Mis 505/84 MD Print F7262

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of notifications of industrial disputes between

The Amalgamated Metals Foundry and Shipwrights' Union

and

Broken Hill Proprietary Co. Limited, Whyalla and others

(C No. 3690 of 1981)

Electrical Trades Union of Australia

and

Metal Trades Industry Association of Australia and others

(C No. 3735 of 1981)

Transport Workers' Union of Australia

and

Ansett Transport Industries (Operations) Pty Limited and others

(C No. 127 of 1983)

in relation to conditions of employment - termination, change and redundancy

And in the matter of notifications of industrial disputes between

The Federated Storemen and Packers Union of Australia

and

Addis (Australia) Pty Ltd and others

(C No. 1419 of 1984)

The Amalgamated Metals Foundry and Shipwrights' Union

Australasian Society of Engineers

The Amalgamated Society of Carpenters and Joiners of Australia

The Plumbers and Gasfitters Employees' Union of Australia

The Federated Ironworkers' Association of Australia

The Building Workers' Industrial Union of Australia

The Federated Miscellaneous Workers Union of Australia

and

Metal Trades Industry Association of Australia and others

(C Nos 4120, 4121, 4122, 4123, 4124, 4125 and 4126 of 1984)

Electrical Trades Union of Australia

and

A. Burton and Sons and others

(C No. 4139 of 1984)

in relation to job protection and redundancy in the metal industry

SIR JOHN MOORE, PRESIDENT
MR JUSTICE MADDERN
MR COMMISSIONER BROWN SYDNEY, 14 DECEMBER 1984

SUPPLEMENTARY DECISION

When we delivered our decision on 2 August 1984[1] we determined all the issues of principle and merely left to the parties the task of speaking to the minutes of the awards which we would make. This we repeated on 4 September when we affirmed that the purpose of speaking to the minutes was to deal with the form of the awards.

We have, since then, received a multitude of complaints from employers about the decision which we made in August and included in those complaints is a suggestion that we should revise or reconsider the decision in principle which we then made. Some of the submissions put to us on the speaking to the minutes also seem to imply that all the issues are open for reconsideration. We say again that our decision in August decided all the matters of principle and the only things left for consideration were matters which went to the form of the award.

The claim by the unions was made in 1981 and, therefore, the employers have known since then that there was a claim which could result in an award of the kind we have made. Moreover, the period of time which the case took, plus the time over which we reserved our decision, gave the employers further time to consider the implications of the ACTU claims. No one should have been surprised at the decision we brought out which was much less than the ACTU claims.

It is a reflection on the activities of employers, and of employer organisations, if they were not aware that since 1981 they were at risk of having a decision made broadly in the terms of the decision which we have made. If they did not prepare themselves for a decision, or if the employer organisations did not keep reiterating that the decision of the kind made was a possibility under the ACTU claim, then the fault does not lie with the Commission.

It is clearly a case where the employers took no action to guard against a decision of a kind which we made although they had some years of notice that such an award was a possibility.

On 2 August 1984, because of the complexity of the case, the Bench published a draft order and took the unusual course of relisting the matter for 4 September to hear the parties as to the form of the order which should be made to give effect to the decision.

[1] Print F6230

At the hearing on 4 September the ACTU produced a draft order which contained a number of amendments to the Commission's draft order which, Mr Boulton contended, were necessary to ensure that the decision of 2 August is translated into and "reflected in the draft order". The ACTU also contended that the most appropriate way for the order to be settled would be in a conference convened by the Commission.

Notice was also given to the Commission that the Commonwealth and some of the States would be making submissions related to the reservation in the Commission's decision for any party to re-argue that a savings clause for State anti-discrimination or equal opportunity legislation should be included in any award made.

The employers submitted that because of the cost implications for employers, and because the decision was already being "used merely as a springboard upon which to attempt to raise the general level of redundancy payments", the Commission should be prepared "to take the unusual step of reconsidering its decision . . . before a binding order is issued."

The employers also argued that

"if the Commission is not prepared to grant us the fundamental review which we seek, then we submit that the Commission should modify its decision in the following ways: it should totally review the requirements as to notice and in particular the provision for time off to seek alternative employment. It should review the procedures where change is being introduced and it should review the procedures where redundancies take place and in particular severance pay. Finally, it should review the position with respect to exemptions."

Reference was also made by the employers to the need to give "consideration of what should happen to awards and . . . agreements, both registered and unregistered, where severance pay provisions are being observed."

The employers also tendered a draft order which contained the modifications for which they contended.

At the end of the hearing on 4 September the Commission ruled that it was "not prepared to re-open this decision to reconsider it at large" but consideration should be given to the modifications which had been suggested.

The matter was then adjourned into conference before Mr Justice Maddern.

Conferences before his Honour were held on the afternoon of 4 September and on 6 September. At those conferences "the differences between the parties" were identified but no agreement on the various proposed amendments was reached.

As a result of the conferences the parties also provided the Commission with draft variations to the Metal Industry Award[2] and the Transport Workers (Airlines) Award.[3]

In the result the Commission had before it three draft orders from the ACTU and three from the CAI. Two (Exhibits B35 and P18) were in general terms; the others were related specifically to the Metal Industry Award and the Transport Workers (Airlines) Award.

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[2] Print F4869 [M039]

[3] Print E8807 [T029]

These draft orders were the subject of consideration before the Full Bench in proceedings in Melbourne on 31 October and 30 November and in Brisbane from 20 to 23 November.

During the Brisbane proceedings affidavits made by 46 employers were tendered and five of the witnesses were the subject of cross-examination. Additional material was also provided.

The employers contended that the evidence and material established that:

(a) the Commission's standards, particularly in relation to severance pay, do severely hit at business viability by the creation of a large and unfunded contingent liability;

(b) the implementation of the decision could cause businesses to fail because of the inability to attract finance;

(c) many businesses cannot get further finance and many proprietors have risked their personal assets to ensure that their businesses remain viable;

(d) there are a large number of unions claiming more than the Commission's standard;

(e) if further redundancies take place, proprietors will have to make payments out of their capital because there are no profits in the business for them to pay the liabilities, and there is an inability to borrow further from financial institutions to cover such a liability;

(f) there is a disincentive imposed by the decision in respect of the desirability of employing employees permanently;

(g) the consultation provisions will delay the introduction of new technology;

(h) the extended notice provisions will create even further financial obligations because the employers will tend to pay in lieu rather than have employees work out notice;

(i) many employers have sought to protect employees by superannuation schemes and unless an offset is granted they will now be required to pay twice;

(j) there is a real fear that to approach the Commission in terms of the reservation relating to incapacity to pay in the Commission's judgment may result in immediate insolvency because creditors learn about that fact and they seek to protect their own interests by calling in debts;

and

(k) there is a real fear that business will not take risks because of the contingent liability they may have to face in the event that their business venture fails.

In the light of this evidence, and the new material, Mr Polites again urged the Commission to undertake a total reconsideration of the decision.

Alternatively, Mr Polites submitted that "if the Commission is not prepared to totally reconsider the decision then it should grant the modifications sought in Exhibit P22."

Mr Polites also submitted that, in the event that the Commission takes some other course then the order should be prospective to enable an appropriate period of time for people to make arrangements to attempt to fund the contingent liability that will be created, and that the decision should be phased in by way of applying to future service only.

Mr Boulton strongly contested the conclusions reached by Mr Polites on the basis of the evidence.

His general submissions in relation to the evidence were that:

(a) the 46 employers were not a representative group;

(b) although the affidavits show some concern on the part of the 46 employers about severance pay, and some concern about the question of notice, they demonstrate a lack of concern about the other provisions of the Commission's decision;

(c) the affidavits demonstrate an incredible ignorance and misunderstanding about the Commission's decision and the consequences of the decision, amongst those 46 employers;

and that

(d) the evidence shows that some employers may have difficulty in making severance payments but that "there is a mechanism within the decision for dealing with the problem of incapacity to pay."

We have considered the material and evidence before us and we have decided not to undertake a total reconsideration of the decision.

However, as indicated in our ruling of 4 September, we have been prepared to consider the modifications suggested by the employers.

We would point out also that the decision and draft order published by the Commission did not contain an operative date and no specific mention was made in the decision as to what service would be taken into account in determining the period of notice and/or the level of severance payments.

The ACTU asked us to do two things as a result of this case. One was to produce a standard form of clause which could be applied as required to other awards of the Commission, and separately to produce an order in the Metal Industry Award. We have considered this approach but we feel that given what has transpired in this case, it is too difficult to produce a form of clause which could provide some general basis for all awards. As we have already emphasised, it is necessary to tailor the effect of our decision to each individual award. This we have done in the Metal Industry Award and we feel what we have done in that award, plus what we have said in our reasons, will enable other members of the Commission to distil from them what we intend generally to be applied in other awards.

For the purposes of this decision we have, so far as is practicable, used the various headings contained in Exhibit B35 tendered by the ACTU, which the ACTU contended should be contained in any order "for the sake of clarity in order to make the award provision easier to read and understand". We have also used the general draft orders tendered by the parties for the purposes of this decision, although the orders to issue from these proceedings will, of course, need to be tailored to meet the requirements of the two awards subject to the test case proceedings.

Where the parties are agreed on the substance of the Commission's order, the terms agreed upon are set out without comment and no comment is made in this decision on a number of technical differences between the parties.

TERMINATION OF EMPLOYMENT

Unfair dismissals

We are prepared to provide:

1. Termination of employment by an employer shall not be harsh, unjust or unreasonable. For the purposes of this clause, termination of employment shall include terminations with or without notice.

Agreed

2. Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment.

Agreed

Statement of employment

In our decision of 2 August we determined 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."[4]

The employers suggested that the employee should be required to make the request for a written statement "in writing" on the grounds that that would not cause undue hardship to the employee and help avoid disputation.

The ACTU contended that a necessity for a request in writing would be an unnecessary complication and unreasonable for some workers.

We have decided against requiring an employee to make his/her request in writing and we will provide:

3. The employer shall, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of his/her employment and the classification of or the type of work performed by the employee.

[4] Print F6230 p.16

Notice of termination by employer

The employers contended that the notice of termination of employment required from an employer should be related to a period of "continuous service" by the employee concerned and they contended that "continuity of service should be deemed broken by strike or other industrial action, a stand down or an unauthorised absence."

At page 19 of the decision of 2 August 1984, we referred to the expressions "continuous full time employment" and "service in connection with the period of notice".

We have considered the concepts of "continuous employment" and "continuous service" and we consider we should relate the required notice to continuous service.

In determining the definition of continuous service, which we consider to be appropriate, we have looked at the service requirements contained in the Annual Leave clause, clause 25, of the Metal Industry Award and in clause 5 of the Metal Industry (Long Service Leave) Award.[5]

We are not prepared to accept the provision that "continuity of service should be deemed broken by strike or other industrial action, a stand down or an unauthorised absence" as suggested by the employers. However, on balance, we will adopt the continuous service definition contained in clause 25 - Annual Leave - in preference to that contained in the Metal Industry (Long Service Leave) Award.

We also consider that:

(a) to qualify for the extended notice based on age the employee should be over 45 years of age at the time at which the notice is given;

(b) to make the position clear, special provision should be made for the splitting of notice;

and

(c) there should be no change to the present position contained in paragraph 6(d)(i) of the award which provides that in cases where payment in lieu of notice is made the employee should receive the wages he/she would have received in respect of the ordinary time he/she would have worked during the period of notice had his/her employment not been terminated.

Substantial debate also took place as to the categories of employees to which the extended period of notice should not apply.

The employers contended generally that the period of notice shall not apply

"in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency, or neglect of duty, or in the case of casual, part-time or seasonal employees, or temporary employees, employees on daily or hourly hire, or apprentices or trainee apprentices, employees who are terminated because of industrial action, employees engaged for a specific period of time or for a specific task or tasks, employees engaged on construction projects, and in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work."

[5] Print F5013 [M160]

However, in relation to the Metal Industry Award the employers sought exemptions only in cases where conduct justified instant dismissal, "casual or part-time employees or apprentices or employees who are terminated because of industrial action or employees engaged for a specific period of time or for a specific task or tasks or employees engaged on construction projects."

To the extent that the employers claimed generally that extended notice should not be required for temporary employees, seasonal employees and trainee apprentices or where provision is contained in the calculation of the wage rates for the itinerant nature of the work, we have decided that the question of extended notice will need to be determined in the context of particular cases.

Furthermore, the employees on daily or hourly hire who are not included in our clause are not included because their exclusion was not claimed in relation to the Metal Industry Award. The unions confined their draft order to the cases of conduct which justified instant dismissal, casual, part-time or seasonal employees or employees on daily or hourly hire. However, it should be stated that Mr Boulton expressed his concern at the exclusion of part-time employees from the extended notice which, he contended was discrimination against part-time employees. He also referred to the fact that there was no mention of part-time employees in relation to the exemption from the redundancy provisions and he emphasised the fact that, in the Metal Industry Award, part-time employees receive the same entitlements as weekly employees pro rata. Mr Boulton contended that an appropriate approach was to look at part-time workers in relation to particular awards.

In our decision at page 19 we said,

"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."

On reflection, however, notwithstanding the words used, we have decided that the exclusion of part-time employees should be looked at on an award by award basis and in the Metal Industry Award we are prepared to award part-time employees the periods of extended notice because, by definition in that award, they are weekly employees and are treated as such for other award provisions such as annual leave.

We are also prepared to exclude apprentices and employees engaged for a specific period of time or for a specific task or tasks as their exemption is consistent with our intention.

However, we are not prepared to exempt employees terminated because of industrial action or employees engaged on construction projects from the extended notice, although it should be clear that employees in those categories may well be otherwise exempt from the extended notice for other reasons.

In relation to this provision, debate also took place about the level of payment that should be used to calculate payment in lieu of notice. In coming to our decision, we have been influenced by the existing provisions in the Metal Industry Award for termination and annual leave, and have decided that regard should be had to the ordinary time rate of pay the employee would have received had his/her employment not been terminated. That rate may not be appropriate in relation to other awards.

Debate also took place about the proper way to express the exclusion in relation to employees dismissed for conduct which justifies instant dismissal.

Mr Boulton drew our attention to the fact that the power of summary dismissal varies from award to award and, in these circumstances, we believe that any consideration of the terminology appropriate for use in any award variation has to be considered in relation to each award.

In coming to our decision in this case, we have paid particular attention to paragraph 6(d)(ii) of the Metal Industry Award which provides that "the employer shall have the right to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct and in such cases the wages shall be paid up to the time of dismissal only."

So far as notice of termination by the employer is concerned, the parties agreed that it be set out in tabular form. We are prepared to provide:

4.(a) In order to terminate the employment of an employee the employer shall give to the employee the following notice:

Period of continuous service Period of notice

1 year or less 1 week 1 year and up to the completion of 3 years 2 weeks 3 years and up to the completion of 5 years 3 weeks 5 years and over 4 weeks

(b) In addition to the notice in subclause (a) hereof, employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional week's notice.

(c) Payment in lieu of the notice prescribed in subclause (a) and/or (b) hereof shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified in part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the wages an employee would have received in respect of the ordinary time he/she would have worked during the period of notice had his/her employment not been terminated shall be used.

(e) The period of notice in this clause shall not apply in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(f) For the purposes of this clause, continuity of service shall be calculated in the manner prescribed by clause 25(e) - Annual Leave - of the Metal Industry Award.

Employers who employ less than 50 employees

In their draft order in relation to variations to the Metal Industry Award, the employers contended that the provisions in relation to termination of employment should not apply to employers who employ less than 50 employees.

The employers relied heavily on the material in the 46 affidavits as an indication that small business cannot cope with the type of inflexibility introduced into operations as a result of the requirement to give long notice periods or make large payments in lieu of notice.

Mr Polites contended that there was ample ground for an exemption to employers who employ less than 50 on the basis of those affidavits. He relied on the exclusion operative in relation to the Employment Protection Act in New South Wales but that Act does not deal with the question of extended notice.

Moreover, we do not believe that there is sufficient material in the affidavits to warrant any alteration to our decision which does not include any such exemption.

Notice of termination by employee

The decision provided 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.

The primary argument in relation to this part of the decision was concerned with the question whether an employee should be liable for forfeiture only of wages held in hand when an employee fails to give the required notice or whether other moneys in hand might be used. The employers also sought to provide an award right for an employer to recover any moneys due.

Both of these provisions were opposed by the ACTU. In arguing that the amount of possible forfeiture should be limited to wages only it argued that such a restriction would be a balance between the competing considerations of reciprocity of treatment for employers and employees and the need not to impede the mobility of labour.

We are prepared to provide that the employer shall have the right to withhold any moneys with a maximum amount equal to the ordinary time rate for the period of notice but we are not prepared to extend the award by including a provision which would give the employer an award right to recover any moneys.

We are prepared to provide that:

5. The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

If an employee fails to give notice the employer shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice.

Contracting out of notice period

The employers also claimed that there should be a provision which would allow the employer and employee to agree, in writing, to waive the period of notice.

It was claimed that there would be circumstances where this would be of benefit to both parties but we are not satisfied, on the submissions before us, that such a clause would be appropriate.

Disputes settlements procedure

In our decision of 2 August we said that

"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" and further, "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." [6]

The employers submitted that the settlement of disputes clause contained in our draft order ought to be amended to:

(a) require notification in writing of the occurrence of the event giving rise to the claim within one week;

(b) make clear that the requirement to notify "duly authorised representatives of the union" was limited to union members;

(c) make clear that work should continue "as required by the employer in accordance with the award" while the matters in dispute are being dealt with in accordance with the clause;

and that

(d) where work does not so continue the claim shall be deemed to have lapsed.

The ACTU claimed that there should be no alteration to the clause as published in the Commission's draft order.

As to the time limit proposed by the employers, we have decided to reject it "because of the nature of our settlement of disputes clause". Furthermore, we consider it appropriate that the settlement of disputes clause without a time limit on its operation, should be allowed to operate for a trial period.

As to the suggestion that there should be the requirement to notify "a duly authorised representative of the union" should be limited to union members, the reference to "his/her union" which appears throughout our order is, in fact, limited to union members. We do not, therefore, intend to alter this expression.

Furthermore, we are unable to distinguish any significant difference between the expression "work should continue in accordance with the award" and the expression used by the employers, and we are not prepared to provide that where direct action of employees, other than the employee dismissed, occurs the claim should lapse.

We are prepared to provide in the Metal Industry Award for a settlement of disputes clause in the following form:

6. Subject to the provisions of sections 5, 119, 122 and 123 of the Conciliation and Arbitration Act 1904, any dispute or claim arising under this clause should be dealt with in the following manner:

(a) As soon as is practicable after the dispute or claim has arisen, the employee concerned will take the matter up with his/her immediate supervisor affording him/her the opportunity to remedy the cause of the dispute or claim.

(b) Where any such attempt at settlement has failed, or where the dispute or claim is of such a nature that a direct discussion between the employee and his/her immediate

[6] Print F6230 p.17

supervisor would be inappropriate, the employee shall notify a duly authorised representative of his/her union who, if he/she considers that there is some substance in the dispute or claim, shall forthwith take the matter up with the employer or his/her representative.

(c) If the matter is not settled it shall be submitted to the Australian Conciliation and Arbitration Commission which shall endeavour to resolve the issue between the parties by conciliation.

(d) Without prejudice to either party, work should continue in accordance with the award while the matters in dispute are being dealt with in accordance with this paragraph.

Time off work during the period of notice

Under the heading "Termination of Employment" we said at page 20 of our decision,

"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."

The ACTU argued that it was clear that the decision meant "one day off per week" in both cases and that the Commission's intention was made clear in the Commission's draft order and the statement of the President, Sir John Moore, on behalf of the Bench on 2 August.

The CAI contended that any award should grant employees in both sets of circumstances only one day off, and they further submitted that the time off should be taken at times that are convenient to the employer, after consultation between the employer and employee; although it was prepared to provide that the employer's agreement shall not be unreasonably withheld.

Provisions were also claimed which related to the employee's obligations and/or entitlements when he/she has received an offer of employment and requiring the employee to produce proof of attendance at an interview.

In relation to termination of employment, we believe we should do what we said in our decision and grant "up to one day off without loss of pay".

We shall provide:

7. Where an employer has given notice of termination to an employee, an employee shall be allowed up to one day'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.

SAVINGS CLAUSE FOR STATE ANTI-DISCRIMINATION OR EQUAL OPPORTUNITY LEGISLATION

In the ACTU log in this case, there is a claim that certain Acts should be permitted to continue to operate despite any decision we might make. The log provision is to be found on page 75 of our decision of 2 August 1984 but for convenience we repeat the provision here:

"4. Savings provisions.

(a) The provisions of paragraphs Al 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 Al 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 Al and A2."

In that decision we reserved leave for any party to re-argue that a savings provision for State legislation should be included in any award made.

The savings clause is concerned with two kinds of Acts, the first being the preservation of a Federal Act and the second being the preservation of various State Acts. As far as any Federal legislation is concerned, the law is clear that awards of this Commission cannot be made to be inconsistent with laws of the Commonwealth (Federated Seamen's Union of Australasia v. Commonwealth Steamship Owners' Association)[7] but it is possible that an award may make additional provisions to those included in the Act (Federated Seamen's Union of Australasia v. Commonwealth Steamship Owners' Association).[8] Therefore, as far as the Federal Act itself is concerned, whatever we do would be subject to these general legal provisions.

It is our view that if we were to make award provisions without saving the Federal Act such provisions would not be inconsistent with the proposed Federal Act because they deal with different issues. One deals with industrial matters and the other with discrimination.

As to the State Acts, a complication arises because the Federal Act, or more precisely, the Act which is to be passed by the Federal Parliament contains provisions which save State Acts in States where there are appropriate Acts. When this Federal legislation is passed a State which has an appropriate law would not have that law interfered with by the Federal legislation. The legislation which is preserved by the Federal Act varies from State to State, as we will discuss later. The question of whether or not the reservation of the Commonwealth law would itself embrace the relevant State laws because those laws are themselves reserved by the Commonwealth law is a matter for consideration.

[7] (1922) 30 CLR 144
[8] (1924) 19 CAR 53

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The position of the State Acts is not affected, in our view, by the fact that they are preserved by the proposed Federal Act. The most that can be said about the proposed Federal Act is that it preserves the existence of the State Acts, in other words it would disclose the intention not to cover the field which those State Acts cover. It would not, as it were, give Federal effect to those State Acts and they would not be equated, in our view, to Federal law.

Therefore, the result of the general principle that we cannot make awards inconsistent with Federal laws will not apply as far as the State Acts are concerned.

However, the general law is clear that if we do not provide a savings clause our award provisions will prevail over the State Acts to the extent of their inconsistency.

The claim by the ACTU was supported by the Commonwealth and by New South Wales, Victoria, South Australia and Western Australia. Broadly speaking, the argument was that each of these States had set up, or was about to set up, special machinery dealing with discrimination. It was put to us that we should not enter this field because of the existence of specialised State Tribunals.

The Tribunals and the legislation varies from State to State but in all cases there is, or there will be, a Tribunal which will be vested with power to deal with discrimination in areas wider than dismissals, but including dismissal.

It was put to us that our provision regarding wrongful dismissal on the ground of discrimination as defined should not be allowed to stand because it might have the effect of rendering inoperative these provisions of the various State Acts. We were given considerable detail of the State Acts to demonstrate to us that quite elaborate machinery has been created and quite a good deal of attention has been given by the various State legislatures to the question of discrimination. It was put that where there is an element of discrimination whether it be on the ground of sex, race or other form of discrimination prohibited by State law, the State Acts should be allowed to have full play uninhibited by award provisions about wrongful dismissals. It was put that these Tribunals would have many instances other than dismissals to deal with in the area of discrimination.

We point out, however, that none of the States have identical legislation and, indeed, there is considerable variation between them. This, it was put by the employers, would cause problems to employers operating in different States because they would have to familiarise themselves with the particular provisions which apply in each State and which differ between States.

In our view the arguments advanced by the States, by the Commonwealth and by the ACTU overlook the fact that very often the question of the dismissal of an employee, no matter what the ground is, can be the subject of an industrial dispute. It is true, in our decision of 2 August, we made a statement that we thought that it would be better for matters of dismissal on the grounds of discrimination to be first referred to Committees on Discrimination in Employment and Occupation either at State level or at the Commonwealth level. However, it is proposed that these Committees should go out of existence when the new Federal law comes into operation and, therefore, what we said about their existence and expertise no longer applies. They were tripartite Committees on which employers and unions were represented, whereas the new bodies which are established, or are to be established, are directed towards discrimination and will not be tripartite in their nature.

We are conscious of our duty to prevent and settle industrial disputes and we believe that in the area of industrial relations, as far as employees covered by Federal award are concerned, we are in a better position to deal with termination of employment whether it be of the kind of discrimination covered by State Acts or not. We are not prepared to vacate the field of industrial relations, even about dismissals on the grounds of discrimination to bodies which have been set up for another purpose.

We believe that it is better that all disputed dismissals, whether involving discrimination or not, should be dealt with by the same Tribunal.

We, therefore, are not prepared to award the savings clause which has been asked for by the ACTU. We point out that if we were to allow the savings clause employers might be put in double jeopardy in the sense they might have to face more than one piece of litigation about a dismissal. It would not be unheard of for a union to take a different view from an individual employee and it is possible that an individual employee might wish to proceed under the State Act and the union, sensing the matter to be an industrial dispute, might want to proceed before this Commission. Moreover, if an action were taken under one of the State Acts and it were found not to be discrimination within the meaning of the Act, then the award would apply because by definition the matter would not be "a form of discrimination proscribed by" the State Act and it would then become automatically a matter to be covered by the award.

We think that to preserve the State Acts would create an unsatisfactory position and, in addition to our view that the expertise of the Commission should not be lost in matters which are so often purely industrial, employers should not be put at risk of multiplicity of actions.

In reaching this conclusion, we note that the employers made certain submissions which were critical of the conduct of the State Tribunals appointed under the various Discrimination Acts. We would emphasise that it is no part of our thinking that the various discrimination bodies are not doing the task which they are called upon to perform under their Acts.

It is simply our view that it is better in the field of industrial relations if this Commission were to deal with dismissals under Federal awards.

INTRODUCTION OF CHANGE

In our decision of 2 August 1984 we decided that:

"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 about the nature of the changes proposed, the expected effect of the changes on employees and any other matters likely to affect employees. However, we will not require an employer to disclose confidential information." [9]

The ACTU claimed that this clause should contain a provision which restricted the right not to disclose information considered to be confidential where "appropriate assurances are given that the information shall not be divulged to any other employer or be used for any purpose other than for the purposes of the discussions."

[9] Print F6230 p.22

The employers submitted that:

1. the obligation to notify employees and their union or unions should only apply when an employer had made a firm decision to make major changes;

2. there should be no obligation to notify a union or unions where employees likely to be affected are not union members;

3. in considering whether the effect of a change is significant, regard should be had to the nature and history and organizational requirements of the industry concerned and existing custom and practice;

and that

4. where an award makes provision for alteration of any matters which would fall within the definition of "significant effects" then that alteration should be deemed not to have a significant effect.

We are not prepared, in any circumstances, to order an employer to disclose confidential information the disclosure of which would be inimical to his/her interests and we, therefore, reject the ACTU claim in relation to that matter.

We also believe that the obligation to notify employees and their union or unions should only apply when an employer has made a definite decision to make major changes. Such a provision is more appropriate than the expression we used in our draft order "where an employer proposes to make major changes."

Further, we have already commented that it was not our intention that unions be notified in cases where notification to employees is concerned unless employees are union members.

Mr Boulton objected to the reference by the employers to the nature, history and organizational requirements of the industry concerned and existing custom and practice on the grounds of its uncertainty. He also submitted that it was not necessary for a proviso to be added to cover the ordinary duties of employees, claiming that that result was achieved by reading the paragraph as a whole.

We are not prepared to include the expression contended for in our award but we are prepared to indicate that where an award already makes provision for alteration of any matters, such as changing shift work rosters, the existing award provision should prevail and that alteration should not be included in the definition of significant effect.

The employers also supported a requirement for the employers to give "prompt consideration to matters raised by employees and/or their unions in relation to the changes" rather than a requirement to discuss with employees and their unions "measures to avert or mitigate the adverse effects of such changes on employees."

They also asked that the specification in the decision that the requirement to provide all relevant material in writing should be changed because of the habit of written information "falling off the back of a truck".

Having regard to our decision in relation to confidential information, and the clear words in the decision, we are not prepared to delete the requirement that all relevant information be provided in writing.

We have decided also to include in our award an obligation for the employers to discuss with employees and their union or unions measures to avert or mitigate the adverse effects of the employers' decision. Further, although we believe that a requirement to give prompt consideration to matters raised by employees and their representatives in discussions is implicit in the clause, we are prepared to add the requirement to give prompt consideration.

We are prepared to provide:

1. (a) Where an employer has made a definite decision to introduce major changes in production, program, organization, 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 work-force or in the skills required; the elimination or diminution of job opportunities, promotion 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. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

2. (a) The employer shall discuss with the employees affected and their union or unions, inter alia, the introduction of the changes referred to in clause 1 hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their unions in relation to the changes.

(b) The discussions shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in clause 1(a) hereof.

(c) For the purposes of such discussion, the employer shall provide to the employees concerned and their union or unions, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that any employer shall not be required to disclose confidential information the disclosure of which would be inimical to his/her interests.

REDUNDANCY

Consultation and provision of information

The employers submitted that the redundancy provisions should not apply to termination of employment "associated with the general turnover of labour or a seasonal downturn within the industry or reclassification or alteration of working conditions."

All these expressions were opposed by the ACTU because they would cut down unreasonably the redundancy provisions, they were uncertain as to meaning and they were not justified by the argument.

In our decision we made reference to a number of definitions of redundancy and our draft order was based on the definition of the Chief Justice, Mr Justice Bray, in the South Australian Supreme Court.[10] Further, at page 33 of the decision we decided that there should not be any fundamental distinction, in principle, based on the causes of redundancy.

Nevertheless, it was not our intention that the redundancy provisions should apply to the "ordinary and customary turnover of labour"; an expression used by Mr Justice Fisher in his decision related to the Employment Protection Act in New South Wales.

However, notwithstanding the helpful submissions of the parties in these proceedings, we have some difficulty in finding a suitable expression to make our intention clear. There is no doubt that we did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business.

Furthermore, there is an overlap between the definition of redundancy for the purposes of any award and the categories of employees exempted from severance pay. To some extent the same can be said for the provisions relating to the introduction of change.

In the circumstances, we are prepared to provide that the redundancy provisions shall not apply where the termination of employment is "due to the ordinary and customary turnover of labour" but we will not include the other categories referred to by the employers.

We are also of the opinion that the employer should provide all relevant information "in writing".

We consider that the following provisions would be suitable for inclusion in any award variation which may follow from our decision of 2 August 1984:

1. (a) Where an employer has made a definite decision that he/she no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment,the employer shall hold discussions with the employees directly affected and with their union or unions.

(b) The discussions shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provision of clause (a) hereof and shall cover, inter alia, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to mitigate any adverse effects of any terminations on the employees concerned.

(c) For the purposes of the discussion the employer shall, as soon as practicable, provide to the employees concerned and 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, and 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.

[10] Print F6230 p.25

(d) This clause shall not apply to employers who employ less than 15 employees.

Transfer to other duties

The employers contended that the payments to employees transferred to other duties referred to at page 39 of our decision should:

(a) be restricted to transfers to lower paid duties;

(b) that the option of payment in lieu of notice should be clearly specified;

(c) that specific reference should be made to the method of calculation of payment in lieu;

and

(d) that an employee and employer may agree in writing to waive the payment in lieu provided by this clause.

Restricting the operation of the clause to transfers to lower paid duties is consistent with our intention expressed at page 39 of the decision and we are not prepared to extend any provision to cover any employee transferred to other duties. Indeed, the provision for payment would be meaningless for other transfers.

To provide that the employer has the option to make payment in lieu of notice is consistent with the position we adopted earlier in relation to termination of employment, as is the refusal to provide for employees and employers to opt out of any payment in lieu otherwise due.

We would be prepared to specify in a clause relating to transfer to other duties a specific reference to the method of calculation of any payment in lieu.

An appropriate provision to give effect to our decision would be:

2. Where an employee is transferred to lower paid duties for reasons set out in clause 1 hereof the employee shall be entitled to the same period of notice of transfer as he/she would have been entitled to if his/her employment had been terminated, and the employer may at his/her option, make payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rates for the number of weeks of notice still owing.

Transmission of business

The only difference between the parties in relation to transmission of a business was whether the clause should apply to transmissions both before and after the date of any award or only after.

For reasons expressed later in relation to the employers' argument that the whole of the order shall only apply to future service by an employee, we have decided that any award variation should cover transmission of a business both before and after the date of any award.

The following provision would be consistent with our decision:

3. (a) Where a business is before or after the date of this award, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee") and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee:

(i) the continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission;

and

(ii) the period of employment which the employee has had with the transmittor or any prior transmittor shall be deemed to be service of the employee with the transmittee.

(b) In this subclause "business" includes trade, process, business or occupation and includes part of any such business and "transmission" includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

Time off work during the notice period

The employers contended that we should provide only one day's time off without loss of pay for the purpose of seeking other employment whereas the ACTU contended that we should allow up to one day off without loss of pay during each week of notice.

This question has been discussed under the heading "Time off work during the period of notice" in relation to termination of employment and in relation to that matter we have granted only one day's time off.

However, in relation to redundancy, the decision at page 40 indicated that "an employer shall grant up to one day off without loss of pay during each week of service" and we have decided to comply with the clear words in the decision.

However, because of the extent of the period of time a redundant employee may have off without loss of pay for the purpose of seeking employment, we consider it necessary to provide some protection for the employer against any possible abuse of the clause. Although we are not prepared to award the clause suggested by the employers in full, we are prepared to provide some protection. In drafting this clause we have had regard to clause 24(b) - Sick Leave - of the Metal Industry Award which relates to single day absences.

In the circumstances, we consider that it would be appropriate to provide that:

4. (a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he/she shall not receive payment for the time absent.

For this purpose a statutory declaration will be sufficient. Notification to the Commonwealth Employment Service

The employers contended that where a decision has been made to terminate redundant employees, the employer should simply be required to notify the Commonwealth Employment Service.

The decision of the Commission on 2 August 1984 at page 40 said:

"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."

In the circumstances, we are not prepared to grant the employers' claim but we have examined the nature of the material that should be provided and we have decided:

5. Where a decision has been made to terminate employees in the circumstances outlined in clause 1 hereof, the employer shall notify the Commonwealth Employment Service thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

Severance pay

The employers and the ACTU differed in respect to the proposed severance pay clause on the question of continuous service and on what should be the definition of a "week's pay" for the purpose of calculation of any payment.

So far as the question of continuous service is concerned, we have decided that the periods of service required before payment is due should be continuous and that the definition of continuous service should be the same as that used for the calculation of service in relation to the notice period in cases of ordinary termination of employment.

The ACTU argued that there was no need to change the expression contained in the decision where we said "week's pay" means the ordinary time rate of pay for the employee concerned.

However, the employers considered we should refer specifically to the rates prescribed by the award for the employment in question.

We have decided that, in the Metal Industry Award, the amount of severance payment should be calculated on the same basis as that for payment in lieu of notice on termination of employment. We would emphasise that that decision is reached having regard to the provisions of the Metal Industry Award. A different decision may well be appropriate in the context of other awards.

In the circumstances, we consider an appropriate clause would be:

6. In addition to the period of notice prescribed for ordinary termination in clause 4, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in clause 1 hereof shall be entitled to the following amount of severance pay in respect of a continuous period of service:

Period of continuous 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.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

Employee leaving during the notice period

The ACTU claimed that specific provision should be made for the position where redundant employees leave during the notice period.

It claimed that any award should provide that:

"7. An employee whose employment is terminated for reasons set out in clause 1 hereof 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. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice."

This provision was based on the passages at page 51 of the decision where we dealt with the position of employees under notice of termination for redundancy who wish to leave their employment.

Little debate took place on the details of this clause. In the circumstances, we are prepared to grant the ACTU provision as drafted, as it would appear to adequately give effect to the terms of the decision.

Superannuation

The employers claimed that a provision should be inserted in any award made to provide that:

8. Where an employee who is terminated receives a benefit from a superannuation scheme, he/she shall only receive under clause 6 the difference between the severance pay specified in that clause and the amount of the superannuation benefit he/she receives which is attributable to employer contributions only.

If this superannuation benefit is greater than the amount due under clause 6 then he/she shall receive no payment under that clause.

The CAI referred to the fact that there are employers who have voluntarily placed their employees in superannuation schemes where they have paid equal or greater contributions than the employees. In other cases they have funded the schemes themselves. It claimed that it would be totally unfair, in respect of such a situation, for the employer to have to pay twice.

The employers claimed that the attitude of the ACTU that superannuation is a different matter and ought to be disregarded in these situations is demonstrably wrong. They contended that it was a practical proposition to write a provision into an award, that the circumstances in which superannuation can be taken into account should be made clear, and that what was proposed by the employers is fair, equitable and perfectly consistent with the Commission's decision.

The ACTU also referred to the Commission's decision and pointed out that the decision only said that an employer can make application for relief which might be granted on such terms as the Commission thinks fit.

Mr Boulton reiterated his earlier submissions that superannuation and severance pay were provided for distinct purposes. Superannuation pay provided income protection and assistance for workers on age retirement. Severance pay provides compensation for loss and hardship consequent on the loss of jobs due to redundancy.

The ACTU said that whilst it accepted the Commission's decision it did not accept that in an order the Commission should prejudge the way in which superannuation should be taken into account.

It also contended that it was preferable to deal with superannuation on an ad hoc basis in the light of all the circumstances because of the many and varied types of superannuation schemes and because in many new arrangements employees will not receive a superannuation payment in cash.

Our decision in relation to superannuation payments at page 49 said:

"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."

and further

"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 do believe that, in contrast to the other exceptions we provided in our decision in relation to incapacity to pay and where an employer obtains alternative employment for a redundant employee, it would be practical and preferable to make the position in relation to superannuation clear in our decision.

Furthermore, particularly as we are not prepared to make our decision operate in relation to future service only, we are prepared to award the clause suggested by the employers with one amendment. We do not believe that, in cases where the employers' contributions are paid out on termination of employment that the distinction between superannuation and severance pay is as clear as the ACTU suggests.

There is substantial merit in the employers' submission that where an employer has voluntarily introduced a superannuation scheme, and his/her contributions are paid to an employee on termination, it would be inequitable to make him/her pay severance pay in addition.

However, as the ACTU has claimed, there may be cases where a different solution is warranted.

In the circumstances, we consider that we should add to the clause suggested by the employer the expression "subject to further order of the Commission".

Incapacity to pay

In general terms, the employers submitted that the Commission did not give sufficient consideration to the question of cost and, particularly, the question of the cost being unevenly spread among enterprises. They claimed that the decision could have catastrophic and uneven effects, particularly on small enterprises. The employers also claimed that providing for severance pay would have a dramatic effect on a firm's ability to borrow from lending institutions.

They also attacked the practicality of the reliance on the procedure outlined by the Commission to deal with this matter. They claimed that the practical result of an employer seeking to exercise the reservation may well lead to the financial failure of the enterprise because of the effect on his/her business creditors.

The employers also indicated their concern with the meaning of the expression "capacity to pay" and expressed particular concern that capacity could be thought to exist by reference to a proprietor's personal assets.

They also expressed concern at the likelihood of direct action being taken against an employer to preclude him/her from making such an application.

They further submitted that if the decision was preserved in the form envisaged, then the award should contain a clause in the following terms:

"Where an employer does not have the capacity to pay the severance payment required by clause C6 he/she shall be entitled to an order from the Commission that he/she shall not be required to make any payments specified in clause 6."

As an indication of their concern the employers originally proposed that all applications should be confidential but, on reflection, they submitted that they ought to be entitled to an order preserving confidentiality of financial information under section 186 of the Act.

Governments also expressed concern at the nature of the provision in the Commission's decision and submitted that the decision should contain a paragraph in the following form:

"8. (b) (i) The provisions of Part C shall not apply to employers coming within the definition of 'small business' as provided hereunder.

(ii) A 'small business' for the purposes of this award shall be an employer employing no more than 100 employees or such number of employees as the Commission may, from time to time, determine by variation of this award.

(iii) Notwithstanding the provisions of (i) and (ii) hereof:

1. The Commission may, on application, make a variation to this award to provide redundancy benefits to particular employees of a particular employer having regard to all the circumstances then existing including the capacity of the employer to pay, the interests of continuing employees and the continued viability of the employer's business.

2. Any variation made pursuant to (iii)1 hereof shall in no circumstances provide for benefits greater than nor otherwise unavailable in terms of the general application of redundancy benefits provided for in this award."

In relation to larger businesses they did not suggest any particular variation to the Commission's decision that was not covered by their submissions in relation to operative date and future service.

The Commonwealth submitted that in genuine cases the reservation in relation to "incapacity to pay" should go a considerable way towards mitigating the effects of the decision on small business. They supported the CAI proposal in so far as it involved incorporating the exemption provision in the award.

The ACTU contended that the proposed capacity to pay exemption was inconsistent with the Commission's decision which simply allowed for employers to argue incapacity and for the Commission to make an appropriate order in the circumstances.

It indicated that it was opposed to the provision in the decision which allows incapacity to pay arguments but accepted that the Commission's decision provided for applications to be made in particular cases.

Objection was also taken on the ground that the clause envisaged a total exemption whereas only a partial exemption may be warranted. The ACTU also argued that the proposed provision would remove any discretion from the Commission in granting appropriate relief in the circumstances of a particular redundancy case. In this latter respect, the ACTU relied on the provisions of the New South Wales Employment Protection Act referred to in the decision.

The ACTU conceded that the mechanism for handling such applications should provide for expeditious handling and that applications might appropriately be made pursuant to section 186.

It opposed the Queensland and Tasmanian Governments' proposition and argued that it was not appropriate for the Commission, at this stage, to lay down criteria with respect to capacity to pay. Its attitude to the provision so far as "small business" is concerned is referred to elsewhere in this decision.

The ACTU contended that the matter has to be determined at the time of the application having regard to all the circumstances, and that the best approach would be to allow applications to be decided by reference to all the circumstances of a particular case, as envisaged by the Commission's decision.

We are not prepared to grant the clauses suggested by either the employers or the Queensland and Tasmanian Governments. In particular, we agree with the ACTU that applications must be determined in the circumstances at the time of the application, and we do not believe that it is appropriate to also provide an all or nothing position which appears to be envisaged by the employers' application.

Having regard to the attitude expressed by the ACTU in relation to claims by employers that capacity does not exist, and to the importance of this exception to the standard of severance pay otherwise fixed, we have decided that a clause should be inserted in the award so that the employers will be aware of their right to argue incapacity to pay.

We are prepared to award the following clause which was based on an alternative wording to that proposed by the employers. The alternative wording was suggested by the ACTU:

9. An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

Alternative employment

The employers contended that where an employer has gone to the trouble and expense of finding acceptable alternative employment for his employee, that employer ought to be prima facie entitled to relief from the requirement to make severance payments.

They claimed that there was not such a welter of non-transferable benefits as to provide what is an unduly onerous obligation on employers to seek an exemption.

The ACTU claimed that the CAI draft was inconsistent with the decision which clearly envisaged an application to the Commission because it simply exempted an employer who "obtains alternative employment for an employee from the obligation to pay any severance pay".

It argued also that the CAI provision was a recipe for abuse and would lead to industrial problems, and that the CAI draft ignores the rights of employees and the need for fair treatment. The ACTU contended that the CAI draft completely disregarded the comment in the decision that "it would be important to consider whether previous service with the previous employer was recognized as service with the new employer".[11]

We are not prepared to award the clause which the employers claim. However, it would be consistent with our decision for the award to provide as follows:

[11] Print F6230 p.49

10. An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if he/she obtains acceptable alternative employment for an employee.

Exemption from redundancy clause

The employers argued that the redundancy clause should not apply:

"Where employment is terminated as a consequence of conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual, part-time or seasonal employees, temporary employees, or employees on daily or hourly hire, or apprentices or trainee apprentices, employees who are terminated because of industrial action, and employees engaged for a specific period of time or for a specific task or tasks."

They also argued that the clause should not apply to cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work and to employees engaged on construction work.

The decision of the Commission, so far as it is relevant to this question, states:

"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."[12]

The ACTU and the CAI both supported the concept of similar exclusions in relation to the periods of notice prescribed and in relation to severance payments, and we have dealt with the exclusions to the extra periods of notice earlier in our decision.

However, the ACTU also argued that the effect of the proposed amendment by the employers would be to exclude certain categories of workers from the whole of the redundancy provisions and not just the operation of the severance pay provisions. It claimed that the decision did not justify such a provision.

In the light of the ACTU submissions, we have given further consideration to the nature of the exemption we should provide and having regard, in particular, to the fact that we have provided specifically for the position of redundant employees with less than one year's continuous service, and having regard to the nature of the categories, we are prepared to exempt the employees concerned from the whole of the redundancy provisions.

In relation to the categories of employees which should be exempt, we earlier decided that we were not prepared to exempt employees terminated because of industrial action or employees engaged on construction projects from extended notice, and we are not prepared to exempt employees in those categories from the redundancy pay provisions either. We emphasise, however, that employees in those categories may be exempt from the redundancy provisions on other grounds.

[12] Print F6230 p.48

Consistent with what we have said in relation to the period of notice, and because part-time employees were not excluded from the severance pay provisions in our decision, we shall not exclude part-time employees as requested by the employers. Further, the fact that seasonal employees, temporary employees and employees on daily or hourly hire or trainee apprentices do not appear in the clause we have drafted only means that those categories of employees are not provided for in the Metal Industry Award. The same can be said for the position of employees whose wage rates make provision for the itinerant nature of the work, in so far as Part I of the Metal Industry Award is concerned.

The necessity for their exclusion, or otherwise, from any provisions in other awards will be a matter for consideration having regard to the terms of those other awards but clearly, having regard to our decision, their inclusion for the purposes of redundancy provisions would be unlikely.

We consider that the Metal Industry Award should provide that the redundancy clause shall not apply:

11. Where employment is terminated as a consequence of conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, in the case of casual employees, apprentices, or employees engaged for a specific period of time or for a specified task or tasks.

Employers who employ less than 100 employees

The employers contended that the material presented in these proceedings must have persuaded the Commission of the very serious impact of any redundancy provision on small and medium size business and they originally contended, in relation to the redundancy clause, that the Commission should provide:

"This clause shall not apply to employers who employ less than fifteen employees."

Late in the proceedings the number was increased to 50. As stated earlier, the Queensland and Tasmanian Governments argued for exemption for all employers with less than 100 employees in terms of their application previously set out.

The ACTU contended that such a provision would be inconsistent with the Commission's decision. Mr Boulton pointed out that the decision had exempted employers with less than 15 employees from the notification and consultation provisions but not the other provisions.

It claimed also that the employers had not discharged the onus that must be on them to justify an exemption. It argued that there was no evidence of incapacity and queried how one would define small business.

In the view of the ACTU the evidence did not show that all employers with less than 50 employees are unprofitable or could not afford to make severance payments. It argued that profitability and capacity varies from firm to firm according to a whole range of factors; that the problem was also present in larger businesses and that it was better to deal with the problems on an individual employer basis.

We would not be prepared to award an exemption from severance payments to employers who employ less than 100 employees from our decision, although we are aware that some such enterprises may not have the capacity to pay.

However, in the interests of uniformity with New South Wales, and in the light of the material presented about the effect of taking into account previous service, we are prepared to grant an exemption for employers of less than 15 employees. This exemption will also be subject to further order of the Commission.

We will provide as follows:

12. Subject to an order of the Commission, in a particular redundancy case, this clause shall not apply to employers who employ less than 15 employees.

Employees with less than 12 months service

The employers contended that we should include in any award made a provision which refers particularly to employees with less than one year's continuous service.

Their suggested provision was based on passages from page 48 of our decision and reads as follows:

"This clause shall not apply to employees with less than one year's continuous service and 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."

The ACTU claimed that it was the intention of the Commission that the short term workers should be excluded only from severance payments and that the effect of the employers' claim would be to exclude short term employees from the other redundancy provisions.

Having regard to what we said at page 48 of our decision, we are prepared to include such a provision.

Existing awards or agreements

The employers emphasised that many awards have severance payments and some of those awards have payments on a different basis to that which the Commission has prescribed.

In particular, the employers claimed there would be a number of awards and agreements with lower magnitudes of payment at the "foot of the severanoe pay scale" but without the bar at the level at which the Commission has established it.

They claimed that there was justification in the decision in these circumstances for the insertion of the following provision:

"This clause shall not apply where an employer is observing the terms of an existing award or agreement whether registered or unregistered in relation to redundancy and wishes to continue doing so."

The ACTU opposed the inclusion of such a provision. It indicated that there was no exception in the decision in regard to employers who wish to continue under an existing award or agreement, and pointed out that the CAI application would allow an employer to continue to observe inferior standards in an agreement or award. No application to the Commission would be required.

The ACTU said that its position was that "where existing standards in awards, for example in regard to severance pay, are superior to the new test case standards those existing standards should apply; and they should apply in substitution for, but not in addition to, the rates of severance pay in the test case".

It is clear from the passages of the decision which appear in the next section of this decision under the heading - No extra claims - that the Commission did not intend that employees should receive the best of both existing awards and agreements and the test case standard.

However, we do believe that the employer should have the power to continue with an existing award or agreement whatever be its terms if he/she "wishes to continue to do so".

Any disputes over such matters should, in our opinion, be decided by the Commission on the application of either the employees or the employers.

No extra claims

The employers contended that the unions should undertake "for a period of two years from the date of the variations in this case . . . that they willnot pursue any extra claims, award or overaward in relation to termination, change or redundancy, except in accordance with the principles."

The employers claimed that the decision of the Commission is being used merely as a springboard upon which to attempt to raise the general level of redundancy payments and that such an undertaking was, therefore, necessary.

They claimed that the attitude of the unions was directly contrary to what was put by the ACTU in the proceedings and to the Commission's underlying assumption in rejecting the employers' submissions for a case by case approach.

In particular, the employers referred to a passage in the decision where the Commission said:

"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." [13]

and further

"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." [14]

The Commonwealth submission in relation to a further no extra claims undertaking was as follows:

[13] Print F6230 p.24
[14] Ibid, at p.29

"The next matter concerns the amendment proposed by the CAI to the effect that unions should undertake not to pursue any extra claims for provisions in excess of the standards laid down. The Commonwealth would submit that such an undertaking is not necessary as in fact unions have already given a commitment under the National Wage Principles not to pursue claims outside those Principles.

In the case of extra claims in respect of redundancy, the Commonwealth would submit that the decision, combined with the National Wage Principles, adequately provides for the resolution of union claims in this area. The Commonwealth would expect that, having had the standards incorporated in awards, union claims for redundancy provisions in excess of the standards determined should be progressed by way of award variation and be tested under the Principles. Applications of this nature, where they involve non negligible costs, would be dealt with under Principle 11 of the National Wage Principles."

In this regard, the ACTU also referred to the fact that there are already in awards a commitment with respect to no extra claims.

It stated that the test case has established national arbitrated standards of job protection and that the ACTU does "not expect to be able to come back to the Commission with the same arguments and to get a different result."

It accepted that the arbitral standard would be "the outcome of arbitral proceedings unless special circumstances can be proved".

It did say, however, that it would be completely unrealistic to expect that existing standards in awards or agreements in advance of the national arbitrated standard will be reduced, and it referred to a number of matters which the Commission has decided might be raised in specific cases of redundancy such as preference, relocation and retraining and re-employment.

We agree with the Commonwealth submissions referred to earlier and have taken note of the ACTU statements and, although we are concerned at the attempts by the unions in some areas to exceed the standard of our decision, we are satisfied with the position outlined by the ACTU.

Having regard to the nature of the decision we have reached and to the fact that there is an existing undertaking in relation to almost all awards of the Commission, we will not grant the employers' claim.

OPERATIVE DATE

The employers claimed that no part of the order of the Commission should take effect until 1 November 1985 and that any order shall only apply to service by an employee after that date.

They claimed that the material from the witnesses in the 46 affidavits "must have persuaded the Commission of the very serious impact of the Commission's decision" and they argued that the decision should be given prospective operation so as to enable employers to make appropriate provision for its implementation.

They also argued that time should be given to consider what should happen to awards and agreements, both registered and unregistered, where severance pay provisions are being observed.

They further submitted that if the decision in any form is allowed to operate in respect of past service, the cost increases to a particular firm cannot be said to be negligible. They argued that if past service is taken into account then a very considerable number of employees would accrue the maximum benefits.

They argued that when long service leave was first introduced accruals up to that date were provided for at the old rate [15]and when the Commission made its decision altering the long service leave entitlements in 1976 in respect of the reduction of the qualifying period for pro rata from 15 to 10 years in certain circumstances, the Commission made clear provision for phasing in.[16]

The Queensland and Tasmanian Governments also argued for prospective operation of any decision because of the effect on the solvency of employers, particularly those in the small business sector and the unintended effect it would have on the personal position of persons who are either sole employers or directors or officers of companies.

They argued that a significant sector of manufacturing industry is engaged in operations which are marginal and that businesses have made no provision for a contingent liability to pay redundancy pay. They pointed, in particular, to the fact that under Queensland law, in certain circumstances, directors of companies were liable to both civil and criminal proceedings for further incurring indebtedness when the business was insolvent.

The ACTU claimed that the operative date in the Metal Industry Award should be as near to the time of the Commission's decision as possible. It argued for 30 October 1984; the date when the disputes were formally found but submitted that, in other cases before the Commission, consideration should be given to retrospective application of the Commission's standards.

It contended that employees had had to wait a very considerable time for long overdue improvements in job security and that employers have had a "substantial period of notice of the improvements in job protection standards that were on the industrial agenda."

It also contended that the Commission had already considered, and determined, the question in relation to economic considerations in the test case decision.

Additionally, the ACTU submitted that:

1. workers have already been accorded severance pay in a number of decisions of the Commission and that there would be "adverse industrial relations implications" where workers are retrenched and not accorded severance pay;

2. the New South Wales standards have been established and implemented since July 1983;

3. as none of the arguments of CAI applied to provisions other than severance payments there was no basis for delaying the implementation of any standards other than severance pay;

and

4. in practice, the Commission's standards of job protection will be implemented across Federal award employment over time because it will take some time for applications to be made and processed.

[15] Print A9584; (1964) 106 CAR 412 at 425
[16] Print D1265; (1976) 181 CAR 285 at 291

As to the decision applying only to service after the date of operation,the ACTU claimed that:

1. this would be a major change to the Commission's decision;

2. there was no evidence before the Commission that the employers or the economy generally cannot afford the standard without a phasing in period;

3. there was a clear distinction from the long service leave position in that "in the present case there is a mechanism that has been decided upon dealing with problems faced by individual employers in relation to severance pay standards . . . the capacity to pay mechanism";

and that

4. the proposal was unreal when the New South Wales standards were already in place.

The decision of the Commission of 2 August did not fix an operative date nor was any mention made in the decision of any reservation as to the period over which the calculation of service for the new standards, should be made. However, we would agree with the ACTU that, by implication, the Commission determined that the required service was to be calculated by reference to service both before and after the making of any order.

As mentioned earlier, the chief justification for the position adopted by the employers was the cost impact of the new standards. However, no material was produced in the speaking to the minutes to challenge the view expressed at page 31 of the decision where the Commission said:

"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."[17]

It was on the basis of this material that the Commission concluded that the decision was consistent with the National Wage Case Principles which require that increases outside National Wage cases should be small.

Nor did we overlook the fact that the impact of redundancy provisions will not apply equally to all businesses.

In our decision on this matter we said:

". . . 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.

[17] Print F6230 p.31

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.'[Print F2900 p.49]

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[18]."

This decision was reached, in particular, having regard to the survey produced in evidence by Mr Anthony S. Wehby which examined the cost of the claim to the metal industry.

It was clearly our intention that the cost impact of the decision on individual firms or enterprises should be dealt with by the procedure of allowing employers in particular redundancy cases to argue that they did not have the capacity to pay.

The decision also allowed for employers to argue for exemption from the standard in two other instances, as can be seen from page 48 of the decision, where we said:

"Two particular instances, which the employers argued might warrant an application for relief from the obligations to pay the general prescriptions, 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."[19]

On the general grounds contained in the material from the 46 witnesses and on the submissions in relation thereto, we are not, in the circumstances, prepared to change our decision, except as earlier outlined.

There is merit in the CAI submissions that the employers should have time to make any necessary adjustments to their operations.

Furthermore, we are concerned at the lack of knowledge and the misunderstandings of the terms of the Commission's decision as exhibited, in particular, in the contents of the many letters addressed to the Commission by employers who complained about the terms of the decision. We think that some time needs to be given to allow the meaning and intent of the Commission's decision to be appreciated. However, we are not prepared to grant the employers' claim.

In all the circumstances, we are prepared to make the decision operative from 1 February 1985. The order will remain in force for a period of twelve months.

We would make it clear that we do not intend that the date of operation in the Metal Industry Award should apply in other awards. It may be that the position that occurred in the metal industry that no industrial dispute had formally been created which would give us jurisdiction would also apply in other industries. The date of operation of each variation will also depend on the facts of each case, and it must be borne in mind that any order will, in part, create award provisions, the breach of which could lead to prosecution.

[18] Print F6230 pp.31, 32
[19] Print F6230 p.48

In regard to the form of the order, we are not prepared to include in any order made by us matters such as the provision for standing down of employees which are not relevant to the present proceedings and which were not debated before us. This was suggested by the employers for ease of understanding. However, we agree that the provisions in regard to notice and redundancy should appear at the end of the award.

Appendices A, B and C and Part V of the Metal Industry Award should be looked at in the light of our decision.

The form of the order will be settled by the Registrar with recourse to a member of this bench.

TRANSPORT WORKERS (AIRLINES) AWARD

The parties to this award have agreed upon the terms which should be provided as a result of our decision. However, the agreed terms are inconsistent with the approach we have adopted in relation to the Metal Industry Award.

We direct the parties to confer to consider their position in the light of our approach in relation to that award and report back to us.