[AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION]

TERMINATION, CHANGE AND REDUNDANCY CASE

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

2 August 1984

EMPLOYMENT PROTECTION — Test case in federal jurisdiction — Unfair dismissals — 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 proceedings

This case has been of mammoth proportions. Not only did the hearing cover a considerable period of time but the Commission had tendered to it a vast 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 various local examples. In our 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 append 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 Amalgamated Metals Foundry and Shipwrights' Union (AMFSU) and the Electrical Trades Union of Australia (ETU) (Print F0870). In that decision the Commission found that an industrial dispute existed "as to the valid parts of the claim" between on the one hand the AMFSU and ETU and, on the other hand the Metal Trades Industry Association of Australia (MTIA), the Metal Industries Association, South Australia (MIASA), the Metal Industries Association Tasmania (MIAT), The Victorian Chamber of Manufactures (VCM) and, except in the case of the ETU, the Victorian Employers Federation (VEF) and Broken Hill Proprietary Co. Limited, Whyalla (BHP).

The Commission referred the parties into conference to see to what extent they could resolve the problems between them. A conference for this purpose was held by Mr Commissioner Brown on 26 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 8 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 Ansett Transport Industries (Operations) Pty Limited (Ansett), Australian National Airlines Commission (TAA), East-West Airlines Limited (East-West) and Qantas Airways Limited (Qantas) on the other hand and joined all three matters for hearing. On that day the ACTU (on 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 "significant 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 proceedings to allow it to consult with the newly 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 awards 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 in 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 also claimed that fundamental and substantial changes should be made to the present position in all areas covered by the claim.

In support of its general position the ACTU relied heavily on the consequences of unemployment for individual employees and, in particular, it referred the Commission to the Report of the Donovan Royal Commission on Trade Unions and Employers' Associations 1965-68 [UK]. In that Report, in Chapter IX [142] dealing with "Safeguards for Employees Against Unfair Dismissal", the Royal Commission commented on the consequences of dismissal from employment in the following terms:

> "In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all."

In the *Food Preservers' Union v. Wattie Pict Limited* (the *Wattie Pict* case) (1975) 172 C.A.R. 227, Justice Gaudron stated:

> "Primarily employment is the chief source of income for Australian families. Its interruption must be attended either by financial hardship or the fear of it. Employment is also part of a worker's daily routine and society; disruption of that routine and social contact necessitates a reorganization of an important aspect of a person's life. Long term employees may also find themselves with a competitive disability as a result of opportunities foregone in the continuous service of their employers."

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

The claim is 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, when there is a high level of unemployment and when there have been a significant number of disputes relating to termination of employment. It was contended that, in the present circumstances of high unemployment, job loss has even more severe 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 "a steady increase in the number of weeks a person who has lost his job may spend on the dole queues before finding a new job" and that "persons in older age groups tend to experience longer than average periods of unemployment".

The ACTU also relied on a number of general developments in support of its submission that a review of federal award standards with respect to job security was needed. In addition to "the growing concern amongst 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 Mechanization and other Technological Change 1963, the tripartite National Labour Advisory Council Guidelines (NLAC) entitled "Adjusting to Technological Change" (1969) and "Planning for Technological Change" (1972), the Report on Policies for Development of Manufacturing Industry 1975 (Jackson Committee), the Study Group on Structural Adjustment Problems of Australian Manufacturing Industries 1979 (Crawford Committee), the Report of the Committee of Inquiry in Technological Change in Australia 1980 (CITCA Report) and the Commu[illegible]ue of the

In particular, the ACTU relied on:

(a) the emphasis by Mr Justice Richards in his Report on the need for early notification and consultation with trade unions of technological change to ensure consideration of measures designed to cushion the impact on employees;

(b) the practices recommended by the NLAC for observation by employers in planning the introduction of changes to work methods and, in particular, changes associated with the introduction of new technology;

(c) the comments about the desirability and advantages of consultation and communication with employees about changes with employment consequences by the Jackson and Crawford Committees;

(d) the conclusions of the CITCA Report that certain aspects of job protection in Australia are unsatisfactory and the recommendation that there should be a national test case in the Commission to establish award provisions with respect to notification, provision of information and consultation on the introduction of new technology and compensation and assistance to find other employment in redundancy situations; and

(e) the conclusions of the Summit Communique that the answer to high unemployment does not lie in rejecting new technology but that the introduction of new technology should be planned, that consultation with workers and their unions should occur, and that the consultative processes should be supported by other policies, including retraining and redundancy provisions.

The ACTU further relied on International developments including the adoption by the International Labour Organisation (ILO) on 22 June 1982 of a new convention (Convention 158) and a new recommendation (Recommendation 166) dealing with termination of employment at the initiative of the employer and what it termed "significant developments in respect of job security in a number of comparable countries particularly the United Kingdom and other Western European countries". Developments in other jurisdictions in Australia, in particular in the public service and in the State industrial jurisdictions, were also relied on by the ACTU. The ACTU contended that the material referred to, which was dealt with in a most comprehensive manner by Mr Boulton, who appeared for the ACTU, supported its detailed claim.

The claim was opposed by the CAI, who appeared for employers generally, on numerous grounds. It contended that there was no justification for varying the Commission's present procedures for dealing with dismissals considered to be "unfair", that the period of notice presently given in ordinary employment situations should not be changed, that it was not appropriate to make award provisions requiring employers to notify and consult with employees about the introduction of new technology and/or redundancy and that disputes in relation to compensation and assistance to employees in redundancy situations should continue to be dealt with in a case by case approach rather than by the fixation of general standards. A principal feature of the CAI's opposition to the claim was its "compulsory, legalistic and inflexible nature". The employers also submitted substantial material going to the cost of the union claim and contended that Australia cannot afford the substantial increase in labour costs involved in acceding to them. The CAI explained that it was not committed to ILO Convention 158 or Recommendation 166, having abstained from voting on both issues, and it contended that the adoption of that Convention and Recommendation was not appropriate having regard to Australian conditions. It also contended generally that overseas experience is not appropriate for Australia and that the Commission should not adopt the principles and practices of the public service, or the principles and practices of the State jurisdictions.

The Australian Government intervened in the proceedings and indicated its support for the [illegible]usion in federal awards of improved standards in relation to

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 retrenchment compensation.

Four State Governments, namely, New South Wales, Victoria, South Australia and Western Australia, intervened in support of the principal claims 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 in 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 summarize the claim and deal with it in parts because, inter alia, we have been moved by different considerations in relation to various aspects of the claim. It is appropriate, therefore, to deal firstly with Parts 1 to 10 of clause A which are contained in the claim under the sub-headings of "Unfair Dismissal" and "Procedure Prior to or at the Time of Termination".

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

(a) Dismissal is defined to include:

(i) the termination of an employee with or without notice;

(ii) the expiry of a fixed term contract without renewal under the same or similar terms;

and also to include:

(iii) termination by an employee where the termination results from harsh, unjust or unreasonable conduct or action by the employer.

(b) 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.

(c) Certain reasons shall not constitute valid reasons for dismissal.

(d) The burden of proving the existence of a valid reason for the termination shall rest on the employer.

(e) A Board of Reference to 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 conciliation proceedings before there is recourse to the courts.

(f) The various courts would act in relation to breaches of an award pursuant to s. 119 of the Act.

(g) Any party may still apply to the Federal Court for an interpretation of an award.

(h) Any federal award provision in this area will not oust the operation of State anti-discrimination legislation.

(i) 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) an 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, upon giving one week's notice.

The standard clause does not prohibit unfair dismissals and does not provide any procedural safeguards for employees in dismissal situations.

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

However, in all States there is established jurisdiction in the industrial tribunals to deal with unfair dismissal of employees and to order reinstatement of employees whose employment has been unfairly terminated. We set out 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 relief including reinstatement. In that State the jurisdiction is not based on legislation or on award provisions prohibiting unfair dismissal, rather it is based on the power of the Commission to hear and determine industrial matters. Section 5 of the *Industrial Arbitration Act* 1940 (N.S.W.) defines industrial matter to include:

"(c) . . . the right to dismiss or refuse to employ or reinstate in employment 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 reimbursed lost 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 of law or fact, which may be brought before it including:

"(c) . . . a 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 employers or employees) to be continued or reinstated in the employment of any particular employer . . .

(d) the right to dismiss or to refuse to employ or reinstate in employment any particular person or class of persons in any calling."

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. 29(2) of the *Industrial Arbitration Act* 1979-1982 (W.A.) provides that an individual may bring an action before the Industrial Commission alleging unfair dismissal and, in many cases entertained 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 time of the hearing, the jurisdiction in South Australia was vested in the Industrial Court and derived

from s. 15(1)(e) of the South Australian *Industrial Conciliation and Arbitration Act* 1972-1983. That provision conferred on the Industrial Court and/or Industrial Magistrates a power to hear and determine any question as to whether the dismissal of an employee was harsh, unjust or unreasonable. The Act also empowered the Industrial Court and/or Industrial Magistrates to order the re-employment of a person found to be unfairly dismissed, and/or 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 the employee was dismissed.

However, since the hearing the *Industrial Conciliation and Arbitration Act* 1972-1983 (S.A.) has been amended. Section 15(1)(e) of the Act has been replaced 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. The 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 employees or their representatives, a right to make application to a Conciliation and Arbitration Board to hear and determine whether that employee's dismissal was harsh, unjust or unreasonable. If a Board so finds, it may order a reinstatement. Similar powers are conferred upon Boards 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 exercise of the Board's jurisdiction to hear a dispute concerning harsh, unjust or unreasonable dismissal. There must be no other right of appeal available to the complainant, and the application by 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 presiding at a compulsory conference can order the reinstatement of an employee under s. 51 of the *Industrial Relations Act* 1975 which provides that the person presiding may direct that "any things should be . . . done, or that any action should be . . . taken, for the purpose of preventing or settling 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 clause in most federal awards will exclude the application of State provisions dealing with reinstatement and re-employment. Unless, therefore, a federal award contains a clause saving the jurisdiction of State industrial authorities, employees covered by federal awards have no access to State industrial authorities. Moreover, the Commission has only been prepared to insert savings clauses into federal awards in special circumstances.

Further, in contrast to the position in the State jurisdictions there are constitutional problems 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 rarely had the power to deal with these types of ites. In the

statutory protection includes s. 5 of the *Conciliation and Arbitration Act* 1904 which relates to certain offences in relation to members of organizations and which provides limited protection to employees in order to protect the general operation of the Act. In such cases a prosecution can be brought before the Federal Court and, upon conviction, it is open to the court to order reimbursement of wages lost and/or reinstatement of the employee in his old position or in a similar position. The statutory protection for federal award employees also includes the protection provided by the provisions of the *Racial Discrimination Act* 1975 (Cth). This legislation makes it unlawful to dismiss an employee by reason of the race, colour, descent or national or ethnic origin of the employee and the Act also provides enforcing mechanisms for aggrieved individuals. The Act prohibits recourse to the courts unless there has been an attempt at conciliation by the Human Rights Commission, but ss 24 and 25 of the Act give civil courts the power to hear a complaint and make a number of orders including damages against the defendant and/or such other relief as the court thinks just. It was contended in the proceedings before us that this power included the power to order reinstatement and/or award damages for lost wages.

The *Sex Discrimination Act* 1982 (Cth) has also been proclaimed and came into force on 1 August 1984.

In addition to the protection afforded by federal legislation, State anti-discrimination legislation in New South Wales, Victoria and South Australia would appear to extend to workers in those States who are covered by federal awards. However, notwithstanding the presently perceived limitations on the Commission's jurisdiction, when the disputing parties agree to the Commission dealing with cases involving disputation over dismissals the Commission does exercise a de facto jurisdiction. In such cases, the member of the Commission concerned usually conciliates between the parties and, if necessary and the parties agree, the member may then make recommendations as to how the dispute should be resolved.

Role of industrial tribunals and/or courts

The ACTU relied heavily on the position in the State jurisdictions in support of its claim that the Commission should provide effective remedies in cases where unfair dismissals occur. It also relied on the ILO standards which are contained in Convention 158 and Recommendation 166. In particular, the ACTU contended that the Convention and Recommendation establish new International standards with respect to unfair dismissal, that a worker should not be dismissed except for valid reason, and that where a worker is dismissed the worker should have the right to contest the dismissal before an impartial body with power to grant effective redress. The ACTU also relied on international practices on this aspect of the claim and, in particular, it dealt in some detail with the *Employment Protection (Consolidation) Act* 1978 (U.K.) as amended by the *Employment Protection Act* 1980 (U.K.). That legislation gives employees the right to complain of unfair dismissal to an industrial tribunal and covers both terminations by notice and without notice.

The United Kingdom legislation provides that where a complaint of unfair dismissal is held to be well founded the tribunal may make an order for reinstatement or re-employment or award compensation.

The employers 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 those limits and act within them, and that the Commission should not, by means of devices, seek to circumvent the established limits on its jurisdiction. They also contended that employers wer ter placed to decide the needs of the business for which they

Commission'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 CAI contended that possession by State jurisdictions of reinstatement powers does not mean that this Commission should seek to circumvent the limits 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 unions' 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 Presidential member assigned 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 this would mean that, except in the 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 an order or award in accordance with s. 119 of the Act. For instance, under the existing legislation no power would exist to order that an employee be reimbursed for wages lost or that an employee be reinstated. The scheme put forward by the ACTU was, as it saw it, restricted by the Constitution and it did indicate that it would prefer that the Federal Commission should have effective power to deal with matters of "unfair dismissal". In essence, the ACTU indicated that it was restricted in its approach by the jurisdictional limitations referred to, and relied on, by the CAI. There was no suggestion by any party that the scheme put forward by the unions 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 dismissals was the basis of argument by the New South Wales and South Australian Governments that the Commission should insert in federal awards a savings clause of the kind awarded by Mr Commissioner Clarkson in *Re The General Motors-Holden's Pty Limited (Part 1) General Award 1974* (*Gnatenko's* case) (1975) 167 C.A.R. 309. It was argued that in all States this would enable one tribunal to deal with all aspects of cases involving allegations of unfair dismissal, whereas the ACTU proposals would provide for the possible involvement of Boards of Reference, members of the Commission and the Federal Court.

We acknowledge the desirability of one federal tribunal being vested with all the powers to deal with complaints about unfair dismissal relating to employees under federal awards. Furthermore, we are inclined to the view that that tribunal 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 CAI and the ACTU, who both agreed that if anything is to be done in this area for federal award employees then it should be done by, and confined to, federal tribunals. It is our view that when the general terms and conditions of employment of a particular industry, including termination, are 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 log of claims would not enable the Commission to order re-employment, reinstatement or compensation for wrongful dismissal to employees unfairly dismissed, we do believe that the Australian Parliament could give an

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.

(a) *Test of unfair dismissal*

The ACTU has submitted that this Commission should provide "that an employer shall not dismiss an employee in a manner or for a reason which is 'harsh, 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 not be bound by the adjectival tyranny of the expressions used in the older cases, such as "harsh", "oppressive" and "unconscionable" and that the objective of an industrial tribunal in reinstatement cases should be "industrial justice". Reference is often made in the New South Wales Commission, and in other jurisdictions, to the decision of Mr Justice Sheldon in *Re Loty and Holloway and The Australian Workers' Union* [1971] A.R. (N.S.W.) 95, and, in particular, to the passage where his Honour said:

> "The less fetters there are on the discretion the better (none appear in the Act) but it is all-important that it should be exercised soundly. The objective in these cases is always industrial justice and to this end weight must be given in varying degrees according to the requirements of each case to the importance but not the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is 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 words "harsh, 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/or 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 this Commission has generally considered whether the decision to dismiss the employee was "harsh, 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 "harsh, 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 shall be "harsh, unjust or unreasonable".

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

(b) *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:

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

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

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

All State jurisdictions, and the de facto jurisdiction of this Commission, apply to termination by the employer with or without 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 the prohibition of unfair dismissals, has not deemed it necessary to specifically refer to the expiry of contracts of employment made for a specified period nor other questions of constructive dismissal.

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

(c) *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 dismissal connected with the capacity or conduct of the employee or based on the operational requirements of the employer.

The proposed clause refers to the words used to express the justification for termination in Article 4 of ILO Convention 158 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 the two expressions are more properly regarded as alternatives. Furthermore, there is no similar provision in either the Victorian or South Australian legislation, and there does not appear to have been the need for any similar test to be established in any other State jurisdiction. In these circumstances, we are not prepared to add such a provision to federal awards.

(d) *Discrimination/equal opportunity*

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

The ACTU claimed 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 CAI opposed the inclusion of a list of reasons which would not constitute valid reasons for dismissal being included in an award. Whilst emphasizing its opposition to discrimination in respect of 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 CAI submitted that the requirements of the employment may necessitate obligations of the nature outlawed. In this, the CAI was supported by the Queensland Go ment who opposed the list going into the award but submitted that if it shou in then it

the legislation from which it comes. The CAI also claimed that the ACTU provisions ignored the special expertise in this area of the existing structure, namely, the Tri-partite Discrimination Committees, and submitted this whole area is best handled by reference to these Committees and the procedures laid down and that if the Commission interfered with those Committees it would only create problems rather than solve them. In this respect, the CAI drew attention to the *Rockhampton City Council* case involving the Municipal Officers (Queensland) Consolidated Award, 1975 (1978) 203 C.A.R. 584.

The federal Government submitted that the protection afforded under federal awards should not work to deny access to the specialised and effective machinery at the State and Federal level dealing with discrimination and equal opportunity in employment. The CAI and the Tasmanian Government were both firmly opposed to discrimination provisions being inserted into federal awards while at the same time savings provisions in respect to State laws applied.

The *Racial Discrimination Act* 1975 (Cth) refers, in s. 9, to discrimination based on "race, colour, descent or national or ethnic origin" and the *Sex Discrimination Act* 1984 (Cth) prohibits discrimination based on a person's "sex, marital status or pregnancy".

Article 1(a) of the ILO Convention 111 defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation", and Article 5 of ILO Convention 158 provides that the worker's "race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin" shall not be a valid reason for termination of employment.

Article 1(b) of ILO Convention 111 also provides for additional grounds to be identified "after consultation with representative employers' and workers' organizations ... and with other appropriate bodies" and the National Committee on Discrimination in Employment and Occupation has identified the additional grounds of "age, criminal record, marital status, medical record, nationality, personal attribute, physical disability, sexual preference and trade union activities".

In addition, ILO Convention 111 provides in Article 1.2 that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

Further, anti-discrimination and/or equal opportunity legislation has been passed in the States of New South Wales, Victoria and South Australia.

We are of the view that it would be preferable for the parties to the employment relationship to be able to ascertain their rights and obligations in this area by reference to one source and, in particular, we do not believe that employers should have to run the risk of prosecution under more than one Act for the same set of circumstances. However, this is a difficult area for the Commission having regard to the existence of ILO Conventions 111 and 158, the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the various Acts of the States relating to discrimination and equal opportunity.

In the circumstances, we have decided to act consistently with the *Rockhampton City Council* case, the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the two ILO Conventions and include a list of factors which will not constitute valid reasons for dismissal. The expression to be used will be that included in ILO Convention 158; namely, "race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extr n or social origin". Consistent with the decision in the

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 Committees 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 should be referred in accordance with the procedures of those Committees to the State Committees and, if necessary to the National Committee, for resolution.

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

(e) *Burden 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 claimed that the insertion of a provision dealing with the onus of proof is consistent with ILO Convention 158, Article 9.2(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* 1904.

The CAI contended that, in accordance with normal practice the employee should carry the burden of proof and that this claim was outside the jurisdiction of the Commission to award as it could operate only after the employment relationship has been 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 also 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 reason for 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 also inconsistent with the practice in State jurisdictions which place the onus on the applicant and, in particular, it is inconsistent with the obligations imposed in the South Australian legislation, and presumably, the Victorian legislation which appears to have used the South Australian legislation as a model. Furthermore, as the legislation stands 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.

(f) *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 seen to be good management practices by a significant number of employers. It was argued that the principles are embodied in ILO Convention 158 and Recommendation 166 and, as stated earlier, include:

(i) an opportunity for an employee to answer allegations made against him before dismissal action is taken;

(ii) dismissal procedures involving a number of stages including verbal and written warnings; and

(iii) the right for an employee to be notified in writing and receive, on request, a written statement of reasons for dismissal.

Reliance was also placed on the code of disciplinary practice and procedures which the tribunals in the United Kingdom have taken into account in determining whether an employer has acted unreasonably. Mr Boulton

contended that the effect of the United Kingdom code which includes warnings, interviews with employees, the right to state a case, and the right for an employee to be accompanied was to encourage an employer to establish and follow those procedures with respect to discipline and dismissal. However, it was conceded that there was, in the United Kingdom, no statutory prescription of procedures to be followed in disciplinary matters.

The CAI opposed this part of the unions' claim contending that there was nothing in Article 7 of ILO Convention 158 which would support the adoption of the complicated mechanisms sought by the ACTU. Further, it emphasized the fact that the United Kingdom code of disciplinary practice does not carry the legal implications of an award provision and that in the United Kingdom dismissals have been upheld in circumstances where there was no compliance with the disciplinary code.

We agree that as a general principle employees should not be dismissed before being given an opportunity to answer allegations against them and we believe that employees should be forewarned by an employer, where possible, in cases of unsatisfactory performance or misconduct. Furthermore, our understanding of the practices adopted in all State tribunals is that they all take into account the adequacy, or otherwise, of the procedural steps taken by employers in coming to their decisions. All State tribunals appear to accept that the manner of dismissal is relevant to the issue whether the dismissal is harsh, unjust or unreasonable but they consider that the adequacy of the procedure is a question of extent and degree to be considered having regard to the circumstances in particular cases. In particular, this appears to be the position adopted by the Industrial Court in South Australia under the provisions of s. 15(1)(c) of the South Australian *Industrial Conciliation and Arbitration Act* 1972-1983. A similar position applies in this Commission when members are asked to make decisions and/or recommendations on dismissal matters, and we expect that a similar approach would continue under the provisions we are prepared to award.

We are attracted to the Tasmanian Government's suggestion that a code of practice approach like that in the United Kingdom, indicating what are prima facie good employment practices, should be adopted as a means of implementing the objectives of the claim. However, we are not prepared, at this stage, to make the complex and detailed provisions in the ACTU's claim an award prescription and we do not believe it necessary or desirable to specifically refer to the method of dismissal in the provisions we are prepared to award.

(g) *Notification of reasons for dismissal/statement of employment*

The ACTU has also claimed that the employer shall notify an employee in writing of a decision to terminate his/her employment and that, in the event of dismissal, an employer shall give a written statement to the employee setting out the reason or reasons for the dismissal. Again, the ACTU seeks to justify this claim on the basis of the ILO Recommendations and on the practice in many countries. The ACTU claims that a requirement to give such notice would alleviate the opportunity for misunderstanding which may occur in cases of dismissal and it also contended that a refusal to give reasons may cause considerable distress and anxiety and may impair the employee in his/her efforts to obtain alternative employment.

The CAI and the Queensland Government both claimed that it would be undesirable to oblige employers to provide written reasons for dismissal and the Queensland Government contended that refusal, or otherwise, by an employer to give reasons for dismissal was a matter appropriate to be considered in particular cases. In a number of cases in the past where there has been a refusal to provide reasons for decision, State industrial tribunals have made inferences adverse to the employers concerned on an application for reinstatement. However, neither

the State legislation nor award provisions require an employer to give a dismissed employee the reason/s for dismissal and we are not prepared, at this stage, without further debate, to grant the ACTU claim.

The ACTU also claimed, and 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 undue 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.

(h) *Settlement of disputes*

As stated earlier, the ACTU procedure for dealing with cases of harsh, unjust or unreasonable dismissals involves a review of the decision of an employer by a Board of Reference and/or the Commission. The intention of the procedure suggested is to ensure that informal conciliation proceedings take place before recourse is had to proceedings 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; thus substantially reducing the number of cases which have to be heard and determined by tribunal members.

As stated in the ILO Report (viii)(i) 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, reinstatement 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 desire of the parties. In an attempt to provide an effective conciliation procedure for handling disputes or claims where "harsh, unjust or unreasonable" dismissal is alleged we are prepared to award a settlement of disputes clause.

We have considered whether it is necessary and/or desirable to include in our settlement of disputes clause a limitation 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 do not think it appropriate. We do, however, reserve leave for the matter to be raised by the employers at some subsequent stage if 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 may need to be adapted 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 or part thereof if the period of employment is more than one year.

It 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 [illegible]ne week's notice per year of service would be an acceptable first step.

The ACTU was prepared to concede that the longer period of notice would not operate with respect to workers employed for less than four weeks and it should not operate in cases of misconduct which warrant instant dismissal. The ACTU also recognized that there might be sections of industry where special considerations exist. These special considerations would need to be considered when the Commission was considering whether or not it was appropriate that the award provision should flow on. The ACTU claimed that the one week's standard in federal awards was not in accord with reasonable community standards. It argued that it was appropriate for the notice period to be linked with the concept of employment for an indefinite duration, and that the present provisions have lead to injustice and unfairness, particularly to employees with long service. It further argued that one week's notice gave employees insufficient time to adjust to and deal with all the consequences of a job loss, and that the longer the period of employment with the employer the more acute the adjustment problems are for the employee. The ACTU also claimed that a period of notice linked to service could also be seen as a reward for long service and a recognition of the obligation of employers to long service employees.

Reliance was also placed on the International material, particularly ILO Convention 158, to justify substantial increases in the period of notice in Australia. Article 11 of ILO Convention 158 states that "a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct . . .". The ACTU stated that the claim was directed to permanent "weekly employees" and conceded that special consideration might need to be given to employees in some sections of industry such as casual employees, part-time employees, seasonal employees and employees on hourly or daily hire. They also stated that they did not intend the extra notice to apply in cases of misconduct warranting instant dismissal.

Both those opposing additional notice and those in favour relied on the common law position that reasonable notice should be given.

The CAI argued that this aspect of the ACTU claim "is a fundamental departure from the provisions which have prevailed in Australia at least since the adoption of weekly hiring". It conceded that there is much to be said for rewarding employees for long service, but the fact is that that is done differently in Australia than in Western European countries. It contended that it was impossible, by way of a general test case, to prescribe the conditions which ought to apply in respect of periods of notice in awards. It pointed to the need to consider particular industries and particular awards and made particular reference to hourly hire, seasonal employment and part-time employment as requiring special treatment and thus making general statements inappropriate.

The Queensland Government supported the CAI. It also relied on the different provisions which exist in awards at the present time and contended that in determining reasonable notice in accordance with ILO Convention 158 it would be necessary to make, at the very least, an assessment of what was reasonable in particular awards, particular industries, particular callings and in respect of particular enterprises. It also submitted that the "few studies that have looked behind the scenes of a lay-off in process find that many workers do little to find other work when they are informed of the lay-off long in advance".

At common law a contract of employment was terminable by notice in accordance with express or implied agreement between the parties under a custom or by reasonable notice. The notice had to be reasonable from the point of view of both parties but its primary aim was to enable "the servant to obtain similar employment elsewhere, or the master to obtain a servant" A. S. Diamond "The Law of [illegible]aster of Servant", 2nd ed., 179-80; *Morrison v. Abernathy School Board* [187[illegible]ess. Cas. 945 at 950; *Strange (S.W.) v. Mann* [1965] 1 All E.R.

1069. Important factors in determining the level of notice were the duties of the employment, the remuneration, the period for which the servant was engaged, the years of service and the periods at which the remuneration was paid. Reasonable notice was, however, a question of fact.

We believe that, subject to capacity and good conduct, it is reasonable for employees and employers to have a proper and reasonable expectation of continued employment after a significant period of time which increases with the length of employment. Further, in our opinion the traditional week's notice of termination included in federal awards provides no practical opportunity for those who have been in a particular job for some time to adjust to the proposed change in circumstances, re-organize their lives and seek alternative employment. In particular, in current economic circumstances, one week would not provide sufficient time for many employees to find another job or for employers to find another employee. In addition, our attention was drawn to a number of instances where extended periods of notice based on the age of the person concerned have been granted. In particular, increased notice was awarded by the Full Bench in the *Municipal Officers' (South Australia) Award 1973* decision (1978) 204 C.A.R. 287. Extended notice based on age is also supported by the evidence before us which indicates that persons in higher age groups often find it more difficult to obtain and adapt to comparable work elsewhere.

We are aware that to some extent the two factors of age and length of service overlap and so far as length of service is concerned there is also an overlap with the provision of long service leave which is granted for similar reasons. Nevertheless, we have taken both these factors, and the need to adjust to the change in circumstances on termination of employment, into account in awarding increased notice of termination of employment. However, the claim is for a fundamental change in established standards and practices and we are of the view that in these circumstances we should proceed cautiously. We have decided that there should be no extension of the notice period for employees with only a short period of service with the employer, but that those employees who, at the time of the receipt of the notice of termination, have been in continuous full time employment with the employer for more than a calendar year should be entitled to an extra week's notice. For each additional two years of service an additional week's notice should apply, with a maximum period of extended notice of four weeks. Employees over 45 years of age shall be entitled to an additional week's notice of termination after two years' service. The increase in the notice period will only apply to permanent "weekly employees" and it will not apply to casual employees, part-time employees, seasonal employees or employees on daily or hourly hire. Nor will the extended notice apply in cases of misconduct which warrant instant dismissal. Payment in lieu of notice shall be at the weekly award rate applying to an employee. In the general run of cases overtime payments should not be included in any payment in lieu of notice.

The ACTU argued that the same periods of notice should not apply to notice by employees and that employees should be able to terminate employment by giving one week's notice because:

(a) completely different consequences of termination of employment exist for the employer and the employee.

(b) reciprocity might operate as an undue restriction upon mobility of employees; and

(c) in most Western European countries protective legislation with respect to dismissals which contain service related notice periods only applies to termination by the employer and not termination 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 employer and employee. In particular, we are concerned at the possible consequences for

small firms of a loss of employees with long service and the requirement for such employers 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 employee based on age.

We are, however, prepared to grant employees up to one day's time off without loss of pay for the purpose of seeking other employment. The time off should be taken at times that are convenient to the employee after consultation with the employer. We take this step for reasons discussed later in this decision under the heading "Redundancy — Assistance in seeking alternative employment". That reasoning is, in our opinion, applicable to all terminations of employment at the initiative of the employer.

Introduction of change

In Part B of its claim the ACTU seeks to ensure that employees and their unions are notified, provided with information, and consulted about, changes that are likely to have significant effects on workers. The proposed clause settles the scope for consultations, namely about the employment effects of such changes and, in particular, outlines measures to deal with any adverse effects of the changes on employees. The clause also sets out a timetable for ongoing consultations which are to commence as early as possible 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 changes to the union. The clause covers not 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 contended that the need for consultation was not controversial; the need was widely recognized by Governments, employers and unions. Furthermore, the need for consultation is supported by:

(a) the Committee of Inquiry into Technological Change in Australia (CITCA Committee);

(b) the National Labour Advisory Council Guidelines (NLAC Guidelines);

(c) the extensive and comprehensive procedure in the federal public service;

(d) decisions of industrial tribunals, including the *Clerks (Oil Companies) Award* case (1968) 122 C.A.R. 339, the *New South Wales Steel Industry* case on 14 January 1983 in *Re Steel Works Employees (Broken Hill Proprietary Company Limited) Award* (1983) 4 I.R. 56 and the Victorian decision in relation to the *Commercial Clerks Award* on 8 July 1982;

and in:

(e) ILO standards and the established procedures for consultation in comparable countries.

Provision for consultation in federal awards is, however, limited notwithstanding the impressive list of authorities and/or inquiries which support the need for consultation and notification regarding the introduction of technological change.

The ACTU made it clear that the purpose of the consultations was not to tell an employer what he must or must not decide with respect to the introduction of change. The main object of the clause is to ensure that notification and consultation procedures are followed by employers in respect of major changes. The ACTU claimed that the opportunity to discuss matters such as job requirements, training, job security, working hours, monitoring the change and so on, would minimize the potential for conflict which exists when changes are introduced with significant benefits for industrial relations.

No party to the proceedings was opposed to the principle of consultation

which is at the heart of the ACTU claims but the CAI, in particular, strongly supported the voluntary approach to consultation, as enunciated in the NLAC Guidelines. It did so on the ground that that approach permits management to take the necessary responsibility for the decisions it makes whilst allowing the appropriate flexibility as to timing, content and implementation of change. The CAI also objected to the widespread nature of the changes covered by the claim and the delay that would be caused to an employer seeking to implement change. It suggested that the provision could be used by unions who have a fundamental and long-standing objection to technological change to frustrate the implementation of change. The CAI contended that, properly construed, the clause does not relate to terms and conditions of employment but to the role and function of the management of an enterprise and for that reason the claim did not relate to an industrial matter.

We have previously stated that, in our opinion, there is a need to hasten slowly in the setting of new standards and we are particularly concerned at 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 change, consistent with the employer's need to protect the interests of his business. Consultation with the union officials and/or 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 organizations with information on the nature of the technological changes proposed; the likely date of implementation of the change; how they expect the change to be implemented; the expected effects on employees; proposals for retraining and redeployment if they are likely to arise; the possibility of retrenchment and any other matters likely to significantly affect employees."

As to consultation, those same Guidelines state:

> "The arrangements for consultation may vary with regard to the type and extent of the change being made, or the needs of particular situations, but the employer should always seek to afford the appropriate trade union officials and/or 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, methods and conditions of restructuring jobs. It will also be necessary to discuss the best method of informing employees of the results of the discussions."

We are aware that procedures for notification, consultation and provision of information have generally been settled by negotiation and agreement, and we are of the view that, generally speaking, they are not matters which lend themselves to effective legislation or award prescription. However, at this stage, 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, program, 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 abo[illegible] nature of the changes proposed, the expected effect of the changes on emp[illegible]es and any

other matters likely to affect employees. However, we will not require an employer to disclose confidential information. What we propose is consistent with the NLAC Guidelines and, in our opinion, is clearly within the jurisdiction of the Commission. The decision is also consistent with the Summit Communique which included the following:

> "The Summit notes that a factor contributing to changes in the level and pattern of employment is the introduction of new technologies in industry. Participants do not consider that the answer to high unemployment lies in rejecting new technology, noting that in certain circumstances the adoption of new technology may be the only means of remaining competitive. It is agreed however that the introduction of new technology should be planned and provide for full consultation with workers and their unions, and that the consultative process should be supported by wider policies, including retraining and redundancy provisions."

Redundancy

Details of claim

The ACTU claim under the heading "Redundancy" seeks to establish a scheme for handling redundancy situations which includes consultation between employers and unions with a view to avoiding or minimizing terminations of employment due to redundancy. It also seeks to provide for reasonable compensation and assistance to employees affected by redundancy.

The approach includes:

(a) (i) an obligation to consult where an employer proposes to dismiss employees as redundant;

(ii) an attempt to ensure consultations will be meaningful through the provision of information about the proposed dismissals;

(b) provision for notification by the employer to the Commonwealth Employment Service where it is not possible to avoid dismissals due to redundancy;

(c) a requirement that preferential treatment be given to union members in redundancy situations;

(d) provision for employers and employees to determine jointly the criteria for selection of employees for termination;

(e) entitlements additional to those applying in respect of normal termination of employment situations including:

(i) at least three months notice of termination;

(ii) payment of redundancy payments;

(iii) payments in respect of sick leave, annual leave and long service leave;

(iv) provision for income maintenance on termination of employment;

(v) payment of relocation expenses;

(vi) assistance to be given by the employer in finding suitable alternative employment for workers dismissed due to redundancy;

(vii) the grant of time off with pay to seek alternative employment or to make arrangements for training or retraining;

(viii) provision for training, re-training or payment of the costs thereof;

(ix) provisions to ensure that employees are not deterred from taking new jobs by the loss of any redundancy payments or entitlements;

(x) preference in re-employment to employees whose employment has been terminated due to redundancy; and

(xi) pr[illegible]ions in relation to redeployment.

The ACTU [illegible]ned that the scheme should apply to all weekly and other

employees with a reasonable expectation of continuous 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 a transmission of a business occurred. The ACTU contended that redundancy has become a major industrial issue in Australia, that there had been an increase in the number of disputes over retrenchment, 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 or at all. It also contended that the greatest hardship is suffered by those workers who would receive inadequate or no compensation assistance from their employers. It submitted that it had been long accepted that workers in redundancy situations warrant special treatment because they are dismissed through no fault of their own and that there are, or should be, special obligations on employers to provide assistance. It acknowledged that broadly speaking there had been a preference for establishing redundancy protection through negotiation rather than through arbitration and an ad hoc approach to redundancy protection. The ACTU claimed that its approach in this case involved only a limited departure from the ad hoc approach which would involve basic procedures to be followed, which would bring the parties affected together in order to discuss the manner in which redundancies might best be managed and which would also involve the establishment of basic rights with respect to such matters as redundancy pay and notice. It was claimed that the establishment of a national approach to dealing with redundancy problems is preferable to the establishment of differing 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 losses and hardship caused to employees on redundancy. It should be a standard that is applied in the vast majority of redundancies. In addition, the ACTU claimed that the procedures it had developed for dealing with redundancy situations would, if implemented, facilitate the resolution of problems associated with redundancy and ensure fair treatment for workers affected by redundancy. This would minimize industrial disruption about this subject.

In support of its general approach to redundancy, the ACTU relied on ILO Convention 158 which requires an employer to give notice of contemplated dismissal due to redundancy to workers' representatives and to consult on measures to avert or minimize terminations and measures to mitigate the adverse effects of such terminations. It also relied on ILO Recommendation 166 which identifies some of the measures to be considered to avert or minimize dismissals in redundancy situations. Reliance was also placed on ILO standards regarding severance allowances which are not restricted to redundancy situations but apply to all dismissals with the exception of termination for serious misconduct. It was claimed also that prior consultation with unions about redundancy problems and prior notification to public authorities, attention to measures to avoid or minimize retrenchments, assistance measures to mitigate the adverse effects of redundancy and service payments were all common features of Western European countries. In addition, the ACTU contended that the Australian position was 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 specified task; in the latter, contracts are generally deemed to be day to day or hour to hour and terminable 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 marked contrast to the position applying in 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 in that area in two main respects, namely, as to consultative arrangements and by granting a limited form of preference.

Reliance was also placed on the conclusion of the CITCA Committee on technological change which was critical of the present ad hoc approach and came out strongly in favour of the establishment of general standards of redundancy protection through a union test case. In particular, attention was drawn to the fact that the recommendations are not restricted to redundancies due to technological change but relate to redundancies for any cause. Additional reference was also made to the CITCA Committee's conclusions that:

(a) 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;

(b) employers should consult unions in redundancy situations in an effort to avoid or minimise retrenchments;

and that:

(c) notice to the Commonwealth Employment Service (CES) and paid time off to seek alternative employment are helpful to workers in redundancy situations in preparation for, and to assist with, finding another job.

Mention was also made of the recommendation by the CITCA Committee that a temporary income maintenance scheme funded by Government, to be administered in the same general way as unemployment benefits, should be introduced. However, the ACTU said that although it supported the thrust of the CITCA 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, raise the question of whether it is preferable to have different standards of redundancy protection from State to State or to have national standards. In particular, the ACTU emphasized that potentially federal award employees in South Australia, New South Wales and Victoria, and in any other States where legislation is introduced or the industrial tribunals take action, will have lower standards of redundancy protection than other employees. Substantial debate 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 rigid definition which would give rise to an unduly 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 rigid definition. It contended that redundancy protection should apply essentially where an employee is dismissed through no fault of his own and relied on ILO Convention 158 which referred to terminations for reasons which relate to the operational requirements of the business, namely, reasons of an 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

contended, was the commonly accepted meaning of redundancy in Australia: *Reg. v. Industrial Commission (S.A.); Ex parte Adelaide Milk Supply Co-operative Ltd* [1977] 44 S.A.I.R. 1202 at 1205. This definition:

(a) refers to a job becoming redundant and not to a worker becoming redundant;

(b) recognizes that redundancy situations may not necessarily involve dismissals; and

(c) emphasizes that the job or work has disappeared through no fault on the part of the employee.

A key element in that definition is that the employer no longer requires to have the work done by anyone.

Reference was also made to the definition in the *Employment Protection (Consolidation) Act* 1980 (U.K.) but the ACTU considered that it was inappropriate to copy that definition. It contended that the approach adopted in the *Municipal Officers' (South Australia) Award 1973* case in 1978 which drew the distinction between redundancies as a result of an employer's own policy and those caused by financial stringency, was not the approach adopted:

(a) in comparable countries or by the ILO;

(b) by the recommendations of the Committee of Inquiry into Technological Change (CITCA Report);

(c) in the job security legislation in New South Wales or that proposed in Victoria;

(d) in most agreements and/or awards;

(e) By the South Australian Industrial Commission in the *Milk Processing and Cheese Etc. Manufacturing Redundancy Clause Reference* case (1980) 47 S.A.I.R. 939 or the New South Wales Commission in the *Steel Industry* case; nor was it

(f) the approach adopted in the Coal Industry Tribunal and in the *Clothing Trades Award* 1982 decision of Mr Commissioner Cox (1983) 4 I.R. 242.

The ACTU claimed that if the Commission attempted to distinguish between the causes of redundancy when awarding redundancy compensation, definitional problems would be created and that, from the viewpoint of the individual employee, redundancy or retrenchment will have the same impact no matter what the cause.

The International material was criticized by the CAI because nothing was put by the ACTU as to the social security network of the countries of Western Europe or the United Kingdom. Further, it was claimed that nothing was put as to the funding of the redundancy or retrenchment arrangements in overseas countries. It was pointed out by the employers that in at least one country, United Kingdom, payments made by the employer under the *Employment Protection (Consolidation) Act* 1978 entitled the employer to a rebate from the central redundancy scheme and employers are also provided with assistance in relation to the retention of labour which would otherwise be redundant under the *Employment Subsidies Act*. It was claimed that such material makes the evidence unreliable as a guide for the Commission. It should also be said that there are a number of exceptions in Western European countries which are not made in the ACTU's proposed scheme. In reply to the ACTU the CAI claimed that a review of the awards of this Commission does not support the view that there is an urgent and pressing need to determine severance pay awards; nor does it give any support to the view that the mechanisms by which the Commission has handled claims of this nature are unsatisfactory. It claimed that the overwhelming majority of employers in retrenchment or termination situations do treat their employees fairly. It challenged the view that if there were general

only afford a base from which the unions will negotiate in order to build up the benefits in a particular situation. It claimed also that there is absolutely no necessity to impose legal obligations on people so that unions can obtain information about standards. The CAI also relied strongly on the need for flexibility and on the cost to employers 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 contingencies which may exist in particular situations. For this reason, it was argued that the Commission should continue to take an ad hoc approach to redundancy claims. It also argued that, in the current economic climate, there is no justification for awarding any of the provisions of the claim. The CAI relied on the fact that retrenchments had become important in the Australian context because of the economic downturn in the Australian economy and not, in its view, because of technological change. It contended that a fundamental distinction can and should be drawn between redundancy which involves the disappearance of jobs as a result of technological change or structural rearrangement and when terminations occur as a result of economic downturn. It relied, in particular, on a number of cases in this Commission and in the State jurisdictions which recognized the distinction and where the tribunals had refused to award severance pay in cases of financial disaster.

The parties fundamentally disagree on whether there is any need for the Commission to change from its present approach, on the cost impact of the claims and the importance which should be attached to the cost implications and as to whether a distinction should be made between redundancy due to technological change and redundancy due to other causes.

We, therefore, consider it necessary to deal with these aspects of the argument before dealing with the details of the ACTU claim.

General standards v. case by case approach

As stated earlier, a major issue between the parties in relation to redundancy was related to the desirability or otherwise of introducing general standards.

In stressing 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 security of regular and continuous employment, the possible loss of earnings and accumulated benefits associated with employment such as seniority, promotion prospects and other benefits, especially the loss 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 calls by Sir Richard Kirby 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 decision in the *Municipal Officers (South Australia) Award* proceedings and on the decision of Mr Justice Fisher on 29 July 1983 in *Re Employment Protection Act* (1983) 7 I.R. 273 establishing general standards of redundancy payments for workers retrenched due to economic circumstances. 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 injustice to workers. The ACTU contended that the question 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 CAI contended that the so called national standards do not enable the arbitrator to take into account particular contingencies which may exist in a particular situation.

For example:

(a) different situations should probably apply where terminations are due to insolvency and there is only a limited amount of money for distribution amongst a number of worthy causes to cases where an employer is solvent and merely closing down a particular section of his business;

(b) mandatory severance pay requirements will raise problems in relation to transmission or sale of a business; and

(c) some industries already have specific award provisions dealing with termination of employment and, in some cases, providing for compensation for the different employment patterns in the industry in the award itself.

It also contended that the cases, in particular, the *Wattie Pict* case 1975 and the *Stockton Ferry* case (1971) 140 C.A.R. 875 point to the desirability of tailoring awards to particular facts and circumstances. It also contended that general provisions will not be uniformly applied but would merely be a floor from which the negotiations are conducted.

All those supporting the unions' claim did, however, concede that it should be open to the parties to a particular dispute to negotiate something different or commence an arbitration to establish that circumstances exist which warrant a departure from such standards.

An analysis of developments in redundancy cases indicates that predominantly redundancy agreements have been reached without involvement of industrial tribunals, that where tribunals have been asked to arbitrate State and federal tribunals have moved steadily and cautiously and that overwhelmingly decisions have been made on an ad hoc basis having regard to the circumstances in particular cases.

An impressive case has been made out by the employers in support of the case by case or ad hoc approach to redundancy and there is much to be said for an approach which allows each case to be the subject of discussion between the parties having regard to the particular circumstances, and, in 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, regard may be had to the losses and/or hardship suffered by particular individuals or groups of individuals, to their employment prospects, and to the wide range of factors which might lead to retrenchment.

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 come, and are coming, before industrial tribunals for decision. As a result, many and varied schemes have been introduced as a consequence of agreements made between employers and unions and/or individual employees and following decisions of industrial tribunals. There is great difficulty in drawing any general conclusions from the resultant agreements and/or award provisions. Moreover, the cases indicate that the criteria for deciding whether a redundancy claim should be entertained by the Commission are not clear; nor are the criteria for assessing the appropriate provisions which should be included in any arbitrated redundancy package. Furthermore, it is difficult to find common thinking in respect of quantum of severance pay, where awarded, and decisions on quantum conflict in amount and in approach to such matters as length of service and age of employees. Further, there has been a trend in industrial tribunals towards a consideration of general redundancy provisions and away from the ad hoc approach. Since the mid 1970's industrial tribunals have indicated a preparedness to arbitrate on prospective [illegible] *Municipal Officers (South Australia) Award*

> "We agree that there may be occasions when because of the circumstances of the case redundancy clauses can properly be made ad hoc. This has in broad been the past practice of the Commission. But we are of the view that if it can be shown that it is possible that for reasons which have not as yet occurred, but which can be identified, redundancy may be occasioned then it is proper to insert into awards redundancy clauses to cover those reasons."

Moreover, any formula for a re-adjustment allowance to be written into an award which is to apply if redundancy occurs can only aim at a general standard of equity for a group of persons and some compromise must be made between equity and administrative feasibility. Even under the ad hoc approach, where there appears to have been at least some acceptance by the parties and the Commission of the desirability of taking into account the particular circumstances of particular individuals, it has almost invariably been decided that a common formula should be adopted on the grounds of practicality. Additionally, we are of the opinion that in the present developing industrial scene, having regard to the number of cases which have been decided, very few decisions relating 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 perceptible patterns of approach which are important.

We believe that it is impossible to turn back the clock and we have, therefore, had regard to these "patterns of approach" in reaching our decision. We also have a positive belief that there is a need for some stability and consistency of approach in dealing with redundancy. We believe that a continuation of the piecemeal approach to redundancy engenders conflict and uncertainty and that there would be a great deal of value to all parties, if, so far as is practicable, consistent approaches were adopted and standard compensation provisions were established.

In all the circumstances, we are of the opinion that we should, so far as is practicable, determine prospective provisions to apply to redundancy situations and we are also of the opinion that we should look to the more 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 conflict between these conclusions in coming to our decision.

Cost of claim

As mentioned earlier, the employers also made detailed submissions as to the cost of the ACTU claim and they contended that Australian employers could not, in the present climate, afford the additional impact of their implementation. In support of that submission they called Mr Anthony S. Wehby who produced a survey which attempted to examine the cost of the claim to the metal industry. Mr Wehby 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 Whole or in Part". The evidence given by Mr Wehby and the various calculations made by him were not only subject to detailed criticism by the ACTU but the calculations were also, understandably, based on the assumption that we would award the union claim in full. As we have, by no means, awarded the claim in full the material which Mr Wehby presented to us has to be read down in the light of that fact. Nevertheless, the material presented by Mr Wehby was primarily directed towards the cost of that part of the claim which relates to compensation for redundancy and notwithstanding the criticisms of the survey by the ACTU that material must be a matter of concern. This is particularly so when, as Mr Polites

any positive offset, and because of the counter-cyclical nature of the claim which affects employers when they can least afford it.

The CAI cast doubt on the nature 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 firms that have to find the income to pay the costs of the redundancy claim. Those opposing the claim pointed out that no employer could reasonably be expected to have made provision for the accruing of redundancy entitlements on account of past services at this point of time. They emphasized also that many redundancies arise from essentially unforeseen circumstances and in such cases, where costs have not been anticipated, they could impact on the level of retrenchments by increasing the rate of business failure at the margin. In particular, the Queensland Government suggested that if the claim was granted bona fide attempts to resuscitate ailing industries might fail because there are simply insufficient funds available.

The Queensland Government also contended that for many enterprises redundancy costs would be of such a magnitude that the cost advantage of new technology will be marginal, and therefore, the introduction of it will be delayed or abandoned. In the alternative, the Queensland Government submitted that employers would seek to limit existing or future cost by accelerating the introduction of new technology with significant adverse effect on employment.

The CAI also emphasized that, in terms of the *National Wage* case decision of 23 September 1983 (1983) 4 I.R. 429, increases in labour cost as a result of our decision must be "very small".

The ACTU conceded the latter point and indicated that the relevant principle in the *National Wage* case is Principle 11 which reads 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-ons. Where such cost increases are 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, in reply, tender material which went to the cost of redundancy compensation; notwithstanding its belief that a wide variety of factors make estimation an extremely difficult, if not impossible, task. On the basis of what the ACTU contended were two "over generous assumptions" namely, the level of retrenchments was based on the Commonwealth Employment Service estimates in relation to 1982 and that the same level of retrenchments 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 or 0.1 per cent of gross domestic product. It contended, on the basis of this estimation, that the cost of its claim would be negligible having regard to the worst possible experience of retrenchment during the depths of the recession.

In reply, the Queensland Government contended that the ACTU cost estimate did not allow for a number of costs inherent in the claim. These included:

(a) the direct cost of time off to look for other employment;

(b) additional payment in lieu on dismissal;

(c) costs of pro rata long service leave;

(d) costs of re-employment, training and re-training; 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 weekly wage rates which, it contended, was inconsistent with ACTU submissions. It contended that [illegible] should be used for calculation purposes.

In coming to our decision in this case we have been conscious of the cost of the unions' claim and we have not overlooked the requirement that s. 39(2) places on us. We have also been conscious of the requirements of the *National Wage* case decision, 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. With these factors in mind, we have decided that in making our decision in this case we should grant limited relief directed primarily to areas where the 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 incidence of severance pay. For many companies it will introduce a new charge directly impacting on industry resources which involves a considerable financial outlay which was not ascertainable beforehand and has not been funded. It is particularly important also that the claim is made during an economic recession when many employers have been compelled to retrench out of commercial necessity and in circumstances where a centralized wage fixing system granting prima facie adjustment of wages for movements in 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 mean ". . . a very small addition to overall labour costs" (1983) 4 I.R. 472. 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 firm ". . . we would expect the relevant employers to make application for the claims to be heard by a Full Bench" (at 476).

Scope of redundancy clause

As previously stated also, the ACTU contended that the Commission should make no distinction between the causes of redundancy, whereas the employers contended that a distinction should be made between cases of technological change and cases where redundancy occurred because of the employers' financial difficulties. Reference was made to several decisions which supported differential treatment for retrenchments due to technological change, staff rationalization and the like, and decisions where dismissal is brought about because of circumstances over which an employer has little or no control such as a downturn in business. There is no doubt that to compensate employees declared redundant 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, in 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 compensation has been awarded even where redundancy has been due to the economic downturn or some financial disaster which has affected the industry and/or company concerned. Indeed, in our opinion, this would be so in the overwhelming majority of cases where redundancy provisions are awarded. Furthermore, there have 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 prescriptions to [illegible]s where redundancy is brought about by technological change or other [illegible]cumstances 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 nature of jobs and that to introduce definitional uncertainty into the resolution of redundancy disputes would have unfortunate consequences for industrial relations and the individual employees concerned. Moreover, the reason for the granting of additional notice to employees and the purpose of redundancy payments apply equally to redundant employees whatever be the cause of their termination. Employees, no matter what the reason for the redundancy, equally experience the inconvenience of hardship associated with searching for another job and/or the loss of compensation for non-transferable credits that have been built up such as sick leave and long service leave. In particular, to make a distinction granting severance pay only in cases of technological change, notwithstanding the equality of hardship on employees in all redundancy situations, would be to penalise an employer for introducing technological change. This would not be consistent with the attitude to technological change adopted 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 Communique.

In these circumstances, we do not believe that there should be any fundamental distinction, in principle, based on the causes 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 and to make proposals about redundancies, for instance, how they can be handled and how dismissals 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 did in fact concede that its proposed award provision, with respect to consultative practices, should apply only to employers employing ten or more employees. It relied on the allegation in the CITCA Report that the manner of handling unavoidable retrenchment will determine the intensity of employee resistance to change.

The ACTU also relied on:

(a) ILO 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 requires consultation between employers and unions in redundancy situations;

(c) the provisions for notification and consultation in a number of agreements and federal awards relating to redundancy;

(d) statements in the *Clerks (Oil Companies)* case in favour of consultation;

(e) the practices of some employers in following consultative procedures in redundancy situations; and

(f) the policy of the ACTU, other unions and the CAI.

The ACTU stated that it did not envisage telling the employer what he must or must not decide with respect to redundancies but rather it wanted to ensure that the employer goes about making decisions in a reasonable and responsible way having regard to the views of, and effect on, employees. In this respect, the ACTU had the support of the New South Wales, Victorian and South Australian Governments. The ACTU also claimed that for consultation to be meaningful it is essential that unions be provided with information to enable them to assess the

dismissal, the number and classifications 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 CAI contended that:

(a) the clause as a whole indicates that the claim really concerns the decision of management as to terminations;

and further that:

(b) the Commission cannot order employers to consult with a union.

In line with these submissions, the CAI indicated that the employers 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 his business 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) expedition and secrecy are fundamental features of management initiatives;

(b) the requirement that consultation take place at least three months before an employee is given notice is totally unrealistic and will seriously inhibit the introduction of technological change into Australia;

and that:

(c) 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 longest possible notice to employees and their organizations of retrenchments due to redundancy. In the *Clerks (Oil Companies)* case the Commission said:

> "... it is essential that both the employees and the union concerned should be informed of and involved in the planning as soon as possible. ... When brought into the planning both the employees and the union should in their turn attempt to understand the problem which the employer faces and co-operate with him to find a reasonable solution."

Although this was said in the context of retrenchments due to technological change, we would endorse those sentiments irrespective of the causes of the redundancy.

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

As we said earlier, we are aware that procedures for notification, consultation and provision of information have generally been settled by negotiation and agreement, and we are of the view that, generally speaking, they are not matters which lend themselves to effective legislation or award prescription. Nevertheless, we believe that it is of fundamental importance to involve employees and their representatives in the problems of redundancy as soon as a firm decision has 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 fact that our decision will apply to redundancy, whatever may be the cause. However, we would indicate that we are not opposed to the concept of a timetable for discussions and the provision of suitable 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 union claim.

We agree with, and are prepared to adopt the conclusions of the NLAC

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 decision extends beyond redundancy caused by technological change. In these circumstances, we will make only a limited award prescription relating to the procedure to be adopted. This limited prescription is also based on the NLAC Guidelines. We will provide:

> "For the purposes of the discussion the employer shall as soon as practicable provide in writing to the employees concerned or their union or unions all relevant information about the proposed terminations including the reasons for the proposed terminations the number and categories of employees likely to be affected the number 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 the disclosure of which would be inimical to its interests."

Notwithstanding the limited nature of this prescription, having regard to its nature, we are prepared to exclude from the requirement to confer employers who employ less than fifteen people.

Criteria for selecting redundant employees

The ACTU also made claims which relate to the criteria for selection of employees to be dismissed. It contended that it was important that relevant criteria be clear and based on considerations of industrial fairness. It divided the considerations into two main divisions; 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 in redundancy situations and also for preference in re-employment, preference in access to benefits and in access to opportunities such as training, relocation and redeployment. The claim was supported by the need to ensure that the ACTU scheme for the better management of redundancies will be effective. It was claimed that a significant number of federal awards already contain provisions for preference in retention and that the Commission should grant the claim to strengthen the capacity of unions to make a meaningful contribution in the consultative process with respect to redundancies and the introduction of change.

As to other criteria for the selection of workers for dismissal for redundancy, the ACTU suggested that these should be jointly determined by the employer and the unions. It submitted that generally the application of the last on first off principle is an equitable system which has been included in some awards but it has been recognized that, at least in some circumstances, it might be appropriate to take into account a range of matters apart from seniority. These additional criteria include the need for efficient operation of the enterprise, the length of service of the employees, the age of the employees, the family situation of employees, ability, experience, skill and occupational qualification of individual workers, and so on. The ACTU also claimed that where agreement could not be reached on which of the various criteria were appropriate in particular circumstances, then there should be recourse to other procedures which could involve voluntary arbitration or recourse to industrial tribunals.

The CAI contended that an employer ought to be left free to select whom he terminates in a situation where terminations need to be carried out. It claimed that there was no logical or equitable reason why unions should be consulted in relation to this matter and this is the more so where there are a number of unions involved or where not all of the employees concerned are union members. In particular, the CAI contended that there is no reason why an employee who has

should be preferred in a retrenchment or redundancy situation over an employee who has had fifteen or more years service with the employer. The position is, the employers claimed, even further complicated where there are a number of unions involved in a particular award.

Our examination of the cases indicates that a variety of factors are considered by the parties and industrial tribunals in determining which employees are to be terminated in redundancy cases including skill, experience and physical ability of employees to perform the work, union membership, length of service, and age and/or residual working life. There is no doubt in our mind that the establishment of criteria and their application are appropriate questions for discussion between the parties. As to the claim for preference of employment for union members, the decisions indicate that preference is a matter which should 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 preference to union members and the purpose of redundancy provisions, such as the inconvenience and/or hardship associated with searching for another job and/or the loss of compensation for non-transferable credits that have been built up. In addition, it is unclear how a general prescription of preference to unionists would be applied in individual firms where, for instance, retrenchments may take place across different classifications of employees and in different sections or departments. In these circumstances, we consider that the criteria to be adopted in relation to which employees should be terminated in particular cases should depend on the circumstances and particular facts of each case and, if an award prescription 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 employee. The reasons given included the need to allow an employee time to adjust to a situation 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, in legislation and practices in many comparable countries, and in the practice 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 employment areas, and on State legislation in New South Wales and South Australia which provides that employers should give at least three months notice of termination due to the introduction of automation. The ACTU also referred to the clear indication in the CITCA Report that that Committee favoured a special or extended period of notice in redundancy situations.

The CAI conceded that periods of extended notice in redundancy situations may well be defensible 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 respect of ordinary terminations of employment there would be no basis for extending even further the periods of notice in redundancy situations. The CAI also claimed that there was no logical basis for a request both for extended notice and large severance payments.

Section 88G of the New South Wales *Industrial Arbitration Act* 1940 and s. 82 of the South Australian *Industrial Conciliation and Arbitration Act* 1972-1983 provide that where applications are made for award provisions relevant to automation employees to whom notices of termination of service are to be given shall receive not less than three months' notice. The various industrial tribunals

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 notwithstanding the requirements of the New South Wales and South Australian Acts. Moreover, there have been various types of notice; a fixed period of time, fixed amount plus a variable period of notice relating to length of service and/or age, and in some cases a maximum period of notice has been set. However, as stated earlier, a distinction exists between redundancies within the control of the employer (where planning is possible and adequate notice may be given) and those suddenly forced on the employer (for which shorter periods of notice are often unavoidable). For this reason, we are not prepared to award a minimum period of notice based on standards granted in cases where redundancy is due to technological change or other factors such as company merger 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 and for older employees. These increased periods of notice will apply to employees declared redundant.

The existence of the award provisions in relation to consultation in matters involving redundancy will also assist employees by giving them extra time to adapt to the possible consequences of being declared redundant. In these circumstances, and in particular having regard to the standards which will result from our award in this matter, we refuse this part of the unions' claim.

Assistance in seeking alternative employment

The ACTU also contends that we should award a number of provisions designed to ensure that the employer assists the employee to find alternative employment. It was claimed 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 CITCA Report, and ACTU and CAI policies. Reference was also made to the South Australian Industrial Commission decision in the *Milk Processing and Cheese Etc. Manufacturing* case where it was decided that there should be included in any detailed prescription on redundancy an obligation on the employer actively to offer, or to make reasonable endeavours to procure, 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 example, what action has to be taken by employers in the search for alternative employment. Presumably, the detail is to be left to the employers to determine in consultation with the unions. However, the ACTU also claimed several specific provisions designed to assist those affected to find other employment. These particular claims related to measures which would minimize or avoid the need for termination such as transfer to jobs elsewhere within firms and, where necessary, the provision of training and re-training 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 redeployment of workers is frequently used in redundancy situations in order to avoid dismissals, that it was recognized in some private sector redundancy award and agreement provisions, and that its advantages were recognized in the 1978 policy of CAI on retrenchments, in the

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 planned technological changes, the employer should accept responsibility to consult, and co-operate with, union officials and/or other recognised employees' representatives, in working out measures to avoid retrenchment.
>
> For this purpose, some measures which have proved successful in the past could be embraced in the consultations. They include the introduction of the changes over a period of time (so that natural labour turnover can absorb those whose jobs are becoming redundant and so those who are affected can be trained and retrained) and transfers to other jobs within the firm or organisation. It may also help in some circumstances to limit overtime and recruitment."

We endorse those remarks by the NLAC and it is our view that these matters are indicative of 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 try to minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and re-training, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters. However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower 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 he would have been entitled to if his/her employment had been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof.

Claims were also made for the employers to assist those affected to find employment with other employers when retrenchments are necessary. These claims included a particular claim that employees 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 these 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 positions in the United Kingdom and Ireland, and in a number of decisions of industrial tribunals.

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

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

(b) the United Kingdom Employment Protection Act 1978 requiring notification to the Secretary of State for Employment of certain redundancies;

(c) NLAC Guidelines recognizing the need for CES involvement to assist workers to find new jobs;

(d) CITCA remarks recommending early notification by employers of possible retrenchment to the CES;

(e) s. 88G of the New South Wales Act and s. 82 of the South Australian legislation which contemplate award provisions requiring notification by employers to relevant public authorities;

and the

(f) recognition of the need to inform relevant public authorities in both the ACTU and CAI policies.

The employers conceded that both these claims were indicative of proper management practices but, in line with its general argument, the CAI opposed an obligation being imposed on each and every employer respondent to the award by the insertion of clauses in the terms sought by the unions.

The terms of the NLAC Guidelines include the following:

"If retrenchment is unavoidable, employers 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 the 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 Commonwealth Employment Service should be given the opportunity to interview the employees concerned, either on the premises or in District Employment Offices so that efforts can be made before their notice of termination expires to find them alternative employment.

So far as practicable the employer should permit employees who are under notice of termination of their employment to attend interviews for other jobs without loss of pay. Indeed some employers have gone further than this and have contacted employers in the same industry, or in the same locality, about employment opportunities for those to be retrenched.

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 employment."

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 an application to the employer beforehand and limitations on the time to be granted have been imposed.

In the circumstances, we are prepared to provide, in an award, that on application an employer shall grant up to one day off without loss of pay during each week 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 ordinary termination at the initiative of the employer. Further, we have decided that the employer should provide the CES with a notification of proposed redundancy together with necessary relevant information at the earliest possible date. Additional claims for assistance in finding employment were that an employer should supply training facilities or pay location expenses where these would be necessary to allow employees to obtain suitable alternative employment with another employer. The ACTU claimed that employers had an obligation, in appropriate circumstances, to supply training opportunities for employees to be dismissed and claimed:

(a) that in some cases, for instance, because of the remote locality of an employer's business or because of the particular skill of employees or employment 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 lump sum calculated and payable at the time of termination; and

(c) conceded that these factors may need to be considered in the context of specific redundancy situations.

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 should cease when the employee is no longer employed. It was also claimed that the cost of relocation and the cost of re-training for outside employment, in the event that they are necessary, is a matter of social policy rather than industrial policy and it is unfair and unreasonable to expect employers to bear the costs of these objectives, whether they be socially desirable or not. The CAI 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 relocation expenses will be involved. A similar argument would apply to re-training expenses for outside employment.

We agree with the employers that the problems of redundancy should be shared by the community and although we are of the opinion that, in isolated cases, it may be appropriate for employers to provide relocation expenses and/or re-training, we do not believe that it would be appropriate in many cases having regard to other aspects of our decision. These matters should be considered in the circumstances of individual cases.

A further claim was that priority in re-employment should be granted when an employer recruits workers with the same or similar qualifications. Reliance was placed on ILO Recommendation 166, the accepted practice in a number of countries and the provisions of a number of redundancy awards and agreements in Australia. It was also claimed that this priority should not be limited to a particular period of time after retrenchment.

The CAI did not dispute the desirability of re-employing employees wherever possible but argued that the matter should be considered in each individual case 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 claiming it was uncertain in operation and arguing that it is difficult to draw a certain and manageable provision in respect of priority in re-employment.

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 tenor of the ACTU submissions but we are unable, on the argument presented, to draft a suitable provision to apply to all cases of redundancy. We would, however, give the unions a reservation to allow the re-raising of this matter 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 for workers or in providing a better scheme for the management of redundancies. The ACTU maintained that the question of severance pay is often at the centre of industrial disputes with respect to redundancy and is of major concern to workers in redundancy situations. It relied on ILO Conventions and Recommendations and on the severance pay entitlements provided for in legislation in a number of comparable countries such as the United Kingdom, France and Ireland and in collective agreements in other comparable countries. It claimed that severance pay is essential to compensate workers for the many losses that they suffer and relied on the fact that employers have provided, and industrial tribunals have awarded, compensation in the form of severance pay. It claimed that in an overwhelming number of cases when

workers are dismissed due to redundancy there are a number of losses suffered and contended that compensation can be provided for a variety of purposes including:

(a) indemnity for the loss suffered as a result of dismissal not due to the fault of the worker;

(b) in recognition of past services;

(c) as income maintenance during any period of unemployment following loss of a job; or

(d) to compensate the employee for leave entitlements which would have accrued if not for dismissal.

The ACTU referred to the dual hardship/compensation principle adopted by Mr Deputy President Isaac in the *Qantas Navigators* case (1971) 140 C.A.R. 1072, which was referred to with approval in the *Municipal Officers (South Australia) Award* proceedings and to the *Food Preservers' Union v. Wattie Pict* decision. It contended that although the degree of hardship suffered will vary from worker to worker according to individual circumstances, it is possible to identify certain common losses or hardships and that, even under the ad hoc approach, in the overwhelming majority of cases, tribunals are not able to take into consideration the individual circumstances of each employee affected and to provide compensation accordingly. The ACTU described the elements of hardship or losses common to most employees as:

(a) the loss of security of regular and continuous employment or "frustration of job continuity";

(b) possible loss of earnings and of fringe benefits;

(c) problems and uncertainties produced by compulsory change of jobs, 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 foregone other opportunities in the continuous service of their employer; and

(e) loss of seniority.

The ACTU claimed that other factors such as industrial relations considerations, including the present standards of redundancy pay in awards and agreements, and the problems of finding alternative employment "in the current economic circumstances" should also be taken into account.

Reference was also made to the CITCA Report view that:

> "The financial compensation for retrenchment 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 no fault of his or her own for such built up 'credits' as:
>
> — accrued long-service leave and other benefits where such benefits cannot be transferred and for which no cash compensation is already given
>
> — the employer's contribution to any superannuation or pension scheme to which the employee had entitlement
>
> — seniority (the individual would usually 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 matters 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 claimed that redundancy pay should be the entitlement of all workers with an expectation of continued employment and should not be restricted to workers in so-called career industries. It maintained that the career nature of employment may have relevance to severance pay; not 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 claimed, as a basic first step, two weeks pay plus two weeks pay per year of service with no qualifying period. It contended that the best guide to establishing a severance pay standard is the standards already established in federal awards, in recent 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 Firemens') Award* 1982 on 28 January 1983;

(b) in *Re Steel Works Employees (Broken Hill Proprietary Company Limited) Award*;

(c) in *Re Shop, Distributive and Allied Employees' Association, New South Wales v. Myer N.S.W. Limited* judgment of Mr Justice Fisher on 18 August 1983 in the Industrial Commission of New South Wales (1983) 7 I.R. 300; 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 statements, to relate payments to age because:

(a) this may act as a disincentive to the employment of older workers thus adding to existing difficulties for those workers in finding employment;

(b) scales based on service tend to provide higher levels of compensation to older workers; and

(c) selection 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 seniority and intangibles are not really a common feature of Australian employment and that it is inappropriate to compensate for them in a general way as the ACTU asks. Further, it referred to the different circumstances which can occur in particular cases such as where a transmission of a business takes place or where superannuation schemes exist. In particular the CAI referred to the fact that many employers at considerable cost to themselves cover their employees for superannuation and that almost all superannuation schemes in Australia contain provisions which provide redundancy benefits that are more generous than benefits on ordinary termination.

There is no doubt that there is hardship necessarily inherent in redundancy situations but we have provided for extended notice on termination of employment and we have imposed obligations on employers which will assist employees in finding alternate employment. In these circumstances, it is arguable that the employer should not be required to do more. Redundancy caused unemployment is no different from unemployment due to any other event and, through legislation, the community at large accepts the burden of paying unemployed persons amounts determined appropriate. However, the material examined by the Commission indicates that many different heads of loss or damage have been considered relevant in matters involving the assessment of redundancy pay. The Full Bench said in the *Clerks (Oil Companies)* case which related to the introduction of computers that ". . . justice can be done to the employees concerned by compensation if the employers are unable to keep them in employment". In the *Helicopter Pilots* case (1968) 122 C.A.R. 951, the tribunal aimed at "determining '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 opportunity of other and more secure employment and cost of movement; while those same matters were taken into

account by the Deputy Public Service Arbitrator in the *Snowy Mountains* case 49 C.P.S.A. R. 829, where the Arbitrator referred to his task as being to alleviate or remove a hardship. In the *Stockton Ferry* case the Full Bench spoke of fixing a '... solatium or consolation for a situation which has arisen because things were not what they used to be'. In the *Qantas Navigators* case the tribunal expressed the view that an appropriate basis for determining a readjustment allowance was to be found in 'the dual hardship-compensation' principle. In the *John Lysaght* case (1973) 149 C.A.R. 846, the Full Bench saw its task as being 'to determine whether the compensation provided was adequate in all the circumstances' and it mentioned such compensable items as loss of wages, removal costs and, in the case of employees in their sixties, the provision for early retirement."

In the *Wattie Pict* case Justice Gaudron was persuaded to award severance pay "to mitigate the hardship necessarily inherent in retrenchment of employees" and she referred in particular to the financial hardship or fear of it caused by an interruption to employment, the disruption to a worker's routine and society, and social contact and the competitive disability of long term employees "as a result of opportunities foregone in the continuous service of their employer". In the *Clothing Trades Award* case Mr Commissioner Cox indicated that "there is a need to compensate employees for the loss of their jobs" and in the *Trustee Officers Award* proceedings (Print F2732) Mr Commissioner Neyland said that the particulars of the case warranted the Commission "moving to protect the interests of officers employed by the company" because, as the majority decision on appeal said (Print F3151) "their legitimate expectations came to an abrupt end through no fault of their own".

In these and other cases, in determining a level of severance payments a wide range of factors have been identified as relevant such as age, seniority, period of notice, availability of alternative employment, compensation already available to the workers, benefits forgone, and the reasons for retrenchment.

In overseas publications the purpose of redundancy pay has been expressed in a more limited way, akin to the views expressed in the CITCA Report previously referred to. For instance, in the publication "Workforce Reductions in Undertakings" edited by Edward Yemin, which deals with policies and measures for the protection of redundant workers in seven industralized market economy countries, the author concludes:

> "Severance allowance payable at the time of termination of the employment relationship appears generally to be intended more to indemnify workers for the loss of their jobs or to compensate them for past services than to provide income protection during unemployment (since it is payable whether or not unemployment ensues and is generally proportionate to length of service), although it no doubt in fact serves an income maintenance function during any period of unemployment that arises."

In the survey of the effects of the Redundancy Payments Act (United Kingdom) carried out by the Department of Employment (United Kingdom) the aim of redundancy payments was set out as follows:

> "The purpose of redundancy pay was to provide compensation to the worker for loss of job, irrespective of whether it leads to any unemployment. The losses which the individual may suffer as a consequence of redundancy, such as loss of security, possible reduction in earnings and fringe benefits and the uncertainty and anxiety of changing jobs, may all be present in the redundancy situation even if he has managed to find another job immediately."

The CITCA Report summarizes the elements in monetary compensation for retrenchment as:

> "— compensation for non-transferable 'credits' that have been built up, such as: accrued benefits like sick leave and long-service leave; loss of seniority; and loss of the employer's contribution to pension or superannuation
> — compensation for the inconvenience or hardship imposed and assistance to the retrenched employee to make the change, with aims such as: to act as temporary income maintenance while the retrenched employee searches for another job; and to allow for the possibility of retraining or relocation to take up a new job
> — an element that has a compensation component to the extent that it may allow the retrenched employee to take a share of the benefits that the employer expects from the change, and in which, if still employed, he or she could expect to share; alternatively, this element 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 existence of, and reason for, unemployment benefits 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 employee 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 prepared 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 non-transferable credits and the inconvenience and hardship imposed on employees. In this respect we agree with the conclusions contained in the CITCA Report but would indicate, at this stage, that in fixing the quantum we have been prepared to take into account the standards established in recent decisions of this Commission and the State Industrial Tribunals.

We are aware that extended notice, which we have granted, will not be sufficient to ensure that all employees find alternative employment and we are aware that these provisions will not solve the problems of the chronically unemployed. However, these must 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 success in obtaining a new job indicated that an individual made 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 but, for the reasons outlined by the ACTU and because the problems of age on the evidence before us are related more towards the attempt to find alternative employment, we have decided not 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 its view, made the ad hoc approach to severance pay more appropriate than a general prescription and, as indicated earlier, all those supporting the unions' claim did concede 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 reasons for decision and the decisions

of various other industrial tribunals make it appropriate to consider in what circumstances our general prescription should be departed from.

In particular, we have had regard to the:

(a) *Milk Processing and Cheese Manufacturing Etc. (Appeal)* case ((1978) 45 S.A.I.R. 902) redundancy clause;

(b) decision of Mr Justice Fisher *Re Employment Protection Act*;

(c) decision of Mr Commissioner Neyland in the *Trustee Officers Award* case which was confirmed in substance on appeal by the Full Bench; and

(e) decision of Mr Commissioner Cox in the *Clothing Trades Award* case.

All of these awards have restrictions placed on their applicability either by the terms of the legislation in accordance with which the decision was made or as a result of the decision.

The decision of the Full Bench in the *Milk Processing and Cheese Manufacturing Etc. (Appeal)* case did not grant severance pay to seasonal or casual employees.

The decision of Mr Justice Fisher was made in the context of the *Employment Protection Act* which requires notice and/or reasons for termination to be given to the Registrar in certain instances. In addition to an exemption from notification and the giving of reasons for termination where severance payments are made at the rate prescribed by Mr Justice Fisher in his decision of 29 July 1983, there are either exemptions from, or limitations on the Act's application to:

(a) employers who employ less than fifteen employees;

(b) terminations made in consequence of misconduct on the part of the employee;

(c) casual employment;

(d) employees not continually employed by the employer for at least twelve months;

(e) persons who remain employees when a business undertaking or establishment, or part thereof, is transmitted from one employer to another;

(f) employees covered by an award or agreement which already includes a provision for severance pay;

(g) employees engaged for a specified period or task;

(h) employees engaged for a trial period;

and

(i) where termination is pursuant to a policy which requires retirement at a specified date, where the policy has been in existence for at least twelve months and where the employee has been appropriately notified of the policy.

Furthermore, the decision of Mr Justice Fisher applies only to terminations due to economic grounds. Terminations due to "seasonal shifts in markets, loss of contracts or changes in contracts not relating to recession, changes in model or product, shifts in marketing emphasis" and the like are not included and cases involving "retrenchments due to technological change" and "retrenchments due to company reconstruction, mergers and takeovers" are expected to be dealt with "on the particular merits of the case rather than by way of broad prescription". Further, the decision would not automatically apply in industries which contemplate intermittency in employment where the rate includes a specific factor to compensate for following the job.

The legislation also provides for an employer to request the Commission to take into account "the financial and other resources of the employer concerned" and the "probable effect the order, if made, will have in relation to the employer".

Mr Commissioner Neyland's decision in the *Trustee Officers Award* case, and the decision of the Full Bench on appeal, did not provide severance pay for

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 malingering, wilful 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 shift his/her 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 Commission, where employers in particular cases argue 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 inconsistent with the general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work. In addition, we are of the opinion that where termination is within the context of an employee's retirement, 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 decision require a period of twelve months continuous service to elapse before there is any entitlement to severance pay, except the *Milk Processing and Cheese Manufacturing Etc. (Appeal)* 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 employers 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, and where employees receive the benefit of superannuation schemes on retrenchment.

We do not wish to prevent an employer making an application to be exempted from the general prescription pursuant to this decision in cases where an employer obtains acceptable alternative employment for an employee but 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 an application was made it would be important to consider whether previous service with the previous employer was recognized as service with the new employer. However, we would make it clear that we do not envisage severance payments being made in cases of succession, assignment or transmission of a business. We intend to provide for transmission of employment in terms similar to cl.5(5) of the *Metal Industry (Long Service Leave) Award* (1976) 183 C.A.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 inescapable part of retrenchment and dismissal situations and payments such as those previously referred to form part of the very situation which, it is said, gives rise to the need for retrenchment pay.

In both cases we would allow an employer to apply for relief from the obligations for payment which may be granted on such terms as to the Commission seem just. We would also make it clear that, in cases similar to that the subject of an application by Tubemakers of Australia Limited and Commonwealth Steel Company Limited in these proceedings, where it is necessary to seek an exemption from the general prescription, that exemption should be granted. In the two steel plants at Newcastle the majority of production employees are covered by New South Wales Steel Industry awards whereas the minority 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 Tubemakers 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 severance payments in addition to the extended period of notice of termination prescribed for ordinary termination:

Service	*Severance pay*
Less than one year	nil
More than one but less than two years	4 weeks' pay
More than two but less than three years	6 weeks' pay
More than three but less than four years	7 weeks' pay
More than four years	8 weeks' pay

"week's pay" means the ordinary time 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 compensation for the loss of their leave entitlements. It claimed that the need to provide compensation in these circumstances is recognized in many redundancy agreements and awards and is also recognized in the CITCA Report's recommendations. It further claimed that an employee does not receive the benefit of 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 he/she has not used the accrued sick leave entitlement. 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 this inequity provisions have been inserted into a number of awards to allow portability of sick leave or to provide payment for all unused sick leave in retrenchment situations. In addition, through no fault of their own, employees are prevented from continuing to accrue the service which will entitle them to either pro rata payment or to the provisions of long service leave.

The employers claimed that annual leave loading is regularly not made applicable to proportionate leave on termination and relied on a recent Full Bench decision in the *Food Preservers' Award 1973* (Print F0191) which has

confirmed this view. The employers also claimed that sick leave is an entirely different concept to annual leave and long service leave as it is there as a means of protecting the employee who gets ill. It is not generally portable and there is no reason why an employer should be saddled on termination due to redundancy with a cost which he would not have had to bear on an ordinary termination and may never have incurred at all. They relied on a decision in the *Federated Ironworkers' Association of Australia v. Australian Carbon Black* (1979) 230 C.A.R. 206 to the effect that sick leave was not intended to afford a general right to paid absences from work in the same way as annual leave and long service leave.

As to long service leave, the employers claimed they already face heavy payouts on termination and they opposed 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 credited annually.

The Queensland Government also submitted that the Commission should not graft alterations onto 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 Preservers' (Long Service Leave) Award 1964* on 5 April 1979 (1979) 219 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 should 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 meant 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 decision regarding the *Food Preservers (Long Service Leave) Award 1964* where 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 standard 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 has awarded 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 employer. 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 retrenchment allowance is to compensate for hardship to the employee caused by the frustration 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 retrenchment allowances.
>
> It is true that frequently parties have negotiated retrenchment allowances which have as a component pro-rata long service leave. But what in

the course of negotiations parties do by way of expediency to settle disputes, should not be applied by the Commission if its principles are compromised thereby."

In these circumstances, we are not prepared to add to the general level of severance pay that we have awarded, additional payments for the loss of leave entitlements. We emphasize that such matters are the fundamental justification for, and comprehended in, the level of severance pay we have granted.

The ACTU also made claims which relate to an employee under notice of termination who wishes to leave, for example, where an employee has found a suitable job and is required to take up that job early. It was claimed that such an employee should be granted the benefits of any redundancy provision because to restrict him/her would discourage workers from finding and taking up other employment opportunities and that the early departure of employees in a redundancy situation will often make little difference to employers. It was also claimed that this would be consistent with the tenor of a number of awards and agreements.

Having regard to the reason for our grant of severance pay, subject to the right of an employer to seek a variation if appropriate circumstances exist, we are prepared to grant this part of the ACTU claim. We would emphasize, however, that such an employee would not be entitled to payment in lieu of notice in such circumstances.

Income maintenance for redundant employees

The ACTU also claimed that where employees declared redundant can only find alternative employment at a lower wage, or cannot find other employment, and the employees have to rely on unemployment benefits, the employer should provide a period of income security for a time after retrenchment. Such a payment by the employer would, so the ACTU claimed, enable workers to spend time and money on searching for a suitable job and it would also provide a supplement to the low unemployment benefits that are available through the social security system. It was claimed that such an income maintenance scheme was recognized in a number of comparable countries and in the CITCA Report recommendations. It was also recognized that, for the ACTU scheme to work, a degree of guess-work as to the likelihood of the loss of income and the period of the loss would have to occur.

The CAI opposed the claim on the basis of the "astronomical costs to employers" and because, it claimed, the provision would operate as an incentive for an employee not to look for alternative work in the full knowledge that for the next twelve months his/her income will be maintained at the expense of the employer.

We have already decided that additional notice should be granted to assist dismissed employees to find alternative work and we have provided for the employer to grant other limited assistance to employees declared redundant for the same purpose. An additional and separate provision would involve double counting.

We also agree with the employers that, if granted, this additional claim would impose too great a financial burden on them and would act as a disincentive both to employers and employees. Further, we would agree with the CITCA recommendations. The burden of assisting employees who lose their jobs should not fall solely on employers. The responsibility is, in part, a community responsibility and for this reason, as well as the practical problems associated

Appendix "A"

Log of Claims re job protection:
A. Introduction of Change
B. Termination of Employment
C. Redundancy

Introduction:
1. Tables:
   — Mean Duration of Unemployment
   [*Source:* ABS Catalogue No. 6203.0]
   — Average (Mean) Duration of Unemployment by Age
   [*Source:* ABS Catalogue Nos. 6204.0, 6203.0]
   — Unemployment Duration, All Persons
   [*Source:* R. G. Gregory, "Work and Welfare in the Years Ahea Australian Economic Papers, December 1982, p. 230]
   — Industrial Disputes Due to Managerial Policy
   [*Source:* 1975-80 — ABS Catalogue No. 6101.0
   1981&82 — ABS Catalogue No. 6322.0 (September quar 1982 figures not then published)]
2. ACTU Policy:
   — Working Conditions Policy Decision [ACTU Circular No. 399/1981]
   — Policy Decision: Technological Change [ACTU Circular]

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   — Volume One: Technological Change and its Consequences Report of Committee of Inquiry into Technological Change in Australia [CI Report]

ILO Convention 158 and Recommendation 166:
1. Summary of Convention and Recommendation
2. International Labour Conference Convention 158 concerning Termina of Employment at the Initiative of the Employer
3. International Labour Conference Recommendation 166 concer Termination of Employment at the Initiative of the Employer

ACTU Claim:
A. Termination of Employment
B. Introduction of Change
C. Redundancy

ACTU Claim — Amendments to Exhibit B5

50 Major Federal Awards — Provisions Relevant to ACTU Claim:
   — Estimate of Number of Employees Covered by 50 Major Federal Av as a Proportion of all Employees Covered by Federal Awards
   [*Source:* ABS, The Labour Force, February 1983, Catalogue No. 6. ABS, Employees Affected by Awards etc Australia, May Catalogue No. 6315.0]
   — 50 Major Federal Awards — Award Provisions:
   Australian Workers' Union Construction and Maintenance Award — Print F0595, D0700
   Bank Officials' (Federal) (1963) Award — Print B4291
   Building Construction Employees' and Builders Labourers' Award — Print E9808, E1599, D6307
   Business Equipment Industry (Technical Service) Award 1978 — D7070
   The Carpenters and Joiners Award 1967 — Print D8911

Clerical and Salaried Staffs (Wool Industry) Award 1977 — Print F1752, D6122
Clerks (Domestic Airlines) Award 1978 — Print E3858
Clerks (Finance Companies) Award 1982 — Print E9497
Clerks (Oil Companies) Award 1980 — Print E7000
Clothing Trades Award 1982 — Print E1647
Dry Cleaning Industry Interim Award 1980 — Print E6068, E5551, B5550
Engine Drivers and Firemen's (General) Award 1968 — Print B9728
Federal Meat Industry Award 1981 — Print E9006
Food Preservers' Award 1973 — Print F0807, C3146, C7134, C703
Footwear — Manufacturing and Component — Industries Award 1979 — Print D8962
Ford Australia Vehicle Industry Award 1978 — Print D0383
Furnishing Trades Award 1981 — Print E9473
General Motors-Holden's Limited (Part I) General Award 1982 — Print F1258
Graphic Arts Award 1977 — Print D3516
Hotels and Retail Liquor Industry Award 1975 — Print C4706
Insurance Officers (Clerical Indoor Staffs) Award 1978 — Print E5806, D7041
Locomotive Enginemen's Award 1966 — Print C4845
Maritime Industry Seagoing Award 1981 — Print E8068
Meat Processing Interim Award 1973 — Print C463
Metal Industry Award 1971 — Print D1611
Metal Industry (Victorian Government Departments and Instrumentalities) Award 1981 — Print E7025
Metal Trades Award 1952 — Print D8906
Motels Award 1976 — Print C4938
Municipal Employees' (Victoria) Award 1981 — Print E6823
Municipal Officers' Association of Australia (State Electricity Commission of Victoria) Award 1975 — Print C4802
Municipal Officers' (Melbourne and Metopolitan Board of Works) Award 1971 — Print B7525
Municipal Officers' (Victoria) Consolidated Award 1974 — Print D2982, C482
National Building Trades Construction Award 1975 — Print E9793, E1597, C6006
Pastoral Industry Award 1965 — 110 CAR 422
Pulp and Paper Industry (Production) Award 1973 — Print E9978, C1063
Railways Miscellaneous Grades Award — Print C2984, Part IV — State Transport Authority, South Australia (title changed by Print D8731), E8731
Railways Metal Trades Grades Award 1953 — Print B6340
Railways Salaried Officers Award 1960 — Print B7349
Railways Traffic, Permanent Way and Signalling Wages Staff Award 1960 — Print D4475
Retail and Wholesale Shop Employees (Australian Capital Territory) Award 1968 — Print D8725
Rubber Plastic and Cable Making Industry (Consolidated' ward 1980 — Print E3741

Salaried Officers' Award 1955, Department of Railways, New South Wales — Print B4442
Shipping Officers' Award 1981 — Print E8206
Textile Industry Award 1981 — Print D0358
Timber Industry Consolidated Award 1974 — Print C487
Transport Workers Award 1972 — Print E3836, B8561
Transport Workers (General) Award 1959 — Print C3651
Vehicle Industry Award 1982 — Print F0813
Vehicle Industry — Repair, Services and Retail — Award 1980 — Print E3784
Waterside Workers' Award 1977 — Print D5408

Anti-Discrimination Legislation:

1. Commonwealth:
   — *Racial Discrimination Act* 1975
2. New South Wales:
   —*Anti-Discrimination Act* (as amended to 1981)
   —*Anti-Discrimination (Amendment) Act* 1982
3. Victoria:
   — *Equal Opportunity Act* 1977
   — *Equal Opportunity (Discrimination against Disabled Persons) Act* 1982
4. South Australia:
   — *Sex Discrimination Act* 1975
   — *Racial Discrimination Act* 1976
   — *Handicapped Persons Equal Opportunity Act* 1981

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1. Tables:
   — Notifications pursuant to s. 25 of Act
   [*Source:* Annual Reports of President, Commonwealth Conciliation and Arbitration Commission]
   — Incidence of awards
   — [*Source:* ABS Incidence of Industrial Awards, Determinations and Collective Agreements, May 1974, Ref. 6.5]
2. Decisions of Australian Conciliation and Arbitration Commission:
   — *Re Municipal Officers (Qld) Consolidated Award 1975* — Print D6553
   — *Re Plastics, Resins, Synthetic Rubbers and Rubbers (Uniroyal) Award 1975* — Print E1313
   — *Re Clerical and Salaried Staffs (Wool Industry) Award 1977* — 29 November 1982, Transcript
3. J. O'Donovan "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice" (1976) — 50 ALJ 636
4. New South Wales:
   — Extracts from *Industrial Arbitration Act* 1940 — "Industrial matters" and s. 20A
   — Extract from CCH Labour Law Reporter re Reinstatement, Vol. I pp. 7952/4
   — Extract from Mills N.S.W. Industrial Laws, pars [151] and [152]
5. Western Australia:
   — Extracts from *Industrial Arbitration Act* 1979 — "Industrial matter"
   — Extracts from CCH Labour Law Reporter, Role of Industrial Commiss Vol. 1, pars [20-220] and [20-225]

6. Queensland:
   — Extracts from *Industrial Conciliation and Arbitration Act* 1961-1976 — "Industrial matter" and s. 11
7. South Australia:
   — Extracts from *Industrial Conciliation and Arbitration Act* 1972 — s. 15
   — Extracts from CCH Labour Law Reporter, The Industrial Court, Vol. 1, pars [17-037], [17-040], [17-043], [17-045], [17-050], [17-055], [17-057], [17-060] and [17-065]
   — Mr Justice L. T. Olsson "Handling Unfair Dismissals in South Australia" [paper presented to Australian Graduate School of Management, August 1982]
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   — Extracts from *Industrial Relations Act* 1975 — ss 2, 50 and 51
9. Victoria:
   — *Industrial Relations (Amendment) Bill* 1983

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   [*Sources:* European Industrial Relations Review (EIRR)
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   UK Legislation
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   — Individual Dismissals in 14 Western European Countries — EIRR No. 9, September 1974
   — Protection of Workers in the Event of Individual Dismissals — EIRR No. 30, June 1976
   — Seniority Rights in the Paper-Making Industry — EIRR No. 49, January 1978
   — Dismissal and Redundancy Pay in 10 Countries — EIRR No. 75, April 1980
3. Belgium:
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   — Act Respecting Contracts of Employment — ILO Legislative Series 1978, Bel. 1
4. Denmark:
   — Dismissals in Denmark — EIRR No. 1, January 1974
   — Industrial Relations in Context, Part 2: Individual Rights — EIRR

   New Industrial Relations Ground Rules — EIRR No. 86, March 1981
   — Act Respecting the Relations Between Employers and Salaried E ployees
   — ILO Legislative Series 1971 — Den. 1
5. France:
   — Industrial Relations in Context, Part 2: Individual Rights — EI No. 74, March 1980
   — New Law on Discipline and Self Expression — EIRR No. September 1982
6. Germany:
   — Consolidated Text of the Protection Against Dismissal Act — Legislative Series 1969 — Der. FR. 3
   — A Review of Individual Dismissals Law — EIRR No. 51, March 197
   — Industrial Relations in Context, Part 2: Individual Rights — E No. 61, February 1979
7. Ireland:
   — Irish Unfair Dismissals Act — EIRR No. 42, June 1977
   — Individual Dismissals in Ireland — EIRR No. 42, June 1977
   — Dismissals Law Two Years On — EIRR No. 63, April 1979
   — Industrial Relations in Context, Part 2: Individual Rights — I No. 71, December 1979
8. Italy:
   — Industrial Relations in Context, Part 2: Individual Rights — I No. 65, June 1979
   — Dismissal of Individual Employees Act 1966
9. Netherlands:
   — Individual Dismissals in the Netherlands — EIRR No. 41, May 197
   — Industrial Relations in Context, Part 2: Individual Rights — I No. 66, July 1979
10. Sweden:
   — Employment Protection Law Revised — EIRR No. 99, April 1982
11. United Kingdom:
   — Industrial Relations in Context, Part 2: The Law of Unfair Dismiss EIRR No. 57, October 1978
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1. Extracts from *Employment Protection (Consolidation) Act* 1978 as ame by *Employment Protection Act* 1980
   — from Harvey on Industrial Relations and Employment Butterworths
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   — from Harvey on Industrial Relations and Employment Butterworths
3. Codes of Practice Under the *Employment Protection Act* 1975
   — Disciplinary Practice and Procedure
   — Disclosure of Information
   — from Harvey on Industrial Relations and Employment Butterworths
4. Extracts from Report of Royal Commission on Trade Unions and ployers' Associations — The Donovan Report

International Labour Conference, 67th Session, 1981: Report VIII(1)

   — Termination of Employment at the Initiative of the Employer

Dismissal Procedures — Decisions of Conciliation and Arbitration Commission:
- — Relevance of Procedure to Fairness/Unfairness of Dismissal Decision
- — Procedures Recommended by Commission

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1. Extract from Report to the Prime Minister by The Committee to Advise on Policies for Manufacturing Industry, October 1975
2. Extract from Report of the Study Group on Structural Adjustment, March 1979
3. Decision of the Industrial Relations Commission of Victoria regarding an appeal against a decision of The Commercial Clerks Conciliation and Arbitration Board in relation to Technological Change — Case No. 76, 8 July 1982 and 31 August 1982
4. National Economic Summit Confererence April 1983 Vol. 2, Prime Minister's Opening Statement and Conference Communique
5. Australian Bureau of Statistics Survey on Technological Change in Private Non-Farm Enterprises — Catalogue No. 8106.0, 18 March 1980
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7. Article by Ms. M. Gaudron, QC, on Industrial Relations Aspects of Technological Change — from "Productivity Australia", No. 15, July 1981
8. Federal Awards/Agreements providing for Consultation on Changes in Technology, etc:
   - — ATI Airline Pilots' Agreement 1982 — Print F0683
   - — Cadbury Schweppes Pty. Ltd. Confectioners' Industrial Agreement (Tasmania), 1981 — Print E5732
   - — Country Printing Award, 1959 — Print E2625
   - — Gas Industry Salaried Officers (A.G.L. Co., North Shore Gas Company and Others) Agreement 1976 — Print E7869
   - — Gas Industry Salaried Officers (Newcastle Gas Company) Agreement 1977 — Print E7870
   - — Gas Industry Salaried Officers (South Australian Gas Co.) Agreement 1981 — Print E7721
   - — Insurance Employees' (Territory Insurance Office) Award 1981 — Print E7621
   - — Newspaper Printing Agreement 1981 — ENS Agreement, Schedule "BB" — Print E6973
   - — Shipping Officers' (A.S.C.) Award 1981 — Print E8369
   - — Textile Industry Award 1976 — Print D0358
9. Australian Public Service Guidelines for Consultation on Technological Change — Circular No. 79/1035, 30 May 1979
10. Telecom Australia Agreement on Introduction of Technological Change:
    - — Telecom Consultative Council Document — "Consideration of the Introduction of Technological Change"
    - — Guidelines for Introduction of Technological Change
11. Victorian Government Policy Guidelines for the Introduction of Technological Change in the Public Sector — Departmental Circular No. 81M
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13. Victorian Commercial Clerks' Award — Technological Change clause

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1. Works Council Rights in Eight Countries — Extract from EIRR, No. 88, May 1981
2. Denmark: Central Union — Employer Agreement on New Technology
   - — Extracts from ILO, Social and Labour Bulletin, No. 2, June 1981
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3. Norway: National Collective Agreement on Computer Based Systems — Extract from ILO, Social and Labour Bulletin, No. 4, December 1979
4. Sweden: National Co-Determination Agreement for Insurance Companies
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5. United Kingdom: New Technology Agreements
   - — Extracts from EIRR, No. 102, July 1982 and No. 81, October 1980

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   - — Terms of Reference
   - — Membership of Committee
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   - — Ministerial Statement by Rt. Hon P. R. Lynch, 18 September 1980
3. ACTU Executive Decision on Technological Change — CITCA Report, 22 August 1980

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Redundancy — Materials:
1. Industrial Disputes over Retrenchment:
   [*Source:* unpublished material provided by Australian Bureau of Statistics]
2. Definitions of Redundancy:
   - — Extract from UK Employment Protection (Consolidation) Act 1978 — s. 81
   - — SA Industrial Commission:
     R. v. The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited (1977) 74 LSJS 251
     Re Milk Processing and Cheese Manufacturing etc. Award — Print No. 72/1978
   - — ILO Convention 158, Article 13
3. A Survey of Redundancy Procedures — article from "Work and People" Vol. 5, No. 1, 1979 pp. 7/12
4. Section 88G of NSW Industrial Arbitration Act, 1940
5. Section 82 of SA Industrial Conciliation and Arbitration Act, 1972-1983
6. NSW Employment Protection Act 1982
7. NSW Employment Protection Regulation 1983
8. Council Directive No. 75/129/EEC, 17 February 1975
9. Collective Dismissals in 10 Countries
   - — article from EIRR No. 76, May 1980
10. Dismissal and Redundancy Pay in 10 Countries
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    - — 13 August 1971, pp. 11/12
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    - — article by Prof D. Yerbury in Australian Journal of Management
13. Employment Size of Establishments in Manufacturing, 30 June 1981
    [*Source:* ABS, Manufacturing Establishments, Selected Items of Data Classified by Industry and Employment Size, Australia, 1980-81, Cat. No. 8204.0]

14. Employment Size of Establishments in Mining, 30 June 1978
[*Source:* ABS, Census of Mining Establishments, Selected Items of Data Classified by Employment Size and Industry Class, Australia 1977-78 Cat. No. 8410.0]
15. Employment Size of Retail and Service Establishments, 30 June 1980
[*Source:* ABS, Census of Retail Establishments and Selected Service Establishments, Australia 1979-80, Cat. No. 8613.0
ABS, Manufacturing Establishments, Australia 1980-81, Cat. No. 8204.0
ABS, Census of Mining Establishments, Australia 1981-82, Cat. No. 8401.0]

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2. SA Industrial Commission:
Milk Processing and Cheese etc. Manufacturing Redundancy Clause Reference Case
Print 1.97/1980, 25 November 1980

Federal Award Provisions relating to Redundancy:

1. Part 1 — Awards commencing "A" to "I":
— Explanatory Notes to Summary Table
— Summary Table of Award Provisions, Part 1
— Award Provisions, Part 1:
Aircraft Flight Stewards' Award 1971 — Print B7851
Aircraft Industry (Commonwealth Aircraft Corporation) Award 1973 — Print C1801, E6296
Aircraft Industry (Commonwealth Aircraft Corporation — Part 2) Award 1975 — C No. 1661 of 1974
Aircraft Industry (Commonwealth Aircraft Corporation) Award 1982, Part 4 — Print E9514
Aircraft Industry (Hawker De Havilland Australia Pty. Ltd.) Award 1977 — Print D5171
Aircraft Industry (Hawker De Havilland Australia Pty. Ltd.) Award 1977 (Part 2) — Draughtsmen, Production Planners and Technical Officers — Print D7604
Aircraft Industry (Qantas Airways Limited) Award 1980 — Print F0885, E5115
Airline Pilots' Agreement 1980 (Ansett Transport Industries Operations Pty. Ltd.) — Print E9318
Airline Pilots (East-West Airlines Ltd.) Agreement 1975 — Print D2203
Airline Pilots' (Qantas) Agreement 1979 — Print E6746
Airline Pilots' (TAA) Agreement 1981 — Print E8900
Australian Institute of Marine and Power Engineers and The Eastern and Australian Steamship Co. Ltd. Agreement 1980 — Print D1299
Aerodrome Boards, Saleyard Boards, Water Boards and River Improvement Boards/Trusts (Queensland) Consolidated Award 1977 — Print D7482, D9251
Australian Motor Industries Limited (Vehicle Building) Award 1976, Part 3 — Draughtsmen, Production Planners and Technical Officers — Print D4227
Australian Paint Industry (Manufacturing) Agreement 1975 — Print

Australian Paint Industry (Storemen and Packers) Agreement 1976 — Print E3475, D2454
Australian Postal Commission Employees (Conditions of Redundancy) Award 1979 — Print E4852
Australian Telecommunications Commission Employees Conditions of Redundancy) Award 1978 — Print D8283
Australian Telecommunications Commission Telecommunications Technical and Trades Staff (Salaries and Specific Conditions of Employment) Award 1975 — Print E0083
Australian Workers' Union Alluvial Mining Award 1976 — Print C4985
Australian Workers' Union — B. F. Goodrich Chemical Ltd. Award 1979 — Print E9849, E4079, E3094
Australian Workers' Union — (BASF Australia Ltd. Victoria) Chemical Workers Award 1979 — Print E7042
Austral-Pacific Fertilizers Limited (Agricultural Chemical Industry) Award 1979 — Print E0405
Austral Standard Cables Pty. Ltd. (Liverpool) Award 1982 — Print E9075
Austral Standard Cables Pty. Ltd. (Clayton) Award 1982 — Print F0346
Brain and Brown Airfreighters Pilots' Agreement 1970 — Print B6285
British Phosphate Commissioners (Cessation of Operations) Award 1981 — Print E6498, E7754, E8307, E8549
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Cable Makers Australia Pty. Ltd. Award 1981 — Print E7399, F0989
Cadbury Schweppes Pty. Ltd. Confectioners' Industrial Agreement (Tasmania) 1981 — Print E5732
Chemical Workers' Branch of the Federated Ironworkers' Association of Australia — Catoleum Pty. Ltd. Agreement 1980 — Print E4567
Clerks (Australian Motor Industries) Award 1978 — Print E1072
Clerks (Vehicle Industry) Award 1973 — Print C1352
Clerks (International Harvester Australia Limited) Award 1982 — Print F0852
Cohn Foods Pty. Ltd. Severance Pay Award 1976 — Print C6394
Commonwealth Accommodation and Catering Services Ltd. (Salaried Staff — Other than Migrant Centres and Guest Houses Management Interim Redundancy Award 1981 — Print E7434
Country Printing Award 1959 — Print E2625, C No. 2405 of 1975 Print E3803
DHA Pharmaceuticals Pty. Ltd. Employees Agreement 1973 — C No. 2522 of 1972
Draughtsmen, Production Planners and Technical Officers (Vehicle Industry) Award 1978 — Print E0784
Dried Fruits Etc. Industry Award 1976 — Print D0806
Engineers (Local Governing Authorities, Queensland) Award 1960 - Print E3766, A7251
Federated Ironworkers' Association Pigment Manufacturers Award 198 (formerly Federated Ironworkers Association Chemical Workers Sub Branch) Pigment Manufacturers Award 1978) — Print D8839
Federated Miscellaneous Workers Union of Australia (Australian Fluorine Chemicals Pty. Ltd. — Newcastle) Award 1978 — Print D7718
Federated Miscellaneous Workers Union Chemical Industry (Hareros Industrial Chemicals) Award 1982 — Print F2901

Ford Australia Clerks Award 1979 — Print D3264
Ford Australia Plant Supervisors' Award 1978 — Print F1118, E5587, D8861, D4211
Ford Australia Salaried Technical Employees' Award 1978 — Print E5582, D8846, D4210
Ford Australia Vehicle Industry Award 1978 — Print F1109, E5579, D8569, D0383A, D0383
Gas Industry Salaried Officers (AGL Co., North Shore Gas Company and Others) Agreement 1976 — Print E7869
Gas Industry Salaried Officers (Newcastle Gas Company) Agreement 1977 — Print E7870
Gas Industry Salaried Officers (South Australian Gas Co.) Agreement 1981 — Print E7721
Glass Merchants and Glazing Contractors (Victoria) Interim Award 1978 — Print D8476, E9996
Goulburn Valley Canneries Severance Pay Award 1976 — Print C7053
Groote Eylandt Mining Company Award 1981 — Print E9149
Health Insurance Commission (General Conditions of Employment) Award 1979 — Print E2312
ICI (Chester Hill Visqueen Factory) Maintenance Agreement — Print E6002
ICI (Villawood) Maintenance Agreement — Print E6003
Ipec Aviation Pilots' Award 1981 — Print E9633
Iron Ore Mining and Processing (Savage River Mines) Award 1974 — Print E3417, C4723

2. Part 2 — Awards commencing "J" to "Z":
   — Explanatory Notes to Summary Table
   — Summary Table of Award Provisions, Part 2
   — Award Provisions, Part 2:

John Lysaght (Australia Limited — Newcastle Works — Severance Pay) Award 1972 — Print B9284
Journalists (Western Mail) Award 1982 — Print E9055
Kevin Waters Maintenance Trades (Container Terminal) Award 1979 — Print E803
Library Boards (Queensland) Consolidated Award 1977 — Print D6603
Licensed Aircraft Engineers' (Connair Pty. Ltd.) Award 1974 — Print E2095
Maritime Industry (Survey Vessels) Award 1974 — C Nos. 2936 and 2937 of 1974
Merchant Service Guild and the Eastern and Australian Steamship Co. Ltd. Agreement 1981 — Print E9051
Maritime Industry Seagoing Award 1981 — Print E8068
Self Propelled Barge and Small Ship Award 1981 — Print E6876
Metropolitan Transport Trust (Tasmania) Non-Traffic Employees' Award 1978 — Print D7143
Milling Industry Award 1978 — Print E6140, D9327, D5477
Miscellaneous Workers Chemical Industry (Hardman Chemicals Pty. Ltd.) Consolidated Award 1981 — Print E8772
Miscellaneous Workers Plaster of Paris and Gypsum Products Industry (Australian Gypsum Ltd.) Award 1978 — Print E0932
Miscellaneous Workers Union Chemicals and Plas Building Materials, Etc. — St. Regis — ACI Pty. Ltd.) Award 1981 — Print F0933

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Mitsubishi Motors Australia Ltd. (Vehicle Industry) Award 1980 — Print E5573
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Mitsubishi Motors Australia Ltd. (Draughtsmen, Production Planners and Technical Officers) Award 1980 — Print E7910
Mitsubishi Motors Australia Ltd. (Supervisors of Engineering Production) Award 1980 — Print E7886
Monsanto Australia Ltd. — Federated Ironworkers Association (Chemical Workers Sub-Branch) Award 1979 — Print E0234
Mount Bundey Iron Ore Mining Award 1970 — Print B5921
Mount Lyell Mining and Railway Company Ltd. Industrial Agreement 1973 — Print C804
Municipal Officers (Bendigo Sewerage Authority) Award 1969 — Print E7268, B4302
Municipal Officers' (City of Sunshine) Award 1973 — Print E1269, C488
Municipal Officers (Northern Territory) Award 1982 — Print F0292
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Municipal Officers (South Australia) General Conditions Award 1981 — Print E7439
Municipal Officers' (Victorian Water and Sewerage Authorities) Award 1969 — Print B4110, E5929
Municipal Officers (Queensland Harbour Boards) Award 1977 — Print D4373
Municipal Officers (Richmond City Council) Award 1969 — Print E1555, D8974, D2112
Newspaper Printing Agreement 1981 — ENS Agreement Schedule "BB" — Print E6973
Municipal Officers' (Western Port Regional Planning Authority) Interim Award 1978 — Print E4425, D8250
Nissan Australia Vehicle Industry Award (Part 2 Supervisors) 1978 — Print D9454
Nissan Australia Vehicle Industry Award (Part 3, Technical Employees) 1978 — Print D9457
Northern Territory Electricity Commission (Employees) Award 1982 — Print F0356
Offshore Industry (Self-Propelled Drilling Vessels) Award 1981 — Print E8341
Pilots (Connair) Award 1979 — Print E1253
Pilots' (General Aviation) Award 1981 — Print E8848
Printing and Kindred Industries Union (Canberra Times) Agreement 1980 — Print E4671
Printing Industry (Maxwell Newton Pty. Ltd.) Agreement 1971 — C No. 636 of 1971
Professional Scientists Agreement 1980 — Print E1530
Professional Scientists Registered Agreement 1981 — Print E8323
Renault (Australia) Clerks Award 1980 — Print E4970
Rubber, Plastic, Adhesive Tape, Abrasive and Coated Materials Consolidation Agreement Award 1982 — Print F0662
Rubb Plastic and Cable Making Industry (Consolidated) Award 1980 — Pri 3741

Salaried Staff (Overseas Airlines) Award 1980 — Print E4881, D4186
Salaried Staff (Qantas Airways Limited) Award 1976 — Print E6876
Shipping Officers (ASC) Award 1981 — Print E8369
South Australian Tramway and Omnibus Award 1981 — Print E9861, E7380
Space Tracking Industry Retrenchment Agreement — Print F0458, C156
Storemen and Packers (Philip Morris Ltd.) Award 1978 — Print D7756
Stevedoring Industry Redundancy Order 1977 — Print F1184, F0077, D5451
Sundry Vessels (M. V. "Harry Messel") Agreement 1974 — Print E5450
Supermarket and Chain Stores (NT) Award 1981 — Print E7969
Space Tracking (Tracking Station Supervising Technicians and Specialists) Award 1981 — E6671
Telephone Germ-Proofing Service Award 1980 — Print E5689
Transport Workers (Airlines) Award 1981 — Print E8807
Transport Workers (Philip Morris Limited) Award 1980 — Print E4870
Vehicle Assemblers (Renault Australia Pty. Limited) Award 1978 — Print E3915, D1529
Vehicle Assemblers Renault (Australia) Pty. Ltd. Supervisors Award 1978 — Print E0003
Vehicle Assemblers (Renault (Australia) Pty. Limited) Technical Employees Award 1978 — Print D9982
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Vehicle Industry (International Harvester Australia Limited) Award 1981 — Print F0431, E6984
Vehicle Industry (Leyland) Clerks Award 1980 — Print E4253
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   — Provisions of Additional Awards

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1. Industry Classification of Agreements
2. Summary Table of Redundancy Agreements
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4. Criteria for Selection for Termination
5. Entitlements on Termination of Employment
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Table 3 — Wage and Profit Share (Seasonally Adjusted)
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Table 4 — Movements in Wages and Prices
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1. Statistics:
   - — Summary of research of Queensland Awards and Agreements
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- — Policy Statement consultation and Technological Change
- — Guidelines for consultation on Technological Change in the Queensland Public Service
- — Attachment to Guidelines for Consultation on Technological Change in the Queensland Public Service
- — Displacement/Redundancy Agreement — Installation of Centralised Traffic Control — Queensland Railways
- — Queensland Railways Displacement/Redundancy Agreement applying to all employees except those under the CTC Agreement

- — 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
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- — Number of Establishments and Employment from the Registrar of Business Establishments — Explanatory Notes and Tables

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Appendix "B"

ACTU JOB PROTECTION TEST CASE

CLAUSE A TERMINATION OF EMPLOYMENT

Unfair Dismissal

1. An employer shall not dismiss an employee in a manner or for a reason which is harsh, unjust or unreasonable.

   For the purposes of this paragraph, "dismissal" 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 unjust in the absence of a valid reason for dismissal connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment or service of the employer. The burden of proving the existence of a valid reason for the termination shall rest on the employer. The following, among others, shall not constitute valid reasons 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, boards of reference shall from time to time be constituted and shall consist of such person as is, or such persons as are, from time to time, appointed by the Presidential Member assigned under s. 23 of the *Conciliation and Arbitration Act* to the panel responsible for this award.

   (b) The functions of a board shall be

   (i) to consider complaints or allegations of unfair dismissals arising under paragraph A1 or A2 brought before it by any respondent union or employer;

   (ii) to inc[illegible] into and if possible to settle by conciliation differences betwe[illegible]e union and the employer.

(c) The decisions or actions of a board of reference may be reviewed by the Conciliation and Arbitration Commission on the application of the respondent union or employer concerned. In any such review, the Commission may
  (i) confirm or alter any decision of the board of reference; and/or
  (ii) exercise any of the functions assigned to the board of reference.

(d) Nothing in this paragraph shall prevent any party from applying to the Federal Court of Australia for an interpretation of any clause in this award.

4. *Savings provisions.* (a) The provisions of paragraphs A1 and A2 shall apply subject to the operation of any anti-discrimination, equal opportunity or other similar law of the Commonwealth, and to the extent permitted thereby, concurrently with such anti-discrimination, equal opportunity or other similar law of the Commonwealth.

(b) The provisions of paragraphs A1 and A2 shall not apply —
  (i) in the State of New South Wales in respect of any form of discrimination proscribed by the *Anti-Discrimination Act* 1977 or any amendment thereto;
  (ii) in the State of Victoria in respect of any form of discrimination proscribed by the *Equal Opportunity Act* 1977 or any amendment thereto;
  (iii) in the State of South Australia in respect of any form of discrimination proscribed by the *Sex Discrimination Act* 1975 or the *Racial Discrimination Act* 1976 or the *Handicapped Persons Equal Opportunity Act* 1981 or any amendment to those Acts.

(c) Leave is reserved to the parties to apply for a variation of this paragraph in respect of any State or Territory which may hereafter adopt anti-discrimination, equal opportunity or other similar legislation in respect of any form of discrimination covered by paragraphs A1 and A2.

Procedure Prior to or at the Time of Termination

5. The employment of an employee shall not be terminated for reasons related to the employee's conduct or performance before he/she is provided an opportunity to defend himself/herself against the allegations made.

6. Where an employer is dissatisfied with the performance or conduct of an employee, the employer may give warning to the employee stating or setting out the nature of the unsatisfactory performance or conduct and the likely consequences of a continuation or repetition of the performance or conduct.

7. (a) Except in the case of serious misconduct, the employment of an employee shall not be terminated for misconduct unless
  (i) the employer has given the employee oral warning in accordance with paragraph A6,
  (ii) following further misconduct, the employer has given the employee written warning in accordance with paragraph A6 stating that further misconduct shall lead to dismissal; and
  (iii) there has been such further misconduct.

(b) The employment of an employee shall not be terminated for any reason related to the performance or capacity of the employee unless
  (i) the employer has given the employee oral warning in accordance with paragraph A6;
  (ii) following further unsatisfactory performance or continued incapacity, the employer has given the employee written warning in accordance with paragraph A6 stating that further unsatisfactory performance or continued incapacity shall lead to dismissal; and

  (iii) there has been such further performance or continued incapacity.

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

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

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

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

10. The employer shall in the event of dismissal provide to the employee whose employment has been terminated, upon request and within 7 days of the request, a written statement setting out the reason or reasons for his/her dismissal.

Period of Notice of Termination of Employment

11. In order to terminate the employment of an employee, the employer shall give the employee the following period of notice (or payment directly related to the notice period in lieu thereof):

(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 applying to an employee and to the normal overtime worked 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 justifies instant dismissal or in the case of casual or seasonal employees.

12. The notice of termination required to be given by an employee to whom paragraph A11 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 employer or by the employee), 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 his/her employment and the classification of or the type or types of work performed by the employee. At the request of the employee, an evaluation of his/her conduct and performance shall be given in this statement or in a separate statement.

CLAUSE B INTRODUCTION OF CHANGE

Notification to Employees and Unions

1. (a) Where an employer proposes to make changes in production, programme, 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 union or unions.

(b) "Significant effects" include termination 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 union 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 consultations shall commence as early as practicable after notification 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 change, there shall be further consultation between the employer and the union or unions concerned at the request of either party.

Provision of Information

3. For the purposes of such consultations, and at least two weeks before the consultations commence, the employer shall provide in writing to the union or unions concerned all relevant information about the changes including the nature of the changes proposed; the likely date and method of implementation 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 union or unions as early as practicable with a view to reaching an agreement. The consultations shall cover, inter alia, the reasons for the proposed terminations, measures to avoid or minimise the terminations, and measures to mitigate the adverse effects of any terminations on the employees concerned.

(b) For the purposes of the consultations, and, at least two weeks before the consultations commence, the employer shall provide in writing to the union or unions concerned all relevant information about the proposed terminations including the reasons for 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 sub-paragraph (a) of this paragraph 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 employer and the union or unions concerned at the request of either [illegible]

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 thereof as soon as possible, giving relevant information including a written statement of 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 employee who is a union member shall be accorded preference over other employees in retention in employment, in re-employment and in respect of all other benefits or opportunities accorded by the employer to employees in a redundancy situation. Preference in retention shall apply only in respect of 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.

Entitlements on Termination of Employment

5. In addition to any other entitlements applying under this Award in respect of termination of employment, an employee whose employment is terminated for reasons of an economic, technological, structural or similar nature shall be entitled 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 to the employee a sum as a redundancy payment calculated as follows:

(i) four weeks' pay, plus

(ii) four weeks' pay for each completed year of service, plus

(iii) one week's pay for each completed year of service when the employee was aged 35 years or over, plus

(iv) an additional two weeks' pay for each completed year of service in excess of 10 years' service if the employee is aged 45 years or over.

(c) The employer shall pay the employee the full value of his/her accrued sick leave, annual leave with loading and/or long service leave. Where the employee is not entitled under award provision or long service leave legislation to pro rata payment for long service leave in respect of any period of service with the employer, the employer shall make a pro rata payment to the employee for that period based on the long service leave provisions applying to the employee.

(d) The employer shall pay to the employee a sum as a maintenance of income payment calculated so as to bring the employee's likely weekly wage rate or unemployment benefit in the twelve months after termination of employment up to the weekly rate applicable to his/her employment with the employer.

(e) Where it will be necessary for an employee to move to a new location in order to find new employment, the employer shall pay to the employee a sum calculated to meet the relocation expenses likely to be incurred by the employee.

(f) The emplo[illegible] shall assist employees whose employment is to be terminated [illegible]d suitable alternative employment. This assistance shall

include the granting of up to one week's additional time off without loss of pay to an employee in order to seek other employment or to make arrangements for training or retraining for future employment.

(g) As part of the assistance to employees 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 connected with training or retraining.

(h) 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 had he/she remained with the employer until the expiry of such notice.

Priority in Re-employment

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.

Redeployment

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 maintenance of income payments calculated so as to bring the employee's wages up to the rate applicable to his/her former classification or duties.

(b) The employer shall pay all relocation expenses incurred by the employee and his/her dependants 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 his/her new duties.

CLAUSE D — TRANSMISSION OF BUSINESS

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

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

Acceptance of Employment with Transmittee

2. Where a person who at the time of the transmission was an employee of the transmittor in that business, undertaking, establishment or part thereof becomes an employee of the transmittee —

(a) the period of service which the employee has had with the transmittor or any prior transmittor shall be deemed to be service of the employee with the transmittee for the purpose of calculating any entitlement of the employee to service — related periods of notice (under para. A11) or severance compensation (under para. C5);

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

Offer of Employment with Transmittee

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

transmittor in that business, undertaking, establishment or part thereof is offered employment by the transmittee, the provisions of paragraphs C4, C5 and C6 shall not apply in respect of the termination of the employee's employment with the transmittor provided that

(a) the offer is made before the transmission of the business, undertaking, establishment or part thereof;

(b) the terms and conditions of the new employment offered

(i) were not substantially different from those applying to the employment with the transmittor; or

(ii) were substantially different but the offer constitutes an offer of suitable employment in relation to the employee; and

(c) the employee unreasonably refuses that offer.

Board of Reference

4. (a) Where a dispute arises in relation to the matters referred to in paragraph D2 or D3, the dispute may be referred to a board of reference established under this award or to the Conciliation and Arbitration Commission.

(b) The functions of a board or the Commission shall be

(i) to consider any questions arising under para. D2 or D3 brought before it by any respondent union or employer;

(ii) to inquire into and if possible to settle by conciliation differences between the union and employer.

(c) The decisions or actions of a board of reference may be reviewed by the Commission on the application of the respondent union or employer concerned. In any such review, the Commission may

(i) confirm or alter any decision of the board of reference; and/or

(ii) exercise any of the functions assigned to the board of reference.

(d) Nothing in this paragraph shall prevent any party from applying to the Federal Court of Australia for an interpretation of any clause in this Award.