attention was drawn to the fact that the recommendation are not restricted to redundancy due to technological change but relate to redundancies for any other cause. Additional reference was also made to the CTICA Committee's conclusions that:

1. A reasonable period of notice in redundancy situations is essential to allow employees time to adjust to a proposed change in circumstances and, where necessary, to take action to secure suitable alternative employment.
2. Employees should consult unions in redundancy situations in an effort to avoid or minimize retrenchments, and that:

- the Commonwealth Employment Service (CES) and local offices are asked to help workers in redundancy situations in preparation for, and to assist in finding, another job.
- Mention was also made of the recommendations by the CTICA Committee that a temporary income maintenance scheme funded by Government, to be administered in the same general way as an unemployment benefit, should be introduced. However, the ACTU said that although it supported the thrust of the CTICA recommendations with respect to retrenchment compensation, it had a different view as to the way in which compensation should be provided. The ACTU also referred, in some detail, to developments in the States which, it said, have taken the matter of whether it is preferable to have different standards on redundancy protection from State to State or to have national standards. In particular, the ACTU emphasized that potentially federal award employers in South Australia, New South Wales and Victoria, and in some other States where legislation is introduced or the industrial tribunal takes action, will have lower standards of redundancy protection than other employers. Substantial inroads took place also as to what should be regarded as redundancy for the purpose of any decision the Commission might make to award, general redundancy provisions. The ACTU asked the Commission to avoid a legalistic approach which would give rise to an uneasy legalistic approach in determining the application of the provisions. It asked the Commission to retain a degree of flexibility in the definition which would discourage efforts to avoid award responsibilities through legal technicalities. It submitted that in "other cases" the Commission was not adopting a legalistic approach in determining that redundancy protection it was applied. Moreover, authority on an employee is dismissed through no fault of his own, said the ILO Convention 158 which referred to terminations for reasons which relate to the occupational requirements of the business, namely, reasons of economic, technological, structural or similar nature. It also relied on the definition of the Chief Justice, Mr Justice Bray in the South Australian Supreme Court which, it
only afford a base from which the unions will negotiate in order to build up the benefit in a particular situation. It claimed that there is absolutely no necessity to impose legal obligations on people so that unions can obtain information about standards. The ACTU also relied strongly on the moral or the cost to employees of implementation of the union claim. It rejected the approach of the ACTU because, in its view, the introduction of national standards would not enable an arbitrator to take into account particular circumstances which may exist in particular situations. For this reason, it is argued that the Commission should continue to take an ad hoc approach to redundancy claims. It also argues that, in the current economic climate, there is no justification for awarding any of the provisions of the claim. The ACTU relied on the fact that redundancies had become important as the Australian economy becomes more and more reliant on high-technology industries. It contended that a fundamental distinction can and should be drawn between redundancy which involves the displacement of employees because of adverse economic conditions and the lesser kind of redundancy which results from organizational change or restructuring in the public or private sectors. The parties irreconcilably disagree on whether there is any case for a new or revised case against redundancy. We, therefore, consider it necessary to deal with these aspects of the argument before dealing with the details of the ACTU claim.

General standard vs case by case approach

As stated earlier, the parties are in relation to redundancy was related to the divisibility or otherwise of introducing mandatory standards. In assessing the need for standards to be established, the ACTU and the Commonwealth relied on the common hardships which employees suffer when termination on the grounds of redundancy occurs. These include the loss of income and continuous employment, the possible loss of earnings and accumulated benefits associated with employment such as seniority, promotion prospects and other benefits, especially in this regard for long service employees. On top of these losses come other difficulties such as the problem of finding and retaining alternative employment. The ACTU also relied on the cases by Sir Richard Casey in the 1971 Annual Report of the Commission for general standards to be established, on the approach adopted in the Commonwealth Public Service, on the decisions in the Municipal Officers (South Australia) Award proceedings and on the decision of Mr Justice Fisher in 29 July 1953 in the Employment Protection Act (1953) 17 R. 273 establishing general standards of redundancy payments for workers affected by economic conditions. Reference was also made to movements in a number of States and in State industrial tribunals with respect to "job security" and the possibility as a result of those, and other movements, that there will be a patchwork of developments with the consequent inconsistency of treatment and injustices to workers. The ACTU contended that the result of is not if general redundancy protection is going to be established, but rather when it will be established and by whom.

In supporting the retention of the ad hoc approach, the ACTU contended that the so called "standards do not enable the arbitrator to take into account the circumstances in which the individual employee's rights are at issue. This approach is also contended to be consistent with the concept of redundancy as a measure of economic or organizational change and the need to ensure that the benefits of redundancy are not eroded by administrative practices.

The International material illustrated by the CAU because nothing was put by the ACTU to as the social security networks of the countries of Western Europe. Further, it was claimed that there were no as to the funding of the redundancy or other arrangements in previous countries. It was also contended that at least one country, the United Kingdom, payments made by the employer under the Employment Protection (Compensatory Arrangements) Act. To do so is not sufficient to establish a redundancy as a matter of law by the Employment Tribunal. It was claimed that such material makes the process or the method by which the redundancy is determined is a complex issue. There are a number of methods which are available for the determination of redundancy. The two general principles are that there is evidence and that a single claim is satisfactory. It is contended that the redundancy of an employee is satisfactory. It is contended that the redundancy of an employee is satisfactory. This is because the redundancy of an employee is satisfactory. It is contended that the redundancy of an employee is satisfactory.
For example:
(a) different situations should probably apply where terminations are due to redundancy and where there is a limited award of money for distribution amongst a number of worthy causes to cases where an employer is solvent and merely choses to pay a particular selection of employees;
(b) mandatory severance pay requirements will raise problems in relation to transition or sale of a business; and
(c) some industries already have specific award providing dealing with termination of apprenticeship and, in some cases, providing for improvements for the different employment conditions in award work.

It also contravened that the costs, in particular, the Wattle Fire case 1973 and the Blackrock Ferry case 1976 in the decision of the other arbitrating award to particular facts and circumstances. It also contended that all general provisions will not be uniformly applied but would merely be a floor from which the conditions were drawn.

All those supporting the "axial" claim did, however, concede that it should be seen as a part when something different or, regrettably, an attribution to achieve that circumstances exist which warrant a departure from what was intended.

An analysis of developments in redundancy cases indicates that predominantly redundancy agreements have been reached without involvement of industrial tribunals, where there tribunals and federal tribunals have moved steadily and cautiously and that every year, by the way, have been more on the ad hoc basis turning around the circumstances in particular cases.

An impressive case has been made out by the employers in support of the case by the ad hoc approach to redundancy and there is much to be said for an approach, which allows such cases to be subject of discussion between the parties having regard to the particular circumstances, and, as the event of dispute for the matter to be considered by the Commission with the advantage of knowing the circumstances.

In this way, in theory, may be due to the losses and hardships suffered by particular individuals or groups of individuals, to their employer's interests, and to the wide range of factors which might lead to reasonable adjustments.

However, this approach, which still characterizes the overwhelming majority of redundancy cases, has significant shortcomings. For instance, an analysis of developments in this area will indicate that there have been an increasing number of claims on employers for provisions to cover redundancy and an increasing number of these claims have been, and are coming, before industrial tribunals for determination. As a result, many and varied interests have been advanced as a consequence of agreements reached between employers and unions in individual employees and following decisions of industrial tribunals.

There is great difference in the awards of industrial tribunals from the relevant agreements attitude award provisions. Moreover, the cases indicate that the criteria for deciding whether or not the employees should be exercised by the Commission are not clear, nor are the criteria for assessing the appropriate provisions which should be included in any arbitrary redundancy perhaps. Furthermore, it is difficult to find support in respect of quantum of severance pay, whose awarded, and decisions on quantum conflict in amount and is in approach to a certain way of employees. Further, there has been a trend in industrial tribunals towards a consideration of general redundancy provisions and the ad hoc approach. Since the end of the 1970s, industrial tribunals have considered a number of cases on prospective

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"We agree that there may be occasions where because of the circumstances of the case redundancy clauses can properly be made ad hoc. This has been the past practice of the Commission. But we are of the view that it can be shown that it is possible that in the future such as the yet sensed, which can be understood, redundancy may be occasioned one is likely to insert into awards redundancy clauses to cover these reasons."

Moreover, any formula for a recapitulation allowance to be written into an award which is usually if redundancy clauses can only ever at a general standard of equity for a group of persons and some compromise need be made between equity and administrative feasibility. Even under the ad hoc approach, there appears to have been at least some acceptance by the claims and the Commission of the desirability of taking into account the particular circumstances of particular individuals, it has not been frequently been stated that a common formula should be adopted on the ground of practicality. Additionally, we are of the opinion that in the present developing industrial law, having regard to the number of cases which have been decided, very few decreases existing to redundancy can be regarded as ad hoc. Indeed, a review of the relevant authorities to which our attention has been directed does disclose some acceptable patterns of approach which are important.

We believe that it is impossible to turn back the clock and we have, therefore, regard to these "axial" approach in reaching our decision.

We also have a positive belief that there is a need for some machinery and consistency of approach in dealing with redundancy. We believe that in a consideration of the possible approach to redundancy procedures conflict and uncertainty and that there would be a great deal of value in all parties, if the ad hoc approach would be adapted and standard redundancy provisions were established.

In all the circumstances, we are of the opinion that we should, for as is practicable, determine prospective provisions to apply to redundancy situations and we are also of the opinion that we should look to the most recent decisions of industrial tribunals, and the material before us, for guidance. However, we are also conscious of the need for consideration to be given in particular cases to particular circumstances, and we have endeavoured to reconcile the matters between these considerations in coming to our decision.

Cost of claim
As mentioned earlier, the employers also made detailed submissions with to the cost of the ACTU claim and they contended that Australian employers could not, in the present climate, afford the additional impact of such implementation. In support of that submission, they called Mr. Anthony S. McCarthy who produced a study which attempted to estimate the cost of the claim in the metal industry, Mr. Whiting produced a study by Coopers & Lybrand Chartered Accountants, which was commissioned by MTIA. The Report was entitled "Financial Implications of ACTU Redundancy Claims if Granted in Wages Payments". The evidence given by Mr. Whiting and the various calculations made by him were not only subject to detail discussion by the ACTU but the calculations were also, understandably, based on the assumption that we would meet the union claim in full. As we have, by no means, awarded the claim in full the material which Mr. Whiting presented to us has to be placed in the light of that fact. Nevertheless, the material presented by Mr. Whiting was strongly directed towards the cost of that gap of the claim which relates to compensation for redundancy and notwithstanding the reduction of the survey by the ACTU that material must be a matter of concern. This is particularly so, when Mr. Polites
any positive offset, and because of the quantum-cyclic nature of the claim which affects employers when they can barely afford it. The CAI cost drags on the future of the present signs of improvement in the economy and emphasized that the cost of the claim must be examined in the context of the individual business and the increase to pay the costs of the redundancy claim. Those opposing the CPIA pointed out that no employer could reasonably be expected to bear the burden of an increase in redundancy entitlements on account of post-service at this point of time. They emphasized that many redundancies could be brought about by increasing the rate of business failure in the margin. In particular, they endorsed Governmental guidance that a claim was granted bona fide attempts to renegotiate aailing industries might fail because there are simply insufficient funds at the time. The Queensland Government also contended that for many enterprises redundancy costs would not carry as a significant percentage of their turnover would be marginal, and therefore, the introduction of it will be delayed or abandoned. In the alternative, the Queensland Government recommended that: introduction of new technology with significant adverse effects on employment; the CAl also emphasized the Queensland Government circular for the National Wage case decision: 23 September 1983 (1984) 4 L.R. 429, increases in labour costs as a result of this decision made a “very small” The ACTU conceded the latter point and indicated that the relevant principle in the National Wage case was Principle 11 which read as follows: “Conditions of Employment: Applications for changes in conditions other than those provided elsewhere in the Principles must be considered in the light of their cost implications both directly and through flow-on. Where such costs increase is not negligible, we would expect the relevant employers to make application for the claims to be heard by a Full Bench.” The ACTU did, however, tender material which went to the cost of redundancy compensation, notwithstanding its belief that a wide variety of factors make estimates of extremely difficult, if not impossible, task. On the basis of what the ACTU contended were “two general categories,” namely, the level of the Commonwealth Employment Service estimates in relation to 1982 and that the same level of redundancy would occur if the claim was granted, the ACTU estimated the cost of their service related redundancy payments at 0.18 per cent of total labour cost 0.1 per cent of gross domestic product. It continued, on the basis of this estimation, that the cost of its claim would be negligible regarding the hazard to the worst possible experience of retraining during the depth of the recession. In reply, the Queensland Government argued that the ACTU cost estimate did not allow for a number of factors relevant to the claim. These included: (a) the direct cost of time off to look for other employment; (b) additional payment in lieu of dismissal; (c) costs of post service benefits; (d) costs of unemployment training and retraining; and (e) indirect costs regarding the administration of a dismissal procedure, consultation procedures, notification and re-employment procedures. In reply, the CAI also criticized the use by the ACTU of minimum wage wage rates which, it contended, was inaccurate for the purposes of comparisons. S.I.R. | TERMINATION, CHANGE AND REDUNDANCY CASE: The Committee 61 In coming to our decision in this case we have been conscious of the cost of the minority claim and we have not overlooked the recommendations that a full time person on so we have also been conscious of the requirements of the National Wage case decisions, namely, that increases outside National Wage cases should be small. We have also paid regard to the fact that the impact of redundancy provisions will not apply equally to all businesses. While these factors in mind, we have decided that in making our decision in this case we should grant limited relief directed primarily to those whose own cost impact is least. Where additional payments are to be made to employees we have acted with restraint having regard to the current economic circumstances and the terms of the National Wage case Principles. However, notwithstanding that position, there is no doubt that acceptance of the approach adopted by the ACTU would significantly increase the level of severance pay. For many companies it will introduce a new charge directly impacting on industry reserves which involves a considerable financial strain which was not anticipated a few years ago and has not been funded. It is particularly important also that the claim is made during the current recession where many employers have been compelled to re-examine the high-cost, non-productive wage award. On the Consumer Price Index has been adopted. Although it is impossible to estimate with any precision what the cost increase will be, having regard to the nature of our decision we are of the opinion that it will amount “... a very small addition to the overall labor costs” (1983) 4 L.R. 427. Nevertheless, we have made provision, in our decision, for employers to argue in particular redundancy cases that they do not have the capacity to pay and in accordance with Principle 11 of the Guidelines “Where such cost increases are not negligible, ... for the particular Scope of redundancy claim As previously stated also, the ACTU contended that the Committee should make no decision between the classes of redundancy, whereas the employers contended that a decision should be made between cases of technological change and cases where redundancy occurred because of the employer’s financial difficulties. Reference was made to several decisions which supported differential treatment for redundancies due to technological change, staff rationalization and the like, and decisions where dismissals were brought about because of circumstances over which an employer had little or no control such as a downturn in business. There is no doubt that in such cases the redundancy in circumstances of financial difficulty will add to the economic difficulties which precipitated the dismissal. That is a strong argument for accepting the CAI submission, as so far as it contends that there is no justification for imposing substantial additional cost burdens on employers when redundancy occurs as a result of economic downturn. However, in many agreements, and in a number of recent decisions of industrial tribunals, both published and unpublished, no distinction has been made between the causes of redundancy and consequences has been avoided even where redundancy has been due to the economic downturn or some financial disaster which has affected the industry as a whole. Moreover, in our opinion, this would be so in the overwhelming majority of cases where redundancy pronouncements were made. Furthermore, there has only been a relatively small number of cases involving technological change. In view of this ingrained feature of existing redundancy provisions, we believe it would be too restrictive to limit our pronouncements to 2. Where redundancy is brought about by technological change or other circumstances within the control of the employer. Further, we
believe that there are difficulties in attempting to isolate the influence of different factors acting on the number and type of jobs and that to introduce definitional uncertainty into the resolution of redundancy disputes would have undesirable consequences for industrial relations and the individual employees. Moreover, the notion for the granting of additional notice to the employed and the purpose of redundancy payments apply equally to redundant employers whenever these be the cause of their termination. Employees, in their view, are not regarding the reason for the redundancy, equally experience the inconvenience of hardship involved with unemployment, and are not losing the use of compensatory measures for non-continued earnings that have been built up in such a way and long service that, in particular, to make a distinction granting redundancy pay only to persons of technological change, notwithstanding the equality of hardship on employees at all redundancy situations, would be to penalize an employer for his investment in technological change and would not be consistent with the attitude of technological change adapted in these proceedings by the ACTU, the views expressed by the various inquiries into technological change to which we were referred, or the terms of the Summit Communiqué.

In these circumstances, we do not believe that there should be any fundamental distinction, in principle, based on the cause of redundancy.

Consultation
In supporting its claim that consultation procedures ought to be awarded in cases of redundancy, the ACTU submitted that consultation provides an opportunity for unions to present a point of view to make proposals about redundancies, for instance, how they can be handled and how damages may be avoided or minimized. Consultation provides an opportunity for employees and unions to have an input into the decision-making process so as to ensure that the interests of employees are taken into account when redundancy decisions are being made. The ACTU contended that where a number of unions are involved then all should be given the opportunity to join in the consultation although, it said in fact concede that it is supposed award provision, with respect to consultative practices, should apply only to employers employing ten or more employees. It relied upon the allegations in the CFCA Report that the manner of handling unavoidable retrenchment will determine the intensity of employee resistance to change.

The ACTU also relied on:
(a) IILO Convention 158 which requires employers to notify and consult with unions in redundancy situations;
(b) legislation in comparable countries, including the Western European countries and Canada, which require consultation between employers and unions in redundancy situations;
(c) the provisions for notification and consultation in a number of agreements and collective awards relating to the iron and steel industry;
(d) statements in the Clipsal (Diamond) case in favour of consultation;
(e) the practice of some employers in following consultative procedures in redundancy situations; and
(f) the policy of the ACTU, other unions and the CAU.

The ACTU stated that although the employer what he must or must not do with respect to redundancies but rather it wanted to ensure that the employer pass about making decisions in a reasonable and reasonable way. Having regard to the views of, and effect on, employees. In this respect, the ACTU has supported the principle of the South Wales, Victorian and South Australian Governments. The ACTU also contended that for consultation to be meaningful it is essential that unions be provided with information to enable them to make informed decisions.

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dismissal, the number and classification of workers affected and the period over which dismissals will take effect. The claim also lays down details for the timing of negotiations and the provision of information.

The CAU contended that:
(a) the clause as a whole indicates that the claim is not concerned with the determination as to termination;
(b) the Commission cannot order employers to consult with a union.

In line with these submissions, the CAU indicated that the employer really feared that the provisions of any award made in this regard will be used as a weapon to inhibit the employer from making decisions necessary for the survival of the company and that, even if the provisions were within the jurisdiction of the Commission to award, they would interfere with management's ability to implement change expeditiously. In particular, it contended that:

(a) the requirement that consultation take place at least three months before an employee's given notice is totally unrealistic and will seriously inhibit the acceleration of technological change into Australia;
(b) that it is impossible to keep such information confidential where there is a spread of information beyond those who need to know.

The Commission has frequently made known its view that the employer should give the greatest possible notice to employees and their organisations of retrenchments due to redundancy. In the Clipsal (Diamond) case the Commission said:

"...it is essential that both the employers and the unions concerned should be informed of, and involved in, the planning as soon as possible. When brought into the planning both the employee and the union should be given a full opportunity to understand the problem which the employer faces and cooperate with him in a reasonable manner."

Although this was said in the context of voluntary retrenchment due to technological change, we would endorse these sentiments irrespective of the cause of the redundancy.

In effect, ILO Recommendation 166 expresses the same view as do the NLAC Guidelines to which we referred in the discussion above regarding consultation and the introduction of change.

As we said earlier, we are aware that procedures for notifying, consultation and provision of information have generally been settled by agreement and, and we are of the view that, generally speaking, they are matters which lend themselves to effective legislation or award provision. Nevertheless, we believe that it is of fundamental importance to involve employers and their representatives in the problems of redundancy as soon as a few decision have been taken that retrenchments may be necessary, and we are prepared to make an award provision to that effect. We have taken the expression "as soon as a firm decision has been taken" from the NLAC Guidelines and we are not prepared to go any further, particularly having regard to the fear that the decision will open up to the other party, whatever may be the cause. However, we would indicate that we are not opposed to the concept of a concise for discussions and the provision of such material. Indeed, we feel that sufficient time must be allowed and sufficient material provided if discussions are to be satisfactory. Nevertheless, we are not prepared to award general and detailed provisions such as those set out in the model clause.

We agree with, and are prepared to accept, the comments of the NLAC

THE REVISED EDITION OF THE 1975 GUIDELINES:
Guidelines that "the arrangements may vary with regard to the type and extent of the change, or the needs of particular situations," particularly as our observation extends beyond redundancy caused by technological change. In three circumstances, we will make only an advisory award provisions relating to the procedure to be adopted. This limited provision is also based on the NLRC Guidelines.

We will provide:

"For the purposes of the discussion the employer shall as soon as practicable provide in writing to the employees concern notice or union claim all relevant information about the proposed termination including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number and types of workers normally employed and the period over which the terminations are likely to be carried out. Provided that any employer shall not be required to disclose confidential information to the disclosure of which would be disadvantageous to its interests.

Notwithstanding the limited nature of this provision, having regard to its nature, we are prepared to exclude from the requirements the requirement to confer employees employed less than six months.

Criteria for selecting redundant employees.

The ACTU also made claim which relate to the criteria for selection of employees to be dismissed. According to the criteria, the size and labor force of the redundant employees. The criteria divided into two main division, the granting of preference to union members and the way in which other appropriate criteria for selection is determined.

In relation to the former, the claim was for preference in retention in employment to employees in positions and in access to opportunities such as training, education and employability. The claim was supported by the need to ensure that the ACTU seeks for the better management of redundancies, will be effective, it was claimed that a significant portion of level awards already contain provisions for preference in retention and that the Commission should grant the claim to ensure levels of union to make a meaningful contribution in the consultative process with respect to redundancies and the introduction of change.

As an other criteria for the selection of workers for dismissal for redundancy, the ACTU suggested that there should be certain determined by the employees and the union. It was claimed that the last but first of principle is an equitable system which has been rather in some awards but it has not been claimed that, if terminations due to the introduction of automation, the ACTU also referred to the clear indication in the CITICA Report that the Commission required a special or extended period of notice or redundancy quotations for workers in redundant situations.

The ACTU also proposed that periods of extended notice in redundancy situations may well be desirable where ordinary terminations can be carried out on one week's notice. However, in circumstances where lengthy periods of notice or payment in lieu of notice are involved in aspect of redundancy terminations employment must be the same as those for extended periods of notice or payment in redundancy situations.

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should be preferred in a retrenchment or redundancy situation where an employee has been in the job for seven years with service of the employer. The case is the fewest number of cases where there are a number of union

Our examination of the cases indicates that a variety of factors are considered by the courts and tribunals in determining which employers are to be terminated in redundancy cases including skill, experience, physical ability of employees to perform the work, union membership, length of service, age and other personal work life experience. There is no doubt in our mind that the establishment of criteria and their applications are appropriate questions for discussion between the parties. As to the claim for preference for employment for union members, the decision indicates that preference in a matter which would be dealt with on the particular facts of each case and, if preference is to be granted, the clause in the award should be tailored to meet the circumstances of particular cases. Moreover, there is potential conflict between similar terms of employment and the purpose of redundancy provisions, such as the inconvenience and hardship associated with searching for another job and the loss of remuneration for non-remunerative expenditures that have been paid. In addition, it is unclear where a relevant general provision of preference for union members would be applicable in individual cases, for instance, do employment terms which may provide different classifieds of employees in different sections or departments. In these circumstances, it is important to consider that the criteria to be applied in circumstances should depend on the circumstances and particular facts of each case and, if an award provision is appropriate, the form of any clause should be tailored accordingly.

Notice of termination

The ACTU called for a notice period of at least three months when redundancy occurs through no fault of the employees. The reasons given included the need to allow employees time to adjust to situations created by dismissal and also to give employees time to look for another job. The need for providing reasonable notice periods is recognized in ILO standards, as regulations and practices in many comparable countries, and in the practices of some employers in Australia, it was claimed.

Reliance was also placed on the "well established principle" in redundancy agreements and awards that workers in redundancy situations should be given an extended period of notice, on the conditions which apply to Government employees, and on State legislation in New South Wales and South Australia which provides that employers should give at least three months notice in cases where the employee has been employed for more than a year. The ACTU referred to the clear indication in the CITICA Report that the Commission required a special or extended period of notice or redundancy quotations for workers in redundant situations.
have also recognized the need for additional notice in cases of redundancy due to technological change and otherwise.

No standard has, however, emerged from the various decisions of this Commission or other industrial authorities as to the treatment of the New South Wales and South Australia Acts. Moreover, there have been various types of notice: a fixed period of notice, a variable period of notice related to the length of service, or a variable period in which the employee may be employed on a short-term basis. For this reason, we are not prepared to recommend a minimum period of notice based on standards granted in cases where redundancy is due to technological change or other causes such as company mergers and the like where it may be practical to give longer periods of notice. Further, for reasons given earlier, we are not prepared to distinguish between the causes of redundancy in determining periods of notice.

Additionally, we have increased the ordinary period of notice on termination of employment for employees with a period of service of five years or more. These increased periods of notice will apply to employers who are covered by the relevant redundancy.

The existence of the award provisions in relation to consultation in matters involving redundancy will also assist employers by giving them extra time to adopt the best possible procedures consistent with their interests. In these circumstances, and in particular having regard to the standards which will result from our award in this matter, we refer this part of the senate's claim.

Assurance in seeking alternative employment

The ACTU also sought that we should award a number of provisions designed to ensure that the employer assist the employee to find alternative employment. It was argued that there is a widespread recognition of the obligation on employers to assist in finding alternative employment. In this connection, reference was made to ILO Recommendation 166, the National Labor Advisory Committee Guidelines of 1969 and 1972, the CICA Report, and ACTU and CAI policies. Reference was also made to the South Australian Industrial Commission's Memorandum and Centrelink Manufacturing case where it was decided that there should be included in any detailed provisions in the award an obligation on the employer actively to assist in finding alternative employment or, to make reasonable endeavours to provide suitable alternative employment for redundant employees.

It should be noted that part of the claim is in general terms and does not specify, except by way of example, what action has to be taken by employers to seek for alternative employment. In this regard, the detail in the claim to be left to the employers to determine in consultation with the union. However, the ACTU also claimed several specific provisions designed to assist those affected by the other employment. These particular claims related to assurances which would minimize or avoid the need for retrenchment such as transfer to jobs elsewhere within firms and, where necessary, the provision of training and retraining for employees to enable them to perform other duties within the enterprise. Claims were also made for maintenance of income and payment of relocation expenses where employees are transferred to other duties within an employer's business. The ACTU claimed that replacement of employees is frequently sought in redundancy situations in order to avoid dismissals, that it is recognized in some private sector redundancy agreements and in agreement provisions, and that it is

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CITCA Report, and in the 1972 National Labor Advisory Committee Guidelines.

Under the heading “Retrenchment” the NLAC Guidelines provide:

"Every effort should be made, consistent with the efficient operation of business, to avoid retrenchment. If a reduction in the level of employment seems likely as a result of the introduction of technological change, the employer should accept responsibility to consult, and to co-operate with, union officials and/or other representatives of employees, in working out measures to avoid retrenchment."

For this purpose, some measures which have proved successful in the past could be embodied in the consultations. They include the introduction of the changes over a period of time to give that natural labour turnover can absorb those whose jobs are becoming redundant and so that the employees who are affected can be trained and retrained and transferred to other jobs within the firm or organisation. It may also help in some circumstances to limit overtime and recruitment.”

We endorse these remarks by the NLAC and it is our view that these matters are integral to the matters which should be discussed between the parties in the conferences we envisage taking place in relation to proposed retrenchments. We are of the opinion that, in general, employers do not minimise retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and retraining, and we do not think it necessary, or desirable, to make award provisions to cover these matters. However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to fewer paid duties because the employer no longer wishes the job the employee has been doing, done by anyone, then the employee should be entitled to the same period of notice of the change in employment as would have been entitled to if his/her employment had been terminated. Additionally, the employer shall pay to the employee maintenance of income calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof.

Therefore, the claims were also made for the employers to assist these affected to find employment with other employers when retrenchments are necessary. These claims included a particular claim that employers should be granted time off with pay to seek new employment. It was claimed that this was particularly important because redundancy often involved a number of workers being dismissed at the same time and, in those circumstances, the job of finding new employment might be more difficult, and might be a more lengthy process, for the workers concerned. Support of this claim was derived from the NLAC Guidelines, the CITCA Report and the position in the United Kingdom and Ireland, and in a number of decisions of industrial tribunals.

The ACTU also sought that the employers should be required to notify the CES of terminations. The ACTU supported this claim by reference to:

10. ILO Recommendation 166 which requires an employer to notify the competent authority "as early as possible" of contemplated terminations for reasons of economic, technological, structural or similar reasons;

11. the United Kingdom Employment Protection Act 1978 requiring notification to the Secretary of State for Employment of certain redundancies;

12. the NLAC Guidelines recognizing the need for CES involvement in mass retrenchments to assist workers find new jobs;

13. CITCA’s recommendation early notification by employers of possible retrenchments to the CES;

14. s. 80 of the New South Wales Act and s. 82 of the South Australian Act which contain award provisions requiring notification by employers in relevant public authorities;
and the
11 recognition of the need to inform relevant public authorities in both the

ACTU and Czd policies.

The employers conceded that both these claims were indicative of proper management practices but, in line with its general position, the Czd opposed an

obligation being imposed on each and every employer in respect to the award by

the motion of clauses in the term sought by the union.

The terms of the NALC Guidelines include the following:

"If retraining is necessary, the employer should accept the responsibility of

assisting those affected to find other employment. There are a number of

ways in which employers can do this.

Employers should provide notices to employees concerned with as much notice

of termination as practicable. Frequently employers should be able to give

quite long notice of termination.

At the earliest possible date the employer should see that the

Department of Labour and National Service is informed of the likelihood

of any retrenchment at the establishment. Subsequently, the Common

wealth Employment Service should be given the opportunity to interview

the employees concerned, either on the premises or in District Employ-

ment Offices so that offices can be made before their notice of

termination expires to find them alternative employment.

So far as practicable the employer should prevent employers who are

under notice of termination of their employment to attend interviews for

other job opportunities to obtain employment to obtain employment

than this and have contacted employers in the same industry, or in the

same health, about employing opportunities for those to be

retrained.

Employers should make every effort to make the retrenched

employees aware of the community services available to them, especially

those which offer assistance and advice about training and employ-

ment.

A number of decisions of industrial tribunals have held that it is reasonable

for an employee under notice to be given some time off work to look for alternative

employment. However, conditions have been imposed requiring the making of all

employment application to the employer be foreclosed and limitations on the time to be granted

application to the employer be foreclosed and limitations on the time to be granted

been imposed.

In the circumstances, we are prepared to provide, in an award, that an

application on an employer shall up to one day off without loss of pay during

each work of notice so that an employee can seek other employment. As

indicated earlier, we have also been prepared to extend this provision to cases of

indicated earlier, we have also been prepared to extend this provision to cases of

termination of employment. Further, we have indicated

termination of employment. Further, we have indicated

ordinarily terminate the employment of the employee. Further, we have indicated

that the employer should provide the CED with a notification of proposed

of proposed

redundancy together with necessary relevant information at the earliest possible

date. Additional clauses specifying work for workers or in providing a better

option for workers or in providing a better

employment should be given training facilities or pay location expenses where there

would be necessary to allow employment opportunities.

The ACTU claimed that employers had an obligation, in appropriate circumstances, to supply training opportunities for employees

were compromised as indicated and claimed

that in some cases, for instance, because of the remote location of an

employee's hours of work or because of field conditions in a particular area a worker will have to move in order to find

suitable alternative employment.

(b) that it would be necessary for such compensation to be in the form of a

sum calculated and payable in the time of termination: or

"The activities of the redundancy costs are clear. It was claimed that provision should be made for travel costs with respect to an

application for a job in a new locality and the cost of taking up a new job

including the estimated cost of removal of household effects.

These claims were opposed because, it was said, the employer's obligation to an

employee she she be clear when the employee is no longer employed. It was also

claimed that the cost of removal consists of the cost of removing household effects

the employee but the criteria for these objectives, whether they be socially desirable

or not. The Czd also pointed out that it may be at the option of an employee to

take one or more of a number of jobs that are offered and that it would be

impossible to tell at the termination whether or not these opportunities will be

similar to the retraining for outside employment. We agree with the employers that the problems of retraining should be

considered by the community and although we are of the opinion that, in

involuntary cases, it may be appropriate for employers to provide relocation expenses and

retraining, we do not believe it is appropriate for employers to provide relocation expenses and

regard to other aspects of our decision. These matters should be considered in the

context of individual cases.

A further claim was that priority in reemployment should be given when an

employer employs workers with the same or similar qualifications. Reference

was made to ILO Recommendation 166, the accepted practice in a number of

countries and the provision of a number of redundancy awards and agreements

in Australia. It was also claimed that this priority should not be limited to

any particular period of time after retrenchment.

The ACTU did not dispute the desirability of reemploying employees

wherever possible but argued that the matter should be considered in such

individual cases and it is not appropriate that it be the subject of a general order of

the Commission.

The Queensland Government also commented on the provision stating that

it was unsatisfactory in operation and arguing that it is difficult to draw a certain and

manageable provision in respect of priority in reemployment.

Again, we are of the opinion that this matter is best dealt with having regard to

the circumstances of each case. We are in agreement with the general view of the

Labor Court and the CED that it is not appropriate that priority be given in the

manner of the award during the course of the award.

Redundancy pay

The ACTU claimed that any general standards established without provision

for a reasonable level of redundancy pay would have little significance in

providing greater redundancy protection. It was the general view of the

Commission that the amount of severance pay in the course of industrial disputes should vary,

in redundancy and is of major concern to workers in the context of redundancy situations. It

was referred to LLO Conventions and Recommendations on the severance pay

entitlements provided in legislation in a number of comparable countries such

as the United Kingdom, France and Australia and in collective agreements in other

comparable countries. It was claimed that severance pay is essential to compensate

workers in the many cases that they suffer and reflect on the fact that employers

have provided, and industrial tribunals have awarded, compensation in the form of

severance pay. It claimed that in an overreaching majority of cases when
workers are dissatisfied due to redundancy there are a number of issues that need to be considered that could prevent the situation from escalating.

(a) unacceptability of loss suffered as a result of dismissal not due to the fault of the worker;
(b) recognition of past services;
(c) at continuing business during any period of unemployment following loss of job; or
(d) to compensate the employee for future earnings which would have been received had there not been dismissal.

The ACTU referred to the dual hardship compensation principle adopted by Mr Deputy President liason in the case of Good v. Industrial Commission (1972) 103 C.A. 312 which was referred to him in the Municipal Officers (South Australia) Award proceedings and to the Federal Employees' Union v. Window Cleaner a discretion. It indicated that although the degree of hardship suffered will vary from case to case, the circumstances are not clear in the presentation of each case and therefore, based on the evidence, there is a need to consider the individual circumstances of each employee affected and to provide compensation accordingly. The ACTU described the elements of hardship or losses to continue as employees as:

(a) the loss of security of regular and continuous employment or "unemployment of job continuity";
(b) possible loss of earnings or fringe benefits;
(c) problems and uncertainties produced by compulsory change of job, such as the problem of finding and retaining suitable alternative employment;
(d) loss of the employee's investment in his/her job, especially for long-term employees who might have foreseen other opportunities in the continuous service of their employee; and
(e) loss of seniority.

The ACTU claimed that other factors such as substantial reductions in pay and conditions, exhaustion of redundancy pay in awards and agreements, and the problems of finding alternative employment "to the current economic circumstances" should also be taken into account.

Reference was also made in the CITCA Report that "the financial compensation for retraining should be based on age and years of service and should be designed to compensate an employee who is forced to leave the firm through the failure of his or her own career for such developed "benefit" as:

- a reduced service leave and other benefits where such benefits cannot be transferred and for which no compensation is already given;
- the employer's contribution to any retraining or retraining scheme to which the employee participates;
- a training program that would already be expected to start in a new enterprise at the bottom of any salary scale and other intangibles.

But it was argued that this view of the matter to be taken into account was too narrow and did not take into account the need for any general award standard to have regard to existing standards in redundancy agreements.

The ACTU further held that redundancy pay should be the entitlement of all workers with an expectation of continued employment and should not be restricted to workers in a so-called career industry. It was maintained that the current nature of employment may have relevance to whether pay is to the question of entitlement but to the issue of quantum. The ACTU recognized that the level of compensation claimed may need to be established over time in the context of general award standards and changes as a basic first step, two weeks pay plus two weeks pay per year of service with no qualifying period. It concluded that if it is necessary to establish a service pay standard the standards already established in federal awards, interstate agreements, and in recent decisions of industrial tribunals.

In particular, it referred to:

(a) the Coal Industry Tribunal standard established in the Coal Mining Industry (Engine Drivers and Firemen) Award 1983/16 29 January 1983.
(b) the RC Steel Workers Employees (Broken Hill Proprietary Company Limited) Award.
(c) the Re Bridge, Distributive and Allied Employees' Association, New South Wales v. Myer A.E.W. Limited Judgment of Mr Justice Fisher on 18 August 1983 in the Industrial Commission of New South Wales (1983) 118 R. 303, and
(d) the Clothing Trades Award decision of Mr Commissioner Cox.

The ACTU does not consider it appropriate at this stage, in the context of general awards, to relate payments to age because:

(a) it may act as a disincentive to the employment of older workers thus adding to existing difficulties for those workers in finding employment; and
(b) salaries based on seniority tend to provide higher levels of compensation to older workers.

If reasonable criteria would allow special measures to be taken to protect the jobs of older workers.

In addition to the CAI objections based on its support for an ad hoc approach, which we have already dealt with, the CAI submitted that it cannot and should not be assumed in the Australian context that every employee has a job in some establishment for life and is entitled to severance payments every time his employment is terminated. It claimed that employer and employees are not really in a position to expect that employment and it is inappropriate to compensate for them in a general way as the ACTU suggests.

Furthermore, it referred to the different circumstances which are common to particular cases such as where a business takes place or where a business permits schemes, that is, in particular the CAI referred to the practice that many establishments at a minimal cost to themselves were their employees less compensation and that almost all compensation schemes in Australian industries are generous prescription which provide redundancy benefits are more generous than other benefits on ordinary termination.

There is no doubt that there is hardship necessary to redundancy situations but we have provided for extended notice on termination of employment and we have different obligations on employees which will assist employees in finding alternative employment. In these circumstances, it is argued that the employee should not be required to do more. Redundancy cannot be considered to be any different from unemployment due to any other event and through legislation, the common law at large, the benefit of paying unemployment persons amounts, were accordingly appropriate. The matter examined by the Commission indicates that many different levels of loss or damage have been considered minimal, but in some, involving, the payment of redundancy pay, the Full bench held in the concentrated (1985) Commission which related to the introduction of computers that "... justice can be done to the employees concerned on compensation if the employees are unable to keep them in employment". In the Heiner, Fairclough (1986) 122 C.A.R. 951, the tribunal applied that "... a reasonable compensation" for a variety of matters including the degree of hardship likely to be suffered by way of loss of accumulated benefits of service, lost opportunities of entry into and more senior employment and cost of retraining, while those same matters were taken into
such as: access benefits like sick leave and long-service leave, loss of seniority, and loss of the employer's contributions to pension or superannuation.

- Compensation for the inconvenience and hardship imposed and assistance to the retrenched employee to make the adjustment, with sums to be set at approximately income equivalent while the retrenched employee searches for another job, and to allow for the possibility of retaining in employment to take up a new job.

In this latter case Justice Smorgon was surprised at how small the payments were and estimated the employer's cost at around $140,000, which, he said, was a cost of about 6 per cent of the employee's salary, of which, if still employed, he or she could expect to share; alternatively, this might be considered as the price of industrial peace.

Having regard to the other aspects of our decision and having regard to what we have said about the necessity of, and reason for, the payment of severance pay and superannuation, we do not believe that the primary reason for the payment of severance pay relates to the requirement to search for another job and/or to tide over an employer during a period of unemployment.

Furthermore, we do not believe that it is appropriate, having regard to the equity considerations and the fact that we are required to make the redundancy provisions effective in all cases of redundancy no matter what the cause, to have regard to the third consideration referred to by CITCA.

We prefer the view that the payment of severance pay is justifiable as compensation for lost tax-deductible credits and the inconvenience and hardship imposed on employees. In this respect we agree with the submissions contained in the CITCA’s Report but would indicate, in this stage, that in framing the provisions we have been permitted to take into account the standards established in recent decisions of the Commission and the State Industrial Tribunals.

We have already expanded on the necessity to which we have referred, not to be sufficient to ensure that all employees find alternative employment and we are aware that these provisions will not solve the problem of the chronically unemployed. However, these remain, in our view, primarily a social rather than an industrial responsibility. Nevertheless, as we have indicated earlier, it would be misleading to assume that our decision in obtaining a new job necessitated that an individual mode redundant had managed to recover the security built up over years of service in the redundant job, and we are prepared to grant severance pay, in addition to the measures we have awarded to assist employees to find alternative employment.

We are prepared to have regard to length of service in determining an appropriate quantum for, on the reasons outlined in the ACU and to become the problem of age on the evidence before us is relied upon to support the claim under the Employment Act, and the doctrine of severance pay is not designed to provide for age-related payments. Of course, indirectly, older employees will benefit from a scale of payments based on years of service.

In the course of its submissions, the CAI referred to a number of particular circumstances which, in our view, made the old age approach to severance pay more appropriate than a general perception and, as indicated earlier, all those supporting the union's claim did not insist that it should be open to the parties to a particular dispute to establish that circumstances exist which would warrant a departure from the standard fixed in this decision.

Furthermore, we have decided that in determining the circumstances in which severance pay should be granted and the quantum of severance pay we should award for reasons of equity and industrial justice, we should pay regard to the most recent decisions of this Commission and other industrial tribunals. An examination of this Commission’s decisions for the decisions and the decisions
employees whose employment was transferred to another trustee company.

Mr Commissioner Cox's decision did not provide for compensation for employees terminated on account of mismanagement, whilst neglect of duty or misconduct, casual employees, or employees offered continuity of employment with the company in the same employment category if the employee was not required to shut further place of residence. In addition, Mr Commissioner Cox's decision provided special arrangements for employees approaching their normal retirement date.

Similarly, other decisions granting severance pay have been limited in their application.

We have already decided that our decision will apply to redundancy, whatever be the cause, and we have decided that there should be a right to have the general prescription varied, by order of the Commissioner, where employers in particular cases are seen that they do not have the capacity to pay.

Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also consistent with the general severance pay prescriptions being granted where termination is as a consequence of insolvency, where employee have been engaged for a specific job or contract, to seasonal and casual employees, or in cases where provision is contained in the calculation of the wage rates for the instant nature of the work. In addition, we are of the opinion that where termination is within the context of an employee's entitlement, an employee should not be entitled to more than he/she would have earned if he/she had proceeded to normal retirement.

Furthermore, we believe that an employee should not be entitled to severance pay immediately but that some period of time should elapse before any entitlement accrues. The length of this period is a matter for judgment and has been variously determined as twelve months, two years or five years. All the decisions to which we have particularly referred in this part of our decisions require a period of twelve months continuance of service before there is any entitlement to severance pay, except the Milk Processing and Cheese Manufacturing case which required a period of five years continuous service before any severance payment is made. We have decided that for employees with less than one year's continuous service the general obligation on employers should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity, and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alternative employment. This restriction will, in most cases, ensure that employees engaged on a trial basis do not become entitled to severance pay.

Two particular instances, which the Employer argued might warrant an application for relief from the obligation to pay the general prescription, which were brought to our attention in the proceedings were when an employer obtains acceptable alternative employment for the employee. However, we would point out that, in our decision, severance payments are not made for the purpose of assisting employees to find alternative employment. Where such application was made it would be important to consider whether previous service with the previous employer was regarded as service with the new employer. However, we would make it clear that we do not distinguish severance payments being made in cases of succession, assignment or reorganization of a business. We intend to provide for transmission of employment in terms similar to cl.36 of the Metal Industry (Long Service Leave) Award (1978) 86 C.C.R. 67.

As to the relevance of superannuation schemes to our decision we agree
with the majority of previous cases that payments under such schemes cannot be ignored, especially in cases where a superannuation scheme has a specific provision whereby full payment is made on redundancy occurring. Superannuation entitlements form an inseparable part of termination and claims for payments which are otherwise referred to form part of the very situation which, it is said, gives rise to the need for redundancy pay.

In both cases we would allow an employer to apply for relief from the obligations for payments which may be granted on such terms as the Commission sees fit. We would also make it clear that, in cases similar to that the subject of an application by Telektrakkers of Australia Limited and Commonwealth Steel Company Limited in these proceedings, where it is necessary to seek an exemption from the general provisions, that exemptions should be granted to the two steel plants at Newcastle that the majority of production employees are covered by New South Wales Steel Industry Awards whereas the majority of employees, mainly maintenance employees, are covered by the Metal Industry Award. Each company desires to deal with its workforce in the steel establishments as one workforce and according to common standards.

The relevant unions agree that an exemption would allow common standards to apply. Accordingly, as requested, we have decided that this decision will not apply to Telektrakkers of Australia Limited and Commonwealth Steel Company Limited.

In the circumstances, we are prepared to decide that an employee whose employment is terminated due to redundancy shall be entitled to the following payments in addition to the extended period of notice of termination proposed for employee termination:

<table>
<thead>
<tr>
<th>Service</th>
<th>Severance pay</th>
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</thead>
<tbody>
<tr>
<td>Less than one year</td>
<td>nil</td>
</tr>
<tr>
<td>More than one but less than two years</td>
<td>4 weeks' pay</td>
</tr>
<tr>
<td>More than two but less than three years</td>
<td>6 weeks' pay</td>
</tr>
<tr>
<td>More than three but less than four years</td>
<td>8 weeks' pay</td>
</tr>
<tr>
<td>More than four years</td>
<td>8 weeks' pay</td>
</tr>
</tbody>
</table>

"Weeks' pay" means the ordinary rate of pay for the employee concerned.

Leave entitlements

The ACTU claimed that in addition to severance pay employees dismissed through no fault of their own should be entitled to continuation for the loss of their leave entitlements. It claimed that the need to provide compensation for these circumstances is recognized in many redundancy agreements and awards and is also recognized in the CTECA Report's recommendations. It further claimed that an employee does not lose all the annual leave loading that he would have received if he had continued in employment and taken the period of annual leave.

An employee may also lose the benefit of any accrued sick leave because holder has not used the accrued sick leave. It was claimed that this was a quantifiable loss which can be identified and which is clearly due to dismissal where redundancy occurs. It was claimed that because of the previous provision of severance pay has been inserted into a number of awards to allow normality of sick leave or to provide payments for all unused sick leave in reemployment situations. In addition, through no fault of their own, employees are prevented from continuing to accrue to them, either prior to payment or to the provision of long service leave.

The employees claimed that annual leave loading in regular not made applicable to proportionate leave on termination and relied on a recent Full Bench decision in the Food Processors' Award 1973 (FPA) 1974 which has

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confirmed this view. The employees also claimed that sick leave is an entirely different concept to annual leave and long service leave as it is there to cover a period of protection to the employee who is ill. It is not generally portable and there is no reason why an employee should be paid on the termination due to redundancy with a cost which he would not have had to pay on an ordinary termination and may never have incurred at all. They rely on a decision in the Australian Clothing Industry (Metal Industry) and others v. Australian Clothing Industry (Metal Industry) 1970 (64) C.A.R. 266 to the effect that sick leave was not intended to afford a general right to a paid absence from work in the same way as annual leave and long service leave.

As to long service leave, the employees claimed they already lose heavy payoffs on termination and they appointed payment of pro rata long service leave on termination on this ground. They also claimed that to reduce the qualifying periods for entitlement to long service leave provisions merely means that leave loses its character as a reward for long service and becomes another form of monetary compensation paid annually.

The Queensland Government also submitted that the Commonwealth should not grant alterations to an area which is essentially a matter of State law and the Commonwealth referred to a Full Bench decision which refused to grant a claim for the payment of pro rata long service leave under the Food Processors' Long Service Leave Act 1964 on 4 April 1979 (79) 21 C.A.R. 764.

As previously mentioned, the loss of service towards long service leave entitlements, sick leave and annual leave loading have been taken into account by us in reaching our decision that a general standard of severance pay may apply. To add to this general provision specific payments for these factors would be a form of double counting. In addition, we are of the view that none of the claims have merit except as part of a general claim for loss of entitlements due to redundancy.

Numerous decisions of this Commission and other industrial tribunals make it clear that sick leave should be regarded as a contingent right analogous to insurance. It is means to provide for periods when a worker is ill and it would be wrong in principle to determine that this accumulated safeguard against loss of wages during an employee's working life should be turned into a cash payment on termination of employment.

The same can be said in relation to long service leave; the purpose is different to that of severance pay as is indicated by the Full Bench decisions regarding the Food Processors' Long Service Leave Award 1964 while the Commission said:

"We do not believe that the long service leave provision in this Award should be manipulated for such a purpose. The long service leave should apply uniformly to all respondents to the Award and, except in very special circumstances, that standard should also be in line with what the Commission's Award in private industry generally.

The purpose of long service leave is different from that of severance pay. The former, as its name implies, is a reward for long service to a particular employee. The question of the appropriate qualifying period is, of course, a matter of judgment in the light of general community values and economic considerations. The essential purpose of redundancy compensation is to compensate hardship to the employee caused by the transition of job continuity and career expectations. The amount of compensation can be determined fairly only by reference to the particular circumstances of each case. The long service leave provision should, therefore, not be adjusted to the variable requirements of redundancy allowances."

It is true that frequently parties have negotiated retrospective agreements which have as a component part severance and pro rata payments for both these leave types, however in these cases these are not paid as a result of a redundancy decision.
6. Withdrawal:
   - Exits from Industrial Conciliation and Arbitration Act 1961 — 1976 — "Industrial matters" sec. 11

7. South Australia:
   - “Exits from Industrial Conciliation and Arbitration Act 1972 — s. 15
   - Exits from CCHI Labour Law Report, The Industrial Cases, Vol. 1, "International Law and Labour Reports. 1974: 17 (6-07), 17 (6-09), 17 (6-09), 17 (6-06), 17 (6-09), 17 (6-09), 17 (6-09)
   - Mr. Justice L. T. Olson “Handling Unfair Dismissals in South Australia” (paper presented to Australian Graduate School of Management, Sydney 1982)

8. Tanzania:
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   - Act Respecting the Relations Between Employers and Subordinate Employees
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   - Re Steelworks Employees (Broken Hill Proprietary Company Limited) Award — No. 336 of 1982, 8 February 1983

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- Table — National Accounting Indicators — Annual and Seasonally Adjusted Quarterly at 1979-80 Prices

- Table — Derived Data in ABS The Labour Force

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Table — Statement Setting Out the Composite Emoluments for Terminations (A1) and Redundancy (C5) for Certain Employers Applying the Original ACTU Job Protection Claim

Table — Statement Setting Out the Composite Emoluments for Terminations (A1) and Redundancy (C5) for Certain Employers Applying the Modified ACTU Job Protection Claim

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Summary of Awards with number of items included in ACTU claim
Summary of Industrial Agreements with number of items included in the ACTU claim
Summary of Awards and Agreements with number of items included in the ACTU claim
Detailed analysis, Award by Award of the ACTU claim as per Exhibit B25
Detailed analysis, Industrial Agreement by Industrial Agreement of the ACTU claim as per Exhibit B25
State Government of Tasmania
— Number of Establishments and Employment from the Register of Business Establishments — Explanatory Notes and Tables

Appendix "B"

ACTU Job Protection Test Case
CLAUSE 1 A TERMINATION OF EMPLOYMENT

Unfair Dismissal

1. An employer shall not dismiss an employee in a manner or for a reason which is unfair, unjust or unreasonable. For the purposes of this paragraph, "unfair" shall include:

(a) the termination of employment by the employer with or without notice of termination;

(b) the expiry of a contract of employment for a specified period of time without renewal under the same or similar terms;

(c) the termination of employment by the employee with or without notice of termination in circumstances where the termination results from harsh, unjust or unreasonable conduct or action on the part of the employer towards the employee.

2. A dismissal is unfair in the absence of a valid reason for dismissal connected with the capacity or conduct of the employer or found on the occasion; the requirements of the undertaking, establishment or service of the employer. The burden of proving the existence of a valid reason for the dismissal lies on the employer. The following, among others, shall not constitute a valid reason for dismissal, namely race, colour, sex, sexual preference, marital status, family responsibilities, pregnancy, handicap, religion, political opinion, national extraction or social origin.

3. (a) For the purposes of this award, awards of reference shall from time to time be concluded and shall consist of such persons as it, or such persons as are, from time to time, appointed by the President of the Office of Employment and Labour Relations — June 1983

Queensland Public Service Board and Queensland Railways Guidelines:

(a) Policy Statement on Court of Employment in the Queensland Public Service;

(b) Amendment to Guidelines for Consultation on Technological Change in the Queensland Public Service;

(c) Replacement/Redundancy Agreement — Installation of Controlled Traffic Control — Queensland Railways;

(d) Queensland Railways Replacement/Redundancy Agreement — dying to all employees except those under the PTC Agreement.
1.6.3. TERMINATION, CHANGE AND REDUNDANCY CASE (The Court)

(i) There has been such further performance or continued inactivity.

(ii) Prior to the issue of any warning, the employer shall give the employee an opportunity to defend himself against the allegations made.

(iii) In exceptional circumstances, warnings in respect of misconduct, unsatisfactory performance or incapacity shall be disregarded after a period of six months of satisfactory performance.

(iv) An employee shall be entitled to be assisted by a union representative when defending himself against allegations regarding his conduct or performance liable to result in termination of employment.

(v) The employer shall notify an employee in writing of a decision to terminate his/her employment.

(vi) The employer shall in the event of dismissal provide to the employee whose employment has been terminated, upon request and within 5 days of the request, a written statement setting out the reason or reasons for his/her dismissal.

Period of Notice of Termination of Employment

1. In order to terminate the employment of an employee, the employer shall give the employee the following period of notice on payment directly related to the notice period in less (hereafter):

(a) One week's notice; plus
(b) One week's notice for each year of service or part thereof of the employee.

In calculating any payment in lieu of notice, regard shall be had to the weekly award rate payable to an employee and the total remuneration earned by the employee. The "normal overtime" in respect of an employee shall be the average overtime worked per week during the period of four weeks prior to the date of termination of employment.

The period of notice in this paragraph shall not apply in the case of dismissal for misconduct, that is, justice fraud or dishonesty, or in the case of casual or seasonal employees.

12. The notice of termination required to be given by an employee within paragraph A1 applies shall be one week.

Time off from Work During the Period of Notice

13. During the period of notice of termination given by the employer, an employee shall be allowed up to one week's time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

Statement of Employment

14. The employer shall in the event of termination of employment (whether by the employee or by the employer), provide to an employee whose employment has been terminated upon request and within 7 days of the request, a written statement specifying the period of notice and employment and the classification of the type or types of work performed by the employee. The request of the employee, an evaluation of his/her conduct and performance shall be given in writing to the statement or in a separate statement.

CLAUSE 2: INTRODUCTION OF CHANGE

Notification to Employees and Unions

1. Where an employer proposes to make changes in production, process, organisation, structure or technology that are likely to have
significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and their unions or unions.

(b) "Significant effects" include terminations of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotional opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs.

Consultation with Unions

2. (a) The employer shall consult with the employees affected through their unions or unions, on, inter alia, the introduction of the changes referred to in paragraph B1, the effects such changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees.

(b) The consultation shall commence as early as practicable after notifi-
cation by the employer and, other than in exceptional circumstances, at least six months before the introduction of any proposed changes.

(c) After a final decision has been taken about the proposed introduction of changes, there shall be further consultation between the employer and the unions or unions concerned at the request of either party.

Provision of Information

3. For the purposes of such consultations, at least two weeks before the consultations commence, the employer shall provide in writing to the unions or unions concerned all relevant information about the changes including the nature of the changes proposed, the likely date and method of implementa-
tion of the changes, the expected effects of the changes on employees, and any other matters likely to affect employees.

CLAUSE C REDUNDANCY

Consultation with Unions

1. (a) Where an employer proposes terminations of employment for reasons of an economic, technological, structural or similar nature, the employer shall consult with the employees likely to be affected through their unions or unions as early as practicable with a view to reaching an agreement. The consultation shall cover, inter alia, the reasons for the proposed terminations, measures to avoid or mitigate the terminations, and measures to minimize the adverse effects of any terminations on the employees concerned.

(b) For the purposes of the consultations, at least two weeks before the consultations commence, the employer shall provide in writing to the unions or unions concerned all relevant information about the proposed terminations including, but not limited to, the proposed terminations, the number and categories of the employees likely to be affected, the number of workers normally employed and the period over which the terminations are intended to be carried out.

(c) Other than in exceptional circumstances, the consultations referred to in subparagraph (b) shall commence at least three months before any employee is given notice of termination due to redundancy.

(d) After a final decision has been taken about the proposed terminations of employment, there shall be further consultation between the employer and the employees concerned, except in the event of a closure of any establishment of the employer.

B 3.1. TERMINATION, CHANGE AND REDUNDANCY CASE (the "Act")

Notification to the Commonwealth Employment Service

2. Where a decision has been made to terminate the employment of employees, the employer shall notify the Commonwealth Employment Service through the officers or employees of the employer representing the employees concerned. The notification shall include the reasons for the terminations, the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

Preference to Union Members

3. An employer who is a union member shall accord preference over other employees in retention of employment, in re-employment and in respect of all other benefits or opportunities accorded to the employer by the employer to employees as a result of the termination of the employees employed under the award in such areas, localities, departments or sections within which terminations of employment are to take place.

Criteria for Selection for Termination

4. The selection by the employer of employees whose employment is to be terminated for reasons of an economic, technological, structural or similar nature shall be made according to criteria determined by the employer and the union or unions representing the employees affected.

Establishments Termination of Employment

5. In addition to any other entitlements applying under this Award in respect of termination of employment, an employer whose employment is terminated for reasons of an economic, technological, structural or similar nature shall, in addition to the following:

(a) The employer shall give the employee not less than three months' notice of termination of employment or payment in lieu thereof.

(b) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(c) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(d) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(e) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(f) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(g) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(h) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(i) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.

(j) The employer shall pay the employee an amount not less than three months' notice of termination of employment or payment in lieu thereof.
include the granting of up to one week's additional time off without loss of pay to an employee as offset to seek other employment or to noise abatement for training or retraining for future employment.

4. As part of the assistance to employes to find suitable alternative work, the employer shall consider providing training or retraining or shall provide payment of a grant towards the costs and expenses incurred with training or retraining.

5. An employee under notice of termination of employment for reasons of an economic, technological, structural or similar nature may terminate his/her employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause as had he/she remained with the employer and the expiry of such notice.

6. Employees whose employment is terminated for reasons of an economic, technological, structural or similar nature shall be given priority in offers of employment by the employer if the employer again seeks to employ workers to perform work which they are qualified to perform.

7. Where an employee is transferred to other duties for reasons of an economic, technological, structural or similar nature, the following shall apply:

(a) Where the employee is transferred to lower paid duties, the employer shall pay to the employee a maintenance of income payments calculated as to bring the employee's wages up to the rate applicable to lower classified duties.

(b) The employee shall pay all relocation expenses incurred by the employee and his/her family in respect of taking up the new duties.

(c) The employer shall provide such training or retraining as is necessary to enable the employee to perform higher duties.

CLAUSE D — TRANSMISSION OF BUSINESS

1. This clause shall have effect where a business, undertaking or establishment, or any part thereof, whether before or after the commencement of this clause, has been transmitted from an employee thereof referred to as "the transmitter" to another employer (hereinafter referred to as "the transmitter").

In this clause, "transmission", without limiting its ordinary meaning, includes transfer, conveyance, assignment or succession, whether by agreement or operation of law and "transmitted" line a corresponding meaning.

2. Where a person who at the time of the transmission was an employee of the transmitter in that business, undertaking, establishment or part thereof, became an employee of the transm去了 —

(a) the period of service which the employee has had with the transmitter or any prior transmitter shall be deemed to be service of the employee with the transmitter for the purpose of calculating any entitlement of the employee to service — related periods of notice (under part A11) or severance compensation (under part C3); and

(b) the provisions of paragraphs C4, C5 and C6 shall not apply in respect of the termination of the employee's employment with the transmitter.

Offer of Employment with Transmitee

3. Where a person who at the time of the transmission was an employee of the